3.800(b)(2). (R: 1130-1134). The trial court rendered an order which granted in part and denied in part that motion. (R: 1190-1191). An Amended Judgment and Sentence and Amended Order of Sex Offender Probation were issued. (R: 1192-1206). This appeal follows.

SUMMARY OF THE ARGUMENT

The State's decision to charge Harvey in a peculiar and unique way introduced error which permeated the entire trial. Harvey, through counsel, repeatedly lodged objections and motions related to the State's charging decision and the language used in the charging document. Harvey was eventually tried for and convicted of a nonexistent offense. Harvey was also tried for and convicted of an interpretation of the illegal conduct which has not been proscribed by the Florida legislature. Despite Harvey's repeated protestations: motions to dismiss, motions for judgment of acquittal and objections to jury instructions, the trial court took no action. The trial court's rulings as to these motions are raised herein in one ground which addresses multiple rulings all related to the same issue (the language of the charging document) and the two sub-issues therein.

The State's evidence as to Count III, the tampering with evidence count, was legally insufficient. The issues as to this argument are firmly controlled by a prior, binding District Court case which was repeatedly argued to the trial court.

The trial court imposed a vindictive sentence upon Harvey after overtly considering his refusal to "take any responsibility for [his] actions". The trial court's overt reliance on Harvey's refusal to take responsibility is especially troubling in light of Harvey's remaining silent during sentencing proceedings, his exercise of his right to a trial and his steadfast claim of innocence which he has maintained throughout.

Three of the specially imposed conditions of probation are not rationally related to the offense or future criminality and must be stricken.

ARGUMENT

I.

The trial court failed to dismiss a defective information, failed to grant a judgment of acquittal and subsequently erroneously instructed the jury based on the language the State chose to use in the charging document.

The argument made herein applies only to Count I of the Amended Information. Some arguments below addressed this issue additionally in the context of Count II. However, Count II was eventually dismissed and is not pending before this Court.

STANDARD

An order granting or denying a motion to dismiss the information is reviewed by the *de novo* standard. *State v. Brabson*, 7 So. 3d 1119 (Fla. 2d DCA 2008). The trial court's ruling on a motion for judgment of acquittal is reviewed by the *de novo* standard. *Hobart v. State*, 175 So. 3d 191 (Fla. 2015). As to the instruction of the jurors, the test for reversible error is whether it is reasonable to conclude that the error in the instruction misled the jury. *Mogavero v. State*, 744 So. 2d 1048 (Fla. 4th DCA 1999).

LANGUAGE

Harvey was charged, as to Count I, with violating Section 847.0135(4)(a), Florida Statutes. (32-33). Section 847.0135(4)(a), Florida Statutes states as follows:

> (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 other unlawful sexual conduct with a child; or

… … …

commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 847.0135(4)(a).

The Amended Information charged Harvey with conduct that was *similar* to the language from the statute quoted above. However, the language was materially different. (R: 32-33). The Amended Information charged that:

> On February 12, 2017, did unlawfully and knowingly travel any distance within, this State, for the purpose of engaging in an illegal act described in Chapter 794, Chapter 800, or Chapter 827, Florida Statutes, or to otherwise engage in other unlawful sexual conduct with a child or a person believed 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 seduce, solicit, lure, or entice, or attempt do so, a child or another person believed to be a child, to engage in or to otherwise engage in other unlawful sexual conduct with a child or another person believed to be a child, contrary to Section 847.0135(4)(a), Florida Statutes.

(R: 32-33).

This language is found in the charging document which the trial court confirmed was used for Harvey's trial and eventual conviction. (TR: 32; 1020).

The jurors in Harvey's trial were eventually instructed that:

> To prove the crime of Traveling to Meet a Minor, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. Darrell Harvey used a computer on-line service, Internet service, local bulletin board service, or device capable of electronic data storage or transmission to seduce, solicit, lure, entice, or attempt to seduce,

> solicit, lure, or entice a person believed by the defendant to be a child to engage in unlawful sexual conduct.
>
> 2. Darrell Harvey then traveled within this state for the purpose of unlawful sexual conduct with a person believed by the defendant to be a child.
>
> (R: 679-670);(TR: 585).

OBJECTIONS / ARGUMENTS

Harvey attacked the State's modification of the statutory language in three separate ways. Initially, Harvey filed an Amended Second Motion to Dismiss which addressed the State's modification of the statutory language. (R: 190). The Motion to Dismiss was argued before the court and an affirmative ruling was rendered. (R: 258; 282-283; 346). The Motion to Dismiss and this, specific argument, was orally renewed and denied prior to trial. (R: 981).

Secondly, Harvey attacked this language during the trial in a written Motion for Judgment of Acquittal. (R: 696). Again, Harvey argued against the State's use of this language in a written motion filed during the course of the trial. Harvey also re-filed the Motion for Judgment of Acquittal and relied on it as part of a post-trial Renewed Motion for Judgment of Acquittal. (R: 693). Harvey's motions were denied by ruling during the trial and the post-trial motions were summarily denied. (TR: 417-419);(R: 729-730).

During the trial itself, Harvey objected to the trial court's jury instructions. Harvey's objections spurred rulings by the trial court. Harvey's jury instruction objections were based on the language which the State chose to use in the charging document. (TR: 532-534).

MOTION TO DISMISS / MOTION FOR JUDGMENT OF ACQUITTAL

"In order to sufficiently inform an accused of the allegations against him, due process requires the State to allege every essential element when charging a violation of law." *Lawshea v. State*, 99 So. 3d 603, 606 (Fla. 2d DCA 2012) (citing *Price v. State*, 995 So. 2d 401, 404 (Fla. 2008)); see also Fla. R. Crim. P. 3.140(d)(1) ("Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged."). "For an information to sufficiently charge a crime it must **follow the statute**, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged." *Price*, 995 So.2d at 404.(emphasis added). "The overriding concern is whether the defendant had sufficient notice of the crimes for which he is being tried." *McMillan v. State*, 832 So. 2d 946, 948 (Fla. 5th DCA 2002).

The charging document fails to follow the statute and allowed the State to charge and convict Harvey for conduct which was not necessarily criminal. Section 847.0135(4)(a), Florida Statutes, makes it a crime to travel for the purpose of

engaging in any illegal act described in three different chapters within Florida Statutes[2] or to otherwise engage in other unlawful sexual conduct with a child or with a person believed to be a child. The traveling is only illegal under Section 847.0135(4)(a) if the person who travels first uses the Internet or an electronic device to seduce, solicit, lure or entice a child or another person believed to be a child to engage in any illegal act as described in the same three Chapters "or to otherwise engage in in other unlawful sexual conduct with a child." The communication is an indispensable part of the traveling offense and is subsumed within the traveling offense. A defendant cannot commit the traveling offense without first committing the sexual communication. *State v. Shelley*, 176 So. 3d 914 (Fla. 2015).

Traveling to commit sexual acts with a child is not a violation of Section 847.0135(4)(a) unless the individual traveling has previously used the Internet or an electronic device to seduce, solicit, lure or entice a child or a believed child to engage in acts proscribed by the three Chapters, "or to otherwise engage in in other unlawful sexual conduct with a child." In charging Harvey, the State did not allege that Harvey had used the Internet or an electronic device to seduce, solicit, lure or entice a child or a believed child to engage in acts proscribed by the three Chapters from Florida Statutes. (R: 32). Instead, the State charged that Harvey had used the Internet

[2] Those Chapters are: Chapter 794 (sexual battery), Chapter 800 (lewdness, indecent exposure) and Chapter 827 (abuse of children).

or an electronic device "to engage in or to otherwise engage in other unlawful sexual conduct with a child or another person believed to be a child." (R: 32). The State omitted the three, listed Florida Statute Chapters. The State relied on the statutory language which read: "*or to otherwise engage in other unlawful sexual conduct with a child[]*" and modified that language to charge: "*to engage in or to otherwise engage in other unlawful sexual conduct with a child or another person believed to be a child*." (R: 32). Florida statutes limits the language addressing other unlawful sexual conduct to include only a real child. Fla. Stat. § 847.0135(4)(a). However, the Amended Information contained additional language, under which Harvey was prosecuted, that charged other unlawful sexual conduct "with a child or another person believed to be a child." (R: 32). The charging document therefore added the provision that Harvey could be convicted and sentenced for communications with a believed child when the language in the statute only allowed for conviction following communication about unlawful sexual conduct with an actual child.

Harvey argued this dichotomy on multiple occasions prior to and during his trial. All of Harvey's arguments were denied. The Office of the State Attorney was permitted to effectively add to and amend the language of the statute. (R: 192). The jury was subsequently instructed that Harvey should be found guilty if he communicated with a person believed to be a child to solicit engagement in unlawful sexual conduct. (R: 679-670);(TR: 585). With only a few words, the Amended

Information varies significantly from the language of the statute and it vastly expands an element of the offense of conviction: the amendment allows for conviction based on unlawful sexual conduct with a believed child and not with only an actual child as was set forth by the Florida Legislature. It was undisputed throughout that there was no actual child involved and that all communications occurred with an adult law enforcement officer who was (sometimes) posing as a child. (R: 281)(TR: 537-538).

Article III of the Florida Constitution states that "[t]he legislative power of the state shall be vested in a legislature of the State of Florida." Art. III, § 1, Fla. Const. This grant of power embraces both "the power to enact laws" and the power "to declare what the law shall be." Any attempted redelegation violates the Florida Constitution. *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991). The Office of the State Attorney, a judicial actor pursuant to Florida Constitution article V, § 17, is without the authority to take the legislature's definition of a crime, modify it, and charge/prosecute such conduct as a felony offense.

> The term "legislative power" as used in Article III most particularly embraces statutes defining criminal offenses; and in the field of criminal law, the concept of separation of powers is directly linked to the Constitutional guarantee of due process. Thus, we have held that "criminal statutes must be strictly construed according to their letter, and ... this rule emanates from article I, section 9 and article II, section 3 of the Florida Constitution." *Jeffries v. State*, 610 So. 2d 440, 441 (Fla. 1992). The nondelegation doctrine arising from article II, section 3 is directly at issue because "the power to create crimes and punishments in derogation of the common law inheres solely in the

> democratic processes of the legislative branch." *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991) (emphasis added). Likewise, due process is implicated because article I, section 9 requires that a criminal statute reasonably apprise persons of those acts that are prohibited; and the failure to do so constitutes a due process violation.
>
> *B.H. v. State*, 645 So. 2d 987, 992 (Fla. 1994).

Florida therefore recognizes no felony offenses except those created by a valid statute which has been properly approved by the legislature. Id. In this case the State took the legislature's language which set forth definitions and elements of a serious felony offense, modified those elements and proceeded to trial which resulted in a general verdict and Harvey's sentence of incarceration. This undertaking by the State violated Harvey's right to due process. The trial court was repeatedly asked to curtail the prosecution to the crime which the Florida Legislature had actually enacted. The trial court refused to do so. This was error. Harvey should be discharged from Count I as the charging document failed to set forth a valid felony offense.

In addition, the Amended Information alleged that Harvey had communicated with a believed child for the purposes of "unlawful sexual conduct." As argued to the trial court, that term is undefined and allowed the jury to make a determination as to what constituted "unlawful sexual conduct" after Harvey had been arrested and charged. (R: 982-983). Presenting the jury with evidence of acts which are covered in the listed Chapters from Florida Statutes and then allowing them to return a guilty

verdict using "unlawful sexual conduct" as a catch-all would render that statutory language as surplusage. The term "unlawful sexual conduct" appropriately referred to illegal sex acts with a child which were codified in Florida Statutes only after the adoption of Fla. Stat. § 847.0135(4)(a). Trial counsel relied on the opinion in *Wetzel v. State*, 779 S.E. 2d 263 (Ga. 2015) in explaining this position to the trial court. (R: 983). The statute at issue in *Wetzel* contained similar language, making it a criminal offense:

> to utilize a computer on-line service or Internet service, including but not limited to a local bulletin board service, Internet chat room, e-mail, on-line messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit any illegal act described in Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency or to engage in any conduct that by its nature is an unlawful sexual offense against a child.
>
> Ga. Code. Ann. § 16-12-100.2(d)(1).
>
> The Supreme Court of Georgia ruled that:
>
> [The parties] now agree, and we now hold, that in saying that a person violates OCGA § 16-12-100.2(d)(1) by using an electronic device to seduce, etc. a child in order "to engage in any conduct that by its nature is an unlawful sexual offense against a child," the General Assembly was requiring the State to allege and prove that the defendant's conduct violated another specific criminal law, not allowing the jury in each case to decide retroactively whether it believed the conduct at issue was "offensive." The State's belated arrival at this conclusion, however, resulted in the jury convicting Wetzel on Count 1 of the indictment after

> being misled about what it needed to decide to find him guilty of that charge.
>
> *Wetzel v. State*, 779 S.E. 2d 263, 268 (Ga. 2015)(footnote omitted).

Harvey argued that the use of the catchall language from the statute prejudiced his defense in requiring him to defend against a charge that he had communicated with a minor in an attempt to solicit, lure or entice her to engage in some undefined conduct as opposed to another specific criminal law which could be defined. Harvey's arguments were repeatedly denied both pre-trial at hearings on his Amended Second Motion to Dismiss (R: 282-283); prior to jury selection (R: 981) and during the trial itself. (TR: 416-419). Harvey was denied his right to due process when he was tried and convicted without being placed on notice of what criminal acts he was alleged to have undertaken. *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991); *Jeffries v. State*, 610 So. 2d 440, 441 (Fla. 1992). The jurors in Harvey's trial were improperly permitted to decide whether Harvey's pre-traveling communication was unlawful. As in *Wetzel*, the Jurors in Harvey's trial were improperly informed about what was required to convict Harvey of a properly-charged offense. The trial court's rulings on this issue resulted in Harvey being denied his constitutional right to a fair trial. See U.S. Const. amend. V & XIV; art. I, § 9, Fla. Const.

Based on the State's charging decision, the State was required to present competent, substantial evidence that Harvey had communicated with a child to seduce, solicit, lure or entice the child to engage in other unlawful sexual conduct. As argued above, there was no evidence presented that any actual child was involved in any communication with Harvey. Additionally, there was no evidence that Harvey had seduced, solicited, lured or enticed any nonexistent child to otherwise engage in other unlawful sexual conduct. Any such conduct must have been conduct that was not defined in Chapter 794, Chapter 800 or Chapter 827 of Florida Statutes. Harvey, in arguing to the trial court, went as far as highlighting other unlawful sexual conduct found within Florida Statutes. (R: 700). Where no such evidence was produced at trial, the trial court was duty bound to enter a judgment of acquittal in favor of Harvey. The trial court failed to do so. This Court must reverse with instructions for a discharge.

JURY INSTRUCTIONS

When it came time to discuss jury instructions, trial counsel objected to the use of the standard instruction based on the disputed language in the State's charging document. (TR: 531). Trial counsel argued that the jury should not be permitted to decide without definition what constituted unlawful versus lawful sexual conduct. The trial court denied counsel's motion for a jury instruction as to unlawful sexual

conduct. (TR: 533). The instructions read to the jury only defined sexual conduct and did not address unlawful sexual conduct whatsoever. (R: 680). As was the case in *Wetzel v. State*, 779 S.E. 2d 263 (Ga. 2015), the jury was provided with a definition of sexual conduct and left on its own to determine whether the conduct was unlawful.

Furthermore, as to both elements of the charged offense, the jurors were instructed that Harvey should be found guilty if he undertook the proscribed acts with a person believed by the defendant to be a child. (R: 669-670);(TR: 585). This was done despite the fact that Harvey was charged with traveling after communicating for the purposes of unlawful sexual conduct. (R: 32). Under the authority of Section 847.0135(4)(a), Florida Statutes, the Florida Legislature has created an offense punishing those who travel after communicating with an actual child for the purposes of "other unlawful sexual conduct." Harvey's jury was therefore instructed on a felony offense which is not proscribed by the applicable statute. Harvey's jury was therefore instructed on a non-existent crime which would constitute fundamental error. *Jordan v. State*, 801 So. 2d 1032, 1034 (Fla. 5th DCA 2001)("[T]his court has consistently held that conviction of a nonexistent crime is fundamental error that may be raised for the first time on appeal. *Mundell v. State*, 739 So. 2d 1201 (Fla. 5th DCA 1999); *Williams v. State*, 516 So. 2d 975 (Fla. 5th DCA 1987)). "[O]ne may never be convicted of a non-existent crime." *Achin v.*

State, 436 So. 2d 30 (Fla. 1982). Harvey was convicted of traveling after communicating with a believed child. The codified offense prohibits only traveling after communicating with an actual child. Harvey was convicted of, and is serving a prison sentence for, an offense which was not proscribed by the Florida Legislature.

It is more than reasonable to conclude that instructing the jury without defining "unlawful sexual conduct" and instructing the jury that Harvey should be found guilty if he traveled after communicating with a believed minor instead of an actual minor misled the jury. *Mogavero v. State*, 744 So. 2d 1048 (Fla. 4th DCA 1999). These two elements were the only elements presented to the jury on which to obtain a conviction. The jury returned a general verdict. (R: 690). Harvey's judgment should therefore be reversed and his case remanded.