

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	
	:	Case No. 2009-2122
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Lucas County
	:	Court of Appeals,
LINDA S. COOK,	:	Sixth Appellate District
	:	
Defendant-Appellant.	:	Court of Appeals
	:	Case No. L-08-1301
	:	
	:	

**MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO**

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF AMICUS INTEREST	2
STATEMENT OF THE CASE AND FACTS	3
A. Cook was indicted for tampering with records and theft from an elderly person.....	3
B. The trial court dismissed the charge of tampering with records as time barred, and the court of appeals reversed.....	4
ARGUMENT.....	5
<u>Amicus Curiae Attorney General’s Proposition of Law:</u>	
<i>Under R.C. 2901.13(F), a criminal statute of limitations does not begin to run until the corpus delicti of the offense is discovered; from that point, the State has the full limitations period in which to commence a prosecution, regardless of when the discovery occurs.....</i>	
A. The plain language of R.C. 2901.13(F) tolls the limitations period for a criminal offense while the corpus delicti of the offense remains undiscovered.	5
B. To preserve the plain meaning of R.C. 2901.13(F), this Court should either confine its decision in <i>Climaco</i> to its facts or overrule it.	8
1. The Court should confine <i>Climaco</i> to its facts.	11
2. Alternatively, the Court should overrule its decision in <i>Climaco</i>	12
C. Cook and her amicus’ heavy reliance on R.C. 2901.13(B) is misplaced.....	14
CONCLUSION.....	18
CERTIFICATE OF SERVICE	unnumbered

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Colbert v. City of Cleveland</i> , 99 Ohio St. 3d 215, 2003-Ohio-3319	5
<i>Groch v. General Motors Corp.</i> , 117 Ohio St. 3d 192, 2008-Ohio-546	13
<i>Hall v. Banc One Mgmt. Corp.</i> , 114 Ohio St. 3d 484, 2007-Ohio-4640	5, 8, 13
<i>Humphreys v. Winous Co.</i> (1956), 165 Ohio St. 45	15
<i>Merck & Co., Inc. v. Reynolds</i> (Apr. 27, 2010), 2010 U.S. Lexis 3671	7
<i>Norgard v. Brush Wellman, Inc.</i> , 95 Ohio St. 3d 165, 2002-Ohio-2007	7
<i>Shaker Heights v. Heffernan</i> (8th Dist. 1989), 48 Ohio App. 3d 307.....	11
<i>State v. Black</i> (1978), 54 Ohio St. 2d 304	1
<i>State v. Broughton</i> (1991), 62 Ohio St. 3d 253	8
<i>State v. Cover</i> (8th Dist.), 2009-Ohio-1272.....	11
<i>State v. Cleveland</i> (9th Dist.), 2009-Ohio-397.....	11
<i>State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.</i> (1999), 85 Ohio St. 3d 582	passim
<i>State v. Cook</i> (6th Dist.), 184 Ohio App. 3d 382, 2009-Ohio-4917	3, 4, 11
<i>State v. Hensley</i> (1991), 59 Ohio St. 3d 136	7, 10, 15
<i>State v. Koren</i> (8th Dist. Jan. 24, 1985), No. 48461, 1985 Ohio App. Lexis 5547.....	7

<i>State v. Martin</i> (4th Dist. Nov. 19, 2001), No. 00CA28, 2001 Ohio App. Lexis 5250	11
<i>State v. Mitchell</i> (1992), 78 Ohio App. 3d 613.....	4, 15
<i>State v. Mruk</i> (6th Dist. May 9, 1997), No. L-96-075, 1997 Ohio App. Lexis 1830.....	7
<i>State v. Palmer</i> (1998), 84 Ohio St. 3d 103	8
<i>State v. Silverman</i> , 121 Ohio St. 3d 581, 2009-Ohio-1576	12, 14
<i>State v. Stephens</i> (2d Dist. July 25, 1997), No. 96 CA 0117, 1997 Ohio App. Lexis 3424	4
<i>State v. Trent</i> (9th Dist. Apr. 2, 1986), No. 2124, 1986 Ohio App. Lexis 6288.....	16
<i>State v. West</i> (1st Dist. 1999), 134 Ohio App. 3d 45.....	7
<i>State v. Wilson</i> (1997), 77 Ohio St. 3d 334	5
<i>Toledo Bar Ass'n v. Cook</i> , 114 Ohio St. 3d 108, 2007-Ohio-3253	3
<i>Toussie v. United States</i> (1970), 397 U.S. 112	6
<i>United States v. Gaudin</i> (1995), 515 U.S. 506	14
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St. 3d 216, 2003-Ohio-5849	12
Statutes, Rules and Provisions	
R.C. 1.51	16
R.C. 109.02	2
R.C. 2901.13	<i>passim</i>
R.C. 2901.13(A).....	4

R.C. 2901.13(B).....	<i>passim</i>
R.C. 2901.13(B)(1)	15
R.C. 2901.13(F)	<i>passim</i>
R.C. 2901.13(G).....	7
R.C. 2901.13(H).....	7
R.C. 2913.02(A)(2).....	4
R.C. 2913.02(B)(3)	4
R.C. 2913.42(A)(1).....	4
R.C. 2913.42(B)(4)	4
Other Authorities	
Committee Comment to R.C. 2901.13, Am. Sub. H.B. No. 511 (effective Jan. 1, 1974).....	6
Josephine Herring Hicks, <i>Note: The Constitutionality of Statutes of Repose: Federalism Reigns</i> (1985), 38 Vand. L. Rev. 627	13
S. Ct. R. Rep. Op. 1(B)(1)–(2).....	10

INTRODUCTION

The criminal statute of limitations in Ohio, R.C. 2901.13, is carefully balanced plan to give law enforcement a full and fair opportunity to achieve justice while ensuring that individuals are not prosecuted for acts from the distant past. For the vast majority of criminal offenses, the limitations period begins to run as soon as every element of the crime occurs, and the period continues uninterrupted until either a prosecution begins or the statutory time expires, whichever comes first. This rule makes sense—most crimes are obvious upon commission, and the State should act promptly in investigating and ultimately charging the responsible parties.

But sometimes crimes are not so obvious; the offender may have actively concealed his crime or acted in such a furtive way that no one realized that a crime had been committed. In these circumstances, R.C. 2901.13(F) applies: “The period of limitation shall not run during any time when the *corpus delicti* remains undiscovered.” As this Court has noted, “[t]he *corpus delicti* of a crime is the body or the substance of the crime, included in which are usually two elements: the act, and the criminal agency of the act.” *State v. Black* (1978), 54 Ohio St. 2d 304, 307. In other words, until someone realizes that a crime has been committed, the limitations period does not run. This rule also makes sense—if law enforcement has no way of knowing that a crime has been committed, it should not be held responsible for delays in initiating the prosecution. As soon as the crime is discovered by any competent person apart from the criminal himself, though, the limitations clock fairly begins to tick.

Here, although appellant Linda Cook committed some allegedly felonious activities pertaining to real property transfers in July 2001, these acts were not discovered until April 2004. Under R.C. 2901.13(F), the six-year statute of limitations for those offenses did not begin to run until that discovery was made, and thus the State had until April 2010 to commence a

prosecution against her. Because the State brought an indictment in July 2007, the Sixth District correctly determined that the indictment was not time-barred.

The only impediment to this logical rule is this Court's decision in *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.* (1999), 85 Ohio St. 3d 582. There, the Court, noting the complicated factual context it faced, declined to apply the tolling rule in R.C. 2901.13(F) because the crimes were discovered within the limitations period had it begun running when the crime was committed. *Id.* at 587. In other words, under *Climaco*, R.C. 2901.13(F) only applies once the "original" limitations period expires; as long as the crime is discovered by any person even one day before that period expires, no tolling occurs.

This holding is at odds with the plain language of R.C. 2901.13(F), and with the purposes underlying the statute. This Court accordingly should confine *Climaco* to its facts, as many lower courts have done. If the Court finds that *Climaco* is indistinguishable, however, it should overrule the decision, in line with Chief Justice Moyer's forceful dissent in the case.

Finally, Cook and her amicus, the Ohio Public Defender, extensively argue that R.C. 2901.13(B)—which adds time to an expired limitations period for fraud-based offenses where the victim does not discover the crime until after the period expires—somehow affects this case. It does not. The extension provision in R.C. 2901.13(B) differs from the tolling provision in R.C. 2901.13(F), and it neither supersedes the latter nor applies to this case.

For these and other reasons, this Court should answer the certified question in the affirmative and hold that R.C. 2901.13(F) tolls the applicable limitations period for as long as a crime remains undiscovered, regardless of when that discovery ultimately occurs.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Richard Cordray is Ohio's chief law officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring that Ohio's criminal laws are correctly

interpreted. Ohio's criminal statute of limitations, R.C. 2901.13, is carefully designed to protect the societal interest in bringing criminals to justice while encouraging efficient law enforcement activities. When properly construed, the statutory scheme serves both to safeguard defendants' rights and to ensure that the criminal justice system works correctly. The Attorney General has a manifest interest in maintaining the integrity of the system devised by the General Assembly and in safeguarding the powers of the State's law enforcement officers.

STATEMENT OF THE CASE AND FACTS

A. Cook was indicted for tampering with records and theft from an elderly person.

In 2001, an elderly woman retained defendant-appellant Linda S. Cook, who at the time was a licensed attorney in Ohio, to assist her with estate planning. *State v. Cook* (6th Dist.), 184 Ohio App. 3d 382, 2009-Ohio-4917, ¶ 2. The client sought to donate real property that she owned in Fulton County to her church, subject to a life estate. *Id.* On July 21, 2001, a deed for the real property, which was purportedly executed in 1998, was filed in the Fulton County Auditor's Office. *Id.* The deed transferred title to Cook as trustee. *Id.* On September 10, 2001, Cook altered and re-recorded the deed, deleting the reference to herself as "trustee" and instead designating herself as "married." *Id.* On December 13, 2001, a third deed was recorded that purportedly transferred the real estate from Cook, as a married individual, to the church, with a life estate reserved to her client. *Id.*

In April 2004, the Toledo Bar Association became aware of Cook's activities regarding the purported deeds. *Id.* at ¶ 10. After its counsel conducted an investigation of the matter, the bar association filed a complaint on April 18, 2005, with the Board of Commissioners on Grievances and Discipline, wherein it alleged multiple counts of professional misconduct, *id.* at ¶ 11; this Court ultimately disbarred Cook for her actions in this regard, see *Toledo Bar Ass'n v. Cook*, 114 Ohio St. 3d 108, 2007-Ohio-3253.

The bar association forwarded its findings to the Lucas County Prosecutor's Office in the summer of 2007. *Cook*, 184 Ohio App. 2d 382, 2009-Ohio-4917, at ¶ 11. On July 18, 2007, the State indicted Cook on two counts: (1) tampering with records, in violation of R.C. 2913.42(A)(1) and (B)(4), and (2) theft from an elderly person, in violation of R.C. 2913.02(A)(2) and (B)(3). Only the first count remains relevant, and it arose from Cook's actions on July 12, 2001. *Cook*, 184 Ohio App. 3d 382, 2009-Ohio-4917, at ¶¶ 3–4.

B. The trial court dismissed the charge of tampering with records as time barred, and the court of appeals reversed.

Cook filed motions to dismiss both counts of the complaint. *Cook*, 184 Ohio App. 3d 382, 2009-Ohio-4917, at ¶ 8. For the first count, Cook argued that the grand jury issued its indictment a few days beyond the applicable six-year statute of limitations. *Id.* The State argued, among other things, that the statute of limitations was tolled because the corpus delicti of the crime was not discovered until 2004. *Id.* The trial court granted Cook's motion to dismiss the first count. In its judgment, the trial court found that the State knew of the alleged crime before the six-year statute of limitations expired, and thus determined that it was barred from indicting Cook after the original limitations period elapsed given *Climaco*. *Id.* at ¶ 19.

The Sixth District Court of Appeals reversed, holding that, under R.C. 2901.13(F), the six-year statute of limitations for the first count did not begin to run until 2004 because the corpus delicti of the offense was not discovered until that point. *Id.* at ¶ 42. The court limited the *Climaco* decision to its facts to reach this conclusion, *id.*, but it later certified its decision as being in conflict on that point with *State v. Mitchell* (1992), 78 Ohio App. 3d 613, and *State v. Stephens* (2d Dist. July 25, 1997), No. 96 CA 0117, 1997 Ohio App. Lexis 3424.

This Court recognized the conflict and ordered the parties to brief the following issue:

Whether R.C. 2901.13(F) operates to toll the six-year period of limitations provided for in R.C. 2901.13(A) so that it extends beyond six years from the date upon which a

felony offense was committed where the corpus delicti of the offense is discovered within the period of limitations and more than one year prior to expiration of the limitations period.

124 Ohio St. 3d 1440, 2010-Ohio-188.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

Under R.C. 2901.13(F), a criminal statute of limitations does not begin to run until the corpus delicti of the offense is discovered; from that point, the State has the full limitations period in which to commence a prosecution, regardless of when the discovery occurs.

A. The plain language of R.C. 2901.13(F) tolls the limitations period for a criminal offense while the corpus delicti of the offense remains undiscovered.

In interpreting statutes, courts must first examine the plain language, giving full effect to the words used without adding or deleting terms. See *Hall v. Banc One Mgmt. Corp.*, 114 Ohio St. 3d 484, 2007-Ohio-4640, ¶ 24. Courts must also strive to effectuate the General Assembly's intent in enacting the entire statute. See *Colbert v. City of Cleveland*, 99 Ohio St. 3d 215, 2003-Ohio-3319, ¶ 12. "[A] court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson* (1997), 77 Ohio St. 3d 334, 336. Such a contextual, plain language review of R.C. 2901.13(F) reveals that it tolls the applicable statute of limitations for as long as the corpus delicti of the offense remains undiscovered, regardless of when that discovery ultimately occurs.

R.C. 2901.13¹ creates a series of baseline time limits for the various classes of criminal offenses in Ohio: Prosecutions that are not commenced—by returning an indictment, making an arrest, or taking a similar action, see *id.* at (E)—within those periods are barred. With the

¹ When Cook was indicted in 2007, the version of R.C. 2901.13 in effect was the one enacted by the 126th General Assembly in S.B. No. 17 (effective April 14, 2006). Since then, the General Assembly has twice amended the statute, but these amendments are not material to the issue at hand. R.C. 2901.13(F) and the other operative provisions here remain unchanged.

exception of limitless offenses like aggravated murder and murder, *id.* at (A)(2), and those like rape and kidnapping, which have twenty-year limitations periods, *id.* at (A)(3)(a), most felonies (like the tampering with records charge here) have six-year limitations periods, *id.* at (A)(1)(a). These provisions encourage law enforcement officials to act swiftly, so that individuals are not forced “to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.” *Climaco*, 85 Ohio St. 3d at 586 (quoting *Toussie v. United States* (1970), 397 U.S. 112, 114–15).

But these protections only go so far. While R.C. 2901.13 exists “to discourage inefficient or dilatory law enforcement” efforts, see Committee Comment to R.C. 2901.13, Am. Sub. H.B. No. 511 (effective Jan. 1, 1974), various provisions toll the limitations periods when certain factors make it difficult, if not impossible, to prosecute in a timely manner. In other words, when delays are not fairly chargeable to the State, the State is not responsible for them; otherwise, the rule would unfairly “give offenders the chance to avoid criminal responsibility for their conduct,” which the General Assembly expressly sought to avoid. *Id.*

R.C. 2901.13 contains several such provisions, all of which state unequivocally that the applicable limitations period “shall not run” when: (1) “the corpus delicti remains undiscovered,” *id.* at (F); (2) the individual “purposely avoids prosecution” for his crimes, *id.* at (G); (3) “a prosecution against the accused based on the same conduct is pending in this state,” *id.* at (H); or (4) the crime features some element of child abuse and either the victim has not yet reached the majority or a children services worker or a peace officer does not know about the abuse, *id.* at (I)(1)–(2).

The “shall not run” language means exactly what it says—that limitations periods simply do not run while one of those events is occurring. The period is wholly suspended and does not begin again until the event ends. This general principle is not controversial; courts have routinely applied these provisions in exactly this manner. See, e.g., *State v. Hensley* (1991), 59 Ohio St. 3d 136, 141 (tolling under R.C. 2901.13(F) for claims of child sex abuse until a responsible adult discovers that the abuse occurred); *State v. West* (1st Dist. 1999), 134 Ohio App. 3d 45, 51–52 (tolling under R.C. 2901.13(G)); *State v. Mruk* (6th Dist. May 9, 1997), No. L-96-075, 1997 Ohio App. Lexis 1830, at *7, 12 (tolling under R.C. 2901.13(H)). This rule holds true even when the condition ends within the original limitations period, had it run from the date of the offense. See *State v. Koren* (8th Dist. Jan. 24, 1985), No. 48461, 1985 Ohio App. Lexis 5547, at *4–6 (holding that an offender who purposely avoided prosecution for four years after committing a felony was properly indicted six years and six months after the offense occurred).

R.C. 2901.13(F) in particular is grounded in foundational legal principles. It is analogous to the well-settled “discovery rule” for torts, where the limitations periods for specific claims do not begin to run until the plaintiff discovers, or should have discovered, the existence of the violation. See *Merck & Co., Inc. v. Reynolds* (Apr. 27, 2010), 2010 U.S. Lexis 3671, at *34 (“[T]he limitations period . . . begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have ‘discover[ed] the facts constituting the violation’—whichever comes first.”); *Norgard v. Brush Wellman, Inc.*, 95 Ohio St. 3d 165, 2002-Ohio-2007, ¶ 8. R.C. 2901.13(F) operates in exactly the same way as the discovery rule—the limitations period is tolled until the key facts are discovered—with the exception that time begins to run when any competent person other than the offender discovers the existence of the crime. See *Hensley*, 59

Ohio St. 3d at 139–40 (refusing to adopt a rule where time begins to run only when law enforcement becomes aware of the corpus delicti).

When applying these rules, courts do not even consider what the limitations period would have been because that date becomes irrelevant when time is tolled. The key factor is when time starts and stops, and how much of it has run, much like with the tolling computations used to determine whether a defendant’s speedy-trial rights have been honored. See, e.g., *State v. Palmer* (1998), 84 Ohio St. 3d 103, 106–07; *State v. Broughton* (1991), 62 Ohio St. 3d 253, 256–62. Nothing in R.C. 2901.13(F), or indeed in any of the other tolling rules, suggests that time should not be tolled if the tolling activity is lifted during what would have been the original limitations period, and this Court should not read such a restriction into the statute. See *Hall*, 114 Ohio St. 3d 484, 2007-Ohio-4640, at ¶ 24.

Applying these provisions to the present case shows that Cook’s indictment was proper. Though Cook’s activities were committed in July 2001, they were not discovered until April 2004. Under the plain language of R.C. 2901.13(F), the six-year limitations period was tolled during that entire, nearly three-year period. Thus, her indictment is wholly timely, and should not have been dismissed; the State actually had until April 2010 to commence a prosecution against her. This Court should follow that plain language and allow the case to proceed.

B. To preserve the plain meaning of R.C. 2901.13(F), this Court should either confine its decision in *Climaco* to its facts or overrule it.

Even though R.C. 2901.13(F) is clear on its face, courts have struggled with the provision since this Court released its decision in *Climaco*. But that decision, which was explicitly tied to factual concerns in that case, strays from the plain language of R.C. 2901.13(F). As a result, lower courts are confused about how to apply the provision on a case-by-case basis. The Court should either limit the *Climaco* holding to its facts or overrule it.

Climaco arose from a complex, and politically explosive, set of facts. In early February 1994, media attention prompted the Attorney General to investigate lobbyist groups that were suspected of violating reporting requirements related to the receipt of honoraria. *Climaco*, 85 Ohio St. 3d at 582–83. The law firm of Climaco, Climaco, Seminatore, Lefkowitz and Garofoli (“Climaco”) was linked to this scandal. *Id.* On March 15, 1994, the Attorney General issued a report on the investigation, concluding that violations may have been committed by some lobbyist groups, though Climaco was not implicated by the report. *Id.* at 584. Nonetheless, on March 22, 1994, Climaco filed amended lobbyist registration statements with expenditure reports including honoraria for 1992 and 1993. *Id.* at 583.

The Attorney General sent the report to the Franklin County Prosecutor, who appointed a special prosecutor in June 1994. *Id.* at 584. The special prosecutor did not find Climaco culpable and ended the investigation. *Id.* Media attention intensified over the next few months, though, and on February 24, 1995, the Climaco matter was again referred to the Franklin County Prosecutor, who had a grand jury consider the case. *Id.* On February 1, 1996, a grand jury indicted Climaco, as well as one of its principals, for misdemeanor charges of criminal falsification in connection with the 1993 updated lobbyist registration statements. *Id.* Climaco sought to dismiss the indictment, arguing that it was untimely under the applicable two-year statute of limitations in R.C. 2901.13. *Id.* The trial court denied this motion, and ultimately convicted Climaco after it pleaded no contest; the conviction was affirmed on appeal. *Id.*

The issue before this Court was whether R.C. 2901.13 barred the prosecution. *Id.* at 585. The State argued that, although the alleged offenses were committed in June and October 1993, the criminal agency of those acts was not known until February 1994, and thus R.C. 2901.13(F) tolled the start of the limitations period until that later point. *Id.* at 585–86.

The Court expressed skepticism about this argument in view of the full factual context, and repeatedly suggested that the State was dilatory in its prosecution. *Id.* at 587. Building on concerns of improper law enforcement investigatory procedures and larger fears of unlimited criminal liability that could arise from such delays, the Court adopted an extremely narrow reading of the tolling provision in R.C. 2901.13(F): “Subsection (A) [setting forth the applicable limitations periods] is of no consequence if subsection (F) controls all circumstances, including situations, such as here, in which discovery occurs within the statutory period.” *Id.* In short, the Court held this tolling rule inapplicable when the corpus delicti of the offense is discovered within what would have been the “original” limitations period.

Chief Justice Moyer issued a strongly worded dissent that criticized the majority opinion for running contrary to both the plain language of R.C. 2901.13(F) and the Court’s previous decision in *Hensley*. *Id.* at 590 (Moyer, C.J., dissenting). The Chief Justice also disputed the majority’s claim that it was merely reading R.C. 2901.13(F) in a limited manner: “In the guise of refusing to broadly interpret subsection (F) the majority has, in fact, read it out of the statutory scheme.” *Id.* at 591.

It is unclear just how far the *Climaco* majority wanted its decision to stretch. It did not issue a syllabus, and thus did not identify a discrete rule of law arising from the case. See S. Ct. R. Rep. Op. 1(B)(1)–(2). Even as it appeared to gut R.C. 2901.13(F), the majority claimed that it did “not need to resort to” that provision “because the alleged offenses were discovered within the statute of limitations.” *Climaco*, 85 Ohio St. 3d at 588. And it did not overrule *Hensley*, which read R.C. 2901.13(F) to toll the limitations period fully. *Id.* In short, *Climaco* made the future application of R.C. 2901.13(F) uncertain.

The result is confusion over the conflict between the plain language of R.C. 2901.13(F) and the factual considerations that permeated *Climaco*. The Court should resolve that confusion.

1. The Court should confine *Climaco* to its facts.

The Court can and should limit *Climaco* to the factual circumstances at issue there—a course that several courts of appeals have done in trying to reconcile the case with the statutory text. See *Cook*, 184 Ohio App. 3d 382, 2009-Ohio-4917, at ¶ 42; *State v. Caver* (8th Dist.), 2009-Ohio-1272, ¶ 28; *State v. Cleveland* (9th Dist.), 2009-Ohio-397, ¶ 36–38; *State v. Martin* (4th Dist. Nov. 19, 2001), No. 00CA28, 2001 Ohio App. Lexis 5250, at *27–28. The *Climaco* decision itself provides a basis for such a limitation. The majority there evinced a strong concern about the State’s lack of diligence once it had the information necessary to indict; indeed, the nearly two-year delay in bringing charges once all of the relevant information was presented to prosecutors was inexplicable. *Climaco*, 85 Ohio St. 3d at 587. Thus, based on overarching concerns about dilatory law enforcement action, the Court could recognize an exception to R.C. 2901.13(F) for circumstances where the corpus delicti is discovered well after the crime is committed, but charges are not brought for an extended period of time after the State becomes aware of the key facts.

If the Court were to create such an exception, though, it would not apply here. While the Toledo Bar Association began investigating Cook in 2004 and filed a disciplinary complaint in 2005, these actions served merely to start the running of the limitations period clock, not to notify the State that a crime had been committed. Disciplinary proceedings are public activities, but they are civil in nature, and knowledge of these activities should not be imputed to the State in assessing its diligence in bringing charges. See *Shaker Heights v. Heffernan* (8th Dist. 1989), 48 Ohio App. 3d 307, 308 (“[T]he filing of a related civil suit did not apprise the court of appellant’s alleged fraud so we will not impute discovery from the date of filing of the civil

suit.”). And when the Toledo Bar Association affirmatively told the Lucas County Prosecutor’s Office about Cook’s conduct in the summer of 2007, the Prosecutor’s Office secured an indictment almost immediately, unlike the multi-year delay in *Climaco*. Thus, even if *Climaco* is to remain standing in some form, it should not bar the application of R.C. 2901.13(F) in this case.

2. Alternatively, the Court should overrule its decision in *Climaco*.

If the Court were to determine that *Climaco* is indistinguishable, then the Court should overrule *Climaco* and reaffirm the plain language of the tolling provision. A prior decision may be overruled when: “(1) the decision was wrongly decided at [the] time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶ 48. Although the Court does not strictly adhere to this test when examining prior precedent on procedural rules like those at issue here, see *State v. Silverman*, 121 Ohio St. 3d 581, 2009-Ohio-1576, ¶¶ 31–33, the elements nonetheless illustrate why *Climaco* should be overruled.

First, to the extent that *Climaco* stands for the rule that R.C. 2901.13(F) does not apply when the corpus delicti is discovered within the limitations period had it run from the date of the offense, it is wrong. As Chief Justice Moyer noted in his dissent, the language of R.C. 2901.13(F), “by its own clear and express terms, means that the clock in criminal cases simply does not begin to run for statute-of-limitations purposes until the corpus delicti is discovered.” *Climaco*, 85 Ohio St. 3d at 590 (Moyer, C.J., dissenting). Subsection (F) does not in any way suggest that it is only applicable when the “original” limitations period has already run.

In fact, by reading R.C. 2901.13 to bar prosecutions commenced outside this “original” period, the *Climaco* majority transformed the statute of limitations into a statute of repose, an absolute deadline that bars all action after a certain set period of time. See *Groch v. General Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 112; Josephine Herring Hicks, *Note: The Constitutionality of Statutes of Repose: Federalism Reigns* (1985), 38 Vand. L. Rev. 627, 628–29. But the General Assembly neither sought to create nor articulated such an inflexible limit on prosecutions; rather, it added numerous tolling provisions to the limitations periods to ensure that, when justice demands it, the time to initiate a prosecution may be extended. The only way to reach the contrary result is to add terms to the statute, which, again, courts may not do. See *Hall*, 114 Ohio St. 3d 484, 2007-Ohio-4640, at ¶ 24.

Second, the *Climaco* majority’s interpretation of R.C. 2901.13 defies practical application, and paradoxically encourages law enforcement to delay investigation of crimes in contravention of the purpose of a statute of limitations. Under that rule, if a crime is discovered even one day before the end of the “original” limitations period, the statute of limitations would not be tolled, despite the fact that law enforcement would simply not have the time necessary to investigate the crime and properly indict on it. Less extreme examples are problematic as well. It takes a significant amount of time to investigate and prosecute a crime correctly, which is why limitations periods generally span several years. Forcing law enforcement to proceed rapidly is to invite error in the process. R.C. 2901.13(F) exists to combat such circumstances; it is unreasonable to construe it to exacerbate the problem.

And, only applying R.C. 2901.13(F) when the initial limitations period would have expired creates substantial disincentives for law enforcement. As the Court noted in *Climaco*, a statute of limitations “has the salutary effect of encouraging law enforcement to promptly investigate

suspected criminal activity.” *Climaco*, 85 Ohio St. 3d at 586. However, *Climaco*’s limited reading of R.C. 2901.13(F) discourages law enforcement from promptly conducting investigations for fear of discovering a criminal offense during the period of limitations, but before criminal charges can practically be brought.

Finally, overruling *Climaco* will not unduly burden those individuals and entities that have previously relied on it. For law enforcement, *Climaco* has muddied the application of R.C. 2901.13(F), and overruling it will provide needed clarity. And potential defendants cannot be said to have relied on this provision, because “a procedural or evidentiary rule ‘does not serve as a guide to lawful behavior.’” *Silverman*, 121 Ohio St. 3d 581, 2009-Ohio-1576, at ¶¶ 32 (quoting *United States v. Gaudin* (1995), 515 U.S. 506, 521). Thus, effecting a change at this point will not unduly affect any of the actors who rely on this Court’s decisions regarding this statute.

Accordingly, this court should overrule *Climaco* and hold that, under the plain language of R.C. 2901.13(F), the criminal statute of limitations is tolled for as long as the corpus delicti of an offense remains undiscovered, regardless of when the discovery ultimately occurs.

C. Cook and her amicus’ heavy reliance on R.C. 2901.13(B) is misplaced.

Cook spends a significant amount of time arguing that R.C. 2901.13(B),² which extends the time to prosecute fraud-based claims after the statute of limitations has expired, applies to this case, and her amicus, the Ohio Public Defender, devotes its entire brief to the subject. It is not clear that this issue is even before the Court, as it arguably expands the scope of the certified question. In any event, Cook and her amicus patently misread this exception, which does not apply to the present matter.

² Under the current version of the statute, this provision is in R.C. 2901.13(B)(1).

R.C. 2901.13(B) states that, “[i]f the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of the offense either by an aggrieved person” or by that person’s legal representative. Cook and the Public Defender suggest that, because this provision specifically addresses fraud-based cases like the present one, it is a specific provision that displaces the general tolling provision in R.C. 2901.13(F). The Public Defender also relies heavily on one of the conflict cases here for the proposition that applying both sections would render R.C. 2901.13(B)(1) superfluous. Public Defender Br. at 10 (citing *Mitchell*, 78 Ohio App. 3d at 616).

It is true enough that, “where a statute couched in general terms conflicts with a specific statute on the same subject,” the more specific provision governs. *Humphreys v. Winous Co.* (1956), 165 Ohio St. 45, 48. Here, though, the more specific provision on point is R.C. 2901.13(F), because R.C. 2901.13(B) does not apply here whatsoever. Indeed, the two provisions set forth different types of rules that apply in different circumstances.

R.C. 2901.13(F) applies to all offenses and *suspends the running of a statute of limitations* until someone discovers the offense, regardless of whether it is a police officer, a prosecutor, or just a competent person unconnected to the crime. See *Hensley*, 59 Ohio St. 3d at 139–40. As Chief Justice Moyer noted succinctly in his *Climaco* dissent, R.C. 2901.13(F) “does not operate to *extend* the period of limitations; it determines when the statute *begins* to run.” *Climaco*, 85 Ohio St. 3d at 591 (Moyer, C.J., dissenting) (emphasis sic).

By contrast, R.C. 2901.13(B) applies only to fraud-based offenses, and *extends an expired statute of limitations* for one year if the victim or his or her representative discovers the offense *after* “the period of limitation . . . has expired.” In cases like this one, where the victim discovers

the act within the statutory period, R.C. 2901.13(B) is irrelevant. See *Climaco*, 85 Ohio St. 3d at 586 n.2 (declining to apply R.C. 2901.13(B) because “the offenses were discovered within the statutory time period”); *State v. Trent* (9th Dist. Apr. 2, 1986), No. 2124, 1986 Ohio App. Lexis 6288, at *3 (same).

The fact that these provisions apply to wholly different circumstances forecloses the general/specific rule entirely. But even if this Court concludes that these two provisions apply to the same subject and considers the general/specific rule, it must construe the provisions so as to give effect to both if at all possible. See R.C. 1.51. And such a construction is appropriate here, because, again, R.C. 2901.13(B) and (F) can be construed to apply to different circumstances.

A brief hypothetical shows how these provisions work separately. Suppose that Cook completed the alleged criminal activity, which involves an element of fraud, in July 2001; that a title attorney first noticed the irregularities in the deeds in July 2002 and realized a crime had been committed then; that the victim did not realize the improprieties until July 2009; and that the State commenced prosecution in June 2010. Under R.C. 2901.13(F), the six-year statute of limitations would toll for one year, from July 2001 to July 2002, when the title attorney made his discovery. At that point, the period would run for six years, or until July 2008. Because no criminal proceedings had been commenced by that point, the action would ordinarily be time barred. But because the offense involved an element of fraud and the victim did not discover it until after the limitations period ended (in July 2009), the State would have one year, or until July 2010, to bring charges under the extension rule in R.C. 2901.13(B). And by commencing the prosecution eleven months later, in June 2010, the State acted properly under the rules.

R.C. 2901.13(F) does not render R.C. 2901.13(B) superfluous; they affect the time for commencing a prosecution in different ways for different reasons. It is proper to begin the

limitations period as soon as a competent individual discovers the offense; law enforcement officials should fairly be required to investigate discovered matters. In cases where a fraud-based offense is committed on an individual, however, the victim will have a strong motivation to report that information to the police, much more so than a disinterested party. Thus, if the victim does not discover the offense until after the limitations period has expired, it makes sense to give law enforcement a small amount of extra time to commence a prosecution, based on the victim's likely reporting of the matter. R.C. 2901.13(B) recognizes that fraud-based offenses are often difficult to detect, and that when the victim of such an offense realizes what has occurred, law enforcement should have a chance to seek justice.

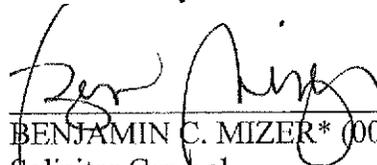
This Court should adopt this reasonable reading of the two provisions and give effect to both. Likewise, it should find R.C. 2901.13(B) inapplicable, just as it was in *Climaco* and *Trent*, because the victim discovered the fraudulent behaviors here three years after the offense was committed, well within the six-year statute of limitation, regardless of when it began to run. As such, this Court should not consider that section in reaching its decision here.

CONCLUSION

For the foregoing reasons, the Court should answer the certified question in the affirmative and affirm the judgment below.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellee State of Ohio was served by U.S. mail this 12th day of May, 2010, on the following counsel:

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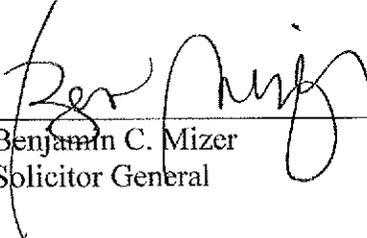
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