ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-15-0017
	)	
	)	**COMMENT OF ARIZONA**
Petition to Amend Rules 9.1, 14.3, and 26.11, Arizona Rules of Criminal Procedure	)	**ATTORNEYS FOR CRIMINAL JUSTICE REGARDING PETITION TO AMEND RULES 9.1, 14.3, and 26.11, ARIZONA RULES OF CRIMINAL PROCEDURE**
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Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submits the following comment to the above-referenced petition.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of

criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ opposes the proposed amendments to Ariz. R. Crim. P. 9.1, 14.3, and 26.1, affecting the advising of defendants that failure to appear for trial could result in waiver of the right to an appeal. The purpose of the rule change petition is to give effect to A.R.S. § 13-4033(C), which took effect in 2008, and the holding of the Court of Appeals in *State v. Bolding*, 227 Ariz. 82, ¶ 18, 253 P.3d 279, 285 (App. 2011), that waiver of a constitutional right could not occur unless a defendant is informed of that right, so that the waiver could be said to be knowing, intelligent, and voluntary. *See Boykin v. Alabama*, 395 U.S. 238 (1969); *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Bolding was the second opinion of the Court of Appeals interpreting § 13-4033(C), the first being *State v. Soto*, 223 Ariz. 407, 224 P.3d 223 (App. 2010), *vacated on other grounds*, 225 Ariz. 532, 241 P.3d 896 (2010). Well after this Court granted review of the State's petition for special action in *Soto*, the State conceded that the statute could not apply to a defendant whose failure to appear occurred prior to the effective date of the statute. This Court then vacated the Court of Appeals' opinion and issued a brief opinion that did not address the statute's constitutionality at all. In so doing, the result was that the Court of Appeals' well-reasoned opinion

in *Soto* had no precedential effect. When the issue was presented to the Court of Appeals anew in *Bolding*, however, the Court abandoned some of its reasoning from *Soto* without any good cause to do so.

This Court accepted the State's concession in *Soto* and declined jurisdiction of the State's special action petition in *Bolding*, and thus this Court has not yet ruled upon the issue of the facial constitutionality of § 13-4033(C). For the reasons stated herein, the statute is facially unconstitutional, and this Court should not adopt rule changes that improperly deprive defendants of their right to appeal.

A. A.R.S. § 13-4033(C) is facially unconstitutional because it abrogates defendants' constitutional right to appeal.

The Court of Appeals, while correctly citing the legal standard that it has a "duty to construe a statute so that it will be constitutional if possible," *Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d at 285 (quoting *State v. McDonald*, 191 Ariz. 118, ¶ 11, 952 P.2d 1188, 1190 (App. 1998)), erroneously found that it is possible for the statute at issue here to be found constitutional under any circumstance.

Article II, § 24 of the Arizona Constitution guarantees that persons "accused in criminal prosecutions" have "the right to appeal in all cases." *Wilson v. Ellis*, 176 Ariz. 121, 123, 859 P.2d 744, 746 (1993); *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995). § 13-4033(C) is facially unconstitutional because it takes away the right to appeal from defendants whose failure to appear for trial delays sentencing

by more than ninety days, and it is in irreconcilable conflict with the state constitution.

At first glance, it might appear that Rule 32 proceedings for post-conviction relief could protect the constitutional right to appeal for non-pleading defendants. A closer look at Rule 32, however, shows that this is not the case. Rule 32.1, which lays out all possible claims under the rule, covers all conceivable claims that may be made by a pleading defendant, but it does not cover claims that may be raised by a non-pleading defendant. In particular, non-pleading defendants may *only* use the process of direct appeal to this Court for claims involving errors occurring under state law or rules with no accompanying federal or state constitutional right. *See, e.g.*, *State v. Ketchner*, 236 Ariz. 262, 339 P.3d 645 (2014) (profile evidence improperly admitted); *State v. Machado*, 226 Ariz. 281, 246 P.3d 642 (2011) (third party culpability evidence admissible under Rules 401-403 without regard for Rule 404(b), Ariz. R. Evid.); *State v. Grannis*, 183 Ariz. 52, 57, 900 P.2d 1, 6 (1995) (finding reversible error in admission of inflammatory evidence pursuant to Ariz. R. Evid. 403); *State v. Cruz*, 137 Ariz. 541, 546, 672 P.2d 470, 475 (1983) (reversing convictions based on failure to grant severance under state rule of criminal procedure). In essence, under § 13-4033(C), non-pleading defendants are afforded no meaningful means of obtaining appellate review that would provide a comprehensive safeguard against wrongful conviction. For this reason, just as a

pleading defendant's right to challenge his convictions or sentences under Rule 32 cannot be waived, a non-pleading defendant's right to direct appeal is similarly immune from waiver.

In finding that a defendant is capable of waiving his right to appeal by conduct, the Court of Appeals mistakenly compared this to the waiver by conduct of the right to be present at trial. *Bolding*, 227 Ariz. 82, ¶ 19, 253 P.3d at 285. Instead, the waiver of the right to appeal may be conducted only by the same procedure as the waiver of the right to trial, which is contained in Rules 17.1-17.4, Ariz. R. Crim. P. Defendants may waive by conduct the right to be present at trial and the right to testify at trial, but they may not waive by conduct the right to the trial itself—their failure to appear results in a trial in their absence. In criminal cases, there is no equivalent to default judgment. Similarly, a criminal defendant who does not keep in touch with his appellate attorney does not abandon his appeal. By finding constitutional a statute that is clearly facially unconstitutional, the Court of Appeals misapplied its "duty to construe a statute so that it will be constitutional if possible." *Bolding*, 227 Ariz. 82, ¶ 19, 253 P.3d at 285 (quoting *McDonald*).

The constitutional right to appeal is on par with the constitutional right to a trial by jury. A defendant can waive both those rights upon a finding by the trial court, after a colloquy, that the defendant knowingly, intelligently, and voluntarily does so. But neither right may be waived by conduct. For these reasons, the statute

is facially unconstitutional because it violates article II, § 24 of the Arizona Constitution in every case to which it purports to apply.

Federal cases involving absconding defendants are clearly inapposite because there is no federal constitutional right to an appeal. *See, e.g.*, *United States v. Persico*, 853 F.2d 134, 136 (2d Cir. 1988) ("There is no constitutional right to appeal a criminal conviction."); *United States v. Baccollo*, 725 F.2d 170, 172 (2d Cir. 1983) (citing *Abney v. United States*, 431 U.S. 651, 656 (1977), for the proposition that "we recognize that the defendant has no *constitutional* right of an appeal") (emphasis in original).

In *Evolga v. State*, 519 N.E.2d 532, 534 (Ind. 1988), the Indiana Supreme Court noted "it is also well settled that the act of escape, by itself, is not proof of a defendant's knowing and voluntary relinquishment of the statutory right to appeal." *Evolga* cites but misinterprets the United States Supreme Court's requirement from *Zerbst* by calling an escape a "voluntary act" which thereby constitutes "intentional relinquishment of a known right or privilege." The Indiana Supreme Court's opinion directly contravenes the United States Supreme Court's analysis in *Moran v. Burbine*, which stated:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

475 U.S. at 421. In this context, the "intentional conduct" must refer not to absconding but to waiving the appeal.

In *Bolding*, 227 Ariz. 82, ¶ 17, 253 P.3d at 285, the Court of Appeals cited two other cases directly on point. In *Mascarenas v. State*, 612 P.2d 1317, 1318 (N.M. 1980), the New Mexico Supreme Court held that "A person convicted of a crime does not forfeit his right to appeal simply because he has escaped from confinement. He still has a right to have his conviction reversed if he was erroneously convicted or if his constitutional rights were violated." And in *State v. Tuttle*, 713 P.2d 703, 704-05 (Utah 1985), the Utah Supreme Court held that

> In light of the fundamental nature of the right to appellate review of a criminal conviction and the lack of any sound practical or policy justification for refusing to hear the appeals of escapees after they are returned to custody, we conclude that a criminal appeal dismissed after escape may be reinstated unless the State can show that it has been prejudiced by the defendant's absence and the consequent lapse of time. No such showing was made here; therefore, the appeal is reinstated.

The Supreme Courts of Utah and New Mexico make the persuasive case for finding A.R.S. § 13-4033(C) facially unconstitutional.

B. The statute's requirement that a defendant prove his absence was involuntary by a "clear and convincing evidence" standard violates due process

A.R.S. § 13-4033(C) states that a defendant forfeits his right to appeal if he cannot prove that his absence was involuntary by a standard of "clear and convincing

evidence." Placing such a high standard on a criminal defendant who wishes to exercise his right to appeal violates his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and article II, § 4 of the Arizona Constitution because it is a standard that cannot realistically be met and would serve to deny the defendant his constitutional right to an appeal. This Court recently held that higher burdens of proof placed on defendants may result in a violation of the defendants' due process rights. *See Machado*, 226 Ariz. 281, ¶ 15, 246 P.3d at 635. The United States Supreme Court has held that no standard of proof greater than preponderance of the evidence could be placed upon a defendant asserting incompetency to stand trial. *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1997).

Furthermore, it is contradictory to have different standards for allowing a trial to proceed in the defendant's absence and for forfeiting a defendant's right to appeal. For nearly fifty years, the law in this state related to voluntary absence from trial has been stated by this Court in these words: "Once his knowledge of the trial date was shown, the appellant bore the ***burden of persuading*** the trial judge that his absence was not voluntary." *State v. Taylor*, 104 Ariz. 264, 266, 451 P.2d 312, 314 (1969) (emphasis added); *State v. Tacon*, 107 Ariz. 353, 356, 488 P.2d 973, 976 (1971); *State v. Goldsmith*, 112 Ariz. 399, 401, 542 P.2d 1098, 1100 (1975). "The burden of persuasion, as its name implies, requires the party that bears it to persuade the trier

of fact to rule in its favor." *State v. Kelly*, 210 Ariz. 460, ¶ 13, 112 P.3d 682, 686 (App. 2005) (quoting *State v. Hyde*, 186 Ariz. 252, 266, 921 P.2d 655, 669 (1996)). Without any additional language, this term can only mean that the defendant's "burden of persuading the trial judge" is a defendant's burden to show, by a preponderance of the evidence, that his absence was involuntary.

C. AACJ is aware of no defendant whose right to appeal has been denied; thus, the Court of Appeals has not yet had any opportunity to reconsider the constitutionality of § 13-4033(C).

Although *Soto* was decided five years ago and *Bolding* four years ago, very few trial judges have modified the Rule 9.1 advisory in a manner that advises defendants of the potential for forfeiture of the right to appeal. The sparse use of the unapproved advisory is the clear reason why there are few, if any, defendants who have been denied the right to appeal from convictions. In fact, AACJ is aware of no such defendants who have been denied the right to appeal convictions. This is the obvious purpose of the rule change petition: to ensure consistent compliance with the statute.

The rule change petition, at pages 8-9, recognizes that "[t]here may potentially be affected individuals … who wish to argue that the substance of the statutory change is unconstitutional" but this Court will be deprived of the opportunity to decide that issue unless and until the "procedural deficiency in the Rules of Criminal

Procedure" is corrected. There is a clear "chicken or the egg" problem here; it will indeed remain unlikely that the law ever gets challenged again until a defendant is denied his right of appeal, which in turn will be unlikely to occur so long as the Rules of Criminal Procedure do not include specific language to guide trial judges. While there is a certain kind of conceptual appeal to this argument, it ultimately fails because the statute is so plainly unconstitutional for the reasons stated above and amending the rules would give merit to a statute that is unworthy of such recognition.

CONCLUSION

AACJ agrees that the rule change petition would assist in ensuring that defendants are advised, pursuant to A.R.S. § 13-4033(C), that failure to appear for trial could potentially result in forfeiture of the right to appeal. Such an advisory is pointless, however, because the statute is plainly unconstitutional. For these reasons, AACJ respectfully requests this Court reject the petition to amend Rules 9.1, 14.3, and 26.11.

DATED: May 20, 2015.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/
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