ARIZONA SUPREME COURT

THE STATE OF ARIZONA, Petitioner, v. HONS. SEAN BREARCLIFFE, GARYE 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-SA COURT OF APPEALS DIV. 2 No. 2 CA-CR 2020-0070 DEPARTMENT B (Pima County Superior Court Cause No. CR2017-1194-001)

BRIEF OF *AMICI CURIAE*
PIMA COUNTY PUBLIC DEFENDER'S OFFICE and
PIMA COUNTY LEGAL DEFENDER'S OFFICE

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INTRODUCTION

Whether Real Party in Interest Phillip Johnson knowingly, intelligently, and voluntarily waived his right to appeal by conduct is easily resolved in his favor, as set forth in Mr. Johnson's Response and Supplemental Briefs. This case also presents the broader question whether A.R.S. § 13-4033(C) is facially unconstitutional, which needs to be addressed because that is the issue of statewide importance and first impression presented in this case. *See State v. Soto*, 225 Ariz. 532, ¶ 1 (2010); *State v. Bolding*, 227 Ariz. 82 (App 2011).

Section 13-4033(C) strips away the right to appeal guaranteed by article 2, § 24 of the Arizona Constitution, and it invades this Court's rulemaking authority and control over the disposition of cases. The State seeks to uphold the statute against these constitutional challenges based on policy arguments related to other defendants who have secured new trials because portions of the record were lost during their decade-or-longer absences. Such a policy argument is not entirely unfounded, but a perceived injustice in a handful of cases cannot justify abrogating a constitutional right for a large class of defendants. To the extent that a policy argument exists for limiting some defendants' right to appeal, this Court cannot rewrite the statute and it should not write public policy through litigation in a single case.

INTEREST OF AMICI CURIAE

The Pima County Public Defender's Office (PCPD) is the second largest indigent defense agency in the state. Its eighty attorneys represent thousands of clients every year in Superior Court and in Juvenile Court. PCPD's appellate unit represents clients in criminal cases before the Arizona Court of Appeals, the Arizona Supreme Court, and, on occasion, the Supreme Court of the United States. PCPD, through undersigned counsel, represents the appellant in *State v. Hons. Espinosa, Eckerstrom, and Staring, Real Party in Interest RL Anthony St Clair,* CR-21-0148-SA (petition for special action pending). As did Mr. Johnson in this case, Mr. St Clair opposed the State's Motion to Dismiss his appeal pursuant to A.R.S. § 13-4033(C). *St Clair Response to Special Action*, CR-21-0148-SA. In *St Clair*, a three-judge panel of the court of appeals unanimously denied the State's motion to dismiss and ordered the State to file an Answering Brief. The State filed a Petition for Special Action, seeking review of the panel's denial of its motion to dismiss.

The Pima County Legal Defender's Office (PCLD) is a conflict indigent defense agency within Pima County, with attorneys who also represent clients in Superior Court and in Juvenile Court. PCLD also has an appellate unit that represents clients in criminal appeals before the court of appeals and the Arizona Supreme Court. PCLD, through undersigned counsel, represents the appellant in *State v.*

Hons. Eppich, Vasquez, and Brearcliffe, Real Party in Interest, Robert Jon Joacques, CV-21-0187-SA (petition for special action pending). There, a separate three-judge panel also unanimously denied the State's motion to dismiss, and the State filed a Petition for Special Action with this Court.

The State filed motions to consolidate its petitions for special action in all three cases. This Court denied the State's motions to consolidate, granted review in Mr. Johnson's case, and continued the State's petitions in *St Clair* and *Jacques.* Although the issue is not presented identically in the three cases, Mr. St Clair's and Mr. Jacques' cases will be substantially affected by this Court's opinion in *Johnson*. For this reason, PCPD and PCLD have an interest in the outcome of this litigation.

ARGUMENTS

I. A.R.S. § 13-4033(C) is directly conflicts with the right to appeal guaranteed all criminal defendants in Ariz. Const., art. 2, § 24.

Arizona's "constitution and statutes embody the public conscience of the people of this state." *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, ¶ 8 (2014). "The legislature has plenary power to deal with any topic unless otherwise restrained by the Constitution." *Seisinger v. Siebel*, 220 Ariz. 85, ¶ 26 (2009). "[T]here can be only one choice when a statute conflicts with the constitution. 'The constitution of this state, second only to the constitution of the United States, is the

supreme law of Arizona. Any act of the legislature ... which contravenes its provisions must fall.'" *State v. Patel*, 251 Ariz. 131, ¶ 26 (2021), *quoting W. Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 430–31 (1991) (*quoting Miller v. Heller*, 68 Ariz. 352, 357 (1949)). And the legislature may not restrict rights that the Arizona Constitution bestows. *State v. Roscoe*, 185 Ariz. 68, 72 (1996) (finding legislative amendment to A.R.S. § 13-4433 unconstitutional because it "interferes with rights provided by the Arizona Constitution").

In 1910, the Arizona Constitutional Convention proposed a state constitution that guaranteed criminal defendants "the right to appeal in all cases," without limitation, and it was adopted in that same form at the 1912 Constitutional Convention. "The Arizona Constitution: 1912 Edition," *Arizona State University Center for Political Thought and Leadership*, available at https://cptl.asu.edu/arizona-constitution/1912-edition (last visited Dec. 8, 2021). Article 2, section 24 has retained verbatim this right of criminal defendants to appeal "in all cases" ever since. The constitutional right to appeal protects a defendant's rights to due process: "A defendant's right to appellate review is an essential safeguard against wrongful conviction." *Montgomery v. Sheldon*, supp. op., 182 Ariz. 118, 119 n. 1 (1995), *superseded by statute on other grounds, State v. Smith*, 184 Ariz. 456, 458 (1996).

The State necessarily concedes that § 13-4033(C) directly conflicts with article 2, § 24 by arguing that § 13-4033(C) "eliminates a defendant's right to a direct appeal." *State's Supplemental Brief*, ep. 16.[1] A statute that strips away the constitutional right from a particular class of people necessarily conflicts with article 2, § 24, which guarantees the "accused" the right to appeal "in all cases," without limitation. As this Court recently held, "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, ¶ 15 (2020), *citing* Ariz. Const. art. 2, § 24 and *Seisinger*, 220 Ariz. 85 at ¶ 26.

The State next argues that § 13-4033(C) is constitutional because this Court has previously held that § 13-4033(B)—limiting the appellate rights of defendants who plead guilty or admit a probation violation to post-conviction relief—is constitutional. *State's Supplemental Brief*, ep. 1-2, 5. Although this Court has previously held that post-conviction relief is sufficient to protect a pleading defendant's right to appeal, *Smith*, 184 Ariz. at 458, this Court has never held that post-conviction relief is an adequate substitute for a direct appeal following a trial. The nature and extent of legal claims available to a pleading defendant are markedly

[1] The State's claim that § 13-4033(C) is substantive is incorrect for the reasons explained in *Section II, infra.*

narrower than those available to a non-pleading defendant. A valid guilty plea has a sufficient factual basis and a trial court has confirmed that the defendant entered the plea knowingly, intelligently, and voluntarily with the competent assistance of counsel under constitutional standards. *See State v. Hamilton*, 142 Ariz. 91, 94 n. 3 (1984). Thus, the primary challenges for a pleading defendant are to the validity of the plea agreement and the sentence imposed. *See Crane McClennen, Eliminating Appeals from Guilty Pleas: Making the Process More Efficient*, 29 Ariz. Att'y 15, 16 (Nov.1992) (setting forth types of cognizable appellate challenges for pleading defendants). As such, the narrow list of cognizable claims that may be asserted in a post-conviction proceeding encompass all conceivable claims for a pleading defendant. *See* Ariz. R. Crim. P. 33.1.

A non-pleading defendant convicted after a trial, however, can raise anything that constitutes reversible error—not just constitutional errors but questions of statutory application, erroneous application of procedural rules (including evidentiary errors), erroneous jury instructions, etc. *See State v. Glassel*, 233 Ariz. 353, ¶ 10 (2013) ("[T]he Rule 32 process does not equate to a direct appeal."); *Wilson v. Ellis (Wilson I)*, 176 Ariz. 121, 125 (1993) (Martone, J., dissenting) (relief under Rule 32 "is more limited" than relief available on direct appeal). Because Rule 32 does not guarantee a non-pleading defendant can raise all errors the defendant

could have raised in a direct appeal, Rule 32 is an inadequate substitute and does not protect a non-pleading defendant's appellate rights.

Mssrs Johnson, St Clair and Jacques all raised substantial constitutional issues in their opening briefs. Dismissal of these challenges to the Real Party in Interests' trial convictions pursuant to § 13-4033(C) will deprive each of them of direct appellate review and post-conviction relief since any challenge under Rule 32.1(a) would be precluded under Rule 32.2(a)(3). Rule 32.2(a)(3) precludes a defendant from seeking post-conviction relief on any ground "waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." The combination of § 13-4033(C) and Rule 32.2(a)(3) would thus deprive defendants of all avenues for review of their convictions, in violation of article 2, § 24. *State v. Wilson (Wilson II)*, 174 Ariz. 564, 567 (App. 1993).

II. A.R.S. § 13-4033(C) is unconstitutional because it violates the separation of powers.

The Arizona Constitution vests this Court with the "[p]ower to make rules relative to all procedural matters in any court." Ariz. Const. art. 6, § 5(5). The legislature may enact procedural laws in two scenarios. First, this Court will "recognize 'reasonable and workable' procedural laws if they supplement rather than

conflict with court procedures." *Reed*, 248 Ariz. 72, ¶ 10, *quoting Seisinger*, 220 Ariz. 85, ¶ 8. The legislature also has authority to enact "'procedural laws to define implement, preserve and protect the rights guaranteed to victims'" by the Victim's Bill of Rights. *Reed*, 248 Ariz. 72, ¶ 10, *quoting* Ariz. Const., art. 2, § 2.1(D). The legislature violates separation of powers principles and infringes on the judicial branch's appellate jurisdiction and rule-making authority if it enacts procedural laws that conflict with court procedure and are not authorized under the VBR. *Reed*, 248 Ariz. 72, ¶¶ 9–10. A law is procedural if it prescribes the manner a right may be exercised or the method it is enforced. *Id.* at ¶¶ 13–15.

The State recites the legislative history of § 13-4033(C) in support of its argument that the statute is constitutional, *State's Supplemental Brief* at 2-7 (citing legislative history), but this legislative history is not relevant to the question whether the plain language of the statute violates Arizona's constitutional guarantee of the right to appeal "in all cases." Rather, the State's discussion reflects certain policy interests of the State in ensuring the finality of convictions. While the legislature has the authority to pass procedural laws to protect the rights of crime victims under the VBR, § 13-4033(C) is sweeping into its web cases that do not involve any victims, including Mssrs. St Clair (drug possession), and Johnson (prohibited possessor with

entrapment defense).[2] In *Reed*, this Court held that the VBR "'cannot serve as a source of authority for the legislature to usurp this court's rulemaking authority'" in all cases because victims' rights to a speedy trial or disposition and prompt and final conclusion of the case after conviction and sentence "'neither creates a right nor defines a right peculiar and unique to victims.'" *Reed*, 248 Ariz. 72, ¶ 23, *quoting State ex rel. Napolitano v. Brown*, 194 Ariz. 340, ¶ 12-13 (1999).

Although the State purports to ask this Court to affirm the court of appeals' opinion in *Bolding*, the State argues that there are no court rules with which § 13-4033(C) conflicts, claiming that the "only procedural rule that currently relates to the same subject matter" is Ariz. R. Crim. P. 14.4(e)(6). *State's Supplemental Brief* at 16. Rule 14.4 does not govern the procedures for filing appeals but instead instructs the courts regarding courts' duty at arraignments. Moreover, *Bolding* explicitly identified the conflicting procedural rules, setting forth the constitutional provision, stating that § 13-4033(A) "codifies that right, specifying the kinds of orders that are appealable, and the Rules of Criminal Procedure set out the procedural means through which a defendant may assert it. *See* Ariz. R. Crim. P.

[2] The two cases the State argues were wrongly decided, *State v. Nunn*, 250 Ariz. 356 (App. 2020), and *State v. Raffaele*, 249 Ariz. 474 (App. 2020), also involved victimless crimes, further demonstrating that the VBR cannot serve as a source of authority for the legislature's procedural lawmaking.

31.1 through 31.27." *Bolding*, 227 Ariz. 82, ¶ 13 (citations included). *Bolding* further explained that a defendant may appeal from a "'final judgment of conviction,'" *id.*, *citing* 13-4033(A)(1), and that "[a] judgment of conviction is final only when a verdict has been rendered, whether by jury or the trial court after a bench trial, and a sentence has been "'orally pronounced in open court and entered on the clerk's minutes.'" *Id.*, *quoting State v. Glasscock*, 168 Ariz. 265, 267 n.2 (App. 1990), and Ariz. R. Crim. P. 26.16(a).

Rule 31.2 permits appeals from "a judgment of conviction and imposition of sentence," without exception, as long as the notice of appeal is filed "no later than 20 days after the oral pronouncement of sentence." Ariz. R. Crim. P. 31.2(a)(1). A criminal defendant may file an appeal that is delayed beyond the 20 days with the court's permission upon a showing that the delay was not the defendant's fault. Ariz. R. Crim. P. 31.2(a)(3), 32.1(f). At any rate, the time for filing an appeal does not start to run until the oral pronouncement of sentence. Ariz. R. Crim. P. 31.2(a)(3).[3]

[3] The State is correct that the common law fugitive disentitlement doctrine does not "[e]ffect the interpretation or constitutionality of § 13-4033(C)" because it is a common-law rule. *State's Supplemental Brief* at 16-17. Notably, however, states with constitutional rights to appeal have rejected the application of the fugitive disentitlement doctrine to bar a fugitive from exercising his constitutional right to appeal. In *City of Seattle v. Klein*, 166 P.3d 1149, ¶ 21 (Wash. 2007) for example, the Washington Supreme Court clarified its holding in *State v. French*, 141 P.3d 54 (Wash. 2006). There, the court held that the "rationales are inapplicable where a criminal appellant has asserted the constitutional right to challenge a potentially

Rule 31 also governs the court of appeals' discretion to dispose of appeals. The appellate court may only dismiss—without decision—an otherwise timely filed notice of appeal if the appellant fails to timely file an Opening Brief, *see* Rule 31.13, or upon a stipulation signed by all parties, or upon the appellant's own motion, *see* Rule 31.24. Indeed, nothing in Rule 31 permits the prosecuting agency to file a motion to dismiss a timely filed and briefed appeal, nor for the appellate court to dismiss a timely filed and briefed appeal based on the State's opposed motion. The State cites no case in which a timely filed appeal was dismissed on the State's motion, strongly suggesting that the court's procedures do not permit a dismissal on this ground.

The State next argues that § 13-4033(C) is a substantive rather than procedural statute because it "eliminates a defendant's right to a direct appeal, and with it the court's jurisdiction, when a defendant waives that right by absconding for a particular amount of time." In support of this argument, the State quotes out of context this Court's recent decision in *State v. Bigger*, 251 Ariz. 402, ¶ 35 (2021).

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erroneous conviction on appeal." *Klein*, 166 P.3d 1149, ¶ 21. Noting that other jurisdictions also reject the doctrine because "the constitutional right to appeal overrides the doctrine's procedural underpinnings," the Washington Supreme Court held that ultimately, "any conflict between waiver and the right to appeal must be decided in favor of the express constitutional right." *Id.*

Bigger reinforced *Reed's* holding and supports argument that § 13-4033(C) is procedural.

In *Reed*, this Court concluded that A.R.S. § 13-106(A), which provided that "[o]n a convicted defendant's death, the court shall dismiss any pending appeal or postconviction proceeding," was an unconstitutional procedural law. The disposition of an appeal is procedural since it "enforce[s] the substantive right to appeal" and directed a particular disposition upon a finding of a particular event. *Reed*, 248 Ariz. 72, ¶¶ 16, 27. Next, the Court held that a statutory procedure directing dismissal conflicted with court procedures governing dispositions because those rules do not "diminish . . . the substantive right to appellate review." *Id.*

Similarly, in *Bigger*, this Court held that A.R.S. § 13-4234(G), which dictated the time limits for filing a petition for post-conviction relief are "jurisdictional, and an untimely filed notice or petition shall be dismissed with prejudice" was procedural and violated the separation of powers. *Bigger*, 251 Ariz. 402, ¶¶ 35-37. This Court found that § 13-4234(G) was unconstitutional as applied because the statute "curtails the constitutional right to appeal for IAC claims, and directly conflicts with Rule 32.4" by eliminating the "no fault" exception to time limits that exists in the rule. *Id.* at ¶ 37, *quoting State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591 (1984) ("We will recognize 'statutory arrangements which seem reasonable and

workable' and which supplement the rules we have promulgated. However, when a conflict arises, or a statutory rule tends to engulf a general rule of admissibility, we must draw the line.").

Section 13-4033(C) is an unconstitutional procedural law. Like §§ 13-106(A) and 13-4234(G), it directs a particular disposition of an appeal upon a finding that a particular event occurred—a delay of sentencing over ninety days due to the defendant's absence. Although § 13-4033(C) does not explicitly state that dismissal must result upon the finding of these events, enforcing it will "[f]unctionally" require this Court to dismiss the appeal. This is evident from the State's three petitions here, which seek orders directing the court of appeals to grant the State's motions to dismiss appeals that were filed and briefed in compliance with this Court's Rule 31 procedures. *Reed*, 248 Ariz. 72, ¶16. As this Court recognized, "The court's disposition of the appeal, whether a merits decision or a dismissal, is the last cog in the 'legal machinery' enforcing the substantive right to appeal" and "[n]either the substance of the disposition nor the rules that govern it diminish or augment the substantive right to appellate review." *Reed*, 248 Ariz. 72, ¶ 16.

Accordingly, § 13-4033(C) is an unconstitutional procedural statute that usurps the courts' rulemaking authority and its discretion over the disposition of the courts' cases.

III. This Court cannot rewrite an unconstitutional statute, regardless of the State's policy concerns.

When interpreting statutes, this Court looks first "to the text itself." *State v.* Green, 248 Ariz. 133, ¶ 8 (2020). Although Courts have a duty to construe statutes in a way that "not only gives effect to the legislature's intent, but also in a way that maintains its constitutionality," *State v. Thompson*, 204 Ariz. 471, ¶ 27 (2003), courts cannot salvage statutes by rewriting them because doing so would invade the legislature's domain." *In re Nickolas S.*, 226 Ariz. 182, ¶18 (2011). The "'choice of the appropriate wording rests with the Legislature, and the court may not substitute its judgment for that of the Legislature.'" *Orca Communications Unlimited, LLC v. Noder*, 236 Ariz. 180, ¶11 (2014) (quoting *City of Phoenix v. Butler*, 110 Ariz. 160, 162 (1973)).

The State has identified a handful of extreme cases that resulted in new trials for people who absconded for a decade or more during which time evidence and transcripts were lost. *State's Supplemental Brief* at 6. That concern does not justify throwing out the right of appeal for all defendants who fail to appear for sentencing within 90 days—a classic case of throwing out the baby with the bathwater.

For example, at the end of the trial at which Mr. St Clair was present, the court reaffirmed his release conditions. After he missed the prior convictions trial, a warrant was issued, with Mr. St Clair's known and correct address, with the warrant

served approximately seven months after trial, on May 12, 2020. He was sentenced three weeks later, on June 9, 2020. The record is silent as to why the State could not secure his appearance earlier. Similarly, Mr. Jacques was convicted *in absentia* on January 9, 2020, while the court knew he was at his home in Las Cruces, NM. The arrest warrant was eventually served at his home address approximately 9 months later, on September 21, 2020. Mr. Jacques was involuntarily absent, (the argument in his appellate brief), and was in the exact location the court permitted him to be throughout the pendency of his case, and the warrant was eventually served during the COVID-19 shut down. In each case, the record on appeal included transcripts of all relevant proceedings, the entire trial court file, and the admitted trial exhibits.

Moreover, the State cites *State v. Sahagun-Llamas*, 248 Ariz. 120 (App. 2020) as an example of an extreme case that supposedly resulted in the loss of the trial record. *State's Supplemental Brief* at 6-7. But in that case, the court reporter was negligent and dilatory at the time of trial, having "stopped filing her notes in all cases six weeks before the date she served as court reporter in Sahagun-Llama's trial." 248 Ariz. 120, ¶ 7. The court reporter later died in August 2007, leaving no notes from which another reporter could reproduce the transcript. The State argued on appeal that Sahagun-Llamas was at fault because he had absconded mid-trial. The court disagreed, finding that the paramount interest is to ensure that the court honors its

duty to preserve the record, and that the rule in effect at the time of Sahagun-Llamas's trial required the court reporter's original notes to be retained for 25 years from the date sentence is imposed. *Id.* at ¶ 25. The court also rejected the State's argument that Sahagun-Llamas's flight was evidence that he hoped the record of his trial would be destroyed in his absence. *Id.*[4]

In *Bolding*, 227 Ariz. 82, ¶¶ 16-17, the court compared Arizona's constitutionally guaranteed right to appeal with other states' rights to appeal. In jurisdictions where the right to appeal was granted only by statute and not a constitutional guarantee, a defendant's appeal could be statutorily barred if the defendant absconded, on a theory similar to that proposed by the State here, that a defendant failed to diligently pursue his statutory rights and therefore forfeited them. *See, e.g., State v. Smith,* 815 S.W.2d 74, 75 (Mo. Ct. App. 1991) (In Missouri, the right to appeal is statutory, which a court can deny to someone who absconds before sentencing in order to maintain orderly "administration of justice."). However, constitutionally guaranteed rights to appeal are not subject to forfeiture except in

[4] A unanimous panel found that they would have remanded for a new trial regardless of the lost transcript because Mr. Sahagun-Llamas raised a meritorious instructional error that prejudiced his trial. *Sahagun-Llamas*, 248 Ariz. 120, ¶ 40 (Espinosa, J., specially concurring in part). Thus, the State's contention that Mr. Sahagun-Llamas somehow won a result to which he would not have been entitled if he had been present for his original sentencing hearing is sorely misplaced.

extreme circumstances. *See, e.g.*, *Klein*, 166 P.3d 1149, ¶¶ 17-18 (the Washington Supreme Court held that the constitutional "right to appeal can be waived only voluntarily, knowingly, and intelligently" upon notice and additional proof the defendant's conduct was "extremely dilatory."). A defendant facing conviction does not leave the courthouse during a break before the verdicts to prevent his attorneys from appealing his convictions. If anything, a defendant who leaves the trial does so to avoid prison. Just as our court rejected the State's argument in *Sagahun-Llamas*, the Utah Supreme Court expressly rejected this argument, noting, "The stated premise … that an escape is an intentional abandonment of an appeal—is founded upon a questionable assumption, *i.e.*, that one who escapes has actually made a decision to abandon his appeal. A far more reasonable assumption is that the escapee has not even considered how his escape will affect his appeal rights." *State v. Tuttle*, 713 P. 2d 703, 704 (Utah 1985) (citation omitted).[5]

Similar to the fault analysis in *Sahagun-Llamas*, the Utah Supreme Court held that the mere act of absconding could not deprive a defendant of the right to appeal. Rather, like Washington, a defendant could forfeit that right only upon a showing by

[5] The Washington and Utah Supreme Courts interpreted the waiver requirements for their respective constitutional provisions as a matter of common law doctrine, and unlike this Court were not bound by statutory construction, leaving them open to crafting common law waiver-plus-prejudice standards.

the state "that it has been prejudiced by the defendant's absence and the consequent lapse of time." *Tuttle*, 713 P.2d at 705. The Utah court found that waiver-by-conduct "raises serious due process and equal protection questions" because dismissal "necessarily operates to punish only those with meritorious grounds for appeal, for those whose appeals lack merit will obtain no relief under any circumstances." *Id.* at 705.

Thus, the State's argument for constitutionality represents nothing more than a policy concern that a defendant who absconds for a decade or more should not benefit from the dissipation of evidence. Our court of appeals rejected this policy concern, finding that the greater concern is ensuring that the court abides its duty to preserve the record for all defendants. Moreover, this policy concern is a fact-specific inquiry, but § 13-4033(C) does not permit a hearing to determine whether the defendant's absence caused the destruction of evidence.

This Court should not engage in judicial public policymaking to save an overbroad and facially unconstitutional statute. Instead, the State could lobby the legislature for a constitutional law that ensure finality in victim cases, or it could submit a petition for a rule change. In any event, to the extent that the State's policy concerns motivated the passage of § 13-4033(C), this case is the wrong forum to

address those concerns. *Rivera-Longoria v. Slayton, ex rel. County of Coconino*, 228 Ariz. 156, ¶ 22 (2011).

CONCLUSION

A.R.S. § 13-4033(C) is an unconstitutional procedural rule that directly conflicts with the courts' rulemaking authority and strips a particular class of defendants of their constitutional right to appeal. This statute raises serious due process and equal protection concerns because it punishes those with meritorious grounds for appeal. This Court should apply the reasoning of *Bigger* and *Reed*, hold A.R.S. § 13-4033(C) unconstitutional, and remand the cases of Mssrs. Johnson, St Clair, and Jacques to the court of appeals so that their appeals can be considered.

DATED: (electronically filed) December 8, 2021.

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