ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. JOSE ADRIAN AGUNDEZ-MARTINEZ, Appellant.	CR– Court of Appeals No. 1 CA–CR 21–0369 Yuma County Superior Court No. CR2019–00622

STATE OF ARIZONA'S
PETITION FOR REVIEW

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I. Issue Presented for Review.

Whether the Court of Appeals erred when it held that the State is prohibited from prosecuting an adult for offenses he committed when he was younger than 14.

II. Additional Issue Presented, But Not Decided by, the Court of Appeals.

Whether the trial court abused its discretion when it denied Agundez-Martinez's motion to sever charges.

III. Introduction.

In a novel opinion about an issue that was not raised by the parties, the Court of Appeals held that no criminal liability exists for a person who commits a crime under the age of 14 when the crime is not discovered until he reaches adulthood. This holding reads far too much into the statutory definition of "delinquent acts" and ignores other relevant statutory provisions. The opinion also conflicts with this Court's decision in *McBeth v. Rose*, 111 Ariz. 399 (1975), and the Court of Appeals' prior opinion in *In re Cameron T.*, 190 Ariz. 456 (App. 1997). The decision below purports to discover a new prohibition against certain criminal prosecutions in decades-old statutory provisions. It will render immune from prosecution certain serious offenders, and could create uncertainty in other contexts. This Court's review is necessary to correct the Court of Appeals' error and provide clarity to criminal practitioners in Arizona. Alternatively, this Court should depublish this portion of the Opinion to allow this issue to be squarely raised and developed by the parties in other cases.

IV. Material Facts.

Agundez-Martinez sexually assaulted and abused three young children (two five-year-olds and one nine-year-old) when he was between 10 and 12 years old. Agundez-Martinez's mother began babysitting "Amy" and "Cate" in 2005, and "Michael" in 2007.[1] R.T. 6/8/21, at 51; R.T. 6/9/21, at 54–55. Amy and Cate are sisters who were born in 1999 and 2004, respectively. R.T. 6/8/21, at 48, 103, 126. Michael was born in 2003. R.T. 6/11/21, at 17. Agundez-Martinez was born in 1996. R.T. 6/15/21, at 22.

Agundez-Martinez anally penetrated Michael with his penis twice in 2008. R.T. 6/11/21, at 20–21, 24. On each occasion, Agundez-Martinez had Michael come into his room, and he stopped only when someone knocked on his door. *Id.* at 21–23. Agundez-Martinez touched Amy inappropriately on several occasions the summer before she began fourth grade. R.T. 6/8/21, at 130. He started "touching [her] chest, and then from there, it slowly progressed to him going under [her] pants." *Id.* at 131, 141.

On one occasion, Amy was playing school with Agundez-Martinez's younger sister. *Id.* at 135. Agundez-Martinez joined them as the teacher, told

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[1] The State refers to the victims by pseudonyms both because they were minors at the time of the offenses and because Agundez-Martinez was charged with offenses listed in A.R.S. § 13–1401 *et seq.* Ariz. R. Crim. P. 31.10(f).

Amy she was in trouble, and "kicked his sister out of the room." *Id.* at 135–36. He "put [Amy] down on [her] knees," "proceeded to take his penis out of his pants," and told Amy to "put it in [her] mouth because [she] would do [it] anyway when [she] grew up." *Id.* at 135. After forcing Amy to perform oral sex on him, Agundez-Martinez put her against a bed and told her to pull her pants down. *Id.* at 138. Agundez-Martinez pressed his hips against Amy, "but before he could do anything, his mom called" and he stopped. *Id.* at 138–39.

Finally, when Cate was between ages four and six, Agundez-Martinez called her into his room and told her to pull her pants and underwear down and get on his bed. *Id.* at 106, 109. When Cate got on his bed, she looked down "and saw his penis next to [her] vagina." *Id.* Agundez-Martinez told her to look up and, a short time later, she felt something wet on her. *Id.* at 109, 112, 123.

The victims delayed reporting Agundez-Martinez's abuse until 2018, when Agundez-Martinez was an adult. R.T. 6/8/21, at 85, 114–16; R.T. 6/9/21, at 7, 64, 87; R.T. 6/18/21, at 97–98, 123, 126–27. Agundez-Martinez was charged with two counts of sexual conduct with a minor and three counts of child molestation in 2019. R.O.A. 1.[2] A jury convicted Agundez-Martinez on all counts following

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[2] The child molestation count related to Agundez-Martinez ejaculating on Cate was amended to attempted child molestation at trial. R.O.A. 151; R.T. 6/15/21, at 4–5.

trial. R.O.A. 163. Pursuant to the dangerous-crimes-against-children ("DCAC") statute, the trial court sentenced Agundez-Martinez to consecutive terms of imprisonment totaling 51 years. R.O.A. 170. Agundez-Martinez timely appealed. R.O.A. 177.

On appeal, Agundez-Martinez argued the trial court abused its discretion by not severing his charges and raised several challenges to his DCAC sentences, including that his sentences violated the Eighth Amendment. O.B. at 13–46. After briefing was completed and prior to oral argument, the Court of Appeals directed the parties to file supplemental briefing on whether the State may prosecute an adult for offenses he committed while younger than 14. Nov. 1, 2022 Order.

Agundez-Martinez conceded that the State could charge him, but argued that the charges would have to be considered "delinquent acts." Supp. O.B., at 2–8. The State responded that it has the authority to charge adults with offenses they committed as juveniles, as this Court recognized in *McBeth v. Rose*, 111 Ariz. 399 (1975), and that nothing in the current statutes eliminates this authority. Supp. A.B., at 6–15. The State also argued that interpreting the statutes to conclude Agundez-Martinez was immune from prosecution would be an absurd result and would effectively create a statute of limitations. *Id.* at 16–23.

In a published opinion, the Court of Appeals vacated Agundez-Martinez's convictions and sentences. *State v. Agundez-Martinez*, ___ Ariz. ___, 2023 WL

1788423, at ¶¶ 1–2 (App. Feb. 7, 2023) (hereinafter "Opinion"). The court held that "any act committed by a juvenile under the age of 14 that if committed by an adult would be a criminal offense is, by definition, a delinquent act and thus not a criminal offense and may be prosecuted only in the juvenile court or transferred to adult court under A.R.S. § 8–327." *Id.*, ¶ 25 (internal quotation marks omitted). The court reasoned that "delinquent acts are different than criminal offenses" and "whether the conduct is a delinquent act depends on the offender's age at the time of the conduct." *Id.*, ¶¶ 15–16. The court also concluded that, by enacting A.R.S. § 13–501 in 1997, the Legislature implicitly "determined that it is inappropriate to define any other unlawful juvenile conduct as a criminal offense" because offenses charged under § 13–501 are exempted from the definition of delinquent act.[3] *Id.*, ¶ 22. The court thus concluded that the State could not prosecute Agundez-Martinez for his offenses because he was now an adult. *Id.*, ¶ 26.

The Opinion also addressed the constitutionality of Agundez-Martinez's sentences "should [this Court] disagree with [its] statutory analysis." *Id.*, ¶ 2. The Court of Appeals held that "a defendant who committed nonhomicidal acts when he was a preadolescent juvenile" cannot constitutionally be subject "to the adult

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[3] Section 13–501 authorizes the State to charge juveniles 14 and older accused of committing specified offenses as adults without first filing charges in juvenile court.

sentencing scheme *only* because he is an adult at the time of prosecution." *Id.*, ¶ 56 (emphasis added). And the Opinion concluded that Agundez-Martinez's cumulative 51-year prison sentence was grossly disproportionate in light of the circumstances of the case.[4] *Id.*, ¶¶ 65–66.

V. This Court Should Grant Review Because the Court of Appeals Wrongly Decided an Issue of Statewide Importance and Created A Conflict with Prior Appellate Decisions.

This Court's review is warranted where "important issues of law have been incorrectly decided" and there are conflicting appellate decisions. Ariz. R. Crim. P. 31.21(d)(1)(C); *see also State v. Gates*, 243 Ariz. 451, 453 (2018) ("We granted review because this case involves a legal issue of statewide importance."). Those criteria are present here.

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[4] This Petition for Review concerns only the first issue decided by the Court of Appeals. The State does not seek review of the Court of Appeals' Eighth Amendment holdings and, in light of the unique circumstances presented by this case, no longer intends to oppose the resentencing relief Agundez-Martinez has sought and obtained. *Cf. State v. Kleinman*, 250 Ariz. 362 (App. 2020) (accepting State's concession that cumulative 39-year sentence for sexual offenses committed at age 12 or 13 was unconstitutional). If this Court were to grant review on the first issue and affirm the convictions, this case would then be remanded for a hearing to determine if Agundez-Martinez may be sentenced as an adult (and, if so, what sentence is appropriate), in accordance with the Court of Appeals' decision. *See* Opinion, ¶ 57.

This case presents an issue of statewide importance, as the Court of Appeals' Opinion would appear to immunize individuals from prosecution if they commit their crimes before age 14 and those crimes are not discovered until adulthood.[5] In reaching its conclusion, the Court of Appeals engaged in fundamentally flawed statutory interpretation that failed to account for all of the applicable statutes. Further, the Opinion is inconsistent with this Court's holding in *McBeth* and the Court of Appeals' opinion in *Cameron T.* Finally, the Court of Appeals overstepped its judicial function by creating a statute of limitations where none existed. This Court should therefore grant review.

A. The Opinion conflicts with longstanding Arizona case law.

As the Court of Appeals recognized, this Court has long held that an adult may be prosecuted (as an adult) for crimes committed while a juvenile. *See* Opinion, ¶¶ 18-20. In *State v. Burrows*, for example, this Court held that Burrows could be charged as an adult for juvenile conduct because he was already an adult

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[5] In the unlikely scenario where the State is aware that a juvenile younger than 14 committed crimes at the time they are committed but chooses to delay filing charges until after he turns 18, the State's decision to delay filing charges could violate due process. *Cf. United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999) (pre-indictment delay violates due process if it causes "substantial prejudice to the defendant's ability to present his defense and the delay was an intentional device to gain a tactical advantage over the accused") (internal quotation marks, alteration omitted) (citing *United States v. Marion*, 404 U.S. 307, 324 (1971)).

at the time of charging. 38 Ariz. 99, 111 (1931), *overruled in part on other grounds by State v. Hernandez*, 83 Ariz. 279 (1958). And in *McBeth v. Rose*, this Court reaffirmed *Burrows*, stating it held "that a juvenile could commit a crime, and his age made it no less a crime, but the law provided a special method of dealing with such a person by reason of his age" and that "[i]f the age factor was not present at the time of prosecution the accused was to be tried as an adult." 111 Ariz. at 402.

In interpreting more recent statutes, the Court of Appeals has come to the same conclusion. *See In re Cameron T.*, 190 Ariz. 456 (Ariz. App. 1997). Specifically, the Court of Appeals held that "as was true before [the 1996 Juvenile Justice Initiative] was adopted, no statute or constitutional provision precludes adult prosecution of a juvenile who is no longer under the jurisdiction of the juvenile court" because offenses "are committed by 'persons,'" a term that plainly includes juveniles. *Id.* at 462–63.

The Opinion here ignores the conflict it creates with *Cameron T.* and argues that statutory developments in fact undermined *Burrows* and *McBeth*. For reasons detailed below, that conclusion fails to withstand scrutiny. At the very least, this Court should be the one to clarify *Burrows* and *McBeth* in light of statutory development.

B. The Opinion relies on faulty analysis of the relevant statutes.

1. *The Opinion misapplies certain changes in the law.*

In explaining its departure from longstanding Arizona case law, the Court of Appeals contends that certain changes in the relevant statutes—including the 1996 Juvenile Justice Initiative and related changes made by the Legislature soon after—effectively prohibit the prosecution of certain offenders like Agundez-Martinez.

"Statutory interpretation requires [courts] to determine the meaning of the words the legislature chose to use." *S. Ariz. Home Builders Ass'n v. Town of Marana*, 522 P.3d 671, 676, ¶ 31 (Ariz. 2023). Courts "do so neither narrowly nor liberally, but rather according to the plain meaning of the words in their broader statutory context, unless the legislature directs … otherwise." *Id.*

"By adopting the Juvenile Justice Initiative, 'voters clearly intended . . . to respond more stringently to juvenile crime when appropriate.'" Opinion, ¶ 22 (quoting *Cameron T.*, 190 Ariz. at 461). Acknowledging this fact, the Court of Appeals nonetheless concludes that the Juvenile Justice Initiative and related statutory changes *impliedly* prohibit prosecutions of adults who committed crimes before age 14 altogether.

In reaching this unprecedented conclusion, the Court of Appeals focuses on the term "delinquent act," concluding that Agundez-Martinez's crimes were in fact "delinquent acts" and thus not prosecutable in adult court. "'Delinquent act'

means an act by a juvenile that if committed by an adult would be a criminal offense," but "does not include an offense under section 13–501, subsection A or B if the offense is filed in adult court." A.R.S. § 8–201(12).

Relying on this definition, the Opinion concluded that whether an act is delinquent—and, consequently, whether the juvenile statutes are applicable—is determined by the offender's age at the time an offense is committed. Opinion, ¶ 16. The Opinion reasons that the Legislature's use of conditional language means delinquent acts are not criminal offenses. *Id.*, ¶ 15 ("The legislature chose to use conditional language to define a 'delinquent act' as an act that "*would be* a criminal offense" "*if* committed by an adult.") (quoting A.R.S. § 8-201(12)). But the Court of Appeals ignores that the current definition mirrors the definition in effect at the time of this Court's contrary decision in *McBeth*.

At the time this Court decided *McBeth*, a "delinquent act" was "an act by a child, which if committed by an adult would be a public offense[.]" A.R.S. § 8–201(8) (1972).[6] For all purposes relevant here, there is no substantive difference between the 1972 definition and the current one. Further, because § 13–501 had not yet been adopted when *McBeth* was decided, the only way at that time to

[6] A copy of the 1972 version of the statute is included in an appendix for the Court's convenience.

charge someone as an adult while they were under 18 was after a transfer hearing. *See McBeth*, 111 Ariz. at 403 (No "person under the age of eighteen may be prosecuted criminally unless, after hearing, the juvenile court transfers the matter to the adult side of the law for criminal prosecution."). The defendants in *McBeth* were thus in precisely the same position as Agundez-Martinez. Nevertheless, this Court held that the State could prosecute them criminally for offenses they committed as juveniles. *Id.* at 402–03.

The Opinion treats the definition of "delinquent act" as substantively defining the State's ability to file charges against someone based on their age when they commit an offense. However, the definition of delinquent act serves a different purpose—to help delineate the juvenile court's jurisdiction. *See* A.R.S. § 8–202(A) ("The juvenile court has original jurisdiction over all delinquency proceedings brought under the authority of this title."). That the definition exempts charges *filed* in adult court does not, in and of itself, suggest that whether an offense is delinquent is determined at the time of commission. Rather, it reflects only that the juvenile court does not have jurisdiction over matters pending in adult court.

2. *The Opinion fails to address all of the applicable statutes.*

The flaws in the Court of Appeals' incorrect interpretation are further demonstrated by A.R.S. § 8–302(A), which provides that if "*during the pendency*

of a criminal charge in any court of this state the court determines that the defendant *is a juvenile* who is not subject to prosecution as an adult pursuant to section 13–501, the court shall transfer the case to juvenile court[.]" (emphasis added). The emphasized, present-tense language reflects that the statute's applicability depends on the defendant's age at the time of prosecution.

The Opinion also fails to address that, under § 13–501(B), whether an offense is a delinquent act depends on the State's charging decision. Section 13–501(B) "authorize[s] the [State] to decide *on a case-by-case basis* whether juveniles age 14 and older and accused of committing specified crimes should be tried as an adult or adjudicated in juvenile court." *Andrews v. Willrich*, 200 Ariz. 533, 536, ¶ 11 (App. 2001) (emphasis added); *see also* § 13–501(B) (the State may charge juveniles as adults). Offenses chargeable under § 13–501(B) are thus not inherently delinquent or criminal based on the defendant's age. This too undermines the Opinion's conclusion that "whether the conduct is a delinquent act depends on the offender's age at the time of the conduct." Opinion, ¶ 16.

Finally, the Court of Appeals' conclusion that Arizona's juvenile statutes impliedly limit jurisdiction over an adult who committed crimes as a juvenile is contravened by looking to the federal Juvenile Delinquency Act. The federal Act shares many relevant features with Arizona's scheme, and defines delinquency as "the violation of a law of the United States committed by a person prior to his

eighteenth birthday which would have been a crime if committed by an adult[.]" 18 U.S.C. § 5031. And the federal government has adopted a statute that generally limits the federal government's ability to prosecute juveniles accused of delinquent acts as adults absent transfer procedures. *See* 18 U.S.C. § 5032. Federal courts have concluded, however, that prosecutions like the one at issue here are nonetheless permitted. *See, e.g., United States v. Hoo*, 825 F.2d 667, 669–70 (2d Cir. 1987) (Federal "courts have consistently held that a defendant who is alleged to have committed a crime before his eighteenth birthday may not invoke the protection of the Juvenile Delinquency Act if criminal proceedings begin after the defendant reaches the age of twenty-one.") (citing collected authority). To avoid absurd results, this Court should grant review and reach a similar conclusion here.

C. The Opinion effectively creates a statute of limitations where none exists.

The "adoption of a statute of limitations is the prerogative of the legislature" because it can have "the effect of abolishing a claim even before a plaintiff knows or has reason to know a cause of action exists." *Anson v. American Motors Corp.*, 155 Ariz. 420, 425 (App. 1987). That is precisely what occurred here as a result of the Court of Appeals' holding.

The Opinion bars the State from prosecuting Agundez-Martinez—and other persons who commit *any* offense, up to and including murder, when they are younger than 14 if the offense is not discovered until adulthood—for no reason

other than the passage of time. The Court of Appeals thus effectively created a statute of limitations based upon its conclusion that the Legislature *implicitly* intended to prohibit the State from prosecuting adults for crimes they committed when younger than 14. Had the Legislature intended to categorically prohibit the State from prosecuting adults for crimes they committed as juveniles, it could—and would—have done so explicitly.[7] *See Matter of Pima County Juvenile Appeal No. 74802–2*, 164 Ariz. 25, 33 (1990) ("If the legislature wished to make an age differentiation among persons falling under the coverage of [the sexual abuse statute], it could have done so.").

VI. Conclusion.

On its own initiative, the Court of Appeals raised and decided an issue of statewide importance. Its conclusion—which purports to discover long after the passage of certain statutes that those statutes impliedly eliminated the State's ability to prosecute certain offenders—is simply incorrect. And at the very least, the abrupt departure from longstanding Arizona law is worthy of this Court's consideration. This Court should grant review. Alternatively, this Court should

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[7] Moreover, the Opinion's holding is inconsistent with the statute of limitations the Legislature has adopted. The statute of limitations does not run when the State is unaware that an offense has been committed. A.R.S. § 13–107(B). Further, certain offenses—including sexual conduct with a minor—have no statute of limitations whatsoever. A.R.S. § 13–107(A).

depublish paragraphs 12 through 31 of the Opinion, along with the portions of paragraphs 1 and 2 referencing this holding.

RESPECTFULLY SUBMITTED this 9th day of March, 2023.

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