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ICAC CASE LAW

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Sexual Performance by a Child - F.S. 827.071

Consent

State v. Snyder, 807 So.2d 117 (Fla. 3d DCA 2002):

> Offense of use of a child in a sexual performance is a strict liability offense for which consent of the minor victim is not a defense.
>
> Because charged offenses are strict liability offenses, evidence of minor victims' prior behavior is irrelevant to prove consent and is admissible for limited purpose of challenging the credibility and veracity of victims.
>
> The word "authorizes" as used in 827.071, refers to an adult, whether related to the minor or not, who knowingly permits or allows that minor to engage in a sexual performance in an area over which the said adult has authority, or the ability to exercise dominion or control.
>
> Discussion: The defendant was charged with using a child in a sexual performance and lewd battery. The case alleges that some minors skipped school and attended a sex party at the defendant's video store. The defendant was accused of participating in the sex as well as taking pictures of it. The State filed a motion in limine asking the court to preclude the defense from bringing out the prior sexual history of the victims, their drug use, or arguing that they consented to the activity. The court denied the motion and the State appealed. The court ruled that since sexual performance is a strict liability statue, the defense could not use this evidence to argue consent. The defense could use this evidence, however, if it was relevant to the credibility of the victims. The court instructed the trial court to issue a very limiting instruction to the jury advising them "(1) that the said evidence may only be considered by the jurors in determining the question of credibility of the minors who claim that the adult committed the acts prohibited by 827.071(2) and (2) that such evidence may not, under any circumstances, be considered by the jurors in connection with determining the guilt of the defendant of the offense charged herein once the jurors determine, if they do, that the question of the children's credibility is decided in favor of the children, to-wit: the jurors believe that the Respondent acted contrary to the provisions of section 827.071(2), regardless of, and notwithstanding, any issue or question relating to any alleged or claimed consent."

Constitutional Issues

A.H. v. State, 949 So.2d 234 (Fla. 1st DCA 2007):

16-year-old girl who took lewd photos with her 17-year-old boyfriend could be convicted of promoting a sexual performance by a child.

Defendant's privacy rights were not implicated, and if they were, the State had a compelling interest in prohibiting such conduct.

State v. Beckman, 547 So.2d 210 (Fla. 5th DCA 1989):

Statute criminalizing private possession of child pornography did not violate the First Amendment even if applied to possession in the privacy of the home.

Constructive Possession and Circumstantial Evidence

Elias v. State, 2020 WL 7776926 (Fla.App. 5 Dist., 2020)

Defendant was convicted at trial for 30 counts of sexual performance by a child. Detectives executed a search warrant on his home based on a NCMEC Cybertip concerning child pornography in a Flikr account.

Detectives located 30 images on CDs and computers. The defendant argued that he inherited them from his deceased father and had not seen the images. Forensic evidence showed that some, but not all, of the images had been transferred from the CDs to the computer. The appellate court ruled that the 23 images that had been transferred were valid convictions but stated the judge should have granted a judgement of acquittal on the 7 that were only on the CD. There was no evidence he ever viewed those images.

Bussell v. State, 66 So.2d 1059 (Fla. 1st DCA 2011)

The testimony of a single witness, even if uncorroborated and contradicted by other State witnesses, is sufficient to sustain a conviction.

In prosecution of defendant for possessing child pornography, State presented sufficient circumstantial evidence to establish that defendant had constructive possession over the illicit computer images so as to warrant submission of charges to jury; defendant's wife and son both testified they did not download the pornography, defendant worked offshore and admitted he was not working on the days the pornography was downloaded, county investigator testified no illegal material was downloaded when defendant was away working, and both parties' experts testified it was very unlikely someone could have searched for and downloaded the files in question without intending to download child pornography.

Constructive possession exists where the accused does not have physical possession of the contraband, but knows of its presence and can maintain dominion and control over it.

State is not required, in order to survive motion for acquittal in circumstantial evidence case, to rebut conclusively every possible variation of events that could be inferred from the evidence, but only to introduce competent evidence that is inconsistent with the defendant's theory of events, and once the State introduces such evidence, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Cruel and Unusual Punishment

Stephens v. State, 2020 WL 2176808, at *9 (Fla. 3d DCA May 6, 2020)

Stephens's aggregate one hundred fifty-year sentence is not cruel and unusual under the Eighth Amendment because the sentence is not grossly disproportionate to the offense of possession of child pornography. The Florida Legislature has the prerogative to set the length of prison sentences for crimes, and the State has a compelling interest in eliminating the possession of child pornography and protecting the victims of child pornography.

The court reviews other decisions where defendants received similar sentences.

The court quotes language from Osborne v. Ohio, 495 U.S. 103, 110, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) in footnote 10:

> *Other interests also support the Ohio law. First, ... the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.*

Berben v. State, 2019 WL 1574659 (Fla.App. 5 Dist., 2019)

Sentence of twenty consecutive five-year sentences resulting from defendant's conviction for possession of child pornography was a violation of defendant's constitutional due process rights; trial court based defendant's sentence on improper considerations and findings, such as an uncharged crime relating to the distribution of pornographic images, and trial court further equated conduct to actual, physical or sexual abuse of a minor.

> *This was a quite troubling case to me. The images that we saw at trial of children being sexually abused, very young children being sexually abused that were on your computer, not just for you to look at, which is bad enough, but for you to share with others or anybody else out there on the internet, was most disturbing and warrants a lengthy prison sentence. I see little difference, and I agree with the State, I see little difference in culpability between those who actually sexually abuse and exploit children and those who encourage and promote conduct by downloading and sharing videos of such, which I think warrants a significant sentence.*

Defendant's argument that the disproportionality of his 100-year sentence (five year sentences on each of the twenty counts to run consecutively) violated constitutional prohibitions against cruel and unusual punishment was rejected.

Rogers v. State, 2012 37 Fla. L. Weekly D1607 (Fla. 5th DCA 2012):

Composite sentence of 75 years in prison resulting from defendant's conviction on 125 counts of possession of child pornography did not constitute cruel and unusual punishment under state or federal

constitutions, even though all 125 images were on single compact disc read-only memory (CD-ROM), and even though defendant had no prior felony convictions.

Digitally Altered Photos

Parker v. State, 81 So.3d 451 (Fla. 3d DCA 2011):

Defendant was charged with Sexual Performance by a Child because he placed the images of real children on the bodies of adults engaged in sexual conduct. The court ruled that such images did not violate the statute because no children were engaged in sexual conduct. The court said that if the bodies had been those of minors, the images would have been chargeable.

The court provided a good comparison between the federal and state child pornography statutes and suggested the Florida legislature may want to consider expanding their child pornography laws in a similar manner.

Stelmack v. State, 58 So.3d 874 (Fla. 2d DCA 2010):

Evidence was insufficient to support convictions for child pornography; defendant was found to be in possession of several images showing faces and heads of two girls, ages 11 and 12, cut and pasted onto images of 19-year-old woman exhibiting her genitals, statute governing offense proscribed knowing possession of photograph or representation that, in whole or in part, includes "sexual conduct by a child," and no part of any of the images displayed child who was actually lewdly exhibiting her genitals, and only sexual conduct in images was that of an adult.

Denhart v. State, 987 So.2d 1257 (Fla. 5th DCA 2008):

Photographs of defendant's home, which depicted various articles of pornography hung on the walls of the defendant's home, were admissible in trial for promoting a sexual performance by a child, as relevant to corroborate the testimony presented by the State's witnesses concerning the fact that the crime took place inside the defendant's home and *to refute a claim that the photos of the child victim were altered by use of computer software.*

Veal v. State, 788 So.2d 1103 (Fla. 5th DCA 2001):

Arguments that assistant state attorney's oath on traverse was defective and that state was obligated to furnish name of witness who would testify that images were of actual children are meritless and not preserved.

Discussion: The defendant filed a sworn motion to dismiss several counts of sexual performance by a child based upon the fact that the state could not prove that the computer-generated images were actual children. The court declined to address the substantive issue as to whether the state had to prove the children were actually really children, but stated that the names of witness who would testify to that fact were not required to be in the Traverse.

Jalbert v. State, 906 So.2d 337 (Fla. 5th DCA 2005):

No error in denying motion to dismiss child pornography charges on ground that state failed to establish that photographs depicted actual children and were not computer-generated children or adults resembling children.

Question of whether photographs depicted actual children is question of fact, not law, and is appropriate for trier of fact to determine.

Discussion: In dicta, the court noted that the State still has to prove the image is real child at trial, but the court did not discuss the quantum of proof.

Discovery

McDonald v. State, 2023 WL 4479575 (Fla.App. 4 Dist., 2023)

There was reasonable probability that defense's trial preparation or strategy in child pornography prosecution would have been materially different had not trial court permitted state to produce previously undisclosed records from email service provider, which linked email account to defendant by name and phone number, as rebuttal evidence to defendant's testimony that email account was not his, and thus defendant was procedurally prejudiced, warranting reversal; undisclosed records directly impeached defendant's testimony that he never had an account with provider and damaged his credibility, and, had such records been disclosed, defense counsel would have discussed them with defendant, who might have chosen to pursue a different defense theory or chosen not

to not testify.

In re Amendments to Florida Rule of Criminal Procedure 3.220, 115 So.3d 207(Fla. 2013)

> The Florida Supreme Court amended rule 3.220 to comply with F.S. 92.561 which prohibits the defense from obtaining copies of child pornography and authorizes ASAs to possess it as long as it is in a locked container.
>
> **(b) Prosecutors Discovery Obligation.**
>
> (1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control, ***except that any property or material that portrays sexual performance by a child or constitutes child pornography may not be copied, photographed, duplicated, or otherwise reproduced so long as the state attorney makes the property or material reasonably available to the defendant or the defendant's attorney:***

In re Amendments to Florida Rule of Criminal Procedure 3.220, 105 So.3d 1275 (Fla. 2012):

> Section 92.561, effective July 1, 2011, dictates that child pornography must remain in the possession of the police, prosecutor or court. I cannot be given to defense counsel or anyone else. As a result, the following change has been proposed for the Rules of Discovery:
>
> RULE 3.220. DISCOVERY
>
> (a) [No Change]
>
> (b)Prosecutors Discovery Obligation.
>
> (1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit

> which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control, except that any property or material that portrays sexual performance by a child or constitutes child pornography may not be copied, photographed, duplicated, or otherwise reproduced:

United States v. Frabizio, F.Supp (W.D. MA. 2004):

> The government retained an expert who wrote a computer program that could distinguish virtual porn from real porn. The defense hired an expert to test the government expert's methods. The court ruled that the defense expert could obtain the child pornography for testing as long as certain controls were in place to prevent copying etc…

State v. Ross, 792 So.2d 699 (Fla. 5th DCA 2001):

> Notwithstanding state's broad duty to disclose, state was not obligated to turn over to defendant contraband of computerized images of child pornography.
>
> Defendant failed to demonstrate any prejudice or harm which would be caused by state's proposed procedure for review of the materials, which was to allow defendant, defense counsel, and defense experts to review the images provided Florida Department of Law Enforcement retained control over them.
>
> Any concern that defendant might be required to reveal identity of consulting experts, information which is normally protected by work product privilege, can be adequately addressed by trial court fashioning procedures which would allow consulting experts to review images without identity being disclosed.
>
> Discussion: The court followed the reasoning of United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995).

U.S. v. Cox, 190 F. Supp. 2d 330 (N.D.N.Y 2002):

> "Defendant contends that he is entitled to return of the contraband material at issue in this case during the pendency of these criminal proceedings. He is mistaken. The government has indicated it will make any and all evidence seized from defendant's home and computer available to him for inspection but not copying upon reasonable notice. Defendant provides no

> factual basis for his assertion that physical possession of the government's evidence is necessary to adequately prepare his defense nor does he cite legal authority which suggests he is entitled to return of illegal materials seized in the course of a criminal investigation. Based thereupon, defendant's motion for a protective order requiring the government to provide him with copies of its physical evidence is DENIED. "

U.S. v. Kimbrough, 69 F.3d 723 (5th Cir. 1995):

> Government's refusal to allow defendant to copy seized child pornography as part of discovery process did not violate discovery rule, since child pornography was illegal contraband.

U.S. v. Horn, 187 F.3d 781 (8th Cir. 1999):

> Trial court did not err in denying defendant's request for copies of video tapes since the tapes were prima facie contraband. Government's offer to allow defendant's expert to view the tapes was sufficient.

United States v. Hill, F.Supp (C.D.CA 2004)

- Defense counsel and his expert have a right to copies of child pornography to prepare their defense. Requiring them to examine images at government lab would be unduly burdensome.

Discussion: This case provides an example of the court order placing conditions on defense counsel to ensure images were not misused.

Discretion as to Which Statute to Charge

Wade v. State, 751 So.2d 669 (Fla. 2d DCA 2000):

> No merit to argument that prosecutor should have charged defendant on the counts relating to computer hard drive files under F.S.847.0135, which specifically deals with computers and child pornography, rather than under F.S.827.071, which prohibits child pornography in general. The State had the discretion to determine under which statute to charge.

Double Jeopardy and Multiple Counts

Taylor v. State, 2019 WL 1494601 (Fla.App. 5 Dist., 2019)

Statute governing penalties for possession of material depicting sexual performance by child and statute governing reclassification of penalties for such possession, read together, expressly stated that possession of each image depicting such performance was separate offense, and permitted reclassification of each violation, and thus defendant's conviction of 55 counts of violation of former statute and one count of violation of latter did not violate double jeopardy.

Statute governing reclassification of penalties for possession of child pornography, which requires that "offender possesses 10 or more images" of child pornography to reclassify, does not require the state to limit the charges to one offense per ten images in order to reclassify; the state may instead charge the possession of each image as a separate second-degree felony.

Pardue v. State, 2015 WL 5239021 (Fla. 1st DCA 2015)

Defendant's convictions on 25 counts of possession of photographs including sexual conduct by a child did not violate double jeopardy, even though photographs allegedly depicted the same conduct that occurred on the same date; the statute provided that "The possession, control, or intentional viewing of each such photograph ... is a separate offense," and the State presented sufficient evidence to demonstrate the distinctness of each image, as each of the 25 images was individually presented to the jury and contained a unique hash value.

Note: Even though the photos taken of the child were taken in rapid succession and looked almost identical, they could still be charged separately.

Cocking v. State, 154 So.3d 1198 (Fla. 2d DCA 2015):

Defendant's trial counsel was ineffective in failing to move to dismiss all but one of the 45 counts of possession of photographs depicting sexual conduct by a child with intent to promote with which defendant was charged, and in advising defendant to enter an open plea to all 45 counts; all 45 images giving rise to the charges were found in a single forensic examination of defendant's computer, such that statute defining the

offense, which barred possession with intent to promote of "any" such photograph, allowed for only a single conviction.

Stowe v. State, 66 So.3d 1015 (Fla. 1st DCA 2011)

"The language of the statute does not contemplate a separate conviction for each child depicted in a single photograph, motion picture, exhibition, show, representation, or other presentation."

Double jeopardy was violated when defendant was convicted for multiple counts based upon multiple children depicted in a single digital video.

Note: This appears to be a case where the defendant possessed a child porn video that was a compilation of multiple child porn video clips. The State argued that the separate videos should be charged separately even though they were combined into a single unit. The court disagreed.

Hudson v. State, 761 So.2d 1161 (Fla. 2d DCA 2000):

Multiple convictions for possession of child pornography with intent to promote were improper.

Crosby v. State, 757 So.2d 584 (Fla. 2d DCA 2000):

Defendant properly convicted of multiple counts of simple possession of child pornography based on several copies of same photograph or computer image.

With regard to statutory provision prohibiting possession of child pornography with intent to promote, defendant found in possession of multiple copies of same article of child pornography during single episode may only be prosecuted for one count.

Wade v. State, 751 So.2d 669 (Fla. 2d DCA 2000):

Error to adjudge defendant guilty of multiple counts of possession of child pornography with intent to promote where multiple copies of three different photographs were found during single search of defendant's residence. Only one conviction is allowed for single episode.

Discussion: Once again, the outcome of this case was determined by the distinction between the words "any" and "a". Since the language of

F.S.827.071(4) states that it is unlawful for any person to possess with intent to promote ***any*** photograph, motion picture, etc., there has been a legislative intent to punish a single episode and not individual photos.

State v. Farnham, 752 So.2d 12 (Fla. 5th DCA 2000):

Multiple counts based on defendant's possession of "Zipped" computer archive file, which was contained on 18 separate computer disks in his possession and the individual computer images contained on the 18 disks were appropriate. Trial court erred in dismissing counts based upon individual images contained in the zipped file.

State's charging decision fell properly within the legal parameters regarding units of prosecution because language of Section 827.071 relates to possession of "a" pornographic photograph representation.

Discussion: This case of first impression involved the use of "zipped" files. When someone wants to take numerous files and store them under one file name, they need to purchase a program that "zips" all of these files into one file name. This form of storing computer files is popular on the Internet because an individual can send someone numerous photographic images in one file attachment. The person receiving this zip file must have a zip program in order to open the file. The defendant in this case had 18 separate floppy disks under the same zip file name. There were 87 separate photographs contained within the single file. The State charged one count for each of the 18 discs plus 87 additional counts for each of the photographs contained therein. The appellate court ruled that this was appropriate because when the word "a" is used in describing contraband, courts have discerned legislative intent that each item of contraband is the basis for a separate unit of prosecution. The defense also argued that it was double jeopardy for the defendant to be prosecuted for the individual discs as well as the various photographs contained therein. The court ruled that this claim was moot and therefore did not have any bearing on the issue.

State v. Parrella, 736 So.2d 94 (Fla. 4th DCA 1999):

Defendant, who during single occurrence showed undercover detectives four different videotapes depicting sexual acts involving children, could be prosecuted only on one count of possessing child pornography with intent to promote, since applicable statute specified "any" violative material, rather than "a" piece of violative material.

Thibeault v. State, 732 So.2d 28 (Fla. 2d DCA 1999):

Multiple convictions for attempt to knowingly transmit obscene material to a minor were improper where counts were based on Defendant sending multiple images to undercover officer posing as minor in only one computer transmission.

Discussion: The defendant in this case communicated with an undercover detective on America-On-Line who was posing as a fifteen-year-old boy. The Suspect then sent this detective sexually suggestive photos of children under 16 years of age. All pictures were sent in one transmission. The issue is whether the Suspect should be charged with one count or several counts for all of the pictures sent. The Appellate Court held the "a/any" test enunciated by the Florida Supreme Court controls under these circumstances. According to the Supreme Court, when the article "a" precedes the item described in the statute it is the intent of the Legislature to make each separate item subject to a separate prosecution. When the article "any" precedes the item, then only one prosecution per criminal episode can take place, even for multiple items. Since F.S.847.0133 uses the term any, then only one count can be charged. (Not a sexual performance case)

Burk v. State, 705 So.2d 1003 (Fla. 4th DCA 1998):

No error in charging defendant with multiple counts of promoting sexual performance by child predicated on twenty-five nude photographs defendant took of fourteen-year-old stepdaughter. Direction of poses and taking of separate photographs by defendant sufficient to support separate violations of statute for each photograph produced.

Discussion: Note that this case was decided under F.S. 827.071(3) regarding promoting a sexual performance by a child. The text of the statute does not specifically say that each photograph can be a separate charge. On the other hand, F.S. 827.071(5), which covers the unlawful possession of such a photograph specifically includes language that the possession of each photograph constitutes a separate offense. Therefor if you had assumed the absence of such language would preclude charging separate counts under the promoting section, you assumed incorrectly.

State v. Cohen, 696 So.2d 435 (Fla. 4th DCA 1997):

For purposes of statute prohibiting person from possessing photograph that includes sexual conduct by child, computer images scanned into computer from magazine photographs qualified as "photographs."

For purposes of statute prohibiting person from possessing representation or other presentation that includes sexual conduct by child, computer image is encompassed by term "representation or other presentation."

Under double jeopardy clause, defendant may be punished for same conduct under both Pornography and Child Exploitation Act (F.S. 847.0135) and statute prohibiting possession of presentations that include sexual conduct by child.

Exhibition before an Audience Requirement

Bishop v. State, 46 So.3d 75 (Fla. 5th DCA 2010):

The State was not required to prove that a performance was exhibited before an audience in order to obtain a conviction for using a child in a sexual performance; conviction was permitted even where the video tape of the child's engagement in sexual conduct was not shown to third persons.

Killian v. State, 761 So.2d (Fla. 2d DCA 2000): *Exhibition before an Audience*

Exhibition before an audience is not required element of sexual performance statute.

Discussion: There is very little discussion about the sexual performance issue. The majority of this opinion concerns *Miranda* issues.

Firkey v. State, 557 So.2d 582 (Fla. 4th DCA 1989):

Defendant's making motion picture showing defendant engaged in sexual performance with child was sufficient to sustain conviction for having child engage in sexual performance, even though videotape had never been exhibited before audience.

Ladd v. State, 715 So.2d 1072 (Fla. 1st DCA 1998):

The following jury instruction is consistent with the evidence presented and correctly states the law:

> "The making of a motion picture or videotape which includes sexual conduct by a child less than 18 years of age is in and of

> itself sufficient to constitute performance *even though the motion picture or videotape had never been exhibited before an audience*. An individual can constitute an audience even if that individual accidentally played the tape ad viewed the performance."

Ignorance of Age

Denhart v. State, 987 So.2d 1257 (Fla. 5th DCA 2008):

> Defendant's contention that he did not know the age of victim was not a defense to offense of promoting a sexual performance by a child.
>
> Where the state has a compelling interest in protecting underage persons from being sexually abused or exploited, an exception is recognized to the general rule that every crime must include a specific intent, or a mens rea and, so, ignorance of the age of the victim, misrepresentation of age, or a defendant's bona fide belief that such victim is over the specified age are not viable defenses to the offense of promoting a sexual performance by a child.

Nicholson v. State, 748 So.2d 1092 (Fla. 4th DCA 2000):

> Florida Statutes 827.071(3) and 827.071(5), governing promoting and possession of a sexual performance by a child, are aimed at protecting persons under the age of 18 from being sexually exploited and do not require that a defendant know that the victim is less than 18 years of age.
>
> Ignorance of the age of the victim, misrepresentation of age, or a defendant's bona fide belief that such a victim is over the specified age, are not viable defenses.

Hicks v. State, 561 So.2d 1284 (Fla. 5th DCA 1990):

> Defendant's ignorance of the victim's age was not a viable defense to conviction for use of a child in a sexual performance.

Improper Sentencing Considerations

Berben v. State, 2019 WL 1574659 (Fla.App. 5 Dist., 2019)

Sentence of twenty consecutive five-year sentences resulting from defendant's conviction for possession of child pornography was a violation of defendant's constitutional due process rights; trial court based defendant's sentence on improper considerations and findings, such as an uncharged crime relating to the distribution of pornographic images, and trial court further equated conduct to actual, physical or sexual abuse of a minor.

> *This was a quite troubling case to me. The images that we saw at trial of children being sexually abused, very young children being sexually abused that were on your computer, not just for you to look at, which is bad enough, but for you to share with others or anybody else out there on the internet, was most disturbing and warrants a lengthy prison sentence. I see little difference, and I agree with the State, I see little difference in culpability between those who actually sexually abuse and exploit children and those who encourage and promote conduct by downloading and sharing videos of such, which I think warrants a significant sentence.*

Defendant's argument that the disproportionality of his 100-year sentence (five year sentences on each of the twenty counts to run consecutively) violated constitutional prohibitions against cruel and unusual punishment was rejected.

Jurisdictional Issues

Knight v. State, 2014 WL 7243139 (Fla.App. 1 Dist.)

Investigation of child pornography in shared computer file accessible over the internet in neighboring city was within city police detective's territorial jurisdiction, even though computer was located in neighboring city, where investigation originated inside detective's territory, at the time of origination detective did not know whether computer was located in her territory, and once it became clear computer was located in neighboring city, detective obtained a search warrant pursuant to a mutual aid agreement with neighboring city's police department.

Knowing Possession

Strouse v. State, 932 So.2d 326 (Fla. 4th DCA 2006):

> Trial court properly dismissed six counts of possession of child pornography related to temporary internet files. Evidence did not show that defendant knowingly possessed them.
>
> Evidence was sufficient to convict defendant of one count of possession of child pornography because defendant's girlfriend testified that she saw it on the computer and defendant admitted to her an interest in child pornography.
>
> "To date, the passive viewing on the Internet of child pornography does not violate the law because viewing does not constitute possession." *See statute change*

Lewdness Element

(*Also see Nudity and Everyday Acts of Personal Hygiene are not Child Porn)*

State v. Brabson, 7 So.3d 1119 (Fla. 2d DCA 2008):

> The lewdness requirement, under statute setting forth offense of sexual performance by a child, may be satisfied by the intent of the person promoting the performance which included sexual conduct by the child.
>
> State established prima facie case of lewdness so as to require submission to jury of charges of promotion of sexual performance by a child; girls were asked to try on swimsuits under pretense of determining sizes for purposes of placing orders for team swimsuits, defendant, who coached girls' swim team, placed camera in his office, defendant then lured girls to his office, where they otherwise would not have been undressing and changing into suits, but for defendant's cajoling, victims were enticed to change in office with intent that their nude bodies be visible to camera and recorded, and nudity and female genitalia were the focus of defendant's filming.

Breeze v. State, 634 So.2d 689 (Fla. 1st DCA 1994):

Child's act of holding his clothed genitals in his hand did not constitute "sexual performance" such as could support defendant's convictions for use of child in sexual performance and promotion of sexual performance; to constitute "actual lewd exhibition of genitals," within meaning of statutory definition, such exhibition had to be unclothed.

State v. Fernandez, 837 So.2d 565 (Fla. 2d DCA 2003): *Lewdness*

Evidence that defendant possessed photograph of her six-year-old grandson holding his unclothed, erect sexual organ was sufficient to show prima facie violation of statute. Error to dismiss charge.

Disscusion: There is little factual detail contained in this opinion, but it is important to note that the ruling involves a C4 motion to dismiss.

Nudity and Everyday Acts of Personal Hygiene are not Child Pornography

Fletcher v. State, 787 So.2d 232 (Fla. 2d DCA 2001)

Facts: The defendant's twelve-year-old daughter reported finding a camera lens secreted behind grillwork in her bathroom. The angle of the lens was directed at the bathroom mirror, which afforded a view of the bathtub and probably the toilet. The girl also observed a video camera positioned in the upper corner of the bedroom occupied by his seven-year-old daughter. The defendant was employed in the electronics field and had above average knowledge about computers and videos, and had three computers in his home, one of which was connected to the Internet. The defendant spent a lot of time on his computers and his daughter reported seeing pictures of naked women on the computer. The warrant application also provided a behavioral profile for pedophiles, and those who collect and trade child pornography over the Internet.

Holding:

- The presence of the cameras observed only thirteen days prior to the issuance of the warrant sufficiently demonstrated that the information provided in this case was not stale. It was not necessary that the warrant application allege facts to show that the cameras were operational.

- The warrant in this case merely alleged that hidden cameras were situated in a bedroom and bathroom in the defendant's home. The affidavit contained no facts to establish that these cameras would have captured anything more than innocent conduct such as children using the toilet, dressing and bathing. Based on Lockwood v. State, 588 So.2d 57 (Fla. 4th DCA 1991), the presence of cameras that can only record such conduct does not establish probable cause to suspect possession and/or production of child pornography. Allegations of the defendant's technical knowledge, the description of practices of child pornographers and Internet sites that cater to "kiddy" covert voyeurism, likewise did not establish probable cause to support the warrant in this case.

Discussion: This case severely restricts our ability to prosecute such cases. The best way to prove such cases is to see what is on the video. When we are not allowed to obtain it, we are extremely disadvantaged. The court noted in footnote 1 that the warrant application did not allege suspicions of a violation of F.S. 810.14 (Voyeurism). The implication by the court is that such an addition to the warrant may have contributed to probable cause. The problem with this issue is that voyeurism is a misdemeanor and does not justify a search warrant of a dwelling.

Schmitt v. State, 590 So.2d 404 (Fla. 1991):

Simple, nonobscene nudity in photographs or films is protected form of expression under the First Amendment.

It is not a crime for parent simply to appear unclothed in front of child in family home or child to so appear in front of parent, with no lewd or abusive intent.

Under Florida criminal law, terms "lewd" and "lascivious" are synonymous, with both requiring intentional act of sexual indulgence or public indecency when such act causes offense to one or more persons viewing it or otherwise intrudes upon rights of others; the terms require something more than negligent disregard of accepted standards of decency or even intentional, but harmlessly discreet, unorthodoxy; acts are neither "lewd" nor "lascivious" unless they substantially intrude upon the rights of others.

Under Florida criminal law, deliberately exhibiting one's nude body to passers-by in shopping mall would be lewd and lascivious, while being stripped naked against one's will in the same location would be neither lewd nor lascivious because it was not intentional.

Terms "lewd" and "lascivious" have specialized meaning in context of photographs, films, or other depictions of obnoxiously debasing offensive portrayal of sex acts that can be characterized as obscene.

Any type of sexual conduct involving child constitutes intrusion upon rights of that child, regardless of whether child consents and regardless of whether conduct originates from parent, for purposes of Florida criminal law.

If father's true purpose in alleged taking of nude photographs and video recording of juvenile and friend stripping down to their panties were intentional exploitation of daughter for sexual purpose, father's conduct was "lewd" within meaning of law.

Discussion: This case contains a wealth of information and should be read in its entirety to have a good understanding of this subject matter. The case involved a father who liked taking photos and videos of his nude daughter. No sexual acts were ever performed. There is good law on probable cause to issue search warrants of the suspect's home under these circumstances. The opinion also contains a lengthy discussion of the unconstitutionally overbroad definition of "sexual conduct." This discussion has limited relevance today because the unconstitutional provisions were amended effective October 1, 1991.

Lockwood v. State, 588 So.2d 57 (Fla. 4th DCA 1991):

Videotapes which depicted 16 year old girl undressing, showering, and dressing did not show presentation of sexual conduct, needed to support conviction under statute which prohibited possession of motion picture that included sexual performance by child; innocent, everyday acts of child did not depict any of detailed sexual acts specified in statute.

Penetration Points

Ladd v. State, 715 So.2d 1072 (Fla. 1st DCA 1998):

Trial court properly scored sexual penetration points on sexual performance by a child count where the facts clearly show that the girl in the video was penetrated.

Prior Removal of Child's Disabilities of Nonage

State v. Robinette, 652 So.2d 926 (Fla. 1st DCA 1995):

Prior removal of child's disabilities of nonage is not a defense to charge of employing, authorizing or inducing a child less than 18 years of age to engage in a sexual performance.

Discussion: The trial court dismissed the charge because the child involved had obtained a prior judgment removing disabilities of nonage pursuant to section 39.016. The appellate court ruled that Sexual Performance by a Child is a strict liability crime and F.S. 39.016 has no effect on that.

Search Warrants and Probable Cause

State v. Peltier, 2023 WL 7006263, at *4 (Fla.App. 2 Dist., 2023)

The defendant moved to suppress a search warrant based on a BitTorrent P2P investigation. The defendant argued that the detective did not specifically describe the images he mentioned in his affidavit, but only provided conclusory references. He also failed to provide the court with copies of the images so the court could make its own determination. The trial court suppressed the warrant based on these grounds.

The appellate court overruled the trial court and ruled the detective's descriptions of the child pornography images were sufficient. Specifically, the court noted,

> *Yet, Detective Klay's description of these items depicted "sexual conduct and sexual battery" between a "female child victim" and "an adult male," or the files "depicted the female child victim exposing her genitals in a lewd manner." Thus, we conclude that the trial court's factual findings are either mistaken or thinly sourced…*
>
> *Detective Klay's affidavit reported that several images depicted the child victim engaged in "various sexual activities with an adult male." The trial court's insistence that "without details of each photograph" "there is no way to identify or distinguish child pornography from child erotica" is off the mark.*

The appellate court also note, "the law does not require the magistrate to personally review the alleged pornography." The court also observed the court should not put a hypertechnical burden on the state.

The appellate court also ruled that the magistrate could also rely on the assertion in the affidavit that some of the images are identified by hash value and were in a database of previously identified child pornography.

State v. McNeela, 2023 WL 4092174 (Fla.App. 2 Dist., 2023)

Microsoft acted as a citizen informant when they submitted a Cybertip and they are presumed reliable.

This case also discusses the necessity to describe the images in the warrant.

Goesel v. State, 2020 WL 6370480 (Fla.App. 2 Dist., 2020)

Detective received a Cybertip from Chatstep indicating defendant had a single child pornography image in his account. The only description of the image in the detective's affidavit was, "[y]our Affiant viewed the photo and it was determined that it did in fact depict child pornography." The court ruled that this was a conclusory statement and not sufficient to establish probable cause. The detective should have either provided a detailed description of the image or attached it to the affidavit.

Morales v. State, 2019 WL 2528912, (Fla.App. 1 Dist., 2019)

Detective properly opened a child pornography image submitted by ChatStep based upon a Photo DNA hit even though ChatStep had not previously opened the file. Defendant had no reasonable expectation of privacy in a file he transmitted via ChatStep and the detective's actions did not substantially expand upon the private party search.

State v. Cook, 972 So.2d 958 (Fla. 5th DCA 2007):

Warrant affidavit set forth facts establishing probable cause to support issuance of warrant to search defendant's residence and his computer; affidavit revealed that citizen informant, defendant's neighbor, told police

that he had access to defendant's computer files through a shared hard wire connection, and that, when he opened a file of defendant's labeled "XXX," he saw 122 images of "young preteen girls in nude, sexually explicit positions."

Even if warrant affidavit did not set forth sufficient facts to establish probable cause to support issuance of warrant to search defendant's residence, good faith exception to warrant requirement applied in that police officers did not omit information or make misrepresentations in the affidavit, and affidavit was not so lacking in indicia of probable cause that the officer executing the warrant could not with reasonable objectivity rely in good faith on the probable cause determination.

State v. Woldridge, 958 So.2d 455 (Fla. 2d DCA 2007):

Internet service provider's compliance with federal law mandating that it report a subscriber's apparent violation of federal child pornography laws to National Center for Missing and Exploited Children (NCMEC) provided presumption of reliability akin to that afforded citizen informant, for purposes of determining whether probable existed for issuance of residential search warrant arising from provider's reports to NCMEC; provider was a recognized, well-established company that essentially witnessed the crime when it received images of child pornography from defendant subscriber in an attempted e-mail transmission.

Search warrant affidavit relating that officer had received four reports from National Center for Missing and Exploited Children (NCMEC) stating that internet service provider had reported that computer user with specific screen name had attempted to e-mail files containing child pornography provided probable cause to issue warrant; tip came from provider, reliability of tip was presumed because of federal law compelling corporation to report to NCMEC, and provider was acting in manner analogous to that of citizen informant when it forwarded information to NCMEC.

AOL, as required by federal law, provided its business record concerning content of specific e-mails from a specific subscriber to NCMEC for it to forward to law enforcement, and defendant offered no basis for trial or appellate court to conclude that these business records were unreliable.

State v. Jenkins, 910 So.2d 934 (Fla. 2d DCA 2005):

Search warrant affidavit contained sufficient information to afford magistrate substantial basis for concluding that probable cause existed to search suspect's office for evidence relevant to commission of crime of sexual performance by a child; affidavit included report of suspect's employer, to effect that female minor told her that suspect had taken photograph or video of himself fondling her breasts, and that employer saw such video on suspect's workplace computer.

Information contained in search warrant affidavit established commission element of offense of sexual performance by a child, where statements of victim and of defendant's employer contained therein were not in conflict; victim reported that defendant photographed her breasts in exchange for a bail bond deal, and defendant's employer reported, based upon her conversation with victim and her viewing of video found on defendant's workplace computer, that defendant had fondled victim's breasts.

Report of defendant's employer that defendant possessed material depicting a child engaged in sexual conduct was sufficient to establish commission element of offense of sexual performance by a child, for purposes of determining sufficiency of search warrant affidavit; there was no requirement that defendant's employer have been present at time video at issue was created.

Discussion: One of the primary issues in this case was whether the affidavit sufficiently showed that there was actual physical contact with the minor victim's breast. The court noted that pictures of the breast alone would not have been child pornography, but touching them for sexual gratification was sufficient under the statute.

Burnett v. State, 848 So.2d 1170 (Fla. 2d DCA 2003):

Conviction of possession of child pornography based on images on computer and diskettes seized in defendant's bedroom reversed where affidavit in support of search warrant failed to set forth crime-specific facts regarding defendant's probable possession of child pornography and the likelihood that it would be found on the computer and diskettes.

Although affidavit properly stated that videotape seized in prior consensual search of defendant's bedroom substantiated allegations of defendant's lewd or lascivious conduct with children, the videotape corroborated only those initial charges and nothing more.

Affidavit failed to describe a factual link between the video camera and

the functioning capability of the computer so that images could be transferred, and omitted any factual averment that the computer was linked to the Internet or that the video camera was compatible with the computer so that images could be downloaded, transferred, or transmitted.

Although affiant averred in general terms her experience in investigations involving crimes against children, affiant failed to describe any personal experience with child pornography from which her conclusions concerning defendant were derived.

Discussion: The suspect videotaped two boys engaged in lewd conduct. During a consent search of the defendant's home, the detective found the videotape containing the alleged lewd conduct. Based on this finding, the detective sought a warrant to search the defendant's home and computer for more child pornography. The detective alleged that based on her expertise, the defendant would have child pornography on his computer.

Even though this case ruled against the State, it is a helpful resource for us because it explains how the affidavit could have been done correctly. The court discussed two basic problems in the detective's affidavit. The first problem concerned her expertise in child pornography investigations. She detailed her expertise in child sex abuse investigation, but did not detail her training and experience in child pornography and the habits of child pornographers. The court implied that she could have remedied this by either elaborating on her specific expertise in child pornography *or* by listing the works of other experts in the field. Since she did neither, the affidavit was deemed insufficient.

The second major concern of the court was the detective's conclusory statement that the computer contained child pornography. The court noted that the detective did not state whether the computer was connected to the Internet or whether it had the capability to connect to the video camera. In conclusion, the affidavit could have been sufficient, but wasn't. The actual language from the detective's affidavit is included in the opinion.

Fletcher v. State, 787 So.2d 232 (Fla. 2d DCA 2001)

Facts: The defendant's twelve-year-old daughter reported finding a camera lens secreted behind grillwork in her bathroom. The angle of the lens was directed at the bathroom mirror, which afforded a view of the bathtub and probably the toilet. The girl also observed a video camera positioned in the upper corner of the bedroom occupied by his seven-year-old daughter. The defendant was employed in the electronics field and had above average knowledge about computers and videos, and had three

computers in his home, one of which was connected to the Internet. The defendant spent a lot of time on his computers and his daughter reported seeing pictures of naked women on the computer. The warrant application also provided a behavioral profile for pedophiles, and those who collect and trade child pornography over the Internet.

Holding:

* The presence of the cameras observed only thirteen days prior to the issuance of the warrant sufficiently demonstrated that the information provided in this case was not stale. It was not necessary that the warrant application allege facts to show that the cameras were operational.

* The warrant in this case merely alleged that hidden cameras were situated in a bedroom and bathroom in the defendant's home. The affidavit contained no facts to establish that these cameras would have captured anything more than innocent conduct such as children using the toilet, dressing and bathing. Based on Lockwood v. State, 588 So.2d 57 (Fla. 4th DCA 1991), the presence of cameras that can only record such conduct does not establish probable cause to suspect possession and/or production of child pornography. Allegations of the defendant's technical knowledge, the description of practices of child pornographers and Internet sites that cater to "kiddy" covert voyeurism, likewise did not establish probable cause to support the warrant in this case.

Discussion: This case severely restricts our ability to prosecute such cases. The best way to prove such cases is to see what is on the video. When we are not allowed to obtain it, we are extremely disadvantaged. The court noted in footnote 1 that the warrant application did not allege suspicions of a violation of F.S. 810.14 (Voyeurism). The implication by the court is that such an addition to the warrant may have contributed to probable cause. The problem with this issue is that voyeurism is a misdemeanor and does not justify a search warrant of a dwelling.

Pendarvis v. State, 752 So.2d 75 (Fla. 2d DCA 2000):

Challenge to warrantless search of Computer hard drive from defendant's office not preserved for appeal where sole objection made when photographs reproduced from pornographic images were introduced was that they were not best evidence.

Staleness Cases

State v. Sabourin, 39 So.3d 376 (Fla. 1st DCA 2010)

> Probable cause existed for issuance of search warrant for residence of defendant, who was suspected of possessing child pornography, including computers, electronic storage devices, and photography equipment, though supporting affidavit failed to include precise date criminal activity occurred, as a fair reading of entire affidavit lead to reasonable conclusion that events described did not occur in the distant past; seven-year-old victim stated in interview with law enforcement that she was riding in defendant's car with him and his six-year-old niece, defendant noticed that seven-year-old had spilled water on her pants, and convinced her to pull down her pants and underwear, at which point he took out camera, and took pictures of seven-year-old's buttocks and vagina as she posed in back seat of vehicle, and six-year-old attempted to reassure seven-year-old by saying, "It's ok, he takes pictures of me like that all the time."
>
> "Staleness" of information contained in a search warrant application is not a separate element that must be disproved by all search warrant applicants, nor is there a magic words requirement where the affidavit must specifically list every date that each of the events described in the affidavit occurred.
>
> A magistrate is not required to leave common sense at the courthouse door when evaluating whether or not the information satisfies the nexus element, i.e., that evidence relevant to the probable criminality is likely located at the place to be searched, and supports a finding of probable cause for issuance of search warrant; instead, an issuing magistrate should assess the whole of the information provided in the affidavit application and determine, based on the particular facts of a given case, the nature of the criminal activity involved, the evidence hoped to be found, and whether there is probable cause to believe evidence will be found.

State v. Felix, 942 So. 2d 5 (Fla. 5th DCA 2006):

> Information contained in affidavit supporting search warrant for child pornography in defendant's home that was five and one half months old was not stale; affidavit discussed in detail expertise and background of affiant, as well as affiant's opinion regarding propensity of collectors of child pornography to retain images for extended periods, indicating that persons such as defendant "rarely, if ever, dispose of their sexually explicit materials," and "rarely destroy correspondence received from

other people with similar interests unless they are specifically requested to do so."

Information provided in search warrant affidavit provided sufficient nexus between defendant's possession of child pornography on computer and residence of owner of computer to be searched; although affidavit listed computer owner's former residence, it was reasonable to believe that even after five and one-half months, defendant would still be in possession of images that he had uploaded from his computer onto police website, and that his computer would be in his new residence.

Brachlow v. State, 907 So.2d 626 (Fla. 4th DCA 2005):

Information provided in search warrant affidavit alleging that videotapes of sexual abuse would be found in defendant's residence was not stale, even though videotapes had been last observed three years ago; victim of the sexual abuse knew when the videotapes were made, saw the videotapes, and knew that defendant stored them in a safe in the family room closet, and expert in sexual abuse investigations testified that it was highly likely that a sexual offender would keep pornographic materials hidden but readily accessible and that such material was not destroyed.

Police had probable cause to search for videotape of child pornography when witness told them that defendant took pornographic videos of him 5 years earlier and kept them in a safe in his house. "From the testimony of Special Agent Thomas, an expert in sexual abuse investigations, it was highly likely that a sexual offender, such as appellant, would keep child pornography hidden but readily accessible and that such material was not destroyed. While some courts may conclude that the time period in this case was too remote and thus the warrant stale, it was clearly permissible for the court in this case to consider this evidence in reaching the conclusion that the warrant was not stale."

Haworth v. State, 637 So.2d 267 (Fla. 2d DCA 1994)

Evidence in search warrant for defendant's residence was stale; affidavit was based in part pornographic videotape depicting defendant and possibly underage female, but date on videotape label was more than 16 months prior to date on which affidavit was being submitted, there was no information as to when events depicted on tape actually occurred and no nonspeculative evidence of ongoing pattern of criminal activity.

Sentencing Enhancements

Wingo v. State, 2015 WL 1810363 (Fla.App. 2 Dist.)

The court briefly addresses the fact that section 775.0847(2) and (3) enhances sexual performance by a child charges from third degree felonies to second degree felonies when the offender possesses 10 or more images.

Sexual Conduct: Type of Touching Required

Taylor v. State, 2019 WL 1494601 (Fla.App. 5 Dist., 2019)

Statute governing penalties for possession of material depicting sexual performance by child and statute governing reclassification of penalties for such possession, read together, expressly stated that possession of each image depicting such performance was separate offense, and permitted reclassification of each violation, and thus defendant's conviction of 55 counts of violation of former statute and one count of violation of latter did not violate double jeopardy.

Statute governing reclassification of penalties for possession of child pornography, which requires that "offender possesses 10 or more images" of child pornography to reclassify, does not require the state to limit the charges to one offense per ten images in order to reclassify; the state may instead charge the possession of each image as a separate second-degree felony.

Denhart v. State, 987 So.2d 1257 (Fla. 5th DCA 2008):

Photographs of defendant making contact with minor girl's breast depicted "sexual conduct" proscribed by statute applicable to promoting a performance of sexual conduct by a child; statute defined "sexual conduct" to include contact with a designated sexual area of a person and did not require the child to make contact with designated sexual area of another person.

The statute prohibiting promoting a sexual performance by a child defines sexual conduct broadly enough to cover contact by one party with the designated sexual areas of another party regardless of whether the child

victim is making the contact or receiving the contact.

Discussion: There is an interesting concurring opinion where the judges imply that images of a child touching herself may constitute child pornography, but they left the issue undecided.

Sufficiency of Proof

(Also see Constructive Possession and Circumstantial Evidence above)

Allen v. State, 2020 WL 20662 (Fla.App. 1 Dist., 2020)

Suspect who recorded himself performing oral sex on a sleeping child could be convicted of use of a child in a sexual performance.

Appellant also disputes whether there was actual touching/union, but Wilkinson, who was trained to view images and videos and to identify sexual acts and victims of child pornography, testified that in his expert opinion, Appellant's penis was touching C.Y.'s mouth. Accordingly, we find that the evidence, taken in a light most favorable to the State, was legally sufficient to sustain a conviction for sexual battery.

The subject photograph was taken at 3:01 a.m., and the images that preceded it and followed it were taken at 2:56 a.m. and 3:09 a.m. and contained Appellant's identifiers. The tattooed finger in the pictures was identified as Appellant's and when enlarged produced a fingerprint that was a match to him. The photographs were taken with a phone of the same make and model as Appellant's, were located on the same flash drive as the bathroom video recordings he admitted he made, and were accessed on his home computer.

Defendant pushed his pants into the next stall where a 14-year-old girl was undressing. She noticed his phone was in the pocket facing up toward her. Defendant was properly convicted of video voyeurism even though the recording was never recovered from the phone.

Bishop v. State, 46 So.2d 75 (Fla. 5th DCA 2010):

Evidence was sufficient to support conviction for the use of a child in a sexual performance; witness testified that defendant pointed the video camera at the lower part of the victim's body while he rubbed her genital area, the victim testified that the video camera appeared to be on, and defendant was observed pressing various buttons on the video camera as he tried to flee the scene.

Oquendo v. State, 24 So.2d 746 (2d DCA 2009):

> Evidence that defendant told 16-year-old to have sex with another man for money in a private bedroom with no one viewing was insufficient to support conviction for promoting the sexual performance of a child, where there was no performance, as that term was defined in criminal statute, by the defendant.

Teenagers Photographing Each Other

A.H. v. State, 949 So.2d 234 (Fla. 1st DCA 2007):

> 16-year-old girl who took lewd photos with her 17-year-old boyfriend could be convicted of promoting a sexual performance by a child.
>
> Defendant's privacy rights were not implicated, and if they were, the State had a compelling interest in prohibiting such conduct.

Ladd v. State, 715 So.2d 1072 (Fla. 1st DCA 1998):

> Prosecution of 22-year-old man for sexual performance by a child, when his 16-year-old girlfriend willingly allowed him to videotape her performing lewd acts and having sex with him, was not an unconstitutional application of the said statute. The appellant's conduct clearly fell within proscriptions of statute, and state has compelling interest in preventing sexual exploitation of children as a class.
>
> The following jury instruction is consistent with the evidence presented and correctly states the law:
>
> > "The making of a motion picture or videotape which includes sexual conduct by a child less than 18 years of age is in and of itself sufficient to constitute performance even though the motion picture or videotape had never been exhibited before an audience. An individual can constitute an audience even if that individual accidentally played the tape ad viewed the performance."
>
> Trial court properly scored sexual penetration points on sexual performance by a child count where the facts clearly show that the girl in the video was penetrated.

Unclothed Genitals Required

Breeze v. State, 634 So.2d 689 (Fla. 1st DCA 1994):

> Child's act of holding his clothed genitals in his hand did not constitute "sexual performance" such as could support defendant's convictions for use of child in sexual performance and promotion of sexual performance; to constitute "actual lewd exhibition of genitals," within meaning of statutory definition, such exhibition had to be unclothed.

Undeveloped Film, Scanned Photos and Computer Images

Schneider v. State, 700 So.2d 1239 (Fla. 4th DCA 1997): Goldstein

> Statute punishing the possession of material that includes sexual performance by a child covers undeveloped film in defendant's camera.
>
> Discussion: Nine separate photos were on the roll and nine separate charges were filed. The opinion also cites State v. Cohen, 696 So.2d 435 (Fla. 4th DCA 1997), which holds that possessing a computer image of child pornography is punishable under this statute.

State v. Cohen, 696 So.2d 435 (Fla. 4th DCA 1997):

> For purposes of statute prohibiting person from possessing photograph that includes sexual conduct by child, computer images scanned into computer from magazine photographs qualified as "photographs."
>
> For purposes of statute prohibiting person from possessing representation or other presentation that includes sexual conduct by child, computer image is encompassed by term "representation or other presentation."
>
> Under double jeopardy clause, defendant may be punished for same conduct under both Pornography and Child Exploitation Act (F.S. 847.0135) and statute prohibiting possession of presentations that include sexual conduct by child.

Venue

State v. Losada, 89 So.3d 1104 (Fla. 3d DCA 2012):

> Defendant who was charged with transmission of child pornography and computer pornography in county where police detective to whom he sent child pornography images was located, and who was subsequently charged with possession of sexual performance of a child in county where defendant's computer was located, was not entitled to transfer venue of the transmission and computer pornography charges to county where the possession charges were pending, despite contention that transfer would be more efficient; consolidation and venue were different issues, and the interests of practicality, efficiency, expense, or convenience were not the operative determinative factors.

Other

Queen v. State, 2021 WL 1111344 (Fla. 3rd DCA 2021):

> In child pornography trial, a computer forensic examiner said he viewed all 300 of the charged images. He testified that he could clearly determine 299 of them depicted children. He said he could not make that determination on one of the images, so he relied on the image's classification in the NCMEC/Project VIC database. The appellate court ruled the defendant could not be convicted on that count because the classification of the file by an unnamed officer was hearsay.

Hall v. State, 2016 WL 7486302, (Fla. Dist. Ct. App. Dec. 30, 2016):

> Court affirmed 825-year sentence for child pornography charges without argument.

Transmission of Child Pornography and Harmful Material - F.S. 847.0137 and 847.0138

Constitutional Issues

Alexander v. State, 2020 WL 465355 (Fla.App. 4 Dist., 2020)

Defendant argued that the standard jury instruction for transmission of harmful material to a minor was defective because it did not specify that appealing to a prurient interest was based on a community standard. In ruling the standard jury instruction was sufficient, the court stated,

> *More specifically, we hold that until a majority of the United States Supreme Court or the Florida Supreme Court holds otherwise, the jury does not need to be specifically instructed that it is to use a community standard, statewide or countywide in determining if material or conduct is prurient.*

The opinion provides a very good discussion of the difference between obscenity and "material harmful to minors." The court traces the history of the statutes and explains how the US Supreme Court has ruled on the issues.

Simmons v. State, 944 So.2d 317 (Fla. 2006):

Florida statute prohibiting transmission of material harmful to a minor did not violate dormant Commerce Clause; statute applied only to electronic mail (email) and instant message communications, and sender must either know or believe that specific individual who was recipient was a minor located in Florida.

"Electronic mail," within meaning of Florida statute prohibiting transmission, by electronic mail, of material harmful to a minor, includes both email and instant message communications sent to a specific individual.

Simmons v. State, 886 So.2d 399 (Fla. 1st DCA 2004): *affirmed by Florida SC*

Statute prohibiting transmission of material harmful to minors to a minor by electronic device or equipment did not violate the First Amendment, despite defendant's claim that the statute was overbroad because it "limits communications on the Internet to those which would only be suitable for children, thereby depriving adults of their constitutional right to engage in protected speech"; statute only pertained to harmful images, information, or data sent to a specific individual known by the defendant to be minor, "via electronic mail," and thus, because the defendant must have had actual knowledge or believed that the recipient of the communication was a minor, adults are not deprived of their constitutional right to engage in protected speech.

Statute prohibiting transmission of material harmful to minors to a minor by electronic device or equipment did not violate the First Amendment, despite defendant's claim that the statute was overbroad because it "limits communications on the Internet to those which would only be suitable for children, thereby depriving adults of their constitutional right to engage in protected speech"; statute only pertained to harmful images, information, or data sent to a specific individual known by the defendant to be minor, "via electronic mail," and thus, because the defendant must have had actual knowledge or believed that the recipient of the communication was a minor, adults are not deprived of their constitutional right to engage in protected speech.

The State has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from material that is not obscene by adult standards, but the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected).

Statute prohibiting transmission of material harmful to minors to a minor by electronic device or equipment was narrowly tailored and not unconstitutionally vague, despite defendant's claim that the statute applied to minors without attempting to classify materials differently for older age groups; Legislature had the responsibility and authority to protect all children, even older ones, and statute was limited to harmful material sent to minors by electronic mail.

Statute prohibiting transmission of material harmful to minors to a minor by electronic device or equipment did not violate the dormant Commerce Clause; a violator who was not in Florida must have known or believed that he or she was transmitting harmful material to a Florida minor.

Double Jeopardy and Multiple Counts

State v. Losada, 175 So.3d 911 (Fla. 4th DCA 2015):

"Pursuant to the Florida Supreme Court's "a/any" test and the rule of lenity, we conclude that Appellee's transmission of multiple images via a

file-sharing program constituted only a single violation of each applicable statute, rather than one count for each individual image contained in the transmissions."

Note: Defendant gave detective to his Gigatribe file sharing account. Detective downloaded multiple child pornography images from the defendant's shared folder. Even though the detective separately downloaded individual files, the court ruled that it could only be charged as one count. Files downloaded the previous day could be charged separately.

Allen v. State, 82 So.3d 118 (Fla. 4th DCA 2012):

Defendant who sent undercover detective who was posing as a 14-year-old girl two instant messages, each with ten nude photographs attached, could be charged with 20 counts of transmitting a harmful image to a minor, representing one for each photograph, rather than just two counts, or one for each instant message; statute punished transmission of "an" image that is harmful to minors, implying that the unit of prosecution was a single image, and detective testified that he had to open each photograph individually, making each a separate image.

Charging defendant with 20 counts of transmitting images harmful to minors, after he sent two instant messages to undercover detective who was posing as a 14-year-old girl, each with 10 nude photographs attached, did not violate double jeopardy; each attached and transmitted photograph was a separate, punishable offense.

State v. Sholl, 18 So.3d 1158 (Fla. 1st DCA 2009):

Dual convictions for lewd exhibition via webcam and transmission of material harmful to minors by electronic device did not violate double jeopardy.

Defendant's double jeopardy argument was premature and improper basis for dismissal; when information contains two or more charges which amount to same offense, double jeopardy concerns required only that trial judge filter out multiple punishments at end of trial, not at beginning, and double jeopardy protections could not be extended to earlier stage of proceeding, such as filing of information or jury selection, otherwise, trial

court would be usurping state's discretion to make strategic decisions about charging alleged criminal activity.

"Electronic Mail" requirement includes text messages

Duclos-Lasnier v. State, 2016 WL 3057352 (Fla. Dist. Ct. App. May 27, 2016)

Photographs of defendant's naked penis that defendant sent via text message from his cellular phone to 13-year-old victim's cellular phone were sent by "electronic mail" within the meaning of statute making it a felony to transmit to a minor via electronic mail an image harmful to minors; text messages, like e-mails and instant messages sent by computer, were sent electronically, were sent to a specific individual, and could include images, information, and data, nothing in plain language of statute required use of a computer or the internet, and treating text messages as electronic mail was consistent with legislative purpose of protecting minors from harmful images sent electronically.

Allen v. State, 82 So.3d 118 (Fla. 4th DCA 2012):

Instant messages with nude photographs attached that defendant sent to undercover detective who was posing as a 14-year-old girl constituted "electronic mail" within the meaning of statute making it a felony to transmit, by electronic mail, "an image, information, or data that is harmful to minors" to a specific minor in the state.

Simmons v. State, 944 So.2d 317 (Fla. 2006):

"Electronic mail," within meaning of Florida statute prohibiting transmission, by electronic mail, of material harmful to a minor, includes both email and instant message communications sent to a specific individual.

Transmission

Is P2P file sharing "Transmission?"

Jeror v. State, 2021 WL 631623, at *6 (Fla.App. 2 Dist., 2021)

We agree that the State presented sufficient evidence through the detective's testimony that would allow the jury to find beyond a reasonable doubt that Jeror reasonably should have known that the child pornography files would be accessible to and transmitted to others through his use of the wTorrent program and the peer-to-peer network. The trial court did not err in denying Jeror's motion for judgment of acquittal, and we affirm Jeror's judgment and sentence.

The detective downloaded child pornography from the defendant's computer using BitTorrent. A subsequent search of the defendant's computer did not discover any illicit images, but there were numerous programs that showed he had advanced computer skills. He had wiping software, VPN software and software designed to access the dark web. The court's ruling was primarily based on the language in the transmitting child pornography statute that says, "knew or reasonably should have known that he or she was transmitting child pornography."

Smith v. State, 2016 WL 4702108 (Fla.,2016)

The use of a computer file-sharing program, where the originator affirmatively grants the receiver access to child pornography placed by the originator in files accessible through the program, constitutes the transmission of child pornography under the plain meaning of statute defining the offense of transmitting child pornography.

Defendant who made child pornography available through a computer file-sharing program committed the act of "sending and causing to be delivered" child pornography, as necessary to support conviction for transmission of child pornography; defendant sent child pornography images to an electronic "place" by loading them into a specific computer file, defendant made the images accessible to third parties for whom access was authorized, and defendant sent a "friend" request to a third party that authorized the third party to obtain access, through the file-sharing program, to the place where the images had been sent.

Smith v. State, 2015 WL 1334323 (Fla.App. 4 Dist.):

Defendant was properly convicted of transmission of child pornography by electronic device when detective downloaded child pornography from his shared folder.

In the context of transmission using the internet, when the originator creates the shared file folder and specifically authorizes others to download the contents of that folder, he is "sending" information in the form of the "friend" request and is "causing" the pornographic images to be delivered to another.
Because we conclude that the exchange of the pornographic images through the use of the file-sharing program constitutes "transmission" within the meaning of the statute, we affirm the order denying postconviction relief. We also certify conflict with Biller.

Biller v. State, 109 So.3d 1240 (Fla. 5th DCA 2013): *overruled by Smith*

Defendant's conduct of allowing access to computer files of pornographic images of children through a peer-to-peer sharing network did not constitute "transmitting" child pornography, as necessary to support a conviction for transmission of pornography by electronic device; statute setting forth the offense was susceptible of more than one construction, such that, under rule of lenity, statute was to be construed in defendant's favor.

Is it necessary for child to receive image?

King v. State, 59 So.3d 272 (Fla. 4th DC 2011):

Trial court, in prosecution for transmission of material harmful to a minor, did not abuse its discretion in declining to instruct jury that "transmission" meant both sending and receiving an image or information; legislature's intent was to punish those who believed they were transmitting harmful material via electronic mail to a minor, regardless of whether the minor received the transmission.

Computer Child Exploitation – F.S. 847.0135(2)

Constitutional Issues

Wegner v. State, 928 So.2d 436 (Fla. 2d DCA 2006):

Receiving computer transmissions of descriptive or identifying information about a minor for the purpose of sexual conduct with a child does not violate Due Process for failing to require a *mens rea* element.

Because state charged defendant with knowledge and trial court required state to prove knowledge, there was no due process violation.

Soliciting and Traveling to Meet a Minor - F.S. 847.0135(3) and (4)

Constitutional Issues

Senger v. State, 2016 WL 3030829 (Fla. Dist. Ct. App. May 27, 2016)

F.S. 847.0135(4) is not unconstitutional based on void for vagueness or being overly broad.

Cashatt v. State, 873 So.2d 430 (Fla. 1st DCA 2004):

Computer Pornography and Child Exploitation Act (847.0135) does not violate First Amendment, is not overbroad or void for vagueness, and does not place discriminatory restrictions on interstate commerce.

Even if statute is considered content-based restriction on constitutionally protected speech, it passes "strict scrutiny" test because it promotes compelling state interest in protecting children from persons who solicit or lure them to commit illegal acts and is narrowly tailored to promote that interest, specifically limiting its prohibitions to communication intended to solicit or lure a child to commit illegal acts.

Use of phrase, "or another person believed by the person to be a child" does not render statute unconstitutional, but simply clarifies the "attempt" portion of the statue.

Claim that statute is overbroad because it chills all sexually oriented communication is without merit, as is claim that statute is vague.

No legitimate commerce is burdened by penalizing the transmission of harmful sexual material to known minors in order to seduce them.

Effect of statute on interstate commerce is incidental and far out-weighed by state's interest in prevent harm to minors and does not burden Internet users with inconsistent state regulation.

Statute not invalid for failure to include *mens rea* requirement as to age of victim.

Fact that recipient of "luring" communications was adult undercover agent posing as child is irrelevant to culpability of sender of communications for attempting to lure a child to commit an illegal sexual act.

State's traverse adequately demonstrated material dispute of ultimate facts, and Internet communications alone constituted prima facie case of guilt under statute.

Simmons v. State, 944 So.2d 317 (Fla. 2006):

Florida "luring" statute, prohibiting luring or enticing a child by use of online service, did not violate dormant Commerce Clause; state had compelling interest in protecting minors from being lured to engage in illegal sexual acts, there was no legitimate interstate commerce interest in communicating with Florida minors for purpose of luring them into sexual activity, statute was narrowed by "intent to seduce" element and requirement that targeted minor reside in Florida, and statute did not extend to conduct taking place wholly outside of Florida's borders.

Karwoski v. State, 867 So.2d 486 (Fla. 4th DCA 2004):

Statute prohibiting speech that amounts to seduction, solicitation and enticement of child to commit a crime is not overbroad or impermissible content-based regulation of speech.

Statute is not overbroad for failing to define the term child.

Custodial Authority Requirement

State v. Vitale, 118 So.3d 853 (Fla. 5th DCA 2013)

State presented prima facie facts to establish that defendant believed that 19–year–old was custodian of her 15-year-old younger sister, thus supporting charges of traveling to meet a child to engage in unlawful sexual conduct after using a computer to solicit a person believed to be a parent, guardian, or custodian to consent to the child's participation in sexual conduct; based on defendant's online discussions with person he was led to believe was minor's older sister, he believed child's parents had left on a cruise, and that the 19–year–old was at the house with her 15–year–old sister, and that the 19-year-old referred to herself as the "boss" of the younger sister.

Discovery

Demings v. Brendmoen, 158 So.3d 622 (Fla. 5th DCA 2014)

County sheriff was entitled to a meaningful opportunity to be heard before trial court could compel State to disclose to the defendant in a pending criminal prosecution the sheriff's operation plan for an undercover operation intended to identify violations of the Computer Pornography and Child Exploitation Prevention Act, which sheriff alleged contained sensitive law enforcement information exempting it from disclosure; trial court acknowledged that sheriff had standing to challenge defendant's discovery request, but did not give sheriff a meaningful opportunity to be heard, and did not review the operation plan in camera.

Siegel v. State, 68 So.2d 281 (Fla. 4th DCA 2011):

Trial court did not err in refusing to permit the defense to examine the undercover computer of detective engaged in online communications with defendant. State complied with discovery rules by providing defense with copies of online chats.

Double Jeopardy and Multiple Counts

Schwoerer v. State, 2021 WL 70091 (Fla.App. 2 Dist., 2021)

The State charged the defendant with using a computer to solicit a child and unlawful use of a two-way communication device. The information

alleged both charges occurred on the same day. Defendant argued that a conviction on both counts violated double jeopardy. The State countered that since it was a bench trial, the trial court obviously believed the two counts related to separate episodes. The appellate court ruled that the language of the information rules and double jeopardy was violated.

Hooks v. State, 2020 WL 3118242, at *2 (Fla. 1st DCA June 12, 2020)

The State reluctantly concedes and we agree that the application of Lee compels us to vacate Appellant's conviction and sentence for unlawful use of a two-way communications device. The State alleged in the information that the offense of traveling to meet a minor to engage in sexual conduct occurred "on or about March 4, 2018," and the offense of unlawful use of a two-way communications device occurred "between March 1, 2018 and March 4, 2018," and the jury found Appellant guilty as charged. Because the charging document does not foreclose the possibility that the State relied on the same act for both charges, we must vacate Appellant's conviction and sentence for unlawful use of a two-way communications device.

Newcombe v. State, 1D16-4769, 2020 WL 1873227 (Fla. 1st DCA Apr. 15, 2020) *on remand from Florida Supreme Court*

Defendant's convictions for unlawful use of a computer service to solicit a minor and traveling to meet a minor did not violate double jeopardy; convictions were based upon a plea agreement rather than on jury verdicts, so charging document did not need to be strictly constructed as to those counts that might form the basis for a double jeopardy violation.

In the context of plea negotiations, the charging document need not be as strictly constructed as it would at trial as to those counts that might form the basis for a double jeopardy violation.

Howard v. State, 2019 WL 4249660 (Fla.App. 1 Dist., 2019)

Convictions for solicitation of a minor via computer and traveling to meet a minor constituted double-jeopardy violation; information alleged only that acts occurred within stated time span, which left open possibility that

acts only occurred once.

District Court of Appeal can consider only the charging document when determining whether multiple convictions for solicitation of a minor, unlawful use of a two-way communications device, and traveling after solicitation of a minor are based upon the same conduct for purposes of double jeopardy.

Morejon-Medina v. State, 2019 WL 3807144 (Fla.App. 2 Dist., 2019)

Defendant's convictions for solicitation of a child to commit a sex act and traveling after solicitation violated double jeopardy, although the information supported an interpretation that the State relied on separate acts of solicitation, where the information did not foreclose the possibility that the State relied on the same act of solicitation and the court could not consider information adduced at trial that supported separate acts of solicitation for each charge.

Wright v. State, 2019 WL 1548873 (Fla.App. 2 Dist., 2019)

When the charged conduct arises out of the same criminal episode, a charge for unlawful use of a two-way communications device is subsumed within a charge of solicitation.

Baker v. State, 2019 WL 1551734 (Fla.App. 3 Dist., 2019)

Double jeopardy requires that, in order for a defendant to be punished for both solicitation of a parent for sexual activity with a minor by computer device or service, and traveling to meet child for unlawful sexual activity following solicitation, the state must plead and prove that the solicitation forming the basis of the travel after solicitation charge is separate and distinct from the solicitation forming the basis of the solicitation charge.

Defendant's convictions for separate offenses of solicitation of a parent for sexual activity with a minor by computer device or service, and traveling to meet child for unlawful sexual activity following solicitation, violated double jeopardy, requiring vacation of solicitation conviction, notwithstanding fact that trial record plainly established separate instances of solicitation underpinning the two charges, where amended information charging defendant with offenses stated two separate dates for each

offense, but it was not clear from information that solicitation forming basis of each charge was separate and distinct.

If the state wishes to charge a defendant for separate offenses of solicitation of a parent for sexual activity with a minor by computer device or service, and traveling to meet child for unlawful sexual activity following solicitation, in order to avoid a double jeopardy violation, the charging document must be clear, on its face, that the conduct constituting solicitation for one offense is separate and distinct from the conduct constituting solicitation under the other offense.

Baker v. State, 2019 WL 1141361 (Fla.App. 3 Dist., 2019)

"While the Second Amended Information charging Baker with both offenses states two separate dates – March 2nd as the date of the solicitation offense and March 3rd as the date of the travel after solicitation offense – it is not clear from this charging document that the solicitation forming the basis of each charge is a separate and distinct act of solicitation."

"To be clear, under Lee, if the State wishes to charge a defendant for separate offenses under sections 847.0135(3) and (4), in order to avoid a double jeopardy violation, the charging document must be clear, on its face, that the conduct constituting solicitation for one offense is separate and distinct from the conduct constituting solicitation under the other offense."

Byun v. *State, 2019 WL 1050888, at *4 (Fla.App. 2 Dist., 2019)*

"Applying the Blockburger "same elements" test, we hold that Byun's convictions for unlawful travel under section 847.0135(4)(a) and for attempted lewd battery under sections 800.04(4)(a)(1) and 777.04(1) do not violate the prohibition against double jeopardy."

The court based its ruling on the fact that unlawful travel requires the victim to be under 18 and attempted lewd battery requires the victim to be between 12 and 16.

Lee v. State, 2018 WL 6542047 (Fla., 2018)

> Considering only the information, defendant's convictions of solicitation, unlawful use of a two-way communications device, and traveling after solicitation were based on the same conduct, and thus violated double jeopardy, requiring that convictions for solicitation and unlawful use of a two-way communications device be vacated; although the evidence presented to jury could support a finding of separate acts, the information did not allege distinct acts, the verdict form did not separate the acts, and it was impossible to know whether the jury convicted defendant of all three offenses based on the same act of solicitation.
>
> To determine whether multiple convictions of solicitation of a minor, unlawful use of a two-way communications device, and traveling after solicitation of a minor are based upon the same conduct for purposes of double jeopardy, the reviewing court should consider only the charging document, not the entire evidentiary record.

Dygart v. State, 2018 WL 2271249 (Fla.App. 1 Dist., 2018)

> Defendant could be convicted of both soliciting a minor and traveling to meet a minor when there were multiple solicitations.

Sherman v. State, 2018 WL 2271429 (Fla.App. 1 Dist., 2018): *on remand*

> Defendant could be convicted of both soliciting a minor and traveling to meet a minor when there were multiple solicitations.

Kania v. State, 2018 WL 1734217, (Fla.App. 2 Dist., 2018)

> Double Jeopardy precludes charging traveling to meet a minor and unlawful use of a two-way communication device when charged on the same day.

Watkins v. State, 2018 WL 1309053 (Fla.App. 2 Dist., 2018)

Convictions for traveling to meet a minor and unlawful use of a two-way communication device violate double jeopardy.

Bermudez v. State, 2018 WL 560369, (Fla.App. 2 Dist., 2018)

A conviction for both traveling to meet a minor and unlawful use of a two-way communications device violates the prohibition against double jeopardy.

Kuckuck v. State, *2017* WL 6624242 (Fla.App. 5 Dist., 2017)

Defendant solicited an undercover officer online on July 14, on July 15, the two agreed to meet and the defendant travelled to the meeting. The defendant was charged with one count of solicitation on the 14th and one count of traveling on the 15th. Double Jeopardy was not violated because the first solicitation was separate conduct from the second solicitation and traveling.

Rubio v. State, 2017 WL 4847518 (Fla.App. 2 Dist., 2017)

The charge of unlawfully using a two-way communications device should have been subsumed within the charge of traveling to meet a minor

Straitiff v. State, 2017 WL 4553902 (Fla.App. 5 Dist., 2017):

Convictions for online solicitation for the consent of the parent of a minor and travelling to meet a minor based on the same conduct violated double jeopardy.

Concurring judge noted that the State could avoid these double jeopardy issues by charging each separate solicitation as a separate count as authorized by statute. If the jury convicts on all charges, only the last solicitation charge would be dismissed for double jeopardy.

Coffey v. State, 2017 WL 3864053 (Fla.App. 1 Dist., 2017)

Online solicitation and traveling to meet a minor charges did not violate double jeopardy when there were multiple solicitations during three day period and the offender both solicited and traveled on the same day.

As such, we agree with the State's argument that the temporal break between the email exchange and text/phone calls on the day of travel

provided the appellant with time to "pause, reflect, and form a criminal intent" to render the email conversation and the text/phone conversation separate and distinct criminal episodes such that no double jeopardy violation exists.

Assanti v. State, 2017 WL 3428277 (Fla.App. 1 Dist., 2017)

The defendant solicited an undercover officer posing as a child to engage in sexual activity. Their online communication went from January 23 to January 30. The defendant travelled to meet the child on January 30 and 31. The defendant argued that it was double jeopardy to charge him with both online solicitation and traveling. The court ruled that the suspect had ample opportunity for independent reflection during the 8 day online relationship and thus both charges were not based on the same criminal act. The double jeopardy claim was rejected.

Pasicolan v. State, 2017 WL 3469261 (Fla.App. 1 Dist., 2017) *reversed*

Defendant's convictions for using a computer service to solicit a minor, traveling to meet a minor to do unlawful acts after using a computer online service, unlawful use of a two-way communications device, and transmission of material harmful to minors did not violate double jeopardy; temporal breaks in defendant's conduct and his change in communication medium in responding to online advertisement from police officer posing as minor, engaging in sexually explicit e-mail and phone conversations, traveling to arranged meeting spot, and text messaging to again meet up after initial meeting was unsuccessful to establish that defendant's convictions did not arise out of the same conduct, although defendant's actions all took place on the same day.

Littleman v. State, 2017 WL 2628011, at *2 (Fla.App. 1 Dist., 2017)

Here, Appellant was separately charged with and pled to solicitations involving two different victims and modes of communication: (1) text messages with the officer posing as a 14–year old girl,[2] and (2) email with the officer posing as the girl's uncle. Because the offenses were based on different conduct, only one of the resulting solicitation convictions was necessarily subsumed in the traveling offense. Thus, Shelley only requires one of the solicitation convictions to be vacated.

Lee v. State, 2017 WL 2374401 (Fla.App. 1 Dist., 2017)

> *Accordingly, viewing the record in the light most favorable to the jury's verdict, we conclude that Lee's convictions for traveling after solicitation, unlawful use of a two-way communications device, and soliciting a minor do not violate double jeopardy because his convictions were based on distinct criminal acts. Based on this conclusion, we need not proceed to step three of the double jeopardy analysis—the same elements test.*

This case provides a very methodical manner in which to evaluate a double jeopardy claim. The court criticizes other jurisdictions for jumping straight to a *Blockburger* analysis instead of first evaluating episodes and distinct acts. The lays out a three step process for analysis. First, you must determine whether all three charges are part of the same episode. If the answer is no, there is no double jeopardy problem. If the answer is yes, you must determine whether the charges arose from separate acts. Did the suspect have the opportunity for independent reflection and time to form a new intent? If they were separate acts, there is no double jeopardy. If there are multiple episodes or multiple acts there is no need to go to the third step. The court then explains how the 12 day interaction between the undercover officer and the defendant constituted multiple acts.

An interesting element of this case involves the court's discussion of how the three crimes were charged. The solicition and two way communication device charges were listed "on one or more occasions" between a certain date range. The court said that since there were multiple solicitations during the 12 day period, one of them could be used for the communication device charge and another could be used for the solicitation charge and yet another for the traveling charge. As long as the evidence supported three separate solicitations, they did not have to specifically charged as such in the information.

Santiago–Morales v. State, 2017 WL 899928 (Fla.App. 1 Dist., 2017)

Convictions for solicitation of a minor and travelling to meet a minor violated Double Jeopardy when based upon the same episode.

Griffith v. State, 2017 WL 127644 (Fla.App. 5 Dist., 2017)

Charges of solicitation of a minor on February 3 and traveling to meet a minor of February 4 did not violated double jeopardy when two acts did not constitute a continuous criminal act.

Discussion: This court distinguished the fact of this case from others regarding whether the solicitation and travelling were part of a continuous criminal act. In cases where the suspect solicits undercover officer on one day and then travels according to plans on the next day the courts have ruled that it is one continuous act and thus only one charge. In this case, the parties made tentative plans on day one and then engaged in future solicitations on day two and finalized plans to meet. This extra activity was sufficient to constitute a separate criminal episode.

Littleman v. State, 2016 WL 7441721 (Fla. Dist. Ct. App. Dec. 27, 2016)

Appellant was separately charged with and pled to solicitations involving two different victims and modes of communication: (1) text messages with the officer posing as a 14–year old girl, and (2) email with the officer posing as the girl's uncle. Because the offenses were based on different conduct, only one of the resulting solicitation convictions was necessarily subsumed in the traveling offense. Thus, Shelley only requires one of the solicitation convictions to be vacated.

Thomas v. State, 2016 WL 6775843 (Fla. 2d DCA Nov. 16, 2016)

Convictions for traveling to meet a person to solicit a child to commit a sexual act and using a computer to solicit a person to commit a sexual act on a child encompassed the same criminal conduct and thus violated the constitutional prohibition against double jeopardy; defendant was searching for a sexual liaison on social media when he happened across a posting from what turned out to be an undercover law enforcement agent posing as the online mother to fictional, minor-aged children, and there was no temporal break between defendant's sustained and increasingly lurid text messages and online communications soliciting the agent and defendant's driving to meet the agent at an agreed upon location.

Lee v. State, 2016 WL 6928551 (Fla. 1st DCA Nov. 28, 2016) *overruled…see above.*

Double jeopardy clause was violated by convictions of traveling to meet a minor after use of a computer service to seduce, solicit, or lure the minor to engage in sex, unlawful use of a two-way communications device to facilitate the commission of a felony, and use of a computer service to seduce, solicit, or lure a minor to engage in sex; none of the text messages dated on day travel occurred were sexually explicit and none contained content constituting seduction or solicitation, and thus "after solicitation" element of travel offense must have been based on texts leading up to date final element of travel offense occurred.

Hughes v. State, 2016 WL 6137348 (Fla. 5th DCA 2016):

Double Jeopardy precluded charging defendant with both soliciting a minor and traveling to meet her even though the interaction spanned two days.

Court ruled that even though the solicitation was on one day the meeting was on the next day, it was really one episode. It was a fact specific ruling.

McCarter v. State, 2016 WL 4708570 (Fla.App. 1 Dist.,2016)

Defendant's convictions for solicitation of a minor and traveling to meet a minor for sex did not arise from the same criminal transaction, and thus did not violate double jeopardy; the solicitation charge was based upon defendant's use of social media to solicit naked photos from the 14-year-old victim more than a dozen times, while the traveling charge was based upon defendant's travel to a series of meetings at which he molested the victim, after defendant enticed the victim to meet him by sending messages from his phone.

Pamblanco v. State, 2016 WL 4586036 (Fla.App. 5 Dist.,2016)

"The unlawful solicitation and travel took place over several days in February 2010. Thus, the State could have charged Appellant with multiple counts of solicitation and traveling with regard to the multiple offenses occurring on multiple occasions. However, the information charged Appellant with one count of solicitation and one count of traveling based on the same conduct." Therefore, the solicitation charge was dismissed for double jeopardy violation.

Honaker v. State, 2016 WL 4415095 (Fla.App. 5 Dist.,2016)

Separate convictions for unlawful use of two-way communications device, use of a computer to solicit parent of a child to consent to sexual activity with the child, and traveling to meet minor to engage in sexual activity violated prohibition against double jeopardy, and thus could not stand, where all three charges arose from same conduct.

Batchelor v. State, 2016 WL 3265542 (Fla. 2nd DCA June 15, 2016)

Defendant's convictions for traveling to meet a minor and unlawful use of a two-way communications device violated double jeopardy; the information charged that both the traveling offense and the unlawful use of a two-way communications device offense occurred during three day period and did not predicate the charges on two distinct acts, and proof of the unlawful use of a two-way communications device was subsumed within the proof of the traveling offense.

Anderson v. State, No. 1D15-207, 2016 WL 1668996 (Fla. Dist. Ct. App. Apr. 27, 2016)

"Consequently, where the State charges the defendant with multiple counts of solicitation and also charges the defendant with traveling, so long as different conduct is alleged with regard to the solicitation and traveling charges, dual convictions will not violate the defendant's double jeopardy rights."

When traveling and solicitation charges stem from the same act, double jeopardy applies.

Duclos-Lasnier v. State, 2016 WL 3057352 (Fla. Dist. Ct. App. May 27, 2016)

Defendant's convictions for use of a computer to seduce, solicit, or entice a child to commit a sex act and for traveling to seduce, solicit, or entice a child to commit a sex act violated the prohibition against double jeopardy, where the convictions were based on the same conduct of sending text messages to 13-year-old victim's phone, arranging to meet her for the purpose of engaging in sexual activity, and then showing up at the designated location.

Stapler v. State, 2016 WL 672083 (Fla.App. 5 Dist.,2016) *revised on motion for rehearing* 2016 WL 1385927

Defendant's solicitation conviction was lesser offense included in traveling charge, and thus his dual convictions under statute provision penalizing using computer to solicit person believed to be a parent for sex with minor and provision penalizing traveling after engaging in such conduct violated his double jeopardy rights; even if there was uncharged conduct that could establish multiple violations, defendant was charged with single counts of solicitation and traveling based on conduct occurring over same specified period of time.

Rivera v. State, 2016 WL 627766, (Fla.App. 2 Dist.,2016)

"It is a violation of the prohibition against double jeopardy to convict a defendant for violations of sections 847.0135(3)(a) and (4)(a), Florida Statutes (2011), for actions that occur as part of the same criminal episode."

Soliman v. State, 2016 WL 455739 (Fla.App. 2 Dist.,2016)

Defendant did not enter into a plea bargain, and therefore open plea did not preclude defendant from asserting on appeal that conviction and sentence for use of a computer to solicit a child to commit a sex act was subsumed into traveling to meet a minor conviction, where there was no written plea agreement, and plea and sentencing transcripts demonstrated that there was not plea bargain.

Dettle v. State, 2016 WL 166724, at *1 (Fla.App. 1 Dist.,2016) *request for rehearing en banc is denied.* 2017 WL 2324673

"We affirm Appellant's convictions for travelling to meet a minor after using a computer to solicit the minor, under section 847.0135(4) and for using a computer or other device capable of electronic data storage to solicit a person believed to be a child to commit an illegal act, in violation of section 847.0135(3)(a), Florida Statutes, because the illegal acts solicited are separate illegal acts in this case."

Convictions for both traveling to meet a minor and use of a two-way communication device violate double jeopardy.

Rodriguez v. State, 2016 WL 358866, (Fla.App. 2 Dist.,2016)

Dual convictions for solicitation and traveling after solicitation based upon the same conduct on the same day impermissibly place [the defendant] in double jeopardy.

Note: The State charged the defendant with online solicitation between February 12, 2013 and March 19, 2013. They charged him with travelling on March 19, 2013. Even though case law generally allows the State to charge separate counts for solicitation and traveling if they occur on separate days, the fact that the dates of both counts overlapped on March 19 precluded the state from doing so. The State should have charged the solicitation count between February 12, 2013 and March 18, 2013. In the alternative, they could have charged each separate use of the computer as a separate count of solicitation through the 18th.

Ready v. State, 2016 WL 231379, (Fla.App. 4 Dist.,2016)

Dual convictions for solicitation and traveling after solicitation based upon the same conduct on the same day impermissibly place [the defendant] in double jeopardy.

Agama v. State, 2015 WL 9487556, (Fla.App. 2 Dist.,2015)

Convictions for solicitation and travelling to meet a minor violate double jeopardy.

Chepelevich v. State, 2015 WL 5946849, at *1 (Fla.App. 2 Dist.,2015)

Dual convictions for solicitation and traveling after solicitation based upon the same conduct impermissibly place [the defendant] in double jeopardy.

Wagner v. State, 2015 WL 6554538 (Fla.App. 5 Dist.,2015)

Appellant correctly contends that under the facts and crimes charged in this case, the elements of computer solicitation of a child or another person believed to be a child wholly subsume the elements of unlawful use of a two-way communication device to facilitate the commission of a crime. Thus, conviction of both offenses constitutes a violation of the proscription against double jeopardy.

Meythaler v. State, 2015 WL 5618273 (Fla. 2d DCA 2015)

Convictions and sentences for solicitation and traveling after solicitation based upon the same conduct impermissibly place defendant in double jeopardy.

Note: Defendant solicited on one day and travelled on another. Unfortunately, the prosecutor charged both offenses on the same day. The court noted that there would be no jeopardy problem if two different dates had been charged in the information.

Holt v. State, No. 5D14-3269, 2015 WL 4768997, at *1 (Fla. Dist. Ct. App. Aug. 14, 2015)

Convictions for traveling to meet a minor under section 847.0135(4)(a), Florida Statutes (2013), and unlawful use of a two-way communications device under section 934.215, Florida Statutes (2013), violate double jeopardy because they were a part of the same criminal episode and the elements to prove unlawful use of a two-way communications device are subsumed within the elements for traveling to meet a minor.

Holubek v. State, No. 5D14-1339, 2015 WL 5051141, at *2 (Fla. Dist. Ct. App. Aug. 28, 2015)

When the charged conduct arises out of the same criminal episode, a charge for unlawful use of a two-way communications device under section 934.215 is subsumed within a charge of solicitation under section 847.0135(3) and subsumed within a charge of travelling to meet a minor after solicitation under section 847.0135(4).

State v. Shelley, 2015 WL 3887433 (Fla. 2015)

Legislature has not explicitly stated its intent to authorize separate convictions and punishments for conduct that constitutes both soliciting the consent of a person believed to be the parent of a child to engage in unlawful sexual conduct with the child and traveling to meet a minor to engage in unlawful sexual conduct after solicitation, for purposes of determining whether multiple convictions for offenses arising from the

same criminal transaction violates double jeopardy; disapproving State v. Murphy, 124 So.3d 323.

Because the statutory elements of the offense of soliciting the consent of a person believed to be the parent of a child to engage in unlawful sexual conduct with the child are entirely subsumed by the statutory elements of the offense of traveling to meet a minor to engage in unlawful sexual conduct after solicitation, the offenses are the same for purposes of the *Blockburger v. United States* same-elements test codified by state statute, and therefore double jeopardy principles prohibit separate convictions based upon the same conduct. Because the statutory elements of the offense of soliciting the consent of a person believed to be the parent of a child to engage in unlawful sexual conduct with the child are entirely subsumed by the statutory elements of the offense of traveling to meet a minor to engage in unlawful sexual conduct after solicitation, the offenses are the same for purposes of the *Blockburger v. United States* same-elements test codified by state statute, and therefore double jeopardy principles prohibit separate convictions based upon the same conduct.

For the foregoing reasons, we approve the Second District's decision in *Shelley* and disapprove the First District's decision in *Murphy*.

Hamilton v. State, 2015 WL 3389223 (Fla.App. 1 Dist.)

Similarly, we conclude in the present case that the offense of unlawful use of a two-way communications device does not contain any elements that are distinct from the offense of traveling to meet a minor. Because the state did not charge the offenses as occurring during separate criminal episodes, we must vacate appellant's judgment and sentence for unlawful use of a two-way communications device.

Rodriguez v. State, 2015 WL 1851546 (Fla.App. 5 Dist.)

Defendant claimed ineffective assistance of counsel because his attorney allowed him to plea to both solicitation of a child using the Internet and travelling to meet a minor based on the same act. Case remanded for further clarification.

Snow v. State, 2015 WL 888267 (Fla.App. 1 Dist.): *quashed by Fla. Supreme Ct.*

Defendant's convictions for using a computer service to solicit a child to engage in sexual conduct and traveling to meet a minor to do unlawful acts, arising out of the same criminal episode, did not violate double jeopardy; statute defining the offenses reflected a clear legislative intent to punish the offenses separately.

Littleman v. State, 2015 WL 1223378 (Fla.App. 1 Dist.): *Conflict certified*

Convictions for online solicitation and travelling to meet a minor did not violate double jeopardy.

Barnett v. State, 2015 WL 965597 (Fla.App. 5 Dist.):

Double jeopardy did not preclude conviction on two counts of using a computer service or device to solicit unlawful sexual conduct with a minor after defendant electronically communicated with a fictitious 14-year old girl expressing his desire to engage in unlawful sexual acts and two days later reinitiated communication with girl prior to traveling to meet her, since there was a temporal break between defendant's initial communication and the communication two days later.

Statutory provision stating that prosecution for an offense under the Computer Pornography and Child Exploitation Prevention Act does not prohibit prosecution for violation of other laws providing for greater penalties or any other crime punishing the sexual exploitation of children does not authorize dual convictions under statutes prohibiting using a computer service to solicit unlawful sexual conduct with a minor and traveling for the purposes of engaging in unlawful sexual conduct with a minor for conduct that occurs in a single criminal episode.

Kim v. State, 154 So.3d 1168 (Fla. 2d DCA 2015) *conflict certified*

Defendant's convictions for both traveling to seduce/solicit/entice a child to commit a sex act and use of a computer to seduce/solicit/entice a child to commit a sex act on the same day violated the prohibition against double jeopardy because the soliciting offense was subsumed by the traveling offense; traveling offense proscribed traveling to meet a child to

engage in unlawful sexual contact, and the soliciting offense did not contain an element that was not found in the traveling offense.

Mizner v. State, 2014 WL 6778278 (Fla.App. 2 Dist.):

Defendant's convictions for soliciting a parent to consent to sex with a minor and unlawful use of a two-way communications device, in addition to traveling to meet a minor, violated double jeopardy; elements of the soliciting offense were subsumed within the elements of traveling offense, elements of unlawful use of two-way communications device were subsumed in elements of other two offenses, and State charged all of the offenses as occurring during a single criminal episode spanning more than one day.

Exantus v. State, 2014 WL 5072715 (Fla.App. 2 Dist.)

Defendant's convictions for receiving information about a minor, for traveling to meet a minor, and for unlawful use of a two-way communications device, based on same episode, was a double jeopardy violation; receiving offense was subsumed into traveling offense, since receiving offense contained same elements as traveling offense, with traveling offense having the additional requirements of traveling within the state and solicitation or attempted solicitation, and unlawful use of a two-way communications device offense was subsumed within the receiving and traveling offenses, since both receiving and traveling offenses required use of a communications device.

Mizner v. State, 2014 WL 3734288 (Fla.App. 2 Dist.)

Facts: FDLE agents posted ad on Craigslist for family fun. Agent posed as 35 year old mother who wanted suspect to have sex with her and her young child. They eventually went to meet in a restaurant to get to know one another. If things worked out, they would drive back to the "mother's" home town, pick up the girl from school and head to the "mother's" house for sex. Defendant was arrested when he arrived at the restaurant.

Holding:

- Unlawful use of two-way communication device was subsumed into both the soliciting and traveling charges and violated double jeopardy.

- Since the State charged the solicitation and traveling charges covering the same dates, it violated double jeopardy.

Griffis v. State, 133 So.3d 653 (Fla. 1st DCA 2014): *online solicitation case*

Dual convictions for using a computer online service to solicit a person that defendant believed to be a minor in order to commit an unlawful sexual act and for traveling to meet a person that defendant believed to be a minor in order to commit an unlawful sexual act did not violate double jeopardy; there was a clear legislative intent to punish the offenses separately.

Shelley v. State, 2014 WL 1047074 (Fla.App. 2 Dist.) *online solicitation case*

Dual convictions, for using a computer service to solicit person believed to be a parent to consent to unlawful sexual activity with child and traveling to meet the minor after soliciting the person believed to be a parent, in the course of one criminal transaction or episode violate the prohibition against double jeopardy, but 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.

Defendant's convictions for both use of computer services or devices to solicit consent of a parent and traveling to meet a minor after using computer services violated the prohibition against double jeopardy because the soliciting offense was subsumed by the traveling offense; traveling offense proscribed traveling to meet a child to engage in unlawful sexual contact after having solicited the child's parent, and the soliciting offense did not contain an element that was not found in the traveling offense, and 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.

Elsberry v. State, 130 So.3d 798 (Fla. 1st DCA 2014): *online solicitation case*

Conviction and sentence for using a computer service to solicit a person believed to be a child to engage in unlawful sexual conduct, and for thereafter traveling for the purpose of engaging in unlawful sexual conduct with a person believed to be a child did not violate double jeopardy.
Conflict certified -reversed and remanded

Cantrell v. State, 132 So.3d 931 (Fla. 1st DCA 2014): *quashed by State v. Shelley, 176 So.3d 914 (Fla.2015)*

No double jeopardy violation arose from convictions for both unlawful use of a computer service to solicit a person believed to be a minor to engage in unlawful sexual activity and traveling to meet a person believed to be minor for the purpose of engaging in unlawful sexual activity, as legislature clearly intended to punish solicitation and traveling after solicitation separately.

Hartley v. State, 129 So.3d 486 (Fla. 4th DCA 2014) *on motion for rehearing*

Sufficient evidence supported defendant's three convictions for using a computer to solicit a minor, based on communications between defendant and undercover officer posing as a 14-year-old boy online that occurred on three different days, even though the communications on only one of those days, via text messages, involved explicit discussions of mutual sexual acts; considering the content of all of the communications between defendant and undercover officer, it could be inferred that defendant's intent was to begin a sexual relationship with a 14-year-old boy, and, thus, defendant's communications with undercover officer met the plain and ordinary definitions of seduce, solicit, lure, and entice, even if defendant did so only obliquely and implicitly by avoiding explicit references to sexual conduct.

Convictions on two counts of using a computer to solicit a minor based on communications between defendant and undercover officer posing online as a 14-year-old boy did not violate double jeopardy; statute authorized separate punishments for violations of the statute where there were separations of time between each of the crimes charged, and there was a temporal break between the occurrences underlying each of defendant's two convictions and the acts that served as basis for a third charge of using a computer to solicit a minor and traveling to meet a minor for an unlawful sexual act.

Convictions for using a computer to solicit a minor and traveling to meet a minor for an unlawful sexual act, based on events that occurred on a single day, violated double jeopardy, as all elements of soliciting a child were included within offense of traveling to meet a minor.

Pinder v. State, 128 So.3d 141 (Fla. 5th DCA 2013)

For purposes of double jeopardy analysis, a single act of solicitation of unlawful sexual activity with a minor through use of a computer device is

a lesser-included offense of traveling to meet the minor for unlawful sexual activity, as the statute defining solicitation of unlawful sexual activity with a minor through use of a computer device contains no element not found in the statutory definition of traveling to meet a minor for unlawful sexual activity.

Defendant's convictions of both traveling to meet a minor for unlawful sexual activity and use of computer services to solicit unlawful sexual activity with a minor did not violate double jeopardy, as defendant was alleged to have committed offense of use of computer services to solicit unlawful sexual activity with a minor over eight-day period and evidence established multiple separate uses of online service for purpose of soliciting unlawful sexual activity with person believed by defendant to be 12-year-old girl.

Murphy v. State, 124 So.3d 323 (Fla. 1st DCA 2013):

No double jeopardy violation arose from convictions for both using a computer service to solicit person believed to be a parent to consent to unlawful sexual activity with a child and traveling to meet the minor after soliciting the person believed to be a parent; legislature clearly intended to punish solicitation and traveling after solicitation separately.

Hammel v. State, 934 So.2d 634 (Fla. 2d DCA 2006):

Defendant was properly convicted of 15 counts of computer child exploitation based upon 15 separate conversations with the undercover detective during the same criminal investigation.

Although all of defendant's acts were targeted at the same victim, separation of time between conversations shows that defendant had time to pause, reflect, and form new criminal intent before initiating each additional conversation.

Single conversation which spanned two days could only be charged as one count.

Probable Cause for Arrest

State v. Cartner, 2014 WL 3375018 (Fla.App. 5 Dist.)

The police had probable cause to arrest defendant for traveling to meet a minor for an unlawful sexual act and solicitation of a minor via a computer; "Big Blues 83" sent electronic communication to the alleged guardian of a minor that he wanted to meet, a photograph appeared next to Big Blues 83's name, police used the photograph to determine defendant identity and the type of vehicle registered in his name, and defendant arrived at the coffee shop at the designated time in the vehicle registered in his name.

Out-of-State Offenders

Rodriguez v. State, 2021 WL 4762545 (Fla.App. 4 Dist., 2021)

While in a foreign country, the defendant solicited an undercover detective posing as a child located in Florida to engage in sexual activity. The court ruled the crime was partly committed in Florida, so the court had jurisdiction to try the case.

State v. Ruiz, 909 So.2d 986 (Fla. 5th DCA 2005)

State had subject matter jurisdiction to prosecute defendant for crime of computer pornography even though defendant solicited victim from out-of-state; computer pornography statute contained specific provision which established subject matter jurisdiction over cases where out-of-state perpetrator engaged in conduct proscribed by statute with person perpetrator believed to be child who resided in-state, and evidence presented at trial would establish crime of attempt over which State also exercised jurisdiction for out-of-state actions.

Solicitation of Child via Parent or other Adult

State v. Jiborn, --- So.3d ----, 2014 WL 73822 (Fla.App. 5 Dist.):

"The charges against the defendant stemmed from email and text correspondence between the defendant and an undercover police officer, who the defendant believed to be the mother of a 14–year–old child. The trial court entered an order granting the defendant's dismissal motion, concluding that the defendant could not violate these statutes without

having direct communication with a child. In State v. Wilson, Case No. 13–387, —— So.3d —— (Fla. 5th DCA Dec. 27, 2013), we considered an essentially identical factual situation and reversed the trial court's dismissal order. For the reasons articulated in Wilson, we reverse the instant order, and remand for further proceedings consistent with this opinion."

State v Wilson, 128 So.3d 946 (Fla. 5th DCA 2013)

Statutes criminalizing attempting to solicit a minor for sexual activity using an electronic device or internet service and traveling to meet a minor for unlawful sexual activity after first using an electronic device or internet service to attempt to solicit the minor applies to attempts to solicit a child through an adult intermediary.

For purposes of prosecution for attempting to solicit a minor for sexual activity using an electronic device or internet service, and traveling to meet a minor for unlawful sexual activity after first using an electronic device or internet service to attempt to solicit the minor, defendant's communication with person he believed to be aunt of 13-year-old girl in attempt to arrange sexual encounter with such girl constituted attempt to solicit, lure or entice person believed by him to be a child by arranging to meet such person for sex..

Note: The facts are stated as, "Responding to an ad in the "personals" section of the internet site "Craigslist," Wilson began an email and text dialogue with a detective posing as the aunt of a thirteen-year-old girl purportedly being offered for sex."

Sufficiency of Solicitation

State v. Panebianco, 2023 WL 4372857 (Fla.App. 2 Dist., 2023)

Law enforcement engaged in an undercover online sting wherein a detective created a profile on an online dating site. The add indicated "Sophia" was a 19-year-old woman. Her photos depicted the detective when she was 22 years old. Shortly after she began communicating with the defendant, she told him she was 14-year-old. The suspect responded, "An older guy can go to jail over somebody like you." The conversation became sexual and the detective kept trying to get the suspect to say what they would do when they met. He eventually began telling her some things he would like to do, but never specifically asked her to do them.

He ultimately suggested they meet at a restaurant for a meal so they could discuss matters further. He was arrested when he arrived.

The trial court dismissed the online solicitation charge on a C4 motion because the defendant never directly solicited the undercover detective. She relied on a case that says it is not a solicitation just because you tell someone what you would like to do. She dismissed the traveling count because the purpose of the meeting was to eat and talk, not to engage in sexual activity. The appellate court ruled the trial court erred in dismissing the case and stated,

> *Based on the entirety of the communications, we have no difficulty concluding that the evidence, construed most favorably to the State, shows that Panebianco was seducing, soliciting, or enticing Sophia to perform a sex act. And even if we were to conclude that the evidence is not sufficient to establish solicitation, it is sufficient to establish that Panebianco was seducing or enticing Sophia to engage in unlawful sexual activity.*

The trial court also ruled the police entrapped the defendant as a matter of law. The state conceded that the defendant was induced to commit the crime, but argued he was predisposed to do so. The defendant argued he had no priors and had never been investigated for this type of offense before. The appellate court noted, however, that "post-inducement acts and statements can, in appropriate circumstances, be relevant to prove that the defendant was predisposed to commit the crime before he was induced to do so." Predisposition can be shown by "ready acquiescence in the commission of the crime." The court noted that the suspect's hesitancy to engage in sexual activity was based more on his fear of getting caught than his reluctance to commit the crime. Since the defendant's own words showed a ready desire to commit the crime, the trial court's ruling was overruled.

The appellate court also ruled it was not objective entrapment.

Hernandez v. State, 2013 WL 6635765 (Fla.App. 1 Dist.) *quashed*

Evidence was sufficient to support conviction for soliciting a person believed to be a minor to engage in unlawful sexual conduct; defendant engaged in a lengthy email conversation with an undercover officer during which he endeavored to convince the person he believed to be a 14–year–old girl to sneak away from home and meet him to have sex.

Note: Undercover officer posted ad in the "Casual Encounter" sections of Craigslist.org. The ad said, "Butterfly 4 Release—w4m (Tallahassee, FL)." The body of the ad read, "Wantn [sic] some1 to capture & release 2 the wild. U got what it takes ... only talented apply." Defendant contacted officer, who informed him she was a 14 year old girl. Defendant told her what he would like to do with her. Defense argued that it was not a solicitation because Defendant simply said what he wanted to do. The court rejected this argument.

Murphy v. State, 124 So.3d 323 (Fla. 1st DCA 2013):

E-mail exchange between defendant and law enforcement officer who placed online advertisement posing as father of a 14-year-old girl was sufficient, on charge of using a computer service to solicit a person believed to be the parent of a child to engage in unlawful sexual conduct with a person believed to be the child, to support a finding that defendant solicited, lured, or enticed the purported father into letting defendant have sex with girl; e-mail messages reflected defendant's efforts to satisfy father's concerns and requirements for a "patient experienced guy" and to show himself to be the right man for the job.

Grohs v. State, 944 So.2d 450 (Fla. 4th DCA 2006): *on motion for rehearing*

Trial court did not invade the province of the jury by affirmatively answering jury's question of whether contents of cell phone call made following provision of a cell number in an e-mail could be used as evidence to establish that defendant utilized a computer service to seduce, solicit, lure, or entice a minor or a person believed to be a minor to commit an illegal act; by affirmatively answering question, court made a legal determination regarding the scope and meaning of computer solicitation statute, and not a factual determination regarding whether evidence demonstrated a violation of statute.

Evidence was sufficient to support conviction for utilizing a computer service to seduce, solicit, lure, or entice a minor or a person believed to be a minor to commit an illegal act, even though defendant's online statements to police officer posing as 15-year-old boy in "Young Men" chat room avoided explicit references to sexual conduct; tenor of defendant's suggestive comments, including "we can be more, and do whatever makes you happy," could be interpreted to demonstrate both the adroit artfulness, or enticement, and the enjoyment of active attraction, or allurement, of a predator laying a trap for his prey.

In the absence of a statutory definition of term, a court looks to the term's plain and ordinary meaning, whether expressed in a dictionary or similar statutes.

Discussion: The Court reversed its previous ruling in this case found at 31 Fla. L. Weekly D354 (Fla. 4th DCA 2006), wherein the court previously ruled that the defendant did not violate section 847.0135(3) because the only overt solicitations he made were on the telephone, not on the Internet. In this decision, the court ruled that the language in the Internet communications could be construed by the jury to fit within the luring and enticing language of the statute.

The court provided additional helpful information in that he quoted from the Miriam-Webster dictionary web site to get the common definition of terms like "seduce", solicit", "lure" and "entice." This approach may help us with formulating jury instructions.

The court also clarified an important issue in that it ruled that the term "solicit" in this statute goes by the common definition of the term and is not the same as the term is used in section 777.04.(2). This issue is directly addressed in footnotes 1 and 2.

> FN1. The third issue addresses whether Grohs was charged with a "double inchoate offense" under section 847.0135(3). We reject Grohs's argument on this point because he was not charged with the separate inchoate offense of criminal solicitation under Florida Statutes section 777.04(2). Additionally, there is no indication that section 777.04(2) has any bearing on the definition of "solicit" in section 847.0135(3), especially where criminal solicitation prohibits conduct focused on having another commit a crime in one's stead while section 847.0135(3) criminalizes soliciting a minor to enable an individual to himself commit a crime of sexual battery, lewdness, or child abuse. As such, we affirm as to Grohs's third issue without further comment.
>
> FN2. "Solicit" is defined in the Florida Standard Jury Instructions in Criminal Cases in relation to the inchoate offense of criminal solicitation, see Fla. Std. Jury Instr. (Crim.) 5.2, but for the reasons explained in footnote 1, we reject the applicability of this definition to section 847.0135(3).

It should be noted that the court specifically refused to rule on whether the statute "is intended to criminalize any conduct occurring by telephone" because the defense did not argue the point in his brief.

Cashatt v. State, 873 So.2d 430 (Fla. 1st DCA 2004):

Fact that recipient of "luring" communications was adult undercover agent posing as child is irrelevant to culpability of sender of communications for attempting to lure a child to commit an illegal sexual act.

State's traverse adequately demonstrated material dispute of ultimate facts, and Internet communications alone constituted prima facie case of guilt under statute.

Undercover Officer Posing as a Child

Cashatt v. State, 873 So.2d 430 (Fla. 1st DCA 2004):

Fact that recipient of "luring" communications was adult undercover agent posing as child is irrelevant to culpability of sender of communications for attempting to lure a child to commit an illegal sexual act.

Karwoski v. State, 867 So.2d 486 (Fla. 4th DCA 2004):

Statute is not overbroad for failing to define the term child.

Fact that potential victim was an undercover officer posing as fifteen-year-old does not preclude conviction under statute at issue.

Venue

Hitchcock v. State, 746 So.2d 1143 (FL 5th DCA 1999):

Where defendant was charged with using a computer located in one county to communicate through another computer located in another county, in an attempt to "seduce, solicit, lure, or entice a child, venue was proper in either county."

Lewd Exhibition via Webcam - F.S. 847.0135(5)

Constitutional Issues

State v. Sholl, 18 So.3d 1158 (Fla. 1st DCA 2009):

> Charge of transmitting image harmful to minors by electronic device did not violate defendant's First Amendment free speech rights; investigator stated that while logged onto email using undercover identity of 13 year old girl, he received invitation from defendant to view live feed from his web camera, investigator accepted invitation and defendant, over web camera, "exposed his penis" three times, since transmission was sent via instant messenger service, it was precisely type of communication defined as "electronic mail," and this was not transmission intended for general public viewing, despite fact that email was public website, as it was targeted through instant messenger at one specific individual, namely someone whom defendant believed was 13 years old.

Double Jeopardy and Multiple Counts

State v. Sholl, 18 So.3d 1158 (Fla. 1st DCA 2009):

> Dual convictions for lewd exhibition via webcam and transmission of material harmful to minors by electronic device did not violate double jeopardy.
>
> Defendant's double jeopardy argument was premature and improper basis for dismissal; when information contains two or more charges which amount to same offense, double jeopardy concerns required only that trial judge filter out multiple punishments at end of trial, not at beginning, and double jeopardy protections could not be extended to earlier stage of proceeding, such as filing of information or jury selection, otherwise, trial court would be usurping state's discretion to make strategic decisions about charging alleged criminal activity.

Lewd Exhibition

Furlow v. State, 2018 WL 663548 (Fla.App. 2 Dist., 2018):

Sending images via messaging applications does not violate section 800.04(5). That section requires lewd act to be live.

State v. Sholl, 18 So.3d 1158 (Fla. 1st DCA 2009):

Court was in error for dismissing lewd exhibition charge. When defendant exposing himself on a webcam was lewd is a matter for the jury to decide.

Attempt to Commit Lewd Act on a Child - F.S. 800.04

Berger v. State, 2018 WL 6004861, (Fla.App. 5 Dist., 2018) (*Recedes from Duke v. State)*

Therefore, we hold that a defendant commits an overt act in furtherance of the crime of attempted sexual battery where, as in this case, the defendant travels to and arrives at an agreed upon location to meet and sexually batter a minor victim.

Batchelor v. State, 2016 WL 3265542 (Fla. 2nd DCA June 15, 2016)

Evidence was sufficient to support defendant's conviction for attempted lewd battery on a child; defendant had a realistic expectation of imminent sexual activity with the fictitious minor when he was arrested, a law enforcement officer posed as "Missy" on an adult, online dating website, defendant responded to "Missy" after seeing her profile on the website and the two began to communicate, "Missy" told defendant that she was looking for a man to show her thirteen-year-old daughter named "Brooke" about sex and defendant was willing to help, and to this end, defendant asked for a photograph of the fictional "Brooke" and agreed to show her about sex, and defendant traveled for a period of 35 minutes to one hour to the location where he expected to meet the fictitious "Missy" and "Brooke."

When he reached the house that was the site of the sting operation, Mr. Batchelor texted "Missy" to alert her to his arrival. Law enforcement officers arrested him in the house's driveway.

Duclos-Lasnier v. State, 2016 WL 3057352 (Fla. Dist. Ct. App. May 27, 2016)

Defendant could be convicted of attempted lewd or lascivious battery on a child 12 or older but younger than 16 arising out of his exchange of text messages with 13-year-old victim's phone in which he sent her pictures of his naked penis and

arranged to meet her to engage in sexual activity, despite contention that State could not prove victim's age because defendant was actually exchanging messages with an adult sheriff's deputy posing as victim; legal impossibility was not a defense to the offense, defendant knew the phone number belonged to victim, and defendant arrived at the arranged location prepared to have sex with a minor, and clearly not intending to meet an adult police officer.

Florida has not adopted the defense of legal impossibility

Defendant who exchanged text messages with adult sheriff's deputy posing as 13-year-old victim, in which he arranged to meet victim for the purpose of engaging in sexual activity, committed a sufficient overt act toward completion of the offense of lewd or lascivious battery on a child 12 or older but younger than 16 to support conviction of attempt to commit the offense, even if the message agreeing to meet was merely preparatory; defendant also sent a picture of his naked erect penis and showed up at the designated location, demonstrating his willingness and ability to consummate the offense.

Mizner v. State, 2014 WL 6778278 (Fla.App. 2 Dist.):

Defendant's conduct, committed as part of a "sexual mentor" sting operation initiated by a law enforcement cybercrime squad, constituted mere preparation and not overt acts leading to the commission of a sexual battery on a minor less than 12 years of age, and thus defendant could not be convicted of attempted sexual battery; arrangement to meet at restaurant and "get to know each other first" and, if either party felt uncomfortable for any reason, he or she could just walk away, was just a preliminary step to whatever followed, and when defendant was arrested in the restaurant parking lot, he was approximately 60 miles and eight-to-ten hours away from the proposed sexual contact with the fictitious minor, so he did not have a realistic expectation of imminent contact with the minor.

Facts: FDLE agents posted ad on Craigslist for family fun. Agent posed as 35 year old mother who wanted suspect to have sex with her and her young child. They eventually went to meet in a restaurant to get to know one another. If things worked out, they would drive back to the "mother's" home town, pick up the girl from school and head to the "mother's" house for sex. Defendant was arrested when he arrived at the restaurant.

Carlilse v. State, 105 So.3d 625 (Fla. 5th DCA 2013):

Sufficient evidence supported conviction for attempted lewd and lascivious

battery; defendant took significant steps toward consummating his desire to have sex with a person he believed was a thirteen-year-old boy, in that he conducted sexually explicit e-mail and text exchanges, arranged to meet the boy and his father to engage in sexual activity, and drove to the boy's home, arriving with lubricant to utilize in his sexual escapades.

Bist v. State, 35 So.3d 936 (Fla. 5th DCA 2010):

Defendant's entrance into what he thought was a 13-year-old girl's home, in possession of flowers, chocolate, lubricant, and condoms, amounted to an overt act sufficient to establish attempt to commit lewd and lascivious battery, where defendant had conducted sexually explicit online conversations with the supposed girl, who was an online decoy, defendant had arranged to meet decoy in the home, and defendant had driven over 200 miles to the home.

Hudson v. State, 745 So.2d 997 (Fla. 2d DCA 1999):

Motions to dismiss in which defendant essentially claimed that facts upon which State relied did not establish prima facia guilt should have been brought pursuant to rule 3.190(c)(4), not 3.190(b) and were technically deficient because they were not made under oath.

The trial court correctly decided that information charged a crime supported by an overt act where after preparatory acts of purchasing an advertisement directed to young males in writing his initial correspondence to police detective who responded to add, representing himself to be a 14 year old boy, the Defendant thereafter wrote numerous letters, mailed respondent a plane ticket and money for travel, arranged for a taxi to bring respondent to his house, and then approached the taxi in order to greet respondent.

Police may use a decoy over the age of 16 and still convict the Defendant of attempted lewd and lascivious act. The fact that no boy under the age of 16 was actually involved, does not belie defendant’s intent or undermine propriety of trial court’s denial of motion to dismiss.

State v. Duke, 709 So.2d 580 (Fla. 5th DCA 1998):

Conduct of defendant in discussing sexual acts on the Internet with detective whom he thought was a 12-year-old child, in arranging to meet “child” to commit sexual acts, and arriving at prearranged meeting point did not reach level of overt act leading to commission of sexual battery as required by attempt statute.

Discussion: Please note that the conduct of the suspect can now be charged under F.S. 847.0135 which makes it a 3rd degree felony for someone to utilize a computer on-line service or Internet service, etc… to solicit, lure, or entice a child or another person believed by the person to be a child to commit any illegal act described in F.S. 794, F.S. 800 or F.S. 827.

Entrapment

(See Entrapment outline for a more thorough discussion)

State v. Panebianco, 2023 WL 4372857 (Fla.App. 2 Dist., 2023)

Law enforcement engaged in an undercover online sting wherein a detective created a profile on an online dating site. The add indicated "Sophia" was a 19-year-old woman. Her photos depicted the detective when she was 22 years old. Shortly after she began communicating with the defendant, she told him she was 14-year-old. The suspect responded, "An older guy can go to jail over somebody like you." The conversation became sexual and the detective kept trying to get the suspect to say what they would do when they met. He eventually began telling her some things he would like to do, but never specifically asked her to do them. He ultimately suggested they meet at a restaurant for a meal so they could discuss matters further. He was arrested when he arrived.

The trial court dismissed the online solicitation charge on a C4 motion because the defendant never directly solicited the undercover detective. She relied on a case that says it is not a solicitation just because you tell someone what you would like to do. She dismissed the traveling count because the purpose of the meeting was to eat and talk, not to engage in sexual activity. The appellate court ruled the trial court erred in dismissing the case and stated,

> *Based on the entirety of the communications, we have no difficulty concluding that the evidence, construed most favorably to the State, shows that Panebianco was seducing, soliciting, or enticing Sophia to perform a sex act. And even if we were to conclude that the evidence is not sufficient to establish solicitation, it is sufficient to establish that Panebianco was seducing or enticing Sophia to engage in unlawful sexual activity.*

The trial court also ruled the police entrapped the defendant as a matter of law. The state conceded that the defendant was induced to commit the crime, but argued he was predisposed to do so. The defendant argued he had no priors and had never been investigated for this type of offense before. The appellate court noted, however, that "post-inducement acts and statements can, in appropriate circumstances, be relevant to prove that the defendant was predisposed to commit the crime before he was induced to do so." Predisposition can be shown by "ready acquiescence in the commission of the crime." The court noted that the suspect's hesitancy to engage in sexual activity was based more on his fear of getting caught than his reluctance to commit the crime. Since the defendant's own words showed a ready desire to commit the crime, the trial court's ruling was overruled.

The appellate court also ruled it was not objective entrapment.

State v. Panebianco, 2023 WL 4372857 (Fla.App. 2 Dist., 2023)

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The appellate court also ruled it was not objective entrapment.

State v. Lopez-Garcia, 2022 WL 16954368 (Fla.App. 2 Dist., 2022)

Trial court improperly granted a motion to dismiss based on entrapment. The issue of entrapment should have been left to a jury.

In this online solicitation case, an undercover detective posing as a 14-year-old girl met the defendant online. When he learned she was 14 he said they would never be able to meet. He also said he had no intention of taking her virginity. The detective continued to ask him to come and see her. Although he expressed a reluctance to meet her, he continued to chat with her in a sexually explicit manner and even asked her for nude photos. The appellate court ruled that both the inducement and predisposition issues were subject to interpretation and therefor should have been decided by a jury.

DeMare v. State, 2020 WL 3477062 (Fla. 2d DCA June 26, 2020)

Appellate court ruled that online sting that resulted in arrest of defendant for traveling to meet a minor was subjective entrapment as a matter of law. The police set up a Meetme.com profile on a dating site. The defendant an undercover detective engaged in a lot of flirtatious behavior and once plans to meet were determined; the defendant was told the detective was 14 years of age. The defendant tried to back out of the encounter because it was illegal. The detective persisted and lured him back in. The court provides many specific facts from the investigation that show it is entrapment.

Senger v. State, 2016 WL 3030829 (Fla. Dist. Ct. App. May 27, 2016)

Defendant responded to an ad in the Craigslist Family Fun section which was posted by a detective pretending to be a mother looking for someone to teach her daughter how to have sex.

Court rejected defendant's claim of objective and subjective entrapment.

Detective's conduct did not constitute inducement.

Oyler v. State, 162 So. 3d 200 (Fla. 5th DCA 2015)

Trial court should not have denied defendant entrapment instruction in prosecution of defendant for use of a computer to lure minor to commit unlawful sexual conduct; police conducted "sting" operation, during which police officer posed as a young female on an internet dating site, to ferret out would-be offenders who prey on children, police decoy stated that she was 13 years old and defendant expressed concern regarding legality of encounter with 13 year-old and questioned whether police decoy was in fact a police officer trying to ensnare him, decoy represented that she was not an officer, and thereafter, majority of the conversation involved attempt by both to get the other to articulate what he or she expected from an encounter.

Defendant, who asserted entrapment defense, should not have been precluded from offering evidence that he had never been arrested in prosecution for use of a computer to lure minor to commit unlawful sexual conduct; evidence of lack of prior criminal history was relevant to entrapment defense.

Ho Yeaon Seo v. State, 2014 WL 3953306 (Fla.App. 1 Dist.)

Defendant was not entitled to jury instruction regarding entrapment, in trial for unlawful use of a computer service and traveling to meet a minor in which defendant testified that he did not believe that the person being portrayed by undercover officers was actually a child, as material element of crimes was that person that defendant was communicating with or traveling to meet was believed by defendant to be a child.

Mizner v. State, 2014 WL 3734288 (Fla.App. 2 Dist.)

Facts: FDLE agents posted ad on Craigslist for family fun. Agent posed as 35 year old mother who wanted suspect to have sex with her and her young child. They eventually went to meet in a restaurant to get to know one another. If things

worked out, they would drive back to the "mother's" home town, pick up the girl from school and head to the "mother's" house for sex. Defendant was arrested when he arrived at the restaurant.

Holding:

- Defendant's argument that sting violated objective entrapment was rejected without discussion.

Cantrell v. State, 132 So.3d 931 (Fla. 1st DCA 2014)

Undercover police officer's misrepresentation about her age on website did not constitute inducement of defendant to engage in unlawful conduct, in prosecution for traveling to meet a person believed to be minor for the purpose of engaging in unlawful sexual activity; after the officer stated the purported minor's age, defendant participated enthusiastically in their exchange, suggested that they meet as soon as possible, and did not show any hesitation.

Inducement to engage in unlawful conduct is not shown by evidence that law enforcement made a fraudulent representation; there must be evidence that the fraudulent representation created a substantial risk that an otherwise law-abiding citizen would commit an offense.

A mere invitation under false pretenses is not synonymous with inducement to engage in unlawful conduct.

Gennette v. State, 124 So.3d 273 (Fla. 1st DCA 2013):

Trial court had authority to rule on pre-trial motion to dismiss charge of unlawful use of a two-way communications device to facilitate a felony based on defense of entrapment, though entrapment statute required that issue of entrapment was to be tried by the trier of fact, as the critical factual circumstances of the case were not in dispute, and trial court's denial of motion was not based on any resolution of conflicts in the documents or testimony presented by the defense, but was the result of the court's application of the terms of the entrapment statute to the undisputed evidence.

Government agent's e-mail correspondence with defendant pursuant to on-line advertisement agent published that sisters were looking for a "hot night," and indicating their age was 19, but then suggesting to defendant that one of the sisters was only 14 constituted entrapment; parties stipulated that defendant was "a person other than one who is ready to commit" the offense, throughout the e-mail chain, it was agent who took the lead and who initially suggested the

presence of a minor, though without any specific proposition of sexual or other criminal involvement between defendant and the minor, when defendant's communications wandered to innocuous matters, it was agent who repeatedly steered the conversation back to sexual activity with a minor, and it was the agent who coaxed and cajoled defendant for more details and challenged defendant's reluctance by impugning his nerve and suggesting he was "scared."

Where the factual circumstances of the case are not in dispute, the trial judge has authority to rule on entrapment as matter of law.

Murphy v. State, 124 So.3d 323 (Fla. 1st DCA 2013):

Use of possibility of a sexual encounter as a lure, in undercover investigative technique in which law enforcement officer used section of online classified advertisement service akin to "Personals" in a newspaper and pretended to be a father looking for a man to have sex with teenage daughter, was not "objective entrapment," as defense to charge of using a computer service to solicit a person believed to be the parent of a child to engage in unlawful sexual conduct with a person believed to be the child; an undercover online investigation designed to apprehend people bent on engaging in sexual activity with minors was not egregious or outrageous so as to violate due process.

Morgan v. State, 112 So.3d 122 (Fla. 5th DCA 2013):

Standard entrapment instruction was supported in prosecution for attempted lewd or lascivious exhibition by evidence that defendant responded to an Internet advertisement for a casual encounter with an adult female, and when the law enforcement officer interjected the prospect of including a minor, defendant expressed reservations and was equivocal in his responses.

Bist v. State, 35 So.3d 936 (Fla. 5th DCA 2010):

Law enforcement team's actions in using an independent nonprofit organization to set up sting operation consisting of supposed meeting of defendant and 13-year-old girl for sexual activity which would be filmed for television did not amount to objective entrapment in violation of due process; there was no prejudicial financial incentive present, law enforcement did not induce or otherwise manufacture the instrumentalities for the crime to occur, there was no suggestion of impropriety by organization, and the recording and storage of all communications between defendant and the decoy girl insured the integrity of the investigation.

The mere failure of law enforcement to supervise or monitor participant in a sting operation does not violate due process.

Defendant's entrance into what he thought was a 13-year-old girl's home, in possession of flowers, chocolate, lubricant, and condoms, amounted to an overt act sufficient to establish attempt to commit lewd and lascivious battery, where defendant had conducted sexually explicit online conversations with the supposed girl, who was an online decoy, defendant had arranged to meet decoy in the home, and defendant had driven over 200 miles to the home.

Farley v. State, 848 So.2d 393 (Fla. 4th DCA 2003):

Facts: Law enforcement agencies in Dallas, Texas, arrested the owners of a Texas Internet site who were commercially distributing child pornography. While examining the company's computers, they found a customer list. They subsequently forwarded the customer lists to law enforcement agencies across the country. Broward detectives decided to conduct a reverse sting operation with the information. Detectives "sent spam e-mail to every address on the list with an advertisement in excess of 300 words soliciting patrons for a fictitious business, "providers4you.com." The email indicated the business could assist adult customers in obtaining taboo, over-the-edge, extreme, intense, and hard-to-find, sexual material. The email also contained repeated assurances that communications and transactions with the business would be protected from governmental interference."

Farley responded to the email and was advised to list his preferences. He said he was interested in pictures of teenage boys. Detectives then sent Farley an additional email asking him to give further details about his preferences. After several exchanges narrowing Farley's preferences, he was emailed an order form. He eventually ordered three VHS cassettes to be paid C.O.D. Law enforcement conducted a controlled delivery and arrested Farley after he accepted the package.

Holding:

- The defendant was entrapped as a matter of law.
- What began as a plan to possibly uncover an offender from the Texas list, became a concerted effort to lure Farely into committing a crime, therefore, inducement was present.
- There was no evidence that Farley was predisposed to possess child pornography and no evidence was adduced that he had ever purchased such pornography nor were any pornographic materials found in his home. Prior to receiving the spam e-mail from the government, there is no indication that Farley had any inclination to purchase and possess child pornography. Therefore, Farley was not predisposed to commit the crime.

- The trial court erred in denying defendant's motion to dismiss based upon substantive due process/objective entrapment.
- The fact that detectives manufactured child pornography by creating tapes promised the defendant protection from government interference and targeted Farley even though he was not involved in an existing criminal undertaking in need of detection by law enforcement led to the finding of a due process violation.

Discussion: Although this was not my case, I am familiar with the reverse sting operation. I don't know whether the State failed to present all of the relevant facts or the appellate court chose to ignore them, but the facts of this opinion do not accurately reflect the nature of the sting operation. In any event, this is the law with which we are stuck. The court relied heavily on the *Beattie* decision. That is unfortunate because Beattie is a flawed decision as noted in my discussion of that case below. The case also seems to fly in the face of the *U.S. v. Jacobson* decision where the Supreme Court said that if you make somebody an offer and they immediately accept it, their predisposition can be shown by the ready acceptance of the offer. If you learn nothing else from this case, please note that cases referred from other jurisdictions often require continuing assistance from that jurisdiction. Had the Dallas authorities who examined the computer in Dallas testified at this hearing about the nature of this customer list, a different result would most likely have been achieved. You can't assume that just because someone provides their name and credit card number to a child porn site, that they actually have an interest in obtaining child porn.

Marreel v. State, 841 So.2d 600 (Fla. 4th DCA 2003):

No unlawful inducement by state occurred where defendant made contact with officer in Internet chatroom for "Married Wants Affair," officer immediately represented that he was 15-year-old girl, and defendant upon learning purported age, continued to engage "girl" in the idea of having an affair involving oral sex, touching, and possibly more.

By the end of first chat, defendant had already shown predisposition and that, independent of government's actions, he was "ready and willing, without persuasion" to commit offense.

No error in denying motion to dismiss charge on grounds of entrapment.

Discussion: This is an excellent case on entrapment issues in online investigations. Yours truly argued this motion at the trial level. It was an interesting case in that the FDLE agent pursued the defendant quite aggressively for several months before the defendant eventually showed up for a meeting.

Since the defendant showed his predisposition in the very first chat, the fact that the agent repeatedly initiated communications after that was not inducement. As the appellate court noted, "There were no coercive tactics or "arm-twisting" on the part of law enforcement; appellant was already on the iniquitous path." "The fact that "Kelly" helped to keep the idea of an affair going by initiating some of the later contacts with the appellant is of no moment. By the end of the first chat, appellant had already shown that he was predisposed and that, independent of the government's actions, he stood ready and willing, without persuasions, to commit the offense." We must keep in mind, however, that a jury may come up with a different interpretation of entrapment. We must also keep in mind that the State has to prove that the defendant did the inducing and enticing, not the officer.

Beattie v. State, 636 So.2d 744 (Fla. 2d DCA 1993):

This is the first Florida case that specifically applies the entrapment defense to a child pornography reverse sting. Unfortunately, it is a poor decision which does not accurately reflect the majority of federal cases. The Beattie opinion ruled that the following fact pattern was entrapment as a matter of law.

U.S. Customs placed an ad in a free shopping publication listing a distributor of "hard to find Foreign videos/magazines in Miniature & Young Love." Beattie responded to the ad and said he was interested in movies "with very young people and with Black men, white women." After an exchange of ten letters concerning the available products and prices etc. a customs agent telephone Beattie and arranged a meeting to sell Beattie a child pornography videotape called "Sexy Lolita," that customs had previously seized. Beattie was arrested when he went to pick up the movie.

In ruling that this was entrapment, the court noted that law enforcement did not know Beattie for any deviant activity or involvement with child pornography until he responded to the advertisement. The facts of the case are not detailed in the opinion, so it is difficult to determine what sort of facts we could use to enhance such a similar situation. For instance, it would be nice to know if the defendant outlined his preferences in the exchange of letters.

In any event, this opinion seems to be in conflict to the Munoz court's reference to Jacobson in which the United States Supreme Court ruled that, "had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner--who must be presumed to know the law--had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. Jacobson at 1540-41

It may help to understand the Beattie opinion by looking at the history. In Beattie v. State, 595 So.2d 249 (Fla. 2d DCA 1992), the court ruled that this same conduct was entrapment as a matter of law, but in so doing, they relied on the old objective entrapment law. The Florida Supreme Court quashed that opinion and remanded the case for reconsideration in light of the ruling in the Munoz case. Surprisingly enough, the Second District reassessed the situation under the correct law and came to the same conclusion. Neither Jacobson, nor any other federal cases were cited in this opinion. It is a poorly written opinion, but it is the only one we have. The primary lesson for law enforcement here is that it is best to target individuals with a known propensity.

Other:

State v. Hubbs, 2023 WL 8441105 (Fla.App. 4 Dist., 2023)

While searching another suspect's phone, they found a text message conversation between the defendant and the other suspect in which they discussed their sexual interest in boys. They also discussed allowing the defendant to sexually molest the boys. During the conversation, the other suspect sent this defendant photos of three young boys in a bathtub. The trial court excluded most of these text messages, claiming lack of relevance and the prejudice outweighed the probative value.

The appellate court ruled the trial court was in error and should have let in many of the excluded statements. The State had to prove the defendant knowingly possessed the images and the text messages were relevant to that element. The State also had to prove why three boys in a bathtub constituted child pornography. The intent of the parties in exchanging such photographs is relevant to establish the lewd exhibition of the genitals requirement. The content of the text messages helps establish that element. Some of the text messages concerning their fantasies were properly excluded, but those dealing directly with the children in the images were admissible.

State v. Darter, 2022 WL 16626059 (Fla.App. 4 Dist., 2022)

Facts available to police detective supported probable cause that defendant's cell phone contained evidence of child pornography images, as supported warrantless search of defendant's phone; facts known to detective at time included Department of Homeland Security cyber-tip showing that image of child pornography had been uploaded to image messaging application from

account with one of defendant's known aliases, image was uploaded from defendant's internet protocol (IP) address, during custodial interview defendant gave evasive answers about whether he had used application or had ever seen child pornography, and after interview defendant was seen frantically swiping and pressing on his phone's screen while demonstrating extremely nervous behavior.

Elias v. State, 2020 WL 7776926 (Fla.App. 5 Dist., 2020)

Defendant was convicted at trial for 30 counts of sexual performance by a child. Detectives executed a search warrant on his home based on a NCMEC Cybertip concerning child pornography in a Flikr account. Several issues were addressed.

1. Detectives located 30 images on CDs and computers. The defendant argued that he inherited them from his deceased father and had not seen the images. Forensic evidence showed that some, but not all, of the images had been transferred from the CDs to the computer. The appellate court ruled that the 23 images that had been transferred were valid convictions but stated the judge should have granted a judgement of acquittal on the 7 that were only on the CD. There was no evidence he ever viewed those images.
2. The detective testified at trial that he received the NCMEC Cybertip concerning child pornography uploaded to the account. The appellate court ruled that this was inadmissible hearsay and should not have been allowed. The court said the case law is clear that the substance of "tips" is inadmissible. The better practice is to say you began the investigation based on a tip without discussing its content. (If the detective had done a search warrant to Flikr, he could have admitted what he needed via the business records exception.) *my comment*
3. During his deposition, the detective testified he had never used Flikr and did not know much about how it worked. At trial, he testified that during trial preparation he created an account and learned how it worked. The court ruled the State committed a discovery violation by not informing the defense of the change of testimony.
4. The detective discussed two images that were not charged in the information. The court ruled this was in error, but not a reason to reverse in this case.
5. The court ruled the State did not have to accept defense counsel's offer to stipulate to the content of the images. The State has a right to show them to the jury.

Umhoefer v. State, 2017 WL 6502463, (Fla.App. 2 Dist., 2017):

Defendant was properly convicted of unlawful access to a computer or network (815.06(2)(a)) when he hacked into victim's Facebook account

without her permission. The case of Crapps v. State, 180 So.3d 1125 (Fla. 1st DCA 2015), previously ruled that an Instagram account was not a computer or computer network. The difference is that in the instant case, the State offered expert testimony by the detective that the victim's account was part of the Facebook network.