

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From the South Carolina Administrative Law Court

The Administrative Law Judge Milton G. Kimpson

ALC 18 ALJ-04-0100 AP

Appellate Case No. 2019-001277

James Anthony Primus 252315

Appellant

v

South Carolina Department of Corrections

Respondent

Final Brief of Appellant

James Anthony Primus 252315

Pro se Appellant

MacDougall Correctional Institution

1516 Old Gilliard Road

Ridgeville S.C. 29472

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FEB 10 2020

SC Court of Appeals

Date February 3 2020

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## Cases

David Tart v. S.C.D.C. 408 S.C. 334 759 SE 2d 398

State v. Benjamin Cervantes Hernandez Appellate

Case no 2019-000023 South Carolina Supreme Court

Opinion 27923

## Other Authorities

75 Am Jur. 2d Trial 606 (1991)

Rule 212 (B) S.C.A.C.R.

Rule 226 S.C.A.C.R.

# Table of Authorities

1 Boan v. State 695 SE 2d 850 S.C. 2010

2 Board of Regents of State College v. Roth  
92 S. Ct 2701 U.S. 573 1972

3 Finley v. State 64 SE 2d 881 S.C. 1951

4 Greenholtz v. Inmates of Nebraska Penal and  
Correctional Complex 99 S. Ct 2100 U.S. 1979

5 In re Shaquille O'Neal B 684 SE 2d 549 2004

6 S.C. Dept of Natural Resources 1170 SE 2d 380 S.C.  
APP 1996

7 Blackburg v. U.S. 52 S. Ct 180 U.S. 111 1932

- 8 Magazine v. State 606 SE 2d 761 S.C. 2004
- 9 State v. Elliott 552 SE 2d 727 S.C. 2001
- 10 State v. Gentry 610 SE 2d 494 S.C. 2005
- 11 State v. Middleton 755 SE 2d 432 S.C. 2014
- 12 State v. Primus 564 SE 2d 103 S.C. 2002
- 13 State v. Binnans 733 SE 2d 890 S.C. 2012
- 14 State v. Campbell 656 SE 2d 371 S.C. 2008
- 15 State v. De angelis 183 SE 2d 906 S.C. 97
- 16 State v. Hudson 519 SE 2d 577 S.C. APP. 1999
- 17 Tant v. South Carolina Department of Corrections 718 SE 2d 753

S.C. APP

Statutes

S.C. Code Ann 16-3-651

S.C. Code Ann 16-3-652

Rule 18 South Carolina of Criminal Procedure

Rule 209 South Carolina Appellate Court Rules

Rule 210 South Carolina Appellate Court Rules

Rule 212 South Carolina Appellate Court Rules

## STATEment OF Issues on Appeal

- 1 Did the South Carolina Department of Corrections Violate Appellate Due Process rights
- 2 Did the South Carolina Department of Corrections erroneously interpret ABHAN Conviction 16-3-652

### Statement of the Case

This matter is before the South Carolina Court of Appeals Pursuant to Notice of Appeal Filed by James Anthony Primus 252315 Appellate From South Carolina Administrative Law Court as Inmate incarcerated with S. C. Dept of Correction Appeals His Step 2 Grievance

### Back Ground

Appellant James Anthony Primus was indicted in Dorchester County for First degree Criminal Sexual Conduct Kidnapping and Second degree burglary He was tried August 31 and September 1 1998 the Jury Found Appellate Guilty of Kidnapping and assault and battery of and High and Aggravated Nature and Not Guilty of Second degree burglary Appellate was Sentence to and aggregate consecutive terms

of thirty years for Kidnapping and ten years for assault and Battery High Aggravated Nature

### Statement OF Facts

This case rose from S.C.D.C. Violated Appellant Due Process rights and erroneously interpreting his ABHAW conviction in correctly by statute Section 16-3-652 and Codified Appellant as a violent crime

## STATEMENT OF THE CASE

Appellate James Anthony Primus 252365 is incarcerated in the South Carolina Department of Corrections at the MacDougall Correctional Institution in Ridgeville S.C.

In September 1997 Appellate was indicted for Criminal Sexual Conduct (CSC) in the First degree, Kidnapping, Possession of Crack Cocaine and Burglary in the Second degree on September

1 1998 Dorchester County South Carolina Appellate was found

guilty of Kidnapping assault and battery of and high and aggravated nature and Possession of Crack Cocaine Appellate received sentence of thirty-years for Kidnapping 10 years for

A.B.H.A.W. to run consecutive and 1 year for Possession of

Crack Cocaine to run concurrent Appellate Sentence sheet

incorrectly indicated that Appellate pled Guilty to the ABHAN

charge Indictment 97-GS-18-1045 warrant no E091998

originally Criminal Sexual Conduct CSC 1st Degree This error

was corrected by the Dorchester County clerk of Court

Mrs Cheryl Graham on June 11 2014 The South Carolina

Department of Correction updated Appellate Record on January

14 2015 by changing the plea of Guilty to a plea of

Not Guilty in South Carolina Department of Corrections Systems

Inmate Records

## Factual Back Ground

The case arose from classification case worker at the MacDougal Correctional Institution MR. Tucker and now also Mrs Nicole Chapman. Classification case worker that assault and Battery of and High and Aggravated Nature are now being Interpreted by the Trial Indictment statute 16-3-652 CSC 1st degree where Appellate was acquitted on at trial and all lesser included offenses and was convicted of ABHAW Appellate Filed and Step one Grievance on 9-27-17 This step one Grievance was investigated and denied Appellate Filed and Step 2 Grievance was also Investigated and denied Appellate Filed November 29 2017 on February 2 2018 Appellant Filed a Notice of Appeal in the administrative Law Court on March 13 2018 after briefs were filed by both Parties Administrative Law Judge Milton G. Kimsan Filed an order dismissing Appellant Appeal on July 24 2019 Appealing now to South Carolina Court of Appeals.

Slezak v SCOC 361 S.C. 327 605 SE 2d 506 (2004)

Tant v. SCOC 408 S.C. 334 759 SE 2d 398

State v. Green 491 SE 2d 263

State v. Primus 564 SE 2d 103 - 109

# ARGUMENT

The South Carolina administrative Law Court reached and Incorrect Conclusion as to every facet of the legal Issue Presented in this case SCDC contends that assault and Battery of a high and Aggravated Nature is the Same as CSC 1st degree However because all the elements of the Purported lesser offense are not also elements of the Purported greater offense it is in Fact not a lesser included offense The test for determining if a crime is a lesser included offense is whether the greater offense include all the elements of the lesser offense see state v. Bland 318 S.C. 315 317 457 SE 2d 611 612 1995 state v. Prince 316 S.C. 57 66 447 SE 2d 177 182 (1993) In John Green v. state 491 SE 2d 263 Criminal Sexual Conduct in the First degree is defined by statute A person is guilty of that offense if he engaged in Sexual Battery with the victim and if any one or more of the following Circumstances are proven

A The actor uses aggravated force to accomplish Sexual Battery Supreme Court ABHAN is not and lesser included offense CSC 1st degree B The victim submits to Sexual Battery by the actor Under Circumstances where the victim is also the victim of Forceable Confinement Kidnapping Robbery extortion burglary house breaking or any other similar offense C The actor causes the victim without the victim consent to become mentally incapacitated or physically helpless by administering distributing dispensing delivering or causing to be administered distributed dispensed or delivered a control substance a control substance

Analogue or any intoxicating substances S.C. Code Ann. 16-3-652 (1) Supp 2001 Subsection c was added in 1998 after the date of the incident in this case Amended 2000 The Code further defines the term Sexual Battery to mean Sexual Intercourse cunnilingus Fellatio anal Intercourse or any intrusion however slight of any part of a Person body or of any object into the genital or anal opening of another Person body Except when such intrusion is accomplished for medically recognize treatment or diagnostic purposes S.C. Code Ann. 16-3-651 (b) The key component of Sexual Battery under this definition is a sexual act or intrusion into the genital or anal opening of another Person body a Sexual Battery requires a touching of the victim See State v. Mims 286 S.C. 553 554 335 SE 2d 237 (1985) an assault on the other hand requires no touching Mims 286 S.C. 553 554 335 SE 2d 237 In McGee 278 S.C. 506, 507 299 SE 2d 334 1983 no element of assault is included in the statutory definition of Sexual Battery See Code Ann. 16-3-651 more over as is shown by the alternative circumstances that elevate a Sexual Battery to the first degree level under the current version of the statute is implicit in the crime See Code Ann. 16-3-652 (1) (c) on the other hand the offense of assault and Battery of a high and aggravated nature is an unlawful Act of violent Injury accompanied by

Circumstances of aggravation see state v. Fennell 340 S.C. 266 274 531 SE 2d 512 546 (2000) state v. Frazier 302 S.C. 500 502 397 SE 2d 93 94 1990 state v. Coleman 342 S.C. 172 176 536 SE 2d 387 389 Ct APP (2000) The S.C. Court of Appeals has recognized the dual Requirement of Both assault and a Battery as separate and distinct elements of that offense thereby precluding its being a lesser included offense of crime which have an assault element but no Battery Component see John Green state 491 SE 2d 263 high and aggravated assault nature assault and Battery is not a lesser included offense of assault with intent to commit third degree criminal sexual conduct December 14 1999 state v. Clarkson 337 S.C. 518 523-34 523 SE 2d 817 820 Ct APP 1999 assault and Battery of a high and aggravated nature is not a lesser included offense of assault with intent to commit second criminal sexual conduct with a minor similarly this Court should recognize that this offense is also not a lesser included offense of first degree criminal sexual conduct which has no assault component in addition to the existence of the assault element in one offense and the lack of that element in the greater offense assault and Battery of a high and aggravated nature is not a lesser included offense of first degree criminal sexual Battery because the elements requiring accompany circumstances are not identical to establish such an assault and Battery the state may prove that it was accompanied by an aggravating circumstance

Such as the use of a deadly weapon the infliction of serious bodily injury the intent to commit a felony Great disparity between the ages or physical condition of the parties differences in the sexes of the party Purposeful infliction of shame and disgrace taking indecent liberties with a female and resistance to lawful Authority See Fennell 346 S.C. 273 531 SE 2d at 516-17 State v. Patterson 337 S.C. 213 231 522 SE 2d 845 884 Ct 1999 These specific elements which raise a simple assault and battery to one of a high and aggravated nature are not also elements of first degree criminal sexual conduct the aggravating circumstance of which are defined by statute See Code Ann 16-3-452 (1)

For example an offense which qualifies as an assault and battery of a high and aggravated nature would lack the statutory elements of first degree criminal sexual conduct if the aggravating circumstance were disparity in age or physical characteristics Indeed the court of appeals has recognize this difference in the nature of the aggravating circumstance of these two offenses finding that the aggravating circumstances that support a conviction for assault and battery of and high and aggravated nature do not necessarily establish first degree criminal sexual conduct See State v. Green 329 S.C. 581 585-86 491 SE 2d 213 214-65 Ct App 1997

as the court in Green if Criminal Sexual Conduct in the First Degree could be established by any form of aggravation accepted for assault and battery of any high and aggravated nature every sexual battery committed by a member of the opposite sex would amount to first degree criminal sexual conduct see Green 327 S.C. at 586 491 SE 2d 265 The state acknowledges that certain circumstances of aggravation that establish assault and battery of any high and aggravated nature are outside the limited statutory circumstance that elevate a sexual to the first degree level The aggravating circumstance for assault and battery of a high and aggravated nature are different from those that establish first degree criminal sexual conduct This form of assault and battery cannot be a lesser included offense of criminal sexual conduct in the first degree Finally a third element prevents a conclusion that assault and battery of a high and aggravated nature is a lesser included offense of first degree criminal sexual conduct Battery is an element of assault and battery of a high and aggravated nature Court should hold this form of assault and battery of any high and aggravated nature is not a lesser included offense CSC 1st Degree

# CONCLUSION

FOR THE REASON SET FORTH S.C.D.C.  
Interpretation of ABHAN Cannot be Interpreted  
By the Statute Judge Luke W. Brown Jr.  
Intended CDR CODE FOR Interpretation  
This Court Should Grant this Declaratory  
Judgment

Date

February 3 2020

Respect Fully Submitted

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James Anthony Primus 252315 Appellant

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South Carolina Department of Corrections Respondent

Certificate of Counsel Pro Se

The undersigned certifies that this Final Brief of  
Appellant complies with Rule 210(b) SCAEC

February 3 2020

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Respondent

Certificate of Counsel

The undersigned certifies that this Final Brief  
Complies with Rule 211 SCACR

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