IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. KEVIN HARRY MONINGER, Appellant.	))))))))))	No. CR-21-0239-PR Court of Appeals No. 1 CA-CR 19-0353 Mohave County Superior Court No. CR-2018-01598

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

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INTRODUCTION

Multiplicitous convictions violate double jeopardy. *State v. Jurden*, 239 Ariz. 526 (2016). Multiplicity manifests itself in three ways: 1) convictions for both the greater and lesser offense; 2) when a single crime is committed but convictions are entered for multiple objects possessed or occurring simultaneously; and 3) when a single crime is committed as a continuing course of conduct but convictions are entered for each distinct act. This Court has recently spoken as to the first type in *State v. Carter*, 249 Ariz. 312 (2020), and the second in *Jurden*. It has not recently explained the third, which presents itself in any case where the elements of the crime are satisfied and then the defendant continues the criminal act unabated and uninterrupted for a period of time.

Three opinions of the court of appeals in one year— *State v. Rodriguez*, 251 Ariz. 90 (App. 2021); *State v. Moninger*, 251 Ariz. 487 (App. 2021) (hereinafter "*Opinion*"); *State v. Rios*, 252 Ariz. 316 (App. 2021)—have approached the same question in different ways and therefore reached different results. The *Moninger* majority recognized *Jurden* is instructive as to the appropriate analysis for the third type of multiplicity, *see Opinion* ¶ 20, but in *Rios*, 252 Ariz. at 322 ¶ 22, the court focused on *Jurden*'s "event-directed" language, while ignoring *Jurden*'s language concerning a single "uninterrupted course of conduct," 239 Ariz. at 531 ¶ 21. This Court should explain that a continuous text conversation is a "course of conduct."

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 because the issues presented concern the rights of criminal defendants to be free from multiple punishments for the same crime and to be sentenced according to the statutes governing their conduct. U.S. Const. amends V, XIV; Ariz. Const. art. 2, §§ 4, 10. This Court has not recently addressed what constitutes a "course of conduct" for purposes of determining the unit of prosecution with a continuing offense, and it has never done so in the context of crimes involving communication. As *amicus*, AACJ is concerned that undercover police officers would manipulate conversations with targets of investigation in order to generate additional charges. Where the defendant's multiple statements are part of a course of conduct aimed at accomplishing a particular crime, a defendant commits a single

offense. AACJ is also concerned with the application of A.R.S. § 13-705 governing dangerous crimes against children (DCAC). The DCAC statute is probably the most confusing statute in the entire criminal code; this would not be so worrisome if it were not also the statute creating the most draconian penalties. *See State v. Berger*, 212 Ariz. 473, 484 ¶ 59 (2006) (Hurwitz, J., concurring) (referring to "draconian sentencing scheme"). If the Legislature intends to impose lengthy prison sentences for certain crimes, it must express so clearly and not through conflicting statutes.

ARGUMENTS

I. Crimes accomplished by means of communication and by accomplishing (or attempting) an agreement are continuing offenses; because the unit of prosecution is the agreement, it must be charged in one count.

A. The continuous course of conduct is the unit of prosecution.

"'A continuing offense is a transaction or a series of acts set on foot by a single impulse, and operated by an unintermittent force, no matter how long a time it may occupy.'" *Reynolds v. State*, 18 Ariz. 388, 394 (1916) (quoting Words and Phrases, vol. 2, p. 1510). "In contrast to the instantaneous nature of most crimes, a 'continuing offense' endures over a period of time, and its commission is ongoing until cessation of the proscribed conduct." *State v. Helmer*, 203 Ariz. 309, 310-11 ¶8 (App. 2002). Some crimes, by their nature, "[are] inescapably a process, a continuing phenomenon." *United States v. Johnson*, 323 U.S. 273, 277 (1944).

The prototypical continuing offense for physical actions is possession of contraband (stolen goods, drugs, weapon by a prohibited possessor, etc.). *See State v. Rascon*, 2 CA-CR 2017-0177, ¶ 10, 2018 WL 2437090 (mem., May 30, 2018) (quoting *People v. Zuniga*, 80 P.3d 965, 969 (Colo. App. 2003)). Similarly, a person commits only one count of kidnapping or unlawful imprisonment for the entire period the victim is restrained, regardless of its duration. *State v. (John) Jones*, 185 Ariz. 403, 406 (1995). Even moving the victim from place to place does not create an additional kidnapping offense so long as the victim's restraint remains uninterrupted. *Id*. (citing *State v. Ring*, 131 Ariz. 374, 378 (1982)). Other examples of continuing offenses are status offenses, such as sex offender registration, *see Helmer*, 203 Ariz. at 312 ¶ 12, or bigamy, *see Ex parte Snow*, 120 U.S. 274, 281 (1887).

In *State v. Ramsey*, 211 Ariz. 529 (App. 2005), the court addressed whether jury unanimity was necessary for each of the three or more acts that constituted the charge of continuous sexual abuse of a minor. The court found that A.R.S. § 13-1417 punished a "series [of acts], in rspect to which individual violations are but the means." *Id*. at 537 ¶ 24 (quoting *Richardson v. United States*, 526 U.S. 813, 818 (1999)). "Thus, the actus reus of § 13-1417 is the pattern of sexual assaults—the continuous course of conduct—rather than each individual act, which would constitute a violation of one of the cited statutes if so charged." *Id*. at 538 ¶ 28.

Because the statute defines a course of conduct as an element, it includes a provision that no other charge may be brought against a defendant for a single victim for acts committed while the victim was under age fourteen. A.R.S. § 13-1417(D).

The *Moninger* court recognized this by resting its reasoning in part on this Court's opinion in a theft/fraud case, *State v. Via*, 146 Ariz. 108, 115-16 (1985). *Opinion* ¶¶ 31-32. It also relied on the seminal case of *Blockburger v. United States*, 284 U.S. 299 (1932), which is most often cited in the context of lesser-included offenses but also involved two separate and distinct drug sales. *Opinion* ¶ 32. In *Blockburger*, the Supreme Court explained: "In the present case, the first transaction, resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one-that is to say, of a new bargain." 284 U.S. at 303.

Crimes whose elements require communication are, by their nature, continuing offenses, because two people do not necessarily stop talking the moment an offer or solicitation or agreement is made. At some point in the communications, the elements of the offense are satisfied. When that happens, there is not a "reset" where the participants start working on a new offense. For example, if a family lists its house for sale for a given price, and a buyer comes along and makes a counter-offer, there might be some give-and-take on the price and other terms, but common sense dictates that the negotiation is a single course of conduct.

A classic example is conspiracy. Two people, A and B, decide to rob a store

using weapons to coerce compliance, and they sit down and talk through their plan. "[A]n overt act [is] not required if the object of the conspiracy was to commit any felony upon the person," A.R.S. § 13-1003(A), and so the agreement alone satisfies all the elements of the crime. The next day, A suggests and B agrees that they should surveil the store for a couple of days. After a couple days of surveillance, B then suggests and A agrees that they should follow the store owner home because maybe it would be better to rob the owner at home than at the store. Shortly after, A gets cold feet and informs police, and B is arrested. B is charged with one conspiracy for the entire course of communication, not three separate conspiracies.

In *State v. Padilla*, 169 Ariz. 70, 72 (App. 1991), the court held that an offer to sell narcotic drugs is not protected by the First Amendment "because the statute does not criminalize speech; it proscribes a course of conduct that may be carried out by speech." Padilla was convicted of a single count of offering; although the facts do not discuss the specific words uttered, it is highly unlikely that Padilla said only a single sentence to the informant Drake. *Id.* at 71. Similarly, in *State v. Crisp*, the defendant was convicted of only one count of soliciting an act of prostitution, but presumably the discussion went back and forth before the agreement was reached and Crisp was arrested. 175 Ariz. 281, 282 (App. 1993). The *Moninger* majority cited *Padilla*'s rationale and put emphasis on the term "course of conduct" to describe an "offer," while noting other cases that use the phrase "course of conduct"

in discussing criminalization of certain offers or solicitations. *Opinion* ¶ 22 & n.4 (quoting *Padilla* and *Crisp*).

Acknowledging this, the State sticks to its assumption—devoid of any authority except the *Moninger* dissent—that several utterances in a single course of communicating should be treated as multiple counts. For support, the State looks to the aggravated luring statute's reference to "the offer or solicitation" in the singular, A.R.S. § 13-3560(A)(2), but such use does not contradict the "course of conduct" application. State Supp. Brief aty 5-6. The State reads too much into the use of singular; on the contrary, use of singular merely ensures that future defendants do not set forth absurd arguments. *See State v. Shepler*, 141 Ariz. 43, 44 (App. 1984) (disparaging defendant's "patently absurd" argument that he lacked notice of proscribed conduct because "the language 'minors are engaged in' in the statute reflects the legislature's intent to ban conduct which utilizes two or more children photographed in sexual positions."). The State is probably correct that the *Moninger* majority would not expect different results for the two statutes; but because its premise is faulty, so is its conclusion. Moreover, this Court recently rejected this argument as it relates to resisting arrest. *Jurden*, 239 Ariz. at 531 ¶ 23.

Moninger also acknowledges that the objective of the crime—luring a minor for sex—is often not achieved on the initial message, nor can it be so easily proven based on a single communication, but rather the solicitation "may comprise a course

of conduct, intended to induce another to act, that continues over an extended period." *Opinion* ¶ 24 (quoting *Pedersen v. City of Richmond*, 254 S.E.2d 95, 99 (Va. 1979)). Particularly in cases involving undercover officers, the communication goes on longer than necessary to charge the offense; this is because the officer wants to ensure that the suspect has a fair opportunity to withdraw so that the suspect will have greater difficulty proving a claim of entrapment. Not surprisingly, Moninger ran an entrapment defense; no doubt a big reason the failure of the defense was the undercover officer's reinforcement of the plan to meet. *Opinion* ¶¶ 5-6.

Just as extrajurisdictional authority supported the result in *Moninger*, it also supports the result that luring is a victim-directed offense that should be charged as one count. *See State v. Morales*, 298 P.3d 791, 798-800 ¶¶ 34-41 (Wash. App. 2013) (unit of prosecution of harassment is the fear felt by a single victim); *United States v. Grimes*, 702 F.3d 460, 468-69 (8th Cir. 2012) (26 voicemail messages left over three weeks was a single offense, not six different courses of conduct). Naturally, if there is a break in the chain of events that would reveal a separate course of conduct, or if there are different victims, then multiple counts would be permissible. *See Matter of France*, 401 P.3d 336, 345 ¶¶ 45-46 (Wash. App. 2017) (because the facts establish France made different types of threats to cause bodily harm to Paulsen and Daugaard at different times and places, the unit of prosecution in this case is each threat).

This Court can adopt a straightforward rule that for crimes such as luring, harassment, stalking, etc.,[1] the unit of prosecution is the course of conduct directed at a single victim. As with assault, separate counts can be brought for separate victims. There should not be a specific time period between messages that separates one course of conduct from another, just as there is no specific measurement of time for an excited utterance or for premeditation. *Cf. Maryland v. Shatzer*, 559 U.S. 98, 111-12 (2010) (if there is a break in custody lasting two weeks or longer, Supreme Court holds that "the court is spared the fact-intensive inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel."). Making this a single offense is hardly a reward for criminal behavior; on the contrary, a trial court could impose a harsher sentence for more serious conduct. To the extent that the conduct is more serious, it is highly probable that the State could charge a more serious offense than aggravated harassment. Regardless, the lack of sufficient punitive force behind the statute is no reason to disregard the legislature's prerogative to define offenses and set punishments. The lower courts need this Court's guidance on the issue of unit of prosecution.

[1] Examples of other crimes involving a course of conduct through communication are: obstruction of a criminal investigation under § 13-2409; bribery under § 13-2602; tampering with a witness under § 13-2804; interfering with judicial proceedings under § 13-2810; disorderly conduct under § 13-2904; and interception of wire, electronic and oral communications under § 13-3005.

B. The *Moninger* dissent and the *Rios* opinion create absurd results and are not supported by public policy

The court of appeals has often disregarded the requirement to effect the intent of the legislature that wrote the statute in favor of deference to the executive branch and prosecutorial discretion. *E.g.*, *Rios*, 252 Ariz. at 322 ¶ 24. For example, in another recent opinion, the court of appeals noted that the State charged a single act of fraudulent schemes and artifices but suggested that it would have been permissible to charge the same continuing scheme as multiple offenses under a theory of "broad exercise of [the State's] charging discretion." *State v. Watson*, 248 Ariz. 208, 215 ¶ 20 & n.3 (App. 2020). The Supreme Court clearly stated, "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio*, 432 U.S. 161, 169 (1977). This Court must make clear that prosecutors' "broad discretion" has constitutional limits.

The *Moninger* court, *Opinion* ¶ 51, noted an early example of an absurd charging decision that was struck down by the Supreme Court for dividing a continuous crime into multiple offenses based solely on the date. In *Snow*, the defendant had cohabitated with multiple wives for a 35-month period; the grand jury divided the continuous offense into three separate charges, one for each 12-month period. The Court explained that this division was "wholly arbitrary," and "[o]n the same principle there might have been an indictment covering each of the 35 months,

with imprisonment for 17 1/2 years and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for 74 years and fines amounting to $44,400; and so on, ad infinitum, for smaller periods of time." 120 U.S. at 282. "It is to prevent such an application of penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted." *Id*.

Rios reflects the same absurdity as in *Snow*, likely as a result of its failure to acknowledge the recent *Moninger* opinion. In *Rios*, the defendant sent thirteen text messages between the hours of 12:51 a.m. and 8:26 a.m., and the recipient A.P. apparently testified to being awake for some of them, but not necessarily all of them. 252 Ariz. at 318 ¶ 4. Since A.P. did not respond, for all Rios knew, she was sleeping that whole time. As in *Snow*, 120 U.S. at 282, "it was the mere will of the grand jury" to charge two counts instead of thirteen, which would have made Rios eligible for twenty years imprisonment or more.

Furthermore, the *Moninger* dissent and *Rios* opinion would endorse multiple counts even where the defendant's true intent was to send a single message. For example, occasionally a sender of a text or email is notified that there is difficulty sending the message, so the person resends the message. Shortly after, the "hiccup" in the system is cleared and the recipient gets both messages. Furthermore, a person

may accidentally send the message prematurely and send another message that completes the thought. Is it really the Legislature's intent for such a person to be charged with two counts?

These concerns are not limited to electronic transmission of messages. Criminal conduct involving communication happens during oral conversations as well. What if the defendant has a stutter and is struggling to finish the statement, and then restates the full sentence again? Is that two offenses?

There is a minority view that utilizes rationale similar to that in the *Moninger* dissent and *Rios* opinion. For example, in *State v. Cody M.*, 259 A.3d 576, 584-88 (Conn. 2020), the court held that each sentence uttered by the defendant to the victim in the courtroom was a separate transaction and that the defendant should not be afforded a benefit by having a single conviction for uttering multiple sentences. This interpretation requires factfinders to determine how many counts are actually supported by a single utterance; for example, if the defendant takes a breath before finishing a sentence, would a separate crime have been committed? The Connecticut Supreme Court apparently answered that question in the affirmative, but this Court must avoid such absurd results. *See State v. Gray*, 239 Ariz. 475, 477 ¶ 6 (2016) (avoiding interpretations where "an absurdity or constitutional violation results").

The State's claim that it "is limited in Luring cases by the number of times a defendant offers or solicits sexual conduct," State Supp. Brief at 14, is not

reassuring. If anything, the State's desired outcome of multiple offenses will invariably lead to undercover police officers dragging out a conversation with a target solely for the purpose of inflating the prison exposure. The *Moninger* court noted the absurdity for a person to receive a longer cumulative sentence based on sending multiple messages toward the same goal than the defendant would receive for achieving the actual criminal objective. *Opinion* ¶ 21.

There will no doubt be hard cases for determining the unit of prosecution—but this is not such a case. This case illustrates the point why luring is a course of conduct that may be charged as a completed offense as soon as the first text message is sent but does not morph into a new offense with each successive message.

C. To the extent the *Moninger* majority opinion contains errors, they are minor.

The State's arguments and the *Moninger* dissent, at their bare essence, are arguments in favor of severe punishment for this crime. *Dissent* ¶ 68 (citing authorities related to the process of "grooming" child sex victims); State Supp. Brief at 9 (quoting same). Although the State cites throughout its brief myriad canons of statutory construction, it does not apply those canons to the offense in this case, nor does it confront the authority adverse to its position that was cited throughout the majority opinion.

The State is correct, however, in pointing out the flaws in the majority opinion's discussion of the relationship between luring and the crimes of

transmission of obscene material to minors over the internet and contributing to the delinquency of a minor. State Supp. Brief at 10-12 (citing *Opinion* ¶ 17). First, as the State points out, A.R.S. § 13-3506.01 has been permanently enjoined as unconstitutionally overbroad. Second, *amicus* agrees with the State that the fact that the State could charge multiple offenses for the same criminal conduct and doing so does not render the other statutes superfluous.

With that said, the State then makes a mountain out of this molehill. Paragraph 17 of the majority opinion is obviously *dictum*; it provides little, if any support for the overarching analysis. To analogize this point to a faulty home construction, this would be the equivalent of a broken tile on the roof, not a crack in the foundation. Excising that paragraph would do nothing to reduce the efficacy of the majority opinion's analysis.

II. At the time of Moninger's offense, luring was a probation-available DCAC offense.[2]

A.R.S. § 13-705(Q)[3] states: "It is not a defense to a dangerous crime against

[2] In noting that the Legislature recently amended A.R.S. § 13-3554(C), the State correctly concedes that this amendment has no bearing on Moninger's sentence or on this Court's analysis of the law at the time of the offense. See State Supp. Brief at 18-19. *Amicus* joins the State in asking this Court not to rely on the new law.

[3] This subsection was added in 2018 as § 13-705(P). Laws 2018, Ch. 181, § 1. It has been relocated several times as a result of subsequent changes to § 13-705, including changes that go into effect on September 24, 2022, but the relevant language has remained unchanged since 2018. For ease of reference, this brief cites the most current version of the statute.

children that the minor is a person posing as a minor or is otherwise fictitious if the defendant knew or had reason to know the purported minor was under fifteen years of age." This subsection of the DCAC statute was added in 2018 in response to this Court's opinion in *Wright v. Gates*, 243 Ariz. 118 (2017). *See* HB 2244, House Summary Fact Sheet. Moninger's conduct occurred in September and October 2018, *see Opinion* ¶¶ 2-4, and thus *amicus* does not know whether his conduct falls under the new statute or whether *Wright* should apply. Assuming the court of appeals was correct in applying the new statute, the majority correctly determined that Moninger's luring conviction is probation available.

A.R.S. § 13-705(G) currently states:

> Except as otherwise provided in this section, if a person is at least eighteen years of age or has been tried as an adult and is convicted of a dangerous crime against children involving luring a minor for sexual exploitation, sexual extortion or unlawful age misrepresentation and is sentenced to a term of imprisonment, the term of imprisonment is as follows and the person is not eligible for release from confinement on any basis except as specifically authorized by section 31–233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to section 41–1604.07 or the sentence is commuted:
>
> | Minimum | Presumptive | Maximum |
> |---|---|---|
> | 5 years | 10 years | 15 years |

References to A.R.S. § 31-233 mean that the prisoner is ineligible for early release credits (also called "flat time"), whereas § 41-1604.07 permits early release credits (also called "85% time"). *See* David J. Euchner & Barbara E. Bergman, ARIZONA

CRIMINAL PRACTICE MANUAL § 27:6 (2021-2022 ed.).

The plain language of this section requires a person to receive a prison sentence with 85% time if two conditions are met: 1) the person is convicted of one of the enumerated offenses; *and* 2) the person "is sentenced to a term of imprisonment." The use of "and" means both conditions must be met. *See State v. Escalante*, 245 Ariz. 135, 140 ¶ 14 (2018) (explaining difference between use of conjunctive "and" and disjunctive "or"). When the legislature intends for a sentence to be ineligible for probation and require imprisonment, it knows how to say that. For example, with §§ 13-705(A) & (B), the statutes begin: "A person who … is convicted … shall be sentenced to imprisonment…" The use of the conditional word "if" in subsection G necessarily implies that the sentencing court has discretion to impose a probationary term.

The luring statute, A.R.S. § 13-3554, was added in 2000, *see* Laws 2000, Ch. 189 § 30, and it first appeared in the DCAC statute in 2001 as section 13-604.01(I) and required a mandatory prison term of five/ten/fifteen years, *see* Laws 2001, Ch. 334, § 7. In 2008, when the Legislature moved DCAC from § 13-604.01 to § 13-705, it also made substantial amendments, and that time it explicitly amended soon-to-be section 13-705(E) to mirror its current form, and thus the Legislature evinced its intent to make the offense probation available.

It is true that A.R.S. § 13-705(K) states: "A person sentenced for a dangerous

crime against children in the first degree pursuant to this section is not eligible for suspension or commutation of sentence, probation…" This language in the DCAC statute has not changed since its adoption in the 1980s (when it was located at § 13-604.01(E)). Further, § 13-705(P) states: "a [DCAC] is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense…" The luring statute states that the offense is punishable under § 13-705, but it does not point to any particular subsection. Because Moninger completed the offense of luring, it would seem that he is not probation available. Yet under subsection G as quoted above, he is obviously probation available. Thus, the DCAC statute is internally contradictory as pertaining to luring.

There are two reasons why the ambiguity must be resolved in favor of Moninger and not the State. First, the statutes that make first-degree DCAC offenses prison mandatory are general provisions adopted in the 1980s, whereas the luring statute was adopted in 2000 and its probation-available terms adopted in 2008. "When 'two conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over an older, more general statute.'" *State v. (Shawnte) Jones*, 235 Ariz. 501, 503 ¶ 8 (2014) (quoting *UNUM Life Ins. Co. v. Craig*, 200 Ariz. 327, 333 ¶ 29 (2001)). Unlike in *Shawnte Jones*, where "reasonable people can disagree about which statute is more specific," *id.* ¶ 11, no such reasonable disagreement could exist here. Second, since no other rules of statutory construction

could resolve the question in the State's favor, the rule of lenity requires resolving it in Moninger's favor. *State v. Tarango*, 185 Ariz. 208, 210 (1996).

No one can reasonably argue that the DCAC statute is a model of clarity. The structure of the statute lends itself to oversights. Most notably, in *State v. Gonzalez*, 216 Ariz. 11, 14-15 ¶¶ 13-15 (App. 2007), the court of appeals held that the crime of attempted sexual conduct with a minor under 12 years old was not subject to DCAC sentencing because, even if it was legislative oversight, it was not enumerated as punishable under DCAC. But as the court of appeals in *Gonzalez* noted, "we cannot supply a punishment the legislature did not enact." *Id*. at 15 ¶ 14. One can hope that the Legislature will soon realize that the DCAC statute needs a complete overhaul.

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CONCLUSION

Interpreting the luring statute as creating a single crime per conversation per victim is supported by the statutory language. It is the only sensible conclusion. Furthermore, canons of statutory construction demonstrate that the conflicts in the DCAC statute must be resolved in favor of Moninger. The *Moninger* majority opinion's minor flaws aside, overall it is well reasoned. This Court should uphold that opinion.

RESPECTFULLY SUBMITTED this 26th day of September, 2022.

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