IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. ROGER DALE CLEMENTS, Respondent.	Case No. SC02-1288

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by information filed on October 20, 1998 with handling and fondling a child under the age of 16 years, in violation of Section 800.04(1), Florida Statutes, between October 24, 1993 and October 24, 1996 (V 1 R 1-2). An amended information charging him with sexual activity with a child 12 years old or older but less than 18 over whom he was in a position of familial or custodial authority, in violation of Sections 794.011(8)(b), 794.041(2)(b),[1] and 800.04(1), between November 1, 1990 and December 28, 1997 was filed on September 10, 1999 (V 1 R 20-21).

Respondent's trial began on September 14, 1999 (V 1 R 55).

Although the transcript is somewhat unclear, it appears that the jury was sent home on the afternoon of the second day of trial (V 2 T 315-316) and that there was a brief discussion concerning jury instructions outside the jury's presence either just before court was adjourned on September 15, 1999 or just before the jury was brought back into court the following morning (V 2 T 316-317).

The transcript contains no notation that the court was in recess for the night, but the transcript indicates that what transpired next was as follows:[2]

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[1]Section 794.041 was repealed in 1993.

[2] For purposes of not making its quotations from the trial transcript any more unreadable than necessary, the State has

THE COURT: Is the state ready to proceed?

MS. MCSWAIN [prosecutor]: I would like to advise the court that we have filed a second amended information. I have a copy for Mr. Comnes [defense counsel]. I'm sure he is going to have argument about at a later time.

THE COURT: Is the state is ready to proceed.

MS. MCSWAIN: Yes.

MR. COMNES [defense counsel]: Judge, I need to bring to your attention they amended a second count capital sexual battery. I'm going to object. Green stands for the prospect that they can not do this. I would like the court to review Green and strike this amendment.

THE COURT: All right, sir. I understand. I have this under advisement. State prepared call your next witness.

MS. MCSWAIN: Yes, Your Honor, the state would call --

THE COURT: Bring the jury in.

(Thereupon, the jury was returned to the courtroom.)

THE COURT: Thank you good morning. Each of you have shown up. Has each of you read anything, heard anything, had anybody speak to you about this case since we were here last evening....

(V 2 T 317-318)

There is nothing in the record on appeal that would pin-

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refrained throughout this brief from placing a "sic" everywhere that it would otherwise be appropriate to do so.

point the specific time that the prosecutor for the first time ever mentioned filing the proposed amended information. The second amended information itself does contain a clerk's stamp bearing a time of 10:17 a.m., but the **date** on that clerk's stamp is September **17**, not September **16**, September 16 being the third day of trial (V 1 R 45). On the other hand, the trial court's handwritten notation on the second amended information is dated 9/16/99.

The discussion concerning the proposed amended information apparently occurred after the jury had been sent to lunch break but before the jury returned to the courtroom after the lunch break (V 3 T 399). Because the court reporter has repeated approximately seven (7) pages of trial transcript three (3) times over 21 consecutively numbered pages (V 3 T 399-420), it is unclear from the transcript whether the first part of the discussion—before the prosecutor announced that the State was withdrawing the proposed amended information—occurred before the judge and counsel broke for lunch or whether that part of the discussion occurred after the judge and counsel broke for lunch and then there was another recess, although undersigned counsel would tend to believe that the former is more likely, in accordance with the Second District's opinion.

Although the trial court initially referred to "the second degree amended felony information which the state indicated they

filed this morning" (V 3 T 399, 406, 413) and also referred to it as "[t]he second amended felony information that was filed this morning being the 16 day of September 1999" (V 3 T 400, 407, 414) and defense counsel stated at one point, "The state filed with the clerk an amended information number CR 9818826CFANO charge of sexual activity, sexual battery" (V 3 T 400, 407, 415), the record does not reflect a clerk's stamp dated September 16, 1999.

After a recess during the argument on the proposed amended information, the following occurred in the context of continuing discussion of Respondent's objection to its filing:

> MS. MCSWAIN: After reading the other motions dismissed one thing I see in here and paragraph number 10. The court has accepted our amended information.[3] It was may understanding that you had not accepted it and it was under advisement and had not been accepted by the court. The state will be withdrawing the amended information and going back to first amended information.
>
> THE COURT: Question. And in sitting an looking at some of new cases it had occurred to me that maybe you're ahead of ourselves. The state essentially before you amend you must seek that approval from the court and in analyzing what prejudice would

[3] The prosecutor is here referring to paragraph 10 of Appellant's Motion to Dismiss Based on Double Jeopardy and/or Speedy Trial Violation, which was served on the prosecutor on September 16, 1999, although it was not filed with the clerk until September 17, 1999 at 10:18 A.M. (V 1 R 42-44). Paragraph 10 of that pleading reads: "On September 16, 1999, the Court ruled, over the Defendant's objection, that the State would be permitted to file the second Amended Information" (V 1 R 43), which allegation is **not** supported by the trial transcript.

> be fall [Respondent] that I grant leave I have concluded that there could be substantive prejudice to him by doing that. Consequently I was prepared to tell you when you came in here that I was not going to give them leave to the amended information.
>
> * * *
>
> THE COURT: For the purpose of the record I'm *going to file* the second amended information *and make a notation on it* that leaves it was made was denied by the court.
>
> MS MCSWAIN: Yes, ma'am. Also if you could state did withdraw it of its own accord.

(V 3 T 420-421, emphasis supplied)

There was no reference to any "sexual battery" in the testimony presented on the morning of the third day of trial (September 16, 1999), only vague references to the victim's claims that Respondent had touched or molested her, which related to the charge of engaging in sexual activity with a person between the ages of twelve and eighteen over whom Respondent had familial or custodial authority. The only witnesses presented that morning were Jill Delanis, an assistant principal at the high school the victim attended (V 2 T 318-323), whose testimony concerned only the victim's academic progress and performance, and the victim's mother (V 2 T 323 - V 3 T 398), whose testimony concerned Respondent's relationships and interactions with the mother and her children during the period that Respondent lived with them, which related to the element of familial or custodial

authority. The only references made to sexual activity between Respondent and the victim in the mother's testimony were a handful of scattered and general references (no specific dates) to the victim's having told her mother that Respondent had been "touching her" (V 3 T 358, 364, 384, 386-88) and a few scattered and general references to Respondent's sexual "molestation" or "molesting" of the victim (V 3 T 360, 362-363, 376).

Neither the State nor defense counsel included a discussion of the charges contained in the (by then withdrawn) proposed amended information in their closing arguments.

Respondent was convicted of sexual activity with a child 12 years old or older but less than 18 over whom he was in a position of familial or custodial authority, as charged (V 1 R 77, V 4 T 643).

On direct appeal, the Second District Court of Appeal held that leave of court is not required in order for the State to file an amended information during trial, that Respondent's rights to due process were violated upon the filing of the second amended information, and that he could not subsequently be tried on any of the charges alleged in any of the informations that had been filed in this case. The Second District therefore reversed Respondent's conviction and ordered that he be discharged. *Clements v. State*, 814 So. 2d 1075 (Fla. 2d DCA 2002).

The State has now sought review by this Court of the Second District's decision.

SUMMARY OF THE ARGUMENT

The proposed second amended information was never officially filed by the State as a substitute or replacement for the amended information that had been filed before trial began. It therefore could not and did not act as a nolle prosequi of the amended information, there was no double jeopardy here, and the trial court correctly denied Respondent's motion for dismissal or discharge.

Even assuming arguendo that the proposed amended information *was* officially filed as a substitute or replacement for the amended information that had been filed before trial began, the State could subsequently amend it by orally withdrawing it and stating that it wished to "go back to" the previous information. A defendant is entitled to relief based on a procedural irregularity at trial only if he has been prejudiced by the departure from standard procedure, and Respondent was not prejudiced inasmuch as he was not rearraigned, and the jury was never told of or instructed on the new charge.

ARGUMENT

THE TRIAL COURT CORRECTLY RULED THAT RESPONDENT WAS ENTITLED TO NEITHER DISMISSAL NOR DISCHARGE BASED ON THE STATE'S "FILING" AND WITHDRAWAL OF AN AMENDED INFORMATION DURING TRIAL.

This is a question of law, which is reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 1023, 127 L. Ed. 2d 344 (1994).

The Second District held that leave of court is not required in order for the State to file an amended information during trial and that Respondent's due process rights were violated upon the filing of the second amended information. However, perhaps due to the very garbled transcript of Respondent's trial, the Second District failed to recognize that the State's proposed amended information was never filed *by the State*, as required by Article I, Section 15, of the Florida Constitution; Sections 932.47 and 932.48, Florida Statutes (1999); and Rule 3.140, Florida Rules of Criminal Procedure.

Contrary to the statement in the Second District's opinion, 814 So. 2d at 1076, that the initial discussion of the State's aborted attempt to amend the information during trial occurred at 10:17 a.m. on the third day of trial, there is nothing in the record on appeal that would pinpoint the specific time that the prosecutor for the first time ever mentioned filing the proposed amended information. The second amended information itself does

contain a clerk's stamp bearing a time of 10:17 a.m., but the **date** on that clerk's stamp is September **17**, not September **16**, September 16 being the third day of trial (V 1 R 45). On the other hand, the trial court's handwritten notation on the second amended information is dated 9/**16**/99.

The trial judge's decision in open court on September 16, 1999, to file the proposed amended information to reflect her notation thereon denying leave to amend resulted in the only copy of the proposed amended information being filed with the clerk and reflecting the filing date and time of September 17, 1999 at 10:17 a.m. 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. The situation should be considered the same as if the prosecutor had gone to the clerk's office and either handed it to a clerk or placed it in a designated location for filing but then snatched it back before the clerk had stamped it in. *See Porter v. State*, 749 So. 2d 514 (Fla. 2d DCA 1999) (held: motion for new trial was filed when it was date-stamped in the clerk's office, rather than when it was delivered to a judge's office two days earlier, where the secretary who left the motion at the judge's office did not ask the judge to accept the motion for filing and the judge did not note the fil-

ing date on the motion, but merely sent the motion to the clerk's office for filing). Because the prosecutor announced that she was withdrawing it 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 prosecution needed to satisfy the above-cited constitutional, statutory, and rule requirements for the commencement of prosecution.

Thus, because the proposed amended information was never officially filed by the State as a substitute or replacement for the amended information that had been filed before trial began, it did not act as a nolle prosequi of the amended information, there was no double jeopardy here, and the trial court correctly denied Respondent's motion for dismissal or discharge.

The State agrees with the Second District that Respondent's rights to due process would have been violated had he actually been tried on and convicted of both counts of the proposed amended information, *see Green v. State*, 728 So. 2d 779 (Fla. 4th DCA 1999), but, even then, the remedy would have been to vacate the capital sexual battery conviction, leaving intact his conviction of engaging in sexual activity with a person between the ages of twelve and eighteen over whom he had familial or custodial authority.

However, Respondent was *not* tried on the proposed amended information. The statement in the Second District's opinion

that "The trial then proceeded, without arraignment, *upon* the second amended information until the lunch recess," 814 So. 2d at 1076 (emphasis supplied), is factually inaccurate. Not only was Respondent not rearraigned, but the jury was never told of or instructed on the new charge. Moreover, as noted *supra* at pp. 5-6, there was no reference to any "sexual battery" in the testimony presented on the morning of the third day of trial, and neither the State nor defense counsel included a discussion of the charges contained in the (by then withdrawn) proposed amended information in their closing arguments.

Accordingly, Respondent was not prejudiced by the prosecutor's discussion of filing or attempted filing in the middle of trial of the proposed amended information followed by the prosecutor's subsequent announcement that she was withdrawing the proposed amended information and proceeding on the first amended information—all of which occurred outside the presence of the jury.

Moreover, even assuming arguendo that the proposed amended information *was* officially filed as a substitute or replacement for the amended information that had been filed before trial began, 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 under Article I, Section 15 of the Florida Consti-

tution, and that the State could subsequently amend it by orally withdrawing it and stating that it wished to "go back to" the previous information.

This Court held in *Anderson* that a defendant is entitled to relief based on a procedural irregularity at trial only if he has been prejudiced by the departure from standard procedure. Specifically, *Anderson* quoted (at 537 So. 2d 1375) the following language from *Lackos v. State*, 339 So. 2d 217, 219 (Fla. 1976):

> We are persuaded by the reasoning articulated by Judge Grimes, writing for the District Court in the instant case:
>
> > 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. *Michigan v. Tucker*, 1974, 417 U.S. 433. 94 S. Ct. 2357, 41 L. Ed. 2d 182. Respondent 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* [*v. State*, 157 Fla. 254, 25 So. 2d 661 (1946)], and *Sipos* [*v. State*, 90 So. 2d 113 (Fla. 1956)].

While *Anderson* is factually distinguishable in that the defense sub judice did not agree to continue proceeding on the first amended information, preferring instead to insist on a

discharge, the salient point is that Respondent could not and did not demonstrate either below or on appeal that he suffered any prejudice as a result of the prosecutor's abortive effort to amend the information during trial. Thus, Respondent has not made the showing of prejudice required by *Anderson*, and *Anderson* therefore mandates affirmance of Respondent's conviction.

Accordingly, this Court should quash the Second District's opinion discharging Respondent and remand this case with directions to affirm Respondent's conviction of and sentence for engaging in sexual activity with a person between the ages of twelve and eighteen over whom he had familial or custodial authority.

CONCLUSION

Petitioner respectfully requests that this Honorable Court quash the Second District's opinion discharging Respondent and

remand this case with directions to affirm Respondent's conviction of and sentence for engaging in sexual activity with a person between the ages of twelve and eighteen over whom he had familial or custodial authority.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard J. Sanders, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 26th day of February, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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