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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

**APPELLANT'S RESPONSE TO *AMICUS CURIAE* BRIEF OF THE  
MARICOPA COUNTY ATTORNEYS' OFFICE**

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## **I. Introduction**

*Amicus curiae* Maricopa County Attorneys' Office ("MCAO") has filed a brief arguing that this Court should grant review because two defendants in other cases have relied on the Court of Appeals' Opinion ("COA Opinion") in this case to file motions to dismiss. The only two examples provided by the MCAO in its brief (filed three months after the COA Opinion was published) both pertain to 17-year-old defendants and one of them has been denied.

This is a highly unusual case (as noted by both the Court of Appeals and the State), and its unique facts are unlikely to arise often. MCAO readily admits that the Court of Appeals' holding in this case is limited specifically to juveniles who were under the age of 14 when the offense was committed, and the holding only applies to those same preadolescent juveniles when their acts aren't discovered until after the age of 18 which narrows the subset even further.

The issue in this case is simple: 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*? MCAO presents no evidence of any cases that have been filed by defendants who fit squarely into the COA Opinion with its limited holding to juveniles aged 13 and younger. Indeed, this case has been published for

three months and MCAO does not point to a single filed case relating to a juvenile under the age of 14 who was tried as an adult. This demonstrates that the issues addressed in the COA Opinion will not have a widespread effect on the prosecution of criminal cases as the State has alleged.

The only caselaw cited in MCAO's brief are 35+ year old cases, already briefed by the State, that were decided prior to the passage of the Juvenile Justice Initiative in 1997. MCAO wants to enjoy both the broad charging authority granted it by the Juvenile Justice Initiative and A.R.S. § 13-501, as well as the caselaw before the legislative change that they argue allows them to charge any juvenile, at any age, as an adult. Mr. Agundez-Martinez has covered at length in his Response to the State's Petition for Review how both the applicable Arizona statutes as well as the Arizona constitution itself has changed since the passage of the Juvenile Justice Initiative and how that affects the application of those older cases to the limited holding in this case.

*Amicus* recognizes the public policy concerns behind charging a preadolescent juvenile offender with adult offenses with mandatory, flat, consecutive minimum sentences based purely on the passage of time. Unable to find a satisfactory resolution of these public policy concerns, MCAO then urges this Court to adopt an "infancy defense" that it freely admits does not exist under Arizona law and has

never been raised by the parties. Finally, MCAO asks this Court to vacate the entire portion of the Court of Appeal’s ruling relating to the Eighth Amendment, despite the fact that this is something the State itself did not ask for in its Petition for Review.

**II. The Court of Appeals’ Holding is Limited to the Very Specific, Unique Facts of this Case, i.e., a Juvenile Under the Age of 14 When the Offense was Committed.**

*Amicus’* main argument for this Court to grant review is that “several defendants have relied on the Opinion to urge dismissal of the charges against them.” *MCAO Brief* at page 2. The only two cases cited by MCAO, as well as its example, involve defendants who were 17 years old at the time the offenses were committed. MCAO specifically acknowledges in its brief that the Court of Appeals limited its holding in this case to juveniles under the age of 14:

We, therefore, hold 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. *Agundez-Martinez*, at ¶ 25; *id.* at ¶ 30 (“Our holding reflects that the legislature has excluded the acts of juveniles younger than 14 from those categorized as criminal for adult prosecution unless the case is transferred under A.R.S. § 8–327.”).

*MCAO Brief* at fn. 1 (*quoting* COA Opinion at ¶ 25, 30).

Given the MCAO’s explicit citation of the COA Opinion’s language limiting the holding to juveniles under the age of 14, it does not follow for *amicus* to now argue

that 17-year-old defendants filing motions to dismiss are grounds for this Court to grant review. This is a very unique case with a limited holding that specifically applies to preadolescent juvenile offenders aged 13 and younger. If MCAO does not agree with the arguments made in the other cases filed involving 17-year-olds, those cases may be appealed directly based on the facts in those cases which differ from those addressed in the limited holding here. The COA Opinion explicitly does not apply to cases involving juveniles aged 14 and older. MCAO's argument that the COA Opinion is creating a flurry of new litigation is belied by the fact that it only points to two cases that are distinguishable from the present holding.

### **III. *Amicus* MCAO Advocates for an “Infancy Defense” That Doesn’t Exist Under Arizona Law**

MCAO acknowledges the public policy concerns in this case: “Agundez-Martinez and similarly situated defendants were very young when they committed crimes, never had a chance for the rehabilitative benefits of juvenile court, and have had lengthy prison sentences imposed as adults.” *MCAO Brief* at pgs. 10-11. After conceding that these are valid concerns, MCAO then argues that the concerns are completely ameliorated by the common law “infancy defense” that it acknowledges no longer exists under Arizona law. *MCAO Brief* at pgs. 11-12 (“[t]he infancy defense is no longer codified in the criminal code. And as *Agundez-Martinez* recognizes, Arizona has abolished common law affirmative defenses.”)

MCAO then engages in linguistic gymnastics and citations to cases in other states to attempt to argue that the infancy defense is still allowed in Arizona, even though in practice it is not permitted, the presumption is not applied, and no judge would authorize its use. MCAO points to zero cases where an “infancy defense” has been used to successfully apply a presumption to a juvenile defendant charged as an adult.

MCAO cites *Gammons v. Berlat*, 144 Ariz. 148, 150 (1985), for the proposition (based on pre-1997 Arizona law) that “capacity to understand the wrongfulness of one’s behavior is a prerequisite to criminal liability under the criminal code when the age of the offender is less than fourteen years.” However, MCAO then readily admits that the law has changed and there is no longer an “infancy defense” or a “presumption of no responsibility.” See *MCAO Brief* at pgs. 11-12. In this case, at no time was Mr. Agundez-Martinez permitted to present an “infancy defense,” nor was a “presumption of no responsibility” ever applied to him, despite his counsel raising the issue repeatedly. This is particularly evidenced by the fact that the sentencing judge believed that his hands were tied in considering Mr. Agundez-Martinez’ age at the time of offense and that he had to sentence him to flat, mandatory minimum, consecutive sentences like an adult offender under the DCAC statutes.

Most importantly, *amicus* is improperly attempting here to raise an issue that has not been previously raised by the parties before the Court of Appeals or before this Court. *See Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 84, 638 P.2d 1324, 1330 (1981) (*amici curiae* may not create, extend, or enlarge issues properly raised by the parties).

#### **IV. *Amicus* MCAO's Request that the COA Opinion's Eighth Amendment Language Be Stricken is Improper**

Finally, *amicus* asks this Court for something that the State did not request in its Petition for Review: for this Court to vacate the COA Opinion's discussion of the Eighth Amendment. The State's Petition for Review specifically states that: "[t]his 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 ..." *State's Petition for Review* at pg. 7, fn. 4.

The only argument MCAO gives for its request is that it was error for the Court of Appeals to consider the Eighth Amendment question because it first vacated Mr. Agundez-Martinez' convictions and sentences on statutory grounds. As authority, MCAO cites only one case: *Katherine S. v. Foreman ex rel. Cty. of Maricopa* 197 Ariz. 371, 378, ¶ 16 (App. 1999) (citing *R.L. Augustine Constr. Co. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 370 (1997)). MCAO is incorrect.

As a preliminary matter, this Court has held that an issue that was “not raised nor argued by the parties” will not be considered as “*amicus curiae* are not permitted to create, extend, or enlarge the issues” and that this “rule applies to constitutional questions as well.” *City of Tempe v. Prudential Ins. Co. of America*, 510 P.2d 745, 109 Ariz. 429 (Ariz. 1973). The State did not request in its Petition for Review that the language relating to the Eighth Amendment be vacated, in fact, it specifically noted that it was not challenging that portion of the COA Opinion. Therefore, MCAO’s request should not be considered as it is creating, extending and enlarging the issues which is not permitted for *amicus* under Arizona law.

Further, MCAO is incorrect in asserting that the Court of Appeals could not address a second issue after determining that the convictions and sentences were vacated on statutory grounds. MCAO’s own case cited, *Katherine S.*, itself does not hold otherwise. MCAO’s brief does not provide the full sentence quoted from *Katherine S.* and only provides the half that serves its purpose. MCAO quotes “[c]ourts should not reach constitutional issues if the case can be fairly decided on other grounds.” The full quote is: “Statutes are presumed to be constitutional, and courts should not reach constitutional issues if the case can be fairly decided on other grounds.” *Katherine S., supra*, at ¶ 16.

This case does not deal with the unconstitutionality of a statute as in *Katherine S.* Here, the COA Opinion’s second issue analysis is limited to whether the sentences applied here constituted cruel and unusual punishment under the Eighth Amendment. Thus, MCAO has cited no caselaw that holds that the Court of Appeals could not engage in an Eighth Amendment analysis as an alternative after vacating the convictions and sentences on statutory grounds.

Finally, courts have broad discretion to address additional and alternative issues as they see fit. *See, e.g., State v. Miller*, 251 Ariz. 99 (2021) (in reviewing an IAC case, this Court held that there was no IAC, and even if there was, there was no prejudice). In fact, even in *Katherine S.*, the Court of Appeals addressed multiple issues and cited *State v. Church*, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973) for the proposition that “the fact that constitutional and non-constitutional issues are interwoven justified addressing all the issues.” *Katherine S., supra*, at 378.

MCAO’s request for the Eighth Amendment language to be stricken has no basis in Arizona caselaw and is precluded by *amicus* as it was explicitly waived by the State. As such, its request is improper and should not be considered.

## **V. Conclusion**

MCAO’s *amicus* brief underlines the fact that this unique case has a very narrow, limited holding and does not have the broad implications alluded to by the State.

Much of MCAO's brief raises issues that are not properly raised by *amicus* under Arizona law. For these reasons, Appellant continues to request that this Court deny the State's petition for review.

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