

A05-0811

A05-811

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Scott Edward Cannady,

Appellant.

RESPONDENT'S BRIEF

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A05-811

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Scott Edward Cannady,

Appellant.

LEGAL ISSUE

Does the affirmative defense provision in Minnesota's child pornography statute, Minn. Stat. § 617.247, unconstitutionally shift the burden of proof of an element of the offense to the defendant?

The trial court, relying upon *State v. Myrland*, 644 N.W.2d 847 (Minn. Ct. App. 2002), held the statute is not unconstitutional. The court of appeals agreed.

Apposite authority:

Minn. Stat. § 617.247, subd. 8

State v. Myrland, 644 N.W.2d 847 (Minn. Ct. App. 2002), rev. denied Aug. 6, 2002, cert denied 537 U.S. 1019.

State v. Auchampach, 540 N.W.2d 808 (Minn. 1995).

STATEMENT OF THE CASE AND FACTS

Appellant Scott Cannady was charged on March 16, 2004 in Ramsey County District Court with 25 counts of possession of child pornography in violation of Minn.

Stat. § 617.247, subd. 4. Each count related to a separate explicitly described image of child pornography found on his computer during a search warrant executed at his home on December 3, 2003. The hard drive was seized, analyzed forensically and determined to have in excess of 1500 such images, including the 25 described in the 25 counts.

The case was assigned to the Honorable Teresa R. Warner, Judge of Ramsey County District Court, for trial. Prior to trial, appellant's counsel submitted a motion and memorandum to dismiss the complaint on constitutional grounds including, *inter alia*, the claim he now raises: that Minn. Stat. § 617.247 violates the due process clauses of both the United States and Minnesota constitutions because it allegedly shifts the burden of proof to appellant on an essential element of the offense; namely, that the persons depicted must be minors. (AA¹-15 to 24) The arguments he made then and now are virtually identical.

The state opposed the motion in a letter response dated May 20, 2004, citing State v. Myrland, 644 N.W.2d 847 (Minn. Ct. App. 2002), rev. denied Aug. 6, 2002; cert. denied Nov. 12, 2002. In an order filed July 6, 2004, Judge Warner ruled, following the reasoning of Myrland, that the statute did not violate the due process clause of either the state or federal constitutions because it still required the state to prove the persons depicted were minors and that the affirmative defense section merely allowed appellant to assert an age defense when available. (AA 8-9)

¹ "AA" followed by a page number refers to appellant's appendix herein filed with his brief.

On September 7, 2004, appellant orally and in writing waived his right to a jury trial and agreed to a stipulated court trial pursuant to State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980), expressly preserving for appeal the constitutional issue raised pretrial. The parties agreed to the submission of 16 exhibits by the state including the 25 child pornography images representing each count² as well as the complaint and police reports. (LT³ 3-15) Appellant offered no evidence related to any defense but asserted an affirmative defense under Minn. Stat. § 617.247, subd. 8.

On September 20, 2004, Judge Warner filed a detailed order with findings of fact, conclusions of law and verdicts of guilty on 23 of the 25 counts and verdicts of not guilty on the remaining 2 counts. She made parallel findings on the record. (VT⁴ 3-7) The parties submitted opposing memoranda setting forth their respective positions on various sentencing issues. At a sentencing hearing on January 19, 2005, they orally argued their positions. On January 27, 2004, Judge Warner issued an order and memorandum for sentencing finding that appellant's 23 convictions constituted 18 separate behavioral incidents to be sentenced individually. Appellant was sentenced on January 28, 2005.

Appellant appealed to the Minnesota Court of Appeals challenging Myrland and the constitutionality of the affirmative defense provision of Minn. Stat. § 617.247 as well as sentencing issues. The court of appeals, following Myrland, unanimously affirmed the

² All have been forwarded to this Court for purposes of appeal. See Item # 40 in Ramsey County district court file (marked "sealed confidential documents found in file").

³ "LT" followed by a page number refers to the transcript of the Lothenbach stipulated trial on September 7, 2004.

⁴ "VT" followed by a page number refers to the transcript of the verdict hearing on September 20, 2004.

constitutionality of the statute.⁵ This Court granted appellant's petition for further review of the constitutionality issue on June 28, 2006.

ARGUMENT

The affirmative defense provision in Minnesota's child pornography statute, Minn. Stat. § 617.247, does not unconstitutionally shift the burden of proof of an element of the offense to the defendant. Myrland's holding that the statute does not violate due process should be affirmed.

A. Minnesota's child pornography statute.

A brief history of the child pornography statute in Minnesota may assist in providing context for the issue presented in this appeal.

Prior to 1999, possession and dissemination of child pornography were both gross misdemeanors. The offenses were defined in terms of photographic representations of sexual conduct involving minors.⁶ In 1999, in light of changing technology and the beginning of computerized availability of these materials, the legislature created a new and more comprehensive definition of pornographic work involving minors, enhanced these offenses to felonies and added the affirmative defense provision which is the subject of appellant's constitutional challenge.⁷ In 2001, in response to the internet explosion of previously unseen quantities of these materials, the legislature once again amended this statute by increasing the penalties for both offenses.⁸ The affirmative defense provision, however, has not been changed since it was enacted in 1999.

⁵ The court of appeals also affirmed on the sentencing issues. However, these issues were not petitioned for further review.

⁶ See Minn. Stat. § 617.247 (1983).

⁷ Laws 1999, Ch. 217, §§ 6 to 11.

⁸ Laws 2001, Ch. 197, §§ 4 and 5.

The instant appeal arises from appellant's convictions of multiple counts of possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4 (2003). The statute makes it a felony to possess "a pornographic work...knowing or with reason to know its content and character." "Pornographic work" for purposes of this statute is expressly defined as depictions, by various media or technologies, of minors engaging in sexual conduct.⁹

Thus, the three elements of the crime are: (1) that the defendant possessed a pornographic work; (2) that the defendant knew or had reason to know the content and character of the work was pornographic work involving minors; and (3) that the crime occurred on or about the time and in the county specified in the complaint.¹⁰

Appellant challenges the constitutionality of the affirmative defense provision of the child pornography statute on due process grounds.

Pursuant to Minn. Stat. § 617.247, subd. 8:

"It is an affirmative defense to a charge of violating this section that the pornographic work was produced using only persons who were 18 years or older."

⁹ "Pornographic work" is defined for purposes of this statute at Minn. Stat. § 617.246, subd. 1 (f) to mean "(1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of sexual performance involving a minor; or (2) any visual depiction, including any photograph, film video, picture, drawing, negative, slide or computer-generated image or picture, whether made or produced by electronic, mechanical or other means that (i) uses a minor to depict actual or simulated sexual conduct; (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or (iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct. For purposes of this paragraph, an identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image issued to created the visual depiction."

¹⁰ See, CRIMJIG 12.107, Possession of Pornographic Work Involving Minors--Elements.

Appellant asserted this defense before the trial court but provided no evidence in support of it. His claim on appeal, as it was before the trial court, is that this affirmative defense unconstitutionally shifts the burden of production of evidence on an essential element of the crime--i.e., that the pornography depicts a minor--to the defense. Specifically, he claims that the Myrland decision described below was wrongly decided and that the trial court herein and the court of appeals therefore wrongly relied on Myrland in denying his due process claim.

B. The holding in *Myrland*.

State v. Myrland, 644 N.W.2d 847 (Minn. Ct. App. 2002), rev. denied Aug. 6, 2002; cert. denied Nov. 12, 2002, was a state's appeal from an order dismissing child pornography charges because the trial court found the affirmative defense provision of the statute violated Myrland's due process rights. The court of appeals reversed and remanded for trial.¹¹

Myrland was represented by the same counsel who represented appellant at trial and now on appeal. The brief filed on behalf of Myrland is virtually identical to the ones filed by appellant herein, first in the court of appeals and now in this Court. Myrland claimed that the affirmative defense provision in Minn. Stat. § 617.247, subd. 8, unconstitutionally shifts the burden of proof of an essential element of the crime of child

¹¹ Myrland was subsequently convicted. However, his conviction was reversed on sufficiency grounds. State v. Myrland, 681 N.W.2d 415 (Minn. Ct. App. 2004), rev. denied Aug. 25, 2004.

pornography possession to the defendant. The Myrland court held it did not. This Court and the United States Supreme Court denied further review.

The state argued in Myrland that the statute was constitutional because it only required the defense to make a prima facie showing that the age of the person depicted is a disputed issue at which point the burden shifts back to the state to disprove the defense. Myrland countered (as does appellant) that the statute was unconstitutional on its face because it required him to prove the person was 18 or older. Myrland at 850.

The Myrland court, being guided by affirmative defense caselaw in Minnesota, held that the greatest burden a state may impose on a defendant is a burden of production and that, therefore, this statute would be construed to require only a burden of production. Id. at 850-1. The statute, according to Myrland,

"merely requires respondents to make a prima facie showing that the age of the persons involved is a disputed issue. As such, the state is never free of its burden to prove the age of the persons involved and the charges will be dismissed if it fails to meet that burden [emphasis added]." Id. at 851.

Although the Myrland court correctly concluded that the statute did not violate due process, the prima facie burden reasoning is flawed, as will be set forth at D., infra.

C. The affirmative defense provision of Minn. Stat. § 617.247 does not violate the federal constitutional or Minnesota law.

Appellant claims Myrland was wrongly decided, and therefore the court of appeals erred in following that decision in the instant case, because it failed to apply basic federal constitutional law as applied in Minnesota. These claims are completely without foundation. Respondent does not contest the basic constitutional principles U. S.

Supreme Court cited by appellant represent, but appellant's use of them does not compel a conclusion that the statute at issue here is unconstitutional.

Appellant cites In re Winship, 397 U.S. 358, 364 (1970) for the proposition that "the U. S. Supreme Court has held that no burden whatsoever may be shifted to the defendant on an element of a crime." (Appellant's brief at 8 to 9) This comment paraphrases but does not quote Winship. More importantly, it does not accurately reflect the holding of that case or its context.

Winship is a juvenile delinquency case in which the United States Supreme Court made clear for the first time that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with a violation of law in juvenile court. Winship, supra at 368. What Winship does say at 364 is:

"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the 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."

This bedrock holding of constitutional law is beyond dispute. However, it does not compel a finding that either the affirmative defense provision of Minn. Stat. § 617.247 is unconstitutional or that, as a result, appellant's convictions are invalid.

Appellant's citations to other United States Supreme Court caselaw are similarly misleading. Contrary to his contention (Appellant's brief at 10), Mullaney v. Wilbur, 421 U.S. 684, 702 FN 31 (1975) does *not* state "that in a criminal case the prosecution bears both the production burden and the persuasion burden." Instead, the footnote referred to

simply points out that the prosecution *generally* bears both the production burden and the persuasion burden, with exceptions.

Mullaney itself is an exception. The footnote comment arises from the holding of the case that there is "no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability [as heat of passion]." The Maine statute at issue in that case, which required the defendant to prove heat of passion beyond a reasonable doubt, was held violative of due process and struck down. The Minnesota child pornography statute has no such defect, and this footnote has no bearing on the analysis of appellant's case.¹²

Mullaney stands for the more general proposition that it is impermissible and a due process rights violation to shift to the defendant the burden of disproving the existence of any element of the crime charged, and it has been cited for this point in Minnesota. State v. Auchampach, 540 N.W.2d 808, 816 (Minn. 1995) (citing Mullaney at 701-4). Myrland, in turn, relies on Auchampach for this point. Myrland at 850. But just as this impermissible shift was held not to have occurred in Auchampach or Myrland, it did not occur here.

Auchampach, like Mullaney, involves the heat-of-passion defense. While (unlike Maine) no Minnesota statute required the defense to disprove heat of passion beyond a

¹² Nor do appellant's quotations (Appellant's brief at 10) from Engle v. Isaac, 456 U.S. 107, 120 FN20 (1993) and Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) compel the result he urges. Respondent does not dispute the fact that the state must prove elements of a crime beyond a reasonable doubt even when the defendant produces no evidence or that the Due Process Clause applies to Minnesota.

reasonable doubt, Auchampach holds it is improper to shift the burden of proof of heat of passion (which would reduce the defendant's criminal culpability to a lesser degree of homicide) to the defendant. In short, the state cannot require a defendant to prove he acted in the heat of passion but, if raised, the state must prove absence of heat of passion beyond a reasonable doubt. This point is firmly settled in Minnesota law, and respondent does not dispute it..

However, neither Mullaney nor Auchampach requires the state to prove lack of heat of passion in a vacuum: In order to support the trial court's giving of an instruction on the lesser-included offense of heat-of-passion manslaughter, there must first be some evidence adduced at trial which provides a rational basis for jury to find heat of passion. The threshold is low: A rational basis is evidence which "is not so unworthy of belief that the jury could not rationally believe it." Auchampach, *supra* at 815.

In Auchampach, the trial court failed to instruct the jury expressly that the state was required to prove the *absence* of heat of passion beyond a reasonable doubt. Nonetheless, this Court concluded that the instructions as given, viewed as a whole,¹³ were more than adequate to inform the jury of the state's burden of proof and affirmed his first-degree murder conviction. Id. at 818. See also, State v. Charlton, 338 N.W.2d 26 (Minn. 1993) (in duress defense case, trial court's erroneous instruction placing burden of

¹³ The instructions given included the instruction that the state bore the burden of proof of guilt beyond a reasonable doubt, instruction on the lesser-included offense of first-degree manslaughter (which contained heat of passion as an element) and the instruction that if the jury had a reasonable doubt as to which crime Auchampach committed, he could be found guilty only of the lesser crime. Id. at 818.

proof of duress on defendant was harmless error); State v. Hage, 595 N.W.2d 200 (Minn. 1999) (no violation of due process to require defendant to prove defense of necessity by preponderance of evidence).

The holdings of Auchampach, Charlton and Hage--all of which are relied upon by Myrland--make clear the state bears the irreversible burden of proving all the elements of the offense charged. In each, however, there is a burden on the defense to make some evidentiary showing if the defense at issue in each is raised, and, in each, the defense is a mitigating factor or legal justification for a crime. Neither of these points is applicable to the child pornography affirmative defense statute.

Auchampach (at 818) holds that once heat of passion is raised, it is the state's burden to disprove the defense beyond a reasonable doubt. Charlton (at 30-1) holds that once the defendant adduces sufficient evidence to make duress an issue, the burden then shifts to the state to prove the converse (lack of duress, or specific intent) because duress negates the element of specific intent. Hage goes even further in imposing more than a mere burden of production on the defense. It affirmed the defendant's conviction for being in physical control of a motor vehicle while intoxicated against the claimed defense of necessity when the court instructed the jury the defendant was required to prove necessity by a preponderance of the evidence (in that case, a claim it was necessary to flee because of abuse).

All of these defenses (as well as others, including self-defense and entrapment) imposing some burden on the defense have been termed, somewhat loosely, "affirmative defenses." Consistent with these cases and following basic constitutional principles, Myrland therefore concludes that the affirmative defense provision of Minn. Stat. § 617.247, subd. 8, could be construed constitutionally as not violative of due process by imposing merely a prima facie burden of production on the defense to show the age of the persons involved was in dispute while making clear that the burden of persuasion remains on the state to prove every element of the crime. Myrland at 851.

Myrland correctly observed that there is nothing in this statute which indicates what burden the legislature intended to place on a defendant raising the defense and that it would be unconstitutional to construe it as requiring a defendant to shoulder the burden of persuasion. It correctly applied the established principle of law that, if a statute is susceptible of multiple interpretations, the court will adopt the one that stands in harmony with the constitution. Id. at 851. It then adopted the interpretation that Minn. Stat. § 617.247, subd. 8, imposes merely the lesser burden of production. Id.

While this construction does make the statute constitutional, it implies the defense bears some burden when, in fact, it bears none at all. On the contrary, while it would have been

possible to enact a child pornography affirmative defense statute which does properly impose a burden upon the defense,¹⁴ this statute as written cannot.

D. The affirmative defense burden-of-production analysis of *Myrland* and *Auchampach* is inapplicable to Minn. Stat. § 617.247, subd. 8.

Myrland's conclusion that the statute does not violate due process is correct, but its burden-of-production rationale is flawed. Just because the legislature calls the statute an affirmative defense does not make it one. The term is a complete misnomer here: Evidence (if there were any) that the persons depicted are adults instead of minors does *not* mitigate or justify the crime, it eliminates the crime. In addition, the statute does not create any presumption or inference which the defense *must* disprove. Instead, the state at all times--whether or not the defense presents any evidence at all--bears the burden of proving each element of the offense beyond a reasonable doubt. This is, in short, not an affirmative defense in any normally understood sense but, rather, an absolute defense.

¹⁴ The legislature could have constructed a reasonable belief affirmative defense similar to the one in Minnesota's criminal sexual conduct law: It is an affirmative defense to engaging in sexual conduct with a child at least 13 but less than 16 years old if the defendant proves by a preponderance of the evidence that he *believed* the child to be 16 or older. See Minn. Stat. §§ 609.344, subd. 1 (b) and 609.345, subd. 1 (b). In these cases, age is an element of the offense which must be proved by the state beyond a reasonable doubt. This statute has been affirmed against a due process challenge that the affirmative defense provision required the state to rebut the defense by proof beyond a reasonable doubt. State v. Kramer, 668 N.W.2d 32 (Minn. Ct. App. 2003), rev. denied Nov. 18, 2003. Kramer reiterates the holding in Auchampach, supra at 816 that the burden of disproving the existence of any element of the offense may *not* be shifted to the defense and the holding of Hage, supra at 205 that "if the mitigating circumstance or issue disproves or negates an element of the crime charged, the *greatest burden* a state may impose upon a defendant is that of shouldering the burden of production. [emphasis added]."

Just because Myrland applies the affirmative defense burden-of-production analysis to this statute to construe it constitutionally does not mean it is either necessary or correct. The most that can be said about the meaning of Minn. Stat. § 617.247, subd. 8, is that it highlights for a defendant charged with child pornography crimes the fact that *if* the persons depicted were really 18 or older (even though they may look like children), there is no crime.

Violation of the child pornography statute does not require proof of the actual identity of the child or children depicted. Indeed, such a requirement would render prosecution impossible in the vast majority of circumstances, especially in this day of global internet proliferation of these images. But it is entirely possible that, in some cases, the charged defendant might know the identity of the person depicted and would be uniquely positioned to prove that the person was 18 or older. The statute serves as a reminder of an opportunity: If a given defendant happens to know the persons depicted are adults, such proof would show the prosecution is mistaken and could lead to dismissal (i.e., no trial at all).

The defense could also present other types of evidence challenging the age of the persons depicted such as, for example, opinion evidence (such as a pediatrician testifying about the anatomical characteristics of the persons depicted). The statute, however, creates no obligation on the defense to do so.

Regardless of the statute, the defense may elect to challenge the state's proof on the element that the persons depicted are minors simply by cross-examining the state's witnesses on any ambiguities or other reason to doubt the images underlying the charges.

Or, the defense could do as appellant did and stipulate to the evidence with neither cross-examination nor argument.

Under any of these alternatives, the state would still have the burden of proving the element of the offense beyond a reasonable doubt the persons depicted are minors. In short, the statute creates no right the defendant does not already have without the statute nor can it be construed to impose any burden upon him.

This Court may affirm Myrland by holding that the statute, constitutionally construed, does not shift the burden of proof of an element of the crime to the defendant. But this Court should hold Myrland's burden of production analysis, relying heavily on Auchampach, supra, is irrelevant in light of the state's irreversible burden of proving the subjects are children.

In Auchampach, this Court noted the inconsistencies Minnesota already had in the use of the term "affirmative defense." While resolving the proper use of the term did not affect the holding in that case, this Court, citing the maxim of Justice Oliver Wendell Holmes, cautioned practitioners prospectively "on the importance to think accurately and to think things, not words." Id. at FN 7.

This Court may wish to use the opportunity presented in appellant's case to think accurately about the meaning Minn. Stat. § 617.247, subd. 8, notwithstanding its words. It should correct any confusion created by Myrland by clarifying that Minn. Stat. § 617.247, subd. 8, places *no* burden of proof whatsoever on the defense as to the essential element of the offense; i.e., whether the persons depicted in the alleged child pornography are, in fact, minors.

Auchampach is helpful in clarifying why the burden-of-production analysis does not apply here. In that case, this Court commented that:

"[I]f the mitigating circumstance or issue is the converse of an enumerated element of the crime charged and negates that element, the defendant is required only to adduce sufficient evidence on the proffered defense to make the defense one of the issues of the case; the burden then shifts back to the state to prove beyond a reasonable doubt the lack of the defense, or its converse." [emphasis added] Id. at 817 (citing State v. Charlton, 338 N.W.2d 26, 30-1 (Minn. 1983)).

There are certainly some parallels between the heat-of-passion cases (Auchampach and Mullaney) and the application of the affirmative defense provision of the child pornography statute. When a defendant asserts the defense of heat of passion and presents some evidence supporting that theory, the state is required to prove the negative (absence of heat of passion) beyond a reasonable doubt. Against a claim by the defense that the images actually depict adults, the state must, in a sense, prove a negative beyond a reasonable doubt--that the images do not depict adults but children. But the similarities end there because the state's obligation to prove that the persons depicted are minors is an element of the offense and not dependent in any way on the defendant proving anything.

Myrland's analysis, which it derives from Auchampach, Hage and Charlton, supra, is inapplicable to the child pornography affirmative defense statute because, unlike the affirmative defenses in those cases, there is nothing the defense *must* do--there is no prima facie showing it must first make--which triggers the state's obligation to disprove the defendant's claim. The defense, in short, has *no* burden of production, and this Court should so hold. To the extent that Myrland suggests it does, it should be corrected.

Unlike defenses, such as duress, necessity or self-defense, the evidence described in this statute is *not* a mitigating factor reducing the level of the defendant's culpability or a legal justification which excuses a crime. To the extent that Myrland suggests it is, this confusion should be dispelled.

This Court in Auchampach recognized that the term "affirmative defense" as applied in Minnesota to duress, entrapment, self-defense or taking a child to protect it from abuse, means the burden of production is on the defense, but, once shown, the burden shifts to the state to prove the converse beyond a reasonable doubt. Auchampach, supra at 817, FN 7.

This concept follows the Model Penal Code (also quoted in Auchampach) which defines "affirmative defense" to mean the "initial evidential burden is * * * placed on the defendant," and then the prosecution must "[disprove] the defense beyond a reasonable doubt." Model Penal Code § 1.12 cmt 3 (1985). However, unlike affirmative defenses in the sense defined by the Model Penal Code, there is no "initial evidential burden" or burden of production at all on the defense involved in the child pornography affirmative defense because the state bears the burden of proving the element of the offense--that the persons depicted are minors--whether or not the defendant produces any evidence.

The same Auchampach footnote noted above pointed out that affirmative defense has also been used in a variety of other ways both by the courts and the legislature in Minnesota but concluded that "[b]ecause the proper legal use of affirmative defense does not affect our holding in this case, we need not resolve this lack of consistency in its use." Auchampach, supra at 817, FN 7. This Court may now wish to take the opportunity it did

not elect to take in Auchampach to clarify what is and what is not an affirmative defense in Minnesota and whether Minn. Stat. § 617.247, subd. 8, is a "true" affirmative defense.

What the legislature has termed an affirmative defense to child pornography crimes is, at best, misleading because it cannot shift any burden of proving age, an element of the offense, to the defense. Especially if this Court should decide to adopt the Model Penal Code definition, it is apparent that this statute cannot be deemed a true affirmative defense in Minnesota law. Instead, it should be deemed merely advisory because the burden-of-production analysis that applies to defenses in mitigation or justification of a crime is inapplicable.

If there *were* proof the persons depicted were adults (and no issue of the credibility of witnesses providing such proof), such evidence would mean no crime occurred, and the case would not be charged or would be dismissed. Understood in this sense, Minn. Stat. § 617.247, subd. 8, creates no right a defendant does not already have, nor does it compel him to do anything. A criminal defendant always has the opportunity, if he wishes, to present evidence that may challenge or call into doubt evidence already presented by the state which tends to prove any element of any offense. Or, he may elect not to present any evidence and to attack the sufficiency of the evidence presented by the state through cross-examination and/or in final argument. Or, he may do nothing at all and simply put the state to its proof. The statute at issue here cannot change this.

Finally, a person who challenges the constitutionality of a statute must generally show that it is unconstitutional *as applied to himself*, not that it could conceivably or theoretically be unconstitutionally applied. Broadrick v. Oklahoma, 413 U.S. 601, 610

(1973). Appellant was found guilty not because he failed affirmatively to present any evidence the subjects were adults but because the court found the state had met its burden of proving beyond a reasonable doubt they were children. Nothing about the way the statute was in fact applied in appellant's case supports any claim that the burden of proof was unconstitutionally shifted. Under these circumstances, the statute cannot be unconstitutional as applied.

E. The precedent of *Myrland* holding that Minn. Stat. § 617.247, subd. 8, does not violate due process remains valid and important, especially in the absence of any more recent law compelling a different result.

Myrland's holding that Minn. Stat. § 617.247, subd. 8, does not violate due process of law remains correct and has properly been relied upon not only by the trial court in deciding the pretrial constitutionality issue raised in this case and by the court of appeals in the instant appeal but also by practitioners in this state for more than 4 years. It is telling that in support of his claim that Myrland was wrongly decided, appellant fails to cite a single child pornography case from any jurisdiction--or even any due process case law which he claims is analogous--decided in the last 4 years.

Myrland has been relied upon in this state for more than 4 years in child pornography prosecutions throughout this state. Respect for precedent and continuity over time are indispensable to our concept of the rule of law under the Constitution. Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992). Of course precedent may be overruled if a prior ruling is clearly in error, such as when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine" or when "facts have so changed...as to have robbed the old rule of significant

application or justification." Id. at 854-5. Certainly, appellant presents nothing which supports either of these grounds.

Perhaps appellant is seeking this Court's review merely because he knows the makeup of the Court now is different from what it was 4 years ago. This is not a basis for changing precedent. State ex rel. Foster v. Naftalin, 74 N.W.2d 249, 265 (Minn. 1956).¹⁵ The fact that Myrland, a published case, was decided by the Minnesota Court of Appeals rather than this Court does not render it nonprecedential.¹⁶

The Myrland court, quoting Minn. Stat. § 645.17(3), noted that the legislature does not intend to violate either the Minnesota or the United States constitution and further, that when confronted with a statute susceptible to multiple interpretations, it will adopt the one in harmony with the constitution. Id. at 851. Applying these same principles, this Court should affirm that the statute at issue here does not violate due process.

Appellant was not required to prove an element of the offense or to prove anything at all. By submitting to a Lothenbach trial and agreeing to the submission of the state's exhibits, the defense was not conceding any element. It was left to the trial court to look at the evidence and decide whether, based on examination of the exhibits alone, it found the element that images depicted minors proved beyond a reasonable doubt.

¹⁵ In refusing to depart from its previously announced rule in Naftalin, this Court observed, "It is only by concluding that, had the present members of the court been serving then, we would have decided differently that we could justify overruling these decisions. If the decisions of this court are to be subject to change every time the personnel of the court changes on the unwarranted assumption that our wisdom is superior to that of our predecessors, then there would be little remaining of the old doctrine of *stare decisis* and the stability it has furnished the law. Id.

¹⁶ Only unpublished cases are nonprecedential. Minn. Stat. § 480A.08, subd. 3 (c).

In support of his claim that this court must revisit Myrland, appellant reiterates the same prior Minnesota and United States Supreme Court case law unsuccessfully cited in Myrland's 2002 appeal and petition for further review of this Court.¹⁷ The sole cases he cites now which were decided after Myrland do not compel a different result here.

In State v. Strommen, 648 N.W.2d 681 (Minn. 2002), the defendant's attempted robbery conviction was reversed because of plain error in the admission of irrelevant and highly prejudicial evidence of his prior bad acts. Although not reversed on these grounds, this Court also found error in the trial court's failure *sua sponte* to instruct on accomplice testimony and the prosecutor's misstatement in final argument of the law as to abandonment and the burden of proof. It is in that context that the court notes, as quoted by appellant, that "[m]isstatements of the burden of proof are highly improper." Id. at 690 (quoting State v. Hunt, 615 N.W.2d 294, 302 (Minn. 2000)). Appellant's case, however, has nothing to do with prosecutorial misconduct or misstatement of the law regarding burden of proof.

Nor does the only other post-Myrland case cited by appellant require this Court to revisit Myrland. In State v. Burg, 648 N.W.2d 673 (Minn. 2002), the Minnesota Supreme Court quotes In re Winship, 397 U.S. 358 (1970) for the general, well-established and undisputed point of law that the 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." Id. at 364. Contrary to appellant's

¹⁷ See, State v. Myrland, #C8-01-2223.

implication, however, the Burg case was far from the first Minnesota case to cite Winship for this point,¹⁸ and it did not announce a new point of law.

In enacting this affirmative defense provision, the legislature may have thought it was simply stating the obvious: If the state mistakenly concluded the subjects depicted were minors when they were not, a wrongfully charged defendant is entitled to be exonerated.

This principle is so self-evident that an express statutory protection may now be unnecessary. But in 1999, when it was enacted and when possession and dissemination of child pornography were made felonies for the first time, it may not have been so obvious. It was uncertain then just how pervasive and explicit these materials would become. Looked at from the standpoint of 2006 and the materials now being so widely disseminated globally, it seems almost laughably naïve to have thought these images could be in the gray area, that a person might legally have a pornographic picture of a young-looking 18-year-old which an overzealous prosecutor might think was a child. The images in appellant's case, and in the vast majority of child pornography cases now prosecuted, carry no such ambiguity. Still, the statute offers an additional express protection against conviction of this offense if the person in the image depicted who arguably looked like a child was, in fact, an adult.

¹⁸ See, e.g., Hage, *supra*; State v. Christie, 506 N.W.2d 293 (Minn. 1993); State v. Livingston, 420 N.W.2d 223 (Minn. Ct. App. 1988); State v. White, 411 N.W.2d 196 (Minn. Ct. App. 1987); City of St. Paul v. Whidby, 203 N.W.2d 823 (Minn. 1972).

As a practical matter, this statutory defense will rarely, if ever, be supported by the production of actual evidence that the persons depicted are adults because images chosen by prosecutors in charging these cases will not be in the age-ambiguous category (i.e., where the subject might arguably be 18). Instead, it will most commonly be asserted either in a trial through cross-examination of witnesses and final argument or (as appellant did) by putting the state to its proof in stipulated Lothenbach trials when, by either route, the images speak for themselves. The statutory affirmative defense is moot because these children are so young as to be beyond argument (let alone proof) that they are really adults.

While appellant had the opportunity, if he wished, affirmatively to challenge the state's evidence under Minn. Stat. § 617.247, subd. 8, he was not required to do so. He presented no evidence which raised even a colorable claim that the subjects depicted were not minors, but his failure to do so in no way reduced the state's burden of proof. The evidence was plainly sufficient to support the trial court's conclusion that the state had proved beyond a reasonable doubt that the photos depicted minors. Nothing about the facts of appellant's case therefore compels a re-examination of Myrland.

Appellant also asserts as a second issue that the affirmative defense provision of Minn. Stat. § 617.247 violates the Minnesota Constitution. However, he cites neither facts nor law in support of this claim. It should therefore be summarily rejected.

CONCLUSION

Appellant has wholly failed to state either facts or law which would compel this Court to reverse Myrland (and the court of appeals decision in the instant case) as to the

central holding of that case: That the affirmative defense provision of the child pornography law does not violate due process by unconstitutionally shifting the burden of proof on an essential element of the offense. While it may be appropriate to clarify and correct some of Myrland's supporting analysis, this conclusion remains correct and should be affirmed.

Although appellant asserted the defense of Minn. Stat. § 617.247, subd. 8, he presented no evidence at all but put the state to its proof. The evidence received by stipulation unambiguously supports Judge Warner's conclusion that the state had proved beyond a reasonable doubt that the photos depicted minors. This application of the statutory defense did not in any way affront appellant's constitutional rights.

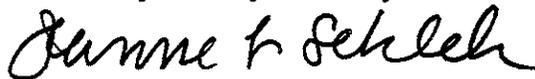
For this and all of the foregoing reasons, respondent State of Minnesota respectfully requests that this Court reject appellant's constitutional claim and affirm his conviction.

Dated: August 28, 2006

Respectfully submitted,

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