IN THE SUPREME COURT OF FLORIDA

DAVID ERIC HOBBS,

Petitioner,

versus CASE NO. SC08-615

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida. In the Brief the Respondent will be referred to as "the State" and the Petitioner will be referred to both by his name ("Mr. Hobbs") and as he appears before this Honorable Court.

In the brief the following symbols will be used:

"R" - Record on appeal, volume two of record on appeal

"T" - Transcript of motion hearing, volume one of record on appeal

STATEMENT OF THE CASE

Petitioner David Eric Hobbs was charged by an information filed by an Assistant State Attorney in the Circuit Court of Orange County, Florida, with sexual activity with a child by a person in a familial relationship and lewd or lascivious battery. (R 28-29, Vol. II) The trial court ruled that Mr. Hobbs' statements to law enforcement were inadmissible because the State was unable to independently establish the *corpus delicti*, and that Section 92.565(2) did not authorize their admission, because the State's inability to prove the crime was due to the complainant's declining to cooperate with the prosecution rather than to her incapacity. (R 132-137, Vol. II; T 9, Vol. I) (Appendix)

The State appealed and the Fifth District Court of Appeal reversed, ruling 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[,]" and certifying conflict with Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006). State v. Hobbs, 974 So.2d 1119 (Fla. 5th DCA 2008). (Appendix) On May 20, 2008, this Honorable Court accepted jurisdiction of this case.

STATEMENT OF THE FACTS

In a "motion regarding admissibility of admission pursuant to 92.565," the State sought to introduce statements made by Petitioner David Eric Hobbs without having to prove the *corpus delicti* of each element of the offenses he had been charged with, sexual activity with a child by a person in a familial relationship and lewd or lascivious battery. After an argument between Mr. Hobbs and his 17-year-old daughter, T.M.Z., she had given written and oral statements in which she said that she and her father had engaged in intercourse during the past two years because "I really got mad at him. I am doing this as a form of payback[,]" but that "I [definitely] didn't make this up." (R 50-51, 52, 64, 68, Vol. II) The State's motion cited the 17-year-old complainant's limited education; the State's characterization of her relationship with her father as "pseudo-husband and wife;" and the complainant's having since recanted her initial statements alleging the sexual activity. (R 113, Vol. II)

At a hearing on the State's motion a Sheriff's detective testified that the complainant, T.M.Z., who was 17 years old at the time of the interview, was coherent and intelligent and showed no evidence of physical or mental disabilities. (T 6, 10, 11, Vol. I) Also at the hearing the State presented T.M.Z.'s handwritten declination to prosecute. (T 9, Vol. I) Citing Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006), the trial court denied the State's motion. (R 132-134, Vol. II)

SUMMARY OF ARGUMENT

The trial court was correct in its determination that a complainant's volitional refusal to cooperate with the State in a prosecution is not akin to the mental and/or physical disability contemplated by and set out in Section 92.565. In Section 92.565(2), the Legislature created an exception to the common law *corpus delicti* rule but limited the circumstances under which the exception could be made to instances in which the State is "unable" to establish the elements of the offense. Consistent with the plain meaning of "unable," the Legislature listed three factors which are all examples of involuntary incapacitation of the victim in the case. The listing itself illustrates that a complainant's lack of cooperation is not of the same sort or nature. The conflict between the District Courts of Appeal should be resolved by approving the First District Court's decision in Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006), and quashing the Fifth District Court's decision herein.

ARGUMENT

THE TRIAL COURT CORRECTLY RULED THAT A COMPLAINANT'S PRESENT LACK OF COOPERATION DOES NOT RENDER THE STATE "UNABLE" TO PROSECUTE UNDER SECTION 92.565's STATUTORY EXCEPTION TO THE COMMON LAW *CORPUS DELICTI* REQUIREMENT.

Standard of Review

The Supreme Court's review of a District Court's decision addressing this issue of statutory interpretation is *de novo*. McDonald v. State, 957 So.2d 605, 610 (Fla. 2007).

Jurisdiction

The Fifth District Court of Appeal certified conflict between its decision in State v. Hobbs, 974 So.2d 1119 (Fla. 5th DCA 2008), that where a victim repudiates charges in a case involving sexual abuse and declines to cooperate, the burden of the State to demonstrate it is unable to establish a *corpus delicti* can be met even though the victim is not incapacitated, and the First District Court of Appeal's decision in Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006), that a victim's refusal to cooperate with the State does not meet the requirements of Section 92.565(2). This Honorable Court accepted jurisdiction of this cause on May 20, 2008.

Argument

In Florida, the State cannot offer into evidence an accused's admission against interest to prove an element of the charged offense in the absence of an independently established *corpus delicti*. Burks v. State, 613 So.2d 441 (Fla. 1993). The policy reason for the rule is that "[T]he judicial quest for truth requires that no person be "convicted out of derangement, mistake or official fabrication." State v. Allen, 335 So.2d 823, 825 (Fla. 1976). This requirement was reaffirmed in 1998 in J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998) ("While we acknowledge that several jurisdictions have abandoned this rule, we conclude that the policy considerations set forth in *Burks* are still applicable and we reaffirm the requirement that an independent *corpus delicti* must be established when offering an admission against interest into evidence."); and in 2003 this Honorable Court declined to answer the question of whether Florida should replace the *corpus delicti* rule with the "trustworthiness approach" set forth by Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954). See State v. Carwise, 846 So.2d 1145 (Fla. 2003).

In Section 92.565(2) the Legislature relaxed the common-law requirement for establishing a *corpus delicti* before allowing an accused's admission into evidence -- when certain circumstances exist. It reads:

> (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.

If the State is unable to first prove its case, then Section 92.565(3) provides the standard and procedure for determining the trustworthiness of the accused's statements. The Fifth District Court of Appeal's decision in this case directed that the trial court conduct such a hearing on remand. State v. Hobbs, 974 So.2d at 1122.

Statutes in derogation of the common law should be strictly construed, and should not be interpreted to displace the common law further than is necessary. Tillman v. State, 934 So.2d 1263, 1269 (Fla. 2006). Florida's criminal laws likewise are to be strictly construed most favorably to the accused. § 775.021(1), Fla.Stat. (2007). Following this dictate, the First District Court of Appeal in Kelly v. State examined the Legislature's examples of when the State would be deemed to be *unable* to show the existence of each element of the crime and, applying both the doctrine of *ejusdem generis* and plain logic, perceived that "it becomes clear that a prerequisite to

the application of section 92.565(2) is the prosecution's inability to independently prove the crime due to some disability on the part of the victim." Kelly v. State, 946 So.2d 591, 593 (Fla. 1st DCA 2007), citing Soverino v. State, 356 So.2d 269, 273 (Fla. 1978) ("Under the well-established doctrine of *ejusdem generis*, where general words follow the enumeration of particular classes of persons, the general words will be construed as applicable only to persons of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown [because] if the legislature had intended the general words to be used in their unrestricted sense, they would not have made mention of the particular classes.") (internal citations omitted).). See also Perkins v. State, 576 So.2d 1310, 1314 (Fla. 1991) ("This is a Latin phrase meaning '[o]f the same kind, class, or nature.'"). The phrase refers to the doctrine that a general term preceded by a list of specific terms will be construed to be limited to the same class described in the list. Id.

In his opinion in this case, Judge Torpy wrote that the First District Court of Appeal's resort to the doctrine of *ejusdem generis* was uncalled for because the statute is unambiguous:

> While maxims such as *ejusdem generis* are intended to aid in the construction of statutes, our first consideration is to give effect to the intent of the legislature as evidenced by the plain meaning of the text. *Capers v. State*, 678 So.2d 330, 332 (Fla. 1996). *Ejusdem generis* should only come into play when it is necessary to construe an ambiguous statute, not to create an ambiguity in a clearly worded statute. *Jacobo v. Bd. of Trs. of Miami Police*, 788 So.2d 362, 363 (Fla. 3d DCA 2001). It is similarly inappropriate to use the maxim if, as a result, the court fails to give meaning to all of the

> words used by the legislature. *Fla. Police Benev. Ass'n, Inc. v. Dep't of Agric. & Consumer Servs.*, 574 So.2d 120, 122 (Fla. 1991). This statute plainly and unambiguously permits the use of confessions in sexual abuse cases when the state is otherwise "unable" to prove the crime. The list of "factors," which "may be relevant," is just that -- a list of some, but not all, evidentiary factors that the court can consider in its determination of whether the state can show an inability to prove the crime. Any contrary interpretation would necessitate that we erroneously deviate from the plain text and completely disregard the phrase, "but are not limited to."

State v. Hobbs, 974 So.2d 1119, 1121-1222 (Fla. 5th DCA 2008). (Appendix)

The Legislature, however, chose to define "unable" and offered a non-exhaustive list of examples of circumstances which might render the State unable to independently prove its case, and they are all of the same sort: dire, irremediable conditions that existed at the time of the offense. A judge's determination that the statute's requirements have been met is not limited to the factors enumerated in the list but the list itself is a catalogue of a distinct category. Each example describes an involuntary impairment. This list, by virtue of the nature and class of the immutable factors it does include, would not contain "the prospect of the victim's volitional refusal to cooperate." It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." Hilton v. State, 961 So.2d 284, 289 (Fla. 2007), citing Hechtman v. Nations Title Ins. of New York, 840 So.2d 993, 996 (Fla.2003). Nor, from a strict and strictly plain reading, would a victim's "lack of cooperation" establish that the State was unable to

establish the *corpus delicti*.

"Unable" means to be:

not able: incapable: as
a: unqualified, incompetent
b: impotent, helpless

Merriam-Webster on Line Dictionary, http://www.merriam-webster.com/.

The American Heritage Dictionary of the English Language (4th ed. 2000) defines "unable" as:

> 1. Lacking the necessary power, authority, or means; not able; incapable: unable to get to town without a car.
> 2. Lacking mental or physical capability or efficiency; incompetent: unable to walk.

The Legislature said that the *corpus delicti* rule could be suspended in cases involving sexual abuses where the State is unable to establish the elements of the charged offense. The State is not "incapable" of presenting its case, or lacking in the necessary power to do so, merely because a complaining witness, now an adult, declines to prosecute. (R 21, 52, Vol. II) See, e.g., State v. Delama, 967 So.2d 385, 386 (Fla. 3d DCA 2007), Gersten, C.J., dissenting ("There is no denying that the State has the authority to issue investigative subpoenas and to seek the court's enforcement in contempt proceedings against recalcitrant individuals.").

The Legislature elected to use the word "unable" to qualify the circumstances under which the *corpus delicti* rule may be dispensed with. As importantly, the Legislature chose to restrict the exception that Section 92.565(2) created. In the same

legislative session that created Section 92.565, the lawmakers specifically eliminated the application of the common law *corpus delicti* rule in prosecutions for the felonies of unauthorizedly engaging in money transmitting or money laundering. See, e.g., Section 560.125(8) ("(8) In any prosecution brought pursuant to this section, the common law corpus delicti rule does not apply. . . . "); and Section 896.101(11) (same); Ch. 2000-204, § 1, and Ch. 2000-360, §§ 9 and 18, Laws of Florida.

By contrast, the Legislature specifically retained some of the safeguards of the common law *corpus delicti* rule in Section 92.565 and, Petitioner maintains, did not lower the bar to the level set by the District Court's decision in this case. "The Legislature clearly [knows] how to draft [a] statute." Reynolds v. State, 842 So.2d 46, 49 (Fla. 2002) (finding that if the Legislature had wanted an animal cruelty statute to include a specific intent element, "they could have specifically said so.").

The trial court in this case and the First District Court of Appeal in Kelly v. State were correct in their determinations that a complainant's refusal to cooperate with the State is not akin to the mental and/or physical disability contemplated by and set out in Section 92.565. (R 133-134, Vol. II) The Fifth District Court of Appeal's decision should be disapproved and reversed and this cause remanded with directions that the trial court's March 19, 2007, order denying the State's motion be reinstated.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court quash the Fifth District Court of Appeal's decision reversing the trial court's denial of the State's motion regarding admissibility of admissions without establishing the *corpus delicti* of the crimes charged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. David Eric Hobbs, 8300 Elm Park Drive, #7211, Orlando, Florida 32821-6419, this 16th day of June, 2008.

ATTORNEY

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point "Times New Roman."

ATTORNEY