IN THE SUPREME COURT OF FLORIDA

DAVID T. DIONNE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO. SC02-1290
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 5D01-1087
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

An information was filed against Petitioner on January 25, 2000. The Petitioner was charged with Sexual Battery on a Person Twelve Years of Age or Older (Record page 6).

On October 5, 2000, the Petitioner filed a Motion to Preclude Testimony of Alleged Victim and Motion to Suppress Statement by Defendant arguing that any confession or admissions made by the Petitioner should be suppressed because the State failed to independently establish corpus delicti (Record pages 13-15).

A hearing on the motion was held on November 28, 2000, before the Honorable R. Stancil (Supp. Record pages 3-16). Judge Stancil ruled that Section

92.565, Florida Statutes (2000) applied to the case and that the Petitioner's statement that he slid two fingers in the victim's private parts while she was asleep would be admissible and denied the Petitioner's motion (Record page 21; Supp. Record, page 14).

On December 8, 2000, the Petitioner filed a Supplemental Motion to Preclude Testimony of Alleged Victim and Motion to Suppress Statement by Defendant (Record pages 27-29). In addition to incorporating the argument advanced in Petitioner's first motion the Petitioner alleged, inter alia, that Section 92.565, Florida Statutes (2000) violated the ex post facto clause of the Florida and United States Constitutions (Supp. Record pages 27-29).

The Respondent filed a response to the Petitioner's supplemental motion on March 17, 2001 (Record pages 45-47).

The same day the Respondent's response was filed, Judge Stancil entered an order granting Petitioner's supplemental motion ruling that Section 92.565, Florida Statutes (2000) violated the ex post facto clause because "The statute in the instant case relates to the quantum of evidence and is not merely a question of the admission of evidence as argued by the State" (Record pages 59-61). The Court held that Section 92.565 could not be retroactively applied and prohibited the State from introducing the Petitioner's statements in the absence of an independently

established corpus delicti (Record pages 61, 62).

The State filed a timely Notice of Appeal on April 29, 2001 (Record page 63).

The Fifth District Court of Appeal issued an opinion on March 15, 2002, reversing the suppression of the Petitioner's confession ruling that Section 92.565 is a procedural rule of evidence that addresses the question of admissibility rather than the quantum of evidence required for a conviction and its retroactive application is not violative of ex post facto law. See State v. Dionne, 814 So. 2d 1087 (Fla. 5th DCA 2002), rehearing denied May 3, 2002. (Appendix A)

SUMMARY OF ARGUMENT

The trial court correctly granted Petitioner's motion to suppress because to allow the alleged admissions of the Petitioner, which occurred prior to the effective date of Section 92.565, Florida Statutes (2000), would violate the ex post facto clauses of the Florida and United States Constitutions. Section 92.565 was a substantive change in the law reducing the quantum of evidence necessary to convict and cannot be retroactively applied. The Fifth District ruled that Section 92.565 implemented a change in a procedural rule. Section 92.565 was enacted by the Florida legislature, however, Article V Section 2(a) of the Florida Constitution grants procedural rule making authority solely to the Florida Supreme Court. The legislature does not have the authority to implement procedural rules.

ARGUMENT

WHETHER RETROACTIVE APPLICATION OF SECTION 92.565, FLORIDA STATUTES (2000) VIOLATES THE EX POST FACTO CLAUSES OF BOTH THE FLORIDA AND UNITED STATES CONSTITUTION.

The standard of review to be applied in this case is de novo because it involves a question of whether the court applied the correct legal rule. Vaughn v. State, 711 So. 2d 64, 66 (Fla. 1st DCA 1998).

The State charged the Petitioner by information with Sexual Battery on a Child alleging the offense was committed between January 7 and 8, 2000. (R 6) Section 92.565 Florida Statutes (2000) went into effect June 5, 2000, providing:

> (1) As used in this section, the term "sexual abuse" means an act of a sexual nature or sexual act that may be prosecuted under any law of this state, including those offenses specifically designated in subsection (2).
>
> (2) In any criminal action in which the defendant is charged with a crime against a victim under s. 794.011; s. 794.05; s. 800.04; s. 826.04; s. 827.03, involving sexual abuse; s. 827.04, involving sexual abuse; or s. 827.071, or any other crime involving sexual abuse of another, or with any attempt, solicitation, or conspiracy to commit any of these crimes, the defendant's memoralized confession or admission is admissible during trial without the state having to prove a corpus delicti of the crime if the court finds in a hearing conducted outside the

> presence of the jury that the state is unable to show the existence of each element of the crime, and having so found, further finds that the defendant's confession or admission is trustworthy. Factors which may be relevant in determining whether the state is unable to show the existence of each element of the crime include, but are not limited to, the fact, at the time the crime was committed, the victim was:
>
> (a) Physically helpless, mentally incapacitated, or mentally defective, as those terms are defined in s. 794.011.
>
> (b) Physically incapacitated due to age, infirmity, or any other cause; or
>
> (c) Less than 12 years of age.
>
> (3) Before the court admits the defendant's confession or admission, the state must prove by the preponderance of evidence that there is sufficient corroborating evidence that tends to establish the trustworthiness of the statement by the defendant. Hearsay evidence is admissible during the presentation of evidence at the hearing. In making the determination, the court may consider all relevant corroborating evidence, including the defendant's statements.
>
> (4) The court shall make specific findings of fact, on the record, for the basis of its ruling.

The State desires to convict the Petitioner using statements he made prior to June 5, 2000, because the corpus delicti cannot be independently established.

Section 92.565 would make the admission of the statements possible in this sexual battery case. However, prior to the effective date of Section 92.565, corpus delicti had to be first established by evidence without the aid of an admission. In Burkes v. State, 613 So. 2d 441, 444 (Fla. 1993) this Court ruled:

> We likewise held in Hodges v. State, 176 So. 2d 91, 92 (Fla. 1965), where "admissions against interest" were involved, that a new trial was required because "the fact that the crime of larceny had occurred could not be established by the other evidence introduced without the aid of the admission." Id. at 93 (emphasis in original). To the same effect is Deiterle v. State, 101 Fla. 79, 80, 134 So. 42, 43 (1931), which held that: "The corpus delicti cannot be proven solely by a confession or admission." (Emphasis in original.)

The trial court found that under the facts of this case that the corpus of the crime could not be laid out without the Petitioner's admission because the alleged victim was asleep at the time of the offense occurred and didn't know what happened to her. The Court also found that Section 92.565 could not be applied retroactively. (R 60) The trial court was correct. In Bates v. State, 750 So. 2d 6, 10 (Fla. 1999) this Court ruled:

> In Florida, without clear legislative intent to the contrary, a law is presumed to apply prospectively. See State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983); McCarthy v. Havis, 23 Fla. 508, 2 So. 819,

> 821 (1887); Bond v. State, 675 So. 2d 184, 185 (Fla. 5th DCA 1996). Retroactive application of the law is generally disfavored, see Herbert Broom, Legal Maxims 24 (8th ed. 1911) ("Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."); and any basis for retroactive application must be unequivocal and leave no doubt as to the legislative intent. See Larson v. independent Life & Accident Ins. Co., 158 Fla. 623, 29 So. 2d 448 (1947); see also Broom, supra at 25 ("it is a general principle of our law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction.")

There is nothing in Section 92.565 that indicates that the statute is to be applied retroactively. Therefore, the Petitioner's statements cannot be used without first proving the corpus delicti.

The Fifth District held that Section 92.565 is merely a procedural change which can be retroactively applied. However, the trial court correctly followed Carmell v. Texas, 529 U.S. 513 (2000) which is directly on point. In Carmell, a Texas law allowed convictions for some sexual offenses based on victim testimony alone if the victim was under the age of 14 at the time of the offense. Texas amended the law to allow for convictions based solely on testimony by victims

under the age of 18. Some of the defendant's offenses were committed when the victim was over 14 but under 18 and were committed prior to the amendment. The defendant was convicted for several of the offenses based solely on the victims testimony even though the victim was over 14 years old. The court found the retroactive application of the amended law violated the Ex Post Facto Clause. The Court explained the four categories of Ex Post Facto prohibitions:

> The proscription against ex post facto laws "necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." Calder v. Bull, 3 Dall. 386, 390 (1798) (Chase, J.). In Calder v. Bull, Justice Chase stated that the necessary explanation is derived from English common law well known to the Framers: "The expressions 'ex post facto laws,' are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by Legislators, Lawyers, and Authors." Id., at 391; see also id., at 389 ("The prohibition... very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws..."); id., at 396 (Paterson, J.). Specifically, the phrase "ex post facto" referred only to certain types of criminal laws. Justice Chase catalogued those types as follows:
>
> "I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punished such action. 2d. Every law that aggravates a crime, or makes it greater than it

> was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

Carmell at 528, 529.

The Court found that the retroactive application of the amended Texas statute violated the prohibition of the fourth category and found that the Amended Texas Article 38.07:

> ... is unquestionably a law "that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Under the law in effect at the time the acts were committed, the prosecution's case was legally insufficient and petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim's testimony and corroborative evidence. The amended law, however, changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence. Under any commonsense understanding of Calder's fourth category, Article 38.07 plainly fits. Requiring only the victim's testimony to convict, rather than the victim's testimony plus other corroborating evidence is surely "less testimony required to convict" in any straightforward sense of those words.

Carmell at 530.

The Court further noted:

> Calder's fourth category addresses this concern precisely. A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim or reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

Carmell at 532, 533.

Likewise, the retroactive application of Section 92.565 reduces the quantum of evidence necessary to convict. Carmell is very similar to the instant case. In Carmell the requirement that the victim's testimony needed corroboration was

eliminated. In the instant case the requirement of establishing the corpus delicti prior to admitting admissions of the accused were eliminated. Both cases involve a lessening of the quantum of evidence and both violate the prohibition of the fourth category. Prior to the effective date of Section 92.565 the State was required to produce evidence sufficient to establish the corpus delicti prior to introducing admissions of the accused. However, the State's job is now much easier because they don't need to first establish the corpus delicti. Surely this is a reduction in the quantum of evidence. The quantum of evidence required under Section 92.565 to convict must be either, less than, equal to, or greater than it was previously. Prior to Section 92.565 the State would not be able to convict the Petitioner but with retro active application a conviction is now possible. Clearly, the quantum is now less than it was. Judge Stancil correctly ruled in his order "Surely a law reducing the quantum of evidence required to convict is as unfair as retroactively eliminating an element of the offense or increasing the punishment" and "The statute in the instant case relates to the quantum of evidence and is not merely a question of the admission of evidence as argued by the State" (Record pages 60, 61).

The State knows it cannot convict the Petitioner under the previous requirements and therefore seeks to be relieved of the burden of establishing the corpus delicti. The State wants the less demanding and more favorable rules and that is fundamentally unfair. Furthermore, if the Fifth District is correct that Section

92.565 merely implemented a procedural rule change this Court should declare Section 92.565 unconstitutional because Article V, Section 2(a) of the Florida Constitution grants procedural rule making authority solely to the Florida Supreme Court:

> **Section 2. Administration; practice and procedure**. – (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Armed Forces for an advisory opinion. Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

The legislature does not have the authority to implement procedural rules. Thus, if Section 92.565 is a procedural rule it is unconstitutional. However, Petitioner contends Section 92.565 implemented a substantive change in the law and therefore cannot be retroactively applied.

It is the position of the Petitioner that the Fifth District Court of Appeal's ruling that Section 92.565 implemented a procedural rule change should be reversed

by this court.

CONCLUSION

Based on the arguments and authorities cited herein, the Petitioner respectfully requests this Honorable Court reverse the decision of the Fifth District Court of Appeal and reinstate the decision of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal, this ____ day of May 2003.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

_____

THOMAS J. LUKASHOW
ASSISTANT PUBLIC DEFENDER

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MERIT BRIEF OF PETITIONER

APPENDIX A