

ARIZONA SUPREME COURT

STATE OF ARIZONA

Appellee,

v.

JERRY CHARLES HOLLE

Appellant.

CR-15-0348-PR

No. 2 CA-CR 2014-0268

Pima County Superior Court
No. CR 20131185-001

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF JERRY HOLLE

MIKEL STEINFELD
AZ Bar No. 024996

Maricopa County Public Defender's Office
620 West Jackson Street, Suite 4015
Phoenix, Arizona 85003-2423
(602) 506-7711
steinfeldm@mail.maricopa.gov
Attorney for AACJ

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTERESTS OF <i>AMICUS CURIAE</i>	1
ARGUMENT	2

DIVISION 2 PROPERLY CONCLUDED THAT CHILD MOLESTATION CONTAINS AN ELEMENT OF SEXUAL INTEREST. THE CONCLUSION REACHED BY DIVISION 2 IS THE ONLY REASONABLE INTERPRETATION OF THE PLAIN LANGUAGE OF THE CHILD MOLESTATION STATUTE; PROPERLY CONSIDERS THE CONTEXT, SUBJECT MATTER, BACKGROUND, CONSEQUENCES, AND PURPOSE OF THE CHILD MOLESTATION STATUTE; AND COMPORTS WITH THE RULE OF LENITY.

1. The plain language of the child molestation statute requires proof of sexual interest.....	4
2. The context surrounding A.R.S. § 13-1410 supports <i>Holle's</i> conclusion that sexual interest is an element of child molestation.	8
A. Statutes related to child molestation consider sexual motivation an element.....	9
B. Statutes related to affirmative defenses indicate no-sexual-interest is not an affirmative defense.	11
C. Interpreting child molestation in such a manner that it does not require proof of sexual motivation renders statutory language void and meaningless.	13
3. Division 2 reached the most fair reading of A.R.S. §§ 13-1407 and 13-1410.....	15

CONCLUSION.....18

TABLE OF AUTHORITIES

Cases

<i>City of Flagstaff v. Mangum</i> , 164 Ariz. 395, 398, 793 P.2d 548, 551 (1990)...	11, 13
<i>Collins v. Stockwell</i> , 137 Ariz. 416, 419, 671 P.2d 394, 397 (1983).....	9
<i>DBT Yuma, L.L.C. v. Yuma County Airport Authority</i> , 238 Ariz. 394, ¶ 9, 361 P.3d 379, ¶ 9 (2015).....	5
<i>Estate of Braden ex rel. Gabaldon v. State</i> , 228 Ariz. 323, 326, ¶ 8, 266 P.3d 349, ¶ 8 (2011).....	4
<i>Matter of Pima County Juvenile Appeal No. 74802-2</i> , 164 Ariz. 25, 790 P.2d 723 (1990).....	5
<i>Olvey v. Calizona Land & Cattle Co.</i> , 76 Ariz. 368, 372, 265 P.2d 432, 434 (1954).....	4
<i>Padilla v. Industrial Commission</i> , 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976).....	11, 12
<i>People’s Choice TV Corp. v. City of Tucson</i> , 202 Ariz. 401, ¶ 7, 46 P.3d 412, ¶ 7 (2002).....	8
<i>State ex rel. Dept. of Economic Sec. v. Hayden</i> , 210 Ariz. 522, ¶ 7, 115 P.3d 116, ¶ 7 (2005).....	8, 13, 15
<i>State v. Berry</i> , 101 Ariz. 310, 419 P.2d 337 (1966)	5
<i>State v. Byrd</i> , 160 Ariz. 282, 772 P.2d 1135 (App. 1988)).....	5
<i>State v. Holle</i>	2, 3, 5, 8, 10
<i>State v. Lujan</i> , 192 Ariz. 448, 967 P.2d 123 (1998)	5
<i>State v. Simpson</i>	2, 13, 14

Statutes

A.R.S. § 13-101.....	16
A.R.S. § 13-103.....	11
A.R.S. § 13-104.....	16
A.R.S. § 13-118.....	10
A.R.S. § 13-202.....	8
A.R.S. § 13-205.....	11
A.R.S. § 13-502.....	12
A.R.S. § 13-1401.....	6
A.R.S. § 13-1405.....	9
A.R.S. § 13-1407.....	12, 13, 15, 16
A.R.S. § 13-1408.....	9
A.R.S. § 13-1418.....	9

A.R.S. § 13-1420.....	9
A.R.S. § 13-1421.....	9
A.R.S. § 13-1802.....	12
A.R.S. § 13-1804.....	12
A.R.S. § 13-206.....	12
A.R.S. § 13-3214.....	12
A.R.S. § 13-3553.....	12
A.R.S. § 13-3559.....	12
A.R.S. § 13-3821.....	10

Other Authorities

Black’s Law Dictionary	5
Merriam-Webster Dictionary, accessed at www.merriam-webster.com	5, 6, 7

INTERESTS OF *AMICUS CURIAE*

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 rights of 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.

AACJ offers this brief in support of Jerry Holle. The core issue in this case—whether child molestation contains an element of sexual interest—confronts the rights of criminal defendants across the state. The related question—whether the no-sexual-interest defense is affirmative or negating—impacts how attorneys will advise defendants, prepare for trials, and proceed when in trial.

Division 2 properly concluded child molestation contains an element of sexual interest and the no-sexual-interest defense was a negating defense. Accordingly, AACJ asks this Court to affirm that portion of the Division 2 opinion.

ARGUMENT

DIVISION 2 PROPERLY CONCLUDED THAT CHILD MOLESTATION CONTAINS AN ELEMENT OF SEXUAL INTEREST. THE CONCLUSION REACHED BY DIVISION 2 IS THE ONLY REASONABLE INTERPRETATION OF THE PLAIN LANGUAGE OF THE CHILD MOLESTATION STATUTE; PROPERLY CONSIDERS THE CONTEXT, SUBJECT MATTER, BACKGROUND, CONSEQUENCES, AND PURPOSE OF THE CHILD MOLESTATION STATUTE; AND COMPORTS WITH THE RULE OF LENITY.

In *State v. Holle*,¹ Division 2 concluded the “no sexual interest” defense to molestation of a child was not an affirmative defense.² Rather, once evidence indicates a defendant’s conduct may not have been motivated by sexual interest, the State must prove the defendant’s sexual interest beyond a reasonable doubt.³ Put simply, the defendant’s burden is one of production, not proof.⁴

Division 2 conceded this conflicted⁵ with *State v. Simpson*.⁶ In *Simpson*, Division 1 held that the State had no burden to prove a defendant’s sexual

¹ 238 Ariz. 218, 358 P.3d 639 (App. 2015).

² *Id.* at ¶ 26.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at ¶ 11.

⁶ 217 Ariz. 326, 173 P.3d 1027 (App. 2007).

motivation in a child molestation prosecution.⁷ Instead, no-sexual-interest was an affirmative defense.⁸ Thus, the defendant bore the burden of proving she did not act with a sexual interest.⁹

In *Holle*, Division 2 respected the decision reached in *Simpson* and held the language was ambiguous.¹⁰ However, Division 2's desire to respect the decision of Division 1 falls short of the truth. Not only is the conclusion reached by Division 2 a reasonable reading of the child molestation statute—it is the most reasonable reading.

In light of the plain language, context, and goals of the child molestation statutory scheme, this Court should affirm Division 2's ruling that no-sexual-interest is a negating defense, not an affirmative defense. Once a lack of sexual interest defense is raised, the State must prove beyond a reasonable doubt that the defendant's conduct was motivated by a sexual interest.

///

///

///

⁷ *Id.* at ¶ 18.

⁸ *Id.* at ¶ 19.

⁹ *Id.*

¹⁰ 238 Ariz. 218, ¶ 11, 358 P.3d 639, ¶ 11.

1. The plain language of the child molestation statute requires proof of sexual interest.

When interpreting a statute, this Court first evaluates the plain language.¹¹ When the plain language is clear, this Court need go no further.¹² But plain language is not considered in a vacuum. Even if a term, in isolation, may be confusing, linguistic inferences can resolve any ambiguity and render the meaning plain. For example, this Court has recognized that the maxim of *noscitur a sociis*, which requires statutory terms to be interpreted in context of the surrounding words,¹³ applies when the Court is determining whether language is ambiguous.¹⁴

Arizona's Molestation of a Child statute, A.R.S. § 13-1410(A), provides:

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.¹⁵

Evaluating this language independently and in light of the maxim of *noscitur a sociis*, Division 2 correctly concluded the State bears the burden of proving a defendant acted with sexual interest once the defense is invoked. Two parts of this

¹¹ *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326, ¶ 8, 266 P.3d 349, ¶ 8 (2011).

¹² *Id.*

¹³ *Id.* at ¶ 13.

¹⁴ *Olvey v. Calizona Land & Cattle Co.*, 76 Ariz. 368, 372, 265 P.2d 432, 434 (1954).

¹⁵ A.R.S. § 13-1410(A).

statute explain why the plain language requires the State to prove sexual intent beyond a reasonable doubt once challenged: the word molestation and the phrase sexual contact.

First, the word molestation suggests a sexual motivation or interest. Molestation is not separately defined in the statutory scheme. “Absent statutory definitions, courts generally give words their ordinary meaning ... and may look to dictionary definitions”¹⁶ Black’s Law Dictionary defines molestation as, “The act of making unwanted and indecent advances to or on someone, esp. for sexual gratification.”¹⁷ This definition is in accord with non-legal definitions of molestation.¹⁸ Indeed, in *Holle*, Division 2 exhaustively discussed Arizona’s jurisprudence related to molestation and correctly concluded molestation connotes a sexual interest.¹⁹

¹⁶ *DBT Yuma, L.L.C. v. Yuma County Airport Authority*, 238 Ariz. 394, ¶ 9, 361 P.3d 379, ¶ 9 (2015).

¹⁷ Molestation, Black’s Law Dictionary (10th ed. 2014).

¹⁸ See Molest, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/molest> (“to make annoying sexual advances to; especially: to force physical and usually sexual contact on”).

¹⁹ *Holle*, 238 Ariz. 218, ¶¶ 13-22, 358 P.3d 639, ¶¶ 13-22 (discussing, among other cases, *State v. Berry*, 101 Ariz. 310, 419 P.2d 337 (1966); *Matter of Pima County Juvenile Appeal No. 74802-2*, 164 Ariz. 25, 790 P.2d 723 (1990); *State v. Lujan*, 192 Ariz. 448, 967 P.2d 123 (1998); *State v. Byrd*, 160 Ariz. 282, 772 P.2d 1135 (App. 1988)).

Second, the phrase “sexual contact” also suggests a sexual interest. In the phrase “sexual contact”, sexual operates as an adjective and contact operates as a noun. Thus, sexual modifies the nature of contact. Contact is not proscribed by the statute; contact that is sexual in nature is proscribed. To that extent, the contact must be related to “having or involving sex.”²⁰

The statutory scheme defines “sexual contact” as “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.”²¹ In light of the phrase being defined, structure of this sentence, and the use of the word “fondling”, this definition requires a sexual interest.

Per the maxim of *noscitur a sociis*, the legislative definition for “sexual contact” must be considered in light of the phrase being defined. Legislative definitions do not exist in a vacuum and do not operate as a simple find-and-replace function. The phrase the legislature sought to define in this case was “sexual contact”. The adjective function of the word “sexual” still operates in the

²⁰ See Sexual, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/sexual>.

²¹ A.R.S. § 13-1401(2).

legislative definition. Thus, the definition must still be considered through the lens of “having or involving sex.”²²

The structure of the sentence bolsters this point. The definition focuses on contact with sexual organs: genitals and breasts. For contact to relate to “having or involving sex,” the contact would be with sexual organs. But mere contact—direct or indirect touching—with sexual organs does render the contact sexual in nature. A parent changing a child would have contact with the genitals but the contact is not “having or involving sex.” A person defending themselves with a groin strike is also not engaged in sexual contact. Rather, the sentence structure, taken in combination with the phrase being defined, reinforces the sexual interest incumbent with the adjective function of “sexual”.

The term “fondling” also has a sexual connotation. Fondle is defined as “to touch (someone) in a sexual way.”²³ Use of the term “fondling” in the legislative definition of “sexual contact” reinforces the conclusion that the contact must still relate to “having or involving sex.”

²² See Sexual, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/sexual>.

²³ See Fondle, Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/fondle>.

Finally, the mens rea element suggests there must be a sexual interest. To commit molestation, a person must, “intentionally or knowingly engag[e] in sexual contact”²⁴ Mental states apply to every element of an offense.²⁵ Thus, a molestation defendant must not only intend or know of the contact, but also the sexual nature of the contact.

Because the plain language of the child molestation statute best supports the interpretation in *Holle*, this Court need look no further. However, if this Court were to look further, the context of the statute also supports Division 2.

2. The context surrounding A.R.S. § 13-1410 supports *Holle*’s conclusion that sexual interest is an element of child molestation.

Even if this Court were to interpret the plain language of A.R.S. § 13-1410 as ambiguous, the conclusion reached in *Holle* was still proper. When interpreting statutes, this Court “construe[s] the statute as a whole, and consider[s] its context, language, subject matter, historical background, effects and consequences, and its spirit and purpose.”²⁶ Division 2 and *Holle* thoroughly discussed the history of the

²⁴ A.R.S. § 13-1410(A).

²⁵ A.R.S. § 13-202(A).

²⁶ *State ex rel. Dept. of Economic Sec. v. Hayden*, 210 Ariz. 522, ¶ 7, 115 P.3d 116, ¶ 7 (2005) (quoting *People’s Choice TV Corp. v. City of Tucson*, 202 Ariz. 401, ¶ 7, 46 P.3d 412, ¶ 7 (2002)).

child molestation statute. Beyond this history, however, the context of the child molestation statute supports the conclusion reached by Division 2.

A. Statutes related to child molestation consider sexual motivation an element.

“Statutes that are in *pari materia*—relating to the same matter—are construed together as though they constituted one law.”²⁷ The child molestation statute and its definition fall under Chapter 14—Sexual Offenses. Just as sexual operates as an adjective modifying contact in the child molestation statute, sexual is an adjective modifying offenses in the chapter title. Chapter 14 seeks to set forth crimes related to “having or involving sex.”

The offenses in chapter 14 range from adultery²⁸ to sexual misconduct by behavioral health professionals²⁹ to sexual conduct with a minor.³⁰ The chapter contains special provisions which allow the introduction of a defendant’s prior sexual offenses³¹ and protect a victim’s sexual history.³² Chapter 14 deals with sex.

²⁷ *State ex rel. Dept. of Economic Sec. v. Hayden*, 210 Ariz. 522, ¶ 7, 115 P.3d 116, ¶ 7 (2005) (quoting *People’s Choice TV Corp. v. City of Tucson*, 202 Ariz. 401, ¶ 7, 46 P.3d 412, ¶ 7 (2002)); see also *Collins v. Stockwell*, 137 Ariz. 416, 419, 671 P.2d 394, 397 (1983).

²⁸ A.R.S. § 13-1408.

²⁹ A.R.S. § 13-1418.

³⁰ A.R.S. § 13-1405.

³¹ A.R.S. § 13-1420.

³² A.R.S. § 13-1421.

Several of the offenses listed in chapter 14, including molestation, require sex offender registration³³ and all offenses in chapter 14 are eligible for registration.³⁴ Molestation is punished more harshly than other class 2 felonies because it is sexual in nature and involves a child.³⁵

A.R.S. § 13-118 provides further contextual support for the conclusion reached in *Holle*. Section 13-118 provides a mechanism for prosecutors to allege a defendant acted with sexual motivation “in cases involving an offense other than a sexual offense”³⁶ Under this section, the State must “prove beyond a reasonable doubt that the defendant committed the offense with a sexual motivation.”³⁷ A finding of sexual motivation allows the trial court to impose sex offender registration, just like all offenses in chapter 14.³⁸

The logical correlation is clear: sexual motivation is the common denominator of sex offenses under chapter 14, the sexual motivation finding under A.R.S. § 13-118, and sex offender registration. Child molestation, an offense defined under chapter 14, also has this common denominator. There is no need to

³³ A.R.S. § 13-3821(A).

³⁴ A.R.S. § 13-3821(C).

³⁵ See A.R.S. § 13-1410(B) (molestation punished under § 13-604.01).

³⁶ A.R.S. § 13-118(A).

³⁷ A.R.S. § 13-118(B).

³⁸ A.R.S. § 13-3821(C).

file a sexual motivation notice in a molestation charge; molestation is understood to require proof of a sexual motivation.

B. Statutes related to affirmative defenses indicate no-sexual-interest is not an affirmative defense.

Beyond statutes that should be considered in *pari materia* to the child molestation statute, statutes related to affirmative defenses suggest the no-sexual-interest defense is not affirmative in nature. A fundamental principle of interpretation is: “what the Legislature means, it will say.”³⁹ Thus, “[w]here the legislature uses a term within one statute and excludes it from another, the term usually will not be read into the provision from which it was excluded.”⁴⁰

A.R.S. § 13-103 abolished affirmative defenses: “No conduct or omission constitutes ... an affirmative defense unless it is ... an affirmative defense under this title or under another statute or ordinance.”⁴¹ The lack of an applicable mens rea is not an affirmative defense.⁴² When an affirmative defense is involved, the defendant must prove the affirmative defense by a preponderance of evidence.⁴³

³⁹ *Padilla v. Industrial Commission*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976).

⁴⁰ *City of Flagstaff v. Mangum*, 164 Ariz. 395, 398, 793 P.2d 548, 551 (1990).

⁴¹ A.R.S. § 13-103(A).

⁴² A.R.S. § 13-103(B).

⁴³ A.R.S. § 13-205(A).

When the legislature wants to create an affirmative defense, it says so. For entrapment, the statute says, “It is an affirmative defense to a criminal charge that the person was entrapped.”⁴⁴ For insanity, “A mental disease or defect constituting legal insanity is an affirmative defense.”⁴⁵ Theft sets forth multiple affirmative defenses, all preceded by, “It is an affirmative defense to any prosecution under subsection B”⁴⁶ Theft by extortion has two affirmative defenses, preceded by, “It is an affirmative defense”⁴⁷ For prostitution, “It is an affirmative defense” that the defendant is a sex trafficking victim.⁴⁸ And sexual exploitation of a minor also has a clearly identified affirmative defense: “It is an affirmative defense to a prosecution for a violation of § 13-3553 that on discover a person in good faith reports the discovery of unsolicited suspected visual depictions involving the sexual exploitation of a minor.”⁴⁹

When the legislature intends a defense to be affirmative in nature, it says so.⁵⁰ But neither the no-sexual-interest defense nor A.R.S. § 13-1407 generally has

⁴⁴ A.R.S. § 13-206(A).

⁴⁵ A.R.S. § 13-502(A).

⁴⁶ A.R.S. § 13-1802(C).

⁴⁷ A.R.S. § 13-1804(B).

⁴⁸ A.R.S. § 13-3214(D).

⁴⁹ A.R.S. § 13-3559(C).

⁵⁰ *Padilla*, 113 Ariz. at 106, 546 P.2d at 1137.

the legislature’s hallmark classification as affirmative defenses. This Court should not read the term “affirmative” into A.R.S. § 13-1407.⁵¹

C. Interpreting child molestation in such a manner that it does not require proof of sexual motivation renders statutory language void and meaningless.

The interpretation endorsed in *Simpson*, on the other hand, courts absurdity. When interpreting statutes, this Court seeks to “give effect to each word of the statute, such that ‘no clause, sentence or word is rendered superfluous, void, contradictory or insignificant.’”⁵² But that is exactly what the Division 1 interpretation in *Simpson* did—it rendered the word “sexual” meaningless, the terms “molestation” and “fondling” insignificant, and ignored the impact of the mens rea element.

Division 1 concluded it could merely find-and-replace the phrase “sexual contact” with the legislative definition. In essence, Division 1 sought to have A.R.S. § 13-1410(A) read:

A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in [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], except [any direct or

⁵¹ See *Mangum*, 164 Ariz. at 398, 793 P.2d at 551.

⁵² *Hayden*, 210 Ariz. 522, ¶ 7, 115 P.3d 116, ¶ 7.

indirect touching, fondling or manipulating] with the female breast, with a child who is under fifteen years of age.

But doing so in a vacuum circumvented the adjective function of the word sexual. Under this interpretation, the word “sexual” is meaningless, even contradictory. Put simply, Division 1 sought to remove and ignore the word sexual despite its presence in the statute. Such an interpretation is improper.

Beyond this, Division 1 ignored the impact “molestation”, “fondling”, and the mens rea have on the statutory scheme. As discussed above, molestation and fondling have sexual connotations. Even if the word “sexual” can be removed, nothing alters the sexual nature of the words molestation and fondling. The interpretation advanced in *Simpson*, however, rendered “molestation” and “fondling” insignificant. Additionally, the intentional or knowing mental state applies to all elements of the offense. A person must not merely know or intend contact, the person must know or intend the sexual nature.

Under the interpretation adopted in *Simpson*, mere contact with genitals—regardless of the nature of the contact—was sufficient to convict a person of child molestation, sentence them to the Department of Corrections, label them a sexual offender, and require a lifetime of sex offender registration. Such an interpretation is implausible in light of the context, history, goals, effects and consequences, and spirit and purpose of the statutory scheme.

Nothing in A.R.S. § 13-1407(E) undermines this interpretation.⁵³ Subsection (E) does not identify itself as an affirmative defense or state that the defendant bears a burden of proof.⁵⁴ At most, the subsection suggests a defendant bears a burden of production.⁵⁵

The context and language of the child molestation statute deal with a sexual interest. The subject matter of chapter 14 and related statutes is sexual in nature. The effects and consequences of a molestation conviction—harsher punishment and sex offender registration—is based upon the sexual nature of the offense. And the spirit and purpose of the sexual offenses chapter is premised upon the understanding that the offenses were motivated by a sexual interest. Thus, even if this Court found it necessary to move beyond the plain language of the child molestation statute, Division 2 correctly concluded the State bore the burden of proving sexual interest beyond a reasonable doubt.

3. Division 2 reached the most fair reading of A.R.S. §§ 13-1407 and 13-1410.

As discussed above, the conclusion reached by Division 2 best considers the plain language of the statute, properly accounts for linguistic inferences, and

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *See id.*

maintains the textual integrity of the child molestation statute by accounting for the context of the statute and ensuring each term and phrase maintains meaning. To the extent any ambiguity could remain, however, Division 2 properly resolved the ambiguity in the Holle's favor.

The criminal code sets forth how statutory provisions should be interpreted.⁵⁶ “[T]he provisions herein must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law, including the purposes stated in § 13-101.”⁵⁷ One of the interests set forth in A.R.S. § 13-101 is “To give fair warning of the nature of the conduct proscribed”⁵⁸ To this extent, in Arizona, the rule of lenity should play a primary role in statutory construction.

A person of reasonable intelligence, however, would read the child molestation statute as requiring a sexual motivation in light of the mens rea.⁵⁹ Accordingly, such a person would consider no-sexual-interest defense a negating defense, not an affirmative defense. In essence, a person with no sexual interest may intend contact with genitalia, but not intend the contact to be sexual in nature:

⁵⁶ See A.R.S. §§ 13-101, 13-104.

⁵⁷ A.R.S. § 13-104.

⁵⁸ A.R.S. § 13-101(2).

⁵⁹ See A.R.S. § 13-1407(E).

- A parent intends to touch a child's genitalia when changing a diaper or caring for a wound. The parent does not intend the contact to be sexual.
- A person defending themselves intends genital contact when delivering a groin strike. The person does not intend the groin strike as sexual.

A person of reasonable intelligence who reads the child molestation statute would not believe the act of changing a diaper would be grounds for criminal prosecution. A person who defends themselves by intentionally striking an aggressive person in the groin would not anticipate being labeled a sex-offender. And neither person would expect that they would bear the burden of affirmatively proving their state of mind. Rather, a reasonable person would interpret the no-sexual-interest defense as a defense that negates the mens rea element.

CONCLUSION

Division 2 properly concluded the no-sexual-interest defense was a negating defense, not an affirmative defense. The plain language of the child molestation statute indicates a defendant's conduct must be sexual in nature. The defendant must intend or know of the sexual nature. Read in this light, the no-sexual-interest defense negates the mens rea element. Accordingly, this Court should affirm the Division 2 ruling that when a defendant invokes the no-sexual-interest defense and meets the burden of production, the State must prove beyond a reasonable doubt that the defendant acted with sexual motivation.

RESPECTFULLY SUBMITTED this 24th day of March, 2016.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ Mikel Steinfeld
MIKEL STEINFELD