

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

MICHAEL ALLEN CHILDERS II,  
*Petitioner.*

No. 2 CA-CR 2020-0238-PR  
Filed March 2, 2021

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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NOT FOR PUBLICATION  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. 31.19(e).*

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Petition for Review from the Superior Court in Pima County  
No. CR20141122001  
The Honorable Howard Fell, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

James L. Fullin, Pima County Legal Defender  
By Stephan J. McCaffery, Assistant Legal Defender, Tucson  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

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BREARCLIFFE, Judge:

¶1 Michael Childers II seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P., in which he claimed he was actually innocent of his 2014 conviction for failing to register as a sex offender. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Childers has not shown such abuse here.

¶2 In October 1997, then-eighteen-year-old Childers pleaded guilty in California to a misdemeanor violation of § 261.5 of the California Penal Code for having sexual intercourse with a person under the age of eighteen who was not his spouse.<sup>1</sup> In 2006, he acknowledged he was required to register as a sex offender in Arizona and, in 2014, pleaded guilty to violating A.R.S. § 13-3822 for failing to report a change of address. In 2019, he was charged with failing to register. Childers moved to dismiss the charge, claiming his California conviction did not require him to register as a sex offender in Arizona. The trial judge in that case denied the motion as an impermissible “collateral attack” on Childers’s 2014 conviction.

¶3 The trial judge urged Childers to seek post-conviction relief in the 2014 matter, and he filed a petition for post-conviction relief asserting he is entitled to relief pursuant to Rule 33.1(h). As he did in his motion to dismiss, he asserted that, although he had admitted violating § 261.5, Cal. Penal Code, it was possible under that statute to commit a misdemeanor violation with a minor less than two years younger than the offender while, in Arizona, in certain circumstances, the same conduct was not an offense.

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<sup>1</sup> Because the relevant provisions of the California and Arizona statutes discussed in this decision have not changed in any way material to our analysis since the time of Childers’s California offense, we cite the current versions of those statutes.

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¶4 Pursuant to § 261.5(b), sexual intercourse with a minor “who is not more than three years older or three years younger than the perpetrator . . . is . . . a misdemeanor.” Conversely, under § 261.5(c), intercourse “with a minor who is more than three years younger than the perpetrator” is “either a misdemeanor or a felony” and is punishable “by imprisonment in a county jail not exceeding one year, or by imprisonment” in the state prison.<sup>2</sup> Under Arizona law, sexual intercourse with a minor is prohibited by A.R.S. § 13-1405(A) but, under A.R.S. § 13-1407(E), “[i]t is a defense to a prosecution . . . if the victim is fifteen, sixteen or seventeen years of age, the defendant is under nineteen years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual.”

¶5 Section 13-3821(A), A.R.S. requires a person to register as a sex offender if that person “has been convicted of or adjudicated guilty except insane for a violation or attempted violation of” offenses identified in the statute, “or who has been convicted of or adjudicated guilty except insane or not guilty by reason of insanity for an offense committed in another jurisdiction that if committed in this state would be a violation or attempted violation” of those offenses. Sexual conduct with a minor is a listed offense. § 13-3821(A)(4). If Childers’s California conduct would have violated § 13-1405, he is required to register as a sex offender.

¶6 Childers argued that, because his plea agreement did not specify which subsection of § 261.5 he had admitted violating, his plea agreement did not foreclose the possibility that his victim was less than twenty-four months younger than he. Thus, he reasoned, his conduct would not have been a “violation” of a listed offense under § 13-3821(A), and he was not required to register as a sex offender. Accordingly, Childers concluded, he was entitled to relief under Rule 33.1(h) in the 2014 matter.

¶7 The trial court summarily dismissed the proceeding. It reasoned that considering the defense under § 13-1407(E) was inappropriate because it was a defendant’s burden “to establish an affirmative defense.” It also observed that it was unsure that the defense could apply in the California case because the charging document had alleged the victim was more than three years younger than Childers. Thus,

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<sup>2</sup>California law provides that certain offenses may be deemed felonies or misdemeanors; such offenses are commonly known as “wobblers.” See *Brown v. Dembow*, 248 Ariz. 374, n.6 (App. 2020). When the defendant is sentenced to county jail, the offense is a misdemeanor. *Id.*

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the court noted, “the assumption can be made that [Childers] pled guilty to subsection (c)” of § 261.5. This petition for review followed.

¶8 On review, Childers asserts the trial court erred by summarily rejecting his claim under Rule 33.1(h). To obtain relief, Childers was required to show, “by clear and convincing evidence,” that “no reasonable fact-finder would find [him] guilty of the offense beyond a reasonable doubt.” Ariz. R. Crim. P. 33.1(h). He argues the court improperly “resolv[ed] factual issues” by relying on the facts in the charging document to conclude he had pleaded guilty under § 261.5(c) and had erred by determining it could not consider the defense in § 13-1407 because it was a defense to rather than an element of sexual conduct with a minor.

¶9 Childers is correct that this court has limited the analysis of whether a foreign offense falls within § 13-3821(A) to comparing the elements of the offense to Arizona law. *State v. Kuntz*, 209 Ariz. 276, ¶ 9 (App. 2004). Thus, a court may not consider “evidence other than the judgment of conviction and the elements of the relevant offenses.” *Id.* And we agree with Childers that Arizona law has not directly answered whether an affirmative defense is material to that determination. We need not reach these issues, however, because the conviction document Childers provided the court from the California case—a signed plea agreement—establishes that he pleaded guilty to having violated § 261.5(c).

¶10 The plea agreement states Childers pleaded guilty to violating “261.5 PC” without specifying a subsection. Standing alone, that entry obviously does not establish which subsection Childers had admitted violating. But Childers disregards the portion of the agreement advising him of the punishment he faced for his admission. Under the “Penalty” section, the agreement indicates that Childers would face a maximum of a one-year term and maximum fine of \$1,000. But a conviction under § 261.5(b) would not allow for that term of confinement—the maximum term for violating § 261.5(b) is six months, with a maximum fine of \$1,000. Cal. Penal Code § 19. Rather, a violation of § 261.5(c) carries a maximum one-year term and a maximum \$1,000 fine. Cal. Penal Code § 672.

¶11 Thus, the plea agreement Childers submitted in support of his Rule 33.1(h) claim shows he was convicted of violating § 261.5(c). The defense enumerated in § 13-1407(E) could not apply to Childers’s conduct violating § 261.5(c) because the victim was at least three years younger than he was. Childers is thus required by § 13-3821 to register as a sex offender due to his California conviction, and he has not met his burden under Rule

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33.1(h) to show that no reasonable jury could have convicted him of violating § 13-3822.

¶12 We grant review but deny relief.