IN THE SUPREME COURT OF FLORIDA

BRIAN MITCHELL LEE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC17-1555



# MERITS BRIEF OF RESPONDENT

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## PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee/Cross-Appellant in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Brian Mitchell Lee, the Appellant/Cross-Appellee in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"IB." will designate Petitioner's Initial Merits Brief, followed by the appropriate page number. The record on appeal consists of five volumes, which will be referenced as "R", followed by the appropriate volume number, followed by any appropriate page number. The transcripts consist of three volumes, which will be referenced by the appropriate volume number, followed by any appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as being generally supported by the record, subject to the following additions and corrections.

1. The information in this Case charged that the appellant "on or about January 2, 2014, … did knowingly travel… for the purpose of engaging in any illegal act… after using a computer… to seduce, solicit, lure or entice …" a person he believed to be a child. Slip op. at 21. The information filed

in this case also charged that the appellant "on one or more occasions between December 22, 2013 and January 1, 2014… did unlawfully and knowingly use a two-way communication device…" and as a separate offense charged that appellant "on one or more occasions between December 22, 2013 and January 1, 2014… did knowingly utilize a computer… to seduce, solicit, lure or entice …" a person he believed to be a child. Slip op. at 21-22.

2. The State filed the following Motion in Limine:

> COMES NOW, the State of Florida, by and through and undersigned Assistant State Attorney and moves this Honorable Court, to enter an order limiting the defense in the above-styled case throughout trial including but not limited to opening statements, closing arguments, direct, cross and re-direct examinations, and any argument in the presence of the jury with regard to the following:
>
> 1. Letter to Jennifer Klous provided in reciprocal discovery on September 8, 2014. The letter is purportedly authored by the Defendant. Pursuant to Fla. Stat. § 90.801(3), when the defendant seeks to introduce testimony concerning his out-of-court statements for the truth of the matter asserted, it is hearsay. Evidence of a defendant's out-of-court exculpatory statements is hearsay when offered by the defendant.
>
> WHEREFORE, the State of Florida respectfully requests that this Honorable Court to enter an order excluding the admission of the letter into evidence and any testimony regarding the letter.

(I.16).

3. After the trial court found that Petitioner was freely, voluntarily, knowingly and intelligently exercising his right to testify at trial, defense counsel explained to the trial court that he was going to testify to the letter that he wrote to Jennifer Klous. (II.219-220). The State stated, "It is still self-serving inadmissible hearsay when offered by the Defendant." (II.220). The trial court decided to the proffer Petitioner's testimony as to this issue. (II.220). The following is the proffered

testimony of Petitioner as to the contents of the letter he wrote to Ms. Klous:

> DFENSE COUNSEL: Dr. Lee – and I'm going to curtail the proffer. Dr. Lee, did you write a letter?
>
> DEFENDANT: Yes, I did.
>
> DEFENSE COUNSEL: And what date did you write that letter?
>
> DEFENDANT: January 1st.
>
> DEFENSE COUNSEL: Of 2014?
>
> DEFENDANT: Correct.
>
> DEFENSE COUNSEL: And did you put that – and in that letter what do you – who is that letter addressed to?
>
> DEFENDANT: Jennifer Klous.
>
> DFENSE COUNSEL: And what do you state in that letter?
>
> DEFENDANT: I basically state that the police have been harassing me on Craiglist and that I have gotten frustrated and planned on playing back at their own game. And that I plan on meeting with them tomorrow and that I expect to be arrested.
>
> DEFENSE COUNSEL: And so in this letter you tell Ms. Klous, you say, I know this is a police officer, I'm going to go meet him and I want to get back at him and fight them at their own game and I may be arrested. And then do you also state, If I'm wrong – could you talk about that?
>
> DEFENDANT: Yes. I put in the unlikely event that I'm wrong then I will explain the situation to the minor and make my apologizes and tell them that, you know I can't meet with them and can't have sex.
>
> DEFENSE COUNSEL: Okay. And did you put this in a sealed envelope?
>
> DEFENDANT: I did.
>
> DEFENSE COUNSEL: And did you leave it for your housekeeper?
>
> DEFENDANT: Yes.
>
> DFENSE COUNSEL: And Your Honor, I would like to proffer to the Court the contents of the letter.
>
> COURT: I'll have it marked a Defense exhibit.

(II.220). Defense counsel explains for the trial court that Petitioner's

testimony of the contents of the letter is admissible "in the same matter that if Defendant takes the stand and testifies, he can testify as to prior statements that he made to the police and that it was crucial to his defense. (II.222).

The trial court inquired into any other defense witnesses on this topic. (II.223). Defense counsel stated that Mrs. Jennifer Klous, defendant's housekeeper and recipient of the letter was going to testify that she recognized the letter. (II.223). The trial court wanted to proffer Mrs. Klous' testimony as follows:

> DEFENSE COUNSEL: And ma'am, how do you know Dr. Lee?
>
> WITNESS: He is my boss.
>
> DEFENSE COUNSEL: Okay. What are your job duties?
>
> WITNESS: I clean his apartment and I also clean the clinic that he owns.
>
> DEFENSE COUNSEL: Did you come across a letter on January 1st 2014?
>
> WITNESS: Yes, ma'am.
>
> DEFENSE COUNSEL: And where was that letter?
>
> WITNESS: It was in his apartment.
>
> DEFENSE COUNSEL: And what time of today was this on January 1st 2014?
>
> WITNESS: I would say about 10:00 a.m. Something like that.
>
> DEFENSE COUNSEL: Now, were you given any – when you saw this letter was it sealed?
>
> WITNESS: Yes, ma'am.
>
> DEFENSE COUNSEL: Okay. And I'm going to show you what has been marked as Defense Exhibit 1. DO you recognize it?
>
> WITNESS: Yes, ma'am.
>
> DEFENSE COUNSEL: Do you recognize his handwriting?
>
> WITNESS: Yeah, I do.

DEFENSE COUNSEL: And were you given any instructions as far as what to do with that sealed envelope?

WITNESS: On the back of it, it had stated not to open until the 3rd of January.

DEFENSE COUNSEL: Did you, in fact, open that letter?

WITNESS: On the 3rd of January, yes, I did.

DEFENSE COUNSEL: I'm going to show you what is marked as Defense Exhibit 2 and ask you if you recognize that?

WITNESS: Yes, ma'am. It's the letter that he wrote to me.

DEFENSE COUNSEL: Okay. Was that the letter that was inside the sealed envelope?

WITNESS: Yes.

(II.224-225). The State questioned Mrs. Klous about why she waited almost eight months before turning the letter over to defendant's trial counsel. Her response was that she did not want to get involved. (II.226-227). The trial court asked the following two questions:

COURT: Ma'am, did you talk with Dr. Lee about his letter between January 3rd and when you gave it to Ms. Cashwell?

WITNESS: Only about the fact that he wanted me to go ahead and surrender it to her.

COURT: Do you recall when that occurred?

WITNESS: Right before I took it to her office. I believe it was in August. I'm not sure real sure about the date.

(II.227).

After Mrs. Klous proffered testimony, the State argued that:

[T]his is self-serving inadmissible hearsay. Ehrhardt's – you know, under 801 subsection 3, you know, When the Defendant seeks to introduce testimony concerning his or her own out-of-court statement for the truth of the matter stated., it is hearsay. It goes on to say, Evidence of a Defendant's out of court exculpatory statements is hearsay if offered by the Defendant.

> Judge, that's exactly what that is. He can get up on the stand all day long and say, I knew it was a copy, I was messing with a cop. He can do that. But this letter which was – it has a lot of authenticity questions -- wasn't – is not admissible under this rule which is why that filed this motion alleging this, you know, citing the rule.

(II.228). Defense counsel argues that because this is a unique set of facts that have not been addressed by any case law that the boiler plate language of Ehrhardt applies. (II.229-230).

After hearing proffered testimony from Appellant and Ms. Klous and argument from both parties, the trial court granted in part and denied in part the State's motion in limine. The trial court stated the following:

> Well, under the circumstances, we have testimony of a witness that a document was received on a date certain. So I'm going to grant the motion in part and deny it in part. I'm going to allow the Defense to present the testimony of the witness saying that a letter was left, it was received on January 1st and opened on January 3rd and ultimately delivered whenever. The content, neither from her and if the doctor testifies, he can testify as to what –
>
> *****
>
> In his own defense, you know, what his intent was.
>
> *****
>
> The letter itself I think is hearsay. He can talk about what he did, he created a letter, that he left it and you can have the witness come in and verify that she got something. All those facts are up to the trier of fact to resolve. The contents of the letter itself are hearsay. And so- but he can testify what his defense is if that is going to be his defense.
>
> *****
>
> It is not about the content of the letter.

(IV.230-231).

4. At trial, Petitioner testified that he never intended to meet a child. (II.246). Petitioner continued to explain during his testimony that he believed that the person he was talking to on the internet was a police

officer and that made Petitioner angry and frustrated. (II.246-253). Petitioner testified that before he went to the bowling alley, he wrote a four-page letter to housekeeper, Jennifer Klous. He also testified that he dated the letter on January 1st and wrote on the back "Do not open until January 3rd". (II.255). Defense counsel proceeded to ask Petitioner about the contents of the letter, however, the trial court sustained the State's objection as to the contents of the letter being presented to the jury. (II.256). The trial court clarified that Petitioner may testify to what his intent was but not to the contents of the letter. (II.256). Petitioner testified again that he did not believe that he was talking to a fourteen-year-old boy and that the police were targeting homosexuals. (III.268).

On cross-examination, the State asked the Petitioner why he would risk his medical license and practice, his income, his future potential earnings, bad publicity, expense of posting bond and legal fees and violation of his personal privacy "to make a cop look stupid". (III.270-271). Petitioner said yes. The State also questioned Petitioner about his statement that he needed to take a stand for the gay community. (II.276). However, the State asked Petitioner if he was "standing up" for the gay community "by associating homosexuality with pedophilia". (III.277). Petitioner explains during his testimony that he knew he was speaking to a police officer. (III.278-283). Defense counsel asked Petitioner, ... "did it allow you time to really think through so you knew the future and knew what the consequences would be?" Petitioner said, "well, yes, the day before". (III.285). Defense counsel followed up with the question, "[i]s

that why you confided in your housekeeper about your thoughts?" Petitioner answered "yes". (III.285-286). Defense counsel asked Petitioner, "how sure were you that this was an undercover police officer that you were going to meet at the bowling alley?" Petitioner answered, "[w]ell, I was sure enough to confide in my cleaning lady". (III.289).

Jennifer Klous, Petitioner's housekeeper, testified. (III.292-298). Ms. Klous testified that she found the sealed envelope addressed to her on January 1, 2014. It was laying on the counter in Petitioner's apartment and she opened it after he was arrested. (III.294). On cross-examination, Ms. Klous testified that, although she opened and read the letter, she did not immediately give it to defense counsel. (III.295-296).

## SUMMARY OF ARGUMENT

ISSUE I.

Petitioner contends that the First District Court erred by placing the burden on him to prove there was a double jeopardy violation. However, this Court accepted jurisdiction to review this case on the issue of whether there was conflict between this case and State v. Shelley, 176 So.3d 914 (Fla. 2015), as to whether Petitioner could be convicted of multiple counts of Traveling to Meet a Minor to Engage in Sexual Conduct, Use of a Computer to facilitate or solicit the sexual conduct of a child and Unlawful use of Two-Way Communication Device to facilitate the commission of a felony. This is not part of the certified conflict. Moreover, the information charged

two offenses on separate days. Furthermore, even showing that the information charged offenses which occurred on the same day does not establish a prima facie violation of double jeopardy. Accordingly, in order to set forth a prima facie case for double jeopardy, a defendant must establish that the offense was subsumed and based on the same act or impulse, not simply that the information charges identical offenses. Therefore, no matter who had the burden, there was no double jeopardy violation and no need for this Court to address this issue.

ISSUE II.

First, this Court should not accept jurisdiction. The State continues to argue that the decision below is not in "express and direct" conflict with State v. Shelley, 176 So.3d 914 (Fla. 2015); Thomas v. State, 209 So.3d 35 (Fla. 2d DCA 2016); Honaker v. State, 199 So.3d 1066 (Fla. 5th DCA 2016); Stapler v. State, 190 So.3d 162(Fla. 5th DCA 2016); Holt v. State, 173 So.3d 1079 (Fla. 5th DCA 2015); or Minzer v. State, 154 So.3d 391 (Fla. 2D DCA 2014).

Second, the Petitioner claims double jeopardy prohibits his convictions for Counts II and III because the offenses were during the same criminal episode. Appellant's argument is both legally and factually without merit. Petitioner's convictions for traveling and improper use and solicitation are clearly separate distinct acts as they were properly charged on separate dates. Therefore, there was no double jeopardy violation.

ISSUE III.

As to this issue before this Court, the State asserts that it is are

beyond the scope of the certified conflict. Petitioner contends that the jury instruction for the solicitation of a minor constituted fundamental error because it used the word "engage" rather than "commit". The Respondent disagrees because the words commit and engage in are synonymous for purposes of this statute. The trial court in this case did in fact read the jury the correct standard jury instruction for 11.17(a) at the time of trial. Further, because the language of Section 847.0135(3)(a), Fla. Stat. (2014), was not amended, the trial court could not have foreseen the Rules Committee amending the rule three months down the road. Furthermore, the refinement of the jury instructions does not make the old jury instruction erroneous. Petitioner was still obligated to object to the instructions and/or ask for a different instruction. Therefore, it was not error, let alone fundamental error for the trial court to read the correct jury instructions at the time of trial.

ISSUE IV.

As to this remaining issue before this Court, the State asserts that it is beyond the scope of the certified conflict. Petitioner contends that the trial court erred by granting the State's Motion in Limine, which precluded Petitioner's housekeeper from reading the contents of letter Petitioner wrote to her before he left to rendezvous with the "victim". Petitioner argued the letter showed his state of mind. (IB.29-31). The State argued it was self-serving hearsay. The trial court allowed the housekeeper to testify she found a letter which she eventually turned over to Petitioner's attorney and Petitioner to testify that he left the letter and what he

wrote in the letter. The trial court precluded the housekeeper from reading the letter itself. The Respondent adamantly disagrees. The contents of the letter were nothing more than self-serving hearsay, being offered to prove the truth of the matter asserted. Based on the circumstances of the letter, there is no indication of trustworthiness. It is clear his self-serving statements were nothing more than a backup plan if things went awry. The trial court properly denied the reading of the letter by the housekeeper. However, Petitioner was still allowed to testify about the letter and the housekeeper to testify about finding the letter, thus allowing him to present his defense.

## ARGUMENT

ISSUE I: WHETHER THIS COURT NEEDS TO DECIDE WHO HAS THE BURDEN TO ESTABLISH A DOUBLE JEOPARDY VIOLATION WHEN THE INFORMATION CHARGED TWO ACTS WHICH OCCURRED ON DIFFERENT DAYS? (RESTATED)

### STANDARD OF REVIEW

The standard of review for legal issues is de novo.

### MERITS

Petitioner contends that the First District Court erred by placing the burden on him to prove there was a double jeopardy violation. However, this Court accepted jurisdiction to review this case on the issue of whether there was conflict between this case and State v. Shelley, 176 So.3d 914 (Fla. 2015), as to whether Petitioner could be convicted of multiple counts of Traveling to Meet a Minor to Engage in Sexual Conduct, Use of a Computer to facilitate or solicit the sexual conduct of a child and Unlawful use of

Two-Way Communication Device to facilitate the commission of a felony. This is not part of the certified conflict. Moreover, the information charged two offenses on separate days. Therefore, no matter who had the burden, there was no double jeopardy violation and no need for this Court to address this issue.

Furthermore, even showing that the information charged offenses which occurred on the same day does not establish a prima facie violation of double jeopardy. The dissent erred in thinking that "[by setting forth a prima facie case for double jeopardy violation by showing the Counts II and III were subsumed in Count I, and with the information showing that the dates overlapped, I believe that the burden shifted to the State to show no double jeopardy violation was present". (Slip op. p.45). For instances, if an offender sold a person drugs and after the transaction was complete, the person drove around the block and returned to make a subsequent purchase, the offenses would have occurred on the same day. Accordingly, in order to set forth a prima facie case for double jeopardy, a defendant must establish that the offense were subsumed and based on the same act or impulse, not simply that the information charges identical offenses.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects an individual's life or limb from being placed in peril twice for the same offense. See Jones v. Thomas, 491 U.S. 376, 380 (U.S. 1989)("The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be 'subject for the same offence to be twice put in jeopardy of life or limb.'"). The Florida Constitution contains a similar

protection. See Kelso v. State, 961 So.2d 277, 279 (Fla. 2007)("Modeled after the double jeopardy provision of the Fifth Amendment to the United States Constitution, article I, section 9 of the Florida Constitution states that 'no person shall . . . be twice put in jeopardy for the same offense.'"). Both Constitutional provisions provide defendants with three basis protections: (1) a shield against subsequent prosecution for the same offense in the wake of an acquittal; (2) a shield against subsequent prosecution for the same offense in the wake of a conviction; and, (3) a shield against multiple punishments for the same offense. See Rodriguez v. State, 875 So.2d 642, 644 (Fla. 2nd DCA 2004), citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Wilson, 680 So.2d 411, 413 (Fla.1996):

> Three basic protections emanate from the Double Jeopardy Clause. It protects against a second prosecution for the same offense following an acquittal, against a second prosecution for the same offense after a conviction, and against multiple punishments for the same offense.

The third protection, "a shield against multiple punishments for the same offense", is the focus of this case. It is well settle law in Florida that "the defendant bears the burden of demonstrating that an error occurred in the trial court". Jones v. State, 923 So.2d 486, 488 (Fla. 2006)(Goodwin v. State, 751 So.2d 537 (Fla. 1999).

"Under Florida's Constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So.2d 2 (Fla. 1986)(citing Art. II, § 3, Fla. Const.; State v. Cain v, 381 So.2d 1361 (Fla. 1980); Johnson v. State, 314 So.2d 573 (Fla. 1975). This Court

in State v. Tuttle, 17 So.3d 1246, 1253 (Fla. 2015) re-affirmed this principle that the prosecutorial discretion is only available at the charging of criminal offense, not after a verdict is rendered. Tuttle at 1249.

"While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution." Ohio v. Johnson, 467 U.S. 493 (1984). Consequently, the State may charge a defendant with multiple offenses arising out of a single act without triggering any Double Jeopardy concerns at that point in the proceedings. See State v. Lewek, 656 So.2d 268 (Fla. 4th DCA 1995)("Despite this clear rule saying that a defendant cannot be convicted of both manslaughter and vehicular homicide for a single death, there is no such rule saying that he cannot be charged with both crimes."). The double jeopardy issue only becomes an issue at the end of the trial. "When an information contains two or more charges which amount to the same offense, [d]ouble jeopardy concerns require only that the trial judge filter out multiple punishments at the end of the trial, not at the beginning." State v. Sholl, 18 So.3d 1158, 1162 (Fla. 1st DCA 2009)(citing Claps v. State, 971 So.2d 131, 134 (Fla. 2d DCA 2007).

A lot of confusion by Petitioner and the Dissent in the First District Court stems from a misunderstanding that there are three ways to prove a double jeopardy violation and which double jeopardy theory they are arguing. If a defendant is arguing that one offense is subsumed into

another when there was one act within one criminal episode, then one looks to the elements of the charged offenses. But if there are distinct acts within one criminal episode, then one must look at the facts of the case to see if the charges are based just one act or is each individual charge based on the different act. Recently this Court clarified the two tests that Blockburger sets out, as follows:

> Resolving the conflict in this way clarifies that *Blockburger* ultimately provides courts with two tests to apply: (1) where the defendant is convicted multiple times under the same statute for acts that occurred during the course of a single criminal episode, a "distinct acts" test is used, but (2) where a defendant is convicted under multiple statutes for one act, the "different elements" test applies.

Graham v. State, 207 So.3d 135 (Fla. 2016).

In Claps v. State, 971 So.2d 131 (Fla. 2d DCA 2007), the defendant argued that double jeopardy protections should be extended to either the information or jury selection phase of the proceedings. Id. at 134. The Second District did not agree with defendant and declined to extend the protections and concluded that the ability of the State to select from a number of charging options does not conflict with the prohibition against double jeopardy. Id. In Claps, the Second District explained:

> Claps, however, would have us usurp the State's discretion to make strategic decisions about charging alleged criminal activity. Further, he would have us usurp the jury's role in deciding facts and determining guilt or innocence. This would be an inappropriate judicial function, infringing on the executive domain of state attorneys to make strategic and tactical decisions within the boundaries of their policies and duty to follow the law. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) (noting the discretion afforded prosecutors-"so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute"-to decide whether to prosecute and which charges to bring)(citation omitted).

Claps at 134-35. In State v. Sholl, 18 So.3d 1158 (Fla. 1st DCA 2009), the First District held that "double jeopardy protections could not be extended to earlier stage of proceeding, such as a filing of information or jury selection; [o]therwise, the trial court would be "usurp[ing] the State's discretion to make strategic decisions about charging alleged criminal activity." Sholl at 1162; citing Ohio v. Johnson, 467 U.S. 493, 503 (1984). The trial court was correct in denying Petitioner's boilplate motion to dismiss.

Appellant filed a pretrial motion to dismiss. However, because "in the multiple punishment context, it is the punishment that implicates the protections against double jeopardy, not the criminal charges alone." (Slip op. p.37). Therefore, dismissal was not appropriate. Moreover, the State will show, even after trial, there still was not grounds to support a double jeopardy violation.

Nevertheless, even if the issue could have been resolved by a motion to dismiss, regardless of the burden, there was an abundance of evidence that the offenses were distinct acts. First, the State alleged in the information the traveling occurred on a second day. Second, the State presented evidence of the traveling. The First District Court of Appeal points out at least five solicitations:

> The uncontroverted record before this Court shows that Lee solicited the investigator at least **five times** for different unlawful acts, from different locations, and at different times via a two-way communications device (his mobile phone):
>
> 1. On December 26, 2013, between 5:46 p.m. and 8:12 p.m., Lee solicited "Matt" for a lewd or lascivious battery[7] by offering to

> teach "Matt" how to perform oral sex. This solicitation occurred while Lee was in Indiana visiting his family for the holidays.
>
> 2. The second solicitation occurred the following night on December 27, 2013, between 11:16 p.m. and 11:49 p.m., as Lee was traveling back to Florida. At that time, Lee solicited "Matt" for lewd or lascivious molestation[8] when he asked to grab "Matt's" buttock and genital area.
>
> 3. Another solicitation for lewd or lascivious battery occurred an hour later when Lee offered to perform oral sex on "Matt." Lee was still traveling back to Florida at this point as he mentioned stopping to refuel.
>
> 4. The solicitations resumed two days later on December 30, 2013, between 8:08 p.m. and 8:57 p.m. when Lee was at home. At that time, Lee solicited "Matt" for another lewd and lascivious battery by describing in detail a fantasy about engaging in sexual conduct at a water park with "Matt," who would appear to others to be his son.
>
> 5. The final solicitation occurred three days later on January 1, 2014 (the day before Lee traveled to meet "Matt"), at 10:22 p.m. when Lee solicited Matt for a lewd or lascivious battery by discussing the performance of oral sex. Lee was at home when this conversation occurred.
>
> Lee solicited the investigator for unlawful sex acts over an eleven-day time span with up to a three-day temporal break between solicitations.

(Slip on 27-28).

This Petitioner did not prove a prima facie claim of double jeopardy violation. In order to establish a double jeopardy claim, the defendant must first present a prima facie claim that double jeopardy principles have been violated. Once the defendant proffers sufficient proof to support a non-frivolous claim, the burden shifts to the government to show that double jeopardy principles do not bar the proceeding. U.S. v. Cruce, 21 F.3d 70, 74 (5th Cir. 1994). It is well settle law in Florida that "the defendant bears the burden of demonstrating that an error occurred in the trial court". Jones v. State, 923 So.2d 486, 488 (Fla. 2006)(Goodwin v. State, 751 So.2d 537 (Fla. 1999).

Petitioner's trial counsel gave the law to the trial court but presented nothing factually about this case that would have potentially shifted the burden to the State. Furthermore, Petitioner's trial counsel did not argue the facts of this case to show that there was potential for a double jeopardy violation. In fact, Petitioner's trial counsel made this boiler plate argument in order to preserve the matter for appellate review. The evidence presented at trial also establishes that the multiple solicitations occurred between December 22nd and January 1st, just as the State had charged it, and that the traveling count was charged on January 2nd and was established by the evidence as well. Since Petitioner never met his burden to shift it to the State to refute, the trial court properly denied Petitioner's Motion to Dismiss and, as always, the Petitioner has the burden to demonstrate that an error was committed at the trial level. Jones at 488.

Furthermore, the dissent errors by stating that additional clarification in the Information or a jury instruction is necessary in order to preclude a double jeopardy violation.

> On the face of the information, a potential double jeopardy problem is immediately apparent, as Lee pointed out below: the solicitation charged in Count 3 is subsumed in the traveling charge in Count 1. See State v. Shelley, 176 So.3d 914, 919 (Fla. 2015) ("[B]ecause the statutory elements of solicitation are entirely subsumed by the statutory elements of traveling after *373 solicitation, the offenses are the same" for purposes of the double jeopardy test in section 775.021(4), Florida Statutes."). This problem is exacerbated because Count 3 of the information charged that Lee used a computer to engage in solicitations "on one or more occasions" over ten days. (Emphasis added). As charged, the jury need only find one solicitation to find Lee guilty as to Count 3. But to also prove the traveling violation in Count 1, an additional solicitation violation—separate and distinct from the one upon which

> the jury found a violation in Count 3—must be shown to avoid a double jeopardy violation. Stated differently, to uphold concurrent convictions on Counts 1 and 3 as alleged in the information against Lee, there must be a basis in the record for concluding that the jury was told and understood that it must actually find at least two separate and distinct solicitation violations. Absent an amended information or some means of channeling their decision-making, the jury was without guidance as to whether they could use just one solicitation violation as the basis for guilt as to Counts 1 and 3; they were adrift without direction.

(Slip op. at 62-63). The Dissent is incorrect. The State is not required to sua sponte amend the Information or ask for a jury instruction. What the dissent has overlooked is that the defense had the ability to request a statement of particulars at any time prior to the trial if the Defendant was not clear on the basis for the charges. Florida Rule of Criminal Procedure provides as follows:

> (n) Statement of Particulars. The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense. The statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.

Petitioner did not do so in this case, but Petitioner's failure to request a Statement of Particulars does not create a double jeopardy violation.[1]

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[1] In fact, it was likely sound strategy of trial counsel not to ask for such a statement. In this case, although the First District Court of Appeal found at least five separate and distinct solicitations, the State only charged one solicitation offense occurring over a period of days. Moreover, the evidence of the solicitations was well-documented in the form of

Again, this issue is beyond the certified question and not necessary for the resolution, at it is already addressed by well settled law. See Marsh v. Valyou, 977 So.2d 543, 546 n. 1 (Fla. 2007) (citing Borden v. East-European Ins. Co., 921 So.2d 587, 596 n. 8 (Fla. 2006) (recognizing an issue as beyond the scope of the certified conflict); Kelly v. Cmty. Hosp. of the Palm Beaches, Inc., 818 So.2d 469, 470 n. 1 (Fla. 2002) (declining to address issues beyond the basis for the Court's conflict jurisdiction)). Secondly, regardless of whether the burden was on the Defendant or the State, the uncontradicted evidence showed there were multiple acts of solicitation and no double jeopardy violation. Accordingly, there is no need to address this issue.

> ISSUE II: WHETHER BOTH APPELLANT'S CONVICTIONS FOR IMPROPER USE OF COMPUTER SERVICES TO SOLICIT A MINOR AND UNLAWFUL USE OF A TWO-WAY COMMUNICATION DEVICE WHEN CHARGED WITH TRAVELING TO MEET A MINOR FOR SEX ON A DIFFERENT DAY VIOLATE DOUBLE JEOPARDY? (RESTATED)

NO EXPRRESS OR DIRECT CONFLICT EXISTS

This Court should not accept jurisdiction. The State continues to argue that the decision below is not in "express and direct" conflict with State v. Shelley, 176 So.3d 914 (Fla. 2015); Thomas v. State, 209 So.3d 35 (Fla. 2d DCA 2016); Honaker v. State, 199 So.3d 1066 (Fla. 5th DCA 2016); Stapler

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written text or emails and recorded conversations. If the State were forced to narrow the period, the state could have easily amended the information to add additional charges.

v. State, 190 So.3d 162(Fla. 5th DCA 2016); Holt v. State, 173 So.3d 1079 (Fla. 5th DCA 2015); or Minzer v. State, 154 So.3d 391 (Fla. 2D DCA 2014). In Shelley, this Court resolved the conflict of whether chapter 847 allowed for convictions for both Traveling and Solicitation for the same conduct. This Court determined that the elements of solicitation were subsumed in the crime of Traveling and there was no indication that the Legislature intended multiple convictions for the same conduct. However, in the case at bar, there were multiple separate and distinct acts and the traveling was charged on a sperate day from the solicitation. The First District Court held that:

> We affirm Lee's convictions for all three offenses because unlike Shelley and Hamilton, his multiple convictions were not based on the same conduct. Rather, Lee's convictions arose from separate criminal episodes and distinct criminal acts; thus, they do not violate the prohibition against double jeopardy.

(Slip op. at 2). The First District Court of Appeal made clear that the cases were distinguishable stating that:

> Both Shelley and Hamilton are cases where the reviewing court has proceeded to the third step of the double jeopardy analysis and applied the same elements test. Thus, the holdings in those cases apply **only** where the reviewing court has determined that the defendant's convictions were based on conduct which occurred in a single criminal episode **and** did not involve distinct criminal acts. And neither decision disturbs well-established precedent that double jeopardy "does *not* prohibit multiple convictions and punishments where a defendant commits two or more distinct criminal acts." Hayes, 803 So.2d at 700 (emphasis in original). Because Lee's convictions arise both from separate criminal episodes and distinct criminal acts, the rationale in Shelley and Hamilton is not applicable and does not bar his multiple convictions.

(Slip op. at 12-13). Therefore, there is no conflict and this Court should decline jurisdiction.

STANDARD OF REVIEW

"Determining whether double jeopardy is violated based on undisputed facts is a legal determination, and thus our standard of review is *de novo*." State v. Paul, 934 So.2d 1167 (Fla. 2006), receded from by Valdes v. State, 3 So.3d 1067 (Fla. 2009). However, when considering a double jeopardy claim after a jury verdict, the evidence at trial is taken most favorably to upholding the convictions. See Casselman v. State, 761 So.2d 482, 483 (Fla. 5th DCA 2000).

MERITS

Petitioner claims double jeopardy prohibits his convictions for Counts II and III because the offenses were during the same criminal episode. Appellant's argument is both legally and factually without merit.

The First District Court of Appeal properly determined that the offenses were separate and distinct acts and employed the distinct acts analysis as this Court did in Graham v. State, 207 So.3d 135, 141 (Fla. 2016)("(1) where the defendant is convicted multiple times under the same statute for acts that occurred during the course of a single criminal episode, a "distinct acts" test is used, but (2) where a defendant is convicted under multiple statutes for one act, the "different elements" test applies.") and Hayes v. State, 806 So.2d 695, 700 (Fla. 2001)("[T]he prohibition against double jeopardy does *not* prohibit multiple convictions and punishments where a defendant commits two or more distinct criminal acts.").

In Lee, the First District recognized that there is a three-step test.

See State v. Paul, 934 So.2d 1167, 1172-73 (Fla. 2006)("A court reviewing a double jeopardy claim alleging multiple punishments must apply a three-step test."). In Partch v. State, 43 So.3d 758 (Fla. 1st DCA 2010), the First District explained how the test should be applied. Id. at 760.

> First, we must determine whether the convictions "were based on an act or acts which occurred within the same criminal transaction and/or episode." Id. Second, if the convictions arose from the same criminal episode, we "must then determine if the convictions were predicated on distinct acts." Id. Third, "[i]f the charges are not predicated on distinct acts and have occurred within the same criminal episode, we must next decide if the charges survive a same elements test as defined by section 775.021, Florida Statutes [ (2013) ], commonly referred to as the Blockburger analysis." Id. (citing to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Thus, we only reach the third step of the analysis, the so-called "same elements" test, if the first two questions are answered in the negative. See Graham v. State, 207 So.3d 135, 141 (Fla. 2016) (clarifying that the same elements test applies when a defendant is convicted under multiple statutes for a single criminal act); Tindal v. State, 145 So.3d 915, 923-34 (Fla. 4th DCA 2014) (engaging in same elements analysis only after concluding that the offenses occurred during the same criminal episode and that the charges were not based on distinct acts); Sanders v. State, 101 So.3d 373, 375 (Fla. 1st DCA 2012) (explaining that if the charged offenses occurred in separate episodes or involved distinct acts, no further analysis is required to conclude that the offenses do not violate double jeopardy).

(Slip op. at 7-8).

This Court in Shelley v. State, 134 So. 3d 1138, 1141-42 (Fla. Dist. Ct. App.), review granted, 147 So. 3d 527 (Fla. 2014), and approved, 176 So. 3d 914 (Fla. 2015), reh'g denied (Oct. 9, 2015), acknowledged that "convictions for both soliciting and traveling may be legally imposed in cases in which the State has charged and proven separate uses of computer devices to solicit." This Court found that double jeopardy principles prohibited separate convictions under each section when they are based upon

the same charged conduct. In Shelley, the State charged the solicitation and the traveling on the same single date, unlike the present case.

"No person shall … be twice put in jeopardy for the **same offense**." Art. I, § 9, Fla. Const. (emphasis added); U.S. Const. Amend. V; see also Trotter v. State, 825 So. 2d 362 (Fla. 2002) ("The scope of the Double Jeopardy Clause is the same in both the federal and Florida Constitutions."). The Double Jeopardy Clause "protects against … multiple punishments for the **same offense**." North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (emphasis added). However, "[t]he Double Jeopardy Clause 'presents no substantive limitation on the legislature's power to prescribe multiple punishments,' but rather, 'seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982) (quoting State v. Hegstrom, 401 So.2d 1343, 1345 (Fla. 1981)).

Under both federal and Florida law, the concepts of "transaction or episode" and "act or conduct" are distinct, and such a "transaction or episode" can include multiple "acts or instances of conduct." See United States v. Dixon, 509 U.S. at 709 n.14 (1993); State v. Meshell, 2 So.3d 132, 135-36 (Fla. 2009). This Court has recognized that a single criminal episode can include multiple criminal acts. Meshell at 135-36 (finding multiple violations of the lewd and lascivious battery statute within the same criminal transaction or episode constitute "distinct criminal acts"). This distinction was also recognized in Dixon, 509 U.S. 688, 709, n.14.

Often overlooking the facts in Blockburger, in addition to the separate elements test, the United States Supreme Court addressed the distinct acts test. Blockburger was convicted of multiple drug offenses, two of which occurred sequentially. For example, in Blockburger, the defendant conducted two separate illegal sales. 284 U.S. at 301. Shortly after delivery of the drug in the first sale, the purchaser paid for an additional quantity, which was delivered the next day. Id. After the first sale had been consummated, the payment for the additional drug "was the initiation of a separate and distinct sale completed by its delivery." Id. The Supreme Court held that "[e]ach of several successive sales constitutes a distinct offense, **however closely they may follow each other**." Id. at 302 (emphasis added). "If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." Id. If "individual acts are prohibited, . . . then each act is punishable separately." Id. at 302.

> Each of several successive sales constitutes a distinct offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that, 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' Wharton's Criminal Law (11th Ed.) § 34. Or, as stated in note 3 to that section, 'The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. * * * If the latter, there can be but one penalty.'

Blockburger at 302.

Recently this Court clarified the two tests that Blockburger sets out, as follows:

> Resolving the conflict in this way clarifies that *Blockburger* ultimately provides courts with two tests to apply: (1) where the defendant is convicted multiple times under the same statute for acts that occurred during the course of a single criminal episode, a "*distinct acts"* test is used, but (2) where a defendant is convicted under multiple statutes for one act, the "*different elements"* test applies.

Graham v. State, 207 So.3d 135 (Fla. 2016)( affirming a conviction over a double jeopardy challenge where "the information and the jury verdict demonstrate that the charges were predicated on two distinct acts"). In Graham, Petitioner Graham was charged with two counts of lewd or lascivious molestation for touching the victim's breasts and touching the victim's buttocks. Id. The issue was "whether double jeopardy prohibits dual convictions under the same statute where the acts upon which the charges are based occur within a single criminal episode". Id. at 137. This Court held that the defendant's dual convictions under the lewd or lascivious molestation statute did not violate double jeopardy because Graham had violated the statue twice in one episode for two distinct acts. Although not identical to the present case because Graham charged with grabbing different sexual body parts, each one of this Petitioner's messages and the traveling were distinct acts that indicated a different impulse for violating the statutes.

The analysis of this Court in State v. Beamon, 298 So.2d 376 (Fla. 1974), illustrates the double jeopardy analysis which applies in cases where the same conduct is charged on completely separate dates and thus

constitutes completely separate and distinct acts. In Beamon, this Court held:

> However, the district court erred in applying this test Sub judice when it determined that the respondent had previously been acquitted of the offense now charged in the second Information. As we indicated above, the offense charged in the first Information, as limited by the bill of particulars filed there, was Not the same offense as that charged in the second Information, as limited by the bill of particulars filed in connection with that Information.
>
> The offenses charged by the two Informations, as each was limited by its own bill of particulars, occurred on different dates; the initial Information, as so limited, charged only an offense occurring on Nov. 24, 1972, and the second Information charged an offense occurring on Nov. 26, 1972. Since the offense involved was not a continuing one, the difference in dates clearly renders them two separate and distinct offenses, a fact recognized by the trial judge when he specifically declared respondent 'not guilty of the crime of robbery on Nov. 24, 1972.' Accordingly, no double jeopardy and no collateral estoppel are involved in the instant case, and the trial court and district court of appeal erred in holding to the contrary.

Beamon at 380.

The Federal Courts have followed the same analysis in cases involving multiple charges for the same conduct charged on completely separate dates. The Seventh Circuit held in United States v. Conley, 291 F.3d 464 (7th Cir. 2002), that "the Government may charge and convict an individual of multiple violations of § 922(g)(1) only if "it can produce evidence demonstrating that the firearms were stored or acquired separately and at different times or places." United States v. Buchmeier, 255 F.3d 415, 423 (7th Cir.2001); see also United States v. Horodner, 993 F.2d 191, 193 (9th Cir. 1993) ("a new possession, separately chargeable, could begin if possession was interrupted")." Conley at 471.

Furthermore, this case is simply not controlled by State v. Shelley,

176 So.3d 914 (Fla. 2015), because the traveling and soliciting occurred on separate dates and were charged on separate dates, they were not part of a single criminal episode. This Court only addresses whether the convictions for the same conduct that charged on same date, not separate dates. In Shelley, the three messages sent by Respondent Shelley on the date in question. The fourth and final message was sent on the same day as the traveling occurred. In Shelley, the state only charged one use of computer device to solicit, and that charge was based on a solicitation occurring the same date as the traveling offense. See Shelley v. State, 134 So.3d 1138 (Fla. 2D DCA 2014). Here, as seen above, Petitioner sent multiple messages over the course of 12 days soliciting who he thought was a 14 year old boy. The State properly charged him for solicitation by computer device and improper use of a two-way communication device over the span of 11 days and charged him for traveling on January 2nd.

> 1. On December 26, 2013, between 5:46 p.m. and 8:12 p.m., Lee solicited "Matt" for a lewd or lascivious battery[7] by offering to teach "Matt" how to perform oral sex. This solicitation occurred while Lee was in Indiana visiting his family for the holidays.
>
> 2. The second solicitation occurred the following night on December 27, 2013, between 11:16 p.m. and 11:49 p.m., as Lee was traveling back to Florida. At that time, Lee solicited "Matt" for lewd or lascivious molestation[8] when he asked to grab "Matt's" buttock and genital area.
>
> 3. Another solicitation for lewd or lascivious battery occurred an hour later when Lee offered to perform oral sex on "Matt." Lee was still traveling back to Florida at this point as he mentioned stopping to refuel.
>
> 4. The solicitations resumed two days later on December 30, 2013, between 8:08 p.m. and 8:57 p.m. when Lee was at home. At that time, Lee solicited "Matt" for another lewd and lascivious battery by describing in detail a fantasy about engaging in sexual conduct at a water park with "Matt," who would appear to others to be his son.

> 5. The final solicitation occurred three days later on January 1, 2014 (the day before Lee traveled to meet "Matt"), at 10:22 p.m. when Lee solicited Matt for a lewd or lascivious battery by discussing the performance of oral sex. Lee was at home when this conversation occurred.

(Slip op.at 27-28).

The information in this Case charged that the appellant "on or about January 2, 2014, … did knowingly travel… for the purpose of engaging in any illegal act… after using a computer… to seduce, solicit, lure or entice …" a person he believed to be a child. (Slip op. at 21). The information filed in this case also charged that the appellant "on one or more occasions between December 22, 2013 and January 1, 2014… did unlawfully and knowingly use a two-way communication device…" and as a separate offense charged that appellant "on one or more occasions between December 22, 2013 and January 1, 2014… did knowingly utilize a computer… to seduce, solicit, lure or entice …" a person he believed to be a child. (Slip op. at 21-22). Accordingly, the case at bar is not controlled by Shelley because the illegal acts constituting the solicitation conviction and the improper use conviction were separate from the acts supporting the conviction for traveling and were clearly charged on separate days.

In Shelley, this Court only looked to the legislative intent and only applied the "same elements" test of Blockburger v. United States, 284 U.S. 299 (1932), to Florida Statutes section 847.0135(3)(b) and section 847.0135(4)(b), not the distinct acts. See Graham, supra. The court found that double jeopardy principles prohibited separate convictions under each section when they are based upon the same charged conduct. In Shelley, the

State charged the solicitation and the traveling on the same single date, a fact the Second District Court of Appeal found to be of great significance.

> The State asserts that because Shelley's three separate uses of computer devices on the date charged in the information would have supported three separate soliciting charges, the soliciting charge is not subsumed by the traveling charge. We are not persuaded by this argument. The State only charged one use of computer devices to solicit, and that charge was based on a solicitation *occurring on the same date* as the traveling offense. We find no legal basis to deny a double jeopardy challenge based on uncharged conduct simply because it could have been charged. *But we acknowledge that convictions for both soliciting and traveling may be legally imposed in cases in which the State has charged and proven separate uses of computer devices to solicit.*

Shelley v. State, 134 So. 3d 1138, 1141-1142 (Fla. 2d DCA 2014) (emphasis added).

Moreover, the Fourth District Court of Appeal has found that Shelley also recognized this distinction in section 847.0135(3) and section 847.0135(4) in Ready v. State, 183 So.3d 1234 (Fla. 4th DCA 2016), and Hartley v. State, 129 So.3d 486 (Fla. 4th DA 2016), as the Fourth acknowledges in both of the cases that there would not have been a double jeopardy violation had the offenses occurred on separate days.[2]

In Hammel v. State, 934 So.2d 634 (Fla. 2d DCA 2006), an undercover officer pretended to be a thirteen-year-old boy in an Internet chatroom. Hammel and the officer had numerous conversations between October 20, 2003

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[2] Although the court uses the term separate days or same day, the State contends that distant acts can occur on the same day as long as the defendant had time to pause and reflect to form a new criminal intent.

through November 30, 2003, which included sexual acts that he would like to perform on the "thirteen-year-old boy". Hammel arranged a meeting with the thirteen-year-old boy and when he showed up, Hammel was arrested. He was charged with eighteen counts of solicitation of a minor to commit sexual acts. He tried and convicted of fifteen counts. On appeal, Hammel argued that his conversations were part of one ongoing event and therefore his convictions arose out of a single criminal episode. The Second District Court of Appeal held that

> The test used to determine whether offenses arise from a single criminal episode requires a trial court to "look to whether there was a separation of time, place, or circumstances' between the crimes because 'those factors are objective criteria utilized to determine whether there are distinct and independent criminal acts or whether there is one continuous criminal act with a single criminal intent. McCann v. State, 854 So.2d 788, 792 (Fla. 2d DCA 2003)(quoting Hayes v. State, 803 So.2d 695, 704 (Fla. 2001)).

Id. at 635. The Second District held that Hammel's convictions, all but one, did not violate double jeopardy because although he was targeting only one "child", the separation of time between the conversation establishes that Hammel had time to pause, reflect and form a new criminal intent for each individual conversation. Id.

In Hartley, an undercover officer pretended to be a fourteen-year old child while responding to a personal ad on Craigslist. Hartley, 129 So.3d at 488. The officer exchanged communications with the defendant on November 2, November 3, and November 4, with plans being made on November 4, for the two to meet each other. Id. The communications for each day were charged separately based on the day on which they occurred--November, 2 (Count I), November 3 (Count II), and November 4 (Count III). Id. Count

IV, was a traveling charge for the meeting planned on and for November 4. Id. Only the communications on November 3, "involved explicit discussions of mutual sexual acts;" the other two days' communications "were not so explicit." Id. Hartley argued that the solicitation charges under Counts I, II, and III, should be dismissed because they violated double jeopardy based on the traveling charge under Count IV. Id. at 490. The court only found that Counts III and IV violated double jeopardy, because they occurred on the same day. Id. at 491.

The Hartley court reached its decision relying on Hammel v. State, 934 So.2d 634, 636 (Fla. 2d DCA 2006), to explain, "where there is a temporal break between computer conversations and there is not one continuous criminal act, double jeopardy is not violated when more than one charge is brought[.]" Id. More pointedly, in Hammel the Second District Court found there was only a "single criminal episode" where the defendant's conversation began late one night, continued through midnight, and ended in the early morning hours of the following day, resulting the reversal of only Count Six of Hammel's fifteen convictions for solicitation of a minor. Hammel, 934 So.2d at 636. Accordingly, the Hartley court explained that Counts I and II were separate offenses from the traveling count, but Count III--which crafted the plans to travel and occurred on the same day as the traveling--was not separate from the traveling count. Hartley, 129 So.3d at 491. The court in Ready, distinguishing Hartley's temporal separation distinction, found that a "twenty-one minute break in the text conversation, which occurred after the detective texted that he would be

right back[,]" was insufficient factually to separate the charges. Ready at 1238. Accordingly, the Ready court found the solicitation charge was subsumed by the traveling charge. Id. The case at bar extends over a period of months with sufficient facts exist to support multiple independent solicitations and traveling counts.

Although Hartley correctly relies on Hammel, the Second District Court's decision is not entirely correct. While the court may have been correct about the holding in Hartley, the court erred simply because the solicitations were all on the same day and did not analyze further as to whether the solicitations were based on different impulses. See Blockburger at 301-302 ("If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lies.").

Also subsequent to Shelley, the Second District Court of Appeal noted this temporal distinction for being sufficient to support separate charges. In Meythaler v. State, 175 So.3d 918, 919 (Fla. 2d DCA 2015), the defendant began texting with undercover officers on February 15, ultimately planning to meet undercover officers--posing as young girls--on March 18. Id. On March 18, the defendant arrived at the meeting place and sent a text message indicating they would have sex; until this point nothing sexual existed within the parties' messages. Id. Apparent from the opinion, was that the State mischarged the dates in their information and did not cite the February 15 communications as the basis for the solicitation charge. Id. The court outlined that the State made no effort to amend the information, but the court explained, "[i]f the State had moved to amend

the information, it could have alleged a separate count for communications that occurred on February 15, 2013." Id. To support this claim, the court relied on Hartley. Accordingly, where there is a separation for the facts, which establish the solicitation, and those which support the traveling, Shelley is not controlling and double jeopardy is not violated.

Other courts have drawn the same distinction regarding the dates the crimes were committed: Hartley v. State, 129 So.3d 486, 491 (Fla. 4th DCA 2014)(finding double jeopardy when events occurred on the same day) and Pinder v. State, 128 So.3d 141, 142-44 (Fla. 5th DCA 2013)(no double jeopardy when separate uses of the computer online service occurred on different days) both held that there was no double jeopardy where the solicitation occurred on a different date or dates than the traveling. As made above, Petitioner's convictions for traveling and improper use and solicitation are clearly separate distinct acts as they were properly charged on separate dates. Therefore, there was no double jeopardy violation.

ISSUE III: WHETHER THE JURY INSTRUCTIONS GIVEN ON THE OFFENSE OF IMPROPER USE OF A COMPUTER TO SOLICIT A MINOR CONSTITUES FUNDAMENTAL ERROR BECAUSE IT USED THE WORD ENGAGE RATHER THAN TO COMMIT? (RESTATED)

STANDARD OF REVIEW

"When not properly preserved, an order or judgment of a trial court may be appealed only where the error alleged "would constitute fundamental error." § 924.051(3), FLA. STAT. (2005). "'Fundamental error,'" which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause

of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). "Fundamental error is defined as the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." McDonald v. State, 743 So.2d 501, 505 (Fla. 1999)(citations omitted).

MERITS

As to this issue before this Court, the State asserts that it is are beyond the scope of the certified conflict. See Marsh v. Valyou, 977 So.2d 543, 546 n. 1 (Fla. 2007) (citing Borden v. East-European Ins. Co., 921 So.2d 587, 596 n. 8 (Fla. 2006) (recognizing an issue as beyond the scope of the certified conflict); Kelly v. Cmty. Hosp. of the Palm Beaches, Inc., 818 So.2d 469, 470 n. 1 (Fla. 2002) (declining to address issues beyond the basis for the Court's conflict jurisdiction)). The First District Court affirmed this issue without opinion. (Slip Op. at 2). However, out of an abundance of caution, the Respondent will address the merits of Petitioner's claim.

Petitioner contends that the jury instruction for the solicitation of a minor constituted fundamental error because it used the word "engage" rather than "commit". The Respondent disagrees because the words commit and engage in are synonymous for purposes of this statute. The word "commit" means "to perform", i.e., "to carry into action deliberately". "Commit." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 11 May 2018. The phrase

"engage in" means "to do (something)" or "to cause (someone) to take part in (something). "Engage in." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 11 May 2018. Specifically, the word "commit" is listed as synonym for "engage in" and vice versa. The Rules committee was not changing the meaning of the instruction or shifting the burden. It was trying to further clarify the language of the instruction.

The actual statute section 847.0135(3)(a), Fla. Stat., (2014), on which this jury instruction is based, has remained the same since July 1, 2009[3]; only the jury instructions were changed. The Rules Committee drafted a revision of the Standard Jury instruction for 11.17 in order to make it easier to understand, as shown below. The following is the standard jury instruction for 11.17(a) SOLICITING A [ CHILD] [PERSON BELIEVED BY THE DEFENDANT TO BE A CHILD] FOR UNLAWFUL SEXUAL CONDUCT USING COMPUTER SERVICES OR DEVICES §847.0135(3)(a), Fla. Stat., at the time of the trial, provides:

> To prove the crime of Soliciting a [ Child] [Person Believed by the Defendant to be a Child] for Unlawful Sexual Conduct Using Computer Services or Devices, the State must prove the following [three] [four] elements beyond a reasonable doubt:
>
> 1. (Defendant) knowingly used a[n] [computer on-line service] [Internet service] [local bulletin board service] [any other device capable of electronic data storage or transmission] to contact (victim).
>
> 2. (Victim) was a child or a person believed by the defendant to be a child.

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[3] Section 847.0135, Florida Statutes, (2009)(citing Laws 2009, c. 2009-194, § 7, eff. July 1, 2009.

3. During that contact, (Defendant) [seduced] [solicited] [lured] [enticed] [attempted to] [seduce] [solicit] [lure] [entice]] (victim) to engage in (any illegal act as charged in the indictment or information under chapter 794, 800, 827, or other unlawful sexual conduct with a child or with a person believed by the defendant to be a child).

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In re Standard Jury Instructions in Criminal Cases--Report No. 2012-09, 122 So.3d 263, 275-76 (Fla. 2013)(underline added).

On April 30, 2015, this Court approved the following updated standard jury instructions as recommended by the Rules Committee:

To prove the crime of Soliciting a [Child] [Person Believed by the Defendant to be a Child] for Unlawful Sexual Conduct Using Computer Services or Devices, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) knowingly used a[n] [computer on-line service] [Internet service] [local bulletin board service] [device capable of electronic data storage or transmission] to contact (victim).

2. (Victim) was a child or a person believed by the defendant to be a child.

3. During that contact, (defendant) [seduced] [solicited] [lured] [enticed] [attempted to [seduce] [solicit] [lure] [entice]] (victim) to ~~engage in~~ [commit (any illegal act as charged in the indictment or information under chapter 794, 800, or 827,)] or [or][engage in (other unlawful sexual conduct with a child or with a person believed by the defendant to be a child) ].

The mere fact that an undercover operative or law enforcement officer was involved in the detection and investigation of this offense shall not constitute a defense from prosecution.

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Comment

This instruction was adopted in 2009 [6 So.3d 574] and amended in 2013 [122 So.3d 263] and 2015.

In re Standard Jury Instructions in Criminal Cases--Report No. 2014-07., 163 So.3d 478, 492-94 (Fla. 2015). Clearly, there was no substantive change

with the law. The Rules Committee simply revised the instruction to make it easier to understand and did not reduce the State's burden. Since the meaning of commit and engage in are synonymous and this issue was not preserved and can only be address under a fundamental error standard, Petitioner cannot and has not shown that the outcome of the trial would have been different had the trial court used the phrase "to commit" rather than "to engage in". There was conversations (solicitations) of Petitioner and the alleged victim that were lewd and explicit and were clearly solicitations for sex. After reading/hearing those specific conversations, the jury would have convicted him even if "commit" was part of the jury instruction.

Furthermore, even if Petitioner's argument is correct that an opinion amending Standard Jury Instruction is included in Florida's pipeline rule, it does not change the outcome here because the word "commit" and "engage in" are synonymous and did not change the burden of proof for the State in this case.

Finally, the trial court in this case did in fact read the jury the correct standard jury instruction for 11.17(a) at the time of trial. Further, because the language of Section 847.0135(3)(a), Fla. Stat. (2014), was not amended, the trial court could not have foreseen the Rules Committee amending the rule three months down the road. Furthermore, the refinement of the jury instructions does not make the old jury instruction erroneous. Petitioner was still obligated to object to the instructions and/or ask for a different instruction. Therefore, it was not err, let

alone fundamental error for the trial court to read the correct jury instructions at the time of trial.

ISSUE IV: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING IN PART AND DENYING IN PART THE STATE'S MOTION IN LIMINE? (RESTATED)

STANDARD OF REVIEW

A ruling on the admissibility of evidence lies within the sound discretion of the trial court and therefore submits to the abuse of discretion standard for appellate review. White v. State, 817 So.2d 799, 806 (Fla. 2002), quoting Ray v. State, 755 So.2d 604, 610 (Fla. 2000); citing Chandler v. State, 534 So.2d 701, 703 (Fla. 1988) ("Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion."). In order to establish an abuse of discretion, the appellant must show that the trial court rendered an arbitrary or fanciful decision that no reasonable person would adopt. See White, supra, citing Trease v. State, 768 So.2d 1050, 1053 n.2 (Fla. 2000)("Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court."). Appellate courts must refrain from reversing a trial court's ruling on the admissibility of evidence unless the appellate court specifically finds that the trial court clearly abused its broad discretion. White at 806, quoting Ray v. State, 755 So.2d 604, 610 (Fla. 2000); citing Chandler v. State, 534 So.2d 701, 703 (Fla. 1988); see also Sexton v. State, 697 So.2d 833, 837 (Fla. 1997), citing Heath v.

State, 648 So.2d 660, 664 (Fla. 1994) ("A trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent an abuse of discretion."). When evaluating the decisions of the lower tribunal, appellate courts must adhere to the unambiguous standard articulated by the Florida Supreme Court: "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." See White, citing Trease v. State, 768 So.2d 1050, 1053 n.2 (Fla. 2000).

Florida courts follow the general canon of evidence that, unless "some specific rule of exclusion" precludes admissibility, trial courts should admit into evidence any information relevant to prove a fact in issue in a case. Williams v. State, 110 So.2d 654, 658 (Fla. 1959). See also Bryan v. State, 533 So.2d 744, 746 (Fla. 1988) (... "the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence."). This approach honors the "fundamental principal of logical relevancy" and views the Rules of Evidence as rules of admissibility, not rules of exclusion. Williams at 659. As a result, trial courts need not search for an exception "under which evidence becomes admissible." Williams at 658. Rather, the converse occurs: trial courts admit all relevant evidence unless "some specifically recognized exception" applies. Id. at 659-660. This approach eliminates the need for court and counsel to conduct an interminable search for an evidentiary exception discoverable "only if out of the infinite variety of human activities a case has arisen

in which some court has held it so." Id. at 659.

MERITS

As to this remaining issue before this Court, the State asserts that it is beyond the scope of the certified conflict. See Marsh v. Valyou, 977 So.2d 543, 546 n. 1 (Fla. 2007) (citing Borden v. East-European Ins. Co., 921 So.2d 587, 596 n. 8 (Fla. 2006) (recognizing an issue as beyond the scope of the certified conflict); Kelly v. Cmty. Hosp. of the Palm Beaches, Inc., 818 So.2d 469, 470 n. 1 (Fla. 2002) (declining to address issues beyond the basis for the Court's conflict jurisdiction)). The First District Court affirmed this issue without opinion. (Slip Op. at 2). However, out of an abundance of caution, the Respondent will address the merits of this issue.

Petitioner contends that the trial court erred by granting the State's Motion in Limine, which precluded Petitioner's housekeeper from reading the contents of letter Petitioner wrote to her before he left to rendezvous with the "victim". Petitioner argued the letter showed his state of mind. (IB.29-31). The State argued it was self-serving hearsay. The trial court allowed the housekeeper to testify she found a letter which she eventually turned over to Petitioner's attorney and Petitioner to testify that he left the letter and what he wrote in the letter. The trial court precluded the housekeeper from reading the letter itself. The Respondent adamantly disagrees. The contents of the letter were nothing more than self-serving hearsay, being offered to prove the truth of the matter asserted.

"An out-of-court statement is hearsay only if it is offered to prove

the truth of the matter asserted." See §90.801. However, if an out-of-court statement is offered to prove that the statement is made rather than to prove its contents, it is not hearsay as long as it is presented to prove a material fact. See Cotton v. State, 763 So.2d 437 (Fla. 4th DCA 2000). Here, Petitioner's defense was that he believed that he was talking to an officer posing as a 14-year-old boy and his intent was to meet the officer to expose the officer. (IB.31). The trial court recognized that the Petitioner's defense that he did not intend to solicit a minor for sex was contained in Petitioner's letter and was intended to prove the truth of the matter asserted and to prove to be a backup plan in case the alleged 14-year-old boy was truly an officer. Furthermore, the trial court realized that was not necessary for the "self-serving statements" in the letter to come in because the Petitioner would be allowed to testify what he wrote in the letter to the housekeeper and the housekeeper was allowed to testify as to finding the letter, reading it and turning it over to defense counsel at the direction of Petitioner.

In the present case, the State filed its motion in limine asking to exclude Appellant's Letter to Jennifer Klous and any testimony regarding the letter because it was self-serving hearsay. (I.16). After the trial court found that Petitioner was freely, voluntarily, knowingly and intelligently exercising his right to testify at trial, defense counsel explained to the trial court that he was going to testify to the letter that he wrote to Jennifer Klous, his housekeeper. (II.219-220). The State stated, "It is still self-serving inadmissible hearsay when offered by the

Defendant." (II.220). The trial court decided to the proffer Petitioner's testimony as to this issue. (II.220). During the proffered testimony, Petitioner testified that he wrote the letter to his housekeeper on January 1, 2014 and left the letter in an sealed envelope for her in his apartment. (II.220). As to the contents of the letter, Petitioner testified that:

> I basically state that the police have been harassing me on Craiglist and that I have gotten frustrated and planned on playing back at their own game. And that I plan on meeting with them tomorrow and that I expect to be arrested.
>
> *****
>
> DEFENDANT: Yes. I put in the unlikely event that I'm wrong then I will explain the situation to the minor and make my apologizes and tell them that, you know I can't meet with them and can't have sex.

(II.220). Then, defense counsel explains for the trial court that Petitioner's testimony of the contents of the letter is admissible "in the same matter that if Defendant takes the stand and testifies, he can testify as to prior statements that he made to the police" and that it was crucial to his defense. (II.222).

The trial court inquired into any other defense witnesses on this topic. (II.223). Defense counsel stated that Mrs. Jennifer Klous, defendant's housekeeper and recipient of the letter was going to testify that she recognized the letter. (II.223). During her proffered testimony, Mrs. Klous testified that she worked for Petitioner as his housekeeper and she also cleaned his clinic for him. She was cleaning his apartment and found the letter on January 1, 2014. She was shown the letter and envelope and testified that was the letter and the envelope that she found in Petitioner's apartment. She explained that she did not open the letter

until January 3rd as instructed on the back of the envelope. (II.224-225). The State questioned Mrs. Klous about why she waited almost eight months before turning the letter over to defendant's trial counsel. Her response was that she did not want to get involved. (II.226-227). The trial court asked the following two questions:

> COURT: Ma'am, did you talk with Dr. Lee about his letter between January 3rd and when you gave it to Ms. Cashwell?
>
> WITNESS: Only about the fact that he wanted me to go ahead and surrender it to her.
>
> COURT: Do you recall when that occurred?
>
> WITNESS: Right before I took it to her office. I believe it was in August. I'm not sure real sure about the date.

(II.227).

After Mrs. Klous proffered her testimony, the State argued that "this is self-serving inadmissible hearsay". (II.228). Furthermore, the State argued about the authenticity of the letter, ultimately questioning its trustworthiness. Defense counsel argued that because this is a unique set of facts that have not been addressed by any case law, that the boiler plate language of Ehrhardt applied. (II.229-230).

After hearing proffered testimony from Appellant and Ms. Klous and argument from both parties, the trial court granted in part and denied in part the State's motion in limine.

The trial court stated the following:

> Well, under the circumstances, we have testimony of a witness that a document was received on a date certain. So I'm going to grant the motion in part and deny it in part. I'm going to allow the Defense to present the testimony of the witness saying that a letter was left, it was received on January 1st and opened on January 3rd and ultimately

delivered whenever. The content, neither from her and if the doctor testifies, he can testify as to what –

*****

In his own defense, you know, what his intent was.

*****

The letter itself I think is hearsay. He can talk about what he did, he created a letter, that he left it and you can have the witness come in and verify that she got something. All those facts are up to the trier of fact to resolve. The contents of the letter itself are hearsay. And so- but he can testify what his defense is if that is going to be his defense.

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It is not about the content of the letter.

(IV.230-231).

Section 90.803(3) allows for the admission of statements showing then existing mental, emotional or physical condition. Section 90.803(3) provides that:

(3) Then-existing mental, emotional, or physical condition.--

(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2. Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2. A statement made under circumstances that indicate its lack of trustworthiness.

Thus, an important requirement is that the statement must be made under

circumstances that indicate trustworthiness. Oftentimes, the spontaneity of a statement shows its trustworthiness. See Charles W. Ehrhardt, Florida Evidence § 803.3a (2015 ed.). Furthermore, the circumstances in which the statement was made can show the trustworthiness or lack thereof.

As shown in Cotton v. State, 763 So.2d 437 (Fla. 4th DCA 2000), the Fourth District found that appellant Cotton's statements to the police officer was inadmissible hearsay because his statements lack reliability and trustworthiness. Cotton attempted to have his statements admitted at trial to deny ownership and knowledge of the cocaine to show his made the statement not for the truth of the statement. The Fourth found that the fact that he made the statements did not prove a material fact or issue in his case and that the content of the statement was in fact his defense. Thus, the statements were offered to prove the truth of the matter asserted and thus are hearsay. Id. at 441-442; see also Fagan v. State, 425 So.2d 214, 214 (Fla. 4th DCA 1983)("There was no corroboration or other basis for its truthfulness and reliability" of the statements made by Fagan).

Here, there is no indication of trustworthiness. It is clear his self-serving statements were nothing more than a backup plan if things went awry. First, Petitioner did not make the statement to a person. He left a sealed letter, which was only to be opened upon his arrest. This is not a situation where petitioner informed several people what he was planning to do. He kept the information secret, only to use if something went wrong. He wrote the letter to a person who is his employee, a person he could control. He knew when she was going to be in his apartment and he knew that

she was loyal and would not do anything unless instructed to do so. Moreover, the housekeeper did not immediately turn the letter over to Petitioner's counsel until he told her to do so, almost eight months after his arrest. In State v. Dillion, appellant Dillion claimed that after he was arrested on a different warrant, he gave statements about him being robbed and kidnapped to an officer and his mother. State v. Dillon, 2009-Ohio-3134, ¶ 28, 2009 WL 853277 (June 29, 2009). Appellant Dillion argued that the statements were admissible because 1) "he was not introducing them to establish that he was kidnapped and robbed; rather the statements are admissible to show why the officer instituted an investigation into the kidnapping and robbery of appellant and 2) his out-of-court statements to his mother were admissible under a number of hearsay exceptions. Id. at ¶35-42. The Fifth District Court of Appeals held that were inadmissible hearsay.

> "Coming as it did during the defense, *** it borders on an attempt to introduce a self-serving affidavit during the trial, which of course clearly is inadmissible under the circumstances. If appellant wanted the exculpatory material brought before the jury [,] he could not do so through the mouth of another, thereby obviating the possibility of cross-examination. State v. Gatewood, 15 Ohio App.3d 14, 16, 472 N.E.3d 63, 64-65 (1984).

State v. Dillon, 2009-Ohio-3134, ¶ 52, 2009 WL 853277 (June 29, 2009). Based on the circumstances in case at bar, there was no indication of trustworthiness or reliable as required by the hearsay exception statute.

Here, the trial court clearly did not abuse its discretion by granting in part and denying in part the State's motion in limine, because the letter's content was hearsay. The trial court allowed the letter and

receipt of the letter to be testified to in order for Appellant to present his defense at trial. Petitioner was allowed to, and did, argue in closing argument that Petitioner did not really believe that he was communicating with a boy and that he wanted to set up the police officer because he was angry and frustrated with the police officers online. Not allowing the jury to see the actual letter did not prejudice Petitioner's defense. This issue should be affirmed.

## CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal in Lee v. State, 223 So.3d 342 (Fla. 1st DCA 2017, should be approved, and the trial court should resentence him in accordance with the First District Court's decision.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by Electronic MAIL on May 25, 2018: Victoria Wiggins, Assistant Public Defender, at Victoria.wiggins@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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