

STATE OF MICHIGAN  
IN THE SUPREME COURT

The People of the State of Michigan  
Plaintiff/Appellee

Docket No. 151076  
COA No. 325582  
Circuit Court No. 14-009613-01-FH

v,

Kameron Leo Kilgo  
Defendant/Appellant

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REPLY BRIEF

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## INTRODUCTION

“Don’t pay any attention to the man behind the curtain.” said the wizard in the movie The Wizard of Oz. This is the essence of Appellee’s answer to Appellant’s Application for Leave to Appeal. “Don’t pay any attention to the changes in the law and society that have occurred since 1984” says Appellee.

Appellee’s only authority is People v. Cash, 419 Mich 230; 351 NW 2d 822 (1984), which is the subject of Appellant’s Application for Leave to Appeal. Appellee does not address the issue of equal protection or due process and dismisses the fact that in 1984, only 14% of the states had adopted some form of mistake of age or mistake of fact defense and today that number has increased to over 40%, a clear trend.

In Cash, this Court stated

Moreover, given the already highly emotional setting of a statutory rape trial, the allowance of a mistake of age defense would only cause additional undue focus on the complainant by the jury’s scrutinizing her appearance and any other visible signs of maturity. The obvious problem is that because early adolescents tend to grow at a rapid rate, by the time of trial a relatively undeveloped young girl or boy may have transforms into a young woman or man. **A better procedure would be to permit any mitigating and ameliorating evidence in support of a defendant’s mistaken belief as to the complainant’s age to be considered by the trial judge at the time of sentencing.** (Emphasis added.) 419 Mich at 245.

With the adoption of MCL 28.721 et seq, the Sexual Offenders Registration Act, this Court’s recommended procedure becomes virtually ineffective. The trial court, in sentencing, cannot alter the requirement of registration, and the effect on the defendant’s life, regardless of the

“mitigating and ameliorating evidence.” (Id.)

Only this Court can address the issues raised by this Appellant.

## ARGUMENT AND LAW

### I. WHETHER PEOPLE V. CASH IS STILL VIABLE?

Appellant addressed this issue in his Application for Leave to Appeal and will stand by that argument. In Appellant’s Application, Appellant cited People v. Doyle, 16 Mich App 242, 243; 16 NW 2d 907 (1969). In Doyle, the court wrote as follows:

Appointed counsel has done an outstanding job in presenting defendant’s appeal. His argument that the doctrine of People v. Gengels (1922), 218 Mich 632, 641, namely, belief that the victim has reached the age of consent is no defense in a statutory rape case, should not be extended to cases of indecent liberties is persuasive. **Current social and moral values make more realistic the California view that a reasonable and honest mistake of age is a valid defense to a charge of statutory rape.** People v. Hernandez (1964), 61 Cal 2d 529 (39 Cal Rptr, 361, 393 P 2d 673). Michigan may ultimately adopt this view, but this Court is bound to follow the law presently in effect. (Emphasis added)

“Current social and moral values” was the centerpiece of the Doyle decision.

“Strict liability”, realistically, should be confined to those children 13 years of age and under. This Court, by decision, can restrict “strict liability” to children 13 and under without legislative action.

In today’s society, by the time an adolescent graduates from high school, 3/4 of the graduates have had sexual relations. By the time adolescents reach 16, nearly 1/3 have had sexual relations. 16% of 15 year olds have had sexual relations. Guttmacher Institute, American Teens Sexual and Reproduction Health, May, 2014, citing Finer, L.B. and Philbien, J.M. Sexual

Initiation, Contraceptive Use and Pregnancy Among Young Adolescents, Pediatrics, 2013.

Advocates for Youth, in its article Adolescent Sexual Behavior: Demographics, writes:

Many adults are uncomfortable with the total of teen sexuality, and prefer to remain in ignorance or denial. But in the United States, 46 percent of all high school age students, and 62 percent of high school seniors, have had sexual intercourse; almost nine million teens have already had sex. It is critically important for adults to address adolescent sexuality realistically and to recognize that many factors, including socioeconomic status, race or ethnicity, family structure, educational aspirations, and life experiences affect young people's behavior.

In the overwhelming majority of states, Appellant would not be prosecuted or would be able to raise the defense of mistake of age. The overwhelming majority of states recognize that the crimes of "indecent liberties" and "statutory rape" applies to those 13 and under. The majority, including the federal government, limit "indecent liberties" and "statutory rape" to sex with a 10 year old or younger.

As set forth in Appellant's Application, due process, in this State, is defined as "fair play". Dodge v. Detroit Trust, 300 Mich 575; 2 NW 509 (1927). There is nothing fair about the application of "strict liability" to sexual relations involving adolescents. Reasonable mistake of fact or mistake of age more fully embraces the reality of today's society. The application of Cash in today's society is to exact retribution for what some may consider a moral wrong, but the law does not deal with the moral views of portions of a society, but instead deals with society as it is. This Court should grant Appellant's Application for Leave to Appeal and review Cash as to its viability in 2015.

## II. WHETHER THE DENIAL OF THE DEFENSE OF REASONABLE MISTAKE OF AGE OR FACT VIOLATES DUE PROCESS UNDER ARTICLE 1 § 17 OF THE MICHIGAN CONSTITUTION OF 1963 AND THE 14<sup>TH</sup> AMENDMENT OF THE UNITED STATES CONSTITUTION?

Under the doctrine of strict liability, mental culpability is not an element of the offense. However, as stated in Appellant's Application, a statute that infringes on a fundamental right or liberty interest violates a substantive component of the due process clause. Reno v. Flores, 507 U.S. 292, 302 (1993). An infringement on a fundamental right must be "narrowly tailored to serve a compelling state interest." The right to raise a reasonable defense against a criminal accusation is a fundamental right, as is mental culpability.

As stated in Appellant's Application, "The idea of some mental culpability must attach to conduct before it can be a crime 'is no provincial or transient notion.' Morissette v. U.S. 342 U.S. 246, 250 (1952). 'It is as universal and persistent to mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.' *Id.* *Mens Rea* is firmly embedded in our law and is 'the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' Staples v. U.S. 511 U.S. 600, 605 (1994)."

Strict liability, as imposed by Cash, violates the holding in Staples. Cash states that *mens rea* is not an element of statutory rape. That may be true as it relates to 10 year olds, or even those 13 and under, but as it relates to 15 year olds, it simply denies reality.

What is the compelling state interest to protect a 15-year, 11 months and 29 days old person from sexual relations and not afford the same protection to a 16 year, one day old person? There is no compelling state interest. It is a distinction without a difference. There is clearly a

compelling state interest to protect a minor, 10 years or younger. It could be argued that there is a compelling state interest to protect a person under 13 years of age, but in today's society, a fully developed, mature 15-year-old is fully conscious of his or her actions and aware of the possible consequences.

In addition to societal changes, strict liability did not take into account the adoption of the Sexual Offenders Registry, MCL 28.721. The court in Cash, as previously stated, suggested that the trial court could consider the maturity and appearance of the 15-year-olds when sentencing a defendant. However, with the adoption of the Sexual Offenders Registration Act, court discretion becomes meaningless. A defendant is branded a predator and deviate to the world for at least 15 years, and possibly for the rest of his life, regardless of the circumstances.

In addition, 19 years after Cash, the United States Supreme Court decided Lawrence v. Texas, 539 U.S. 558 (2003). In Lawrence, the Court stated that the "obligation [of the courts, including this Court] is to define the liberty of all, not to mandate our own moral code." 539 U.S. at 571. This Court may be appalled by the statements set forth earlier in this brief regarding adolescent sexual relations, but that reaction is to deny reality and to subject defendants to the Court's "own moral code."

This Court can permit a defense of reasonable mistake of fact or mistake of age as it relates to those adolescents over 13 and apply strict liability to those 13 and younger without a change in the existing statute. As Justice Kavanaugh recognized in his dissent in Cash: "If one had to choose the most basic principle of the criminal law in general \*\*\*it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respects to that result."

As stated in Appellant's Application, most criminal statutes do not state or prohibit a particular defense. MCL 750.356; MSA 28.588, Larceny, does not mention the words intentionally, knowingly or willfully. If the language in Cash were literally adopted, strict liability would apply to numerous criminal defenses. Such application would violate fundamental due process. Why should the lack of intention, knowing or willfull in the statutory rape statute compel strict liability when the lack of these words in other criminal statutes does not require strict liability? There is no valid reason. It is a case of this Court applying its own moral convictions, contrary to Lawrence and a violation of due process.

**III. WHETHER THE DENIAL OF THE DEFENSE OF REASONABLE MISTAKE OF AGE OR FACT VIOLATES EQUAL PROTECTION UNDER ARTICLE 1 § 2 OF THE MICHIGAN CONSTITUTION OF 1963 AND THE 14<sup>TH</sup> AMENDMENT OF THE UNITED STATES CONSTITUTION?**

As stated in Appellant's Application, in Lawrence, supra, Justice Kennedy, citing Cleburne v. Cleburne Living Center, Inc. 473 U.S. 432, 439 (1985) wrote that the Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. 539 U.S. at 579. Where the law exhibits a desire to harm a politically unpopular group, a more searching form of a more rational basis review is required. Teenage sex is politically unpopular. Teenagers having sex with adults is even more unpopular.

This Court has never addressed the issue of equal protection as it pertains to the decision in Cash. No other felony offense, with the possible of OWI 3<sup>rd</sup> Offense, has a strict liability standard.

Two individuals, each facing a possible conviction standard and subsequent sentence, are treated differently when it comes to statutory rape. However, the equal protection clause of the

14<sup>th</sup> amendment of the U.S. Constitution and Article 1, § 2 of the Michigan Constitution of 1963 provide that two people similarly situated should be treated alike. Two prospective felons facing trial are not treated alike if one of those individuals is charged with statutory rape. Any prospective felon, other than an individual charged with statutory rape, is entitled to raise all reasonable defenses to the accusations that person is facing.

As stated above, in the overwhelming majority of the states, Appellant would not be charged with a crime. Michigan sets a higher standard for adolescent protection and Appellant does not argue that Michigan is not entitled to set a higher standard, but Michigan cannot set a higher standard and then deprive a defendant of the right to present a reasonable defense to the allegations against him or her and deprive only those charged with statutory rape.

The State has no greater interest in protecting a 15-year-old than it does in protecting an individual from any serious felony. If this is so, and it is, then to prevent a defendant in a statutory rape case from raising the defense of reasonable mistake of fact or mistake of age as a defense is a denial of equal protection.

As Justice O'Connor, in Lawrence, points out, treating one group of people as pariahs based solely on the State's disapproval of moral conduct runs contrary to the values of the Constitution and the equal protection clause. Strict liability is abhorrent to our concept of due process and equal protection. As stated in Appellant's Application, strict liability can lead to absurd results. As stated in Appellant's Application, a mentally disabled male with an IQ of 50 could be seduced by an adolescent and, under the doctrine of strict liability, be found guilty. A woman can be raped by a 15-year-old male and the woman is technically, under the doctrine of strict liability and the wording of the statute, guilty of statutory rape.

The statute, itself, does not require strict liability. Strict liability is a creation of this Court. That which this Court creates, it can modify or change. Appellant seeks to have this Court review the holding in People v. Cash.

### **CONCLUSION**

Appellee argues that trial has not occurred and the Court of Appeals has not ruled. The basic facts, as set forth in Appellant's Application, are not in dispute. The Court of Appeals is bound by this Court's decision in Cash and must deny Appellant's Application for Leave to Appeal, or if it granted the Application, must uphold Cash. Only this Court can address the issues and modify or reverse its holding in Cash.

Appellee attempts, with its superficial Answer, to have this Court ignore Appellant's Application and Reply. The issues raised by Appellant are of constitutional magnitude and involve legal principles of major significance to this State's jurisprudence.

Dated: March 23, 2015

Respectfully Submitted,

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