

NO. 17-15603

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN EDWARD MAY, Petitioner-Appellee,

v.

CHARLES L. RYAN, *et al.*, Respondents-Appellants.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURRT
FOR THE DISTRICT OF ARIZONA IN
No. CV-14-00409-NVW

BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION FOR RATIONAL SEX OFFENSE LAWS
IN SUPPORT OF PETITITONER/APPELLEE STEPHEN EDWARD MAY

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*¹

The National Association for Rational Sexual Offense Laws (“NARSOL”) is a national nonprofit organization exclusively dedicated to advocating for rational, evidence-based sexual offense prevention policies that minimize unnecessary collateral consequences while maintaining a focus on public safety. NARSOL funds and promotes research into sexual offense recidivism, maintains and aggregates data on recidivism and the efficacy of sexual offense registries, participates where appropriate in litigation related to sex offender registry law, and hosts conferences throughout the United States focusing on fact-based reform of sexual offense legislation.

NARSOL’s interest in this case is to provide the Court an objective analysis of the legislative practice of shifting the burden of proof on the intent element of an offense from the prosecution to the accused by improper characterization of the burden to disprove criminal intent as an affirmative defense under state law. Shifting the burden of proof with respect to the accused’s intent from the prosecution to the defense effectively forces an accused to testify at trial in order to carry the burden, compromising his privilege against self-incrimination and right to remain silent at trial.

¹ No counsel for a party authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner/Appellee May and the Arizona Attorney General consented to this filing on April 2, 2018.

ARGUMENT

Arizona law provides that the purpose of statutes defining criminal offenses lies, in part, in “proscribing conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests,” and affording “fair warning of the nature” of the proscribed conduct. ARIZ. REV. STAT. § 13-101(1) and (2), respectively. Section 13-101 also provides:

It is declared that the public policy of this state and the general purposes of the provisions of this title are:

....

3. To define the act or omission *and the accompanying mental state which constitute each offense* and limit the condemnation of conduct as criminal when it does not fall within the purposes set forth.

(emphasis added).

I.

THE ARIZONA STATUTORY SCHEME UNDER WHICH MAY WAS CONVICTED IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE ACCUSED CHARGED WITH CHILD MOLESTATION UNDER ARIZ. REV. STAT. § 13-1410 BY REQUIRING THE ACCUSED TO DISPROVE CRIMINAL INTENT TO COMMIT THE OFFENSE, IN VIOLATION OF DUE PROCESS OF LAW.

Within the general framework for the definition of criminal offenses, the Arizona Supreme Court’s construction of the burdens imposed upon the prosecution and defense for proof of violations under Section 13-1410, the statutorily-defined offense for Molestation of a Child, in *State v. Holle*, 240 Ariz. 300, 379 P.3d 197 (Ariz. 2016) (“*Holle II*”), reflects a constitutionally-

impermissible shift in the burden proof from the State to the accused. The *Holle II* court's construction of the respective duties imposed upon the prosecution and defense requires an accused charged under Section 13-1410 to prove his innocence of the offense charged by proving his lack of a sexual motivation or interest. The statute defines the offense:

A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age.

The statute is relatively simple in language, requiring the prosecution to prove that the accused acted "intentionally or knowingly" in either personally engaging in an act of sexual contact with a minor under the age of fifteen, or alternatively, causing a minor under the age of fifteen to engage in sexual contact with another individual. "Sexual contact" is defined in Section 13-1401(3), which states:

"Sexual contact" means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.

The statutory scheme includes a defense applicable in sexual offenses charged under Section 13-1410 that provides:

It is a *defense* to a prosecution pursuant to § 13-1404 or 13-1410 that the defendant *was not motivated by a sexual interest*. It is a defense to a prosecution pursuant to § 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.

ARIZ. REV. STAT. § 13-1407(E) (emphasis added).

Under Arizona law, a defensive theory labeled a “defense” in the criminal statutes is treated as an affirmative defense upon which the accused must carry the burden of proof by a preponderance of evidence, *Holle II*, 240 Ariz. at 311, 379 P.3d at 208--as opposed to a justification defense, which requires the State to disprove the existence of justification when raised by the evidence. *Id.* 240 Ariz. at 304, 379 P.3d at 201. The statutory provision differentiating an affirmative defense from a justification explains:

Except as otherwise provided by law, a defendant shall prove any affirmative defense raised by a preponderance of the evidence. Justification defenses under chapter 4 of this title are not affirmative defenses. Justification defenses describe conduct that, if not justified, would constitute an offense but, if justified, does not constitute criminal or wrongful conduct. If evidence of justification pursuant to chapter 4 of this title is presented by the defendant, the state must prove beyond a reasonable doubt that the defendant did not act with justification.

ARIZ. REV. STAT. § 13-205(A) (reference to note 1 omitted).

A defense offered at trial which is based on the absence of a specific intent to engage in sexual contact with the minor complainant does not fall within the concept of justification. *Holle II*, 240 Ariz. at 304, 379 P.3d at 201. Instead, the line of defense at trial under Section 13-1407(E)—lack of “sexual interest” or “sexual motivation,” *Holle II*, 240 Ariz. at 208, 379 P.3d at 311, sexual or intent--is characterized as an “affirmative defense,” under Section 13-205(A), requiring

the accused to bear the burden of proving his lack of sexual intent by a preponderance of the evidence, in response to a prosecution brought pursuant to Section 13-1410. The *Holle II* court explained, referencing “affirmative defenses” and “defenses”: “These categories of defenses are mutually exclusive.”

There are significant problems of constitutional dimension in the Arizona statutory scheme based on the requirement in Section 13-1407(E) that the defendant accused of violating Section 13-1410 must prove a defense based on his lack of “sexual interest” in engaging in or causing another to engage in sexual contact, as defined in Section 13-1401(3). The imposition of the burden of proving his lack of criminal intent to the accused compromises the intent and effectiveness of the constitutionally-imperative operation of *reasonable doubt* in the criminal trial.

The statutory scheme expressly shifts the burden of proof to the accused to prove his lack of sexual intent in engaging in sexual contact, rather than requiring the prosecution to prove that he was acting with a “sexual interest,” or sexual motivation or intent. Although the Arizona Supreme Court could have addressed the consequences of this burden-shifting scheme to avoid violation of the due process protection afforded by application of the reasonable doubt test, it did not do so.

There is, however, no equivocation in the *Holle II* court's construction of the statutory scheme for molestation of a child. It is the accused's burden to disprove that his act was motivated by "sexual interest." The assignment of this burden to the accused violates the constitutional guarantee of due process included in the Fourteenth Amendment, as recognized by the Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The state court's interpretation of Arizona law is controlling. *Id.* at 691.

A.

In *Mullaney v. Wilbur*, the Court held that the imposition of a burden on the accused to disprove an essential element of the prosecution's case violates the basic constitutional requirement that the State has the burden of proving each element of the offense charged beyond a reasonable doubt. 421 U.S. at 704. There, the Court addressed the situation resulting from shifting the burden of proof on an essential element of the prosecution's case to the accused to disprove the element. As here, the *Mullaney* Court the issue involves the effect of burden-shifting with respect to the accused's intent. While *Mullaney* is the pivotal decision holding that such a shift violates the constitutional protection of Due Process, neither the Arizona Supreme Court nor the Arizona Court of Appeals cited or discussed *Mullaney* in the decisions rendered in *Holle II* or *State v. Holle*, 238 Ariz. 213, 358 P.3d 279 (Ariz. App. 2015) (*Holle I*), respectively.

The reasonable doubt standard of proof was imposed upon the prosecution in all criminal cases as a matter of due process by the Court in *In re Winship*, 397 U.S. 358, 364 (1970). Arizona recognized this rule. *E.g.*, *State v. Duran*, 118 Ariz. 239, 249, 565 P.2d 1265, 1275 (Ariz. App. 1978). Later, in *Jackson v. Virginia*, 443 U.S. 307, 313-14 (1979), the Court extended this principle to the review of challenges to the sufficiency of the evidence offered in support of conviction in requiring the prosecution to discharge its burden of proving each element beyond a reasonable doubt in all criminal trials, even when considered in habeas review of state court convictions.

The effect of the *Winship/Jackson* line of cases results in the accused being entitled to an acquittal when the prosecution fails to meet its burden of proof with respect to any element of the offense charged. *Holle II*, 240 Ariz. 311, 312, 379 P.3d 208, 209 (Ariz. 2016), (Bales, C.J., dissenting in part and concurring in the judgment). The rule applies at trial or on a finding of insufficient evidence on appeal, *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19, 24 (1978), or, under *Jackson*, on post-conviction review of properly preserved insufficient evidence challenges.

The Arizona statutory scheme, as approved by the *Holle II* majority, stands the *Winship/Jackson* principle on its head by essentially eliminating the role of reasonable doubt with respect to the accused's motivation, or specific intent, in the

prosecution of molestation under Section 13-1410. The *Holle II* majority gave the broadest deference to statutory language, finding that neither Section 13-1410, nor the definition of “sexual contact” in Section 13-1401(D), include any reference to the actor’s intent to engage in conduct motivated by of “sexual interest,” reflecting the correct reading of legislative intent. While the Arizona court might have imposed an implicit element of proof of sexual interest as an implicit element of necessary specific intent for a constitutionally-acceptable application of the statute--as the dissenting justices argued--the majority rejected this approach. *See, Holle II*, 379 P.3d at 208, 209 (Bales, C.J., joined by Brutinel, J., dissenting in part and concurring in the result).

The *Holle II* majority observed: “A defendant in a criminal case can defend a charge by claiming that the state failed to prove all elements beyond a reasonable doubt.” *Id.* at 240 Ariz. at 304, 379 P.3d at 201. In holding that the statute does not require proof of sexual intent in order to support a conviction for molestation of a child under Section 13-1410, the majority’s construction effectively precludes reliance on the *Winship/Jackson* rule requiring acquittal when the trier of fact has a reasonable doubt as to whether the accused was motivated by “sexual interest.”

The statute does not purport to operate as a strict liability offense, moreover, as the defense recognized in Section 13-1407(E) demonstrates. Subsection (E) is consistent with statutory defenses in Section 13-1407 applicable to other sex

offenses in the chapter that reflect legislative recognition that not all contact with “any part of the genitals, anus or female breast” results in criminal liability, such as contact occurring during the course of lawful medical treatment. *See* Ariz. Rev. Stat. § 13-1407(A). In contrast to the other defensive theories included in Section 13-1407, however, subsection (E) addresses the absence of “sexual interest,” or intent, while subsections (A), (B), (C), (D) and (F) address factual circumstances that the legislature found to not warrant criminal liability.

Consequently, conviction on the Arizona statutory scheme for molestation of a child rests on a finding that the accused engaged in sexual contact unless the “touching” of the child’s genitalia or anus occurs without being motivated by a “sexual interest” on the accused’s part. The critical issue is whether the shifting of the burden of proof violates Due Process of Law in reducing the prosecution’s burden of proof of guilt by requiring the accused to prove that he did not act with specific intent, out of his “sexual interest” in engaging in an act defining “sexual contact” under Section 13-1401(3).

B.

Mullaney v. Wilbur involved the construction of Maine’s homicide law in light of constitutional requirements for allocation of the burden of proof necessary to convict the accused on the offense charged. Under Maine law, murder was defined as causing the death of another individual with malice. If the defendant

killed under the influence of heat of passion caused by sudden provocation, that state of mind would serve to reduce the offense to manslaughter. 421 U.S. at 691-

92. The Court explained:

Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter.

421 U.S. at 703. The Court held that this shift in the burden of proof, requiring the accused to *disprove* that he acted with malice by proving that he acted in the heat of passion violated due process.

Historically, Arizona courts recognized *Mullaney* and its significance. *See, e.g., State v. Jensen*, 153 Ariz. 171, 176, 785 P.2d 781, 786 (1987); *State v. Moya*, 138 Ariz. 12, 14-15, 672 P.2d 964, 966-67 (1983); *State v. Mincey*, 130 Ariz. 389, 397, 636 P.2d 637, 645 (1981); and *Norton v. Superior Court in and for County of Maricopa*, 171 Ariz. 155, 157, 829 P.2d 345, 347 (Ariz. App. 1992) (all recognizing *Mullaney* rule against shifting burden of proof on element of the offense to accused as violative of due process).

The shift in the burden of proof in the Arizona statutory scheme for molestation in requiring the defendant to disprove that he acted with “sexual interest,” or sexual motivation, is even more egregious than that condemned in *Mullaney*. In the homicide context there, the issue of the defendant’s intent in putting forth a partial justification for his act went to the question of the degree of criminality, with the shift serving to lessen culpability only. 421 U.S. at 697-98.

In contrast, the imposition of the burden of disproving “sexual interest” under Section 12-1407(E) addresses criminality, if any, in the accused’s act. It is not the distinction between degrees of offenses, or relative punishment imposed based on those degrees, that rests on the accused’s burden of proving his defensive theory by a preponderance of evidence, but his very guilt, itself.

By requiring the accused to disprove that his act was motivated by “sexual interest,” the statutory scheme impermissibly increases the potential for an erroneous conviction, as the *Mullaney* Court observed, undermining the protection afforded by the *Winship* rule requiring proof beyond a reasonable doubt for conviction. Similarly, the danger of erroneous conviction is greater here because an essential element of culpability is omitted, relieving the State of any burden to prove specific intent, than had the State been required to prove all elements by the lower standard of preponderance condemned in *Winship*, because the prosecution at least had been required to carry its burden as to all elements, rather than being relieved of a burden of proof on a necessary element of proof. *Mullaney*, 421 U.S. at 700-01.

The molestation statute operates like a mandatory presumption, authorizing conviction unless the defendant rebuts the presumption by proving that he was not motivated by “sexual interest.” Reliance on a mandatory presumption in a criminal cases, requiring the accused to rebut the presumption to avoid its application, was

condemned by the Supreme Court in *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979). If the accused cannot carry his burden of proving that his conduct, including the touching described as “sexual contact” in Section 13-1401(3), was not motivated by sexual interest, the statutory scheme permits the jury to find, or presume, that his intent was sexual. Failure to negate the implied element of sexual motivation will result in conviction without the State having to prove the specific intent, much as a mandatory presumption permits a jury to base its finding on the lack of rebuttal evidence.

As in *Mullaney*, the key element of intent not included in the formulation that must be addressed by the jury or trial court in determining guilt, or the degree of guilt (*Mullaney*) is established unless successfully contested by the accused in asserting the defense of lack of sexual intent—or in the case of homicide under Maine law, lack of malice because the accused acted in the heat of passion.

The element of “sexual interest” is implied in the statutory definition of molestation although not expressly included in the elements included in Section 13-1410. Because the statutory scheme includes the option afforded the accused of attempting to negate the implied intent when the prosecution offers evidence sufficient to establish that the defendant engaged in “sexual contact” with a child, the omission of an element of proof of specific intent, or “sexual motivation,” from Section 13-1410 relieves the prosecution of proving that the accused acted with

“sexual interest” in its case in chief. This is, then, an implied or implicit element, on which the prosecution is relieved of its burden of proof on a necessary element of specific intent and, consequently, compromises the application of the *Winship/Jackson* rule. The State does not have to prove that the accused was motivated by sexual interest in order to avoid acquittal based on insufficient evidence.

While the Arizona courts neither cited, nor discussed *Mullaney*, in their respective interpretations of the constitutionality in the operation of the defensive theory included in Section 13-1407(E), the federal habeas court did. The District Court noted the significance of *Mullaney* for analysis of the burden-shifting determination: “[T]he Supreme Court has repeatedly cautioned legislatures against skirting *Winship* by simply extracting essential elements from offenses and putting the burden on defendants to disprove them.” *May v. Ryan*, 245 F.Supp.3d 1145, 1157 (D. Ariz. 2017) (citations omitted).

Holle unsuccessfully argued in the state supreme court that the omission of “sexual interest” from Section 13-1410 did not free the prosecution from the burden of proving that the accused acted with “sexual interest” when the evidence raises the accused’s lack of “sexual motivation.” The court of appeals, however, had expressly found that “sexual interest” remains an *implicit element* of the

State's case in charging molestation, based on the history of molestation statutes in Arizona law. *Holle I*, 238 Ariz. at 224-25, 348 P.3d at 646-47.

The court of appeals further looked to the express language of Section 13-103(B), which provides, in pertinent part: "Affirmative defense does not include any justification defense pursuant to chapter 4 of this title¹ or any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent." Based on its view, Section 13-1408(E) operates not as an affirmative defense, but only as a defensive theory requiring the accused to produce evidence creating a reasonable doubt as to whether he acted with "sexual interest," then requiring the prosecution to disprove his claim. It concluded:

Therefore, sexual interest appears to be the type of defense that "either denies an element of the offense charged or denies responsibility, including ... lack of intent." § 13-103(B). To conclude otherwise would force defendants to negate a "fact[] of the crime which the State is to prove in order to convict."

Holle I, 238 Ariz. at 224-25, 348 P.3d at 646-47.

The supreme court, in *Holle II*, rejected the intermediate appellate court's analysis, including its characterization of "sexual interest" as an *implicit element* of the state's sexual molestation statutes historically, explaining:

Holle does not cite, nor have we uncovered, any case in which an Arizona court has found an "implicit" element of a crime when the statute itself that defines the crime contains no such element, particularly where, as here, the alleged "implicit" element is contained

in a separate statute that identifies “defenses” to the charged offense. Contrary to the court of appeals, we do not view the § 13–1407(E) defense as one that “either denies an element of the offense charged or denies responsibility,”

Holle II, 240 Ariz. at 308, 379 P.3d at 205. Thus, the court held that Section 13-1407(E) operates as an affirmative defense under Arizona law, rejecting the intermediate court’s conclusion that the prosecution has the burden of disproving that the accused acted with “sexual interest” when the evidence raises that lack of specific intent:

[W]e hold that § 13–1407(E) provides an affirmative defense. The trial court thus properly instructed the jury that Holle’s alleged lack of *sexual motivation* is an affirmative defense under that statute, requiring him to prove by a preponderance of the evidence that he was not motivated by a sexual interest. Accordingly, we vacate the court of appeals’ opinion and affirm Holle’s convictions and sentences. 240 Ariz. at 208, 379 P.3d at 311 (emphasis added).

That the *Holle II* majority found no reference to an “implicit element” in prior Arizona law can hardly be dispositive on the question of whether such an element of specific intent to act with “sexual motivation” in the touching described in the definition of sexual contact under Section 13-1401(3) is constitutionally required. The *Holle II* dissenters correctly argued that omission of a necessary element of criminal intent or scienter from the definition of an offense requires that the element be implied. They relied on the Supreme Court’s decision in *Staples v. United States*, 511 U.S. 600, 615-616 (1994) holding that omission of *mens rea*, from the statutory definition of an offense did not convert the offense described to

one based on strict liability. Instead, the *Staples* Court relied on the traditional rule of *Morissette v. United States*, 342 U.S. 246, 250 (1952), that criminal intent is a required element for an offense. Although the Court has recognized that in some circumstances, strict liability has been deemed constitutionally sufficient as a basis for liability, the *Morissette* Court required a clear expression of legislative intent that the element of criminal intent was purposely not included in the definition of the offense. *Staples*, 511 U.S. at 606. The inclusion of the lack of “sexual motivation” in the definition of the affirmative defense in Section 13-1407(E) demonstrates that the legislature’s clear understanding that the accused’s “sexual interest” was integral to the culpability of an accused under Section 13-1410.

The accused is entitled to acquittal upon proving lack of sexual motivation by a preponderance of the evidence under Section 13-1407(E). Thus, proof of sexual motivation would necessarily follow as a basis for finding culpability under Section 13-1410; sufficient proof of sexual motivation constitutes an implicit element in the State’s case, even though not expressly included in the statutory definition of child molestation. Yet, proof of the accused’s “sexual interest” or “sexual motivation” is not required of the prosecution in the *Holle II* court’s interpretation of the interplay between Sections 13-1410 and 13-1407(E). This conclusion is untenable as a matter of due process.

Inclusion of the affirmative defense requiring acquittal, if proved, precludes any conclusion that Section 13-1410 is a strict liability offense and the Arizona courts did not consider it as such. Instead, it is an offense grounded in proof of criminal intent, consistent with the public policy set forth in Arizona Revised Statutes § 13-101(3), requiring criminal statutes to “define the act or omission *and the accompanying mental state which constitute each offense.*” (emphasis added).

The *implicit element* paradigm noted by the Arizona Court of Appeals in its review of state law with respect to molestation statutes and the proper effect to be given to Section 13-1407(E) clearly fits within the framework of the omitted element in Maine homicide law which was the focus of the Court’s decision in *Mullaney*. In both instances, the prosecution was relieved of the burden of proving a key element of proof, one that involved the accused’s intent in the alleged commission of the offense. In both, the burden of disproving the implicit element was imposed on the accused to demonstrate the lack of the implied intent by a preponderance of the evidence. And, in both instances, this shift in the burden of proof to require that the accused disprove the implied element resulted in the prosecution being relieved of having to prove each element necessary to prove culpability for the offense charged, resulting in a violation of due process.

The District Court correctly characterized the *Holle II* court’s interpretation of the statutory scheme governing prosecution of molestation offenses under

Arizona law as effectively skirting the *Winship/Jackson* rule establishing the prosecution's burden of proof in criminal cases, which extends to each element of the offense charged. By omitting the element of specific intent relating to the accused's "sexual interest" in engaging in contact arguably constituting "sexual contact," as defined in Section 13-1401(3), the Arizona statutory scheme fails to afford defendants the protections of *Winship/Jackson* that operate to prevent the conviction of individuals who are, in fact, innocent of offenses charged.

C.

Instead of considering the implications of *Mullaney* in light of Section 13-1407(E), the *Holle II* court rested its analysis on the post-*Mullaney* holding in *Patterson v. New York*, 432 U.S. 177 (1977). There, the Court recognized broad, but not unlimited, authority of the states to define affirmative defenses and impose a burden of proof or production on the defendant in responding to criminal charges. *Id.* at 201-02.

New York's homicide statute, in contrast to the Maine approach, defined the offense of murder without referencing any particular defense or justification. It did not require proof of malice, but the Court explained that New York recognized that a homicide committed under the influence of extreme emotional disturbance caused by a reasonable explanation could reduce liability as an affirmative defense to a murder warranting a manslaughter conviction. *Id.* at 206.

The distinguishing feature between *Mullaney* and *Patterson* homicide law was the inclusion of the implied element of intent—that the homicide occurred with malice—under Maine law, necessary for proof that the offense was murder. The *Patterson* Court held that New York could constitutionally define the offense of murder in terms of elements objectively proving intentional killing without having to negate any defense excusing culpability, such as insanity, or mitigating factor, such as extreme emotional disturbance, that could weigh into the determination of the degree of culpability. 432 U.S. at 210.

Sections 13-1410 and 13-1407(E), read together, provide that an accused who acts without “sexual motivation” or “sexual interest” is not guilty of molestation. This defensive theory is distinguished from both justification-based defenses and other affirmative defenses in Section 13-103(B), which provides:

B. For the purposes of this section, “affirmative defense” means a defense that is offered and that attempts to excuse the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable. Affirmative defense does not include any justification defense pursuant to chapter 4 of this title *or any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent.* (emphasis added).

It necessarily follows that *only* an accused whose act is motivated by “sexual interest” is culpable under Section 13-1410.

In response to Holle’s argument that the affirmative defense included in Section 13-1407(E) improperly shifted the burden of proof to him to prove that he

was not sexually motivated, while “removing sexual motivation as an element of proof of child molestation,” the *Holle II* court cited *Patterson* and *Martin v. Ohio*, 480 U.S. 228 (1987) for the proposition that the States are free to adopt defensive theories that require a defendant to carry the burden of proof. 240 Ariz. at 205, 379 P.3d at 308.

However, the *Holle II* court failed to appreciate the very limitation on assignment of the burden to prove a defensive theory that it quoted in citing *Patterson* and *Martin*. Requiring the accused to prove facts supporting an affirmative defense which do not implicate negating an element of the offense does not violate due process. But the language of the critical limitation is included in *Holle II*:

“The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense [] negate[s] an element of the crime. Where instead it excuse[s] conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt.”

Holle II, 240 Ariz. at 205, 379 P.3d at 308, citing *Smith v. United States*, 568 U.S. 106 (2013) (emphasis added). *Smith* differentiated between the affirmative defense that does not controvert an element of the offense and an impermissible shifting of the burden of proof to require the accused to disprove an element of the offense charged. *Smith* argued that requiring him to prove the affirmative defense that he had withdrawn from the conspiracies with which had been charged improperly

shifted the burden to him to prove his lack of culpability. The Court held, however, that “[w]ithdrawal does not negate an element of the conspiracy crimes charged here.” *Id.* at 110. It explained: “The State is foreclosed from shifting the burden of proof to the defendant only ‘when an affirmative defense *does* negate an element of the crime,’” citing Justice Powell’s dissenting opinion in *Martin*, 480 U.S. at 237 (emphasis in original).

In an Arizona prosecution for child molestation, the imposition of the burden of disproving that the accused acted with “sexual motivation” does negate an element of the crime--that the accused, by inference, did act with “sexual motivation” in engaging in sexual contact with the child. The omission of this specific intent on the accused’s part as an element of proof from Section 13-1410 reflects precisely the District Court’s concern that the omission reflected an attempt to “skirt” the holding in *Winship*. 245 F.Supp.3d 1157.

In *Martin*, the Court upheld the assignment of the burden of proof to the defendant claiming the affirmative defense of self-defense, typically a justification theory that would require the prosecution to disprove the defense. The Ohio approach did not require the defense to disprove any element of the prosecution’s case because the prosecution had to prove that the accused killed her husband with the “specific purpose and intent to cause his death;” and that a failure of proof on this element would require acquittal. Alternatively, the jury could find the killing

justified and acquit if she carried her burden in proving that she acted with “an honest belief that she was in imminent danger of death or great bodily harm.” 480 U.S. at 234.

In contrast to the Ohio affirmative defense, Section 13-1410 does not give jurors a way to find that the prosecution failed to prove the accused was motivated by “sexual interest” because *Holle II* expressly holds that the State is not required to prove that he acted with this specific intent. Instead, acquittal is only possible on the question of the accused’s intent if he establishes lack of sexual motivation by a preponderance of evidence. In eliminating the State’s burden of proof of this element of specific intent, Section 13-1410 exceeds constitutional limits on the State’s discretion in defining offenses and defenses. *Patterson*, 432 U.S. at 210.

D.

In operation, Section 13-1407(E) not only shifts the burden of proof to the accused to negate the existence of “sexual motivation” or “sexual intent” in doing the physical act described as “sexual contact.” It also deprives the accused of reliance on the *Winship/Jackson* rule barring conviction except upon proof establishing each element necessary for commission of the offense *beyond a reasonable doubt*.

If the accused charged with molestation of a child under Section 13-1410 elects to forego his right to remain silent at trial and undertakes to prove his

absence of “sexual motivation” or “sexual interest” by testifying in his defense, he faces an all or nothing situation in the process. The affirmative defense will require the accused to convince the jury by a preponderance of the evidence that he or she did not act out of any “sexual motivation,” while admitting the facts alleged to constitute “sexual contact.” Failure to meet this burden of proof to gain a unanimous jury verdict on his claimed defense will result in conviction.

But in some cases, the accused’s effort to convince jurors to acquit might fail even though the jury would have otherwise found that the evidence offered in support of the affirmative defense, almost certainly the accused’s own testimony, was sufficient to raise a reasonable doubt on the question of “sexual motivation.” Under *Winship/Jackson*, this reasonable doubt would have required acquittal based on the prosecution’s failure to meet its burden of proving the element of intent beyond a reasonable doubt, or its burden of disproving the accused’s testimony as to absence of “sexual motivation” or “sexual intent.”

In *Martin v. Ohio*, when the Court upheld Ohio’s requirement that the accused bear the burden of proving self-defense, it expressly explained:

When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence.

480 U.S. at 234. But in asserting the affirmative defense in Section 13-1410(E), the accused contesting the molestation charge has no alternative basis for acquittal based on the *Winship/Jackson* reasonable doubt rule.

Because *Holle II* expressly holds that proof of “sexual motivation” or “sexual interest” is not an element of the offense, the Arizona defendant able to raise a reasonable doubt, likely through his own trial testimony, but unable to convince the jury by a preponderance of the evidence will suffer conviction based on this failure. The statutory scheme violates Due Process of Law by subverting the reasonable doubt rule of *Winship* and *Jackson*.

II.

THE IMPERMISSIBLE SHIFTING OF THE BURDEN OF PROOF TO THE ACCUSED TO PROVE HIS LACK OF CRIMINAL INTENT COMPROMISES THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY FORCING HIM TO TESTIFY THAT HE “WAS NOT MOTIVATED BY A SEXUAL INTEREST.”

The construction of the defensive theory set out in Section 13-1407(E) by the Arizona Supreme Court creates a constitutional conundrum for the accused charged under Section 13-1410 with molestation of a child. Whether or not the accused acted with “sexual motivation” or “sexual interest,” as required for proof of the affirmative defense, is peculiarly within the accused’s knowledge. As a consequence, the omission of any requirement for proof by the State of this element of intent subject to the operation of the *Winship/Jackson* reasonable doubt rule, virtually requires the accused to testify in his own behalf in order to attempt to carry the defensive theory by the required standard of preponderance of the evidence.

The imposition of the burden of proving that the accused did not act with “sexual interest” impermissibly compromised his exercise of his right to remain silent through the trial, contrary to the protection afforded by the Fifth Amendment. The accused may often find it necessary, as a matter of tactics, to waive his right to remain silent and offer his own testimony in support of a defensive theory at trial. However, the option afforded by Section 13-1407(E) of

proving that he did not act with “sexual interest” in committing the act underlying the offense is virtually necessitates that he testify to explain his lack of criminal intent since only the accused could ever know what his intent was in this circumstance. Because the prosecution has been relieved of any requirement to show that the defendant charged under Section 13-1410 did act out of his “sexual interest,” the accused’s only route to acquittal lies in proof of the defense recognized in Section 13-1407(E). The option of remaining silent and arguing reasonable doubt based on the perceived weakness of the prosecution’s evidence will be unavailable in light of the *Holle* court’s construction of the statute.

It was the *Patterson* Court, in fact, that recognized the problem posed by adoption of an affirmative defense that would effectively require the accused to testify at trial in order to attempt to carry the assigned burden of proof. Justice White cautioned:

As Chief Judge Breitel cogently stated in concurring in the judgment and opinion below:

“A preliminary caveat is indicated. It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime. Indeed, a by-product of such abuse might well be also to undermine the privilege against self-incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf. . . .”

432 U.S. at 211, n.13, citing *People v. New York*, 347 N.E.2d 898, 909 (N.Y. Ct. App. 1976), (Breitel, C.J., concurring).

The assignment of the burden of negating the specific intent based on sexual motivation implicit in the molestation statute to the accused, while relieving the state of the burden of proving that he did act with sexual intent, effectively coerces the accused who was not sexually motivated to forego his right to remain silent and testify at trial. Since only the accused can truly know whether he is guilty or not guilty of molestation his only reasonable chance at acquittal based on his lack of intent will rest on waiving the Fifth Amendment privilege and testifying in support of the affirmative defense.

CONCLUSION

The Arizona statutory scheme for prosecution of child molestation rests upon the improper assignment of the burden of disproving, or negating, “sexual motivation” implicit in the offense to the accused by a preponderance of the evidence at trial. This burden-shifting violates Due Process of Law and further, by virtually compelling an accused to testify at trial in order to establish his lack of guilt, compromises the protection afforded by the right to remain silent under the Fifth Amendment. Stephen May’s conviction under Arizona law violated Due Process of Law.

Respectfully submitted this 3rd day of April, 2018.

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CERTIFICATE OF COMPLIANCE

The Brief for Amicus Curiae National Association for Rational Sexual Offense Laws complies with the typeface requirements of Rule 32(a)(5), using Microsoft Office Excel 2007, and type-style requirements of Rule 32(a)(6), using Times New Roman, 14 pt., and contains 6485 words.

/s/ J. Thomas Sullivan

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Attorney for Amicus Curiae

April 3, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2018, I electronically filed the foregoing with the Clerk of Court using CM/ECF system, which shall send notification of such filing to counsel for all parties entitled to notice by electronic filing.

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