

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT DOYLE BARRETT,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner was sentenced to thirty years in prison following a jury's verdict finding him guilty of six counts of child molestation of a victim under fifteen years old. At the close of trial, the court instructed the jury, consistent with Arizona statutes, that "[t]he crime of child molestation requires proof of the following: [t]he defendant intentionally or knowingly engaged in or caused a person to engage in any direct or indirect touching, fondling or manipulation of any part of the genitals or anus by any part of the body or by any object with a child." The court conspicuously left out that to constitute child molestation, any touching must be done with sexual motivation. In Arizona, pursuant to statute, sexual motivation is not an element of a child molestation offense, but rather an affirmative defense to such molestation.

This case presents the following question:

Does Arizona's statutory scheme, which excludes sexual motivation as an element of child molestation, unconstitutionally shift the burden of proof on the essential element of sexual motivation to the accused in contravention of an accused's guaranteed Due Process rights under the 14th Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Scott Doyle Barrett, Petitioner.

Mark Brnovich, Arizona Attorney General, Dominic Draye, Solicitor General, Joseph T. Maziarz, Chief Counsel Criminal Appeals, Eliza Ybarra, Assistant Attorney General, Attorneys for State of Arizona.

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OPINION BELOW

The unpublished memorandum opinion of the Arizona Court of Appeals, *State v. Barrett*, 2018 WL 615156, which is the subject of this petition, is included in the Appendix as A-1.

STATEMENT OF JURISDICTION

On July 23, 2015, the state secured an indictment charging Petitioner with six counts of child molestation.

Arizona Revised Criminal Statute §13-1410(A) reads: “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.” “Sexual contact” is defined as “any direct or indirect touching, fondling or manipulation of any part of the genitals, anus or female breast or any part of the body or by any object or causing a person to engage in such contact.” A.R.S. §13-1401(3). A.R.S. §1407(E) provides, “[i]t is a defense to a prosecution to . . . §1410 that the defendant was not motivated by a sexual interest.”

The above statutes do not require the state to prove sexual motivation as an element of child molestation; but rather, require defendants accused of molestation to affirmatively prove lack of sexual motivation as a defense. In *State v. Holle*, 240 Ariz. 300, 379 P.3d 197 (2016) (Bales, C.J. and Brutinel, J. dissenting), the court rejected defendant’s argument that Arizona’s statutory scheme regarding molestation violated due process when the legislature “removed sexual motivation

as an element of child molestation . . and shift[ed] the burden to defendants by making lack of such motivation an affirmative defense.” *Id.*, ¶ 38. In doing so, the *Holle* court cited the state’s “broad authority to define the elements of a crime”, “to codify defenses and to define their elements.” *Id.*, ¶40.

Consistent with the foregoing statutes and the *Holle* decision, following the close of evidence in Petitioner’s matter, the court instructed the jury that “the crime of molestation of a child requires proof of the following: One, the defendant intentionally or knowingly engaged in or caused a person to engage in any direct or indirect touching, fondling or manipulation of any part of the genitals or anus by any part of the body or by any object with a child; and Two, the child was under 15 years of age.” (Appendix, A-2, partial trial transcript, Feb. 16, 2017.)

Following Petitioner’s guilty verdicts on five child molestation counts, Petitioner timely appealed. On appeal, Petitioner argued that Arizona’s statutory scheme violates due process in failing to require the state to prove sexual motivation as an element of child molestation, and that the trial court thus committed fundamental error¹ in neglecting to instruct the jury that sexual motivation is a required element of molestation. (Appendix, A-3, relevant portion of Petitioner’s opening appellate brief to trial court.)

The Arizona Court of Appeals disagreed, noting, “[a]s Barrett properly concedes, Arizona law does not recognize sexual motivation to be an element of

¹ Petitioner did not raise this issue at the trial court level, thus subjecting his claim to a fundamental error appellate review standard.

molestation. *State v. Holle*, 240 Ariz. 300, 301, ¶ 1 (2016); *State v. Simpson*, 217 Ariz. 326, 328, ¶15 (App. 2007).” (Appendix A-1, ¶ 18.)

Petitioner filed a Petition for Review of the Appellate Court’s decision with the Arizona Supreme Court, (Appendix, A-4). The Arizona Supreme Court denied jurisdiction of the petition on July 5, 2018. (Appendix, A- 5).

Petitioner timely filed this petition, pursuant to Supreme Court Rule 13.1, within 90 days after the Arizona Supreme Court denied review of this matter. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

PROVISIONS OF LAW INVOLVED

Fourteenth Amendment to the U.S. Constitution

No State shall “deprive any person of life, liberty, or property without due process of law. . .”.

STATEMENT OF THE CASE

As set forth above in the “Statement of Jurisdiction” section of this petition, the sole issue in this matter is whether Arizona’s statutory molestation scheme violates due process in its exclusion of sexual motivation as an element of child molestation.

REASONS CERTIORARI SHOULD BE GRANTED

The Arizona Court of Appeals has Decided an Important Federal Question in a Way
That Conflicts with Relevant Decisions of this Court.

The state bears the burden of proving every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072 (1970). This Court has cautioned legislatures against skirting *Winship* by extracting crucial elements of a crime from offenses and putting the burden on defendants to disprove them. “[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes . . .” *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S.Ct. 1881, 1889 (1975). Although recognizing broad authority of states to define crimes, this Court in *Patterson, infra*, 210, 2327, warned that “there are obviously constitutional limits beyond which the States may not go in this regard.” An unconstitutional abuse of an affirmative defense statutory scheme occurs, “if the purpose of effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime.” *Patterson v. New York*, 432 U.S. 197, 211, 97 S.Ct. 2319, 2327, ft. nt. 13(1977).

Petitioner avers that in removing sexual intent from its child molestation statute, and requiring defendants to affirmatively prove lack of sexual intent, Arizona has “unhinge[d] the procedural presumption of innocence” which historically shielded

a citizen accused of child molestation, and has thus violated the “constitutional limits” referenced in *Patterson*, *Id.* Accordingly, the Arizona molestation statute exceeds “the constitutional limits to states’ authority to define away facts necessary to constitute a criminal offense.” *Apprendi v. New Jersey*, 530 U.S. 466, 486, 120 S. Ct. 2348, 2360 (2000). In this regard, it is no coincidence that “Arizona stands alone among all United States jurisdictions in allocating the burden of proof this way”, and “Arizona is the only jurisdiction ever to uphold the constitutionality of putting the burden of disproving sexual intent on the accused.” *May v. Ryan*, 245 F. Supp. 3d 1145, 1149 and ft. nt. 6 (2017) (attached as Appendix, A-6, currently pending 9th Circuit review.)²

CONCLUSION

The Arizona molestation statutes violate an accused due process rights under the 14th Amendment to the United States Constitution. The statutes unconstitutionally shifted the burden of proof on the very fact that historically and morally distinguishes innocent and criminal conduct – lack of sexual motivation - to Petitioner.

Petitioner respectfully requests this Court accept review of the Arizona Court of Appeals’ decision in his matter, nullify Arizona’s current unconstitutional molestation statute, and order Petitioner receive a new trial where the state must prove sexual motivation beyond a reasonable doubt.

² The *May v. Ryan* opinion has succinctly set forth all Petitioner’s arguments, and is thus included as Appendix, A-6.

Respectfully submitted,

/S/

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