

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiffs-Appellee,

v

KAMERON LEO KILGO,

Defendants-Appellant.

Supreme Court No. 151076

Court of Appeals No. 325582

Wayne Circuit Court No. 14-009613-
FH

**AMICUS BRIEF OF ATTORNEY GENERAL BILL SCHUETTE ON APPEAL
IN SUPPORT OF THE WAYNE COUNTY PROSECUTOR'S OFFICE**

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STATEMENT OF QUESTIONS PRESENTED

In response to the Kilgo's application for leave, this Court in its May 27, 2015 order asked the parties to address the following questions:

1. Whether this Court's decision in *People v Cash*, 419 Mich 230 (1984), remains viable.

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: Yes.

Amicus Attorney General answers: Yes.

2. Whether the denial of the ability to assert the defense of reasonable mistake of age or fact violates due-process or equal-protection principles.

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: No.

Amicus Attorney General answers: No.

INTRODUCTION

Society's desire to protect children from sexual abuse is timeless, with deep roots in the common law. Michigan's law confirms the common law and protects children by preventing adults charged with statutory rape from asserting as a defense that they made a reasonable mistake about the child's age. The law thus protects children from predatory conduct and manipulation by adults, who seek to seduce them for their own sexual ends.

Consider the allegations against Kameron Kilgo. He was 27 years old when he repeatedly sexually penetrated 15-year-old C.M. He plied her with marijuana and bought her two bottles of vodka the first evening they met, while she was a run-away. The following day, he took her to a hotel and engaged in vaginal intercourse four times. He now wishes to raise a defense that he believed she was of age.

There is nothing new about this type of manipulation or about this excuse. Allowing an aggressive adult to shield himself from criminality based on ignorance or mistake would reward predatory conduct. And it would shift the focus to the victim's conduct, what was she wearing, how physically mature she was, and how sexually experienced. It would place her on trial. Nothing in the law, including the U.S. or Michigan constitutions, requires the State to allow this defense.

Rather, this is a policy question, one for the Legislature. The considerations that support Michigan law are as powerful today as they were in 1984 when *Cash* was decided. The real novelty here is the argument that the Court should arrogate the matter to itself and wrest the issue from the people. This Court should deny leave and allow the Legislature to address this issue if it wishes to do so.

COUNTER-STATEMENT OF FACTS

Twenty-seven year old defendant Kameron Kilgo met fifteen-year old C.M. on a social dating website. Apparently unaware that she was merely 15 years old (and failing to take the time to find out), Kilgo took C.M. to a hotel, gave her alcohol and marijuana, and repeatedly had vaginal sexual intercourse with her.

A. Kilgo meets C.M., plies her and her friends with alcohol and marijuana, and takes C.M. to a hotel for sex.

Kilgo met C.M. on a social dating website. (Investigator's Report, p 2.)¹ According to him, C.M.'s profile indicated that she was nineteen years old, that she was a bartender, and that her education was listed as "college/university." (*Id.*)

After the events, C.M. was interviewed by Kids Talk, a child advocacy center, and said that Kilgo picked her and her friend Cheyenne up from Cheyenne's house and went to another friend Heather's house on Friday, November 8, 2014. (*Id.*) Kilgo brought marijuana, and they smoked it. (*Id.*) Kilgo also bought C.M. two bottles of vodka at a party store nearby. (*Id.*) After Kilgo bought the alcohol, he and C.M. went to another friend's house nearby and C.M. got "really" drunk. (*Id.*)² In his interview with police, Kilgo omitted anything about this first day.

The next evening, on Saturday, Kilgo picked up C.M. and went to a Red Roof Inn. (*Id.*) C.M. said the plan was to go to the hotel and have sex. (*Id.*) Kilgo

¹ Because there has been no preliminary examination, the facts are taken from the Romulus Police Department Investigator's Report. (Attached as Exhibit C to Kilgo's Application for Leave to Appeal.)

² The furnishing of alcohol to a minor is a crime under Michigan law. See MCL 436.33(1). The possession of marijuana is also a crime. See MCL 333.7403(2)(d).

admitted to giving alcohol – this time Mike’s Hard Lemonade – and marijuana to C.M. at the hotel. (*Id.*) They stayed overnight; Kilgo said they had vaginal sex only twice, but C.M. said it was four separate times, and that he digitally penetrated her in the shower. (*Id.* at 2-3.) At no point was contraception used. (*Id.* at 3.)

B. Kilgo is told C.M. is only 15 years old.

According to C.M.’s version of events, as Kilgo got out of the shower on Sunday morning, he asked her about voice and text messages he received on his phone that said she was not 19 years old. (*Id.*) It is unclear what her response was. Thereafter, around 10:00 a.m., Kilgo and C.M. went to Big Boy for breakfast. (*Id.* at 2.) According to Kilgo’s version, it was not until just after breakfast that he received text messages from a friend and a cousin of C.M. telling him that C.M. was not 19 years old, and that she was a runaway and a missing juvenile. (*Id.*) C.M. said that her friend had told him that C.M. was only 15. (*Id.* at 2-3.) Kilgo asked C.M. about her age, and C.M. admitted she was not 19, but said that she was 17. (*Id.*) C.M. became upset and began stabbing herself in the leg with a pen. (*Id.*)

Their accounts of what happened next also differ. C.M. says that she asked Kilgo to give her a ride to her friend Cheyenne’s house. (*Id.* at 3.) Kilgo says that C.M. initially wanted a ride to Ohio, which he refused. (*Id.* at 2.)

PROCEEDINGS BELOW

Kilgo was charged with criminal sexual conduct in the third degree in Wayne County Circuit Court. MCL 750.520d.

A. The trial court denies Kilgo's motion to assert a mistake-of-age defense.

Kilgo moved to be allowed to attempt to establish a reasonable-mistake-of-age defense, and on December 19, 2014, the trial court heard oral arguments on the motion. (12/19/14 Motion Hrg, p 3.) Kilgo argued that other states allow for the defense. (*Id.* at 3-4.) The trial court recognized that the controlling law in Michigan does not allow for a defendant to put on a mistake-of-age defense, but stayed the case to allow Kilgo to file an interlocutory appeal. (*Id.* at 6-7.)

B. Kilgo files an application for interlocutory leave to appeal in the Court of Appeals.

On January 9, 2015, Kilgo filed an application for interlocutory leave to appeal in the Court of Appeals. But before the Court of Appeals ruled on the application, on February 20, 2015, Kilgo filed an application for leave to appeal in this Court.³ On May 27, 2015, this Court ordered oral argument on the application, directing briefing on two issues:

The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether this Court's decision in *People v Cash*, 419 Mich 230 (1984), remains viable; and (2) whether the denial of the ability to assert the defense of reasonable mistake of age or fact violates due process or equal protection principles.

³ The Court of Appeals denied Kilgo's application on April 7, 2015.

ARGUMENT

I. The decision of this Court in *People v Cash* remains as pertinent and correctly reasoned today as the day it was decided.

The only difficult questions posed by the Court in its order are ones of policy, not law. And such issues are for the Legislature. As persuasively argued by Wayne County and as contended in Argument II of this brief, nothing in the law has changed that requires the reasonable-mistake-of-age defense, either as a matter of due process or equal protection. *Cash* remains good law. As a consequence, this Court should honor the actions of the Legislature, which foreclose this defense.

And such a legislative decision makes sense. Adults have an obligation not to have sexual encounters with children. Any rule that would allow such a defense would place a premium on the perpetrator's ignorance, creating the very kind of incentives that the law should be seeking to discourage. Any adult who – as here – plies a runaway child with marijuana and alcohol, and then later penetrates the child repeatedly, creating the risk of an unwanted pregnancy and sexually transmitted disease, is guilty of rape. The explanation that he wrongly believed that she was of age because she lied to him should carry no weight. The law may legitimately balance the considerations in favor of the child in this circumstance. The contrary view would place the conduct and character of the victim on trial, shielding conduct that creates the specter of children bearing children. If there is a reason to revisit or qualify these standards – for example by creating a requirement of an age differential or by foreclosing the reasonable-mistake-of-age defense only to those under 13 – these are actions for the Legislature, not this Court.

A. The analysis in *Cash* has not lost its vitality.

The statute at issue in *Cash* is the same as the one at issue here:

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age and under 16 years of age. [MCL 750.520d.]

In reviewing the statute, this Court determined that the Legislature “intended to omit the defense of a reasonable mistake of age from its definition of third-degree criminal sexual conduct involving a 13- to 16-year old, and we follow the legislative intention.” *Cash*, 419 Mich at 240. While this Court did not ask this question and Kilgo has not argued to the contrary, it is important to note that this Court expressly rejected an effort to “engraft a mens rea element onto the statute[.]” *Id.* Rather, the Court concluded the Legislature intended “that the actual, and not the apparent, age of the complainant governs in statutory rape offenses.” *Id.* at 241. The opinion has been in place for 30 years, and the statute remains unchanged.

The statutory construction in *Cash* is unimpeachable, and there is no reason to revisit it. The Court noted that the Legislature revised the entire scheme of the crime of rape in 1975 and was aware of the prior decision of the Court in *People v Gengels*, 218 Mich 632; 188 NW 398 (1922). *Cash*, 419 Mich at 241. And the Court powerfully explained that the Legislature *did* include a mistake defense for the rape of the mentally ill or physically helpless by including the language “knows or has reason to know,” see MCL 750.520d(1)(c), language that is not included here. *Id.* at 241. No wonder that Kilgo does not argue otherwise on the statutory language.

The *Cash* decision remains good law and considerations of due process and equal protection do not require a different result. See Argument II. In rejecting the claim that a reasonable-mistake-of-age defense was necessary in *Cash*, this Court examined two points in support of its analysis that were true then and are true now, which further confirm the validity of the decision.

First, the allowance of the defense would place the focus on the victim:

[G]iven the already highly emotional setting of a statutory rape trial, the allowance of a mistake-of-age defense would only cause additional *undue focus on the complainant by the jury's scrutinizing her appearance and any other visible signs of maturity*. [*Id.* at 244 (emphasis added).]

As here, the victim in *Cash* was a 15-year-old “runaway” whom the perpetrator drove to a motel and engaged in multiple penetrations. *Cash*, 420 Mich at 235. At trial, Cash attempted to press the victim on cross-examination about her lifestyle “to show that she was ‘street-wise.’” *Id.* at 236. The same is true of his effort to question the victim’s mother about her daughter’s “lifestyle,” *id.*, to show that she was not “naïve and unsophisticated.” *Id.* at 246.

This blame-the-victim mentality has been resisted in other areas of the law, most notably in the rape-shield arena. The same analysis used to uphold the rape-shield statute protecting victims from being interrogated on deeply personal matters applies here:

The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant’s testimony with evidence of the complainant’s prior consensual sexual activity, which discouraged victims from testifying “*because they kn[e]w their private lives [would] be cross-examined.*” [*People v Adair*, 452 Mich 473, 480; 550 NW2d 505 (1996) (citation omitted) (emphasis added).]

Likewise, here, C.M. might not have been willing to come forward and cooperate with authorities if the questions whether she was “streetwise,” “naïve and unsophisticated,” how she dressed, and how physically developed she was were all relevant to whether there was a crime at all. If the defense of reasonable mistake of age is available, the focus of the trial would shift from whether the sexual activity occurred to whether the perpetrator may have reasonably believed the victim to be of age. The victim and her character and physical appearance would be placed front and center. The law does not require this change.

Second, this Court in *Cash* was expressly aware of the substantial changes in the sexual activity of teenagers, but concluded that the justification for the rule remained valid:

One critic has argued that the exclusion of a reasonable-mistake-of-age defense in statutory rape cases is no longer justified given the increased age of consent, the realities of modern society that young teens are more sexually mature, and the seriousness of the penalty as compared with other strict liability offenses. We are not convinced that the policy behind the statutory rape laws of protecting children from sexual exploitation and possible physical or psychological harm from engaging in sexual intercourse is outmoded. [*Cash*, 419 Mich at 244.]

The fact that children are increasingly engaging in sexual activity does not lessen the injury or reduce the seriousness of the matter. One risk is teenage pregnancy, i.e., a girl who is 15 years old or younger conceiving and bearing a child. While teenage pregnancy rates are recently down, the fact remains that teenagers bearing children results in less education, reliance on public assistance, poverty, and poorer outcomes for children. U.S. Dep’t of Health & Human Services, “Teen Pregnancy

and Childbearing.”⁴ See also *Michael M. v Superior Court of Sonoma Co*, 450 US 464, 470–472 (1981) (identifying that harms prevented by statutory rape include the prevention of “illegitimate pregnancy,” noting that the law “protects women from sexual intercourse at an age when those consequences are particularly severe”). Kilgo engaged in vaginal intercourse with 15-year-old C.M. four times.

Another consideration is protecting runaways. The link between runaway girls and sexual exploitation is a close one, in which human traffickers prey on young girls for prostitution. See Michigan Commission on Human Trafficking, “The Crime of Human Trafficking,” p 14.⁵ It is no coincidence that the victim here, C.M., and the victim in the *Cash* case, were both runaways. Children in this circumstance are particularly vulnerable. The adult perpetrators exploited children for their own ends. Neither Cash nor Kilgo took the time to establish any significant relationship or bond with either of these children before sexually penetrating them. A reasonable-mistake-of-age defense would excuse the adult who wishes to initiate a sexual encounter with a younger person from the responsibility of knowing that person in a substantial way. The actions of Cash and Kilgo fit the paradigm of the harm the statute seeks to prevent: an adult who manipulates his victim and seeks to gratify himself at the expense of a vulnerable runaway child.

⁴ This article may be found at the following website:
<http://www.hhs.gov/ash/oah/adolescent-health-topics/reproductive-health/teen-pregnancy/index.html> (last accessed July 23, 2015).

⁵ This report may be found at the following address:
https://www.michigan.gov/documents/ag/2013_Human_Trafficking_Commission_Report_439218_7.pdf (last accessed on July 23, 2015).

B. Any contrary rule will imperil victims, embolden predators, and fail to protect the common good.

Protecting children is part of the common good. The primary practical effect of providing a reasonable-mistake-of-age defense is to allow predators and others who prey on children to hide behind a shield of ignorance. The defense creates the *exact* wrong incentives. The adult who has spent the least amount of time with the victim likely has the best ability to claim that his mistake is reasonable.

Additional information and time with the victim would only impeach his defense. In this case, according to the police report, Kilgo believed after he met C.M. on a dating social media website that she was employed as a waitress at a restaurant and that she was in college. But he spent only one night with her before he picked her up to travel to a hotel for the sexual liaison. If he had spent any significant time with her, the fact that she was living with a friend, did not have a driver's license, was not working as a waitress, and was likely only a sophomore in high school would have become evident. The mistake-of-age defense is plausible only when the perpetrator knows little about the victim, her family, and her background. Only in the fleeting encounter – as here – does this defense become possible, but this circumstance is what the statute is precisely designed to prevent. As an indication of the seriousness of the harm here, the police report indicates that C.M. began “stabbing herself in the leg” when confronted about her age. This self-infliction of harm, i.e., cutting, underscores the harm to C.M.’s well-being at issue. To allow a defense to protect such predatory conduct undermines the common good.

C. The issue here is a question for the Legislature.

In viewing the issue properly, the matter is a legislative one, and Kilgo's arguments should be directed to the Legislature. It is a well-established point, one that this Court has recognized many times in the past. *People v Reese*, 491 Mich 127, 151; 815 NW2d 85 (2012) ("This Court has emphatically stated that once the Legislature codifies a common law crime and its attendant common law defenses, the criminal law of this state concerning that crime 'should not be tampered with except by legislation'" (ellipsis in original); see also *Lamphere's Case*, 61 Mich 105, 109; 27 NW 882 (1886). In fact, it has reiterated this principle of legislative authority in the context of this specific issue: "Had the Legislature desired to revise the existing law by allowing for a reasonable-mistake-of-age defense, it could have done so, but it did not do so." *Cash*, 419 Mich at 241.

This point remains valid. The Court's questions invite suggestions for policy changes to the rule. Kilgo argued in his reply brief at the application stage that this Court could retain the application of strict liability for victims under the age of 13, but allow the reasonable-mistake-of-age defense for victims between the ages of 13 and 16. Def's Reply Br at 5 ("This Court can permit a defense of reasonable mistake of fact or mistake of age as it relates to those adolescents over 13 and apply strict liability to those 13 and younger without a change in the existing statute"). This is similar to federal law, which allows the reasonable-mistake-of-age defense where the victim is between the ages of 12 and 16. 18 USC 2243(c)(1). See also Model Penal Code, § 213.6 (reasonable-mistake-of-age defense available where the victim is older than 10 years of age). As a variation on this rule, Michigan law requires a

five-year differential in age for criminal sexual conduct for improper sexual touching where the victim is between the ages of 13 and 16. MCL 750.520e(1)(a) (defining criminal sexual conduct in the fourth degree as requiring “(a) That other person is at least 13 years of age but less than 16 years of age, *and the actor is 5 or more years older than that other person.*”) (emphasis added).

The question whether to adopt such changes has factors that weigh against and in favor of such changes. But this kind of line drawing and balancing falls squarely within the purview of the Legislature, not the courts. As argued below, the Constitution does not require any change. The arguments that Kilgo raises here are being addressed to the wrong branch of government.

II. The US Supreme Court has consistently approved of strict-liability offenses including statutory rape, and no court has held that it violates federal due process or equal protection.

In 1984, the Michigan Supreme Court recognized that “[t]he [United States] Supreme Court has never held that an honest mistake as to the age of the [victim] is a constitutional defense to statutory rape.” *Cash*, 419 Mich at 245. The law has not changed since. *Stare decisis* counsels its reaffirmance. No court in any jurisdiction in the United States has held that statutory rape violates the federal Constitution’s protection of due process or equal protection by failure to permit a defendant to prove the reasonableness of his “mistake of age.” While the Court has noted the general historical inclusion of a *mens rea* requirement for all elements of an offense, it has always been careful to note that strict liability crimes – and statutory rape crimes in particular – are not constitutionally problematic.

A. The United States Supreme Court has explicitly exempted statutory-rape offenses from the canon of statutory construction that presumes a criminal sanction must contain an element of mens rea.

The United States Supreme Court has long made clear that strict liability offenses are not generally constitutionally suspect. *Williams v State of North Carolina*, 325 US 226, 238 (1945) (“The objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law has more than once been overruled.”); *Chicago, B & Q Ry Co v United States*, 220 US 559, 578 (1911) (“The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned.”).

Moreover, the Court has never limited its acceptance of strict-liability crimes to regulatory offenses. See, e.g., *United States v Feola*, 420 US 671, 694 (1975) (refusing to require the defendant have knowledge that a person was a federal officer in the crime of conspiracy to assault a federal officer); *Williams*, 325 US at 238 (refusing to nullify the defendants’ convictions for bigamy, a strict-liability crime, where they reasonably believed they had secured a valid divorce prior to the second marriage).

In Michigan, Justice Cooley explained in *People v Roby*, 52 Mich 577, 579; 18 NW 365 (1884), that common-law crimes generally require the showing of a criminal intent but at the same time he expressly stated that such laws need not necessarily do so:

I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations . . . impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. [*Roby*, 52 Mich 577 at 579.]

Given the common law’s preference for inclusion of a mens rea element in most crimes, courts have applied a canon of construction imposing a mens rea requirement where it does not explicitly appear in a statute. The landmark decision *Morissette v United States*, 342 US 246, 250–257 (1952), stands for the proposition that, given the general common-law preference that criminal statutes typically contain a mens rea element when construing a criminal statute, courts should presume that the legislative body intended to impose a mens rea requirement.

Rather than creating a due-process right, however, *Morissette* only provides a “background principle” of common law – in essence, a canon of construction – that legislatures are presumed to impose a mens rea requirement even absent an express statement to the contrary. *United States v X-Citement Video, Inc*, 513 US 64, 71–72 (1994); *Staples v United States*, 511 US 600, 605 (1994) (“[W]e must construe the statute in light of the background rules of the common law.”); cf *Whalen v United States*, 445 US 684, 691 (1980) (characterizing the *Blockburger* test as one of “statutory construction,” not one of constitutional dimension, in determining whether a statute authorizes multiple punishments).

Kilgo improperly relies on *Morissette* and its progeny as requiring, as a matter of *due process*, that a mental-state requirement must be shoehorned into *all*

crimes. Not so. *Morissette* did not once use the phrase “due process,” and the Court clearly couched its presumption on the traditions of the common law, *not* the federal Constitution. See 342 US at 250–257; *Stepniewski v Gagnon*, 732 F2d 567, 570 (CA 7, 1984) (“[T]he Court *did not establish those factors as principles of constitutional law*. Rather, the Court discusses the factors as general policy concerns which in part explain the historical development of strict liability crimes.”) (emphasis added).

When *Morissette* established this “background principle,” the Court went out of its way to *explicitly* carve out an exception for “sex offenses, such as rape, in which the victim’s actual age was determinative despite defendant’s reasonable belief that the girl had reached age of consent.” 342 US at 251 n 8. Forty-four years later in *X-Citement Video*, the Court noted that *Morissette* had “expressly excepted” statutory rape from “the common-law presumption of mens rea.” *X-Citement Video*, 513 US at 72 n 2. In cases of statutory rape, “the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim’s age.” *Id.* That answers Kilgo’s due-process claim. The presumption does not apply to statutory rape, just as it does not apply to “offenses of negligence, such as involuntary manslaughter or criminal negligence” *Morissette*, 342 US at 251 n 8. Just last Term, the US Supreme Court reiterated that this “rule of construction” is the “general rule,” but “there are exceptions.” *Elonis v United States*, 135 S Ct 2001, 2009 (2015). As the earlier cases made plain, statutory rape is one of those exceptions.

B. The Supreme Court’s single due-process ruling on a strict-liability crime is narrow and is distinct from statutory rape.

Aside from a single fact-specific case from the 1950s, there is no Supreme Court precedent that establishes any due-process limitations on a legislature’s ability to provide for strict-liability offenses. See *Powell v State of Texas*, 392 US 514, 535 (1968) (the “Court has never articulated a general constitutional doctrine of mens rea”); *Hujazi v Superior Court of California*, 890 F Supp 2d 1226, 1237 (CD Cal 2012) (“There is no clearly established Supreme Court law defining the precise criteria courts should employ in determining which crimes constitutionally require a mental element and which crimes do not.”); *Perry v Berghuis*, No. 1:13-CV-686, at *9 (WD Mich, 2014) (“[I]ndependent research has not found[] any holding of the Supreme Court that clearly establishes due process limitations on a state’s ability to define strict liability offenses.”).

The U.S. Supreme Court has struck down one statute lacking any requirement of knowledge or diligence, but only in a limited factual scenario where the criminalized conduct is wholly passive and the defendant lacked any notice. In *Lambert v People of the State of California*, 355 US 225, 226 (1957), the Court found unconstitutional a Los Angeles criminal ordinance requiring a person who had been convicted of any felony to register their conviction if they remained in the city. Before so holding, however, the Court first noted the “wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition” and that “conduct alone without regard to the intent of the doer is often sufficient” to constitute a crime. *Id.* at 228. The Court recognized that the

criminalized conduct “is wholly passive – mere failure to register. It is unlike the commission of acts.” *Id.* Obviously statutory-rape offenses criminalize serious and affirmative conduct, and *Lambert* plainly acknowledges that affirmative conduct may be criminalized in the absence of a mens rea requirement. See *Powell*, 392 US at 535 (eschewing any suggestion that “*Lambert* established a constitutional doctrine of mens rea”).

Additionally, the Court’s due-process discussion rested exclusively on the lack of notice, an integral ingredient in procedural due process. See *id.* at 228–230. Because the defendant had no notice of the duty to register and was given no ability to comply with the law once she was put on notice, the ordinance criminalizing an innocent omission offended the due-process requirement of notice. *Id.* at 229–230. Thus, *Lambert* is of a different species than this case.

C. Under general due-process principles, statutory rape is rationally related to the government interest in protecting its children from sexual exploitation.

Applying the general due-process rubric, Kilgo has not articulated what recognized due-process right of his has been infringed. A substantive-due-process analysis begins with “a careful description of the asserted right, for the doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever we are asked to break new ground in this field.” *Reno v Flores*, 507 US 292, 302 (1993). The People strain to see the precise right at issue, and “[t]he mere novelty of [Kilgo’s] claim is reason enough to doubt that substantive due process sustains it; the alleged right certainly cannot be considered so rooted in the traditions and

conscience of our people as to be ranked as fundamental.” *Id.* at 303 (quotation marks omitted). Other than “the right to be free from harsh punishment when mental culpability is entirely absent,” Def’s App for Lv to Appeal, p 7 – that is, the right to be free of strict liability, which is not a fundamental right – Kilgo has failed to assert what protected right has been infringed upon.

No matter what non-fundamental right Kilgo seeks to exercise, it must yield in the face of the overwhelming government interests in protecting the State’s children. To survive basic rational-basis scrutiny, a law must only “be rationally related to legitimate government interests.” *Washington v Glucksberg*, 521 US 702, 728 (1997).

The law recognizes the distinct attributes of youth:

[Y]outh is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. [*Miller v Alabama*, 132 S Ct 2455, 2467 (2012) (citations, brackets, and quotation marks omitted).]

These “conclusions apply broadly to children as a class,” and the law has recognized, “time and again,” that children “often lack the experience, perspective, and judgment to recognize and avoid choices that *could be detrimental to them*” and “are more *vulnerable or susceptible to outside pressures*.” *JDB v North Carolina*, 131 S Ct 2394, 2403 (2011) (quotations omitted; emphasis added). Because of their vulnerability, the law has historically and consistently placed legal disqualifications on children as a class, including limitations on their ability to sell property, to enter contracts, and to marry without guardian consent. *Id.* at 2403–2404.

The same is true in Michigan law. See *Widrig v Taggart*, 51 Mich 103, 104; 16 NW 251 (1883) (“Persons who contract with minors must understand that they do so at the risk of greater or less disadvantage. The adult binds himself, but the infant does not.”); cf MCL 600.1403 (limiting non-age as a defense in situations involving goods or loans where the minor affirmatively misrepresented his or her age and the seller had no actual knowledge). See also MCL 551.51 (prohibiting a child under 16 from marrying with an exception when a parent or guardian consents).

Consistent with their vulnerability, the government has a strong interest in protecting children. See *Reno*, 507 US at 319 (recognizing interest in “preserving and promoting the welfare of the child”). The Supreme Court has “repeatedly recognized the governmental interest in protecting children from harmful materials,” *Reno v ACLU*, 521 US 844, 875 (1997), so surely the state has an interest in protecting children both from actual physical sexual harm – not to mention psychological harm – and from allowing a child’s sexuality to be put on trial. As already explained, the law is rationally related to these interests because it prohibits an adult from asserting that his mistake of age was reasonable, placing the responsibility on the adult to protect a child’s innocence. The statutes also protect children from re-victimization through investigation into their sexual past, physical development, or sexual proclivities in search of a “reasonable” excuse.⁶

⁶ Kilgo’s reliance on the “reality” that teenagers are “involved in sex” is of no moment. The harm of adults raping children remains.

D. Kilgo has failed to demonstrate that Michigan’s criminal-sexual-conduct statutes protecting children from sexual exploitation violate equal protection.

Laws that treat individuals differently based on race, religion, national origin, alienage, and sex have been considered to warrant heightened scrutiny under the Equal Protection Clause. “[P]eople who have been deceived or misled by the actions of a minor,” Def’s Supp Br in Support of App for Lv to Appeal, p 11, however, is not a suspect classification.

“Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *FCC v Beach Comms, Inc*, 508 US 307, 313 (1993). To withstand rational-basis review, a statutory classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.* Functionally identical to review under the due-process clause, rational-basis review requires only that the challenged law is “rationally related to a conceivable and legitimate state end.” *Tuan Anh Nguyen v INS*, 533 US 53, 77 (2001) (quotations omitted).

The Legislature’s decision to prohibit a defendant charged with third-degree criminal sexual conduct from asserting a mistake-of-age defense is not inconsistent with the Equal Protection Clause. No suspect classification is at issue, and therefore the challenger must establish that under no conceivable justification could the statute be saved. Kilgo has failed to explain why the interests in protecting our State’s youth from sexual predators and refusing to re-victimize children who have been exploited are insufficient to sustain the law.

CONCLUSION AND RELIEF REQUESTED

This Court should deny the application for leave.

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