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IN THE SUPREME COURT OF FLORIDA

BRIAN MITCHELL LEE

Petitioner/Cross-
Respondent

vs.

STATE OF FLORIDA,

Respondent/Cross-
Petitioner.

______________________________/

CASE NO. SC17-1555
DCA CASE NOS.
1D15-0943; 1D15-0945

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner/Cross-Respondent was the Appellee/Cross-Petitioner in the lower court proceedings and the Respondent/Cross-Petitioner was the Petitioner/Cross-Appellee in the proceedings in the First District of Appeal. Petitioner/Cross-Respondent will be referred to in this brief as "Petitioner" or by his proper name. Respondent/Cross-Petitioner will be referred to in this brief as "Respondent" or "State."

STATEMENT OF THE CASE

On January 16, 2014, the State Attorney for the First Judicial Circuit in and for Escambia County filed an information charging Petitioner, BRIAN MITCHELL LEE, with travel to meet a minor, unlawful use of two-way communications device to facilitate the commission of a felony, and improper use of a computer to facilitate or solicit the sexual conduct of a child (I:3-4). On January 7, 2015, Petitioner filed a Motion to Dismiss arguing that prosecution on soliciting sexual conduct of a child and traveling to meet a minor violated double jeopardy, and the prosecution of traveling to meet minor and use of a two-way communication device also violated double jeopardy (I:33). The trial court denied Petitioner's Motion to Dismiss finding there were no violations of double jeopardy (III:61).

The State filed a Motion in Limine to exclude evidence of or testimony regarding Petitioner's letter to his housekeeper, Jennifer Klous, in which Petitioner wrote on January 1, 2014 that he was going to meet a person he had been communicating online with who he believed was a law enforcement officer posing as a minor. The state argued the letter was inadmissible hearsay under Section 90.801(3) because it was exculpatory (I:16-17). The trial court heard proffered testimony from Ms. Klous and Petitioner (IV:220-226). Petitioner testified that on January 1, 2014,he wrote a letter to Ms. Klous prior to meeting the alleged minor.

In that letter, he stated he had been harassed by the police on Craigslist, and was meeting them the next day. Petitioner wrote that he knew the person was a police officer, and that he would beat the officer at his own game. Petitioner wrote further that if the person was a minor, then Petitioner would apologize to the minor, and tell the minor that he, Petitioner, cannot engage in sex with the minor. He placed the letter in a sealed envelope addressed to Ms. Klous (IV:220-222). Ms. Klous testified to receiving the letter, and delivering it to defense counsel (IV:224-226). The trial court ruled that the contents of the letter were inadmissible hearsay, but that Petitioner could testify as to writing a letter and Ms. Klous could testify to receiving the letter (IV:230-231). Petitioner's letter was admitted as an Exhibit (II:249-252).

Petitioner received a jury trial with the Honorable Terry D. Terrell, Circuit Judge, presiding (III:60-V:413). Petitioner was found guilty as charged on all three counts (I:42; V:410). The trial court withheld adjudication, and placed Petitioner on community control for two years followed by 13 years of probation for traveling to meet a minor, and to concurrent terms of community control for two years followed by three years for unlawful use of a two-way communication device and use of a computer to solicit sexual conduct of a child (I:91-110; II:222).

Petitioner appealed to the First District Court of Appeal. On June 1, 2017, the court granted the State's Motion For Rehearing En Banc vacating the prior

opinion, and affirming Petitioner's convictions finding no violation of double jeopardy. *Lee v. State*, 223 So. 3d 342 (Fla. 1st DCA 2017). Petitioner filed a Motion to Certify Conflict with *State v. Shelley*, 176 So. 3d 914 (Fla. 2015) as well as *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); and, *Mizner v. State,* 154 So. 3d 391 (Fla. 2d DCA 2014). On August 8, 2017, the First District Court of Appeal denied Petitioner's Motion To Certify Conflict. On August 21, 2017, Petitioner filed a Notice to Invoke the discretionary jurisdiction of this Court. On February 8, 2018, this Court accepted jurisdiction.

STATEMENT OF THE FACTS

Investigator Ward of Escambia County Sheriff's Office testified he was in the Computer Crimes division and on the FBI North Florida Cyber Task Force and the North Florida Internet Crimes Against Children Task Force (III:93-95). He participated in an undercover investigation on December 22, 2013 (III:97). Investigator Ward went on different websites checking for advertisements showing interests in sex with minors (III:97-98). He stated that the ads did not explicitly state an interest in having sex with a minor. He acknowledged there were adults looking for sexual encounters with other adults on Craigslist, and some of the ads he targeted where from people who had no interest in children (III:98).

That night, Investigator Ward saw an ad in the Casual Encounters section of Craigslist (III:98-99). The ad stated "Oral top-for younger fit men-MFM-41 (Perdido Key and NAS)." Investigator Ward stated he understood the ad to mean the person was a 41 year old male in the area of Perdido Key offering to give oral sex to another male (III:102). The ad read,

> Prefer to host, but can travel. Free all morning. Love to suck and swallow. I can most men nut twice. I prefer younger men. Under 30 is a big plus. I am versatile. I am more of top than bottom. I like to cuddle, stroke, body contact, shower together, and like kissing. I'm 6'4, 255, but HWP, seven and a half inches and thick. Clean, cut, DDF. Don't smoke; rather you didn't either. I don't drink, but don't mind if you do. Live near base. Can

> come pick you up. No reciprocation required if you
> come to me are fit and under 25.

(III:103). The ad had a primary photo of a man giving another man oral sex. The ad was posted five days before Investigator Ward responded to it, assuming the persona of a 14 year old boy (III:103-104). He stated the ad caught his attention because it was for men who were under the age of 25 (III:104). Initially, Investigator Ward and Petitioner communicated through Craigslist. When Petitioner requested a picture, Investigator Ward asked for Petitioner's email address in case of a need to follow up (III: 105). Investigator Ward sent a photo of a Pensacola Police Officer with his face blurred (III:106).

Copies of the emails between Petitioner and Investigator Ward were furnished to the jury so that jurors could follow along during his testimony (III:107). The emails were sent between December 22, 2013 and January 2, 2014 (III:108). Investigator Ward would purposely misspell words and use slang in portraying a 14 year old male named Matt Breaux (III:111-112,113). Investigator Ward's initial response to the ad was, "hey, I'm kinda young, if that's ok." Petitioner responded, "what are you looking to do? I like young. When are you free?" Investigator Ward responded, "I don't know. I have never done anything. But I'm not 18 yet so I know you probably don't want to talk to me" (III:113). Petitioner responded, "I understand the situation. I am willing to meet you." He continued suggesting they meet in a public place, and then go somewhere private

so as to prevent committing to anything in text. Investigator Ward replied he could not meet that day because his "dad" was home and he did not have a driver's license (III:114). Petitioner emailed that he was going out of town for a week, and asked "Matt" where he lived. Investigator Ward emailed a location. Petitioner responded he would be in the area that night, but Investigator Ward did not respond. Petitioner also asked if "Matt" had been around girls. Investigator Ward did not respond (III:115). The next day, Investigator Ward emailed that he was 14 years old, and "girls aren't my thing." Petitioner responded, "Wow. You are young." Petitioner told Matt he had oral sex with another boy when he was 14 (III:116). Petitioner emailed that he tried to be "straight," but his preference was guys" (III:116). Petitioner continued to email "Matt" that week offering to show him how to perform oral sex on another man (III:117-118). On December 26, 2013, Petitioner and "Matt" discussed meeting at the bowling alley, and then going to Petitioner's residence when Petitioner returned home (III:119-120). Petitioner asked for a picture of "Matt" in "tight briefs." Investigator Ward asked Petitioner for his email (III:120). Petitioner offered to send a "body pic" of himself, and also suggested the photo and the messages not be saved (III:121). Petitioner and Investigator Ward exchanged photos (III:122-123). Petitioner emailed that he had never done anything with anyone under age before, and would never approach a boy or make any kind of sexual advances on an underage boy (III:124-125). He

admitted to having fantasies of walking in on someone "jerking off" and giving him oral sex. "Matt" emails that he's "always wanted to try things." Petitioner responded that he had been there, and wanted to help "Matt" okay with his urges and preferences (III:125-127). Petitioner admitted to being attracted to adolescent males, but had never done anything to initiate any such relationship (III:126). Investigator Ward asked Petitioner what he would do. Petitioner responded they would initially sit on the couch while touching "Matt's" inner thigh, and then proceed to kissing and grinding (III:127). Petitioner would then undress "Matt" while kissing him, and proceed to give him oral sex (III:128-129).

On December 29, 2013, Investigator Ward asked Petitioner what was his occupation, and Petitioner emailed that he was a family doctor (III:130). On December 30th, Petitioner emailed that his sexual fantasy was spend the day with a young man at a water park posing as father and son; then, have sex in private (III:135-137). Petitioner emailed regarding his attraction to adolescent males, but did not believe he was a pedophile since he did not act on his desires or coerced a child into sexual acts. He believed that since "Matt" approached him, there was a difference between their contact and the acts of a sexual predator (III:139-140).

Petitioner emailed "Matt" on January 1st and planned to meet "Matt" at the bowling alley the next day at 6:00 p.m. Petitioner gave a physical description of himself and his truck. When Petitioner arrived the next evening at the bowling

alley, he and his vehicle matched the description he gave in his email (III:142,144). Using the information provided by Petitioner in his emails and DAVID database, Investigator Ward found a driver's license photo that matched the description and the photos sent by Petitioner (III:145-146). Petitioner was arrested, and his vehicle was searched. Investigator Ward found a Boy Scout patch and two medications prescribed for erectile dysfunction (III:150). Investigator Ward identified Petitioner in court as the person who solicited and traveled to meet a person believed to be 14 years old (III:151). Investigator Ward seized Petitioner's iPhone, but was not about to conduct a forensic review of the phone because it was password protected (III:151).

On cross-examination, Investigator Ward admitted he targeted Petitioner's ad (III:155). Investigator Ward admitted the ad stated Petitioner's age as 41, and there was nothing in ad which stated he was looking for a teen or a child (III:156). Investigator Ward also admitted he targeted the homosexual adult community on Craigslist (III:158). In the eight years Investigator Ward had been investigating these crimes, he never received a complaint against Petitioner (III:160-161).

Agent Vannessa Carmona of Florida Department of Law Enforcement testified that she was contacted early on the afternoon of January 2, 2014 to assist with surveillance of Petitioner (IV:206-207,211). She located his vehicle at a doctor's office in Perdido Key (IV:207). Agent Carmona arrived there between

3:00 and 3:30. She did not remember the exact time when Petitioner left the doctor's office, but it was later than anticipated. It was getting dark as she followed his vehicle. She was in an unmarked vehicle (IV:208). Agent Carmona could see the light of Petitioner's cell phone illuminating as he was driving (IV:209). Agent Carmona relayed that to the team at the meet location which was the bowling alley (IV:209,210). Petitioner would occasionally drive off to the side of the road, and then come back onto the road when his cell phone would light up (IV:209). She did not follow Petitioner into the bowling alley (IV:210). Petitioner did not attempt to disguise what he was doing, and did drive in irregular patterns except for driving onto the shoulder of the road, and back onto the road (IV:214). Petitioner did not speed (IV:215).

Petitioner testified that he was doctor in family medicine (IV:234). Petitioner had been going through a divorce for a few years when he started online dating in the summer of 2012 (IV:242-243,245). He dated a few women, but realized he was interested in men. Petitioner had been attracted to men since he was a teenager (IV:242-243). He posted several ads mostly on Craigslist in the area of Men for Men and Casual Encounters (IV:244-245). Both were adult sites (IV:245). His intent was to meet other adult men. Petitioner stated he knew Investigator Ward's responses to his ad were those of a police officer rather than a 14 year-old. Petitioner traveled to meet the officer out of anger of attempts to

entrap him (IV:246). Petitioner felt he was being targeted because he was a homosexual. Petitioner stated that it was the third or fourth time in a month someone had responded to his ad claiming to be underage, asking if that was okay, and asking Petitioner to meet with the alleged minor. Petitioner had responded to these previous messages by stating "not interested" (IV:247; V:280). Petitioner also alerted Craigslist to the "under-aged" person on an adult site. The responses were to different ads (IV:248). Petitioner had minors who messaged him, but when an actual minor would respond, he would not reveal his age. Petitioner surmised the person was under-aged by catching the person in a lie. An actual minor would never send picture of himself (IV:249-250). Petitioner would cut off contact when Petitioner concluded the person was a minor (IV:250).

Petitioner stated Investigator Ward's initial response, "I'm a little young," and his second response, "I'm under 18" were too blatant to be from an actual minor (IV:250). At first, Petitioner thought he would "mess" with the officer and send him/her on a wild goose chase (IV:250-251). He was attempting to antagonize the officer by discussing his fantasy about the water park and his attraction to adolescent males. Petitioner was telling the officer what he wanted to hear (IV:251;:286). Before going to the bowling alley, Petitioner wrote a four page letter confiding his suspicions he was emailing an officer to his cleaning lady on January 1st (IV:254-255;V:289). He put it in an envelope, sealed it, and instructed

her not to open it until January 3rd (IV:255). When Petitioner went to the bowling alley, he expected to be arrested; he saw himself as a political activist protesting the issue of the police targeting homosexuals. Petitioner never believed he was meeting a 14 year old (V:268). He traveled to the bowling alley to confront the officer (V:290).

Jennifer Klous testified she was Petitioner's housekeeper and friend for five years (V:293). On January 1, 2014, she found an envelope on the counter in Petitioner's apartment addressed to her. She opened it after Petitioner was arrested (V:294). Ms. Klous gave the letter to defense counsel some months later because Ms. Klous did not want to become involved and the letter contained personal information (V:296).

Dr. Julie Harper, a clinical and forensic psychologist, testified she was asked to evaluate Petitioner (V:302). Dr. Harper formed am opinion of Petitioner that he had high intelligence but also had a lot of inner pain and low self-esteem from having to relinquish childhood ideals such as marrying and raising children. He was diagnosed with depression and personality characteristics which make him vulnerable (V:303). Dr. Harper opined that Petitioner's personality was consistent with someone who would want to antagonize and confront an officer (V:303-304). She used the broad measures of clinical pathology and personality to determine whether there were findings of depression and anxiety which would explain his

decision making (V:304-305). She also used the Computerized Test of Attention to determine whether there was any difference in impulse control. The third test was a Trauma Symptom Inventory to determine whether he was a victim of trauma. Essentially, Petitioner did not respond to tests.[1] The results of the Department of Health evaluations deemed Petitioner fit to practice (V:305). Petitioner had taken the tests prior to Dr. Harper's evaluation. He did not want to repeat them again, and so he only participated in some of the tests. Dr. Harper characterized Petitioner's response to the testing as a "round about way to confront" her which was similar to Petitioner's behavior with Investigator Ward (V:306). Dr. Harper stated Petitioner's responses were consistent (V:309).

Dr. Harper read the e-mails between Petitioner and Investigator Ward (V:306). The e-mails revealed Petitioner's tolerance of risks by giving information as to his location at a particular time. The lapse of times between his responses showed he did not have a constant and pervasive interest; thus, he was not obsessive (V:307).

The trial court gave the following jury instruction on Count III, the solicitation of a minor based on Section 847.0135(3)(a):

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[1]The witness's testimony on the results is contradictory and confusing. Undersigned believes there may have been some typographical errors causing confusion. This testimony is not germane to issues raised on appeal.

> To prove the crime of solicitation a child or a 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: One, Brian Lee Mitchell, knowingly used a computer online service, Internet service, local bulletin board service, or device capable of electronic data storage or transmission to contact a law enforcement officer posing as a 14 year old male child; Two, the law enforcement officer posing as a 14 year old male child was a child or a person believed by the Defendant to be a child; Three, during that contact Brian Mitchell Lee seduced, solicited, lured, enticed, or attempted to seduce, solicit, lure, or entice victim **to engage** in unlawful sexual conduct with another child.

(V:395-396).

SUMMARY OF THE ARGUMENT

Issue I:

The lower court improperly shifted the burden of proof to Petitioner to prove his convictions violated double jeopardy. Since he raised the issue of double jeopardy in his pre-trial motion to dismiss, he presented a prima facie case of a violation of double jeopardy which shifted the burden to the State to prove his convictions did not violate double jeopardy.

Issue II:

The lower court erred in finding no double jeopardy violation after considering evidence in the record outside of the information and verdict to find Petitioner's convictions of solicitation, unlawful use of a two-way communication device, and traveling to meet a minor after solicitation were based on separate and distinct acts. The information charged Petitioner with one count of solicitation and one count of unlawful use of a two-way communication device during the same twelve day period, and one count of traveling to meet minor after solicitation on the thirteenth day. By contemplating the evidence could support multiple acts of solicitation and use of a two-way communication device, the lower court considered improperly uncharged conduct.

Issue III:

The standard jury instructions on improper use of a computer to facilitate or solicit the sexual conduct of a child constitute fundamental error by reducing the State's burden to prove the solicitation was to have the child engage in unlawful sexual activity, whereas the statute required the State to prove the solicitation was for the child to commit a crime. This Court has revised the standard jury instruction to require the State to prove the solicitation was to have the child commit a crime in accordance with the statutory language. Thus, the standard jury instruction given during Appellant's trial constituted fundamental error, entitling to a discharge of the offense of improper use of a computer to facilitate or solicit the sexual conduct of a child.

Issue IV:

The trial court erred in excluding Appellant's letter to Ms. Klous written before he proceeded to meet the alleged minor because the letter was evidence of his state of mind and was relevant to the element of intent to engage in sexual acts with a minor as well as Appellant's sole defense that he believed the person to whom he was communicating with was a police officer and not a minor. Upon this ground, this Court should reverse Appellant's judgment and sentence, and remand for a new trial.

ARGUMENT

I. WHETHER THE BURDEN OF PROVING A VIOLATION OD DOUBLE JEOPARDY RESTS WITH PETITIONER WHEN ISSUE WAS RAISED IN TRIAL COURT?

The standard of review is *de novo.* "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 a defendant proffers sufficient proof to support a nonfrivolous claim, the burden shifts to the government to show that double jeopardy principles do not bar the proceedings." *U.S. v. Cruce,* 21 F. 3d 70, 74 (5th Cir. 1994) (citations omitted); *see also United States v. Stricklin*, 591 F. 2d 1112 (5th Cir. 1979); *United States v. Reed*, 980 F. 2d 1568 (11th Cir. 1993).

In the case at bar, Petitioner filed a motion to dismiss in the trial court arguing convictions solicitation of a minor, traveling to meet a minor, and unlawful use of a two way communication device violated double jeopardy (I:33). The trial court denied the motion finding there were no violations of double jeopardy (III:61). The First District Court of Appeal held in its majority opinion held that in double jeopardy cases, it is the appellant's burden to demonstrate that an error occurred at the trial level, and not the State's burden to show that error did not occur, citing *Edwards v. State,* 139 So. 3d 981 (Fla. 1st DCA 2014) and *Capron v. State*, 948 So. 2d 954 (Fla. 5th DCA 2007). The defendant in *Edwards* entered a

guilty plea to attempted murder, aggravated battery, and aggravated battery on a pregnant victim. Since Edwards entered a guilty plea, he did not raise the issue of double jeopardy at trial, and raised the issue for the first time on appeal. In *Capron*, the Fifth District Court of Appeal held the defendant bears the burden of proving a double jeopardy violation, but once again, there are no indications that Capron raised this issue at the trial level as did Petitioner. Moreover, the court in *Capron* cited to a federal case, *U.S. v. Rodriguez-Aguirre*, 73 F. 3d 1023 (10th Cir. 1988) which dealt with the aspect of double jeopardy from a former conviction on the same charge; *United States v. Daniel,* 857 F.2d 1392 (10th Cir. 1988) which dealt with an appeal of a motion to dismiss where the defendant had not been convicted; and *Koon v. State*, 463 So. 2d 201, 203 (Fla. 1985) which dealt whether the state was a "tool" used in the federal prosecution on similar charges. None of the scenarios in the three cases are similar to or have any bearing on the issue of double jeopardy in the case at bar.

Where the defendant raises the issue of a double jeopardy violation for the first time, the burden of proof is on the appellant as stated in *Griffith v. State*, 208 So. 3d 1208 (Fla. 5th DCA 2017). In that situation, the double jeopardy must be apparent from face of the record. *Id.* at 1211. However, in the case at bar, Petitioner raised the double jeopardy violations in the trial court and maintained his innocence below. He has presented a prima facie claim that double jeopardy

principles have been violated. Thus, the burden shifts to the State to prove double jeopardy principles do not bar the proceedings. This Court should find the burden of proof rests with the State to prove there is no violation of double jeopardy.

II. WHETHER PETITIONER'S CONVICTIONS FOR SOLICITATION OF A MINOR, UNLAWFUL USE OF A TWO WAY COMMUNICATION DEVICE, AND TRAVELING TO MEET MINOR FOR UNLAWFUL SEXUAL ACTIVITY AROSE FROM THE SAME CRIMINAL EPISODE IN VIOLATION OF DOUBLE JEOPARDY?

The standard of review is *de novo*. *Graham v. State*, 207 So. 3d 135 (Fla. 2016). The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U.S. Constit. Amend. V. The Double Jeopardy Clause of the Florida Constitution provides that "[n]o person shall be…. twice put in jeopardy for the same offense." Art. I, Section 9, Fla. Constit. Section 775.021, Florida Statutes (2013), commonly referred to as the *Blockburger*[1] analysis provides:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not

[1] *Blockburger v. United States*, 284 U.S. 299 (1932).

> allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are the degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

In the case at bar, there was no dispute that the elements of solicitation and unlawful use of a two-way communication device were subsumed in the offense of traveling to meet minor after solicitation. The disputed issue was whether Petitioner's convictions of solicitation, unlawful use of a two way communication device, and traveling were based upon the same criminal episode or separate and distinct acts. The First District Court of Appeal considered the evidence at trial as well as the charging document to find Petitioner's convictions did not arise from the same criminal episode. The majority opinion in *Lee* cited *State v. Shelley,* 176 So. 3d 914 (Fla. 2015), and stated "[i]n some recent decisions, our sister courts have misconstrued the holdings of *Shelley* and *Hamilton*[1] in one or more of the following respects" by concluding the convictions violated double jeopardy without first examining whether there were separate criminal episodes or distinct acts, and basing the finding of a double jeopardy violation solely on the charging

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[1] *Hamilton v. State*, 163 So. 3d 1277 (Fla. 1st DCA 2015)

document and the jury verdict without examining the entire record. *Lee,* 223 So. 3d at 352-353. The majority opinion in *Lee* found the fact the information charged distinct acts of solicitation and the illegal use of a two way communication device because Lee used his mobile phone from three different places and there were temporal breaks during the eleven day period. Although Petitioner was charged with one count of solicitation and one count of illegal use of a two-way communication device, the court held the charging document put Lee on notice that the jury could find he "committed multiple acts of solicitation during the charged period." *Lee,* 223 So. 3d at 354-356.

"Distinct acts" are "acts of a separate character and type requiring different elements of proof." *State v. Meshell*, 2 So. 3d 132, 135 (Fla.2009). While the offenses described by section 847.0135(3) and section 934.15 are subsumed within the proof of the offense described by section 847.0135(4), case law discusses violations of these statutes which occurred on the same day or span of days. For example, the charging document in *Shelley* also alleged a single count of solicitation which spanned several days; yet this Court considered the single count of solicitation as a single criminal act of solicitation in its analysis of double jeopardy. *Shelley*, 176 So. 3d at 916-917. Another case would be *Hamilton v. State*, 163 So. 3d 1277 (Fla. 1st DCA 2015) where the cell phone uses occurred over three days but the court in *Hamilton* found the State had "charged them as

occurring during a single episode." *Id.* at 1278. In *Mizner v. State*, 154 So. 3d 391 (Fla. 2d DCA 2014), the State argued that since the offenses occurred over a number of days, the defendant could be convicted of multiple acts. The court rejected the State's argument stating, "[a]lthough the offenses spanned more than one day, the State charged single counts of soliciting, traveling, and unlawful use of a two-way communication device." *Id.* at 399-400. *See, Holt v. State*, 173 So. 3d 1079, 1081 (Fla. 5th DCA 2015)(since the charging document and the verdict lacked clear language to show charges were based on two distinct acts, "the State charged the offenses as occurring during a single criminal episode, and we may not assume they were predicated on different acts"); *Holubek v. State*, 173 So. 3d 1114 (Fla. 5th DCA 2015) (the unlawful use of the two-way communication device and the travel to meet "minor arose from the same criminal episode spanning the evening of one day to the early morning hours of the next day). Conversely, in *Graham v. State*, 170 So. 3d 141, 143 (Fla. 1st DCA 2015), the court found no double jeopardy violation where "the information and the jury verdict demonstrate that the charges were predicated on two distinct acts."

As pointed out in the dissenting opinion in *Lee*, the prosecutor had the option to charge Lee with separate counts of solicitation for each day in the alleged timeframe pursuant to section 847.0135(3)(b) , Florida Statutes, but chose not to. *Lee*, 223 So. 3d at 365. Thus, the number of charges listed in the information

notified Lee he could only be found guilty of one count of solicitation and one count of illegal use of a two way communication device, and actually limited the jury to finding Lee guilty of that number of offenses. To hold otherwise is to invalidate the notice requirement of information pursuant to the Fourth and Sixth Amendments. *See, U.S.* v. *McIntosh*, 704 F. 3d 894, 204 (11th Cir. 2013) (Three unique functions are served by an information or indictment: (1) to ensure that the defendant has adequate notice of the charges against him or her as the Sixth Amendment requires, (2) to preserve the defendant's right to be accused by his fellow citizens upon a finding of probable cause, and (3) to protect the defendant against double jeopardy. U.S.C.A. Const.Amends. 4–6.). In the interest of ensuring uniformity in the determination of double jeopardy, it is imperative for this Court to reverse the lower court's decision in this case by applying the aforementioned case law to hold courts must consider whether the charging document and the verdict demonstrate the charges are based upon separate and distinct acts. To allow courts to consider evidence outside of the charging document and verdict in determining whether convictions were based on distinct acts would invite courts "to deny a double jeopardy claim 'based on uncharged conduct simply because it could have been charged.'" *Stapler v. State*, 190 So. 3d 162, 165 (Fla. 5th DCA 2016) (quoting *Shelley v. State*, 134 So. 3d 1138, 1141-1142 (Fla. 2d DCA 2014).

Applying the above case law to the instant case, this Court should find that based upon the information and the verdict, Petitioner's convictions of solicitation, unlawful use of a two-way communication device, and traveling arose from the same criminal episode and violate double jeopardy. In so doing, this Court should reverse Petitioner's convictions for solicitation and use of a two-way communications device.

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III. WHETHER THE JURY INSTRUCTIONS GIVEN ON THE OFFENSE OF IMPROPER USE OF A COMPUTER TO SOLICIT A MINOR CONSTITUTED FUNDAMENTAL ERROR?

The standard of review for this issue is *de novo*. The trial court gave the following jury instruction on Count 3, the solicitation of a minor based on Section 847.0135(3)(a):

> To prove the crime of solicitation a child or a 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: One, Brian Lee Mitchell, knowingly used a computer online service, Internet service, local bulletin board service, or device capable of electronic data storage or transmission to contact a law enforcement officer posing as a 14 year old male child; Two, the law enforcement officer posing as a 14 year old male child was a child or a person believed by the Defendant to be a child; Three, during that contact Brian Mitchell Lee seduced, solicited, lured, enticed, or attempted to seduce, solicit, lure, or entice victim **to engage** in unlawful sexual conduct with another child.

(V:395-396) (emphasis added). Section 847.0135(3)(a) states:

> (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;

(Emphasis added). The phrase used in the standard jury instruction which was given, "to engage in," broadened the scope of prohibited conduct beyond the phrase used in the statute which is "to commit." Thus, the jury instruction reduced the State's burden of proof by authorizing a conviction if Petitioner seduced the child to engage in the alleged sexual offenses, whereas the statute only allows a conviction if Petitioner seduced the child **to commit** the alleged sexual offenses. This Court wrote in *Steele v. State,* 561 So. 2d 638, 645 (Fla. 1st DCA 1990), "[w]hile the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide, and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case."

On April 30, 2015, the Florida Supreme Court rendered an opinion amending Standard Jury Instruction (Criminal) 11.17(a) by changing the phrase, "to engage in," to the statutory phrase, "to commit." *In Re: Standard Jury Instructions in Criminal Cases-Report No. 2014-07*, 163 So. 3d 478 (Fla. 2015). Appellate cases are decided upon the law in effect at the time of the appeal, and not at the time of trial. *Hudson v. State*, 825 So. 2d 460 (Fla. 1st DCA 2002), *citing, Hendeles v. Sanford Auto Auction, Inc.,* 364 So. 2d 467, 468 (Fla. 1978). Thus, the revised Standard Jury Instruction 11.17(a) should be applied in the instant case since it is now in effect.

Fundamental error has been found where the standard jury instruction has been given. *See e.g. Williams v. State*, 123 So. 3d 23 (Fla. 2013); *State v. Montgomery,* 39 So. 3d 252 (Fla. 2010); *Reed v. State*, 837 So. 2d 366 (Fla. 2002); *State v. Dominguez,* 509 So. 2d 917 (Fla. 1987). Likewise, this Court should find that the jury instruction given in this case constituted fundamental error since the former standard jury instruction upon which it was based improperly reduced the State's burden of proof. This Court should reverse Petitioner's conviction on Count III, and discharge Petitioner from that offense.

IV. WHETHER THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE TO EXCLUDE PETITIONER'S LETTER TO JENNIFER KLOUS WRITTEN DURING THE INCIDENT AS ADMISSIBLE EVIDENCE OF PETITIONER'S THEN EXISTING STATE OF MIND?

The standard of review for a trial court's decision on admissibility of evidence is abuse of discretion; however, the question of whether the evidence falls within the statutory definition of hearsay is a matter of law subject to *de novo* review. *Burkey v. State*, 922 So. 2d 1033 (Fla. 4th DCA 2006). Section 90.803(3)(a), Florida Statutes (2014) states:

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is unavailable:

(3)(a) A statement of the declarant's then existing state of mind, 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 any other time when such state is at issue in the action.

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

In the case at bar, Petitioner sought to introduce a letter he wrote before he went to meet the alleged minor at a bowling alley. Thus, the letter was written during the incident and qualifies as a statement of Petitioner's then existing state of

mind and is proof of his intent which makes it admissible under section 90.803(3). In the letter, Petitioner stated his belief that the person who responded to his ad on Craigslist was a police officer posing as a 14 year-old boy, and wrote, "I have suggested we may have sex at some future time, but only because I am convinced this is the police..." (II:250). Petitioner stated his belief that the officer's activity on Craigslist was "soliciting men to perpetrate crime" and was "an injustice" he needed to stop (II:250). Petitioner also wrote, "if by some chance I am wrong and this is a young boy, I will offer my sincere apologies and will try to give him some guidance and be the mentor and friend to him that I never had growing up" (II:252). Since intent is an element of the offense of soliciting a minor for unlawful sexual activity, Petitioner's letter was admissible because its contents were clearly relevant to a material fact as to whether he intended to solicit a minor for sex. *See, Kent v. State*, 704 So. 2d 121 (Fla. 1st DCA 1997) (trial court committed reversible error by excluding testimony of three witnesses who overheard defendant's statements to officers refusing to sell cocaine to officers, holding the statements were admissible as circumstantial non-hearsay evidence offered to prove the defendant's state of mind and relevant to prove a material fact, i.e., a lack of predisposition.)

In a more recent case, *Burkey v. State*, 922 So. 2d 1033 (Fla. 4th DCA 2006), the trial court allowed a defense witness who was in the house when a confidential

informant and undercover officer were there to testify that the confidential informant sat on defendant's lap and asked for marijuana, but the trial court did not allow the witness to testify that the defendant said, "I don't do that kind of stuff." The appellate court held the defendant's statement was not offered to prove the truth of the matter asserted, but to prove that he rejected the confidential informant's offer to buy drugs, and should have been admitted as relevant non-hearsay evidence. *Id.* at 1035-1036. The appellate court held the error to be harmful because it was "highly relevant and crucial to his defense that he did not participate in the sales transaction... We cannot say beyond a reasonable doubt that the exclusion of the defendant's statement did not contribute to the jury's verdict." *Burkey*, 922 So. 2d at 1036.

Likewise, the trial court erred in the instant case in excluding Petitioner's letter written during the incident wherein he expressed his belief he was communicating with an officer posing as a 14 year old boy and his intent to meet the officer for the purpose of exposing the officer. Petitioner clearly denied any intent to solicit a minor for sex. Since the letter was proof of Petitioner's then existing state of mind and highly relevant and crucial to his defense that he had no intent to solicit a minor for sexual activity, the trial court's error in excluding the letter was harmful error. This Court should reverse Petitioner's judgment and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing arguments and authorities in this brief, Petitioner is entitled to reversal of his conviction for solicitation of a minor and unlawful use of a two-way communication device, or in the alternative, remand for a new trial.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic mail to Heather Flanagan Ross, Office of the Attorney General, at crimapptlh@myfloridalegal.com, this day of February 28, 2018. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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