

No. _____

In The
Supreme Court of the United States

BRADLEY BIEGANSKI,

Petitioner,

v.

ARIZONA,

Respondent.

**On Petition For A Writ Of Certiorari To The
Arizona Court of Appeals**

PETITION FOR WRIT OF CERTIORARI

Erica T. Dubno, Esq.*
Fahringer & Dubno
43 West 43rd Street, Suite 261
New York, New York 10036
(212) 319-5351
erica.dubno@fahringerlaw.com

Louis M. Spivak, Esq.
State Bar No. 009309
Lou Spivak, PC
5447 East 5th Street, Suite 205
Tucson, Arizona 85711
(520) 325-4667
lspivak@louspivackpc.com

Counsel for Petitioner
** Counsel of Record*

August 27, 2020

QUESTION PRESENTED

States have wide latitude to define crimes and defenses. Nevertheless, "there are obviously constitutional limits beyond which the States may not go" in reallocating burdens of proof by labeling elements of an offense to be affirmative defenses that must be established by the defendant instead of by the prosecution. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

The question presented here is:

Whether Arizona's molestation statute -- which presumes that anyone, including parents and foster parents like Petitioner, who bathe or diaper their children, is a child molester and then, through an affirmative defense, shifts the burden to parents to prove that any non-accidental touching lacked sexual motivation -- violates the Due Process Clause of the United States Constitution because it defies the presumption of innocence and absolves the prosecution of its constitutional burden to prove, beyond a reasonable doubt, each substantive element of the offense.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED PROCEEDINGS

State v. Bieganski, Nos. S0900CR201400118 and S0900CR201500721, Superior Court in Navaho County, Arizona (sentenced imposed Jan. 23, 2018)

State v. Bieganski, No. 1 CA-CR 18-0093, Arizona Court of Appeals Division One (opinion filed Sept. 3, 2019)

State v. Bieganski, No. CR-19-0301-PR, Arizona Supreme Court (order filed Mar. 31, 2020)

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
STATEMENT OF RELATED PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING CERTIORARI	6
THERE IS AN URGENT NEED TO RESOLVE RECURRING ISSUES RELATING TO THE UNCONSTITUTIONALITY OF ARIZONA'S MOLESTATION LAW, WHICH RELIEVES THE PROSECUTION OF PROVING THE INHERENT ELEMENT OF SEXUAL MOLESTATION -- SEXUAL INTENT -- AND THEN, THROUGH AN AFFIRMATIVE DEFENSE, SHIFTS THE BURDEN OF PROOF TO DEFENDANTS TO PROVE THAT ANY TOUCHING WAS NOT SEXUALLY MOTIVATED.....	6
Arizona Claims it Can Shift Any Traditional Element to an Affirmative Defense	9
Arizona's Chief Justice and Others Recognize that this Burden-Shifting Scheme is Unconstitutional and Violates this Court's Precedent	12
Arizona's Legislature Amended the Law to Eliminate the Affirmative Defense, but the Law Still Presumes Sexual Intent	13
This Issue Has and Will Continue to Recur and Plague this Court Until it is Definitively Resolved	14
CONCLUSION.....	16

APPENDICES

Order of the Arizona Supreme Court, Denying Review of the Decision Affirming Petitioner's Conviction Dated March 31, 2020	App. 1
Opinion of the Arizona Court of Appeals Division One, Affirming Petitioner's Conviction Dated September 3, 2019.....	App. 2

TABLE OF AUTHORITIES

CASES

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	8, 14
<i>In re Winship</i> , 397 U.S. 358 (1970)	7, 11, 12, 15
<i>Jones v. United States</i> , 526 U.S. 227 (1999)	7
<i>May v. Ryan</i> , 245 F. Supp. 3d (D. Ariz. 2017)	6, 10, 11
<i>May v. Ryan</i> , 807 F. App’x 632 (9th Cir. 2020)	6, 10, 11
<i>May v. Shinn</i> , 954 F.3d 1194 (9th Cir. 2020)	6, 12
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986)	7
<i>McNabb v. United States</i> , 318 U.S. 332 (1943)	9
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975)	8
<i>Patterson v. New York</i> , 432 U.S. 197 (1977)	<i>passim</i>
<i>Staples v. United States</i> , 511 U.S. 600 (1994)	12
<i>State v. Holle</i> , 240 Ariz. 300 (2016)	<i>passim</i>
<i>Turner v. United States</i> , 396 U.S. 398 (1970)	12

United States v. Haymond,
139 S. Ct. 2369 (2019) 7

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 12

CONSTITUTION AND STATUTES

U.S. Const. amend. V *passim*

U.S. Const. amend. XIV *passim*

18 U.S.C. § 3501 9

28 U.S.C. § 1257(a) 1

A.R.S. § 13-205(A) 7

A.R.S. § 13-1401(3) 7

A.R.S. § 13-1407(E) 2, 7

A.R.S. § 13-1410(A) 2, 7

A.R.S. § 13-3821 14

OTHER AUTHORITIES

Ariz. HB2283 (2018) 13

Howard Fischer, *Almost 400 New Laws Take Effect Friday*, Ariz. Capitol Times,
July 31, 2018 13

[http://www.scotusblog.com/2009/09/petitions-to-watch-conference-of-9-29-09-
part-iii](http://www.scotusblog.com/2009/09/petitions-to-watch-conference-of-9-29-09-part-iii) 14

Petition for Certiorari, *Holle v. Arizona*, No. 16-1025, 2017 WL 727972
(Feb. 21, 2017) 15

Petition for Certiorari, *May v. Arizona*, No. 08-1393, 2009 WL 1339242
(May 8, 2009) 14

Respondent's Brief in Opposition to the Petition for Certiorari in *May v. Arizona*, No. 08-1393, 2009 WL 2524209 (Aug. 14, 2009) 15

Video of the Arizona House Judiciary and Public Safety Committee meeting on HB2283 (2018), dated Feb. 14, 2018, available at <https://www.azleg.gov/bills/> 13

Petitioner Bradley Scott Bieganski respectfully requests that a writ of certiorari be issued to review the decision of the Arizona Court of Appeals, entered on September 3, 2019.

OPINIONS AND ORDERS BELOW

The Arizona Court of Appeals' decision, which affirmed Bradley Bieganski's conviction on direct appeal, is reproduced at App. 2. *See State v. Bradley Bieganski*, 2019 WL 4159822 (Sept. 3, 2019) (unpublished). The Arizona Supreme Court's unpublished order declining review of the Court of Appeals' decision is reproduced at App. 1.

JURISDICTION

The Arizona Supreme Court's order, denying review of the Court of Appeals' decision, was issued on March 31, 2020. The 90-day period for filing this Petition for Certiorari would have expired on June 29, 2020. *See* Rule 30.1. However, that deadline is automatically extended by 60 days pursuant to the Court's Order, dated March 19, 2020, in response to the COVID pandemic. Therefore, the 150-day period for filing this Petition expires on August 28, 2020.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides, in relevant part, that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amends. V and XIV.

The Right to Silence provides that “[n]o person shall be ... compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V.

Section 13-1410(A) of the Arizona Revised Statutes provides, in pertinent part, that a “person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact.”

Section 13-1407(E) of the Arizona Revised Statutes, in effect at the time of Petitioner’s conviction, provides that “[i]t is a defense to a prosecution pursuant to ... § 13-1410 that the defendant was not motivated by a sexual interest.”

STATEMENT OF THE CASE

Arizona is the only state to criminalize parenting. Indeed, as recognized by Arizona’s Chief Justice, “[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 felony.” *State v. Holle*, 240 Ariz. 300, 311 (2016) (Bales, C.J., dissenting).

This is because Arizona *presumes* that anyone who knowingly or intentionally touches a child’s genitals is a child molester -- regardless of whether it was for bathing, diapering, having his son circumcised, or carrying the child on the parent’s shoulders. The State then, through an affirmative defense, puts the *burden on the accused* to prove that the touching was not sexually motivated.

Arizona's statutory scheme amounts to a full-frontal assault on the presumption of innocence, which is a bedrock principle at the very foundation of our criminal law. It also violates the stringent requirements of the Fourteenth Amendment, which prohibits the deprivation of a person's liberty without due process of law. And, since in virtually all cases, the only way the defendant could negate or disprove the presumption of sexual intent is by taking the stand, the burden-shifting scheme effectively violates defendants' right to remain silent.

Petitioner Bradley Bieganski and his wife are devout Christians who founded a ministry to help underprivileged children. They ran the Kingdom Flight Ranch (the "Ranch"), in Navajo County, Arizona. App. 3. The State and several tribes licensed the Ranch to provide foster care and homeschooling for Native American girls, whose parents voluntarily transferred parental rights and guardianship to the Bieganskis. Mr. Bieganski and his wife acted in *loco parentis* for the girls who lived with them at the Ranch.

Among their parenting duties, the Bieganskis helped the young children (3 to 8 years old) bathe and get ready for Sunday morning church services. In 2014, Mr. Bieganski was charged with child molestation for touching the genitals of children while bathing them. App. 7. However, there was no evidence of sexual gratification, self-touching, or any requests by Mr. Bieganski that the girls touch him. To the contrary, the girls stated that he came in, he washed them, and he left.

His first trial, during which the prosecution assumed the burden of establishing sexual interest, ended in a mistrial. App. 4.

Before his second trial the Arizona Supreme Court held, in another case, that lack of sexual intent is an affirmative defense a defendant must prove by a preponderance of the evidence. *Holle*, 240 Ariz. at 305. The Arizona Supreme Court, in its majority opinion, never addressed the constitutionality of the burden-shifting statute. Instead, it decided whether, under the existing statutory scheme, the State must prove sexual intent or whether the accused must establish a lack of sexual motivation. Arizona's Chief Justice and another Justice dissented and found that the majority's burden-shifting approach "renders the statutes unconstitutional." 240 Ariz. at 311 (Bales, C.J., dissenting).

As a consequence, Mr. Bieganski moved to dismiss the charges because the State's burden-shifting scheme violated his federal constitutional right to due process. He urged that "[t]ouching is just touching" and "without the sex, it is not criminal." And, "yet here the [State] does not have to prove sex in any way." Superior Ct. Doc. 253. The trial court denied the motion because it believed it was bound by the recent decision in *Holle*.

During Mr. Bieganski's second trial, the prosecutor urged the jury to find him guilty because, under Arizona law, "any direct or indirect touching of any part of the genitals" was, by definition, child molestation.

Faced with the presumption that any non-accidental touching amounts to child molestation, Mr. Bieganski endeavored to invoke Arizona's "lack of sexual interest" affirmative defense. This required him to admit the allegations (and, thus, the felony) that he intentionally touched the children's genitals. He also had to take the stand to

testify that he considered the girls in his care to be his daughters and had no sexual interest in them whatsoever. App. 9.

During summation the prosecutor, who presented no evidence of sexual intent, told the jurors that the defendant “hasn’t presented any evidence of a lack of sexual motivation.” Unable to carry the heavy burden that had been placed on him by Arizona law, Mr. Bieganski was convicted of child molestation. App. 5.

Bradley Bieganski, who has no criminal history, has been incarcerated since 2013 and condemned to prison for 34 years based upon traditional parenting activity. His federal constitutional rights were violated as a result of Arizona’s statutory scheme which

- (1) requires jurors to presume that the defendant committed the felony of molestation because he intentionally and knowingly touched the genitals of the children he was bathing as their caregiver,
- (2) relieves the State of its burden to establish every essential element,
- (3) shifts the burden to the defendant to disprove the essential element of sexual intent, and
- (4) effectively compels the defendant to take the stand and testify that any touching was not sexually motivated.

As developed below, numerous judges including, but not limited to, Arizona's Chief Justice, a member of a Ninth Circuit panel, and a United States Senior District Judge, called into question the constitutionality of the burden-shifting scheme, which is "criminalizing a broad swath of indisputably innocent conduct by assigning to defendants the burden of proving their conduct was not criminally motivated."¹

REASONS FOR GRANTING CERTIORARI

THERE IS AN URGENT NEED TO RESOLVE RECURRING ISSUES RELATING TO THE UNCONSTITUTIONALITY OF ARIZONA'S MOLESTATION LAW, WHICH RELIEVES THE PROSECUTION OF PROVING THE INHERENT ELEMENT OF SEXUAL MOLESTATION -- SEXUAL INTENT -- AND THEN, THROUGH AN AFFIRMATIVE DEFENSE, SHIFTS THE BURDEN OF PROOF TO DEFENDANTS TO PROVE THAT ANY TOUCHING WAS NOT SEXUALLY MOTIVATED

Review by this Court is needed to resolve questions of exceptional importance regarding the ability of states to reallocate burdens of proof -- from the prosecution to defendants -- regarding essential elements of criminal offenses through affirmative defenses. Specifically, the Court is asked to confirm that the prosecution cannot be relieved from having to prove *the inherent element* of an offense which transforms benign conduct into something criminal and wrongful.

Defendants in Arizona have been deprived of their federal constitutional right to due process under a unique criminal statute that does not require the State to prove guilt beyond a reasonable doubt of each and every essential element of the crime, in

¹ *Holle*, 240 Ariz. at 312 (Bales, C.J., dissenting); *May v. Shinn*, 954 F.3d 1194, 1222 (9th Cir. 2020) (Block, J., dissenting) ("statute of dubious constitutionality"); *May v. Ryan*, 245 F. Supp. 3d 1145, 1167 (D. Ariz. 2017), *rev'd on procedural grounds*, 807 F. App'x 632 (9th Cir. 2020) (mem.), *rehearing petition filed August 9, 2020*.

defiance of the mandates of *In re Winship*, 397 U.S. 358, 364 (1970). Instead, Arizona's child molestation statutory scheme *presumes* a defendant's guilt on the critical element of intent unless *he* proves otherwise.

Like every other state, Arizona long considered sexual interest an essential element of sexual molestation. However, in recent years Arizona shifted intent away from an *element* the prosecution had to prove beyond a reasonable doubt, to an *affirmative defense* that defendants must disprove by a preponderance of the evidence.²

It is well settled that States are given deference in defining crimes and defenses.³ However, that deference is not -- and should not be -- absolute. *See Patterson v. New York*, 432 U.S. 197, 210 (1977) ("there are obviously constitutional limits beyond which the States may not go" when defining the elements of a criminal offense); *Jones v. United States*, 526 U.S. 227, 241 (1999) (there is "some limit upon state authority to reallocate the traditional burden of proof").

To the contrary, certain elements are so central to the definition of a crime that the burden of proof as to those elements may not be reallocated to the defendant under the pretense of labeling it an affirmative defense. Indeed, the State's power to define the

² The Arizona Revised Statutes provide, in pertinent part, that a "person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact" with a "child who is under fifteen years of age." A.R.S. § 13-1410(A). "Sexual contact" includes "any direct or indirect touching" of the genitals. A.R.S. § 13-1401(3). In 1997, the Arizona legislature changed the burden of proof for all affirmative defenses. Accordingly, A.R.S. § 13-1407(E) allowed defendants to assert they were "not motivated by sexual interest," but they had to prove this affirmative defense by a preponderance of the evidence. A.R.S. § 13-205(A); *Holle*, 240 Ariz. at 305.

³ *See McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986), *overruling on other grounds recognized by United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) ("the state legislature's definition of the elements of the offense is usually dispositive").

burdens may be limited if it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Patterson*, 432 U.S. at 201-02, 210.⁴ And, a defendant’s “intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense ‘element.’” *Apprendi v. New Jersey*, 530 U.S. 466, 493 (2000).

As a consequence, “although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him.” *Mullaney*, 421 U.S. at 702.

Sexual intent is an inherent element of sexual molestation. If not, individuals who intentionally touch children’s genitals as part of their work or responsibilities -- such as parents, doctors, nurses, childcare workers, and mohels who perform ritual circumcisions -- would commit the crime of molestation every day. What separates their innocent conduct from that which is criminal is the *intent* or the predicate *sexual motivation for the touching*. As such, the motive for the touching is the fundamental element of the offense of child molestation.

Here, by placing the burden on defendants to prove that they did not have a sexual motive for touching children, Arizona has impermissibly removed an essential element of proof from the prosecution and shifted that burden to defendants.

These constitutional guarantees are essential to ensure that everyone, even those charged with offenses involving children, receives due process. After all, the safety and

⁴ See also *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (Maine’s statute, which required defendants to prove that they acted with the “heat of passion on sudden provocation” to reduce an offense to manslaughter, unconstitutionally shifted the burden to the defendant to negate the mental intent required for murder).

security provided by the Due Process Clause belong to all of us and its safekeeping cannot be made to depend upon the popularity of those who seek its shelter. Indeed, the late Justice Felix Frankfurter once noted that the “history of liberty has largely been the history of observance of procedural safeguards.”⁵

Furthermore, it violates the rights of Petitioner Bradley Bieganski and others to remain silent because, in virtually all cases, the only way a defendant can endeavor to invoke the affirmative defense is by taking the stand to testify that there was no sexual intent. This is especially true in cases, such as this, which involve benign touching through the traditional parenting role of bathing a child.

Here, certiorari is necessary to ensure that these procedural safeguards are sustained and to make certain that directions are given, once and for all, regarding statutes which so drastically shift the burden from the prosecution to defendants on such an essential element of the offense.

Arizona Claims it Can Shift Any Traditional Element to an Affirmative Defense

Review by this Court is especially important because Arizona has taken the audacious view that it can shift any traditional element to an affirmative defense. Quite alarmingly, “[d]efying the plain language of *Patterson*,” the State recently defended another defendant’s conviction under this same statute

on the basis that legislatures have complete and unfettered authority to decide both the elements of and “affirmative” defenses to any crime.

⁵ *McNabb v. United States*, 318 U.S. 332, 346 (1943), superseded by statute on other grounds, 18 U.S.C. § 3501.

According to the State, the constitutional limit is entirely a matter of form: lawmakers can force the accused to prove or disprove any fact as long as the legislature is careful to call the arrangement an “affirmative defense.”

Or, as in this case, a legislature can take what was for decades an element of the crime (sexual intent) and relabel the denial of it as an affirmative defense, thereby freeing the state from having to prove it and making the accused disprove it instead. *May*, 245 F. Supp. 3d 1145, 1158 (D. Ariz. 2017), *rev’d on procedural grounds*, 807 F. App’x 632 (9th Cir. 2020) (mem.).

In *May*, another defendant with no prior criminal history was convicted of violating Arizona’s molestation statutory scheme and sentenced to imprisonment for 75 years. The conviction was based upon “he said, she said” allegations that he momentarily touched three children over their clothing, in public places where other adults were present. There was no physical, surveillance, or eyewitness evidence to support the claims. Mr. May’s trial attorney failed to challenge the constitutionality of the statutes. He also failed to submit any briefing on shifting the burden of proof even though the trial judge invited him to do so. Instead, like the Petitioner in this case, Mr. May was forced to shoulder the burden of disproving any sexual intent, which required him to take the stand.

Stephen May’s new attorneys challenged the burden-shifting law in a post-conviction proceeding. They established that his trial counsel’s failure to preserve this federal constitutional violation was ineffective assistance that excused any procedural bar. Mr. May then sought habeas relief after the Arizona courts denied post-conviction relief.

As recognized by Arizona Senior District Judge Neil Wake, who presided over Mr. May's habeas proceeding,

at oral argument the State was candidly absolutist in maintaining that legislatures have unbounded capacity to shift to defendants the burden of disproving anything, subject only to the specific examples listed in *Patterson*: a legislature “cannot declare an individual guilty or presumptively guilty of a crime”; nor may it “validly command that the filing of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.” *Patterson*, 432 U.S. at 210.

The State declined any more specific constitutional justification for allowing a state to make an accused disprove sexual intent for child molestation. *May*, 245 F. Supp. 3d at 1158.

Here, Arizona is declaring all parents presumptively guilty of the crime of child molestation. And, as recognized by Judge Wake, the State's efforts to evade *Winship* and its progeny are “directly contrary to *Patterson*'s holding that ‘there are obviously constitutional limits beyond which the States may not go in this regard.’” 245 F. Supp. 3d at 1158, quoting *Patterson*, 432 U.S. at 210. The District Judge granted habeas relief and held that Arizona's burden-shifting scheme violated Stephen May's due process right to be convicted of a crime only if the State proved each element of the offense. The court also found that there was a “significant likelihood” that Mr. May “would not have been convicted had constitutional instructions been given.” 245 F. Supp. 3d at 1172.

The Ninth Circuit reversed purely on procedural grounds -- believing that trial counsel's failure to preserve the federal constitutional issue in state court was not ineffective assistance that could surmount a procedural bar to review of unpreserved

claims on habeas. The Court expressly did “not reach the constitutionality of the Arizona child molestation statute.” 807 F. App’x at 635 (mem.).

Nevertheless, in a related decision, one member of the panel noted that the district judge “raised compelling reasons why the statute placing the burden of proving lack of intent on the defendant may well be unconstitutional.” 954 F.3d at 1222, n. 16 (Block, J., dissenting).

Arizona’s Chief Justice and Others Recognize that this Burden-Shifting Scheme is Unconstitutional and Violates this Court’s Precedent

District Judge Wake and the member of the Ninth Circuit panel are not alone in their concerns regarding this unconstitutional law. Arizona Chief Justice Scott Bales and Justice Robert Brutinel agree “Arizona, apparently alone among jurisdictions, has enacted criminal laws broadly stating that a person commits a felony merely by ‘intentionally or knowingly’ touching” a child’s private areas, without proof of any other mental state. *Holle*, 240 Ariz. at 311 (dissent).

Chief Justice Bales recognized that it violates this Court’s precedent to require a defendant on trial for molestation to prove the absence of sexual motivation.⁶

⁶ 240 Ariz. at 312 (dissent), citing *Winship*, 397 U.S. at 364. See also *Staples v. United States*, 511 U.S. 600, 614-15 (1994) (holding the government is required to prove, beyond a reasonable doubt, that a defendant knew the weapon he possessed had characteristics that brought it within the statutory definition of a machine gun); *Turner v. United States*, 396 U.S. 398, 430 (1970) (the Constitution requires the defendant in a criminal case be presumed innocent and places the burden of proving guilt squarely on the prosecution); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (scienter requirement must apply to the “crucial element separating legal innocence from wrongful conduct”).

Arizona's Legislature Amended the Law to Eliminate the Affirmative Defense, but the Law Still Presumes Sexual Intent

After Petitioner Bradley Bieganski's conviction, the Arizona legislature *eliminated* the affirmative defense which required him to prove that he was "not motivated by a sexual interest." Ariz. HB2283 (2018) (amending A.R.S. §§ 13-1401[A][3] and 13-1407[E]). The legislature also expressly precluded "direct or indirect touching or manipulating during caretaking responsibilities..." from the definition of "sexual contact" -- the very act the jury found Mr. Bieganski engaged in when convicting him of molestation for bathing his foster children. 2018 Ariz. HB 2283.

Arizona Representative Anthony Kern (R-Glendale), who sponsored the amendment, said it is not fair to put that burden on the accused. He also questioned "why someone who might be changing a diaper should have to go to court in the first place."⁷ He noted that under Arizona's burden-shifting law defendants were "guilty until proven innocent." And, as another legislator indicated, the amendment "shift[ed] the burden back where it should be."⁸

Nevertheless, even though the statute was amended, defendants such as Bradley Bieganski, Stephen May, and countless others, were convicted under the unconstitutional burden-shifting scheme that was in effect from at least 1997 to 2018. Many of them are still subject to draconian prison sentences including imprisonment

⁷ Howard Fischer, *Almost 400 New Laws Take Effect Friday*, Ariz. Capitol Times, July 31, 2018 ("[a]nother bill is a reaction to existing law and court rulings on child molestation that say someone charged with touching a child could claim that the action was "not motivated by sexual interest").

⁸ See Video of the Arizona House Judiciary and Public Safety Committee meeting on HB2283 (2018), dated Feb. 14, 2018, available at <https://www.azleg.gov/bills/>, at 1:34.

for 34 years (Bradley Bieganski) and 75 years (Stephen May). Virtually all of them will be labeled and forced to register as sex offenders for the rest of their lives.⁹ And, despite eliminating the affirmative defense, Arizona's molestation statutory scheme still relieves the prosecution from proving the single most essential element of sexual molestation -- that the defendant acted with sexual intent.

This Issue Has and Will Continue to Recur and Plague this Court Until it is Definitively Resolved

The recurring nature of this issue -- especially in light of Arizona's harrowing belief that it can shift any element of an offense to an affirmative defense -- underscores the need for review now. The issue was previously raised in a petition filed by Stephen May, who, as developed above, was sentenced to 75 years imprisonment under this unconstitutional statutory scheme. That petition asked "whether Arizona's child molestation statutes violate an accused's Fourteenth Amendment right to due process because they 'manipulate the prosecutor's burden of proof by ... placing the affirmative defense label on "at least some elements" of traditional crimes.'" Petition for Certiorari, *May v. Arizona*, No. 08-1393, 2009 WL 1339242 (May 8, 2009), quoting *Apprendi*, 530 U.S. at 475; *Patterson*, 432 U.S. at 210. That petition, which challenged the very same statutory scheme addressed in this Petition, was featured in the Supreme Court of the United States (SCOTUS) Blog as a "Petition to Watch."¹⁰

⁹ See A.R.S. § 13-3821 ("Persons required to register").

¹⁰ See <http://www.scotusblog.com/2009/09/petitions-to-watch-conference-of-9-29-09-part-iii>.

On June 15, 2009, this Court requested that the prosecution respond to that petition. Although acknowledging that the “constitutional validity of Arizona’s child-molestation statutes is a matter of great importance,”¹¹ the State argued that this Court should not review Stephen May’s case because the issue in that case had not been raised before the Arizona courts. The Court declined to review on October 5, 2009.

A similar challenge to this statutory scheme was presented to this Court in *Holle v. Arizona*, No. 16-1025, 2017 WL 727972 (Feb. 21, 2017). There the issue presented was “may Arizona reallocate the burden of proof and require the defendant to disprove a fact necessary to authorize conviction by labeling as an affirmative defense at least some elements of an existing crime,” citing *Patterson*, 432 U.S. at 210 (internal punctuation omitted).

The current Petition is a perfect platform for this Court to review, at long last, this perennial issue. The federal due process issue (both on its face and as applied) was amply preserved and developed at all three levels in the state courts.¹²

¹¹ See Respondent’s Brief in Opposition to the Petition for Certiorari in *May v. State of Arizona*, No. 08-1393, 2009 WL 2524209, *30 (Aug. 14, 2009).

¹² See Superior Ct. Doc. 253; Appellant’s Opening Brief to the Arizona Court of Appeals, dated Dec. 28, 2018 at 1, 27-51, citing *Winship*, the Fifth Amendment, the Fourteenth Amendment, and developing that the molestation statutes violate due process and the right to remain silent; and Appellant’s Petition for Review to the Arizona Supreme Court, dated Oct. 17, 2019, at 5-6.

The Arizona Court of Appeals’ decision states that Bradley Bieganski contends that the molestation statutes “violate due process because they shift the burden of proof to the defendant regarding the issue of sexual motivation.” App. 5. The court found that it was bound by the Arizona Supreme Court’s recent decision in *Holle*. The court also found that laws were not unconstitutional as applied to Mr. Bieganski. App. 7. The Arizona Court of Appeals found that the right to remain silent challenge was not raised in the trial court. Nevertheless, the court reviewed the issue at length and found no fundamental error. App. 5-6.

These enduring questions, regarding Arizona's direct infringement of defendants' federal constitutional rights, are of sufficient urgency to warrant review by this Court. If not definitively resolved, this case will give directions and carry consequences far beyond its own facts. States need to know the limits on their ability to relabel essential elements of offenses as affirmative defenses to shift the burden of proof and to avoid having to prove every element beyond a reasonable doubt. And, the questions will certainly sponsor a host of similar controversies in the future. Thus, it is better they be resolved now.

CONCLUSION

For all these reasons, Petitioner prays that a writ of certiorari issue to review the Arizona Court of Appeals' decision in this case.

August 27, 2020

Respectfully submitted,

Erica T. Dubno, Esq.*
Fahringer & Dubno
43 West 43rd Street, Suite 261
New York, New York 10036
(212) 319-5351
erica.dubno@fahringerlaw.com

Louis M. Spivak, Esq.
State Bar No. 009309
Lou Spivak, PC
5447 East 5th Street, Suite 205
Tucson, Arizona 85711
(520) 325-4667
lspivak@louspivackpc.com

Counsel for Petitioner
** Counsel of Record*