

IN THE SUPREME COURT OF FLORIDA

**Case No. SC14- 2008
1st DCA Case No. 1D12-5952
Lower Tribunal Case No. 2011-CF-3232**

EDUARDO HERNANDEZ,

Appellant/Petitioner,

v.

STATE OF FLORIDA,

Appellee/Respondent.

**On Review from the District Court of Appeal,
First District
State of Florida**

**JURISDICTIONAL BRIEF OF PETITIONER,
EDUARDO HERNANDEZ**

/s/ Michelle P. Smith

Law Office of Michelle P. Smith, P.A.

Michelle P. Smith

Florida Bar Number 389382

827 Menendez Court

P.O. Box 1788

Orlando, Florida 32802-1788

Telephone 407-601-6700

Facsimile 1-888-614-3231

E-Mail michellesmith@mpsmithlegal.com

**Counsel for Petitioner Hernandez
Case No. SC14- 2008
1st DCA Case No. 1D12-5952**

Eduardo Hernandez v. State of Florida

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner, Eduardo Hernandez, certifies that the following persons have or may have an interest in the outcome of this case:

Pam Bondi, Attorney General, Office of the Attorney General

The Honorable Nancy Daniels, Public Defender

Glen Gifford, Assistant Public Defender/Former Appellate Counsel

Richard Greenberg, Former Trial Counsel for Petitioner/Appellant

The Honorable James C. Hankinson, Circuit Court Judge

Eduardo Hernandez, Defendant/Appellant

McCoy, Charles, Supervising Attorney, Attorney General

Michael McDermott, Assistant Attorney General

The Honorable William N. Meggs, State Attorney

Kathy Ray, Assistant State Attorney

Michelle P. Smith, Counsel for Petitioner/Appellant

Tallahassee Police Department

TABLE OF CONTENTS

	Pages
Certificate of Interested Persons	<i>i</i>
Table of Contents	<i>ii</i>
Table of Authorities	<i>iii</i>
Statement of Case and Facts	1
A. Trial Proceedings and Disposition	1
B. Appellate Proceedings	1
Summary of Argument	4
Jurisdictional Statement	6
Argument and Legal Authority	6
This Court should accept jurisdiction because the decision in this case cites <i>State v. Murphy</i> , 124 So. 3d 323 (Fla. 1st DCA 2013, which is pending review before this court, and <i>Murphy</i> expressly and directly conflicts other cases including <i>Shelley v. State</i> , 134 So.3d 1138, 1141 (Fla. 2d DCA 2014), which is also pending before this Court	6
Conclusion	10
Certificate of Service	11
Certificate of Compliance	11

TABLE OF CONTENTS-cont'd

	Pages
Appendix	
Opinion of the First District Court of Appeal, affirming Mr. Hernandez's judgment and sentence, entered December 17, 2013, mandate issued March 24, 2014	A
Order of the First District Court of Appeal, denying motion for certification of a question of great public importance, entered January 23, 2014	B
Order of the First District Court of Appeal, denying motion to certify conflict, entered March 6, 2014	C

TABLE OF AUTHORITIES

Cases	Pages
<i>Arias v. State</i> , 90 So.3d 269 (Fla. 2012)	5
<i>Cantrell v. State</i> , 132 So. 3d 931 (Fla. 1st DCA 2014)	9
<i>Elsberry v. State</i> , 130 So. 3d 798 (Fla. 1st DCA 2014)	9
<i>Griffis v. State</i> , 133 So. 3d 653 (Fla. 1st DCA 2014)	9
<i>Hartley v. State</i> , 129 So.3d 486 (Fla. 4th DCA 2014)	<i>passim</i>
<i>Jollie v. State</i> , 405 So. 2d 418 (Fla. 1981)	5,6,8
<i>Pinder v. State</i> , 128 So. 3d 141 (Fla. 5th DCA 2013)	5,7,8
<i>Pizzo v. State</i> , 945 So.2d 1203 (Fla. 2006)	7
<i>Shelley v. State</i> , 134 So.3d 1138 (Fla. 2d DCA), <i>pending rev.</i> , SC14-755 (Fla. 2014).	<i>passim</i>
<i>State v. Murphy</i> , 124 So. 3d 323 (Fla. 1st DCA), <i>cert. pet. filed and pending rev.</i> , SC13-2068 (Fla. 2013)	<i>passim</i>
<i>Wooding v. State</i> , 940 So.2d 1109 (Fla. 2006)	5
Statutes	
Fla. Stat. § 775.021(4)(b)3	7
Fla. Stat. § 847.0135(3)	1
Fla. Stat. § 847.0135(4)	1

TABLE OF AUTHORITIES-cont'd

Constitutional Provisions	Pages
U.S. Const., amend. V	2
Fla. Const., Art. V, § 3	<i>passim</i>
Rules	
Fla. R. App. P. 9.030.	6
Fla. R. App. P. 9.140	10
Fla. R. App. P. 9.141	10
Fla. R. App. P. 9.200	11
Fla. R. App. P. 9.210	11

STATEMENT OF THE CASE AND FACTS

A. Trial Proceedings and Disposition

On October 17, 2011, Mr. Hernandez, who was 20 years old at the time and had no criminal history, was arrested for one count of using a computer to solicit a minor for sex under § 847.0135(3)(a), Florida Statutes, and one count of traveling to meet a minor for sex after using a computer to solicit the minor for sex under § 847.1035(4)(a), Florida Statutes. The record reflects that the conduct constituting solicitation consisted of e-mail exchanges over approximately a 90-minute period, followed by Mr. Hernandez's arrest at a prearranged destination to meet the purported minor approximately a half-hour after the final e-mail.

Following guilty verdicts on both counts, the trial court imposed the minimum Criminal Punishment Code sentence of 42 months in prison, with credit for 59 days served, plus five years on probation. If one of the convictions is vacated, Mr. Hernandez's minimum Criminal Punishment Code sentence drops to 21 months in prison. His current release date on the 42-month sentence is December 25, 2015.

B. Appellate Proceedings

Counsel was appointed to represent Mr. Hernandez on appeal. Appointed counsel timely filed a brief. However, on December 17, 2013, the First District Court of Appeal (DCA) rejected Mr. Hernandez's challenge to the sufficiency of the evidence to establish solicitation, citing its October 9, 2013 opinion in *State v.*

Murphy, 124 So. 3d 323 (Fla. 1st DCA 2013), *entered Oct. 9, 2013, cert. pet. filed Oct. 21, 2013, pending rev.*, SC13-2068 (Fla. 2013). *See* Exh. A. That same day, appointed counsel sent Mr. Hernandez a copy of the First DCA's order with a letter. The letter stated that the First DCA had issued its opinion denying relief. The letter went on to discuss the 60 day clock beginning on a motion for mitigation and the two year time limit beginning for the filing of post conviction motions. At no time did the letter explain to Mr. Hernandez that he could file a pro se petition for discretionary review even though *Murphy* was pending review in this Court.

Subsequently, on December 23, 2013, Mr. Hernandez's appointed counsel filed a motion for certification of a question of great public importance or rehearing en banc, *i.e.*, whether an accused's mention of sex acts in response to questions from an officer posing as an under-aged teen constituted online solicitation of a minor. On January 23, 2014, the First DCA denied the motion for certification of a question of great public importance or rehearing en banc, without comment. *See* Exh. B. Appellate counsel did not mail a copy of that order to Mr. Hernandez or inform him that he could file a pro se petition for discretionary review.

On January 30, 2014, appointed counsel sent Mr. Hernandez stating that "Enclosed is one last motion I filed today with the appellate court. It's my attempt to latch onto an issue that it turns out I sould (sic) have argued in the first place. I'll let you know how the Court rules." The motion asked the court to certify conflict

between *State v. Murphy*, 124 So. 3d 323, 330-31 (Fla. 1st DCA), *cert. pet. filed and pending rev.*, SC13-2068 (Fla. 2013), and *Hartley v. State*, 129 So.3d 486 (Fla. 4th DCA 2014), on the issue of whether convictions for using a computer to solicit a minor for sex and traveling to meet a minor for sex after computer solicitation, for conduct within a single episode, violate the constitutional prohibition on double jeopardy. In *Murphy*, the First DCA held that convictions of these two offenses for crimes committed in a single episode does not violate double jeopardy. In contrast, in *Hartley*, the Fourth DCA held that convictions for using a computer to solicit a minor and for traveling to meet a minor for an unlawful sexual act, based on events that occurred on a single day, violated double jeopardy. Subsequently, the Second DCA rendered an opinion agreeing with the decision in *Hartley* and certifying conflict with *Murphy*. See *Shelley v. State*, 134 So.3d 1138, 1141 (Fla. 2d DCA), *pending rev., oral argument on Dec. 2, 2014*, SC14-755 (Fla. 2014).

On March 6, 2014, the First DCA denied Mr. Hernandez's motion to certify conflict, without comment or an opinion. See Exh. C. Appointed counsel sent Mr. Hernandez a copy of the order, but never filed a petition for certiorari review or explained to Mr. Hernandez that he could file a pro se petition for certiorari review with the Supreme Court. Rather, the letter specifically told Mr. Hernandez that the First DCA denied the motion and the appeal was concluded. The letter also confirmed that the double jeopardy issue was pending before this Court and if this

Court rules in favor of that defendant [Mr. Murphy], Mr. Hernandez should file a petition under Fla. R. Crim. P. 3.850 or Fla. R. App. P. 9.141.

On March 24, 2014, the First DCA issued its mandate. That same day, appointed counsel sent Mr. Hernandez a copy of the mandate and the December 27, 2013 order. The letter stated there was no further action to be taken in his case and informed Mr. Hernandez that the mandate started the clock on all post conviction motions.

Mr. Hernandez's mother consulted with undersigned on April 14, 2014 about the filing of a post conviction motion, pursuant to Rule 3.850. She retained undersigned to represent Mr. Hernandez on April 21, 2014. That same day, after reviewing the appellate record, undersigned filed the Notice of Appeal on Mr. Hernandez's behalf. On April 25, 2014, this Court dismissed the cause as untimely, subject to reinstatement if timeliness could be established. Subsequently, this Court granted Mr. Hernandez's Verified Motion to Reinstate and/or Motion for Belated Discretionary Review.

SUMMARY OF THE ARGUMENT

On December 20, 2013, in affirming Mr. Hernandez's judgment and conviction, the First District cited its opinion in *State v. Murphy*, 124 So. 3d 323 (Fla. 1st DCA 2013), *entered Oct. 9, 2013, cert. pet. filed Oct. 21, 2013, pending rev.*, SC13-2068 (Fla. 2013). Pursuant to Article V, § 3(b)(4) of the Florida Constitution

and *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this Court has discretionary jurisdiction to review a decision of a district court of appeal that cites to a case that is currently pending before this Court. *See also Arias v. State*, 90 So.3d 269 (Fla. 2012); *Wooding v. State*, 940 So.2d 1109 (Fla. 2006). Moreover, *Murphy* is currently pending before this Court and counsel for *Murphy* has filed *Hartley v. State*, 129 So.3d 486, 490 (Fla. 4th DCA 2014) as supplemental authority, which was cited by Mr. Hernandez in his motion to certify conflict.

Furthermore, pursuant to Article V, § 3(b)(4) and *Jollie*, this Court should accept jurisdiction in this case because there is a conflict between *Murphy* and *Hartley*; *Shelley v. State*, 134 So.3d 1138, 1141 (Fla. 2d DCA), *pending rev., oral argument on Dec. 2, 2014*, SC14-755 (Fla. 2014); and *Pinder v. State*, 128 So. 3d 141, 143 (Fla. 5th DCA 2013). *Hartley*, *Shelley*, and *Pinder* held that dual convictions, for using a computer to solicit unlawful sexual activity with a child and traveling to meet the minor after soliciting unlawful sexual activity, in the course of one criminal transaction or episode, without a temporal break, violates the prohibition against double jeopardy. *Shelley* certified conflict with *Murphy* and *Shelley* is currently scheduled for oral argument on December 2, 2014. Thus, this Court should accept jurisdiction to resolve this conflict and/or to consider this case in conjunction with *Murphy*, *Hartley*, and *Shelley* to promote uniformity in decisions.

JURISDICTIONAL STATEMENT

Pursuant to Article V, § 3(b)(4) of the Florida Constitution and *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this Court has discretionary jurisdiction to review a decision of a district court of appeal that cites a case in its holding that is pending review or has been reversed by this Court. Furthermore, this Court has discretionary jurisdiction to review a decision of a district court of appeal expressly construing a provision of the federal or state constitution, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Fla. Const., Art. V, § 3(b)(4) (2011); Fla. R. App. P. 9.030(a)(2)(A); *Jollie*, 405 So.2d at 420.

ARGUMENT AND LEGAL AUTHORITY

This Court should accept jurisdiction because the decision in this case cites *State v. Murphy*, 124 So. 3d 323 (Fla. 1st DCA 2013, which is pending review before this court, and *Murphy* expressly and directly conflicts other cases including *Shelley v. State*, 134 So.3d 1138, 1141 (Fla. 2d DCA 2014), which is also pending before this Court.

Mr. Hernandez was convicted of one count of using a computer to solicit a minor for sex in violation of section 847.0135(3)(a), Florida Statutes, and one count of traveling to meet a minor for sex after using a computer service to solicit the minor for sex in violation of section 847.1035(4)(a). In a case that was decided after Mr. Hernandez filed his initial and reply briefs, the First District held that convictions for these two offenses which were committed in a single episode does not violate double

jeopardy. *State v. Murphy*, 124 So. 3d 323 (Fla. 1st DCA), *cert. pet. filed and pending rev. in Shelley*, SC13-2068 (Fla. 2013). However, the Second District, Fourth District, and Fifth District have all held that when the defendant's conduct all occurred on the same day during the course of one criminal episode, without a temporal break, the solicitation offense under section 847.0135(3) was subsumed within the traveling offense under section 847.0135(4), and dual convictions violated double jeopardy. *Hartley v. State*, 129 So.3d 486, 490 (Fla. 4th DCA 2014); *Shelley v. State*, 134 So.3d 1138, 1141 (Fla. 2d DCA), *pending rev., oral argument on Dec. 2, 2014*, SC14-755 (Fla. 2014); *Pinder v. State*, 128 So. 3d 141, 143 (Fla. 5th DCA 2013). As *Pinder* explained:

There is no doubt that subsection (4)(b) contains a “travel” element that is not found in subsection (3)(b). However, we agree with *Pinder* that subsection (3)(b) does not contain an element that is not found in subsection (4)(b).² Thus, if a defendant solicited unlawful sexual activity with a minor through a single use of a computer device prior to traveling to meet the minor for unlawful sexual activity, double jeopardy principles would preclude convictions under both subsections. *See* § 775.021(4)(b)3., Fla. Stat. (2011) (intent of Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction except for . “[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense”); *see also Pizzo v. State*, 945 So.2d 1203, 1206 (Fla. 2006) (defendant is placed in double jeopardy where, based on the same conduct, the defendant is convicted of two offenses, each of which does not require proof of a different element).

Pinder, 128 So. 3d at 143 (finding that *Pinder*’s convictions did not violate double jeopardy because they were separate, distinct and occurred over eight days).

Murphy was cited by the First District in its December 30, 2013 opinion affirming Mr. Hernandez's judgment and conviction. *See* Exh. A. Additionally, *Murphy* expressly and directly conflicts with *Hartley*, *Shelley*, and *Pinder*. Counsel for *Murphy* filed *Hartley* as supplemental authority with this Court and *Murphy* is awaiting a decision in *Shelley*. Moreover, the Second District certified conflict with *Murphy* in its decision in *Shelly*, which has been accepted for review and oral argument is scheduled for December 2, 2014. *Shelley v. State*, 134 So.3d 1138, 1141 (Fla. 2d DCA), *pending rev.*, SC14-755 (Fla. 2014). Therefore, Mr. Hernandez's case should also be accepted for review under *Jollie* to promote uniformity of decisions.

Finally, although Mr. Hernandez's appointed appellate counsel did not assert a double jeopardy claim in his initial or reply briefs filed with the First District, the issue could have and should have been raised as fundamental error as Mr. Hernandez went to trial rather than plead guilty to the two counts. *See generally Novaton v. State*, 634 So. 2d 607 (Fla. 1994)(negotiated plea waives double jeopardy claim). Appellate counsel readily admitted that he should have raised the double jeopardy issue and the conflicting DCA opinions in the briefs he filed in the First District. After the First District denied Mr. Hernandez's motion to certify conflict, it certified conflict with *Hartley* on this same double jeopardy issue in several other cases. *See Griffis v. State*, 133 So. 3d 653, 654 (Fla. 1st DCA 2014); *Elsberry v. State*, 130 So. 3d 798 (Fla. 1st DCA 2014); *Cantrell v. State*, 132 So. 3d 931, 933 (Fla. 1st DCA

2014), all of which are pending review in this Court. Thus, but for the ineffectiveness of appointed appellate counsel for failing to raise the issue, the First District likely would have certified conflict.

Appellate counsel's other instances of ineffectiveness, which were detailed at length in Mr. Hernandez's Amended Verified Amended Motion to Reinstate or Petition for Belated Discretionary Review filed in case no. SC14-801, are another basis for jurisdiction. Appointed counsel never informed Mr. Hernandez that either appointed counsel or Mr. Hernandez, pro se, had the option of filing a petition for certiorari review for any of the First District's opinions or orders. Failure to do so was error. *Sims v. State*, 998 So.2d 494, 498-502 & n.6 (Fla. 2008). Also, counsel's various misrepresentations in his letters caused Mr. Hernandez to believe that there was no other option available to him other than a post conviction motion. Finally, appellate counsel did not forward a copy of the January 30, 2014 order, denying the motion for certified question. Appellate counsel has an obligation to deliver a copy of the decision to the client because jurisdiction cannot be invoked without a copy of the order. *Id.* at 498-499, 500 n.6 (citation omitted).

"A claim of ineffective assistance may be considered during the direct appellate proceedings if the 'ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue.'" *Id.* (citations omitted). Rather than making Mr. Hernandez file a Rule 3.850 motion and

waste the precious time and resources of the Court that are involved in the litigation of a Rule 3.850 motion, this Court should “address this ineffective-assistance claim at the first opportunity.” *Id.* Discretionary review is the proper forum in which to remedy this ineffective assistance of appellate counsel, which occurred during the direct first appeal and is apparent on the face of the record. *Id.* at 501-02 (citations omitted); *see* Fla. R. App. P. 9.141(c)(6).

This Court is empowered to grant Mr. Hernandez any relief to which he is entitled in the interests of justice. Fla. R. App. P. 9.140(i). Accordingly, this Court should accept this case for review to promote justice and uniformity. *Sims*, 998 So.2d 498-502 & n.6; Fla. R. App. P. 9.141(c)(6).

CONCLUSION

Mr. Hernandez respectfully requests that this Honorable Court accept the instant case for review, quash the First District’s decisions, and vacate Mr. Hernandez’s judgment and sentence.

Respectfully submitted,

/s/ Michelle P. Smith

Michelle P. Smith

Florida Bar Number 389382

Law Office of Michelle P. Smith,

827 Menendez Court

P.O. Box 1788

Orlando, Florida 32802-1788

Tel. 407-601-6700, Fax 888-614-3231

Email: michellesmith@mpsmithlegal.com

Counsel for Appellant Hernandez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant together with the attached Appendix were furnished by email to Mr. Michael McDermott, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, Email: crimapptlh@myfloridalegal.com and by U.S. Mail to Mr. Eduardo Hernandez, DOC# N26202, Blackwater River Correctional Facility (Male), 5914 Jeff Ates Road, Milton, Florida 32583-0000 on this 31st day of October, 2014.

/s/ Michelle P. Smith
Attorney

CERTIFICATE OF COMPLIANCE

Counsel for Mr. Hernandez certifies that this brief complies with the type-font and volume limitations set forth in Rules 9.200 and 9.210 of the Florida Rules of Appellate Procedure.

/s/ Michelle P. Smith
Attorney

IN THE SUPREME COURT OF FLORIDA

**Case No. SC14 - 2008
1st DCA Case No. 1D12-5952**

EDUARDO HERNANDEZ,

Appellant/Petitioner,

v.

STATE OF FLORIDA,

Appellee/Respondent.

**On Review from the District Court of Appeal,
First District
State of Florida**

**APPENDIX TO JURISDICTIONAL BRIEF OF PETITIONER,
EDUARDO HERNANDEZ**

/s/ Michelle P. Smith

Law Office of Michelle P. Smith, P.A.

Michelle P. Smith

Florida Bar Number 389382

827 Menendez Court

P.O. Box 1788

Orlando, Florida 32802-1788

Telephone 407-601-6700

Facsimile 1-888-614-3231

E-Mail michellesmith@mpsmithlegal.com

Counsel for Petitioner Hernandez

Case No. SC14-2008
1st DCA Case No. 1D12-5952

Index to Appendix

Opinion of the First District Court of Appeal, affirming Mr. Hernandez’s judgment
and sentence, entered December 17, 2013, mandate issued March 24, 2014 . . . A

Order of the First District Court of Appeal, denying motion for certification of a
question of great public importance, entered January 23, 2014 B

Order of the First District Court of Appeal, denying motion to certify conflict, entered
March 6, 2014 C

APPENDIX A



DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32399-0950
(850) 488-6151

JON S. WHEELER
CLERK OF THE COURT

(850) 488-6151

March 24, 2014

Hon. Bob Inzer, Clerk
Second Judicial Circuit
301 S Monroe St, Appeals Div
P.O. Box 1024
Tallahassee, FL 32302-1024

RE: Eduardo Hernandez

v. State of Florida

Docket No.: 1D12-5952
Lower Tribunal Case No: 2011CF3232

Dear Mr. Inzer,

I have been directed by the court to issue the attached mandate in the above-styled cause. It is enclosed with a certified copy of this Court's opinion.

Yours truly,

Jon S. Wheeler
Clerk of the Court

JSW/jm
Enclosures

c: (letter and mandate only)

Hon. Pamela Jo Bondi,
A.G.
Glen P. Gifford, A.P.D.

Hon. Nancy A. Daniels, P.D.
Michael McDermott,
A.A.G.

Charles R. McCoy,
S.A.A.G.
Alex Weintraub

MANDATE

From

**DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT**

To the Honorable Judges of the Circuit Court for Leon County

WHEREAS, in the certain cause filed in this Court styled:

EDUARDO HERNANDEZ

Case No : 1D12-5952

v.

Lower Tribunal Case No : 2011CF3232

STATE OF FLORIDA

The attached opinion was issued on December 17, 2013.

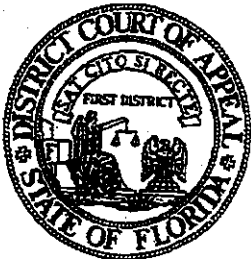
YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida.

WITNESS the Honorable Joseph Lewis, Jr., Chief Judge

of the District Court of Appeal of Florida, First District,

and the Seal of said Court done at Tallahassee, Florida,

on this 24th day of March 2014.



Jon S. Wheeler

JOHN S. WHEELER, Clerk
District Court of Appeal of Florida, First District

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

EDUARDO HERNANDEZ,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D12-5952

STATE OF FLORIDA,

Appellee.

Opinion filed December 17, 2013.

An appeal from the Circuit Court for Leon County.
James C. Hankinson, Judge.

Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender,
Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, Michael McDermott, Assistant Attorney
General, and Charlie McCoy, Senior Assistant Attorney General, Tallahassee, for
Appellee.

MARSTILLER, J.

Eduardo Hernandez appeals his convictions and sentences for using a computer online service to solicit a person believed to be a child to engage in unlawful sexual conduct, and for traveling to engage in unlawful sexual conduct with a child after committing the above-described solicitation. As grounds for reversal, Hernandez asserts that the trial court erred by denying his motion for judgment of acquittal

because the State put on insufficient evidence to prove solicitation, and by denying his facially sufficient motion to disqualify the trial judge establishing a reasonable fear the judge would not sentence him fairly. We affirm.

I. Motion for Judgment of Acquittal

The State charged Hernandez with violating the following laws:

(3) CERTAIN USES OF COMPUTER SERVICES OR DEVICES PROHIBITED.—Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

(a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child . . .

...

commits a felony of the third degree[.] . . .

(4) TRAVELING TO MEET A MINOR.—Any person who travels any distance either within this state, to this state, or from this state by any means, who attempts to do so, or who causes another to do so or to attempt to do so for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

(a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to engage in any illegal act

because the State put on insufficient evidence to prove solicitation, and by denying his facially sufficient motion to disqualify the trial judge establishing a reasonable fear the judge would not sentence him fairly. We affirm.

I. Motion for Judgment of Acquittal

The State charged Hernandez with violating the following laws:

(3) CERTAIN USES OF COMPUTER SERVICES OR DEVICES PROHIBITED.—Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

(a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child . . .

...

commits a felony of the third degree[.] . . .

(4) TRAVELING TO MEET A MINOR.—Any person who travels any distance either within this state, to this state, or from this state by any means, who attempts to do so, or who causes another to do so or to attempt to do so for the purpose of engaging in any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in other unlawful sexual conduct with a child or with another person believed by the person to be a child after using a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:

(a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to engage in any illegal act

described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child . . .

...
commits a felony of the second degree[.]

§§ 847.0135(3)(a), (4)(a), Fla. Stat. (2011).

At his trial, the State put on evidence that, as part of a sting operation, Tallahassee Police Officer Laura Gereg placed an advertisement on the Internet site www.craigslist.org ("craigslist"), in the "casual encounters" section, with the tagline "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." Hernandez responded to the ad, and the following email conversation ensued between him and the undercover officer:

HERNANDEZ: Hi. i'm eddy. let me know if ur bored.

OFFICER GEREK: hey eddy....i m bored, lookn 4 fun down wit an yunger girl?

HERNANDEZ: Yeah for sure. I can dig it. what are u up to

OFFICER GEREK: well i m almost 15 chilln...lookn to get out u cool wit dat? lets tlk

HERNANDEZ: Yea I suppose. would you be discreet?

OFFICER GEREK: r u kiddn me hell yes i would b....would get my ass kicked if anyl found out

HERNANDEZ:well what are you doing. we can meet and maybe try and see if this can work. I'd like it to

OFFICER GEREG: i would too but what we gonna do? i could sneak out in about an hr or so.

HERNANDEZ: yea i can give you my number. I have a car. I can pick you up. i guess let me know where to go

OFFICER GEREG: i will let u know but what we gonna do? need a reason to risk gettn my ass kicked by my rents
LOL

HERNANDEZ: [redacted] We could fool around and if you like it we can do more perhaps. Maybe do this more often [redacted] idk what else would you want to try

OFFICER GEREG: [redacted] fool around like how? if i m sneakn out I wanna know wat 2 b ready 4...so I can get ready

HERNANDEZ: well if i like you and you like me i'll fuck you. if you want to try other things we can fuck as long as you're able to be out. i'm open to anything i think

OFFICER GEREG: i m down wit dat..long as u bring protection not on the pill... .yet... .when u wanna do this?

HERNANDEZ: yea of course, how about 12:30ish.

OFFICER GEREG: I cud prob do that....the rents r headn 2 bed now they should b sound asleep by then... u anywhere near tville rd?

HERNANDEZ: yea. real close. im over by park

OFFICER GEREG: lets plan on that? 1230 at circle k on shamrock cool?

HERNANDEZ: sounds good. looking forward to it babe

OFFICER GEREG: me too...how will i know its u, got a pic or who m i lookn 4?

HERNANDEZ: I'll be in a blueish toyoya [sic] minivan. I'll be wearing a salmon colored Ralph lauren t. I have black hair. no pics that i have on my desktop i dont think

HERNANDEZ: what about you. what outfit should i be looking for

OFFICER GERE: Ok, i m in jeans, flip flops, got brn hair and prolly gonna throw on my bik jacket

HERNANDEZ: hott. sounds good

OFFICER GERE: k baby....a lil nervous. ..u aint a creeper r u?

HERNANDEZ: I'm nervous too. Not a creeper. i just love play

OFFICER GERE: play? good tthing u aint

HERNANDEZ: play just refers to sex. i'm heading out now.

OFFICER GERE: alright babe....i will sneak out at about 1225 and should b there by 1230.

Hernandez argues that nothing he said in the email exchange constituted solicitation. He contends he merely stated what he was going to do, which, under *Randall v. State*, 919 So. 2d 695 (Fla. 4th DCA 2006), does not amount to solicitation as a matter of law. The defendant in *Randall* was charged with soliciting a minor to commit a lewd or lascivious act. See § 800.04(6), Fla. Stat. (2003). At trial, the victim testified that the two had taken a walk during which they did not converse, but that upon reaching an overpass and sitting on the ground, the defendant told her he

“wanted” to lick her vagina, while touching her. *Randall*, 919 So. 2d at 695-96. The appellate court held that the defendant’s statement did not constitute an act of solicitation. *Id.* at 697.

The facts are significantly different here. Hernandez and the undercover officer engaged in a lengthy email conversation during which, as the above-quoted exchange shows, Hernandez 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. This he did by first suggesting they could “fool around and if you like it we can do more perhaps.” Then, when the girl seemed to doubt it was worth the risk of getting in trouble with her parents, Hernandez said he would have sex with her for “as long as you’re able to be out,” and, importantly, he agreed to bring “protection” with him. Considering these statements and all the evidence *de novo*, in the light most favorable to the State,¹ we conclude Hernandez’s statements, under the circumstances present here, were sufficient for the jury to find he solicited a person believed to be a minor to engage in unlawful sexual conduct. *Cf. State v Murphy*, Nos. 1D12-4514, 1D12-4810 (Fla. 1st DCA Oct. 9, 2013), (affirming conviction for using online service to solicit person believed to be the parent of a child to consent to the child’s participation in unlawful sexual conduct, where defendant’s statements were intended to allay father’s

¹ See *Johnston v. State*, 863 So. 2d 271, 283 (Fla. 2003).

concerns and thereby obtain consent). Accordingly, we affirm the trial court's denial of Hernandez's motion for judgment of acquittal.

II. Motion to Disqualify

Pretrial, Hernandez moved to disqualify the trial judge based on statements the judge made when sentencing two individuals in earlier cases that had arisen from the same online sting operation that ensnared Hernandez. The other defendants were adjudicated guilty of the same two crimes with which the State charged Hernandez.

The motion averred, in pertinent part:

4. During the sentencing hearing of Mr. Cantrell [who had been convicted by a jury], his defense counsel urged Judge Hankinson to impose a downward departure sentence from the Criminal Punishment Code lowest permissible sentence of 42 months. After hearing the testimony of witnesses and argument of counsel, Judge Hankinson held that Mr. Cantrell's case was "not outside the mainstream" for these offenses and that he would not exercise his discretion to go below the lowest permissible sentence of 42 months.

5. Mr. Chavez [who entered an open plea] was sentenced immediately after Mr. Cantrell. Again, his counsel argued that Mr. Chavez should be sentenced below the lowest permissible sentence of 42 months. As with Mr. Cantrell, Judge Hankinson ruled that he would not depart from the 42 month sentence. In addition, Judge Hankinson stated he "is trying to be consistent" in the sentences he imposes for these offenses. Judge Hankinson also stated that based upon the cases he has seen charging these offenses he had no doubt a jury would have convicted Mr. Chavez if he had gone to trial. Further, Judge Hankinson stated he saw no reason to depart from the sentence of 42 months because he "has to protect the public" against persons charged with these offenses.

...
9. A judge's public pronouncement indicating the judge's own sentencing preferences could be interpreted as a fixed intention and thus establish a reasonable fear on the part of the defendant that the judge has a bias in refusing to consider a sentencing option that is among the range of sentencing options available to him[.] ...

Under Florida Rule of Judicial Administration 2.330(f), a judge to whom an initial motion to disqualify is directed determines only whether the motion is legally sufficient, and not whether the facts alleged are true. If the motion sets forth facts that would create an objectively reasonable fear of not receiving a fair and impartial trial, it is legally sufficient, and the judge must grant it. *See* § 38.10, Fla. Stat.; *Gregory v. State*, 118 So. 3d 770, 778 (Fla. 2013).

The trial judge presiding in Hernandez's case denied the motion to disqualify.² Hernandez contends the judge's statements evince a fixed sentencing policy, leading him reasonably to fear the judge would not consider a downward departure sentence in any circumstance. We disagree. According to Hernandez's motion, the defendants in the two other cases sought downward departure from the lowest permissible scoresheet sentence. *See* §§ 921.0024(2), 921.0026, Fla. Stat. (2011). One defendant presented witness testimony in an attempt to establish mitigating circumstances;³ the other defendant, it appears, argued for leniency because he had pled to the offenses

² We review the motion *de novo* for legal sufficiency. *See Stein v. State*, 995 So. 2d 329, 334 (Fla. 2008).

³ The record before us provides no illumination on what those circumstances were.

instead of going to trial. The judge's statements, as recounted and quoted in the motion, indicate that neither defendant presented sufficient grounds to justify mitigating their sentences. Neither the desire to be consistent in sentencing, nor the desire to protect the public, reasonably imply an unwillingness to consider—or a fixed policy against—departing downwardly from the scoresheet minimum when sentencing defendants convicted of crimes similar to those committed by Hernandez. *Cf. Martin v. State*, 804 So. 2d 360, 364 (Fla. 4th DCA 2001) (granting petition for writ of prohibition because judge's statement in interview that incarceration should always be followed by probation could reasonably be interpreted as announcing fixed intention to invariably impose probation with jail or prison sentence). On the contrary, it appears from the motion that the judge would consider a downward departure if there were mitigating circumstances in a given case setting it apart from the "mainstream." For these reasons, we conclude the facts alleged in Hernandez's motion failed to create an objectively reasonable fear the trial judge would not be fair and impartial. The motion therefore was facially insufficient, and we affirm the order denying it.

Based on the foregoing, Hernandez's convictions and sentences are
AFFIRMED.

LEWIS, C.J., and OSTERHAUS, J., CONCUR.

APPENDIX B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

January 23, 2014

CASE NO.: 1D12-5952
L.T. No.: 2011CF3232

Eduardo Hernandez

v.

State of Florida

Appellant / Petitioner(s),

Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed December 23, 2013, for certification or rehearing en banc is **denied**.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Hon. Pamela Jo Bondi, A.G.
Glen P. Gifford, A.P.D.

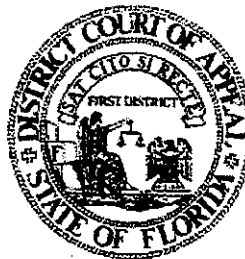
Hon. Nancy A. Daniels, P.D.
Michael McDermott, A.A.G.

Charles R. McCoy, S.A.A.G.
Alex Weintraub

jm



JON S. WHEELER, CLERK



APPENDIX C

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

March 06, 2014

CASE NO.: 1D12-5952
L.T. No.: 2011CF3232

Eduardo Hernandez

v.

State of Florida

Appellant / Petitioner(s),

Appellee / Respondent(s)

BY ORDER OF THE COURT:

Motion to certify conflict, filed January 30, 2014, is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Hon. Pamela Jo Bondi, A.G.
Glen P. Gifford, A.P.D.

Hon. Nancy A. Daniels, P.D.
Michael McDermott, A.A.G.

Charles R. McCoy, S.A.A.G.
Alex Weintraub

kr


JOY S. WHEELER, CLERK

