IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

NICHOLAS CLAY OSLUND,
*Petitioner*.

No. 2 CA-CR 2015-0212-PR
Filed July 20, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Petition for Review from the Superior Court in Mohave County
No. CR20061587
The Honorable Steven F. Conn, Judge

**REVIEW GRANTED; RELIEF GRANTED**

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COUNSEL

Mohave County Legal Defender's Office, Kingman
By Ronald S. Gilleo, Legal Defender
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

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V Á S Q U E Z, Presiding Judge:

**¶1** Nicholas Oslund seeks review of the trial court's order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review and, for the reasons that follow, grant relief.

**¶2** Oslund pled guilty to attempted aggravated assault and was sentenced to an aggravated sixteen-year prison term pursuant to former A.R.S § 13-702.01(C).[2] Oslund sought post-conviction relief,[3] arguing that his trial counsel had been ineffective in failing to request an evaluation pursuant to Rule 26.5, Ariz. R. Crim. P., "to

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

[2]In this decision, we refer to the sentencing statutes in effect at the time of Oslund's offenses. *See* 2006 Ariz. Sess. Laws, ch. 148, § 1 (former A.R.S. § 13-702), § 2 (former § 13-702.01).

[3]The record establishes that Oslund filed a timely notice of post-conviction relief in May 2008, but for various reasons, the case languished for four years; not until Oslund filed a second notice of post-conviction relief in May 2012 did the trial court become aware that the sentencing transcript had not been filed, as the court previously had ordered. The two notices apparently were regarded as having commenced one timely proceeding, and a petition finally was filed in November 2013.

establish a statutory mitigating factor" and that the trial court was not permitted to impose the sixteen-year prison term pursuant to § 13-702.01(C) because it did not find two aggravating factors specifically enumerated in § 13-702(C), citing *State v. Perrin*, 222 Ariz. 375, 214 P.3d 1016 (App. 2009).[4] The trial court summarily denied relief, concluding that trial counsel had not been ineffective in failing to seek a Rule 26.5 evaluation and that the sentence was proper because Oslund had agreed the court "could find aggravating factors" and "use them to impose a substantially aggravated sentence where only one statutory aggravating factor was found." This petition for review followed.

**¶3** On review, Oslund asserts the trial court erred in rejecting his claim that the sixteen-year prison term was improper pursuant to *Perrin*. At the time of Oslund's offenses, § 13-702(C) provided a list of specified aggravating factors for sentencing purposes, including a "catch-all" provision in subsection (23) allowing as an aggravating factor "[a]ny other factor" that is "relevant to the defendant's character or background or to the nature or circumstances of the crime." Oslund's plea agreement provided that he "waiv[ed] any right . . . to a jury determination of aggravating sentencing factors." It also allowed for the court to find any statutory aggravating factors as well as certain aggravating factors falling under the catch-all provision of § 13-702(C), specifically, factors based on: Oslund's "criminal history not otherwise covered by A.R.S. § 13-702(C)(11); reduction of charges; dismissed charges; all potential enhancement allegations." At

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[4]Although Oslund characterized *Perrin* as a significant change in the law pursuant to Rule 32.1(g), we need not address that question because Oslund's conviction was not final when *Perrin* was decided. *See State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (case final when judgment of conviction rendered, appeal exhausted, and time for filing petition for certiorari to Supreme Court passed or certiorari denied); *State v. Ward*, 211 Ariz. 158, ¶¶ 9-11, 118 P.3d 1122, 1126 (App. 2005) (pleading defendant's of-right Rule 32 proceeding functional equivalent of direct appeal for purpose of finality).

sentencing, the court found as aggravating factors one of Oslund's previous felony convictions and the factors listed in the plea agreement. The plea agreement provided a sentencing range of 3.5 years to 16.25 years. Pursuant to § 13-702.01(C), the sixteen-year term imposed by the court was available only if the court found that "at least two aggravating factors listed in section 13–702, subsection C apply."

**¶4** Our supreme court determined in *State v. Schmidt* that the catch-all provision was "patently vague" and thus its use "as the sole factor to increase a defendant's statutory maximum sentence violates due process because it gives the sentencing court virtually unlimited post hoc discretion" to increase the defendant's sentence based on his or her previous conduct. 220 Ariz. 563, ¶¶ 9-10, 208 P.3d 214, 217 (2009). In *Perrin*, this court applied the reasoning in *Schmidt* to § 13-702.01, concluding a trial court must find two enumerated aggravating factors before a sentence under § 13-702.01 may be imposed. 222 Ariz. 375, ¶ 9, 214 P.3d at 1019.

**¶5** In denying Oslund relief, the trial court acknowledged the rule announced in *Schmidt* and *Perrin* but determined that Oslund had agreed the court could impose a sixteen-year prison term based on the aggravating factors listed in the plea. We cannot agree that the mere recitation of a potential sentencing range along with several aggravating factors which might be found by the court constitutes agreement that the court is authorized to impose a particular sentence irrespective of governing law. And, in any event, a defendant cannot agree as part of a plea to the imposition of an illegal sentence. *Cf. Jackson v. Schneider ex rel. Maricopa Cnty.*, 207 Ariz. 325, ¶¶ 2, 9-11, 86 P.3d 381, 382-84 (App. 2004) (trial court not permitted to impose lifetime probation as part of plea agreement if not authorized by statute).

**¶6** The trial court appeared to partially ground its conclusion that Oslund had agreed the court could sentence him pursuant to § 13-702.01(C) on Oslund's waiver of his right to have a jury determine aggravating factors. We cannot conclude Oslund's waiver of that right permitted the trial court to impose a sixteen-year sentence pursuant to § 13-702.01(C). As our supreme court

explained in *Schmidt*, the use of the catch-all factor as the sole basis to increase a sentence violates due process because it permits "virtually unlimited post hoc discretion to determine whether the defendant's prior conduct is the functional equivalent of an element of the aggravated offense." 220 Ariz. 563, ¶ 10, 208 P.3d at 217. The court also observed that vague statutory provisions—like the catch-all provision—violate a person's right "to fair notice of the acts the government deems worthy of punishment so they may conform their conduct to the law." *Id.* ¶ 5.

**¶7** The plea agreement in this case limited the trial court's discretion to find only certain aggravating factors not enumerated in § 13-702(C), but that does not change the fact that the circumstances increasing the length of Oslund's sentence—which are functionally elements of the offense—were determined only after he had committed the offense. In short, Oslund lacked notice at the time he committed the offense that the facts described in the plea agreement could serve to increase his sentence. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶ 25, 218 P.3d 1069, 1079-80 (App. 2009) (noting catch-all does not give adequate notice of what behavior is prohibited), *overruled on other grounds by State v. Bonfiglio*, 231 Ariz. 371, 295 P.3d 948 (2013). Even assuming a defendant could waive his or her right to such notice in a plea agreement, nothing in Oslund's plea agreement constitutes such a waiver. *See State v. Rose*, 231 Ariz. 500, ¶ 31, 297 P.3d 906, 914 (2013) (proper waiver of constitutional right exists "'when it appears from a consideration of the entire record that the accused was aware that he was waiving [his constitutional] rights and it appears that it was a knowing and voluntary waiver'"), *quoting State v. Henry*, 114 Ariz. 494, 496, 562 P.2d 374, 376 (1977) (alteration in *Rose*).

**¶8** We grant this petition for review. For the reasons stated, we vacate Oslund's sentence for attempted aggravated assault and, granting Oslund the relief he has requested, we remand the case to the trial court for resentencing.