

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Antonio Avilez — PETITIONER
(Your Name)

vs.

Massachusetts — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Massachusetts Appeals Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

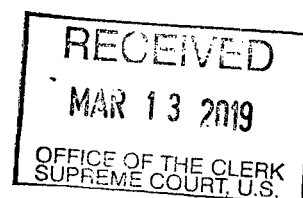
PETITION FOR WRIT OF CERTIORARI

Antonio Avilez
(Your Name)

MCI-Norfolk - Box 43,
(Address)

Norfolk, MA 02056
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

Whether The Petitioner's
Conviction For Kidnapping
Violated The Fifth Amendment
To The United States Constitution?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix 1 to the petition and is

- ☐ reported at 94 Mass. App. Ct. 1109 (2018); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Denial of ALOFAR-Supreme Jud. Court court appears at Appendix 2 to the petition and is

- ☒ reported at 481 Mass. 1102 (2018); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

Denied ALOFAR

The date on which the highest state court decided my case was 1/8/2019.
A copy of that decision appears at Appendix 2.

☒ A timely petition ^{Further Appellate Review} for rehearing was thereafter denied on the following date: 1/8/2019, and a copy of the order denying rehearing appears at Appendix 2.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment 5

U.S. Constitution, Amendment 14

G.L. c. 265 ss. 22A

G.L. c. 265 ss. 26

G.L. c. 269 ss. 10(j)

Sup. Court Rule 61A

STATEMENT OF THE CASE

Ten years after his conviction of October 16, 2000, petitioner filed a Motion For New Trial, which was denied by the Superior Court and affirmed by the respondent's intermediate appellate court. Commonwealth v. Avilez, 82 Mass. App. Ct. 1104 (2012) rev. den. 463 Mass. 1106, cert. den. 133 S.Ct. 999 (2013) (Appendix 1, p. 12)

The petitioner filed a second Motion For New Trial, which was denied by the Superior Court, and affirmed by the respondent's intermediate appellate court. Commonwealth v. Avilez, 85 Mass. App. Ct. 1115 (2014) rev. den. 468 Mass. 1105, cert. den. 135 S.Ct. 312 (2014)(Appendix 1, p. 11)

The petitioner filed a third Motion For New Trial, in which 15 years after the petitioner's guilty plea, the Superior Court vacated the charge of Possession of a Firearm as an underlying felony. Commonwealth v. Avilez, 90 Mass. App. Ct. 1104 (2016) (Appendix 1, pp. 5-10)

In August 2017, the petitioner filed a Motion To Vacate, Set Aside, or Correct Sentence pursuant to Superior Court Rule 61A, that the kidnapping conviction is duplicitous/multiplicitous. After being denied in the Superior Court, the respondent's intermediate appellate court affirmed the denial, stating inter alia:

"...the kidnapping charge was not used to enhance the rape charges..."

"...the aggravating circumstances for which the enhanced sentence was imposed in the forcible rape of a child charge was the defendant's possession of a firearm and not the fact that he had kidnapped the victim."

(Appendix 1, p. 4)

In Commonwealth v. LaCroix, 85 Mass. App. Ct. 1104, ALOFAR den. 468 Mass. 1102 (2014) the Trial Court, Lowy, J., (now a Supreme Judicial Court Judge) instructed the jury that kidnapping is a lesser-included offense of aggravated rape... (Appendix 3, pp. 1-8)

The respondent argued at the petitioner's plea

hearing that "...either one of the rape of a child indictments or the indecent assault and battery, a person under 14, would be duplicative, would be a lesser-included offense, since they would have to prove that there was a sexual assault during a kidnapping." (Appendix 3, p. 7)

The respondent then "merged" Indictment No. 00689, Indecent Assault & Battery On A Child, with Indictment No. 00687, kidnapping under G.L. c. 265 ss. 26. (Appendix 3, pp. 7-8)

Once the petitioner showed the firearm to the victim to facilitate the kidnapping, the firearm remained hidden in the petitioner's pocket.

The kidnapping was a continuing violation.

REASONS FOR GRANTING THE PETITION

Issue Presented:

Whether The Petitioner's Conviction
For Kidnapping Violated The Fifth
Amendment To The United States
Constitution?

"No person shall be subject for the same
offense to be twice put in jeopardy of life or limb."
Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 769
(n. 1) (1994)

The Fourteenth Amendment's Due Process Clause
extends the Double Jeopardy Clause's protections
to State prosecutions. Benton v. Maryland, 395 U.S.
784, 794 (1969)

Based on the Statement Of The Case, ante, the
petitioner was charged with violating G.L. c. 265
ss. 22A Rape Of A Child With Force, and violation
of G.L. c. 265 ss. 26, which contains two crimes
in the same statute; (simple) Kidnapping (10 years)

and Kidnapping With Sexual Assault (25 mandatory years)

The petitioner argued to respondent Massachusetts that because the two statutes (22A and (26) both contain sexual assault provisos, (1) a defendant would not know to which sexual assault he was pleading guilty; (2) that the kidnapping was a necessary element (of force) imbued in 22A. Brown v. Ohio, 432 U.S. 161, 169-170 (1977)(Conviction for auto theft reversed because barred by defendant's guilty plea and sentence for lesser-included offense of joyriding)

The conviction of the petitioner for rape of a child by force contained the same elements imbued in the kidnapping statute; sexual assault and use of force, which was the kidnapping.

The rape by force charge did not require proof of elements beyond those required for kidnapping with sexual assault. Brown, 432 U.S. at 167-168.

See also, United States v. Midgett, 488 F.3d 288, 302 (4th Cir. 2007)(double jeopardy bars separate convictions for bank robbery by force and jeopardizing life of another with a weapon during bank robbery because first is lesser-included offense of second)

The elements of the two statutes, G.L. c. 265 ss. 22A and G.L. c. 265 ss. 26 are the same:

G.L. c. 265 ss. 22A = sexual assault, force

G.L. c. 265 ss. 26 = force, sexual assault

In the Commonwealth of Massachusetts, a single act may provide the basis for multiple convictions and penalties so long as none of the offenses involved is a lesser-included crime of the other. Commonwealth v. Arriaga, 44 Mass. App. Ct. 382, 386-388 (1998); Commonwealth v. Valliere, 437 Mass. 366, 371 (2002)

Simply stated, where each of two crimes has an element the other does not, neither is a lesser-

included offense of the other, regardless of any subjective similarity or unity of the criminal act on which they are based. Valliere, 437 Mass. at 371.

Where the elements of one offense are wholly a subset of those of another, however, the crimes are deemed lesser and greater offenses. Double jeopardy principles forbid the imposition of multiple penalties for such kindred crimes, provided they arise out of a single criminal act. Missouri v. Hunter, 459 U.S. 359, 366-369 (1983)

Without the force (of kidnapping) used to satisfy the elements of the Rape Of A Child By Force, the sexual assault in the kidnapping charge cannot be sustained.

The Massachusetts Legislature did not intend to create duplicative punishments for defendants within the overlap sexual assault provision, use of force provision in the two statutes. Ball v. United States, 470 U.S. 856, 862 (1985); Also,

Blockburger v. United States 284 U.S. 299, 304
(1932)

Here, the same transactions occurring at the same continuing violation(s) of the two statutes were committed during the same short period, violated two criminal statutes, the test to determine whether there are multiple offenses is whether each provision requires proof a fact that the other does not. Blockburger, 284 U.S. at 304.

Here, the kidnapping with sexual assault imbedded in G.L. c. 265 ss. 26 is exactly the same element of the sexual assault in G.L. c. 265 ss. 22A.

Both statutes contain sexual assault with force, the kidnapping (ss. 26) being the force as an element in (ss. 22A). United States v. White, 240 F.3d 127, 132-133 (2nd Cir. 2001)(offenses charged same transaction because distribution of cocaine within 1000 of school includes all elements of possession and distribution of cocaine); Williams v. Singletary,

78 F.3d 1510, 1516 (11th Cir. 1996)(offenses charged same transaction because assault does not require any element of proof not required by burglary with assault)

In this case, it's the same transaction because the rape of a child by force does not require any element of proof not required by kidnapping with a sexual assault.

See, United States v. McLaughlin, 164 F.3d 1, 16 (D.C. Cir. 1998)(offenses charged same transaction because though each crime required both same and separate elements (guilty plea)(convictions) for assault with intent to kill while armed and aggravated assault armed are part of a common statutory scheme and no showing that Legislature intended multiple punishments)

In the petitioner's third motion for a new trial, claiming duplicative convictions, the respondent conceded (and the Appeals Court agreed) to

dismiss the firearm possession on school grounds
(G.L. c. 269 ss. 10(J) as duplicative.

Then, the Appeals Court held on November 9,
2018:

"...the aggravating circumstances for
which the enhanced sentence was imposed on
the forcible rape of a child charge was the
possession of a firearm, and not the fact
that he had kidnapped the victim."

(Vuono, Sacks & Lemire, JJ, Appendix 1, p. 4)

Commonwealth v. Avilez, 94 Mass. App. Ct. 1109
(2018), rev. denied, 481 Mass. 1102 (2018)

Previously, the petitioner waxed eloquent on
the issue, only to be shunned in a troika of denials.
Commonwealth v. Avilez, 82 Mass. App. Ct. 1104 (2012)
Commonwealth v. Avilez, 85 Mass. App. Ct. 1115 (2014)
Commonwealth v. Avilez, 90 Mass. App. Ct. 1104 (2016)

The petitioner has also been screened by the
United States Supreme Court:

Antonio Avilez, Petitioner 135 S.Ct. 312 (2014)

Antonio Avilez, Petitioner 568 U.S. 1147 (2013)

This is a unique case with a "shotgun approach" in the original indictments by the respondent's attorney.

If it was a simple kidnapping, with the element of "confinement," carrying a 10-year penalty (no ransom) there would be no duplicity, no multiplicitous charges, because "confinement" may be excluded from the elements of rape.

Since 1998 the kidnapping elements include sexual assault as an element of kidnapping, which is same as rape of a child with force which has the element of sexual assault. Ergo, the additional element of "confinement" is not relevant to this claim as both statutes, G.L. c. 265 ss. 22A and G.L. c. 265 ss. 26 contain a sexual assault. Both statutes require "force" as an element of the crimes.

"Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such child to submit by force and against his will or compels such child

"to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for life or for any term of years...."

(St. 1998, c. 194, ss. 237)

"...whoever commits any offense described in this section while armed with a dangerous weapon and inflicts serious bodily injury thereby upon another person or who sexually assaults such person shall be punished by imprisonment in the state prison for not less than 25 years...."

For purposes of this paragraph, the term "sexual assault" shall mean the commission of any act set forth in Sections...22A...."

(St. 1998, c. 180, ss. 63)

The respondent tries to distinguish the so-called "confinement" in ss. 26 from the "compels" in ss. 22A. However, they are indistinguishable for duplicative, multiplicitous purposes.

The petitioner was charged with two sexual assaults from two different statutes, one of which has two crimes in the same statute. This relegates the whole crime into a single continuous scheme.

United States v. Tutino, 883 F.3d 1125, 1141
(2nd Cir. 1989)

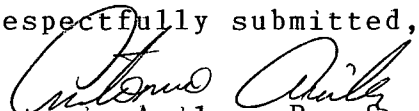
Under the amended G.L. c. 265 ss. 26, the confinement element was superceded by the sexual assault by force element, of which the "confinement" i the force necessary to violate G.L. c. 265 ss. 22A.

Where one crime is a lesser-included offense of the other, the Fifth Amendment forbids cumulative punishment for a greater and lesser-included offense. Brown v. Ohio, 432 U.S. 161, 169 (1977); Commonwealth v. Suero, 465 Mass. 215, 223 (2013)

Conclusion

For the reasons stated above, in fact and law, the petition for a writ of Certiorari must be granted.

March 5, 2019

Respectfully submitted,

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