NO._____

IN THE SUPREME COURT OF THE UNITED STATES

MONGKHON LEEKOMON, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Georgia Court of Appeals erred in concluding that the indictment alleged a statutory tolling exception to extend the seven-year statute of limitation.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were Petitioner Mongkhon Leekomon and Respondent State of Georgia. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1 (b) (iii), are as follows:

1. Superior Court of Gwinnett County, Case No. 16B-00037-10, State v. Mongkhon Leekomon, Jury trial held November 13-17, 2017; Sentencing hearing held December 6, 2017; Sentence entered December 6, 2017; Amended Sentence entered June 4, 2018; Motion for new trial hearing held May 10, 2018; Order denying motion for new trial entered May 14, 2018.

2. Court of Appeals of Georgia, Case No. A19A081, Mongkhon Leekomon v. The State, Opinion rendered July 16, 2019; Order denying motion for reconsideration entered on September 17, 2019.

3. Georgia Supreme Court, Case No. S20C0283, Mongkhon Leekomon v. The State, Order denying petition for writ of certiorari entered May 4, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mongkhon Leekomon respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINION AND ORDERS BELOW

The Opinion of the Georgia Court of Appeals affirming Petitioner's judgment of conviction is published and reproduced here. Pet. App. 1a-11a. The order of the Superior Court denying Petitioner's motion for new trial is unpublished and reproduced here. Pet. App. 12a-14a. The order of the Georgia Court of Appeals denying Petitioner's motion for reconsideration is unpublished and reproduced here. Pet. App. 15a. The order of the Georgia Supreme Court denying Petitioner's petition for writ of certiorari is unpublished and reproduced here. Pet. App. 16a.

JURISDICTION

The Georgia Court of Appeals affirmed Petitioner's judgment of conviction on July 16, 2019. Pet. App. 1a-11a. The Supreme Court of Georgia denied Petitioner's petition for writ of certiorari on May 4, 2020. Pet. App. 16a. On March 19, 2020, this Court entered an Order extending the deadline to file a petition for writ of certiorari for a period of 150 days from the date of the order denying discretionary review. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 17-3-1 (c) provides in relevant part:

> [P]rosecution for felonies committed against victims who are at the time of the commission of the offense under the age of 18 years shall be commenced within seven years after the commission of the crime.

O.C.G.A. § 17-3-2.1 (a) provides in relevant part:

> For crimes committed during the period beginning on July 1, 1992 and ending on June 30, 2012, if the victim of a violation of: . . . (5) Child molestation or aggravated child molestation as defined in Code Section 16-6-4; . . . (7) Incest, as defined in O.C.G.A. § 16-6-22, is under 16 years of age on the date of the violation, the applicable period within which a prosecution shall be commenced under Code Section 17-3-1 . . . shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the appropriate prosecuting attorney.

INTRODUCTION

Statutes of limitations "are statutes of repose . . . ; they protect defendants and the courts from having to deal with cases in which the search for the truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." United States v. Kubrick, 444 U.S. 111, 117 (1979). The imposition of a limitations period "reflects a value judgment concerning the point at which the interests in favor of

protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones[.]" Johnson v. Railway Express Agency Inc., 421 U.S. 454, 463-464 (1975).

"The time limitation in which a criminal prosecution must be instituted is one of the essential elements of the offense." Taylor v. State, 44 Ga. App. 64, 74 (1931). "The indictment must not only show to the Court upon its face, that a public law of the State has been violated, but it should also appear that the defendant has been indicted therefor, in the manner, and within the time, prescribed by the laws of the land." McLane v. State, 4 Ga. 335, 340 (1848). *Accord* People v. Terry, 127 Cal. App. 4th 750, 773 (2005) (noting the "long-standing rule require[s] the *prosecution* to file a charging document that is not, on its face, time-barred[]") (citation omitted).

The grand jury returned an indictment on January 6, 2016 charging Petitioner with single counts each of aggravated child molestation, child molestation and incest, and a jury convicted him of these offenses. Pet. App. 1a, 3a. The face of the indictment showed that it was filed after the expiration of the seven-year statute of limitations. O.C.G.A. § 17-3-1 (c). Pet. App. 1a, 4a.

Under these circumstances, the State "must specifically allege in each count of the indictment the applicable tolling provision or exception to show that the charged offense[s] [are] not time barred." Lynch v. State, 346 Ga. App. 849, 856 (3) (2018); Jannuzzo v. State, 322 Ga. App. 760, 765 (2) (2013) ("[W]here an exception

is relied upon to prevent the bar of the statute of limitations, it must be alleged and proved."); Moss v. State, 220 Ga. App. 150, 151 (1996) (proof of exception to the statute of limitation was inadmissible where the State did not allege the exception in the indictment). *See also*, People v. Macon, 396 Ill. App. 3d 451, 458 (2009) (State must allege the circumstances of the tolling exception on the face of the indictment and indicate the specific facts and the specific exception that would suspend the statute of limitations); Sturdivan v. State, 419 So. 2d 300, 302 (Fl. 1982) (if it "appears from the date shown on the charging document that the statute of limitations may have run, the State must allege facts necessary to show the statute was tolled for the offense charged before prosecution commenced."); State v. Comstock, 205 Tenn. 389. 393 (1959) ("[W]here the indictment is brought after the period of limitations has expired, it must be pleaded and proved that certain specific facts toll the statute of limitations.").

In 2005, when the victim was 10 years old, she had knowledge that her uncle, the Petitioner, had committed sexual acts with her. Pet. App. 32a-34a. The indictment did not allege a statutory tolling exception to extend the seven-year statute of limitations. Petitioner argued, among other things, that trial counsel was ineffective by failing to file a plea in bar or motion to dismiss indictment on statute of limitation grounds and failing to object to the jury instruction on statute of limitation. The trial court denied Petitioner's motion for new trial, and the Georgia

Court of Appeals upheld the trial court's judgment affirming the convictions. Pet. App. 1a, 3a-8a.

"OCGA § 17-3-1 limits the time within which a prosecution for particular offenses or categories of offenses must commence, while OCGA §§ 17-3-2[] [and] 17-3-2.1, . . . specify periods that are excluded from the various limitations periods." State v. Outen, 296 Ga. 40, 42 (2014).

"As in all statutory construction cases, one must start with the plain text of the statute." Marx v. General Revenue Corp., 568 U.S. 371, 376 (2013).

O.C.G.A. § 17-3-2.1 (a) provides in pertinent part:

> For crimes committed during the period beginning on July 1, 1992 and ending on June 30, 2012, if the victim of a violation of: . . . (5) Child molestation or aggravated child molestation as defined in Code Section 16-6-4; . . . (7) Incest, as defined in O.C.G.A. § 16-6-22, is under 16 years of age on the date of the violation, the applicable period within which a prosecution shall be commenced under Code Section 17-3-1 . . . shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the appropriate prosecuting attorney.

Georgia's appellate courts have construed this statute to mean that the State must allege the earlier circumstance in the indictment to toll the applicable statute of limitation. *See*, Lyde v. State, 311 Ga. App. 512, 517 (2) (2011) ("If a victim of child molestation was younger than 16 at the time of the act alleged, the applicable statute of limitation does not begin to run until the victim reaches the age of 16 or

the violation is reported to law enforcement, whichever occurs earlier[]"); State v. Godfrey, 309 Ga. App. 234, 239 (2) (2011) (holding that, for the crimes charged in Counts 5, 7 and 8, the statute of limitations did not begin to run until the earlier of the two dates in O.C.G.A. § 17-3-2.1 (a), -- when the offenses were reported to police in January 2003); Duke v. State, 298 Ga. App. 720, 721-722 (1) (2009) (finding that the crime was not reported to law enforcement until 2006, long after the victim turned 16; therefore, the statute of limitation ran 15 years from January 12, 1995, the victim's 16th birthday, and did not expire until January 12, 2010); Johnston v. State, 213 Ga. App. 579, 580 (1994) (O.C.G.A. § 17-3-2.1 evinces the legislature's intent that the statute of limitation for certain crimes against minors should be tolled by the infancy of the victim until the victim is 16 years of age or until the violation is reported to law enforcement authorities, whichever is earlier.").

States with analogous tolling statutes have reached the same conclusion. *See*, Curry v. State, 227 So. 3d 628, 630 (Fla. DCA 2017) (Fla. Stat. § 775.15 provides that "[i]f a violation of an enumerated sexual offense is reported to law enforcement or other governmental agency before the victim reaches [the] age of 18, it is this reporting date that triggers the statute of limitations[]"); State v. Kerby, 141 N.M. 413, 419 IV (2007) (N.M. Stat. 30-1-9.1 tolls the statute of limitations for certain offenses until the victim attains the age of 18 or the violation is reported to a law enforcement agency, whichever occurs first).

The determination of whether an indictment alleges a statutory tolling exception depends on the language in the indictment. In rejecting Petitioner's claims, the Georgia Court of Appeals failed to construe the indictment narrowly against the drafter, misread the indictment and text of O.C.G.A. § 17-3-2.1 (a), failed to strictly construe criminal statutes against the State, ignored its own precedent, and relied on inapposite cases. "[T]he holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome." (Citation omitted). Tate v. Showboat Marina Casino Partnership, 431 F.3d 580, 582 (7th Cir. 2005). The result is confusion and error.

Here, the indictment did not specifically allege O.C.G.A. § 17-3-2.1 as a tolling exception in each count. Rather, the following language appears in the last sentence of each count: "said offense not being known to law enforcement until January 5, 2015." Pet. App. 3a. At trial, both the State and Petitioner believed that the foregoing phrase invoked O.C.G.A. § 17-3-2.1 (a)'s tolling provision, "until . . . the violation is reported to a law enforcement agency[.]" Pet. App. 23a, 28a. The tolling exception relied upon by the State was reflected in its written request to charge on statute of limitation:

> [P]rosecution for these offenses must begin within seven years after the offense has been committed or within seven years of when the offenses became known to law enforcement officers. If you find from

> the evidence that the indictment or accusation in this case was not filed within seven years after the offense was committed or seven years of when the offense became known to law enforcement officers, it would be your duty to acquit this Defendant as to that offense.

Pet. App. 6a, 35a-37a. The trial court gave the foregoing instruction to the jury without objection from Petitioner. Pet. App. 6a, 27a, 31a.

Trial counsel testified at the motion for new trial hearing that he reviewed the pertinent law on the statute of limitations, including O.C.G.A. § 17-3-2.1, and determined he had no "valid basis to file a plea in bar or a motion to dismiss the indictment" on that ground. Pet. App. 4a, 17a-21a. He understood that if the State was relying on an exception to the statute of limitations, the exception had to be alleged in the indictment and proved. Pet. App. 23a-24a. He believed that the indictment was timely because it was filed within seven years of T.N.'s sixteenth birthday and the date she reported the crimes to police. Pet. App. 4a, 21a-22a, 29a-30a

The Georgia Court of Appeals recognized that "the indictment was filed more than seven years after the crimes were committed[.]" Pet. App. 4a. Finding that "T.N. turned 16 years of age on January 24, 2011, and she first reported the crimes to police on January 5, 2015[,]" the Court held that trial counsel "properly concluded that the

January 6, 2016 indictment, filed within seven years of both T.N.'s sixteenth birthday and the date she reported the crimes to police, was timely." Pet. App. 4a.

This holding is erroneous as it conflicts with settled precedent that the applicable statute of limitation does not begin to run until the earlier of two circumstances in O.C.G.A. § 17-3-2.1 (a). This determination is fact-driven. *See*, Lyde, 311 Ga. App. at 517 (2), Godfrey, 309 Ga. App. at 239 (2); Duke, 298 Ga. App. at 721-722 (1); Johnston, 213 Ga. App. at 580. The Georgia Court failed to realize that the earlier circumstance must be alleged in the indictment to toll the operation of the seven-year statute of limitation. Godfrey, 309 Ga. App. at 239 (2). Because the indictment did not allege that the victim reached the age of 16 on January 24, 2011 in each of the counts, and this date is earlier than January 5, 2015, the State did not allege a valid tolling provision under O.C.G.A. § 17-3-2.1 (a). *See*, McLane, 4 Ga. at 341; Moss, 220 Ga. App. at 151. *See also*, Lyde, 311 Ga. App. at 517 (2), Godfrey, 309 Ga. App. at 239 (2); Duke, 298 Ga. App. at 721-722 (1); Johnston, 213 Ga. App. at 580. Pet. App. 1a, 3a.

The plain language of the statute does not support the Court's interpretation. The Georgia Court of Appeals failed to read the statute as a whole, misread the 'or' in the statute as a conjunctive, 'and', which rendered the "whichever occurs earlier" phrase meaningless. *See*, Ga. Paper Stock Co. v. State Tax Bd., 174 Ga. 816, 819 (1932) ("Or" is never construed to mean 'and' when the evident intent . . . would be

thereby defeated."); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("[A] cardinal principle of statutory construction is that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant."); Slakman v. Cont'l Cas. Co., 277 Ga. 189, 191 (2003) ("Courts should attempt to give effect to all parts of a statute, and constructions that would render meaningless a part of the statute should be avoided.").

Additionally, by concluding that the mere averment in the indictment that "T.N. was under the age of 16" invokes O.C.G.A. § 17-3-2.1 (a) (Pet. App. 5a), the Georgia Court of Appeals improperly engrafts language onto the statute that does not otherwise appear there. *See*, Nichols v. United States, 136 S.Ct. 1113, 1118 III (2016) ("To supply omissions transcends the judicial function.") (citation omitted); CBS v. Primetime 24 J.V., 245 F.3d 1217, 1222 II (A) (11th Cir. 2001) (Courts should begin and end the process of legislative interpretation with the words of the statutory provision); Perkins v. State, 277 Ga. 325, 326 (2) (2003) ("The unambiguous words of a criminal statute are not to be altered by judicial construction[]"); People v. Casas, 104 N.E.3d 425, 430 (Ill. 2017) (the Court "must not depart from the statute's plain meaning by reading into it exceptions, limitations or conditions the legislature did not express.")

The face of the indictment did not state in each of the counts that the victim "*reached the age of 16*" and the date, a requisite circumstance under O.C.G.A. § 17-3-2.1 (a), to toll the seven-year statute of limitation. *See*, McLane, 4 Ga. at 341; Lynch, 346 Ga. App. at 856 (3); Jannuzzo, 322 Ga. App. at 765 (2); Moss, 220 Ga. App. at 151; Taylor, 44 Ga. App. at 74. Nor did it allege that the "*violation is reported to a law enforcement agency* on January 5, 2015," another requisite tolling exception under the statute. Thus, it did not "affirmatively appear [from the face of the indictment] that [Petitioner] was liable under the law, to be arrested, tried and convicted for the offenses." Hollingsworth v. State, 7 Ga. App. 16, 18 (1909); McLane, 4 Ga. at 342.

The Court's misinterpretation of the plain meaning of O.C.G.A. § 17-3-2.1 unlawfully extended the seven-year limitation period beyond its natural life. Had trial counsel filed a plea in bar or motion to dismiss on statute of limitation grounds, the trial court would have been constrained to grant the motion. Jenkins v. State, 278 Ga. 598, 604 (1) (B) (2004) ("If a defendant prevails on a plea in bar on the statute of limitations, the charge should be dismissed."). Petitioner would stand a free man.

STATEMENT OF THE CASE

The January 2016 indictment alleged that Petitioner committed the offenses of aggravated child molestation and child molestation against T.N., a child under the age of 16 between August 1, 1998 and December 31, 2007 and incest against T.N.

between January 1, 1998 and December 31, 2007. Pet. App. 1a-3a. T.N. is Petitioner's niece. Pet. App. 2a. In December 2017, a jury convicted Petitioner of all counts. Pet. App. 1a-2a. Petitioner appealed the denial of his motion for new trial, and the judgment of his conviction was affirmed by the Georgia Court of Appeals on July 16, 2019. Pet. App. 1a. On September 17, 2019, the Court of Appeals denied Petitioner's motion for reconsideration. Pet. App. 15a. On May 4, 2020, the Supreme Court denied Petitioner's petition for writ of certiorari. Pet. App. 16a.

In 2005, T.N. and her parents visited Petitioner and his wife at their townhome on the weekends. Pet. App. 29a. According to T.N., Petitioner touched her vagina, buttocks and breasts and put his mouth on her vagina during the visits. Pet. App. 2a, 29a. T.N. turned 16 years old on January 24, 2011, but she waited almost four years until January 5, 2015 before notifying law enforcement about Petitioner's acts. By then, T.N. was 19 years old. Pet. App. 2a. She had already disclosed her uncle's acts to her college boyfriend in 2013 as well as a college counselor and her mother in 2014. Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

> The 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. Such a limitation is designed to protect individuals

> from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.
>
> Toussie v. United States, 397 U.S. 112, 114-115 (1970).

This Court has repeatedly held that criminal limitations statutes must be "liberally interpreted in favor of repose." Id. at 115. *Accord* Jannuzzo, 322 Ga. App. at 761-762.

The value judgment underlying the length of a limitations period "typically rests in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." Stogner v. California, 539 U.S. 607, 615 II (2003). Criminal statutes of limitation "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." United States v. Marion, 407 U.S. 307, 322 (1971). This Court "once described statutes of limitations as creating 'a presumption which renders proof unnecessary.'" Wood v. Carpenter, 101 U.S. 135, 139 (1879). Thus, "to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution[.]" Stogner, 539 U.S. at 616 II.

"[T]he sole function of the Courts is to enforce [the statute] according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1979). *See also*, O.C.G.A. §

1-3-1 (b) ("In all interpretations of statutes, the ordinary signification shall be applied to all words[.]"). Where, as here, the legislature did not define words like "under" or "reached" in a statute, "the basic rule used by Courts across the country is to apply the word's ordinary, everyday meaning." Couch v. Red Roof Inns, Inc., 291 Ga. 359, 364 (1) (2012). *See also*, James Kent, Commentaries on American Law 432 (1826) ("The words of a statute are to be taken in their natural and ordinary signification and import[.]"). Courts typically consult the dictionary to "determine the ordinary meaning of a term" in a statute. *See*, CBS, 245 F.3d at 1223 ("In order to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance.") (citations omitted). The Georgia Court of Appeals should have consulted the dictionary for the definition of "under" or "reached."

Viewing the language "in the context in which it appears, and . . . read[ing] the statutory text in its most natural and reasonable way," the Court took the words out of context. Johnson v. State, 308 Ga. 141, 144 (2020). Specifically, it embarked on judicial construction and improperly substituted the phrase "under the age of 16" in the indictment for requisite statutory language, "until the victim has reached the age of 16[]" to support its conclusion that the indictment alleged a tolling exception under O.C.G.A. § 17-3-2.1 (a). The Court improperly varied the plain terms of the statute, essentially rewriting it. *See*, Anderson v. Wilson, 289 U.S. 20, 27 (1933)

("We take the statute as we find it."); Baber v. Hospital Corp. of America, 977 F.2d 872, 878 II (4th Cir. 1992) ("When a statute is clear and unambiguous, we must apply its terms as written, instead of varying its terms to accommodate a perceived legislative intent."); State v. Fielden, 280 Ga. 444, 448 (2006) (Courts "do not have the authority to rewrite statutes[]"); Jackson v. Jackson, 186 Tenn. 337, 342 (1948) ("As a Court we take the [statute] as it was written by the Legislature, not as we would write it.").

Because this case presents a fundamental error in statutory construction and departs from the settled principle that criminal statutes should be strictly construed against the State and liberally in favor of the accused, contrary to this Court's precedent, a majority of the federal circuits and several State courts, this Court should grant the writ of certiorari, reverse Petitioner's convictions and remand the case to the trial court for findings consistent with this Opinion.

I. Georgia's Outlier Position is Contrary to the Ordinary Meaning Canon.

An ordinary reader can see that the language in each count of the indictment is not verbatim to either tolling circumstance in O.C.G.A. § 17-3-2.1 (a): "until the victim has reached the age of 16 or [until] the violation is reported to a law enforcement agency[.]" The indictment speaks to the date law enforcement knew about the offense: "said offense not being known to law enforcement until January 5, 2015." Pet. App. 1a, 3a. It does not state that the victim reported the violation to

law enforcement or that law enforcement's knowledge of the offense resulted from the victim's report of the violation. Id. The averment in the indictment cannot be manipulated or distorted to mean something else. *See*, Nichols, 136 S.Ct. at 1118 III (reading words into a statute "is not a construction of a statute, but in effect, an enlargement of it by the court[]") (citation omitted); Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000) ("[T]he role of the judicial branch is to apply statutory language, not to rewrite it."); Perkins, 277 Ga. at 326 (2).

"In a criminal statute of limitations[,] only an exception or condition contained *within the statute* will toll its operation[]") (emphasis supplied), Duncan v. State, 193 Ga. App. 793, 794 (1989), citing 21 AmJur2d 227 and 22 C.J.S. 228 (1). "As a general rule, exceptions will not be implied to statutes of (limitation) for criminal offenses, and ordinarily the running of such statute is not interrupted unless it contains an exception or condition that will toll its operation." Womack v. State, 260 Ga. 21, 23 (1990).

"When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-462 (2002). *See also*, Deal v. Coleman, 294 Ga. 170, 172-173 (1) (2013) ("When we consider the meaning of a statute, we must presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its 'plain and ordinary meaning[.]") (citations omitted). Because "the

language of [O.C.G.A. § 17-3-2.1 (a)] is plain and susceptible to only one natural and reasonable construction, courts must construe the statute accordingly." Chase v. State, 285 Ga. 693, 695 (2) (2009).

"Criminal limitations statutes are to be liberally interpreted in favor of repose." United States v. Habig, 390 U.S. 222, 227 (1968). The majority of federal circuits agree with this principle. *See*, United States v. Miller, 911 F.3d 638, 645 (II) (1st Cir. 2018); United States v. Rivera-Ventura, 72 F.3d 277, 281 (2nd Cir. 1995); United States v. Gilchrist, 215 F.3d 333, 338 (3rd Cir. 2000); United States v. Rabhan, 540 F.3d 344, 347 (5th Cir. 2008); United States v. Gomez, 38 F.3d 1031, 1037 (8th Cir. 1994); United States v. Gonsalves, 675 F.2d 1050, 1055 (9th Cir. 1982); Phillips v. United States, 843 F.2d 438, 443 II (11th Cir. 1988); United States v. McGoff, 831 F.2d 1071, 1084 (D.C. Cir. 1987).

State courts adhere to this principle as well. *See*, State v. King, 282 So. 2d 162, 166 (Fl. 1973); Jannuzzo, 322 Ga. App. at 761-762; Commonwealth v. Perella, 464 Mass. 274, 283 (2013); State v. Nuss, 454 N.W.2d 482, 486 (Neb. 1990); State v. Lawrence, 312 N.W.2d 251, 255 (Minn. 1981).

Construing the language in the indictment narrowly against the drafter, the State, and construing O.C.G.A. § 17-3-2.1 strictly against the State "and in the light most favorable to the accused," the Court of Appeals' construction deviates from these settled principles and leads to an absurd result. Womack, 260 Ga. at 23 ("[A]ny

exception to the limitation period must be construed narrowly and in [the] light most favorable to the accused."). A Court cannot imply "elaborate unprovided-for exceptions to a text." Samak v. Warden, FCC Coleman-Medium, 766 F.3d 1271, 1289 (11th Cir. 2014). "Under the omitted-case canon of statutory interpretation, '[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*)." State v. Schultz, 939 N.W.2d 519, 537 III (F) (2020).

Contrary to the Court's holding, the concluding phrase in each count, "said offense not being known to law enforcement until January 5, 2015" does not invoke O.C.G.A. § 17-3-2.1 (a). Rather, it appears to be an attempt to invoke O.C.G.A. § 17-3-2 (2), which states: "The period within which a prosecution must be commenced under Code Section 17-3-1 or other applicable statute does not include any period in which: . . . (2) The person committing the crime is unknown or the crime is unknown."

In Georgia, the knowledge of the victim is imputed to the State. *See*, Harper v. State, 292 Ga. 557, 563 (3) (2013); Lowman v. State, 204 Ga. App. 655, 655-656 (1992) ("The knowledge at issue in O.C.G.A. § 17-3-2 (2) is the knowledge of the State, including that imputed to the State through the knowledge of the prosecution, the knowledge of someone interested in the prosecution, or the knowledge of one injured by the offense."); Duncan, 193 Ga. App. at 794 ("the knowledge of a victim of a crime . . . is imputed to the State."). The Georgia General Assembly "intended

for the 'person unknown' tolling exception to apply to a situation . . . where there is no identified suspect among the universe of all potential suspects." Jenkins, 278 Ga. at 603 (I) (A).

The language in this indictment is analogous to the indictment in Lee v. State, 211 Ga. App. 112 (1993). In Lee, the defendant, a correctional officer, was charged in a multicount indictment with sodomy and 18 counts of sexual contact with an inmate in violation of O.C.G.A. § 16-6-5.1. Id. Counts 2-18 of the indictment charged defendant with crimes which were alleged to have been committed outside the applicable four-year statute of limitation (O.C.G.A. § 17-3-1 (c)). The State alleged in the indictment that the crimes were unknown to the "proper prosecuting officer" until August 26, 1992. Id. Lee filed a plea in bar, arguing that the indictment should be dismissed as it was filed outside the statute of limitations. The trial court denied the plea in bar, finding that because the victim was incarcerated, the statute did not start to run until the victim was released from prison or the actual date of the report of the crimes by the alleged victim. Id. The Court of Appeals reversed the trial court's judgment, finding that the victim's knowledge was imputed to the State and the statute started to run when the victim was aware of the crimes. Id. The Court held that "this rule applies even if there may be some reason why the victim did not report the crime, such as the victim's age, her lack of awareness that defendant's conduct was criminal and/or her purported fear of the defendant." Id.

The same analysis applies here. T.N. was ten years old in 2005 and knew that Petitioner, her uncle, had committed sexual acts against her. Pet. App. 2a. The State conceded that the offenses commenced in 2005 when Petitioner and his wife moved to a townhome in Gwinnett County. Pet. App. 32a-33a. Because T.N.'s knowledge of the crimes was imputed to the State in 2005, law enforcement's knowledge of the offenses in 2015 is irrelevant and did not operate to toll the seven-year statute of limitations. Harper, 292 Ga. at 563 (3); Lee, 211 Ga. App. at 112; Lowman, 204 Ga. App. at 655-656.

The State "bears the burden of proving that an otherwise time-barred allegation falls within an exception to the statute of limitation." State v. Green, 350 Ga. App. 238, 241 (3) (2019). Since the State did not allege a valid statutory tolling exception to the statute of limitation in the indictment, it was not permitted to prove the charges at trial. *See*, Jenkins, 278 Ga. at 605 (1); State v. Davidson, 816 S.W.2d 316, 321 (Tenn. 1991) (where allegations in indictment or presentment are insufficient to plead tolling of statute of limitations, indictment or presentment will be dismissed upon motion, and "there can be no trial in which to prove what was not alleged.").

The trial court was constrained to find that the State did not allege a valid tolling exception under O.C.G.A. §§ 17-3-2.1 and 17-3-2 (2) and trial counsel was ineffective by not filing a plea in bar or motion to dismiss on statute of limitation

grounds. Trial counsel had reviewed the applicable statutes and knew that the State had to allege an exception to the statute of limitation in the indictment. Pet. App. 18a-21a, 23a-24a. He understood that if the offense was unknown or the identity of the perpetrator was unknown, that time frame tolled the statute of limitations, but he was not aware of the law that the knowledge of the victim is imputed to the State. Pet. App. 26a, 41a. Trial counsel did not believe the rule of lenity applied to statute of limitations. Pet. App. 25a. At all relevant times, trial counsel thought that the indictment was timely filed. Pet. App. 21a.

Under these circumstances, trial counsel's conduct was not reasonable. Strickland v. Washington, 466 U.S. 668, 688 (1984). The Georgia Court of Appeals "cannot affirm a trial court's reasoning when it is based upon an erroneous legal theory." Phillips v. Harmon, 297 Ga. 386, 397 II (2015).

II. The Decision Below is Wrong.

This is a case that "begins, and pretty much ends, with [O.C.G.A. § 17-3-2.1's text]." Lomax v. Ortiz-Marquez, 140 S.Ct. 1721, 1724 (2020). It is well settled that "any period of limitation is utterly meaningless without specification of the event that starts it running." Klehr v. A.O. Smith Corp., 521 U.S. 179, 199 (1997). "[I]t should . . . appear that the defendant has been indicted [for the crimes], in the manner, and within the time, prescribed by the laws of the land." McLane, 4 Ga. at 340. *Cf.* State v. Nistler, 342 P.2d. 1035, 1041 (Ore. 2015) (holding that, because the

indictment "does not explicitly allege concealment, much less specify the date within the statute of limitations when any 'concealment' ended[,] . . . . on the face of the indictment, the crimes alleged were committed on dates more than three years prior to the bringing of the action[]").

Here, the instant indictment fails to allege on its face that the victim "reached the age of 16" in each count, a requisite statutory tolling exception, and the date of that occurrence. Pet. App. 3a, 23a. The Georgia Court of Appeals erred when it concluded that "an indictment alleging the molestation of a child 'under the age of 16' sufficiently invoke[s] the statute of limitation tolling provision set forth in O.C.G.A. § 17-3-2.1 [: until the victim has reached the age of 16][.]" Pet. App. 5a. If the legislature had intended the result reached by the Georgia Court, it would have written the statute this way:

> For crimes committed during the period beginning on July 1, 1992 and ending on June 30, 2012, if the victim of a violation of: . . . (5) Child molestation or aggravated child molestation as defined in Code Section 16-6-4; . . . [or] (7) Incest, as defined in O.C.G.A. § 16-6-22 is under 16 years of age on the date of the violation, the applicable period within which a prosecution shall be commenced under Code Section 17-3-1 . . . shall not begin to run until *a child under the age of 16 years* or the

violation is reported to a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier.

But the statute does not read that way. *See*, Fielden, 280 Ga. at 448 (Courts "can not add a line to the law.") (citation and punctuation omitted); A. Scalia and B. Garner, Reading Law: The Interpretation of Legal Texts at 93 (2012) ("Nothing is to be added to what the text states or reasonably implies."); R.W.M. Dias, Jurisprudence 232 (4th ed.) ("A judge may not add words that are not in the statute, save only by way of necessary implication.").

"The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." (Citations omitted). Bostock v. Clayton County, 140 S.Ct. 1731, 1749 (2020). Here, the Georgia Court of Appeals improperly conflated a condition precedent for the application of O.C.G.A. § 17-3-2.1 -- the requirement that the victim be under the age of 16 years for child molestation, aggravated child molestation and incest -- with a requisite circumstance which may toll the statute of limitation under O.C.G.A. § 17-3-1, i.e. "until the victim has reached the age of 16[.]" The tolling exception of "until the victim has reached the age of 16" is a valid exception under O.C.G.A. § 17-3-2.1 *only* if it is alleged in the indictment together with the date of that occurrence *and* if that date is earlier than the date the violation is reported to a law enforcement agency. *See*, Johnston, 213 Ga. App. at 580 ("[I]nfancy shall toll the

statute of limitations for [certain] offenses until the victim is 16 years of age or until the violation is reported to law enforcement authorities, whichever is earlier.").

"In the absence of an intention to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning." Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 207 (1997). Here, there is "no such requisite clear indication of an intent at odds with the text of [O.C.G.A. § 17-3-2.1][]" that would prevent a Court from construing the words of the statute according to their ordinary and common meaning. Detweiler v. Pena, 38 F.3d 591, 596 II (D) (D.C. Cir. 1994).

Common sense and dictionary definitions dictate the conclusion that "under the age" of 16 does not mean the same thing as "reaches the age" of 16. *See*, Merriam-Webster Online Dictionary ("under" means "below"; "reach" means "to get up to or as far as").

The Court erroneously read the phrase "under the age of 16" in isolation, which rendered the language "until the victim reaches the age of 16" superfluous. *See*, Samantar v. Yousuf, 130 S.Ct. 2278, 2289 (2010) ("[W]e do not . . . construe statutory phrases in isolation; we read statutes as a whole."); Robinson v. Shell Oil Co., 519 U.S. 337, 341 II (A) (1997) ("The plainness . . . of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). This reading of the indictment and the statute does not square with common sense. *See*, McNeill

v. United States, 563 U.S. 816, 819 III (2011) (Court must "accord words and phrases their ordinary meaning and avoid rendering them meaningless, redundant and superfluous[]"); Tuten v. Brunswick, 262 Ga. 399, 404 (7) (1992) (Statutory construction "must square with common sense and sound reasoning.").

While the Court of Appeals found support for its conclusion in Lyde, 311 Ga. App. at 517 (2) and Godfrey, 309 Ga. App. at 238 (2), both cases are factually distinguishable. Pet. App. 5a. The question of whether the date the child reached the age of 16 was earlier than the date the violation was reported to a law enforcement agency was not raised in Lyde and Godfrey. Nor was it raised in Tompkins v. State, 265 Ga. App. 760 (2004) and Grizzard v. State, 258 Ga. App. 124 (2004), upon which Lyde and Godfrey rely for the notion that an allegation in the indictment that the child is under the age of 16 invokes the tolling provision of when the "victim has reached the age of 16" under O.C.G.A. § 17-3-2.1. An essential element of child molestation and aggravated child molestation is the child must be under the age of 16 at the time of the offense. *See*, O.C.G.A. § 16-6-4 (a). Such averment is in the indictment for that reason and none other.

Upon close examination of Tompkins and Grizzard, each case is inapposite.

In Grizzard, the defendant was charged with two counts of aggravated child molestation, one count of statutory rape, and one count of aggravated sexual battery. Grizzard moved to dismiss the indictment on the grounds that the statute of

limitations had run and the State did not allege in the indictment an exception to the applicable limitation period. 258 Ga. App. at 125 (2). The State did not reference O.C.G.A. § 17-3-2.1 as a tolling exception in the indictment. The aggravated child molestation and statutory rape counts alleged that the victim was under the age of 16, not that the victim reached the age of 16 and the date of the victim's 16th birthday. Id. The Court recognized that an essential element of child molestation and statutory rape requires that the child be under the age of 16 years. Id. O.C.G.A. §§ 16-6-3, 16-6-4 (a).

The facts in Grizzard do not address whether the indictment contained an averment that the violation was reported to law enforcement or a date certain. The Court held that because the State alleged in the indictment that the victim was under the age of 16, "it appears on the face of the indictment that the statute of limitation is subject to the condition found in O.C.G.A. § 17-3-2.1, i.e. that the victim is under the age of 16." 258 Ga. App. at 127 (2). This is an erroneous statement of Georgia law. The fact the victim is under the age of 16 is not a tolling circumstance or condition under O.C.G.A. § 17-3-2.1 (a).

The plain language of the statute provides that only two circumstances toll the seven-year statute of limitation (O.C.G.A. § 17-3-1 (a)): "'until the victim has reached the age of 16' or '[until] the violation is reported to a law enforcement agency,' . . . whichever occurs earlier." *See*, Lyde, 311 Ga. App. at 517 (2); Godfrey,

309 Ga. App. at 239 (2); Duke, 298 Ga. App. at 721-722 (1); Johnston, 213 Ga. App. at 580. Thus, Grizzard was wrongly decided.

Tompkins, *supra*, is also not binding precedent for two reasons. First, the facts are distinguishable from the evidence in this case. Tompkins, charged with two counts of child molestation, conceded that the averment in the indictment that the victim was under the age of 16 years invoked the statute of limitation tolling provision set forth in O.C.G.A. § 17-3-2.1. 265 Ga. App. at 765 (2) (c).

Since Petitioner did not make that concession in this case and emphatically urged the antithesis of that position, Tompkins is not on point. Further, the Tompkins Court did not address whether the indictment also contained an averment that "the violation is reported to a law enforcement agency" and the date of such occurrence, a competing consideration under O.C.G.A. § 17-3-2.1 (a).

Second, the Tompkins Court misquotes O.C.G.A. § 17-3-2.1 (a), stating that the "applicable period within which a prosecution shall be commenced under Code Section 17-3-1 . . . shall not begin to run until the victim has reached the age of 16." 265 Ga. App. at 765 (2) (c). The statute plainly provides that, the "applicable period within which a prosecution shall be commenced under Code Section 17-3-1 . . . shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency, . . . whichever occurs earlier." O.C.G.A. § 17-3-2.1 (a). Thus, Tompkins is an erroneous statement of the law in Georgia.

In sum, the Court of Appeals' reliance on Lyde and Godfrey was misplaced.

Lyde is factually dissimilar. The defendant in Lyde was charged with two counts of aggravated child molestation and two counts of child molestation. While the Lyde Court noted the indictment alleged the victim was under the age of 16, an essential element of the offenses, it fails to mention whether the indictment contained an averment regarding *when* the victim "reached the age of 16" or whether or when the violation was reported to a law enforcement agency. 311 Ga. App. at 517 (2). Absent information concerning these pertinent facts, it cannot be determined the State alleged a valid statutory tolling exception under O.C.G.A. § 17-3-2.1 (a).

Therefore, Lyde does not control the outcome here. *See*, Willis v. State, 304 Ga. 686, 694 (2018) ("[Q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedents."). The same is true for Godfrey as it relied upon inapposite cases, Tompkins and Grizzard; neither case dealt specifically with the question of whether the indictment alleged the earlier of two circumstances in O.C.G.A. § 17-3-2.1 (a).

"[T]here being no statutory basis for the exceptions to the statute [of limitation] espoused here by the [Georgia Court of Appeals]," it was required to "give effect to the clear expression of legislative will that felony prosecutions [of these crimes] must be commenced within [seven] years after the commission of the

crimes and reverse [Petitioner's] convictions of" aggravated child molestation and child molestation. Sears v. State, 182 Ga. App. 480, 482 (1987). *See also*, O.C.G.A. § 17-3-1 (c) (2007).

Trial counsel's failure to file a plea in bar or motion to dismiss indictment on statute of limitation grounds prejudiced Petitioner. But for his omission, there is a reasonable probability Petitioner would not have been convicted of the crimes. Strickland, 466 U.S. at 694 III (B).

III. The Question Presented is Important and this Case Presents an Ideal Vehicle for Deciding It.

"Statutes of limitation are vital to the welfare of society and are favored in the law . . . They promote repose by giving security and stability to human affairs. . . While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary." Wood, 101 U.S. at 139 (3). *See also*, Burnett v. New York Cent. R.R., 380 U.S. 424, 428 n. 4 (1965) ("the right to be protected from stale claims prevails over the right to prosecute those claims."); Kavanagh v. Noble, 332 U.S. 535, 539 (1947) (statutory periods "are established to cut off rights, justifiable or not, that might otherwise be asserted, and they must be strictly adhered to by the judiciary[]"); Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 559 (2d Cir. 1962) (*en banc*), cert denied, 372 U.S. 912 (1963) (noting that the primary purpose of statute of limitations is to protect the interests of potential

defendants, both from a loss of their defense and fear of litigation); Riley v. State, 305 Ga. 163, 167 (3) (2019) ("Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by passage of time and to minimize the danger of official punishment because of acts in the far distant past."); State v. Fogel, 492 P2d 742, 744 (1972) (statutes of limitation "are designed primarily to protect the accused from the burden of defending himself against charges of long completed misconduct.").

While the age of majority may differ among the States, one thing is clear: the age of majority is universally recognized as a demarcation point in a child's life where she has the wherewithal to know that a violation has been committed against her. That date may operate to toll the statute of limitation in criminal cases or determine the time frame by which a victim may bring a civil action against her perpetrator. *See, e.g.*, Fla. Stat. 775.15 (7) ("If the victim of a violation of s. 794.011, s. 794.05, s. 800.04 or s. 826.04 is under the age of 16, the applicable period of limitation, if any, does not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency or other governmental agency, whichever occurs earlier."); Wis. Stat. § 893.587 (claim may be filed within two years of reaching age of majority).

The inclusion of language in O.C.G.A. § 17-3-2.1 (a), "until the victim has reached the age of 16" coupled with the concluding phrase, "whichever occurs

earlier" can only mean what the words state there, that the legislature contemplated that a victim might sleep on her rights for whatever reason and not report a violation to law enforcement until well after her 16th birthday. *See*, Barnhart, 534 U.S. at 461-462 ("the legislature says in a statute what it means and means in a statute what it says there.").

Given this Court's dictate construing statutes of limitations and their tolling provisions liberally in favor of repose, O.C.G.A. § 17-3-2.1 (a) expresses the legislature's intent to shorten the time that tolls the statute of limitation based on the earlier of two circumstances. Habig, 390 U.S. at 227. Otherwise, it would not have included the language, "whichever occurs earlier." *See*, United States v. Butler, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used."). It should not be "presum[ed] that the legislature was ignorant of the meaning of the language it employed." BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004).

A Court "can not make exceptions to the statute of limitations in favor of particular persons or special cases, to meet the hardships resulting from its application to the facts of a given case." Davis v. Boyett, 120 Ga. 649, 655 (1904). Nor can it "abdicate [its] duty to faithfully apply a valid limitations period." United States v. Seale, 542 F.3d 1033, 1045 III (5th Cir. 2008). One "must be guided by the language of the statute itself rather than by the popularity of the result of the statute's

proper application to the facts." Dankert v. State, 859 So. 2d 1221, 1224 (2nd DCA 2003). "While their operation in some courts deprives society of its ability to prosecute criminal offenses, that is the price we pay for repose." United States v. Meador, 138 F.3d 986, 994 II (C) (5th Cir. 1998).

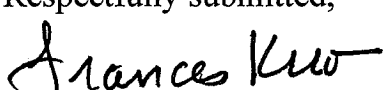
The Georgia Court of Appeals has misconstrued the plain meaning of O.C.G.A. § 17-3-2.1 (a) for over a decade and continues to do so. "The liberty of a citizen is not to be abridged by implication." Perkins, 277 Ga. at 326 (2).

CONCLUSION

The petition for writ of certiorari should be granted.

This 28 day of September, 2020.

Respectfully submitted,



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