

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

CASE NO: 2016-001831

RECEIVED

DEC 27 2018

SC Court of Appeals

The State of South Carolina, Respondent.

v.

Timothy Alan Oertel..... Appellant.

PETITION FOR REHEARING

James W. Boyd
1544 Ebenezer Road
Post Office Box 36425
Rock Hill, SC 29732
(803) 328-2600
Attorney for Petitioner

The Petitioner petitions the Court for a rehearing in this case on the following grounds:

1. THE LOWER COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE INDICTMENTS OF ATTEMPTED DISSEMINATION OF OBSCENE MATERIAL TO A PERSON UNDER THE AGE OF EIGHTEEN.

The Court cites the case of *State v. Thompkins*, 263 S.C. 472, 484, 211; S.E.2d 549, 554 (1975) for proposition that, "One may be found to knowingly violate the statute when it appears that he shuts his eyes to avoid knowing what would otherwise be obvious." *Thompkins* was a case in which knowing the contents of obscene material could have been obtained by reasonable inquiry. The Court also cited *Feldman v. S.C. Tax Comm'n*, 203 S.C. 49, 56, 26 S.E.2d 22, 25 (1943) which held that the term "knowingly" included situations where a person "had such information from an individual's appearance or otherwise, as would lead a prudent man to believe that the individual was a minor, and if followed by inquiry must bring knowledge of that fact home to him. The Appellant in the case was not charged with the substantive offense but was charged with the attempt to commit the offense. The cases cited by the Court, were cases in which the defendant was accused of committing a substantive offense. In order to be guilty of attempt, the Appellant had to have the specific intent to disseminate obscene material to a person over the age of eighteen (18). In the *Feldman* case a store clerk had actually sold an individual under the age of twenty-one (21) years alcohol. The ruling in *Feldman* does not apply to the facts of the present case. An analogy using the sale of alcohol to a minor, would be a store clerk who sells alcohol to an individual who was actually over the age of twenty-one (21) years but because his appearance appeared to be under twenty-one years of age. Although the clerk should have thought the

individual was under the age of twenty-one (21) years and should have inquired further of the age no crime was committed because the person was actually over the age of twenty-one (21) years. In the presence case the Appellant actually disseminated obscene material to a person over the age of eighteen (18). Although one could argued that a prudent man would believe that the individual was a minor, no crime is committed unless the Appellant actually believed that the individual that he thought was Emmy Robinson was a minor. There was no specific intent in this case.

2. THE COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF CRIMINAL SOLICITATION OF A MINOR.

S.C. Code Ann. § 16-15-342(A) (2015), provides two situations in which a person may be guilty of criminal solicitation of a minor. The person is guilty if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen. In this situation the victim must actually be under the age of eighteen. The second way a person can be guilty of criminal solicitation is if a defendant contacts a person reasonably believed to be under the age of eighteen. This scenario requires the defendant to actually reasonably believe that the individual is under the age of eighteen (18). The *Thompkins* and *Feldman* cases do not apply to this case. In *Thompkins* the material actually did depict minors and in *Feldman* the individual was actually a minor. S.C. Code Ann. § 16-15-342(A) requires the defendant to actually believe that he was contacting a minor.

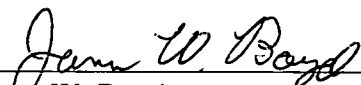
3. THE COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF ATTEMPTED SEXUAL EXPLOTATION OF A MINOR FIRST DEGREE.

South Carolina Code of Laws §16-15-395(A)(1) (2015) requires that the defendant encourage one to appear in a state of sexually explicit nudity for sexual

stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity. There was no evidence that the Appellant was producing or had the intent to produce material. Therefore, a directed verdict of not guilty should have been granted on the charge of sexual exploitation of a minor first degree.

Conclusion

All of the above reasons the Petitioner requests that the Court grant this Petition for Rehearing.



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December 21, 2018

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APPEAL FROM RICHLAND COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

CASE NO: 2016-001831

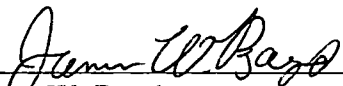
The State of South Carolina, Respondent.

v.

Timothy Alan Oertel..... Appellant.

PROOF OF SERVICE

I, James W. Boyd, certify that I served on December 21, 2018, the within
Petition for Rehearing of Appellant on Respondent by depositing a copies of the
same in the United States mail, postage prepaid, addressed to South Carolina
Attorney General's Office, Rembert C. Dennis Building, PO BOX 11549,
Columbia, SC 29211-1549. I further certify that all parties required by Rule 208
to be served have been served.


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December 21, 2018

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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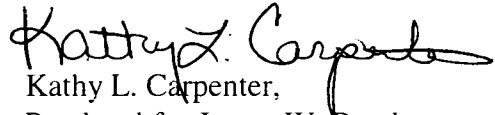
Re: State v. Timothy Alan Oertel
CASE NO; 2016-001831

Dear Ms. Kitchings:

Enclosed you will find a Petition for Rehearing and Proof of Service for the above title and matter. Thank you for your attention to this matter.

With kind regards, I am

Sincerely,


Kathy L. Carpenter,
Paralegal for James W. Boyd
Attorney for Appellant

JWB/klc

Enclosures

cc: South Carolina Attorney General's Office