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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, CASE NO. SC14-755

Petitioner,

vs.

DEAN ALDEN SHELLEY,

Respondent.

AMICUS BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT SHELLEY

WILLIAM R. PONALL
SNURE & PONALL, P.A.
425 W. New England Ave., Ste 200
Winter Park, Florida 32789
Telephone: (407) 469-62009
ponallb@criminaldefenselaw.com
Florida Bar No. 421634

SONYA RUDENSTINE
2531 NW 41st St. Ste E
Gainesville, Florida 32606
Telephone: (352) 374-0604
srudenstine@yahoo.com
Florida Bar No. 711950
FACDL Amicus Committee
Co-Chair

KAREN GOTTLIEB
P.O. Box 1388
Coconut Grove, Florida 33233
Telephone: (305) 648-3172
karen.m.gottlieb@gmail.com
Florida Bar No. 199303
FACDL Amicus Committee
Co-Chair

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PRELIMINARY STATEMENT

The Florida Association of Criminal Defense Lawyers (FACDL) is a statewide organization representing over 2,000 members, criminal defense lawyers, including both private attorneys and public defenders. FACDL has an interest in this case because the decision of the First DCA in *State v. Murphy*, 124 So.3d 323 (Fla. 1st DCA 2013), if it is permitted to stand, has the capacity to compromise the constitutional prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution as it applies to every criminal defendant in the State. FACDL seeks to ensure a fair and constitutional adjudication of the issues in this case, which it believes to be of exceptional importance.

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SUMMARY OF THE ARGUMENT

This Court should resolve the certified conflict in favor of the decision of the Second DCA in *Shelley v. State*, 134 So.3d 1138 (Fla. 2d DCA 2014). The plain language of Fla. Stat. § 847.0135 fails to evince a clear Legislative intent that a defendant be subject to dual convictions and sentences for violations of Fla. Stat. §§ 847.0135(3)(b) (Solicitation) and (4)(b) (Traveling) based on the same conduct.

Additionally, because the Information charging the counts of Solicitation and Traveling fails to provide any indication that the two charges are based on separate offenses of solicitation, there is no basis to conclude that Mr. Shelley's plea was to two different acts of solicitation and that he should be subjected to dual convictions and sentences.

Finally, without a jury verdict that specifies that there were multiple offenses of solicitation or a plea which specifically admitted to multiple offenses, an appellate court cannot conclude for the first time that the evidence supports multiple convictions. Such a determination would violate Mr. Shelley's right to a trial and to due process under the Sixth and Fourteenth Amendments to the United States Constitutions

ARGUMENT

THE SECOND DISTRICT PROPERLY CONCLUDED THAT MR. SHELLEY'S CONVICTIONS FOR BOTH TRAVELING TO MEET A MINOR AND SOLICITATION OF A MINOR VIA COMPUTER CONSTITUTED DOUBLE JEOPARDY.

This Court should resolve the certified conflict in favor of the decision of the Second DCA in *Shelley v. State*, 134 So.3d 1138 (Fla. 2d DCA 2014). Mr. Shelley's convictions for both Solicitation of a Minor via Computer, in violation of Fla. Stat. § 847.0135(3)(b), and Traveling to Meet a Minor, in violation of Fla. Stat. § 847.0135(4)(b), violated the constitutional prohibition against double jeopardy. The State's arguments to the contrary are not supported by the plain language of Fla. Stat. § 847.0135 or the applicable caselaw.

"Article I, section 9 of the Florida Constitution provides in pertinent part: 'No person shall ... be twice put in jeopardy for the same offense.' Art. I, § 9, Fla. Const. Similarly, the Fifth Amendment to the United States Constitution provides that no person shall be 'subject for the same offense to be twice put in jeopardy of life or limb.' U.S. Const. amend. V." *Valdes v. State*, 3 So.3d 1067, 1069 n.4.

"The prevailing standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature

'intended to authorize separate punishments for the two crimes.' Absent a clear statement of legislative intent to authorize separate punishment for two crimes, courts employ the *Blockburger* test, as codified in section 775.021(4), Florida Statutes, to determine whether separate offenses exist." *Valdes*, 3 So.3d at 1070 (internal citations omitted).

1. Section 847.0135 Does Not Contain a Clear Indication of Legislative Intent to Authorize Separate Convictions and Punishment for Violations of Sections 847.0135(3)(b) and 847.0135(4)(b).

The Second DCA correctly concluded that Section 775.021(4)(b)3. precluded Mr. Shelley's convictions for violations of both §§ 847.0135(3)(b) and 847.0135(4)(b), because § 847.0135 does not contain a clear indication that the Legislature intended separate punishments. In arguing the opposite, the State relies on a portion of Fla. Stat. § 847.0135(3), § 847.0135(8), and the First DCA's decision in *State v. Murphy*, 124 So.3d 323 (Fla. 1st DCA 2013).

Initially, the State's reliance on *Murphy* is misplaced. In *Murphy*, the district court concluded that there was no double jeopardy violation based on the defendant's conviction for both solicitation and traveling. The district court reasoned as follows:

> We find no double jeopardy violation here because the Legislature expressly intended

> to punish both acts. "[T]here is no constitutional prohibition against multiple punishments 'if the Legislature intended separate convictions and sentences for a defendant's single criminal act.'" The crime of using the Internet to solicit a person believed to be a parent to consent to a child's participation in unlawful sexual activity is defined in section 847.0135(3)(b), and is designated a third degree felony. The crime of traveling to meet a minor after using the Internet to solicit a person believed to be a parent, as described above, is separately established and defined in section 847.135(4)(b), and is designated a second degree felony. In light of the clear legislative intent to punish solicitation and traveling after solicitation separately, we conclude Murphy's sentences for the two crimes do not violate double jeopardy.

124 So.3d at 330-31 (internal case citations omitted).

The district court's analysis in *Murphy* is cursory and fails to cite to actual evidence of Legislative intent that a defendant be convicted and sentenced for both crimes. The mere fact that the Legislature chose to define two separate offenses and to make the traveling offense which includes an additional element a more serious offense does not constitute evidence of intent that there be dual convictions for the same conduct. The plain language of the statute simply establishes that a more serious offense is committed if a defendant both solicits sexual activity with a minor over the Internet and then travels for the purpose of engaging in sexual activity with a minor as opposed

to committing the lesser-included offense by only soliciting sexual activity with a minor over the Internet.

If the cursory analysis employed by the district court in *Murphy* is adopted by this Court, that analysis would eviscerate the meaning of Fla. Stat. § 775.021(4)(b)3., and always permit dual convictions and sentences for both the greater offense and a lesser-included offense for the same conduct. It is well-established that double jeopardy principles prohibit convictions for offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. This rule applies to necessarily lesser included offenses. *Hare v. State*, 114 So.3d 252, 255 (Fla. 5th DCA 2013). "Necessarily lesser included offenses are offenses in which the statutory elements of the lesser included offense are always subsumed within those of the charged offense." *Id.*; *Coicou v. State*, 39 So.3d 237, 243 (Fla. 2010). Likewise, the State's reliance on §§ 847.0135(3) and 847.0135(8) is also in error. Section 847.0135(3) states the following:

> **(3) Certain uses of computer services or devices prohibited.--**Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
>
> (a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice,

> a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child; or
>
> (b) Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct,
>
> commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any person who, in violating this subsection, misrepresents his or her age, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. **Each separate use of a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission wherein an offense described in this section is committed may be charged as a separate offense.**

Fla. Stat. § 847.0135(3) (emphasis added).

As the Second DCA concluded in both the instant case and in *Mizner*, the plain language of the highlighted language at the end of § 847.0135(3) simply indicates an intent that a defendant may be subjected to multiple convictions and sentences for multiple acts of solicitation in violation of § 847.0135(3). *See*

Mizner v. State, 39 Fla. L. Weekly D1586 (Fla. 2d DCA, July 20, 2014). It evinces absolutely no indication that the Legislature intended dual convictions under §§ 847.0135(3) and (4) for the same conduct. *See Mizner*, *supra*; *Shelley*, 134 So.3d at 1140.

Section 847.0135(8) provides the following:

> **(8) Effect of prosecution.--**Prosecution of any person for an offense under this section shall not prohibit prosecution of that person in this state or another jurisdiction for a violation of any law of this state, including a law providing for greater penalties **than prescribed in this section** or **any other crime** punishing the sexual performance or the sexual exploitation of children.

Fla. Stat. § 847.0135(8) (emphasis added). Again, the plain language of subsection (8) also fails to indicate that the Legislature intended that an individual be subject to dual convictions and sentences for violations of §§ 847.0135(3) and (4) based on the same conduct. Instead, the plain language of subsection (8) evinces an intent that a conviction under § 847.0135 does not preclude prosecution under a **different statute**.

As previously asserted, a clear indication that multiple convictions and punishments were intended by the Legislature is required in order to avoid a double jeopardy violation. *Valdes*, 3 So.3d at 1070. At most, the language of the statute makes the

intent of the Legislature ambiguous. If that is the case, the rule of lenity applies, and the language of the statute should be construed in a favor of the defendant. *See* Fla. Stat. § 775.021(1). Since no clear evidence of Legislative intent to permit dual convictions and sentences exists in § 847.0135, § 775.021(4)(b)3. applies and precludes dual convictions and sentences for both Solicitation and Traveling.

2. The Specific Facts of This Case Do Not Support Separate Convictions and Punishment for Violations of Sections 847.0135(3)(b) and 847.0135(4)(b).

The State contends that, even if this Court concludes that § 847.0135 does not include an explicit statement of intent for dual convictions, the specific facts of this case support dual convictions. To support its argument, the State relies primarily on the Fifth DCA's decision in *Pinder* and the fact that Mr. Shelley admitted he engaged in certain communications in his pretrial Motion to Dismiss. Both of the State's contentions lack merit.

In *Pinder*, the defendant was charged and convicted of both Traveling to Meet a Minor, in violation of Fla. Stat. § 847.0135(4)(b), and Solicitation of Minor via Computer, in violation of § 847.0135(3)(b). *See Pinder v. State*, 128 So.3d 141 (Fla. 5th DCA 2013). Unlike the Traveling charge, however, the Solicitation charge was charged over an eight-day period of

time. 128 So.3d at 142-43.

The district court held that, "if a defendant solicited unlawful sexual activity with a minor through a single use of a computer device prior to traveling to meet the minor for unlawful sexual activity, double jeopardy principles would preclude convictions under both subsections." *Id*. at 142. The district court, however, further concluded that, because the defendant was alleged to have violated § 847.0135(3)(b) over an eight-day period, **and** the evidence established multiple offenses, there was no violation of double jeopardy.

This Court should not apply the district court's decision in *Pinder* to the instant case because it is both factually distinguishable and wrongly decided. First, the Information charging the offense of Solicitation in *Pinder* alleged that the offense occurred over an 8-day period of time. Thus, the Information arguably charged the defendant in *Pinder* with committing acts of solicitation on dates other than when he was alleged to have traveled. Thus, it was possible that the jury concluded he had committed an act of solicitation on a date other than the date he had traveled and had not used the same act of solicitation to support both convictions.

In the instant case, unlike the Information in *Pinder*, the Information charging Mr. Shelley alleged that he committed the

offense of Traveling on September 19, 2011, and the offense of Solicitation on September 19, 2011. The count of the Information alleging the Solicitation charge provided absolutely no indication that it was based on an instance of solicitation different from the instance of solicitation required to support the offense of Traveling. Mr. Shelley entered a plea to the offenses charged in the Information. Since the Information included no indication that there was more than one instance of solicitation, his plea did not constitute an admission that he committed more than one act of solicitation. As such, the facts of Mr. Shelley's case are materially distinguishable from the facts addressed by the district court in *Pinder*.

More importantly, the district court's decision in *Pinder* was wrongly decided. Although the Information in *Pinder* charged the defendant with Solicitation over an 8-day period of time, there is no indication that the Information specifically indicated that the Solicitation count was based on an incident of solicitation separate from an incident of solicitation required to support the defendant's conviction for Traveling. The district court's decision also fails to include any indication that the jury completed a special verdict form indicating that it based its verdicts on the two counts on two separate instances of solicitation. In absence of more specific

allegations in the Information or a special verdict form, there was no way to conclude that the jury based its verdicts on two separate incidents of solicitation. *See Reeves v. State*, 57 So.3d 874 (Fla. 5th DCA 2011) (in absence of special verdict forms, convictions must be vacated based on double jeopardy because the appellate court cannot guess what the jury was thinking); *Torna v. State*, 742 So.2d 366 (Fla. 3d DCA 1999) (same).

The district court, however, independently reviewed the evidence and concluded that the evidence was sufficient to support multiple solicitation offenses. Based on that conclusion, the district court held that there was no double jeopardy violation. *Pinder*, 128 So.3d at 1143-44.

The district court's independent determination that there was sufficient evidence to support multiple convictions was improper. It is well-established that an appellate court is not a fact-finder and should not be making an initial factual determination on whether the evidence supports multiple convictions. The appellate court cannot simply guess that the jury found the defendant guilty of separate offenses of solicitation. *See Reeves*, *supra*; *Torna*, supra. Accordingly, *Pinder* was wrongly decided and should not be adopted by this Court.

Next, the fact that Mr. Shelley swore to the facts of the case in his pretrial motions to dismiss is irrelevant to the Court's disposition of the case. Mr. Shelley simply admitted facts, not that those facts supported multiple offenses of solicitation. No fact-finder at the trial-court level, neither the jury nor the trial judge, ever concluded that the facts in question supported multiple offenses of solicitation. As previously asserted, it is improper for an appellate court to make that determination.

More importantly, Mr. Shelley entered a plea to the counts alleged in the Information. The offenses of solicitation and traveling are alleged in the Information as occurring on the same date and include no specificity as to what communications constituted the offenses of solicitation. Thus, they provide no indication that the charges were based on separate acts of solicitation.

As the Second DCA indicated, the mere fact that the State could conceivably have charged multiple offenses does not provide a legal basis to deny a double jeopardy challenge. *See Shelley*, 134 So.3d at 1141-42. Therefore, this Court should reject the State's contention that the specific facts of this case establish that there is no double jeopardy violation for dual convictions and sentences.

3. **Separate Convictions and Punishments for Violations of Sections 847.0135(3)(b) and 847.0135(4)(b) Would Violate the Sixth and Fourteenth Amendments to the United States Constitution**.

Additionally, by making the initial determination that there was sufficient evidence to support multiple convictions, the district court in *Pinder* violated the defendant's Sixth Amendment right to a jury trial and the Due Process Clause of the Fourteenth Amendment. All findings of fact which alter the legally prescribed sentencing range in a way that aggravates the penalty must be made by the jury. *Alleyne v. United States*, 133 S.Ct. 2151, 2161 (U.S. 2013) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to facts which trigger a minimum mandatory sentence).

By concluding that the evidence supported multiple convictions of solicitation, the district court in *Pinder* improperly assumed the role of the jury. By doing so, the district court altered the sentencing range by both increasing the minimum sentence the defendant was facing under the Criminal Punishment Code and the maximum sentence he was facing from 15 to 20 years in prison based on two convictions instead of a single conviction. As such, the *Pinder* decision was rendered in violation of the Sixth and Fourteenth Amendments.

As in *Pinder*, there is no basis in Mr. Shelley's case for

an appellate court to make the initial determination that his plea to the offenses charged in the Information was to two different acts of solicitation and that he should be subjected to dual convictions and sentences. That determination increases the applicable sentencing range by increasing both the minimum sentence under the Criminal Punishment Code and the statutory maximum. As the district court's determination did in *Pinder*, such a determination by this Court would violate the Sixth and Fourteenth Amendments pursuant to *Alleyne* and *Apprendi*.

CONCLUSION

This Court should resolve the conflict between *Shelley* and *Murphy* in favor of *Shelley* and should quash the First DCA's decision in Murphy. The plain language of Fla. Stat. § 847.0135 does not establish a clear Legislative intent that defendants be subject to dual convictions and sentences for violations of § 847.0135(3)(b) and § 847.0135(4)(b) based on the same conduct. Moreover, the specific facts of the case, including the manner in which the two offenses were charged in the Information, do not support the imposition of dual convictions and sentences. Dual convictions and sentences would violate the Sixth and Fourteenth Amendments to the United States Constitutions.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that FACDL's Amicus Brief is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

/s/ William R. Ponall
WILLIAM R. PONALL
Florida Bar No. 421634

DESIGNATION OF EMAIL ADDRESSES

Pursuant to Fla. R. Jud. Admin. 2.516, Attorney William R. Ponall, Counsel for Amicus Curiae, hereby designates ponallb@criminaldefenselaw.com as his primary email address and gallaherb@criminaldefenselaw.com as his secondary email address.

/s/ William R. Ponall
WILLIAM R. PONALL
Florida Bar No. 421634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Amicus Brief has been furnished by email delivery to Assistant Attorney General Susan Dunlevy, crimapptpa@myfloridalegal.com, and Victoria Hatfield, veh@markjobrien.com, on this 9th day of September, 2014.

/s/ William R. Ponall
WILLIAM R. PONALL
SNURE & PONALL, P.A.
425 W. New England Ave., Ste. 200
Winter Park, FL 32789
Telephone: (407) 469-6200
Fax: (407) 645-0805
ponallb@criminaldefenselaw.com
Florida Bar No. 421634

SONYA RUDENSTINE
2531 NW 41st St., Ste E
Gainesville, Florida 32606
Telephone: (352) 374-0604
Fax: (352) 374-4666
srudenstine@yahoo.com
Florida Bar No. 711950
FACDL Amicus Committee Co-Chair

KAREN GOTTLIEB
P.O. Box 1388
Coconut Grove, Florida 33233
Telephone: (305) 648-3172
Fax: (305) 648-0465
karen.m.gottlieb@gmail.com
Florida Bar No. 199303
FACDL Amicus Committee Co-Chair