

No. 17-15603(L), 17-15704(XAP)

United States Court of Appeals
For the
Ninth Circuit

STEPHEN EDWARD MAY,
Petitioner-Appellee,

v.

CHARLES L. RYAN, Warden; MARK BRNOVICH, Attorney General,
Respondents-Appellants.

STEPHEN EDWARD MAY,
Petitioner-Appellant,

v.

CHARLES L. RYAN, Warden; MARK BRNOVICH, Attorney General,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA (PHOENIX) IN CASE NO. 2:14-cv-00409-NVW

**BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF PETITIONER-APPELLEE STEPHEN MAY**

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CONSENT OF THE PARTIES

This brief is being filed with the consent of both parties, per [Rule 29\(a\)\(2\)](#), [Fed. R. App. P.](#) Undersigned counsel received consent from Robert Walsh, attorney for Charles Ryan and the Arizona Attorney General, on March 29, 2018, via email. Counsel received consent from Erica Dubno, counsel for Stephen May on March 29, 2018, via email.

IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Arizona Attorneys for Criminal Justice (“AACJ”), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens’ rights, the criminal justice system, and the role of the defense lawyer.

¹ Per [Rule 29\(a\)\(4\)\(E\)](#), [Fed. R. App. P.](#), no party’s counsel authored this brief in whole or in part and no party, party’s counsel, or person other than the amicus curiae, contributed money that was intended to fund the preparation or submission of this brief.

AACJ offers this brief in support of petitioner Stephen May because the issue on which the district court granted relief touches the core of AACJ's mission to protect individual rights guaranteed by the federal Constitution and to resist efforts to curtail such rights. Indeed, AACJ has repeatedly submitted *amicus curiae* briefs on this subject. AACJ submitted a brief on this issue to the Arizona Court of Appeals and then the Arizona Supreme Court in connection with Mr. May's postconviction proceedings. AACJ also submitted *amicus* briefs on this topic to both the Arizona Supreme Court and the U.S. Supreme Court in *State v. Holle*, [379 P.3d 197](#) (Ariz. 2016) (*Holle II*), *cert. denied*, [137 S. Ct. 1446](#) (2017).

Specifically, Arizona's child-molestation statutes presume that a person who has contact—direct or indirect—with a child's genitals does so with sexual intent. The government does not bear the burden to prove sexual intent; rather, the mother or babysitter who changed a diaper or the uncle who carried a nephew on his shoulders must instead prove the contact was *not* sexually motivated. This burden shifting implicates one of the most important due process protections guaranteed to criminal defendants by the Fifth and Fourteenth Amendments: the right to be convicted only if the state is able to prove every element of an offense beyond a reasonable doubt. *In re Winship*, [397 U.S. 358, 364](#) (1970). And this statutory scheme creates very real harms for the criminally accused.

ARIZONA, THROUGH ITS FREAKISH CHILD MOLESTATION STATUTES, IS THE ONLY STATE THAT REQUIRES THE DEFENDANT TO PROVE HER INNOCENCE. THIS UNCONSTITUTIONAL BURDEN SHIFT CARRIES VERY REAL IMPACTS FOR THE PUBLIC.

The briefing in this case has comprehensively considered the constitutionality question and the district court correctly concluded that Arizona's scheme unconstitutionally shifts the burden of proof to the criminally accused. Because the parties have extensively briefed this issue before the district court and this Court, *amicus curiae* does not seek to repeat what has already been said. Rather, AACJ seeks to provide insight on three issues.

First, the district court's comprehensive multi-jurisdictional analysis, although largely correct, incorrectly concluded that Hawaii does not require the government to prove a sexual purpose in molestation cases; Hawaii does require the State to prove an improper purpose. Arizona is the only jurisdiction to presume a sexual motivation.

Second, the district court's decision is consistent with other courts that have considered similar issues. Hawaii, New Mexico, California, and Alaska all considered a question similar to the one that faced the district court in this case. And the lower court's decision fell in line with each of these jurisdictions.

Third, this unconstitutional burden shift has real-world impacts on the criminally accused. People are convicted based upon the misallocated burden.

People are forced to take their cases to trial even when they can carry their burden. People are held in custody pretrial or have restrictions placed upon their freedom. And people are forced to live with a record for a sexual offense even if they are able to prove their innocence or convince the prosecutor to dismiss before trial.

1. Arizona is the only jurisdiction that requires the defendant to prove her innocence for sexual offenses.

The district court looked to the pertinent statutes of every jurisdiction to determine if Arizona's structure was an outlier. Order, 18-19. After conducting this evaluation, the district court correctly concluded, "Today the statutes or case law of 48 out of 50 states, the District of Columbia, three U.S. territories, and the federal government require some sexual purpose for the crime of child molestation." Order, 18. The district court concluded that the only other state that did not require a sexual purpose was Hawaii. However, Hawaii also requires a sexual purpose.

Hawaii defines sexual contact as the touching "of the sexual or other intimate parts" of another person. Haw. Rev. Stat. § [707-700](#). The Hawaii Supreme Court has applied the interpretation maxim of *ejusdem generis* when interpreting this statute to construe "intimate parts" as "only parts of the body similar in nature to 'sexual parts.'" *State v. Kalani*, [118 P.3d 1222, 1227](#) (Haw. 2005). To this extent, the statute still requires the government to prove that the body part touched

was intimate or sexual in nature. *State v. Silver*, 249 P.3d 1141 (Haw. 2011) provides an adequate example.

In *Silver*, two separate contacts with a victim's buttocks were charged: a touching that occurred during a late-night massage and a touching that occurred when the defendant threw an alleged victim back and forth in a swimming pool. *Id.* at 1143-44. The Hawaii Supreme Court concluded that context largely governed the determination of whether the body part touched was an "intimate part." *Id.* at 1147. Where a youth-team coach gives a player "a congratulatory pat on the buttocks" or a parent hugs or carries a child, the buttocks is not an "intimate part." *Id.* Thus, the Hawaii Supreme Court separated the two instances: the contact with the victim's buttocks that occurred during the late-night massage constituted contact with an "intimate part;" the contact with the victim's buttocks that occurred during horseplay in the pool did not. *Id.* at 1148.

Silver demonstrates that prosecutors in Hawaii must still present proof beyond a reasonable doubt that the context of an alleged offense supports the conclusion that contact was with an "intimate part." Put simply, the prosecutor must prove a sexual purpose or motivation.

Because of the way in which the state's court of last resort interpreted the text of the statute, not even Hawaii aligns with Arizona's requirement that a defendant prove her innocence. *See Schad v. Arizona*, 501 U.S. 624, 640 (1991)

(plurality) (“[A] freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.”). The upshot is that in fact 49 out of 50 states, the District of Columbia, three U.S. territories, and the Federal Government all require a sexual or otherwise improper purpose.

2. The district court’s decision is consistent with the reasoning and conclusion reached by every other court that has considered a similar question, with the sole exception of Arizona.

The decision of the Hawaii Supreme Court in *Silver*, discussed above, is illustrative of how other jurisdictions have handled similar questions. The Hawaii Supreme Court interpreted its definition of “sexual contact” to include a requirement that the State prove that the body part contacted is, under the context of the contact, intimate in nature. In doing so, the Hawaii Supreme Court ensured that defendants are not required to prove their innocence.

The New Mexico Supreme Court engaged in an even more similar evaluation in *State v. Osborne*, [808 P.2d 624](#) (N.M. 1991). There, the New Mexico Attorney General argued that an “unlawfully” element established a defense “providing the defendant with the opportunity to introduce evidence showing that his actions were within the scope of lawful activities such as routine childcare.” *Id.* [at 627](#). The court rejected this interpretation, in part because it was concerned that such a construction would sweep in innocent conduct. *Id.* [at 628](#). The court refused

to “sanction an interpretation of a statute which would allow the state to impose such unjustifiable hardships upon presumptive innocent defendants.” *Id.*

The New Mexico court further concluded: “The necessity of establishing an excuse or justification for an act should not be imposed upon a defendant until the state has established that conduct has occurred which, under common standards of law and morality, may be presumed criminal.” *Id.* at 630. In supporting this conclusion, the court relied, in part, upon due process. *Id.* (citing W. LaFave & A. Scott, *Handbook on Criminal Law* § 21 (1972) for “due process and statutory presumptions, defenses, and exceptions”). This language echoes the Supreme Court’s holding in *In re Winship* that “[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” 397 U.S. at 364. Accordingly, the New Mexico Supreme Court concluded “unlawfulness” was an element as to which the government bore the burden of proof, and expressly recommended a standard instruction that clearly excepted “nonabusive parental or custodial child care.” *Osborne*, 808 P.2d at 630-31 (internal brackets omitted).

The California Court of Appeal reached a similar decision in *People v. Pallares*, 246 P.2d 173 (Cal. App. 1952). In *Pallares*, the court considered a statute that stated: “Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable ... by” a term of imprisonment. *Id.* at 174. The court

concluded, “[w]hen the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender.” *Id.* at 177. Thus, while the statute did not provide a *mens rea*, the court concluded “that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children.” *Id.* Thus, California requires the State to prove the conduct was “motivated by an abnormal sexual interest in children in general or a specific child” *People v. Phillips*, 188 Cal. App. 4th 1383, 1396 (Cal. App. 2010).

And while Alaska defines “sexual contact” in a manner that does not include sexual intent, Alaska also does not saddle the defendant with the burden of proving her own innocence. Alaska’s definition of “sexual contact” does not include an element of “intent to obtain sexual gratification.” Alaska Stat. § 11.81.900(b)(59); *Braun v. State*, 911 P.2d 1075, 1078 (Alaska App. 1996). Nevertheless, a defendant does not bear a burden to prove his contact was innocent. The definition for “sexual contact” expressly provides an exception for “normal caretaker responsibilities.” Alaska Stat. § 11.81.900(b)(59)(B). This exception operates as a defense, but not an affirmative defense. *Peratrovich v. State*, 903 P.2d 1071, 1074-75 (Alaska App. 1995). Thus, a defendant must merely present “some evidence” that places the defense at issue. Alaska Stat. § 11.81.900(b)(19); *Peratrovich*, 903 P.2d at 1075. Once “some evidence” puts the defense at issue, the government

must prove, beyond a reasonable doubt, that the contact was not within the ambit of “normal caretaker responsibilities.” Alaska Stat. § 11.81.900(b)(19); *Peratrovich*, 903 P.2d at 1075.

In each of these jurisdictions, the courts considered whether a similar statute relieved the government of its burden to prove beyond a reasonable doubt that the defendant’s conduct was improper. And in each, the courts placed the burden of proof squarely on the government, either by construing the operative terms of the statute in that way or by otherwise resorting to federal due-process rules. The district court’s ruling here thus was consistent with nearly every court to have addressed a similar decision. The only court to differ: the Arizona Supreme Court in *Holle*.

3. The improper allocation of burden has a real world impact that negatively impacts people.

The law at issue in this case has an impact. Real people are harmed by the improper allocation of the burden of proving innocent contact. This harm stretches through all phases of the criminal process: jury deliberations, trial, and even pretrial release.

The most striking example of this harm is illustrated by *State v. Holle*, 379 P.3d 197 (Ariz. 2016) (*Holle II*) & 358 P.3d 639 (Ariz. App. 2015) (*Holle I*). Jerry Holle’s granddaughter accused him of touching her. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641. The granddaughter first brought this accusation up to a

friend and school counselor. *Holle I*, 358 P.3d at 641. During an investigation, she also told police that Jerry had inappropriately touched her. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641. The State charged Jerry with three sex offenses (molestation of a child, sexual abuse of a minor under fifteen, sexual conduct with a minor under fifteen) and one count of aggravated assault. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641.

Before trial, Jerry objected to the statutory elements of the sexual offenses and asked the trial court to instruct the jury that the State was required to prove that any touching was sexually motivated to prevail on the charged sex offenses. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641. The trial court refused. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641.

After the State's case closed, the trial court entered a judgment of acquittal on the aggravated-assault count. *Holle I*, 358 P.3d at 641. The trial court refused to enter a judgment of acquittal on any of the other counts. *Id.*

Jerry presented a number of witnesses who testified that Jerry was sexually normal. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 641-42. Both of Jerry's "daughters testified that he never sexually assaulted them or any other children." *Holle II*, 379 P.3d at 198; accord *Holle I*, 358 P.3d at 642. The alleged victim's uncle also testified that he "had no reason to believe Holle was sexually interested in [the victim] or other children." *Holle I*, 358 P.3d at 642; accord *Holle II*, 379

P.3d at 198. All-in-all, Jerry argued the allegations were “blown out of proportion.” *Holle I*, 358 P.3d at 642.

In line with its prior ruling, the trial court instructed the jury that Jerry bore the burden of proving “the affirmative defense of no sexual interest by a preponderance of the evidence.” *Holle I*, 358 P.3d at 642; accord *Holle II*, 379 P.3d at 198.

Despite this instruction, the jury asked, early in its deliberations: “For these accusations to be a crime, must there be sexual intent proven?” *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 642. The trial court referred the jury to the original instructions. *Holle II*, 379 P.3d at 198; *Holle I*, 358 P.3d at 642.

The jury’s question illustrated that the evidence presented a close call and the jury was concerned with which party bore the burden of proof. The instruction, which told the jury to presume sexual motivation unless Jerry could prove a lack of sexual motivation by a preponderance of the evidence, carried the day. Jerry was convicted because he could not adequately prove his innocence.

Fortunately, not everyone suffers conviction because of the burden. But that is not to say that the improper burden has no impact. The Motion for Reconsideration filed in *Holle II* discussed the charge and acquittal of David Zupan. David Zupan and his wife took in two foster children who suffered from psychological problems and had a history of lying; including fabricating an

allegation of sexual misconduct against David's four-year-old son that Child Protective Services investigated and determined was unfounded. As a result of the psychological problems, the foster children had to wear diapers and would soil themselves. But the children also would not admit to having soiled themselves, meaning David and his wife had to check the diapers regularly in order to make sure the children were kept clean. David's wife also kept a very thorough account of the foster experience, including several instances when the children were dishonest.

Even though all of this information was presented to the prosecution before an indictment, the prosecution took the case to the grand jury. The prosecution also minimized the soiling problems and never mentioned the psychological problems or history of lying.

Like in Jerry Holle's case, the trial court instructed the jury that David had to prove his innocence—David had to prove any contact was not motivated by a sexual interest. Fortunately for David, he was able to carry this burden.

But accusation alone is so serious that it can be disqualifying for some activities or careers. And even if the charge is not automatically disqualifying, David must forever live with the obloquy of being an accused sexual predator of children.

A person in David's position has their freedom of movement restrained. Many must stay in jail pending trial. Even if they are not confined the entire time, pretrial release conditions nonetheless restrict movement. This last legislative session, Arizona State Representative Anthony Kern proposed a bill designed to fix the molestation statute. HB 2463. The Bill proposed to insert an additional element: that the molestation was motivated by sexual interest. On February 15, 2017, the Arizona House Judiciary and Public Safety Committee held a hearing on the bill.

During that hearing, Christopher Manberg, a Phoenix attorney whose practice focuses on the defense of sex crimes, testified that the current law in Arizona created a very real problem beyond just potential outcomes after trial. http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18767&meta_id=390869, 4:14:00-4:15:00. While prosecutors are restrained by their responsibility to bring charges only if there was a reasonable likelihood of conviction, that ethical duty did not avoid all harms. *Id.* at 4:15:00-4:16:00. First, police officers are not restrained by the same ethical responsibility. *Id.* at 4:15:08-4:15:20. Thus, a person who engages in conduct as innocent as changing a diaper could still be arrested. *Id.* at 4:15:20-4:16:00.²

² This echoes Chief Justice Bales's dissent in *Holle II*, wherein he observed that "[p]arents and other caregivers who have changed an infant's soiled diaper or bathed a toddler will be surprised to learn that they have committed a class 2 or 3

That is when the second problem arises: a person can then be held in custody for a substantial period of time before the prosecution decides not to pursue charges. *Id.* at 4:16:00-4:16:44. Mr. Manberg shared the story of one of his clients who was arrested for just that sort of innocuous conduct. *Id.* at 4:16:00-4:16:19. After arrest, this person was held non-bondable. *Id.*³ He had to wait in jail for seven days before the prosecution decided not to proceed with molestation charges. *Id.* at 4:16:20-4:16:28. After those seven days the charges were dropped and he was released. *Id.* But that does not mean the charges were harmless. *Id.* at 4:16:28-4:16:44. He lost that time with his family. *Id.* He lost that time at work, potentially risking employment. *Id.* And when he came out, he had an arrest for molestation on his record—a devastating impact on its own. *Id.*

felony. They also will likely find little solace from the majority’s conclusion that although they are child molesters or sex abusers under Arizona law, they are afforded an ‘affirmative defense’ if they can prove by a preponderance of the evidence that their toughing ‘was not motivated by sexual interest.’” 379 P.3d at 208.

³ The Arizona Constitution excepts molestation of a child under the age of 15 from the requirement for bail. Ariz. Const. Art. 2, § 22(A)(1). Additionally, Ariz. Rev. Stat. § 13-3961(A)(4) directs that persons charged with molestation of a child under the age of 15 “shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged” Only recently was this provision held unconstitutional as applied to child molestation charges. *Chantry v. Astrowsky*, 395 P.3d 1114 (Ariz. App. 2017).

CONCLUSION

The district court correctly concluded that Arizona's child molestation statutory scheme improperly shifts the burden to the criminally accused. The impropriety of such a scheme is illustrated by the fact that Arizona is the only jurisdiction that presumes a sexual motivation and requires the defendant to prove her innocence. And the shifted burden has real impacts upon people accused of a horrible crime. Accordingly, *amicus curiae* asks this Court to affirm the district court's ruling.

RESPECTFULLY SUBMITTED this 30th day of March, 2018.

By /s/ Mikel Steinfeld
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CERTIFICATE OF COMPLIANCE

This brief was written in fourteen-point Times New Roman and thus complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as required by Fed. R. App. P. 29(a)(4). This brief contains 3,464 words, in compliance with Fed. R. App. P. Rules 29(a)(5) and 32(a)(7)(B).

DATED this 30th day of March, 2018.

By /s/ Mikel Steinfeld
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