STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Oconee County

Alexander S. Macaulay, Circuit Court Judge

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Opinion No. 2014-UP-160 (S.C. Ct. App. filed 4/2/2014)

07-GS-37-01081

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THE STATE,

RESPONDENT,

V.

CHARLES M. HARRIS,

PETITIONER

APPELLATE CASE NO. 2014-001236

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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# INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 8, 2014.

## QUESTION PRESENTED

Whether the Court of Appeals erred by ruling a directed verdict was properly denied on the charge of criminal solicitation of a minor where the talk of sex was vague, the state failed to offer the requisite evidence of petitioner's criminal intent to knowingly entice a person he believed be under eighteen to have sex, and the opinion imposes a strict liability standard that does not allow for abandonment of intent?

## STATEMENT OF THE CASE

Petitioner was indicted at the July 16, 2007 term of the Oconee County Grand Jury for the offense of criminal solicitation of a minor pursuant to S.C. Code § 16-15-342, and S.C. Code § 16-15-375(5). R. 189. His case was called to trial on August 13, 2012 before the Honorable Alexander S. Macaulay and a jury. R. Daniel Day represented petitioner. Jason Anders and Kyle Senn were the Assistant Attorney Generals. R. 1.

On August 14, 2012, the jury found petitioner guilty. R. 163, ll. 1-5.

Judge Macaulay sentenced petitioner to ten years imprisonment suspended, on five years probation with one year of home detention. R. 168, ll. 7-25.

The Court of Appeals affirmed in State v. Charles Monroe Harrris, 2014-UP-160 (April 2, 2014). App. 1-2. Petitioner filed for rehearing on April 17, 2014. App. 3-36. Rehearing was denied on May 8, 2014. App. 7.

This petition for a writ of certiorari follows.

## ARGUMENT

The Court of Appeals erred by ruling a directed verdict was properly denied on the charge of criminal solicitation of a minor where the talk of sex was vague, the state failed to offer the requisite evidence of petitioner's criminal intent to knowingly entice a person he believed be under eighteen to have sex, and the opinion imposes a strict liability standard that does not allow for abandonment of intent.

**Introduction - appellant's character**

The state's case consisted of one witness, Officer Casey Bowling. R. 2, l. 4 – 3, l. 9. In petitioner's defense, he offered the testimony of his ex-wife of twenty-nine years, Helena Dorothy Harris. At the time of trial he had been separated from Helena for the last five years. Their seventeen-year-old daughter, Sabrina, lived with petitioner. R. 81, l. 2 – 83, l. 14. Mrs. Harris said in their twenty-four years of marriage, and living together, she never feared nor saw any improper behavior by petitioner towards their children or any other girls. R. 83, l. 11 – 84, l. 7.

Sabrina testified petitioner never acted improperly around her, her sisters, or any other girls. R. 86, l. 21 – 91, l. 5. Sabrina testified that Officer Bowling told her when petitioner was arrested at their house that "he tried to set up a meeting to meet with my Dad and he refused to meet him, so he came and arrested him because he was talking to a minor on the computer." R. 89, l. 25 – 90, l. 3.

Candace Roberts was twenty-years-old. Her mother was dating petitioner. She along with her mother resided at petitioner's home from 2009 until March of 2012. Two of her sisters, fourteen and sixteen now, also lived with them. Petitioner never acted improperly towards any of them. R. 93, l. 17 – 97, l. 10.

Fifteen-year-old Samantha R. also testified that petitioner never acted improperly towards her, her sisters, or anyone else. R. 98, l. 19 – 101, l. 15. Carrie C., petitioner's daughter, Brittany R.

and Cynthia R. all testified consistently that petitioner never acted improperly towards girls or young women. R. 101, l. 12 – 112, l. 11.

**Officer Bowling**

Officer Bowling was a narcotics officer at the time of trial. He had previously worked internet cases in 2007, and he posed undercover on the computer as a thirteen-year-old girl, Amy. R. 2, l. 4 – 5, l. 8. Bowling said his investigation in this case lasted three days: March 14-17, 2007.

He testified that petitioner's screen name was "Mr. Lover love me," and that petitioner contacted him on Yahoo. Petitioner used a Yahoo terms of Service document, for documentary purposes, that stated all users agreed they were of age, and that they would only provide accurate information. R. 181. Bowling testified this talk on the internet ultimately led to petitioner asking him if he – pretending to be a she -- wanted to have sex. R. 8, l. 6 – 10, l. 8.

Bowling read from his copy of the conversation with Petitioner. It talked about the weather (rain), shopping, "hanging out" and other mundane matters. R. 12, l. 7 – 15, l. 7.

Petitioner allegedly told Bowling that some men were only out for sex and "don't let them do anything to you." R. 15, ll. 13-19. Bowling told petitioner - - as Amy - - that "she" would not let that happen. "She" lived in Anderson, and petitioner corresponded that he owned a "Z28 with T tops." R. 16, l. 12 – 22, l. 4.

Bowling further said, as Amy, at another point, that he told petitioner that "my mom and dad just left for work." He said petitioner told him that he wished "she" were older and the character posing as Amy said: "I don't care." Then petitioner said it was not right to not care. The Amy character countered: "Whatever that's stupid." R. 22, ll. 5-24. The Amy character repeatedly said: "You're sweet." Petitioner allegedly asked her if she had ever seen a male nude, to which the Amy character responded: "Once."

Petitioner once again allegedly told "her": "If you were older it would be alright." R. 26, l. 2 – 28, l. 20. Petitioner also said: "I don't want to go to jail" and the Amy character responded: "I'm no cop." At one point petitioner typed: "You want to have sex?" The Amy character said: "If you want. Will you be careful?" R. 29, l. 15 – 31, l. 10.

The Amy character then told petitioner she lived behind Hardee's on "Earl Street West Union." R. 31, ll. 10-21. Petitioner typed he was "coming now." However, it was undisputed, as Bowling admitted, that there was no evidence that petitioner traveled anywhere. Petitioner never showed up at "her" house. R. 35, ll. 20-24.

On cross-examination Bowling admitted there were deputies waiting to arrest petitioner at "Amy's" place, but he stated petitioner never showed up for the alleged encounter. R. 57, l. 23 – 58, l. 4. Bowling denied he ever told petitioner's father or brother that he may have made a mistake in bringing a case against petitioner on these facts. R. 64, l. 22 – 65, l. 6. Bowling admitted that when he interviewed petitioner, petitioner told him that "his intentions were just to teach her a lesson and that he was sorry for what he did and he had made a mistake." R. 41, ll. 13-23.

**Directed verdict motion**

Defense counsel moved for a directed verdict of acquittal. He argued the state had failed in its burden of showing petitioner knowingly intended to have sex with someone he should have known was under the age of eighteen. Petitioner took no action in furtherance of knowingly enticing someone he believed to be under eighteen-years-old to have sex. R. 74, l. 24 – 77, l. 8. Counsel argued that a mere mention of wanting to have sex in a chat room, where "[t]here's no follow-up, no prelude to it or anything else that would indicate that there was a fleshing out so to speak of all of this" was insufficient evidence to survive a directed verdict motion. R. 74, l. 24 – 76, l. 9.

The judge observed that the statute had not been held to be overbroad, and that appellant had asked "about sex," and that was sufficient evidence to survive a directed verdict motion. R. 77, l. 16- 78, l. 12. Defense counsel renewed his motion for a directed verdict, and the judge again noted that the asking if the whether the officer "would have sex with him" was sufficient under the statute. R. 120, ll. 13-24.

**Direct appeal**

On appeal appellant argued what he continues to argue before this Court. That in:

> State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) the Supreme Court held that no overt act needs to be done in furtherance of the charge of criminal solicitation of a minor. This case illustrates why that is such a disturbing holding and should be revisited.
>
> Officer Bowling admitted appellant never showed up at the scene and there was no evidence he "traveled." If appellant ever had the fleeting intention to solicit sex with a minor as envisioned under the statute, he abandoned it seemingly without leaving his computer screen. He never traveled. A fundamental tenet of our criminal justice system has been -- hopefully not in the past tense -- that we do not punish people for their thoughts. We only punish people for their evil deeds.
>
> Further, under a correct directed verdict analysis the state's circumstantial evidence is *not substantial circumstantial evidence* showing appellant had the criminal intention of enticing a person he reasonably believed to be under eighteen-years-old to have sex with him.
>
> Further, unlike State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012) and State v. Reid, 393 S.C. 325, 713 S.E.2d 274 (2011) appellant was not caught "red-handed."[1] Appellant offered the explanation, which came out during the state's case-in-chief, that he was trying to teach the young woman on the other side of the chat room "a lesson."

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[1] Appellant understands the distinction in the crime of attempted criminal sexual conduct with a minor.

Brief of appellant at 9.

**Court of Appeals**

The Court of Appeals decided this case without oral argument in a one-page string cite of parentheticals. App. 1-2. Petitioner argued on rehearing that the Court of Appeals had imposed a strict liability standard in this case. He argued:

> Any defendant charged with criminal solicitation [is strictly liable and guilty] if he discusses the possibility of having sexual relations with a person he believed to be under the age of eighteen even for a "fleeting moment." See Brief of Appellant at 9-10. Appellant would therefore be punished for his thoughts, and not his actions. That is anathema to our criminal system of justice.
>
> A defendant, here appellant, could have also quickly abandoned any plan to have sexual relations with the fictitious minor even if he very briefly discussed the possibility of having sex with that fictitious minor.
>
> Appellant understands that this Court is bound by State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) wherein the Supreme Court held that no overt act needs to be done in furtherance of the charge of criminal solicitation of a minor. Although that holding should respectfully be revisited by the Supreme Court a directed verdict nonetheless should have been granted under the highly unusual facts of this case.

Petition for rehearing at 1-2. App. 3-4.

**Discussion**

The opinion of the Court of Appeals discourages abandonment of momentary criminal intent. A person could inquire about a willingness to grant a sexual favor on a computer while under the influence, but not "voluntarily intoxicated." That person takes no action in furtherance of the mere words and quickly abandons any intent to pursue the idea after a modicum of reflection. Under the legal standard articulated in this case a person is guilty of criminal solicitation from the moment he or she asks the fictitious person about having sex. It is strict liability offense, and

abandonment of momentary intent is not possible. This Court should respectfully hold that violates the public policy of encouraging abandonment of any criminal intent. See State v. Cox, 278 N.W.2d 62 (Minn. 1979)(statute recognizing it is desirable to encourage the voluntary good faith withdrawal from the commission of a crime). People v. Forte, 269 Ill. 505, 110 N.E.47 (1915) (abandonment of being the aggressor in a crime that would be murder can revive the right of self-defense).

Further, the crime of solicitation of the non-existent minor should be deemed abandoned in this case as a matter of law. The mere mention of having sex on the computer did not provide substantial circumstantial evidence that appellant knowingly intended to entice a girl he reasonably knew was a minor to engage in sex, and the evidence established appellant abandoned any such thought. Cf. Weaver v. State, 116 Ga. 550, 42 S.E. 745 (1902)(whether the defendant repented or thought better of the attempted arson was a jury question where the police saw the defendant throw oil on a house). Moreover, abandonment, unlike withdrawal from a conspiracy, does not require communication of the withdrawal or abandonment since appellant was the sole person involved, and therefore none of the inherent dangers -- multiple co-conspirators being involved -- of a conspiracy were present. See State v. Woods, 189 S.C. 281, 288, 1 S.E.2d 190, 193 (1939).

In State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), this Court discussed its decisions in State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), and State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2011) as to the standard relied on by the trial judge in assessing circumstantial evidence. The Court repeated that under settled principles the trial court should grant a directed verdict when the evidence merely raises a suspicion of the defendant's guilt, and when relying on circumstantial evidence the standard is "substantial circumstantial evidence." See State v. Mitchell, 341 S.C. 406, 409, 535 S.C. 126, 127 (2000); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

In State v. Odems this Court noted that the traditional circumstantial evidence charge from State v. Edwards, 298 S.C. 272, 274-76, 379 S.E.2d 888, 889 (1989), illustrated the lack of evidence against Odems the state had provided. In State v. Edwards, the instruction stated that "every circumstance relied on by the state must be proven beyond a reasonable doubt; and . . . all the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis."

In State v. Logan, this Court stressed that both Bostick and Odems addressed the standard to be applied by the trial judge at the directed verdict stage, and not necessarily of a jury instruction that must be given on circumstantial evidence. Applying the directed verdict standard, it should be apparent that all of the circumstances here are not consistent with each other and they do not point exclusively to petitioner's guilt pursuant to the elements of S.C. Code § 16-15-342, and S.C. Code § 16-15-375(5). Petitioner recognizes that in State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) this Court held that no overt act needs to be done in furtherance of the charge of criminal solicitation of a minor. Again, this case illustrates why that is such a disturbing holding, and respectfully it should be revisited.

Officer Bowling admitted petitioner never showed up at the scene and there was no evidence he "traveled." Any fleeting intention appellant had to solicit sex with a minor as envisioned under the statute was abandoned seemingly without Petitioner leaving his computer screen. A fundamental tenet of our criminal justice system has been that we do not punish people for their thoughts, but for their evil deeds.

The state's case did not provide circumstantial evidence that was *substantial circumstantial evidence* showing petitioner had the criminal intention of enticing a person he reasonably believed to be under eighteen-years-old to have sex with him.

In State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012), the defendant sent two photographs of his penis to the purported fourteen-year-old. He arranged to meet her on a secluded road, and he drove there to meet her. He had alcohol, DVD's, condoms, and enhancement creams with him. The Court found the defendant's conduct in Green was clearly within the solicitation statute so that he did not have standing to challenge the constitutionality of the statute on vagueness grounds.

State v. Reid, 393 S.C. 325, 713 S.E.2d 274 (2011), involved a charge of second-degree attempted criminal sexual conduct with a minor.[2] In a similar fashion as the defendant in Green, Reid started out in the internet chat room, and Reid traveled to meet the fictitious fourteen-year-old.

Here, conversely, Petitioner offered the explanation, which came out during the state's case-in-chief, that he was trying to teach the young woman on the other side of the chat room "a lesson." The state simply did not provide the requisite direct or substantial circumstantial evidence to show petitioner reasonably knew he was attempting to entice someone he believed to be thirteen-year-old (under eighteen) to have sex with him and that he had the criminal intent to commit that crime. Defense counsel correctly argued the mere mention of having sex was not enough, and that lack of follow through proved that fact. The opinion of the Court of Appeals improperly makes criminal solicitation a strict liability offense. In other words if a defendant mentions having sex with the fictitious minor, and then stated he was "just kidding" it would not matter because the solicitation crime was completed. This Court should, respectfully, recognize that where, as here, the evidence shows the defendant abandoned any criminal intent -- if it ever existed – that he is entitled to a directed verdict because the state has failed to present substantial circumstantial evidence of his guilt. State v. Bostick; State v. Odems.

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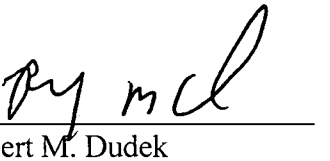
[2] Petitioner understands the distinction in the crime of attempted criminal sexual conduct with a minor.

## CONCLUSION

The petition for writ of certiorari should be granted to allow full briefing on this significant issue.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 7th day of August, 2014.

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THE STATE,

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Deborah R.J. Shupe, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and a true copy of the petition for writ of certiorari has been served on the S.C. Court of Appeals this 7th day of August, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of August, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.