IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, v. MICHAEL DUANE MULLET, Appellant.	)	Court of Appeals No. 1 CA-CR 17-0179 Maricopa County Superior Court No. CR2016-002063-001 DT

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice ("AACJ"), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief in support of Appellant because the second issue raised in Appellant's Opening Brief, concerning the multiple convictions for fraudulent schemes and artifices, impacts the prohibition on multiple punishments for the same offense, which violates a person's constitutional right to be free from double jeopardy. U.S. Const. amends. V, XIV; Ariz. Const. art. II, § 10; *State v. Powers*, 200 Ariz. 123 (App. 2001), *aff'd*, 200 Ariz. 363 (2001). The State's discretion in deciding what charges to file must necessarily constrained by applicable law. In the case of allegations of fraudulent schemes and artifices, it is clear that numerous acts may be committed in furtherance of the scheme and the State cannot choose to extract individual acts, events, transactions, or benefits received pursuant to the

scheme to artificially expand a defendant's criminal exposure and dissuade the defendant from exercising his or her right to go trial.

Ultimately, the concern here is one of overcriminalization. AACJ's parent organization describes the problem in this manner:

> Overcriminalization is a dangerous trend that NACDL battles daily. With over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions, our nation's addiction to overcriminalization backlogs our judiciary, overflows our prisons, and forces innocent individuals to plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk. This inefficient and ineffective system is, of course, a tremendous taxpayer burden.

See https://www.nacdl.org/overcrim (last visited April 12, 2018).[1] Broad criminal statutes already catch far more offenders in their nets than the Legislature intended, escalating misdemeanor crimes into felonies such as burglary or fraud schemes. Even though the Legislature has already deemed the crime of fraudulent schemes and artifices very serious by making it a class 2 felony, often overzealous prosecutors take an otherwise harsh penalty and amplify it by tacking on additional charges, even

[1] *See also* https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization (last visited April 12, 2018) ("Over the last forty years, federal criminal law has exploded in size and scope while deteriorating in quality. . . . There are countless more criminal laws and regulations at the state and local levels"); http://rightoncrime.com/category/priority-issues/overcriminalization/ (last visited April 12, 2018); https://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991 (last visited April 12, 2018).

if doing so bends the intent of the statute. By allowing prosecutors to charge a single offense as multiple offenses has the additional impact of increasing the sentencing exposure of a person who might otherwise be eligible for probation to mandatory prison, thus coercing the person to plead guilty to a probation-available offense in order to avoid litigating an issue that the defendant should win but might lose. For these reasons, AACJ asks this court to publish an opinion in this case holding that a single scheme to defraud may not be charged as multiple offenses merely based on number of acts or victims.

ARGUMENTS

I. UNDER ARIZONA'S FRAUD SCHEME STATUTE, IT IS THE SCHEME ITSELF THAT IS THE CRIME, NOT INDIVIDUAL ACTS, EVENTS, TRANSACTIONS, OR BENEFITS RECEIVED PURSUANT TO THE SCHEME.

Multiplicity is defined as charging a single offense in multiple counts. *State v. Via*, 146 Ariz. 108, 116 (1985). In *Via*, the Arizona Supreme Court explained that in determining whether charges of fraudulent schemes and artifices are multiplicitous, courts must consider whether the defendant embarked on "separate courses of conduct" involving a "distinct scheme" and whether, as to each scheme, the evidence shows a "specific intent" to defraud a "separate and specific victim." *Id*. at 116. The court found that Via could properly be charged with two counts of fraudulent schemes

and artifices for two separate courses of conduct, each involving a distinct scheme to defraud a bank using a different credit card. Specifically, Count III charged that Via, "pursuant to a scheme or artifice to defraud, knowingly obtained a benefit from ARIZONA BANK, 101 FIRST AVENUE, PHOENIX, by means of fraudulent pretenses, representation, promises or material omissions…," whereas Count IV alleged that Via "pursuant to scheme or artifice to defraud, knowingly obtained a benefit from GREAT WESTERN BANK, 4041 NORTH CENTRAL, PHOENIX, by means of fraudulent pretenses, representation, promises or material omissions…" *Id.* at 115. Notably, the indictment did not charge any individual dates, events, transactions, fraudulent acts, or uses of the credit card as separate fraudulent schemes.

State v. Suarez, 137 Ariz. 368 (App. 1983), also illustrates that Arizona's fraudulent schemes and artifices statute criminalizes the scheme, itself, not individual acts, events, or transactions that occur, or benefits that are received, pursuant to the scheme. Suarez was the finance director of Lake Havasu City, and in that capacity he engaged in numerous purchases from vendors who would "kick back" half of the value of the purchases to him. He separately received these benefits in 24 distinct transactions. *Id.* at 371-72. The court held that he was properly charged with and convicted of one count of fraudulent scheme and artifice:

> "A 'scheme or artifice to defraud' consists of forming a plan or devising some trick to perpetrate a fraud upon another." *State v. Smith*, 121 Ariz. 106, 588 P.2d 848 (App. 1978). A scheme to defraud thus implies a plan, and numerous acts may be committed in furtherance of that plan. In this

> case, it is apparent that appellant had a plan to defraud Lake Havasu City. His plan was manifested in a course of conduct involving numerous transactions between appellant and [vendors]. It is also apparent that appellant did not formulate 24 separate schemes to defraud, but rather, formulated one scheme to defraud and implemented the scheme through the subsequent series of transactions. A charge of fraudulent schemes and artifices is, therefore, distinguishable from a charge of receiving stolen property precisely because the "scheme" implies a plan in furtherance of which numerous acts may be committed.

Id. at 373.

Relying on *Suarez*, *State v. Schneider*, 148 Ariz. 441 (App. 1985), also makes clear that Arizona law criminalizes a scheme, even though numerous acts, events, transactions, or benefits may be involved.

> In *State v. Suarez*, 137 Ariz. 368, 373, 670 P.2d 1192, 1197 (App. 1983), we noted that "*a scheme to defraud thus implies a plan, and numerous acts may be committed in furtherance of that plan.*" In this case, it is clear that appellant had *a plan* to solicit investments from numerous people, and he used the money garnered from each to pay off other investors while skimming substantial sums off the top for himself. His plan was manifested in a course of conduct involving many different individuals and numerous transactions. The success of the plan depended on appellant's ability to obtain the numerous investors in order to pay the previous investors. *It is clear therefore that he did not formulate multiple schemes to defraud, but one scheme to defraud* which he could only keep going by seeking additional investors.

Id. at 446-47 (emphasis added). Accordingly, even if different dates, individuals, benefits, events, transactions, or misrepresentations may have been involved in a single scheme, those acts do not constitute separate schemes under clearly settled Arizona

law.[2]

In addition to this clearly settled law, the legislative history behind Arizona's fraudulent schemes and artifices statute also shows that the criminal conduct punishable under the statute is the *scheme* to defraud, not any acts, events, benefits, or transactions involved in the scheme. The statute was intended to permit prosecutors to charge the scheme itself as a very serious felony offense to remedy the problem under previous law of having to separately prosecute individual acts of theft by false pretenses—the only statute previously covering such fraudulent criminal activity. [RB, pp. 33-34 & Appendix A, Attachment B, pp. 1-2: Correspondence from Arizona Attorney General Commenting on Proposed Fraudulent Schemes and Artifices Statute]. The Attorney General informed the Legislature that the fraud statute was enacted to permit prosecutors to, instead, charge one criminal scheme that would allow them to aggregate the underlying amounts involved in each transaction.

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[2] The Answering Brief largely bypasses this binding Arizona precedent, and resorts to an extended discussion of federal case law [AB, pp. 29-31, 34-35], ignoring the fact that the operative language in the statutes discussed in the federal cases is quite different. For example, the act criminalized by the mail fraud statute is "plac[ing] in any post office…any matter or any thing whatever." 18 U.S.C. § 1341. Likewise, the wire fraud statute specifically criminalizes "transmit[ting]… any writings, signs, signals [etc.]." 18 U.S.C. § 1343. For bank and securities fraud, the statutes criminalize each act of "execut[ing]" a scheme to defraud. 18 U.S.C. §§ 1344, 1348. Under the wording of the Arizona statute, in contrast, the crime is the fraudulent scheme; and the Arizona cases clearly point out that acts committed under the scheme are not separate schemes. Moreover, even the federal cases recognize the obvious -- that "each act in furtherance of a scheme to defraud" is not "a separate violation." *United States v. Molinaro*, 11 F.3d 853, 860 (9th Cir. 1993).

> The major statutory weapon that exists in the prosecutor's arsenal in this area is the statute charging theft by false pretenses…. An analysis of this statute reveals serious weaknesses which the proposed fraud statute corrects.
>
> …
>
> Since theft by false pretenses is a part of the theft statute, the penalties are governed by the controlling statute of that section of the criminal code which sets $100 as the dividing line between misdemeanor and felony. Thus, a person who takes $99.99 from a victim is guilty only of a misdemeanor. Since each act of theft must be treated separately, penalty wise, if a criminal took that same amount from hundreds of victims, he would be criminally liable for only the same number of misdemeanors.
>
> Since the present statute focuses on the formation and execution of the scheme itself, citing the individual taking or attempted taking as an example of the scheme's operation, *the scheme itself is the basis of felony liability*.
>
> …
>
> This statute affords the prosecutor an opportunity to charge a general scheme which immediately becomes apparent to a jury.

Id. (emphasis added). This legislative history thus directly refutes the State's claim that "any benefit" obtained is the basis for the felony. [AB, p. 24]. Rather, the "benefit" obtained, i.e. "the individual taking," is merely "an example of the scheme's operation," whereas "the scheme itself is the basis of felony liability." *Id*. The statute was not intended to permit each separate act, event, benefit, or transaction to be charged as a separate scheme when there is only one overarching scheme.

The State thus misapprehends the significance of the aggregation provisions of the fraud statute. A.R.S. § 13-2310(D) references "aggregation prescribed by § 13-1801, subsection B," which in turn states: "In determining the classification of *the offense*, the state may *aggregate* in the indictment or information *amounts* taken in thefts committed *pursuant to one scheme or course of conduct*, whether the *amounts* were taken from one or several persons." (Emphasis added). If the aggregated amount of *a violation* of A.R.S. § 13-2310 meets or exceeds one hundred thousand dollars, *then* the sentencing enhancements requiring mandatory prison terms kick in: "A person who is convicted of *a violation* of this section that involved a benefit with a value of one hundred thousand dollars or more is not eligible for a suspension of sentence, probation, pardon…." § 13-2310(C) (emphasis added).

The State's theory regarding aggregation repeatedly misstates the law. Even though § 13-1801(B) clearly refers to aggravating "amounts" under a single scheme, the State ignores this critical term and incorrectly claims that the statute really refers to aggregating "offenses" or "counts." [AB, p. 28]. The State then argues that this non-existent provision in the statute purporting to allow the State to aggregate multiple "offenses" would be superfluous. [AB, p. 28]. But this allegedly superfluous language does not exist in the first place because the statute does not allow aggregation of "offenses" or "counts," just aggregation of "amounts."

The statute recognizes that there may be certain cases like *Via,* in which there

really are separate and distinct schemes with separate and distinct victims. The total amount in each scheme can be aggregated for sentencing purposes. However, the statute also recognizes that there are other cases like *Suarez*, *Schneider*, and Mr. Mullet's case, in which there is only one scheme involving multiple underlying acts, events, or transactions. The statute calls for the amounts involved in the underlying acts, events, and transactions to be aggregated for sentencing purposes for a conviction of that singular scheme. It was certainly never the intent of the Legislature to turn each and every one of the acts, events, benefits, and transactions that may involve misdemeanor amounts into separate, very serious class 2 felonies.

The State's argument about a defendant being free to commit new crimes if each amount is not a separate offense, [AB, p. 32], also ignores the way in which the statute was intended to operate as it was enacted by the Legislature. The State seems to forget that every scheme is a class 2 felony, the most serious class of offense under Arizona law except murder, and an offense that carries very serious penalties. If a defendant keeps obtaining amounts pursuant to the one scheme, then he is subject to the mandatory penalty for the aggregated amount, as the Legislature intended.

The State's argument that the prosecutor <u>can</u> aggregate separate "offenses" into a single count, but is not required to do so, [AB, p. 33], ignores the clear holding in *Suarez* that "it is also apparent that appellant did not formulate 24 separate schemes to defraud, but rather, formulated one scheme to defraud and implemented

the scheme through a series of transactions." *Suarez*, 137 Ariz. at 373. The State's argument also ignores the language in *Schneider* that "it is clear therefore that he did not formulate multiple schemes to defraud, but one scheme to defraud which he could only keep going by seeking additional investors." *Schneider*, 148 Ariz. at 446-47. Again, *Schneider* did not hold that there were multiple offenses here that could have been prosecuted. Because *Suarez* involved a claim of duplicity and *Schneider* involved a claim of fatal variance, the courts were *required* to determine just how many prosecutable offenses were committed.[3]

Moreover, the State's claim that obtaining "any benefit" is chargeable as a separate offense simply cannot be squared with the analysis set forth in *Via, Suarez* and *Schneider*. In *Via*, the Arizona Supreme Court did not find a separate scheme each time Via obtained "any benefit" by using either of the stolen credit cards. 146 Ariz. at 116. In *Suarez*, the court did not find a separate scheme each time Suarez obtained "any benefit" from Lake Havasu City during his "one scheme to defraud" the city. 137 Ariz. at 373. Finally, the court did not find a separate scheme each time Schneider obtained "any benefit" from any of the multiple investors involved in his scheme. 148 Ariz. at 446-47.

Indeed, the State's position is quite troubling. The State contends that a very

[3] Contrary to the state's suggestion [AB, p. 31], courts routinely determine the contours of the fraud scheme at issue, and cases like *Via*, *Suarez*, and *Schneider*, show that courts have no difficulty doing so.

serious felony (and a predicate offense for racketeering and money laundering charges), can be split up and multiplied into separate and additional equally serious felonies for each and every "benefit" obtained pursuant to the single scheme. This is a classic example of government overreaching. This is precisely the type of overcriminalization that has become the subject of so much just criticism from courts, commentators, and organizations from across widely diverse political and ideological perspectives.[4]

If this court is considering whether to publish an opinion on this issue, this Court may wish to consider its own memorandum decisions[5] in *State v. Crotts*, No. 1 CA-CR 06-0818, 2009 WL 1531024 (Mem. Dec.) (Ariz. Ct. App. 2009) and *State v. Grabinski*, No. 1 CA-CR 06-0835, 2009 WL 1531020 (Mem. Dec.) (Ariz. Ct. App. 2009), and *State v. Giso*, No. 2 CA-CR 2014-0251, 2015 WL 1605169 (Mem. Dec.) (Ariz. Ct. App. 2015), which further demonstrate the absurdity of the state's theory. In *Giso*, Division Two of this court stated:

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[4] *See also State v. Copenhaver*, 834 N.W.2d 870, 2013 WL 2107282, *7 (Iowa App. 2013) (Danilson, J., specially concurring) ("Overcriminalization is a matter of bi-partisan concern [and consists] of charging multiple crimes covering the same conduct, thus tipping the scales in favor of the prosecution and encouraging a defendant to accept a plea bargain rather than face the risk of getting convicted of multiple crimes"); E. Yankah, *A Paradox in Overcriminalization*, 14 New Crim. L. Rev. 1, 34 (2011) ("unchecked state power threatens to criminalize so much behavior as to leave the actual exertion of power over the citizen all too often at the whim of the state").

[5] Memorandum decisions dated earlier than January 1, 2015 are cited only to call the court's attention to the need to publish an opinion, whereas those dated after January 1, 2015 may be argued for their persuasive value. Ariz. R. Sup. Ct. 111(c)(1)(B)-(C).

> *The criminal conduct punishable under § 13-2310 is the scheme to defraud, not any acts committed in furtherance of the scheme. See State v. Suarez*, 137 Ariz. 368, 373, 670 P.2d 1192, 1197 (App. 1983). A scheme to defraud may involve numerous acts and multiple victims. *See id*. ("A scheme to defraud thus implies a plan, and numerous acts may be committed in furtherance of that plan."); *State v. Schneider*, 141 Ariz. 441, 445, 715 P.2d 297, 301 (App. 1985) (single scheme involving forty victims).

Id. ¶ 11 (emphasis added).

But the State's theory has additional, unduly harsh consequences. If the State is permitted to take one scheme and divide it up into separate class 2 felony schemes based on each "benefit," the state can then allege those separate counts as separate offenses not committed on the same occasion, A.R.S. § 13-703, thus invoking severe mandatory sentencing provisions. Lest this Court deem this a fanciful scenario, it is precisely what happened in *State v. Oxnam*, Pima County Superior Court Cause No. CR2014-4954-001. Mr. Oxnam was a paramedic who asked co-workers to use sick days so that he could work extra overtime shifts. The state charged each of these four sick days, which involved amounts that would otherwise be misdemeanor thefts, as separate class 2 felony fraudulent schemes and artifices, and further alleged that they were repeat offenses. The trial court properly found the counts multiplicitous and dismissed the sentencing enhancement allegation. *See* Appendix, Under Advisement Ruling, September 23, 2016; Minute Entry, October 17, 2016.[6]

[6] This Court may "take judicial notice of the records of the Superior Court." *State v. Valenzuela*, 109 Ariz. 109, 110 (1973).

As noted above, there is already a statutory mechanism in place for sentence enhancement and mandatory prison terms in fraud cases. If the aggregate amount involved in the fraudulent scheme meets or exceeds one hundred thousand dollars, then the defendant is ineligible for probation and the trial court must impose a mandatory prison term. If the amount involved in the fraud is under one hundred thousand dollars, then the trial court, who has heard all of the evidence in the case and evidence about the history and characteristics of the defendant, can determine the appropriate sentence to impose for this very serious felony. It is up to the trial court to exercise its sentencing discretion in determining whether to impose a term of imprisonment within the applicable statutory range, or whether some other sentencing terms and conditions would be an appropriate disposition of the case. The State now wants a new mechanism where its charging decisions cannot be challenged and these charging decisions take away the trial court's traditional sentencing discretion and place it in the hands of the prosecutor.

The State's theory thus squarely presents all of the evils of overcriminalization. The State wants to take an already very serious felony and artificially divide it into multiple very serious felonies which, in turn, can be alleged as repeat offenses thus triggering mandatory sentencing provisions. This practice of charging multiple crimes covering the same conduct cannot help but encourage a defendant to accept a plea bargain rather than face the risk of being convicted of multiple crimes carrying

mandatory prison terms. This is the kind of absurd result that courts are careful to avoid when interpreting statutes. *State v. Harris*, 234 Ariz. 343, 345 ¶ 13 (2014).

CONCLUSION

A.R.S. § 13-2310 is entitled "[f]raudulent schemes and artifices." "The criminal conduct punishable under § 13-2310 is the scheme to defraud, not any acts committed in furtherance of the scheme." *Giso* at ¶ 11. This has been settled law in the Arizona Supreme Court and both divisions of this Court for decades. The state now apparently wants this Court to overrule all of these cases and uphold the practice of dividing a single scheme into separate, class 2 felony schemes, in order to subject a defendant to severe mandatory prison terms, thereby dissuading defendants from exercising their constitutional right to a jury trial. This Court should decline that invitation.

RESPECTFULLY SUBMITTED this 13th day of April, 2018.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE

By /s/ Jefferson Keenan & David J. Euchner

Jefferson Keenan & David J. Euchner
Attorneys for **Arizona Attorneys for Criminal Justice**

FILED
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CLERK, SUPERIOR COURT
9/23/2016 2:30:49 PM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. RICHARD S FIELDS

CASE NO. CR20144954

DATE: September 23, 2016

STATE OF ARIZONA
Plaintiff,

vs.

HERBERT OXNAM (-001)
Defendant

UNDER ADVISEMENT RULING

UNDER ADVISEMENT

The Court has Defendant's Motion to Strike Allegation of Repetitive Offender Pursuant to A.R.S. 13-703 under advisement. Having reviewed the pleadings, the case law, and argument, the Court now **GRANTS** the Motion.

This is a case where, as alleged, the Defendant perpetuated a series of fraudulent transactions to achieve the overarching benefit of increasing his base pay to pad his pension. There are no cases on point, but the Court found all of the cases cited in both the Motions/Responses/Replies to Strike the Allegation and Multiplicity instructive. While it is not disputed that each of these transactions reaped a small benefit in the form of overtime pay offset by his "fee"; the overarching fraud scheme was to achieve the ultimate goal of pension spiking. There was no way to commit pension spiking in any appreciable way without the commission of multiple acts over an extended period of time. *See State v. Suarez*, 137 Ariz. 368, 373, 670 P.2d 1192, 1197 (Ct. App. 1983) ("A scheme to defraud thus implies a plan, and numerous acts may be committed in furtherance of that plan.")

Dani DuBois
Law Clerk

The commission of these acts was a grave betrayal of the public trust. The State could have charged one fraud scheme, *Id.*, but instead elected to charge four separate counts which the Court may stack in its discretion. Despite the charging decision, this fact scenario does not support a repetitive offender allegation and therefore, the allegation is stricken.

Dated this 23rd day of September, 2016.

/s/
HON. RICHARD S. FIELDS
(ID: e01276d0-3609-4465-85c4-e9195ae99022)

cc: Hon. Richard S Fields
Kimberly H. Ortiz, Esq.
Michael L. Piccarreta, Esq.
Clerk of Court - Criminal Unit
Clerk of Court - Under Advisement Clerk

Dani DuBois
Law Clerk

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FILED
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TONI L. ELLISON, Clerk
Deputy
OCT 20 2016
OCT 18 2016

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. RICHARD S FIELDS

CASE NO. CR20144954-001

COURT REPORTER: Barbara Short
Courtroom - 802

DATE: October 17, 2016

STATE OF ARIZONA

Nicholas Klingerman, Esq. and
Lindsay P St John, Esq. on behalf of
Kimberly H. Ortiz, Esq.
Counsel for State

VS.

HERBERT OXNAM (-001)
Defendant

Michael L. Piccarreta, Esq.
Counsel for Defendant

MINUTE ENTRY

STATUS CONFERENCE

Defendant present, out of custody.

THE COURT FINDS AS FOLLOWS:

1. The Indictment is multiplicitous.
2. The case of *Merlina v. Jejna*, 208 Ariz. 1, 90 P.3d 202 (Ct. App. 2004) makes it clear that there will not be an issue until time of punishment.
3. The punishment can be merged at the end of the case, which will be necessary.
4. The Court is not required to dismiss the compliant.

Mr. Klingerman requests that the proceedings be *stayed.*

IT IS ORDERED the proceedings in this matter are *stayed.*

cc: Hon. Richard S Fields
Kimberly H. Ortiz, Esq.
Michael L. Piccarreta, Esq.
Pretrial Services

Melissa Bingham
Deputy Clerk