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IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. JOSE ADRIAN AGUNDEZ-MARTINEZ, Appellant.	S.Ct. Case No. CR-23-0053-PR Court of Appeals Division One No. 1 CA-CR 21-0369 (Yuma County Superior Court Cause No. S1400 CR2019-00622) **OPPOSITION TO STATE'S PETITION FOR REVIEW TO ARIZONA SUPREME COURT**

Jose Adrian Agundez-Martinez ("Mr. Agundez Martinez") requests that this Court deny the State's petition for review of the Court of Appeals' (COA) opinion dated March 9, 2023. The COA correctly held that existing Arizona law and statutes do not authorize the State to prosecute criminal charges against an adult (a "criminal offense" under A.R.S. Chapter 13) for conduct he committed as a juvenile under the age of 14 (a "delinquent act" under A.R.S. Chapter 8). The COA's Opinion is

consistent with the plain language of Arizona statutes as well as this Court's precedent. As the COA correctly decided these important issues of law and there are no conflicting appellate decisions, this Court should deny review.

Alternatively, if this Court has concerns about the language of the Opinion, it may order the depublication of paragraphs 12-31, along with the corresponding portions of paragraph 1 and 2 referencing this holding, as requested by the State.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals correctly hold that the State is not authorized by existing Arizona law and statutes to prosecute a "criminal offense" against an adult for a "delinquent act" he committed as a juvenile under 14 at the time of the alleged offense?[1]

II. ADDITIONAL ISSUES PRESENTED BUT NOT DECIDED BY COA

Was the sentence imposed under Count 5 (Attempted Molestation of a Child) illegal as it should have been sentenced under the general sentencing scheme, not the Dangerous Crimes Against Children sentencing statute?

Did the failure to hold a juvenile transfer hearing violate Mr. Agundez-Martinez' due process rights?

[1] The State does not seek review of the second and third issues in the COA's Opinion, regarding the 8th Amendment.

Does the Dangerous Crimes Against Children sentencing statute apply to adults who committed the relevant offenses when they were children and were not tried as adults?

Does the application of the Dangerous Crimes Against Children sentencing statute to Mr. Agundez-Martinez violate his constitutional rights?

III. MATERIAL FACTS AND PROCEDURAL HISTORY

The facts in this case are largely uncontested and are set forth in the COA's Opinion. *COA Opinion* at ¶¶ 3-11. In 2019, the State charged 23-year-old Agundez-Martinez with five total counts all arising from conduct when he was between the ages of 10-12: two counts of sexual conduct with a minor (Counts 1 and 3), two counts of molestation of a child (Counts 2 and 4), and one count of attempted molestation of a child (Count 5) and alleged that the offenses constituted dangerous crimes against children ("DCAC"). *COA Opinion* at ¶ 8. The States acknowledges that Mr. Agundez-Martinez was under the age of 13 when the crimes were committed. Nevertheless, the State simply proceeded to charge him as an adult, in the same manner as if he had committed the offenses as a 23-year-old man, without seeking a transfer hearing or any other procedure.

Mr. Agundez-Martinez was found guilty on all five counts. At sentencing, the prosecutor advocated for mandatory, flat, consecutive minimums on all counts for DCAC under A.R.S. § 13-604.01 (now A.R.S. § 13-705). Altogether, the sentences

on all five counts result in a total of 51 years, flat-time with no eligibility for earned release credit or parole.[2]

On appeal, the parties submitted initial briefs on the issues including the State's charging of Mr. Agundez-Martinez as an adult for juvenile offenses. In November 2021, the COA requested supplemental briefing specifically on the issue of what authority the State had to prosecute criminal charges against an adult for conduct he committed as a juvenile under 14 at the time of the alleged offense. The parties fully briefed the issue and the COA held oral argument regarding the initial briefing as well as the supplemental briefing in January 2023. On February 9, 2023, the COA issued its Opinion in this matter.

The COA held: 1. The State is not authorized by existing Arizona law and statutes to prosecute criminal charges against an adult for conduct he committed as a juvenile under 14 at the time of the alleged offense; 2. Under the 8th Amendment to the U.S. Constitution, Mr. Agundez-Martinez should not be sentenced as an adult; and 3. Under the 8th Amendment to the U.S. Constitution, a 51-year flat time

[2] The superior court later issued an order permitting Mr. Agundez-Martinez to submit an early petition to the Arizona Board of Executive Clemency for commutation of his sentences, *see* A.R.S. § 13-603(L), noting the sentences are "clearly excessive under the facts of this case." The Board denied Agundez-Martinez's clemency request. *See COA Opinion* at fn 4.

sentence based on the DCAC statutes is cruel and unusual punishment. The State seeks review only on the first issue.

IV. REASONS TO DENY REVIEW

The COA correctly applied Arizona statutes, the Arizona Constitution, and this Court's precedent in determining that the State could not bring criminal charges against a juvenile offender under the age of 14 as his offenses are considered "delinquent acts," not adult "criminal offenses." The State calls the COA's Opinion in this case "novel" and argues that it "prohibits" the State from prosecuting the conduct of preadolescent juveniles that is discovered when they are adults, thereby framing its petition as if the COA's Opinion was revolutionary and created a watershed rule. Nothing could be further from the truth.

In reality, the Opinion does not "prohibit" the State from prosecuting, it holds that the State is not "authorized" by law to file these types of adult charges. The distinction in words is important. The COA did not hold that the State could not be authorized in the future to prosecute these types of cases. It holds only that under the current legislative structure, this type of prosecution by the State is not authorized.

1. The COA correctly reviewed and applied the plain language of all relevant statutes

The Arizona legislature decides how crimes are classified and outlines the State's authority to prosecute those crimes as well as the appropriate punishments for those acts. The Arizona legislature has spoken extensively and clearly about how crimes committed by children are to be charged and sentenced. As noted by the COA, the court "interprets 'statutes to give effect to the legislature's intent.'" *COA Opinion* at ¶ 13. In Arizona, juvenile delinquencies and adult criminal offenses are solely defined by statute. *Id.* at ¶ 14. Under A.R.S. §§ 13-501(A) and (B), the State has the authority to charge and prosecute a juvenile as an adult for certain crimes if the juvenile is at least fourteen years of age "at the time the alleged offense is committed." *Id.*

A.R.S. § 8-201 is titled "Definitions" and A.R.S. § 8-201(12) defines a "delinquent act" as "an act by a juvenile that if committed by an adult would be a criminal offense." *Id.* The only exception listed in the statute is if the State files charges in adult court pursuant to A.R.S. §§ 13-501(A) or (B). *Id.*

The State concedes that Mr. Agundez-Martinez' conduct here, committed between the ages of 10-12, did not fall under A.R.S. § 13-501. As the COA held, his conduct does, however, fall squarely within the plain language of A.R.S. § 8-201(12). The State cannot dispute that the offenses at issue in this case were

committed by a juvenile and that if they had been committed by an adult they would be a criminal offense as required by the statute.

The COA's Opinion notes that two things are clear from the plain language of these statutes: 1. Delinquent acts are different than criminal offenses based on the conditional language in A.R.S. § 8-201; and 2. Whether the conduct is a delinquent act depends on the offender's age at the time of the conduct (*i.e.* whether he was a juvenile at least fourteen years of age at the time the alleged offense is committed). *COA Opinion* ¶¶ 15-16.

Based on the plain language of the statutes, not statutory interpretation, the COA held that "the result of the legislature's statutory changes is that an offensive 'act by a juvenile' is a 'delinquent act' unless it is enumerated in A.R.S. §§ 13-501(A) or (B)" and that "[n]either subsection criminalizes the conduct of an individual younger than 'fourteen years of age at the time the alleged offense is committed.'" *COA Opinion* at ¶ 25.

The COA then drew its conclusion from the plain language analysis of the statutes: "an 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…" *Id.* Because the COA correctly reviewed and applied the plain

language of the relevant Arizona statutes, there is no need for further review by this Court and the State's petition should be denied.

2. The State seeks unfettered discretion to circumvent the Juvenile Justice Initiative and to charge and sentence preadolescent juvenile offenders as adults

The State has repeatedly sidestepped the question before the COA (and continues to do so in the petition for review) of the basis for its authority to charge a preadolescent juvenile offender with an adult criminal offense merely based on the passage of time. Despite given ample opportunity and the COA ordering supplemental briefing on the issue, "the State does not offer a statutory basis for its assertion [that there's no prohibition against charging Agundez-Martinez as an adult]." *COA Opinion* at ¶ 12. The State essentially views a defendant's age at the time of the offense as irrelevant once he turns 18.

Accepting the State's argument would necessarily require that this Court find that A.R.S. § 8-201 essentially doesn't exist. Such a finding would encourage the prosecution to simply wait to file charges against children 13 and under until they turned 18 to circumvent the automatic transfer provisions at A.R.S. § 13-501 entirely. It also allows the State to do what it did here – argue to the Superior Court that it has no discretion to sentence the child offender to a sentence less than the mandatory minimums legislatively established for adults. This surely isn't the result

the legislature intended in creating the strict and very clear automatic transfer provisions of A.R.S. § 13-501 and accompanying procedural safeguards.

The flaw in the State's reasoning regarding how the statutes should be construed fails to answer the question: who gets to decide how the State charges juvenile offenders? The petition for review argues throughout that it is the ***State*** that gets to make that decision. In fact, the State even goes so far as to argue that "whether an offense is a delinquent act depends on the State's charging decision." *State's PFR* at 13. Thus, the State's position is that it, not the statute at A.R.S. § 8-201(12), defines a "delinquent act."

In 1997, Arizona's entire legislative scheme was changed to answer that question and allow the State the broad discretion to make those charging decisions for most juveniles ages 14 and up. Yet the State wants the authority and complete discretion to charge all juveniles, no matter their age, as adults even though the statutes don't grant the State that power.

The State argues that if the legislature wanted to "categorically prohibit the State from prosecuting adults for crimes they committed as juveniles, it could – and would – have done so explicitly." *State's Petition for Review* at pg. 15. Yet the inverse argument is even more true – if the legislature wanted to categorically allow the State to prosecute adults for crimes they committed as juveniles 13 and under, it

could – and would – have done so explicitly. The fact that it did not, especially given the detailed procedures set forth in A.R.S. §§ 13-501(A)-(B), demonstrates that the legislature did not authorize this type of prosecution by the State.

The State does not have unlimited charging authority under Arizona law. The State's authority is limited by statute as to what types of crimes may be charged, how they may be charged, and how they may be sentenced. A.R.S. § 13-501 will apply to the majority of juvenile offenders who are later discovered as adults. This case, however, is an exceedingly rare situation – where the conduct occurred prior to the age of 14, but was not discovered until after the age of 18. The rare facts of this case fall squarely within the definition of a "delinquent act" under A.R.S. § 8-201. The State does not have the statutory authority to just "pretend" that Mr. Agundez-Martinez was an adult when the offense was committed.

The State does not believe in the importance of hearings or trial court discretion for young juvenile offenders under the age of 14 once they have reached adulthood. Instead, the State argues that no special procedures should apply and the preadolescent juvenile offenders should be charged and sentenced as adults without any consideration given to their tender age at the time the crimes were committed.[3]

[3] The U.S. Supreme Court disagrees as to the *mens rea* of juvenile offenders: "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Indeed,

The State overstates the implications of the COA's Opinion in this case and its effect on future prosecutions. There is a possibility that certain preadolescent juvenile offenders, as here, will not be prosecuted by the State. But this would only apply to the incredibly small subset of juveniles who committed delinquent acts prior to the age of 14 and were not discovered until after the age of 18. Further, it would only apply to preadolescent juvenile offenders who did not commit any further crimes after the age of 14 as they could then be prosecuted under A.R.S. § 13-501. The effect is certainly not as widespread as the State implies and thus this Court should deny review.

3. The COA's Opinion does not conflict with prior Arizona caselaw

The COA's Opinion is not a "departure" from "longstanding" case law as the State argues. The State mischaracterizes the COA's Opinion by saying: "[a]s the Court of Appeals recognized, this Court has long held than an adult may be prosecuted (as an adult) for crimes committed while a juvenile." *See State's Petition for Review citing COA 18-20.* This is not, however, an accurate characterization of the COA's Opinion. The COA's Opinion does not ever state that this Court has long

'[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" [citation omitted]. *Roper v. Simmons*, 543 U.S. 551 (2005).

held that an adult may be prosecuted (as an adult) for crimes committed while a juvenile no matter the age at time of commission of the offense.

The COA specifically reviewed *Burrows v. State*, 38 Ariz. 99 (1931) and *McBeth v. Rose*, 111 Ariz. 399 (1975) and determined that those decisions interpreted different statutory language. *COA Opinion* at ¶ 17. Specifically, the COA found that *Burrows* related to a procedural issue only, spoke to the prosecution of an 18-year-old who committed a crime at age 17, and was based on the law in 1931. *COA Opinion* at ¶¶ 18-19.

In *McBeth,* the COA specifically reviewed the facts relating to the juvenile court's jurisdiction over 17-year-olds after they turned 18 and the procedural decision of the State to refile adult charges against them. The State argues that *McBeth* stands for the proposition that a juvenile offender of any age can be charged as an adult once they turn 18. But the COA held that *McBeth* was distinguishable as it was decided on jurisdictional grounds and also applied the law in 1975 which was substantially overhauled in 1996 when Arizona voters passed Proposition 102 - the Juvenile Justice Initiative. *COA Opinion* at ¶¶ 20-21. Contrary to the State's

contention, the 17-year-old defendants in *McBeth* were not "in precisely the same position as Agundez-Martinez."[4] *State's Petition for Review* at pg. 12.

The COA notes that the Juvenile Justice Initiative amended part of the Arizona Constitution and included new provisions about the prosecution of juveniles. At the time that the cases cited by the State were decided, the Arizona Constitution expressly gave jurisdiction over juvenile matters to "the superior court." See former Ariz. Const. art. VI, § 15 (effective Dec. 9, 1960). Today's provision states instead that "[t]he jurisdiction and authority of the courts of this state in all proceedings and matters affecting juveniles shall be as provided by the legislature...." Ariz. Const. art. VI, § 15 (effective Dec. 6, 1996). The legislature has so provided in A.R.S. § 8–202.

The COA notes that the Juvenile Justice Initiative signaled voters' intent to respond "more stringently to juvenile crime *when appropriate.*" *COA Opinion* at ¶ 22 (emphasis in original). The COA also noted that the legislature specifically removed acts by juveniles charged under A.R.S. § 13-501(A)-(B) from the definition of a "delinquent act" under A.R.S. § 8-201(12). *Id.*

[4] The State argues that A.R.S. § 8-201(12) was substantively the same in 1975 when *McBeth* was decided as it is currently. This is not true. The statute and definition of "delinquent act" was amended in 1997 to exclude any charges filed in adult court under A.R.S. §§13-501(A)-(B), thus specifically excluding juveniles aged 14-17. *See A.R.S. 8-201(12).*

The COA cites *In re Cameron T.*, 190 Ariz. 456, 461-62 (App. 1997) regarding the implementation of the new act. The State argues that the COA's Opinion conflicts with *In re Cameron T.*, however, it's unclear in what way since that case dealt with the transfer of 15-17 year old juveniles to adult court under a very narrow time period right before the new A.R.S. § 13-501 went into effect.

Because the COA's Opinion does not conflict with existing precedent, there is no need for further review. Accordingly, the State's petition should be denied.

4. The COA's Opinion does not create a "statute of limitations"

The State quotes the civil case of *Anson v. American Motors Corp.*, 155 Ariz. 420, 425 (App. 1987) as saying "[n]ormally the adoption of a statute of limitations is the prerogative of the legislature." In the criminal context, the legislature has set a statute of limitations on criminal offenses at A.R.S. § 13-107. As this statute is part of the adult criminal code, it presumably applies to adult criminal offenses as defined under A.R.S. Chapter 13. As noted by the COA, Mr. Agundez-Martinez' offenses were "delinquent acts" under A.R.S. § 8-201(12), not adult criminal offenses so those same statutes of limitations would not necessarily apply. Further, the COA's Opinion does not in any way nullify the legislature's statutes relating to adult prosecutions and statutes of limitations.

The COA's holding that the State is not authorized by Arizona law to pursue a prosecution is not the equivalent of a *de facto* statute of limitations. As the COA notes, there are several circumstances under the Arizona criminal code where individuals may not be held responsible for criminal conduct such as A.R.S. § 13-502 (Insanity) and A.R.S. § 13-503 (Effect of Alcohol or Drug Use). *COA Opinion* at ¶ 30. Similarly, if a person is found incompetent to stand trial, the State cannot "try, convict, sentence or punish" that person for an offense. *A.R.S. § 13-4502.* This is not a statute of limitations, it is simply a statutory limit on the State's charging authority. Similarly, the State cannot try a juvenile as an adult without following the specific procedures set forth in Arizona statutes.

5. If this Court has any concerns with the analysis in *Agundez-Martinez*, it may order the Opinion's partial depublication as requested by the State

It appears that the reason the COA published an opinion in this case is to distinguish *McBeth* and *Burrows* as cases decided prior to 1997 legislative and constitutional changes and to explain that current Arizona law does not provide authority for the State to conduct these types of prosecutions. This is a highly unusual and unique case, as noted by both the COA and the State, and one that does not arise often, likely because the State would generally exercise its discretion in these types of cases.

It is Mr. Agundez-Martinez' position that the COA's analysis is correct, for the reasons stated above. Nevertheless, if this Court is of the view that there is any material flaw in the analysis, it has a ready-made tool for addressing that: depublication of the opinion pursuant to Ariz. R. Sup. Ct. 111(g). Specifically, this Court could depublish paragraphs 12-31 of the Opinion, along with the portions of paragraph 1 and 2 referencing this holding, as requested by the State.

V. CONCLUSION

For the reasons stated herein, Jose Adrian Agundez-Martinez respectfully requests that this Court deny the State's petition for review.

DATED: (electronically filed) April 10, 2023.

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