SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Petitioner, v. HONS. SEAN E. BREARCLIFFE, GARYE L. VASQUEZ, and Judges of the Court of Appeals Division Two, of the State of Arizona, Respondent Judges, PHILLIP MATTHEW JOHNSON, Real Party in Interest.	CV–21–0174–SA Arizona Court of Appeals No. 2 CA–CR 2020–0070 Pima County Superior Court No. CR–2017–1194–001 **STATE OF ARIZONA'S SUPPLEMENTAL BRIEF**

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QUESTION PRESENTED FOR REVIEW

Section 13–4033(C), as interpreted by *State v. Bolding*, 227 Ariz. 82 (2011), deprives the court of appeals of subject matter jurisdiction when the record shows that a criminal defendant, like Johnson, validly waived his right to a direct appeal through his conduct. Did the court of appeals exceed its jurisdiction or abuse its discretion when it refused to dismiss Johnson's appeal under § 13–4033(C)?

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BACKGROUND

I. Introduction.

This Court has long recognized that "[e]ven when [the right to appeal in criminal cases is] granted by the Constitution, it is subject to reasonable statutory regulations, and is infringed only when the conditions imposed are such as to amount to a denial of justice." *Hancock v. State*, 31 Ariz. 389, 392 (1927); *see also State v. Ramirez*, 178 Ariz. 116, 122 (1994) (quoting *Hancock*, 31 Ariz. at 392). In *Ramirez*, for example, this Court considered the constitutionality of A.R.S. § 13–4031, which provides that capital cases "may only be appealed to the supreme court." 178 Ariz. at 122 (quoting A.R.S. § 13–4031). The defendant argued that § 13–4031 violated the state and federal guarantees of equal protection "because it limits capital defendants to one appeal . . . whereas non-capital defendants have two possibilities for appeal: direct appeal to the court of appeals and discretionary review by the supreme court." *Id.* (footnotes omitted). Quoting *Hancock*, this Court rejected the defendant's argument, reasoning that § 13–4031 had "a rational basis for requiring automatic review by a state's supreme court: such a review promotes consistency in death sentencing." *Id.*

The statute at issue here, A.R.S. § 13–4033, regulates a non-capital criminal defendant's state constitutional right to appeal. *See* Ariz. Const. art. II, § 24. Subsection (A) enumerates categories of appealable orders. A.R.S. § 13–4033(A).

Subsection (B) then provides that "a defendant may not appeal from a judgment or sentence" that is entered in accordance with a plea agreement or an admission to a probation violation. A.R.S. § 13–4033(B). In those circumstances, a defendant waives his right to a direct appeal and is limited to raising issues in a post-conviction relief proceeding under Rule 33 of the Arizona Rules of Criminal Procedure. *Id*.; *State v. Smith*, 184 Ariz. 456, 458 (1996) ("It is through operation of the rules governing post-conviction relief that our constitutional guarantee of appellate review in all cases is effectuated for pleading defendants.") (citing Ariz. Const. art. II, § 24, and *Wilson v. Ellis*, 176 Ariz. 121, 123 (1993)); *see also* Ariz. R. Crim. P. 33.1 (describing the scope of Rule 33 and grounds for relief).

Nearly 30 years ago, the court of appeals upheld § 13–4033(B) as constitutional, observing that the Arizona Constitution's guarantee of the right to appeal is not absolute, and, "like any other constitutional right, may be waived." *State v. Wilson*, 174 Ariz. 564, 566–67 (App. 1993). Accordingly, the court of appeals rejected the argument that § 13–4033(B) violated article II, § 24 of the Arizona Constitution, reasoning that "[w]hether by neglect or conscious choice, defendants often forego exercise of the right to appeal." *Id*. at 566.

II. History and Purpose of A.R.S. § 13–4033(C).

In 2008, the Legislature amended § 13–4033 by adding subsection (C). 2008 Ariz. Legis. Serv. Ch. 25 (S.B. 1068) (West). That subsection provides that a

defendant may not appeal a final judgment of conviction or verdict of guilty except insane or an order denying a motion for a new trial "if the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary." A.R.S. § 13–4033(C).

The bill's sponsor emphasized (consistent with the statute's text) that this provision of the statute would "appl[y] only to voluntary absences." Ariz. House Comm. Minutes, 48th Leg., 2nd Reg. Sess., S.B. 1068 (Mar. 27, 2008). A supporter of the bill, Sheryl Rabin from the Attorney General's Office, explained the intent of S.B. 1068 to the Senate's Committee on Judiciary and to the House's Committee on Judiciary. *See* Ariz. Senate, 48th Leg., 2nd Reg. Sess., Comm. on Jud. Hearing, S.B. 1068 (Feb. 4, 2008);[1] Ariz. House of Rep., 48th Leg., 2nd Reg. Sess., Comm. on Jud. Hearing, S.B. 1068 (Mar. 27, 2008).[2] Before the Senate, Ms. Rubin explained that S.B. 1068 essentially "closes a loophole in the law that would allow fugitives to

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[1] *Available at*: https://www.azleg.gov/videoplayer/?eventID=2008021233&startStreamAt=5782 (from 1:37:05 to 1:39:34) (last visited November 21, 2021).

[2] *Available at* https://www.azleg.gov/videoplayer/?eventID=2008031368&startStreamAt=760 (from 13:56 to 15:14) (last visited Nov. 18, 2021).

evade prompt appeal of their convictions." Ariz. Senate, 48th Leg., 2nd Reg. Sess., Comm. on Jud. Hearing, S.B. 1068 (Feb. 4, 2008). Ms. Rubin elaborated as follows:

> The time for [a criminal defendant] to appeal doesn't start until they are sentenced. So if a person is tried and convicted, whether they are present or not, and then they flee, their appeal doesn't start until they return. So it could be 12 years later that a person comes back and now they start the appeal process. We're saying the person was on notice, that they knew there was the sentencing. If they choose not to be there, their appeal rights shouldn't run longer than 90 days. That's actually a little longer than the current amount of time a person would have than if they had been present.[3]
>
> We feel that this provides more justice for the victims. We heard earlier about how people are just waiting and waiting for some finality in a case, but also for the entire criminal justice system. If the case is appealed and goes back to the trial level, you could have new public defenders, you have a court that's not familiar with the case, prosecutors not familiar with the case, [and] witnesses may have disappeared. So it doesn't seem right, from our position, to give the defendant all of this power to affect the appeal process when they were on notice of when they needed to be there to be sentenced.

Id. The Committee had no questions, and S.B. 1068 passed the Committee by a 4-0 vote (with 3 members of the Committee not voting). *Id.*

Before the House, Ms. Rabin expressed similar concerns and provided hypothetical examples of two defendants: one who appears for sentencing and then

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[3] Trial courts are expected to "order the defendant to be present for sentencing and, if the defendant fails to appear, issue a warrant for the defendant's arrest"; and (2) set sentencing hearings "no later than 60 days after the determination of guilt." Ariz. R. Crim. P. 26.3(a)(1)(C), (b).

appeals, and a second who absconds for several years before he is sentenced and then appeals. Ariz. House of Rep., 48th Leg., 2nd Reg. Sess., Comm. on Jud. Hearing, S.B. 1068 (Mar. 27, 2008). The appeal by the absconding defendant presents several problems, she explained. *Id.* It "does not provide final and prompt resolution for victims. It's not efficient use of the court's time. Evidence may no longer be available. Witnesses' memories may have faded." *Id.* And an absconding defendant could "end[] up in a better position" than the defendant whose absence did not delay sentencing. *Id.*

The Senate Fact Sheet reflects that the purpose of § 13–4033(C) was to "prohibit[] a defendant's right to appeal if the defendant's absence prevented sentencing" from occurring 90 days after conviction. Ariz. Senate Fact Sheet for S.B. 1068, 48th Leg., 2nd Reg. Sess. (Jan. 31, 2008).[4] The Legislature noted that the right to appeal in a criminal case derives from the Arizona Constitution and that under subsection (B) of § 13–4033, "an appeal is prohibited from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation[.]" *Id.*

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[4] *Available at* https://www.azleg.gov/legtext/48leg/2r/summary/s.1068jud.doc.htm (last visited November 19, 2021).

(continued ...)

The bill passed overwhelmingly by a near-unanimous vote of 52-3 in the House and a unanimous vote of 30-0 in the Senate.[5]

The problems that motivated the Legislature to enact § 13–4033(C) are real and significant. By way of example, a defendant's unexcused absence delays the proceedings and can cause deficiencies in appellate records. *See, e.g.*, *State v. Puccini*, No. 1 CA-CR 15-0238, 2015 WL 9450356, at *2–3, ¶¶ 14–15 (Ariz. App. Dec. 24, 2015) (trial transcripts were unavailable because defendant absconded and remained at large for over 20 years before sentencing); *State v. Diaz*, No. 1 CA-CR 11-0771, 2013 WL 2151393, at *1, ¶¶ 3–5 (Ariz. App. May 16, 2013) (trial transcript notes were destroyed according to administrative retention schedule after defendant absconded during trial and was arrested about 16 years later); *State v. Craig*, No. 1 CA-CR 09-0561, 2013 WL 325617, at *1, ¶¶ 2–4 (Ariz. App. Jan. 29, 2013) (trial transcripts could not be prepared after defendant absconded and remained a fugitive for nearly 18 years before sentencing).

This occasionally turns to the defendant's benefit, as in *State v. Sahagun-Llamas*, for example, where the defendant absconded midway through trial and was not apprehended for over 13 years. 248 Ariz. 120, 122, ¶ 6 (App. 2020). After he

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[5] *See* Bill Status, Vote Details for the House and Senate, *available at* https://apps.azleg.gov/BillStatus/BillOverview/24960 (last visited November 19, 2021).

was sentenced and appealed, it was discovered that the court reporter for the fourth day of trial had died and left no notes from which to transcribe the testimony of that day. *Id*. at ¶¶ 7–8. After attempts to reconstruct the record, the court of appeals ruled that the defendant was entitled to a new trial because of the missing transcript. *Id*. at 125, ¶ 20. Section 13–4033(C) attempts to avoid these problems created by a defendant's voluntary and knowing actions.

Moreover, § 13–4033(C) is reasonable. *See Hancock*, 31 Ariz. at 392. It does not foreclose a defendant's right to appeal his sentence and the defendant still retains the right to pursue post-conviction relief under Rule 32—a sufficient "form of appellate review" under article II, § 24 of the Arizona Constitution. *See Wilson*, 176 Ariz. at 124.

ARGUMENT

I. This Court Should Embrace *Bolding* as the Correct Interpretation of § 13–4033(C) and Disavow *Raffaele*, Which Rewrote the Statute with No Legal Basis for Doing So.

Subsection 13–4033(C) is about waiver of a constitutional right. As discussed in the State's Petition for Special Action ("Petition"), it is well-settled that a defendant can waive a constitutional right through his actions (by implication) after he has been informed about the consequences and he, nevertheless, voluntarily chooses to engage in conduct which manifests his intent to waive that right. *See* Petition at 14–16.

The Legislature did not create anything novel by adding subsection (C) to this statute. Implied waiver is a longstanding common-law doctrine. *See Bain v. Superior Court*, 148 Ariz. 331, 334 (1986) (observing that a prior decision "adhered to the common law principle of implied waiver" and in the 20 years since that decision, "no legislative action has been taken to negate the effects of this holding," and thus continuing to adhere to the doctrine for purposes of waiving the physician-patient privilege). And the implied waiver of a constitutional right has been repeatedly recognized as constitutional by our courts. *See, e.g., State v. Hampton*, 208 Ariz. 241, 243–44, ¶ 7 (2004) (implied waiver of right to counsel through conduct); *State v. Greenawalt*, 128 Ariz. 150, 158-61 (1981) (answering questions after being given a *Miranda* warning constituted a waiver by conduct of the right to remain silent); *State v. Hall*, 136 Ariz. 219, 222 (App. 1983) (implied waiver of right to be present).

In *State v. Bolding*, the court of appeals held that § 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" and that "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." 227 Ariz. 82, 88, ¶ 20 (App. 2011). Thus, a defendant can waive his right to directly appeal his conviction if the record shows that he had been advised

of the consequences of voluntarily delaying his sentencing for more than 90 days, and he nonetheless caused such a delay through his absence. *Bolding* correctly characterized § 13–4033(C) as "essentially permitting an implied waiver" of the right to appeal a conviction. *Id.* at 87, ¶ 16.

In contrast, the court of appeals' recent decision, *State v. Raffaele*, effectively rewrote § 13–4033(C) and added unnecessary fact-finding requirements to the statute. 249 Ariz. 474 (App. 2020). The statute places the burden on "the defendant" to show "at the time of sentencing that [his] absence was involuntary." A.R.S. § 13–4033(C); *cf. Hall*, 136 Ariz. at 222 (holding, in the analogous context of a defendant's voluntary absence from trial, that when a defendant is adequately warned about his right to be present and received a warning that the proceeding would go forward in his absence, "the burden falls on the defendant to show that his absence was involuntary"). Despite the statute's unambiguous text, the *Raffaele* court found that, because the *State* did not raise the issue of waiver in the trial court, and because the trial court made no separate, after-the-fact finding that the defendant's waiver was knowing, intelligent, and voluntary, "the record d[id] not support the conclusion that Raffaele waived appellate jurisdiction." *Id.* at 479, ¶ 14. But *Raffaele*'s re-writing of the statute is impermissible under article III of the Arizona Constitution and is wrong as a matter of law because a defendant's knowing, intelligent, and voluntary waiver is already established through his informed

conduct. *Cf. Hall*, 136 Ariz. at 222 (holding "[t]he trial judge need not even make a specific finding of voluntariness prior to beginning the proceedings in absentia" when a defendant is adequately warned of the consequences of his absence because "the absence is presumed voluntary and is construed as a valid waiver of the defendant's right to be present"). An after-the-fact inquiry into the validity of defendant's waiver is contrary to the statute's text and intent.

Moreover, requiring a *Raffale*-type of inquiry is illogical because, after a defendant has absconded and caused at least a 90-day delay in sentencing, it is highly unlikely that any defendant would agree during a colloquy with the court that he or she knew that voluntarily absconding would result in the waiver of his or her direct appeal—even if the record indicates otherwise. The process *Raffaele* contemplates is similar to asking a defendant who pleaded guilty and subsequently received an extremely lengthy prison sentence, if (now that he is faced with the exact consequences of his waiver) he really understood his guilty plea. In hindsight, many defendants would feign ignorance in an attempt to obtain an advantage and seek a better outcome. Likewise, in the case where a defendant waives the right to direct appeal (as Johnson has done here), a defendant has every incentive to feign ignorance because doing so could only result in a benefit.

In these circumstances, by the time a defendant is sentenced, the facts necessary to show a waiver of the right to a direct appeal will already be contained

in the record. Here, for example, in compliance with Rule 14.4(e)(6), the trial court informed Johnson that he could lose his right to a direct appeal if he was convicted and his absence prevented the trial court from sentencing him within 90 days of conviction. Petition, Exhibit B at 025 (hereafter "Exh."). Johnson signed the arraignment order, acknowledging the same and initialed the paragraphs next to the information. Exh. C at 028. On the fourth day of trial, Johnson fled to California. Exh. G; Exh. H at 060-061. The trial court and defense counsel believed Johnson had absconded because, after the guilty verdict, the trial court issued a warrant for Johnson's arrest the same day. Exhs. I, J.

To the extent there may be facts suggesting that the defendant's delay of sentencing was not voluntary, it is incumbent on the defendant (who has the best knowledge of such information) to bring those facts to the trial court's attention at sentencing. *See* A.R.S. § 13–4033(C). Because Johnson did not do so, the trial court and appellate courts may presume that he voluntarily delayed sentencing and thereby implicitly waived his right to a direct appeal. *Cf. Hall*, 136 Ariz. at 222.

In addition to shifting the burden from the defendant to the State, *Raffaele* also created new requirements that are not supported by law. First, *Raffaele* stated that "[i]n order for this implied waiver of a defendant's constitutional right to appeal under § 13-4033(C) to become effective, however, there must first be a finding that the waiver was knowing, voluntary, and intelligent." *Id.* at 478–79, ¶ 12. This

finding must be made by the trial court. *Id.* at 479, ¶ 15. The *Raffaele* court explained that "[d]uring sentencing, the State would be required to present evidence" to prove the waiver and the defendant could present evidence "to rebut the State's showing and present evidence that his absence was involuntary," after which the trial court could "make adequate findings of fact, including credibility determinations." *Id.* It is unclear what evidence the State would present that would be additional to or different from the existing record. The required warning and a defendant's failure to appear would already be a matter of record. Additional facts and credibility questions would arise only if the defendant claimed his absence was involuntary—which is a defendant's burden to show at the time of sentencing. A.R.S. § 13–4033(C). As described above and in *Bolding*, a defendant's informed decision to abscond and delay sentencing for more than 90 days already establishes that his or her waiver was knowing, voluntary, and intelligent. *See Bolding*, 227 Ariz. at 88, ¶ 20.

Applying the statute's language and intent, *Bolding* correctly did not impose an additional fact-finding requirement on the trial court. Instead, the *Bolding* court required a "knowing, voluntary, and intelligent waiver" of the right to appeal (which is undisputedly required before a constitutional right can be waived), and recognized that this finding could be inferred "if the defendant has been informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety

days." *Bolding*, 227 Ariz. at 88, ¶ 20. That holding is consistent with how courts treat the implied waiver of other constitutional rights. For example, in *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010), the United States Supreme Court held that the prosecution "does not need to show that a waiver of *Miranda* rights was express" and that "[a]n 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence." The Court explained that its decision in *North Carolina v. Butler*, 441 U.S. 369 (1979), interpreted *Miranda* "in accord with usual principles of determining waiver, which can include waiver implied from all the circumstances." *Berghuis*, 560 U.S. at 383–84. It held that "*Butler* made clear that a waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" *Id.* at 384 (quoting *Butler*, 441 U.S. at 373). Thus, "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Id.* In other words, where the record shows that a defendant is warned of the consequences of failing to appear, understands them, and still voluntarily fails to appear to cause a 90-day delay in sentencing, no further hearing or finding is required.

Raffaele noted that "the superior court can infer that a defendant's absence 'is voluntary if the defendant had personal notice of the time of the proceeding, the right

to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear.'" *Id*. at 479, ¶ 15 (quoting *Bolding*, 227 Ariz. at 88, ¶ 19 (quoting Ariz. R. Crim. P. 9.1)). But then *Raffaele* appeared to contradict itself by stating that "it is not for us to make such a determination for the first time on appeal and that the superior court must make such a finding at the time of sentencing." *Id*. This makes little sense. If a trial court can infer that a defendant's absence was voluntary based on those facts, so may an appellate court.

Raffaele relied on several authorities for its ruling. *See Raffaele*, 249 Ariz. at 478–79, ¶¶ 12–15. But none of those authorities forbid an appellate court from finding a waiver based on the record. In sum, *Raffaele* created new requirements and rewrote the statute without any legal authority or justification. Section 13–4033(C), and *Bolding*'s application of it, are completely consistent with waiver principles, both the common-law waiver doctrine and case law addressing the waiver of constitutional rights.

II. Section 13–4033(C) does not violate the separation of powers.

A. Section 13–4033(C) does not conflict with any court rule, and even if it did, the statute prevails because it regulates the substantive right to appeal.

Further, as the State explained in its Petition and Reply, § 13–4033(C) does not violate the constitutional separation-of-powers provision. *See* Petition at 19–24; Reply at 21–25. Proof of a conflict is the first step in separation-of-powers analysis.

See Duff v. Lee, 250 Ariz. 135, 139, ¶ 20 (2020). Johnson fails to establish any conflict. Section 13–4033(C) does not conflict with any court rule or common-law practice. Notably, the only procedural rule that currently relates to the same subject matter of § 13-4033(C) is Rule 14.4(e)(6), which is consistent with § 13-4033(C). The most that Johnson can assert is that, "[a]bsent the statute, the court would require the State to file an answering brief and proceed with the appeal, where the statute would require dismissal." Response at 22. Silence on a subject in the court rules does not establish a conflict with a statute on that subject. Given that we should "not hastily find a clash between a statute and court rule," neither should we find a clash between a statute and absence of court rule. *See Duff*, 250 Ariz. at 138, ¶ 14 (quoting *Graf v. Whitaker*, 192 Ariz. 403, 406, ¶ 11 (App. 1998)).

And even assuming that § 13–4033(C) conflicts with a court rule or practice, the statute controls because it is substantive, not procedural. "[T]he right to appeal is substantive" and "the substantive law is that part of the law which creates, defines and regulates rights." *State v. Birmingham*, 96 Ariz. 109, 110 (1964). As this Court recently noted, if a statute "creates or takes away a vested right—such as the right to appeal—it is substantive." *State v. Bigger*, 251 Ariz. 402, ¶ 35 (2021). Section 13–4033(A) substantively prescribes the circumstances under which a criminal defendant may take an appeal, thereby establishing the court of appeals' jurisdiction. *See Bolding*, 227 Ariz. at 87 ¶ 13 ("Section 13–4033(A) codifies th[e] right [to

appeal], specifying the kinds of orders that are appealable[.]"); *see also* Ariz. Const. art. VI, § 9 ("The jurisdiction … of any intermediate appellate court shall be as provided by law."). Section 13–4033(C) 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. The statute is substantive and prevails in a separation of powers analysis. *See In re Marriage of Waldren*, 217 Ariz. 173, 177, ¶ 21 (2007) ("the court's rules must yield to statutory provisions on substantive matters such as the court's subject matter jurisdiction").

B. The fugitive disentitlement doctrine does not alter the analysis.

To the extent Johnson may contend that the fugitive disentitlement doctrine suggests that courts, rather than the Legislature, have the authority to make a rule similar to § 13–4033(C), such an argument fails. The fugitive disentitlement doctrine does not apply under the facts of this case and is not a basis from which to deviate from the text of § 13–4033(C). And because the fugitive disentitlement doctrine governs a completely different circumstance than § 13–4033(C), it does not conflict with the statute for purposes of separation-of-powers analysis. *See Duff*, 250 Ariz. at 139, ¶ 20 (finding "no conflict exists" and therefore declining to consider "whether the statute is substantive or procedural").

The fugitive disentitlement doctrine contemplates the dismissal of an appeal when a criminal appellant absconds during the pendency of his appeal, not before

sentencing. *See, e.g.*, *State v. French*, 141 P.3d 54, 59, ¶ 17 (Wash. 2006) (the doctrine "generally does not apply to a defendant who absconds after conviction but before sentencing"); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239–40, 249 (1993) (the doctrine generally does not require dismissal of appeal based on defendant being fugitive before appeal began); *accord Griffis v. State*, 759 So. 2d 668, 670 (Fla. 2000); *Commonwealth v. Adams*, 200 A.3d 944, 952, 955 (Pa. 2019); *State v. Hentges*, 844 N.W.2d 500 (Minn. 2014); *Redden v. State*, 418 A.2d 996, 997 (Del. 1980). In contrast, § 13–4033(C) prevents an appeal from going forward in the first place.

It appears that the fugitive disentitlement doctrine exists in Arizona. *See Stewart v. Stewart*, 91 Ariz. 356, 357–59 (1962); *Owen v. State*, 19 Ariz. 193, 194 (1917); *Alday v. State*, 15 Ariz. 334 (1914). But it has very little application in criminal cases. Because a defendant cannot be sentenced in absentia in Arizona, *see* Ariz. R. Crim. P. 26.9 (defendant must be present at sentencing), it will be exceedingly rare for a defendant to be a fugitive at the time of his appeal because the time for filing an appeal runs from the oral pronouncement of sentence. Ariz. R. Crim. P. 31.2 (a)(2)(A). In the rare case of an escape or absconding defendant pending appeal, the doctrine might be applied. That, of course, is not this case.

In any event, the existence of the fugitive disentitlement doctrine does not affect the interpretation or constitutionality of § 13–4033(C). The doctrine is a

common-law rule created by courts exercising their common-law authority. *See, e.g., State v. Brabham*, 21 A.3d 800, 803 (Conn. 2011) (the fugitive felon disentitlement doctrine "is a common-law rule"); *French*, 141 P.3d at 58, ¶ 12 ("The fugitive disentitlement doctrine is a common law rule"); *Worthen v. State*, 804 S.E.2d 139, 142 (Ga. App. 2017) (fugitive disentitlement is an "equitable common law doctrine"). It is not a procedural rule adopted under the Court's authority that derives from article VI, § 5 of the Arizona Constitution.

Finally, this Court recognizes "'reasonable and workable' procedural laws if they supplement rather than conflict with court procedures." *State v. Reed*, 248 Ariz. 72, 76, ¶ 10 (2020) (citing *Seisinger v. Siebel*, 220 Ariz. 85, 89, ¶ 8 (2009)). Because there is no conflict between the statute and the fugitive disentitlement doctrine, § 13–4033(C) would be a supplemental rule even if it were procedural.

C. *Reed* supports a conclusion that § 13–4033(C) is constitutional.

This Court's recent opinion in *Reed* supports the constitutionality of § 13–4033(C). In *Reed*, this Court addressed A.R.S. § 13–106(A), which stated that "[o]n a convicted defendant's death, the court shall dismiss any pending appeal or postconviction proceeding." 248 Ariz. at 75, ¶ 8. The Court concluded that § 13–106(A) violated separation of powers principles because the statute "directs how a court must process a pending appeal upon the occurrence of an event—here, a convicted defendant's death" and "[t]he disposition of an appeal is a matter of court

procedure" over which the Legislature lacked authority. *Id*. at 77, ¶ 16. In the same paragraph, the Court quoted the observation in *Podiatry Association v. Director of Insurance*, 101 Ariz. 544, 548 (1966), that "*[i]f* a right of appeal is granted, then the ultimate right to determine the appeal rests in the supreme court by virtue of Article 6, § 5[.]" *Reed*, 248 Ariz. at 77, ¶ 16. (emphasis added). By enacting § 13–4033(C), the Legislature decided—as a matter of public policy—that the right to a direct appeal is not granted to an absconding defendant who voluntarily delays sentencing for more than 90 days. *See* § 13–4033(C); *Bolding*, 227 Ariz. at 88, ¶ 20. While the defendant in *Reed* was granted the right to a direct appeal and exercised that right when he was alive, the Legislature directed that the appeal was dismissed, which dictated the process by which the appellate court should implement this decision and dispose of the pending appeal upon Reed's death.

Here, because § 13–4033(C) establishes only the circumstances under which a court may infer that Johnson waived his right to direct appeal and does not dictate any process for the court's disposal of the appeal, it does not impermissibly infringe on the court's procedural rule-making authority. *See Podiatry Ass'n*, 101 Ariz. at 548. Section 13-4033(C) is more analogous to the subsection of the same statute that the Court upheld in *Reed*, A.R.S. § 13-106(B), which substantively abolished the common law "ab initio doctrine." *See Reed*, 248 Ariz. at 75, ¶ 8.

In this case, as discussed above, Arizona courts have never rejected the fugitive disentitlement doctrine (they have applied it on certain occasions). But even if (hypothetically) Arizona case law had consistently rejected the doctrine and allowed appeals of fugitive defendants, the Legislature would still be well within its authority to withhold appellate jurisdiction when a criminal defendant's voluntary absence causes sentencing to be delayed for more than 90 days. The Legislature's determination reflects "a policy matter affecting competing interests and rights held by victims, the state, the defendant's family, and society." *See id*. at 77-78, ¶ 18. Section 13–4033(C) "regulates the primacy of those interests and rights," which makes it "a substantive law." *See id*.

CONCLUSION

The State respectfully requests that this Court grant special action relief and dismiss Johnson's appeal, or alternatively, remand to the court of appeals with instructions to grant the State's motion to dismiss Johnson's appeal for lack of jurisdiction.

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Respectfully submitted,

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