

IN THE SUPREME COURT OF FLORIDA

BRIAN MITCHELL LEE, :
 :
 Petitioner/Cross- :
 Respondent, :
 v. : **SC17-1555**
 :
 STATE OF FLORIDA, :
 :
 Respondent/Cross- :
 Petitioner. :
 _____/

JURISDICTIONAL BRIEF OF PETITIONER

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I. PRELIMINARY STATEMENT

Petitioner/Cross-Respondent was the Appellee/Cross-Appellant in the lower court proceedings and the Respondent/Cross-Petitioner was the Appellant/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."

II. STATEMENT OF THE CASE AND FACTS

On January 15, 2015, Petitioner/Cross-Respondent was found guilty of traveling to meet minor for unlawful sexual activity in violation of Section 847.0135(4) (a), unlawful use of two-way communications device to facilitate the commission of a felony in violation of Section 934.215, and improper use of computer services in violation of Section 847.0135(3) (a). Petitioner appealed his convictions 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.

The First District Court of Appeal rendered an opinion on November 28, 2016 reversing Petitioner's convictions for unlawful use of two-way communications device to facilitate the commission of a felony and improper use of computer services. *Lee v. State*, 41 Fla. L. Weekly D2650 (Fla. 1st DCA Nov. 28, 2016). 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*, 42 Fla. L. Weekly D1273 (Fla. 1st DCA June 1, 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.

III. SUMMARY OF ARGUMENT

This Court should accept jurisdiction in this case pursuant to rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The First District Court of Appeal certified that its decision conflicts with the decisions of this Court and the Second, and Fifth District Courts of Appeal, creating discretionary review jurisdiction.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S OPINION IN *Lee v. State*, 42 FLA. L. WEEKLY D1273 (FLA. 1ST DCA, JUNE 1, 2017) EXPRESSLY AND DIRECTLY CONFLICTS 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); and, *Mizner v. State*, 154 So. 3d 391 (Fla. 2d DCA 2014).

This Court should accept jurisdiction in this case because the First District Court of Appeal's opinion expressly and directly conflicts with the precedent from this Court and the Second and Fifth Districts Courts of Appeal.

In *Lee v. State*, 42 Fla. L. Weekly D1273 (Fla. 1ST DCA June 1, 2017), the single count of solicitation alleged communications over a span of twelve days. The court held Petitioner's convictions for traveling to meet a minor to engage in sexual conduct, the unlawful use of a two-way communications device to facilitate a felony, and use of a computer to facilitate or solicit the sexual conduct of a child did not violate double jeopardy even though there was a single count of solicitation. This Court held its review of the evidence established there were separate criminal episodes and distinct acts of solicitation sufficient to overcome a violation of double jeopardy. This Court also held the burden of proof was on the Appellant to show

there was a violation of double jeopardy regardless of the fact Appellant raised the issue in the trial court and preserved the issue for appeal. *Id.*

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.” *Id.* at *17. The court further explained the other courts came to the conclusion the convictions violated double jeopardy without first examining whether there were separate criminal episodes or distinct acts; concluded there was a double jeopardy violation based solely on the charging document and the jury verdict without examining the entire record; or, improperly shifted the burden to the State to show the multiple convictions were not a violation of double jeopardy. Specifically, this Court cited the opinions from the Second and Fifth District Courts of Appeal. *Id.* at *17-18.

In *State v. Shelley*, 176 So. 3d 914 (Fla. 2015), although the single count of solicitation covered several days of communication, this Court found the defendant’s convictions of solicitation and traveling to meet minor violated double jeopardy. *Id.*

In *Thomas v. State*, 209 So. 3d 35 (Fla. 2d DCA 2016), the

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

court looked at the allegations in the information to determine the allegations of the single count of solicitation spanning March 19, 2013 through March 23, 2013 constituted a single episode of criminal conduct because the State did not describe any temporal break. The court also relied on the information in its determination of a double jeopardy violations in *Honaker v. State*, 199 So. 3d 1066 (Fla. 5th DCA 2016), *Stapler v. State*, 190 So. 3d 162 (Fla. 5th DCA 2016) and *Mizner v. State*, 154 So. 3d 391 (Fla. 2d DCA 2014). The court placed the burden of proof on the State to show there was no double jeopardy violation in *Holt v. State*, 173 So. 3d 1079 (Fla. 5th DCA 2015).

Thus, the court's opinion in *Lee* directly conflicts with the above opinions of the Second and Fifth District Court of Appeal on whether the reviewing court should only consider the charging document and jury verdict or examine the entire evidentiary record to determine whether a single count of solicitation spanning a period of more than one day can be considered a single criminal episode for purposes of double jeopardy and whether the Appellant bears the burden of proving the existence of a violation of double jeopardy even after raising the issue in trial court. Thus, this Court should accept this case for jurisdictional review, finding that it creates a direct and express conflict with this Court's opinion in *Shelley* and its sister courts decisions in *Thomas*, *Honaker*, *Stapler*,

Holt, and Mizner.

IV. CONCLUSION

This Court should accept jurisdictional review, finding that *Lee v. State*, 42 Fla. L. Weekly D1273 (Fla. 1ST DCA, June 1, 2017) expressly and directly conflicts 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); and, *Mizner v. State*, 154 So. 3d 391 (Fla. 2d DCA 2014).

V. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Heather Ross, Assistant Attorney General, at crimapptlh@myfloridalegal.com, and, via US Mail, to Brian Mitchell Lee, 9890 North Loop Road, Apt 517, Pensacola, FL 32507, on this date, August 23, 2017.

VI. CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Rule 9.210 of the Florida Rules of Appellate Procedure, this brief was typed in Courier New 12 Point Font.

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