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 SECOND SUPPLEMENTAL BRIEF

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INTRODUCTION

Although Petitioner, John Richard Therrien, is seeking this court's affirmative answer to the certified question, this court is not bound by the wording of the question certified but may review any issues raised below. *See Bell v. State*, 394 So. 2d 979 (Fla. 1981). This second supplemental brief will address whether Mr. Therrien 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," can be designated a sexual predator at a post-sentencing hearing pursuant to §§ 775.21(5)(a)1. or 775.21(5)(c), Fla. Stat. (2000).

SUMMARY OF ARGUMENT

The polestar for determining legislative intent is the plain language of the statute. This court will construe a statute to give meaning to all its parts and presumes that the legislature did not intend a particular portion of a statute to be meaningless. Finally, this court will construe a statute so that it does not lead to absurd, unreasonable, or harsh results.

When applying these principles of statutory construction to §§ 775.21(5)(a)1. and (5)(c), this court will discern that Mr. Therrien should not have been designated a sexual predator because, at the time of his sentencing on August 25, 1997, the current offenses for which he was sentenced were not subject to sexual predator designation. Section (5) would allow the State to designate Mr. Therrien in only one of two ways: (1) if it discovered a predicate conviction after August 25, 1997, or (2) if Mr. Therrien were a

resident of a foreign state who had been convicted of a qualifying offense and moved into Florida.

No language within §§ (5)(a)1. or (5)(c) permits the retroactive application of a change in the criteria for sexual predator designation to suffice for a post-sentence designation. Section (5)(a)1. is clear that the trial court must make a written finding of sexual predator status at sentencing for the current offense. Only if law enforcement, the DOC, or the FDLE, acting through the offices of the State Attorney, were to discover new facts or information, could a post-sentencing designation take place. Any other construction of §§ (5)(a)1. and (5)(c) would render the wording of § (5)(c) meaningless and superfluous.

As this court and other courts throughout the nation have construed Megan's Laws as being civil and regulatory, it follows that the rules of civil procedure would apply. The construction advanced by State would give it an unlimited amount of time to bring a sexual predator designation proceeding which no civil claimant in Florida enjoys. State could sit back and wait until the end of a lengthy probation and then seek designation through § (5)(c). This would give the State Attorney unbridled discretion over when to cause the loss of a protected liberty interest. Applying Fla. R. Civ. P. 1.540(b) to § (5)(c) proceedings gives the State a time certain to bring a designation. If State were disadvantaged by the failure of the trial court to make a written designation, then it could bring a Rule 1.540(b) motion within one year to bring to the trial court's attention newly discovered evidence or to show mistake or inadvertence that the finding was not made.

Section (5)(c) has the purpose of acting as a safety valve, but should not be used to cause loss of protected liberty interests because of substantive changes in the law.

ARGUMENT

I. DESIGNATION OF MR. THERRIEN AS A SEXUAL PREDATOR BASED ON POST-SENTENCING CHANGE IN STATUTORY CRITERIA IS CONTRARY TO LEGISLATIVE INTENT.

A. The Plain Language of § (5)(c) Requires Newly Discovered Evidence.

In construing a statute, legislative intent is the polestar that guides the court's analysis. *Knowles v. Beverly Enterprises-Florida, Inc.*, ___ So. 2d ___, 2004 WL 2922097, *3 (Fla. Dec. 16, 2004) (citing cases). To determine intent, the statute's plain meaning is ascertained. *Id*. The actual language of the statute is the first step. *State v. Bodden*, 877 So. 2d 680, 685 (Fla. 2004). If the language is clear, then the rules of construction need not be applied. *See Kephart v. Regier*, __ So. 2d __, 2005 WL 673681, *3 (Fla. March 24, 2005). The legislature is presumed to know the rules of grammar and the definition of words and the court must give generally accepted construction to the words of a statute. *Bodden*, 877 So. 2d at 685 (citing cases). A court must harmonize all parts of the statute whenever possible. *Knowles*, 2004 WL 2922097, *4. Moreover, when the legislature uses the term "shall" it should be construed as mandatory when it refers to some action which will cause the deprivation of a substantive right. *DeGregorio v. Balkwill*, 853 So. 2d 371, 375 (Fla. 2003) (seizing agency must file forfeiture complaint within 45 days); *State v. Goode*, 830 So. 2d 817, 823 (Fla. 2002)

(construing the Jimmy Ryce Act requirement of a trial within 30 days after the determination of probable cause as mandatory).

In construing the language of §§ (5)(a)1. and (5)(c), it is clear that a trial court can only designate an offender a sexual predator if he or she is before the court for sentencing on a current offense committed on or after October 1, 1996. It is also clear that § (5)(c) is a safety valve, as it were, for the DOC, the FDLE, or any law enforcement agency which obtains new information post-sentencing indicating that an offender qualifies as a sexual predator. There would be no logical or rational reason for the legislature to insert § (5)(c) unless it was intended to provide appropriate agencies the opportunity to uncover facts which existed prior to sentencing but have only become apparent post-sentencing.

The trial court could not make a written finding that Mr. Therrien was a sexual predator because, at the time of sentencing on August 25, 1997, when Mr. Therrien entered his plea of *nolo contendere* to the offenses of attempted sexual battery by a person under 18 years of age, upon a person under 12 years of age (F2º), and of lewd and lascivious assault upon a child less than 16 years of age (F2º), those offenses did not qualify Mr. Therrien as a sexual predator. It was only upon a subsequent act of the legislature in expanding the sexual predator criteria did the State Attorney seek a post-sentencing hearing. A change in the law is not, according to ordinary and plain meaning, "information". Information is commonly defined as knowledge or intelligence obtained from investigation or study. See Merriam-Webster Collegiate Dictionary, 620 (9th Ed. 1986). This is precisely what government agencies administering the FSPA and local law

enforcement agencies are tasked to do. Although a statutory amendment may be the result of investigation or study by legislative staff or through committee hearings, the amendment itself is the product of legislative policymaking enacted by a majority vote of both houses of the legislature. A statutory amendment is not information that government or law enforcement agencies uncover in performing their duties.

In Mr. Therrien's briefs filed in the First District before it ordered supplemental briefs, Mr. Therrien argued the illogic of interpreting § (5)(c) as encompassing statutory amendments. State will undoubtedly rely on *State v. Galloway*, 721 So. 2d 1197 (Fla. 1st DCA 1998), for the proposition that the State Attorney has free rein in designating someone a sexual predator post-sentencing even if it had information that an offender could and should be designated a sexual predator at the time of sentencing. State will also argue that Mr. Therrien has not been disadvantaged by the community notification and employment restrictions by the amendment of October 1, 1998, as these provisions were part of the FSPA effective July 1, 1996, citing *Collie v. State*, 710 So. 2d 1000, 1007 (Fla. 2d DCA 1998) (*quoting McKibben v. Mallory*, 293 So. 2d 48 (Fla. 1974) and, therefore, Mr. Therrien would be subject to retrospective application of these provisions. However, *Collie* involved the repeal of the 1995 FSPA (containing a provision for an evidentiary hearing to prove dangerousness) and re-enactment of the FSPA effective July 1, 1996. Even the Second District would have declined to apply the newly enacted community notification and employment restrictions to Mr. Collie if he had made a showing that the FDLE were actually prepared to notify the community or that his

employment had actually been restricted. 710 So. 2d at 1007. In further contrast, *Collie* only dealt with the application of Fla. R. Cr. P. 3.800(c) to a designation of sexual predator and did not construe or apply the plain and ordinary meaning of the language in §§ (5)(a)1. and (5)(c). 710 So. 2d at 1006-1007.

This court can quell much of the confusion brewing in the District Courts of Appeal as to whether the criminal or civil rules of procedure apply by holding that § (5)(c) applies only when new material or information is discovered post-sentencing. Chief Judge Sawaya of the Fifth District Court of Appeal has come to this same conclusion in his concurring opinion in *Cabrera v. State*, 844 So. 2d 482, 484-491 (Fla. 5th DCA 2004). Chief Judge Sawaya struggled with whether an erroneous designation is part of the sentence or is the result of a conviction and with whether the designation is a criminal or civil proceeding. He observed, "it is the state's responsibility to bring to the trial court's attention the fact that a defendant qualifies as a sexual predator and to establish the necessary prerequisites to obtain a designation from the court. See, §§ 775.24(4)(c), (5)(a)(2), (5)(c), Fla. Stat. (2002). If it fails to meet that burden, the designation may not be made." *Id*. at 487. Most importantly, Chief Judge Sawaya construes §§ (5)(a)1. and (5)(c) to apply either to instances where the trial court initially failed to make the designation or to instances where the information that the offender would qualify as a sexual predator "was discovered subsequent to sentencing for the current or qualifying offense." *Id*. Although Chief Judge Sawaya believes that a post-sentencing hearing can take place for any reason, citing *Gonzalez v. State*, 808 So. 2d 1265 (Fla. 3d DCA 2002),

which in turn cited to *Fletcher v. State*, 699 So. 2d 346, 347 (Fla. 5th DCA 1997), both of those opinions were concerned with *ex post facto* implications. *Id*. at 487-488. Neither Chief Judge Sawaya, *Gonzalez*, or *Fletcher* addressed the plain and ordinary meaning of §§ (5)(a)1. and (5)(c) which prescribes the methods to take away a person's liberty interests.

Chief Judge Sawaya also compiles several cases in which designation has taken place long after a defendant has been sentenced for the qualifying or current offense. *Id*. at 488, n.4. In the end, Chief Judge Sawaya, based upon *Nicholson v. State*, 846 So. 2d 1217 (Fla. 5th DCA 2003), agrees that the sexual predator designation is part of a sentencing proceeding and is governed by Fla. R. Cr. P. 3.800 requiring any errors in sentencing to be raised at that time. *Id*. at 490-491. The Second District Court of Appeal has taken a different approach and believes that the erroneous designation of a sexual predator should be attacked either by seeking declaratory relief or relief through Fla. R. Civ. P. 1.540(b). *Anderson v. State*, 886 So. 2d 430 (Fla. 2d DCA 2004); *Coblentz v. State*, 775 So. 2d 359, 360 (Fla. 2d DCA 2000); *Angell v. State*, 712 So. 2d 1132 (Fla. 2d DCA 1998). Recently, the First District has also forsaken the criminal rules of procedure and simply reaffirmed its holding in *State v. Galloway* that a trial court has the power to impose sexual predator status post-sentencing without explaining under what circumstances the trial court would have such power. *Moore v. State*, 880 So. 2d 826 (Fla. 1st DCA 2004).

None of the district courts, including the opinion below, have met squarely the issue that § (5)(c) can only live in harmony with all other parts of the FSPA if it is construed to be used as a safety valve to designate offenders who "slipped through the cracks" through inadvertence[1] or where newly discovered evidence, not available at sentencing despite due diligence, reveals that an offender should be designated. Even if this court were to hold the 1998 amendment retroactive to Mr. Therrien, it does not follow that he would be subject to post-sentencing designation. His sentencing for the current offense was completed on August 25, 1997. Had he been prosecuted subsequent to October 1, 1998, for the 1996 offenses, then the 1998 amendment, if applied retroactively, would have been applicable at his sentencing.

B. Giving the State Attorney an Unlimited Amount of Time to Bring a Designation Proceeding Leads to Unreasonable, Harsh, or Absurd Consequences.

"A basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences." *State v. Atkinson*, 831 So. 2d 172, 174 (Fla. 2002). In *Atkinson*, this court construed § 394.925, Fla. Stat. (2001), to mean that the Jimmy Ryce Act would apply to those offenders in lawful custody, as opposed to actual custody, on its effective date. 831 So. 2d at 174. Agreeing with the district court, this court observed that an

1 *See, e.g., State v. Colley*, 744 So. 2d 1172 (Fla. 2d DCA 1999) (post-sentencing designation appropriate where trial court erred).

interpretation of actual custody would produce an unreasonable, harsh, or absurd result which would be contrary to public policy. *Id*. at 173-174.

In order for § (5)(c) not to lead to an absurd, harsh, or unreasonable result and be construed in harmony with § (5)(a)1., it would only come into play when new information or facts were uncovered subsequent to sentencing that would make an offender eligible for designation as a sexual predator. At the time of sentencing on August 25, 1997, Mr. Therrien could not have been designated a sexual predator when sentenced for his current offenses, as the amendment to § (4)(c), which took effect on October 1, 1998, was not in existence at the time of sentencing. The trial court could not have inadvertently overlooked the amendment, even if deemed retroactive, because the amendment had been enacted after sentencing. It would be an absurd or unreasonable to allow the State Attorney to use statutory amendments as newly discovered information.

Furthermore, the State's interpretation would lead to harsh results as the language of § (5)(c) becomes superfluous and the State Attorney need not obtain new information, as Chief Judge Sawaya has interpreted § (5)(c), but could use any or no reason to bring a post-sentencing designation proceeding. This would totally eviscerate what the legislature intended in enacting § (5)(a)1.: that those before the trial court for sentencing be designated predators so that those offenders who meet the qualifying criteria be monitored from day one of their sentence and the public warned of their whereabouts. § (5)(b) requires the clerk of the court to forward a predator's fingerprints to the FDLE within 48 hours, for those not imprisoned, as evidence of the speed required by the FSPA. If this

court is to take seriously the legislative findings that sexual offenders pose a threat and danger to society, § 775.21(3), then it is a reasonable interpretation of §§ (5)(a)1. and (5)(c) that the State Attorney be required to come forward at the earliest possible moment to begin the monitoring process. Either the FSPA is a shield to protect society or it is a weapon of subjugation to be wielded whenever the State Attorney feels like it. The former interpretation promotes public policy, the latter promotes prosecutorial excess.

This court has determined that the sexual predator designation deprives a person of protected liberty interests. *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004). Therefore, this court must construe § (5)(a)1. as being mandatory on the part of both the trial court and the State Attorney to bring predator-eligible information to the trial court's attention at sentencing so that the trial court may make the necessary written finding. If the State proves its case, absent the written finding, then the State is left to appeal. *See State v. Colley, supra*, 744 So. 2d at 1174 (State can seek review by certiorari or by appeal from non-final civil order). If the State does not request the designation, for whatever reason, then the trial court loses its power to designate post-sentencing unless the State can come within the exceptions for relief from a judgment or a proceeding as contained in Fla. R. Civ. P. 1.540(b).

According to this court's analysis in *State v. Goode*, *supra*, 830 So. 2d at 828-829, mandatory language is not always jurisdictional because of circumstances where a court could retain jurisdiction. The exceptions to the finality of a judgment or proceeding contained in Fla. R. Civ. P. 1.540(b) is such a circumstance. Moreover, the mandatory

requirements of a written finding at sentencing contained in § (5)(a)1. must be read in conjunction with § (5)(a)2. which gives the DOC, the FDLE, or any law enforcement agency which obtains information that an offender, who maintains a permanent or temporary residence in Florida, could be designated a sexual predator if the offender had committed a similar violation in another jurisdiction on or after October 1, 1996. The language following this portion of § (5)(a)2. is identical to the language contained in § (5)(c), namely, that the DOC, the FDLE, or any law enforcement agency will notify the State Attorney of the county where the offender maintains a temporary or permanent residence. As in § (5)(a)1., § (5)(a)2. would require the court to make a written finding that the offender is a sexual predator. Similarly, the language in § (5)(c), upon the discovery of information that indicates that the offender meets the sexual predator criteria, the State Attorney shall bring the matter to the court's attention for the purpose of a hearing. If the State Attorney fails to carry its burden of proof, then no written finding of sexual predator status can be made.

All of these statutory provisions must be construed in harmony so as not to make § (5)(c) a useless appendage. Under a reasonable construction, a trial court will lose its power to make a designation if no information is brought to the trial court's attention that a domestic or foreign offender is predator-eligible. If, after sentencing, new information or facts are discovered that a domestic offender should have been designated a sexual predator at sentencing, then the trial court can regain the power to make the designation assuming the State carries its burden of proof.

II. BY CONSTRUING DESIGNATION A CIVIL PROCEEDING, THIS COURT CAN BRING ORDER TO DIVERGENT LOWER COURT OPINIONS AND FIND THE FSPA NOT APPLICABLE TO MR. THERRIEN.

This court has the exclusive power to adopt rules for practice and procedure in all courts. *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000). Fla. R. Civ. P. 1.540(b) provides as argued *supra*, that a court may relieve a party from a final judgment, decree, order or proceeding when there exists mistake, inadvertence, newly discovered evidence, fraud or misrepresentation, among other facts. Motions alleging mistake, newly discovered evidence, or fraud or misrepresentation must be made not more than one year after the order or proceeding. As the FSPA is a civil, regulatory statute, it is logical to apply the Florida Rules of Civil Procedure to designation proceedings. *See Smeltz v. State*, 818 So. 2d 538, 539 (Fla. 2d DCA 2002) (citing Fla. R. Civ. P. 1.010). Even is this court were to determine that the amendment of October 1, 1998, had retrospective effect and would be applied to Mr. Therrien, the law came into being on October 1, 1998, almost fourteen months after his sentencing and two years after the commissions of his offenses. The state filed its amended motion to seek sexual predator status on October 7, 2000. Even applying Fla. R. Civ. P. 1.540(b)(3) to the amended motion, the State would not be able to bring a sexual predator designation proceeding because more than one year had elapsed since the effective date of the amendment on October 1, 1998.

It is unreasonable or absurd to give the State no time limits or parameters to bring a sexual predator designation. First, as argued above, no time limits or designation could

lead to prosecutorial misconduct. A state attorney's office could hold back on the sexual predator designation and use it as the Sword of Damocles over an offender during a period of probation or community control to be dropped when the offender is non-compliant in giving information about other offenders or other crimes, for example. The public policy of having predators monitored from day one of their sentence is thereby thwarted.

Second, all civil claimants within the state of Florida are subject to statute of limitations for public policy reasons. The State is no different as a civil claimant. The legislature has enacted a statute of limitations to promote finality and to protect defendants from unfair surprise and stale claims. *See Florida Dept. of Health and Rehabilitation Services v. S.A.P.*, 835 So. 2d 1091, 1096, (Fla. 2002). Pursuant to §§ 95.031(1) and 95.11(3)(b), Fla. Stat., all actions not otherwise specified have a four-year statute of limitations. In those cases where an offender has a qualifying offense involving a minor, § 95.11(7), Fla. Stat., provides that certain intentional child sexual abuse claims may be brought within seven years of reaching majority or four years under other circumstances. If the FSPA is a civil, regulatory statute, then it must be governed by the civil statute of limitations just as criminal prosecutions are subject to a statute of limitations. The only criminal offense that is not subject to a statute of limitations is first-degree murder. *See*, §775.15 (1)(a) et. seq, Fla. Stat. (2004).

Section (5)(c) must be construed within the framework of Rule 1.540(b) and a statute of limitations for civil actions. Should the State cry foul, this court has recognized

equitable estoppel, i.e., affirmative conduct by a defendant lulling a claimant into foregoing a claim and the delayed discovery doctrine for fraud and intentional childhood sexual abuse as exceptions to the statute of limitations for civil actions. *See Fla. HRS v. S.A.P., supra*, 835 So. 2d at 1096-1097; *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002). Any other interpretation would give the State an unlimited amount of time to bring a designation proceeding subjecting offenders to harsh treatment and which would violate the public policy of the FSPA.

CONCLUSION

Applying the plain and ordinary terms of §§ (5)(a)1. and (5)(c) to Mr. Therrien, no new information has come into the hands of law enforcement, the DOC, or the FDLE which would enable the trial court to hold a post-sentencing hearing to designate Mr. Therrien a sexual predator. Furthermore, the wording of §§ (5)(a)1. and (5)(c) must be construed to avoid unreasonable, harsh or absurd results. The State should not be afforded unbridled discretion or be given an unlimited amount of time to bring a designation proceeding as it is contrary to public policy.

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 3rd day of May, 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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