THE SUPREME COURT
STATE OF ARIZONA

LISA GILPIN, Petitioner, v. HON. DANIELLE HARRIS, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA in and for the County of Pinal, Respondent Judge, MARCOS JERELL MARTINEZ, Real Party in Interest.	Arizona Supreme Court No. CR-23-0252-PR Court of Appeals Division Two No. 2 CA-SA 2023-0067 Pinal County Superior Court No. CR 2018-00324

Real Party in Interest's Response to Petition for Review

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Issue Presented for Review

Over two decades ago in *State v. Heartfield*, 196 Ariz. 407 (App. 2000), the Court of Appeals held that a trial court does not have the authority to order a person found guilty except insane to pay criminal restitution to a victim. *Heartfield* was based on two premises. The first is that Arizona law requires a criminal conviction to impose criminal restitution. The second is that a guilty except insane verdict does not result in a criminal conviction.

This conclusion is consistent with how Arizona generally treats successful affirmative defenses. It is also consistent with our society's longstanding belief that the insane are neither morally nor legally culpable for otherwise criminal conduct.

Should this Court overrule *Heartfield*, ignore its own precedent acknowledging that a plea of guilty except insane under A.R.S. § 13-502 is an affirmative defense, and judicially create a requirement for those found guilty except insane to pay criminal restitution?

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I. Material Facts

The State and Marcos Martinez (Real Party in Interest) entered into a plea agreement resolving the first-degree murder charges against him with a plea resulting in a guilty-except insane verdict. (Pet-SA-App-1; Pet-SA-App-2 at ep 19-20.)

Ms. Gilpin, the step-daughter of the decedent,[1] argued that she was entitled to criminal restitution. (PFR-App ep 139-140.)

But the State and the Pinal County Superior Court acknowledged that Arizona law did not authorize criminal restitution since a guilty except insane verdict does not result in a criminal conviction. (PFR-App ep 139-140; PFR-App ep 63.)

Ms. Gilpin petitioned the Court of Appeals for special action relief on the grounds that this Court's decision in *State v. Patel*, 251 Ariz. 131 (2021) and other

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1 For the first time in a footnote in her Petition for Review, Ms. Gilpin asserted statutory victim status as one related by "affinity to the second degree" to a person "against whom the criminal offense has been committed" under A.R.S. § 13-4401(19). (PFR at 5, fn 2.) To the extent it is not deemed waived, Mr. Martinez does not object to standing on this basis. *See Allen v. Sanders*, 237 Ariz. 93, 97, ¶ 14 (App. 2015) (applying common law definition of affinity to determine that biological children of one spouse are related by affinity to the second degree of the other spouse.)

jurisdictions' guilty but mentally ill statutes[2] required that *Heartfield* be overruled. (Pet-SA ep 5-7.)

The Court of Appeals ordered Mr. Martinez to respond. (Order Re Special Action) (filed Aug. 15, 2023.)

In his Response, Mr. Martinez explained that the legislature has classified a guilty except insane defense as an affirmative defense. (RPI-Pet-Resp. ep 21-33) When successful, an affirmative defense cannot result in a criminal conviction. Thus, *Heartfield* correctly held that a guilty except insane verdict does not result in a criminal conviction for which criminal restitution may be ordered. (RPI-Pet-Resp. ep 24-33.)

The Court of Appeals declined to grant jurisdiction. (PFR-App-8.)

Ms. Gilpin filed a Petition for Review. She still does not explain how a successful affirmative defense results in a criminal conviction under Arizona law. Rather, Ms. Gilpin's Petition for Review ignores entirely that A.R.S. § 13-502(A) defines a guilty except insane defense as an "affirmative defense." (*See* PFR ep 5-14.)

Nonetheless, this Court ordered Mr. Martinez to respond. (Order) (filed Jan. 05, 2024.)

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2 Ms. Gilpin has abandoned this argument before this Court. (*See* PFR.)

Mr. Martinez now urges this Court to deny review because *Heartfield* correctly held that guilty except insane adjudication does not result in a criminal conviction for which criminal restitution may be ordered. *Heartfield*, 196 Ariz. at 410, ¶¶ 9-10.

II. Reasons to Decline Review

"A mental disease or defect constituting legal insanity is an affirmative defense." A.R.S. § 13-502(A). An "affirmative defense" "excuse[s] the criminal actions of the accused." A.R.S. § 13-103.

Despite three opportunities to develop an argument as to why the affirmative defense of guilty except insane should be treated differently than every other affirmative defense defined by Arizona statute, Ms. Gilpin has ignored the doctrine entirely in asserting that a guilty except insane verdict nonetheless results in a criminal conviction for which criminal restitution must be ordered. (PFR-App ep 139-145 (RT 8/14/23); Pet-SA ep 3-7; PFR ep 5-14.)

This Court should deny review because Arizona law is clear. *See* Ariz. R. Crim. P. 31.3(d)(1)(C) (listing bases for granting review). A successful affirmative defense does not result in a criminal conviction. A.R.S. § 13-103. Therefore, criminal restitution cannot flow from a guilty except insane verdict. *See* Ariz. Const. art. II, § 2.1(8) (requiring a criminal conviction for criminal restitution).

A. *Heartfield* correctly held that a guilty except insane verdict does not result in a criminal conviction that triggers criminal restitution.

The Arizona Constitution establishes a victim's right "to receive prompt restitution from the person or persons *convicted* of the criminal conduct that caused the victim's loss or injury." Ariz. Const. art. II, § 2.1(A)(8) (emphasis added). Nearly twenty-four years ago, the Arizona Court of Appeals held that a "finding of guilty except insane" is not "a conviction for purposes of restitution." *State v. Heartfield*, 196 Ariz. 407, 408, ¶ 6 (2000).

Heartfield rested on the foundational principle that "the long standing policy of this state has been that persons who are insane are not responsible for criminal conduct" because "such a person is unable to conform his behavior to societal norms." *Id.* at 410, ¶ 8 (quoting *State ex rel. Collins v. Superior Court,* 150 Ariz. 295, 298 (1986); *State v. Corley,* 108 Ariz. 240, 242 (1972)). *Heartfield* noted that the 1993 amendment to A.R.S. § 13-502 that renamed Arizona's insanity defense statute to "guilty except insane" "eliminated the first part of the *M'Naghten* test, inherent in the definition is the historical recognition that an insane defendant is not responsible for his or her conduct." *Heartfield*, 196 Ariz. at 410, ¶ 10.

Given this historical understanding of insanity and that the amendment of A.R.S. § 13-502 did not upend the insanity defense, *Heartfield* concluded that a

guilty except insane verdict is not a criminal conviction. *Id*. at 410, ¶ 9. Because Arizona law requires a criminal conviction for restitution to be ordered, *Heartfield* held that criminal restitution cannot be ordered as a consequence guilty except insane verdict. *Id*. (applying "conviction" requirement of A.R.S §13-804(A) Ariz. Const. art. II, § 2.1(A)(8)).

Ms. Gilpin's argument that *Heartfield* was wrongly decided omits this foundational understanding of insanity defenses. Instead it rests on a misunderstanding of insanity and misguided statutory interpretation.

But the history and plain meaning of A.R.S. § 13-502 leave no room for confusion. Insanity has been and remains an affirmative defense which cannot, if successfully asserted, result in a criminal conviction.

B. Nothing urged in the Petition for Review explains how a successful affirmative defense could result in a criminal conviction.

Heartfield's conclusion that a guilty except insane finding is not a criminal conviction is hardly novel. Rather it is consistent with this Court's precedent. In *State v. Hurles*, 185 Ariz. 199, 202-203 (1996), this Court held that that defense counsel was not required to obtain consent from the accused before pursuing an affirmative defense under A.R.S. § 13-502. This is because "Arizona maintains a

distinction between recognized pleas and affirmative defenses, such as insanity." *Id.* at 203.

Before and after *Hurles*, this Court has consistently explained that an insanity defense is a substantive affirmative defense on the issue of guilt or innocence:

- "To prohibit the introduction of any or all the evidence bearing on proof of insanity at the trial of guilt or innocence would deprive a defendant of the opportunity of rebutting intent, premeditation, and malice, because *an insane person could have none*." *State v. Shaw*, 106 Ariz. 103, 112 (1970) (emphasis added).

- "Insanity is an affirmative defense in criminal law. It is a substantive matter affecting the guilt or innocence of a defendant." *State v. Fletcher*, 149 Ariz. 187, 192 (1986) (internal citations omitted) (holding that statute changing the burden of proof does not violate due process).

- The insanity defense is an affirmative defense in which the defendant "effectively admit[s] the criminal act, for all practical purposes leaving only one factual issue in the case—the question of his sanity." *State v. King*, 158 Ariz. 419, 425 (1988).

- "Arizona does not allow evidence of a defendant's mental disorder *short of insanity* either as *an affirmative defense* or to negate the mens rea element of a crime." *State v. Mott*, 187 Ariz. 536, 541 (1997) (emphasis added).

- "[O]ur courts have found that the legislature did not violate defendants' due process rights by placing the burden of proving *other affirmative defenses,* such as . . . insanity under A.R.S. section 13–502, on the defendant." *State v. Casey*, 205 Ariz. 359, 363, ¶ 14 (2003).

- "Insanity, however, is an affirmative defense that a defendant must prove by clear and convincing evidence. A.R.S. § 13–502(A), (C). Again, the trial court had no duty to inform [the defendant] of that potential defense, which he previously had alleged." *State v. Rose*, 231 Ariz. 500, 506, ¶ 19 (2013)

- "The State persuasively argues that Rule 11.7 does not apply to the penalty phase of a capital case because that phase is neither a 'proceeding to determine guilt or innocence,' nor the phase in which a defendant's GEI defense or other sanity issues are litigated. Ariz. R.Crim. P. 11.7(a); *see also* A.R.S. § 13–502(A) ("A mental disease or defect constituting legal insanity is an affirmative defense.")" *State v. Fitzgerald*, 232 Ariz. 208, 216, ¶ 42 (2013)

- "As a result, 'Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the mens rea element of a crime.'" *State v. Leteve*, 237 Ariz. 516, ¶ 20 (2015) (internal citation omitted).

- "[A]part from insanity, Arizona does not permit a defendant to introduce evidence of a mental disease or defect as either an affirmative defense or to negate the mens rea element of a crime." *State v. Malone*, 247 Ariz. 29, 31, ¶ 8 (2019).

- "In Arizona, legal insanity is a permissible affirmative defense to a crime[.]" *Cruz v. Blair*, 255 Ariz. 335, ¶ 15 (2023).

This Court should not excuse Ms. Gilpin's failure to explain and distinguish the affirmative defense status of a guilty except insane plea and verdict because Mr. Martinez fully briefed the argument below. (*See* RPI-Resp. at 21-22.). Instead, this Court should treat Ms. Gilpin's failure to develop an argument concerning why a successful affirmative defense of guilty except insane does not result in a criminal

conviction as a concession via waiver and deny review. *State v. Moody*, 208 Ariz. 424, 457, ¶ 131 (2004).

Regardless of whether waiver forecloses review, Ms. Gilpin's statutory construction does not dispel the plainly obvious conclusion that a guilty except insane verdict is a successful affirmative defense which precludes any criminal liability, including criminal restitution. *See State v. Holle*, 240 Ariz. 300, 304, ¶ 22 (2016) (cleaned up) ("An affirmative defense is a matter of avoidance of culpability, even if the State proves the offense beyond a reasonable doubt.").

C. The canons of statutory construction reinforce *Heartfield*.

When courts interpret statutes, they must accord the plain meaning of the language chosen by the Legislature." *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 287 ¶ 31 1 (2023). In doing so, courts must refrain from imposing new meanings on the words chosen by the legislature, or else the laws passed by the legislature will be stripped of the meaning and violate due process by failing to provide adequate notice to the public as to their scope. *See BSI Holdings, LLC v. Ariz. Dep't of Transp.*, 244 Ariz. 17, 22, ¶ 25 (2018); *State ex rel. Arizona Dep't of Revenue v. Tunkey*, 254 Ariz. 432, 437, ¶ 26 (2023) (Bolick, J., concurring with Beene, J, Montgomery, J., and King, J.) (reaffirming the statutes must be interpreted as written.)

1. The plain meaning of "affirmative defense" and "except" in A.R.S. § 13-502 plus the appellate procedure in A.R.S. § 13-4033 establish that a guilty except insane adjudication is not a criminal conviction.

Although Ms. Gilpin concedes that this Court must apply statutes as they are plainly written, she ignores the import of the "affirmative defense" language in A.R.S. § 1 3-502(A) and the meaning of "except" in "guilty *except* insane" (PFR at 8-9)

Here, the legislature plainly defined a guilty except insane defense to be an "affirmative defense." A.R.S. § 13-502(A). An "affirmative defense" "excuse[s] the criminal actions of the accused." A.R.S. § 13-103.

"Except' means "not including; other than." "Except" Oxford Languages Dictionary (available at https://bit.ly/3vTLH8F) (last access Jan. 23, 2024). Thus, the statute plainly exempts the insane from guilty status, as this Court has repeatedly explained. Remarkably, Ms. Gilpin argues that any interpretation to the contrary would render the term "guilty" superfluous. (PFR at 8). But "except" is the dispositive language Here, "except" establishes that there is not enough for a guilt. Were it not for the insanity, there would be criminal guilt. This is because sanity is a precondition to criminal liability. Without sanity, there cannot be criminal liability. *Fletcher*, 149 Ariz. at 192.

Lastly, A.R.S. § 13-4033(A)(1) provides that a defendant may appeal "A final judgment of conviction or verdict of guilty except insane." The distinction plainly establishes that a guilty except insane verdict is not a criminal conviction. *See, also* A.R.S. § 36-3701(7)(a) (defining a sexually violent person as someone "convicted of *or* found guilty but insane" of a sexually violent offense) (emphasis added.)

The plain meaning is not disputable. A guilty *except* insane verdict is the product of a successful affirmative defense that excuses the criminal actions of the accused. A.R.S. § 13-502(A); A.R.S. § 13-103; A.R.S. § 13-4033(A)(1).

2. Twenty-four years of precedential reliance on *Heartfield* establishes that the legislature has not intended that a guilty except insane adjudication trigger criminal restitution.

But even if more assurances are needed, this Arizona courts have long "presume[d] that the legislature is aware of existing case law when it passes a statute and that, when it retains language upon which appellate decisions are based, it approves the judicial interpretation" *State v. Aro*, 188 Ariz. 521, 524 (App. 1997). As noted above this Court has long treated insanity, including guilty except insane verdicts, as affirmative defenses which preclude criminal liability. And that *Heartfield* was decided nearly twenty-four years ago and the legislature has never amended any statute to authorize criminal restitution upon a guilty except insane verdict establishes that *Heartfield* was correctly decided. This is reinforced by the

fact that A.R.S. § 13-502 has been amended four times since *Heartfield*. See Laws 1996, Ch. 173, § 1; Laws 2007, Ch. 138, § 1; Laws 2008, Ch. 301, § 14, eff. Jan. 1, 2009; Laws 2021, Ch. 390, § 4; Laws 2021, Ch. 390, § 5, eff. Jan. 1, 2023.

3. Legislative history and scholarly interpretation reinforces *Heartfield*.

When the Arizona Legislature amended its insanity scheme to by adopting the phrase "guilty except insane," lawmakers took specific steps to ensure that an insanity verdict was not treated as a criminal conviction. *See Renee MelanCon, Arizona's Insane Response to Insanity, 40 Ariz. L. Rev. 287, 312–16 (1998)*. This intent was further evinced by the amendment to A.R.S. § 13-4033(A)(1) to allow for an appeal from a guilty except insane verdict. *Id.*; Laws 1993, Ch. 256, § 6, eff. Jan. 2, 1994.

4. The Rule of Lenity applies.

But even if two decades of legislative reliance is not enough to dispel the argument, the rule of lenity also counsels against an expansive interpretation. the rule of lenity *See, e.g., United States v. R.L.C.*, 503 U.S. 291, 307–11 (1992) (Scalia, J., concurring in the judgment) (describing historical reasons rule of lenity permitted legislative history to apply to ambiguous statutes in favor of the defendant but not against him)

D. Criminal restitution requires criminal culpability not met by a guilty except insane verdict.

Ms. Gilpin asserts that this Court should redefine a guilty except insane verdict to be a criminal conviction so that restitution may be awarded because restitution is not regarded as a punishment. According to Ms. Gilpin, a guilty except insane verdict only bars punishment of the insane; therefore Ms. Gilpin argues that a guilty except insane verdict should be regarded as a unique type of criminal conviction for which criminal restitution may be awarded. (*See* PFR at 10-11.)

But Ms. Gilpin fails to appreciate that under Arizona law, sanity is fundamental requirement for criminal culpability and that criminal restitution is only constitutional as a consequence of a criminal conviction.

1. Sanity is a requirement for criminal culpability that differs from mens rea.

Arizona law has consistently required that a defendant be sane in order to be subject to criminal liability. For much of Arizona's history, the defendant was presumed sane, but if the presumption was rebutted, the state bore the burden of proof beyond a reasonable doubt to prove sanity. But that burden was deemed excessive by the legislature, so it was shifted to the defendant to prove insanity. Then in 1993, the definition of sanity was shortened to the 2nd *M'Naghten* prong to limit insanity claims where the defendant did not that the "act was wrong." *See State v.*

Tamplin, 195 Ariz. 246, 248, ¶ 10 (App. 1999) (the-Judge Pelander's historical survey of insanity defense in Arizona)

Yet, Ms. Gilpin asserts that sanity is not required for criminal liability because A.R.S. § 13-201 sets the minimal requirement for criminal liability to be a voluntary act or omission. She points to *State v. Ovind*, 186 Ariz. 475, 481 (App. 1986) to support this misunderstanding. (PFR at 11.)

Neither A.R.S. § 13-201 nor *Ovind* strip the foundational perquisite of sanity for criminal liability. A.R.S. § 13-201, combined with A.R.S. § 13-202(B) merely establishes that certain crimes require no mens rea element but are instead strict liability crimes. *See State v. Williams*, 144 Ariz. 487, 488 (1985) ("Strict liability applies only where there is a clear legislative intent that the crime does not require any degree of mens rea.") But by authorizing criminal liability in the absence of mens rea, A.R.S. § 13-201 does not endorse criminal liability for the insane. *Ovind* reinforces this point.

In *Ovind*, after a bench trial on premeditated murder, a judge had "found the Defendant guilty except insane" and committed her to a secure mental health facility. 186 Ariz. at 480-481. The defendant argued that guilty except insane judgment should be set aside because "a person who does not know that his conduct is wrong cannot form the intent to do the act knowingly." 186 Ariz. at 477. But *Ovind*

correctly rejected the argument because mens rea (premeditation) and insanity (not knowing an act is wrong) are two completely different concepts. *Id.* Accordingly, Ovind held that the defendant could be committed to a secure mental health facility. *Id.* at 479. That *Ovind* mischaracterized a guilty except insane judgment as a conviction is irrelevant because it was not central to its holding. *Id.* at 481; *see Town of Chino Valley v. City of Prescott,* 131 Ariz. 78, 81 (1981) ("Dictum thrice repeated is still dictum.") Neither *Ovind* nor A.R.S. § 13-201 upended this Court's jurisprudence establishing that insanity is an affirmative defense that precludes criminal liability.

Thus, *Heartfield* reflects a national and historical consensus that the insane are not legally culpable for otherwise criminal conduct. *See, e.g.*, *State v. Garnett,* 916 A.2d 393, 397 (Md. 2007) (pointing to broad historical consensus that the insane are not criminally culpable to conclude that criminal restitution cannot flow from an insanity verdict.); *State v. Thomas*, 69 P.3d 814, 814 (Or. 2003) (restitution not authorized "when a person is found guilty except for insanity."); 21 Am. Jur. 2d Criminal Law § 43, "Insanity defense excusing criminal responsibility" ("Generally, a person who is insane . . . is not criminally accountable for such act, and will not be convicted or punished for it.")

2. The Arizona Constitution requires a criminal conviction for restitution.

Recently, this Court reaffirmed that the Arizona Constitution requires that criminal defendants "convicted" of a crime pay criminal restitution. *State v. Patel*, 251 Ariz. 131, 135, ¶ 14 (2021). Ms. Gilpin extends *Patel* to guilty except insane verdicts on the theory that restitution's non-punitive purpose justifies such an extension. (PFR at 9.) But this Court has noted that the constitutional and statutory limits of Arizona's criminal restitution scheme must be maintained to avoid conflict with Arizona's civil jury trial right. *See Town of Gilbert Prosecutor's Office v. Downie ex rel. Cnty. of Maricopa,* 218 Ariz. 466, 469, ¶ 14 (2008).

Thus, this Court should decline to extend criminal restitution where there is no criminal conviction.

III. Conclusion

Arizona's guilty except insane scheme remains an affirmative defense which excuses criminal liability. A successful affirmative defense—by definition—cannot result in a criminal conviction.

Ms. Gilpin has not established otherwise.

This Court should deny review.

Respectfully submitted this 29th day of January, 2024.

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