IN THE SUPREME COURT OF ARIZONA

ERIC GREGORY MOORE,

Petitioner,
v.

HON. SCOTT McDONALD, JUDGE OF THE PIMA COUNTY SUPERIOR COURT,

Respondent/Judge,

STATE OF ARIZONA *ex rel.* KRISTIN K. MAYES, ATTORNEY GENERAL,

Real Party in Interest

Arizona Supreme Court Case
No. CR-23-0127-PR

Arizona Court of Appeals
No. 2 CA-SA 2023-0027

Pima County Superior Court
No. CR-2022-1627-001

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

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INTEREST 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 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. 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 issue presented in the petition concerns the rights of criminal defendants to be free from long-delayed prosecutions. Although the statute of limitations is just that—a statute—it goes to the heart of two separate but related constitutional rights. First is the right to due process of law, which includes the responsibility of a prosecuting agency to bring criminal charges without undue delay. U.S. Const. amends. V, XIV; Ariz. Const. art. 2, § 4. The second is the right to a speedy trial. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24.

With the advent of DNA analysis to uncover the offenders of long past crimes, the Legislature amended the statute of limitations so it is tolled during time when the offender's identity is unknown. A.R.S. § 13-107(E). This provision has been

interpreted many times by court of appeals, but never by this Court.[1] AACJ asks this Court to grant review of Petitioner's case and give the statute of limitations a narrow reading as intended by the Legislature, because the state's reading, adopted by the Respondent Judge in this case, would result in rampant due process violations and defeat the purpose of the statute.

ARGUMENTS

I. Statutes of limitations protect important constitutional rights to due process and a speedy trial.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…" Article 2, section 24 of the Arizona Constitution provides: "In criminal prosecutions, the accused shall have the right...to have a speedy public trial…" Ever since the Supreme Court incorporated the right to a speedy trial to the states through the Fourteenth Amendment, *see Klopfer v. North Carolina*, 386 U.S. 213 (1967), Arizona adopted the federal standard for the right to speedy trial. *State v. Schaaf*, 169 Ariz. 323, 327 (1991). Since the right to a speedy trial is "triggered by arrest, indictment, or other official accusation," *Doggett v. United States*, 505 U.S. 647, 655

[1] *See* David J. Euchner & Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL § 9:2 (2022-2023 ed.) (citing cases discussing A.R.S. § 13-107(E)).

(1992), other provisions of law protect a defendant's right against oppressive delay in bringing charges. These provisions are largely embodied by statutes of limitation.

Statutes of limitations are the primary guarantee against bringing stale charges against a defendant, protecting against the higher likelihood of due process problems in state prosecutions. *See U.S. v. Habig,* 390 U.S. 222, 227 (1968) (given liberty interests at stake in criminal prosecution, statutes of limitation are "to be liberally interpreted in favor of repose"). The purpose behind statutes of limitations, to protect defendants from stale prosecutions, is particularly apropos where, as here, the state waited so long to charge that it had destroyed evidence from the investigation.

Although the Due Process Clause also "has a limited role to play in protecting against oppressive delay[,]" *United States v. Lovasco*, 431 U.S. 783, 788 (1977), and does not demand that the government bring charges as soon as it believes it can secure an indictment against the defendant so that the government can wait to bring charges until it completes its investigation and is satisfied that it has amassed the evidence it needs to secure a conviction, *United States v. MacDonald*, 456 U.S. 1, 7 (1982), the government may not wait indefinitely. The Arizona legislature, like 47 other states and the federal government,[2] enacted statutes of limitations to securely

[2] Only two states, Wyoming and South Carolina, have no criminal statutes of limitations, and Kentucky has none for felonies. *See* 3 *Wharton's Criminal Procedure* § 14:23 (14th ed.).

protect against the increased likelihood of due process problems with the passage of time.

Constitutional principles are inherently vague and subject to balancing tests, whereas the words of the Legislature in a statute of limitations must be precise. It is for this reason that the Supreme Court has created a four-factor balancing test for speedy trial violations, *see Barker v. Wingo*, 407 U.S. 514 (1972), and an amorphous standard for considering bad faith of pre-indictment delay for due process violations, *see Lovasco*, 431 U.S. at 96-97, whereas "[t]he purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions," *Toussie v. United States*, 397 U.S. 112, 114 (1970).

II. This Court has never construed A.R.S. § 13-107(E).

A. Discovery of the offense triggers the statute of limitations.

A.R.S. § 13-107 is Arizona's statute of limitations. If a defendant raises a claim that the statute of limitations has expired, the state bears the burden of persuasion to show it has not. *State v. Jackson*, 208 Ariz. 56, 60 ¶¶ 15-16, 63-64 ¶ 26 (App. 2004). The statute of limitations begins to run when law enforcement discovers the crime, or, acting with reasonable diligence, believes that there is probable cause to believe a crime was committed. *Id*. at 64-67 ¶¶ 28-41. "Unlike a

statute of limitation in a civil case, a criminal statute of limitation is not a mere limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused. It is jurisdictional. Statutes of limitation are to be construed liberally in favor of the accused and against the prosecution." *Price v. Maxwell*, 140 Ariz. 232, 234 (1984) (quoting *State v. Fogel*, 16 Ariz. App. 246, 248 (1972)); *see also Habig*, *supra*.

Section 13-107(B) requires prosecution for crimes such as arson and fraud "to be commenced … within [seven years] after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or the political subdivision that should have occurred within the exercise of reasonable diligence, whichever first occurs…" The legislature has not materially altered this provision since 1985, *see State v. Aguilar*, 218 Ariz. 25, ¶ 6 (App. 2008) (citing Laws 1985, ch. 223, § 1), but in 1997 it added section 13-107(E), which states, "The period of limitation does not run for a serious offense … during any time when the identity of the person who commits the offense or offenses is unknown."

Not just the current version of section 13-107 but its predecessor versions "also referred exclusively to the commission of the offense as the trigger of the time limitation." *Taylor v. Cruikshank*, 214 Ariz. 40, 43-44 ¶ 14 (App. 2006). *See also State v. Cook*, 942 N.E. 2d 357, 362-63, ¶ 33 (Ohio 2010) (statute of limitations begins to run when corpus delecti is discovered). In *State v. Escobar-Mendez*, 195

Ariz. 194 (App. 1999), the court found that the mere fact that a 13-year-old child who gave birth at a county hospital did not give rise to discovery by "the State or a political subdivision." The reasoning shows that it is the offense, and not the offender, that must be detected by a government law enforcement agency:

> While a county hospital may arguably perform some functions of local government, may be part of a hospital district, and may have the authority of self-governance through a board of directors, nothing in the record suggests that the Maricopa county hospital is such an entity. See A.R.S. §§ 48–1901 through –1916. Moreover, even if a county hospital is a political subdivision, it clearly would not have jurisdiction over the offense of sexual conduct with a minor as required by A.R.S. section 13–107.

Id. at 198 ¶ 16.

In *Jackson*, 208 Ariz. at 64 ¶ 27 (App. 2004), the court of appeals interpreted section 13-107(B) to include both a probable cause and a reasonable diligence requirement. "To the extent that statement suggests that, under § 13-107(B), the limitation period commences when the government has actually discovered or through the exercise of reasonable diligence should have discovered that the suspect probably committed the offense in question, we agree." *Id*. ¶ 28. *Jackson* did not interpret section 13-107(E), which is at issue here.

B. A.R.S. § 13-107(E) tolls the statute of limitations only when the identity of the offender is unknown.

A.R.S. § 13-107(E), at issue here, is a tolling provision. Georgia's similar provision "tolls the statute of limitation when the 'person committing the crime is

unknown[.]'" *Riley v. State*, 824 S.E.2d 249, 254 (Ga. 2019). Georgia's supreme court analyzed "when a person ceases to be 'unknown' under the statute and becomes 'known.'" *Id.* Thus, if "there is no known person amongst the universe of all potential suspects[,]" the statute tolls, but as here, where "[t]he evidence shows that the State had actual knowledge of [the defendant's] identity as a suspect for the crimes shortly after they were committed," the statute runs. *Jenkins v. State*, 604 S.E.2d 789, 793 (Ga. 2004). Georgia's reasoning is persuasive:

> The tolling exception to the statute of limitations cannot be based upon the subjective opinion of the district attorney as to whether there was enough evidence to file charges against a particular person. Otherwise there would be tolling of the statute of limitations for routine investigation into a crime . . .. Such a broad interpretation of the tolling period would permit the exception to swallow the rule."

Id. at 793-94. It is thus unsurprising that Moore's petition relies so heavily on Georgia cases in the absence of controlling Arizona authority.

In *Aguilar*, 218 Ariz. at 38 ¶ 49, the court noted that addition of section 13-107(E) relates only to "actual knowledge of the offender's identity," whereas subsection (B), unaltered for decades, relates to the reasonable diligence of discovering the offense. The concern in *Aguilar* was that the state was not reasonably diligent in identifying the defendant as the rapist through DNA testing; whether a crime existed was never in question. *Id*. at 28 ¶¶ 3-5. Subsection (E) was enacted to allow for cold-case prosecutions with DNA evidence.

Even if *Aguilar*'s reasoning is correct,[3] the state has stretched its language to a new context: where the offense and offender are both known but the state does not feel confident enough to prosecute. *Response to Petition for Special Action*, ep 15. The state's preferred result is expressly prohibited by the language and purpose of the statute of limitations. "Statutes of limitation in criminal cases are designed primarily to protect the accused from the burden of defending himself against charges of long completed misconduct." *Martin v. Superior Court*, 135 Ariz. 99, 100 (1983) (quoting *Fogel*, 16 Ariz. App. at 248).

If the state does not feel confident enough to prosecute even when it has corpus delecti and a suspect, it simply should not. But that does not mean that the state can investigate offenses indefinitely, as the state urged below, because that would render the statute of limitations a nullity and produce absurd results.

The legislature could repeal the limitations period for the crimes enumerated in subsection (E), but it has chosen not to. The Court is obligated to give meaning to the entire statute. *Jackson* and *Aguilar* do not allow police to sit on a case until a smoking gun serendipitously falls into their lap; such an interpretation defies both legislative intent and the statute's plain meaning.

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[3] *Aguilar*'s analysis of retroactivity of statutes is dependent on civil cases like *Cook v. Stegall*, 295 F.3d 517 (6th Cir. 2002), which are not applicable in criminal law contexts. 218 Ariz. at 33-34 ¶ 31. Since section 13-107(E)'s relevant amendments occurred prior to 2011, it is unnecessary to address these legal errors in this brief.

C. The burden of proof should be beyond a reasonable doubt.

Respondent erroneously placed the burden of persuasion on the defendant,[4] when the sate bears the burden to show the statute of limitations was tolled once the defendant produces some evidence that the statute expired. *Jackson*, 208 Ariz. at 60 ¶ 15. The defendant must make only a *prima facie* showing that more than the time allotted has passed to shift the burden of proof to the state. *See Riley*, 824 S.E. at 255. Arizona requires the state to prove tolling by only a preponderance of the evidence. *Jackson*, 208 Ariz. at 64 ¶ 26. *Jackson* cited cases from other states distinguishing personal jurisdiction from subject matter jurisdiction to support preponderance as a sufficient standard.

Jackson wrongly decided the burden of proof, and its analogy to the preponderance burden in Ariz. R. Crim. P. 16.2 is deeply flawed because the legality of the evidence's collection is not an element of the offense. Whether it be personal jurisdiction or subject-matter jurisdiction (one waivable and the other not), both require the government to prove it has authority to prosecute and convict the offender of an offense—and it is for this reason that the prosecution should prove tolling beyond a reasonable doubt. *See*, *e.g.*, *People v. Smolens*, 258 A.D. 373 (N.Y.S. 1940); *Commonwealth v. Cogswell*, 583 N.E.2d 266, 269 (Mass. App. 1991); *State*

[4] "[T]he Court finds as follows: The Defendant failed to provide reasonable evidence to support that the statute of limitations ran for those three claims…" *Appendix to Response to Petition for Special Action* ep 180 (Attachment C, 3/3/23 RT 63).

v. Pierce, 782 P.2d 194, 196 (Utah App. 1989). Because jurisdiction is a fact that must be proven at trial, it must meet the same burden as all other elements. *United States v. Owens*, 965 F. Supp. 158, 162-63 (D. Mass. 1997) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

The policies behind statutes of limitations are so important that many states do not even require a *prima facie* showing from the defendant. They require the state to plead in the indictment facts sufficient to allege that the statute of limitations has tolled on penalty of dismissal. *See Lynch v. State*, 815 S.E.2d 340, 347 (Ga. App. 2018) (where the state files an indictment after the limitations period has passed, "the State must specifically allege in each count of the indictment the applicable tolling provision or exception to the statute of limitation in order to show that the charged offense is not time-barred."); *State v. Davidson*, 816 S.W.2d 316 (Tenn. 1991) ("When an indictment is brought after the period of limitations has expired, the specific facts which toll the statute of limitations must be pleaded and proved."); *Dickerson v. State*, 571 S.W.2d 942, 943 (Tex. Crim. App. 1978) ("A prosecution commenced after the statute of limitations has run is barred unless facts tolling the statute are pled and proved by the State."); *State v. Williams*, 69 A.2d 299, 300 (Del. Gen. Sess. 1949) (If indictment "contains nothing to show that the statute of limitations does not apply, then it appears from the face of the indictment that the State cannot proceed against the accused. In such event, a motion to quash is

appropriate."); *People v. Crosby*, 375 P.2d 839, 846 (Cal. 1962) ("An accusatory pleading must allege facts showing that the prosecution is not barred by the statute of limitations.").

Like Arizona, these states view the statute of limitations as a jurisdictional bar to prosecution. In those states the indictment must allege facts bringing the defendant into the jurisdiction of the state. *See Crosby*, 375 P.2d at 846 ("[A]s the bar of the statute is a jurisdictional defect rather than simply an affirmative defense which must be raised by special plea (such as double jeopardy), the burden is on the People of establishing that the offense was committed within the applicable period of limitations."). Furthermore, that evidence must be legal, competent evidence. *Id.* at 847. A grand jury must find probable cause that the statute was tolled. *Id.* Even with *Jackson*'s recent view that personal jurisdiction can be waived, there remains a policy announced by the United States Supreme Court and followed strictly among the states, that statutes of limitations are to be construed strictly against the state and in favor of the defendant. In this case, personal jurisdiction has not been waived, leaving the purpose of the statute of limitations as the lone light against which this statute must be construed.

By granting review, this Court can explain that the burden of proof is the same as for all other elements of an offense: beyond a reasonable doubt.

III. In granting review, this Court should opine that claims of violations of the statute of limitations are ripe for special-action review.

In its response to Moore's petition for special action, the state argued that this case was inappropriate for discretionary special-action jurisdiction based on two points: 1) defendants can raise preserved claims on direct appeal; and 2) the cases in which the court of appeals has previously granted special-action jurisdiction involved issues of first impression or statewide importance. *Response to Petition for Special Action*, ep 9-11. While the state is mostly correct in those two points, that alone does not control the issue, as evidenced by this Court's grant of jurisdiction in *Martin*.

In other areas, this Court has recognized that a petition for special action is preferable to waiting for appeal even when an issue is appealable. For example, in *State v. Minnitt*, 203 Ariz. 431, 437 ¶ 24 (2002), this Court denied a special action petition related to double jeopardy, "knowing that, should Minnitt be convicted in the third trial, this court would then have the opportunity to conduct appellate review on a complete record." Yet "[o]ur courts have held that 'a petition for special action is the appropriate vehicle for a defendant to obtain judicial appellate review of an interlocutory double jeopardy claim.'" *State v. Moody*, 208 Ariz. 424, 438 ¶ 22 (2004) (quoting *Nalbandian v. Superior Court*, 163 Ariz. 126, 130 (App. 1989)).

The state asserts that the court granted jurisdiction in *Taylor*, 214 Ariz. at 41 ¶ 2 (App. 2006), "because [the issue] was 'purely a question of law' that was likely

to recur and was a 'matter of statewide importance.[']" *Response to Petition for Special Action*, ep 10. The state omitted the rest of the court's reasons for granting jurisdiction: "Moreover, because we conclude the limitation period has expired, accepting jurisdiction eliminates the time and expense of conducting futile trials and ends the cases." *Taylor*, 214 Ariz. at 41 ¶ 2 (citations omitted). Denial of motions to dismiss are particularly appropriate for special action review because they not only spare the defendant the ordeal of a trial but they may also spare a victim from testifying in an unnecessary trial. *See State v. Kinslow*, 165 Ariz. 503 (1990) ("[O]ne reason the state agreed to stipulate here was to prevent the psychological devastation that would result if this family had to testify regarding defendant's acts."). Thus, although this Court granted review of a special action declination in *Mejak v. Granville* "because it presents an issue of statewide importance and first impression," 212 Ariz. 555, 556 ¶ 6 (2006), it resolved the issue early because the issue was dispositive.

Of course, *amicus* does not suggest that appellate courts must hear all special action petitions challenging a denial of a motion to dismiss. The legislature knows how to bind courts to such an exercise of jurisdiction. *See* A.R.S. § 13-753(I) (if any party challenges a trial court's intellectual-disability finding, "the court of appeals shall exercise jurisdiction and decide the merits of the claims raised."). But it would help the court of appeals and practitioners to know such cases are appropriate for

special action review—especially since the court of appeals has held it is appropriate in civil cases. *See Montaño v. Browning*, 202 Ariz. 544, 545-46 ¶ 2 (App. 2002) (citing *Engle Bros., Inc. v. Superior Court*, 23 Ariz. App. 406 (1975)) ("special action jurisdiction appropriate to review purely legal question as to applicability of statute of limitations to undisputed facts when correct ruling would avoid expense and delay of unnecessary trial"). This Court implicitly found it to be the case in *Martin*, but it did not explain why.[5] By accepting review, this Court can provide that explanation.

CONCLUSION

For the reasons above, this Court should grant review and resolve issues of statewide importance.

DATED (electronically filed): July 5, 2023.

By /s/ David J. Euchner

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[5] Although Moore is seeking dismissal of only three of eight counts and would still face trial on the other five, the trial he would face would be less complex, particularly because the government destroyed the evidence related to the 2011 fire.