IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. SC02-1288

ROGER CLEMENTS, :

Respondent. :

______________________________:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the State's statement of the case and facts, noting only the following:

This matter first arose on the morning of the third day of trial, when the State announced: "I would like to advise the court that we have filed a second amended information." TII-317, A-1 (emphasis added).[1] When the trial court said "I have this under advisement," the only motion before the court at that point was defense counsel's motion to "strike this amendment." TII-317, A-1.

When the issue was discussed again after lunch, the court began by noting the parties were addressing "the issue of the second amended felony information, which the state indicated they filed this morning[, the] 3rd day of trial ...." TIII-413, A-2 (emphasis added). After the State explained why it felt compelled to file the new information, TIII-413-14, A-2-3, the court again noted "[t]he second amended felony information ... was filed this morning ... the 16th day of September 1999

[1] "T" refers to the trial transcript. A copy of the relevant portions of the transcript is attached as an appendix, designated "A" in this brief.

...." TIII-414, A-3 (emphasis added). Defense counsel then began his argument by asserting "[t]he state filed with the clerk an amended information." TIII-415, A-4 (emphasis added). After defense counsel made his argument, the State responded "the state can amend any information at any time and through the state resting its case. That is an absolute right that the state has"; the State then argued at length that the filing of the second amended information did not prejudice Respondent. TIII-415-16, A-4-5 (emphasis added). Neither the trial court nor defense counsel contested the emphasized statement. Defense counsel argued "[the j]ury having been sworn before the filing of [the second] amended information[,] jeopardy has attached[,] they can not file a new information ...." TIII-417, A-6 (emphasis added). A short time later, defense counsel said "they filed a new information ...." TIII-418, A-7 (emphasis added). The parties argued at length the questions of whether there was any speedy trial or double jeopardy problems, or whether Respondent was prejudiced by the filing of the new information. TIII-415-20, A-4-9. The court then took a recess. TIII-420, A-7.

The State did not object to any of the emphasized statements. At no point during these proceedings did the State argue, concede, or even indicate, that the second amended information had not been filed, or that it needed the court's permission to file it. Nor did the trial court indicate that it felt court approval was required. It was only after the recess that the State took the position that it was its "understanding that [the court] had not accepted [the second amended information]." TIII-420, A-9.[2] The State then announced it "will be withdrawing the [second] amended information and going back to [the] first amended information"; the State did not move for leave to amend the second amended information. TIII-420-21, A-9-10. Immediately after the court said it was "not going to give them leave to the amended information," defense counsel "renew[ed his] prior argument." TIII-421, A-10. That prior argument was that the filing of the second amended information nol

[2] It seems safe to assume that, at some point during this recess, the State read the case law cited in defense counsel's motion and realized the problem it had created. The district court noted in its opinion: "During the lunch recess, the state attorney apparently realized the consequence of her earlier decision to file the second amended information." Clements v. State, 814 So. 2d 1075, 1077 (Fla. 2d DCA 2002).

prossed the prior information; Respondent was prejudiced by the filing of the second amended information; jeopardy had attached; and dismissal was required. TIII-415, 417, 419-20; A-4, 6, 8-9. Defense counsel never agreed to the State's "withdrawing" the second amended information and "going back to" the prior information.

In the district court ("DCA") opinion, the court said "[o]n the third day of trial, ... <u>the state attorney filed</u> a second amended information." <u>Clements</u>, 814 So. 2d at 1076 (emphasis added). The court also noted "defense counsel pointed out that he was being forced to defend against the second amended information without adequate preparation and was denied additional jury challenges which count II [the capital sexual battery count] would support." <u>Id.</u>

SUMMARY OF THE ARGUMENT

The State's argument is primarily based on "facts" not contained in the DCA opinion, coupled with the State's belief (based on its own interpretation of the record) that statements in the DCA opinion are "factually inaccurate." IB, p. 11. However, this Court may review DCA decisions on conflict grounds only if the conflict "appear[s] within the four corners of the majority decision" under review. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). "[I]nherent or ... 'implied' conflict" is insufficient. Department of Health and Rehabilitative Services v. National Adoption Counseling Services, Inc., 498 So. 2d 888, 889 (Fla. 1986).

Further, the State makes no argument that there is anything in the DCA decision which conflicts with any decisions of this Court or any other district court.

As to the merits, the State argues: 1) the second amended information was never "officially filed by the State as a substitute or replacement ... information," IB, p.7; and 2) even if it was filed, the State could simply "amend it by orally withdrawing it and stating that it wished to 'go back to' the previous informa-

tion." IB, p.7.

The first proposition flatly conflicts with what is stated in the DCA opinion, Clements, 814 So. 2d at 1076, and with what is in the record.

The second proposition is an erroneous statement of law. State v. Anderson, 537 So. 2d 1373 (Fla. 1989). Further, this proposition mischaracterizes what happened here and conflicts with the DCA opinion. The State never sought leave to amend the second amended information; rather, the State "abandon[ed]" or "withdrew" it. Clements, 814 So. 2d at 1077.

The basic flaw in the second proposition is the failure to distinguish between "amending an information" and "filing an amended information." See Anderson, 537 So. 2d at 1374-76 (discussed below); Green v. State, 728 So. 2d 779, 781 (Fla. 4th DCA 1999)(noting "[t]here is a significant difference ... between amending a charged offense and the filing of a new and entirely different offense."); State v. Stell, 407 So. 2d 642 (Fla. 4th DCA 1981)(similar).

"Amending an information" refers to modifying the existing document. When an information is amended, there

is no need to file a new document, and the formalities of arraignment, etc., need not be observed. Amending an information requires court approval, precisely because the amending procedure does not need to observe the formalities and thus court approval is necessary to insure the process is not abused.[3]

"Filing an amended information" refers to the filing of a new document, which in turn means the formalities must be observed. Although the phrase "amended information" is often used in this context, the more accurate phrase would be "superseding information" or "new information." In this context, the second information does not amend the original information; it takes its place. This procedure does not require court approval, because it is wholly within the State's discretion to file or nol pros charges and the filing of a new information

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[3] Rule 3.140(c)(1) provides: "Any defect, error, or omission in a caption may be amended as of course, at any stage of the proceedings ... by court order." Rule 3.140(j) provides: "An information ... that charges an offense may be amended on the motion of the [State] or defendant at any time prior to trial because of formal defects." The case law establishes that informations may be amended during trial with court approval, provided the defendant suffers no prejudice. E.g., Lackos v. State, 339 So. 2d 217 (Fla. 1976). As discussed below, the type of during-trial amendments allowed in the case law tend to be such things as correcting the name of the owner of burglarized or stolen property.

accomplishes both.[4]

But the filing of a new information nol prosses the original information.[5] If the new information is in turn nol prossed (or "abandon[ed]" or "withdr[awn]," Clements, 814 So. 2d at 1077), another information must be filed. By contrast, in the amending-an-information context, the original information remains in effect even if the motion for leave to amend is denied or withdrawn.

The present case is a filing-an-amended-information case. The State bases it argument on the erroneous premise it is an amending-an-information case. The second amended information was filed as a new information and

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[4] Katz v. State, 736 So. 2d 734, 735 (Fla. 4th DCA 1999) (holding there was no error in denying defendant's motion to dismiss the State's "sworn amended information," even though the State "failed to seek leave to amend," because "[t]he state was not required to seek leave of court ... when a new amended information is filed."); State v. Belton, 468 So. 2d 495, 497 (Fla. 5th DCA 1985)(similar); sec. 932.47, Fla. Stat. (1999)(providing informations "may be filed by the [State] with the clerk of the circuit court in vacation or in term without leave of the court first being obtained.").

[5] Anderson, 537 So. 2d at 1374-75 (asserting "the filing of an amended information purporting to be a complete restatement of the charges supersedes and vitiates an earlier information."); accord, State v. Thomas, 714 So. 2d 626, 627 (Fla. 5th DCA 1998); Belton, 468 So. 2d at 497; State v. Stell, 407 So. 2d 642, 643 (Fla. 4th DCA 1981); Wilcox v. State, 248 So. 2d 692, 694 (Fla. 4th DCA 1971). However, "the State's power to nol-pros and refile Informa-tions is not unbridled[;] double jeopardy ... prevent[s] the State from nol-prossing and refiling an Information after the jury has been sworn." Stell, 407 So. 2d at 643.

it was later withdrawn, not amended.

Asserting "a defendant is entitled to relief based on a procedural irregularity at trial only if he has been prejudiced," the State also argues Respondent did not "suffer[] any prejudice as a result of the prosecutor's abortive attempt to amend the information [and thus] has not made the showing of prejudice required ...." IB, pp. 11-12. This argument is flawed in several respects.

First, the State cites nothing in the DCA opinion to support its assertion that Respondent "has not made the showing of prejudice required," again overlooking the fact that conflict jurisdiction must be based on conflict found within the opinion being reviewed. Further, this assertion conflicts with the DCA opinion. Clements, 814 So. 2d at 1076.

Second, what occurred in the present case was not an "abortive attempt to amend the information." The State filed a new information which "purport[ed] to be a complete restatement of the charges," which in turn "supersede[d] and vitiat[ed the] earlier information." Anderson 537 So. 2d at 1374.

Third, a showing of prejudice, as the State is using the word, is not required in cases with facts such as those in the present case. That concept is relevant only if the State seeks to amend an existing information. The prejudice in the present case is in proceeding with the trial without a valid charging document. Lack of jurisdiction is hardly a "procedural irregularity."

In the present case, the State filed a new information (thus nol prossing the existing information), then withdrew that new information. When this happened, the trial court was deprived of jurisdiction to proceed. Jeopardy having already attached, discharge was required. The only prejudice that needs to show in such circumstances is the prejudice of being convicted of an offense by a court that has no jurisdiction.

The DCA decision does not conflict with any decisions from this Court or any other district court. The DCA reached the correct result. Its decision should be approved.

ARGUMENT

ISSUE

THE DISTRICT COURT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER DISTRICT COURT; THE SECOND AMENDED INFORMATION WAS FILED (BY THE STATE, AS A CHARGING DOCUMENT) ON THE MORNING OF THE THIRD DAY OF TRIAL AND IT NOL PROSSED THE PRIOR INFORMATION; THE "WITHDRAWAL" OF THE SECOND AMENDED INFORMATION LEFT THE STATE WITHOUT A CHARGING DOCUMENT AND DEPRIVED THE TRIAL COURT OF JURISDICTION; AND THE STATE CANNOT SIMPLY "WITHDRAW" AN EXISTING INFORMATION AND "GO BACK TO" A PRIOR (ALREADY NOL PROSSED) INFORMATION.

This issue presents a pure question of law and should be reviewed on appeal de novo. See Walter v. Walter, 464 So. 2d 538 (Fla. 1985).

I. THE SECOND AMENDED INFORMATION WAS FILED, BY THE STATE, AS A CHARGING DOCUMENT, ON THE MORNING OF THE THIRD DAY OF TRIAL.

The State asserts:

1. "The proposed second amended information was never officially filed by the State," IB. pp. 7, 8, 10;

2. "[t]his proposed amended information was never filed by the State as a charging document, because it was neither filed with the clerk nor accepted by the trial judge for filing for any purpose until after the prosecutor had stated she was withdrawing it," IB, p.9;

3. "[b]ecause the prosecutor announced that

> she was withdrawing [the second amended information] before the trial judge had actually filed it with the clerk, this copy filed by the trial judge is not the required filing by the prosecutor needed to satisfy ... constitutional, statutory, and rule requirements for the commencement of prosecution," IB., p. 10; and
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> 4. "there is nothing in the record on appeal that would pinpoint the specific time that the prosecutor ever mentioned filing the proposed amended information." IB, p.8.

"On the third day of trial, ... <u>the state attorney filed</u> a second amended information." <u>Clements</u>, 814 So. 2d at 1076 (emphasis added). The State's argument here is not only based on "facts" not contained in the DCA opinion, it contradicts facts contained in that opinion.

The record fully supports the DCA's statement of fact. There is nothing in the record to support the State's assertion that the second amended information was neither "filed with the clerk nor accepted by the trial court ...." IB, p.9. Without objection from the State: defense counsel said "[t]he state filed with the clerk an amended information"; the trial court twice stated the second amended information had been "filed this morning"; and defense counsel referred to the information's having been "filed" on three more occasions.

TIII-413-18, A-2-7. Indeed, the State itself initiated the whole discussion by "advis[ing] the court that we have filed a second amended information." TII-317, A-1.

It is not clear why the State believes the second amended information "was never officially filed <u>by the State</u> [and] was never filed by the State <u>as a charging document</u>." IB, pp. 7, 10. Who else but the State could have filed it?[6] An information is "a charging document"; what else would it be filed as?

The State's assertion that "there is nothing in the record ... that would pinpoint the specific time that the prosecutor ever mentioned filing the proposed amended information," IB, p.8, is accurate only if "pin-point the specific time" means "the precise hour/minute/second the second amended information was filed." As the trial court twice stated, the second

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[6] At one point in its brief, the State asserts "perhaps due to the very garbled transcript ... , the Second District failed to recognize that the State's proposed amended information was never <u>filed by the State</u> ...." IB, p.8. Here again the State seeks to find jurisdictional conflict based, not on what is actually said in the DCA opinion, but on the State's disagreement with what is said in that opinion.

Further, while it is true the transcript leaves something to be desired, it is hardly accurate to say it is "very garbled." More importantly, there is no "garble" in the crucial parts of the transcript which could lead the DCA to "fail to recognize" that the remarks noted above mean anything other than exactly what they seem to mean.

amended information was "filed this morning[, the] 3rd day of trial[,] the 16th day of September 1999 ...." TIII-413-14, A-2-3. It is not clear how much more "specificity" the State would require, or why more specificity is necessary here. "[T]he prosecutor ... mentioned filing the proposed amended information," IB, p.8, on the morning of the third day of trial, when she "advise[d]" the court "we have filed a second amended information." TII-317, A-1.

The thrust of the State's argument seems to be that the second amended information was "filed by the trial judge [and this] is not the required filing by the prosecutor needed to satisfy ... constitutional, statutory, and rule requirements for the commence-ment of prosecution." IB., p. 10. But that information was not "filed by the trial judge."

The State seems to be relying on the statement made by the court after the recess, when the prosecutor first took the position that the court had not "accepted" the second amended information and announced she was withdrawing it. TIII-420, A-9. After the court erroneously took the position that leave of court was necessary

before a new information could be filed,[7] the court said "I'm going to file the amended information ...." TIII-421, A-10. But there was nothing for the court to "accept" or "file" at this point; the second amended information had already been filed, with no need for court acceptance. The court's statement about "fil[ing] the amended information" was meaningless.

The State notes that the clerk's stamp shows the second amended information was time-stamped on September 17 at 10:17 a.m. IB, p.9. This is not the controlling fact here. The State filed the second amended information on September 16, the morning of the third day of trial. TII-317, TIII-413-21; A-1-10. The clerk's time stamp probably resulted from the fact that the second amended information was filed in open court and was not clocked in by the courtroom clerk until that clerk got back to the office (where the time stamp in located). This is confirmed by the fact that defense counsel's Motion to Dismiss, etc., (which attacked the filing of the second amended information) was time stamped on September 17 at 10:18 a.m., a minute after the second

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[7] See authorities cited in footnotes 4 and 5, above.

amended information was stamped. RI-42. Clearly, both the second amended information and the motion were stamped the day after the trial ended. Equally clear, both were filed with the clerk in open court on September 16.[8]

The State relies on "Article I, Section 15, of the Florida Constitution; Sections 932.47 and 932.48, Florida Statutes (1999); and Rule 3.140" to prove the second amended information was "never filed <u>by the State</u> ...." IB, p.8. These authorities do not support the State's position; these authorities do not require either judicial approval or a clerk's time stamp as the <u>sine qua non</u> of a proper filing.

Article I, section 15 simply provides that informations must be "filed" by the State; it says nothing about time-stamping or court approval. Section 932.47 provides that informations "may be filed by the [State] with the clerk of the circuit court in vacation

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[8] Indeed, the State's argument contradicts itself here. After stating the trial court "file[d] the proposed amended information" "on September 16," the State asserts that document was "filed with the clerk ... reflecting the filing date and time of September 17 ...." IB, p.9. How could the trial court "file" the second amended information on September 16 if it was not "filed" until it was time stamped on September 17?

or in term without leave of the court first being obtained." (Emphasis added). Section 932.48 provides that, "[u]pon filing ..., the clerk ... shall docket the information ...." Rule 3.140 adds nothing of relevance here to these provisions.

The State cites no authority for its assertion that "the State's proposed amended information was [n]ever filed by the State, as required by" these authorities. Section 932.47 refutes the State's assertion; leave of court is not required for the filing of a new information. Section 932.48 refers to the clerk's docketing the information, but that is to occur after it is filed; section 932.48 does not say a pleading is not considered to be filed until it is docketed by the clerk.[9]

Rule 3.030(d) (which the State overlooks) defines "filing with the court" as meaning that pleadings "shall be ... fil[ed] with the clerk of court, except that the judge may permit the papers to be filed with him or her ...." A pleading is considered filed when placed in the trial court's hands and accepted for filing, even though

[9] Further, docketing and time-stamping are not necessarily the same thing.

"it was not actually filed in the clerk's office until [the next day]." Guarana v. State, 436 So. 2d 313, 314 (Fla. 1st DCA 1983). In the present case, the trial court's twice stating that the State "filed [the second amended information] this morning," TIII-413-14, A-2-3, shows that, regardless of who was handed the actual document by the State, the trial court had accepted that document as being filed on September 16th.

The State's assertion that "this proposed amended information was never filed by the State as a charging document, because it was neither filed with the clerk nor accepted by the trial judge for filing for any purpose until after the prosecutor had stated that she was withdrawing it," IB, p.9, conflicts with the DCA opinion and is not supported by the record. The second amended information was not a "proposed" (proposed as what?) information. Everyone recognized it had been filed. TII-317, TIII-413-15; A-1-4. There was nothing for the trial judge to accept; further, the court did accept it. TIII-413-14, A-2-3. And what is the "purpose" the State is suggesting must be present before an information is considered to be filed? The general purpose of filing a

document is to make it part of the court file; that is accomplished by handing the document to the clerk or to the court. "[T]he second amended information ... became effective for its intended purpose upon being filed." Clements, 814 So. 2d at 1077.

What occurred here is hardly tantamount to the State's "go[ing] to the clerk's office and either hand[ing] it to a clerk or plac[ing] it in a designated location for filing but then snatch[ing] it back before the clerk had stamped it." IB, p.9.[10] Proceeding through several hours of testimony after a new information had been filed in open court is not the equivalent of "snatching" a pleading back from the clerk at the office

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[10] The case the State cites at this point -- Porter v. State, 749 So. 2d 514 (Fla. 2d DCA 1999) -- is distinguishable. The issue in that case was whether a motion for new trial had been timely filed. Defense counsel's secretary delivered the motion (within the applicable time limits) to the trial judge's chambers and left it with the judge's judicial assistant. The judge later placed the motion "in his out box to be delivered to the clerk's office." Id. at 515. Upon delivery to the clerk's office, it was time stamped two days later; it was untimely at that point. Id. The trial judge later said he assumed the motion had been sent to him by mistake and he did not consider it to have been filed with him because he was not asked to accept it for filing; had he been asked, he would have noted the filing time. Id. Defense counsel's secretary conceded she did not ask the judge to accept it for filing. Id.

The facts in the present case are quite different. The amended information was not delivered by a secretary to the trial court's chambers and left with the judge's judicial assistant. The second amended information was "filed with the clerk," TIII-415, A-4, in open court. The trial court recognized as much. TIII-413-14, A-2-3.

counter.[11] The State further argues "Respondent was not tried on the proposed amended information" because he was "not rearraigned[,] the jury was never told of or instructed on the new charge[, and] there was no reference to any 'sexual battery' in the testimony presented on the morning of the third day of trial." IB, pp. 10-11. The State concedes its assertion that "Respondent was not tried on the proposed amended information" conflicts with a statement in the DCA opinion (which, the State contends, "is factually inaccurate"). IB, pp. 10-11; cf. Clements, 814 So. 2d at 1076.[12]

None of this is relevant to the question of whether the second amended information was filed. A defendant does not have to be arraigned or tried on an amended information before it is considered to have been filed. Arraignment follows filing; without a filing, there is no reason to arraign. The filing date is the date of filing; a rule that there could be no filing until ar-

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[11] Further, it is not clear whether pleadings can be so casually "snatched back" from a clerk's hands, even at the office counter.

[12] The State's factual assertions that "the jury was never told of or instructed on the new charge [and] there was no reference to any 'sexual battery' in the testimony presented on the morning of the third day of trial" are not contained in the DCA opinion.

raignment would radically alter the rules regarding such things as statute of limitation issues.[13] Further, neither the jury's being "told of or instructed on the new charge" nor the presentation of testimony is a requirement for filing. With such a rule, nothing would be considered filed unless and until there was a jury trial, and the jury would have to be "told of or instructed on" everything previously filed. The question of whether the second amended information was filed does not hinge on the presence or absence of such facts.

In sum, aside from the conflicts with the statements in the DCA opinion, aside from the fact that the DCA opinion does not support most of the State's argument, it is simply not accurate to say: 1) that the second amended information was not filed by the State as a charging document; or 2) that it was filed at any time other than September 16th, the morning of the third day of trial.

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[13] See sec. 775.15(5), Fla. Stat. (1999)(providing a prosecution "is commenced by the filing of [a] charging document."); Studnicka v. State, 679 So. 2d 819, 820 (Fla. 3d DCA 1996)(holding prosecution is considered commenced upon the filing of the information, not upon arraignment).

II. THE STATE CANNOT SIMPLY "WITHDRAW" AN EXISTING INFORMATION AND "GO BACK TO" A PRIOR INFORMATION WHICH HAD BEEN NOL PROSSED.

The State asserts "assuming arguendo that the proposed amended information was officially filed ..., the Second District overlooked the fact that this Court held in State v. Anderson, 537 So. 2d 1373 (Fla. 1989), that the amended information filed during trial conferred subject matter jurisdiction ..., and that the State could subsequently amend it by orally withdrawing it and stating that it wished to 'go back to' the previous information." IB, p. 11. The State misreads Anderson. That case rejects, rather than supports, the State's position here; and the legal principles Anderson endorsed are consistent with those that animated the DCA decision. The State made no attempt to amend the second amended information at trial; it withdrew it (which, as Anderson recognizes, left the State with no charging document and deprived the trial court of jurisdiction).

Both Anderson and the present case are filing-an-amended-information cases. However, as the State concedes, "Anderson is factually distinguishable ...." IB, p. 12. In Anderson, the defendant personally and ex-

pressly consented to the procedure that occurred there; and this consent was the crucial fact in this Court's conclusion that the procedure was valid. In the present case, Respondent objected when the State withdrew the second amended information. TIII-421, A-10.

Anderson was charged with residential burglary, a second degree felony. The day before trial, the State filed a new information changing the charge to a first degree felony burglary. "Immediately prior to trial, the state and [Anderson] reached an agreement that the state would proceed on the original burglary charge ...." 537 So. 2d at 1373. This agreement resulted from the fact that the filing of the new information entitled Anderson to a continuance, but neither party wanted to delay the trial. In a lengthy colloquy, the trial court obtained Anderson's consent to this procedure. This colloquy included the trial court's informing Anderson that proceeding on the original information "required a waiver of an important legal right on your part. You have <u>the right to require the State to refile the original charge and proceed on that</u> ..., to in effect nol-pros the amended charge and refile the original charge." <u>Id.</u> at

1374 (emphasis added). Anderson expressly waived that right.

After Anderson was convicted under the original information, the district court reversed. Relying on Wilcox v. State, 248 So. 2d 692 (Fla. 4th DCA 1971) and Alvarez v. State, 25 So. 2d 661 (Fla. 1946), the district court "reason[ed] that the filing of the amended information superseded the original information; therefore, when the state subsequently withdrew the amended information, no viable charging document remained [and] the trial court lacked jurisdiction to proceed." Id. at 1374. The district court held the doctrine of invited error could not cure the problem (because jurisdictional defects cannot be waived) but certified the following question: "whether invited error can overcome the fact that technically the information has been extinguished by the filing of an amended information, or whether an information so extinguished can be revived by mutual agreement ...." Id.

In quashing the district court's decision, this Court said:

> We ... agree[] with many of the principles

of law expressed by the district court. It is well-settled that the filing of an amended information purporting to be a complete restatement of the charges supersedes and vitiates an earlier information. It is also clear ... that jurisdiction to try an accused does not exist ... unless there is an extant information .... It is also well settled that the parties may not confer jurisdiction on a court. Nevertheless, under the facts present here ..., we conclude that the district court's reliance on Alvarez and Wilcox was misplaced and the decision below is in error.

In Alvarez, the defendant was charged [with burglary]. After the trial commenced, testimony was introduced that the owner of the property as alleged in the information was erroneous and that the property was owned by another.[[14]] Over objection, the state amended the information without refiling, the trial continued, and the defendant was convicted. Upon review, we concluded that the amendment was a matter of substance which under then well-settled law required dismissal of the charge and recommencement by refiling, rearraignment, repleading, and reselection of a jury. Because the original information had been vitiated, the defendant had been tried on a purported information which did not comply with the Florida Constitution. Relying on Alvarez, we again reversed a conviction in Sipos v. State, 90 So. 2d 113 (Fla. 1956), where the trial judge had permitted a similar substantive amendment of an information during trial and over the objection of the defendant.[[15]] In Wilcox, the court applied Alvarez to a situation where the state filed an

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[14] The information alleged the burglarized property belonged to Harold McGucken; the actual owner was McGucken Liquor Stores, Inc. 25 So. 2d at 662.

[15] Sipos was also a burglary prosecution. The information alleged the burglarized property belonged to Sterchi Brothers, Inc.; the correct name was Sterchi Brothers Stores, Inc. 90 So. 2d at 114.

information describing a certain stolen car and then filed an amended information describing an entirely different car. On oral motion, without refiling and over the objection of the defendant, the state withdrew the amended information and trial was had on the original, superseded information. The court found this to be reversible error.

In relying on Alvarez and Wilcox, the district court apparently overlooked Lackos v. State, 339 So. 2d 217 (Fla. 1976) where we accepted jurisdiction of Lackos v. State, 326 So. 2d 220 (Fla. 2d DCA 1976) because of conflict with Alvarez and Sipos. In Lackos, during trial and over the objection of the defendant, the state was permitted to substantively amend the information by correcting the name of the owner [of] the [stolen] property ....[16] Revisiting Alvarez and Sipos, we concluded that [rule] 3.140(o),[17] first adopted in 1967 and not addressed by Alvarez and Sipos, governed the resolution of such amendments, and, further:

> We are persuaded by the reasoning articulated by Judge Grimes, writing for the District Court in the instant case:

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[16] The information alleged the owner of the stolen property was Remington Electric Razors, Inc.; the correct name was Remington Electric Shavers, a Division of Sperry Rand Corporation. 339 So. 2d at 218.

[17] Rule 3.140(o) provides:

> Defects and Variances. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.

> "The modern trend in both criminal and civil proceedings is to excuse technical defects which have no bearing upon the substantial rights of the parties. When procedural irregularities occur, the emphasis is on determining whether anyone was prejudiced by the departure. A defendant is entitled to a fair trial, not a perfect trial.... Appellant received a fair trial."
>
> We agree that a showing of prejudice should be a condition precedent to undertaking the kind of procedural niceties envisioned by Alvarez, supra, and Sipos, supra.

Lackos, 339 So. 2d at 219. Accordingly, "to the extent that Alvarez and Sipos conflict with the principles enunciated herein they are expressly overruled." Id.

Alvarez and Sipos represent a highly formalistic approach requiring that amendments to informations be resworn and refiled by the prosecutor even if the amendments do not violate due process (notice) or otherwise prejudice the defendant. By overruling Alvarez and Sipos, Lackos signaled the adoption of a due process standard and the abandonment of the highly technical and formalistic requirement that every amendment be resworn and refiled. Lackos stands for the proposition that the state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice ....

In summation, we agree that the original information was vitiated by the filing of an amended information (second information). At this point the court had jurisdiction to proceed to trial. The fact that the amended information was subsequently orally amended did not have the effect of divesting the court of jurisdiction. Respondent argues that the second

> information was vacated by court order, therefore there was no charging instrument before the court when the defendant agreed to proceed to trial. In support of his position he refers us to the judge's statement, "Mr. Hesse, vacate and set aside the amended information." This statement, taken in isolation would appear to support his argument. The statement, however, must be read in context of the entire colloquy in which the respondent agreed to go to trial on ... the originally filed information. Functionally, ... the colloquy shows the state agreeing to amend the second (extant) information by charging a lesser offense in return for respondent's agreement not to seek a continuance. This conclusion is consistent with the clear intent of the parties ....
>
> Essentially, respondent's position is that the trial court erred in not delaying the trial by requiring the state to retype and refile a "new" information even though both parties understood the charge and urged immediate trial. We reject this position.
>
> Because we reach a different conclusion than the district court concerning the import of the aforementioned colloquy, the certified question is moot in light of Lackos.

Id. at 1374-76 (emphasis added).

As the emphasized language shows, Anderson recognizes the distinction between amending an information and filing an amended information. "[T]he filing of an amended information ... supersedes and vitiates an earlier information," but "amendments to informations [need not] be resworn and refiled [and] the state may substantively amend an information during trial ...." Id. at

1375.

Given this distinction, the present case is distinguishable from Anderson in a crucial way. In both cases, the State did not originally attempt to amend existing informations; rather, the State filed new informations, thus "supersed[ing] and vitiat[ing the] earlier information[s]." Id. at 1374. In Anderson, the new information was then, by agreement, amended to restore the original charge. In the present case, the State did not attempt to amend the second amended information; rather, the State "abandon[ed]" or "withdr[ew]" it, over Respondent's objection. Clements, 814 So. 2d at 1077; TIII-421, A-10. When that occurred, no charging document remained.

Anderson does not stand for the proposition that, having filed the second amended information, the State could "orally withdraw[] it and stat[e] that it wished to 'go back to' the previous information." IB, p. 11. To the contrary, Anderson recognizes that the State's withdrawing an existing information and attempting to reinstate a prior information "require[s] a waiver of an important legal right on [the defendant's] part[:] the

right to require the State to refile the original charge and proceed on that ..., to in effect nol-pros the amended charge and refile the original charge." 537 So. 2d at 1374.

This point is further illustrated by Anderson's treatment of Wilcox v. State, 248 So. 2d 692 (Fla. 4th DCA 1971), which was one of the cases the Anderson district court relied upon in reversing Anderson's conviction. 537 So. 2d at 1374. This Court in Anderson said the district court's "reliance on ... Wilcox was misplaced," id. at 1375, but the Court did not disapprove of the reasoning or result in Wilcox in any way. Wilcox is factually similar to the present case, and the legal principles it embraced are essentially identical to those used by Anderson and the DCA opinion in the present case.

Wilcox was charged with receiving stolen property, the property at issue being a car owned by an auto dealership. Prior to trial, the State filed an amended information changing the stolen property to a different car owned by a rental car company. The State later (also pretrial) "made an oral motion to 'withdraw' the amended

information," which was granted. 248 So. 2d at 693. When the trial began, Wilcox objected on the ground that, since the State had withdrawn the amended information, no charging document then existed; the objection was overruled and Wilcox was convicted of the offense charged in the original information. Characterizing the issue as being "whether ... the trial court erred in permitting [the State] to proceed to trial on the original information, after the same had been amended and the amended information had been withdrawn," the district court reversed, asserting:

> The filing of an amended information which purports to be a complete restatement of an offense has the effect of vitiating the original information as fully as if it had been formally dismissed by order of court.... Consequently, when the state announced its intent to abandon the amended information and secured an order permitting same, the state was left without a charge against the defendant, and the trial court erred in requiring the defendant to proceed to trial without the filing of a new information and compliance with all procedural steps that would be pertinent to an original information.
>
> We cannot sanction the procedure that was here followed as harmless error. Aside from the theoretical difficulty in holding that the withdrawal of the amended information 'revives' the original information, the procedure here employed contains a serious potential for the imposition of surprise and the consequent de-

nial of a fair trial.

Id. at 693-94 (emphasis added)(citations omitted).

The emphasized language is virtually identical to the language in Anderson. 537 So. 2d at 1374.

As noted above, although this Court in Anderson said the district court's "reliance on ... Wilcox was misplaced," 537 So. 2d at 1375, the Court did not disapprove of Wilcox. Wilcox, like Anderson and the present case, is a filing-an-amended-information case. Unlike in Anderson, but as in the present case, Wilcox objected to the State's being allowed to "go back to" the original information after withdrawing the amended information. The Anderson district court's reliance on Wilcox was misplaced because of this crucial factual distinction.[18] As this Court noted in Anderson, because of Anderson's consent to the procedure, "[f]unctionally, [what occurred there was] the state agree[ed] to amend the second (extant) information by charging a lesser offense in

[18] In Anderson, this Court characterized Alvarez and Sipos as cases in which "the state amended the information," but characterized Wilcox as a case in which "the state withdrew the amended information and trial was had on the original, superseded information." 537 So. 2d at 1375. Thus, Anderson recognizes the distinction between "amend[ing an existing] information" and "withdr[awing an] information."

return for [Anderson's] agreement not to seek a continuance." 537 So. 2d at 1376 (emphasis added). In effect, Anderson's consent converted the case from a filing-an-amended-information case into an amend-an-information case.

Read together, Anderson and Wilcox stand for the following principles: If the State files an amended information, the prior information is nol-prossed. The State cannot then "orally withdraw[the amended information] and ... 'go back to' the previous information," IB, p. 11, unless the defendant consents to this. That consent, in effect, means that the amended information is in turn being amended to reflect the original charge. But when this happens, the State is not, technically, "going back to" the original information; the amended information is itself being amended.

This point is reinforced by the language this Court used in Anderson to reject Anderson's claim "that the second information was vacated by court order, therefore there was no charging instrument before the court when [he] agreed to proceed to trial." 537 So. 2d at 1376. The Court noted "the judge's statement, 'Mr. Hesse,

vacate and set aside the amended information' ..., taken in isolation would appear to support his argument." Id. The Court went on to say:

> The statement, however, must be read in context of the entire colloquy in which the respondent agreed to go to trial on ... the originally filed information. Functionally, ... the colloquy shows the state agreeing to amend the second (extant) information ... in return for respondent's agreement not to seek a continuance. This conclusion is consistent with the clear intent of the parties ....

Id.

In the present case, the second amended information was in effect "vacated by court order," when the trial court allowed the State to withdraw it. TIII-420-21, A-9-10.[19] But, unlike in Anderson, there was no "context" in which this must be placed, nor any "agreement ... of the parties" that would validate the procedure. Again, Anderson recognizes that vacating or withdrawing an existing information leaves the State without a charging document, unless the defendant agrees to it.

Thus, Anderson does not support the State's position here; to the contrary, it undermines it.

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[19] Of course, court approval is not required for the State's withdrawing or nol prossing an existing information.

The State also cites Anderson for the proposition that "a defendant is entitled to relief based on a procedural irregularity at trial only if he has been prejudiced ...." IB, pp. 11-12. The State then quotes Anderson's quote from Lackos (quoted above) and argues Respondent "did not demonstrate either below or on appeal that he suffered any prejudice as a result of the prosecutor's abortive attempt to amend the information [and thus] has not made the showing of prejudice required by Anderson." IB, p. 12.

This argument is flawed in several respects.

First, the State cites nothing in the DCA opinion to support its assertion that Respondent "has not made the showing of prejudice required by Anderson," again overlooking the fact that conflict jurisdiction must be based on conflict found within the opinion being reviewed. The State also overlooks the DCA's assertion that "defense counsel pointed out that he was being forced to defend against the second amended information without adequate preparation and was denied additional jury challenges which count II would support." Clements, 814 So. 2d at 1076.

Second, what occurred in the present case was not an "abortive attempt to amend the information." The State filed a new information which "purport[ed] to be a complete restatement of the charges," which in turn "supersede[d] and vitiat[ed the] earlier information." _Anderson_ 537 So. 2d at 1374.

Third, _Anderson_ did not address the question of prejudice in cases with facts such as those in the present case. The only issue raised by the certified question in _Anderson_ was whether the trial court had jurisdiction following the procedural maneuvers that occurred there. _Anderson_'s discussion of prejudice occurred during its discussion of _Lackos_ and the other prior cases, all of which dealt with the issue of _amending_ an information (by doing such things as "correcting the name of the owner from which property had allegedly been stolen."). 537 So. 2d at 1375. _Anderson_ asserted "a showing of prejudice should be a condition precedent to undertaking the kind of procedural niceties envisioned by _Alvarez_ and _Sipos_ ...." 537 So. 2d at 1375. _Lackos_, _Alvarez_ and _Sipos_ are all amending-an-information cases.

Quoting rule 3.140(o), the district court in Lackos found the misnomer of the corporate victim to be a mere "defect in the form of the ... information." 326 So. 2d at 221. The court then added the statement about "technical defects" and "procedural irregularities" quoted with approval in Anderson. Id. As just discussed, Anderson's consent to the procedure in that case converted the case from a filing-an-amended-information case into an amending-an-information case. The technical defect in Anderson was the failure to "requir[e] the state to retype and refile a 'new' information even though both parties understood the charge and urged immediate trial." 537 So. 2d at 1376.

What occurred in the present case cannot be called a defect in form, a technical defect, or a procedural irregularity. The question of prejudice, as addressed in cases like Lackos, does not come into play here. That concept is relevant only if the State seeks to amend an existing information. Put another way, the prejudice in the present case is in proceeding with the trial without a valid charging document. Lack of jurisdiction is not a technical defect or procedural irregularity.

The State's withdrawing the second amended information cannot be read as an attempt to "amend" that information by "going back to" the prior information, i.e., by in effect nol prossing count two (the capital sexual battery count) of the second amended information, leaving only count one intact. First, the State never requested this. Second, count one of the second amended information was not identical to the sole count in the prior information.

Although count one of the second amended information charged the same offense as the prior information, there is a significant difference in the time frames. The prior information charged a time frame of November 1, 1990 to December 28, 1999. RI-20. Count one of the second amended information charged a time frame of October 24, 1993 to December 28, 1999. RI-45-46. This difference in time frames is quite significant because the complainant's testimony indicated the offense(s) occurred in the 1992-94 time period. TIII-443-45, 456-57. Thus, the expanded time frame in the prior information may have included the dates upon which the jury believed the offenses occurred.

In sum, the State has not shown any conflict between the DCA decision and any other decision. The State's arguments that the second amended information was never "officially filed" by the State "as a charging document," or that it was actually filed by the trial court, are not supported by the record. The State's argument that it could "withdraw" the second amended information and "go back to" the prior information is not supported by the law. The State's attempt to characterize this case as an amend-an-information case conflicts with what is in the record; the State did not attempt to amend the second amended information. The State's argument that what occurred here was a mere "procedural irregularity" for which Respondent is required to show prejudice (or some prejudice beyond being convicted by a court that lacked jurisdiction) is also without merit.

CONCLUSION

The district court decision should be approved.

APPENDIX

PAGE NO.

1. Excerpts from trial transcript

TII-317 ... 1

TIII-413-21 ... 2-10

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan Dunlevy, Concourse Center #1, 3507 E. Frontage Rd., suite 200, Tampa, FL 33607, on this _____ day of April, 2003.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

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