IN THE FLORIDA SUPREME COURT

STEVEN SEAGRAVE,

Petitioner,

v. **CASE NO. SC00-2228**

STATE OF FLORIDA,

Respondent.
_____/

AMENDED PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant/defendant below and will be referenced as "Mr. Seagrave" or as "Petitioner" in the following brief. A one-volume record on appeal will be referenced by 'R', followed by the appropriate page number in parenthesis. A one volume transcript of trial and sentencing will be referenced by 'T.' All proceedings in the trial court were before the Honorable William L. Gary.

Pursuant to an Administrative Order of the Supreme Court dated July 13, 1998, counsel certifies this brief is printed in 12 point Courier New, a proportionately-spaced, computer-generated font.

STATEMENT OF THE CASE

By information filed May 22, 1998, Petitioner was charged with one count of lewd, lascivious or indecent assault on a child under 16 per s. 800.04, F.S. (R 3). The cause proceeded to jury trial on January 28, 1999, whereupon a verdict was returned "guilty, as charged." (R 28)

The cause proceeded to sentencing on March 3, 1999 (T 179). A sentencing guidelines scoresheet was prepared, scoring the primary offense at Level Seven and reflecting a range of 51 to 85 months prison (R 31, 32). Forty points were scored for sexual contact (R 31). Petitioner was adjudicated guilty and sentenced to 6 years prison (T 190).

Petitioner filed a timely notice of appeal on March 24, 1999 (R 50), and the First District Court of Appeals issued its opinion affirming the conviction and sentence on August 16, 2000, but certified the following question:

> MAY 40 POINTS BE ADDED TO A SENTENCING GUIDELINE SCORESHEET UNDER SECTION 921.0011(7), FLORIDA STATUTES (1997), BASED ON A DEFENDANT'S ACT OF FONDLING THE VICTIM'S BUTTOCKS, OR IS "SEXUAL CONTACT" LIMITED TO ACTS ENCOMPASSED WITHIN THE SEXUAL BATTERY STATUTE, AS WAS DECIDED IN REYES v. STATE, 709 So. 2d 1181 (FLA. 5TH DCA 1998), receded from in KITTS v. STATE, 25 FLA. L. WEEKLY D1102 (FLA. 5TH DCA MAY 5, 2000) (ON REH'G EN BANC)?

Petitioner filed a notice to invoke discretionary review to this Court on October 20, 2000.

STATEMENT OF THE FACTS

B.L., a 12-year-old girl, testified she spent schoolday afternoons at Mr. Seagrave's home as part of a daycare arrangement (T 62). One afternoon in April, desiring to watch Mr. Seagrave's oldest son's baseball game, B.L. and her little sister asked to be allowed to remain with the Seagraves overnight (T 64). They had done this a couple of times before. B.L. testified she spent the evening on a couch in the living room, but was awakened by Mr. Seagrave as he pulled her arm out from underneath her body (T 66). She realized he was rubbing her bottom "real hard" with his hand, on the outside of her nightgown (T 67). She further noticed he was breathing heavily and he kissed her on the back of her head (T 67). She commented, "His breath stunk real bad." (T 68) He also pulled her hand toward his "private parts" which were covered by his underwear. When her hand made physical contact with the cloth of his underwear, she snatched her hand away, crawled to the other end of the couch and went to sleep (T 69). Mr. Seagrave returned to his bedroom at this point (T 70).

About five minutes later, she noticed him come out of the bedroom again and, this time, he left for work without saying anything to her (T 71). Ten minutes after that, Mrs. Seagrave got all the children up and ready for school (T 72). B.L. did not say anything to Mrs. Seagrave, and she did not want to return to the home after school that day (T 72). Consequently, she went to her Aunt Brenda's (Ms. Kimbrell's) house, instead (T 72). She told her

Aunt Brenda what happened in the early morning hours and, when her mother picked her up at the end of the day, she told her mother as well (T 73). Her mother stopped the car, returned to the Seagraves' house and confronted Mr. and Mrs. Seagrave about the accusation (T 73). Soon thereafter, her mother came out to the car and led her back inside to make the accusation in Mr. Seagrave's presence. "I told Steven to his face what had happened." (T 74) Afterwards, they drove to the police station where B.L. made out a written statement of what happened to her (T 74). B.L. identified Mr. Seagrave in court (T 75).

Ms. Kimbrell (Aunt Brenda) corroborated B.L.'s story that she came to her house on the afternoon of April 22, 1998, instead of going to the Seagraves' house as per her usual daycare arrangement (T 40). She also corroborated B.L.'s story in that B.L. told her what Mr. Seagrave had done to her earlier that morning (T 40). After that day, Ms. Kimbrell watched B.L. and her little sister after school each day (T 41). Defense Counsel lodged a timely objection to Ms. Kimbrell's hearsay testimony but was overruled by the court (T 39).

Ms. McKinney, B.L.'s mother, corroborated B.L.'s story in that B.L. told her what Mr. Seagrave did to her, as soon as Ms. McKinney picked her up (T 44). B.L. asked her if Aunt Brenda (Ms. Kimbrell) had called her on the phone and Ms. McKinney said, "No. Why? Was she supposed to? ... About what?" B.L. said, "About what Steven

done last night," and B.L. began crying (T 52)

Once B.L. repeated the story to her, she returned to the Seagraves' house where, first, she and then B.L. confronted Mr. Seagrave directly about the accusation (T 52). Ms. McKinney quoted Mr. Seagrave as saying, "I didn't do that little girl." B.L. pointed her finger at him and "told him he was lying, that she had no reason to lie on him, that he had done it and he knew he'd done it." (T 54) Eventually, they made their way to the police station where B.L. made a written statement to Officer Gardner (T 56). Since this incident occurred, B.L. began having trouble sleeping and she slept in long pants and long-sleeve shirts instead of her usual nightgowns (T 57).

Officer Gardner, of the Havana Police Department, testified he took the written statement from B.L., but the statement was not introduced into evidence (T 83). He also testified that Mr. Seagrave called the police station looking for him, earlier that day (T 82).

The state announced rest. Petitioner renewed his objections to the hearsay evidence offered by Ms. McKinney and Ms. Kimbrell, moved for a judgment of acquittal based on insufficiency of the evidence which motion was denied (T 84).

The Defense put on three witnesses, including Mr. Seagrave and his wife, and the jury returned a verdict of "guilty, as charged." (T 175)

SUMMARY OF THE ARGUMENT

Issue I

Due to the brevity of the argument, the summary is omitted.

Issue II

B.L.'s first complaint was not made at the first possible opportunity, but rather, was made roughly nine hours after the incident occurred. Because B.L. had time to ponder and reflect what she was going to say, and because she passed up many other reasonable opportunities to make the complaint sooner, the statements do not possess the inherent indicia of reliability required to be admitted under the "first complaint" exception to the hearsay rule. The case must be remanded for a new trial because the state's case was unfairly bolstered by this improper evidence.

ARGUMENT

ISSUE I

MAY 40 POINTS BE ADDED TO A SENTENCING GUIDELINE SCORESHEET UNDER SECTION 921.0011(7), FLORIDA STATUTES (1997), BASED ON A DEFENDANT'S ACT OF FONDLING THE VICTIM'S BUTTOCKS, OR IS "SEXUAL CONTACT" LIMITED TO ACTS ENCOMPASSED WITHIN THE SEXUAL BATTERY STATUTE, AS WAS DECIDED IN REYES v. STATE, 709 So. 2d 1181 (FLA. 5TH DCA 1998), receded from in KITTS v. STATE, 25 FLA. L. WEEKLY D1102 (FLA. 5TH DCA MAY 5, 2000) (ON REH'G EN BANC)?

Mr. Seagrave was convicted of lewd or lascivious act pursuant to **Section 800.04, Fla. Stat.**, and was scored an additional 40

points for “sexual contact.” (R 31) The record at trial revealed that Mr. Seagrave rubbed B.L.’s bottom, kissed her on the back of her head and placed her hand on his clothed penis. None of these acts qualify as sexual contact as contemplated by **Section 912.0011(7), Fla. Stat.**

> In Karchesky v. State, 591 So. 2d 930 (Fla. 1992), the supreme court determined that victim injury points on a sentencing guidelines scoresheet could not be added for penetration or contact because neither could be fairly equated to "physical injury" or "physical trauma." Shortly after Karchesky, the legislature enacted a statute which provided that for crimes of Chapter 794 (sexual battery), Chapter 800 (lewdness, including statutory rape), and Section 826.04 (incest), which involve sexual penetration, the points indicated for penetration or slight injury on the scoresheet shall be added, and that for such crimes which do not include sexual penetration but do include sexual contact, points must be added for "contact but no penetration." See Section 921.001(8), Fla. Stat. (Supp. 1992). The legislature, in requiring points for sexual contact in this original statute as well as its successor, the one at issue, appears to be referring only to the contact occurring in a sexual battery by union without penetration.

Reyes v. State, 709 So. 2d 181, 182 (Fla. 5th DCA 1998). Although the Fifth District Court of Appeals receded from **Reyes** in **Kitts v. State**, 776 So. 2d 1067 (Fla. 5th DCA 2000) (on reh'g en banc), Petitioner submits the **Reyes** decision was correct as explained by its author’s dissent, reprinted here:

> **PETERSON, J.**, dissenting.

The majority is candid and admits that nowhere in the caselaw or statutes is the phrase "sexual contact" expressly defined. In Reyes v. State, 709 So. 2d 181, 182 (Fla. 5th DCA 1998), however, receded from today, we did conclude that: "The legislature, in requiring points for sexual contact ... appears to be referring only to the contact occurring in a sexual battery by union without penetration." See also, Spioch v. State, 742 So. 2d 817 (Fla. 5th DCA 1999). Although the legislature has not expressly defined the phrase, any uncertainty resulting from the legislature's vagueness should accrue to the benefit of the defendant, not the state. Section 775.021(1), Fla. Stat. (1999) ("When ... language is susceptible of differing constructions, it shall be construed most favorably to the accused."); Scates v. State, 603 So. 2d 504 (Fla. 1992); Hollingsworth v. State, 632 So. 2d 176 (Fla. 5th DCA 1994).

I do not find the out-of-state cases mentioned by the majority to be supportive of the decision today. The opinions all specifically mention that the legislatures of their states had defined the phrase "sexual contact" or similar relevant terms or phrases. In State of Minnesota v. Oanes, 543 N.W. 2d 658, 661, (Minn. App., 1996), a case in which the defendant was charged with prostitution, the court noted its legislature had defined sexual contact to include, "*1070 the intentional touching by an individual of a prostitute's intimate parts." In the New York case cited by the majority, that state defined sexual conduct as "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or if such person be a female, breast." The Wisconsin legislature says a criminal sexual contact results when touching occurs on intimate parts. Ohio state law defines sexual contact as "any touching of an erogenous zone of another person, including a female breast." Accord, Arkansas and New Mexico, see majority opinion.

The Florida legislature has not similarly

defined sexual contact for purposes of scoring victim injury points on a sentencing guidelines scoresheet. My review of the legislative and sentencing guidelines history of the phrase "sexual contact" indicates that it evolved from the phrase "contact but no penetration," which was used first in the sentencing guidelines scoresheet, and then repeated in the statutory modification enacted subsequent to Karchesky v. State, 591 So. 2d 930 (Fla. 1992). Section 921.001(8), Fla. Stat. (1992 Supp.). A sexual battery in Florida can be committed either by penetration or union. Section 794.011, Fla. Stat. (1997). Union means contact according to the standard jury instruction given in sexual battery cases. Fla. Std. Jury Instr. (Crim.) 168. The supreme court, when using the phrase, "contact but no penetration," in the guidelines, and the legislature in the post-Karchesky statute, were both referring to a sexual battery committed with union (contact) but without penetration. Although the phrase "sexual contact" has been isolated from the term "penetration" in subsequent revisions of the victim injury guidelines scoring statute, none of the minor changes to the statute show any clear intent on the part of the legislature to begin scoring victim injury points for contact for other than union during sexual batteries. Ch. 93-406, § 9; Ch. 96-312, § 8; Ch. 96-388, § 50; Ch. 96- 393, § 2, Laws of Fla. The only matter made clear by the legislature in the revised statute is that for some sexual battery crimes, neither penetration nor contact points should be scored. See, e.g., Sections 921.0011(7)(c) & (d), Fla. Stat. (1999).

Today, the majority has broadly defined an ambiguous statute through judicial fiat and interpreted it against the accused in violation of a primary rule of statutory construction. Section 775.021(1). We must await future cases in order to determine how far the majority will go in expanding its definition of sexual contact to other parts of the body. The 40 points imposed on the

> scoresheet for victim injury contact should not have been scored. Reyes v. State, 709 So. 2d 181 (Fla. 5th DCA 1998). See also Spioch v. State, 742 So. 2d 817, 818 (Fla. 5th DCA 1999); Wright v. State, 739 So. 2d 1230, 1234 (Fla. 1st DCA 1999).
>
> **THOMPSON, J.**, concurs.

Id., at 1069. Because there was no sexual contact between Mr. Seagrave and B.L., the 40 points for "sexual contact" were scored in error. Consequently, this cause must be remanded for resentencing within the guidelines.

Preservation and harmless error analysis

At sentencing, Defense Counsel objected to the points for sexual contact, citing the aforementioned caselaw as the basis for the objection. Hence, the issue is preserved for review.

Subtracting 40 points from Petitioner's sentencing guidelines scoresheet would have resulted in a recommended sentence of 28 months prison with a permitted range of 21 to 35 months prison (R 32). Hence, Mr. Seagrave is serving an illegal sentence and must be remanded for a sentence within the guidelines.

ISSUE II

WHETHER MS. KIMBRELL'S HEARSAY TESTIMONY REPEATING B.L.'S ALLEGATION AGAINST MR. SEAGRAVE WAS ADMISSIBLE UNDER THE "FIRST COMPLAINT" OR "EXCITED UTTERANCE" EXCEPTIONS TO THE RULE AGAINST HEARSAY.

The State argued Ms. Kimbrell's hearsay evidence should be admitted pursuant to the "first complaint" exception to the hearsay rule and the trial court agreed, over the objection of defense counsel. [1] Petitioner submits B.L.'s statements to Ms. Kimbrell were admitted in error thereby violating Petitioner's right to confrontation and due process. See, **Article I, Section 16 of the Florida Constitution**; and **Amendments V, VI, and XIV of the United States Constitution.**

First complaint exception requires statement to be made at first possible opportunity

The state erroneously believed the "first complaint" exception to the hearsay rule admits any hearsay statement reporting an attack as long as it is the first time the victim makes the statement. This is wrong. The "first complaint" exception to the hearsay rule actually requires the statement to have been made at the first possible opportunity.

> [2] Here, the victim's statement to her friend immediately after the attack was admissible under the common-law "first complaint" exception to the hearsay rule in sexual battery cases. See Monarca v. State, 412

[1] B.L. was twelve years of age at the time of her testimony accusing Mr. Seagrave of fondling her in a lewd or lascivious manner. As such, other witnesses could not repeat B.L.'s allegations in court pursuant to s. 90.803(23), F.S., nor did the state even contend the hearsay statements should be so admitted.

> So.2d 443, 445 (Fla. 5th DCA 1982) (**such statements are admissible to rebut the inference of consent** which might be drawn from prolonged silence of the victim). It was also admissible either under section 90.803(1) as "a spontaneous statement describing an event made while the declarant was perceiving the event or immediately thereafter," or section 90.803(2) as "a statement relating to a startling event made while the declarant was under the stress of excitement caused by the event." It was undisputed that the victim made the statement to her friend immediately after the attack, and that she was "hysterical and crying" when doing so. [e.a.]

McDonald v. State, 578 So. 2d 371, 373-374 (Fla. 1st DCA 1991), **review denied**, 587 So. 2d 1328 (Fla. 1991). See, also, **Pacifico v. State**, 642 So. 2d 1178 (Fla. 1st DCA 1994); **Turtle v. State**, 600 So. 2d 1214 (Fla. 1st DCA 1992); and **Preston v. State**, 470 So. 2d 836(Fla. 2nd DCA 1985).

B.L.’s complaint to Ms. Kimbrell may have been the first complaint she made, but it was not made at the first opportunity. To the contrary, it was made roughly nine hours after the incident occurred. B.L. had many opportunities to make the complaint to others during this interval. She could have told Mrs. Seagrave, the school bus driver, any one of her teachers or school guidance counselors. Indeed, there does not appear to be any reason she could not have run next door, to Ms. Kimbrell’s house, and made the complaint immediately after the incident occurred. Nor did this case involve the issue of consent; rather B.L. said it happened and Mr. Seagrave said it did not. Hence, B.L.’s statements to Ms.

Kimbrell were not admissible under the "first complaint" exception.

Preservation and harmless error

Defense counsel objected to the admission of the evidence at the point it was offered at trial on the grounds that it was unreliable due to "passage of time and opportunity for reflection and fabrication which exists." (T 38, 39) Defense Counsel renewed the objection to this evidence at the close of the state's case, as well (T 84). Hence, the issue is preserved for review.

There was no physical evidence offered by the state; rather, the case involved a swearing match between B.L. and Mr. Seagrave. She said the incident occurred; he said it did not. Naturally, the retelling of B.L.'s side of the story by a witness other than herself or her mother (Ms. McKinney) unfairly bolstered her credibility with the jury. At least, the state can not show the error did not affect the verdict beyond a reasonable doubt. See, **State v. Diguilio**, 491 So. 2d 1129 (Fla. 1986).

CONCLUSION

Based on the foregoing reasoning, caselaw and other citations of authority, Petitioner requests this Honorable Court reverse the judgement and sentence below and the opinion issued by the First District Court of Appeals, and remand this cause for a new trial. In the alternative Petitioner requests a remand for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Karla Ellis, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Steven Seagrave, DOC# N05110, Century Corr. Institution, 400 Tedder Road, Century, FL 32535, on this ____ day of December, 2000.

Respectfully submitted,

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