

20-6761

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

DEC 10 2020

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Wayne Wells Jr. — PETITIONER
(Your Name)

vs.

United States Court of Appeals — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court, District of S.C. 4th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Wayne Wells Jr.
(Your Name)

84 Greenhouse Road.
(Address)

Trenton, South Carolina 29847
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Does the Statute SC Code Ann. § 16-3-655 (B)(2) has an intent requirement?
2. Could the State remove the element "to coerce" from the statute and prosecute because the Petitioner was older than the Victim?
3. Was Trial Counsel's failure to object to the trial judge's answer to the jury's question an misunderstanding of the law?
4. Was Petitioner entitled to a mistake of age defense as a affirmative defense?

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:

RELATED CASES

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A .. United States Court of Appeal Decision

APPENDIX B .. United States District Court Decision

APPENDIX C .. United States District Court Report and Recommendation

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>In re Clinton P.</u> , No. 2005-UP-220, 2005 WL 7083861	11
<u>Matter of Decker</u> , 322 S.C. 215, 471 S.E.2d 462 (1995)	10
<u>Morissette v United States</u> , 342 US 246, 72 S.Ct. 240, 96 L.Ed 2d 288, 14 (1952)	14
<u>Seaton v State</u> , 645 So.2d 341 (Ala. Crim. App. 1994)	8
<u>State v Adams</u> , 430 SC 420, 845 S.E. 2d 217 (2020)	7
<u>State v Brown</u> , 178 S.C. 294, 182 SE 838 (1935)	16
<u>State v Johnson</u> , 334 SC 78, 512 S.E. 2d 795	12
<u>State v Sweat</u> , 379 SC 367, 665 S.E. 2d 645 (2008)	10, 11
<u>State v. Thickness</u> , 257 SC 295, 185 S.E. 2d 607 (1971)	8
<u>United States v Bailey</u> , 444 US 394, 100 S.Ct 624, 62 L.Ed. 2d 575 (1980)	8
 STATUTES AND RULES	
SC Code Ann. § 16-3-651 (H)	7
SC Code Ann. § 16-3-655 (B)(2)	6, 7, 9, 10 12, 14, 17
Model Penal Code § 213.6 (1)	15
18 U.S.C.A. § 2243 (C)	15
U.S.C.A VI Amendment	13

OTHER

ECF No 19 p. 9-10	14, 16
ECF No 26 p. 7-8	14
ECF No 29 p. 7	16
82 C.J.S. Statutes § 346	10
2006 WL 2382448 (S.C.A. 6 July 14 2006)	14

Table of Authorities Cited (continued)

Cases	Page Number
<u>US v Barnard</u> , 440 F.2d 907 (1973)	12, 13
<u>US v Scheffer</u> , 523 US 303 (1998)	12
<u>Weaver v Lantz</u> , 348 SC 672, 561 S.E.2d 360 (2002) ..	9

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 A to the petition and is 816 Fed. Appx. 856 (mem)
☐ reported at No. 19-7744 (2:19-cv-01284-SFA); 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 B to the petition and is
☒ reported at 2:19-cv-01284-SFA / 2019 WL 5617935; 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 C 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 _____ 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.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 11, 2020.

☒ 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**:

The date on which the highest state court decided my case was November 1, 2019.
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. VI Const. Amend.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his Defense.

U.S.C.A. Const. Amend. XIV (1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

In November 2010 Petitioner trial began, in which he was found guilty of Criminal Sexual Conduct (CSC) with a minor in the second degree. ~~guilty~~ Petitioner was sentenced to 20 years imprisonment that was suspended to 13 years and 2 years probation with a life sentence of registering as a Sex Offender. Before the jury return with the verdict of guilty, during their deliberation they sent out two questions to the trial judge concern how could they consider the facts. They asked, "If the defendant truly believed the victim was 18, does that matter" and "Was his ignorance to the victim's age any excuse?" The victim and the Petitioner testified that the victim lied about her age and the circumstance, or incident could not have taken place if it wasn't for her deception. Even after this evidence was present the trial judge answered the jury's question as, "no, if the defendant truly believe the victim was 18 years of age, it does not matter and ignorance is no excuse. Trial judge then asked Petitioner's counsel if he had any objections which he replied, "none".

In a evidentiary hearing Petitioner's trial counsel testified that he did

not object to the trial judge's answer to the jury because he thought the answer were according to the law.

Petitioner filed a writ of certiorari. The Magistrate judge ruled that the offense, Criminal Sexual Conduct (CSC) with a minor in the 2nd degree does not provide an explicit intent element, but on another issue rule that it does, but because the Petitioner was not in the position of the specifically enumerated authorities the intent element "to coerce" was not a requirement that the State had to prove. Petitioner was convicted for being older than the victim. The Magistrate judge concluded that since the Petitioner did not prove that intent was a requirement of the statute Petitioner did not show that the trial judge answer to the jury's question were wrong or that the trial counsel's understanding of the law was wrong in his failure to object to the judge's answer.

REASONS FOR GRANTING THE PETITION

During the trial, the victim testified that she lied to the Petitioner about her age. She even testified that she lied because she knew if Petitioner knew she was 15 years of age he would not have got involved with her. Petitioner testified and admitted to the sexual battery by intrusion, but offered that his act was done because he believed the victim was 18 years of age as she told him. During the jury's deliberation, the jury sent out two questions, "1) is the defendant truly believed the victim was 18, does that matter?", and "2) is his ignorance of the victim's age any excuse?" The trial judge answered the questions as, "No, is the defendant truly believe the victim was 18 years of age, no it does not matter and ignorance is no excuse." Petitioner's trial counsel failed to object to the trial judge's answers which ultimately prejudiced Petitioner from receiving a fair jury trial.

Ground I. The Statute S.C. Code Ann. § 16-3-655(B)(2) provides an intent requirement that the state did not prove beyond a reasonable doubt, and the trial judge's answers, to the jury, prejudiced the Petitioner because he lessened the burden of proof for prosecution to secure a conviction.

The Magistrate judge concluded that the trial judge's response to the jury's questions was a correct statement of law explaining that the SC Code § 16-3-655(B)(2) does not have an explicit intent element. The Magistrate judge conclusion was not only erroneous but was an overlook of well establish law.

S.C. Code Ann. § 16-3-651 (H) defines sexual battery as:

"sexual intercourse, cunnilingus, fellatio, and intercourse, or any intrusion, however slight, of any part of a person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

The South Carolina Court of Appeal in State v. Adams, 430 S.C. 420, 430, 845 S.E.2d 217, 222 (2020) has explained that "the statute, § 16-3-655, criminalize the act of intrusion, however slight. An intrusion, in its popular and accepted sense, is not just any act, but an act committed with wrongful intent. It is not mere volition."

Petitioner admitted to the intrusion but conceded that he believed the victim was 18 years of age. When intrusion is not just an act, but an act committed with wrongful intent the Petitioner intent could not be wrongful if he truly believed the victim was 18 years of age. The Magistrate judge conclusion was erroneous when it would indicate that the trial

Judge was correct in his answers to the jury that related "is the defendant truly believed the victim was 18, his wrongful intent does not matter and his ignorance which would also prove his intent is no excuse" (Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind and an evil doing hand.'") United States v. Bailey, 444 U.S. 394, 402, 100 S.Ct. 624, 631, 62 L.Ed.2d 575, 586 (1980).

"The element of intent must usually be inferred from the facts testified to by the witnesses together with the circumstances as developed by the evidence." Seaton v State, 645 So. 2d 341, 343 (Ala. Crim. App. 1994) The intent of a defendant at the time of the offense is a jury question. See, State v Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 607 (1971).

When the Petitioner intrusion was committed, he believed the victim was 18 years of age, that he proved by a preponderance of evidence. The Magistrate judge not only overlooked that intrusion is the commitment of a wrongful act, with an evil meaning mind and evil doing hand, but overlooked the jury's questions were not an issue of law, but a issue of fact which were jury questions that the judge could not answer. The jury's questions were a consideration of the circumstance facts and if the Petitioner truly believed the victim was 18 years of age when he committed intrusion, where is his criminal intent or purposely wrongful act. Instead, the trial judge's

answers removed circumstantial evidence from the jury's consideration and intimidated the jury into finding Petitioner guilty when it was clear that he could not possess the mental capacity to appreciate or conform his act when he did not even know it was criminal. The Magistrate's ruling that the trial judge's answers were correct was erroneous when it was a violation of Petitioner 6th Amendment right, to be fully heard in his defense and "it is the jury that must decide what part of the witnesses testimony it wants to believe and what part it wants to disbelieve". Weaver v. Lentz, 348 SC 672, 681, 561 S.E.2d 360, 365 (2002)

Ground II. Did the Trial Judge removed the element "to coerce" from the Statute to secure a conviction and lessen the burden of the State.

SC Code ann. § 16-3-655 (b)(2) reads in relevant part:

(B) A person is guilty of criminal sexual conduct (CSC) with a minor in the second degree if

(2) the actor engages in sexual battery with a victim who is at least 14 years of age, but who is less than 16 years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is

Older than the victim.

The Magistrate is holding that the state could prove that the Petitioner was older than the victim without the element "to coerce" because legislation did not write "to coerce" in the statute behind "or is older than the victim". Magistrate assertion is erroneous and not a correct application of the law.

In §2 C.J.S Statutes § 346, see also Matter of Decker, 322 SC 215, 219, 471 S.E.2d 462, 463 (1995) it's established that (a statute should be construed that no word, clause, sentence, provision, or part shall be rendered surplusage or superfluous). Put simply, meaning that a court cannot construct a statute as rendering one provision or part of the same statute as it is superior or held in a higher regard than the rest of the statute. The law of statutory construction is that "Courts in construing a statute 'should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law'". State v Sweet, 379 SC 367, 665 S.E.2d 645 (2008).

The third element of §16-3-655 (B)(2) establishes that "an actor" can either be a person of the specific enumerated authorities or a person

Older than the victim. This is what In re Clinton P., No. 2005-11P-

220, 2005 WL 7083861, at ^{*}2, establishes. In re Clinton P. does not

provide that if a defendant is older than the victim the state could

read him in isolation from the rest of the provision ~~breaks off~~ from

the element "to coerce." Swat at 377, 665 S.E.2d at 651 even states

"In statutory construction the language must be read in a sense which

harmonizes with its subject matter and accords with its general

purpose." While intrusion, however slight, is not just an act, but an act

with wrongful intent the element "to coerce" would provide the evidence

that the defendant act was committed wrongfully which is why the

element to coerce can not be remove from any person accused as ESL

with a minor in the second degree. The Magistrate assertion is absurd

when is allowed the statute on its face would support the state in

differing between the element of coercion and the defendant's age

even if the defendant was one of the specific enumerated authority because

a person of either of the specified authorities would have to be or normally

would be older than a person less than 16 years of age. How could a person

of 14 years of age be of authority of a child of 15 years of age? Even

when the statute provides that a person up to the age of 18 can not be

charge if his act was committed with consent does not only provides a

Consent defense, but the element "to coerce" would also disapprove that the act was consensual which would subject that person up to 18 to prosecution under § 16-3-655 (B) (2). The Statute did not provide that a person up to 18 years of age, only from the specifically enumerated of authority were allowed to not be convicted if their act resulted from consensual conduct.

Grounds III and IV

- Trial Counsel failure to object was ineffective assistance which prejudiced Petitioner when the trial judge's answer to the jury's question were erroneous.
- Petitioner was entitled to a mistake of age as a affirmative defense after presenting mitigating evidence.

"A jury's question is created if there is any direct or substantial circumstantial evidence which reasonably tends to the guilt of the accused or from which guilt may be fairly or logically deduced." State v. Johnson, 334 S.C. 78, 512 S.E.2d 795, 798. "The fundamental premise of the criminal trial system is that the jury is the lie detector, and the determination as to weight and credibility of witness testimony belongs to jury." U.S. v. Schesser, 523 U.S. 303 (1998) see also. U.S. v. Barnard, 490 F.2d 907 at 913

(1973). The jury's questions was created from the evidence which guilt could have been fairly or logically deduced. When the trial judge instructed the jury that it did not matter if the defendant truly believed the victim was 18 years of age or that his ignorance was no excuse when it applied to her age the judge's answer was a determination of the weight and the credibility of the witnesses testimony that violated the fundamental premise of the criminal trial system. The issue of whether if the Petitioner truly believed the victim was 18 was not an inquiry of the law, but was a inquiry of fact that was for the jury as the USCA

VI amendment provides, Trial counsel's failure to object to the trial judge's answers and requesting an affirmative defense such as the mistake of age or mistake of fact defense amounted to ineffective assistance that prejudice Petitioner because the trial judge's answers remove crucial circumstantial evidence and the Petitioner's only defense from the jury's consideration. As it was the Petitioner's right to be fully heard in his defense the trial judge did not give Petitioner the opportunity to be heard.

The Magistrate has also held that Petitioner's trial counsel was not ineffective in his failure to object because mistake of age is not a viable defense of C.S.C with a minor in the second degree.

Magistrate is trying to assert that SC Code § 16-3-655(B)(2) is a strict liability offense even when the statute has neither express or implied that it ~~was~~ was legislation intent to make this offense strict liability. "Similarly, absent a clear statement by Congress that it intended to create a strict liability offense, a mens rea requirement has generally been presumed in Federal statutes". Morrisette v. United States, 342 US 246, 273, 72 S.Ct. 240, 96 L.Ed 288 (1952). Instead, Magistrate lean on a legislation revision of the 2008 statute. In the (ELF No. 26 p. 7-8) the Magistrate claim that "the S.C. statute at issue, SC Code Ann. § 16-3-655(B)(2), does not include mistake of age as a defense. Moreover, the version of the statute in effect at the time of the incident in question is a version wherein the General Assembly removed a previously included mistake of age defense. (ELF No. 19 p. 9-10)." "

Upon review of the South Carolina Attorney General's opinioned letter, 2006 WL 2382448 (S.C.A.G.) July 14 2006, the Attorney General explained that the sentence "mistake of age may be a defense" that was added to the § 16-3-655(B)(2) statute was only applicable for a defendant that fell under the 'Romeo' clause. He stated that the mistake of age defense for a defendant over the age of 18 could not co-exist with our statutory rape statute

or sexual battery statute which is intended to set forth the age of consent. The Model Penal Code § 213.6 (1), statutory rape, indicates:

"When criminality depends on a child below the critical age other than 10 or under, it is a defense for the actor to prove by a preponderance of the evidence that he believed the child to be above the critical age."

18 U.S.C.A. § 2243 (c), Sexual Abuse of a minor, provides:

"it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years."

In the light, that both, statutory rape and sexual battery, hold that a mistake of age to the victim's age is a viable defense when the offense involves a victim of a certain age. The Magistrate ruling that "of relevancy, under a charge of statutory rape, the honest belief of the accused that the complainant was of the age of consent when in fact she was not constitutes no defense" was erroneous, but when

Petitioner discussed the Model Penal Code § 213.6 and showed that statutory rape provided the defense of mistake of age that the defendant must prove by a preponderance of evidence that he believed

the victim was 18 years of age, as she declared, when she was 15 years of age, the Magistrate claimed that "the Model Penal Code has no bearing on this matter." (ELF No. 29 p. 7). Is the Model Penal Code of Statutory Rape has no bearing in this matter, why did the Court held it in relevancy in their Report and Recommendation, (ELF No. 19 p. 9-10), and why would the Attorney General discuss the statutory rape offense in his opinion letter if it held no bearing to the § 16-3-655(B)(2) statute, which was the subject of his letter? Instead, the Petitioner believes that even though he presented clear constitutional errors that prejudiced him from receiving a fair trial, the lower courts are purposely ignoring the merits of the issues to prevent Petitioner of relief, even when his conviction was unlawful.

Although, mistake of age is not an essential element of § 16-3-655(B)(2) that the state is required to prove beyond a reasonable doubt, the Petitioner, when he presented evidence that his mistake of fact to the victim's age was caused from the victim's own declaration was his establishment that he was entitled to the mistake of fact to the victim's age defense. Meeting the Supreme Court's standard as emphasized in State v. Brown, 178 SC 294, 182 SE 838, 842 (1935) (where a defendant claims his conduct is exempted from the provisions

of a criminal statute, "the burden is on him to establish such defense." As the trial court has asserted, it is claiming that the statute § 16-3-655 (B)(2) is a strict liability offense that does not provide a criminal intent. A felony conviction, carrying the possible penalty of a lengthy prison term without a finding of criminal intent is unduly harsh and offensive to the due process protection of the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Walter W. P. H. H.

Date: 12-9-2020