

No. _____

In The
Supreme Court of the United States

WILLIE KIPYEGO BUTIA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is due process violated where the trial judge instructs the jury using words not found in the statute and in such a way that clearly expands the statutory definition of the crime.

LIST OF ALL PROCEEDINGS

- *Commonwealth v. Butia*, No. 2016-1060, Fairfax Circuit Court. Judgment entered March 15, 2017.
- *Commonwealth v. Butia*, No. 0906-18-4, Virginia Court of Appeals. Judgment entered Feb. 27, 2019 and rehearing denied April 8, 2019.
- *Commonwealth v. Butia*, No. 190601, Supreme Court of Virginia. Judgment entered Oct. 15, 2019.

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THE OPINIONS BELOW

The order of the Supreme Court of Virginia is at App. 1.

The opinion of the Court Appeals of Virginia is reproduced at App. 2.

JURISDICTION

The Supreme Court of Virginia denied Butia's appeal on October 15, 2019. App. 2. This Court has jurisdiction under 28 U.S.C. §§ 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The United States Constitution's Fourteenth Amendment provides, in part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Willie Butia ("Butia") was indicted and tried for rape and abduction of his wife, Omega Butia ("Mrs. Butia"). In April and May of 2016, after nearly eight years of marriage, Butia and his wife were living together off and on. TR vol. 1, pgs. 121-125. On Friday May 20, 2016, Butia asked his wife to stay with him so that they could attempt to reconcile their marriage. TR vol. 1, pg. 123; vol. 2, pg. 34. The days before the alleged offense the couple had consensual sex. TR vol. 2, pgs. 38-39.

On the night of the alleged offense, May 26, 2016, Mrs. Butia and Butia were together at their

home with their infant son, Butia's mother, and Butia's teenage daughter. TR vol. 1, pg. 125. That night, Mrs. Butia found text messages between Butia and his previous wife along with several other women, which made Mrs. Butia "really mad." TR vol. 1., pg. 125, vol. 2, pg. 45. As Mrs. Butia was preparing for bed, Butia put his arms around her in the bathroom. TR vol. 1. pg. 126, 142, vol. 2 pg. 46. Moments later, she got in bed, and her husband joined her. TR vol. 1 pg. 127. She got out of bed because she was annoyed by his sexual advances. *Id.* She then got back in bed. *Id.* Mrs. Butia claimed that Butia then held her so she "couldn't move very well." TR vol. 1, pg. 128. She claimed to have screamed, but the other household members did not hear anything. TR vol. 1, pg. 128, vol. 2. pg. 15, 26. Later, she left the bedroom and went to another room. TR vol. 1 pg. 128. After a few minutes, she returned to the bedroom where her husband and child were sleeping. *Id.* Mrs. Butia testified that once she was back in the bedroom, Butia tried to pull her out of the chair she was sitting in, "and somehow, I don't remember, we got on the bed and he was holding me down...and he just kept berating me." TR vol. 1, pg. 129.

Butia did not object to the Commonwealth's Instruction No. 7. TR vol. 2 pg. 118-119. Instruction No. 7 stated:

The definition of 'detain,' as used in these jury instructions, is 'to hold, to keep in or to restrain.' The Commonwealth does not need to prove that the Defendant detained Mrs. Butia for the entire incident. Mrs. Butia was

detained if she was held, kept in or restrained by the Defendant for a brief period of time.

The jury instruction violated Butia's due process rights by expanding the definition of the crime by telling the jury the definition of "detain" is to "restrain." On December 20, 2016, the jury acquitted Butia of rape, but convicted him of abducting his wife, in violation of Va. Code § 18.2-47. Upon finding him guilty, the jury recommended a sentence of six months and a fine of \$2500. The trial court imposed the jury's recommended sentence.

Butia timely filed a notice of appeal and a petition for appeal in the Court of Appeals of Virginia. The Court of Appeals denied his petition in a per curiam order on February 27, 2019, the last reasoned decision in this case. On March 13, 2019, Butia filed a demand for reconsideration by a three-judge panel, which was denied on April 8, 2019, for the reasons stated in the previous opinion. Butia appealed to the Supreme Court of Virginia, which denied his appeal without explanation on October 15, 2019. This timely petition for a writ of certiorari follows.

SUMMARY OF ARGUMENT

Butia's due process rights were violated when the trial court instructed the jury, pursuant to instruction no. 7, that the definition of detain is to restrain, and that the victim was detained if she was restrained by the defendant for a brief period of time.

REASONS FOR GRANTING THE PETITION

The lower courts need guidance on when due process rights are violated by a court's issuing a jury instruction that expands the statutory definition of a crime.

ARGUMENT

"A reviewing court's responsibility in reviewing jury instructions is 'to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises.'" *Darnell v. Commonwealth*, 6 Va. App. 485, 488 (1988) (quoting *Swisher v. Swisher*, 223 Va. 499, 504 (1982)). "It is elementary that a jury must be informed as to the essential elements of the offense; a correct statement of law is one of the 'essentials of a fair trial.'" *Id.* (quoting *Dowdy v. Commonwealth*, 220 Va. 114, 116 (1979)).

Indeed, when a principle of law is vital to a defendant in a criminal case, a trial court has an affirmative duty to properly instruct the jury about the matter. *Jimenez v. Commonwealth*, 241 Va. 244, 250 (1991). This duty arises even when trial counsel fails to object to the instruction. *Campbell v. Commonwealth*, 14 Va. App. 988, 991 (1992) (citing *Jimenez*, 241 Va. at 248). When due process requires, attaining the 'ends of justice' is necessary for correction of an instruction which allows a jury to convict a defendant without proof of an element of a crime." *Campbell*, 14 Va. App. at 992.

Butia did not object to the Commonwealth's Instruction No. 7. TR vol. 2 pg. 118-119. Instruction No. 7 stated:

The definition of ‘detain,’ as used in these jury instructions, is ‘to hold, to keep in or to restrain.’ The Commonwealth does not need to prove that the Defendant detained Mrs. Butia for the entire incident. Mrs. Butia was detained if she was held, kept in or restrained by the Defendant for a brief period of time.

Instruction No. 7 significantly broadens the definition of abduction and is not an accurate statement of law. First, it adds the word “restrain,” which is not contained within the abduction statute. See Va. Code § 18.2-47. This word, apparently, was important for the Commonwealth to add, because Butia used it in the telephone sting, and the Commonwealth stressed in closing and rebuttal that he admitted to abduction because he admitted he restrained his wife. TR vol. 2 pg. 133, 134, 156. Second, the instruction is plainly inconsistent with *Johnson*, supra, where the Supreme Court of Virginia held that a brief deprivation of a person’s liberty, even by a stranger, in furtherance of sexual advances is not sufficient to sustain a charge of abduction. *Johnson* at 879. The instruction is also inconsistent with *Brown*, supra, the pivotal case holding that detention must be more than the minimum amount of detention necessary to accomplish the other offense [here, rape]. *Brown*, 230 Va. at 314.

The meaning of “detain” is commonly understood, and the only effect of the Commonwealth’s instruction was to impermissibly broaden the definition of abduction. The incorrect

instruction violated Butia's due process rights because it allowed the Commonwealth to argue that his statement in the sting phone call was tantamount to a confession and to convict him for a crime that is not a violation of statute. In *Gardner v. Commonwealth*, 195 Va. 945 (1954) the Supreme Court of Virginia found that a similarly overbroad jury instruction was prejudicial to the defendant stating "[the] statutory definition is not as broad and all inclusive as that given in the instruction... hence, the instruction was prejudicial to [the defendant]." *Id.* at 944-945.

The Court of Appeals in its per curiam opinion, affirmed by the three-judge panel, holds that the 'ends of justice' exception does not apply because Instruction number 7 and instruction number 6 properly informed the jury of the Commonwealth's burden of proof. Per Curiam Opinion at 5. The court, however, never actually addressed the substance of Butia's assignment of error which is that instruction number 7 impermissibly 1) expanded the definition of abduction by adding the word 'restrain' and 2) contradicts settled law to the favor of the Commonwealth and to the clear detriment of Butia. Concerning Butia's first complaint, the court of appeals cited to *Commonwealth v. Herring*, 228 Va. 59, 74 (2014) (internal citation omitted) for a definition of "detain" for purposes of § 18.2-47 as "a defendant 'detains' a victim by having that victim 'remain in a certain location, or even in a certain position' through use of force, intimidation, or deception." Per Curiam Opinion at 4. Nowhere is the word 'restrain' used in the very definition the court of appeals relies upon. Concerning Butia's

second complaint, the court of appeals again never addressed how instruction no. 7 contradicts settled law regarding the amount of deprivation needed to constitute a separate offense of abduction.

Viewing the evidence in the light most favorable to Butia,¹ Instruction 7 broadened the definition of abduction to the benefit of the Commonwealth and enabled it to use the instruction to bolster its weak case and misled the jury on a vital issue – whether or not Butia detained his wife. The trial court, especially in the face of trial counsel’s silence, had a duty to ensure the jury was properly instructed on the elements of law and thus should have rejected the Commonwealth’s instruction defining “detain.” This failure violated Butia’s Fourteenth Amendment due process rights and this Court should grant certiorari to instruct the lower courts that they have an independent duty to ensure that a jury is properly instructed.

¹ This Court should consider this assignment of error in the light most favorable to Butia, as is the case when reviewing a denial of a requested jury instruction. *Lynn v. Commonwealth*, 27 Va. App. 336, 344 (1998) (internal citation omitted).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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