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**IN THE SUPREME COURT OF ARIZONA**

In the Matter of )  
 ) Arizona Supreme Court No. \_\_\_\_\_  
 )  
PETITION TO AMEND RULES 26.9 )  
AND 31.3, ARIZONA RULES OF ) PETITION TO AMEND RULES 26.9  
CRIMINAL PROCEDURE ) AND 31.3, ARIZONA RULES OF  
 ) CRIMINAL PROCEDURE  
\_\_\_\_\_ )

Pursuant to Rule 28, Rules of the Supreme Court, the Arizona Supreme Court Staff Attorneys' Office petitions the Court to adopt amendments to Rules 26.9 and 31.3, Arizona Rules of Criminal Procedure, as proposed in the Attachment hereto.

Currently, Arizona Rule of Criminal Procedure 31.3 provides that “[t]he notice of appeal shall be filed with the clerk of the trial court within 20 days after entry of judgment and sentence,” with stated exceptions to the general rule not relevant here. The rule does not, however, specify when “entry” occurs.

This Court in *State of Arizona v. Whitman*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_ (2014) (2014 WL 1385396), addressed the question of “whether ‘entry,’ as used in Rule 31.3, occurs when the judge pronounces the sentence in open court or instead when the clerk files the minute entry memorializing the judgment and sentence.” 2014 WL 1385396 \*1 ¶ 1. The Court “conclude[d] that entry occurs when the sentence is pronounced and that defendants have twenty days from

that date to file a notice of appeal.” *Id.* Accordingly, amendment is necessary to clarify the current ambiguity in Rule 31.3 and to conform the rule to the Court’s opinion in *Whitman*. Petitioner recommends addition of the following language: “The notice of appeal shall be filed with the clerk of the trial court within 20 days after the entry of judgment and sentence, which occurs at the time the judge pronounces sentence, except that: . . . .”

Additionally, in concluding that entry of judgment and sentence occurs at the time of sentencing, the Court in *Whitman* relied on a comment to Rule 26.9 (presence of the defendant) explaining that “the time for filing a notice of appeal is to run from the entry of judgment and sentence whether or not the defendant is present.” The Court noted that “[a]lthough this comment incorrectly suggests that sentencing in absentia is permitted, it nonetheless reveals the drafters’ intent to measure the time to appeal from the date the sentence is pronounced in open court.” 2014 WL 1385396 \*4 ¶ 18.

As background, in 1993, Rule 26.9 was amended to clarify that that unless extraordinary circumstances exist, a trial court should not sentence a defendant in absentia. *See State v. Fettis*, 136 Ariz. 58, 664 P.2d 208 (1983). A portion of the undated comment to Rule 26.9, however, still retains language that is confusing and obsolete in light of the 1993 amendment. The comment provides, in part:

The defendant is not permitted to extend the time for taking an appeal by non-appearance at sentencing. Hence the time for filing a notice of appeal is to run from the entry of judgment and sentence whether or not the defendant is present. A defendant who is absent at sentencing through no fault of his own may be entitled to a delayed appeal under Rule 32. *See State v. Tacon*, 41 U.S.L.W. 4275 (U.S. Feb. 21, 1973), certiorari dismissed [107 Ariz. 353, 488 P.2d 973 (1971), certiorari dismissed 93 S. Ct. 998.]

Accordingly, Petitioner recommends these sentences be deleted from the comment to Rule 26.9.

Petitioner respectfully requests that the Court adopt the proposed amendments as reflected in the Attachment to this Petition.

DATED this \_\_\_ day of May, 2014.

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Ellen M. Crowley  
Chief Staff Attorney, Arizona Supreme Court

## Attachment<sup>1</sup>

### ARIZONA RULES OF CRIMINAL PROCEDURE

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#### **Rule 26.9. Presence of the defendant**

The defendant is entitled to be present at a pre-sentencing hearing and shall be present at sentencing. In a capital case, the defendant is entitled to be present at both the aggravation and penalty hearings, and the return of any verdict.

#### **Comment**

Unlike the 1956 Arizona Rules of Criminal Procedure, Rule 235, this rule requires the presence of the defendant at sentencing, absent extraordinary circumstances, no matter what the nature of sentence to be imposed. *See State v. Fettis*, 136 Ariz. 58, 664 P.2d 208 (1983). This change is made because of the essential warnings and information regarding appeal required to be given after sentence is pronounced. See Rule 26.11. ~~The defendant is not permitted to extend the time for taking an appeal by non appearance at sentencing. Hence the time for filing a notice of appeal is to run from the entry of judgment and sentence whether or not the defendant is present. A defendant who is absent at sentencing through no fault of his own may be entitled to a delayed appeal under Rule 32. See State v. Tacon, 41 U.S.L.W. 4275 (U.S. Feb. 21, 1973), certiorari dismissed [107 Ariz. 353, 488 P.2d 973 (1971), certiorari dismissed 93 S. Ct. 998.]~~

#### **Committee Comment to 1993 Amendment**

[No change in text.]

\* \* \*

#### **Rule 31.3. Time for taking appeal**

The notice of appeal shall be filed with the clerk of the trial court within 20 days after the entry of judgment and sentence, which occurs at the time the judge pronounces sentence, except that:

- a. A notice of cross-appeal may be filed within 20 days after service of the appellant's notice of appeal; and
- b. A notice of delayed appeal shall be filed within 20 days after service of an order granting a delayed appeal under Rule 32.1(f).

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<sup>1</sup> Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.