No._____

In The
Supreme Court Of The United States

KEDDRON RAKEE WEST

Petitioner,

V.

STATE OF GEORGIA

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is due process violated by not allowing Petitioner to rely upon the statutory enacted mistake of fact defense as his sole defense to an indictment for statutory rape?

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The decision of the Supreme Court of Georgia denying Motion for Reconsideration dated September 24, 2018 is set forth in the Appendix at A-1. The decision of the Supreme Court of Georgia denying Writ of Certiorari, dated August 27, 2018, is set forth in the Appendix at A-2. The Court of Appeals of Georgia's denial of Motion for Reconsideration and Suggestion of En Banc Review, dated January 22, 2018, is set forth in the Appendix at A-3. The decision Court of Appeals of Georgia affirming the Superior Court of Berrien County's Order granting State of Georgia's Motion in Limine dated December 12, 2017 is set forth in Appendix A-4. The Order of the Superior Court of Berrien County granting the State of Georgia's Motion in Limine, dated March 21, 2017, and is set forth in the Appendix at A-5.

JURISDICTION

The final judgment of the Supreme Court of Georgia was rendered on September 24, 2018 denying the Motion for Reconsideration. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

O.C.G.A §16-3-5, "A person shall not be found guilty of a crime if the act or omission to act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission."

O.C.G.A §16-6-3(a), "A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.

Fourteenth Amendment of the United States Constitution "…Nor shall any State deprive any person of life, liberty or property without due process of law..."

STATEMENT OF THE FACTS

Keddron Rakee West was indicted in *State v. West,* Docket NO., 16CR00096 in the Superior Court of Berrien County, Georgia for statutory rape of an alleged victim who was 15 years old who represented that she was 17 years old in which the Petitioner reasonably believed. The State presented a Motion in Limine to prevent any testimony or evidence regarding the victim's representation that she was 17 years old including a video in which the Petitioner stated that he was under the belief that the victim's age was 17 years old. The Trial Court granted the States Motion on March 21, 2017 prohibiting the Petitioner or his counsel from submitting any evidence or contention that the victim represented that she was 17 years old thereby denying the Petitioner his sole defense. The Motion in Limine further denied the mistake of fact defense as to the Petitioners belief of victims age as provided in O.C.G.A. § 16-3-5.

STATEMENT OF THE CASE

Petitioner, Keddron Rakee West, ("Defendant" in the underlying case in Superior Court of Berrien County), files this Petition for Writ of Certiorari in support of his appeal of the Order of Judge Howard McClain granting the State's Motion in Limine. On March 21, 2017, the State presented a Motion in Limine ("State's Motion") in *State v. West*, Docket 16CR00096 to prohibit any testimony or presentation of any evidence in this case regarding the Defendant's reasonable belief about the victim's representation that she was

seventeen years of age, including part of a video recording of the Defendant where he stated his belief that the victim's age was seventeen (Appendix 5). The trial court granted the State's Motion on March 21, 2017. Within ten (10) days of the trial court's Order ("Order"). Defendant requested a Certificate of Immediate Review from the trial court, as the granting of the State's Motion is not subject to direct appeal. The trial court granted the Defendant's request for a Certificate of Immediate Review and signed the Certificate of Immediate Review on March 31, 2017. Defendant then filed an Application for Interlocutory Appeal in the Court of Appeals of Georgia which was granted on April 25, 2017. Notice of Appeal was filed on May 1, 2017 and docketed on June 29, 2017 as Appeal No. A17A2020. On December 12, 2017 the panel decision of Dillard, CJ, Ray and Self, JJ affirmed the Superior Court decision prohibiting any testimony or evidence regarding the Defendant's reasonable belief that the alleged victim was over the age of consent (Appendix 4).

A Motion for Reconsideration and Suggestion of En Banc Review was denied on January 22, 2018 which attached a substituted opinion for the original opinion dated December 12, 2017 (Appendix 3).

A Petition for Writ of Certiorari to the Supreme Court of Georgia was filed and docketed on February 8, 2018 as S18C0887 and was denied on August 27, 2018 (Appendix 2). A Motion for Reconsideration was denied on September 24, 2018 (Appendix 1).

REASONS FOR GRANTING THE PETITION

Due process requires that the Petitioner should be able to rely upon the defense of mistake of fact as the sole defense. The State should not be permitted to deny the Defendant the statutory enacted mistake of fact defense which should be considered in conjunction with statutory rape law in order to convict.

The arbitrariness of the conclusive presumption that someone under the age of sixteen is incapable of consent is demonstrated by the legislative history that the age of consent was raised in 1995 by the Georgia legislature from fourteen to sixteen years old, showing that prior to 1995, a fifteen year old was fully capable of consenting. A policy behind criminal law is to punish prohibited actions committed with a culpable intent, but the question in this case is whether the law should punish an individual with no culpable intent who reasonably believes that he was not violating the law based upon justifiable reliance of the misrepresentation of the age by the alleged victim. It is submitted that punishing the male without allowing him any defense of justifiable reliance on the alleged female victim's culpable misrepresentation violates due process as well as basic notions of fairness and substantial justice. Countless unsuspecting persons have had their lives wrecked by being convicted of statutory rape when they reasonably believed that the alleged sexual partner was of age and had no intent of committing a crime.

The trial court granted the State's Motion in Limine limiting testimony and evidence concerning the Defendant's justifiable belief that the victim's age was seventeen, including limiting the use of Defendant's recorded interrogation and statements by the victim about her represented age of seventeen. This prohibited the Defendant from proffering a mistake of fact defense based on his good faith and reasonable belief in the alleged victim's misrepresentation of her age.

Georgia's statutory rape statute O.C.G.A §16-6-3 should be considered in conjunction with O.C.G.A §16-3-5 providing for a mistake of fact defense. O.C.G.A §16-6-3 reasonably punishes those individuals who have the intent to have sex with underage persons, but unless read in conjunction with the mistake of fact statute O.C.G.A §16-3-5, unreasonably punishes those who have no such intent. The plain language of the statutory rape statute does not prohibit the use of a mistake of fact defense codified in O.C.G.A §16-3-5. It would be a violation of due process to deny the Defendant his sole defense of mistake of fact that he reasonably believed representation of the alleged victim that she was seventeen years old.

Georgia recognizes the sole defense doctrine and if there is some evidence to support a charge on a defendant's sole defense, the trial court must charge the jury on said defense whether it was requested or not. See *Tarvestad v. State*, 261 Ga. 605, 606, 409 S.E.2d 513 (1991); *Watts v. State*, 59

Ga. App. 531, 532, 578 S.E.2d 231 (2003); *Morgan v. State*, 303 Ga. App. 358, 360, 693 S.E.2d 504 (2010) ("A charge on the defendant's sole defense is mandatory only if there is some evidence to support the charge."). Failure to do so constitutes reversible error. See *Hill v. State*, 310 Ga. App. 695, 713 S.E.2d 891 (2011); *Watts, supra.*

In the case at hand, there was not only some evidence to support the mistake of fact defense, but an abundance of evidence would be barred from trial. The exclusion of said evidence "cannot be considered harmless error" and the exclusion warrants reversal. See *Henderson v. State*, 255 Ga. 687, 689, 341 S.E.2d 439 (1986).

In *Walker v. State*, as in the case at bar, the trial court granted a motion in limine which excluded evidence of appellant's sole defense. See *Walker v. State*, 260 Ga. 737, 739, 399 S.E.2d 199 (1991). The Supreme Court of Georgia held that the appellant "should have been given the opportunity to attempt to raise a reasonable doubt in the minds of the jury" to his guilt. Id. The ruling on the motion of limine was found to have "infected the trial with error" to the point that any mitigating actions "could not rescue the trial." *Id.*

Thus, the Petitioner has been denied his sole defense in violation of due process that was granted to him in the plain language of the legislative enactment of the mistake of fact defense in O.C.G.A. §16-3-5. The motion in limine stripped the Petitioner of his ability to defend the charges against him.

ARGUMENT AND CITATION OF AUTHORITY

DUE PROCESS REQUIRES THAT THE PETITIONER SHOULD BE PERMITTED TO PRESENT EVIDENCE OF HIS JUSTIFIABLE BELIEF THAT THE VICTIM WAS SEVENTEEN YEARS OLD AND IS ENTITLED TO A MISTAKE OF FACT DEFENSE

The Petitioner should not be prevented from introducing evidence that he justifiably relied upon the representation of the alleged victim that she was seventeen years old as well as operating under the reasonable mistake of fact that she was seventeen years old. The decision did not consider the established law of a mistake of fact defense established by O.C.G.A §16-3-5 allowing for a mistake of fact defense in criminal cases and disregarded the case law that subsequently conflicts with *Hayward v. State*, 383 Ga App. 586 (2007) which has been modified in the language in *Davis v. State,* 329 Ga App. 17 (2014) and *Castanerian v. State*, 321 Ga. App. 418 (2013).

The plain language of the statutory rape statute does not prohibit the use of a mistake of fact defense codified in O.C.G.A §16-3-5 and contained in Georgia Pattern of Jury Instructions 1.41.50 and 3.40.10 which provide for the mistake of fact defense. The statutory rape statute O.C.G.A §16-6-3 should be read in conjunction with the mistake of fact statute O.C.G.A. §16-3-5 when a Defendant has a reasonable belief of the fact that the sexual partner was of age of consent. It is submitted that Defendant in the instant case should not be punished when he had no intention of violating Georgia's

statutory rape statute and was reasonably mistaken that the alleged victim was of age. When the statutory rape statute and the mistake of fact statute are read together for a Defendant who reasonably believed that the alleged victim was of age there would be no intention to have sexual relations with an underage individual and therefore there would be no crime.

Generally, to be convicted of a crime, the prosecution must prove both the actus reus and mens rea. *Staples v. United States,* 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). As with anything in the law though, there is an exception to this general rule: the public welfare doctrine. Id; Catherine L. Carpenter, Article on Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am U.L. Rev. 313 (2003). Under this doctrine, the prosecution need only prove that there was an illegal act, no additional proof of criminal intent is necessary. The theory is that public welfare offenses regulate "a type of conduct that a reasonable person should know is subject to stringent public regulation." *Liparota v. United States,* 471 U.S. 419, 433, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). As such, the doctrine holds that the actor is effectively put on notice that his or her conduct may be subject to potential regulation and the burden shifts to the actor to "ascertain at his [or her] peril" the legality of the conduct. *Staples v. U.S at 607.* Notice of regulation, then, is the cornerstone of the public welfare doctrine.

In the case of statutory rape, Courts have held that by engaging in sexual activities with someone who is not that person's spouse, the actor is on

notice that he or she is engaging in a type of activity that is highly regulated under the law. While this position may have arguably made sense in the past, Georgians and Americans no longer live in a society where consensual sexual activity is highly regulated. Far behind us are the days where consenting adults are convicted for adultery, fornication and sodomy.

As Justice Kennedy stated in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 2480, 156 L.Ed.2d 508 (2003), "our laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Thus, it is no longer valid to consider the actor "on notice," within the meaning of the public welfare doctrine simply because he or she is engaging in sex outside of marriage, as our society recognizes a liberty interest in the way consenting adults choose to conduct their sex lives. On this point alone, statutory rape should fall outside the reaches of the public welfare doctrine. See *Liparota v. United States*, 471 U.S. 419, 433, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) ("Congress has rendered [public welfare offenses as the type of offenses] that a reasonable person should know is subject to stringent public regulation.").

While the Supreme Court of the United States has not decided the issue of whether statutory rape should still be considered a public welfare offense, it has decided several other cases that insinuate statutory rape and

strict liability are no longer compatible. For instance, in *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), the Defendant was charged with unlawful possession of an unregistered machine gun. The Government argued that they did not have to prove the defendant knew of the characteristics that made his gun an illegally unregistered machine gun because possession of an unregistered firearm was a public welfare offense. The Court did not agree.

In holding that the Defendant's knowledge was relevant to the charge, the High Court distinguished the facts from those in *United States v. Freed,* 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed. 2d 356 (1971). In *Freed*, the Defendant was prosecuted for unlawful possession of unregistered grenades, the Defendant knew he was in possession of grenades and the Court held that the Government did not need to prove that the Defendant also knew the grenades were unregistered. The majority in *Staples* held that unlike the grenades, "possession of which was not entirely 'innocent' in and of itself," because possession of an unmodified gun could be totally innocent. *United States v. Staples,* 511 U.S. 600 at 610 ("[T]he fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country."). Thus, in order to avoid "criminaliz[ing] a broad range of apparently innocent conduct," the Government must prove that the defendant knew he possessed an illegal machine gun. Id.

The same must be mandated about an actor who engages in consensual sexual activity with a person he or she believes to be of consenting age. "For both Staples and the mistaken statutory rape defendant, if the circumstances were as they believed them to be, both actors would be engaging in conduct that is within the contemplated range of lawful behavior." Catherine L. Carpenter, Article on Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am U.L. Rev. 313 (2003). Thus, the Defendant's knowledge of the victim's age (or lack thereof) must be an essential element in determining whether he or she knew the potential criminality of the act.

However, as stated above, since the teaching in *Lawrence v. Texas*, supra, it has been made very clear that sexual relations between consenting adults are fairly free from regulation. Thus, a Defendant's belief that the victim is of consenting age is highly relevant in determining whether the accused was aware of the criminality of his conduct. On the other hand, if this quote is not referring to the public welfare doctrine, not only is it unsupported by any authority but it also defies logic. If the victim was actually the age the Defendant believed her to be, to wit: over the age to be able to consent, and the two had consensual sex, there would be absolutely nothing criminal about this interaction. Thus, the act would be legally justified within the meaning of the statute. See *United States v. X-Citement*

Video, 513 U.S. 64, 69-70 (1994)("one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults [as this is completely legal conduct]. Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct.").

The decision of the Court of Appeals on the State's Motion in Limine followed *Hayward v. State*. However, the case law subsequent to *Haywood* has allowed such evidence to be introduced in *Davis* and *Castaneria* as the panel decision characterized as *dicta*. *See Davis v. State*, 329 Ga. App. 17 (2014); *Castaneira v. State*, 321 Ga. App. 418 (2013). Thus, in the instant case, a mistake of fact charge should be permitted where the alleged victim misrepresented her age to the Defendant. Prohibiting Defendant from raising this defense will adversely affect his right to a fair trial, especially where the mistake of fact charge has been allowed in similar cases. The statutory rape statute O.C.G.A. § 16-6-3 states: "A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim."

The plain language of the statutory rape statute does not prohibit the use of a mistake of fact defense and must be considered in conjunction with O.C.G.A §16-3-5 a mistake of fact defense contained in OCGA§16-3-5 and the Georgia Pattern of Jury Instructions provide for the mistake of fact defense.

Georgia Pattern of Jury Instructions by the Counsel of Superior Court Judges of Georgia 1.41.50 and 3.40.10 provide a mistake of fact instruction with regard to intent for all crimes: "A person shall not be found guilty of a crime if the act (or omission to act) constituting the crime was induced by a misapprehension of fact that, if true, would have justified the act or omission." O.C.G.A§ 16-3-5. *Tant v. State*, 158 Ga. App. 624 (1981) later cited by *Haywood v. State*, declared that a reasonable belief that the alleged victim was of age was not a defense to statutory rape. However, *Tant v. State,* a case from 1981, relied solely on American Jurisprudence for this statement of law and the subsequent case of *Haywood v. State* relied on *Tant v. State* for its holding prohibiting a mistake of fact defense in statutory rape cases without considering the general common law allowing for a mistake of fact as a defense. "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense." *People v. Hernandez,* 61 Cal. 2d 529 (1964).

The mistake of fact defense was codified in the Model Penal Code that allows a mistake of age defense for a statutory rape charge: "When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age." Model Penal Code § 213.6(1).

The Supreme Court of the United States stated in *Staples v. U.S.*, 511 U.S. 600 (1994) that the requirement of some mens rea for a crime is "firmly embedded" in common law and mens rea is the "rule rather than the exception to Anglo-American criminal jurisprudence." *Staples* at 605. This rule requiring mens rea has been followed "in regard to statutory crimes even where the statutory definition did not include it." *Staples v. U.S.* at 605-06 (quoting *U.S. v. Balint*, 258 U.S. 250 (1992). There must be some indication of legislative intent, express or implied, to dispense with mens rea as an element of a crime. *Staples* at 606.

In the instant case, the Defendant's mistake of fact defense is potentially his sole defense and Defendant should be permitted to present evidence of this defense at trial. More than fifty years ago the Supreme Court of California faced the same issues as to why there should not be a conclusive presumption of lack of ability of a female less than sixteen years of age to consent to intercourse and that a defendant could not raise as a defense justifiable reliance upon a mistake of fact that the alleged victim as of age.

In *People v. Hernandez,* 61 Cal. 2d 529 (1964) the Supreme Court of California came to the conclusion that criminal offenses need be accompanied by the proper mens rea stating: "The primordial concept of mens rea, the guilty mind, expresses the principle that it is not conduct alone but conduct accompanied by certain specific mental states which concerns, or should concern, the law. In a broad sense the concept may be said to relate to such

important doctrines as justification, excuse, mistake, necessity, and mental capacity. In the final analysis, it means simply that there must be a 'joint operation of act and intent." *People v. Hernandez,* at 532. "If [defendant] participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief, where is his criminal intent?" *People v. Hernandez* at 534.

The seminal case of *People v. Hernandez* recognized the contradiction to public policy of a rigid interpretation of statutory rape law, a crime which requires the factual existence of a minor under the age of sixteen. "The issue raised by the rejected offer of proof in the instant case goes to the culpability of the young man who acts without knowledge that an essential factual element exists and has, on the other hand, a positive, reasonable belief that it does not exist." *People v. Hernandez* at 532.

As discussed by *People v. Hernandez*, the law has long been concerned with protecting the "social, moral and personal values" particularly of teenaged females because sexual activity is viewed as doing "harm to herself and the social mores by which the community's conduct patterns are established." *People v. Hernandez* at 531. However, these concerns do not give any consideration to the choice of the teenaged female to misrepresent her age and have sexual relations with older partners. Even though the statutory rape law is meant to punish sexual conduct in such an instance, the goal of preventing harm to a teenaged child is not accomplished by penalizing the

individual who had a reasonable belief that the alleged victim was of the age of consent due to the misrepresentations of the alleged victim herself.

Other states have reached a similar conclusion that a mistake of fact defense should be allowed in statutory rape cases. The Supreme Court of Alaska recognized a constitutional violation of due process in failure to allow a mistake of age defense for statutory rape stating that "consciousness of wrongdoing is an essential element of penal liability." *State v. Guest,* 583 P.2d 836 (1978) (superseded by legislation). Alaska's legislature, tracking the ruling in *State v. Guest*, amended the statutory rape statute to include mistake of age as a defense. Alaska Stat. §11.41.445(b).

The Supreme Court of New Mexico also reached a similar conclusion in *Perez v. State,* 111 N.M. 160, 162 (1990) where the Court held that even though the legislature had repealed a portion of New Mexico's statutory rape statute providing for a mistake of age defense, the legislature's failure to state a prohibition of a mistake of fact defense for statutory rape meant that the defendant should have been allowed to present a mistake of fact defense.

Some states have recognized the unfairness of strict liability for statutory rape and have enacted statutes that allow for reasonable mistake of age as a defense to statutory rape, including Pennsylvania (18 Pa.C.S. § 3102), Montana (§ 45-5-511, MCA), Colorado (C.R.S. § 18-1-503.5), Tennessee (Tenn. Code Ann. § 39-11-502), Indiana (IC § 35-42-4-9(c)), Kentucky (K.R.S. §510.030), Maine (17-a M.R.S. § 254(2)), Minnesota (Minn. Stat. §609.345)

and Ohio's Code regarding statutory rape requiring a knowledge of age if the alleged victim is older than 13 but less than 16 (ORC Ann. §2907.04).

Not only is the reasoning of this case outdated but it is also a tad shaky. First, while mistake of age may have only been recognized by two States in 1981, today twenty-one States recognize the defense. So, although Appellee may be correct in saying that the *Tant* Court dismissed the Alaska and California rules, they were the only two States with mistake of age rules in effect at the time. No longer is this defense such an abstract idea, as demonstrated by the fact that forty-two percent of the States in this country have now recognized such a defense. Moreover, as stated above, most States that did not originally allow for mistake of age defense did so based on the public welfare doctrine, which is no longer viable for statutory rape.

However, as stated above, since the teaching in *Lawrence v. Texas*, supra, it has been made very clear that sexual relations between consenting adults are fairly free from regulation. Thus, a Defendant's belief that the victim is of consenting age is highly relevant in determining whether the accused was aware of the criminality of his conduct. If the victim was actually the age the Defendant believed her to be, to wit: over the age to be able to consent, and the two had consensual sex, there would be absolutely nothing criminal about this interaction. Thus, the act would be legally justified within the meaning of the statute. See *United States v. X-Citement Video*, 513 U.S.

64, 69-70 (1994) (one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults [as this is completely legal conduct]. Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct.").

In granting the State's Motion in Limine, the trial court furthered a practice of denying due process and justice to those who have unknowingly committed statutory rape and therefore must suffer the consequences for an act that they reasonably believed to be perfectly legal at the time

CONCLUSION

It is submitted that the Court should grant this Petition for Writ of Certiorari when the Petitioner has been denied his sole defense that he reasonable believed that the alleged victim was of age and Defendant's entire video statement should be admitted without redaction.

Respectfully submitted,

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