THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM OCONEE COUNTY
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

Indictment No. 2010-GS-37-364A

The State.....Respondent,

v.

Anthony Clark Odom.....Appellant,

FINAL BRIEF OF APPELLANT

December, 27, 2013

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STATEMENT OF THE CASE

This case was initiated by the South Carolina Attorney General's Office, which sought direct indictments for alleged chats stemming from an alleged online sting operation. The indictments were put before the County of Oconee, State of South Carolina Grand Jury on April 12, 2010. Indictment number 2010-GS-37-364A alleged that Appellant had violated S.C. Code § 16-15-342 on May 4 and/or May 5, 2006. Indictment number 2010-GS-37-363A alleged that Appellant had violated S.C. Code § 16-15-342 on May 6, 2006. Both indictments were true billed on April 12, 2010 and were initially called to trial by the South Carolina Attorney General's Office on June 27, 2011. This trial was before The Honorable Alexander S. Macaulay, and though the jury was selected, it was not sworn. During arguments on a Defense motion to dismiss both indictments due to vindictive prosecution, The Honorable Alexander S. Macaulay, recused himself from the case, on motion by the defense, and the jury was discharged.

The South Carolina Attorney General's Office called the indictments to trial again on November 7, 2011. This jury trial was held before The Honorable R. Lawton McIntosh and a jury was selected and sworn at this trial. On November 10, 2011, at approximately 10:00 pm, the jury returned verdicts on both indictments, finding the Appellant not guilty on indictment number 2010-GS-37-363A and guilty on indictment number 2010-GS-37-364A. The Honorable R. Lawton McIntosh sentenced Appellant to seven years, suspended to five years probation, and required sex offender registration, on November 10, 2011.

On November 17, 2011, Appellant's trial counsel filed a timely motion for new trial. The order denying Appellant's motion for new trial was received on January 9, 2012. The Notice of Appeal, appealing the Appellant's conviction on indictment number 2010-GS-37-364A, the trial court's rulings, denial of Appellant's motion for new trial, and sentence, was timely served on the

South Carolina Attorney General's Office on January 13, 2012.

ARGUMENT

I. Was it unconstitutional, and not subject to harmless error, for the trial court to take conclusive judicial notice of an element of the crime charged, and instruct the jury during jury deliberations to disregard evidence on the element of "official capacity."

A. The trial court's unconstitutional taking of conclusive judicial notice of a crime element and the application of harmless error.

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216,220(2006). Thus, an appellate court is bound by the "trial court's factual findings unless they are clearly erroneous." Id.

In this case, the trial court made errors of law that prejudiced and abused the rights of the Appellant, when it improperly entered the fact-finding province of the jury and took judicial notice of the age of the appellant, which, as an element of the crime charged, is reserved for determination by the jury. By so doing, the trial court usurped the province of the jury and violated the rights of the Appellant to be tried by a jury as guaranteed under both the South Carolina Constitution and the United States of America. Constitution S.C. Const. art. I, § 14, and S.C. Const. art. V § 21, and U .S. Constitution, Fifth, Sixth and Fourteenth Amendments. U .S. Const. amends. V, VI, XIV. The trial court's actions violated the settled legal principle that there are no unimportant element(s) of a crime, and that the **State must prove every element of a crime beyond a reasonable doubt.** Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) (emphasis added).

The trial judge in this case initially instructed the jury that it was the jury's duty to find the facts (Rp. 77, lines 2-20) and, per the South Carolina Constitution, that the trial court was not allowed to have an opinion on the facts of the case and that the factual matters were solely in the province of the jury. (Rp. 77, lines 21-25). The trial court also told the jury to disregard anything that indicated the trial court had a preference on the facts (Rp. 77, lines 2-20). However, the trial court violated its own instructions and subsequently made critical factual determinations reserved for the jury, in violation of the instructions.

Specifically, the State's lead prosecutor requested that the trial court take judicial notice of the Appellant's age, based on what they alleged were S.C. Department of Motor Vehicle Records (DMV Records), (Rp. 113, lines 20-25). Defense counsel objected to this request, arguing that the purported DMV Records had not been supplied to the Defense pursuant to Rule 5, SCRCrimP, which required their pre-trial disclosure. The trial court then asked if the Defense would be willing to stipulate the Appellants' age to avoid the disclosure issue, and Defense counsel refused to do so. (Rp. 114, lines 1-18).

The State's lead prosecutor responded to the objection by stating they were not asking to introduce the DMV Records themselves, but were asking the trial court to take conclusive judicial notice under Rule 201, SCRE of the age of the Defendant. Defense counsel again objected stating that this would be an impermissible taking of judicial notice of an element of a crime. The trial court disagreed (Rp. 115, lines 4-19). Defense counsel also questioned the authenticity of the DMV records, and lack of a records custodian and therefore the reliability of the proffered DMV Records (Rp. 114, lines 7-11) and Defense counsel objected to the taking of judicial notice based upon specific statutes dealing with DMV Records (Rp. 115, lines 20-22). The trial court agreed to allow further argument and go into more detail on the issue later (Rp. 116, lines 4-5), however, the trial court instructed the jury on the age element before allowing the additional argument (Rp. 118, lines 18-25). Since the judge did not allow the issue to be revisited, Defense counsel submitted additional arguments in Appellant's New Trial Motion, showing that DMV Records are at times unreliable (Rp. 717, Para E. p. 7-8).

Significantly, from the alleged DMV records the trial court judge (while not admitting the records into evidence) took conclusive judicial notice of Appellant's age and instructed the jury on the issue on two separate occasions. First, the Judge told the jury during trial that it must find as a

conclusive fact the (Appellant] was born on June 22, 1973 (Rp. 119, lines 16-24). The second time, during the trial court's jury charges, the jury was again told by the trial judge to accept the fact that the [Appellant] was born on June 22, 1973 as conclusive, and that they shall not debate it. (Rp. 136, lines 15-22).

It is a substantial prejudice and abuse to the rights of the Appellant, and clearly unconstitutional, for the trial court to take conclusive judicial notice of a crime element. **This court is prohibited from taking judicial notice of any element of the crime regardless of how easily the particular clement could have been proved.** Beem v. McKune, 278 F.3d 1108 (10 Cir. 2002) (emphasis added). By overstepping its bounds, the trial court, and not the jury, was making a critical determination of fact reserved for the jury. Furthermore, it is well-established law that Courts are forbidden from directing verdicts against criminal defendants on any element of a crime. See Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) ("Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."). The instruction of the trial court to the jury, "that [Appellant] was born on June 22, 1973 ... and that they shall not debate it", effectively, directed a verdict of guilty on that element. (Rp. 136, lines 15-22).

In Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), the US Supreme Court considered a case in which the trial court instructed the jury that the law presumes the ordinary consequences of a voluntary act. The Supreme Court held that such an instruction violated "the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt." The Court stated that such interference by the trial judge in instructing as to a conclusive presumption "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime, and they invade the

fact finding function, (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 442 (1978)) which in a criminal case the law assigns to the jury."

... "The State was thus not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged,' Id. (citing In re Winship, 397 U.S. 358, 364 (1970) and petitioner was deprived of his constitutional rights.

The current case goes beyond a presumption, of which the jury might overcome, and quite remarkably takes judicial notice of a fact necessary to constitute the crime charged. The result was that Appellant was deprived of his constitutional rights to a trial by jury. S.C. Const. art. I, § 14 also sets out that a trial court shall not charge juries in respect to matters of fact, but shall declare the law. State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), Limehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011).

The age of the accused, in a charge of Criminal Solicitation of a Minor (S.C. Code § 16-15-342) was set forth explicitly as a crime element by the South Carolina Court in State v. Reid, 383 S.C. 285, 30l; 679 S.E.2d 194, 202 (S.C. App. 2009) ("the elements of criminal solicitation of a minor include: (1) the defendant is eighteen years of age or older; (2) he or she...") and as such must be proven by the State. By taking conclusive judicial notice of this element, the judge took this crime element out of the hands of the jury, and denied the Defense the opportunity to contest the element. It was in all respects a directed verdict on an element in which no evidence was presented to the jury, as the DMV Records were never admitted, nor was there ever any testimony or other evidence as to the age of the Appellant, during the State's case in chief and the State could not therefore, meet its' burden of proof on the element. The issue was hotly contested and was inflamed by the fact that the DMV Records were never properly disclosed nor allowed to be subjected to proper review by Defendant's trial counsel.

Once a constitutional error is shown to have been committed, the court first must determine if it is subject to harmless error analysis, or is automatically reversible Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993), Neder v. United States, 527 U.S. 1,119 S.Ct. 1827 (1999). It is Appellant's position that the facts presented create a structural error in the trial and require automatic reversal under a Sullivan or Neder analysis.

In Neder, the court applied harmless error analysis when an element of a crime was not charged to the jury. The key issues for the court in the Neder case analysis was that there existed evidence on the element omitted from the charge and the fact that the element omitted was not in dispute at trial. In this case, however, the actions of the trial Judge are significantly more prejudicial to the Defendant than the omission of a charge on an element of the crime upon which evidence was presented. As noted in Sullivan, a conclusive presumption, although completely unconstitutional under Sandstrom, at least requires the jury to find some fact beyond a reasonable doubt, before it must then presume the other fact. Additionally, with an omitted element upon which evidence was presented, as in Neder, the judge does not enter into the realm as the finder of fact.

In this case, the trial court directed a verdict against the Appellant on a contested element of the crime charged, though it clearly lacked the power to do so under Sullivan. Unlike Neder, there is no question the age of Appellant was an element of the crime charged. Also unlike Neder, the alleged DMV Record presented to show age were only shown to the trial Judge and not the jury, and even then were contested because it was not provided to the defense in violation of Rule 5, SCRCrimP. Though the trial Judge attempted to avoid the disclosure problem by taking conclusive judicial notice. In fact, it was never entered as evidence in the State's case in chief and the jury never saw it (Rp.119, lines 16-24). The trial court took upon itself the role of jury on this element and in review of the undisclosed records "evidence", it deemed that element met, and then told the jury to

find that element had been met.

In Sullivan, Justice Scalia, in writing for a unanimous Court in discussing the improper reasonable doubt charge made in that case, explains why automatic reversal and not the harmless error analysis was appropriate and states:

> "There is no object, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt -not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough."

Likewise, in this case, the lack of any evidence being placed before the jury on the age element of the crime is analogous to the unconstitutional reasonable doubt charge found in Sullivan. "There is no object to operate on, and [...] [A] reviewing court can only engage in pure speculation- its view of what a reasonable jury would have done. And when it does that "the wrong entity judge[s] the defendant guilty."" Id. at 281.

There was no finding beyond a reasonable doubt of the element, just as in Sullivan. There was, in fact, no jury verdict on this element, and no evidence presented to the jury from which they could have made such a verdict. In Sullivan, Justice Scalia states, "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal". This was in effect a directed verdict for the State on an element of the crime charged, a structural defect, and the "wrong entity judges the defendant guilty." Id. at 281

The act of the trial court taking conclusive judicial notice of the age element of the crime charged, also violated the South Carolina Constitution (S.C. Const. art. I, § 14) which states that a trial court shall not charge juries in respect to matters of fact, but shall declare the law. State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), Limehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211

(Ct. App. 2011) and automatic reversal should be required by the same rationale.

However, should the court engage in a harmless error analysis, this constitutional error cannot be found to be harmless. In such an analysis, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) would control. The Chapman rule states, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Under South Carolina law, State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) would also be controlling. Pagan, while also incorporating Chapman's rule, states, "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."

In this case, the jury was never provided with any evidence on the age element of the crime charged. The State also avoided a Rule 5 (SCRCrimP.) issue by not entering the DMV Records, since they were only reviewed by the trial court. Since this is so, it cannot be claimed that the constitutional error of taking conclusive judicial notice did not contribute to the verdict. In fact, as to the element of age, it was only concluded by the jury due to the error of the trial court. The jury was told it must find this element met and was not allowed to even debate it (Rp. 156, lines 15-22). The act of the trial court confused the roles of judge and jury, and infected the entire trial as to what the jury's role was in this criminal case. There is no way to quantify the confusion this created for the jury after being told by the judge they were the sole finders of fact, and then being told they must find a fact. There are no unimportant elements of a crime, the State must prove every element of a crime beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). The judge in this case performed this function and not the jury as requested by the Appellant.

B. Trial court erred in instructing the jury, after deliberations had begun, to disregard legal evidence, thereby interfering with the jury's fact-finding role on the element of "Official Capacity", and the application of harmless and cumulative error.

In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's

factual findings unless they are clearly erroneous. Id. During the progression of the trial "official capacity" became a major issue. This is believed to be a matter of first instance for this court. Based on the Appellant's counsel's research, this issue has not been squarely addressed by any appellate court of this state. Below are the sections of S.C. Code § 16-15-342 relevant to this argument:

During the progression of the trial determining "official capacity" of the investigating officer became a significant issue. Below are the sections of S.C. Code §16- 15-342 under which Odom was prosecuted which are relevant to this case and the appellant's argument:

(B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

(D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer **acting in an official capacity**. (Emphasis Added)

The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature. Howell v. U.S. Fid. & Guar. Ins. Co., 370 S.C. 505, 636 S.E.2d 626 (2006). However, statutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). Criminal statutes are to be construed strictly against the State and in favor of the defendant. State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002). The words in a statute must be given their plain and ordinary meaning.

When the statute was charged to the jury it was clear the trial court found that S.C. Code § 16-15-342(B) was an affirmative defense, while S.C. Code §16-15-342 (D) due to there being no actual underage person involved, became elements of the crime the State had to prove beyond a reasonable doubt. This construction, in fact, was uncontested by the State at trial.

The following questions from Odom's counsel Mr. James Huff during cross-exam of Officer Mark Patterson (Patterson), established the capacity defense to the charge, as provided under S.C.

Code §16-15-342(B):

By Mr. Huff:

Q. Mr. Patterson, I believe where I might have been was, this person on the internet, if they really intended to have sex with some one less than eighteen, and they reasonably believed that the person they are communicating with is less than eighteen but they're at least sixteen, and that sixteen year old agrees to the communication, then that person would not violate the statute, would they?

A. I don't believe so.

Q. I'm sorry?

A. I don't believe so, no, sir.

Q. Okay. Because even though the statute says that he shouldn't have the intent to have engagement in sex or

(Rp. 84, lines 12-25)

sexual activity with somebody less than eighteen, if, in fact that person is sixteen and wants to do it, they say it's not a violation, right?

A. Right.

Q. Okay. Is that a little confusing to you?

A. No, sir.

Q. Okay, good. Now, back in 2006, in May of 2006, how old were you?

A. I believe I was thirty-two.

Q. Okay. Definitely over sixteen.

A. Yes, sir.

Q. Definitely over eighteen.

A. Yes, sir.

Q. Okay. So you were engaged in a conversation with this Danger person, and your, your belief was that Danger intended to have sex with somebody less than eighteen; is that true?

A. Yes.

Q. And he reasonably believed that you were less than eighteen?

A. Yes.

Q. But, in fact, you were over sixteen?

A. Yes.

Q. Now, so based up on what we just discussed, the Danger fella would not be violating the statute?

(Rp. 85, lines 1-25)

Q. I know you say that. My question to you is: If you were not acting in your official capacity,

then there would be no violations of this statute, would there?

A. I would assume not.

Q. You would assume not. Okay. Is that a no?

A. I'd give an explanation. It's not a yes-or -no question, sir.

Q. Well, isn't it a requirement that the officer be acting, that he be a law enforcement agent or officer acting in his official capacity?

A. Yes

Q. Okay. Because otherwise you're just like any other more than eighteen-year- old person engaged in a sex chat on the internet, right?

(Rp. 86, lines 11-25)

By Mr. Huff :

Q. So what's key here is whether or not you're acting in your official capacity, right?

A. Right.

(Rp. 87, lines 9-12)

This testimony clearly established the factual requirements needed for the defense in S.C. Code § 16-15-342(B), which was therefore charged to the jury.

On cross exam of another State's witness, the Chief of Police for the City of Westminster, Scott Bannister (Bannister), the issue of "Official Capacity" was revisited.

Testimony established that Bannister was Chief of Westminster in May of 2006, and Patterson's supervisor, when the alleged single chat between Patterson and the Appellant occurred. From the cross exam below, it is clear that the question of bond and oath being required of an officer, as well as being on-duty, are being connected with "Official Capacity" before the jury:

By Mr. Huff:

Q. Chief Bannister, can you swear under oath today what hours specifically that Mr. Patterson worked in May of 2006?

A . No, I cannot.

(Rp. 88, lines 6-9)

Q. Okay. So, as far as any claim to conducting an ICAC investigation through the Westminster Police Department, that totally relies upon Mr. Patterson's assertion that he did these?

A. That's correct.

Q. Or did them properly?

A. Correct.

Q. And I believe that every police officer at Westminster Police Department has to have a bond on them; is that correct? They have to take an oath, don't they?

A. Yes.

Q. And they have to be bonded, as well, don't they?

A. I'm sure they do.

Q. Okay. And that's the requirement that every police officer in the State of South Carolina has to have in order to lawfully have the power of arrest, is to be sworn under oath and to have a bond, correct?

A. Correct.

(Rp.89, lines 3-21)

After the resting of the State's case, the trial court requested that trial counsel to call the defense's first witness. As a result, trial counsel requested that the trial court preserve its motion for Directed Verdict, this request was granted by the trial court. (Rp. 120, lines 13-25). The first defense witness was, Jennifer Adams (Adams), the city clerk and treasurer for the City of Westminster. (Rp. 121, lines 15-24). Adams was asked if the City of Westminster or Officer Mark Patterson had a bond at the time Patterson worked as a police officer for the City of Westminster. Adams stated not to her knowledge, and further stated that if there was she would think she would know. (Rp. 122, lines 7-22). The full directed verdict motion was made by trial counsel and incorporated the failure of the State to prove "Official Capacity" due to the lack of evidence of a required bond and oath for Officer Patterson at the time of the alleged single chat in May 2006. The trial court denied the motion. (Rp. 137 lines 10-25, Rp. 138 lines 1-25, Rp. 139, line 1-25, Rp. 140 lines 1-25, Rp. 141 lines 1-25, Rp. 142 lines 1-25, Rp. 143 lines 1-25, Rp. 144 lines 11-14, and Rp. 145 14-21). Also the defense motion for directed verdict was again renewed after the defense's case and State's reply, both were denied by the trial court. (Rp.146, lines 1-21).

The trial court allowed the State reply (Rp. 147 , lines 15-20). During the reply of the State, only Patterson was called as a witness. Under cross exam by trial counsel Patterson admitted to not

personally having dealt with bond, and Patterson assumed bond was handled by the agency. Patterson admitted he could not personally say he did, in fact, have a bond at the time of the chat. These questions to Patterson were objected to by the State, but the objections were overruled by the trial court (Rp.148, lines 8-25; Rp. 149, line 1-11).

After the State's reply, the defense requested Sur Reply; this request was denied. However, the witness testimony was preserved for the record via proffer by one of Appellant's trial counsels. The witness to be called was The Honorable Beverly Whitfield (Clerk), the Clerk of Court for Oconee County, State of South Carolina. The Clerk would have testified that after a search of the county records where law enforcement bonds and oaths were held, that no such bond document was found for Patterson, or, for the City of Westminster and that as Clerk she was familiar with these types of bonds and had a number of such for deputy sheriffs. The trial court preserved this as a proffer, and declined to allow the testimony stating it would be confusing to the jury , and that the trial court did not believe it mattered if Patterson had a bond or not. The trial court was additionally requested by the defense to take judicial notice of the above facts, this request was denied. (Rp. 150, lines 8-25; Rp. 151 1-25; Rp. 152 lines 1-25, and Rp.153 lines 1-25).

The case then proceeded to closing argument. During the closing argument of Appellant 's trial counsel, it was argued to the jury that during the relevant times that Patterson was not in his "Official Capacity" due to his lack of a bond and oath. Trial counsel reviewed for the jury the testimony of both, Bannister, the Chief of Police for the City of Westminster, who had stated a bond and oath were required to be a law enforcement officer, and the testimony of, Adams, the Clerk for the City of Westminster, who had testified no such bond or oath was known to her. The State objected to these arguments and had its objection overruled by the trial court (Rp. 154, lines 10-25;Rp. 155, lines 1-19). The State never requested the jury to be charged on the issue of bond

requirements, and the full testimony of both Bannister and Adams was fully and properly before the jury when it began its deliberations.

The jury was given the following charges relevant to this argument: that the State must prove the defendant's guilt beyond a reasonable doubt and that the defendant was presumed innocent unless and until, the jury is satisfied that the defendant is guilty beyond a reasonable doubt (Rp. 157, lines 11-25; Rp. 158, lines 1-13). The trial court also spoke to the duties of the jury, that it is the sole finder of fact, that the only thing to base the jury's finding on are the evidence presented before them, the witness testimony, regardless of who called the witness, and exhibits; that they are to ignore anything the trial court may have done to give them any idea the trial court has a view of the facts in the case; and that the Constitution does not allow the trial court to have an opinion on the facts. Contradicting that instruction, the trial court then conclusively instructed the jury to find the element of age in the case, and that they were not to debate it (Rp. 159, lines 13-25; Rp. 160 lines 1-25; Rp. 156 lines 1-22).

Likewise, the trial court instructed the jury on "Official Capacity" and told them the State must prove this beyond a reasonable doubt. The trial court charged the jury that it is not a defense based on consent or otherwise, if the person being communicated with is a law enforcement officer or agent acting in their "Official Capacity". The trial court continues that charge and instructed the jury that if they find that the law enforcement officer of agent was not acting in his "Official Capacity" that it would be a defense to the communication occurring during that period (Rp. 161, lines 5-13). Additionally, the trial court charged the jury that consent is a defense to a prosecution under S.C. Code § 16-15-342, if the person reasonably believed to be under the age of eighteen, is sixteen years of age or older (Rp. 134, lines 21-25). It should be noted the State had no objections to these charges. Under Rule 20 (b), SCRCrimP any objections to these charges were waived.

The jury was sent out to begin deliberations at 4:28 PM and returned with a question at 4:56 PM (Rp. 162, lines 5-10). The question was hand written (Rp. 613 Court's Exhibit #10) and asked, "If an officer is not bonded, are they considered an official police officer?" The trial court's proposed response was to state to the jury that it had not charged the law of bond and that this was not a proper matter for the jury to consider. The State was in full agreement, however, Appellant's trial counsel objected. Trial counsel first asked that the trial court not give any charge and tell the jury they have heard the charges and evidence and that the jury should continue with deliberations. The trial court refused this request and again trial counsel objected to the proposed charge stating that it is a charge on an element of the crime. The jury was brought back in and the trial court charged the jury stating that he (the Judge) did not charge them on bond, and as such, it was not something they could consider in their deliberations. After the charge was given the trial court asked the defense if they had any further objections. Trial counsel reiterated that the testimony of Chief Bannister stated that officers need both an oath and bond to be police and that the charge was thus an improper charge on a matter of fact (Rp. 162, lines 11-25; Rp. 163 lines 1-25; Rp. 164 lines 1-25; Rp. 165, lines 12-23).

At 7:07 PM the jury again came back with a question which is hand written and (Rp. 613 Court's Exhibit #11). (Rp. 166, lines 2-5). This question by the jury requested to rehear the entire cross exam of both Officer Patterson and Police Chief Bannister. The trial court, after conferring with the respective counsel's, asked the jury to make the request more specific due to the volume of testimony. The jury specifically asked for: the requirements that an officer be bonded, was Patterson bonded, and "Official Capacity" (Rp. 614 Court's Exhibit #12). The trial court stated that the jury is obviously not necessarily listening to what he told them; to which the State agreed. Then, the trial court stated that what the jury has asked to hear is ***evidence*** (emphasis added) in the trial, so he can

not say 'no '. The State then asked the trial court to take Judicial Notice that Patterson had a bond, the trial court refused this request. (Rp. 166, lines 8-25; Rp. 167, lines 7-25; Rp.168, lines 16-25; Rp.169, lines 1-9; Rp. 170, lines 17-25). The trial court indicated it would recharge the jury as before on the issue of bond.

Trial Counsel objected to this stating that the jury had asked to listen to testimony, not be recharged on a proposition of law. The trial court denied the objection, and stated that if the jury is talking about bond they are not following the law, as it was not charged (Rp. 170, lines 23-25; Rp.171, lines 1-12). The jury was then charged again that bond was a proposition of law, not charged to them; that they are the finders of fact and the trial court is the finder of the law. They were further instructed that they are ***not to discuss the bond requirement*** and that it would be improper for the jury to do so (emphasis added). The evidence requested was read aloud to the jury by the trial court's law clerk, this consisted of the cross of Police Chief Bannister and parts of the cross of Officer Patterson (Rp.172, lines 3-15).

The jury returned to deliberations at 8:24 pm. The trial court acknowledged the previous objections by trial counsel to these charges (Rp. 173, lines 17-23). At 9:57 pm the jury returned a verdict of not guilty on one count of Criminal Solicitation of a Minor, and guilty on one count (Rp. 14) Indictment Number 2010-GS-37-364 (A) the latter being the subject of this appeal (Rp. 174, lines 4-25).

By its extraordinary interference into the domain of the jury, the trial court has effectively turned a jury trial into a bench trial. In critical ways, the trial court intervened in the fact finding function of the jury and, in effect, directed a verdict of guilty as to the age element of the offense charged and as to the defense based upon lack of "Official Capacity" removing that element and defense from the realm of the (jury) fact finder.

Appellant's right to be tried by a jury and not a judge is guaranteed under both the South Carolina Constitution and the United States Constitution. See S.C. Const. art. I, § 14, and S.C. Const. art. V § 21, and U.S. Constitution, Fifth, Sixth and Fourteenth Amendments. In instructing the jury to disregard legal evidence concerning the element of "Official capacity" the trial court invaded the jury's fact-finding province. The trial court did not recognize that there are no unimportant elements of a crime, and that the State must prove every element of a crime beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

Based upon the two questions asked by the jury it is clear that the issue of "Official Capacity", indisputably linked to bond and oath, were in the mind of the jury. Lasting some five and one half hours, the jury deliberations focused early on the issue of "Official Capacity", as their first question on the issue came after approximately thirty minutes of deliberating (Rp. 162, lines 5-10). The jury subsequently returned to rehear testimony on the issues of bond and "Official Capacity" (Rp. 166, lines 8-25) again evidencing a focus, and perhaps confusion of their role, in deciding this factual issue.

By directing the jury as it did, the trial court excluded the only evidence on the issue of "Official Capacity" due to bond and oath. It is also indisputable that this was done by the court after allowing the defense to argue the point thereby undermining the credibility of the Defense. The defense in fact argued the point over the State's objection, in its' closing, and during the State's reply in cross and prior to deliberations the evidence on bond and oath was never excluded, in full or in part. The trial court, as noted above, put before the jury as a fact question, was it a law enforcement officer..., acting in their "Official Capacity", and that if they were not it would be a defense as to that communication. Also the trial court told the jury to make these determinations based only on the record before it, which included the issues of bond and oath as it related to "Official Capacity".

The State never contested the jury charges given, nor did it ever request a charge on bond and oath, until the jury questions were received. When the questions were received, the State requested the court take judicial notice and instruct the jury, not that no bond was required, but ***remarkably that the jury should take as true that Patterson had a bond*** as previously cited above (a claim which all evidence in the case refutes). The trial court though technically denying the State's request, effectively granted it by telling the jury it could not consider the issue of bond and oath. The trial court simply prevented the jury from using legal evidence at trial which went directly to the element of "Official Capacity". The trial court's justification, and apparent belief, that the jury in their deliberations was failing to follow the law as charged, is simply incorrect. The law of bond and oath was never charged, but the defense of "Official Capacity" was and it was proper for the jury based on the legal record before it to use the evidence it was considering. In fact, by its statement on the facts, the court effectively removed from the province of the jury an issue which provided the Appellant a complete defense to the crime charged. Clearly, the jury asking multiple questions about bond, oath, and "Official Capacity" suggests that it spent a great deal of time deliberating on the defense and were probably leaning toward being hung or to not guilty.

Also, the acts of the trial court undercut the credibility of Appellant's trial counsel as he was allowed to fully argue the point on closing and during the State's reply, yet after the fact have the entire argument judicially charged to be ignored, after the start of deliberations. Additionally, as with the conclusive judicial notice, being told to ignore legal evidence in the trial (which the trial court allowed the jury to rehear), after being told they, the jury, were the sole finders of fact, no reasonable jury could not be confused as to what to do or what facts went to "Official Capacity."

The Judge made an impermissible factual determination violating the principle that it is forbidden from directing verdicts against criminal defendants on any element of a crime. See

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993) ("Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."). Beem v. McKune, 278 F.3d 1108 (10 Cir. 2002). Again, under S.C. Const. art. I, § 14 a trial court shall not charge juries in respect to matters of fact, but shall declare the law. State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), Limehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011). Appellant's rights were violated by the jury being charged to ignore legal evidence after it had started it deliberations on the element of "Official Capacity" in the crime of Criminal Solicitation of a Minor.

As set out, the errors create a structural fundamental defect in the case, and harmless error analysis should not be applied. Again, in Sullivan, Justice Scalia in writing for a unanimous Court states: "There is no object, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough."

The trial court in directing the jury to ignore the evidence on the issue of "Official Capacity" in essence directed a verdict for the State on the element. While denying the State's request for judicial notice Patterson had a bond and oath, it still in effect granted the outcome requested. The jury was simply not allowed to find the facts on the element of "Official Capacity" which is a compete defense to the crime. It completely undermined the argument of trial counsel during closing on the issue and was fundamental and structural in nature. Since the defense operates on each and every element of the crime Sullivan is fully implicated as there was no jury trial and it is automatically reversible.

Even if the court was to conduct a harmless error analysis on this constitutional error, the

result is still reversal. (See Chapman and Pagan). The jury was out over five hours. It had a question about the bond, oath and "Official Capacity" after only thirty minutes of deliberations. Then even after being instructed by the trial court to ignore this evidence, it requested to rehear the evidence again on "bond, oath and "Official Capacity"". The jury was again instructed by the Judge to ignore this evidence.

The jury's confusion had to be magnified because the trial court had allowed the jury to hear defense make specific argument on how bond and oath relate to "Official Capacity", over the objection of the State. The trial court had allowed the defense to go into these same issues during the State's reply and the court charged the jury that "Official Capacity" was a complete defense to the crime charged.

Since the questions asked by the jury can only be seen as favorable to the defense and not the State, and clearly go to its fact finding role in determining official capacity (a complete defense), it can not be found that the trial court error, as under the State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) definition, was the type of "Error [that was] harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." When it is abundantly clear the error in all likelihood not only contributed to the verdict, but likely determined it.

Lastly, taken together, the acts of the trial court in (1) taking conclusive judicial notice of a crime element, and (2) instructing the jury to ignore legal evidence on "Official capacity after the start of jury deliberations, had a cumulative effect in prejudicing the Appellant. Cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial State v. Johnson, 334 S.C. 78, 512 S.E.2d 705 (1999). If this court determines the described errors are "insignificant" independently, it must bear in mind

the cumulative effect which had the effect of preventing the Defendant from receiving a fair trial.

If the court does not believe the errors are fundamental, State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010) sets forth that the determination of whether an error (or in this case errors) are harmless depends upon their materiality and prejudicial character in relations to the entire case. Unlike the Wiley case, in which the Defendant confessed to the crime and the error involved tangential mention of an unrelated warrant, the errors herein presented are fundamental. This case resulted in a split verdict, and each and every element that was allowed to be contested was. The jury was out for over five hours in deliberations. There was never any travel alleged in the case, and when the record is viewed as a whole it cannot reasonably be said that the record outweighs the errors of the trial court, where elements of the crime were taken off the table for jury consideration. And, in light of the multiple questions of the jury, which were favorable to the defense in the case, and the speed at which the first question came, it is simply not supported in the record to claim that the errors could not reasonably have affected the result of the trial nor that no other rational conclusion" could have been reached. State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560 (Ct.App. 2010).

II. Did the trial court err in failing to dismiss the indictment due to vindictive prosecution?

The court erred in failing to dismiss due to prosecutorial vindictiveness, which was shown through direct evidence or at least clearly sufficient evidence to create a presumption of vindictiveness that was in turn not rebutted by the State.

In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. The motion to dismiss due to vindictive prosecution was presented to the court by Appellant's civil trial counsel, Mr. Brian McDaniel, Esquire (civil counsel). A written brief also accompanied the motion (Rp. 420, lines 3-7). Civil

counsel also incorporated by reference a previous hearing on this issue held June 27, 2010, and asked the trial court to incorporate and review this record in making its decision on the motion, to which the trial court agreed (Rp. 421, lines 18-25; Rp. 422, lines 1-7). The argument was also presented after the swearing of the jury (Rp. 78, lines 6-9). The trial court ruled on the vindictive prosecution, calling it quite frankly, a "close call", yet finding that actual malice or implied malice were not established. The trial court found the State's explanation was reasonable, and that based on the wide discretion given prosecutors a dismissal was not warranted. (Rp.130, lines 8-18).

The findings of the court were clearly erroneous for several reasons including that the trial court erroneously analyzed the motion as one for malicious prosecution and not properly prosecutorial vindictiveness. In doing so the wrong legal standard of malice was applied in making its legal ruling since no evidence of ***actual bad faith or malice is necessary*** to establish prosecutorial vindictiveness. Blackledge v. Perry, 417 U.S. 21, 28 (1974), United States v. Wilson, 262 F.3d 305 (4th Cir. 2001).

According to the cases, as herein briefed, the key issue to determine prosecutorial vindictiveness is whether the prosecution was the result of punishment due to the Appellant's exercising his constitutional and statutory rights to their fullest. The answer in this case is that, at a minimum, the facts present evidence from which an improper vindictive motive would have to be presumed. Id. and therefore the burden would be upon the State to refute with objective evidence or the court must dismiss. The State, in fact, with its own statements only enhances the claim of Appellant, and never overcome this presumption with objective evidence.

This claim of vindictive persecution, characterized by the trial court, as a "close call" (Rp.130, lines 9-10) springs from the Appellant being punished (prosecuted in Oconee) for legally pursuing his defense in a different case. A finding of vindictive prosecution is supported by a) the

testimony given by Appellant's Lead Trial Counsel on 27 June 2011 and at trial; b) statements on the record by the Lead State's Counsel at the 27 June 2011 hearing and at trial; c) the conduct of the investigation of this case; d) the length of time to indict the case; e) a letter of former Lead Counsel, David Stumbo; f) and on the record statements, of David Stumbo, Esquire; g) the fact that no incident report was completed for this case at any point; and h) comments made by the South Carolina Attorney General Henry McMaster while running for Governor for the State of South Carolina.

The present case against the Appellant is based on a single chat alleged to have occurred on May 4-5, 2006 (Rp. 16) (Indictment No.: 2010-GS-37-364A). However, the case was not presented for indictment by the State until nearly four years later on April 12, 2010, (Rp. 16 Indict. No. 2010-GS-37-364A) despite the State's awareness of the alleged chat in May 2006. Notably, Appellant was arrested for similar charges on May 12, 2006, for violation of the same statue, as in this matter. The facts overwhelming support that the State, at least initially, did not intend to prosecute related to the Oconee chat. During the bond hearing on the May 12, 2006, arrest, the then Lead Counsel for the State on the case, David Stumbo, Esquire (Stumbo) made known he was aware of the alleged Oconee chat (Rp. 736 Motion to Dismiss due to Vindictive Prosecution p. 3-4). However, in a letter of December 2006, Stumbo stated (Rp. 615 27 June 2011 hearing, Court Ex. #18) that no further forensic exam of the Appellant's computer would be conducted (Rp. 175, lines 4-25) (27 June 2011 Rp. 76 lines 3-21). Stumbo also in a hearing stated that "We never intended to charge, you know at that time in Oconee County" (Rp. 736 Motion to Dismiss due to Vindictive Prosecution p. 4, and Rp. 95, lines 4-7). None of these statements have ever been denied by the State. Furthermore, the investigating officer, Patterson, also never completed the required incident report for this case at any point (Rp 92, lines 17-25).

However, in February 2010, the State abruptly changed course on this chat and a forensic exam of Appellant's computer was conducted for this case after indictment in 2010, based on a new search warrant not obtained until late 2010. (Rp. 123, lines 21-25; Rp. 124, line 1-3; and Rp. 736 Mtn. to Dismiss due to Vindictive Prosecution p.6). To understand what caused this reversal of position the Appellant now directs the court to June 5, 2009, when Mark Patterson (Patterson) was arrested and fired from the Aiken County Sheriff's Office (Rp. 736 Mtn. to Dismiss due to Vindictive Prosecution p.5). Shortly after the firing Appellant's trial counsel attempted to obtain the records related to that firing for use in the ongoing Spartanburg case. The records were subpoenaed, but never turned over to Defendant's Trial Counsel.

However, the records, due to the efforts of Appellant's Trial Counsel, were preserved by order of the City Judge for the City of Burnettown (Rp. 736 Mtn. to Dismiss due to Vindictive Prosecution p.5). Subpoenas were also served for the production of time records for Detective McGraw of the Spartanburg Sheriff's Office (McGraw) (Rp. 236, lines 4-12).

It is Appellant's contention that his lawful attempt to obtain these potentially exculpatory records resulted in, and accounts for why, the State abruptly reversed course and decided in 2010 to prosecute the Appellant in Oconee. This contention is supported by, among other things, the statements of the State's own Lead Counsel.

During the 27 June 2011, hearing on this issue Appellant's civil counsel called, as a sworn witness, Appellant's Lead trial counsel (Huff) on several important issues. This was done without objection from the State (27 JUN 11 Rp. 61, lines 16-21). Huff testified that he had served subpoenas for the arrest records of Patterson, and for the time records of McGraw (27 JUN 11 Rp. 59, lines 4-12). Huff stated that although the State had indicated they would be helpful in getting the records that the State was, in fact, not helpful (27 JUN 11 Rp. 62, lines 4-8). Huff stated he also

served a subpoena on Patterson's criminal counsel for the records turned over to him by the City of Burnettown, which were public documents (27 JUN 11 Rp. 63, lines 21-25). Another, subpoena was served by Huff on McGraw for time records (27 JUN Rp. 62, lines 10-11). Huff stated he was doing this in order to find any evidence that may allow impeachment or lead to other evidence useful in the defense of the Appellant (27 JUN 11 Rp. 63, lines 12-16).

Huff then testified to two separate phone calls with the State's lead counsel (Wines). The first on February 16, 2010, and the second on February 18, 2010, (27 JUN Rp. 60, lines 21-22; and Rp. 64, lines 3-7). Huff testified that during the call on February 16, 2010, that Wines said that the subpoena to Patterson's criminal counsel was "Irritating to [her]" (27 JUN 11 Rp. 63, lines 9-10). Wines stated that Huff did not have subpoena power and she had "[instructed] the people not to turn things over" to both McGraw, and Patterson's criminal counsel. Wines stated again to Huff "You don't have subpoena power" (27 JUN 11 Rp. 62, lines 10-14). Huff testified he believed Wines to be irritated about the subpoenas also, but that under his understanding of the Criminal Rules of this state he did have such power (27 JUN 11 Rp. 62, lines 15-18). Huff further testified, that no Motion to Quash the subpoenas was made by the State, and that if they felt the subpoena to be improper that is what they should have done, not instruct people not to comply. (27 JUN 11 Rp. 65, lines 21-25).

Huff then testified that two days later on February 18, 2010, he had another phone conversation with Wines which revisited this disagreement over the subpoenaed Patterson records (27 JUN 11 Rp. 64, lines 18-23). Huff testified that, though Wines contended that the arrest records were irrelevant to the case, that he [Huff] continued to demand the records (27 JUN 11 Rp. 66, lines 1-3 and lines 18-19). Wines while frustrated during the called stated "Fine. We'll just indict him [Appellant] in Oconee" (27 JUN 11 Rp. 66, lines 2022). Huff testified that it was his impression that since the defense was pressing to get the Patterson arrest records the State was pushing back (27

JUN 11 Rp. 67, lines 4-11). Huff stated that he believed and understood from the conversation that the seeking of the Patterson arrest records was the reason for the indictment, (27 JUN 11 Rp. 67, lines 16-20). Huff told Wines "You know that's wrong, but you do what you've got to do, but you know that's wrong" referring to the abrupt decision to indict Appellant. (27 JUN 11 Rp. 66, lines 23-25). Huff testified that there had never been any indication of any such prosecution of Appellant in Oconee until the February 18, 2010, conversation with Wines, and he was shocked by it. (27 JUN 11 Rp. 68, lines 1-18).

Huff also testified regarding an article (27 JUN 11, Rp. 616 Court's Ex. #15) in The Aiken Standard dated May 11, 2010, which appeared just after the Spartanburg mistrial of February 2010. (27 JUN 11 Rp. 69, lines 19-25; Rp. 70, lines 1-2). In the article, The Honorable Henry McMaster (McMaster), while running for South Carolina Governor, and serving as South Carolina Attorney General states, "We know that he's [Appellant] guilty", "We don't charge somebody unless we know they are guilty and we know we have the evidence to prove their guilt", "This case is one [the present case before this court] that needs to be charged and tried." (27 JUN 11 Rp. 69, lines 19-25; Rp. 70 lines 1-25). These statements were made at a political event while McMaster was running for Governor. (27 JUN 11 Rp. 70, lines 3-7). Huff additionally testified regarding his belief that the statements made by the Attorney General in the case violated the rules of Ethical and Professional conduct for an ongoing criminal case.

Huff was released for cross exam, but the State declined to cross-examine Huff. (27 JUN 11 Rp. 71, lines 12-14 and Rp. 72, lines 5-6). The State presented no evidence but Wines responded to the motion contending, on the record, that her response on the phone call was because she felt the documents related to the Patterson firing were becoming too collateral of an issue and were making the Spartanburg case more difficult than it needed to be. (27 JUN 11 Rp. 73, lines 12-18). Wines

admitted to the phones calls as testified to by Huff. (27 JUN 11 Rp. 73, lines 4-5). Wines argued that the indictment was a change in trial strategy because it was becoming too collateral. (27 JUN 11 Rp. 74, lines 7-12). Wines admitted to being very irritated and that she probably did say he [Huff] did not have subpoena power. (27 JUN 11 Rp. 74, lines 17-21). Wines stated that the "Discovery process should have gone through [her], and that she was "Frustrated" that Judge Hayes had ordered a hearing in regard to the Patterson arrest records. (27 JUN Rp. 75, lines 6-7, and 11-14) Wines again at the trial in this case stated ""And I was upset because my understating about discovery is it should come through me." (Rp. 93, lines 4-6). In response to the Vindictive Prosecution motion during the November 2011, trial Wines responded again to the motion. Wines claims it was becoming too cumbersome in Spartanburg [to have the hearing on the records]. (Rp. 94, lines 11-21). Of great importance, after direct questioning by the Court about the telephone call with attorney Huff, Wines claims she does not remember the exact language, but does ultimately confirm Huff's recall of the conversation. (Rp. 101, line 14 - Rp. 102, line 4). All of these responses verify that the decision to prosecute was made based upon the Appellant seeking the records of Patterson, which he had a legal right to seek.

Incredibly, when addressing why the indictment came so many years after the alleged incident, Wines claimed that they delayed for four years because they were doing "a good deed" and did not want to pile on charges on the Defendant. (Rp. 95, lines 2-15). In discussion on the hearing the trial court found that clearly, at least at some point, it was not the intention of the Attorney General to indict the Oconee case, and Wines concedes the point. (Rp. 96, lines 16-18). The trial court further commented that avoiding a hearing would not justify re-indictment. (Rp. 95, lines 21-24). The trial court than asked the State for any other reasons for the indictments in Oconee. Wines then claims she had not been lead counsel before and may have done the cases in reverse order, had

she been. The trial court asks if it was Wines' decision to indict the Oconee case, and she responds 'yes' with advice and consent of her supervisors. The trial court noted that no change in administration occurred during the decision to indict. (Rp. 97, lines 5-25; Rp. 98 lines 1-25; Rp. 96 lines 1-25; Rp. 99 lines 1-25; Rp. 100 lines 1-16).

In responding to the trial court questions of how long the Spartanburg trial took, Wines states it took more than a week, before it ended in a mistrial and adds that since the Spartanburg trial they changed their indictments to cover more than one chat. (Rp. 97 line 25; Rp. 98, lines 1-5). The trial court also questioned the State with regard to Defendant's claim that vindictiveness is demonstrated in the State's change in indictments from seeking one in Spartanburg to subsequently bringing two in Oconee. Ms. Wines contended that there was confusion in the Spartanburg trial because of there being only one indictment so the Attorney General now does them separately, but not in all cases, depending on if they feel it is cumulative or not (Rp. 100, lines 18-25; Rp. 101, lines 1-13).

Appellant asserts that the above-described acts of the prosecutor and as fully set forth in the arguments and briefs submitted in this case constitute a violation of Appellant's Fifth Amendment Due Process Clause rights as well as his United States Constitutions rights afforded him by the Fourteenth Amendment and present a case of vindictive prosecution. U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001), Bordenkircher v. Hayes, 4343 U.S. 357, 89 St. 663 (1978), State v. Fletcher, 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996).

It is well established that a prosecutor violates the Due Process Clause of the Fifth Amendment by exacting a price for a defendant's exercise of a clearly established right or by punishing the defendant for doing what the law plainly entitles him to do. It is a due process violation to punish a person for exercising a protected statutory or constitutional right. *See* United

States v. Goodwin, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982); North Carolina v. Pearce, 395 U.S. 711, 724, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), Bordenkircher v. Hayes, 4343 U.S. 357, 89 St. 663 (1978), State v. Fletcher, 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996).

Because the prohibition on vindictive prosecution is intended not only to prevent against prosecutions actually motivated by animus, but also to prevent the chilling of the exercise of constitutional rights by defendants, ***no evidence of actual bad faith is necessary to establish a claim***. Blackledge v. Perry, 417 U.S. 21, 28 (1974) (emphasis added); In cases in which action detrimental to a defendant has been taken after the exercise of a legal right, the presumption of an improper vindictive motive has been applied only where a reasonable likelihood of vindictiveness existed. United States v. Goodwin, 457 U.S. 368 (1982). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the [State] to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' Bordenkircher.

Under U.S. v. Wilson, 262 F.3d 305 (4th Cir. 2001), for a claimant to be successful under a vindictive prosecution claim they must be able to show through objective evidence, that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus. *See* Goodwin, 457 U.S. at 380 n.12, 102 S.Ct. 2485. If the defendant is unable to prove an improper motive with direct evidence, he may still present ***evidence of circumstances from which an improper vindictive motive may be presumed***. (Wilson, 262 F.3d at 314 (4th Cir. 2001) (emphasis added).

Once a presumption of vindictiveness has arisen, the burden then shifts to the prosecution to show that "independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." United States v. Montoya, 45 F.3d 1286 (9th Cir. 1995)

(citing United States v. Hooton, 662 F.2d 628 (9th Cir. 1981)).

"[A]n indictment must be dismissed if there is a finding of actual vindictiveness, or if there is a presumption of vindictiveness that has not been rebutted by objective evidence (emphasis added) justifying the prosecutor's action" the indictment must be dismissed. United States v. Johnson, 171 F.3d 139, 140 (2d Cir. 1999) (per curiam).

In this case the elements are clearly met. Although, Wines states that "I don't believe frustration amounts to vindictive prosecution" (Rp. 441, lines 9-10) where that frustration results in additional prosecution of the Defendant, she is wrong. The presumption of a vindictive motive is met and the indictment must be dismissed unless objective evidence to rebut is offered. U.S. v. Johnson. The frustration by the State was clearly over the determined attempt by Huff to acquire relevant information (which the law plainly allows him to do) but which the State did not want to produce and so they indicted the Appellant in Oconee. The State reasons for this action do not dispel the appearance of vindictiveness nor justify the decision.

The State may also contend, as Wines did at the hearing, that Wines was not in charge of the July 2007 Spartanburg case, but this is also factually incorrect. Stumbo, at the time of the first trial, had left the Attorney General's Office and was an Assistant Solicitor with the County of Lexington, South Carolina, but had obtained special permission to continue with the prosecution. However, Megan Wines, Esq. had at the time already assumed Stumbo's ICAC duties at the Attorney General's and was a participant in the Spartanburg prosecution in 2007 (Rp. 736, Mtn. to Dismiss due to Vindictive Prosecution p.4, fn 1).

The charging choice of the State in the Oconee case also shows retaliation for Appellant getting a mistrial on the Spartanburg case, and the frustration over the seeking of the Patterson arrest evidence. Wines' claims that as a result of Spartanburg, the charging was changed, in some cases. In

Spartanburg, Appellant was alleged to have seventeen separate communications and was charged once. In Oconee, Appellant was alleged to have engaged in only two communications, but was charged separately for both. The only intervening event before Appellant's Oconee indictment is Patterson's arrest and the mistrial in Spartanburg. (Rp. 736, Mtn. to Dismiss due to Vindictive Prosecution p. 7). It should be noted that all the decisions come after the initial calling of the Spartanburg case in 2007. With the indictments in Oconee even further removed, coming after the mistrial in the second calling of the Spartanburg case on February 22, 2010. A change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than a pretrial decision. United States v. Goodwin, 457 U.S. 368 (1982).

The political environment must also be taken into account. Wines and her supervisors were also working for McMaster who was running for Governor for the State of South Carolina. In addition to the statements made by Wine and the timing of event, McMaster's statements to The Aiken Standard clearly show a hostility and improper bias behind these decisions.

"[A]n indictment must be dismissed if there is a finding of actual vindictiveness, or if there is a presumption of vindictiveness that has not been rebutted by objective evidence (emphasis added) justifying the prosecutor's action" the indictment must be dismissed. United States v. Johnson, 171 F.3d 139, 140 (2d Cir. 1999) (per curiam). A claim of change in trial strategy is not objective evidence, when unsupported by anything more and the State put no evidence or testimony on the record on this point. Particularly, when the statements made by Wines clearly show the change was due to the trial in Spartanburg, not being in the State's favor, as well as Wines' incorrect belief that defense does not have subpoena power, and her admitted frustration at the defense doing what is legally and properly could do, in seeking to obtain the Patterson information.

The State may argue that State v. Odom, 382 S.C. 144, 676 S.E. 2d 124 (2009), final on May

13, 2009, justifies the delay in the Oconee indictment but this is simply not compelling. First, the Odom decision is very limited in nature, and has nothing to do with the Oconee charges. Also there is over eight months between the final decision in Odom, and the indictments and well over a year, before the trial of this matter. Additionally, nothing prevented the State during all the time from May of 2006 till February of 2010 to seek indictments in Oconee, not even the Odom case. Lastly, the State did not abandon its efforts to enter the Oconee evidence in the Spartanburg trial until ordered to turn over the Patterson arrest information by the Spartanburg trial judge. (Rp. 18 State Complaint Paragraph 41-42 p.8).

III. Does the trial court err in failing to dismiss the charges due to S.C. Code § 16-15-342 being unconstitutional under the equal protection clauses of the South Carolina and United States Constitutions?

The Court has a limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). The motion to dismiss due to a violation of the equal protection clauses under both the South Carolina and United States Constitutions was presented by Brian McDaniel, Esquire Appellant's civil counsel. The motion was presented after the swearing of the jury on the record and by brief to the trial court (Rp. 390, lines 16-19 and Rp. 78, lines 6-9).

The court denied the State's attempt to stop the motion from being presented to the trial court. (Rp. 387, lines 23-25; Rp. 388 line 1 and Rp. 388, lines 7-10). The trial court later denied the equal protection motion due to finding a rational basis, for the treatment of the classes. The trial court in its view of the statutory scheme of S.C. Code §16-15-342 and the elements of CSC with a minor under the age of Sixteen, found that the age provisions in S.C. Code §16-15-342 match up with those in CSC with a minor under the age of Sixteen (Rp. 104, lines 5-13).

The Appellant asserts that under the Fourteenth Amendment of the United States

Constitution and Article 1, Section 3 of the South Carolina Constitution his rights to Equal Protection have been violated. Under the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution to violate the Defendant's rights to Equal Protection certain showings must be made. First, it must be shown that there exist similarly situated individuals. Next, one must show that there is disparate treatment under the law of the similarly situated individuals. If there is disparate treatment, the State must then have both a legitimate interest in treating the two individuals differently and must do so on a rational basis. Olson v. DHEC, 379 S.C. 57, 663 S.E.2d 497 (Ct.App. 2008), Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002).

Below are the excerpts from S.C. Code § 16-15-342 that are relevant to this argument:

(B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

(D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.

As can be seen from the wording of the statue it has a provision in S.C. Code § 16-15-342 (B) that gives an individual the complete defense of consent. It does so when "the person reasonably believed to be under the age of eighteen, is at least sixteen years old."

In S.C. Code § 16-15-342(D) this defense is taken away is if the "person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity."

These provisions create two classes of defendants. The first class, for sake of ease for the reader, will be referred to as the (Luke Skywalker Class), in which one believes they are communicating with someone under the age of eighteen, but are in fact communicating with someone sixteen or older. This person believed to be less than eighteen years of age happens not to be "a law enforcement agent or officer acting in an official capacity." Therefore, the Luke

Skywalker (Skywalker) class gets the consent benefit in S.C. Code § 16-15-342(B). This is true because the consent defense is available regardless of "Skywalker's" belief as to age of the person to which he is communicating. Skywalker's belief as to the age of the person is in fact not relevant to the defense.

In the second class, again for the reader's sake, will be referred to as the (Darth Vader Class). Darth Vader (Vader) also believes they are communicating to someone under eighteen. However, Vader is communicating with "a law enforcement agent or officer acting in an official capacity." Under S.C. Code § 16-15-342(D), Vader would not have the defense of consent.

Under review of S.C. Code § 16-15-342 it is clear that members of either the Skywalker class or Vader class would be similarly situated individuals. Both believe that the individual to whom they are communicating with is under eighteen. Both have the required specific intent in the communication of "persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen". Additionally, for simplicity sake both have word for word identical communications with such individual. There is simply no difference between the Skywalker Class and Vader Class individual.

However, the Skywalker Class is communicating with someone over sixteen who is not a law enforcement agent or officer acting in an official capacity while the Vader Class is communicating with a law enforcement agent or officer acting in an official capacity. The law under S.C. Code § 16-15-342(B) gives the member of the Skywalker Class a complete defense (simply put-it makes it not a crime), but denies it to the member of the Vader Class under S.C. Code § 16-15-342(D). The law is not treating the two similarly situated individuals remotely the same. One has

a full defense while the other has none based on consent. This is true even when the classes' intents, beliefs, and communications are identical. The Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution are clearly indicated, Olson v. DHEC, 379 S.C. 57, 663 S.E.2d 497 (Ct.App. 2008). It appears from the trial court's discussion and ruling denying the motion in the current case, that it found there to be two classes under this statute, and that the two classes were not treated the same, and analysis of the rational basis was needed (Rp. 104, lines 5-13), and discussed by the trial court in its' denial.

It is clear that the purpose of S.C. Code § 16-15-342 is to protect those under the age of sixteen from solicitation of both sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, (see also State v. Reid, 383 S.C. 285 at pg. 301, 670 S.E.2d 194 (Ct.App. 2009)). With this being the expressed goal of the statute how does the State justify treating members of the Skywalker Class and Vader Class so differently? The State must have both a legitimate interest in treating the two individuals differently and must do so on a rational basis. Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002). Both class members are engaged in the same activity showing the same criminal inclination. Both class members are equally dangerous to those under the age of sixteen. There is no legitimate interest served in treating the two classes differently.

Should it be found there is a legitimate interest to treat members of Skywalker Class and Vader Class differently the State must still show it is doing so on a rational basis, Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002). The State claims that a rational basis exists in the creation of the classes because it allows its adult law officers to conduct sting operations even though they are adults. This is not a rational basis however, because the statute is already specific in requiring the accused must have a "reasonable belief' as to the age of the person with which they are communicating without the need to create the distinct classes. The trial court also appears to have

found the argument that it was to aid the State in sting operations unconvincing (Rp. 397, lines 23-25), as the trial court does not find this in its ruling on the matter (Rp. 104, lines 5-13).

The consent provision as written in S.C. Code § 16-15-342(D) also allows a person to communicate with someone believed to be under eighteen, but who is in fact over sixteen about commission of a violent crime. So long as the individual being communicated with is not a "law enforcement agent or officer acting in an official capacity." this individual, even soliciting a violent crime as defined in Section 16-1-60, would have the absolute defense of consent. This supports no rational or legitimate State interest. But in the other instance when only communicating with an individual who is very unlikely to commit the solicited violent crime does the "Defendant" have no defense due to S.C. Code § 16-15-342(D).

No other State in the Union has such a provision in similar laws. This, however, was not always the case. The State of Louisiana had a virtually identical law to S.C. Code § 16-15-342. Below are its versions of S.C. Code § 16-15-342(B) and (D), under La. Rev. Stat. Ann. § 14:81.3 (words in italics are different from the South Carolina Law):

(C. (1) Consent is a defense to a prosecution brought pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.

(C. (3) It is not a defense to a prosecution brought pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement officer or peace officer acting in his official capacity.

An equal protection argument was made in State v. Hatton, 2007-2377 (La. 7/1/08; 985 So. 2d 709 (2008), and the trial court in that case dismissed. State v. Hatton was then appealed to the Supreme Court of Louisiana. In, State v. Hatton, the Court reversed the judgment, but on procedural grounds and did not reach the issue of the equal protection violation. On June 16, 2009 by Act Number 58 the Louisiana State Legislature revised the law in its entirety and removed completely La. Rev. Stat. Ann. § 14:81.3 (C. (1)) and (C. (3), eventually removing the consent provision,

thereby erasing the fact the law treated similarly situated individuals differently and making no distinction between the Vader and Skywalker classes.

In this matter, the offending provision cannot be severed by the court to save the statute. The court will attempt a constitutional interpretation or sever offending provisions if possible. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). In this matter it is not possible to remove either provision because removal of either one, or both, sections and what is defined as criminal conduct changes. It also cannot be presumed the legislature would have passed S.C. Code §16-15-342 without either provision Joytime Distribs. & Amuse. Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999). It should also be noted that the act which created the crime defined in S.C. Code § 16-15-342 (S.C. ACT No. 208 of 2004) has no severability clause. As in the State of Louisiana, the statue needs to be made constitutional by the elected legislature.

The trial court in ruling that its view of the statutory scheme of S.C. Code §16-15-342 and the elements of Criminal Sexual Conduct (CSC) with a minor under the age of Sixteen S.C. Code §16-3-655, found that the age provisions in S.C. Code §16-15-342 match up with those in CSC with a minor under the age of Sixteen (Rp. 104 lines 5-13). This is unavailing as to the finding of a rational basis for the unequal treatment of the Skywalker and Vader under S.C. Code §16-15-342. These two statutes are not part of the same statutory scheme, they are not even in the same chapters of the S.C. Code of Laws. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). The statutes cover widely different conduct. For instance, under CSC with a minor under the age of sixteen, mistake as to age or reasonable belief as to age, have no meaning as a defense to the charge. CSC with a minor under the age of Sixteen also deals with a sexually battery and not solicitation, and imposes absolute liability for sexual battery with someone under the age of sixteen when the defendant is eighteen or order.

Due to the specific consent language found in S.C. Code §16-15-342(B), use of CSC with a minor under the age of sixteen is illogical, especially in light of the fact that a person may reasonably believe they are communicating with someone under the age of sixteen, have the intent required under the statute, yet still have the consent defense, so long as, the person is in fact sixteen or older and not covered by S.C. Code §16-15-342(D). Use of CSC with a minor under the age of Sixteen to find a rational basis for the unequal treatment of the two classes under S.C. Code §16-15-342 is unjustified and highlights how illogical it is to have the two separate classes under S.C. Code §16-15-342 treated so differently when it is clear both S.C. Code §16-15-342 and S.C. Code §16-3-655 are apparently designed to protect minors, just in different ways.

At its best, the point of S.C. Code §16-15-342 seems to be to protect minors from those who would harm them. Yet the wording of the statute itself fails to do this in a rational way. By allowing the creation of the two classes Skywalker and Vader, the statute fails its purpose. It excuses one and punishes another for the same "conduct". In doing so, S.C. Code §16-15-342, treats identical classes of people under the law differently without basis. Skywalker in this case is as bad as Vader. Skywalker should not be allowed to have a full defense, while Vader, having committed the same act as Skywalker, is fully subject to loss of liberty and punishment under the statute. Both Skywalker and Vader are the same yet under S.C. Code § 16-15-342(B), Skywalker behavior is allowed, while Vader is punished for doing the exact same thing.

IV. Does S.C. Code § 16-15-342, as interpreted at trial and as being enforced, violate the free speech clauses of the South Carolina and United States Constitutions?

A. Is it protected speech and how to construe S.C. Code § 16-15-342 and S.C. Code § 16-15-375(5) together and the Application of the "Chilled Speech Doctrine

The Court has a limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). The motion to

dismiss due to violations of the free speech clauses of the South Carolina and United States Constitution was presented on the record by brief to the trial court.(Rp. 105, lines 24-25)(Rp. 725 Appellant's Brief in Support of Mtn. to Dismiss Due to Free Speech Violations). The argument was also presented after the swearing of the jury. (Rp. 78 lines 6-9). The brief submitted was new to the trial court, the trial court denied the motion without argument, summarily.(Rp. 129, lines 23-25 and Rp. 130, lines 1-2). The State attempted to prevent this argument from being presented to the trial court, which request the trial court denied. (Rp. 80 lines 3-5; Rp. 81 line 1; Rp. 82 lines 7-10.)

In this matter before the court, the Appellant asserts that his rights to Free Speech under both the United States and South Carolina Constitutions has been infringed upon. Additionally, under the case law of the United States Supreme Court the Appellant asserts the doctrine of chilled speech to additionally show violations of the Free Speech rights quarantined him under both the State and US Constitutions.

The court in determining if free speech rights have been infringed must first determine if the speech in question is protected. The issue of whether or not the court is dealing with speech is not in question. The speech in question is alleged to have occurred over the Internet in a Yahoo Internet chat designed to be restricted to adults. As to the particular speech in this case, a representative of Yahoo, Mr. LaChance, testified at trial in this matter that, at the time relevant to this case, that Yahoo had the policy of informing law enforcement of the fact the chat rooms were adult rooms; that Yahoo had removed the teen category and any associated chat rooms were also removed; that Yahoo ended users ability to create their own rooms; that Yahoo expected users to be truthful; that all users in chat rooms on Yahoo had to register as being eighteen years of age or older; and that this was all implemented in July of 2005. (Mr. LaChance as witness for the State) (Rp. 125, lines 18-20; Rp. 126 lines 10-16, Rp. 126, lines 21-25; Rp. 127 lines 1-25; Rp. 117 lines 1-4).

This speech would not be protected if it were a call for immediate criminal conduct. Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827 (1969). This would include solicitation to commit a crime, which is what is prohibited by S.C. Code § 16-15-342. It is that connection between the words and the action incited thereby which would not be protected. In order to fully enlighten the issues as to what speech would not be protected the statute in question must be construed to determine what conduct is prohibited.

Our court in State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008), has found most of the required elements of the crime defined in S.C. Code § 16-15-342. Under S.C. Code § 16-15-342 the actor must first be over the age of eighteen years as stated by the language "A person eighteen years of age or older". The second element in the offense would be to contact or communicate with while doing so knowingly. Knowingly has been defined as a person acting while aware of the result that is practically certain to follow from his conduct, whatever his desire may be as to that result. State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994). In other words you must know you are contacting or communicating.

The third element of S.C. Code § 16-15-342, deals with age of the person receiving the communication. It states that the knowing communication or contact must be with a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen. The fourth element that has been found in S.C. Code § 16-15-342 is separate from the communication itself and goes to the intent behind it as it states the communication must be for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity. The term sexual activity is defined by statute and will be discussed in detail shortly.

In order to fully understand the meaning of this element each term must be defined and given its plain meaning. Persuade means to cause somebody to adopt a certain position primarily

through the uses of reason. Induce means to cause something to arise. Entice is to offer some reward in order to get someone to stop resisting and do as you wish. And coerce is to cause someone to do something through pressure or necessity, by physical, moral or intellectual means. These terms in their collective would be used to describe the act of solicitation which is defined as asking with the desire to receive.

The second part of this element of S.C. Code § 16-15-342 deals with the goal of these tactics used to solicit. It tells you what the intent or purpose of the communication must be to get the receiver of the communication to engage or participate in a sexual activity. In essence the words engage and participate are synonyms describing the same concept of doing, while the terms intent and purpose are also words describing the same concept or goal. In all the final element of S.C. Code § 16-15-342 is the use of the solicitation tactics to get someone to do a specific goal. This is not a deviation from common law solicitation of a crime, which requires the use of the same tactics to get someone to commit a crime.

Solicitation at common law is an offense whereby "it is only necessary that the actor, with intent that another person commit a crime, have enticed, advised, invited, ordered, or otherwise encouraged that person to commit a crime State v. Bowers, 35 S.C. 262, 14 S.E. 488 (1892). This crime requires the actor to use the tactics prohibited under the statute with the purpose to get the receiver to engage or participate in a sexual activity. This is a specific goal and is separate from the act of using the prohibited tactics. The intent required is specific. The most common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but in addition it must be shown that there was an "intent to steal"

the property. Similarly, common law burglary requires a breaking and entry into the dwelling of another, but in addition to the mental state connected with these acts it must also be established that the defendant acted "with intent to commit a felony therein." A specific intent crime is a crime where a particular intent is a necessary element of the crime itself. Russell v. State, 373 So. 2d 97, 98 (Fla. Dist. Ct. App. 1979). In our case the act, as in the communication, must be knowingly done, while the specific intent is to solicit the receiver to engage in sexual activity.

The term sexual activity as used by S.C. Code § 16-15-342 is defined by reference to S.C. Code § 16-15-375(5). This section is a list in a much longer statutory scheme and in order to determine what the legislature means by the defined term one must look to the whole section and not take it out of context.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature. Howell v. U.S. Fid. & Guar. Ins. Co., 370 S.C. 505, 636 S.E.2d 626 (2006). However, statutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). Criminal statutes are to be construed strictly against the State and in favor of the defendant. State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002). The words in a statute must be given their plain and ordinary meaning.

There appear to be no South Carolina cases construing S.C. Code § 16-15-375(5) in whole or part. Yet when this statue is viewed in light of the entire statutory scheme it becomes clear that the definition of sexual activity concerned what could be seen, since the definitions apply to Section 16-15-385, disseminating or exhibiting to minors harmful material or performances; Section 16-15-387, employing a person under the age of eighteen years to appear in a state of sexually explicit nudity in a public place; Section 16-15-395, first degree sexual exploitation of a minor; Section 16-

15-405, second degree sexual exploitation of a minor; Section 16-15-410, third degree sexual exploitation of a minor; Section 16-15-415, promoting prostitution of a minor; and Section 16-15-425, participating in prostitution of a minor.

Also when looking at the referenced section in S.C. Code § 16-15-342 it refers to the terms "act" or "simulation". An act is to perform an action, while a simulation creates the appearance of being real, giving the experience of a real situation without risks. Both these terms refer to things that are real or at a minimum appear to be real and implies visual representations not written ones.

Besides the definitions of act and simulation, this section contains a definition of "material", which further illustrates what types of acts and simulations the legislators had in view. S.C. Code § 16-15-375 (2) in relevant part states:

"Material" means pictures, drawings, video recordings, films, digital electronic files, or other visual depictions or representations, but not material consisting entirely of written words.(Emphasis added).

Additionally, under S.C. Code § 16-15-385 materials consisting only of words cannot even be harmful to individuals under age eighteen. This sets a clear policy that words describing even the acts and simulations defined in 16-15-375(5) cannot be unlawful. In order to have criminal liability under S.C. Code § 16-15-342, one must be over the age of eighteen, knowingly communicate or contact someone under the age of eighteen, or reasonable believed to be under that age, must specifically use the tactics of persuading, inducing, enticing, or coercing with the specific purpose to get the receiver to engage in a sexual activity for which the Defendant must have the intent to see. This could be accomplished by the use of a web cam or pictures of the activity transmitted over the internet.

However, no such items are alleged to be used in this case, it is solely words. The section

concerning violent crimes, S.C. Code § 16-15-342(A) when referencing S.C. Code §16-1-60 (which includes criminal sexual conduct with minors), deals with attempts to have actual intercourse with a target, not S.C. Code § 16-15-375(5). Lastly, if the legislature had wanted mere words to be included it could have referenced S.C. Code § 16-15-305 (A)(1),(C)(1), which has a virtually identical list found in § 375(5) and includes words, but the legislature did not do this.

Now having construed the statute it is clear that words alone were not what the legislature wanted to criminalize, but words that lead to action. However, the State does not enforce it in that manner but instead in this case the State has chosen to conduct its' investigations in adult chat rooms and has declared (and prosecuted) that any discussion of a sexual nature is a crime regardless of the intent to carry out such act, (Rp. 131, lines 2-25; Rp. 132, lines 1-9) This enforcement ignores the intent required behind the words. Cyber-sex is not a crime under S.C. Code § 16-15-342 since it is fantasy and not a request to actually engage in sexual activity. It is also not listed as a specific act under S.C. Code § 16- 15-375(5) which defines the acts for which solicitation is a crime. However, when charging the jury the trial court simply read the S.C. Code § 16-15-375(5) full list without explanation (Rp. 133, lines 23-25; Rp. 134, lines 1-20). Per Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005), no additional argument was required by trial counsel on this issue.

The State to avoid the speech being protected would point to the virtual discussion of masturbation in the chat, which is one line, and the only request in the entire single chat (Rp. 602 State Ex. #2). However, this would also be protected in the first amendment since the underlying act is itself fully legal for anyone of any age to engage. In Wood v. United States, 498 A.2d 1140 (D.C. 1985), the defendant asserted his First Amendment right by claiming that the act prohibited "entirely lawful conduct". In Wood, it is stated that the First Amendment does not protect solicitation to commit an unlawful act. Upon review of South Carolina law, masturbation at any age

is an entirely lawful act. Since this is so, the speech related thereto is entitled to protection since it does not request illegal conduct. In fact, under Wood the only way to proscribe its solicitation would be for the State to show a substantial government interest and that it is narrowly tailored to serve that interest. The absolute prohibition on masturbation would prohibit health professions from discussion of the act as well as sex education providers. In fact, any discussion of masturbation with a minor, even by a parent, would be actionable under the State's interpretation of the statute. Also, any books promoting its use or that it was a healthy part of life, or web site saying the same would be prohibited, if directed to someone under 16, or to a law enforcement or agent acting in their "Official Capacity." This chills huge swaths of legitimate speech and would make the statute unconstitutional under the law, as it is not narrowly tailored. The State in fact openly takes the position that discussions of masturbation are punishable under this statute (Rp. 135, lines 12-15) Ashcroft v. Free Speech Coalition, 535 U.S. 234. 122 S.Ct. 1389 (2002).

B. Conduct of sting operations in Adult rooms with no emphasis on minor children. And application of the "Chilled Speech Doctrine".

Officer Mark Patterson (Patterson) testified that the room alleged to be the one in which the chat occurred with Appellant "Romance South Carolina", did not have an emphasis on minor children, and he acknowledged that people go to these rooms and lie about their ages, sex, and location. He admitted that role play can and does happen in "Romance South Carolina" and that people in the room talk about sex. (Rp. 106, lines 1-25; Rp. 107 lines 1-25; Rp. 108 lines 1-25). Patterson also testified that you had to represent yourself as at least eighteen to enter the room (Rp. 109 lines 6-11), and that before you enter you see the following "to enhance the user experience and compliance with out terms of service, Yahoo! is now available to users who are eighteen years of age or order." Patterson agreed this meant you must be eighteen to get into "Romance South Carolina" (Rp. 110, lines 1-9). Patterson also confirmed that the chat room is in the Adult folder for

the chat rooms listed. (Rp. 111, lines 19-23).

The State, by going into a known adult chat room for such investigation chills lawful speech under threat of prosecution, such as role-play, age-play, or cybersex. Adults have the right to pretend to be any age and engage in any such chat as they wish. The presence of investigations in such rooms chills huge swaths of protected speech and makes such speech less likely where few would risk the chance of prosecution for engaging in this protected speech. As such, under the "chill speech" doctrine the conduct of the investigation due to the State's interpretation of the statute is unconstitutional. Ashcroft v. Free Speech Coalition, 535 U.S. 234. 122 S.Ct. 1389 (2002).

CONCLUSION

Based on the forgoing arguments, this Court must reverse the conviction of Appellant and enter judgment of acquittal. As the State's failure to prove elements of the crime prevents retrial in this case. Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141 (1978). Additionally, the Court must on other grounds, as argued above, reverse the conviction of Appellant and remand the case back to the lower court, for entry of dismissal with prejudice.

Respectfully submitted,

December 27, 2013

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IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

Indictment No. 2010-GS-37-364A

The State.....Respondent,

v.

Anthony Clark Odom.....Appellant,

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have personally served the Appellant's Final Brief on The Office of the South Carolina Attorney General by delivering a copy of it on December 30, 2013, at the address of it's attorney of record, William Blitch, Jr., Esquire, P.O. Box 11549, Columbia, SC 29211, Rembert Dennis Building1000 Assembly Street, Room 519 Columbia, S.C. 29201.

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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of General Sessions

R. Lawton McIntosh, Circuit Court Judge

Indictment No. 2010-GS-37-364A

The State.....Respondent,

v.

Anthony Clark Odom.....Appellant,

PROOF OF SERVICE

I certify that I have personally served the Record on Appeal (one bound copy and one PDF Copy on disk) on The Office of the South Carolina Attorney General by delivering a copy of it on December 30, 2013, at the address of it's attorney of record, William Blitch, Jr., Esquire, P.O. Box 11549, Columbia, SC 29211, Rembert Dennis Building1000 Assembly Street, Room 519 Columbia, S.C. 29201.

December 30, 2013

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