IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID ERIC HOBBS,

Petitioner,

v.

Case No. SC08-615
5th DCA No. 5D07-1199

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

BILL McCOLLUM
ATTORNEY GENERAL

PAMELA J. KOLLER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0775990

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 0773026
444 Seabreeze Boulevard
Suite 500
Daytona Beach, Florida 32118
(386) 238-4990
(386) 238-4997 (fax)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with one count of sexual activity with a child and lewd or lascivious battery. (R28, Vol I). The intimate relationship between father and daughter was revealed on November 8, 2006, after the victim, T.M.Z., refused to exit her father's car and law enforcement was contacted. (R42, Vol I). After Petitioner left, T.M.Z. informed the law enforcement officers that her father had been having sexual relations with her beginning two years ago when they resided in Montana. Id. She and her father had engaged in sexual relations the night before when Petitioner made a comment about being horny and he wanted to have sexual relations with her. Id. They had sexual relations and before Petitioner ejaculated, he withdrew from her and ejaculated into a towel, which he had always done during the approximately 200 times they had engaged in sexual relations. Id. T.M.Z. explained that she voluntarily has sexual relations with her father because it makes him happy. Id. She also does not want him to waste their money on a girlfriend, because their money is very tight. Id. T.M.Z. provided both an oral and a written statement regarding the sexual abuse. (R50-51,52-69, Vol I).

Armed with her statements, the police spoke with Petitioner about T.M.Z.'s allegations. At first, Petitioner denied having sexual relations with his daughter, but when his descriptions of

her jealous actions caused the detective to comment that T.M.Z. sounded more like a love interest than a daughter, Petitioner admitted to having sexual relations with his daughter. (R70-110, Vol I). Petitioner explained that T.M.Z. refuses to perform oral sex and they have never had anal sex. (R103, Vol I).

On November 9, 2006, the media contacted T.M.Z. and she told the media that she had lied and her father had done nothing to her. (R47, Vol I). Another individual on the scene apparently told the reporters that T.M.Z. was lying now and Petitioner had been abusing T.M.Z. for years. Id.

On January 5, 2007, the State filed a motion regarding the admissibility of admissions pursuant to section 92.565, Florida Statutes. (R113, Vol I). In the motion, the State indicated that it was seeking to admit Petitioner's audiotaped confession pursuant to this section due to the victim's recantation. Id. The State asserted that the confession was trustworthy. Id. The defense filed a written response relying upon Kelly v. State, 946 So. 2d 591 (Fla. 1st DCA 2007). (R117-118, Vol I).

A hearing was held on February 22, 2007. At the hearing, the sex crimes investigator, Detective Samara Melich (Detective Melich), revealed that the detective had been the one to speak with T.M.Z. about the sexual abuse. (T4-5, Vol I). After obtaining the audiotaped statement from T.M.Z., Detective Melich spoke with Petitioner and he voluntarily agreed to follow her

back to the Sheriff's Office. (T6, Vol I). The State introduced both transcripts of the victim's and Petitioner's statements into evidence. (T7-8, Vol I). Finally, the State introduced the declination to prosecute signed by the victim. (T9, Vol I). The State then argued that because of the victim's refusal to cooperate with the prosecution of her father, the father's confession should be admitted without a *corpus delecti* pursuant to section 92.565. (T12-13, Vol I). The prosecutor noted that the statements were introduced to establish the trustworthiness of the confession and the State would not be able to prove corpus due to the victim's declination or recantation. (T13, Vol I). Furthermore, although none of the specified factors applied in this case, the list indicates that it is not exclusive and in this context should be applied to allow Petitioner's confession to be admitted in at trial. Id.

The defense relied upon the Kelly v. State case which had been issued a month before the hearing. (T14, Vol I). The State, after reviewing the case, agreed that the court did not have any choice but to deny the motion and the State would appeal the issue to the Fifth District Court of Appeal. (T15, Vol I). The trial judge indicated he would take it under advisement, but that the court would presumably deny the motion. (T16, Vol I).

On March 21, 2007, the trial court issued an order denying the motion, relying upon the Kelly v. State opinion. (R132-133,

Vol I). The State appealed asking the Fifth District of Appeal not to follow the Kelly v. State ruling, and to hold that the victim's statement was admissible under section 92.565, Florida Statutes.

The Fifth District Court of Appeal issued an opinion in State v. Hobbs, 974 So. 2d 1119 (Fla. 5th DCA 2008), holding:

> David Eric Hobbs, Appellee, stands accused of sexual activity with a child by a person in a familial relationship and lewd or lascivious battery. The sole issue on appeal concerns the admissibility of Appellee's confession pursuant to section 92.565, Florida Statutes (2007), which eliminates the *corpus delicti* precondition for introduction of admissions and confessions in sexual abuse cases when the state is otherwise unable to prove the crime. Based on the First District's decision in Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006), the trial court ruled that Appellee's confession was inadmissible because the State's inability to prove the crime was due to the victim's lack of cooperation rather than her incapacity. The State acknowledges that the trial court correctly applied Kelly, but contends here, as it did below, that Kelly's narrow construction of the statute is erroneous. Based on the unambiguous text of the statute, we agree and certify conflict with Kelly. Accordingly, we reverse and remand this cause for further proceedings.
>
> Several days after the victim accused Appellee of improper sexual activity and gave a sworn statement to police, she recanted, claiming that she had fabricated the charges. Prior to the recantation, however, police had interviewed Appellee, and he provided a recorded confession. As a result of the recantation, the State filed a

> pretrial motion seeking to admit Appellee's confession without first proving each element of the charged offenses. The State's motion was based on section 92.565(2), Florida Statutes[.]
>
> **********
>
> Despite the pervasive language of the statute, Appellee contends that the statute is only applicable when the state is unable to prove a crime because the victim is incapacitated or under the age of twelve, which the State concedes is not the case here. Appellee's position is grounded in the First District's decision in Kelly, which, on indistinguishable facts, held that section 92.565 only applies when the state is unable to prove a crime because of some disability on the part of the victim. Kelly, 946 So.2d at 593.
>
> **********
>
> We conclude, therefore, that where a victim repudiates charges and declines to cooperate, and other evidence is not available to prove the *corpus delicti*, the burden of the state can be met even though the victim is not incapacitated. See Hernandez v. State, 946 So.2d 1270 (Fla. 2d DCA 2007)(statute permits use of trustworthy confession when state unable to locate victim). Because the trial court was bound by Kelly and based its ruling entirely on that precedent, it did not fully address the issues and make the specific findings required by the statute. On remand, the trial court shall conduct a new hearing, as contemplated by the statute, and make specific findings as appropriate.
>
> We certify that our holding today conflicts with the First District's decision in Kelly.

Id. at 1120-1121.

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court. Jurisdictional briefs followed. This Court accepted jurisdiction on May 20, 2008. The State files this brief on the merits in response to Petitioner's merits brief.

SUMMARY OF THE ARGUMENT

The interpretation and application of section 92.565, Florida Statutes, advocated by the First District Court of Appeal in Kelly v. State, 946 So. 2d 591 (Fla. 1st DCA 2007), does not conform with the plain language of that section. The unambiguous purpose of section 92.565 is to eliminate the *corpus delecti* requirement and permit the admission of confessions in sexual abuse cases where the State is unable to prove an element. Limiting this section to those factors listed, in complete derogation of the plain language of the section, is erroneous. Accordingly, this Court should affirm the Fifth District Court of Appeal's holding in State v. Hobbs, 974 So. 2d 1119 (Fla. 5th DCA 2008), and disapprove the First District Court of Appeal's holding in Kelly v. State, 946 So. 2d 591 (Fla. 1st DCA 2007).

ARGUMENT

THE APPLICATION OF SECTION 92.565, FLORIDA STATUTES, ADVOCATED BY THE FIRST DISTRICT COURT OF APPEAL IN KELLY V. STATE IS IN DEROGATION OF THE PLAIN LANGUAGE OF THAT SECTION AND THIS COURT SHOULD AFFIRM THE HOLDING OF THE FIFTH DISTRICT COURT OF APPEAL IN STATE V. HOBBS.

In State v. Hobbs, 974 So. 2d 1119 (Fla. 5th DCA 2008), the Fifth District Court of Appeal held that pursuant to section 92.565, Florida Statutes, where a victim repudiates charges and declines to cooperate, and other evidence is not available to prove the *corpus delicti*, the burden of the State can be met even though the victim is not incapacitated. Id. at 1122. The Fifth District Court certified conflict with Kelly v. State, 946 So. 2d 591 (Fla. 1st DCA 2007); wherein, the First District Court of Appeal held that under the rule of *ejusdem generis* that section 92.565, Florida Statutes, applied only where there was some sort of disability on the part of the victim. Kelly v. State, 946 So. 2d at 593. The First District Court of Appeal's interpretation of that section is in derogation of the plain language and purpose of that section and this Court should affirm the holding of the Fifth District Court of Appeal in State v. Hobbs.[1]

[1]The issue in this case involves matters of statutory construction which are questions of law subject to *de novo* review. Maggio v. Fla. Dep't of Labor & Employment Sec., 899 So. 2d 1074 (Fla. 2005); see also State v. Florida, 894 So. 2d 941,

Legislative intent is the polestar that guides a court's inquiry in construing a statute. See M.W. v. Davis, 756 So. 2d 90, 100 (Fla. 2000); State v. Patterson, 694 So. 2d 55 (Fla. 5th DCA 1997). The first step in determining the meaning of a statute is to examine its plain language. Koile v. State, 934 So. 2d 1226, 1230 (Fla. 2006); see also Shelby Mut. Ins. Co. v. Smith, 556 So. 2d 393, 395 (Fla. 1990)("The plain meaning of statutory language is the first consideration of statutory construction."). When the language is clear and unambiguous, as it is here, there is no need to resort to rules of statutory construction to determine the legislature's intent. Id. at 1230-31(citing Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 303 (Fla. 2002)). Further, words must be given their plain meaning and statutes should be construed to give them their full effect. Id.

"When faced with an unambiguous statute, the courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'" State v. Cohen, 696 So. 2d 435, 437 (Fla. 4th DCA 1997), citing, Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). "This principle is 'not a rule of grammar;

---

945 (Fla. 2005)(An appellate court reviews *de novo* an issue that requires only a legal determination based on undisputed facts).

it reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature.'" Id. (citing State v. Brigham, 694 So. 2d 793 (Fla. 2d DCA 1997)).

Section 92.565, Florida Statutes, provides that:

> (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 memorialized 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 that, 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 a 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 its 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.

(Emphasis added).

When section 92.565 is properly invoked, it replaces the *corpus delicti* doctrine with the trustworthiness doctrine with respect to the offenses listed in the statute. See Geiger v. State, 907 So. 2d 668, 674 (Fla. 2d DCA 2005); State v. Dionne, 814 So. 2d 1087, 1091 (Fla. 5th DCA 2002)("The statute substitutes the trustworthiness standard in place of the corpus delicti rule in the circumstances addressed by the statute."), rev. dismissed, 865 So. 2d 1258 (Fla. 2004). As explained by Judge Thomas in his dissent in Kelly v. State, "the critical focus of the statute is the trustworthiness of the confession and not the particular reason why the State cannot prove an element of the crime." Kelly v. State, 946 So. 2d at 597-598 (Thomas, J., dissenting).

Even the First District has observed that section 92.565 "serves the same general purpose as the *corpus delicti* rule but it contains a different set of safeguards." Bradley v. State, 918 So. 2d 337, 340 (Fla. 1st DCA 2005). The statutory safeguards require (among other things) that the trial court must find (1) "that the [S]tate is unable to show the existence of each element of the crime" and (2) "that the defendant's confession or admission is trustworthy." § 92.565(2). See Bradley, 918 So. 2d at 340.

In the case at bar, there is no need to look to principles of statutory construction because the statute is clear and unambiguous. The 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 statutory list. State v. Dionne, 814 So. 2d at 1091 ("[s]ection 92.565 eliminates *corpus delicti* as a predicate for the admission of a defendant's confession when the state is unable to show the existence of each element of the offense because the victim is either physically helpless, mentally incapacitated, mentally defective, or physically incapacitated. **These factors are not exclusive**.")(Emphasis added). Furthermore, the minor victim's refusal to testify against the adult defendant is consistent with the other factors on the list.

In Kelly v. State, the First District relied upon the maxim of statutory construction known as *ejusdem generis*. Kelly v. State, 946 So. 2d at 593. "*Ejusdem generis* provides that where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated." State v. Cohen, 696 So. 2d at 438. The Kelly v. State majority concluded that under this rule of statutory interpretation, this section applied only where there was some sort of disability on the part of the victim. Kelly v. State, 946 So. 2d at 593. This was clearly erroneous. Where the plain language of the statute is unambiguous, it is unnecessary to apply the rule of *ejusdem generis*. McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998)("[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction.")(quoting Holly v. Auld, supra).

Assuming the Legislature wished to limit this section only to situations where the victim was suffering some sort of disability, the statute would so state. Notably, as Judge Thomas noted in his dissent, both the Senate and the House staff analyses relating to the amendment adding this language indicate that the list is non-inclusive and is simply a list of factors

which may be relevant to the court's determination of whether the State will be able to establish the elements of the offense. Kelly v. State, 946 So. 2d at 597 (Thomas, J., dissenting). As such, there was no legislative intent to so limit this section to apply only to disability of the victim.

Also, there is another principle of statutory interpretation. The "principle of *in pari materia* requires that a law be construed together with any other law relating to the same purpose such that they are in harmony." State v. Cohen, 696 So. 2d at 441. Section 90.804, Florida Statutes, allows certain hearsay statements to be admitted into evidence when the declarant is unavailable. Section 90.804(1), Florida Statutes defines unavailability as:

> (1) DEFINITION OF UNAVAILABILITY. --"Unavailability as a witness" means that the declarant:
>
> (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
>
> (b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
>
> (c) Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;
>
> (d) Is unable to be present or to testify at the hearing because of death or

> because of then-existing physical or mental illness or infirmity; or
>
> (e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.
>
> However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his or her statement in preventing the witness from attending or testifying.

Thus, for purposes of entering hearsay, the declarant is unavailable if the declarant refuses to testify. Moreover, the witness's repeated refusal to testify is sufficient to satisfy the statute. See Happ v. Moore, 784 So. 2d 1091, 1101 (Fla. 2001)("Miller made it quite clear to the court that he was not going to testify despite the possibility of fines or imprisonment. Under these circumstances, a court order would have been futile. Accordingly, Happ's claim that the trial court misapplied section 90.804 is without merit."); Stano v. State, 473 So. 2d 1282, 1286 (Fla. 1985) (holding that trial court did not abuse its discretion by declaring the victim's parents unavailable when the parents repeatedly refused to testify).

In fact, in Peterson v. State, 810 So. 2d 1095 (Fla. 5th DCA 2002), the Fifth District Court of Appeal related the unavailability of a witness for Section 92.565, Florida

Statutes, to unavailability for purposes of the admission of hearsay. Id. at 1099. In Peterson, the twelve-year-old victim was called to testify, and although she was crying, she was able to answer general questions. However, when she was asked about when Peterson came into her room, she continued to cry and refused to answer more questions. When the efforts to get the child to testify failed, "[t]he judge made an express finding that she refused to testify or that she had no memory of the events and thus was 'unavailable.'" Id. The Fifth District Court of Appeal found that the trial judge had satisfied the requirements of the statute.

Likewise, in the case at bar, the victim's refusal to testify to protect the sexual offender constitutes unavailability under the statute. The abuse in this case came to the authorities' attention because the victim became angry with her father after she learned he had a date. The victim, in her statement to police, revealed that she had been having sex with her father for a couple years because it made him happy and, further, this way her father did not spend money they did not have on a girlfriend. Petitioner, after being advised of his constitutional rights, eventually admitted that he had been having sexual relations with his daughter, but denied that they had ever had anal sex and explained that his daughter refused to perform oral sex. This is the statement the State is attempting

to introduce. Unfortunately, soon after the charges became public, the victim told someone from the media that she had lied and executed a declination to prosecute. As a result of the victim's clear expression of a refusal to cooperate with the prosecution of her father, the State filed a motion seeking to introduce Petitioner's statement pursuant to section 92.565. The State's motion was denied based upon Kelly v. State.

However, as the Fifth District Court of Appeal recognized in State v. Hobbs, these circumstances are precisely the sort of circumstances that section 92.565 was enacted to remedy, i.e., a child of minority age who is being sexually exploited by her father but who refuses to cooperate with a prosecution because she loves her father and their unnatural relationship has damaged and confused her. Without section 92.565, the victim's refusal to cooperate with the prosecution would mean that her father would go free under a standard *corpus delecti* situation. However, applying section 92.565 in this case would satisfy the clear intent of the Legislature in passing this legislation, i.e., allowing the prosecution of adults to who have confessed to exploiting children to proceed even when the child cannot or will not help or protect themselves.

Indeed, including the minor victim's refusal to testify against the sexual offender as a reason why the State is unable to prove each element of the offense and invoke Section 92.565,

is consistent with Florida's overall statutory scheme regarding the sexual abuse of children. The Florida Supreme Court held that "[t]he State has the prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interests of the individual." Jones v. State, 640 So. 2d 1084, 1085 (Fla. 1994); see also Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991)("sexual exploitation of children is a particularly pernicious evil that sometimes may be concealed behind the zone of privacy that normally shields the home. The state unquestionably has a very compelling interest in preventing such conduct.") The Legislature, aware of minor's limited experiences and particular vulnerabilities, has limited the ability of minors to make certain decisions, especially where sex is involved.

For example, the Legislature has determined that minors are not able to consent to sexual offenses. In prosecuting lewd and lascivious offenses, section 800.04(2), Florida Statutes (2006), provides that "[n]either the victim's lack of chastity nor the victim's consent is a defense to the crimes proscribed by this section." The Florida Supreme Court "squarely held that section 800.04, Florida Statutes, is constitutional because the state's compelling interest in protecting children outweighed a minor's right to privacy. The court reasoned that the statute's disallowance of consent of the fourteen-year-old victims as a

defense did not render the statute unconstitutional under the privacy provision of the state constitution." State v. Raleigh, 686 So. 2d 621, 622 (Fla. 5th DCA 1996)(relying upon Jones v. State, supra).

Similarly, section 827.071 governs the sexual performance of a child. The district court stated that "if the defendant is found to have participated in those acts which are prohibited by Section 827.071(2), it is irrelevant to the defendant's guilt that the minor child who was employed, authorized, or induced by the defendant to engage in the sexual performance, may have either consented to be so involved or may have even solicited the defendant to allow himself or herself to be so involved." State v. Snyder, 807 So. 2d 117, 120 (Fla. 3d DCA 2002); see also Schmitt v. State, 590 So. 2d at 410-411 ("it is evident beyond all doubt that any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents and whether or not that conduct originates from a parent.")

Likewise, a minor should not be able to preclude a sexual offender from being prosecuted because the minor lacks the experience to discern love and affection from exploitation. Therefore, including a minor victim's refusal to testify against the sexual offender as a factor to consider as to whether the State could prove an element of the offense would be consistent

with the compelling State interest in protecting and the Legislature's clear intent to protect children from potential harm from sexual offenses. Accordingly, pursuant to Section 92.565, Florida Statutes, the State should be able to establish its inability to prove an element of the offense due to the victim's refusal to cooperate with the prosecution, thereby allowing the State to present a defendant's confessions assuming the State can establish the trustworthiness of the confession by a preponderance of the evidence. § 92.565, Fla. Stat.

Based on the foregoing facts and authorities, the interpretation and application of section 92.565, Florida Statutes, advocated by the First District Court of Appeal in Kelly v. State, 946 So. 2d 591 (Fla. 1st DCA 2007), does not conform with the plain language of that section. The unambiguous purpose of section 92.565 is to eliminate the *corpus delecti* requirement and permit the admission of confessions in sexual abuse cases where the State is unable to prove an element. Limiting this section to those factors listed, in complete derogation of the plain language of the section and the Legislature's express statements to the contrary, is erroneous. Accordingly, this Court should affirm the Fifth District Court of Appeal's holding in State v. Hobbs, 974 So. 2d 1119 (Fla. 5th DCA 2008), and disapprove the First District Court of Appeal's holding in Kelly v. State, 946 So. 2d 591 (Fla. 1st DCA 2007).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Court affirm the Fifth District Court of Appeal's holding in State v. Hobbs, 974 So. 2d 1119 (Fla. 5th DCA 2008), and disapprove the First District Court of Appeal's holding in Kelly v. State, 946 So. 2d 591 (Fla. 1st DCA 2007).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Respondent has been furnished via hand delivery to counsel for Petitioner, Brynn Newton, Assistant Public Defender, at 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118, this 11th day of August, 2008.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____

PAMELA J. KOLLER
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0775990

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar. No. 0773026
444 Seabreeze Boulevard
Suite 500
Daytona Beach, Florida 32118
(386) 238-4990/ 238-4997 (fax)

COUNSEL FOR RESPONDENT