IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Plaintiff/Respondent, v. STEPHEN EDWARD MAY, Defendant/Petitioner.	Arizona Court of Appeals No. 1 CA-CR 12-0022 PRPC Maricopa County Superior Court No. CR-2006-030290-001 SE

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND OFFICE OF THE MARICOPA COUNTY PUBLIC DEFENDER IN SUPPORT OF PETITION FOR REVIEW

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") is a not-for-profit membership organization representing 400 criminal defense lawyers licensed to practice in the State of Arizona, law students, and other associated professionals, which is dedicated to protecting the rights of the criminally accused in the courts and the legislature.

Amicus curiae Maricopa County Public Defender's Office ("MCPD") is the largest indigent defense law firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 50,000 cases.

Amici offers this brief in support of Stephen May's petition for review because the issue presented touches the core of AACJ's and MCPD's mission to protect individual rights guaranteed by the Federal and State Constitutions and to resist all efforts made to curtail such rights.

INTRODUCTION

This case implicates one of the most important constitutional protections guaranteed to criminal defendants: the right to be convicted only upon proof beyond a reasonable doubt and to require the State to prove guilt rather than the defendant to prove innocence. Indeed, "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of criminal law. It 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." *In re Winship*, 397 U.S. 358, 364 (1970). This concern is at its height "in a case . . . where the defendant is required to prove the critical fact in dispute" because the "result . . . is to increase further the likelihood of an erroneous . . . conviction." *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

Moreover, the interests at the heart of the Constitution's demand for a higher standard of proof in criminal cases are magnified here because of the severe loss of liberty and powerful stigma attached to a child molestation conviction. *See In re Winship*, 397 U.S. at 363. Due process cannot allow the State to visit upon one of its citizens such dire consequences in the absence of proof beyond a reasonable doubt of the very fact – motivation by sexual interest – that makes child

molestation so repugnant. *Cf. Apprendi vs. New Jersey*, 530 U.S. 466, 495 (2000) ("The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."). By misinterpreting the statutory scheme and re-labeling the element of sexual interest as an affirmative defense, Arizona allows an accused to be punished as a *sex* offender with no requirement that the State prove anything *sexual* about the accused's conduct.

REASONS THE COURT SHOULD GRANT THE PETITION

ARIZONA'S CHILD MOLESTATION STATUTORY SCHEME, AS APPLIED, IS UNCONSTITUTIONAL BECAUSE IT IMPROPERLY SHIFTS THE BURDEN OF PROOF ON THE ESSENTIAL ELEMENT OF SEXUAL INTENT TO CRIMINAL DEFENDANTS

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A legislature may not lower the State's burden of proof by calling an "element" something else. *Apprendi vs. New Jersey*, 530 U.S. 466 at 476-77 (2000); *cf Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). Due Process also

limits a legislature's authority to change an "element" of a crime into an affirmative defense. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

Here, sexual interest is, and always has been, an element of the offense of Child Molestation. In *State v. Simpson*, 217 Ariz. 326, 173 P.3d 1027 (App. 2007), the Arizona Court of Appeals interpreted A.R.S. § 13-1410 as not requiring the State to prove the element of sexual interest and found that A.R.S. § 13-1407 created an affirmative defense if a defendant could prove that any contact forbidden by § 13-1410 was not due to sexual interest. The first problem is that this decision failed to appropriately interpret the statutory scheme in light of prior jurisprudence. However, even if the Court of Appeals correctly interpreted the statutory scheme, such a scheme is still unconstitutional because the legislature has then overstepped its constitutional authority and because the scheme creates a mandatory rebuttable presumption as to a key aspect of child molestation—the sexual interest.

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I. SEXUAL INTEREST IS AN ELEMENT OF THE OFFENSE OF CHILD MOLESTATION AND *SIMPSON*'S INTERPRETATION THAT THE STATUTORY SCHEME CREATED AN AFFIRMATIVE DEFENSE FOR LACK OF SEXUAL INTEREST WAS INCORRECTLY DECIDED

There are some elements so central to the definition of a crime that the burden of proof may not be reallocated to the defendant. *Patterson*, 432 U.S. at 210. "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" *Apprendi*, 530 U.S. at 493; *cf United States v. XCitement Video, lnc.*, 513 U.S. 64, 73 (1994) (scienter requirement must apply to "crucial element separating legal innocence from wrongful conduct"). And "a State cannot through mere characterization change the nature of the conduct actually targeted." *Apprendi*, 530 U.S. at 493 n.18. A crucial element is that fact which separates legal innocence from wrongful conduct.

When legislatures attempted to reallocate the burden of proof on such core elements, a long line of Supreme Court cases reaffirmed the due process command that "the jury find beyond a reasonable doubt every fact necessary to constitute the crime." In *Mullaney v. Wilbur*, the Court held that a Maine statute impermissibly "shifted the burden of proof to the defendant" to negate the murder element of

"malice aforethought" by requiring the defendant to prove he acted with "heat of passion on sudden provocation" to reduce the crime to manslaughter. 421 U.S. 684, 701, 705 (1975). The Court spoke in broad terms, rejecting the notion that *Winship* should be "limited to those facts that constitute a crime as defined by state law" because a "State could undermine many of the interests that decision sought to protect" merely by "redefin[ing] the elements that constitute different crimes." *Id*. at 698. *Patterson* upheld New York's murder statute against a challenge based on *Mullaney*, because, although the defendant had the burden to prove "extreme emotional disturbance" to reduce the crime from murder to manslaughter, "New York, unlike Maine, had not made malice aforethought, or any described *mens rea*, part of its statutory definition of second-degree murder." *Apprendi*, 530 U.S. at 485 n.12 (discussing *Mullaney* and *Patterson*). Deference to New York's definition of murder was warranted, the Court reasoned, because the prosecution must prove beyond a reasonable doubt only "the elements included in the definition of the offense" charged; New York remained free to create affirmative defenses and require the defendant to carry the burden on those defenses. *Patterson*, 432 U.S. at 210-11. Yet, the Court recognized that its deference to legislatures left open the door to States amending criminal statutes to shift the

burden of proof on some elements of existing crimes and assured that "there are obviously constitutional limits beyond which the States may not go in this regard." *Id*. at 210.

More than two decades later, *Apprendi* conclusively confirmed in one important regard the constitutional limits on the States' ability to manipulate burdens of proof: any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Put differently, "all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). In *Apprendi*, the Court invalidated a so-called "sentencing enhancement" because the fact in question was "the functional equivalent of an element of a greater offense." 530 U.S. at 469, 494 & n.19. The Court noted that the statute at issue in that case did not present a question "concerning the State's power to manipulate the prosecutor's burden of proof . . . by placing the affirmative defense label on 'at least some elements' of traditional crimes." *Id.* at 475 (quoting *Patterson*, 432

U.S. at 210). The Court reaffirmed, however, that it has not "budge[d] from the position that . . . constitutional limits exist to states' authority to define away facts necessary to constitute a criminal offense." 530 U.S. at 486.

The history of how the Child Molestation statute read at different times, and how the statutes were interpreted, also provides insight as to how the present statute should be interpreted and how the Court of Appeals erred in *Simpson* and *Sanderson*.

From 1939 until 1993, the crime of child molestation required proof that the defendant "molested" a child. *See* 1990 Ariz. Sess. Laws, Ch. 384, § 4; Ariz. Code Ann. 1939 § 43-5902. Pre-1993 case law makes clear the sexual connotation pregnant in the word "molest" and the legislature's intent to target conduct motivated by sexual interest. In 1955 the Arizona Supreme Court analyzed the Child Molestation statute in effect at the time. *State v. Trenary*, 79 Ariz. 351, 290 P.2d 250 (1955). The Court quoted the pertinent statute:

> Molesting children or loitering.-Any person who molests a child under the age of sixteen (16) years, or who without legitimate reason loiters about a school where children are in attendance or a nearby public place frequented by school children, or who loiters in or about a public toilet in a park, shall be deemed a vagrant, and upon conviction therefor shall be punished by a fine of not more than three hundred dollars ($300),

> imprisonment in the county jail for not more than six (6) months, or both. A person convicted under the provisions of this section who has previously been convicted of the same offense, or of an offense under the provisions of sections * * * 43-5902, Arizona Code of 1939, or of any offense involving lewd or lascivious conduct, shall be punished by imprisonment for not more than five (5) years.

Id. at 353, 251 (quoting A.R.S. § 43-5902). In defining this statute, the Court relied heavily upon *People v. Pallares*, 112 Cal.App.2d Supp. 895, 246 P.2d 173 (Cal.Super. 1952). The Arizona Supreme Court relied upon the California Court's determination that "When 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." *Trenary*, 79 Ariz. at 354, 290 P.2d at 252 (quoting *Pallares*, 112 Cal.App.2d Supp. at 901, 246 P.2d at 177).

In 1966 the Arizona Supreme Court again reviewed the Child Molestation statute in effect at the time in *State v. Berry*, 101 Ariz. 310, 419 P.2d 337 (1966). By 1966 the statutory language of the Child Molestation statute had changed and read:

> A person who molests a child under the age of fifteen years by fondling, playing with, or touching the private parts of such child or who causes a child under the age of fifteen years to fondle, play with, or touch the private parts of such person shall be guilty of a felony ….

Berry, 101 Ariz. at 312, 419 P.2d at 339 (quoting A.R.S. § 13-653). Berry argued that the statute was vague because "the absence of any mention of an intent or scienter element in the statute necessarily makes it applicable to such people as parents and doctors who might touch a child's private parts for other than condemning reasons." *Id.* The Court criticized Berry's argument because it attempted to analyze separate words of the statute in isolation. *Id.* Applying *Trenary*, the Court stated:

> Thus, from both the word 'molest' itself and the general intent of the Legislature as may be grasped from a reading of the statute as a whole, a scienter requirement is apparent. As we have said before, where a penal statute fails to expressly state a necessary element of intent or scienter, it may be implied. In answer to defendant's contention, therefore, it is certainly possible for a doctor or parent to touch the private parts of a child without 'molesting' him by doing so, in which case the statute has not been violated.

Id. at 313, 340.

These cases came under scrutiny by the Court of Appeals in *Matter of Maricopa County Juvenile Action No. JV-121430*, 172 Ariz. 604, 838 P.2d 1365 (App. 1992). In *JV-121430* the Court of Appeals was determining whether the Child Molestation statute required an "unnatural or abnormal sexual interest." *Id.*

at 605, 1366. The juvenile's argument was that his sexual interest was not abnormal or unnatural based upon expert testimony and his youth. *Id.* at 605-06, 1366-67. The statute at the time read:

> A person who knowingly molests a child under the age of fourteen years by directly or indirectly touching the private parts of such child … is guilty ….

Id. 606, 1367 fn.2 (quoting A.R.S. § 13-1410). Additionally, by this point the Legislature had already enacted A.R.S. § 13-1407(E), providing:

> It is a defense to prosecution pursuant to § 13-1410 that the defendant was not motivated by *a sexual interest*.

Id. at 606-07, 1367-68 (quoting A.R.S. § 13-1407(E))(emphasis added in opinion). "[T]he logical correlation to this defense is that the intent necessary to commit the crime of molestation is not an 'abnormal or unnatural sexual interest,' but only that the actor be motivated by a 'sexual interest.'" *Id.* at 607, 1368. The Court concluded, "the formerly articulated 'unnatural or abnormal sexual interest' standard is now modified by the statutory 'sexual interest' standard, if, in any event, that former standard was ever meant to do anything more than 'distinguish the criminal conduct ….'" *Id.*

JV-121430 did not abandon the notion that Child Molestation still required proof of some sort of sexual interest; *JV-121430* simply noted that there was no

longer a requirement that the sexual interest be abnormal or unnatural. However, this case was then misinterpreted in *State v. Sanderson*, 182 Ariz. 534, 898 P.2d 483 (App. 1995), setting the stage for future misinterpretations.

In *Sanderson* the defendant argued that the Child Molestation statute shifted the burden of proof to the defendant. 182 Ariz. at 541, 898 P.2d at 490. When *Sanderson* was decided, the language of the statute had been changed to the following:

> A person who knowingly molests a child under the age of fifteen years by directly or indirectly touching the private parts of such child or who causes a child under the age of fifteen years to directly or indirectly touch the private parts of such person is guilty of a class 2 felony and is punishable pursuant to § 13-604.01.

Id. (quoting A.R.S. § 13-1410). The defendant argued that this statute, when read in concert with A.R.S. § 13-1407(E), "effectively created a presumption regarding the existence of sexual motivation which he was required to disprove." *Id.* at 542, 491. The constitutional argument, however, was not raised at the trial court and the Court of Appeals ruled that the issue had been waived on appeal. *Id.*

Interestingly, the Court of Appeals continued its analysis and found that the statutes "did not allocate the burden of proof on any element to the defendant but, rather, created an affirmative defense regarding motive. *Id.* The Court cited to

Patterson and *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980), to support its finding. *Id.* Both of these cases, however, discuss affirmative defenses in the context of murder statutes, not Child Molestation statutes. *See Patterson*, 432 U.S. at 198; *Gretzler*, 126 Ariz. at 89, 612 P.2d at 1052. The *Sanderson* Court also relied upon *JV-121430* to hold, "Contrary to the defendant's implication, proving the existence of such motivation was not necessary to establish guilt of child molestation under the statute at issue." 182 Ariz. at 491, 898 P.2d at 542. The Court even went so far as to footnote the citation to *JV-121430*, proposing that *JV-121430* "prov[ed] sexual motivation remains unnecessary under the current version of the statute." *Id.* at fn.4.

Notably, *Sanderson* is the first interpretation of A.R.S. § 13-1407(E) as establishing an affirmative defense. *JV-121430* had the opportunity to review § 13-1410 in conjunction with § 13-1407 and came short of "Proving sexual motivation remains unnecessary." Instead, upon reviewing the statutory scheme, *JV-121430* concluded that "the logical correlation to this defense is that the intent necessary to commit the crime of molestation is not an 'abnormal or unnatural sexual interest,' but only that the actor be motivated by a 'sexual interest.'" 172 Ariz. at 607, 838 P.2d at 1368. The disparity in interpretation is best noted by how

the Arizona Supreme Court interpreted *JV-121430* at A.R.S. § 13-1407(E), which was presented in *State v. Lujan*, 192 Ariz. 448, 967 P.2d 123 (1998).

In *Lujan* the defendant was convicted under the same statutory scheme that had been discussed in *Sanderson* and *JV-121430*. Under this scheme, the crime of Child Molestation read:

> A person who knowingly molests a child under the age of fifteen years by directly or indirectly touching private parts of such child … is guilty of a class 2 felony and is punishable pursuant to § 13-604.01.

Lujan, 192 Ariz. 448, ¶ 7, 967 P.2d 123, ¶ 7. Interpreting the statutory scheme, and specifically relying upon A.R.S. § 13-1407(E), the Arizona Supreme Court held:

> "Knowingly molests" not only requires that the defendant touch a child's private parts but that the defendant be motivated by sexual interest.

Id. (citing A.R.S. § 13-1407(E) and *JV-121430*, 172 Ariz. at 606-07, 838 P.2d at 1367-68). The Supreme Court then spent the bulk of its time analyzing expert testimony and rape shield issues before vacating the decision of the Court of Appeals, reversing the judgment of the trial court, and remanding the matter.

Finally, in *State v. Simpson*, the Court of Appeals again reviewed the Child Molestation statute. 217 Ariz. 326, ¶ 1, 173 P.3d 1027, ¶ 1 (App. 2007). The pertinent Molestation statute provided:

> A person commits molestation of a child by intentionally or knowingly engaging in … sexual contact … with a child under fifteen years of age.

Id. at ¶ 13 (quoting A.R.S. § 13-1410(A) (2001)). Sexual contact was also defined:

> "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 …."

Id. (quoting A.R.S. § 13-1401(2) (2001)). The scheme also provided:

> It is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that defendant was not motivated by sexual interest.

Id. at ¶ 15 (quoting A.R.S. § 13-1407(E)). Because no objection was made at the trial court level, the defendant argued on appeal that "the trial court should have *sua sponte* instructed the jurors that the State was required to prove that Defendant's actions were motivated by sexual interest under A.R.S. § 13-1407(E)." *Id.* The Court of Appeals disagreed. *Id.* Relying on *Sanderson*, the Court of Appeals determined that sexual interest was an affirmative defense. *Id.* at ¶ 19. *Simpson* more correctly interpreted *JV-121430*, noting that in *JV-121430* the

Supreme Court concluded "the intent necessary to commit the crime of molestation is … that the actor be motivated by a 'sexual interest.'" *Id.* at ¶ 20 (quoting *JV-21430*, 172 Ariz. at 606-07, 838 P.2d at 1367-68). The Court of Appeals also correctly noted that in *Lujan* the Supreme Court noted "interpreted the 'knowingly molests' language as requiring an additional finding that a defendant be motivated by a 'sexual interest.'" *Id.* at ¶ 21 (quoting *Lujan*, 192 Ariz. 448, ¶ 7, 967 P.2d 123, ¶ 7). The Court of Appeals differentiated its case as follows:

> Neither *JV–121430* nor *Lujan* construed the current version of A.R.S. § 13–1410, enacted in 1993, which differs from the previous version as the current version does not contain the language "knowingly molests." These cases are, therefore, not persuasive in construing the applicable version of the statute. Also, the current version of A.R.S. § 13–1410 makes molestation of a child a crime if a person "intentionally or knowingly engag[es] in ... sexual contact ... with a child under fifteen years of age." Nothing in either *JV–121430* or *Lujan* compels this court to interpret the A.R.S. § 13–1410, as amended, to require proof of "sexual interest" as an element of the offense.

Id. at ¶ 22 (internal citations omitted).

The shortcomings in the analysis presented by the Court of Appeals in *Simpson* is that the Court of Appeals failed to adequately explain how the small changes in the statute changed, in any way, the analysis presented by the Arizona

Supreme Court in *Berry*. Reviewing just the progression of the statutes, the Child Molestation statutes have read as follows:

> Any person who molests a child … shall be deemed a vagrant, and upon conviction therefor shall be punished [by fine, imprisonment or both].

Trenary, 79 Ariz. 351, 290 P.2d 250:

> A person who molests a child … by fondling, playing with, or touching the private parts of such child … shall be guilty of a felony ….

Berry, 101 Ariz. 310, 419 P.2d 337:

> A person who knowingly molests a child under … by directly or indirectly touching the private parts of such child … is guilty of a class 2 felony ….

JV-121430, 172 Ariz. 604, 838 P.2d 1365; *Sanderson*, 182 Ariz. 534, 898 P.2d 483; *Lujan*, 192 Ariz. 448, 967 P.2d 123;

> A person commits molestation of a child by intentionally or knowingly engaging in … sexual contact … with a child under fifteen years of age.
>
> "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 …."

Simpson, 217 Ariz. 326, 173 P.3d 1027.

From the statute presented in *Berry* forward, the statute has always provided a definition of what it means to molest. The statutes have consistently provided that a person molests a child by engaging in certain behavior. In the statute in *Berry* a person molested a child "by fondling, playing with, or touching" a child's genitalia. In *JV-121430*, *Sanderson*, and *Lujan* a person knowingly molested a child "by directly or indirectly touching the private parts" of a child. Finally, in *Simpson*—and the present statute—a person molests a child "by intentionally or knowingly engaging in" "any direct or indirect touching, fondling or manipulating" of a child's genitalia. The elements discussed in *Berry* remained fundamentally unchanged through *Simpson*. Accordingly, the Supreme Court has consistently maintained a standard interpretation. The Court of Appeals, however, has attempted to single out small word changes in order to come to a different conclusion. By doing so, the reasoning used by the Court of Appeals in *Simpson* faults from the same logical defect criticized in *Berry*:

> The defendant would have us analyze each statutory word in its isolated form and in strict dictionary terms. In his brief, for instance, he discusses the dictionary definitions of the words 'touching' and 'playing' and concludes that, because the definitions do not include anything to suggest a wrongful act and because the definitions are extremely broad, the language of the statute 'fails to satisfy due process.'

Berry, 101 Ariz. at 312, 419 P.2d at 339.

When analyzing the statutory scheme of Child Molestation, as a whole, the statute still requires the State to prove that the prohibited conduct was done with a sexual interest. The statute refers to molestation in the body of the text, which still has a connotation of sexual conduct. The fact that there is reference to "sexual contact" speaks of the element of a sexual intent. "Sexual" is defined as "of, relating to, or associated with sex or the sexes" or "having or involving sex." Merriam-Webster (accessed at http://www.merriam-webster.com/dictionary/sexual). Defining the phrase "sexual contact" in clinical terms does not remove the requirement that such contact must still be "of, relating to, or associated with sex." Moreover, these statutes are included in Chapter 14, dealing with "Sexual Offenses." A person convicted of Child Molestation is further required to register as a sex offender. A.R.S. § 13-3821(A)(7). The references to a sexual intent are manifest within the statutory scheme. Accordingly, sexual intent is still something that must be proved by the State.

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II. IF *SIMPSON* WAS CORRECTLY DECIDED AND THE CRIME OF CHILD MOLESTATION DOES NOT REQUIRE PROOF OF SEXUAL INTEREST, THE LEGISLATURE HAS OVERSTEPPED ITS CONSTITUTIONAL AUTHORITY BY SHIFTING THE BURDEN OF PROOF TO DEFENDANTS AND ESTABLISHING A MANDATORY BUT REBUTTABLE PRESUMPTION THAT ANY CONTACT WITH GENITALIA IS SEXUAL AND ILLEGAL

Generally, in determining the necessary elements of a crime, courts defer to state legislatures because the states are "free to choose the elements that define their crimes." *Jones v. United States*, 526 U.S. 227, 241 (1999). "The caveat [is] a stated recognition of some limit upon state authority to reallocate the traditional burden of proof." *Id*. (citing *Patterson*, 432 U.S. at 210). The Supreme Court had issued repeated assurances that this constitutional limit exists on states' ability "to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes[.]". *Patterson*, 432 U.S. at 210; *see Harris v. United States*, 536 U.S. 545, 557 (2002) (plurality opinion); *Apprendi*, 530 U.S. at 486; *Jones*, 526 U.S. at 241; *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (all acknowledging the limits identified in *Patterson*).

That limit on legislative power has been aggressively enforced by the Supreme Court since *Apprendi*. *See Ring*, 536 U.S. at 609 (holding that aggravating factors "necessary for imposition of the death penalty" must be found

by jury, not judge); *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004) (invalidating Washington's sentencing scheme, which allowed judge-found facts to increase punishment); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (applying *Apprendi* and *Blakely* to the mandatory federal Sentencing Guidelines); *Cunningham v. California*, 549 U.S. 270, 293 (2007) (invalidating California's determinate sentencing scheme); *cf. Oregon v. Ice*, 555 U.S. 160, 177 (2009) (Scalia, J., dissenting) ("The right to . . . proof beyond a reasonable doubt is a given, and all legislative policymaking – good and bad, heartless and compassionate – must work within the confines of that reality.").

Apprendi seems to reject *Patterson*'s extreme deference to legislatures, noting that "the relevant inquiry is one not of form, but of effect." 530 U.S. at 494; *see also Harris*, 536 U.S. at 18, 557 (plurality opinion) ("Though defining criminal conduct is a task generally left to the legislative branch, . . . Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.") (internal quotation marks and citations omitted). Although the Court has never said what would fall beyond the limits identified in *Patterson* and confirmed in *Apprendi*,

there have been strong suggestions by members of the Court that call Arizona's child molestation statutes into constitutional question. Foremost, in *Apprendi*, Justice O'Connor criticized the rule announced by the majority, saying that New Jersey could easily evade that rule simply by restructuring the form of the statute. 530 U.S. at 541-42 (O'Connor, J., dissenting). Rejecting the dissent's charge that the opinion's rule could be easily evaded, the Court answered:

> [I]f New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not . . .), we would be required to question whether the revision was constitutional under this Court's prior decisions.

Apprendi, 530 U.S. at 490 n.16 (citing *Patterson*, 432 U.S. at 210, and *Mullaney*, 421 U.S. at 698-702). Arizona's statute, as interpreted in *Simpson*, effected exactly the reversal the Court hypothesized in *Apprendi*: now Arizona's child molestation statutes "assum[e] a crime was performed with a [sexual interest] and then requir[e] a defendant to prove that it was not." *See id.* The statute has changed in such a way as to unilaterally make non-existent the constitutional limits affirmed in *Mullaney, Jones*, *Patterson* and *Apprendi*.

In 1993, the legislature amended § 13-1410 to its current form. Today, a defendant commits child molestation "by intentionally or knowingly engaging in

or causing a person to engage in [direct or indirect touching, fondling or manipulating of any part of the genitals or anus] with a child who is under fifteen years of age." A.R.S. § 13-1410(A). The interpreted effect of the statute was to remove motivation by sexual interest from the definition of the crime. By this action, the legislature overstepped its constitutional authority to define crimes and impermissibly lowered the government's burden of proof. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) ("The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.").

The current version of the charging statute, A.R.S. § 13-1410(A), reflects a wholesale revision that removed from the statute the "essential element . . . that the acts involved be 'motivated by an unnatural or abnormal sexual interest or intent with respect to children.'" *State v. Brooks*, 120 Ariz. 458, 460, 586 P.2d 1270, 1272 (1978) (quoting *Berry*, 101 Ariz. at 313, 419 P.2d at 340); *see* 1993 Ariz. Sess. Laws Ch. 255, § 28. The State was required to prove only that a defendant (1) intentionally or knowingly (2) touched the genitals (3) of a child less than

fifteen years old. A.R.S. § 13-1410(A). And, although sexual motivation is no longer labeled an element, the availability of the affirmative defense makes clear that criminal culpability continues to hinge on the presence or absence of that fact. Indeed, it is this element of *mens rea* that distinguishes innocent touching of children from touching that the State is trying to punish. *Cf. State v. Berry*, 101 Ariz. 310, 313, 419 P.2d 337, 340; *Patterson*, 432 U.S. at 211 n.13 ("It would be an abuse of affirmative defenses . . . if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime.") (quoting *People v. Patterson*, 39 N.Y.2d 288, 305-07 (N.Y. 1976) (Breitel, C.J., concurring)). Unquestionably, the State has a strong interest in protecting children against sexual predators. The legislature has accordingly assigned a high degree of culpability to child molestation – it is a class 2 felony, a "dangerous crime against a child in the first degree," and carries a presumptive sentence of seventeen years imprisonment. A.R.S. §§ 13-1410(B), 13-705(D). If multiple victims are involved, the defendant's sentences must run consecutively. A.R.S. § 13-705(L). A person convicted of child molestation is not eligible for early release, A.R.S. § 13-705(H), and is subject to sex offender registration requirements upon release. A.R.S. § 13-3821 (A)(7). Due Process

prohibits attaching such severe consequences to a conviction in the absence of proof beyond a reasonable doubt of the very thing, the essential fact – sexual interest – that makes child molestation so repugnant. *Cf. Apprendi*, 530 U.S. at 495 ("The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."). In this way the affirmative defense of lack of motivation by sexual interest is the tail that wags the dog of the offense of child molestation: *any* criminal punishment depends on the existence of that fact. *See McMillan*, 477 U.S. at 88 (upholding mandatory minimum statute because it gave "no impression of having [the operative sentencing factor] . . . be a tail which wags the dog of the substantive offense"). Over and again, the Supreme Court has suggested that such a statute would be unconstitutional.

The statute is also an unconstitutional violation of due process protections because of the way in which it creates a mandatory presumption of guilt. The State bears the burden of proof in criminal cases. *State v. Syrafi*, 201 Ariz. 147, ¶ 7, 32 P.3d 430, ¶ 7 (App. 2001). This burden applies to every element of a criminal

offense and the burden never shifts. *Id.* A statute that shifts the burden of persuasion to a criminal defendant violates due process. *Id.* at ¶ 8. Permissive presumptions, however, have been approved of because the State still bears the burden of proving every element. *Id.* at ¶ 9. Mandatory rebuttable presumptions "violate due process if they relieve the state of the burden of persuasion on an element of the offense." *Id.* at ¶ 10. The Arizona Supreme Court succinctly described the difference between permissive presumptions and mandatory presumptions in *State v. Grilz*:

> A "permissive presumption" is really nothing more than an inference. It allows the trier of fact to infer the presumed fact from proof of the basic facts, but places no burden of any kind on the defendant. A "mandatory presumption" requires the trier of fact to find the presumed fact upon proof of the basic fact unless the defendant has presented some evidence to rebut the presumption. The class of mandatory presumptions is further divided into two parts. There are mandatory presumptions that merely shift the burden of production to the defendant. Once the defendant meets that burden the ultimate burden of proof is on the prosecution. The second type of mandatory presumption entirely shifts the burden of proof to the defendant.

136 Ariz. 450, 457, 666 P.2d 1059, 1066 (1983) (internal citations omitted).

Pragmatically, the establishment of an "affirmative defense" in this case operates identically to a "mandatory rebuttable presumption." The Florida

Supreme Court had the opportunity to evaluate whether an affirmative defense was a mandatory rebuttable presumption in *State v. Brake*, 796 So.2d 522 (2001). *Brake* dealt with a statute that criminalized luring a child into a "structure, dwelling, or conveyance for other than a lawful purpose." *Id.* at 525, fn.1. Under this statute, the lack of a guardian's consent was prima facie evidence that any luring was done for "other than a lawful purpose." *Id.* However, it was an affirmative defense that a defendant lured a child for a lawful purpose. *Id.* The Court reasoned:

> In the instant case, the statute permits the State to prove the mens rea element of the offense ("for other than a lawful purpose") by proving lack of parental consent for the child to enter the structure, dwelling, or conveyance with the defendant. We cannot say with substantial assurance that a defendant's unlawful intent can be so presumed. For example, a neighbor who invites a child into their house for a perfectly innocent reason is not likely to seek parental permission.

Id. at 529. Accordingly, the Court held the statutory presumption was unconstitutional and remanded the matter to allow the Defendant to withdraw from his nolo contendere plea. *Id.* at 529-30.

Like the Florida statute, the statutory scheme involved with A.R.S. §§ 13-1401, 1407 and 1410 similarly permits the State to prove the *mens rea* element

(sexual interest) by proving simply that touching of the genitalia occurred. However, like a neighbor can invite a child into their house for perfectly innocent reasons without first seeking parental permission, a person can also touch the genitalia of a child for non-sexual reasons. Doctors would find it necessary to touch a child's genitalia if examining or treating the genitalia, parents touch a child's genitalia when cleaning the child during a bath, and parents or child-care workers would touch a child's genitalia to wipe a child during a diaper change. Under each of these scenarios, the Legislature has sought to saddle the parents or doctors with the burden of proving they did not have a sexual interest when engaging in innocent behavior, rather than appropriately require the State to prove that a sexual interest was possessed. Accordingly, just as the Florida Supreme Court determined that the affirmative defense created in Florida's luring statute unconstitutionally created a mandatory rebuttable presumption, this Court should find that the establishment of an "affirmative defense" for a lack of sexual interest unconstitutionally created a mandatory rebuttable presumption that any contact was sexually driven.

The statutes under which Stephen May was convicted exceed the Constitution's limits on the legislature's power because the State was required to

prove only that he (1) intentionally or knowingly (2) touched the genitals (3) of a child less than fifteen years old. A.R.S. § 13-1410(A). This "crime" is committed every day by parents, doctors, nurses, and child care workers; it carries a presumptive sentence of seventeen years incarceration and the crushing stigma of being branded a child sex offender. A.R.S. §§ 13-1410(B), 13-705(D), 13-3821 (A)(7). A defendant can escape conviction under this scheme only if he proves he "was not motivated by a sexual interest." A.R.S. § 13-1407(E). In other words, Arizona's legislature, in a statute purporting to proscribe one of the most repugnant acts in our criminal code, has placed the burden on the defendant to disprove the very thing that makes this crime criminal. This reversal of the presumption of innocence is proscribed by our State and Federal Constitutions. The statutory scheme set up by §§ 13-1410 and 13-1407 amounts to a full-fledged assault on the presumption of innocence – "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship,* 397 U.S. at 363 (citation omitted). Instead of respecting the presumption of innocence, the scheme imposes a mandatory presumption of guilt, forcing upon the defendant both the burden of production and the burden of persuasion to disprove the element of sexual interest. "It is... important in our free

society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Id.* at 364. The Arizona child molestation statutes fail to instill that confidence required by the Federal and State Constitutions because so much unquestionably innocent conduct so clearly falls within the definition of the crime.

III. Conclusion

The question at issue here implicates constitutional protections that the Supreme Court has characterized as "of surpassing importance." *Apprendi*, 530 U.S. at 476. Mr. May was convicted under a statutory scheme that, as interpreted, does not require the State to carry the burden of proving the very element that makes child molestation criminal: sexual interest. For the reasons stated herein, the Maricopa County Public Defender's Office respectfully asks that the Court accept jurisdiction in this matter and grant Mr. May relief.

Respectfully submitted this 26th day of March, 2012,

MARICOPA COUNTY PUBLIC DEFENDER

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Cory Engle
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By_____*/s/*_____
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Deputy Public Defender

CERTIFICATE OF SERVICE

The undersigned has served Brief of *Amici Curiae* Arizona Attorneys for Criminal Justice and Office of the Maricopa County Public Defender in support of Petition for Review, electronically filed with the Court, this 26th day of March, 2012, by depositing one copy in the U.S. mail to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31.25(b)(1) and 31.19(c), I certify that the foregoing Brief of *Amicus Curiae* Arizona Attorneys for Criminal Justice in Support of Petition for Review uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 7,364 words.

Dated this 26th day of March, 2012.

By /s/
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