

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY, S.C. SUPREME COURT  
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

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CASE NO: 2016-001831

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The State of South Carolina, ..... Respondent.

v.

Timothy Alan Oertel..... PETITIONER

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PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

## CERTIFICATE OF COUNSEL

The Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 17, 2019.

### QUESTIONS PRESENTED FOR REVIEW

- I. **DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF ATTEMPTED DISSEMINATION OF OBSCENE MATERIAL TO A PERSON UNDER THE AGE OF EIGHTEEN?**
- II. **DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF CRIMINAL SOLICITATION OF A MINOR?**
- III. **DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF ATTEMPTED SEXUAL EXPLOTATION OF A MINOR FIRST DEGREE?**

### STATEMENT OF THE CASE

The Petitioner was indicted on Indictments 2016-GS-40-02104; 2016-GS-40-02105; 2016-GS-40-02106; and 2016-GS-40-02107 with attempted dissemination of obscene material to a person under the age of eighteen. The Petitioner was also indicted on Indictment 2016-GS-40-02108 with criminal solicitation of a minor. The Petitioner was also indicted in Indictment 2016-GS-40-02110 with attempted sexual exploitation of a minor first degree. On August 31, 2016, the case was tried by jury before the Honorable R. Knox McMahon. The Petitioner was found guilty an Indictment 2016-GS-40-02105; Indictment 2016-GS-40-02106; Indictment 2016-GS-40-02107 and Indictment 2016-GS-40-2104 and sentenced to six (6) years concurrently. The Petitioner was also sentenced on Indictment 2016-GS-40-02108 to six (6) years concurrently with the other indictments. On Indictment 2016-GS-40-02109 the Petitioner was sentenced to three (3) years consecutive to all other sentences imposed. On September 2, 2016 the Petitioner filed Notice of Appeal.

## FACTS

Sara Parry Hood, a Deputy with the Richland County Sheriff's Department, was a School Resource Officer at Heathwood Hall, which is a private school located in Richland County, South Carolina at the time of the incident.<sup>1</sup> Deputy Hood set up a Facebook profile using a fictitious individual named Emmy Robinson.<sup>2</sup> She put in the profile that Emmy Robinson "went to A. C. Flora High School", she lives in Columbia, SC, and that she was from Florence SC. Under the above information, she stated she was born on April 15, 2000. Officer Hood found a photograph of a women in a blue bikini and used that photograph to make a profile picture of the fictitious Emmy Robinson.<sup>3</sup> A search of the internet showed that the individual was Lena Borchitnic, who identified herself as a happy Polish Mom whose date of birth was June 11, 1994.<sup>4</sup> On August 28, 2015, Deputy Hood received a message from the Appellant that stated, "Hello their". Deputy Hood responded a few days later stating, "Hey, How are you".<sup>5</sup> The conversation proceeded as follows: Appellant stated, "I'm great and yourself?" Deputy Hood stated, "Doing well, enjoying this nice weather." Appellant stated, "Yep I hear you sweetie. So where are you from?" Deputy Hood stated, "From Columbia the North east side, what about you." Appellant stated, "Rock Hill, nice not too far. So do u have any more pics?"<sup>6</sup> At that point the Appellant sent Deputy Hood a photograph of himself from the chest up.<sup>7</sup> Deputy Hood stated, "I just posted some, yea rock hill is not too far." Appellant stated, "Where at? I just checked and didn't find any, like pics of your beautiful face. Yea, it's about an hour away." Deputy Hood responded, "Hmm, I wonder what happened. By the way, I like your

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<sup>1</sup> A. - P. 25, lines 20-25.

<sup>2</sup> A. - P. 28, lines 3-13

<sup>3</sup> A. - P. 58, lines 6-14.

<sup>4</sup> A. - P. 61, lines 6-11.

<sup>5</sup> A. - P. 35, lines 8-10.

<sup>6</sup> A. - P. 170, State's Exhibit 1, p. 1.

<sup>7</sup> A. - P. 171, State's Exhibit 1, p. 2.

picture. Oh, an hour is an easy drive.”<sup>8</sup> The next communication was on September 4, 2015 at 11:42am when the Appellant asked Deputy Hood, “Yep, you want to see something hot.”<sup>9</sup> Deputy Hood answered in the affirmative. The Appellant then sent Deputy Hood a nude picture of himself in the shower. Appellant stated, “What do you think?” Officer Hood stated, “I like! You look good.” Appellant stated “Thanks baby. U like my dick?” Deputy Hood Stated, “Yes, it looks very nice”.<sup>10</sup> The following conversation then ensued. Appellant stated, “Yep, I love my dick. The Appellant then sent three (3) photographs of his penis and said, Hope u like.”<sup>11</sup> Deputy Hood stated. “Ohhh wow. Yes sure do.” Appellant stated, “Maybe one day he will be all yours, so I can see what u look like.” Deputy Hood stated, “I just have to get some pictures but Yea and I hope so.”<sup>12</sup> The Appellant sent no more photographs. After that point the conversation continued as follows: Appellant stated, “What would u do if I was with you naked in front of u right now.” Deputy Hood stated, “Probably start kissing you, after that i’m not sure, not really experienced. Appellant stated, “Lol. I love to kiss by the way.” Deputy Hood stated, “Good, bc I’m good at that lol.” Appellant stated. “Well maybe this weekend we can hang out. Well I will be the judge of that.” Officer Hood than sent a smiley face with a wink. Appellant then wrote, “So what do u like to do to my dick baby.” Deputy Hood stated, “hmm probably kiss around it. Again I’m not experienced I guess I would need help.” Appellant stated, “Lol Well you know what I would do if you were in front of me naked?” Deputy Hood stated, “What would you do?” Appellant stated, “ I would push your naked body against mine as you feel my rock hard dick slide between your legs I slam your agency the wall holding your head kissing

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<sup>8</sup> A. - P. 37, lines 8-21.

<sup>9</sup> A. - P. 39, lines 15-17.

<sup>10</sup>A. - P. 171, State’s Exhibit 1, p. 2.

<sup>11</sup>A. - P. 171, State’s Exhibit 1, p. 2.

<sup>12</sup>A. - P. 172, State’s Exhibit 1, p. 3.

those soft wet lips. I run my hands down your body to your legs then to your beautiful butt to grab them and pulls you onto me. Something like that.” Deputy Hood stated, “Oh wow. What do you do?” Appellant stated, “I’m an engineer and u?”<sup>13</sup> Officer Hood stated, “I’m still in school.”<sup>14</sup> Appellant stated, “So what do you think if I had you right now? Cool, where at.” Deputy Hood answered, “A.C. Flora High School.” Appellant stated, Cool, How old are you?” Deputy Hood stated, “15 but I will be 16 in February. How old are you?”<sup>15</sup> Appellant stated, “Really, I should have never sent u pics of me naked. I’m 26. Then y are you using someone else’s pic.” Deputy Hood stated, “I’m not that’s me, people tell me I look older but I’m just 15”. Appellant stated, “Really if that’s u I wanna see more pics”. Deputy Hood stated, “I will have to wait till I get home from school but I will post some”. Appellant stated, “Sure. That works. But seeing u have seen me naked I wanna see u naked.” Deputy Hood stated, “Ok.”<sup>16</sup>

After he was arrested, the Appellant gave a written statement dated September 3, 2015, in which he stated he did not believe that Emmy Robinson was under age 18 when he sent her the photographs of himself.<sup>17</sup> Appellant was found guilty by a Jury of 4 counts of attempting to disseminate obscene material to a minor, one count of solicitation of a minor and one count of sexual exploitation of a minor in the first degree.

After he was arrested, the Petitioner gave a written statement dated September 3, 2015, in which he stated he did not believe that Emmy Robinson was under age 18 when he sent her the photographs of himself. Petitioner was found guilty by a Jury of four counts of attempting to disseminate obscene material to a minor, one count of solicitation of a minor and one count of sexual exploitation of a minor in the first degree.

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<sup>13</sup> A. - P. 173, State’s Exhibit 1, p. 4.

<sup>14</sup> A. - P. 48, line 17.

<sup>15</sup> A. - P. 48, line 17 – P. 47, line 11

<sup>16</sup> A. - P. 174, State’s Exhibit 1, Page 5.

<sup>17</sup> A. - P. 180, State’s Exhibit 7.

## ARGUMENTS

### **I. DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF ATTEMPTED DISSEMINATION OF OBSCENE MATERIAL TO A PERSON UNDER THE AGE OF EIGHTEEN.**

An element of attempt is the mental state of the accused. There must be the specific intent to engage in the conduct or to receive the result prescribed of the substantive criminal offense. State v. Ready, 96 S.E.2d 287, 110 S.C. 177 (1918)

South Carolina Code of Laws §16-15-345 requires that one has to knowingly disseminate to a person under the age of eighteen years, material which he knows or reasonably should know to be obscene. To attempt to commit a violation of §16-15-345, the Petitioner would have to believe that he was disseminating the material to a person under eighteen years of age at the time he committed the act.

The Petitioner did not disseminate obscene material to a person under the age of eighteen (18). The Petitioner disseminated obscene material to a person over the age of eighteen (18) who was holding herself out to be under the age of eighteen (18). The State's position is that the Petitioner should have thought that the person who was not under the age of eighteen (18) really was under the age of eighteen (18). The Brief of the Respondent states that the Petitioner knew or should have known that, "Emmy Robinson" was under the age of eighteen (18). "Should have known" does not satisfy the element of the intent in an attempt case. There must be the specific intent to engage in the conduct or to receive the result prescribed of the substantive criminal offense. State v. Ready, 96 S.E.2d 287, 110 S.C. 177 (1918) In order to convict the Petitioner of attempted dissemination of obscene material to a person under the age of eighteen (18), the State is required to prove that the Petitioner thought that the person to whom he disseminated the obscene material to was under the age of eighteen (18).

One cannot attempt to commit an act that cannot be committed unless one thinks he is committing the actual act. The Petitioner could not have attempted to disseminate obscene material to a minor if he thought the minor was over the age of eighteen (18) and the person was actually over the age of eighteen. The present case differs from the case of Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943). In the Feldman case the Petitioner actually sold alcoholic beverages to a minor. Feldman was not an attempt case. In Feldman the Court held that the requirement of knowingly was satisfied when the Petitioner has information from appearance or otherwise it would led a prudent man to believe that he was dealing with a minor. If the Petitioner had actually disseminated obscene material to a minor then the element may be satisfied. The element of intent is not present in this case.

The obscene material that the Petitioner sent to the individual alleged to be Emmy Robinson, were nude pictures of himself.<sup>18</sup> There is no evidence that the Petitioner knew that Emmy Robinson claimed to have been under the age of eighteen at the time the Petitioner sent the material. The State relies on Emmy Robinson's birth date on her profile page which would show that she was fifteen.<sup>19</sup> However, there is no evidence that the Petitioner read or paid any attention to the birth date. All the evidence shows that the Petitioner did not think that Emmy Robinson was under the age of eighteen. After the Petitioner sent the material, Deputy Hood asked the Petitioner, "What do you do?" Petitioner answered, "I am an engineer and you?" At that point Deputy Hood stated, "I am still in school." The Petitioner answered, "So what do you think if I had you right now. Cool, where at?"<sup>20</sup> At that point Officer Hood answered, "A. C.

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<sup>18</sup> A. - P. 170, State's Exhibit 1.

<sup>19</sup> A. - P. 170, State's Exhibit 1

<sup>20</sup> A. - P. 48, line 17 - P. 49, line 11 and A. - P. 170, State's Exhibit 1

Flora High School". The Petitioner then asked for her age.<sup>21</sup> If the Petitioner had already known her age he would not have been asking the question at that point. Officer Hood then answers that she is fifteen. The Petitioner was obviously surprised by her age. He answered, "Really, I should have never sent you pictures of me naked, I'm 26." Then he stated, "Then y are you using someone else's pic?"<sup>22</sup> This conversation shows that the Petitioner did not know how old she was and was in fact surprised at her age. The Petitioner accused the Deputy of using someone else's photograph because he did not believe the picture depicted someone who was fifteen years old. After that point, no other material was sent to Deputy Hood.<sup>23</sup> The act was committed at the time that the Petitioner sent the material. If no crime was committed at that point it cannot later be turned into an illegal act by information Petitioner obtained after the act was committed.

During Petitioner's questioning by Officers after his arrest he was asked, "What did arouse you about Emmy Robinson?" Petitioner answered, "Just that she was cute and adorable and that she was in my age group between 20 and 26". When he was asked if he was guilty of soliciting sex from Emmy Robinson he stated quote, "I guess so, I wasn't meaning to, I did not know she was so young". He was asked if any reasonable person would know if Emmy Robinson was fifteen years of age because her age of birth was clearly posted on her profile page along with the name of the school Emmy Robinson attended. The Petitioner answered, "I honestly did not check that, I just checked out her pictures."<sup>24</sup> It should be noted that Emmy Robinson's Facebook page did not state that she was attending A. C. Flora but that she "went to

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<sup>21</sup> A., P. 48, line 17 – P. 49, line 11 and A. - P. 170, State's Exhibit 1

<sup>22</sup> A., P. 174, State's Exhibit 1.

<sup>23</sup> A., P. 174, State's Exhibit 1.

<sup>24</sup> A., P. 183, State's Exhibit 7.

A. C. Flora”. The Facebook profile used the past tense which would indicate to anyone that she was no longer a student at A. C. Flora High School.

The State in its opening statement concedes that the Petitioner did not realize the Emmy Robinson was originally fifteen years old at the time he committed the acts. The State’s Counsel stated, “When he decides to finally ask and confirm her age, he finally realizes that he has done something wrong”.<sup>25</sup> The State’s Counsel further states, “He made a mistake. He said, “I shouldn’t have done that.”<sup>26</sup>

There is no evidence that the Petitioner read or paid attention to the date of birth on the alleged Emmy Robinson’s Facebook page. All of the evidence shows that the Petitioner did not know her alleged age at the time he sent the material. The essential element of intent is missing. The Petitioner should have been granted a directed verdict on the counts of attempted dissemination of obscene material to a person under the age of eighteen.

**II. DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF CRIMINAL SOLICITATION OF A MINOR?**

The question in this case is what conduct is required to constitute criminal solicitation of a minor.

In order to be guilty of South Carolina Code of Laws §16-15-375, the Petitioner must have contacted and communicated with the person he reasonably believed to be under the age of eighteen for the purpose or intent of persuading, inducing, enticing or coercing the person to engage or participate in sexual activity as defined in §16-15-375(5) or with the intent to perform a sexual activity in the presence of the person reasonably believed to be under the age of eighteen as defined in South Carolina Code of Laws §16-15-342. The Petitioner never tried to persuade, induce, entice, or coerce the alleged Emmy Robinson to engage in a sexual activity or

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<sup>25</sup> A. - P. 17, lines 5-6.

<sup>26</sup> A. - P. 17, lines 10-11.

to perform a sexual activity in his presence. Before there was any conversation of a sexual nature the Petitioner and Emmy Robinson discussed that Columbia and Rock Hill were not too far apart.<sup>27</sup> After the Petitioner had sent the alleged Emmy Robinson photographs of his penis, he stated, “maybe one day he will be all yours.”<sup>28</sup> This statement does not constitute an attempt to persuade, induce, entice, or coerce Emmy Robinson to engage in a sexual activity as defined in §16-15-375(5). Later in the conversation there is a statement by the Petitioner as to what he would do if Emmy Robinson were with him at that time.<sup>29</sup> This was not a request that she do any of those acts but merely fantasy talk about what they would do if they were together. There was no arrangement made for them to meet at any time and the conversation never came to the point that the Petitioner and Emmy Robinson would actually meet to engage in any of the activities defined in §16-15-375(5).

South Carolina Code Annotated 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 may be guilty of criminal solicitation is if a Petitioner contacts a person reasonably believed to be under the age of eighteen. This scenario requires the Petitioner to actually believe that the individual is under the age of eighteen.

In its decision the Court of Appeals cites State v. Thompkins, 263 SC 472, 484, 211 SE2nd 549, 554 (1975) Feldman v. S.C. Tax Comm'n, 203 SC 49, 26 SE2d 22 (1943). The Thompkins and Feldman cases do not apply to this case. In Thompkins the material did actually

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<sup>27</sup> A. - P. 170, State's Exhibit 1, p. 1.

<sup>28</sup> A. - P. 172, State's Exhibit 1, p. 3.

<sup>29</sup> A. - P. 173, State's Exhibit 1, p. 4.

depict minors and in Feldman individual was actually a minor. South Carolina Code Annotated 16-15-342(A) requires that the Petitioner to actually believe that he was contacting a minor.

### **III. DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF ATTEMPTED SEXUAL EXPLOTATION OF A MINOR FIRST DEGREE?**

An issue is the novel question of what constitutes appearance for the purpose for producing material pursuant to South Carolina Code of Law 16-15-395.

After the Deputy depicting herself as Emmy Robinson told the Petitioner that she was fifteen, the Petitioner said, "Really if that is you I want to see more pics". The alleged Emmy Robinson texted back, "I will have to wait till I get back home from school, but I will post some." The Petitioner then stated "Sure that works, but since you have seen me naked, I want to see you naked."<sup>30</sup> South Carolina Code of Laws §16-15-395(A)(1) makes it unlawful for one to uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity or appear in a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation for a live performance or for the purpose of producing material that contains a visual representation depicting this activity or a state of sexually explicit nudity when a reasonable person would infer the purpose is sexual stimulation. Arguably, the Petitioner was requesting that Emmy Robinson to send him nude pictures of herself. Nude pictures do not constitutes sexual activity as defined by South Carolina Code of Laws §16-15-375(5). The State was apparently alleging that the Petitioner was asking Emmy Robinson to appear in a state of sexual explicit nudity. Section 16-15-395(A)(1) also requires that the purpose of encouraging one to appear in a state of sexual explicit nudity is for sexual stimulation for a live performance or for the purpose of producing material that contains a visual

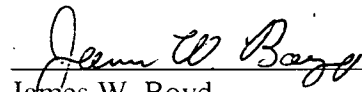
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<sup>30</sup> A. - P. 174, State's Exhibit 1, p. 5.

representation depicting this activity. There was no evidence that the Petitioner was asking Emmy Robinson to appear for a live performance. Neither is there any evidence that he was asking her to appear for the purpose for producing material. The Petitioner asking Emmy Robinson to send him pictures is not asking her to appear for the purpose of producing material. There was no evidence presented that the Petitioner was going to produce material. The Petitioner did not ask her to produce material. Section 16-15-395 requires that the Petitioner must, 1) encourage the victim to appear in the state of sexually explicit nudity and; 2) that the appearance be for the purpose for producing material. Producing in the context of this statute means making or manufacturing something.<sup>31</sup> There is no evidence that the Petitioner was making or manufacturing materials. The obvious purpose of the statute is to forbid individuals from producing, making, manufacturing or creating child pornography or from using children in sexual life performances. The behavior of the Petitioner in this case was potentially a violation §16-15-405, which forbids one from soliciting material that contains a visual representation of a minor engaging in sexual activity or appearing in a state of sexually explicit nudity but not a violation of §16-15-395.

For the reasons stated, Petitioner asks this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

  
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February 8, 2019

<sup>31</sup> Webster's Dictionary, Third Edition

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

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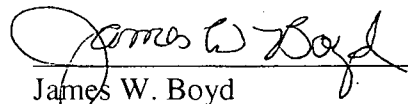
The State of South Carolina, ..... Respondent.

v.

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PROOF OF SERVICE

I, James W. Boyd, certify that I served on February 14, 2019, the within Petition for Writ of Certiorari and Appendix 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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February 14, 2019