

>> SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
PLEASE BE SEATED.

>> OKAY THE NEXT CASE ON THE
DOCKET IS STATE v. SHELLEY.
COUNSEL?

>> THANK YOU, YOUR HONOR.
MAY IT PLEASE THE COURT.
I'M SUSAN DUNLEVY.

AND I REPRESENT THE STATE IN
THIS CASE.

AND THIS CASE IS, WAS GRANTED--

>> SPEAK IN THE MIC, PLEASE.

>> I'M SORRY.

THIS CASE WAS REVIEWED, REVIEW
IN THIS CASE WAS GRANTED BASED
ON A CERTIFIED CONFLICT WITH THE
FIRST DISTRICT'S CASE THAT'S
ALSO PENDING IN THIS COURT,
MURPHY VERSUS STATE.

AND THE ISSUE IS WHETHER OR NOT
THE LEGISLATURE EXPRESSED AN
INTENT TO PUNISH BOTH THE
OFFENSE OF SOLICITATION OF A
PARENT OR GUARDIAN OF A MINOR TO
CONSENT TO SEXUAL ACTIVITY WITH
THE MINOR AND THE OFFENSE OF
TRAVELING AFTER SUCH A
SOLICITATION.

IT IS THE STATE'S POSITION THAT
THE LEGISLATURE DID INDEED
EXPRESS AN INTENT TO PUNISH EACH
OF THESE OFFENSES SEPARATELY.

>> HOW WAS THAT INTENT
EXPRESSED?

>> THAT INTENT IS EXPRESSED IN
THE LANGUAGE OF THE STATUTE.
AND THERE ARE TWO EXPRESSIONS OF
INTENT IN THE SAME SUBSECTION.
847.0135.

THE FIRST ONE IS, IN THE
SUBSECTION, SUB 3, THAT PERTAINS
TO SOLICITATION.

THE SOLICITATION REQUIRES USE OF
COMPUTER OR SOME INTERNET
SERVICE OR SOME OTHER DEVICE
CAPABLE OF ELECTRONIC DATA
TRANSMISSION TO ACTUALLY DO THE
SOLICITING.

AND THE LAST SENTENCE OF THAT

SUBSECTION SAYS, EACH SEPARATE USE OF SUCH A DEVICE WHEREIN AN OFFENSE DESCRIBED IN THIS SECTION IS COMMITTED MAY BE CHARGED AS A SEPARATE OFFENSE.

>> BUT THAT DOESN'T, THAT DOESN'T REALLY ADDRESS THE RELATIONSHIP BETWEEN THE SOLICITATION CHARGES AND THE TRAVELING CHARGES, DOES IT?

>> I THINK--

>> THAT'S JUST TALKING ABOUT THE SOLICITATION.

AND OTHER THINGS THAT ARE WRAPPED UP WITH THAT.

>> NO, YOUR HONOR, I DON'T AGREE.

I THINK IT DOES BECAUSE IT SAYS EACH SEPARATE USE CONSTITUTES A SEPARATE OFFENSE, NOT JUST SEPARATE OFFENSE.

IT DOESN'T SAY SEPARATE OFFENSE FROM OTHER SOLICITATIONS.

IT IS A SEPARATE OFFENSE SO IT'S A SEPARATE OFFENSE FROM THE TRAVELING.

>> WELL, HOW ABOUT IN THIS CASE WAS IT ACTUALLY CHARGED?

I UNDERSTAND YOUR READING WHAT YOU SAY COULD BE DIFFERENT BUT IN THIS CASE WAS THERE A SEPARATE CHARGE FOR EACH USE? IS THAT HOW THIS CAME DOWN? OR WAS THIS JUST ONE USE AND THEN THE TRAVELING?

>> IN THIS CASE THERE WERE ONLY TWO CHARGES THAT WOULD CONCERN THIS COURT.

ONE COUNT OF SOLICITATION AND ONE COUNT OF TRAVELING.

>> OKAY, WOULD THAT THEN NOT NEGATE THAT CLAUSE APPLICATION HERE BECAUSE IT WAS NOT JUST FOR THE SOLICITATION?

>> NO, YOUR HONOR.

IT'S A THE STATE'S POSITION THAT--

>> ISN'T THAT WHAT IT SAYS?

IT JUST TALKS ABOUT EACH SEPARATE USE OF A COMPUTER TO

MAKE A SOLICITATION MAY BE CHARGED.

>> AS A SEPARATE OFFENSE.

>> RIGHT.

>> THAT MEANS THAT THE SOLICITATION, EVEN IF THERE IS ONLY ONE, MAY BE CHARGED AS A SEPARATE OFFENSE FROM THE TRAVEL.

THEY'RE DIFFERENT ACTS. THEY OCCUR AT DIFFERENT TIMES, IN DIFFERENT PLACES.

>> I THOUGHT THAT, I READ THAT STATUTE TO SAY THAT IF YOU USE THE COMPUTER, FOR EXAMPLE, MULTIPLE TIMES, TO SOLICIT, THEN EACH OF THOSE USES IS A DIFFERENT SOLICITATION? ISN'T THAT WHAT THAT STATUTE IS REALLY SAYING?

>> I THINK IT IS SAYING THAT BUT I THINK IT GOES FURTHER BECAUSE IT DOESN'T, IT DOESN'T SAY, EACH SEPARATE USE AFTER THE FIRST. IT SAYS, EACH SEPARATE USE MAY BE CHARGED AS A SEPARATE OFFENSE.

>> OKAY.

>> AND THAT MEANS NOT ONLY A SEPARATE OFFENSE FROM OTHER SOLICITATION, OFFENSES, BUT ALSO FROM THE TRAVELING.

>> ISN'T THAT AMBIGUOUS? CAN'T THAT BE UNDERSTOOD, PERHAPS IN THE SENSE YOU'RE SUGGESTING BUT ALSO PERHAPS IN THE SENSE THAT'S JUST TALKING ABOUT, WITH REFERENCE TO OTHER SOLICITATION OFFENSES?

>> WELL WE ALSO HAVE SUBSECTION 8.

>> I UNDERSTAND THAT.

>> WE SEE THAT IN MANY, MANY CRIMINAL STATUTES, CORRECT?

>> WE SEE THAT MORE THAN ONE.

>> RIGHT.

I MEAN THIS IS A COMMON, A THE END A CATCH-ALL KIND OF PROVISION.

HAVE WE EVER APPLIED THAT TYPE

OF PROVISION IN OTHER STATUTE AS CREATING OR PROTECTING AGAINST A DOUBLE JEOPARDY VIOLATION?

>> WELL, NOT THIS SPECIFIC LANGUAGE AS FAR AS--

>> ISN'T THAT GENERALLY THOUGHT OF AS THEY MAY HAVE VIOLATED ONE FOR SOLICITATION BUT THEY MAY HAVE, DO A DIFFERENT CRIME UNDER A DIFFERENT SECTION?

ISN'T THAT WHAT THAT SECTION IS SAYING?

>> IT DOESN'T, SUBSECTION 8 DOES NOT LIMIT ITSELF TO OTHER SECTIONS.

IT DOESN'T SAY OTHER.

>> ANY OTHER LAW OF THE STATE, OF THIS STATE.

>> SAYS ANY LAW.

IT DOESN'T SAY ANY OTHER LAW, YOUR HONOR.

>> IT DOESN'T SAY OTHER LAW.

>> NO.

IT SAYS PROSECUTION OF ANY PERSON FOR AN OFFENSE UNDER THIS SECTION SHALL NOT PROHIBIT PROSECUTION OF THAT SECTION IN THIS STATE FOR A VIOLATION OF ANY LAW OF THIS STATE.

DOESN'T SAY OTHER.

AND, YOU KNOW THE TENDENCY IS TO READ IT IN AND OPPOSING COUNSEL HAS DONE THE SAME THING.

BUT IT DOESN'T SAY THAT.

SO JUST BECAUSE HE IS PROSECUTED FOR TRAVELING, IF HE IS SEPARATELY CHARGED WITH SOLICITATION, HE CAN BE PROSECUTED AND PUNISHED SEPARATELY FOR THAT.

>> BUT, SEE, AGAIN, I GUESS WE'RE GOING TO GO AROUND ON THIS BECAUSE THE SOLICITATION IS, IF THERE HAD BEEN MULTIPLE INTERNET COMMUNICATIONS, IT SEEMS CLEAR THAT THE STATE COULD HAVE CHARGED WITH MORE THAN ONE COUNT.

BUT IN THIS CASE THEY ELECTED TO TAKE THE ONE COUNT OF

SOLICITATION AND THEN BASED ON THAT SOLICITATION ADDED THE TRAVEL COUNT ON.

IF WE DON'T AGREE WITH YOU THAT THE LEGISLATIVE INTENT IS CLEAR, THAT BOTH OF THOSE CRIMES SHOULD BE PUNISHED SEPARATELY, WOULD YOU AGREE THAT UNDER THE BLOCKBERGER SAME ELEMENTS THAT THE SOLICITATION IS SUBSUMED WITHIN THE CRIME OF THE TRAVELING?

THAT IN OTHER WORDS, HE SOLICITED AND THEN HE TRAVELED IN ORDER TO EFFECTUATE THE SOLICITATION?

>> IF YOU APPLY THE BLOCKBERGER TEST, THEN IT IS SUBSUMED BUT IT IS THE STATE'S POSITION THAT YOU DO NOT GET TO GO TO BLOCKBERGER.

>> I UNDERSTAND THAT.

BUT, BUT YOU'RE RELYING ON A SECTION, THAT AS I READ IT, REALLY WOULD HAVE PERMITTED THE STATE TO HAVE CHARGED MULTIPLE COUNTS, IF, WHETHER, I'M NOT FAMILIAR WITH THE FACTS ON THIS AS DISTINCT FROM THE CONFLICT CASE BUT WHERE THERE WAS MORE THAN ONE INTERNET SOLICITATION OF THE VICTIM.

>> YES, THAT'S TRUE IN THIS CASE.

>> OKAY.

>> THE PROSECUTION HAS DISCRETION.

THEY COULD HAVE CHARGED MULTIPLE COUNTS.

I COULDN'T TELL YOU HOW MANY BUT SEVERAL OTHER COUNTS.

OF SOLICITATION, OR THEY COULD HAVE CHARGED NO SOLICITATION AT ALL AND SIMPLY CHARGED TRAVELING.

IF THEY DID THAT, THEY WOULD STILL HAVE TO PROVE A SOLICITATION OCCURRED BEFORE THE TRAVELING.

>> WHICH IS WHY IT IS SUBSUMED. I GUESS IN THESE SITUATIONS IN

TERMS OF THE STATE BEING, TAKING THIS POSITION AND SINCE THESE ORAL ARGUMENTS ARE TELEVISED, THE MAJOR CRIME, HE RECEIVED WHAT, FIVE YEARS FOR THE, FOR THE TRAVELING?

>> NO.

HE RECEIVED 10 YEARS PRISON FOLLOWED BY FIVE YEARS PROBATION FOR THE TRAVELING.

AND HE RECEIVED A CONCURRENT FIVE YEARS PRISON FOR THE SOLICITATION.

>> SO BASICALLY WHAT WE HAVE, IF THIS IS SET ASIDE OR ASSET ASIDE IT IS THE SAME SENTENCE, JUST CONCURRENT SENTENCE IS SET ASIDE?

>> THAT WOULD BE TRUE IN THIS CASE.

>> BUT AGAIN, AS YOU SAY, THE STATE HAS SO MUCH DISCRETION AND THE STATE, SINCE THIS WAS THE POLICE OFFICER POSING, COULD HAVE REALLY CREATED THEORIES OF SOLICITATIONS THAT COULD HAVE BEEN CHARGED SEPARATELY IF THAT'S WHAT THEIR GOAL WAS TO HAVE MULTIPLE COUNTS OF SOLICITATION?

>> WELL THEIR GOAL IS TO STOP THE EXPLOITATION, THE SEXUAL EXPLOITATION OF FLORIDA'S CHILDREN.

THAT'S THEIR GOAL.

>> SO THE TRAVEL REALLY IS THE GREATER, I MEAN, THEY'RE ALL HORRENDOUS CRIMES.

I MEAN THERE IS NO QUESTION ABOUT IT BUT THE TRAVELING IS TO ACTUALLY EFFECTUATE THIS INTENT IS PUNISHED--

>> TRAVELING GOES FURTHER. IT IS A STEP FURTHER BEYOND SOLICITATION.

AND, YES, IT IS, THE TRAVELING IS A SECOND-DEGREE FELONY WHEREAS THE SOLICITATION IS A THIRD-DEGREE FELONY.

BUT THE--

>> WAS THERE ALSO, DID THE TRAVEL END UP WHERE THERE WAS A ACTUAL MEETING?

I NOTICE THERE WAS A THIRD COUNT OF ACTUAL ATTEMPTED SEXUAL BATTERY.

>> NO, YOUR HONOR, THERE WAS NO MEETING.

THE AND, THE DEFENSE MOVED TO DISMISS THE ATTEMPTED SEXUAL BATTERY COUNT AND THE STATE CONCEDED THAT IT COULDN'T PROVE A PRIMA FACIA CASE ON THESE FACTS.

SO THE TRIAL COURT GRANTED THAT MOTION TO DISMISS.

SO WE ONLY WERE LEFT WITH THE TRAVELING AND SOLICITATION.

>> BUT THERE WAS, THERE WAS TRAVEL TO THE, VERY CLOSE TO THE POINT OF WHERE THE RENDEZVOUS WAS SUPPOSED TO TAKE PLACE, RIGHT?

>> YES, SIR.

YEAH, THEY WERE SUPPOSED TO MEET AT A STARBUCKS.

HE PULLED UP IN FRONT OF THE STARBUCKS AND WALKED OVER TO AN ATM THAT WAS RIGHT THERE, EITHER NEXT TO THE STARBUCKS OR IN FRONT OF IT.

THE POINT IS, THE PROSECUTION HAS THE DISCRETION OF WHAT TO CHARGE AND THEY CAN CHARGE MORE COUNTS OF SOLICITATION WHERE THERE ARE MULTIPLE ACTS.

>> THIS SEEMS TO BE SIMILAR TO HAVING AN AGREEMENT.

THEN YOU TAKE THE NEXT STEP TO IN FURTHERANCE OF THE AGREEMENT.

>> I AGREE.

>> SO UNDER THOSE KINDS, AND UNDER THOSE CIRCUMSTANCES WOULD YOU BE, WOULD THE PROSECUTOR BE ALLOWED TO CHARGE BOTH OFFENSES? BOTH FOR THE AGREEMENT AND FOR THE ACT IN FURTHERANCE OF THE AGREEMENT.

>> I BELIEVE SO BUT EVEN IF, THAT'S NOT THE CASE, IT DEPENDS

ON THE STATUTORY SCHEME AND
WHETHER THE LEGISLATURE
EXPRESSED AN INTENT TO ALLOW
THAT TO OCCUR.

AND SUCH AN INTENT WAS
CLEARLY--

>> YOU'RE HANGING YOUR HAT ON
THAT SECTION THAT SAYS, YOU CAN
BE CHARGED WITH MULTIPLE ACTS?

>> I'M HANGING MY HAT ON NOT
ONLY THAT SUBSECTION BUT ALSO
SUBSECTION 8 THAT--

>> 8?

>> RIGHT.

>> WHERE IT SAYS--

>> THAT IS THE ONE THAT SAYS
PROSECUTION FOR ANY OFFENSE
UNDER THIS SECTION SHALL NOT
PROHIBIT PROSECUTION OF THAT
SAME PERSON IN THIS STATE FOR A
VIOLATION OF ANY LAW OF THIS
STATE.

WHICH WOULD INCLUDE--

>> THAT IS PRETTY VAGUE, ISN'T
IT?

>> NOT JUST OTHER STATUTORY
SECTIONS BUT ALSO THE OFFENSES
DEFINED IN 847.0135.

TOGETHER, I THINK THEY CLEARLY
SHOW THE LEGISLATURE'S INTENT TO
PROSECUTE PEDOPHILES AND
WOULD-BE PEDOPHILES TO THE FULL
EXTENT OF WHAT THE LAW CAN DO,
INCLUDING GETTING THE DEFENDANT
FOR EACH AND EVERY ACT,
REGARDLESS OF WHETHER IT
OCCURRED IN THE SAME CRIMINAL
EPISODE AND--

>> SAME OFFENSES, ASSUMING THAT
YOU COULD BE, CONVICTED OF BOTH
OF THEM, WOULD YOU RUN THOSE
CONSECUTIVELY?

>> I'M NOT CERTAIN BECAUSE IF
WE'RE LIMITED TO--

>> SEEMS TO ME THE EXTENT OF THE
PUNISHMENT IS THE 10-YEAR
SENTENCE FOR THE TRAVELING, FOR
SOLICITATION, THE OTHER IS, THE
FIVE-YEAR SENTENCE.

THEY RAN IT CONCURRENTLY,

CORRECT?

>> THAT WAS RUN CONCURRENTLY IN THIS CASE.

>>-- THE LAW WOULD HAVE BEEN IN YOU CAN RUN THOSE CONSECUTIVELY.

>> I'M NOT SURE.

I'M NOT SURE WHETHER IT WOULD MAKE A DIFFERENCE IF IT WAS DIFFERENT DAYS WHERE HERE THE SOLICITATION CHARGE WAS ALLEGED TO HAVE BEEN COMMITTED ON THE SAME DATE AS THE TRAVELING. IF WE CAN NOT HAVE CONSECUTIVE SENTENCES FOR CRIMES COMMITTED IN THE SAME CRIMINAL EPISODE, THEN WE COULD NOT HAVE THEM CONSECUTIVE IF, DEPENDING ON WHAT, HOW YOU DEFINE A CRIMINAL EPISODE.

BUT I MEAN THAT, THAT'S GETTING ON TO NOT ONLY THE, THAT GOES PAST PROSECUTORIAL DISCRETION AND ON TO SENTENCING OPTIONS FOR THE, FOR THE TRIAL JUDGE AND ALSO--

>> COUNSEL, YOU'RE INTO YOUR REBUTTAL.

WELCOME TO CONTINUE IF YOU WANT. I JUST WANT TO WARN YOU.

>> THANK YOU.

I WOULD LIKE TO RESERVE THE REST OF MY TIME.

THANK YOU.

>> MAY IT PLEASE THE COURT, COUNSEL, MY NAME IS VICTORIA HATFIELD, I REPRESENT THE RESPONDENT, DEAN SHELLEY AND MYSELF, BILL PINELL IS HERE ON BEHALF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS. WE'LL TAKE TEN MINUTES FOR ARGUMENT.

THE STATE ASSERT THERE IS CLEAR EXPRESSION OF LEGISLATIVE INTENT IN TWO DIFFERENT SECTIONS. SECTION 3, SUBSECTION 3 AND SUBSECTION 8.

I WILL ADDRESS THE SUBSECTION 3 FIRST.

WITH REGARD TO THE STATEMENT

THAT EACH SEPARATE USE CAN BE CHARGED AS A SEPARATE OFFENSE, THAT LANGUAGE IS SPECIFICALLY CONTAINED IN SUBSECTION 3. IT DOES NOT HAVE A SEPARATE NUMBER WITHIN THE STATUTE FOR THAT STATEMENT.

SO BECAUSE OF THAT, I WOULD SUBMIT THAT THAT IS SOLELY MEANS THAT FOR EVERY SEPARATE USE, THAT CONSTITUTES AN OFFENSE, THE STATE CAN CHARGE UNDER SUBSECTION 3 AND SUBSECTION 3 ONLY.

IT IS NOT AUTHORIZING MULTIPLE CHARGES AND CONVICTIONS FOR SUBSECTION 3 AND SUBSECTION 4.

>> IN CONNECTION WITH THAT, LET ME CAN YOU THIS HYPOTHETICAL. SAY WE'VE GOT A CASE, AND WE'RE, THERE ARE 10 SEPARATE INSTANCES OF THE USE OF COMPUTER SERVICES OR DEVICES IN VIOLATION OF SUBSECTION 3.

AND WE JUST STIPULATE THAT THERE WERE FACTS THAT WOULD SUPPORT, THAT THERE WERE 10 SEPARATE IN VIOLATION OF SUBSECTION FOUR, OKAY? IN THE FIRST-- UNDER SUBSECTION THREE AND ONE UNDER SUBSECTION FOUR.

IF THE STATE DECIDES THAT THEY WANT TO PROSECUTE UNDER SUBSECTION FOUR, WHAT OPTIONS DO THEY HAVE WITH RESPECT TO PROSECUTION UNDER SUBSECTION THREE?

>> THEY COULD PROSECUTE NINE INSTANCES OF SOLICITATION UNDER SUBSECTION THREE AND ONE INSTANCE OF TRAVELING UNDER SUBSECTION FOUR, AND THE ONE UNCHARGED INSTANCE OF SOLICITING WOULD BE THE INSTANCE OF SOLICITATION THAT WOULD BE--

>> THAT WOULD BE THE ONE.

>> CORRECT.

>> OKAY.

WELL, EXPLAIN TO ME HOW THIS

CASE IS DIFFERENT.

>> THIS CASE IS DIFFERENT
BECAUSE THE STATE INTENDED TO
CHARGE THE SAME INSTANCE OF
SOLICITATION IN BOTH COUNTS.

>> HOW DO WE KNOW THAT?

>> I WOULD CORRECT DIRECT THE
COURT'S ATTENTION TO THE
TRANSCRIPT OF THE MOTION TO
DISMISS.

THE DEFENSE PUT FORTH A MOTION.
THERE WERE MULTIPLE ARGUMENTS,
BUT ONE OF THE ARGUMENTS WAS
THAT SOLICITATION OFFENSE WAS
THE SAME SOLICITATION THAT WAS
SUBSUMED IN THE TRAVELING
OFFENSE AND, THEREFORE, THE
COURT SHOULD DISMISS THE
SOLICITING.

AND RATHER THAN THE STATE
STANDING UP AND SAYING, NO, YOUR
HONOR, WE HAVE SEPARATE
INSTANCES OF SOLICITATION HERE
TO SUPPORT BOTH CHARGES, THE
STATE ARGUED SOMETHING ENTIRELY
DIFFERENT.

WHAT THE STATE ARGUED, AND IT'S
ON PAGES 124 AND 125 OF THE
MOTION TO DISMISS, THE STATE
ARGUED THE SOLICITATION IS NOT A
LESSER INCLUDED OFFENSE BECAUSE
IT'S NOT STATED IN THE JURY
INSTRUCTIONS AS A LESSER
INCLUDED OFFENSE.

AND THEN THE STATE WENT ON TO
ARGUE THAT THE TRAVELING ELEMENT
CONTAINS, OR THE TRAVELING
OFFENSE CONTAINS AN ELEMENT THAT
THE SOLICITATION DOES NOT.

WHICH IS NOT WHAT THE LAW IS.

THEN THE STATE WENT ON TO SAY ON
PAGE 125, BASICALLY, COUNT THREE
CHARGES HIM TALKING ABOUT IT ON
THE COMPUTER WHEREAS COUNT ONE
REQUIRES THE STATE TO PROVE THAT
HE ACTUALLY FOLLOWED THROUGH.

SO I WOULD SUBMIT--

>> YEAH, BUT THE TRIAL COURT
RULED IN FAVOR OF THE STATE.

>> CORRECT.

THE TILE--

>> WHY DOESN'T THE STATE GET THE BENEFIT OF ANY REASON, OR WHY SHOULDN'T THEY HAVE GOTTEN THE BENEFIT OF ANY REASON THAT WOULD HAVE UPHELD THE, THAT WOULD UPHOLD THE TRIAL COURT'S DECISION?

EVEN IF TRIAL COURT WAS SMARTER THAN THE STATE IN FIGURING OUT THE RIGHT ANSWER?

>> YOUR SAYING-- YOU'RE SAYING WHY SHOULD NOT, WHY SHOULD THE STATE NOT GET THE BENEFIT NOW? BECAUSE, ESSENTIALLY, THE STATE IS ASKING THIS COURT TO, AT THIS POINT, TO FIND A WAY TO JUSTIFY THESE TWO CONVICTIONS DESPITE THE FACT THAT THE STATE ORIGINALLY DID NOT CHARGE THEM AS TWO SEPARATE OFFENSES.

I THINK IT WOULD BE IMPROPER FOR THIS COURT TO NOW FIND A WAY TO JUSTIFY THESE TWO CONVICTIONS WHEN REALLY THE STATE SHOULD HAVE JUST CHARGED IT PROPERLY TO BEGIN WITH.

AND IF YOU LOOK AT THESE CONVERSATIONS ON THE DATE THAT THE STATE ACTUALLY CHARGED IT, ON SEPTEMBER 19TH, THOSE WERE THE LEAST EXPLICIT, SEXUALLY EXPLICIT CONVERSATIONS THAT THERE WERE.

>> I UNDERSTAND THAT ARGUMENT, BUT DON'T THOSE CONVERSATIONS REALLY HAVE TO BE UNDERSTOOD IN THE CONTEXT OF THE EARLIER CONVERSATIONS?

BECAUSE THE EARLIER CONVERSATIONS THAT LAY THE GROUNDWORK FOR WHY THIS MEETING IS TAKING PLACE.

>> CORRECT.

I AGREE WITH THAT. BUT IF THE STATE IS INTENDING TO CHARGE SEPARATE INSTANCES OF SOLICITATION, THEY WOULD HAVE GONE TO THE 8TH, THE 9TH, THE 10TH, THE 11TH, THE 12TH, ALL

THE WAY UP TO THE 19TH IS WHAT I'M SUBMITTING TO THE COURT.

>> SO YOUR ARGUMENT HERE IS REALLY NOT SO MUCH ABOUT THE STRUCTURE OF THE LAW AND THE LIMITATIONS ON WHAT THE STATE CAN CHARGE, BUT IT'S ABOUT THE INARTFUL OF PROCEEDING BY THE STATE ATTORNEY.

>> I'M GOING INTO MR.PA KNELL'S TIME, SO AISLE LEAVE YOU WITH THIS.

WE ARGUE THAT THERE'S NO--
[INAUDIBLE]

FIRST OF ALL, THAT'S OUR ARGUMENT.

IF THIS COURT FINDS AND AGREES WITH THAT, THEN WHAT I'M SAYING IS YOU SHOULD NOT GO FURTHER AND FIND WAY TO STILL JUSTIFY THESE CONVICTIONS.

THANK YOU.

>> MAY IT PLEASE THE COURT, WILLIAM PA KNELL FOR THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS.

TO DIRECT MY, TO ANSWER JUSTICE CANADY'S HYPOTHETICAL, I THINK THE CORRECT ANSWER WAS THAT THERE WOULD BE NINE INSTANCES OF SOLICITATION AND ONE INSTANCE OF TRAVELING.

THE SECOND QUESTION WAS WHAT, WHY SHOULDN'T WE FIND SOME REASON TO UPHOLD THE TRIAL COURT'S DECISION, AND THE ANSWER IS BECAUSE THE STATE DIDN'T CHARGE IT CORRECTLY TO JUSTIFY THE TRIAL COURT'S DECISION.

THE EASY ANSWER TO THIS PARTICULAR CASE IS THE STATE COULD HAVE DONE, SHOULD HAVE-- IF THEY WANTED TO SUPPORT TWO CONVICTIONS-- THEY SHOULD HAVE SPECIFIED IN THE SOLICITATION COUNT WHICH USES OF THE COMPUTER THEY WERE RELYING ON.

THERE WERE FOUR-- TWO TEXT MESSAGES AND TWO E-MAILS ON THE DATE IN QUESTION, SEPTEMBER

19TH.

AND BOTH OFFENSES WERE CHARGED
ON SEPTEMBER 19TH.

SO ALL THEY NEEDED TO DO TO
JUSTIFY MULTIPLE CONVICTIONS WAS
TO ALLEGE WHICH OF THOSE E-MAILS
OR TEXTS WERE SUPPORTING EACH OF
THOSE COUNTS.

THEY CHOSE NOT TO DO SO.

SO NOW WE'RE LEFT WITH AN
INFORMATION THAT RELIES ON THE
SAME E-MAILS AND TEXTS, BECAUSE
WE DON'T KNOW BECAUSE THEY
DIDN'T SPECIFY WHICH ONES THEY
WERE RELYING ON.

SO IT'S THE SAME OFFENSE, THE
SAME ACT OR POTENTIALLY THE SAME
ACT OF SOLICITATION THAT
SUPPORTS BOTH COUNT ONE AND
COUNT TWO OR COUNT ONE AND COUNT
THREE IN THIS CASE.

SO THAT'S THE PROBLEM IN THIS
CASE.

>> AND THE PRACTICAL MATTER HERE
IS THIS REALLY DOESN'T AFFECT
MR. BRETHERRICK, DOES IT?

>> IN THIS CASE IT PROBABLY DOES
NOT.

IN OTHER CASES IT COULD BECAUSE
IT WOULD AFFECT THE SCORE SHEET
OF, IN FACT, WHEN THE DEFENDANT
IS CONVICTED OF BOTH
SOLICITATION AND TRAVELING, IT
ACTUALLY DOUBLES THE MINIMUM
SENTENCE FROM 21 TO 42 MONTHS.
SO IN THIS PARTICULAR CASE K HIS
SENTENCE WAS BY PLEA AND THE
AGREEMENT WOULDN'T HAVE A
PRACTICAL EFFECT.

THERE WOULDN'T BE A BROADER
EFFECT FOR THE SAME FACTS ARE
BEFORE A COURT FOLLOWING A TRIAL
WHERE THERE WAS A CONTESTED
SENTENCING HEARING.

SO IT IS IMPORTANT.

SO AGAIN, THE MAIN ISSUE IS THE
STATE DIDN'T PROPERLY CHARGE IT.
AND THERE WAS NO GOOD REASON FOR
THAT.

THEY WERE ON NOTICE THAT THIS

WAS AN ISSUE.

THEY COULD HAVE AMENDED THE INFORMATION, THEY COULD HAVE REQUIRED A SPECIFIC FINDING OF FACT AT THE PLEA HEARING. THEY DID NEITHER OF THOSE THINGS.

AND SO THERE'S NO BASIS TO CONCLUDE THAT THERE SHOULD BE TWO SEPARATE CONVICTIONS BASED ON THE SAME ACT OF SOLICITATION. AS TO THE LEGISLATIVE INTENT, I'D REITERATE CO-COUNSEL'S ARGUMENT THAT THERE'S NO CLEAR LEGISLATIVE INTENT.

YOU NEED CLEAR LEGISLATIVE INTENT TO JUSTIFY MULTIPLE CONVICTIONS FOR THE SAME ACT.

>> CAN I JUST GO BACK TO SOMETHING ABOUT, BECAUSE YOU'RE REPRESENTING I GUESS I DON'T KNOW HOW MANY OF THESE CASES ARE OUT HERE, BUT THIS SEEMS LIKE-- BUT THIS SEEMS LIKE IT WAS FROM THE TIME THAT HE RESPONDED TO THE AD UNTIL HE ACTED ON IT THAT WERE THEY REALLY, IN ANY EVENT, MULTIPLE INSTANCES OF SOLICITATION IF THEY HAD CHARGED IT, OR WAS IT WORKING OUT, WELL, I WANT TO SOLICIT YOU, LET ME KNOW WHERE, WHEN, THAT IT WAS REALLY JUST A CONTINUING SINGLE SOLICITATION? BECAUSE I JUST WANT TO UNDERSTAND FOR THE FUTURE THAT IF HE'S NOT DOING SOMETHING WHERE HE'S SHOWING HIS GENITALS OR, YOU KNOW, OTHER ACTS, HE'S RESPONDING TO AN AD, AND HE'S THEN TRYING TO UNDERSTAND WHAT IS IT THAT THE MOTHER, POLICE OFFICER POSING AS THE MOTHER, INTENDS TO HAVE HIM, I MEAN, DO. THE WHOLE THING IS, I MEAN, AGAIN, THE WHOLE THING IS SO FENCE I HAVE, IT'S HARD TO EVEN ARTICULATE IT.

>> OF COURSE.

>> BUT HOW IS THAT SEPARATE

CRIMES IF IT'S ALL THE SINGLE SOLICITATION?

I MEAN, EVEN IF IT OCCURS IN A SERIES OF E-MAILS OR TEXTS?

>> I'M NOT SURE I KNOW THE ANSWER TO THE COURT'S QUESTION.

>> BECAUSE I GUESS WE'RE ASSUMING, WELL, THEY COULD HAVE CHARGED IT SOME WAY WHERE--

>> IF YOU WERE GOING TO ASK MY OPINION UNDER THE LAW, I WOULD SAY THAT THERE WAS ACTUALLY NO ACT OF SOLICITATION BECAUSE THIS IS A PREARRANGED PLAN THAT THE IMAGINARY MOTHER AND DAUGHTER LAID OUT, AND HE WAS JUST AGREEING TO IT.

SO I DON'T KNOW THAT THERE WAS REALLY ANY ACTS OF SOLICITATION, BUT THAT'S NOT THE ISSUE BEFORE THE COURT TODAY.

>> BUT I THINK WE HAVE TO BE CAREFUL AS WE SET THIS OUT THAT THIS IS NOT, YOU KNOW, THAT THIS IS NOT LIKE SOMEBODY WHO HAS MULTIPLE ACTS OF SEXUAL, ATTEMPTED SEXUAL BATTERY ON SOMEBODY OVER A SERIES OF DAYS. THIS IS SETTING UP A MEETING--

>> SURE.

>>-- AND YOU MIGHT BE RIGHT, I MEAN, WHICH WASN'T RAISED, THAT IT'S REALLY RESPONDING TO A PLAN.

NOT SOLICITING, BUT IT'S DEFINITELY TRAVELING TO DO THE DEED.

SO HE GOT PUNISHED OR GOT-- PLED TO THE--

>> IT CAN'T, ISN'T IT TRUE THAT THERE CAN'T BE THE TRAVELING OFFENSE WITHOUT THE SOLICITING OFFENSE?

>> THAT'S 100%--

>> THAT'S THE WHOLE POINT.

>> THAT'S--

>> I'M JUST SAYING I DIDN'T KNOW THERE WERE MULTIPLE ACTS OF SOLICITATION.

IT SEEMED TO ME THAT THIS WAS AN

ONGOING HOW ARE WE GOING TO DO THIS.

>> SURE.

I DON'T DISAGREE WITH JUSTICE PARIENTE.

IMPORTANTLY--

>> I MEAN, INSTEAD OF SORT OF SAYING THE STATE SCREWED UP, IT MAY BE THE STATE UNDERSTOOD THAT THERE WAS ONLY--

>> I THINK THAT WOULD MAKE--

>>-- A ABILITY TO CHARGE SOLICITATION.

>> I WOULD THINK THAT WOULD MAKE MORE SENSE, IF HAY CHARGED THE ENTIRE TIME PERIOD.

THEY CHOSE ONLY THE SINGLE DAY ON THE END OF THIS, ON THE 19TH OF SEPTEMBER, 2011.

BUT BACK TO THE LEGISLATIVE INTELLIGENT, THERE'S GOT TO BE CLEAR LEGISLATIVE INTENT FOR MULTIPLE OFFENSES BASED ON THE SAME ACT.

IT'S OUR POSITION THAT THERE'S NOT CLEAR LEGISLATIVE INTENT IN EITHER SUBSECTION 3B AS JUSTICE CANADY POINTED OUT.

AT BEST IT'S AMBIGUOUS AS TO WHETHER IT IMPLIES ONLY TO ACTS OF SOLICITATION.

IT DOESN'T CONNECT SUBSECTIONS THREE AND FOUR EVEN IF IT'S AMBIGUOUS UNDER SUBSECTION ONE AND 4B3, AND THAT IS RESOLVED. ANY AMBIGUITY'S RESOLVED IN FAVOR OF THE DEFENDANT.

SO THAT RULE SHOULD BE I PLIED HERE TO FIND THERE'S A DOUBLE JEOPARDY VIOLATION FOR BOTH COUNTS.

SUBSECTION EIGHT, AS JUSTICE LEWIS POINTED OUT, THE A REOCCURRING STATUTE AND REALLY APPEARS TO READDRESS CONVICTIONS FOR OTHER STATUTES.

IF YOU LOOK AT THE PLAIN LANGUAGE, THERE'S NO SPECIFIC REFERENCES TO SUBSECTIONS THREE AND FOUR.

THE LANGUAGE SAYS PROSECUTION OF ANY PERSON IN AN OFFENSE UNDER THIS SECTION SHALL NOT PROHIBIT PROSECUTION OF OTHER CRIMES. LATER ON THEN PRESCRIBED IN THIS SECTION OR ANY OTHER CRIME PUNISHING THE SEXUAL PERFORMANCE OR SEXUAL EXPLOITATION OF CHILDREN.

IT APPEARS THAT THE INTENT, THE PLAIN LANGUAGE APPEARS TO BE THAT JUST BECAUSE YOU'RE CONVICTED AND CHARGED OF SOLICITATION AND TRAVELING DOES NOT PRECLUDE YOU FROM BEING CHARGED AND CONVICTED OF AN ACTUAL CONTACT OFFENSE IF YOU FOLLOW THROUGH ON THAT INTENT AND ACTUALLY DO MEET A CHILD AND HAVE INAPPROPRIATE SEXUAL CONDUCT.

THAT SEEMS TO BE THE PLAIN MEANING OF THAT STATUTE.

WE ALSO KNOW FROM ARE SUBSECTION THREE THAT THE LEGISLATOR KNOWS HOW TO BE MORE CLEAR IF THEY WANT TO BE, BECAUSE IN SUBSECTION 3B THEY SAID MULTIPLE OFFENSES OF SOLICITATION COULD BE BASED ON EACH USE OF THE COMPUTER.

SO THEY KNOW HOW TO BE MORE SPECIFIC, AND THEY CHOSE NOT TO BE IN THIS STATUTE.

FINALLY AGAIN, AT BEST IT'S AMBIGUOUS, AND THEN WE REVERT BACK TO 775021, SUBSECTION 21 AND SUBSEXER 4B3 THAT SAYS THE RULE APPLIES WHEN WE HAVE LESSER INCLUDED OFFENSES AND THAT THE AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF THE DEFENDANT, AND FOR THAT REASON IN THIS CASE THE COURT SHOULD APPROVE THE DECISION OF THE SECOND DCA AND FIND THAT THERE'S A DOUBLE JEOPARDY VIOLATION AND VACATE THE CONVICTION AND SENTENCE FOR THE SOLICITATION OFFENSE.
THANK YOU.

>> COUNSEL, YOU HAVE THREE MINUTES AND 36 SECONDS.

>> OKAY.

FIRST OF ALL, REGARDING JUSTICE PARIENTE'S QUESTION ABOUT WHAT CONSTITUTES AN ACT OF SOLICITATION, THAT'S REALLY NOT AN ISSUE BEFORE THIS COURT AT THIS TIME.

THIS DEFENDANT ADMITTED BY HIS PLEA OF GUILTY THAT WHAT HE DID, UM, ON THE 19TH CONSTITUTED SOLICITATION.

AND SO THAT'S REALLY A QUESTION FOR ANOTHER DAY.

>> I WASN'T QUESTIONING THAT, I WAS QUESTIONING WHETHER THE LEAD-UP, IF IT HAD BEEN CHARGED THAT WAY, WERE SEPARATE ACTS OF SOLICITATION AS OPPOSED TO SETTING UP.

BUT WE DON'T HAVE TO-- I'M JUST-- BECAUSE WE WERE SORT OF SAYING THE STATE COULD, YOU KNOW, CHARGE--

>> AND THAT HAS BEEN DONE, YOUR HONOR, IN AT LEAST ONE OTHER CASE THAT REACHED THE APPELLATE LEVEL WHERE I THINK THERE WERE THREE OR FOUR CHARGES ALL BASED ON THE SAME LEAD-UP TO ONE TRAVELING--

>> WELL, THAT'S NOT IN FRONT OF US.

>> NO.

BUT I'M JUST SAYING IT HAS BEEN DONE.

IN OTHER CASES IT HAS NOT BEEN DONE.

AND I DON'T KNOW THE REASON THAT HAND.

REGARDING-- THAT HAPPENED.

REGARDING THE SUGGESTION THAT THE STATE SHOULD HAVE BEEN REQUIRED TO SPECIFY WHICH COUNT, WHICH ACT ON THE 19TH WAS WHICH, WHICH ACT THAT COULD CONSTITUTE SOLICITATION, HE COULD HAVE FILED A MOTION FOR A MORE DEFINITE STATEMENT IF HE WANTED

TO.

THAT, THAT'S ALSO AN ISSUE THAT
COULD COME UP AT TRIAL WHEN
DETERMINING JURY INSTRUCTIONS.

WE DIDN'T GET THAT FAR.

HE PLED.

AND HE CAN'T ARGUE ABOUT THE
UNDERLYING FACTS NOW.

AGAIN, HE PLED IN THIS CASE.

REGARDING--

>> AND THE FACT, AND THE
UNDISPUTED FACTS SHOW THAT ON
THAT DAY, THE 19TH, THERE WERE
TWO TEXT MESSAGES AND TWO
E-MAILS.

>> CORRECT.

>> THAT WERE IN FURTHERANCE OF
FACILITATING THE RENDEZVOUS.

>> YES, YOUR HONOR.

>> SO IS IT THEN YOUR ARGUMENT
THAT ANY ONE OF THOSE WOULD THEN
SUPPORT THE TRAVELING AS OPPOSED
TO THE ENTIRE TWO--

>> WELL, IT DOESN'T REALLY
MATTER IN THIS CASE BECAUSE
THERE WAS ONLY ONE COUNT OF
SOLICITATION.

THAT'S HOW THE PROSECUTOR CHOSE
TO CHARGE IT.

SO I'M, WE DIDN'T HAVE TO
DISTINGUISH BETWEEN THOSE OR
EVEN ARE THEY SEPARATE FOR THIS
PURPOSE.

NOW REGARDING, YOU KNOW,
UNCHARGED, YOU DO NOT HAVE TO
HAVE, YOU DO NOT HAVE TO CHARGE
SOLICITATION IN ORDER TO CHARGE
TRAVELING.

YOU HAVE TO PROVE A SOLICITATION
TO CONVICT OF TRAVELING, BUT YOU
DON'T HAVE TO CHARGE THAT
UNDERLYING PRIOR SOLICITATION.

THEREFORE, IF YOU DO CHARGE A
SOLICITATION, THAT'S--

ACCORDING TO THE STATUTE AND THE
LEGISLATURE'S LANGUAGE-- IT'S A
SEPARATE OFFENSE.

YOU GET BOTH CONVICTIONS AND
BOTH--

>> BUT YOU DID AGREE THAT IF WE

DON'T AGREE WITH YOUR ANALYSIS
THAT THE STATUTE ALLOWS THAT,
THAT UNDER THE BLACK BERGER,
THIS WOULD BE A LESSER INCLUDED
OFFENSE, THE--

>> YES, YOUR HONOR.

>> THE TRAVELING.

>> YES, I HAVE AGREED WITH THAT
IN THE SECOND DISTRICT AND, YES,
I DO AGREE IF YOU GET TO THE
BLOCK BERGER TEST.

BUT, AGAIN, STATE'S POSITION IS
YOU CAN'T GO, YOU CAN'T GO TO A
BLOCK BERGER ANALYSIS BECAUSE
YOU HAVE THE EXPRESS INTENT OF
THE LEGISLATURE IN SECTION
847.0135.

AND--

>> COUNSEL, YOUR TIME IS UP.
THANK YOU.

>> THANK YOU, YOUR HONOR.

>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT'S IN RECESS UNTIL
TOMORROW MORNING.

>> ALL RISE.