No. 08-1393

In The
Supreme Court of the United States

STEPHEN EDWARD MAY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To Division One Of The Court Of Appeals Of The State Of Arizona

REPLY BRIEF FOR PETITIONER

JEAN-JACQUES CABOU
Counsel of Record
KATHLEEN BRODY O'MEARA
JOSEPH N. ROTH
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, AZ 85012
(602) 640-9000

TRACEY WESTERHAUSEN
DEBUS, KAZAN & WESTERHAUSEN, LTD.
335 East Palm Lane
Phoenix, AZ 85004
(602) 257-8900

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

REPLY BRIEF FOR PETITIONER

In the absence of guidance from this Court, Arizona and its sister states have fallen into conflict regarding whether and to what extent they may "manipulate the prosecutor's burden of proof by . . . placing the affirmative defense label on 'at least some elements' of traditional crimes." *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)). Conceding that "the constitutional validity of Arizona's child-molestation statutes is a matter of great importance" (Br. in Opp'n 30), the State nevertheless resorts to misdirection in its attempt to divert the Court from the narrow, properly presented question raised by this case. *Apprendi* is not, as the State contends, limited to "construing the Sixth Amendment's jury-trial guarantee." (Br. in Opp'n 32.) And, contrary to the State's arguments, May did raise to the Arizona state courts the constitutional challenge presented in his Petition. Finally, published decisions in several states demonstrate that there is real conflict regarding whether a legislature may constitutionally reduce the government's burden to prove the sexual part of a sex crime.

1. The State Misapprehends This Court's Holding in *Apprendi v. New Jersey*, Which Rests Directly on the Due Process Requirement That the Government Prove Every Element of a Crime Beyond a Reasonable Doubt.

The *only* constitutional principle at issue in the Petition is the one enunciated in *Winship* and confirmed in *Apprendi*: "[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." *Apprendi*, 530 U.S. at 477 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (alteration in *Apprendi*). The State ignores this critical component of *Apprendi*'s rationale when it insists that May's "reliance on *Apprendi* and its progeny . . . is misplaced." (Br. in Opp'n 33.)[1]

The State is similarly wrong when it argues that *Apprendi*'s holding "refers only to those facts that, if found, have the effect of exposing the defendant to a greater punishment than that authorized by the jury's guilty verdict." (Br. in Opp'n 35.) On the contrary, the holding of *Apprendi* is so inextricably linked with the core due process principles enunciated in *Winship* and expounded in *Mullaney v.*

---

[1] The State's claim that "Petitioner maintains that the Arizona Legislature[ ] . . . violated his Sixth Amendment right" is bizarre. (*See* Br. in Opp'n 32-33.) No such claim is present in the Petition, nor is the Sixth Amendment ever cited in the Petition.

Wilbur, 421 U.S. 684 (1975), and *Patterson* that the principal dissent suggested that *Apprendi* "would require the Court to overrule . . . *Patterson*." *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting). Thus, the State's argument that *Apprendi* "applies solely to sentence enhancement provisions" (Br. in Opp'n 36 (citation omitted)) mistakenly presumes the answer to the question presented in the Petition and so far left unanswered by this Court: Does *Apprendi*'s functional approach apply not only to facts necessary to increase the degree of punishment, but also "to facts that authorize criminal punishment in the first place?" (Pet. 16-17.)

2. May Timely and Fairly Presented His Constitutional Claim to Arizona's Courts.

Without question, May's claim was "properly presented to[ ] the state court that rendered the decision [this Court has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). In his Opening Brief before the Arizona Court of Appeals, whose decision this Court has been asked to review, May's challenge to the jury instructions given in accordance with Arizona Revised Statutes sections 13-1407(E) and 13-1410 literally begins and ends with the Constitution. The first argument in May's Opening Brief is titled, "**The jury instructions unconstitutionally placed the burden of proof on the defendant**." (Br. in Opp'n 12a.) After raising a statutory argument, May returned to press the basic constitutional guarantee at issue: "This means that

we are left with the cherished principle and constitutional due process right, imposing upon the state the burden to establish each element of the offense beyond a reasonable doubt. This was not done in this case." (*Id.* at 15a.) As authority for this proposition, May cited *Winship* and the Fifth and Fourteenth Amendments. (*Id.*)[2] These statements plainly brought May's constitutional claim "to the attention of the state court with fair precision and in due time" and therefore place the question presented in the Petition within the Court's jurisdiction. *Street v. New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

The State's claim that the Court of Appeals "had no reason to understand" that May had raised a federal due process claim (Br. in Opp'n 27-28) is particularly vexing because, in response to May's having raised the issue in his Opening Brief, the State itself pitched the issue to the forefront in its Answering Brief in that court. At the beginning of its "Argument" section in that brief, the State urged that "[a]lthough the Fourteenth Amendment's Due Process Clause obligates the prosecution to prove every *element* of a criminal offense beyond a reasonable doubt, legislatures may constitutionally require the defendant to

---

[2] The State's attempt to devalue the citations to *Winship* and the Constitution as occurring "in the seventy-ninth footnote of his opening brief without accompanying argument" is misleading. (*See* Br. in Opp'n 24.) Every citation in that brief appears in a footnote rather than in the text.

bear the burden of proving affirmative defenses." (Reply Br. App. 5 (citing *Winship* and *Martin v. Ohio*, 480 U.S. 228, 231-34 (1987)).)

The State's related argument that May's reliance on *Winship* in his Opening Brief in the Arizona Court of Appeals "did not squarely present the constitutional claim presented in his petition" (Br. in Opp'n 24) is premised on the mistaken belief that *Winship* does not address precisely the due process principle implicated in this case. (*See* Br. in Opp'n 24-25, 28-29.) Both *Winship* and this case hinge on the constitutional requirement that, before criminally punishing one of its citizens, the state must "show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. at 363 (quoting *Davis v. United States*, 160 U.S. 469, 493 (1895)). Contrary to the State's suggestion (Br. in Opp'n 25), May did not need to cite the later cases of *Mullaney* and *Patterson* to preserve his *Winship*-based due process claim. *See Zimmerman*, 278 U.S. at 67 ("No particular form of words or phrases is essential . . . ."); *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) (The Supreme Court's "jurisdiction does not depend on citation to book and verse.").

Furthermore, the question presented in the Petition was first raised in the trial court. May requested a jury instruction requiring the State to prove sexual motivation beyond a reasonable doubt (Pet. 4; Pet. App. 35) and argued that "the State is obliged to prove a motivation of sexual interest as an element of

the offense" (Pet. App. 38). In response, the State relied on *State v. Sanderson*, 898 P.2d 483 (Ariz. Ct. App. 1995), *review denied* (Ariz. July 11, 1995), to argue that "[t]he defendant constitutionally carries the burden of proving lack of sexual motivation by a preponderance of the evidence." (Pet. App. 50-51.) "This should have sufficed to alert the trial judge to petitioner's reliance on due process principles." *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (holding as sufficient to raise federal due process claims petitioner's objection regarding "an instruction on the presumption of innocence" that "invoked fundamental principles of judicial fair play" (internal alteration and quotation marks omitted)).[3]

Moreover, the State is mistaken to suggest that a challenge to the jury instructions did not preserve a challenge to the statutes on which the jury instructions were premised. (*See* Br. in Opp'n 10, 26.) "[T]he jury instruction[s'] construction of [Arizona's statutes] 'is a ruling on a question of state law that is as

---

[3] The State contends that if a defendant does not squarely raise a constitutional objection at trial, Arizona law deems the argument waived or precluded on appeal. (Br. in Opp'n 24.) This is false. *See State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."). Even if May had said nothing about the jury instructions applying Arizona Revised Statutes sections 13-1407(E) and 13-1410, his claim of error to the Arizona Court of Appeals would have remained viable. *Cf. id.* at 608, 610 (holding that non-objected-to *Apprendi/Blakely* error was fundamental and would have required new sentencing proceedings).

binding on [the Supreme Court] as though the precise words had been written into' the statute[s]." *Virginia v. Black*, 538 U.S. 343, 364 (2003) (plurality opinion) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)) (holding unconstitutional provision of statute "as interpreted by the jury instruction"). And Arizona appellate courts have at least twice construed Arizona Revised Statutes sections 13-1407(E) and 13-1410 to be consistent with the jury instructions May challenges here. *See State v. May*, No. 1 CA-CR 07-0144, 2008 WL 2917111, at **1-2 (Ariz. Ct. App. July 24, 2008) (Pet. App. 3-5); *State v. Simpson*, 173 P.3d 1027, 1030 (Ariz. Ct. App. 2007) (Pet. App. 19).

Finally, the State misrepresents Arizona law when it urges this Court to deny the Petition so as not to be the "very first to address" the constitutionality of Arizona's statutes. (Br. in Opp'n 18.) In *Sanderson*, the Arizona Court of Appeals, explicitly relying on this Court's holding in *Patterson*, explained that Arizona Revised Statutes sections 13-1407(E) and 13-1410 "did not allocate the burden of proof on any element to the defendant but, rather, created an affirmative defense regarding motive. This is constitutionally permissible." 898 P.2d at 491. Indeed, the State cited *Sanderson* to the trial court *for this very proposition*. (*See* Pet. App. 50-51.) Having relied upon *Sanderson* to buttress its constitutional argument in the trial court, the State cannot now claim that no Arizona appellate court has ever before addressed the constitutionality of the statutes challenged in the Petition.

3. States Are in Conflict Regarding Whether Legislatures May Reduce the Government's Burden to Prove Illicit Intent in Molestation Cases.

Without the guidance of defined constitutional limits on their ability to manipulate burdens of proof, states have disagreed regarding the constitutionality of statutes that reduce the government's burden to prove illicit intent in child molestation prosecutions. (Pet. 18-20); *compare State v. Tibbetts*, 281 N.W.2d 499, 500-01 (Minn. 1979) (statute requiring proof that touching "can reasonably be construed as being" for a sexual or aggressive purpose unconstitutionally shifted the burden of proof), *with In re Wentworth*, 651 N.W.2d 773, 776 (Mich. Ct. App. 2002) (statute requiring proof that touching "can reasonably be construed as being" for a sexual purpose *did not* unconstitutionally shift the burden of proof). Rather than confront the merits of the conflicting rationales, the State maintains that the cases discussed are irrelevant because "the statutes at issue in the cases that Petitioner has cited contain language not found in Arizona's child-molestation laws." (Br. in Opp'n 30.) But whether the statutes at issue in *Tibbetts* or *Wentworth*, for instance, are identical to Arizona's statutes is unimportant. What is critical is that in each statutory scheme the legislature reduced the government's burden to prove the sexual part of a sex crime to something less than beyond a reasonable doubt. Reflecting the tension between *Apprendi* and *Patterson*, state courts are split

regarding whether such a reduction is constitutionally permissible.

"[T]here are obviously constitutional limits" on the powers of the states to "reallocat[e] burdens of proof." *Patterson*, 432 U.S. at 210. (Pet. 9.) The divergent cases – including most prominently this one – demonstrate the need for this Court to resolve the tension between *Apprendi* and *Patterson* and provide state legislatures and courts with much needed guidance.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

JEAN-JACQUES CABOU
Counsel of Record
KATHLEEN BRODY O'MEARA
JOSEPH N. ROTH
OSBORN MALEDON, P.A.
2929 North Central Avenue,
21st Floor
Phoenix, AZ 85012
(602) 640-9000

TRACEY WESTERHAUSEN
DEBUS, KAZAN &
WESTERHAUSEN, LTD.
335 East Palm Lane
Phoenix, AZ 85004
(602) 257-8900

Attorneys for Petitioner