IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. BRADY WHITMAN, JR. Appellant.	)))))))))	Supreme Court No. CR-13-0201-PR Court of Appeals No. 2 CA-CR 2012-0006 DEPARTMENT A Pima County Superior Court Cause No. CR-20110393-001

SUPPLEMENTAL BRIEF OF *AMICI CURIAE*
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ISSUE PRESENTED ON REVIEW

When does "entry of judgment and sentence" occur in a criminal case?

INTRODUCTION

¶1 In *State v. Whitman*, 232 Ariz. 60, 301 P.3d 226 (App. 2013), a two-judge majority of a panel of the Court of Appeals ("*Whitman Majority*") held that "entry of judgment and sentence" occurs when the clerk files the minute entry and Judge Miller dissented ("*Whitman Dissent*") and held that "entry of judgment and sentence" occurs at the time of the oral pronouncement of sentencing. In *State v. Montgomery*, 233 Ariz. 341, 312 P.3d 140 (App. 2013), a different Court of Appeals panel held that *Whitman* was wrongly decided and that "entry of judgment and sentence" occurs at the time of the oral pronouncement of sentencing.

¶2 *Amici curiae* Arizona Attorneys for Criminal Justice (AACJ) and Pima County Public Defender (PCPD) were nominated and appointed by the Court to ensure that there would be argument in support of the *Whitman* majority opinion. *Amici* recognize that there is significant support for both positions scattered throughout various procedural rules and cases of this Court and the Court of Appeals. Counsel has read not only all sources cited by the various opinions of the Court of Appeals and the arguments of the parties, but has conducted his own research as well. Counsel is unconvinced of the correctness of any of the positions set forth, except that counsel agrees with the *Whitman* majority opinion that there

is some confusion. Counsel for *amici* owes a duty of candor to the Court and thus has provided what counsel considers to be the best arguments that can be made on both sides of the issue. At oral argument, however, counsel for *amici* will focus the presentation on defense of the *Whitman* majority opinion (*see* **Argument I**, *infra*), since the State will adequately represent the position of the *Whitman* dissent and *Montgomery*.

¶3 The issue presented in this case does not affect substantive law. Once this Court settles the law on this question, defense attorneys will be advised of the deadline and will be expected to file timely notices of appeal accordingly. Defendants who fail to file a timely notice of appeal through no fault of their own may pursue a delayed appeal pursuant to Ariz. R. Crim. P. 32.1(f); for this reason, the "jurisdictional bar" to pursuing an untimely appeal is actually no bar at all for criminal defendants.

¶4 *Amici* recognize the importance of this issue for practitioners in other areas of law. This is particularly so in civil litigation, where the parties have no constitutional right to an appeal and the parties who suffer great prejudice through the failures of their attorneys have no remedy in Rule 32 proceedings. For that reason, *amici* ask that this Court resolve this question in a manner that provides clear guidance to all attorneys and not just those in criminal practice.

¶5 *Amici* ask this Court to apply two equitable rules for cases moving forward. First is the rule of lenity. "When a statute is 'susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor the defendant.'" *State v. Tarango*, 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (1996) (quoting *State v. Pena*, 140 Ariz. 545, 549-50, 683 P.2d 744, 748-49 (App. 1983)). Second, this Court should find that retroactive application of any construction affecting pending appeals by criminal defendants would violate due process protections. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) ([i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect."). The fact that two out of six Court of Appeals judges reached the conclusion that "entry of judgment and sentence" occurs when the clerk files the minute entry is strong evidence that the rule was sufficiently unclear. The defendant in *Montgomery* and all other pending defendants whose notices were timely under the *Whitman* majority's construction of the rule should have their appeals reinstated.

ARGUMENTS

I. The *Whitman* majority finds ample support in case law and rules promulgated by this Court.

¶6 Statutes having the same purpose or object should be interpreted in

light of each other. *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, ¶ 19, 30 P.3d 649, 654 (App. 2001) (quoting 2B Norman J. Singer, *Statutes and Statutory Construction* § 51.03 (5th ed. 1992)). When interpreting statutes, courts "must also try to harmonize related statutes and aim to achieve consistency among them within the context of the overall statutory scheme." *State v. George*, 206 Ariz. 436, ¶ 6, 79 P.3d 1050, 1054 (App. 2003) (internal cites omitted). This Court has described the rule of statutory construction in this manner:

> "If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent. If the statutes relate to the same subject or have the same general purpose … they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law. As they must be construed as one system governed by one spirit and policy, the legislative intent therefor must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes. This rule of construction applies even where the statutes were enacted at different times, and contain no reference one to the other…"

State v. Sweet, 143 Ariz. 266, 270-71, 693 P.2d 921, 925-26 (1985) (quoting *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970)).

¶7 Applying this methodology, this Court should compare the criminal rules of procedure to the Arizona Rules of Civil Procedure, Civil Appellate Procedure, and Juvenile Court, and construe "entry of judgment and sentence" as occurring when the minute entry is filed by the clerk. Ariz. R. Civ. App. P. 9(a) states that the notice of appeal must be filed "not later than 30 days after the entry

of the judgment from which the appeal is taken…" Ariz. R. Civ. P. 58(a) states that "all judgments shall be in writing and signed by a judge … The filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry." Ariz. R. P. Juv. Ct. 104(a) states that the notice shall be filed "no later than 15 days after the final order is filed with the clerk."

¶8 Clearly a distinction can be made between civil and criminal judgments. Specifically, the defendant must be present for sentencing under Ariz. R. Crim. P. 26.9 and advised of the right to appeal under Ariz. R. Crim. P. 26.11, whereas the civil judgment is not final until the judge signs the order of judgment not only as to the jury verdict but also as to taxable costs. Yet in juvenile court delinquency proceedings, which are most similar to criminal proceedings, the rules are abundantly clear. A juvenile must be present for the adjudication and disposition hearing under Ariz. R. P. Juv. Ct. 12(a), and the judge must similarly advise the juvenile personally at the disposition hearing of the right to appeal under Ariz. R. P. Juv. Ct. 30(B)(4). Despite the personal advisory in open court, and the fact that the juvenile is also entitled to appointment of counsel, the time limit in Ariz. R. P. Juv. Ct. 104(a) for filing the notice of appeal is still triggered by filing the final order with the clerk. If a delinquent juvenile is advised in open court of the right to appeal and the time is triggered by the filing of the final order with the clerk, then there is no reason to jump to the conclusion that in a criminal

proceeding the twenty-day window for filing a notice of appeal is triggered by the pronouncement in open court when the language is ambiguous.

¶9 The State argued that the heading of Rule 26.16(a) is "entry of judgment and sentence" and therefore this is dispositive of this issue; and Judge Miller agreed with that position. *Whitman Dissent* ¶ 47. *Amici* disagree that the heading is dispositive. "Headings to sections … are supplied for the purpose of convenient reference and do not constitute part of the law," A.R.S. § 1-212, but "where an ambiguity exists the title may be used to aid in the interpretation of the statute." *State v. Barnett*, 142 Ariz. 592, 597, 691 P.2d 683, 688 (1984). While it is certainly plausible to find that the heading of Rule 26.16(a) aids the interpretation and leads to the conclusion that "entry of judgment and sentence" occurs at the time of sentencing, it cannot be said that there is no other reasonable interpretation. As stated in the introduction, where there are two or more reasonable interpretations of a statute or rule, *Tarango* requires that the defendant receive the benefit of the doubt.

¶10 *Whitman Majority* ¶ 8 cites this Court's opinion in *State v. Falkner*, 112 Ariz. 372, 373, 542 P.2d 404, 405 (1975), for the proposition that "in criminal matters a judgment was complete and appealable when it had been orally pronounced in open court and thereafter entered on the clerk's minutes." While that sentence was prefaced by the clause, "[p]rior to the passage of the 1973

Rules," the distinction that was made in the following sentences discussed the opportunities available to defendants to seek modification of the sentence before the trial court under Rules 24.2 and 24.3. *Id*. at 373-74, 542 P.2d at 405-06. It is therefore expected that this Court intended to continue to read the phrase "entered on the clerk's minutes" into the appealability of a criminal judgment and sentence. Whitman Majority ¶ 8 also noted that "More recent cases have echoed this principle." Judge Miller correctly notes that successive cases that quote this language were actually relying on pre-1973 case law that ought not to apply. *Whitman Dissent* ¶ 52. Nevertheless, the *dictum* was repeated regularly enough that it is reasonable to rely on that language.

¶11 *Whitman Dissent* ¶ 56 properly acknowledges that this Court had before it in 1973 a proposed Rule 29.16 that would mirror Fed. R. App. P. 36 and specify that "the notation of the exact terms of the judgment and sentence by the clerk in the docket shall constitute the entry of judgment and sentence." But Judge Miller's assumption that this Court "rejected the federal rule and deliberately chose" the current language is unsupported. It is at least as likely that this Court in 1973 found the language repetitive or otherwise unnecessary. An analogue would be this Court's decision to order the depublication of a Court of Appeals opinion pursuant to Ariz. R. Sup. Ct. 111(g). When depublication is ordered without further comment, it cannot be said that this Court disapproved of the holding or of any

particular part of the reasoning; all that is known is this Court simply did not want the particular opinion published any longer. Silence is a difficult act to interpret.

¶12 The State and Judge Miller also rely on Ariz. R. Crim. P. 41, Form 23, which states unequivocally that "entry of judgment and sentence occurs at the time of sentencing." *Whitman Dissent* ¶¶ 48-50. Although the forms are approved by this Court, it is clear that the purpose of the form is to give guidance to defendants rather than set jurisdictional limits. It should also be noted that Form 23 also states: "4. You should have a lawyer handle your appeal." Clearly the language of this form is intended to help defendants understand the importance of exercising their constitutional right to appeal in plain English. But a form that uses words such as "you should…" is clearly meant to be advisory and nothing more. A defendant who receives this form is not expected to understand all of the criminal rules, whereas a criminal defense attorney most certainly is expected to have that understanding. For that reason, the most logical interpretation of Form 23 is that offered by Appellant in his response to the State's Petition for Review: that Form 23 is a guide but does not state firm jurisdictional requirements.

¶13 Judge Miller's statement that the majority "overrules the decision of our supreme court rejecting that rule," *Whitman Dissent* ¶ 56, is very strong language that does not fit the circumstances of this case. The majority takes great pain to recognize competing authority, and the majority resolves the case

according to an analogue of the rule of lenity, announced in *State v. Brown (Brown I)*, 23 Ariz.App. 225, 532 P.2d 167 (1975), which this Court affirmed and approved in *State v. Brown (Brown II)*, 112 Ariz. 29, 536 P.2d 1047 (1975). "'"[B]oth remedies … should remain alternatively available to him"' until amendments to the rules could take effect and remove the inconsistency." *Whitman Majority* ¶ 22 (quoting *Brown II*, 112 Ariz. at 31, 536 P.2d at 1049, *quoting in turn Brown I*, 23 Ariz.App. at 228, 532 P.2d at 170). The majority did not believe it had the authority to overrule this Court; instead, the majority expressed its concern that the rules and cases were unclear.

¶14 *Amici* disagree with Judge Miller's concern that "simplicity is lost" and "defense counsel [will be] burdened with unnecessary post-sentencing tasks" on account of the majority opinion. *Whitman Dissent* ¶ 63. For example, it is the practice of the PCPD to advise *every* client at the time of sentencing that the client need not file the notice because the attorney will file for the client. PCPD is the second-largest criminal defense firm in Arizona, with approximately seventy lawyers representing clients in Pima County Superior Court. PCPD is the very definition of the "high-volume criminal defense practice," yet PCPD does not complain that the *Whitman* opinion adds complexity to its practice.

¶15 No matter the attorney or the firm, however, attorney and client had at least a month since the jury returned guilty verdicts to discuss the appellate

process. For example, attorneys regularly advise their clients not to discuss the offenses for which the jury returned guilty verdicts with the pre-sentence investigator, because any statements made by the defendant may affect the appeal and potential re-trial if successful on appeal. At the very least, however, any minimally competent attorney ought to know by the time sentence is pronounced whether the case is going to be appealed. For these reasons, the concerns expressed in *Whitman Dissent* ¶¶ 62-63 are not shared by the criminal defense bar. Contrary to Judge Miller's assertion that "an especially diligent attorney can provide the exact date to defendant while in the courtroom," *id*. ¶ 62, this mere task involves only counting twenty days on a calendar. The normal practice is for the attorney to file the notice of appeal for the client.

¶16 In *Montgomery*, a panel in Division One found that Judge Miller's opinion was better reasoned and rejected the *Whitman* majority's holding, thereby creating a split of authority. Montgomery relied heavily on *dictum* from *Maricopa County Juv. Action No. JS-8441*, 174 Ariz. 341, 849 P.2d 1371 (1992), where this Court compared the confusing juvenile court rule and practice of the Maricopa court with the civil and criminal rules: "In the best of all worlds, all judgments or orders from which appeals lie in any kind of case would be clear and free of confusion. Examples are the non-minute entry civil judgment with a file stamp date and, in criminal cases, the oral pronouncement of judgment at the time of

sentencing under Rule 26.2(b), Ariz.R.Crim.P." *Id*. at 343, 849 P.2d at 1373. But contrary to *Montgomery*'s suggestion, this *dictum* does not "reflect[ ] our supreme court's understanding that the time for filing a notice of appeal in a criminal case runs from the date of sentencing." *Montgomery*, 233 Ariz. 341, ¶ 9, 312 P.3d at 142.

¶17 *Montgomery* also misapplied the Court of Appeals' previous decision in *State v. Rosario*, 195 Ariz. 264, 987 P.2d 226 (App. 1999). In *Rosario*, the issue was whether the filing of the notice occurred on the date Rosario's notice was stamped by the court or on the date Rosario delivered the notice to prison officials for mailing; the case assumes the date of the operative event as the oral pronouncement of sentencing and Rosario apparently did not argue to the contrary. *Id*. ¶ 8, 987 P.2d at 228. Again, that language from *Rosario* is clearly *dictum*, and *Montgomery*'s reliance on that language as binding authority is erroneous. 233 Ariz. 341, ¶ 11, 312 P.3d at 143.

¶18 The presence of a dissent in *Whitman* offered both the majority and dissent to offer their best arguments. *Montgomery*, on the other hand, largely cites from the *Whitman* dissent and offers little more analysis. The *Whitman* majority is the best reasoned opinion. For these reasons, this Court should resolve the split in authority by upholding *Whitman* and overruling *Montgomery*.

II. There is also support for the position taken by the dissenting judge in *Whitman*.

¶19 The pertinent part of Form 23 relied upon by Judge Miller appeared on the "Notice of Rights of Review After Conviction" that was signed by the defendant in this case on December 7, 2011: "The entry of judgment and sentence occurs at the time of sentencing." While it is certainly true that the language given in forms is not always exact, Judge Miller corrected noted that this form must be approved by this Court. Therefore, the language of a form promulgated by this Court is entitled to no less weight or deference than a rule, particularly when there is no apparent conflict among the rules and forms.

¶20 *Whitman Dissent* ¶¶ 46-47 refers to eight different criminal rules using the phrase "entry of judgment and sentence"; many of them are similar to Rule 31.3 in that they refer to the timeliness requirement for filing a post-judgment motion, notice of appeal, or notice of post-conviction relief. Reference to all but one of those rules adds no strength to the dissent. One rule, however, provides great support for Judge Miller's position: Rule 31.8(b)(2)(iii), which refers to the designation of record on appeal and which transcripts the court reporters must prepare. It is axiomatic that the court reporters prepare written transcriptions of the oral proceedings in court; court reporters do not transcribe minute entries or other written orders. If the court reporter is expected to transcribe "entry of judgment and sentence" per Rule 31.8(b)(2)(iii), then it stands to reason that "entry of

judgment and sentence" must refer to the oral pronouncement and not to the courtroom clerk's minute entry.

¶21 There is a potential distinction between judgments made in open court with the parties present and judgments by written ruling which are mailed to the parties only after they are filed in court. In *Maricopa County Juvenile Action No. JS-8441*, the juvenile court rule required appeal be taken within 15 days. The appealable order was made by written ruling by the juvenile court judge on October 18, 1990, but the order was not "received" and "processed" by the clerk until October 25, 1990. 174 Ariz. at 342, 849 P.2d at 1372. The "processed" date is when the order was mailed to the parties. *Id*. Assuming the mail took five days to be received by the attorneys, *see* Ariz. R. Civ. P. 6(e) & Ariz. R. Crim. P. 1.3, the appealing party had only three days to confer with his attorney. Consequently, the notice was filed on November 7, 1990, shortly after the 15-day deadline had expired. *Id*.

¶22 Writing for the Court in *JS-8441*, Justice Martone expressed extreme frustration on behalf of litigants who could not possibly be expected to understand nuanced procedures of a particular court that not only were not set in local rules but even seemed to defy the rules. *Id*. The Court used the language of "fundamental fairness" to read the rule to mean that the "processed" date on the minute entry would trigger the 15-day deadline for filing a notice of appeal. *Id*. at

343, 849 P.2d at 1373. The Court concluded the opinion with a footnote: "We shall also begin the process of reviewing Rule 25(a), R.P.Juv.Ct., and related rules on appeals in other kinds of cases, in an effort to bring some measure of clarity and uniformity to the mechanics of timely appeals." 174 Ariz. at 343 n.4, 849 P.2d at 1373 n.4. The 1996 amendment to Rule 25(a), R. P. Juv. Ct. states that the notice shall be filed "within 15 days after the final is filed with the clerk." The current version of Juvenile Rule 104(a) states that the notice shall be filed "no later than 15 days after the final order is filed with the clerk."

¶23 The civil rules provide a similar level of clarity. As stated above, Ariz. R. Civ. App. P. 9(a) states that the notice of appeal must be filed "not later than 30 days after the entry of the judgment from which the appeal is taken…" Ariz. R. Civ. P. 58(a), in turn, defines what constitutes entry of judgment: "all judgments shall be in writing and signed by a judge … The filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry." Civil Appellate Rule 9(a) was also amended in 1994 to provide for an enlargement of the time to appeal under certain circumstances. According to the court comment, these rules were amended in 1994 "to address a problem experienced by practitioners, whereby they were not receiving notice of entry of judgment in some cases and their clients' rights to appeal were jeopardized." *See also Haroutunian v. ValueOptions, Inc*., 218 Ariz. 541, ¶ 8, 189 P.3d 1114, 1118

(App. 2008).

¶24 In criminal procedure, on the other hand, "[t]he judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court." Ariz. R. Crim. P. 26.16(a). The notification problem present in *Haroutunian* and other civil cases is impossible under Ariz. R. Crim. P. 26.9. This Court could have used language defining "entry of judgment" similar to that in the civil and juvenile rules if that was the Court's intent; and use of the heading "entry of judgment and sentence" in Rule 26.16(a) makes clear that this Court intended such to occur upon the oral pronouncement in court, rather than the filing of the minute entry by the clerk. If the purpose of all of these rules is to ensure that the litigants are aware of the judgment so that they know when appellate rights may be exercised, then the sentencing process described in Rules 26.2, 26.9, 26.10, 26.11, and 26.16 ensures that defendants and their attorneys are informed of the time for filing a notice of appeal. Mr. Whitman was so informed in this case, and he signed for receipt of his rights. 12/7/11 Reporter's Transcript 4; Record on Appeal Doc. #80.

¶25 *Whitman Majority* ¶ 20 cites *State v. Schroeder*, 95 Ariz. 255, 259, 389 P.2d 255, 257 (1964), for the proposition that "under certain circumstances, 'dismissal for slight delay in filing criminal appeals seems inconsonant with sound policy and fundamental justice.'" In *Schroeder*, the failure to file a timely notice of

appeal was due to personal problems of the attorney (which required appointment of new counsel to represent the defendant for appeal). To the extent that a "slight delay" is through no fault of the defendant, Ariz. R. Crim. P. 32.1(f) now provides a clear remedy consistent with "sound policy and fundamental justice." The courts need no longer look the other way when a notice of appeal is untimely filed.

¶26 As stated above, it is the practice of the PCPD to advise *every* client at the time of sentencing that the client need not file the notice because the attorney will file for the client. Hence, any untimeliness in the filing of the notice of appeal in a PCPD case is automatically without fault of the defendant. Any pending case where the notice of appeal was filed untimely can be remedied through that procedural mechanism. Creating a special rule extending the deadline for filing a notice of appeal, therefore, is a solution in search of a problem.

CONCLUSION

¶27 Six judges of the Court of Appeals have voted on this issue in the last several months; two out of six held that Rule 31.3 was sufficiently unclear and confusing that Brady Whitman should be entitled to pursue his appeal in spite of the fact that his notice of appeal was filed 21 days after sentencing occurred. If even one experienced jurist reached this conclusion, that fact alone should be satisfactory to find that the rule of lenity must apply. Regardless of how this Court

decides the issue for future cases, *amici* ask this Court to hold that all notices of appeal that satisfy the *Whitman* rule be considered timely, and that the dismissed appeal in *Montgomery* and the appeals of all other similarly-situated criminal defendants be allowed to be reinstated.

DATED: (electronically filed) February 7, 2014.

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