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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-22-0041
	)	
	)	**COMMENT OF DAVID EUCHNER**
Petition to Amend ARCAP 15 & 21,	)	**IN SUPPORT OF PETITION TO**
Ariz. R. Crim. P. 31, and the Rules of	)	**AMEND VARIOUS RULES OF**
the Supreme Court.	)	**APPELLATE PROCEDURE**
	)	
	)	

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, David J. Euchner hereby submits the following comment on the petition to amend various rules of appellate procedure.

Introduction

I have been a full-time appellate practitioner for over 15 years. For more than 10 years, I have supervised the appellate unit of the Pima County Public Defender's Office. For the last 12 years, I have served as a chair or co-chair of the amicus and rules committee of Arizona Attorneys for Criminal Justice, and in that capacity I file several *amicus curiae* briefs in state and federal appellate courts every year. I do not keep count of how many *amicus* briefs I have filed, but I am listed as counsel or co-counsel for *amicus curiae* in 42 published opinions in Arizona state courts. In at least

9 cases that I argued at the Arizona Supreme Court on behalf of a client of the Public Defender's Office, I was supported by at least one *amicus* brief.

My experience gives me perspective as to the first two areas of concern contained in this Petition, and I agree with most of the arguments made by Petitioners in favor of their proposals. On the first issue related to placing limitations on responses to amicus briefs, I also agree with the specific proposal. On the second issue related to appellate courts deciding cases on unbriefed issues, I have an alternative proposal and specify a location where the language should be added.

Limitations on Responses to *Amicus* Briefs

My experience with *amicus* briefs was exclusively in criminal cases until last year when I began authoring *amicus* briefs in cases involving termination of parental rights. Until recently, Ariz. R. Crim. P. 31 and 32 contained limited provisions for *amicus* briefs, so I cobbled together a sense of what the rules should be by extrapolating from ARCAP and through trial and error. In 2016-17, the Criminal Rules Task Force added a rule specifically for *amicus* briefs, current Rule 31.15, and it took the language directly from ARCAP 16. The new Arizona Rules of Criminal Procedure went into effect on January 1, 2018.

As Petitioners point out, there is no rule that prohibits a party from filing a response to a supporting brief. Even without explicit prohibition, I have avoided this

(and I instruct others not to do this when people ask if it is permitted) because it is obviously bad form. The State of Arizona (including its agency Department of Child Safety) being the adverse party in 100% of my cases, I have never seen my opposing counsel engage in such bad form either. Given that many civil appeals are handled by trial lawyers with little appellate experience, however, I have no doubt that Petitioners have seen some lawyers have filed responses *amicus* briefs supporting their position. Having a rule in place would help practitioners navigate these procedures for lawyers who are unaccustomed to working with an *amicus*. I also agree with Petitioners' point that even a friendly *amicus* brief can disagree with the party it supports on some points, and in those circumstances the party should be able to contest the point or clarify the argument.

Ultimately, whether there is a specific rule or not, some attorneys will bend or break the rule, and it is always up to opposing counsel to police such violations by bringing them to the attention of the court—just as they must bring to the court's attention violations committed by *amici*.

Appellate Decisions on an Unbriefed Basis

A. Violation of Due Process and of Judicial Norms

There is never a reason for an appellate court to decide a case on an unbriefed issue. Petitioners suggest an appellate court might properly dismiss an appeal based on a jurisdictional defect, Petition at 6 n.1, but this is no less improper.

Once I was counsel for a mother in a private dependency proceeding initiated by the maternal grandmother, and the juvenile court dismissed the petition under the UCCJEA. On appeal, I briefed an issue of first impression concerning the application of UCCJEA and ICWA, and I filed a request for oral argument. The court of appeals denied my request for oral argument and three days later published an opinion. In *Holly C. v. Tohono O'odham Nation*, 246 Ariz. 85 (App. 2018), the court of appeals dismissed my appeal for lack of jurisdiction because my client, the mother of the child at issue, was not an "aggrieved party." No party raised this issue, and for good reason: the court was terribly wrong. Inexplicably, the court denied my motion for reconsideration. When I filed a petition for review, this Court issued a one-page order stating that my client was an aggrieved party and ordering the court of appeals to hear the appeal. A different panel of the court of appeals then published a new opinion on the issue I raised. *Holly C. v. Tohono O'odham Nation*, 247 Ariz. 495 (App. 2019).

Unfortunately, *Holly C.* was not an anomaly. This has occurred in at least three of my criminal cases in recent years. *State v. Lopez*, 2 CA-CR 2016-0042, 2017 WL 5594054 (mem., Nov. 21, 2017); *State v. Massey*, 2 CA-CR 2018-0030, 2018 WL 6735181 (mem., Dec. 24, 2018); *State v. Leeman*, 2 CA-CR 2021-0100-PR, 2022 WL 1043745 (mem., April 7, 2022). What makes *Leeman* stand out even more is that the State confessed error in that case, yet the court of appeals reached for an

issue in order to uphold a result that no party thought was correct. Colleagues who practice in Division One occasionally encounter this problem as well. For example, in a recent parental-termination case, *Sheena W. v. DCS*, 522 P.3d 686 (App. 2022), *vacated in part* (Ariz., April 4, 2023), DCS candidly conceded that the court of appeals, in reaching a decision on an unbriefed issue, made a substantial error of fact and law that required vacating part of the opinion.

The practice of resolving appeals on unbriefed grounds is unwise because the court lacks the benefit of adversarial briefing, and it increases the likelihood of a terrible result, most notably in *Holly C*. But it is not only unwise; it also violates due process.

"A fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Samiuddin v. Nothwehr*, 243 Ariz. 204, 211 ¶ 20 (2017) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *quoting in turn Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The Supreme Court recently reminded lower courts of the importance of adhering to the "principle of party presentation" to determine what issues to decide:

> in both civil and criminal cases, in the first instance and on appeal, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. In criminal cases, departures from the party presentation principle have usually occurred to protect a pro se litigant's rights. But as a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.

> In short: Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.

United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (internal quotations omitted, cleaned up). The principle is "supple, not ironclad," and circumstances exist where "a modest initiating role for a court is appropriate," *id*., but deciding a case on an unbriefed issue is a "radical transformation of [a] case [that] goes well beyond the pale." *Id*. at 1581-82.

Some judges have explained that there is a need to reach unbriefed issues as a product of the "affirm if correct for any reason" rule. Like the waiver doctrine, however, this is a prudential doctrine that courts should exercise wisely, not an opportunity to shoot down appellants' arguments for reasons that not even appellees thought were justified. When an appellate court bends over backward looking for ways to reach a particular result, it sheds its role as a neutral arbiter and dons the cloak of the advocate. The court of appeals correctly noted this in one recent case:

> As appellate judges, we have a duty to be fair and impartial in rendering our decisions. *See* Rule 2.2, Ariz. Code of Jud. Conduct, Ariz. R. Sup. Ct. 81. If the state intended to argue for the good-faith exception on appeal, it was the state's duty to raise the issue in its answering brief and thereby provide Sisco the opportunity to respond in his reply brief through our normal appellate procedures. The state's abandonment of the issue may be fairly interpreted as a tactical decision aimed at generating a ruling on the state's argument that the plain-smell doctrine has not been affected by the AMMA. If our court were to now deviate from our normal appellate procedures and either give the state another

> opportunity to discharge its burden or relieve the state of its burden entirely by deciding the issue of good faith sua sponte, we would risk appearing asymmetrical in our treatment of the parties. As illustrated by *State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008), our court holds criminal defendants strictly responsible for discharging their appellate burdens, and it is only fitting that we hold the state to the same standard.

State v. Sisco, 238 Ariz. 239, 245 ¶ 56 (App. 2015), *overruled on other grounds*, 239 Ariz. 532 (2016).

B. Ordering Supplemental Briefing is not a Panacea

The typical practice is for an appellate court to order supplemental briefing on an issue newly identified—especially for jurisdiction. In Division Two, whenever a criminal defendant files a notice of appeal from a guilty plea, the court issues an order to show cause why the court has jurisdiction or else the appeal will be dismissed. In other cases, the court identifies the legal issue that it wishes the parties to brief. This Court also engages in that practice.

As the Supreme Court noted in *Sineneng-Smith*, however, a court should tread carefully when identifying entirely new issues. In *State v. Hernandez*, 244 Ariz. 1 (2018), the issue presented was whether police could follow a driver to the end of the long driveway and encroach on the curtilage based on an insurance cancellation on the vehicle. The parties extensively briefed the issue, and oral argument did not generate new issues beyond those already briefed. Four months after argument, this Court issued an order for supplemental briefing, identifying a brand new issue and

providing a tight briefing schedule and a limit of only 8 pages for the brief. This Court then decided the case based on its newly-identified issue, "implied consent." *Id*. at 3-4 ¶ 10, 5 ¶¶ 17-19. Two years ago the U.S. Supreme Court held that a person's failure to stop for police for a misdemeanor offense does not alone justify an intrusion into the curtilage, *see Lange v. California*, 141 S. Ct. 2011 (2021), and thus *Hernandez* is no longer good law. *See* David J. Euchner & Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL § 12:26 (2022-23 ed.). *Hernandez* likewise shows that it is better to let the parties develop their own arguments and for courts to reserve use of the power to reach additional issues in extraordinary situations (for example, jurisdiction).

C. My Proposal

I agree with the Petitioners when they state that "motions for reconsideration are not an adequate solution" because of confirmation bias and other reasons. Petition at 6-7. In my four cases described above where the court of appeals decided my case against my client on an unbriefed issue, I filed motions for reconsideration in three of those, and the motions were denied immediately in all three.

As with Petitioners' concern related to *amicus* briefs, perhaps the presence of an explicit rule of procedure will enable litigants to better enforce their rights. The Petition provides suggested language but no location for the new language. I propose the following language to be added to Ariz. R. Crim. P. 31.19:

Ariz. R. Crim. P. 31.19. An appellate court's orders and decisions.

(a) [No change]

(b) Order pending a decision. An appellate court may issue any order during the course of an appeal that it deems necessary or appropriate to facilitate or expedite the appeal's consideration. **If the appellate court identifies a legal question important to the disposition of the case, it must issue an order identifying that question and giving the parties a reasonable time to file supplemental briefs on that question**.

(c)-(f) [No change]

ARCAP 20 is nearly identical to Ariz. R. Crim. P. 31.19(a), but it does not contain any of the other five subsections of the corresponding criminal rule (and only one of those subsections, Rule 31.19(d), applies only to criminal cases). ARCAP 20, whether or not it is expanded to include the other subsections, provides an ideal location for my proposed language.

I believe my proposal is preferable to Petitioners' proposal for two reasons. First, attorneys are more likely to look to ARCAP or Criminal Rule 31 for appellate procedural rules than to the Rules of the Supreme Court. Second, ARCAP 20 and Criminal Rule 31.19(b) are more logical locations than the Rules of the Supreme Court. Wherever this change appears, I agree it is needed and I thank Petitioners for bringing it to the fore.

Conclusion

For the reasons in my comment, I request this Court adopt changes to rules governing *amicus curiae* briefs and deciding cases on unbriefed issues. I express no opinion on Petitioners' third area of concern related to attorney fees.

DATED (electronically filed): April 28, 2023.

By: /s/ David J. Euchner
David J. Euchner

Comment electronically mailed to:

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