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IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA Plaintiff/Appellee, v. HONS. SEAN BREARCLIFFE, GARRYE L. VASQUEZ, and KARL C. EPPICH, Judges of the Court of Appeals, Division Two, of the State of Arizona, Respondents, and PHILLIP MATHEW JOHNSON, Real Party in Interest.	CV-21-0174 (Court of Appeals Case No. 2 CA-CR 2020-0070) (Pima County Superior Court Case No. CR2017-1194001) **SUPPLEMENTAL BRIEF OF REAL PARTY IN INTEREST PHILLIP MATHEW JOHNSON**

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INTRODUCTION

It is important never to lose sight of the purpose of waiver requirements: to ensure that no defendant gives up a constitutional right accidentally. *See, e.g., Barker v. Wingo,* 407 U.S. 514, 525 (1972); *Miranda v. Arizona,* 384 U.S. 436, 444 (1966) (court must "insure that what was proclaimed in the Constitution [does] not become but a 'form of words' in the hands of government officials") (internal citation omitted). While the law must recognize practicalities, such as the fact that a defendant who is giving up his right to be present is obviously not there to explicitly confirm that choice, or that an obstinate defendant might disrupt the system by refusing to explicitly agree even when he clearly understands, these accommodations exist because defendants sometimes intentionally waive their rights without saying so explicitly, and courts must be empowered to so find. They do not exist to trap defendants, or to give the State a shortcut to securing and defending convictions without defendants exercising their rights.

Scrupulous protection of individual constitutional rights is essential to our justice system. It of course benefits defendants, but it also benefits courts and the State, because it ensures the integrity of convictions and legitimizes the justice system. A successful prosecution is not one that leaves doubt about whether a defendant got what he was entitled to, or understood what he was giving up. Taking steps to ensure compliance benefits everyone, especially when the cost is low.

A. IMPLIED WAIVER

The pleadings filed so far in this case demonstrate that both sides agree on some important things: waivers of constitutional rights must be knowing, intelligent and voluntary; courts can in some instances infer that a waiver meets these requirements through a defendant's conduct, without an explicit acknowledgment; and this inference is generally warranted when a defendant has adequate notice that his conduct will cause the loss of a right and he then voluntarily engages in that conduct anyway. The disagreement comes in four places: first, *why* showing notice and voluntary action can establish a valid waiver; second, whether the fact that a court *can* make an inference about the nature of the waiver means that it always *must*; third, how it is determined that the notice a defendant received is adequate to permit an inference that subsequent conduct reflects a knowing, intelligent, and voluntary waiver; and fourth, when and how the information necessary to make the waiver determination can fairly and appropriately be placed in the record.

1. THE ROLE OF NOTICE AND VOLUNTARY ACTS IN ESTABLISHING WAIVER

The function of the implied waiver doctrine is not to change the standard required for surrender of a constitutional right; it is essentially evidentiary. It allows courts to make the finding they must make for any waiver—that it is knowing, intentional, and voluntary—based on circumstantial, rather than only on direct, evidence. The State claims that so long as the standard Rule 14.4(e)(6) advisement is given and

acknowledged at arraignment, and the subsequent voluntary absence occurs, the right is waived—period. *See* Petition at 18 ("[T]he trial court fully complied with Rule 14.4(e)(6), and Johnson acknowledged in writing that he understood this warning. Nothing more was required."). This view distorts the concept of an implied waiver and misapprehends what it means to imply something.

If an implied waiver occurs when a defendant is advised of the consequences and then voluntarily fails to appear, it is not simply because those two things—the advisement and the failure to appear—occurred. It is because the advisement demonstrates knowledge and understanding of the consequences, and the voluntary action illustrates a choice to accept them, together establishing that the waiver was knowing, intelligent, and voluntary, as any valid waiver must be. *See State v. Avila,* 127 Ariz. 21, 25 (1980) ("[A]s in any proceeding involving the surrender of Constitutional rights, it must appear from the record that the waiver was knowingly, intelligently and voluntarily made."). It is not the actions themselves that create a waiver; it is what they can be understood to mean. *Cf. North Carolina v. Butler,* 441 U.S. 369, 373 (1979) (question of waiver "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights . . . "); *Brewer v. Williams,* 430 U.S. 387, 403 (1977) (affirming the view "that the question of waiver was not a question of historical fact, but one which. . . requires 'application of

constitutional principles to the facts as found . . . .'") (quoting *Brown v. Allen,* 344 U.S. 443 (1953)).

That distinction is crucial because it means a valid waiver does *not* occur if an advisement is given, and even acknowledged in writing, but does not actually create the requisite knowledge and understanding. True, being told something and knowing it often go together. But they are not one and the same, and the connection cannot be blindly assumed without context. To treat the actions themselves as conclusive without taking this important step is to turn an implied waiver into a forfeiture based on a checklist of events. The events themselves are constitutionally meaningless; their power is in what they have the potential to prove.

2. CAN VERSUS MUST

Building on this understanding, the doctrine of implied waiver allows courts to conclude, based on the provision of notice and voluntary actions, that the defendant knew he would be giving up his rights and chose to take the action anyway. But it does not require them to draw that conclusion; it simply permits them to if, in the circumstances, the notice and voluntary action satisfactorily demonstrate that the waiver was indeed knowing, intelligent, and voluntary. This is why the implied waiver cases uniformly say that courts "can" infer, or "may" infer, or permit waiver

when conduct "can be regarded" as a knowing, voluntary, and intelligent waiver.[1]

Everyone agrees a defendant *can* establish a valid waiver through his conduct. But that leaves the question of whether, in a given case, he in fact did so. The permissive language consistently used in the cases merely empowers courts to make an inference; it does not create a requirement. For example, in *State v. Hampton,* on which the State relies (Pet. at 14), this Court explained implicit waiver: "*In some circumstances*, persistent disruptive or dilatory conduct by a defendant *will support a determination* that the defendant 'waived' his right to counsel. Such a waiver by conduct *can* occur *only* after a court both warns the defendant that further disruptive conduct may result in the loss of the right to counsel and explains the implications of such a waiver." 208 Ariz. 241, 244, ¶ 7 (2004) (emphasis added); *see also id.* at 7 (summarizing a California case as "concluding that implied waiver of counsel by conduct is *possible* once the defendant" has been warned) (emphasis added). That is not the same thing as creating a conclusive presumption that certain conduct after a warning waives the right; that would require mandatory language like "shall" and

[1] The State phrases the rules this way, too—the natural result of repeating the rules as they are stated in the caselaw. *See, e.g.,* Pet. at 9 (quoting *Bolding*); 14 (defendant "can 'implicitly waive' the right 'through his conduct'" (citing *State v. Hampton,* 208 Ariz. 241, 243-44, ¶¶ 7-8 (2004); Reply at 11 (discussing consequences of the fact that "a defendant can impliedly waive a constitutional right with his conduct after receiving adequate notice"); 12 (quoting *Bolding*); 13 ("If the defendant's past actions allow such an inference. . ."); 16 ("As described in the Petition, the waiver of a constitutional right *can* be implied based entirely on conduct") (emphasis original). *See also State v. Rasul,* 216 Ariz. 491, 494 (App. 2007) (warning and explanation of consequences required "[b]efore a defendant *may* waive by conduct his right to counsel") (emphasis added).

"must." *Accord, Daniel Y. v. Arizona Dept. of Economic Sec.,* 206 Ariz. 257, 260 (App. 2003) ("The waiver of constitutional rights is not easily presumed."). Reading the cases—and the pleadings—with attention to this distinction significantly clarifies things. The State has not identified a single case characterizing implied waiver as mandatory or conclusive, or using "shall" or "must" language.

Consistent with this analysis, despite the State's claims to the contrary, *Bolding,* discusses not a mandatory presumption, but a condition precedent to the drawing of an inference. The State quotes *Bolding* and *Raffaele* selectively and misleadingly, including two citations in its Reply to paragraph 20 of *Bolding*, on pages 12 and 13; in neither reference is it clear from the quotation what the *Bolding* Court was actually saying. The paragraph, in its entirety, says:

> Because we have a "duty to construe a statute so that it will be constitutional if possible," *State v. McDonald*, 191 Ariz. 18, ¶ 11, 952 P.2d 1188, 1190 (App. 1998), we conclude § 13–4033(C) is constitutional when the defendant's voluntary delay of sentencing can be regarded as a knowing, voluntary, and intelligent waiver of his constitutional right to appeal. But such an inference can be drawn only if the defendant has been informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days.[2]

[2] This language is unfortunately also quoted misleadingly in *State v. Nunn,* 250 Ariz. 366, 368 ¶ 5 (App. 2020), which cites *Bolding*'s ¶ 20 for the proposition that "a defendant's voluntary delay of sentencing can be regarded as a knowing, voluntary, and intelligent waiver." This passage does not say that at all; it says that *when* an absence can be so regarded, the statute can be constitutionally applied. This is the opposite of what the *Nunn* Court represents it to say, because it necessarily entails the possibility that a voluntary delay of sentencing cannot always be so regarded. Indeed, the *Nunn* Court did seem to realize this, as it went on to assess whether there was *adequate* notice in the record before it, and found there was not. The State did not pursue the issue further.

That is the language of a necessary condition, not of a conclusive presumption. Notice and voluntary action are required, but that does not mean they are automatically sufficient in every case. That would require a different rule with different language.

With this understanding, the State's suggestion—that upon proof of a Rule 14.4(e)(6) advisement, no further finding is needed—becomes untenable, because once permission to make the inference about the nature of a waiver is granted, someone still has to decide whether to make it. If the cases left no choice in the matter—if they stated the inference was mandatory—the argument would be different. But as it is, there is still a decision to be made, and because it depends on the circumstances, the trial court is best positioned to make it. *See, e.g., State v. Butler,* 232 Ariz. 84, 89 ¶ 25 (2013) (Pelander, J., concurring) ("[V]oluntariness issues often are fact-intensive and are assessed from the totality of the circumstances."). If the leap is as easy to make as the State seems to believe it is, then this step imposes almost no cost on the State or trial courts, but it serves the important function of verifying, rather than assuming, that a valid waiver occurred.

3. ADEQUACY

There does not appear to be any dispute that an implied waiver can only occur with *adequate* notice and *voluntary* action. Indeed, the State relies on its assertion that "*Bolding* . . . requires adequate notice followed by voluntary conduct" to argue

that its rule would not lead to unknowing waivers. Reply at 15. But disagreement arises over how it should be determined whether notice was adequate.[3]

The State's position is that the standard advisement in Rule 14.4(e)(6) is *per se* adequate. *See, e.g.,* Reply at 18-19 (because he was advised at arraignment, "as a matter of law, he received adequate notice of the consequences of his actions."); *id.* at 21 (Rule 14.4(e)(6) "provides the procedural means by which a court provides a defendant with the requisite adequate notice" of § 13-4033(C)). In other words, the State assumes that notice adequate to satisfy the rule is also automatically adequate as a constitutional matter. But the source of that certainty is unclear. The inclusion of the advisement requirement in the rule certainly demonstrates that the Court believes defendants should be so advised, and such an advisement surely increases the likelihood that any subsequent waiver—whether express or implied—is knowing, intelligent, and voluntary, but it does not follow that such an advisement is automatically adequate in every case, or that it substitutes for a finding that the defendant's conduct in the circumstances indeed demonstrated a valid waiver. Invoking A.R.S. § 13-4033(C) generates an inquiry of constitutional importance: is the waiver knowing, intelligent, and voluntary? The State proposes that if a standard

[3] Implied waiver is sometimes phrased as conduct "inconsistent with intent to assert the right." *See, e.g., American Continental Life Ins. Co. v. Ranier Const. Co.,* 125 Ariz. 53, 55 (1980). In some cases, the act is so clearly linked to the right that the inconsistency is obvious. For instance, walking out of the courtroom is inconsistent with asserting the right to be present. But when the connection is only because a statute has made loss of the right a consequence for a particular action, that action is inconsistent with intent to exercise the right only if the defendant is fully aware of the link.

advisement was given at arraignment, we not ask that question and just assume the answer is yes. But it has presented no authority for doing such an extraordinary thing.

Consider *Miranda* warnings. Advisements must be given before a custodial interview, but the State cannot conclusively establish a valid implied waiver of the Fifth Amendment just by proving the advisement was given and the defendant then talked. *State v. Montes,* 136 Ariz. 491, 495 (1983) (in case where warning was given, "[w]e must undertake to determine whether Montes understood his right to remain silent and his right to counsel and whether he intelligently and knowingly relinquished those rights."). The advisement is necessary, but there is no valid waiver if the defendant did not comprehend his rights, and that is something a court must determine, often after taking evidence on the circumstances.[4] *See, e.g., State v. Bravo,* 158 Ariz. 364, 369-70 (1988). A similar issue arises with Arizona's implied consent law, A.R.S. § 28-1321. This statute purports to deem any motorist arrested on suspicion of driving under the influence, by virtue of driving on the roadways, to have consented to a blood draw by police, i.e., to have waived his Fourth Amendment right to refuse such a request. The purported waiver is based solely on a statute's directive that the action of driving on the roadways waives the right. But

[4] Of course, different rights may have different requirements for what ultimately counts as voluntary. For instance, consent to search (i.e., a Fourth Amendment waiver) need not meet the same stringent standards required for a Fifth Amendment waiver. *Butler,* 232 Ariz. at 88. And the determination here regarding the waiver of the right to appeal would not need to entail the kind of full-blown voluntariness hearing often held regarding suppression of confessions. But the fact remains that a case-specific determination of the validity of any purported waiver is necessary.

this Court has always maintained that the individual constitutional inquiry into the voluntariness of that consent/waiver is still necessary. *See, e.g., Butler,* 232 Ariz. at 88 ¶ 18 ("[I]ndependent of § 28-1321, the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw."); *State v. Valenzuela,* 238 Ariz. 299 (2016) (rejecting State's argument that operating vehicle alone constituted valid consent to search; rejecting *per se* rule for voluntariness determination); *State v. De Anda,* 246 Ariz. 104, 108 ¶ 18 (2019) ("Here, the admin per se form read to De Anda did not in itself establish that his consent was voluntary."). A valid waiver requires true voluntariness, whatever statutes might say.

There is another problem with the assertion of automatic adequacy: if the standard advisement is so effective that it's reasonable to assume—as the State does—that it is always adequate to protect defendants' rights, what is so objectionable about having the trial court confirm that in each case before finding waiver? If the State truly believes there is no danger the standard warning will be inadequate, then it should be an easy win for the State at sentencing: they need only present the record of the advisement,[5] and the judge will find the waiver. In resisting that inquiry, either the State is afraid defendants may not actually understand, and given the chance, they will demonstrate that, or the State finds ensuring compliance

[5] As Judge Brearcliffe pointed out in his concurrence, the State must also prove both that the defendant was indeed absent and that his absence, rather than some other cause, was the reason for the delay in sentencing. The State would then also need to challenge or rebut any evidence the defendant presented that his absence was not voluntary.

with a defendant's rights when foreclosing review of a conviction to be inconvenient. Either way, insistence that we not examine the circumstances does not engender confidence in the integrity of the proceedings.

Although the inquiry might be simple in many cases, situations where the standard advisement would not constitute adequate notice indisputably exist. Imagine a judge wrongly advising a defendant his presence could be waived for sentencing, or a defendant who, it was learned after arraignment, has a limited understanding of English, or is intellectually disabled, or any number of other scenarios that cast doubt on the defendant's understanding. Courts cannot equate "received standard advisement" with "had adequate notice" conclusively and without inquiry or the opportunity for meaningful challenge. The notice must actually *be* adequate for that defendant.

Finally, there are good reasons to believe defendants do *not* routinely understand their absence will waive their right to appeal based solely on the standard advisement. Perhaps the best indicator of that is in the record here: the trial judge, a former prosecutor who had been on the bench approximately 20 years and would surely be familiar with the standard advisements, didn't realize it. In conducting the sentencing—after the requisite delay had occurred, and with Mr. Johnson's arraignment order on his docket—he both explicitly advised Mr. Johnson he had the right to appeal and suggested he take his concerns to the court of appeals. APPX 90-

91. If someone with so much experience in the justice system did not realize what the standard advisements meant in practice, how can we assume a defendant will?

Indeed, the law has long recognized that people sometimes sign things they don't understand. Arizona courts generally will not enforce "fine print" terms in standard contracts—with considerably lower stakes—when the evidence shows no genuine meeting of the minds. *See, e.g., Philadelphia Indem. Ins. Co. v. Barerra*, 200 Ariz. 9, 16, ¶ 18 (2001) (exclusion appearing in fine print on reverse side of standard insurance contract not enforceable). Waiver of a constitutional right requires not that a defendant signed a paper, but that he understood the consequences, and the circumstances matter. The *Barerra* Court doubted "the car rental company expect[ed] its ordinary customer to spend fifteen or twenty minutes at the rental desk reading all of the small print and asking for an explanation of the terms involved." *Id.* Likewise, at arraignments, judges with busy calendars move through cases quickly and often recite standard advisements quickly by rote. Defendants are given papers to sign and shuttled out the door to make room for the next case. They do not typically stand in the courtroom reading and analyzing each line before signing where they are told to sign, nor are they encouraged—or sometimes even permitted—to ask questions. All of this is not to say that arraignment orders and advisements are irrelevant. Rather, it is to say the fact that a defendant signed a form

often says little about his comprehension. Yet that is the primary evidence the State treats as conclusively establishing a subsequent waiver was knowing and intelligent.

4. BUILDING THE RECORD

To the extent the question presented here is procedural—who should make the waiver determination and when—it is important to remember that the burden to prove a valid waiver is on the State. *See State v. Raffaele,* 249 Ariz. 474, 478-9, ¶ 12 (App. 2020) (collecting cases); *see also Boykin v. Alabama,* 395 U.S. 238, 242 (1969) ("The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation."). Moreover, as the moving party seeking to dismiss the appeal, the State must establish the applicability of § 13-4033(C). That does not mean that once the State makes a prima facie case, the issue is decided. A defendant must have notice and an opportunity to challenge that assertion with his own evidence. *See McClung v. Bennett,* 255 Ariz. 154, 156 ¶ 10 (2008); *see also Raffaele,* 249 Ariz. at 479, ¶ 15 ("Once the State met its burden, the defendant could present evidence to rebut the State's showing . . ."). Proceeding to the court of appeals on a record the State finds adequate to make a prima facie case for waiver without raising the issue below seems almost perfectly calculated to deprive defendants of the opportunity to rebut the State's claims. Of course the State would rather go straight to the court of appeals with its prima facie case in hand—it

will usually win. But only because the defendant was not given notice and a chance to present contrary evidence. That offends due process.

It is no answer that any defendant whose sentencing was delayed for 90 days could choose to present evidence challenging the waiver the state may or may not later decide to assert, on as-yet-unidentified bases. Our criminal justice system does not typically require defendants to anticipate the claims the State might make and preemptively present rebutting evidence, just in case the State brings it up for the first time in the court of appeals. Even if a defendant did so, he could not be sure he had correctly anticipated what the State planned to argue down the road. Indeed, this issue will arise primarily in cases where a defendant does *not* believe he has waived his right to appeal. If a defendant does not believe he has waived his right, requiring him to prove he didn't, when no one has asserted that he did, makes no sense.

This opportunity matters, because assessing whether the fact of advisement sufficiently establishes knowledge in any given case might well depend on facts not yet in the record. The State thinks what's in the record is good enough to meet its burden in Mr. Johnson's case. But the Court cannot assume the record would look the same if the waiver question had been before the trial court and Mr. Johnson had been given the opportunity, upon notice of the State's claim, to present controverting evidence. What further evidence might exist is not for this Court to speculate about.

For another thing, assessing whether the standard advisement adequately informed the particular defendant will often benefit from the opportunity to observe and communicate with the defendant throughout the proceedings. The trial judge will often have a sense of how well a defendant understands what's going on that is completely unavailable to appellate judges who have never met him.

Although the State asserts that the record here is more than adequate to allow the Court of Appeals to conclude there was a knowing, intelligent, and voluntary waiver, even this record, which was built without notice of this issue, is replete with reasons to doubt the adequacy of the notice—and it is not an appellate court's job to weigh those reasons. Among them, the trial judge announced on the record during sentencing that Mr. Johnson had the right to appeal, and also separately commented that he had various things to tell the Court of Appeals. There is nothing in the record to suggest that anyone in the courtroom—not Mr. Johnson, not his attorney, not the State—expressed any surprise at these statements. That strongly suggests that whatever happened at the arraignment—864 days before the guilty verdicts when Mr. Johnson left the courthouse—by the time of sentencing, Mr. Johnson did not realize his absence had any effect on his right to appeal. If he had really thought he would have no appeal due to his decision not to appear within 90 days for sentencing, when the Court told him, "It sounds like you've got a lot of stuff that the Court of Appeals is going to consider," one might expect him to have protested this

suggestion that he was going to have another chance to make his arguments. The trial judge, of course, was present for this, and could observe Mr. Johnson's reaction to these statements in addition to what appears in the transcript.

As for the arraignment order, the State has taken every opportunity, in reciting the facts, to emphasize that Mr. Johnson "initialed next to the paragraph containing" the language about losing the right to direct appeal. Pet. at 5; *see also* APPX 098 (State's motion to dismiss in the Court of Appeals). But the document itself is not so clear. The point for this Court is not that Mr. Johnson did or didn't initial it—it is that the State finds that relevant to the waiver inquiry, and the document in the record is ambiguous—militating in favor of resolution in the trial court.

Finally, an important event happened as the jury headed out to deliberate on the third day of trial: the trial court told Mr. Johnson that when the jury returned a verdict, "if you want to be here, then you need to be here when [your attorney] gets here. Otherwise I'll take the verdict or verdicts and [your attorney] will let you know what happened." (Corrected Exhibit 1 at 205). Whatever Mr. Johnson may or may not have understood at his arraignment over two years prior, this statement had to complicate matters. And again, the trial judge, not the judges of the Court of Appeals, was present when this occurred and when, the next day, Mr. Johnson disappeared after asking to go to the restroom. Thus, it is the trial judge who can best

assess what effect these events might have had on Mr. Johnson's understanding of the consequences his actions could carry.

B. SEPARATION OF POWERS

In considering whether the legislature had the authority to enact § 13-4033(C) under Article 6, section 5(5) of the Arizona Constitution, this Court must determine (1) whether a conflict exists between the statute and a court rule and (2) if so, whether the statute is substantive or procedural. *Duff v. Lee,* 250 Ariz .135, ¶ 12 (2020).

Regarding conflict, the court rule can be either a formal codified rule, or it can simply be the common law practice regularly applied. *See, e.g., State v. Reed*, 248 Ariz. 72 (2020) (finding conflict between statute and common-law doctrine). Although it is enshrined in the Constitution as a right, the allowance of a timely appeal from a judgment has also been the long-standing practice of Arizona courts.[6] Today, the Court's practice is codified in Rule 31, which sets the parameters for when and how appeals from judgments are made. Against the backdrop of Article 2, Section 24, which enshrines the right of the accused to appeal "in all cases," Rule 31.2 permits appeal from a judgment—without exception—if the notice of appeal is filed within 20 days. Mr. Johnson received a conviction and sentence and complied with the requirements of Rule 31.2. Under this Court's rules, he has thereby properly

[6] The State's discussion in Reply of what it terms the "fugitive disentitlement doctrine" is inapposite. Those cases deal with defendants who, after being sentenced and remanded to custody, escaped and absconded while their appeals were pending. Those cases, and the reasoning supporting them, have no application here, where a defendant who is properly serving the sentence imposed seeks to appeal after judgment.

appealed his judgment and sentence. Rule 31.13(a) permits dismissal of the appeal after timely notice only if the appellant has not timely filed his opening brief—which Mr. Johnson has. Section 13-4033(c) would provide for something the rules do not allow: dismissal of the timely filed and briefed appeal. That is a direct conflict.

On the substantive/procedural question, there are two ways to interpret § 13-4033(c): either it redefines who may exercise the constitutional right to appeal (which is substantive), or it merely prescribes methods and conditions for exercising the right (which is procedural). In either case, it is unconstitutional.

If it is substantive—as the State argues, *see* Reply at 24—it fails immediately under Article 2 Section 24. As this Court recently explained, "the constitution defines who is entitled to appeal—'the accused'—and the legislature lacks authority to redefine who may exercise this right." *State v. Reed*, 248 Ariz. 72, 77, ¶ 15 (2020). Clearly, the legislature cannot say who is and is not granted the right to appeal, and if the statute is read to do that, it is facially unconstitutional. Yet that is precisely what the State seems to be urging. *See* Reply at 24 (arguing under the statute, "the right to a direct appeal is *not* granted to an absconding defendant who voluntarily delays sentencing for more than 90 days.") (emphasis original). If this Court interprets the statute as the State is urging, it cannot survive.

If the statute does not define who may exercise the right to appeal, then it can only be read as prescribing how courts are to go about enforcing it, and that makes

it unmistakably procedural. It operates like a time limit rather than a substantive delineation of who has what rights. No one would question that the rule requiring a notice of appeal to be filed within 20 days of sentencing is procedural; § 13-4033(c) similarly requires a defendant to appear to be sentenced within a certain time if he wishes to exercise his right. That is fundamentally procedural.

In *State v. Birmingham*, 96 Ariz. 109, 110 (1964), this Court explained, "the substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion. It is often said the adjective law pertains to and prescribes the practice, method, procedure or legal machinery by which the substantive law is enforced or made effective." That type of prescription is precisely what § 13-4033(c) does. Indeed, appeal itself, while constitutionally mandated to exist by some procedure, is a means of, or "legal machinery" for, enforcing the full complement of rights afforded criminal defendants in trial-level proceedings.

In discussing the substantive/procedural distinction in *Heat Pump Equip. Co. v. Glen Alden Corp.*, 93 Ariz. 361, 364 (1963), this Court invoked *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946), which deemed a rule procedural because "it does not operate to abridge, enlarge or modify the rules of decision by which that [the district] court will adjudicate its rights. It relates merely

to 'the manner and means by which a right to recover * * * is enforced.'" Here, § 13-4033(c) provides no rule of decision by which the Court of Appeals will adjudicate Mr. Johnson's rights under the Fifth, Sixth, and Fourteenth Amendments as presented in the timely filed Opening Brief. It deals instead with when and where he can present those claims. Along the same lines, in *Seisinger v. Siebel,* 220 Ariz. 85, 92 ¶ 29 n.4 (2009), this Court drew a parallel to the *Erie* doctrine in federal court, wherein courts use the substantive/procedural distinction to dictate choice of law, with state law prevailing if it is substantive. But it is the federal rules that dictate the who, what, where, and when of appeals in federal court, even of state law claims. In other words, in that context, rules like this are decidedly procedural. The State's only argument that the law is substantive—that it defines who is *granted* the right rather than how to use it—takes it directly into the teeth of Article 2, Section 24.

CONCLUSION

The Court need not reach the constitutionality of the statute, and need not hold it unconstitutional, because it can simply interpret it to require that for the contemplated waiver to be enforced, the trial court must find that the waiver knowing, intelligent, and voluntary as required by the Arizona Constitution. That is what the Court of Appeals did in both *Bolding* and *Raffaele,* and it is what this Court has done with other statutes purporting to create a blanket waiver. That is the best answer here.

DATED: November 23, 2021

Respectfully submitted,

/s/ Amy P. Knight

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