IN 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 *Amici Curiae*: National Crime Victim Law Institute, et. al.

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Table of Contents

Table of Citations

Page(s)

Federal Cases

State Cases

United States Constitution

Arizona Constitution

State Statutes

State Rules

Secondary Citations

I. A successful GEI affirmative defense does not result in a criminal conviction. Restitution requires a criminal conviction.

Both the Arizona Constitution and Arizona's statutory restitution scheme require a criminal conviction as a predicate to criminal restitution. Ariz. Const. art. II, § 2.1A(8); A.R.S. § 13-603(C); A.R.S. § 13-804(A); Ariz. R. Crim. P. 26.10(a) & (v)(3). Yet, *Amici Curiae*, like Ms. Gilpin, urge this Court to ignore the plain language of this scheme and expand criminal restitution unless the accused establishes the he has been acquitted. *Amicus* Br. at 5-14; Gilpin Supp. Br. at 3-7.

This Court should reject the invitation to rewrite the law.

Arizona has not departed from a shared, long, and consistent history of exempting the insane from criminal liability. *See* Martinez Supp. Br. at 2-8. Consistent with this history, the Legislature has classified a GEI adjudication that as something other than a criminal conviction. *Id*. To hold otherwise would mean that Arizona has no insanity defense at all. Such a holding would render Arizona's GEI scheme unconstitutional. *See* Martinez Supp. Br. at 16-18.

Therefore, this Court should conclude that GEI adjudications remain something other than a criminal conviction and deny relief.

A. Successful affirmative defenses do not result in criminal convictions.

"Arizona maintains a distinction between recognized pleas and affirmative

defenses, such as insanity." *State v. Hurles*, 185 Ariz. 199, 203 (1996). Even under Arizona's Guilty Except Insane scheme, the insanity defense remains an affirmative defense. A.R.S. § 13-502(A); *see Cruz. v. Blair*, 255 Ariz. 335, 332, ¶ 15 (2023) ("In Arizona, legal insanity is a permissible affirmative defense to a crime.").

Amici Curiae does not argue that a successful affirmative defense results in a criminal conviction. *Amicus* Br. at 5-8. Rather, *Amici Curiae* argue that the legislative history of the Victims Bill of Rights compels the conclusion that criminal restitution is mandatory unless the accused is acquitted. *Amicus* Br. at 5-14.

B. Legislative history does not alter the plain language of the "conviction" requirement for restitution.

Much of *Amici Curiae's* brief is dedicated to establishing the legislative history behind the adoption of the Victims' Bill of Rights. *Amics Br*. at 2-15. But nothing in this history establishes that the voters ever intended to authorize criminal restitution short of a criminal conviction. *See State v. Mata Jr*., No. 1 CA-CV-23-0522, ¶13 (App.2024) (finding "erroneous premise that under the VBR a victim acquires the right to restitution when a defendant is charged with a criminal offense").

Mr. Martinez established in his Supplemental Brief that the Legislature renamed Arizona's insanity defense and dropped the first *M'naghte*n prong in 1993 after voters passed the Victims' Bill of Rights. Martinez Supp. Br. at 9-12. And the

Legislature has made numerous changes to the GEI scheme in the 24 years since *State v. Heartfield*, 196 Ariz. 407 (App. 2000), was decided. Yet, the Legislature has never attempted to modify Arizona's statutory restitution scheme to require the accused pay restitution unless acquitted. *Id*. at 12, fn. 18 (identifying 18 amendments to the GEI scheme since *Heartfield*).

Instead, contrary to *Amici Curiae's* assertions, Arizona's law concerning the criminally insane and restitution has aligned with the national consensus.

C. No jurisdiction authorizes criminal restitution from the insane, including those with "Guilty But Mentally Ill" schemes.

Amici Curiae claim that "[o]ther states recognize that a crime victim should recover restitution from criminal defendants who either pled guilty except insane or have been adjudicated guilty as mentally ill." *Amici* Br. at 14, fn 5.

But this claim is untrue. It is also belied by the very source cited by *amici curiae* to support it.

A recent survey conducted by the National Crime Victim Law Institute acknowledged that there is a distinction between "guilty but insane" and "guilty but mentally ill" schemes adopted by the states. *Survey of Select State Laws Governing the Availability of Restitution when a Defendant is Found or Pleads "Guilty But Insane" or "Guilty But Mentally Ill.* National Crime Victim Law Institute (Oct. 2022) (available at https://ncvli.org/wp-content/uploads/2022/11/Select-State-

Survey-GBI-or-GBMI_Updated-10-31-22.pdf.) The survey concluded that, because those who are found "Guilty But Insane" are not "criminally responsible," such a verdict, although "not an acquittal," "does not constitute a 'conviction' for the purposes of restitution." *Id*. (*citing State v. Heartfield*, 196 Ariz. 407 (App. 2000); *State v. Thomas*, 69 P.3d 814, 815 (Or. Ct. App. 2003).

Thus, the National Crime Law Victim Institute recognized that Arizona and Oregon's "Guilty But Insane" schemes differ than the "Guilty But Mentally Ill schemes. *Id*. Neither *Amici Curiae* nor Ms. Gilpin have identified a single jurisdiction that authorizes criminal restitution from those who assert successful insanity defenses. Like *Amici* C*uriae*, Ms. Gilpin at one point in this case claimed that the "Guilty But Mentally Ill" schemes of other jurisdictions supported her argument that Arizona's "Guilty Except Insane" scheme warrants criminal restitution. *See* Gilpin S.A. Pet. at 6

Ms. Gilpin has abandoned this claim. And for good reason.

This is because the "Guilty But Mentally Ill" schemes adopted by other states drastically differ from Arizona's "Guilty Except Insane" scheme. Rather than authorize punishment of the criminally insane, "Guilty But Mentally Ill" schemes like those in Georgia, Indiana, and Pennsylvania are designed to offer accommodations to mentally ill defendants who are unable to establish insanity at

the time of the offense. *See* Martinez S.A. Resp. at 29-31 (citing *Poole v. State*, 756 S.E.2d 322, 325 (Ga. App. 2014) (explaining under Georgia law, a "guilty but mentally ill" finding "falls short of insanity and delusional compulsion."); *Christopher v. State*, 511 N.E.2d 1019, 1020 (Ind. 1987) (explaining that under Indiana law, a "guilty but mentally ill" verdict "is a finding against [the defendant] on the defense of not responsible by reason of insanity."); *Commonwealth v. Andrews*, 158 A.3d 1260, 1263 (2017) (explaining "guilty but mentally ill" finding authorized under Pennsylvania law if insanity defense fails).

Following *Heartfield,* the Ohio Supreme Court canvassed every jurisdiction in the country, including Arizona, and concluded none consider the result of a successful insanity defense to be a "conviction." *State v. Tuomala*, 818 N.E.2d 272, 276, ¶16 (Oh. 2004). Recently Division Two of the Arizona Court of Appeals reiterated the conclusion that "a finding of guilty-except insane is not a criminal conviction." *Dominguez v. Metcalf in & for Cnty. of Pima*, 255 Ariz. 310, ¶ 9, fn 3 (App. 2023) (quoting *State v. Bomar*, 199 Ariz. 472, 477 ¶18 (App. 2001). In doing so, it concluded that legislative changes to Arizona's scheme authorizing those who are later found to be dangerous but not in need of mental health treatment do not change this conclusion. *Dominquez*, 255 Ariz. at 310, ¶ 9, fn 3. This Court should agree.

D. Due Process, the Eighth Amendment, and the Fourteenth Amendment prohibit states from abolishing the insanity defense.

Amici Curiae and Ms. Gilpin argue that provisions authorizing a transfer of commitment to the Department of Corrections if a court makes a dangerousness finding under A.R.S. § 13-3994(B)(4) means that the legally insane still face "criminal liability," and it is this criminal liability that warrants criminal restitution. *Amicus* Br. at 12, fn. 4; Gilpin Supp Br. at 7-9. However, such a conclusion is at odds with constitutional considerations authorizing the commitment of other dangerous individuals such as those found to be "sexually violent persons." And if Arizona's GEI scheme is interpreted apart from other non-criminal schemes as one which authorizes criminal punishment of the insane, Arizona's GEI scheme would be rendered unconstitutional.

1. Post-*Clark* and *Heartfield* changes to the commitment placements of the dangerous did not transform GEI adjudications into convictions.

In *Jones v. United States*, 463 U.S. 354, 356 (1983), the United States Supreme Court decided whether a person who had been adjudicated insane may be "hospitalized for a period longer than the might have served in prison." At issue in *Jones* were Washington D.C's commitment procedures for the criminally insane. *Id.* at 357. Jones had argued that due process protections under *Addington v. Texas*, 441

U.S. 418 (1979)[1] required that the government prove his mental illness and dangerousness by clear and convincing evidence to justify an indefinite period of detention. *Id*. at 362.

But *Jones* rejected the argument, concluding that—although the criminally insane are not "convicted" and "may not be punished"—Washington D.C.'s scheme was constitutional because the confinement of the criminally insane was premised on the "continuing illness and dangerousness" of the committed person. *Id*. at 369. In reaching this conclusion, *Jones* held that *Addington's* clear and convincing standard of proof of dangerousness applicable to the civilly committed was unnecessary because 1.) an insanity adjudication supported a continuing inference of mental illness, and 2.) "that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." *Id*. at 364.

Ultimately, *Jones* upheld the procedures at issue because, although the commitment period was indefinite, it was subject to periodic review to assess whether the committed person has "regained his sanity or is no longer a danger to himself or society." *Id*. at 370.

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1 *Addington* held that "to meet due process demands," states must adopt civil commitment procedures that require at least proof by clear and convincing evidence to justify indefinite commitment of individuals whose mental illness poses a risk of danger to themselves or others. 441 U.S. at 432-433.

a. Arizona courts have applied *Jones*.

Arizona courts have scrutinized the constitutionality of prior versions of Arizona's statutory scheme concerning the treatment and commitment of the criminally insane pursuant to *Jones*. In 1986, this Court held that the 1983 version A.R.S. § 13-3994(D) was unconstitutional because it required a mandatory period of commitment without first conditioning the commitment on a continued mental illness or finding of dangerousness. *State ex rel. Collins v. Superior Court of Maricopa Cnty.*, 150 Ariz. 295, 299 (1986). Consistent with *Jones*, *Collins* declared:

> When the basis for commitment does not exist, the state no longer has an interest in limiting the acquittee's liberty. Without procedural safeguards insuring the timely termination of confinement, the risk of erroneous deprivation of liberty becomes a certitude, and continued confinement becomes a denial of due process of law.

Collins, 150 Ariz. at 298; *see, also Jones*, 463 U.S. at 366 (relying on "prompt opportunity to obtain release" if the person adjudicated criminally insane "has recovered.").

In 1992, the Court of Appeals upheld a 1987 amendment to A.R.S. § 13-3994(D) that substituted the 230 day review period held unconstitutional in *Collins* with a 120 day review period. *State v. Helffrich*, 174 Ariz. 1, 6 (App. 1992). The primary basis for upholding the constitutionality of this scheme was *Helffrich's*

conclusion that the scheme authorized the evaluating or treating agency to file a petition to conduct an expedited hearing at any time it determined that the person is no longer suffering from a mental disorder that justified continued commitment. *Helffrich*, 174 Ariz. at 6.

Then, in 2002, the Court of Appeals examined the 1996 changes to A.R.S. § 13-3994. *Blake v. Schwartz*, 202 Ariz. 120, 125, ¶ 21 (App. 2002), *as amended* (Feb. 21, 2002). Notably, the 1996 version of A.R.S § 13-3994 occurred after the Legislature renamed Arizona's insanity defense to "Guilty Except Insane" and eliminated the first *M'Naghten* prong in A.R.S. § 13-502 (1993). And, between 1993 and 1996, several changes were made to A.R.S. §13-3994. Blake had challenged the 1996 changes to A.R.S. § 13-3994(A), (F), and (G) that did not authorize her to seek release "prior to her the expiration of the initial 120-day confinement period." *Id*. at 124, ¶ 18.

But *Blake*, relying on *Helffrich*, denied the challenge because the medical director of the psychiatric security review board still maintained a duty to have procedures in place to determine whether release hearings should be held within 120 days of commitment. *Blake*, 202 Ariz. at 127, ¶ 35. In reaching this conclusion, *Blake* read into the statutory scheme a requirement that, in order to remain constitutionally adequate, Arizona's commitment scheme for the criminally insane must include

procedures that do not include "a mandatory 120-day time period before the medical director may request a release hearing." *Blake*, 202 Ariz. at 125, ¶ 33.

b. *Jones, Collins, Helffrich,* and *Blake* still apply.

Blake appears to be the last published case in Arizona that addresses the constitutionality of the commitment procedures for those adjudicated "Guilty Except Insane" under A.R.S. § 13-3994. Yet, two sets of significant changes concerning this scheme have happened since *Blake*. Both involve the commitment to the department of corrections upon a finding that the criminally insane no longer needing mental health treatment but remain dangerous. The first happened in 2007, and the second in 2023.

In 2007, A.R.S. § 13-3994(D)(4) was adopted to authorize a transfer of commitment of a person who "no longer needs ongoing treatment or a mental disease" but "is dangerous or has a propensity to reoffend." A.R.S. § 13-3994(D)(4) (2007). Upon such a finding, the statute authorized the transfer to the department of corrections for the duration of a criminal sentence otherwise authorized under Arizona's sentencing scheme. *Id*.

Up until 2023, in addition to authorizing judicial review (A.R.S. § 13-3994 (G) (2014-2021)), this scheme maintained the same scheme upheld in *Blake* setting a minimum 20-month review period the those whose commitments were transferred

from secure mental health facilities to the department of corrections could challenge their continued commitment. *Compare* A.R.S. § 13-3994(H) (2014-2021) *with Blake*, 202 Ariz. at 124, ¶ 18 (citing A.R.S. §13-3994(G) (1996)). Additionally, the scheme maintained the requirement that no "more than two years" could pass without the psychiatric security review board holding a hearing to determine if "the person should be released or conditionally released." *Id*.

The second change, implemented in 2023, substituted courts in place of the psychiatric security review board as the entity with continuing jurisdiction over those adjudicated criminally insane. A.R.S. §§ 13-3992 & 13-3994 (2023). Like the 2007 amendments, the constitutionality of the 2023 amendment do not appear to have ever been examined by Arizona's courts.

But, because the 2007 procedures for transfer of commitment for those found dangerous but no longer needing treatment for a mental disease still required periodic review every two years, the 2007 version of A.R.S. § 13-3994 still apparently aligned with the mandate of *Jones*, *Collins*, *Helfrich*, and *Blake*. If *Blake*'s rationale applies to the 2023 changes, the 2023 scheme could be constitutional so long as it is interpreted to require periodic review. This is because the reliance on an adjudication of criminal insanity is a sufficient initial basis to authorize the continued detention of the dangerous if sufficient review procedures

are in place. *Blake*, 202 Ariz. at 125, ¶ 33; *see*, *also* *Dominguez v. Metcalf in & for Cnty. of Pima*, 255 Ariz. 310, ¶ 9, fn 3 (App. 2023) (holding that commitment of the "guilty except insane" to a mental health facility is not a "sentence of imprisonment" because an insanity adjudication is not a criminal conviction, and noting that the changes to A.R.S. §13-3994(B) did not affect the court's analysis).

Such a conclusion concerning the commitment of the criminally insane but dangerous is consistent with Arizona's commitment schemes for sexually violent persons.

c. Arizona's GEI and SVP schemes align.

This Court has examined Arizona's civil commitment scheme for "sexually violent persons" under A.R.S. §§ 36-3701 - 36-3717, and found them to comport with substantive due process. *In re Leon G.*, 204 Ariz. 15, 17, ¶ 1 (2002). In doing so, *Leon G.* noted that the SVP procedures applied to any person who had "been convicted of *or* found guilty but insane[2] of a sexually violent offense or was charged" with such an offense but found incompetent to stand trial. *Id*. at 19, ¶ 10 (quoting A.R.S. § 36-3701.7(a)). Because the procedures limited the class of persons subject

2 The Legislature's distinction between criminal convictions and adjudications of "guilty but insane" by the use of the disjunctive "or" within its SVP scheme further establishes that a GEI adjudication is not a criminal conviction. This is because "under the conjunctive/disjunctive cannon . . . *or* creates alternates." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012).

to commitment met the constitutional minimum showing of dangerousness and required regular review hearings, this Court held that them to comport with due process. *Id*.

The common predicate between the recent prison commitment scheme for the guilty except insane and sexually violent persons is dangerousness plus the continued existence of a mental illness or abnormality, not the existence of a criminal conviction. *See id*; *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (mental illness plus dangerousness constitutionally sufficient for involuntarily commitment) That Arizona's sexually violent persons scheme distinguishes between those convicted versus those found guilty but insane reiterates this point. Thus, the dangerous commitment scheme outlined in A.R.S. § 13-3994(B)(2) aligns under the constitutional parameters for the commitment of the insane under the test in *Jones v. United States*, 463 U.S. 354, 356 (1983).

To hold otherwise would render Arizona's GEI scheme unconstitutional because it would mean Arizona has no insanity defense at all.

2. An interpretation of Arizona's GEI scheme that concludes the insane are convicted of a crime would render it unconstitutional.

As this Court has "continually reaffirmed," Arizona does not recognize diminished capacity as a defense. *Cruz v. Blair*, 255 Ariz. 335, ¶ 17 (2023) (quoting *State v. Leteve*, 237 Ariz. 516, 524, ¶ 20 (2015)); *see*, *also State v. Mott*, 187 Ariz.

536 (1997). Thus, the only form of defense concerning the incapacity to form a culpable mental state is the insanity defense under A.R.S. § 13-502. *See Clark v. Arizona*, 548 U.S. 735, 754-756 (2006). But if successful affirmative defenses under A.R.S. § 13-502 are interpreted to result in criminal convictions, that would mean that Arizona has departed from longstanding tradition exempting the insane from criminal culpability.[3]

In *Kahler v. Kansas*, 589 U.S. 271, 279-297 (2020), the United States Supreme Court explained that Kansas's approach to insanity comported with due process because it had two methods by which the insane could be excepted from criminal liability. The one at issue in *Kahler*, diminished capacity, has been repeatedly held incognizable under Arizona law. *Compare Kahler*, 589 U.S. at 284 with *Mott*, 187 Ariz. at 544-545 (rejecting argument that diminished capacity defense is constitutionally required because Arizona has "one test for criminal responsibility the—*M'Naghten* test—that Arizona does follow.")

In finding constitutional Kansas's choice to limit its insanity defense to diminished capacity, *Kahler* juxtaposed Kansas's insanity test with Arizona's moral

3 It would also require overruling *State v. Hurles*, 185 Ariz. 199, 203 (1996), since the "affirmative defense" of guilty except insane would be tantamount to an admission of guilt. *See McCoy v. Louisiana*, 584 U.S. 414 (2018) (holding that Sixth Amendment forbids counsel from conceding guilt without client authorization).

incapacity test upheld in *Clark v. Arizona*, 548 U.S. 735 (2006). *Kahler*, 589 U.S. at 284. First, *Kahler* noted its study of history had not uncovered "a single case to the contrary" of the "principle of non-culpability" long-afforded to insane defendants. 589 U.S. at 284. But then *Kahler* confirmed that Kansas had not "depart[ed] from that broad principle." *Id*.

Like *Kahler's* analysis of Kansas law, *Clark* deemed Arizona's Guilty Except Insane scheme constitutional based on the premise that states are free to adopt different insanity defense formulas. *Clark*, 548 U.S. at 748-756. But neither *Clark* nor *Kahler* authorized states to abolish the insanity defense entirely.

Thus, the changes to Arizona's Guilty Except Insane scheme since *Clark* and *Heartfield* authorizing commitment of the dangerous should be interpreted as consistent schemes for safeguarding the public from dangerous individuals who have been adjudicated insane as outlined in *Jones v. United States*, 463 U.S. 354, 356 (1983).

Otherwise, if the 2023 implementation of A.R.S. §§ 13-3992 and 13-3994(B)(2) transform successfully asserted insanity defenses from mere guilty except insane adjudication into criminal convictions, they would violate due process. Regardless of the constitutionality of the 2023 amendments, if changes made in 2023 transformed Arizona's scheme from one in which the those adjudicated guilty except

were not criminally culpable into one which they are deemed criminally culpable, such a transformative change could not apply to Mr. Martinez's 2018 offense.

E. Even if the 2023 changes are constitutional, the Ex Post Facto Clause prevents their application to Mr. Martinez.

Mr. Martinez's guilty except insane adjudication concerns an offense that occurred in 2018. *See* Indictment, Gilpin SA Pet App. at 002. In 2021, the Legislature substantially amended Arizona's Guilty Except Insane scheme, effective 2023, by, 1.) removing the ongoing jurisdiction of the psychiatric security review board and replacing it with the superior court, and 2.) eliminating the maximum period of 2 years of confinement before a review hearing was required to assess whether a person should be released or conditionally released. *Compare* A.R.S. § 13-3994(G) (2018) *with* A.R.S. §§ 13-3992 & 13-3994 (2023).

Up until 2023, the psychiatric review board maintained jurisdiction over those adjudicated guilty except insane for the duration of time for which "a sentence could have received" pursuant to the relevant sentencing statute. A.R.S. § 13-3994(D) (2018). Thus, although the pre-2023 statute authorized the transfer of commitment of those deemed dangerous but no longer needing mental health treatment to the department of corrections (A.R.S. § 13-3994(F)(4) (2018)), the law still authorized such persons to "seek a new release hearing" after 20 months had passed since the

last review hearing and required such review hearings to occur every 24 months. A.R.S. § 13-3994(H) (2018).

By stripping the psychiatric review board of jurisdiction and eliminating any ongoing review procedures, the 2023 changes to Arizona's Guilty Except Insane scheme deprives those adjudicated insane of release procedures. *See* A.R.S.§ 13-3994 (2023). To the extent the stripping of such release procedures are constitutional under *Jones*, *Collins, Clark*, and *Kahler*, they are nonetheless inapplicable to Mr. Martinez under Article 1, § 10 of the United States Constitution. This is because, by removing the jurisdiction of the psychiatric security review board to conduct the ongoing review hearings required by *Jones* and *Collins*, the 2023 amendments to A.R.S. §13-3994, if constitutional, transformed Arizona GEI scheme by abolishing it as a defense that exempted the insane from criminal culpability.

Up until 2023, Arizona's GEI scheme was one which authorized commitment to protect the public from dangerous individuals. But if the legislative scheme no longer has procedures to ensure that such confinement. "Without procedural safeguards insuring the timely termination of confinement, the risk of erroneous deprivation of liberty becomes a certitude, and continued confinement becomes a denial of due process of law." *Collins*, 150 Ariz. at 298. The only basis for avoiding this conclusion is if the scheme is predicated upon criminal punishment rather than

other societal interests concerning the dangerousness of those otherwise deemed to lack criminal culpability.

It is this theory of punishment found in the 2023 changes in the law that *Amici Curiae* and Ms. Gilpin implicitly argue require reclassifying guilty except insane adjudications as criminal convictions that would authorize the issuance of criminal restitution. *Amicu*s Br. at 12, fn. 4; Gilpin Supp Br. at 7-9.

But "Article I, § 10, of the Constitution prohibits the States from passing any "ex post facto law." *California Dept. of Corr. v. Morales*, 514 U.S. 499, 504 (1995) The Ex Post Facto Clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" *Id.* (internal citation omitted). Thus, "[t]he Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)

In *Lindsey*, a Washington grand larceny statute was amended from an indeterminate sentence with no minimum tone that required prisoners to serve the duration of the maximum of the sentence. 301 U.S. at 400. *Lindsey* held the change in law violated the Ex Post Facto Clause because it was a "substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would

give them freedom from custody and control prior to the expiration of the "sentence." *Id*. at 401-402.

The 2023 changes to Arizona's Guilty Except Insane scheme are more severe than those at issue in *Lindsey*. Rather than just increase the mandatory term of imprisonment, the 2023 changes transformed Arizona's Guilty Except Insane scheme from a civil commitment scheme to a criminal punishment scheme.

Thus, if this Court concludes that the 2023 amendments transformed Arizona's traditional and historical exemption of criminal culpability for guilty except insane into a criminal punishment scheme for the criminally insane, this Court should conclude that they do not apply to Mr. Martinez because the Ex Post Facto Clause of the United States Constitution prohibits states from retroactively redefining criminal conduct to encompass acts not previously deemed subject to criminal punishment, adding new punitive measures, or increasing punishment for criminal acts. *Lindsey*, 301 U.S. at 401. Therefore, an ex post facto law cannot be the basis for this Court to transform Mr. Martinez's guilty except insane adjudication into a criminal conviction so that criminal restitution may be imposed.

II. Conclusion

Amici Curiae argue that the intent of Arizona's constitutional and statutory framework establishing the rights of victims to criminal restitution should be extended to all crimes for which the accused has not been acquitted. This Court should reject this invitation to rewrite the law. A criminal conviction must remain a predicate requirement for criminal restitution.

Consistent with history and tradition of this nation, the Legislature has established an affirmative defense of insanity exempting the accused of criminally culpably if able to establish that he did not know that the criminal act was wrong. Changes to this scheme to provide for additional commitment procedures of the criminally insane and dangerous not altered the nature of this long-standing and deeply rooted tradition.

Thus, this Court should affirm that GEI adjudications are not criminal convictions for which criminal restitution may be awarded.

Respectfully submitted this 28th day of May, 2024.

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