IN THE SUPREME COURT
IN AND FOR THE STATE OF ARIZONA

STATE OF ARIZONA, Respondent/Appellee, v. BOBBY CHARLES PURCELL, Petitioner/Appellant.	Arizona Supreme Court No. CR 21-0398-PR Court of Appeals – Division One No. 1 CA-CR 21-0541 Maricopa County Superior Court No. CR 1998-008705
CONSOLIDATED WITH	
STATE OF ARIZONA, Respondent/Appellee, v. SCOTT LEE DESHAW, Petitioner/Appellant.	Arizona Supreme Court No. CR 21-0400-PR Court of Appeals – Division One No. 1 CA-CR 21-0512 Maricopa County Superior Court No. CR 1994-011396

PETITIONER PURCELL'S SUPPLEMENTAL BRIEF

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ISSUE PRESENTED FOR REVIEW

Arizona appellate courts have exercised appellate jurisdiction over direct appeals from re-sentencing proceedings where the defendant obtained the re-sentencing as relief from a post-conviction proceeding. The only exception is when the defendant's original sentencing arose from a plea agreement rather than trial.

Here, the Court of Appeals granted Mr. Purcell post-conviction relief and remanded his case for resentencing. Rather than conduct the re-sentencing, however, the Maricopa County Superior Court ignored the higher court's mandate and dismissed the case. In doing so, the Superior Court mischaracterized the proceedings before it as post-conviction proceedings.

Mr. Purcell filed a timely notice of appeal from the dismissal.

The Court of Appeals dismissed the appeal for want of jurisdiction.

Did the Court of Appeals err by concluding that it did not have appellate jurisdiction over the dismissal of the resentencing proceedings?

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STATEMENT OF FACTS AND THE CASE

With the exception of the following supplement, Mr. Purcell relies on the procedural history offered in his Petition for Review outlining the long list of barriers he has encountered in his effort to obtain the protections of *Miller v. Alabama*, 567 US. 460 (2012) and *Montgomery v. Louisiana,* 577 U.S. 190 (2016) that are guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. *See* PFR at 4-7.[1]

On remand, MCAO had previously argued that, despite its prior stipulation waiving the applicability of *State v. Valencia*, 241 Ariz. 206 (2016), the post-conviction burden announced in *Valencia* applied, but Judge Rea had rejected MCAO's arguments in finding that the proceedings are distinct and those on remand were resentencing rather than post-conviction proceedings. *See* Docket #307 (Minute Entry concerning burden of proof at *Miller/Montgomery* resentencing) (filed May 07, 2019).

Judge Starr's subsequent Order dismissing the case in violation of the appellate mandate fails to reference Judge Rea's prior ruling. *See* PFR-App. at 31A (Ruling / Rule 32 Claim Dismissed) (filed Nov. 10, 2021).

[1] This Court's Order granting Mr. Purcell s Petition for Review did not invite Mr. Purcell "to repeat the contents of the Petition for Review." (filed April 06, 2022).

ARGUMENT

Article 2, Section 24 of the Arizona Constitution provides: "In criminal prosecutions, the accused shall have ... the right to appeal in all cases...."

Mr. Purcell was denied his constitutional right to appeal in this case when the Arizona Court of Appeals dismissed his appeal for want of appellate jurisdiction. The rationale offered by Judge Pro Tempore Armstrong for dismissing the appeal was that the proceedings below were post-conviction proceedings not subject to appeal under A.R.S. § 13-4033 and Ariz. Crim. P. 32.16 (a) (1). *See* PFR-App. at 7A (Order Dismissing Appeal) (filed Dec. 07, 2021).

However, the proceedings below were not post-conviction proceedings. The post-conviction proceedings terminated in the Court of Appeals when Judge Thumma granted post-conviction relief pursuant to MCAO's stipulation that Mr. Purcell was entitled to resentencing. *See* PFR-App at 28A (Order Granting Review and Granting Relief) (filed Feb. 16, 2018).

MCAO persists in mischaracterizing the proceedings below as post-conviction proceedings. *See* PFR-Resp. at 2, 9-13.

This Court has granted review over "Issue one only," which this Court has declared to be "whether the Court of Appeals erred by concluding that it did not have appellate jurisdiction over the dismissal of the resentencing proceedings" *See* Order

Consolidating Cases at 2 (filed Apr. 11, 2022). This Court should confirm that the proceedings below were resentencing proceedings and conclude that the Court of Appeals erred by dismissing Mr. Purcell's appeal because Judge Starr's dismissal of the resentencing proceedings was "an order made after judgment affecting the substantial rights of" Mr. Purcell under A.R.S. § 13-4033 (A) (3) and Rule 31.2 (B) of the Arizona Rules of Criminal Procedure.

A. The Resentencing Proceedings Below Were Not Post-Conviction Proceedings

MCAO argues that the Court of Appeals did not err in dismissing this case because it asserts that the proceedings before Judge Starr in the Maricopa County Superior Court were post-conviction proceedings[2] and thus not subject to direct appeal. PFR-Resp. at 10-14. Judge Pro Tempore Armstrong's Order Dismissing Appeal likewise mischaracterized the proceedings below to be post-conviction

[2] MCAO likewise points to three post-conviction cases *State v. Wagner*, 1 CA-CR 21-0492 PRPC, *State v. Odom*, 1 CA-CR 21-0537-PRPC, *State v. Cabanas*, 1 CA-CR 21-0534-PRPC to support its argument, further illustrating the continuity of MCAO's error *See* PFR-Resp. at 13-14. The other case MCAO references, *State v. Arias*, 1 CA-CR 22-0064-PRPC was set for resentencing before Judge Starr evaded a similar mandate. Arias filed a Notice of Appeal, which was dismissed and not challenged under the rationale of *State v Rodriguez-Gonzales*, 208 Ariz. 198 (App. 2004). *See* Notice of Intent to Proceed with Petition for Review, *State v. Arias*, Maricopa County Superior Court No. CR 1999-012662 (filed Dec. 07, 2021). *See, also* Ariz. R. Evid. 201 (C) (2); *State v. Valenzuela*, 109 Ariz. 109, 110 (1973) (authorizing judicial notice of court records).

proceedings in concluding that appellate jurisdiction was not proper under Rule 32.16 (a) (1) of the Arizona Rules of Criminal Procedure. *See* PFR-App. at 7A (Order Dismissing Appeal) (filed Dec. 07, 2021).

Both are wrong. Resentencing proceedings are distinct from post-conviction proceedings. Judge Starr's order dismissing the resentencing proceedings on remand did not transform the nature of the proceedings into post-conviction proceedings.

1. The Court of Appeals terminated the post-conviction proceedings when it granted relief pursuant to the State's stipulation.

On October 31, 2016, the United States Supreme Court issued a Grant, Vacate, Remand (GVR) order in this case. *Purcell v. Arizona*, 137 S.Ct. 369 (2016). In that Order, the Court vacated the judgment of this Court denying review of the trial court's denial of Mr. Purcell's petition for post-conviction relief and remanded for further consideration in light of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

Following the United States Supreme Court's GVR Order, the Arizona Court of Appeals ordered the parties to file simultaneous briefs regarding the impact of *Montgomery* and *State v. Valencia*, 241 Ariz. 206 (2016) on Mr. Purcell's case. *See* PFR-App. at 25A-26A (Order on Remand) (filed December 20, 2016)).

In *Valencia*, this Court held that juveniles sentenced to life-without-parole could obtain resentencing *if* they could prove, by a preponderance of the evidence, that their crimes reflected transient immaturity at a post-conviction evidentiary

hearing conducted pursuant Rule 32.8 of the Arizona Rules of Criminal Procedure. 241 Ariz. at 210, ¶ 18. This Court noted that in lieu of a contested post-conviction evidentiary hearing, the State could "stipulate to the defendant's resentencing in light of *Montgomery* and *Miller*" if it did "not contest that the crime reflected transient immaturity." *Id*.

MCAO entered such a stipulation here, and the Court of Appeals accepted it. *See* PFR-App. at 28A (Order Granting Review and Granting Relief) (filed Feb. 16, 2018). Upon accepting MCAO's stipulation, the Court of Appeals granted Mr. Purcell "relief" and remanded "to the trial court for resentencing." *Id*.

Notably absent from the Order Granting Review and Granting Relief is any reference to ongoing post-conviction proceedings on remand. *Id*. This is understandable since Judge Thumma's Order granted post-conviction relief in the form of a resentencing. *See* Ariz. R. Crim. P. 32.16 (k) (authorizing appellate court to grant post-conviction relief upon granting discretionary review); A.R.S. § 13-4239(G) (same); *Valencia*, 241 Ariz. at 210, ¶ 18 (noting that resentencing is the relief sought in separate post-conviction proceedings concerning the constitutionality of JLWOP sentences).

2. The Maricopa County Superior Court treated the proceedings as re-sentencing proceedings up until it evaded the appellate mandate.

Up until Judge Starr dismissed this case in the Maricopa County Superior Court, the Maricopa County Superior Court had treated the proceedings before it to be resentencing proceedings. The prior judge, Judge Rea, had explicitly rejected MCAO's arguments that the post-conviction burden announced in *State v. Valencia*, 241 Ariz. 206 (2016) applied because "the State has stipulated to resentencing" and thus the burden of proof applicable at a Rule 32 proceeding did not apply. *See* Docket #307 (Minute Entry concerning burden of proof at *Miller/Montgomery* resentencing) (filed May 07, 2019).

Judge Rea correctly noted that post-conviction proceedings are distinct from sentencing proceedings. *Id*.

Yet, inexplicably, Judge Starr recharacterized the proceedings before the Maricopa County Superior Court to be post-conviction proceedings. *See* PFR-App. at 31A (Ruling / Rule 32 Claim Dismissed) (filed Nov. 10, 2021). Presumably, the rationale for the recharacterization was rooted in Judge Starr's decision that the trial court had the authority to evade Judge Thumma's appellate court mandate, relieve MCAO of its appellate stipulation, predict that this Court would eventually overrule *State v. Valencia*, 241 Ariz. 206 (2016) and hold that *Miller v. Alabama*, 567 .US. 460 (2012) is inapplicable in Arizona. *See Id*. at 31A-32A (concluding that "the basis

for [*Valencia*] no longer exists" which permitted the lower court to refuse to enforce the appellate mandate.).

3. Resentencing proceedings are distinct from post-conviction proceedings.

A review of relevant statutes and rules establishes the obvious: resentencing and post-conviction proceedings are materially distinct.

a. Post-conviction proceedings provide the procedure to obtain sentencing relief.

Arizona's post-conviction regime is governed by Rule 32 and Rule 33 of the Arizona Rules of Criminal Procedure and A.R.S. §§ 13-4231-4239. Keith J. Hilzendeger, *Arizona State Post-Conviction Relief*, 7 Ariz. Summit L. Rev. 585, 590 (2014); *State v. Reed*, 252 Ariz. 236, FN 1 (App. 2021) (Noting that this Court amended the rules codifying post-conviction rules for pleading defendants by adding a new Rule 33 effective January 01, 2020).

Notably absent from this post-conviction regime is any rule or statute governing sentencing proceedings. *See* Ariz. R. Crim. P. 32-33; A.R.S. §§ 13-4231-4239. The absence of such a rule or statute makes sense because a new sentencing hearing is a type of relief that may be won during post-conviction proceedings.

Rule 32.1(g) of the Arizona Rules of Criminal Procedure and A.R.S § 13-4231 (7), the germane provisions here, offer the relief of resentencing where "there has

been a significant change in the law" that if applicable," would probably overturn the defendant's … sentence."

In order to obtain relief, including resentencing, absent a stipulation from the state, defendants bear the burden of proving material facts necessary to sustain their claims by a preponderance of the evidence at a post-conviction evidentiary hearing. *See* Ariz. R. Crim. P. 32.13, 33.13; A.R.S. 13-4238; *Valencia*, 241 Ariz. at 210, ¶ 18.

If the defendant prevails, the post-conviction court may order a new sentencing hearing, if "necessary and proper." *See* Ariz. R. Crim. P. 32.13 (2) (C), 33.13 (2) (C); A.R.S. § 13-4238 (D); *Valencia*, 241 Ariz. at 210, ¶ 18.

b. Sentencing hearings are governed by different rules than post-conviction hearings.

Sentencing proceedings are governed by Rule 26 of the Arizona Rules of Criminal Procedure. Rule 26.14 of the Arizona Rules of Criminal Procedure governs resentencing proceedings that occur when a sentence "has been set aside - either on appeal, by collateral attack, or by post-trial motion." Post-conviction proceedings constitute the primary form of collateral review available in Arizona state courts. *See* Keith J. Hilzendeger, *Arizona State Post-Conviction Relief*, 7 Ariz. Summit L. Rev. 585, 590 (2014).

Given that Rule 26.14 governs resentencing proceedings and Rule 26 governs sentencings generally, it is evident that resentencing proceedings are not governed

by rules and statutes governing post-conviction proceedings. *See Valley Nat. Bank of Phoenix v. Glover*, 62 Ariz. 538, 550 (1945) (embracing *in pari materia* canon of statutory construction).

Given that neither Rule 32 nor Rule 33 reference sentencing proceedings and that the rules' reference to sentencing proceedings are limited to the procedures applicable to obtaining sentencing relief, it is evident that sentencing and post-conviction proceedings are distinct.

The Court of Appeals erred by characterizing the proceedings below as post-conviction proceedings. Judge Starr erred by recharacterizing the proceedings below to be post-conviction proceedings. Post-conviction proceedings ended with the Court of Appeals Order Granting Review and Relief issued on February 16, 2018.

B. Mr. Purcell has a Right to Appeal the Order Dismissing the Resentencing Proceedings in Violation of an Appellate Mandate.

MCAO argues that Mr. Purcell is not entitled to a direct appeal from Judge Starr's order dismissing his resentencing because 1.) Mr. Purcell was not resentenced and thus cannot invoke A.R.S. 13-4033 (A) (4) to establish appellate jurisdiction (PFR-Resp. at 12-14), and 2.) Judge Starr's order dismissing the case was not "a order made after judgment affecting the substantial rights of the party under A.R.S. 13-4033 (A) (3). PFR-Resp. at 9-12.

Mr. Purcell urges this Court to reject MCAO's rationale and find that appellate jurisdiction exists in circumstances such as this where a lower court evades a higher court mandate and dismisses a case rather than complying with said mandate.

1. MCAO concedes that Mr. Purcell had a right to appeal from a resentencing.

MCAO does not dispute that Mr. Purcell would have had a right to appeal if the Maricopa County Superior Court had complied with the appellate mandate and actually resentenced Mr. Purcell. PFR-Resp. at 11, 12-13.

MCAO similarly does not contest the validity of *State v Rodriguez-Gonzales*, 208 Ariz. 198 (App. 2004), a Division Two case that reasoned appellate jurisdiction would exist in scenarios, such as this, where new sentencing hearings are conducted following successful post-conviction proceedings arising from trial convictions. PFR-Resp. at 11.

Rather, MCAO argues that he does not have a right to appeal because the resentencing did not occur when Judge Starr evaded the mandate and dismissed the case. PFR-Resp. at 11, 12-13. MCAO's failure to contest the rationale of *Rodriguez-Gonzales* should be treated as concession via waiver. *State v. Moody*, 208 Ariz. 424, 457, ¶ 131 (2004) (the state confesses error by failing to respond).

2. Appellate jurisdiction exists under A.R.S. 13-4033 (A) (4).

MCAO disputes whether it has stipulated that Mr. Purcell's natural life sentence is unconstitutional under the Eighth Amendment. PFR-Resp. at 13, FN2. MCAO contends that "it did not stipulate to resentencing in light of *Valencia*." *Id*.

But the record belies MCAO's claim.

After the United States Supreme Court vacated the appellate decision in this case and remanded the matter for reconsideration in light of *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Arizona Court of Appeals ordered the parties to "file simultaneous briefs not to exceed twenty pages regarding the effect of *Montgomery v. Louisiana* and the effect, if any, of the *State v. Valencia* decision on the issues to be decided in this case." The briefing was due "no later than 30 days after" this Court's decision was issued in *State v. Valencia*, 241 Ariz. 206 (2016). *Id*. The 30-day briefing deadline was extended until the United States Supreme Court ruled on a petition for certiorari in *Valencia*.[3] The United States Supreme Court denied certiorari in *Valencia* on November 27, 2017. *Valencia v. Arizona*, 138 S. Ct. 467 (2017).

[3] This Court may take judicial notice of the orders issued by the Court of Appeals concerning the briefing deadline extension ordered in connection with the petition for certiorari filed in *Valencia*. *See* Ariz. R. Evid. 201(C)(2); *State v. Valenzuela*, 109 Ariz. 109, 110 (1973) (authorizing judicial notice of court records).

Following the denial of certiorari in *Valencia*, MCAO waived the opportunity to brief "the effect, if any, of *State v. Valencia*, 241 Ariz. 206 (2016), on the issues to be decided in this case." PFR-App. at 28A (Order Granting Review and Granting Relief) (filed Feb. 16, 2018). The Court of Appeals accepted "the State's waiver of the right to file a supplemental brief, and stipulation to remand this case to the trial court for resentencing." *Id*.

Valencia was clear about the importance of such a stipulation to resentencing. Under *Valencia*, defendants bear the burden of proving "that their natural life sentences are unconstitutional" by proving that the crimes reflected transient immaturity before they are entitled to resentencing. 241 Ariz. at 210, ¶ 18. Under *Valencia*, the state can stipulate that the crimes reflected transient immaturity, thereby stipulating that the sentences are unconstitutional, and "stipulat[ing] to the defendant's resentencing in light of *Montgomery* and *Miller*." *Id*.

A.R.S. § 13-4033 (A) (4) provides that an appeal may be taken by the defendant from a "sentence on the grounds that it is illegal or excessive." Given this procedural history and the unequivocal language in *Valencia* concerning the import of a stipulation to resentencing, this Court should find that appellate jurisdiction exists under A.R.S. § 13-4033 (A) (4) because Judge Starr's ruling left in place a

sentence which has been found, pursuant to a stipulation, to be "illegal."[4] *Valencia*, 241 Ariz. at 210, ¶ 18.

3. This Court should adopt the rationale of *State v Rodriguez-Gonzales*, 208 Ariz. 198 (App. 2004).

Mr. Purcell has previously laid out the rationale of *State v Rodriguez-Gonzales*, 208 Ariz. 198 (App. 2004) in his Petition for Review. PFR at 12-13. MCAO does not dispute the rationale; instead, MCAO argues that *Rodriguez-Gonzales* is inapplicable because there was no resentencing. PFR-Resp. at 11.

Rodriquez-Gonzales held that appellate jurisdiction does not exist over an appeal of a resentencing conducted pursuant to post-conviction relief obtained from an illegal sentence arising from a plea agreement. 208 Ariz. at 200, ¶ 20. The rational centered on prior cases holding that an illegal sentence is no sentence at all; therefore the "new sentencing orders merely placed appellants in the position in which they would have been had they been sentenced correctly in the first place." *Id*. (internal citations omitted).

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[4] Whether MCAO accurately characterizes the scope of its waiver and the importance of its stipulation can be addressed on the merits in the subsequent appeal should this Court find appellate jurisdiction to exist. Petitioner offers this argument in support of the issue presented concerning appellate jurisdiction. Should this Court be interested in the substantive issues presented by Judge Starr's ruling, this Court could issue an order requesting briefing on the substantive issue of whether the dismissal was erroneous. *See* Ariz. R. Crim. P. 31.18 (f) (authorizing transfer of cases pending in Court of Appeals on this Court's own motion).

MCAO argues that the *Rodriguez-Gonzales* rationale favors the rejection of appellate jurisdiction here. PFR-Resp. at 11. However, MCAO's argument rests on the erroneous assertion that the proceedings below "remained part of [a] collateral attack." The proceedings on remand were not post-conviction proceedings. Rather, they were sentencing proceedings. *See* Argument Section A, *supra*.

Like *Rodriguez-Gonzales*, Mr. Purcell obtained post-conviction relief. Unlike *Rodriguez-Gonzales*, the sentences subject to appeal were ordered after a trial conviction. Thus, the *Rodriguez-Gonzales* rationale supports the exercise of appellate jurisdiction because the successful post-conviction proceeding put Mr. Purcell "in the position in which they would have been had they been sentenced correctly in the first place." *Rodriguez-Gonzales,* 208 Ariz. at 200, ¶ 20. Here, that posture is pending sentencing after a conviction or judgment at trial.

4. Appellate jurisdiction exists under A.R.S. § 13-4033 (A) (3).

Appellate jurisdiction exists here under A.R.S. § 13-4033 (A) (3), which provides for appellate jurisdiction over "an order made after judgment affecting the substantial rights of the party."

MCAO argues that appellate jurisdiction cannot be found under A.R.S. § 13-4033 (A) (3) because it contends that the terms of this subsection of the jurisdictional statute are not met. PFR-Resp. at 10-11. MCAO's argument is based on its erroneous

assertion, embraced by Judge Pro Tempore Armstrong in the Order Dismissing Appeal, that the proceedings below were post-conviction proceedings. *Id.* at 10. The foundation of MCAO's argument crumbles since the proceedings below were resentencing proceedings, not post-conviction proceedings. *See* Argument Section A, *supra*.

a. The dismissal followed the trial conviction judgment.

Under the rationale of *Rodriguez-Gonzales,* 208 Ariz. at 200, ¶ 20, the proceedings below were pending sentencing following a conviction at trial. A trial conviction is a judgment. *See* Ariz. R. Crim. P. 26.1 (b) (defining judgment to include "the court's adjudication of guilt." Defendants have a right to be present at sentencing and cannot be held in prison absent a lawful sentencing order. *State v. Davis*, 105 Ariz. 498, 503, (1970). Thus, appellate jurisdiction exists here under A.R.S. § 13-4033 (A) (3).

MCAO relies on *State v. Jimenez,* 188 Ariz. 342, 345 (App. 1996) to support its argument that appellate jurisdiction was properly declined under A.R.S. § 13-4033 (A) (3). PFR-Resp. at 10-11. In *Jimenez*, the defendant was sentenced to probation via a plea agreement. 188 Ariz. at 343. The defendant then filed a motion to modify the terms of his probation. *Id.* After the trial court denied the motion, the

defendant attempted to appeal the ruling by invoking A.R.S. § 13-4033 (A) (3) as a basis for appellate jurisdiction. *Id*. at 343-344.

The *Jimenez* court declined jurisdiction over the appeal because the defendant had waived his right to appeal the sentence and the trial court's subsequent ruling declining to modify the terms of probation did not affect a substantial right. *Id*. Notably, the *Jimenez* court opined that A.R.S. § 13-4033 (A) (3) would have vested appellate jurisdiction with the Court of Appeals had the trial court actually modified a term of probation. *Id*. at 345; *see, also State v. Regenold*, 226 Ariz. 378, 380, ¶ 1 (2011) (holding that appellate jurisdiction over a contested probation violation hearing resulting in a sentencing is proper and A.R.S. § 13-4033(B) is inapplicable.).

b. The dismissal also followed the mandate judgment.

Even if this Court elects not to apply the *Rodriguez-Gonzales* rationale placing the proceedings on remand to be pending sentencing after a judgment via a trial conviction, an alternative but equally applicable "judgment" was the mandate issued by the Court of Appeals granting post-conviction relief and remanding for resentencing.

This Court has previously referred to an appellate mandate as a judgment. *See State v. Tucker*, 133 Ariz. 304, 308 (1982) (reversing conviction and dismissing with prejudice for a speedy trial violation arising from failure to timely try the case after

a "certified copy of the judgment/mandate" was issued by the Ninth Circuit). Rule 31.1 of the Arizona Rules of Criminal Procedure similarly includes an expansive definition of "judgment," to include any "appealable order, whether identified as a 'judgment,' an 'order,' a 'pronouncement of sentence,' or another term." Thus, Judge Starr's order dismissing this case before complying with the appellate mandate amounts to "an order after judgment."

c. The dismissal affected substantial rights.

Here, unlike *Jimenez*, Mr. Purcell argues that Judge Starr's order evading the judgment/mandate affected his "substantial rights" under A.R.S. § 13-4033 (A) (3). Mr. Purcell has a constitutional right to be sentenced in accordance with the requirements of the Eighth Amendment under *Montgomery v. Louisiana*, 577 U.S. 190 (2016). He also has a right to a fair sentencing procedure. *State v. Grier*, 146 Ariz. 511, 515 (1985). Judge Starr's order deprived him of that right, thus affecting his "substantial interest[]" in a constitutional sentence and a fair sentencing procedure.

Additionally, Mr. Purcell has a substantial interest in enforcing the mandate. Historically, appellate jurisdiction has been exercised of appeals challenging voidable orders. *See State v. Serrano*, 234 Ariz. 491, 495, ¶ 15 (App. 2014) (holding that void orders are appealable under the terms of A.R.S. § 13-4033 (A) (3)); *State*

ex rel. Morrison v. Superior Court In & For Yavapai County, 82 Ariz. 237, 241 (1957) (embracing rule that appellate jurisdiction must exist to challenge void orders or judgments); *Spicer v. Simms*, 6 Ariz. 347, 350 (1899) ("If the court had no power to make the order at the time it was made, the judgment rendered would be void, and an appeal would lie to review it."). An order which exceeds the mandate of a higher court is void because the jurisdiction of the lower court on remand is limited to enforcement of the mandate. *Vargas v. Superior Court of Apache Cty.*, 60 Ariz. 395, 397 (1943); *Raimey v. Ditsworth*, 227 Ariz. 552, 559, ¶ 19 (App. 2011).

No matter how it is viewed, the order dismissing the case without complying with the mandate falls under the jurisdictional grant of A.R.S. § 13-4033 (A) (3).

5. MCAO's substantive arguments should not justify the deprivation of the right to appeal.

MCAO's jurisdictional argument is entirely reliant on its conclusion that Judge Starr had the authority to evade the appellate mandate, relieve MCAO of its appellate-level stipulation, and recharacterize the proceedings below to be post-conviction proceedings. *See* PFR-Resp. at 7-9, 10-12. But MCAO's substantive argument should not justify the denial of appellate jurisdiction. Rather, it should be tested under the mandatory appellate jurisdiction ensured by Article 2, Section 24 of the Arizona Constitution.

6. The Arizona Constitution compels a finding of appellate jurisdiction.

Article 2, Section 24 of the Arizona Constitution provides: "In criminal prosecutions, the accused shall have … the right to appeal in all cases...." The only exceptions to a right to a direct appeal recognized by this Court fall under the waiver doctrine. *Wilson v. Ellis*, 176 Ariz. 121, 123 (1993). Even with a valid waiver, this Court has recognized that Article 2, Section 24 of the Arizona Constitution "guarantees some form of appellate relief." *Id*. However, in those instances that right of appeal is implemented by a review conducted in post-conviction proceedings in the court of conviction. *Id*.

MCAO argues that Mr. Purcell has an alternative "avenue to review" under Rule 32.16 of the Arizona Rules of Criminal Procedure. This argument fails to appreciate the discretionary nature of review afforded under Rule 32.16 (k). Unlike discretionary review under Rule 32.16, the Court of Appeals is required to exercise appellate jurisdiction over an appeal. *See State v. Ikirt*, 160 Ariz. 113, 116 (1987). Furthermore, there is no right to counsel during discretionary review of post-conviction proceedings. *State v. Smith*, 184 Ariz. 456, 460 (1996)

Thus, MCAO's argument falls short; the denial of a right to appeal here would violate Article 2, Section 24 of the Arizona Constitution. Here, there has been no waiver of the right to appeal under Article 2, Section 24 of the Arizona Constitution.

This Court should ensure that the promise of the right to appeal in all cases is kept by finding appellate jurisdiction here.

CONCLUSION

For the reasons stated in this Supplemental Brief and those in the Petition for Review, Mr. Purcell respectfully requests that this Court ensure that he is afforded the protections guaranteed to him under Article 2, Section 24 of the Arizona Constitution, reverse the Court of Appeals order dismissing this appeal for want of appellate jurisdiction, remand to the Court of Appeals with an order to grant appellate jurisdiction of this case and conduct the appeal pursuant to Rule 31 of the Arizona Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this 26th day of April, 2022

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