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IN THE SUPREME COURT OF FLORIDA

MARK GRIFFIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-713
L.T. No(s). 1D13-1640;
12-1951CF

RESPONSE TO ORDER TO SHOW CAUSE

Respondent, State of Florida, (hereinafter the State), files its response to this Court's Wednesday, October 14, 2015, Order to Show Cause and in support thereof states:

1. This Court has ordered the State to show cause, "why in light of *State v. Shelley*, 40 Fla. L. Weekly S362 (Fla. Jun. 25, 2015), this Court should not accept jurisdiction in this case, summarily quash the decision being reviewed, and remand this case with an instruction that the conviction and sentence for the lesser included offense be vacated."

2. In *Shelley*, this Court found there was no express Legislative intent found in § 847.0135, Florida Statutes, "to authorize separate convictions and punishment for conduct that constitutes both solicitation under subsection (3)(b) and traveling after solicitation under (4)(b)." *Id.* at *4. Further, this Court held "because the statutory elements of solicitation are entirely subsumed by the statutory elements of traveling after solicitation, the

offenses are the same for purposes of the *Blockburger* same-elements test codified in section 775.021(4), Florida Statutes." *Id.* Therefore, this Court held conviction for the two offenses violate double jeopardy. *Id.*

3. It is the State's position that *Shelley* is not controlling in the instant case because Petitioner's acts of unlawful use of a computer service occurred in two separate and distinct acts. Petitioner was charged by Information with one count of traveling to meet a minor to commit an unlawful sex act and one count of solicitation of a minor; both offenses were charged as occurring between June 14, 2012 and June 15, 2012. (R. 15).

Petitioner responded to a Craigslist ad with a title line of "Looking to have fun, w4m, my place." (JT. 46). Petitioner emailed Officer Andrew Thomas Husar ("Husar"), who was the chatter behind the ad. (JT. 46). There were eight emails back and forth between Petitioner and Husar on the first day and one on the second day. (JT. 47-48). Once Petitioner gave the officer his phone number, the communication between the two was completed through text messaging and voice telephone calls. (JT. 48). Within the first four emails Petitioner indicated to "Shelby" that he wanted to communicate via text message, but by that point he had also already been informed that she was only 14 years of age, a point that was reiterated during the text messages. (JT. 49-52).

Deputy Tammy Tindle-Husar ("Tindle-Husar") testified Petitioner was initially informed in emails that the child was 14 years old and that it was again reiterated in text messages. (JT. 76). Officer Rebekah Moore ("Moore"), with the Gainesville Police Department, testified she was requested by the

online chatters to make the controlled phone call to Petitioner on June 15, 2012. (JT. 27). Subsequent to the phone call, Petitioner arrived at the home. (JT. 28). Husar testified Petitioner traveled "some distance" within the State of Florida to the house he was given direction to by Moore; Petitioner, by his own admission, indicated he had travelled to meet "Shelby." (JT. 132, 135). Husar, again, testified that Petitioner carried on an e-mail conversation and text message conversation with him, as well as a text message conversation with Tindle-Husar, and a phone conversation with Moore. (JT. 137).

4. The plain language of § 775.021(4)(a), Florida Statutes, provides that a criminal "act" or "instance of conduct" can encompass multiple separate legislatively defined "offenses." *See Valdes v. State*, 3 So. 3d 1067, 1078 n.12 (Fla. 2009)("We note that this case involves a circumstance where, because one criminal act gave rise to multiple separate offenses, double jeopardy is not violated."); *see also Dixon*, 509 U.S. at (finding "same conduct" test inappropriate under Double Jeopardy analysis and expressly adopting "same offense" test). As noted by this Court in *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009):

> We note that this case involves a circumstance where, because one criminal act gave rise to multiple separate offenses, double jeopardy is not violated. Thus, the circumstance in this case is distinguishable from cases in which **double jeopardy is not a concern because multiple convictions occurred based on two distinct criminal acts**. *See Paul*, 934 So. 2d at 1172 n.3 ("Of course, if two convictions occurred based on **two distinct criminal acts, double jeopardy is not a concern**.") (citing *Hayes*, 803 So. 2d at 700.)

Id. at 1078 n.12 (emphasis added). "[T]he prohibition against double jeopardy does *not* prohibit multiple convictions and punishments where a defendant

commits two or more distinct criminal acts." *Hayes v. State*, 803 So. 2d 695, 700 (Fla. 2001) (emphasis in original).

Here, Petitioner engaged in two separate acts of unlawfully using a computer service by soliciting through email, text message, and phone contact. More specifically, Petitioner asked "Shelby" if the conversation could change over from email to text messaging. During that conversation, Petitioner provided "Shelby" a phone number for the officers to contact him. Furthermore, the testimony demonstrates that the communications and traveling occurred on different days. Therefore, whereby one of Petitioner's acts of soliciting a minor would be subsumed by the traveling charge, the other was separate and distinct conduct. As such, *Shelley* does not control and Petitioner's conviction and sentence should stand. Further, although the facts of this case appear to constitute separate acts, if it is unclear this case should be remanded to the First District Court of Appeal for further determination.

WHEREFORE, the State of Florida hereby files this Response to this Court's Order to Show Cause and asks that this Court decline to exercise jurisdiction and not to quash the opinion by the First District Court of Appeal and remand for the lesser included offense to be vacated and for resentencing.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by ELECTRONIC MAIL to: DAVID A. HENSON, at david.henson@flpd2.com on this 7th day of December 2015.

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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