24-6639

ORIGINAL

No. 25-_____

In The
Supreme Court of the United States

MARIO AYALA ALFARO,
Petitioner,

v.

CALIFORNIA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,

SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR A WRIT OF CERTIORARI

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Petitioner *in propria persona*

QUESTIONS PRESENTED

Two teenagers meet at a party, youth being what it is, they act on chemicals triggered in their brains—what we call attraction. These chemicals are designed to drive action. The force at work here is the biological drive to propagate the species. Since the first single-celled organism formed, that force to create two, has governed everything we do.

A 19-year-old boy and a 17-year-old girl engaged in consensual intercourse.

Except she knew her biological drive would remain unsatisfied, so the girl lied — she was actually 13.

Below are the questions, verbatim, as posed to the California Supreme Court.

The Questions Presented are:

1. Whether punishing a common-law infant in violation of a substantive rule of criminal procedure when devoid of the requisite knowledge and guilty *mens rea* required by the statute renders the conviction void in violation of the Eighth Amendment as held in *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016).
2. Whether the denial of the defense of mistake of fact in violation of procedural due process guaranteed by the Fourteenth Amendment as held in *Montana v. Egelhoff* 518 U.S. 37, 56 (1996) and *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020) afforded to all as codified in Penal Code §§ 26, 1019, 1020 renders a judgment void because of the jurisdictional defect resulting from the denial of the Sixth Amendment rights of trial by jury, confrontation, obtaining favorable witnesses, and assistance of counsel.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

People vs. Alfaro, No. CR38580, Superior Court of Ventura County. Judgment entered July 9, 1996

People vs. Alfaro, No. 2003038125, Superior Court of Ventura County. Judgment entered February 19. 2004

People vs. Alfaro, No. 2013014879, Superior Court of Ventura County. Judgment entered August 28, 2013

People vs. Alfaro, No. 2018033632, Superior Court of Ventura County. Judgment entered November 15, 2018

People vs. Alfaro, No. 2022011940, Superior Court of Ventura County. Order summarily denying motion to vacate and have conflict counsel appointed entered July 27, 2023

People vs. Alfaro, No. 2022011940, Superior Court of Ventura County. Judgment entered August 31, 2023

People vs. Alfaro, No. B333141, Court of Appeal, Second District, Division Six. *Wende* judgment entered on April 18, 2024

People vs. Alfaro, No. B333141, Court of Appeal, Second District, Division Six. Order denying motion to recall the remittitur entered September 5, 2024

People vs. Alfaro, No. S287407, California Supreme Court. Order denying petition for review entered November 20, 2024.

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OTHER

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

The opinion of the Second Appellate District Division Six intermediate court appears at Appendix A 3a to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was November 20, 2024.

A copy of that decision appears at Appendix A 1a.

Under the California Rules of Court, rule 8.532(b)(2)(A) the denial was final upon entry— no rehearing was possible. This petition is timely received for filing if post-marked on or before February 18, 2025, as the 90th day, 28 U.S.C. § 2101(d).

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment VI
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 defence.

Amendment VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV
Section 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 laws.
Section 2 ... denied to any of the male inhabitants of such State, **being twenty-one years of age**, and citizens of the United States... to the whole number of male citizens **twenty-one years of age** in such State.

California Health & Safety Code

California Penal Code

§ 20 "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

§ 26 All persons are **capable** of committing crimes **except** those belonging to the following classes:
One-Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.
Three-Persons who committed **the act** or made the omission charged under an **ignorance or mistake of fact**, which disproves any criminal intent.
Five-Persons who committed *the act* or made the omission charged through **misfortune** or by accident, when it appears that there was *no evil design, intention*, or culpable negligence.

§ 288 [as it read in 1996] "(a) Any person who **willfully and lewdly** commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, **with the intent** of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.
(b) (1)... use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury... punished by imprisonment in the state prison for three, six, or eight years."
1995-1996 SB1161 Section 1. (Amends) – Chaptered (Stats.1995 Ch.890)

§ 1019 "The plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025."

§ 1020 "All matters of fact tending to establish a defense other than one specified in the fourth, fifth, and sixth subdivisions of Section 1016, may be given in evidence under the plea of not guilty."

STATEMENT OF THE CASE

Introduction: This case is about the use of a void conviction obtained by the state's denial of rights guaranteed by the Sixth, Eighth and Fourteenth Amendments as noted in the Questions Presented. The instant offense of simple possession is not the concern, yet it produced the issues that resulted from the denial of said rights to a common law infant and the life that was taken as a result thereof. App. D 25a

Never having been privy to the record on appeal, as done in the state high court, the citations will be to the pages in the motion to recall remittitur "R.", references to "Motion" conveys it was from the original motion to vacate and attached to R. Undesignated Code references are to the California Penal Code. Most of this content is directly taken from the petition for review, so that this Court may see what the lower courts passed on, except for the showing of the split in the state courts on the issue. Case citations have been reformatted to match this Court's style preference.

Here is the crux of the issue: Under California law, the crime of unlawful sex § 261.5 contains no statutory mens rea component (App. E 32a) good faith belief is a permitted defense; yet the crime with two mental states § 288 "willfully and lewdly" (both adverbs) and "with the intent" is disallowed the statutory defenses in § 26, the required union of act and intent is relieved § 20, and the issue created by the plea of not guilty § 1019, (giving the court subject matter jurisdiction) and resulting defenses permitted § 1020, are disallowed by the case of *People v. Olsen* 36 Cal.3d 638 (Cal. 1984) (public policy, not statutory based). Shown to the state high court to have been since overruled on every component of *Olsen*, yet still denying said statutory procedure. The mens rea component is judicially resolved *ab initio*, relieving the government of its burden and depriving the jury of their province.

Petitioner is now in his twenty-ninth year of not being heard.

Factual Overview: As a common law infant at the age of 19 in 1996, Petitioner was at a party. Whereat the homely Petitioner was approached by a beautiful female named Mary Anne—appearing to be in her early twenties. The two hit it off.

Petitioner had never experienced a female gushing so much attention before. Inclusive of lap dances and pouring alcoholic drinks. She eventually inquired about age, and in response to hearing 19 years, she stated she was 17. "Cool", Petitioner thought, "we are the same age." (Motion 181)

In 1999 the California Legislature would admit that it was negligently teaching the youth about statutory unlawful sex.[1] Petitioner did not know of this concept.

The two youths eventually had consensual sex.

After which time, during small talk, it came up that her brother was the man that had recently stabbed Petitioner. Loud words were exchanged and the two parted ways.

Later that night, a 13-year-old girl named Sylvia was discussing events with her brother and her mother overheard altercation and sex and assumed it was her good-for-nothing 25-year-old live-in boyfriend "Mad Balls" that had raped her again. The police were called and the mother communicated the events and Sylvia being afraid of being discovered did not deny the claim of forcible rape. (Motion 182)

Police investigated a prior disturbance call. Questioned Petitioner and saw his sincerity that he never heard of Sylvia. Petitioner volunteered to have his photo taken to rule him out.

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[1] See SB 832 (Committee on Public Safety), Chair Vasconcellos, report 5/11/1999, p.2) See § 11165.1 (specifically not mandatory to report) (Motion 240) Due to Congressional urging in 1996 regarding lack of education regarding these laws, 42 U.S.C. § 602(a)(1)(A)(vi).

Later the Police returned and arrested Petitioner for forcibly raping Sylvia after she identified him. While in custody, Petitioner repeatedly asked the guards to be taken to test his DNA. (The concept was still new back then.) Eventually they took him to the hospital and after a couple of hours declared the DNA matched.

It was not until his Public Defender told him that Sylvia was 13-years-old, that Petitioner first learned of her age.

The appointed attorney could not get past that Petitioner had denied knowing who Sylvia was when the DNA matched. And completely failed to recognize that the reason the DNA *could* be matched, was because Petitioner demanded the police take a sample. That is completely inconsistent with a guilty mens rea. (Motion 183)

Threatened with 37 years to life in prison, as a common law infant on a first offense, incapable of consuming beer due to immaturity, Petitioner was convinced to plead guilty to two counts of § 288 and given six years prison. Petitioner was ordered to register per § 290.[2]

After being released, fate would have it that Petitioner's fiancé was Sylvia's best-friend. She felt horrible about that night and wanted to talk, but not wanting any trouble with parole, repeated requests were denied. (Motion 185)

Eventually the two females tricked Petitioner into a one-on-one conversation. Sylvia communicated that she went out on an assumed name of Mary Anne to avoid detection if her mother came looking for her. And she lied about her age because she knew Petitioner would have rejected her. (Motion 185)

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[2] The penalties for § 288, forcible § 288 and rape were all the same in 1996, so no need to create more work for themselves. Opting instead to use a statute comprised of "broad and amorphous language" (*People v. Martinez*, 11 Cal.4th 434, 442 (1995)) R.17

Sylvia volunteered to tell this information to the District Attorney of Ventura County, the prosecutor advised that nothing could be done because Petitioner admitted to having sex. This information was never communicated to the defense and Petitioner believed the government. (Motion 186)

Knowing that he was innocent of these charges and proof presented to the government, Petitioner refused to register and was sent to prison three more times, for being innocent.

In 2019, Petitioner met another 290 registrant in one of those mandatory classes and became friends as he was also suffering from a similar plight, and he said:

Being innocent and free is a lot better than innocent and in prison; so just register.

Coming from someone who understood, meant more. It was logical, so thereafter Petitioner started to register. (Motion 187)

A few years later, upon crossing paths, he mentioned a case that would permit vacating the matter because the current drug charges had as a material element the 290 conviction. The Motion was prepared and filed. The next day, the court declared it was refusing to hear it. The deputy Public Defender that was "conflicted out the moment this motion was filed" (Motion 274:7-8) convinced Petitioner to plead guilty after the prosecutor reduced the matter to a misdemeanor—negating constitutional and professional obligations (Motion 252-265) allowing the void conviction to continue.

"This is not something made up nearly 30 years later, his refusal to register because he did not commit the offense charged was of such immense resolve that he was sent to prison and despite knowing it would happen again, he was sent to prison two more additional times thereafter because he did not commit the offense charged.

That is the definition of a man's conviction in his honest and good faith belief." Motion 217

Procedural summary: This case is different from instances when the prior conviction is being used to double the present offense, see *Monge v. California* 524 U.S. 721, 728 (1998). Because here a prior void conviction from 1996 was a substantive element of the offense of simple possession. Established by the March of 2023 complaint, alleging a ***felony*** violation of Health and Safety Code § 11377 subd. (a) (App. E 32a); tripling its possible term and because it was now a felony, only then was it now permitted to be doubled by using the void conviction again as an enhancement. (App. A 10a) Sextupling the original punishment. Invoking "any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." (*Alleyne v. United States* 570 U.S. 99, 111 (2013)) R.13, Motion 179-180.

On July 26, 2023, the following titled motion was filed:

> "Notice of Motion and Verified Motion to Vacate the Prior Void Conviction Alleged as a Material Element of Count One, Re: Case No. CR38580; *and* Motion **to Relieve the Public Defender and Seek Appointment** of Alternate Counsel; Memorandum of Law and Exhibits Attached"

On July 27, 2023, the following order was entered: "Court Finds and Orders: The Court will **not** take action on motion filed as Pro Per to vacate prior conviction" R.14 (App. A 8a)

> "Motions and briefs of parties represented by counsel must be filed by such counsel." (*People v. Clark* (1992) 3 Cal.4th 41, 173.) A narrow exception to this rule allows the filing of "pro se motions regarding representation, including requests for new counsel." (*Ibid.*)...
> We therefore conclude that the trial court abused its discretion in denying Carter's *Marsden* motion without an adequate inquiry and further erred in denying Carter the assistance of counsel in determining whether to file a motion to dismiss.
> *People v. Carter* S278262 (5/20/24) p.14 (R.34)

The trial court summarily denied the motion to vacate the void judgment that sought appointment of new conflict-free counsel, without hearing the matter at all. Yet the *Carter* opinion was released the day the intermediate court's *Wende* opinion became final in this case. (App. A 3a) A motion to stay the remittitur's release was rejected by the clerk on June 11, 2024, stating loss of jurisdiction. Which actually occurred when the remittitur issued June 27, 2024. Research continued, a motion to recall the remittitur was filed on September 3, 2024—and denied September 5, 2024 (App. C 23a). R.2-3

The intermediate court and assigned appellate council overlooked a fundamental foundational aspect of grave moment. R.22-23:

> In the request for court appointment of counsel form CR-133, under "Information About Your Case", the basis for why the matter was being appealed was set out:
> f. ☒ *Describe any other negative consequences that you are/your client is likely to suffer because of this conviction*:
> Prior conviction alleged in felony complaint was void for ineffective assistance of counsel and all reasons raised in motion to vacate **that established present conflict of interest with Public Defender, trial court refused to hear it,** as a result the obligation remains to register pursuant to PC 290 despite being void for 27 years
> ([App. B. 19a)
>
> That document was incorporated into the notice of appeal, form CR-132 because of 4.a. if counsel was being requested: "Yes. Complete and attach *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133)." (Exhibit K, 149)
>
> The Presiding Judge of the Appellate Division of the Superior Court understood that to mean exactly what it said, as noted in the Superior Court docket on 10/4/23:
> "Order on application for appointment of appellate counsel is filed and Granted. **Conflict Defense Attorney** is appointed. Proof of service mailed." (App. A 6a)

That was from very order that allowed him *to be* assigned and also just above f. ☒ it stated: "Please note, **the briefing process has already been completed** and is just waiting for the record, this request for an attorney is only needed if the court wishes to have oral argument, if after briefing no argument is desired then no attorney is needed." (App. B 19a)

The opening brief was sent to the first assigned appellate counsel. Rather than being submitted, instead— before being assigned— a second attorney apparently sent a *Wende* letter, which was not received until July 2024. *Then* was assigned after abandoning his not yet client's cause. R.6 No *Wende* letter was received from the Court of Appeal. R.3, 39 Yet they were clearly apprised by that notice that a brief was completed. R.7 When all of this information was submitted they summarily denied the motion to recall the remittitur, which began before it was released. "Where the acts which cause a late filing are those of a clerk of the court or other administrative officer, the right to file is preserved." (*In re Martin*, 58 Cal.2d 133, 140 (1962)) R.8 The facts of that case were remarkably on point, *id.*, at 137-38. R.9

The trial court's summary denial of a defendant's written motion for conflict free counsel was an error of law, based on the sound premise that an attorney "cannot reasonably be expected to argue his own ineffectiveness; his client should not pay a penalty because of the attorney's unwillingness to assert his own incompetence." (*People v. Martinez* 36 Cal.3d 816, 826 (1984)) (R. 33; R. 77 (email to Public Defender); R. 95, 102, 107 (pre-prepared Appellant's Opening Brief that appointed counsel never filed); Motion 177)

With that fact pattern, the assigned appellate counsel submitted a *Wende* brief. Justifying himself with: "The court did tell you that it couldn't consider the motion because it had no jurisdiction." To the contrary, "A judge has a duty to decide any proceeding in which he or she is not disqualified." (Cal. Code Civ. Proc. § 170)

"The United States Supreme Court has decided, however, that a trial court, when sentencing a criminal defendant, may not rely on a prior felony conviction obtained in violation of the defendant's constitutional rights." (*People v. Allen* 21 Cal.4th 424, 429 (1999),

(Motion 180-81) citing *Burgett* v. *Texas* 389 U.S. 109 (1967) and *Gideon* v. *Wainwright* 372 U.S. 335 (1963)) See Motion 255:18-19, "'was denied his right to counsel in the... proceeding, and therefore that his conviction was void.' (*Burgett v. Texas* 389 U.S. 109, 114 (1967))" Page 2 of the Motion:

> **NECESSARILY**, this motion requires the declaration of a conflict of interest with the Public Defender of Ventura County, due to the ineffective assistance of the prior deputy Public Defender. Resultantly, request is made for a court appointed attorney, pursuant to the Sixth Amendment, *Gideon v. Wainwright*, 372 U.S. 335, 372 (1963):
>
> > "'He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'"

Motion 160:21-28, emphasis in original.

> "[T]he sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. [Citations.] The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence" (*Gardner v. Florida*, 430 U.S. 349, 358 (1977))
>
> "I do not give up my right to counsel and the state cannot compel me to hire private counsel as I am an indigent, *Gideon*. It is only up to you to communicate in whatever way you deem fit, by motion or further discussions, to communicate the cause and need for Judge Murphy to correct the interim ruling as reflected in the minutes, as a part of her judicial inherent powers of self-preservation of every court to make its orders conform to law and justice, *People v. Castello* (1998) 65 Cal. App. 4th 1242, 1246-50." (Exhibit C, 84-85)
>
> We are not here because she abided Professional Rules of Conduct, Rule 1.2 as quoted just before the above.

R.34-35 quoting from email to Public Defender

Federal Issues Raised in Lower Courts

The motion to recall the remittitur was based on its exhibits and the record on file. R.3 Which included the verified Motion—a modest 118 pages but in fairness the table of contents was 3 pages, table of exhibits 2 pages, and table of authorities cited was 7 pages. Thus, the verified memorandum was only 102 pages, supported by 154 pages of exhibits, 27 of which were substantive to establish supporting facts regarding aspects of law, the remainder was historical laws and definitions from relevant periods when legislation was

enacted. Raising such issues as: "resulting in state caused deprivation of counsel in all subsequent matters, *Strickland v. Washington*, 466 U.S. 668, 69[2] (1984)" (*id.*, 175) "'constitutional guarantee applies to pretrial critical stages' (*Lafler v. Cooper* 132 S.Ct. 1376, 1385 (2012)" (*id.*, 177) "'but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.'" (*Lafler* at 1384-85) (*id.*, 178) "STATE DENIAL OF DUE PROCESS, JURY TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS" announced as main topic (*id.*, 187-269); "A CONSTITUTIONALLY INVALID CONVICTION IS NOT A CONVICTION UNDER OUR LAWS; THE SIXTH AMENDMENT COMMANDS THAT "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO... HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE" (*id.*, 262-69);

"CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE TO THE REQUIRED ELEMENTS BY STATUTE AS TO THE ISSUE OF MENTAL STATE" (*id.*, 211-17); "'a meaningful opportunity to present a complete defense' (*Crane v. Kentucky* 476 U.S. 683, 690 (1986), quoting *California v. Trombetta* 467 U.S. 479, 485 (1984))" (*id.*, 176); "'guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.' *McCarthy v. United States* 394 U.S. 459, 466 (1969)" (*id.*, 176); failure to apprise of a viable defense (*id.*, 196-202); denial of a defense protected by the Fourteenth Amendment "*mens rea*,... mistake... *Montana v. Egelhoff* 518 U.S. 37, 47-48, (1996)" (*id.*, at 203-207, R.15); creation of strict liability crime by relieving the state of proving the requisite intent element, denial of ability to present a defense, denial of jury trial rights, (*id.*, 217-21); "NO MENS REA, NO CRIME. THE JUDGMENT IS DEVOID OF A FACTUAL BASIS, RESULTANTLY IT IS VOID FOR WANT OF SUBJECT MATTER JURISDICTION AND IS OPEN TO DIRECT OR COLLATERAL ATTACK AT ANY TIME"

(*id.*, 255-59); some variation of the word "punish" was raised 52 times, *"All of which is cruel and most unusual to then declare him a danger to society for life, for being a teenager with no criminal design and deceived by another teenager* (*id.*, 271:16-18);[3] *Brady* issues derived from a prosecutor being advised of the truth by the alleged victim and the failure to advise the Public Defender, *Napue* violations for failing to correct the false conviction and yet sending Petitioner to prison three more times thereafter based on that known false conviction (*id.*, at 259-262, R.16).

With that in the record, a *Wende* brief was deemed correct. Ineffective assistance of counsel in 1996, 2023, & 2024 denied the right to be heard. Petitioner has been as diligent as one can be.[4] California refuses to honor:

> We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge... was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

In re Oliver, 333 U.S. 257, 273 (1948)

This Court has jurisdiction.

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[3] "If the object and purpose of the penal law is to punish and/or to reform: What punishment is wanting of one who was deceived into believing facts that are not true? What reform is desired of someone who was made to believe facts that did not constitute the basis to be reformed? Imposing punishment without any basis at all, is to wantonly impose punishment for the sake of imposing punishment, that is cruel and unusual punishment. To further impose strict liability on anyone without even so much as knowledge, with these harsh penalties and a lifelong duty to register as a sex offender when the facts he was made to believe required no registration, has long since been prohibited by the due process clause. "Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it....where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Lambert v. California* 355 U.S. 225, 229-30 (1957)
"What troubles me is the notion that a person who acted with such belief, and is not otherwise shown to be guilty of any criminal conduct, may not only be convicted but be sentenced to prison notwithstanding his eligibility for probation when it appears that his belief did not accord with reality. To me, that smacks of cruel or unusual punishment." [Fn. omitted.] *People v. Olsen* 36 Cal.3d 638, 649-50 (1984), Grodin, J., dissenting. Motion 218

[4] Because there is clearly a tendency to believe an attorney and court of appeal over a lay person, the pages from the motion to recall the remittitur explaining why the Wende letter sent by counsel was errant and flawed is provided in the App. F 36a per RULE 14.1(g)(vi).

REASONS FOR GRANTING REVIEW

> The legislative purpose of section 288 would not be served by *recognizing a defense of reasonable mistake* of age. Thus, one who commits lewd or lascivious **acts** with a child, even *with a good faith belief* that the child is *14 years of age or older*, does so at his or her peril. [Emphasis added.]
> *People v. Olsen* 36 Cal.3d 638, 649 (1984) (*Olsen*)

Four years after *Olsen* the California Legislature made express that this was a specific intent crime when enacting § 288 (c) (1) "A person who commits an act described in subdivision (a) with the intent described in that subdivision," (see App. E. 32a-33a)

The holding in *Olsen* "violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985)." (*Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993)) (Motion p.209)

Before addressing the conflicting states, as this Court will not hear a state court's interpretation of state law, it is necessary to establish the California Supreme Court had since overruled all components of *Olsen*.

I. A THRESHOLD MATTER TO CLARIFY

§ 26 Three- "Persons who **committed the act** or made the omission charged under an *ignorance or mistake* of fact, which disproves any criminal intent."

That Petitioner engaged in a general intent crime does not foreclose the statute's application, because commission of "the act" was the very event forgiven by § 26.

Motion 221: "If one did not do the acts that brought their conduct within the import of a statute, then they are not guilty anyway; rather § 26 expressly contemplates that the acts were within the provision declaring crime, but because of the lack of the evil will, the conduct is forgiven and no need for society to punish." Because "an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws,

there must be first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will." (Blackstone, W. *Commentaries on the Laws of England in Four Books* Vol. 2 p. 302)

Modernly, "specific intent has come to mean an intention to do a future act or achieve a particular result," (*People v. Hood*, 1 Cal.3d 444, 457 (1969)). The use of "intent" in §288(a) is an intention that be directed at a child, but one cannot direct intention at a child without first... *knowing it is a child.* (Motion 249)

"Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act." (*People v. Martinez*, (1995) 11 Cal.4th 434, 444) Thus "disproves any criminal intent" means the intent contemplated in the statute.

II. THIS COURT IS NOT BEING ASKED TO INTERFERE WITH STATE INTERPRETATION, FOR IT HAS ALREADY BEEN OVERRULED

A. THE *OLSEN* COURT MEMBERS THEMSELVES HAD OVERRULED IT

Exactly 24 days and 1 year after *Olsen*, its sole dissenter Justice Grodin, now speaking for the court, after quoting the original 1872 § 26 at length, observed the importance of *People vs. Harris* 29 Cal. 678 (1866) to the Code commissioners, then quoted from *Harris*:

> 'There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. Criminal law relates only to crime, and neither in philosophical speculation nor in religious or moral sentiment would any people in any age allow that a man should be deemed guilty unless his mind were so. It is, therefore, a principle of our legal system, as probably of every other, that the essence of an offense is the wrongful intent, without which it cannot exist.'

People v. Skinner, 39 Cal.3d 765, 772 (1985)

"The rule that a defendant must know what he is doing is 'wrong and criminal' has been recognized as the accepted formulation 'since the first decision in this state (*People* v.

M'Donell, 47 Cal. 134) and has been followed consistently....'" (*Id.*, at 780) Well, not exactly *consistently*, "even with a good faith belief that the child is *14 years of age or older*, does so at his or her peril." (*Olsen, supra*) The author of *Olsen* was the sole dissent in *Skinner,* "it is not within this court's power to... rewrite the statute." (*Id.*, at 786, Bird, C.J., dissenting.)

The same seven Justices in *Olsen* also decided *Skinner,* then with only one Justice missing from the *Olsen* court, those same six Justices noted the fundamental aspect of § 288 that *Olsen* precluded statutory inquiry into, but then gave back:

> Defendant argues that "it is inconceivable that a person can engage in sodomy on a child without at the same time committing a lewd and lascivious act on that child." Although this may be accurate in a moral sense, it is not true that every such act is committed **with the specific intent required in section 288.** For example, an act of sodomy can be committed for wholly sadistic purposes, or by **an individual who lacks the capacity to form the required specific intent.** [Emphasis added.] *People v. Pearson,* 42 Cal.3d 351, 356 (1986) overruled on other grounds in *People v. Vidana,* 1 Cal.5th 632, 651 (2016)

Sec. 26 "All persons are ***capable*** of committing crimes except those belonging to the following classes:" enacted in 1872, Will, J. *Wharton's Law Lexicon or Dictionary of Jurisprudence,* (1872):

> "**Capacity**, ... All persons are **capable** of committing crimes, unless there be in them a defect of will: for, to constitute a legal crime, there must be both a vicious will and a vicious act. The will does not concur with the act: (1) Where there is a defect of understanding. (2) Where no will is exerted. (3) Where the act is constrained by force and violence. A vicious will may, therefore, be wanting in the oases of—(a) infancy; (ß) idiocy or lunacy; (y) drunkenness, which does not, however, excuse; (ð) **misfortune**; (€) **ignorance, or mistake** of fact; (*f*) compulsion, or necessity" (Motion 228)

"As in the *Ratz* case the courts often justify convictions on policy reasons which, in effect, eliminate the element of intent." (*People v. Hernandez,* 61 Cal.2d 529, 534-35 (1964) (*Hernandez*))

"There exists a strong public policy to protect children of tender years. As *Gutierrez* indicates, section 288 was enacted for that very purpose." (*Olsen* at 646)

"The language of section 288 is silent as to whether a good faith, reasonable mistake as to the victim's age constitutes a defense to a charge under that statute." (*Olsen* at 642) The premise of *Olsen* was deemed absurd just a few years after it was written.

"The People's theory would lead to the remarkable conclusion that the Legislature creates exceptions to a specific code section merely by failing to mention it." (*People v. Siko*, 45 Cal.3d 820, 824 (1988))

"Such an argument, in our view, invokes a policy consideration for the Legislature — adoption of the argument would result in effective nullification of Penal Code sections 20 and 26" (*People v. Mayberry* 15 Cal.3d 143, 156 (1975)) (Applying *Hernandez*)

B. ADDITIONAL CASES OVERRULING *OLSEN* BECAUSE MENS REA IS REQUIRED BY § 288

Olsen created strict liability by imposing knowledge. "The Legislature, of course, by making intent an element of the crime, has established the prevailing policy from which it alone can properly advise us to depart." (*Hernandez* at 534-35)

Torres v. Lynch 578 U.S. 452, 467 (2016) ("courts interpret criminal statutes to require that a defendant possess a *mens rea,* or guilty mind, as to every element of an offense. [Citation.] That is so even when the 'statute by its terms does not contain' any demand of that kind.... the defendant **must *know* each fact making his conduct illegal**. *Staples v. United States*" emphasis added.) Same holding in *People v. Garcia* 25 Cal.4th 744, 754 (Cal. 2001) (addressing 290 registration) citing to *People v. Coria* 21 Cal.4th 868, 876 (Cal. 1999) ("section 26 provides that a person is incapable of committing a crime where an act is performed in ignorance or mistake of fact negating criminal intent"); *Skinner, supra,* ("a defendant must know what he is doing is 'wrong and criminal'"); *Stark v. Superior Court,* 52 Cal.4th 368, 392 (Cal. 2011) ("honest and reasonable belief" negates

charged intent "always been held to be a good defence"); *id.*, at 398 n.10 ("He must know the facts that affect the material nature of his conduct.")

Before the conviction: *United States v. Aguilar* 515 U.S. 593, 599 (1995) ("lacks knowledge... he lacks the requisite intent"); *Staples v. United States* 511 U.S. 600, 605 (1994) ("the requirement of some *mens rea* for a crime is firmly embedded"); *People v. Simon* 9 Cal.4th 493, 519-20 (Cal. 1995) (criminal intent is the rule, only public welfare with minimal consequence does not offend the Constitution, citing: "to constitute any crime there must first be a 'vicious will.'" (*United States v. United States Gypsum Co.* 438 U.S. 422, 436-37 (1978)) Continuing, "intent generally remains an indispensable element of a criminal offense.... mens rea is required" (*Gypsum* at 437).

The Legislative employ of "disproves any criminal intent" for ignorance or mistake, means for the intent as alleged.[5] If one is made to believe that the other is 17, that negates any criminal knowledge that a person was under 14. Lack of knowledge of the age threshold being breached negates the capability of knowingly breaching.

C. *OLSEN'S* STATED SUPPORT OF ITS PREMISE WAS FLAWED.

"The *Hernandez* court acknowledged that an accused possesses criminal intent when he acts without a belief that his victim is 18 or over." (*Olsen* at 643) Actually, that court stated: "This is not to say that the granting of consent by even a sexually sophisticated girl **known** to be less than the statutory age **is a defense**.(fn.4)" (*Hernandez* at 536) "'But although legally underage, the girl who is past puberty and sexually sophisticated would be capable of granting operative consent to sexual intercourse.'" (*Ibid.*, fn. 4)

[5] If a man knowingly parks in the red to run into a store, and in his rush mistakenly forgets to pay for an item, that separate criminal intent does not satisfy a different intent to permanently deprive, even if causing the second.

Knowledge of statutory age was the very hurdle attempting to be circumvented in *Olsen*. Petitioner has not said he is free of culpability, notwithstanding the legislative confession of not educating. The key here, and in every crime, is do the facts fulfill the elements? Being guilty of one crime has never justified pleading any crime. If Sylvia was 17, a conviction for § 288 would be untenable.

The cited case in support of tender years in *Olsen* was *People v. Tober*, 241 Cal.App.2d 66, 73 (Cal. App. 1966) ("fondling of the private parts of a 10-year-old child" relying on the *Hernandez* quote.) *Olsen's* three cases relied on were unsound. Both *Tober* and *People v. Toliver* 270 Cal.App.2d 492 (Cal. App. 1969), were pure obiter dictum, as neither defendant raised good faith on appeal. The prosecutor in *People v. Gutierrez* 80 Cal.App.3d 829 (Cal. App. 1978) caught them in the hallway colluding to fabricate the defense of good faith.

The citation to a draft of the Model Penal Code that went unenacted speaks for itself.

"This conclusion is supported by the Legislature's enactment of section 1203.066." (*Olsen* at 647) The very statute that was the premise of *Olsen*—shows no intention to remove mistake of fact, quite the opposite. The intention was to *expressly afford* the defense in this exact situation. Motion p.229::

> "If the defendant befriends the victim for the purpose of initiating sexual relations and **the victim neither solicits sexual contact nor shares in that initial purpose** at the time of the befriending." (Leg. Digest, SB-586 Amended by Assembly August 25, 1981, p.7)

The Assembly's gutting of the 34-page bill down to 13 pages was voted down by "a vote of Ayes 0. Noes 24." The complete break down between the Assembly and Senate was saved by a committee that rushed through salvaging the bill in less than two days. (*Id.*)

The result was what *Olsen* discussed:

"(3) A person convicted of a violation of Section 288 and who was a stranger to the child victim or made friends with the child victim for the purpose of committing an act in violation of Section 288, *unless* the defendant honestly and reasonably believed the victim was 14 years old or older."

Olsen's rationalization did not consider the prior wording, and removed the entire defense, thus nullifying the word *unless*. A lengthy discussion in the Motion on this aspect is at pp.229-232. Plus, *Olsen* ignored:

"(8) A person who in violating Section 288 has substantial sexual conduct with a victim under the age of 11 years." (Motion p.248)

(b) "'Substantial sexual conduct' means penetration of the vagina or rectum by the penis of the offender or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

There is no like mention of unless honestly and reasonably believed the victim was 11 years old or older, because of the physiological, hormonal, and basically everything that is different between a 10-year-old and a post-pubescent. (See Model Penal Code discussion Motion 373) The holding was not based on a statute: "The language in *Hernandez,* together with the reasoning in *Tober, Toliver* and *Gutierrez,* compel the conclusion that a reasonable mistake as to the victim's age is not a defense to a section 288 charge." (*Olsen* at 647)

III. THE 1996 JUDGMENT SUFFERS FROM A JURISDICTIONAL DEFECT THAT RENDERS THE MATTER VOID

The *Olsen* court deprived Petitioner of numerous federal rights through deprivation of the statutorily afforded defense provided in § 26(3) when the paramount element of knowledge of child under the age of 14 years (§288(a)) was put in issue upon entering the plea of not guilty at arraignment on the complaint and again at arraignment on information.

"The plea of not guilty **puts in issue every material allegation** of the accusatory pleading, *except* those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025." (§ 1019). "**All matters of fact** *tending to establish*

a defense other than one specified in the fourth, fifth, and sixth subdivisions of Section 1016, *may be given in evidence* under the plea of not guilty." (§ 1020) "Under the familiar rule of construction, *expressio unius est exclusio alterius,* where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (*Wildlife Alive* v. *Chickering* 18 Cal. 3d 190, 195 (1976).) Because both statutes specified exceptions, there is no basis to find an implied exclusion of any defense or more accurately any exception to those capable of committing a crime under § 26.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'" (*Crane v. Kentucky, supra,* quoting *California v. Trombetta, supra*) these particular defenses were "so deeply rooted at the time of the Fourteenth Amendment ...as to be a fundamental principle which that Amendment enshrined." (*Montana v. Egelhoff,* 518 U.S. 37, 48 (1996)) "'The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools'" (*id.*, at 56). The issue raised here is not that the statute violates criminal procedure, rather it is the arbitrary denial of the statute's protection based on a fictional policy that denies the jury's province.

> Under well-settled precedent, a state rule about criminal liability—laying out either the elements of or the defenses to a crime—violates due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." [Citation.] Our primary guide in applying that standard is "historical practice." *Montana v. Egelhoff,* 518 U.S. 37, 43 (1996) (plurality opinion). And in assessing that practice, we look primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions.

Kahler v. Kansas, 140 S. Ct. 1021, 1027 (2020)

"'The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress'—the Court counted them off—" (*id.*, at 1028, quoting *Powell v. Texas*, 392 U.S. 514, 536 (1968))

Blackstone, W. *Commentaries on the Laws of England in Four Books* Vol. 2 Chapter II p. 302 "to inquire what **persons** are or are **not *capable* of committing crimes**... shall be **excused from punishment**... as are **expressly defined and exempted by the laws themselves**." [¶][¶] "Now, there are three cases in which the will does not join with the act 1. Where there is a defect of understanding. ... [he] that has no understanding can have no will to guide his conduct."

As noted above in the dictionary from 1872, Blackstone's stated defenses were what was codified in § 26.

Because a judge predetermined the mental state required was satisfied, this case was over ten years before it began, "verdicts may not be directed against defendants in criminal cases." (*Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979))

> We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan* v. *Louisiana*, 508 U. S. 275, 277-278 (1993). The right to have a jury make the ultimate determination of guilt [fn. omitted.]

United States v. Gaudin, 515 U.S. 506, 509-510 (1995)

"[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." (*Id.*, at 514) (See Comment to CALJIC 4.35 and Bench Notes to CALCRIM 3406, both citing *Olsen* and precluding use of the instruction.) "See also *Sullivan, supra,* at 277 ('The right [to jury trial] includes, of course, as its most important element, the right to have the jury, **rather**

than the judge, reach the requisite finding of 'guilty"); *Patterson, supra,* at 204; *Winship, supra,* at 361, 363." (*Gaudin* at 515, emphasis added, brackets in original.)

The history surrounding the enactment of § 288 finds the same legislature amended § 1020, and did not include an exception for § 26 nor for § 288 when so amending.

> "It is assumed that the Legislature has in mind existing laws when it passes a statute. [Citations.] 'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.' [Citations.]" [Citation.]
> *Olsen* at 647, fn. 19

Therefore, the statute that applies to all persons, § 26(3), as to the element of knowledge as put in issue § 1019 afforded the right to establish facts re mistake, ignorance and good faith belief, § 1020 as historical defenses, protected by the Fourteenth Amendment. Because every jury was precluded from "apply[ing] the law to those facts and draw the ultimate conclusion of guilt or innocence" that fundamentally denied the option of trial by jury and precluded marshalling witnesses in favor.

The greatest advocates in history, Aristotle, Cicero, Adams, Lincoln, and the entire ABA were rendered ineffective when precluded from presenting fact and advising the jury of law because of *Olsen.*

"Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." (*Strickland v. Washington,* 466 U.S. 668, 692 (1984)) *Olsen* is objective proof rising to "the level of a jurisdictional defect resulting from the failure to appoint counsel at all." (*Custis v. United States,* 511 U.S. 485, 496 (1994)) Because "a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." (*Evitts v. Lucey,* 469 U.S. 387, 396 (1985))

Appointment means nothing, when the legal means are denied and the element of knowledge is conclusively found by the doing of the act, expressly found impermissible in *Tot v. United States*, 319 U.S. 463, 469 (1943). "With regard to the 'knowledge' presumption, we believe that *Tot* and *Romano* require that we take the statute at face value and ask whether it permits conviction upon insufficient proof of 'knowledge,'" (*Leary v. United States*, 395 U.S. 6, 37 (1969)) Even if not an issue, the government still carries the burden to prove beyond a reasonable doubt, *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991). "[T]he analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." (*Schlup v. Delo* 513 U.S. 298, 328 (1995))

"Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." (*Burgett v. Texas*, 389 U.S. 109, 115 (1967))

IV. PUNISHING THE COMMON LAW INFANT WHILE VIOLATING A SUBSTANTIVE RULE OF CRIMINAL PROCEDURE RENDERS THE CONVICTION VOID IN VIOLATION OF THE EIGHTH AMENDMENT

Petitioner cannot deny that "an 'infant' at the time of *Ratz* was any child under 14." (*Olsen* at 646) Equally so, Petitioner cannot deny that throughout the history of the law, up until 1971, any male under the age of 21 years was an infant.

Ratz was decided in 1896, when the word "Infant" was defined as "One under the age of twenty-one years." Rawle, F., Bouvier, J. (1897). Bouvier's Law Dictionary. Vol. I.

In the 1872 Penal Code annotated, the commissioner's notes under § 26 at p.31: "3. *The liability of infants above the age of fourteen.*

> Here all authorities agree that, with but a single class of exceptions, entire criminal responsibility commences, and the presumption of incompetency wholly ceases. Blackstone, on this point, says: "The law of England does in some cases **privilege an**

> **infant under the age of twenty-one**, as to common **misdemeanor**, so as to **escape** fine, **imprisonment**, and the like," (also at Blackstone, *supra*, p. 303)

"But an attempt to commit the misdemeanor of having carnal knowledge of a girl between ten and twelve years old, is not an assault, by reason of the consent of the girl [citations.]" (Bouvier's Law Dictionary, (1897) Motion pp.236, 294) which was "at the time of *Ratz*".

Since 1872, despite amendments in 1880, 1901, 1905, until 1971, these provisions went without change such that at the time of *Ratz* and thereafter, California viewed Petitioner as incapable of giving consent. (1909) Civ. Code § 69 *Marriage licenses*

> "All persons about to be joined in marriage must first obtain a marriage license... If the **male is under the age of twenty-one years, or the female is under the age of eighteen years**, and such person has not been previously married, no license must be issued by the county clerk unless the **consent in writing of the parents** of the person under age"

Another quick point: yes, as a full-grown adult in their 40's and older observing any teenager, clearly sees a child. But not to another child. A 19-year-old is a common law infant, and persons around the same age, look around the same age. It is reasonable to believe someone when they relay facts about themselves.

The Legislature has not mandated checking ID if someone looks under a certain age before engaging in sex, which is required for tobacco sales, Bus. & Prof. Code § 22952; required to confirm over 21 for cannabis sales, *id.*, § 26140(a)(4) and encouraged for alcohol sales, *id.*, §§ 25658(f), 25659, 25660.

California law dictates that as a common-law infant, a 19-year-old is not responsible enough to have a beer, generally not allowed to purchase firearms, cannot gamble, nor tend a bar but may play as a musician at such bar if no live nude performances (*id.*, § 25663.5)

and modernly cannot purchase cannabis nor buy a cigarette. Because there is not a requisite maturity and development and awareness of consequences.

At the time of *Ratz*, and after (1909) Civil Code:

§ 25 Minors are: 1. Males under twenty-one years of age; 2. Females under eighteen years of age. (as enacted since 1872) Later amended Stats. 1971, Ch.1748

This is why the Fourteenth Amendment Sec. 2 twice names males 21 and over, ratified a century before 18-year-olds were given the right to vote, but not drink.

Yet since then, this class of legal minors is deemed old enough to be punished for every act just like any adult, despite society recognizing their impairments. "'An offender's age,' we made clear in *Graham* , 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" (*Miller v. Alabama*, 567 U.S. 460, 473-74 (2012), emphasis added.)

The law specifically recognizes the incapacity of 18-, 19-, & 20-year-old persons yet fails to take that "youthfulness into account at all", except to extend punishment to only them.

The *Miller* court was, of course, addressing juvenile offenders. See Cal. Vehicle Code, Div. 11, Ch. 12 Public Offenses, Article 1.5 **Juvenile Offenses** Involving Alcohol, § 23140 ("(a) It is unlawful for a person *under the age of 21 years* who has 0.05 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.") See additional special penalties *id.*, §§ 23136(a),(c)(3); 13353.1(a)(2)(A),(3)(A); Bus. & Prof. Code § 25662; additional crimes canvassed in *In re Jennifer S.*, 179 Cal.App.4th 64, 72-73 (2009).

And all the reasons why the above laws do not allow participation in the above events were laid out by this Court in *Montgomery v. Louisiana*, 577 U.S. 190, 206-07 (2016), quoting *Miller* at 471:

Miller took as its starting premise the principle established in *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing." [Citations.] These differences result from children's "diminished culpability and greater prospects for reform," and are apparent in three primary ways:

> "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, children 'are more vulnerable to negative influences and outside pressures,' including from their family and peers; they have limited 'control over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.'"

This Court was very clear that age is the major factor to account for; not the acts.

> Miller grabbed the bat and repeatedly struck... placed a sheet over Cannon's head... and delivered one more blow.... decided to return... to cover up evidence of their crime... they lit two fires. Cannon eventually died from his injuries and smoke inhalation.

Miller at 468

The above started from a robbery. Shows cruelty and deliberation with consciousness of guilt. There was no mistake to their mindset.

The instant case's immaturity manifested in recklessly seeking her own fun, then leaving another's life in ruins as a result, and it is a shame that has haunted the now adult Sylvia's life. She needs relief too.

"Because '[t]he heart of the retribution rationale' relates to an offender's blameworthiness," (*People v. Gutierrez*, 58 Cal.4th 1354, 1376 (2014) quoting *Miller* at 472) One who is mistaken has always been viewed as not criminally blameworthy.

It is not even so much about mistake as it is being deceived. Regardless of the finite descriptor the result is the same, there was no evil intent. It was two youths being governed by hormones and attraction. That is as natural and simple as it could be. The politics of society and religion is where the chaos derived from.

"*Miller* was a new substantive rule that applies retroactively." (*People v. Bd. of Parole Hearings*, 83 Cal.App.5th 432, 440 (2022)) "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence. [Citation.] ('The concept of proportionality is central to the Eighth Amendment');" (*Montgomery* at 206)

Retroactive relief is mandated as our laws provide no relief for common law infants, still recognized, yet unforgiven in violation of *Miller*. Continuing punishment here is a violation of the Eighth Amendment.

Vacatur is required because § 26 exempted punishment, and *Olsen* disallowed a fundamental defense— protected by the due process clause of the Fourteenth Amendment— and thus imposed punishment, and that commands action.

> A substantive rule, in contrast, **forbids** "criminal **punishment** of certain primary **conduct**" or prohibits "a certain category of **punishment** for a **class of defendants** because of their **status** or offense." [Citations.] (A substantive rule "alters the range of conduct or the **class of persons** that the law **punishes**"). [Emphasis added.]
> *Montgomery* at 206

Section 26 ("*All* persons are *capable* of committing crimes except those belonging to the following **classes**:" under Title 1 Of Persons Liable to **Punishment** for Crime.

"If it occurs that he has been misled, we cannot realistically conclude that for such reason alone the intent with which he undertook the act suddenly becomes more heinous." (*Hernandez* at 534)

> A conviction or **sentence** imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, **void**. See *Siebold,* 100 U.S., at 376. It follows, as a general principle, that **a court has no authority to leave in place** a **conviction or sentence that violates a substantive rule**, regardless of whether the conviction or sentence became final before the rule was announced.
> *Montgomery* at 203, emphasis added.

This Court declared the substantive defenses denied by *Olsen* were protected by the Fourteenth Amendment. Those defenses were substantive rules precluding punishment, when punishment was imposed, it was a violation of the Eighth Amendment. The specific holding of *Montgomery* was the conviction was void, "punishment is as necessary to constitute a crime as definition. Without either, there is no crime;" (*People v. McNulty* 93 Cal. 427, 439 (1892), citing § 15.)

The trial court's leaving in place the void conviction, the assigned appellate attorney declaring this was permissible, and the Court of Appeal declaring the same, all ignored that "if an order or judgment is void, an order denying a motion to vacate that order or judgment is also void and appealable because it gives effect to a void judgment. [Citation.]" (*Doe v. The Regents of the Univ. of Cal.*, 80 Cal.App.5th 282, 292 (2022))

V. THERE IS A DEEPLY ENTRENCHED AND DIVIDING CONFLICT AMONGST THE STATES, OPPOSING FORCES ARE PRODUCING DIFFERENT RESULTS, SOME BASED ON LAW, SOME BASED ON OPINION. ONE THING IS CLEAR, THE STATES NEED THIS COURT TO CLARIFY THE CONSTITUTIONAL ISSUE—THEY ARE RELYING ON DIFFERENT OPINIONS OF THIS COURT

A. Review Of State Laws And State Courts And The Common Laws The Courts Claim To Uphold

Tender years was one of the many euphemisms of the day, meaning prepubescent. Because our rape laws originally began at under 10 years old, "an act of intercourse with a woman above the age of ten years" (§ 261 note 2, 1872 annotated). See *Blackburn v. State*, 22 Ohio St. 102, 110 (1871):

> In the popular and most common use of the words, the female ceases to be a "child," and becomes a "woman," at the age of puberty, and this seems to be in accordance with the primary or leading definitions of the terms by lexicographers. That meaning of the words is, moreover, peculiarly appropriate in a statute for the punishment of this crime — a crime against the person and sexual purity of the female. The very nature of the subject suggests at once that it is the physiological and genital development of the female, and not her mental condition, that should determine the period of her womanhood. Sexually and physically, she may be, and generally is, a woman years

> before she becomes a woman *sui juris,* according to the law which fixes the age of her majority.

In 1880, there were 37 states that set the age of consent at 10 years. Another 9 states and the District of Colombia set it at 12 years, Delaware set it at 7 years. No data reported for Hawaii or Alaska, or Oklahoma.[6] See App. F. 40a At least 12 years after the Fourteenth Amendment was ratified, not a single state criminalized the act at issue here, let alone defied a statutory and common law defense to this statutory crime.

Globally, other countries in 1880: 13 years in Bulgaria, England, France; 14 years in Austria, Germany; 15 years in Luxemburg, Romania, Sweden, Turkey; and 20 years in Chile. Similar to the U.S., 12 years in Denmark, Portugal, Scotland, Spain, Canada, Australia; and 10 years in Russia. App. F 40a *Age of Consent Laws*

> But in the early statutes of the Colony, enacted in 1649 and 1669, we find provisions very similar to the present statute, taking the distinction that the act must be done by force, if the female was above the age of ten years; but if under ten years of age, the act should still be punished with death, though the act was done with her consent.

Commonwealth v. Sugland, 4 Gray 7, 70 Mass. 7, 9 (1855)

> By our statutes, the punishment for rape embraces all cases of violation of females of any age. If the party assaulted be above the age of ten years, then, to constitute the offence of rape, the act must have been committed by force and against her will. But if it be upon a child under the age of ten years, it is alike punishable under the statute, whether committed with the consent or against the will of such female child.

Id., at 10

"Our Statute makes it rape carnally to know a child under ten years of age, even although she consent;" (*State v. Storkey,* 63 N.C. 7, 8 (N.C. 1868)) "rape upon a girl under ten years of age. ... the averment as to the tender age of the assaulted party" (*Mosely v. State,* 9 Tex. Ct. App. 137 (Tex. App. 1880)) "consent of an infant under ten years

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[6] Oklahoma 46th state admitted to the union in 1907; New Mexico 47th in 1912, note: *Allison v. Berger,* 1 Okla. 1 (1890) compare *Bray v. United States,* 1 N.M. 1 (1851) The statute making 10 years the age of consent was discussed in *State v. Martin,* 32 N.M. 48, 53-54 (N.M. 1926).

of age affords no excuse to a man so depraved as to attempt to gratify his passion upon one of such tender years. Code of 1871, § 2672" (*Williams v. State*, 47 Miss. 609, 612-613 (Miss. 1873) "carnal knowledge of a female child under ten years of age." (*People v. Mills*, 17 Cal. 276 (Cal. 1861)) "she being over ten years of age, and the defendant, she consenting, did have carnal knowledge of her, then it would be no rape." (*Joiner v. State*, 62 Ga. 560, 562 (Ga. 1879)) "most improbable story told under oath by his daughter, a child under the age of ten, was convicted of having committed the crime of incest with her. ... By statute... any female of the age of ten years or more, by force...or... under the age of ten years" (*DeGroat v. People*, 39 Mich. 124 (Mich. 1878))

"Although some states have followed California's lead — most through legislative enactments — the majority of courts that have considered this issue continue to reject the reasonable mistake of a victim's age as a defense to statutory-rape and maintain their allegiance to the common law." (*State v. Yanez*, 716 A.2d 759, 763 (R.I. 1998)) As just shown that is not accurate. See also Blackstone, S. (1753). Commentaries on the Laws of England in Four Books, vol. 1. J. B. Lippincott. pp. 212-214 discussing statutes and ages of 10 or 12 as the age of consent.

Nor is this outdated law, currently there is a statutory defense under Vatican Law:

> Cannon 1096 §1. "For matrimonial consent to exist, the contracting parties must be at least not ignorant that marriage is a permanent partnership between a man and a woman ordered to the procreation of offspring by means of some sexual cooperation. §2. This ignorance is not presumed after puberty." (Motion 270)

> 1872 Code commissioners' annotated California Penal Code
> "§ 261 Rape defined.
> Rape is an act of sexual intercourse accomplished with a female, **not the wife** of the perpetrator, under either of the following circumstances:
> 1. Where **the female is *under* the age of ten years.**
> ...

Subd. 1. – This provision embodies the well settled rule of the existing law; that a girl under ten years of age is incapable of giving any consent to an act of intercourse which can reduce it below the grade of rape." (Motion p.236)

Currently, mostly a valid defense under federal law.

10 U.S.C. § 920b(d)(2) UNDER 16 YEARS.-In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

Two statutes state: "attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger...)..." 18 U.S.C. § 2243(a) "the defendant reasonably believed that the other person had attained the age of 16 years." (d); and 18 U.S.C. § 2423(i) "reasonably believed...engaged in the commercial sex act had attained the age of 18 years."

B. MODERN CASES CANVASSED—ESTABLISHING THE DIVIDE

The errant reasoning of *Olsen* has spread into other jurisdictions and affecting other crimes. See *U.S. v. Chin* 981 F.2d 1275, 1280 (D.C. Cir. 1992); and "children under age fourteen are considered 'infants' or 'of tender years' and that a mistake-of-age defense may 'be untenable when the offense involved a child that young.'" (*Fleming v. State*, 455 S.W.3d 577, 608 (Tex. Crim. App. 2014) citing to *Olsen.*) "In any event, most states that allow a mistake-of-age defense disallow such a defense when the child's age drops below a certain threshold. There seems to be no unanimity as to the threshold age, however, with ages ranging from twelve to sixteen." (*Fleming* at 608-09)

Also, quoting out of context:

See also Morissette v. United States, 342 U.S. 246, 251 n. 8 (1952) (noting "[e]xceptions [to *mens rea* requirement] . . . include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent").
In *People v. Olsen*, 36 Cal. 3d 638 (1984), the California Supreme Court confronted a virtually identical issue of legislative intent to the one presented in this case...

State v. Breathette, 202 N.C. App. 697, 703 (N.C. Ct. App. 2010)

The text connected to fn. 8 was, "although a few exceptions not relevant to our present problem came to be recognized." (*Morissette v. United States*, 342 U.S. 246, 251 (1952)) Although addressing another issue, the court in *U.S. v. Cordoba-Hincapie*, 825 F. Supp. 485, 497-499 (E.D.N.Y. 1993) canvassed a number of cases related to the instant issues.

Noting those that do acknowledge *State v. Guest,* 583 P.2d 836 (Alaska Sup.Ct. 1978); *Perez v. State,* 111 N.M. 160 (Sup.Ct. 1990); *State v. Elton,* 680 P.2d 727 (Utah Sup.Ct. 1984); *State v. Dodd,* 53 Wn. App.178, 765 P.2d 1337 (Ct.App. 1989); *People v. Hernandez,* 61 Cal.2d 529 (Sup.Ct. 1964).

Those that do not acknowledge: *State v. Stiffler,* 117 Idaho 405, 406 (Sup.Ct. 1990);[7] *Commonwealth v. Knap,* 412 Mass. 712 (Sup.Ct. 1992); *People v. Cash,* 419 Mich. 230 (Sup.Ct. 1984);

Stiffler cited identical laws as § 20 and § 26 which *Hernandez* held viable defenses, yet *Stiffler* rejected.

> Several state courts that have declined to recognize mistake-of-fact defenses in statutory rape cases have done so over vigorous dissents. *See, e.g., People v. Olsen,* 36 Cal.3d 638 (Sup.Ct. 1984) (Grodin, J., concurring and dissenting) (conviction should not be permitted in the absence of fault except in narrow class of public-welfare offenses carrying light penalties and little stigma); *State v. Stiffler,*117 Idaho 405 (Sup.Ct. 1990) (Blistine, J., dissenting) ("Refusal to recognize a mistake of age defense to statutory rape . . . continues an archaic practice which is no longer in step with modern values or practical reality."); *People v. Cash,* 419 Mich. 230 (Sup.Ct. 1984) (Kavanagh, J., dissenting) (obviation of proof of *mens rea* in felony case is unprecedented).

Cordoba-Hincapie, 825 F. Supp. at 498

[7] The lower court in *State v. Stiffler*, 114 Idaho 935, 937-938 (Idaho Ct. App. 1988) (adopted *Olsen*, rejected *Hernandez*, but affording consideration during sentencing "where sexually sophisticated adolescents are involved".)

"Both California and Nevada have strong state policies in favor of protecting children from sex crimes. *See Olsen*" (*Moore v. State*, 475 P.3d 33, 37 (Nev. 2020)) Noting their threshold was 16 years.

"In defense of mens rea principles, a growing number of states have developed legislative or judge-made defenses applicable in statutory rape cases, usually requiring the defendant to prove a 'reasonable' mistake of fact as to the victim's age." Noting the above cases. "Imposition of strict liability has been justified on the grounds that, in certain instances, the prosecution otherwise would have difficulty proving the requisite mental state." (*Garrison v. Elo*, 156 F. Supp. 2d 815, 831 (E.D. Mich. 2001))

> The long history of statutory rape as a recognized exception to the requirement of criminal intent undermines Petitioner's implied argument that the statute in question offends principles of justice deeply rooted in our traditions and conscience. *Cf. Powell v. Texas,* 392 U.S. 514, 535-36 (1968) ("[T]his Court has never articulated a general constitutional doctrine of mens rea.")... Moreover, the statute rationally furthers a legitimate governmental interest. It protects children from sexual abuse by placing the risk of mistake as to a child's age on an older, more mature person who chooses to engage in sexual activity with one who may be young enough to fall within the statute's purview.... Such a strict rule may reasonably be expected to have some deterrent effect.

Id. at 832

Cordoba-Hincapie, supra, continued discussing the premise behind the rejection of mistake as formulated in *Regina v. Prince,* L.R. 2 Cr.Cas.Res. 154 (1875) and noted it was rejected by commentators leading into the above passage. But did not cite to the best discussion as set out in the dissenting opinion in *State v. Silva,* 53 Haw. 232, 235-238 (Hawaii 1971), (Motion 244-245) relaying the subsequent legislative history rejecting it, and "judicially constructed strict liability . . . . in mid twentieth century criminal law is an anachronism; it stands as the major bar to rational solution of important social problems."

"States may 'create strict criminal liabilities by defining criminal offenses without any element of scienter.' *Smith* v. *California,* 361 U.S. 147, 150 (1959)." (*Commonwealth v.*

Knap, 412 Mass. 712, 715 (Mass. 1992)) "but we consider today only one which goes to the extent of eliminating all mental elements from the crime." (*Smith v. California*, 361 U.S. 147, 155 (1959))

> It is well established that the Legislature may, pursuant to its police powers, define criminal offenses without requiring proof of a specific criminal intent and so provide that the perpetrator proceed at his own peril regardless of his defense of ignorance or an honest mistake of fact. *United States v Balint*, 258 U.S. 250, 252 (1922); *Williams v North Carolina*, 325 U.S. 226, 238 (1945), *reh. den.* 325 U.S. 895 (1945). In the case of statutory rape, such legislation, in the nature of "strict liability" offenses, has been upheld as a matter of public policy because of the need to protect children below a specified age from sexual intercourse on the presumption that their immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct.
> *People v. Cash*, 419 Mich. 230, 242 (Mich. 1984)

> In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State in punishing particular acts may provide that "he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." *United States* v. *Balint*,
> *Williams v. North Carolina*, 325 U.S. 226, 238 (1945) (bigamy)

As to *Balint* " an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law." (*Morissette* 342 U.S. at 250) We now have two state courts citing opposing cases from this Court declared to justify what this court rejects: strict liability for serious crimes.

C. UNEQUAL JUSTICE UNDER LAW

> In considering this bill, the Legislature expressly questioned whether extending the requirement to section 261.5 offenders might have negative repercussions when voluntary intercourse between individuals in a relationship results in the birth of a child...."How many teen[ ] mothers would want the father of their child to plead guilty of statutory rape and be subject to a life time registration requirement?"
> *Johnson v. Department of Justice* 60 Cal.4th 871, 886 (Cal. 2015)

One who violates the law with such frequency as to obtain the result sought to be deterred by causing pregnancy is to be rewarded by not having to register. But not actually requiring the father to marry or even to stick around.

> 42 U.S.C. § 601 ("**CONGRESSIONAL FINDINGS** Pub. L. 104-193, title I, §101, Aug. 22, 1996, 110 Stat. 2110, provided that: "The Congress makes the following findings:"(1) Marriage is the foundation of a successful society." ... (A) It is estimated that the rate of nonmarital teen pregnancy rose 23 percent from 54 pregnancies per 1,000 unmarried teenagers in 1976 to 66.7 pregnancies in 1991. [5.4% to 6.67%] The overall rate of nonmarital pregnancy rose 14 percent from 90.8 pregnancies per 1,000 unmarried women in 1980 to 103 in both 1991 and 1992. ... The total of all out-of-wedlock births between 1970 and 1991 has risen from 10.7 percent to 29.5 percent and if the current trend continues, 50 percent of all births by the year 2015 will be out-of-wedlock."(7) **An effective strategy to combat teenage pregnancy must address the issue of male responsibility, including statutory rape culpability and prevention.** The increase of teenage pregnancies among the youngest girls is particularly severe and is linked to **predatory sexual practices** by men who are **significantly older.**"(A) It is estimated that in the late 1980's, the rate for girls age 14 and under giving birth increased 26 percent."(B) Data indicates that at **least half** of the children born to teenage mothers are **fathered by adult men**. Available data suggests that almost **70 percent** of births to teenage girls are fathered by **men over age 20**."

That statutory scheme was about giving money to states to deter pregnancy, promote marriage, and punish men. Not educate men *and* women. Just punish men. California does not punish them but rewards them for violating the law so frequently that they undermine Congress.

> We are not convinced that the policy behind the statutory rape laws of protecting children from sexual exploitation and possible physical or psychological harm from engaging in sexual intercourse is outmoded. Indeed, the United States Supreme Court recently acknowledged the state's authority to regulate the sexual behavior of minors in order to promote their physical and mental well-being, even under a gender-based statutory rape law.(n.13)

Cash, 419 Mich. at 244

"See *Michael M v Superior Court of Sonoma County*, 450 U.S. 464, 472, fn 8 (1981), wherein the Court upheld, against an equal protection challenge, California's statutory rape law which exclusively punished male perpetrators." (*Id.*, 245 n.13)

Another court spent the first have of its opinion discussion the trend against strict liability crimes noted *Hernandez* and *Elton* then concluded that strict liability should apply,

based on its reading and relying on *Michael M.* to justify, *Garnett v. State*, 332 Md. 571, 585-87 (Md. 1993)[8]

> Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes.
> *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 473 (1981)

The crime identified by this Court to level the field, is pregnancy, not sex. The deterrent is focused on pregnancy, only. The real-world result of that holding is that females are free to lie to execute their biological lust, they may scheme, console, persuade and deceive; all without a haphazard care in the world. Then the male is called the evil one. Branded a child molester, for life. While she is free to do engage in the same conduct the next night, the night after. Indeed for 1,825 nights she may so recklessly engage in conduct to produce pregnancy and she is the victim not the 1,825 males imprisoned as a result of her lust drive.

This Court held the sexes are thus not equal. For as a society we need not educate both sexes equally, rather we must allow one to have free reign of her loins and punish those who satisfy her.

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[8] "The legislatures of 17 states have enacted laws permitting a mistake of age defense in some form in cases of sexual offenses with underage persons." (*Id.*, at 582) (listing the statutes in AZ, AK, CO, IL, IN, KY, ME, MN, MO, MT, ND, OH, OR, PA, WA, WV, WY.) "In addition, the highest appellate courts of four states have determined that statutory rape laws by implication required an element of *mens rea* as to the complainant's age." (*Id.*, at 583) Citing *Guest, Perez, Elton,* and *Hernandez.*

For more data on state laws see *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1573 (2017) ("These tables list offenses criminalizing sexual intercourse solely because of the age of the participants.") And see 34 U.S.C. § 60106 (ordering the Attorney General to create a comparative report on the statutory rape laws and marriage laws of all states.) Department of Justice. (2022), *Conflicts between State Marriage Age and Age-Based Sex Offenses* Last Visited 2/17/25 https://www.justice.gov/ovw/media/1362871/dl?inline

If pregnancy is the evil to be halted, then the states must decriminalize anal sex, oral sex, and mutual masturbation; or criminalize unprotected sex. "The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California Legislature is within constitutional limitations." (*Michael M.* at 473) When the scales of justice balance unfettered and undeterred consequence-free sex on one end; and on the other end, imprison followed by destruction of life by publicly branding them a child molester forever, removing them from the work force and stealing from them all drive to live because they were foolish enough to be deceived; Petitioner does hereby assert—after living three decades under that boot—that it is outside of the constitution. At least according to this Court: "For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (*Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))

D. EQUAL JUSTICE UNDER LAW

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

Morissette v. United States, 342 U.S. 246, 263 (1952)

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta*, 467 U.S. at 485)

Petitioner wants one thing—a modest request—that the right intended by the founders be reserved to those that hold the constitutional obligation to adjudge guilt, be given their province. Only we the people may determine that another shall surrender liberty. No police officer, witness, accuser, prosecutor or judge was ever given that power. It was exclusively reserved to the individual and his or her peers. If the individual declines to concede, then the jury is the only entity authorized to determine guilt or not.

These cases all involve the refusal of the court to instruct the jury on the law. What is their fear? It is only one thing: that the accused will be found not guilty. These jurists are not afraid that the accused will be convicted. The only fear is that they will be acquitted. That alone is enough to trigger a holding that the Sixth Amendment cannot tolerate usurpation of the jury's role.

Such cases that fear the jury's acquittal cite to obscure passages. Opposite those citations are some of this Court's giants: *Sandstrom, Gaudin, Winship, Duncan, Sullivan, Gideon,* and *Pointer.*

Olsen and its progeny deny all of the following bedrock principles that comprise the core of the due process requirement: a verdict of guilt requires a jury to make such a finding (*Duncan* v. *Louisiana,* 391 U.S. 145, 149 (1968)); based on the government's burden of proving all elements (*United States v. Gaudin,* 515 U.S. 506 (1995)); even if required to disprove a negative element (*Mullaney v. Wilbur,* 421 U.S. 684 (1975)); to persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements (*In re Winship,* 397 U.S. 358, 364 (1970)) in order to rebut "the presumption of innocence [which] 'lies at the foundation of our criminal law.'" (*Nelson v. Colorado,* 137 S.Ct. 1249, 1256 (2017)) Denying the right to counsel (*Gideon* v. *Wainwright,* 372 U.S. 335 (1963))

even of one's choice (*United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006)) and even if its oneself (*Faretta v. California*, 422 U.S. 806, 834 (1975)) foreclosing cross-examination (*Davis v. Alaska*, 415 U.S. 308, 318 (1974) and *Brookhart* v. *Janis*, 384 U.S. 1, 3) permitting directed verdicts (*Sandstrom* v. *Montana*, 442 U.S. 510 (1979)).

All of the above are structural error cases, resulting from *Olsen* determining in advance that a statutory defense is not applicable. "And when it does that, 'the wrong entity judge[s] the defendant guilty.'" (*Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993))

"There is no crueler tyranny than that which is perpetrated under the shield of law and in the name of justice."
— Montesquieu, 1742

SUMMATION

> The *mens rea* principle is just that — a general principle — not a constitutionally mandated doctrine. "The [United States] Supreme Court has never held that an honest mistake as to the age of the prosecutrix is a constitutional defense to statutory rape, ... Petitioner has cited and this Court has found no United States Supreme Court authority to the contrary.

Garrison v. Elo, 156 F. Supp. 2d at 832

Seven years earlier "the requirement of some *mens rea* for a crime is firmly embedded." (*Staples v. United States*, 511 U.S. 600, 605 (1994))

The state courts have manifested the need for this Court to hear this issue. Apparently needing it to be expressly stated in this context too. That being: a jury must decide if a person held knowledge of the age of the claimed victim. If looking at the witness, after hearing the evidence as a whole, suffices to establish guilt beyond a reasonable doubt then no problem. But if not, then that is a real problem.

State courts are ruling opposite each other. Some are relying on this Court's cases; others are relying on other cases from this Court.

This Court's cases are sending mixed messages. Mistake is a protected defense; mistake is not protected. Mens rea is the norm; mens rea is not required. Men and women are equal; men and women are not equal. Due process is guaranteed to all; due process is capricious.

Petitioner is asking this Court to simply let the jury decide.

As a common law infant, allowing punishment to stand after being denied counsel, imposed mens rea, disregarded and treated as a non-human, it is requested that this Court also protect all other infants, leave them some breathing room to grow into adulthood. Without the vast future of life being snatched from them just as they begin it.

The liberty to make mistakes is as much a fundamental right as dissent.

If anyone could put the issue simply, it is of course, Justice Hugo Black, *Ginzburg v. United States*, 383 U.S. 463, 481 (1966), dissenting:

"Sex is a fact of life."

"[Sh]e who consents to an act is not wronged by it." (Cal. Civ. Code § 3515)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: February 18, 2025

MARIO ALFARO
PETITIONER, *PRO SE*