ORIGINAL

24-6802

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH BLEA

Petitioner

v.

HECTOR RIOS, WARDEN, AND THE ATTORNEY GENERAL OF THE STATE OF NEW MEXICO

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSEPH BLEA #25100
PRO SE Petitioner
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MARCH 7, 2025

QUESTIONS PRESENTED

Many courts have adopted the holding that "so long as the original applicable time period remains "unexpired" on the amendatory act's effective date, the amendment applies retroactively. Such holding negates all other Ex Post Facto considerations. Such holding negates any existing vested or accrued rights from consideration. Such holding also nullifies instances wherein "conditions precedent to a right of action upon a liability created by statute" exist. Also, whether retroactive application of an enlargement operates prospectively is no longer relevant! The problem is that such holding is viewed as "established United States Supreme Court precedent" to which the Doctrine of Stare Decisis applies. Thus, the courts are limited in terms of actions that can be taken.

The matter of legislative extensions of unexpired statutes of limitation has not directly been addressed by the United States Supreme Court and is in dire need of clarification. The matter is one of national public importance in that, by establishing clear precedence on the issue, it will prevent the Doctrine of Stare Decisis from being undermined, will prevent a miscarriage of justice in many instances, and preserve judicial integrity by resolving disagreements among lower courts on the issue.

Thus, in order to thoroughly clarify the matter of legislative extensions of unexpired statutes of limitations, all questions presented should be addressed.

The questions presented are:

1) Did the United States Supreme Court establish ruling precedent in Stogner v. California, 539 U.S. 607 (2003) with regards to "legislative extensions of unexpired statutes of limitations"?

2) When vested/accrued rights exist, is a court's premise that retroactive application of an enlargement of a time period solely on the basis that, on the amendment's effective date the original applicable time period remained unexpired, sufficient for such an application?

3) In the instant case, did the cause of action accrue, when the offense was reported to a law enforcement agency"?

4) When the cause of action accrues, "does the 'right of action' and the 'right of exemption' upon

A liability created by statute vest as accrued rights"?

5) When the cause of action accrues, "does the original applicable time period vest as a substantive limitation of both the liability and the right" (in a criminal case)?

6) As a substantive limitation of both the liability and the right, "does such a condition preclude retroactive application of an amendment enlarging the time period"?

7) When the applicable time period expires, it is accepted that prosecution of the offense is time-barred. However, when the cause of action accrues and retroactive application of an enlargement to the time period is precluded because the applicable time period is specifically tied to a statutory right of action, "Is the offense then considered to be time-barred"?

8) When vested/accrued rights exist, can such rights be viewed as a defense that precludes retroactive application of an amendment enlarging the time period?

9) As a substantive limitation of both the liability and the right, can the time period be referred to as a "statute of limitations defense" that precludes retroactive application of an enlargement to the time period?

10) If an amendatory act enlarging the time period is to apply retroactively, "is it necessary that on its effective date the original applicable time period remain unexpired"?

11) If an amendatory act enlarging the time period is to apply retroactively, "is it also necessary that on its effective date the cause of action has not yet accrued, i.e., the cause of action has not been reported or 'discovered'"?

12) When a time period is a limitation of both the liability and the right, and can be considered substantive rather than procedural or remedial, "Does it effectively function as a statute of repose, that cannot be tolled or extended, instead of merely a statute of limitations"?

13) In an instance wherein the cause of action has accrued and rights have vested, "Does retroactive application of an amendatory act enlarging the time period, operate prospectively"?

14) Does the 1987 Tolling Provision (NMSA 1978, § 30-1-9.1 (1987)) govern the instant case?

15) Because the 1987 Tolling Provision (NMSA 1978, §30-1-9.1 (1987)) is contained in a statutory scheme that creates the rights it limits, "Is the 1987 Tolling Provision considered substantive law which precludes retroactive application of an enlargement to the time period"?

16) Pursuant to the 1987 Tolling Provision (NMSA 1978, §30-1-9.1 (1987)), "does 'the reporting of the offense...', function like a 'Discovery Rule' wherein the cause of action accrues and the applicable time period commences 'as a matter of substance'"?

17) Pursuant to the 1987 Tolling Provision (NMSA 1978, §30-1-9.1 (1987)), 'the victim attaining the age of eighteen' is a condition precedent to the liability and the right of action coming into existence and also commences the running of the applicable time period. Because the cause of action need not accrue, "Does this portion of the 1987 Tolling Provision effectively function as a 'statute of repose' that cannot be tolled or extended"?

18) Pursuant to the Doctrine of Expressio Unis Est Exclusio Alterius, "Are the offenses that are specifically enumerated within the 1987 Tolling Provision's purview the only offenses that can be properly tolled"?

19) Are causes of action (offenses) that fall outside the 1987 Tolling Provision's purview, which cannot be properly tolled, governed by what can be effectively construed as a 'statute of repose' that cannot be extended?

20) Can an amendatory act enlarging the time period be retroactively applied to the 1987 Tolling Provision which creates the rights it limits and already properly tolls specifically enumerated offenses within its purview?

21) When the cause of action accrues and/or the cause of action is governed by a statutory scheme that creates the right of action it limits (such as the 1987 Tolling Provision), "Can the statute of limitations be construed as jurisdictional"?

22) Did retroactive application of the 1997 amendment (NMSA 1978, §30-1-8(G)) to the instant case result in a violation of the Ex Post Facto Clause of the United States Constitution?

23) Did counsel's failure to brief Blea's due process claim, i.e., the statute of limitations, result in a violation of Blea's right to effective assistance of counsel?

24) Did the State District Court commit procedural error when it misunderstood and/or misapplied the law?

25) Did failure to grant Blea an evidentiary hearing on his state habeas constitute an 'abuse of discretion' by the state court?

26) Does all relevant law in effect at the time the cause of action accrues have to be considered in an analysis relative to "legislative extensions of unexpired statutes of limitations"?

LIST OF PARTIES

ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE.

RELATED CASES

- STATE V. BIEA, No. CR 2010-4089, 2ND JUDICIAL DISTRICT COURT; COUNTY OF BERNALILLO; STATE OF NEW MEXICO. ORDER TO DEFENDANT TO CONFORM WITH PAGE LIMIT. ORDER ENTERED ON JANUARY 12, 2015.

- STATE V. BIEA, NO. CR 2010-4089, 2ND JUDICIAL DISTRICT COURT; COUNTY OF BERNALILLO; STATE OF NEW MEXICO. ORDER DENYING DEFENDANT'S "MOTION TO DISMISS FOR VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS". ORDER ENTERED ON FEBRUARY 18, 2015.

- STATE V. BIEA, No. CR 2010 4089, 2ND JUDICIAL DISTRICT COURT; COUNTY OF BERNALILLO; STATE OF NEW MEXICO. JUDGEMENT ENTERED JUNE 2, 2015.

- STATE V. BIEA, No. A-1-CA-34986, NEW MEXICO STATE COURT OF APPEALS. JUDGEMENT ENTERED JUNE 21, 2018.

- STATE V. BIEA, No. S-1-SC-37150. IN THE SUPREME COURT OF THE STATE OF NEW MEXICO. ORDER DENYING PETITION FOR WRIT OF CERTIORARI. ORDER ENTERED ON AUGUST 17, 2018.

- BIEA V. MARTINEZ, D-202-CR-2010-04089, 2ND JUDICIAL DISTRICT COURT; COUNTY OF BERNALILLO; STATE OF NEW MEXICO. ORDER SUMMARILY DISMISSING PETITION FOR WRIT OF HABEAS CORPUS. JUDGEMENT ENTERED ON JANUARY 21, 2020

- BIEA V. MARTINEZ, No. S-1-SC-38153. IN THE SUPREME COURT OF THE STATE OF NEW MEXICO. ORDER DENYING PETITION FOR WRIT OF CERTIORARI. ORDER ENTERED ON APRIL 13, 2020

- BIEA V. MARTINEZ, No. 2:20-CV-00986-JCH-JHR, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. MAGISTRATE JUDGE'S "PROPOSED FINDINGS AND RECOMMENDED DECISION DENYING MOTION TO AMEND HABEAS CORPUS PETITION" AND DISMISSING THE CASE. PROPOSED FINDINGS ENTERED ON MARCH 17, 2023.

- BIEA V. MARTINEZ, No. 2:20-CV-00986-JCH-JHR. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. ORDER ADOPTING MAGISTRATE JUDGES PROPOSED FINDINGS AND RECOMMENDED DISPOSITION. FINAL JUDGEMENT ENTERED ON SEPTEMBER 29, 2023.

- BIEA V. MARTINEZ, No. 2:20-CV-00986-JCH-JHR. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO. ORDER GRANTING "MOTION FOR EXTENSION OF TIME FOR FILING A NOTICE OF APPEAL. ORDER FILED ON OCTOBER 25, 2023.

- Blea v. Martinez, No. 23-2191 (D.C. No. 2:20-CV-00986-JCH-JHR (D.N.M.)). In the United States Court of Appeals for the Tenth Circuit. Order Denying Certificate of Appealability. Judgement entered on August 1, 2024.

- Blea v. Rios, Warden, No. 23-2191. In the Supreme Court of the United States. Application, No. 24A338, for extension of time within which to file a petition for Writ of Certiorari granted. Order entered on October 9, 2024.

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The Antiterrorism and Effective Death Penalty Act provides in relevant part:

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim— 11

IV. 28 U.S.C. §2254(d)(1) - resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or 11

V. 28 U.S.C. §2254(d)(2) - resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding". 11

VI. This case represents a superior vehicle to address legal questions of National Importance. 11

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IN THE
SUPREME COURT OF THE UNITED STATES

Petitioner respectfully petitions for a writ of certiorari to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Order Denying Certificate of Appealability) appears at Appendix A to the petition. It has been designated for publication "for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1." (However, petitioner cannot verify if it has been reported as Lexis Nexis has not been updated at this facility. Opinion of the United States District Court for the District of New Mexico (Order Adopting Magistrate Judge's PFRD) appears at Appendix B to the petition and is reported at: Blea v. Martinez, 2023 U.S. Dist. LEXIS 177502 (No. 2:20-cv-00986-JCH-JHR). The opinion of the New Mexico Court of Appeals appears at Appendix D to the petition and is reported at: State v. Blea, 2018 NMCA 052, 425 P.3d 385, 2018 N.M. App. LEXIS 33 (Docket No. A-1-CA-34986).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on August 1, 2024. Pet. App. 1A-6A. On October 9, 2024, Justice Gorsuch extended the time within which to file a petition for a Writ of Certiorari by 60 days, to and including December 29, 2024 (24A338). This Court has jurisdiction under 28 U.S.C. § 1254(1); See U.S.C. § 2243, "The court shall... dispose of this matter as law and justice require". The New Mexico Court of Appeals issued its opinion on June 21, 2018. A copy of that decision appears at Pet. App. 1D-32D. A timely petition for Writ of Certiorari was thereafter denied on August 17, 2018 and a copy of the order appears at Pet. App. 1N-2N. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

• The Antiterrorism and Effective Death Penalty Act provides in relevant part: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding". 28 U.S.C. §2254 (d).

STATEMENT OF THE CASE

Joseph Blea was convicted in violation of his well established Fifth, Sixth, and Fourteenth Amendment rights because the State's case ultimately relied on evidence obtained through a misconstrued and unreasonably misapplied United States Supreme Court holding in Stogner v. California, 539 U.S. 607 (2003). Therein the Supreme Court concluded that "a new law enacted after expiration of a previous applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution". 539 U.S. at 633. In support of its holding, the Supreme Court noted that: "[E]ven where Courts have upheld extensions of unexpired statutes of limitations, they have consistently distinquished situations where limitation periods have expired". The court further noted that "our holding today does not affect extensions of unexpired statutes of limitations". 539 U.S. at 618. See Thomas v. United States, 50 A.3d 458, 468 (District of Columbia CA 2012), ("Many courts interpreting Stogner have adopted the holding that the constitutionality of extending an unexpired statute of limitation is clearly supported by Stogner".). In the matter of "legislative extensions of unexpired statutes of limitations", both state and federal courts across the country are permitting retroactive application of such amendments SOLELY on the basis that on the amendatory act's effective date, the original applicable time period remained unexpired. Thomas, supra, allowed such an application despite the existence of an accrued cause of action and vested rights.

Cf. United States v. Richardson, 393 F. Supp. 83 (W.D. Pa. 1974), aff'd 512 F.2d 105 (CA 3 1975) (Amendatory Act, effective approximately two (2) years prior to the expiration of the original applicable time period, was

denied retroactive application because cause of action had accrued and rights had vested. Original applicable time period became a limitation of both the right of action and the liability created by statute. Retroactive application of the amendment did not operate prospectively in such an instance. Thus, the original applicable time period governed the cause of action. The amendment did not apply because an accrued cause of action TIME-BARRED the offense). Simply, the offense was complete "when dawn breaks six days after his 18th birthday. Id. at ¶3.

With regard to "extensions that our holding today does not affect", State v. Glenn, No. 21-5010, 2021 U.S. App. LEXIS 36680 at 6, 2021 WL 5873144 at 2 (10CA Dec. 13, 2021), notes that "[t]he Supreme Court's Stogner decision expressly avoided opining on this scenario". Yet, the lower court's interpretation of Stogner, supra, is effectively overruling United States Supreme Court precedent with regards to the Ex Post Facto Clause. United States v. Hatter, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed 2d 820 (2001)("[I]t is [the Supreme] Court's prerogative alone to overrule one of its precedents.").

See R. Brian Tanner, A legislative Miracle: Revival Prosecutions and the Ex Post Facto Clauses, 50 Emory L.J. 397, 406 (2001)("According to all the federal circuits that have reached the issue, as long as the prior statutory bar has not run, an extension of that period is constitutional."). Legislative intent behind extensions to the time period in the overwhelming number of cases is to counter instances wherein the applicable time period expires before the offense is discovered and prosecution is precluded. Examples of offenses included in this group: fraud, forgery, conspiracy, cases wherein the Doctrine of Fraudulent Concealment applies, and cases subject to equitable tolling. Such cases remain concealed or unreported as of the effective date of the amendment. The cause of action DOES NOT ACCRUE and rights do not vest. The applicable time period remains procedural, a limitation of the remedy only. Retroactive application of an amendment enlarging the time period OPERATES PROSPECTIVELY because if, or when the cause of action accrues and rights vest, it will be after the amendment's effective date.

The exemption would involve cases wherein the cause of action accrues and rights vest prior to the effective date of the amendment. Retroactive application of the amendatory act is precluded because such application would alter or impair vested rights, such rights functioning as a defense against such an application. In

such an instance, retroactive application of an enlargement would not operate prospectively. It would be retrospective law in violation of the Ex Post Facto clause of the U.S. Constitution. Simply, an accrued cause of action or compliance with conditions precedent to the existence of the right and the liability prior to the effective date of the amendatory act negates any reason for tolling or extension of the time period. If an amendment enlarging the time period is to apply retroactively, the following must be complied with: (1) the original applicable time period must not have expired as of the effective date of the amendment, (2) the cause of action must not have accrued, i.e., discovery of the cause of action must occur AFTER the amendment's effective date, and (3) conditions precedent to the right of action and the liability must not exist.

Cf. Commonwealth v. Johnson, 520 Pa. 165, 170, 553 A.2d 897 (1989) ("There is nothing retroactive about the application of an extension of a statute of limitation, so long as the original statutory period has not yet expired .... Only when a vested right or contractual obligation is involved is a statute applied retroactively [impermissible] when it is applied to a condition existing on its effective date which resulted from events [that] occurred prior to that date."). Simple logic distinguishes an instance wherein the cause of action has accrued and rights have vested from one wherein the cause of action has yet to accrue and rights have not vested. Also, a cause of action that is governed by a statute that creates the right of action and establishes the time period within which such right must be enforced is distinguished from a cause of action not governed by such a statute.

Despite a lack of clarification by the United States Supreme Court, on the matter of "legislative extensions of unexpired statutes of limitations", the 1997 enlargement of the time period was applied retroactively to Mr. Biea's case SOLELY because the original time period remained unexpired on the amendment's effective date. Such a holding effectively nullified an 'accrued cause of action' and 'vested rights' as variables in an ex post facto analysis. Also, such a holding effectively deems irrelevant that "statutes must be construed so as to OPERATE PROSPECTIVELY." As a matter of law, when vested rights exist, retroactive application of an enlargement DOES NOT OPERATE PROSPECTIVELY because such an application would alter or impair those rights. In interpreting the Supreme Court's holding in Stogner, supra, as supporting "the constitutionality of extending an unexpired statute of limitations", the courts conclude, under 'Stare Decisis', that Stogner is binding Supreme Court law.

> The Supreme Court warns us that, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be". Indeed, rigid adherance to vertical stare decisis is absolute and requires us, as... circuit judges, to follow applicable Supreme Court precedent in every case. So once the Supreme Court has adopted a rule, standard or interpretation, "we must use that same rule, standard, or interpretation in later cases". United States v. Guillen, 995 F.3d 1095, 1114 (10th 2021); Hutto v. Davis, 454 U.S. 370, 375, 102 S.Ct. 730 (1982) (per curiam).

TRIAL COURT - On December 15, 2014, counsel for BIEA filed a 69 page "Motion to Dismiss for Violation of Defendant's Due Process Rights". Though the length of the motion had been discussed with, and approved by Judge Martinez, no documentation in the court file verified this. Obviously an oversight due to Judge Martinez' rapidly failing health. Nonetheless, respondent's answer noted the lack of documentation and requested the court strike such motion. On January 27, 2015, the court filed its "Order to defendant to conform with the 10-page limit", thereby effectively striking the motion filed on December 15, 2014 (App. K). Defense counsel never filed a conforming motion; due process issue was never briefed. The only thing that appears on the record is a general discussion relative to the "statutes of limitations".

On February 18, 2015, the Second Judicial District Court filed its "Order Denying Defendant's Motion to Dismiss for Violation of Defendant's Right to Due Process". (App. L). Therein the court cited State v. Morales, 2010 NMSC 026, 148 N.M. 305 and its holding that the 1997 Amendment (NMSA 1978, §30-1-8 (1997)) "applies to UNEXPIRED criminal conduct committed before the amendment's effective date of July 1, 1997". Id. ¶20. (App. L, pg. 2). Also on page 2, ¶3, the court states "Indeed, each of [BIEA's] constitutional arguments appears to rest on the assumption that the original limitation period for the charged crimes had expired by the effective date of the 1997 amendment". This has never been BIEA's position. BIEA has always adamantly asserted that an accrued cause of action and vested rights existing prior to the amendment's effective date vested him with "the opportunity to plead the original applicable fifteen year time period as a bar to prosecution". The original fifteen year time period expired November 2, 2003 (App. L, pg. 3) and prosecution did not commence until August 24, 2010 (App. L, pg. 1). Therefore, if the original fifteen year time period governed the cause of action, the time period expired before prosecution commenced and prosecution was thereby barred!

However, based on the New Mexico Supreme Court's holding in Morales, supra, and that court's interpretation of Stogner, supra, the trial court's decision that the 1997 amendment applied retroactively was based SOLELY on the fact

that on the amendment's effective date the original applicable time period remained unexpired. Whether retroactive application of the 1997 amendment OPERATES PROSPECTIVELY when vested rights are altered or impaired was never addressed. Simply, the court was following what it believed was clear and binding United States Supreme Court precedent.

> As a general rule, under the doctrine of stare decisis, inferior courts are obligated to apply the law as decided by courts to which they owe obedience, and in particular, all other American courts, state and federal, owe obedience to the decisions of the Supreme Court of the United States on questions of federal law, and a judgement of the Supreme Court provides the rule to be followed in such courts until the Supreme Court sees fit to reexamine it. Troff v. Utah (In re Troff), 329 B.R. 85, 2005 U.S. Dist. LEXIS 23344 (10 Cir. 2005).

NEW MEXICO COURT OF APPEALS - On June 21, 2018, the New Mexico Court of Appeals filed its opinion (App. D). Therein, paragraphs 49-52 are the relevant sections of the opinion (App. D, pgs. 29-31). The court held that Blea's "argument is answered by State v. Morales, 2010 NMSC 026, ¶1, 148 N.M. 305, 236 P.3d 24. Therein the Supreme Court held:

> "Although the extension of a statute of limitations cannot revive a previously time-barred prosecution, we conclude that it can extend an unexpired limitation period because such extension does not impair vested rights acquired under prior law, require new obligations, impose new duties, or affix new disabilities to past transactions. Because capital and first-degree violent felonies committed after July 1, 1982, were not time-barred as of the effective date of the 1997 amendment, we hold that the legislature intended the 1997 amendment to apply to these crimes.

In other words, if the alleged crimes were not time-barred [applicable time period had not expired] under the fifteen year time period when the 1997 amendment of Section 30-1-8 became effective, then the 1997 amendment applied. Blea asserts that the expression "time-barred" is construed too narrowly because it only references the expiration of the applicable time period. "Time-barred" should be construed to also include instances wherein the cause of action accrues and the original time period is specifically tied to the statutory right of action upon a liability created by statute, which then effectively bars retroactive application of the amendatory act. Blea's assertions were never reviewed because review is based on the record and defense counsel failed to brief the issue in District Court. The court noted that "Defendant's attempts to distinguish Morales... is not supported by any authorities, is not persuasive, and is rejected." (App. D, pg. 30). The court also "rejected the defendant's undeveloped and unprecedented construction that lacked 'any principled analysis'." (App. D, ¶52) (citing Guerra, 2012 NMSC 014, ¶21).

However, any attempt to distinguish Morales would prove futile because the New Mexico Supreme Court's interpretation of Stogner, supra, and the use of such interpretation in Morales, supra, is binding precedent under the doctrine of Stare Decisis. State v. Mares, 2023 N.M. LEXIS 282 & 333 (citing Alexander v. Delgado, 1973

NMSC 030, ¶9, 84 N.M. 717, 507 P.2d 778) ("The Court of Appeals is to be governed by the precedents of this Court"). Thus, vertical stare decisis, as recognized in the Alexander doctrine, requires absolute fealty to this Court's precedents by the Court of Appeals.

WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS - Writ of certiorari was denied on August 17, 2018. See State v. Riley, 2010 NMSC 055, ¶40, 147 N.M. 557, 226 P.3d 656 (Explaining stare decisis prevents this court from overruling precedent where the parties have not briefed and specifically argued the relevant factors to be considered before overturning our precedent).

STATE POST CONVICTION PROCEEDING - Mr. Blea filed his 5-802 petition for Habeas Corpus on May 15, 2019. After long delay, the court only took action after Blea filed a Writ of Mandamus on December 31, 2019. An Order Summarily Dismissing Petition for Writ of Habeas Corpus was filed on January 21, 2020. (Pet. App. E). Therein, issues (b) and (c) (App. E, pgs. 2, 3) are the only ones of relevance and were summarily dismissed because "[A] defendant may not seek post-conviction relief for issues raised on appeal that were decided on the merits against defendant". State v. Gomez, 1991 NMCA 061, ¶5, 112 N.M. 313, 815 P.2d 166. (App. E, pg. 5, No. 12, 13). (Issues (b) and (c) were never reviewed by the Court of Appeals). As the dates indicate, the court summarily dismissed the petition for Writ of Habeas Corpus while Blea's Writ of Mandamus was pending before the Court. After Blea's 5-802 Petition for Writ of Habeas Corpus was summarily denied, the State Supreme Court then denied Blea's Writ of Mandamus on February 4, 2020 (App. F). On February 20, 2020, motion for extension of time to file Petition for Writ of Certiorari was granted and would be timely if filed on or before March 23, 2020 (App. G). Writ of Certiorari denied April 13, 2020 (App. H).

FEDERAL HABEAS CORPUS PROCEEDING - Mr. Blea filed a motion to amend his 28 U.S.C. §2254 Habeas Corpus Petition on August 11, 2022. The Magistrate Judge's PFRD was filed on March 17, 2023 (App. C). Therein, Judge Ritter (citing State v. Morales, 2010 NMSC 026, 148 N.M. 305, 236 P.2d 24, ¶¶8-9) noted that "[a] statute,... is considered retroactive if it impairs vested rights acquired under prior law...". Id., ¶9. (citing Howell v. Heim, 118 N.M. 500, 506, 802 P.2d 541, 547 (1994) (Pet. App. C, pg. 4, ¶2). Judge Ritter also references additional principles to criminal laws from Morales, 2010 NMSC 026, ¶¶10-18 in concluding that "[b]ecause a defendant does not have a vested interest in an unexpired statute of limitations, a legislative amendment extending or abolishing the limitation period does not impair vested

rights...". (App.C, pg. 5, ¶1). Blea asserts error in such a conclusion. Morales, supra, was a case wherein the cause of action had not yet accrued on the amendment's effective date, i.e., no discovery. Because the cause of action had not yet accrued, no vested rights existed that could be altered or impaired. Without existing rights, the applicable time period cannot be specifically tied to "a statutory right of action upon a liability created by statute" and remains merely procedural and and a limitation of the remedy ONLY! In Morales, retroactive application of the amendment operated prospectively because nonexistent rights cannot be altered or impaired. Such application did not violate the Ex Post Facto Clause of the United States Constitution. Simply, only when no vested rights or liability exists does a defendant NOT have a vested interest in an unexpired statute of limitations.

Judge Ritter concluded that because the original time period had not expired on the amendments effective date, "application of the 1997 Amendment is not retroactive". Judge Ritter's analysis falls short on logic. Its not about the unexpired statute of limitations. It is about rights that vest when the cause of action accrues or conditions precedent to the right of action upon a liability created by statute have been met. (App.C, pg. 6, ¶1). Contrary to Judge Ritter's conclusion, when the statute of limitations qualified the right of action and the liability, Blea did have a "vested right to shelter under the fifteen year duration of the original statute of limitations. Simply because the applicable time period remained unexpired on the effective date of the 1997 amendment, does not justify impairment of vested rights or depriving Blea of a "defense available to him" at the point the cause of action accrued. Of course, all of this is beside the point. See Hawes v. Pacheco, 7 F. 4th 1252, 1264 (10th 2021) ("A state court's interpretation of state law, ..., binds a federal court sitting in Habeas Corpus."). Thus, Judge Ritter's recommendation was to "dismiss this matter and terminate all pending motions as moot".

On September 29, 2023, Judge Herrera filed an "Order Adopting Magistrate Judge's PFRD". (App.B). Therein Judge Herrera enumerates a number of instances that violate the Ex Post Facto Clause. She also quotes Stogner v. California, 539 U.S. 602 (To "hold that such a law is ex post facto does not prevent the State from extending time limits for the prosecution of of future offenses, or for prosecution not yet time-barred."). (App.B, pg.4, lines 1-8). What needs to be clarified is what exactly the expression "time-barred" encompasses. It is generally accepted that is refers to an instance wherein the applicable time period has expired. It should also include an instance wherein the cause of action accrues and the applicable time period "is a condition annexed to the enjoyment of the right, in a statute" and is substantive rather than

"merely procedural". (App.B, pg4, lines 9-23). Judge Herrera "disagrees with Mr. Blea that the reasoning of Morales is limited to crimes that were not reported to law enforcement until after the expiration of the statute of limitations". This is incorrect. Blea's assertion is that the "reasoning of Morales is limited to crimes that were reported to law enforcement after the effective date of the amendment. Judge Herrera cites Morales, 2010 NMSC 026, ¶6, 203 and notes the New Mexico Supreme Court's holding "that the New Mexico Legislature intended the 1997 amendment to apply retroactively to unexpired criminal conduct committed before the amendment's effective date of July 1, 1997. (App. B, pg 5, line 6-13).

Judge Herrera also cites Stogner, 539 U.S. at 632-33 (Suggesting in dicta that extensions of unexpired statutes of limitation do not violate the ex post facto clause); United States v. Glenn, No. 21-5010, 2021 WL 5873144, at *2 (10th Cir. Dec. 13, 2021) ("In United States v. Taliaferro, 979 F.2d 1399, 1402 (10th CA 1992), we held that 'the application of an extended statute of limitations to offenses occurring prior to the legislative extension, where the prior and shorter statute of limitations has not run as of date of such extension, does not violate the ex post facto clause'. The Supreme Court's Stogner, supra, decision expressly avoided opining on this scenario... . Taliaferro therefore remains good law".); Taliaferro, 979 F.2d at 1403 ("Since the original statute of limitations had not run on any of Taliaferro's statutory violations and Congress has the authority to extend a statute of limitations where the original time period has not run, 18 U.S.C. § 3293 does not violate the ex post facto clause of the Constitution".). Simply, Taliaferro is a case that consists of a "fraud element" and until the United States Supreme Court addresses "legislative extensions of unexpired time periods", cases wherein the cause of action has accrued and rights have vested will continue to be unreasonably ruled wrong! (App.B, pg5, ¶3, pg. 6, lines 1-9). Mr. Blea's argument is completely nullified by the court's holding that the 1997 Amendment applies to Blea SOLELY on the basis that on the amendment's effective date, the applicable time period remained UNEXPIRED!

See United States v. Meyers, 200 F.3d 715, 720 (10CA 2000) ("Under the doctrine of stare decisis, this panel cannot overturn the decision of another panel of this court... . The precedent of prior panels which this court must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law".). See Richmond v. Embry, 122 F.3d 866, 870 (10th 1997), cert. denied 522 U.S. 1122, 140 L.Ed.2d 126, 118 S.Ct. 1065 (1998) (AEDPA amended the standards for reviewing state court judgements in habeas proceedings by increasing the deference federal courts are to give to state

court findings and legal determination. Prior to the Amendment, federal courts disregarded the state court's legal conclusions and reached independent judgements on issues presented to them).

UNITED STATES COURT OF APPEALS - On August 1, 2024, the United States Court of Appeals filed an "Order Denying Certificate of Appealability". (App. A). In noting that "extension of an unexpired statute of limitations does not violate the Ex Post Facto Clause", the court cites Stogner, 539 U.S. at 632-33 and United States v. Taliaferro, 979 F.2d 1399, 1402 (10th 1992) (App A, pg 4, lines 8-15). See Hawes v. Pacheco, 7 F.4th 1252, 1264 (10th 2021) ("State court's interpretation of state law, ..., binds a federal court sitting in habeas corpus". (App. A, page 5, lines 4-6). Also, the Tenth Circuit Court of Appeals expressly states: THE SUPREME COURT and THIS COURT have held the extension of a statute of limitations does not violate the constitution", and cites Stogner, supra, and Taliaferro. (App. A, pg. 5, lines 16-18), (Taliaferro involved offenses with a "fraud element" and "the matter of legislative extensions has never been before the United States Supreme Court.). See United States v. Glenn, No. 21-5010, 2021 WL 5873144 at *2 (10th 2021) ("The Supreme Court's Stogner decision expressly avoided opining on this scenario...").

Hutto v. Davis, 454 U.S. 370, 375, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam). United States v. Guillen, 995 F.3d 1095, 1114 (10th 2021) (The Supreme Court warns us that, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be". Indeed, "Rigid adherance to vertical stare decisis is absolute and requires us, as ... circuit judges, to follow applicable Supreme Court precedent in every case. So once the Supreme Court has adopted a rule, standard, or interpretation, we must use the same rule, standard, or interpretation, we must use that same standard, or interpretation in later cases".

REASONS FOR GRANTING THE WRIT - Supreme Court Rule 10; 28 U.S.C. § 2254 (d)(1)(2).

Rule 10. Considerations Governing Review on Certiorari: (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power; (b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United State court of appeals; (c) A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an

important federal question in a way that conflicts with relevant decisions of this court.

28 U.S.C. § 2254(d)(1)(2).- The Antiterrorism and effective Death Penalty Act provides in relevant part: "An Application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding".

Currently, many courts across the country interpreting Stogner v. California, 539 U.S. 607 (2003) have adopted the holding that the constitutionality of extending an unexpired statute of limitations is clearly supported by Stogner. See Thomas v. United States, 50 A.3d 458, 468 (District of Columbia CA 2012). As a result, state and federal courts are permitting retroactive application of an enlargement of the time period SOLELY on the basis that the original applicable time period remained unexpired on the amendment's effective date. Such a holding effectively nullifies considerations involving 'VESTED/ACCRUED rights' and 'PROSPECTIVE OPERATION' of statutes. The problem arises when a United States Supreme Court holding is unreasonably misinterpreted as binding law under the doctrine of stare decisis and the courts allow retroactive application of an enlargement in two cases that are distinguishable.

United States Courts of Appeal have consistently permitted retroactive application of an enlargement to the time period in cases wherein, on the amendment's effective date, the causes of action have NOT ACCRUED and rights have not vested. Such an application is not retroactive law and does not violate the ex post facto clause of the United States Constitution because no rights have vested that effectively function as a defense against such an application. When the right of action and the liability do not come into existence, the applicable time period remains merely procedural and a limitation of the remedy only. Dobbert v. Florida, 432 U.S. 282, 292-93 (1977) ("No ex post facto violation occurs if a change does not alter 'substantial personal rights', but merely changes modes of procedure which do not affect 'matters of substance'". In such an instance application of an enlargement can be determined SOLELY on the fact that the original applicable time period remains unexpired on the amendment's effective date because without an accrued cause of action, no rights exist that can be altered or impaired. Retractive application of an enlargement OPERATES PROSPECTIVELY because if the cause of action accrues and rights vest, it will be at some point after the amendment's effective date. What is readily apparent is that if the cause of action accrues

under the original applicable time period, tolling is not required as a matter of equity. Simply, an enlargement of the time period is not an issue.

Thus, in cases wherein the cause of action has accrued and rights have vested/accrued, retroactive application of an enlargement would be retroactive law and in violation of the ex post facto clause of the United States constitution. That the time period remains unexpired on the amendments effective date is of no relevance. Wherein the cause of action has accrued and rights have vested, the statute of limitations is a substantive limitation of the right and the liability and precludes retroactive application of an extension of the time period. Simply, an accrued cause of action and vested/accrued rights are effectively a defense against retroactive application of an enlargement of the time period because existing rights must not be altered or impaired.

> Retroactive law - A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. A retroactive law is not unconstitutional unless it (1) is in the nature of an ex post facto law or Bill of Attainer, (2) impairs the obligation of contracts, (3) divests vested rights, or (4) is constitutionally forbidden. (Also termed retrospective law; retroactive statute; retrospective statute.) Black's Law Dictionary, 10th Edition.

See State v. Morales, 2008 NMCA 155 ¶93, 145 N.M. 259, 262, 196 P.3d 490, 493 - Our Supreme Court has defined retroactive in the following manner: "A retrospective law may be defined more specifically as one which is made to affect..., or rights already accrued,...." Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed 2d 351, 360 (1987) (An ex post facto law is one that is retrospective, affects substantial rights, and disadvantages the defendant.); Landgraf v. USI Film Prod., 511 U.S. 244, 268-70 (1994) (The ban on retrospective legislation embraced "all statutes, which though operating only from their passage affect vested rights and past transactions".); Sturges v. Carter, 114 U.S. 511, 519, 29 L.Ed 240, 5 S.Ct. 1014 (1885) (A retroactive statute is one that "takes away or impairs vested rights acquired under existing laws."); Dobbert v. Florida, 432 U.S. 282, 292-93 (1977) ("..., or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."); Lujan v. Regents of the University of California, 69 P.3d 1511, 1517 (10th 1995) (Regardless of how statutes of limitations are treated generally, however, where a statute of limitations does not merely bar the remedy for a violation of the right but limits or conditions the right itself, courts have treated the statute as substantive").

And finally, when a case is governed by a statutory scheme that creates the conditions precedent to the right

and establishes the limitation of time within which the right must be exercised, the statute itself is SUBSTANTIVE LAW, and the time period is a substantive limitation of the right upon a liability created by statute that cannot be extended. Retroactive application of an enlargement would be retroactive law in violation of the ex post facto clause of the United States Constitution. Yet, under the doctrine of Stare Decisis, the fact that the case is governed by SUBSTANTIVE LAW is irrelevant. Retroactive application is unreasonably permitted SOLELY because the applicable time period remains unexpired on the amendment's effective date. Also, vested rights are effectively nullified by such an application.

This is a matter that involves state and federal courts across the country whose holdings conflict with established federal law. Only the United States Supreme Court can establish ruling precedent and "the matter of *legislative* extensions of unexpired statutes of limitations" has never been directly addressed by the United States Supreme Court. In misinterpreting the Supreme Court's holding in Stogner, supra, state and federal courts are following a standard that in reality does not exist. See Williams v. Taylor, 529 U.S. 362, 413, 146 L.Ed 2d 389, 120 S.Ct. 1495 (2000) (an unreasonable application of law exists "if the state court unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." It is a matter that needs to be addressed by the United States Supreme Court. Ruling precedent needs to be established to maintain judicial integrity. When a case is unreasonably 'wrongly ruled', it "sets a precedence for all other cases to lose. It sways public opinion. It sways juries. It is unstoppable." Simply, state and federal courts are deciding cases in a way "that conflicts with relevant decisions of this court."

The primary case used against Blea was State v. Morales, 2010 NMSC 026, 148 N.M. 305, 236 P.3d 24. Therein, the court concluded that "Although the extension of a statute of limitations cannot revive a previously time-barred prosecution, Stogner v. California, 539 U.S. 607 (2003), we conclude that it can extend an UNEXPIRED limitation period because such extension does not impair vested rights acquired under prior law, require new obligations, impose new duties, or affix new disabilities to past transactions". Morales, 2010 at ¶7. The court continues: "We conclude that the 1997 amendment, which abolished the statute of limitations for all capital and first-degree violent felonies, applies to unexpired criminal conduct committed before the amendment's effective date of July 1, 1997. Because the crimes committed by [Morales] after July 1, 1982 were not time-barred as of July 1, 1997, we hold that the 1997 amendment applies to this CASE. Id. at ¶20.

Relative to Morales, supra, the court's holding is sound beyond controversy. However, concluding that the 1997 amendment applies to all unexpired criminal conduct committed prior to the amendment's effective date SOLELY on the fact that the applicable time period remains unexpired on the amendment's effective date is an unreasonably incorrect standard when applied to Blea's case. A proper analysis must consider all the law in effect at the time of the offense, especially whether rights have vested and whether retroactive application of the amendment OPERATES PROSPECTIVELY. See NMSA 1978, §12-2A-8 (1997)("A statute or rule OPERATES PROSPECTIVELY ONLY unless the statute or rule expressly provides otherwise or its context requires that it operate retrospectively.") Morales, 2010 at ¶8. See Hassett v. Welch, 303 U.S. 303, 314, 58 S.Ct. 559, 82 L.Ed. 858 (1938)("Moreover, a law is presumed to operate prospectively..."). See Also Landgraf v. USI Film Products, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed 229 (1994)(Let us keep in mind another canon of unquestionable vitality, "the maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.").

See State v. Lymon, 2021 NMSC 021, ¶12, 488 P.3d 610 ("An 'abuse of discretion' occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case" or "when the trial court misapprehends or misapplies the law."). Statutes of limitations can be classified as either procedural or substantive as determined by the substance of the cause. See Danzer and Co. v. Gulf and Ship Island R. Co., 268 U.S. 633, 637, 69 L.Ed 1126 (1925)("[Statutes of limitations] sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability.").

See State v. Morales, 2008 NMCA 155, 145 N.M. 259, 196 P.3d 490, ¶1. This case considers the retroactive application of a 1997 statute eliminating the statute of limitations on the prosecution of first-degree felonies. NMSA 1978, §30-1-8(G) (1997, prior to the Amendments through 2005) (hereinafter the 1997 amendment). In 2005, Morales was charged with five counts of criminal sexual penetration of a minor-all first degree felonies. The state alleged that these five incidents occurred "on or between the 1st day of January, 1978 and the 30th day of December, 1985". In 1978, the statute of limitations for first-degree felonies was ten years. NMSA 1953, § 40A-1-8(B)(Vol. 6, 2d Repl.). In 1979, the legislature increased the limitation period to fifteen years. NMSA 1978, §30-1-8(B)(1979, prior to Amendments through 2005). And finally, in 1997, the legislature completely abolished the statute of limitations for first-degree felonies. Section 30-1-8(G).

Additionally, in 1987, the legislature passed NMSA 1978, §30-1-9.1 (1987), which tolled the statute of limitations for specifically enumerated offenses. According to the statute, the limitations period is tolled "until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first". The tolling provision does not apply to Morales, and is not an issue, because it "is only applicable to crimes committed on or after June 19, 1987". Morales, 2008, at ¶33. Morales filed a motion to dismiss, arguing that the statute of limitations in effect when the crimes were allegedly committed had expired and, therefore, the time for prosecution of the charged crimes had passed. The trial court denied Morales' motion and certified the statute of limitations issue for interlocutory appeal. Morales, 2008, at ¶13.

Based on Stogner, supra, and construction of the ex post facto provision, the State conceded that Morales could not be prosecuted for acts that occurred between 1978 and July 1, 1982, because the fifteen-year limitation period for those acts had expired by the time the 1997 amendment became effective. Morales, 2008 at ¶63. The Stogner Court held "that a law enacted after expiration of a previously applicable limitations period violates the ex post facto clause when it is applied to revive a previously time-barred prosecution". Stogner, 539 U.S. at 617-19, 632-33.

In contrast, for offenses that happened after July 1, 1982, however, the fifteen-year time period had not yet expired when the 1997 amendment became effective. The State argued that the 1997 amendment could be applied to any offense that the State could prove occurred after July 1, 1982. Morales, 2008, at ¶73. The court concluded that prosecution for acts committed after July 1, 1982, would not violate the ex post facto clause of the United States Constitution. Morales, 2008 at ¶83. The Court of Appeals acknowledged that "the United States Supreme Court has not directly addressed the matter of legislative extensions of unexpired statutes of limitations", Morales, 2008 at ¶73. See Angelo L. Rosa, Litigating Adult Claims of Childhood Sexual Abuse, L.A. Law., Sept. 30, 2007, at 12, 16 (2007), noting that despite this lack of direct guidance, "the Stogner Court acknowledged that (1) statutes extending unexpired limitations periods do not violate the Ex Post Facto Clause, and (2) laws that extend limitations periods for prosecutions not yet time-barred are valid".

However, a careful reading of Stogner confirms that Angelo L. Rosas' interpretation is too narrow. See Stogner, 539 U.S. at 618. In proper context, the Stogner Court merely cited cases wherein the court upheld extensions of unexpired statutes of limitations that also distinguished situations where limitation periods have expired - "a manner of speaking that suggests a presumption that revival of time-barred criminal cases is not allowed". The Stogner court

is quick to note that their holding "does not affect extensions of unexpired statutes of limitations." Simply, the court is noting that unexpired statutes of limitation was not the issue for which certiorari review was granted!

See State v. Morales, 2008 NMCA 155 ¶13. As noted, the charging date is almost twenty years after the last alleged offense. It is also days short of being eight years after the effective date of the 1997 amendment (Section 30-1-8(G). It is not a far stretch to conclude that the offenses remained unreported on the effective date of the 1997 amendment especially since retroactive application of the 1997 Amendment "does not impair vested rights acquired under prior law. Simply, if no rights exist, it merely indicates that the cause of action "has not accrued". Also, if no rights exist, retroactive application of an enlargement is NOT PRECLUDED and defendant is not "deprived of a defense available to him at the time the acts were committed... or at the time the amendment became effective. When the cause of action does not accrue and the right of action and the liability remain nonexistent, the statute of limitations never specifically attaches to a statutory right. It remains merely procedural and a limitation of the remedy only. Retroactive application of an amendment to a time period OPERATES PROSPECTIVELY in that the amendatory act governs all causes of action that accrue after its effective date even if the offense was committed prior to such amendment's effective date.

Conversly, any cause of action that accrues under the original applicable time period would be governed by that statute and not the subsequent amendment. Thus, the offense would be considered "time-barred". Also, because vested rights effectively precludes retroactive application of the amendatory act, such vested rights function as a "statute of limitations defense". Simply, retroactive application of an enlargement would alter or impair rights that vested when the cause of action accrued. (Note: accrue and committed are not synonymous). See Davis v. Mills, 194 U.S. 451, 454, 48 L.Ed 1067, 1070, 24 S.Ct. Rep. 692 (1904); The Harrisburg v. Richards, 119 U.S. 199, 214, 30 L.Ed 358 (1886).

The Morales Court also relied on People v. Russo, 439 Mich. 584, 594, 487 N.W. 2d 698 (1992) for its conclusion that "prosecution for acts committed after July 1, 1982 did not violate the Ex Post Facto Clause of the United States Constitution. The Supreme Court of Michigan has explained that "[w]ell-settled principles require the conclusion that applying the extended statute of limitations to the then-not-yet-time-barred alleged sexual assaults is not ex post facto". Morales, 2008, at ¶13. Russo is on point for Morales, supra, in that the original applicable time period in both had not yet expired on the amendment's effective date. Most importantly, on the date the amendment became effective, the crimes had

not been reported, thus, the liability and the right of action remained non-existent. Simply, the offenses with which Russo was charged were not time-barred because (1) the applicable time period remained unexpired on the amendment's effective date, and (2) the fact that the liability and the right of action were non-existent on the amendment's effective date, i.e., no accrued cause of action/no discovery, left the original applicable time period "procedural" rather than "substantive". Simply, the offense remained unreported until after the amendment's effective date. Retroactive application of the amendment was not ex post facto as no rights existed that could be altered or impaired or used as a "statute of limitations defense". Thus, Russo was not deprived of a defense available to him at the time the acts were committed... or at the time the amendment became effective.

Close examination of Russo, and logic, leads to a conclusion that the expression "time-barred" is not limited SOLELY to the expiration of the applicable time period which BARS PROSECUTION of the offense, but also includes instances wherein the liability and the right of action exist, i.e., the cause of action accrues and the time limitation is a limitation of both the right and the liability and is SUBSTANTIVE instead of merely procedural. The Russo Court clearly notes the "statute of limitations defense was not available to the defendant at the time the assaults were committed or at the time the amendment became effective". Simply, the right of action upon a liability created by *statute* did not exist until the offense was reported and that did not happen until after the amendment's effective date. The Russo Court also informs us that "the legislature amended the statute of limitations five months before the defendant had any substantive right to invoke its protection". In other words, the effective date of the amendment was five months before the original applicable statute expired. Finally, the court notes that "the statute of limitations defense remained available to the defendant AFTER the amendment, just as it did immediately BEFORE the amendment went into effect". Russo, at 593-94.

Question: If "the legislature amended the statute of limitations five months before the defendant had any substantive right to invoke its protection", how then did the "statute of limitations defense remain available IMMEDIATELY BEFORE the amendment went into effect"? The only logical explanation would involve "the reporting of the offense" to a law enforcement agency or the "discovery" of the offense by such an agency prior to the amendment's effective date. When the cause of action accrues and the liability comes into existence, the applicable time period, in effect at the point of accrual, would be substantive and would preclude retroactive application of the amendment thereby functioning as a statute

of limitations defense". When the cause of action accrues, the time limitation is a limitation of both the right and the liability. The fact that the time period becomes "a condition annexed to the enjoyment of the right" in a statute, makes the time period substantive which precludes retroactive application of the amendment. Simply, the offense is "time-barred".

Clearly, the expression "time-barred" refer to: (1) the expiration of the applicable time period before the amendment's effective date which BARS PROSECUTION of the defendant, and (2) to the annexation of the applicable time period to a statutory right of action, i.e., the cause of action accrues (the right and the liability come into existence) and BARS RETROACTIVE APPLICATION of an enlargement to the time period. See Link v. Receivers of Seaboard Air Line Ry. Co., 73 F.2d 149, 151 (4th CA 1934). Since the offense in Russo was not reported until after the amendment's effective date and the original applicable time period had not expired prior to such date, Russo had no "statute of limitations" defense on which to rely. Russo was not deprived of a defense available to him according to law at the time when the act was committed. Thus, the Michigan Court's holding was that "the extended limitation period for criminal sexual conduct involving a minor was intended by the legislature to apply to formal charges of offenses not time-barred on the effective date of the act". Russo, at 588. Cf. Dobbert v. Florida, 432 U.S. 282, 292-93, 97 S.Ct. 2290, 53 L.Ed 2d 344 (1977).

In line with Russo, the New Mexico Court of Appeals found no ex post facto violation in Morales' case and reversed the judgement of the trial court. Despite finding no violation of the ex post facto clause, the Court of Appeals noted that, "Although the ex post facto clause does not bar the prosecution of crimes committed after July 1, 1982 (Morales, 2008, at ¶13), the presumption is that the legislature intended the 1997 amendment to OPERATE PROSPECTIVELY, absent clear legislative intent to the contrary". Morales, 2008, at ¶8; §12-2A-8.

However, the Court of Appeals obviously interpreted the expressions "OPERATES prospectively" and "APPLIES prospectively" as synonymous because the court concluded that the legislature intended for the 1997 amendment to APPLY prospectively. The difference is basic: 'Operate' denotes function, whereas 'Application' deals with the act of applying. An amendment enlarging a time period would APPLY prospectively ONLY when retroactive application of such an enlargement would alter or impair vested/accrued rights. When no vested/accrued rights exist, retroactive application of an enlargement CANNOT alter or impair nonexistent rights. Thus, retroactive application of an enlargement would be permitted and would OPERATE prospectively because if the cause of action accrues, and

rights vest/accrue, it would be after the amendment's effective date. The amended time period would then govern all causes of action which accrue after its effective date regardless of when the offense was committed.

See Renderos v. Ryan, 469 F.3d 788, 793-97 (9th 2006) for discussion on Stogner and clarification of the applicability of Section 803(g). In 1994, California enacted Cal. Pen. Code § 803(g), and a 1996 amendment - now repealed per Stogner - provided that satisfaction of the conditions in § 803(g)(2) "shall revive any cause of action barred by [prior statutes of limitations]". Cal. Pen. Code § 803(g)(3)(A)(1996)(alteration omitted). Renderos at 794. The Supreme Court found the law unconstitutional, holding that a statute enacted after the expiration of a statute of limitations and that revives prosecution is a classic ex post facto law. Stogner, 539 U.S. at 614-15, 123 S.Ct. 2446. The critical element in Stogner was the fact that the amendment in question became effective after the statute of limitations had already expired.

In contrast, in Renderos, § 803(g) was enacted while the limitations periods were still running on the claims against Renderos. Additionally, a close look at Renderos informs us that the cause of action had not yet accrued, i.e., NO DISCOVERY, prior to the effective date of the amendment to the time period. Thus, the cause of action was subject to the conditions of § 803(g). The proviso that the subsection does not apply unless the statute of limitations has expired in section 800 or 801, "obviously ensures that the one-year period in section 803(g)(1) does not override or otherwise conflict with sections 800 or 801 where [the victim] reports the crime to a qualifying law enforcement agency BEFORE the three-year or six-year period set forth in the latter provisions 'has expired'."

Because the statute of limitations under section 800 had not expired when Section 803(g) became effective on January 1, 1994, Section 803(g) permitted the People to commence prosecution for the offenses within one-year after the filing of Ryan's report, notwithstanding the limitations period in section 800. Renderos, at 794. The most significant consideration is that there is never a period in which a putative defendant is subject to "punishment [], where [he] was not, by law, liable, to any", Stogner, 539 U.S. at 612, 123 S.Ct. 2446 (quoting Calder v. Bull, 3 U.S. 386, 389, 3 Dall. 386, 391, 1 L.Ed 648 (1798)), "until after the victim files a report with the proper authorities. Putative defendant is then subject to liability for one-year". Because the offense was never reported to a law enforcement agency prior to the amendment's effective date and prior to the expiration of the original applicable time period, the amendment (803(g)) governs the cause of action and OPERATES PROSPECTIVELY.

Simply, because liability was non-existent when the amendment became effective, there was also no right of action (no discovery). Thus, the applicable time period remained merely procedural and a limitation of the remedy ONLY! Without an accrued cause of action, rights are non-existent, conditions precedent to the commencement of the time period notwithstanding. Since it is not possible to alter or impair non-existent rights, retroactive application of an enlargement does not violate the ex post facto clause of the United States Constitution. See United States Constitution, Art I, §10, cl. 1. When no vested/accrued rights exist on the amendment's effective date, retroactive application of an amendment to the statute of limitations operates prospectively in that it governs causes of action which accrue after its effective date regardless of when the offense was committed. See §803(g)(1); Renderos, at 795.

Cf. Huffman v. Metzer, 2018 U.S. Dist. LEXIS 68323, at LEXIS 9, 10 (2018)(Citing Hoenicke v. State, 13 A.3d 744 (Del. 2010). The Delaware Supreme Court explained that the version of §205(e) in effect at the time of petitioner's offense in 1993 permitted "prosecution of delineated sexual offenses after the expiration of the five-year general limitation period if the prosecution commenced within 2 years of the initial disclosure of misconduct to an appropriate law enforcement agency." Id. Section 205(e) was amended in 2003 "to provide that a prosecution for certain sexual offenses, including unlawful sexual intercourse in the Second Degree, could be commenced at any time. Id. Based upon the reasoning in Hoenicke, and given the terms of the version of §205(e) in effect at the time of petitioner's 1993 offense, the Delaware Supreme Court held that petitioner's prosecution was not time-barred when §205 was amended in 2003 because petitioners stepdaughter did not report the offense to any law enforcement agency until 2010. Id. The critical element herein was that the offense was not reported until after the amendment's effective date. (It is to be noted that the 1993 version of §205(e) is similar to the amendment that was introduced in California in 1994. See Stogner v. California, 539 U.S. 607 (2003)).

See United States v. Chief, 438 F.3d 920, 924 (9th 2000)(Citing Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985)(In Friel, we concluded "that when a newly enacted statute of limitations affects only a remedial change but does not alter substantive rights, there is no reason to apply it only prospectively. Friel was a civil case, so it does not apply directly, nonetheless, in the context of a criminal case, ex post facto principles yield a similar result.").

Cf. United States v. Richardson, 512 F.2d 105 (CA 3 1975) (After considering "all the law in effect at the time of the offense", the court denied retroactive application of the amendment despite its effective date being almost two years prior to the expiration of the original applicable time period. Simply, "when dawn breaks on the unregistered male, six days after his 18th birthday", the cause of action accrued. At that point the liability and the right of action came into existence. Simply, rights vested for both the plaintiff and the defendant. "Retroactive application" of the amendment would alter or impair vested/accrued rights and would be retroactive law in violation of the ex post facto clause of the United States Constitution. Furthermore, such an application obviously would not OPERATE PROSPECTIVELY! When vested/accrued rights exist, the only application that OPERATES PROSPECTIVELY is prospective application.

> Accrual Rule (1939) - A doctrine delaying the existence of a claim until the plaintiff has discovered it. The accrual rule arose in fraud cases as an exception to the general limitations rule that a claim comes into existence once a plaintiff knows, or with due diligence should know, facts to form the basis for a cause of action. Merck & Co. v. Reynolds, 559 U.S. 633, 646-47, 130 S.Ct. 1784 (2010). Black's Law Dictionary, Tenth Edition.

> Accrue (vb) - 1) To come into existence as an enforceable claim or right; to arise. < the plaintiff's cause of action for silicosis did not accrue until the plaintiff knew or had reason to know of the disease >. "The term 'accrue' in the context of a cause of action means to ARRIVE, to come into existence, or to become a present enforceable demand or right. The time of accrual of a cause of action is a question of fact". 2 Ann Taylor Schwing, California Affirmative Defenses, §25:3, at 17-18 (2d ed. 1996). Black's Law Dictionary, Tenth Ed.

See Garcia, 1995 NMSC 019, ¶¶'s 33-36, 119 N.M. 532, 893 P.2d 428 (Once a cause of action accrues, it is subject to the protections of due process.). A statute of limitations establishes the time, after a cause of action arises, within which a claim must be filed. A statute of limitations begins to run when the cause of action accrues, the accrual date usually being the date of discovery. Garcia, 119 N.M. at 537, 893 P.2d at 433. Wilson v. New Mexico Lumber & Timber Co., 42 N.M. 438, 441, 81 P.2d 939, 940 (S.Ct. 1938) (cited in Morales 2010 at ¶23) ("It is entirely settled that, until the period fixed by such a statute HAS ARRIVED, the statute is a mere regulation of the limitation, and, like other such regulations, subject to legislative control". [However, when the liability and the right of action come into existence], "it operates, not only as a limitation of the remedy given the plaintiffs, but also as a limitation of liability which it creates against defendants". "The defendants became legally liable and were exempt from such liability at the expiration of [the designated] period. Their right to complete exemption at the end of the time specified was as complete as the right of the plaintiff to hold them responsible ... during the running of that time, and the right of each vested when the

[cause of action accrued]".). In Wilson, the cause of action accrued on April 13, 1937 and was subject to a six month time period. On June 17, 1937 there became effective an amendment that extended the time period from six months to one year. Claimant's action was filed on December 16, 1937. The amendment became effective almost four months prior to the expiration of the original time period. Yet, the Supreme Court did not allow retroactive application of the amendment because when the cause of action accrues, vested rights exist that can be altered or impaired and such an application would be ex post facto. See Wall v. Gillett, 61 N.M. 256, 298 P.2d 939 (S. Ct. 1956)(Cause of action accrued on September 4, 1952 and was subject to a one-year time period. Effective on June 12, 1953, almost three months prior to the expiration of the one-year time period, an amendment extended the time period to three years for bringing of the action. Despite the original time period remaining unexpired on the amendment's effective date, the amendment was denied retroactive application. Simply, the Supreme Court, McGhee, J., held that [action] brought more than one-year after the cause of action accrued was barred by limitations; original applicable time period governed.

Grygorwicz v. Trujillo, 2006 NMCA 089, 140 N.M. 129, 140 P.3d 550 ¶23. The New Mexico Court of Appeals noted that "Our Supreme Court has established that ordinary statutes of limitations deal with remedial procedure". The holdings in Wilson, supra, and Wall, supra, however, were that the statutes of limitations (the amendments) could not be applied to those cases because the [original] statutes could not be considered remedial or procedural. As variously characterized by our Supreme Court, they constituted a limitation on the liability created by statute, "a condition annexed to the enjoyment of the right" in a statute, a "change affecting substantive rights", and a "limitation upon the right to bring an action under a statute." Wilson, 42 N.M. at 441, 442, 81 P.2d at 63, 64; see Wall, 61 N.M. at 257, 298 P.2d at 940. See Landgraf v. USI Film Products, 511 U.S. 244, 259, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994). In the context of procedural laws, the Court in Landgraf also stated "that because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the [action] does not make application of the rule at trial retroactive." Id. at 275. Under Landgraf a court is to look to the nature of the statute and what the statute governs, including consideration of the extent of the connection of the "relevant past event" with the operation of the new statute. Although decided years before Landgraph, Wilson and Wall fairly engaged in a Landgraf inquiry. In effect, the Court determined that the limitations provisions were primarily connected and attached new legal

consequences to the conduct already completed before the statutes were enacted. The Court did not view the limitations provisions as general statutes of limitations, but instead considered them as part and parcel of newly created actions that altered substantive rights. See Weingarten v. United States, 865 F.3d 48, fn. 6 (2nd CA 2017) (Landgraf analysis applies to both civil and criminal statutes.). See Landgraf, at 280. ("In the second stage of the Landgraf test the court determines whether the statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed".) Id. If the statute, as applied, would have such effect, it will not be applied retroactively "absent clear congressional intent to the contrary". Id. "Extending the statute of limitations" for antecedent conduct would upset settled expectations and fail to protect reasonable reliance interests because it would "increase defendant's liability for past conduct by increasing the period of time during which a defendant can be [prosecuted]. Weingarten, 865 F.3d 57. See Andrew v. Schlumberger Technology Corp., 808 F. Supp. 2d 1288 (10th 2011) (D.N.M). "New Mexico law controls whether a New Mexico statute of limitations is retroactive". Id. at 1294. "Thus, even where a cause of action is not yet time-barred, when the legislature amends the statute of limitations without making the amendment expressly retroactive, the Supreme Court of New Mexico applies the statute of limitations that is specific to the statute at the time the cause of action accrued and not the amended time". Id. at 1299.

Howell v. Heim, 118 N.M. 500, 506, 882 P.2d 541, 547 (1994) ("A statute or regulation is considered retroactive if it IMPAIRS VESTED RIGHTS acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions".). See Link v. Receivers of Seaboard Airline Ry. Co., 73 F.2d 149, 152 (4th CA 1934) ("It is well settled that a statute of limitations will not be so construed as to affect a cause of action already barred, if such construction can reasonably be avoided, and that this principle is peculiarly applicable where the limitation in force WHEN THE CAUSE OF ACTION ACCRUED is a part of the right itself. See William Danzer & Co. v. Gulf, etc., R. Co., 268 U.S. 633, 636, 45 S. Ct. 612, 613, 69 L. Ed. 1126 (1925) ("But such provisions sometime constitute a part of the DEFINITION of a cause of action created by the same or another provision, and operate as a limitation upon liability".). Collins v. Youngblood, 497 U.S. 37, 43, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) (Under the ex post facto clause, "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts".).

See Bennett v. New Jersey, 470 U.S. 632, 639, 84 L.Ed 2d 572, 105 S.Ct. 1555 (1985) ("The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."). This limitation comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect. See e.g., United States v. Security Industrial Bank, 459 U.S. 70, 79, 74 L.Ed 2d 235, 103 S.Ct. 407 (1982); Greene v. United States, 376 U.S. 149, 160, 11 L.Ed 2d 576, 84 S.Ct. 615 (1964).

State v. Morales, 2010 NMSC 026, 148 N.M. 305, 236 P.3d 24 - The court's grant of certiorari was limited to the question of legislative intent, namely, whether the legislature intended the 1997 amendment to apply to unexpired crimes committed before its effective date. Defendant did not seek and, therefore, [the court] did not grant certiorari review of the Court of Appeals holding regarding the ex post facto clauses of the United States and New Mexico Constitutions. Id. at ¶19. The New Mexico Supreme Court concluded that the 1997 amendment, which abolished the statute of limitations for all capital felonies and first-degree violent felonies, applies to unexpired criminal conduct committed before the amendment's effective date of July 1, 1997. Because the crimes committed by defendant after July 1, 1982 were not time-barred (applicable time period remained unexpired and cause of action had not accrued, i.e., no discovery) as of July 1, 1997, "we hold that the 1997 amendment applies TO THIS CASE. Id. at ¶20. Accordingly, the Supreme Court reversed the judgement of the Court of Appeals.

Because the offense was not reported until after the amendment's effective date, the liability and the right of action never came into existence. Thus, the time limitation is a limitation of the remedy only and is merely remedial. On the other hand, if the cause of action HAD ACCRUED, the right of action upon a liability created by statute would have come into existence, i.e., would be substantive. The applicable time period would then be a substantive limitation of both the right and the liability and would effectively function as a "statute of limitations defense" that would PRECLUDE RETROACTIVE APPLICATION OF THE AMENDMENT! Simply, if the liability is tangible, i.e., "substantially real", an amendment enlarging the time period CANNOT APPLY RETROACTIVELY! See Martin v. Rinck, 491 NE.2d 556, 559 (Ind. App. 1986) ("It is the substance of the cause which determines the applicable statute of limitations.").

The New Mexico Supreme Court concluded that an extension to a time period can extend an unexpired time period

because such extension "does not impair vested rights acquired under prior law, require new obligations, impose new duties, or affix new disabilities to past transactions." Id. at ¶13. The fact that such extension "does not impair vested rights acquired under prior law" supports Mr. Blea's contention that the offense was not reported until after the amendment's effective date, otherwise, rights would have vested. Since no accrued rights or liability existed, Morales was not deprived of any defense available to him prior to the effective date of the amendment. In Dobbert v. Florida, 432 U.S. 282, 292-93, 97 S.Ct. 2290, 53 L.Ed 2d 344 (1977), the court stated: "..., or which deprives one charged with crimes of any defense available according to law at the time when the act was committed, is prohibited as Ex Post Facto". So long as rights do not vest, the applicable time period remains merely procedural and subject to legislative control, therefore, retroactive application of the 1997 amendment **DOES OPERATE PROSPECTIVELY** because if the cause of action accrues and rights do vest, it will be at some point after the effective date of the amendment. Simply, the amendment only governs causes of action that accrue after its effective date regardless of when the offense was committed.

Blea's case is distinguishable from Morales, supra, for the following reasons: (1) The offense in Blea's case was immediately reported to a law enforcement agency and the cause of action accrued at that point, (2) the right of action upon a liability created by statute came into existence when the cause of action accrued, (3) the time period became a substantive limitation of both the right and the liability, and (4) Blea's case is governed by the substantive law of the 1987 Tolling Provision (§30-1-9.1).

What undeniably distinguishes Blea's case from State v. Morales, 2010 NMSC 026 is that Blea's case is governed by NMSA 1978, §30-1-9.1 (1987) (hereinafter the 1987 Tolling Provision), whereas Morales' case is not. Morales, 2008 at ¶3. "The applicable time period for commencing prosecution pursuant to §30-1-8 NMSA 1978 shall not commence to run for an alleged violation of section 30-6-1, 30-9-11, or 30-9-13 NMSA 1978 until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first. See State v. Whittington, 2008 NMCA 063, ¶103, 144 N.M. 85, 183 P.3d 970, "General report to Children, Youth and Family Department that criminal sexual contact of a minor MAY have occurred was insufficient to trigger running of the statute of limitations. In order for the statute to begin running, victim must either reach the age eighteen, or a

specific report of the actual charged incident must be made to a law enforcement agency."

The 1987 Tolling Provision specifically enumerates the offenses that can be properly tolled. It establishes the conditions under which the liability and the right of action come into existence and the time period within which prosecution must commence. In § 30-1-9.1, the "reporting of the offense to a law enforcement agency" functions like a 'DISCOVERY RULE'. When a law enforcement agency becomes aware of the claim, the cause of action accrues and the right of action upon a liability created by statute comes into existence. The applicable time period in such a statutory scheme is substantive and an amendment extending the time period applies prospectively only. If the offense is not reported, it is properly tolled until "the victim turns eighteen".

If the victim turns eighteen and the offense remains unreported, the applicable time period nonetheless commences. Because the liability and the right of action do not come into existence until law enforcement becomes aware of the offense, i.e., the cause of action accrues, this part of the statute effectively functions as a 'statute of repose' that is substantive and cannot be enlarged by a subsequent amendment to the time period.

Also, relative to offenses that fall outside the Tolling Provision's purview that CANNOT BE PROPERLY TOLLED, the applicable time period also functions as a 'statute of repose' that commences when the crime is committed, pursuant to § 30-1-8. State v. Costillo, 2020-NMCA-051, 475 P.3d 803, "Defendant's prosecution for intimidation of a witness was barred by the statute of limitations because the intimidation occurred in August 2008 and defendant was not charged or indicted until 2016; tolling under § 30-1-9.1 did not apply to an intimidation of a witness charge. Because defendant's prosecution for intimidation of a witness exceeded the applicable limitations period of five years between when the crime was COMMITTED in August 2008 and when the information was filed in March 2016, and the statute of limitations WAS NOT TOLLED, defendant's conviction was barred."

See Fernandez v. Española Pub. Schools District, 2005-NMSC-026, ¶ __, 138 N.M. 283, 119 P.3d 163, "Where authority is given to do a particular thing and a mode of doing it is prescribed, it is limited to be done in that mode", all other modes are excluded. This is part of the so-called "Doctrine of Expressio Unis Est Exclusio Alterius". (A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. (This is never more applicable than when applied to the interpretation of a statute)). Black's Law Dictionary.

The two catagories of statutory time bars - statutes of limitations and statutes of repose - each have "a distinct purpose". CTS Corp. v. Waldburger, 573 U.S. 1, 7-9, 134 S.Ct. 2175, 2183, 189 L.Ed. 2d 62, 73. Statutes of limitation are designed to encourage plaintiffs "to pursue diligent prosecution of known claims", while statutes of repose "effect a legislative judgement that defendants should be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason". Id. at 9. For this reason, statutes of limitations begin to run "when the cause of action accrues", while statutes of repose begin to run on "the date of the last culpable act or omission of the defendant." Id. at 7-8. A statute of repose is not related to the accrual of any cause of action. Rather, it mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued. Thus, a statute of repose can prohibit a cause of action from coming into existence. A statute of repose can be said to define the scope of a cause of action, and therefore the liability of a defendant. Id. at n.14. See Morgan v. Donley, 1995 U.S. Dist. LEXIS 10957 at 10 (quoting Harding v. K.C. Wall Products, Inc., 250 Kansas 655, 688, 831 P.2d 958 (1992), "noting, with regards to a statute of repose that "It is substance".

Lujan v. Regents of the Univ. of Cal., 69 F.3d 1511, 1517-18 (10th (D.N.M.) 1995):

"The statute of limitations as a substantive limit on the right: A statute of limitations that restricts a right created by statute rather than a right at common law generally is deemed to be a substantive limit on the right as opposed to a mere procedural limit on the remedy. (citing United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157, 162, 34 S.Ct. 550, 552, 58 L.Ed 893 (1914); Davis v. Mills, 194 U.S. 451, 454, 24 S.Ct. 692, 693, 48 L.Ed 1067 (1904); Kozan v. Comstock, 270 F.2d 839, 841 (5th Cir. 1959); Bell v. Wabash Ry., 58 F.2d 569, 571 (8th Cir. 1932). In other words, the limitations period is an integral part of the right itself and is a condition on whether the right may be exercised. The fifth circuit, in an opinion adopted as binding precedent on the eleventh circuit, has stated that an amendment to a limitations period that is an integral part of the right will not be retroactively applied to cover causes of action already in existence, unless the legislature manifests such intent. See McCloskey & Co. v. Eckart, 164 F.2d 257, 260 (5th Cir. 1947) (citing United States v. St. Louis, S.F. & Tex. Ry. Co., 270 U.S. 1, 3, 46 S.Ct. 182, 183, 70 L.Ed. 435 (1926) and John v. Waterson, 84 U.S. (17 Wall.) 596, 599, 21 L.Ed 737 (1873))." "Where the statute includes a limitation provision, the time within which the [action] must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to [take action] at all. The Harrisburg, 119 U.S. 199, 214, 30 L.Ed 358, 7 S.Ct. 140 (1886); See e.g. Western Fuel Co. v. Garcia, 257 U.S. 233, 240, 66 L.Ed 210, 42 S.Ct. 89 (1921),"

See Central Vermont R.Co. v. White, 238 U.S. 507, 511, 59 L.Ed 1433 (1915) ("Matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability"). The cause of action is one created by statute, which fixes a time within which action must be brought as an essential element of the

[RIGHT], AND IN SUCH CASES IT IS WELL SETTLED THAT A DECLARATION OR COMPLAINT WHICH SHOWS ON ITS FACT THAT THE ACTION WAS NOT BROUGHT WITHIN THE TIME PRESCRIBED IS DEMURRABLE. Phillips v. GRAND TRUNK RY., 236 U.S. 622, 667, 35 S.Ct. 444, 59 L.Ed 744 (1915); FINN V. U.S., 123 U.S. 227, 232, 8 S.Ct. 82, 31 L.ED 128.

SEE ATLANTIC COAST LINE R. CO. V. BURNETTE, 239 U.S. 199, 201, 60 L.Ed 226, 277, 36 Sup. Ct. Rep. 75, 17 N.C.C.A 144 (1915) - IN DEALING WITH THE ENACTMENTS OF A PARAMOUNT AUTHORITY, SUCH AS CONGRESS IS, WITHIN ITS SPHERE, OVER THE STATES, WE ARE NOT TO BE CURIOUS IN NOMENCLATURE IF CONGRESS HAS MADE ITS WILL PLAIN, NOR TO ALLOW SUBSTANTIVE RIGHTS TO BE IMPAIRED UNDER THE NAME OF PROCEDURE. CENTRAL VERMONT R. CO. V. WHITE, SUPRA, AT 511. BUT, IRRESPECTIVE OF THE FACT THAT THE ACT OF CONGRESS IS PARAMOUNT, WHEN A LAW THAT IS RELIED ON AS A SOURCE OF AN OBLIGATION IN TORTS SETS A LIMIT TO THE EXISTENCE OF WHAT IT CREATES, OTHER JURISDICTIONS NATURALLY HAVE BEEN DISINCLINED TO PRESS THE OBLIGATION FARTHER. DAVIS V. MILLS, 194 U.S. 451, 454, 48 L.Ed 1067, 1070, 24 S. Ct. Rep. 444 (1904); THE HARRISBURG, 119 U.S. 199, 214, 30 L.Ed 358, 7 Sup. Ct. Rep. 140 (1886).

THE SUPREME COURT HAS HELD THAT STATUTES OF LIMITATION MAY FAIRLY BE CHARACTERIZED AS "SUBSTANTIVE", AND HENCE APPLIED BY THE "FOREIGN FORUM", IF DEFENDANT'S LIABILITY AND PLAINTIFF'S REMEDY ARE CREATED BY THE SAME STATUTE OR STATUTES, THE HARRISBURG, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed 358 (1886), OR IF THE REMEDY IS SO "INSEPARABLE" FROM THE RIGHT AS TO QUALIFY IT. DAVIS V. MILLS, SUPRA. THIS "BUILT IN EXCEPTION HAS COME TO MEAN THAT A FOREIGN STATUTE OF LIMITATIONS WILL BE TREATED AS "SUBSTANTIVE", AND HENCE APPLIED BY THE COURTS OF THE FORUM, WHEN THE COURTS OF THE STATE WHOSE SUBSTANTIVE LAW IS APPLIED TREAT THE RIGHT AS CONTINGENT UPON THE CONTINUED EXISTENCE OF THE REMEDY. SEE SCHRIEBER V. ALLIS-CHALMERS CORP., 448 F. Supp. 1079, 1092 (10th CIR. 1978).

MARK V. SHELTON, 124 F. Supp. 206, 209, FN. 1 (10th 1954) (TIME LIMITATIONS OF A CAUSE OF ACTION, "IF BY THE LAW OF THE STATE WHICH HAS CREATED A RIGHT OF ACTION, IT IS MADE A CONDITION OF THE RIGHT THAT IT SHALL EXPIRE AFTER A CERTAIN PERIOD OF LIMITATION HAS ELAPSED, NO ACTION BEGUN AFTER THE PERIOD HAS ELAPSED CAN BE MAINTAINED IN ANY STATE".).

SEE DAVIS V. MILLS, SUPRA, AT 454. (THE CONDITION, OR LIMITATION, PUT UPON A RIGHT OF ACTION CREATED BY STATUTE, AND NOT EXISTING AT COMMON LAW, INHERES IN THE RIGHT ITSELF, AND FOLLOWS IT INTO OTHER JURISDICTIONS. SUCH A CONDITION, OR LIMITATION, NEED NOT BE CONTAINED IN THE SAME STATUTE. IT OPERATES THE SAME WAY IF IT BE SPECIFICALLY ATTACHED TO SUCH A STATUTORY RIGHT OF ACTION *SUBSEQUENTLY* AND *IN A DIFFERENT STATUTE*".). THE HARRISBURG, SUPRA AT 214 - ([WHEN] A STATUTE CREATES A NEW LIABILITY, WITH THE RIGHT TO A [REMEDY] FOR ITS ENFORCEMENT, PROVIDED THE [REMEDY] IS BROUGHT

within [the applicable time period], and not otherwise, the time within which the [action] must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right of [action]. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, the limitations of the remedy are, therefore, to be treated as limitations of the right). See Macke v. Judy's Foods, Inc., 654 F. Supp. 1465, 1480 (1987). Two exceptions have been created to the general rule that the forum state's statute of limitations governs. The first exception created was by the Supreme Court in "The Harrisburg", supra at 214. There, the Supreme Court held that a limitation period contained in a state wrongful death statute was a substantive law; emphasizing that "the liability and the remedy were created by the same statutes, and the limitations of the remedy was therefore to be treated as limitations of the "rights". The rule in Harrisburg was extended later to any statute that also created a right unknown to the common law. In Davis v. Mills, supra, the Supreme Court extended this exception. Justice Holmes observed:

> The common case [where limitations are treated as substantive] is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. The Harrisburg, supra at 214. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right. (Emphasis add). Davis v. Mills, 194 U.S. at 454, 24 S.Ct. at 694, 48 L.Ed at 1070. Thus, even in the absence of a "built-in" statute of limitations, a limitations period nonetheless may be considered substantive where it is contained in a different statute, so long as it is reasonable to conclude that the limitation is directed specifically to the statutorily created liability.

See Western Fuel Co. v. Garcia, 257 U.S. 233, 243, 66 L.Ed 210 (1921) ("The time within which the [action] must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right [to take action] at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore to be treated as limitations of the right".)

> Partee v. St. Louis & S.F.R. Co., 204 Fed. 907, 971 (8th CA 1913) ("A statute which in itself creates a new liability gives an action to enforce it unknown to the common law and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability"). (Citing the Harrisburg, at 214; Bank v. Franklyn, 120 U.S. 747, 756, 7 Sup. Ct. 757, 30 L.Ed. 825 (1887) (Citing Pollard v. Bailey, 87 U.S. 520, 20 Wall. 526,

527 (1874), "where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed").

See Wilson v. Denver, 1998 NMSC 016, ¶9, 125 N.M. 308, 961 P.2d 153, (As our Supreme Court noted, "defenses based on statutes of limitations are typically waived if not raised in the pleadings, [but] our cases have indicated that time limitations contained in statutes which establish a 'condition PRECEDENT to the right to maintain the action are jurisdictional and not subject to waiver"). See also Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 552 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) (If "there are two plausible constructions of a statute of limitations" we generally "adopt the construction that starts the time running when the cause of action ... accrues" because "Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action").

See State v. Morales, 2010 NMSC 026 at ¶13 (citing State v. Merolla, 686 P.2d 244, 245-46 (Nev. 1984)) ("An amendment to a criminal statute of limitations, silent on the question of its retroactive application, must be construed as prospective only and cannot apply to an offense committed before its effective date"). This quote by 'Merolla', placed in proper context, refers to the court's holding in United States v. Richardson, 512 F.2d 105 (3rd Cir. 1975).

Similar to Mr. Blea's case, Merolla also involved a TOLLING PROVISION. Therein, the alleged offense, conspiracy (a gross misdemeanor), took place between January 1 and August 1, 1980. During that time the statute of limitations for gross misdemeanors was one year from the date of commission of the offense. Because the last date of commission of the alleged conspiracy was August 1, 1980, the conspiracy charge had to have been filed no later than August 1, 1981. The indictment in this case was not filed until September 18, 1981; the conspiracy was filed beyond the one-year period of limitations. Effective July 1, 1981, BEFORE THE ONE YEAR LIMITATIONS PERIOD EXPIRED, the legislature amended and extended the statute of limitations for gross misdemeanors to two-years.

Also effective at the time of the offense, a TOLLING PROVISION provided that "when an offense is done in a secret manner', the limitations period is tolled until the 'DISCOVERY' of the crime". During the time the conspiracy was allegedly committed and arguably discovered, however, the TOLLING PROVISION applied only to felonies and misdemeanors. It was amended in July of 1981 to include GROSS MISDEMEANORS within its purview. "Since gross misdemeanors were excluded from the tolling statute at all times relevant to the alleged

conspiracy, the state may not avail itself of its provisions". Simply, gross misdemeanors were not subject to tolling and, therefore, were governed by what effectively functions as a 'statute of repose'.

Thus, the court concluded that the 1981 amendment to the statute cannot be construed to apply retroactively to offenses committed before its effective date. In its analysis, the court considered all the applicable law in effect at the time of the offense: (1) "Before the statute of limitations for a criminal offense expires, a legislature MAY amend the statute and extend the limitations period without violating the ex post facto clause." See Falter v. United States, 23 F.2d 420 (2nd CA), cert. denied, 277 U.S. 590 (1928). It was not a question of whether the legislature had the power to extend the statute of limitations retroactively, but whether the legislature actually intended to do so. There is no EXPRESSLY stated 'legislative intent' that the amendment apply retroactively, (2) generally, a statute must be construed to have only prospective effect, unless a contrary legislative intent is clearly indicated by the EXPRESS terms of the statute. See Hassett v. Welch, 303 U.S. 303 (1938), (3) Moreover, "criminal statutes of limitation are to be liberally construed in favor of the accused", Toussie v. United States, 397 U.S. 112, 114-15 (1970). The actual quote from Merolla reads as follows: ("IN LIGHT OF THESE CONSIDERATIONS, it has been held that an amendment to a criminal statute of limitations, silent on the question of its retroactive application, must be CONSTRUED AS PROSPECTIVE ONLY and cannot apply to an offense committed before its effective date."). United States v. Richardson, 512 F.2d 105 (3rd CA 1975) (Amendment in Richardson WAS NOT APPLIED RETROACTIVELY despite the amendment becoming effective almost two-years before the expiration of the original applicable time period because the cause of action HAD ACCRUED and RIGHTS HAD VESTED. The original applicable time period had become a substantive limitation of both the liability and the right.). Simply, an accrued cause of action and vested rights effectively functioned as a statute of limitations defense" that BARRED retroactive application of an enlargement to the time period.

The Merolla court noted, "We agree with the Richardson rationale (i.e., an explanation of principles controlling belief or practice) and hold that absent an express legislative intent to the contrary, an amendment extending the period of limitations for a criminal offense OPERATES PROSPECTIVELY ONLY". Consequently, the conspiracy charge was governed by the one-year time period; since the charge was filed after the expiration of

the one-year time period, it was properly dismissed by the court.

Similarly, in Mr. Blea's case, all offenses that are not specifically enumerated within the Tolling Provision's purview that CANNOT BE PROPERLY TOLLED, are governed by what is functionally a 'statute of repose' that is SUBSTANTIVE and cannot be extended. Therefore, application of the 1997 amendment is PROSPECTIVE ONLY.

Additionally, offenses specifically enumerated within the 1987 Tolling Provision's purview that CAN BE PROPERLY TOLLED also cannot be extended by an amendment enlarging the time period because application of an enlargement would be redundant and superfluous as such offenses are already subject to tolling and are governed by SUBSTANTIVE LAW that establishes the conditions under which the time period commences to run. See State ex rel. State Engineer v. Lewis, 1996 NMCA 019, 121 N.M. 323, 327, 910 P.2d 957, 961, "We are generally unwilling to construe one provision of a statute in a manner that would make another provision NULL or SUPERFLUOUS". Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n, 953 P.2d 435, 437 (Utah 1997)(quoting Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1998)) ("One long standing rule of statutory construction is that a legislative enactment which alters the substantive law... will not be read to operate retrospectively unless the legislature has clearly expressed that intention". "The second relevant rule of statutory construction, which is often referred to as an exception to the first permits retroactive application 'where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights' WITHOUT ENLARGING OR ELIMINATING VESTED RIGHTS". Roark v. Crabtree, 893 P.2d 1058, 1062 (Utah 1995)).

National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458, 38 L.Ed 2d 646, 94 S. Ct. 690 (1974)(A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode".); Botony Mills v. United States, 278 U.S. 282, 289, 73 L.Ed 379, 49 S.Ct. 129 (1929)(This principle of statutory construction reflects an ancient maxim - 'Expressio unis est exclusio alterius'.); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 38, 79 L.Ed 176, 55 S.Ct. 31 (1934)(As this court has previously stated: "We are not at liberty to imply a condition which is opposed to explicit terms of the statutes. ... To so hold... is not to construe the act but to amend it.").

Judge Federico with the 10th Circuit Court of Appeals is under the impression that the United States Supreme Court and the Tenth Circuit Court of Appeals have both unconditionally held that extension of an unexpired statute of limitations does not violate the Constitution and cites Stogner v. California, 539 U.S. 607, 632-33 (2003) and United States v. Jaliaferro, 979 F.2d 1399, 1402 (10 CA 1992). (App. A, pg. 5). Stogner, 539 U.S. at 632, specifically notes, "And to hold that such a law [that revives an offense wherein the time period has expired prior to the amendment's effective date] is ex post facto does not prevent the State from extending time limits for prosecution of future offenses, or for prosecutions not yet time-barred." "Even where courts have upheld extensions of unexpired statutes of limitations (extensions that our holding today does not affect), they have consistently distinguished situations where limitations periods have expired." 539 U.S. at 618. See Thomas v. United States, 50 A.3d 458 (District of Columbia Court of Appeals, 2012) (citing Stogner, 539 U.S. at 618), "The Court's parenthetical phrase 'extensions that our holding today does not affect', id., could be interpreted as either implicitly approving of the cited decisions of other courts, or as explicitly leaving the issue undecided. Many Courts interpreting Stogner have adopted the former view, holding that the constitutionality of extending an unexpired statute of limitations is clearly supported by Stogner. See United States v. Jaliaferro, 979 F.2d at 1402 (holding that "the application of an extended statute of limitations to offenses occurring prior to the legislative extension, where the prior and shorter statute of limitations has not run as of the date of such extension, does not violate the Ex Post Facto Clause".). But see United States v. Glenn, No. 21-5010, 2021 U.S. App. LEXIS 36680 at 6, ?, 2021 WL 5873144 at *2 (10th CA 2021) ("The Supreme Court's Stogner decision expressly avoided opining on this scenario".). Jaliaferro therefore "remains good law".

Blea asserts that Jaliaferro "remains good law" only in those instances wherein the liability is nonexistent on the amendment's effective date". What is readily apparent is that if the cause of action accrues, i.e., the liability and the right come into existence under the original period, tolling is not required as a matter of equity. Jaliaferro is not on point with Blea's case and its use as authority is unreasonable because the offenses therein consist of a fraud element involving 'criminal concealment of banking transactions'.

Jaliaferro, on September 4, 1991 was charged with a five-count indictment of 'making a material false statement' for the purpose of influencing the action of the bank making a loan to him. Only counts one, two and three

ARE RELEVANT AND INVOLVE A VIOLATION OF 18 U.S.C. §§ 1014 AND 2. COUNT ONE WAS COMMITTED ON AUGUST 16, 1985. COUNT TWO WAS COMMITTED ON DECEMBER 19, 1985, AND COUNT THREE WAS COMMITTED ON APRIL 18, 1986. ALL THREE COUNTS WERE CONTROLLED BY THE FIVE-YEAR STATUTE OF LIMITATIONS IN 18 U.S.C. § 3282. ON AUGUST 9, 1989 CONGRESS ENACTED THE FINANCIAL INSTITUTIONS REFORM, RECOVERY, AND ENFORCEMENT ACT OF 1989 (FIRREA) WHEREIN THE STATUTE OF LIMITATIONS FOR VIOLATIONS OF 18 U.S.C. § 1014 WAS EXTENDED TO TEN YEARS FOR ALL VIOLATIONS ON WHICH THE FIVE-YEAR TIME PERIOD HAD NOT RUN, AND AS OF AUGUST 9, 1989, THE FIVE-YEAR TIME PERIOD HAD NOT RUN ON ANY OF THE THREE COUNTS. RETROACTIVE APPLICATION OF A NEW PROVISION THAT LENGTHENS THE STATUTE OF LIMITATIONS SOLELY ON THE BASIS THAT THE ORIGINAL TIME PERIOD REMAINS UNEXPIRED IS NOT ABSOLUTE OR UNCONDITIONAL; IT IS CONDITIONAL. POLICY SECTION APPLICABLE TO JALIAFERRO AND HOW SUCH SECTIONS APPLY ARE AS FOLLOWS:

18 USCS § 3293 - FINANCIAL INSTITUTION OFFENSES; HISTORY: ANCILLARY LAW AND DIRECTIVES, NOTES TO DECISIONS ➔ ANALYSIS. (FIRREA)

18 USCS § 3293 (2) - CARVES OUT AN IMPORTANT EXCEPTION: IF THE OFFENSE "AFFECTS A FINANCIAL INSTITUTION", THE GOVERNMENT HAS 10 (TEN) YEARS TO INDICT A DEFENDANT BEFORE THE PROSECUTION BECOMES TIME-BARRED. THE PHRASE "TO AFFECT A FINANCIAL INSTITUTION" MEANS THAT SCHEME TO DEFRAUD EXPOSES FINANCIAL INSTITUTION TO NEW OR INCREASED RISK OF LOSS OR CAUSES FINANCIAL INSTITUTION TO SUFFER ACTUAL LOSS. United States v. Mullins, 613 F.3d 1273 (10th CIR), CERT. DENIED, 562 U.S. 1035, 131 S.Ct. 582, 178 L.Ed 2d 245 (2010).

18 USCS § 3293 - "PARTICULAR CIRCUMSTANCES": "SCHEMES TO DEFRAUD BANKS", "CONSPIRACY TO COMMIT WIRE FRAUD AND WIRE FRAUD", "CONSPIRACY TO MAKE FALSE STATEMENTS".

18 USCS § 1007 - FEDERAL DEPOSIT INSURANCE CORPORATION TRANSACTIONS: WHOEVER, FOR THE PURPOSE OF INFLUENCING IN ANY WAY THE ACTION OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, KNOWINGLY MAKES OR INVITES RELIANCE ON A FALSE, FORGED, OR COUNTERFEIT STATEMENT, DOCUMENT, OR THING SHALL BE FINED....

18 USCS § 1014 - IN GENERAL: LOAN AND CREDIT APPLICATIONS GENERALLY; RENEWALS AND DISCOUNTS CROP INSURANCE. WHOEVER KNOWINGLY MAKES A FALSE STATEMENT OR REPORT, OR WILLFULLY OVERVALUES ANY LAND, PROPERTY OR SECURITY, FOR THE PURPOSES OF INFLUENCING IN ANY WAY THE ACTION OF THE FEDERAL HOUSING ADMINISTRATION....

18 USCS § 1014 (#7) PURPOSE - ONE POLICY BEHIND USCS § 1014 IS PROTECTION OF SPECIFIC FINANCIAL INSTITUTIONS FROM FRAUDULENT LOAN APPLICATIONS. United States v. Lentz, 524 F.2d 69, 71 (5th 1975).

CONGRESS' CONCERN FOR PUNISHING CRIMINAL CONCEALMENT OF BANKING TRANSACTIONS NOT NECESSARILY INVOLVING CRIMINAL MISAPPLICATION OF FUNDS IS EXPRESSED IN 18 USCS §§ 1005, 1006, AND 1014; THESE SECTIONS WERE ENACTED TO PROSCRIBE CRIMINALLY FALSE OR FRAUDULENT STATEMENTS WHICH LIE BEYOND THE SCOPE OF USCS § 656. United States v. Michael, 456 F. Supp. 335 (D.N.J. 1978), Aff'd 605 F.2d 1198 (3rd CIR. 1979).

THE OFFENSES IN JALIAFERRO CONSIST OF A 'FRAUD ELEMENT' AND THE APPLICABLE TIME PERIOD CANNOT BECOME A SUBSTANTIVE LIMITATION OF THE LIABILITY UNTIL THE OFFENSE IS DISCOVERED. SIMPLY, THE LIABILITY DOES NOT EXIST UNTIL THE OFFENSE IS DISCOVERED, AND UNTIL THE OFFENSE IS DISCOVERED, THE APPLICABLE TIME PERIOD TIME PERIOD REMAINS MERELY PROCEDURAL

AND A LIMITATION OF THE REMEDY ONLY. ONCE THE OFFENSE IS DISCOVERED, THE APPLICABLE TIME PERIOD BECOMES A SUBSTANTIVE LIMITATION OF THE LIABILITY CREATED BY STATUTE. IF THE OFFENSE IS DISCOVERED PRIOR TO THE AMENDMENT'S EFFECTIVE DATE, THE ORIGINAL APPLICABLE TIME PERIOD GOVERNS. ON THE OTHER HAND, IF AN AMENDMENT ENLARGING THE TIME PERIOD BECOMES EFFECTIVE PRIOR TO DISCOVERY OF THE CAUSE OF ACTION, I.E., THE OFFENSE, THE AMENDMENT WILL THEN GOVERN THE CAUSE OF ACTION. ASIDE FROM THE APPLICABLE TIME PERIOD REMAINING UNEXPIRED ON THE AMENDMENT'S EFFECTIVE DATE, OF PARAMOUNT CONSIDERATION IS WHETHER THE LIABILITY EVER CAME INTO EXISTENCE, AND IF SO, WHEN DID IT COME INTO EXISTENCE?

SEE PEOPLE V. ISAACS, 37 ILL. 2d 205, 226 N.E. 2d 38, 51-52 (1967) (App. C, pg 3, lines 3-6) ("... THE STATE MAKES NO CONTRACT WITH CRIMINALS AT THE TIME OF THE PASSAGE OF ACTS OF LIMITATIONS THAT THEY SHALL HAVE IMMUNITY FROM PUNISHMENT IF NOT PROSECUTED WITHIN THE STATUTORY PERIOD"). THE AMENDATORY ACT RELATIVE TO ISAACS (SECTION 3--6(b) OF THE CRIMINAL CODE OF 1961, EFFECTIVE ON JANUARY 1, 1962) PROVIDES:

> "(b) A PROSECUTION FOR ANY OFFENSE BASED UPON MISCONDUCT IN OFFICE BY A PUBLIC OFFICER OR EMPLOYEE MAY BE COMMENCED WITHIN ONE-YEAR AFTER DISCOVERY OF THE OFFENSE BY A PERSON HAVING A LEGAL DUTY TO REPORT SUCH OFFENSES, OR IN THE ABSENCE OF SUCH DISCOVERY, WITHIN ONE-YEAR AFTER THE PROPER PROSECUTING OFFICER BECOMES AWARE OF THE OFFENSE. HOWEVER, IN NO SUCH CASE IS THE PERIOD OF LIMITATION SO EXTENDED MORE THAN THREE-YEARS BEYOND THE EXPIRATION OF THE PERIOD OTHERWISE APPLICABLE". Id. AT 227.

UNDER THE AMENDMENT, THE DEFENDANT IS LIABLE, AT MOST, FOR A TOTAL OF FOUR AND ONE-HALF YEARS BEYOND THE DATE OF THE OFFENSE. PURSUANT TO ISAACS, THE RELEVANT COUNTS CHARGE OFFENSES [COMMITTED] ON JUNE 15, 1961, MORE THAN SIX-MONTHS PRIOR TO THE ENACTMENT'S EFFECTIVE DATE. THE EIGHTEEN-MONTH ORIGINAL APPICABLE TIME PERIOD HAD NOT EXPIRED AT THE TIME SECTION 3--6(b) BECAME EFFECTIVE. ISAACS AT 228. ALSO, THE STATE'S ATTORNEY FIRST DISCOVERED AND BECAME AWARE THAT THE OFFENSES HAD BEEN COMMITTED LESS THAN ONE-YEAR FROM DECEMBER 16, 1964. ISAACS AT 227. SIMPLY, DISCOVERY OCCURRED AFTER THE ENACTMENT'S EFFECTIVE DATE AND PROSECUTION COMMENCED WITHIN ONE-YEAR AFTER DISCOVERY.

> "THE DRAFTERS OF THIS LEGISLATION DEEMED IT WISE TO PROVIDE FOR AN EXTENDED PERIOD OF LIMITATIONS CONCERNING PROSECUTION FOR MISCONDUCT IN OFFICE BECAUSE OF THE LIKELIHOOD THAT SUCH MISCONDUCT WOULD NOT BE DISCOVERED WHILE THE GUILTY PERSON HELD OFFICE AND EVEN FOR SOMETIME THEREAFTER. WHILE IT IS TRUE THAT SECTION 3--6(b) DOES NOT EXPRESSLY PROVIDE FOR RETROSPECTIVE APPLICATION, WE DO NOT BELIEVE THE GENERAL ASSEMBLY INTENDED TO IMMUNIZE, UPON THE RUNNING OF THE FORMER LIMITATIONS PERIOD, PERSONS GUILTY OF MISCONDUCT IN OFFICE WHICH HAD NOT BEEN DISCOVERED AT THE TIME THIS LEGISLATION WAS ENACTED BUT WHICH WAS THEN STILL SUBJECT TO PROSECUTION. WE ACCORDINGLY HOLD THAT § 3--6(b) APPLIES RETROSPECTIVELY". ISAACS AT 52.

THOUGH SECTION 3--6(b) IS APPLIED RETROACTIVELY, IT OPERATES PROSPECTIVELY IN THAT NO VESTED/ACCRUED RIGHTS EXISTED ON ITS EFFECTIVE DATE THAT COULD BE ALTERED OR IMPAIRED. PLAINTIFF'S RIGHT OF ACTION AND DEFENDANT'S RIGHT OF EXEMPTION FROM

a liability created by statute never came into existence because, on the amendment's effective date, the cause of action had not yet accrued, i.e., remained undiscovered. The applicable time period remained merely procedural and a limitation of the remedy only instead of specifically being annexed to the statutory right. There is no violation of the Ex Post Facto Clause of the United States Constitution because IF the cause of action accrues, and the liability comes into existence, it will be at some point after the effective date of the amendment. Thus, the amendment governs causes of action discovered after its effective date. Isaacs IS authority for Morales 2010, supra, wherein the offenses remained undiscovered, the liabilitity did not exist and the original applicable time period had not expired on the date the 1997 amendment became effective. However, Isaac's IS NOT authority for Blea's case wherein the cause of action accrued when a law enforcement agency became aware that a violation of the law had occurred. With knowledge of the offense the right of action and the liability came into existence as "matters of substance". Simply, retroactive application of the 1997 amendment to Blea's case would be in violation of the Ex Post Facto Clause of the United States Constitution.

The expression used in Isaacs: ("... the State makes no contract with criminals at the passage of an act of limitation ...") was first used in Commonwealth v. Duffy, 96 Pa. 506, 514, 42 Am. Rep. 554, 39 Am. Rep. 577 (1880) wherein the charged offense was a misdemeanor forgery which is defined as: "to make or imitate falsely especially with intent to defraud". See Webster Dictionary. The complete expression in Duffy reads as follows:

> "The state makes no contract with criminals, AT THE TIME OF PASSAGE of an act of limitation, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They are entirely subject to the mere will of the legislative power, and may be changed or repealed altogether, as that power may see fit to declare. Such being the character of this kind of legislation, we hold that in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is SUBJECT TO ENLARGEMENT OR REPEAL without being obnoxious to the constitutional prohibition against ex post facto laws. A law enlarging or repealing a statutory bar against criminal prosecutions may therefore, apply as well to past as to future cases IF ITS TERMS INCLUDE BOTH CLASSES. SUCH LEGISLATION RELATES TO THE REMEDY ONLY and not to any PROPERTY RIGHT OR CONTRACT RIGHT. Id. at 514
> "There is no cannon of construction better settled than this: that a statute shall always be interpreted so as to OPERATE PROSPECTIVELY and not retrospectively, unless the language is so clear as to preclude all question as to the intent of the legislature -- because retrospective laws and laws DIVESTING VESTED RIGHTS, though they may not be repugnant to any fundamental law, are repugnant to all principles of sound and wise legislation. Id. at 509.
> "It is argued that the Act of 1877 is retroactive and retrospective, and hence, partakes of the characteristics of an ex post facto law. This, if true, we admit, if it effected ANY VESTED RIGHTS OR CONTRACT, would render it as to all matters prior to its passage inoperative, but we claim that the law is not retrospective nor ex post facto." Id. at 510.

In Duffy, the offense was committed on September 23, 1875 and was subject to a two-year time period for commencement of prosecution; the offense was "misdemeanor forgery". On March 23, 1877, the time period was extended to five-years. Obviously, the applicable two-year time period remained unexpired on the amendment's effective date. Id. at 508-09. The offense remained UNDISCOVERED until the fall of 1878. Thus, the cause of action accrued and the liability came into existence AFTER the five-year period became effective. Id. at 507. On February 9, 1880, an indictment was presented and a true bill was found against defendant. Id. at 507. What is undoubtedly clear from the facts presented, is that on the day the amendment became effective, the applicable time-period HAD NOT EXPIRED and the offense REMAINED UNDISCOVERED. The defendant had not acquired a COMPLETE STATUTE OF LIMITATIONS DEFENSE because the applicable time period had not yet expired when the amendment became effective. Also, because the offense REMAINED UNDISCOVERED on the amendment's effective date, the liability never came into existence "as a matter of substance".

Duffy, at 514 notes: "We hold that in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against ex post facto laws. A law enlarging or repealing a statutory bar against criminal prosecutions may, therefore, apply as well to past as to future cases if its terms include both classes. Such legislation relates to the remedy only and not to any property right or contract right". The court's use of the phrase "is subject to" can only be interpreted to mean that enlargement or repeal of a limitations period is DEPENDENT ON SOME ACT OR CONDITION. (See MERRIAM-WEBSTER DICTIONARY (2016). Simply, just because the original time period remains unexpired on the effective date of an amendment that enlarges the time period, does not necessarily mean that the amendment applies retroactively. That the original applicable time period remain unexpired on the effective date of the amendment is ONLY THE FIRST CONDITION. The second condition that must exist for an amendment enlarging the time period to apply retroactively is that the liability and the right of action must be nonexistent on the effective date of the amendment. Simply, the cause of action has not accrued and rights have not vested/accrued. Substantive law notwithstanding. Statutes shall always be interpreted so as to OPERATE PROSPECTIVELY..." because retrospective laws and laws divesting vested rights ... are repugnant to all principles of sound and wise legislation". See Tafoya v. Doe, 183 NMCA 070, 100 N.M. 328, 331, 670 P.2d 582 ("The constitutional provision

of due process extends to protect that "property" construed to be a vested right and that generally an accrued right of action is a vested property right, which may not be arbitrarily impinged").

> An individual has a property interest in a benefit for purposes of due process protection only if [there is] "a legitimate claim of entitlement" to the benefit, as opposed to a mere "abstract need or desire" or "unilateral expectation". Bd. of Regents v. Roth, 408 U.S. 564, 570, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Such an interest arises not from the Due Process Clause itself, but is "created by independent sources such as a state or federal statute, a municipal charter or ordinance, or an implied or express contract. Teigen v. Renfrow, 511 F.3d 1072, 1079 (10th 2007) (quoting Carnes v. Parker, 922 F.2d 1506, 1509 (10th 1991).

"Legislative extensions of unexpired statutes of limitations" have never been directly before the United States Supreme Court and is a matter in dire need of clarification. Even before Stogner v. California, supra, state and federal courts have been deciding cases in a manner that conflicts with Supreme Court precedent. In United States v. Richardson, the court did a proper analysis and, despite the fact that the amendment became effective almost two-years before the original applicable time period expired, such amendment was denied retroactive application because it would alter or impair rights that had vested when the cause of action accrued and the liability became substantive (real). Simply, retroactive application would not operate prospectively and would violate the ex post facto clause of the United States Constitution. But see United States v. Grimes, 142 F.3d 1342, 1351 (11CA 1998). Despite the fact that the cause of action had accrued and the liability became substantive, the amendment extending the time period from five-years to seven was applied retroactively. Such an application did alter or impair vested rights and did not operate prospectively. Thus, it violated the ex post facto clause of the United States Constitution.

The Grimes court cited the following cases to support its holding: United States v. Brechtel, 997 F.2d 1108, 1113 (5th Cir. 1993); United States v. Taliaferro, 979 F.2d 1394, 1402-03 (10 cir. 1992); United States v. Knipp, 963 F.2d 839, 843-44 (6th Cir. 1992); United States v. Madia, 955 F.2d 538, 539-40 (8th Cir. 1992); United States ex rel Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir. 1982); Clements v. United States, 266 F.2d 397, 399 (9th Cir. 1959), and Falter v. United States, 23 F.2d 420, 425-26 (2nd Cir. 1928). These cases all involve a "fraud element" wherein the offense remains unknown or undiscovered on the amendment's effective date. The liability and the right of action do not come into existence, as if the offense never happened. There are no vested rights to consider because so long as the offense remains unknown, "it never happened". Under such conditions, an amendment to the time period can be applied retroactively solely on the basis that the applicable time period remains unexpired on its effective date. Simply, there is no existing right of action, no substantive liability and no vested/accrued rights exist that can be altered or impaired.

People v. Zamora, 557 P.2d 75, fn. 33, 18 Cal. 3d 538, 134 Cal. Rptr. 784 (1976). Under the "discovery" rule, once there is sufficient knowledge that [an offense] has been committed the limitation period will begin to run. [T]he limitation period is not tolled on the ground that the authorities are unable to bring a case for prosecution. Simply, tolling is applicable because no one but the criminals themselves even knows that a crime has been committed.

When a law enforcement agency DOES NOT have knowledge that an offense has been committed, a statute of limitations remains procedural and a limitation of the remedy ONLY. However, once a law enforcement agency possesses knowledge of the crime, the statute of limitations becomes a substantive limitation of the statutorily created liability and right of action and functions as a statute of limitations defense that bars retroactive application of an enlargement to the time period.

Obviously, the cases cited by the Grimes court are not on point and should not have been used. Yet, the government argues that there is no ex post facto violation in Grimes because the statute of limitations was extended before the original time period expired – and this was before Stogner v. California, supra, was decided. The Supreme Court's holding in Stogner was in regards to the unconstitutional revival of a statute of limitations that had expired before an amendment's effective date; yet, "many courts [both state and federal] interpreting Stogner have adopted the view that the constitutionality of extending an unexpired statute of limitations is clearly supported by Stogner. Thomas v. United States, supra, at 468. This viewpoint is construed as precedent established by the United States Supreme Court that, under Stare Decisis, must be followed. This viewpoint makes any analysis by the court wholly inadequate, especially when the cause of action accrues or conditions precedent to the right of action and/or the liability have been complied with. See Thomas v. United States, supra. Therein, the amendment was applied retroactively SOLELY because the original applicable time period remained unexpired on the amendment's effective date. That the time period remained unexpired was the only factor "assigned any weight" in the court's decision. That vested rights would be altered/impaired was never considered. Also not considered was the fact that retroactive application of the amendment, wherein the liability and the right of action are substantive, does not OPERATE PROSPECTIVELY.

Blea's case is similar to Thomas' in that the only variable considered as relevant was the fact that the original applicable time period remained unexpired on the effective date of the 1997 amendment. Any argument, i.e., defense, presented by Mr. Blea pertaining to accrued/vested rights, the substantive law of the 1987 Tolling Provision or IAC were considered to be "without merit" simply because the time period remained unexpired!

Peggy v. Staver, 81 N.M. 766, 473 P.2d 380, 383 (NMCA 1970) (Suggesting that New Mexico follows "the general rule"... that limitation provisions in [statutes that create the right] "are not properly statutes of limitations as that term

is generally understood, but they are qualifications and conditions restricting the rights granted by the statutes, and must be strictly complied with" (quoting Annot. 67 A.L.R. 1070 (1930)), and as such, [those] statutes of limitations are a part of the state's substantive law.).

See American Pipe & Construction Co. v. Utah, 414 U.S. 538, 559, 94 S.Ct. 756, 38 L.Ed 2d 713 (1974) for an exception in a "civil" statute: "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."

For an amendment to apply retroactively, the following conditions must apply: (1) the applicable time period must remain unexpired on the amendment's effective date, (2) the offense must remain <u>unknown</u>, i.e., no discovery, prior to the amendment's effective date, and (3) no conditions precedent to the right of action and the liability can exist.

Blea is a pro se petitioner and "the court is obliged to give plaintiff's allegations, however unartfully pleaded, a liberal construction", Hugh v. Rowe, 449 U.S. 5, 9-10, 101 S.Ct. 173, 175-76, 66 L.Ed.2d 163 (1980). In Blea's case, the 1997 amendment <u>should not</u> have been applied retroactively in that it constitutes retroactive law. But for constitutional error, Blea would not have even been indicted. Blea was deprived the opportunity to plead the original time period as a bar to his prosecution. It also relieved the state of its "burden of establishing a factual basis for tolling the statute". Andrew v. Schlumberger Tech. Corp. at 1292. This case presents exceptional circumstances wherein the need for remedy afforded by the writ of Habeas Corpus is apparent and necessary. Winters v. New York, 333 U.S. 507, 514, 92 L.Ed 840, 68 S.Ct. 665 (1948). Addressing this matter will provide guidance to all state and federal courts by establishing Supreme Court precedent. Clarification would establish a standard that is public and of importance in the administration of justice and the preservation of judicial integrity. Supreme Court Rule 10 (a) (b) (c) and § 2254 (d) (1) (2) <u>all</u> provide a basis for granting this petition.

<u>CONCLUSION</u>- For the forgoing reasons the petition should be granted.

Respectfully submitted,

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