# A HOUSE DIVIDED: STATUTORY INTERPRETATION PROBLEMS EXEMPLIFIED BY *WHITMAN I*, *MONTGOMERY*, AND *WHITMAN II*

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*At least in theory, courts share the same set of guiding principles when it comes to statutory and rule interpretation. These principles exist to help courts adhere to the rule-makers' original intent, but the rules themselves often provide little guidance as to that intent in practice. In* State v. Whitman *(2013),* State v. Montgomery *(2013), and* State v. Whitman *(2014), the two divisions of Arizona's Court of Appeals and its Supreme Court each tackled nearly identical fact patterns. Four written opinions ultimately yielded three different approaches—and two opposite results. This Note examines how the general rules of statutory interpretation both permitted and encouraged these different results (despite the judges' shared goal of deference to the rule-makers), and contemplates the need for a more consistently applicable set of instructions.*

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## INTRODUCTION

> What is a moderate interpretation of the text? Halfway between what it really means and what you'd like it to mean?
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> —Justice Scalia[1]

Despite the regular need for statutory interpretation in the courts, there are a wide variety of (and often competing) views on how that should be conducted. Some judges, like Justice Scalia, are famous textualists.[2] Others look to related external indicators, such as legislative history, to determine whether a statute is ambiguous.[3] Still others rely more heavily on legislative history to determine the intent that shaped the rule.[4] Each of these approaches aims to achieve the same ultimate goal: to interpret the statute as the rule-making body meant for it to be interpreted.

Where the statute is proper—where there are no validity concerns for constitutional or other reasons—courts overwhelmingly prefer to defer[5] to the legislative intent and strive, not to alter the law, but, to apply it as it was written. This preference stems from one of the fundamental principles of our government: the separation of powers between branches.[6] A judge's job is not to create law, but to interpret it.[7] The importance of this distinction is highlighted by the disapproving tone used to describe judges who are "legislating from the bench."[8] Judges must therefore walk something of a tightrope; they must use external clues to discern

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1. Justice Scalia, Remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C.: Constitutional Interpretation the Old Fashioned Way 7 (Mar. 14, 2005) (transcript available at http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf).

2. Justice Scalia argues for a textualist approach, which prioritizes the meaning of the words used in statutes, in his book, wherein he also laments the lack of uniform principles of statutory interpretation. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

3. *See e.g.*, Zedner v. United States, 547 U.S. 489, 501 (2006), (writing the majority opinion, Justice Alito referred to legislative history for the purpose of validating an interpretation of an Act's plain meaning).

4. *See, e.g.*, W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 385–88 (1992) (providing insights from multiple judges on the role of legislative history in statutory interpretation).

5. In some cases this may not be possible, as when legislative intent is unclear even after reviewing other factors such as legislative history. *See* Hayes v. Continental Ins. Co, 872 P.2d 668, 674 (Ariz. 1994).

6. *See, e.g.*, ARIZ. CONST. art. 3 (outlining the separation of powers in Arizona).

7. *See* State v. Murray, 982 P.2d 1287, 1289 (Ariz. 1999) ("As a general matter, the separation of powers doctrine leaves creation of future statutory law to the legislative branch and determination of existing law and its application to past events to the judiciary branch.").

8. *See, e.g.*, Estate of Pew v. Cardarelli, 527 F.2d 25, 36 (2d Cir. 2008) ("We frequently hear, however, that 'legislating from the bench' is a cardinal sin of the judicial profession); AT&T Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1429 (3d Cir. 1994) ("[C]ourts should be wary about looking outside of the statute itself . . . lest they accurately be accused of legislating from the bench.").

legislative intent, but if they look too far outside the scope of the statute, they risk inadvertently infringing on legislative authority. Principles of statutory construction help judges maneuver such tricky interpretation issues—at least in theory. At their core, principles of construction are designed to promote fidelity to legislative intent. Assuming the legislature does not amend a statute in the meantime, two judges applying the same principles of construction in an effort to determine the statute's legislative intent should be able to reach the same conclusion in interpreting that statute

Despite these goals, even judges applying the same analytical steps can reach different conclusions. This can be frustrating for judges who are trying to defer to legislative intent but who increasingly find themselves left guessing, particularly when those same judges are overturned by others ostensibly applying the same principles. Principles of construction afford flexibility at the expense of consistency. While in some cases that gives courts much-needed room to maneuver (as when a previously unforeseeable circumstance demands flexibility), when the court's goal is merely to follow the legislative map, such subjective tools offer little guidance.

This Note will explore the existing framework for statutory interpretation in Arizona, explore how that framework fails to foreclose subjectivity, and offer a more comprehensive solution. Part I will discuss current principles of statutory construction, including the policy justifications that drive these principles. Part II will introduce the recent Arizona cases that best demonstrate this problem in action—*Whitman* and *Montgomery*. Part III will explore the analytical steps judges took in reaching their four divergent opinions in these cases, and Part IV will offer suggestions for resolving the analytical holes these examples expose.

## I. PRINCIPLES OF STATUTORY CONSTRUCTION

Like many other state and federal courts, Arizona's courts favor a deferential approach to statutory interpretation that gives weight to legislative intent and prioritizes cohesion between statutes.[9] This process begins with a presumption of legislative competency, which prevents courts from assuming that the legislature was ignorant of any other statutes or the effect of a new statute on the existing scheme when it enacts a law.[10] Operating under this assumption, courts undertake an analysis that begins with an examination of the "plain meaning" of the statute.[11] At least in most cases, courts will not explore alternative meanings when the plain language itself is clear,[12] opting instead to presume that legislative intent is best

9. *See, e.g.*, Frye v. South Phx. Volunteer Fire Co., 224 P.2d 651, 654 (Ariz. 1950) (finding that courts must give meaning to individual clauses wherever possible, and must also consider the law's intended spirit and purpose); *see also* Jett v. City of Tucson, 882 P.2d 426, 430 (Ariz. 1994) ("Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it.").

10. *See* State v. Garza Rodriguez, 791 P2d 633, 637 (Ariz. 1990) ("We presume that the legislature knows the existing laws when it enacts or modifies a statute.").

11. State v. Slayton, 154 P.3d 1057, 1060 (Ariz. Ct. App. 2007) ("[W]e look first to the plain language of the statute, then to its context and history.").

12. *See, e.g.*, Perini Land and Dev. Co. v. Pima Cnty., 825 P.2d 1, 4 (Ariz. 1992) ("We look first to the language of the provision, for if the constitutional language is clear,

discerned from the language of the adopted statute.[13] In determining whether the plain language is clear, courts consult widely-used dictionaries, statutorily prescribed definitions, and the context in which the plain language appears.[14] All of these interpretive precautions stem from the desire to adhere to the statute without unintentionally redrafting it.[15]

Only if the plain language is not clear—if it permits more than one reasonable interpretation[16]—will courts look to alternative methods of statutory construction.[17] These include "examining the rule's historical background, its spirit and purpose, and the effects and consequences of competing interpretations."[18] If legislative intent remains unclear, courts rely on other guiding principles to fill in the gaps.[19]

Nor are courts able to ignore such ambiguous language; the canons of construction require them to give meaning to every word in a statute.[20] Thus, judges often find themselves caught in a balancing act between the requirement to give deference to legislative intent where none is apparent and the need to issue a ruling

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judicial construction is neither required nor proper."); *but see* Harper v. Canyon Land Dev., LLC, 200 P.3d 1032, 1033 (Ariz. Ct. App. 2008) ("In construing rules, we give effect to the plain meaning unless the language is ambiguous, *or would create an absurd result*[.]") (emphasis added) (internal citations omitted).

13. *See* Stout v. Taylor, 311 P.3d 1088, 1091 (Ariz. Ct. App. 2013) ("Our goal is to discern the intent of the drafters of the rule, and 'we look to the plain language of the statute or rule as the best indicator of that intent.'" (quoting Fragoso v. Fell, 111 P.3d 1027, 1030 (Ariz. Ct. App. 2005))).

14. *See, e.g.*, State v. Lychwick, 218 P.3d 1061, 1063 (Ariz. Ct. App. 2009) ("To determine the plain meaning of a term in a statute, courts refer to established and widely used dictionaries."); State v. Reynolds, 823 P.2d 681, 682 (Ariz. 1992) ("We look primarily to the language of the statute itself and give effect to the statutory terms in accordance with their commonly accepted meanings, 'unless the legislature has offered its own definition of the words or it appears from the context that a special meaning was intended.'" (internal citation omitted) (quoting Mid Kansas Fed. Sav. & Loan v. Dynamic Dev. Corp., 804 P.2d 1310, 1316 (Ariz. 1991))).

15. *See, e.g.*, Tucson Unified Sch. Dist. v. Borek *ex rel.* Cnty. of Pima, 322 P.3d 181, 185 (Ariz. Ct. App. 2014) ("We 'are not at liberty to rewrite [a] statute under the guise of judicial interpretation.'" (quoting New Sun Bus. Park, LLC v. Yuma Cnty., 209 P.3d 179, 183 (Ariz. Ct. App. 2009))).

16. *See* State v. Salazar-Mercado, 325 P.3d 996, 998 (Ariz. 2014) (finding a statute ambiguous "because it can be reasonably read in two ways").

17. *Id.*

18. *Id.* (citing Chronis v. Steinle, 208 P.3d 210, 211 (Ariz. 2009)).

19. *See, e.g.*, *See* Hayes v. Continental Ins. Co, 872 P.2d 668, 674 (Ariz. 1994) (noting that where legislative intent behind a particular statute is unclear, courts look to the general goals of the legislature that drafted it).

20. *See, e.g.*, State v. Garza Rodriguez, 791 P.2d 633, 638 (Ariz. 1990) ("We must, if possible, give meaning to each clause and consider the effects and consequences as well as the spirit and purpose of the law." (citing Frye v. S. Phx. Volunteer Fire Co., 224 P.2d 651, 654 (Ariz. 1950))); Ariz. State Hosp./Ariz. Cmty. Prot. & Treatment Ctr. v. Klein, 296 P.3d 1003, 1007 (Ariz. Ct. App. 2013) ("Each word, phrase, clause and sentence must be given meaning so that no part of the statute will be void or trivial and the meaning determined must avoid absurd results.").

on an ambiguous piece of law. These same principles of statutory construction, and their attendant problems, apply in instances where judges must interpret rules as opposed to statutes.[21]

The recent decisions in *State v. Whitman* (*Whitman I*), *State v. Montgomery*, and *State v. Whitman* (*Whitman II*) provide an excellent example of this problem in practice. The two divisions of Arizona's Court of Appeals and its Supreme Court, all supposedly applying the same principles of statutory construction to a rule of criminal procedure, arrived at two opposite outcomes supported by four different explanations of the legislative intent behind the rule. This begs the question: were the rule-makers of such divided intent that all four reasonings were valid; were the principles of statutory construction misapplied by one or more courts; or do Arizona's statutory interpretation principles provide insufficient guidance for deducing legislative intent?

## II. BACKGROUND OF THE CASES

The two cases required the courts to interpret the same rule, in similar situations. First, on December 7, 2011, Brady Whitman Jr. was sentenced following criminal conviction.[22] The sentencing minute entry was filed two days later, on December 9.[23] Whitman filed his notice of appeal on December 28:[24] 21 days after his sentence was pronounced, but only 19 days after the sentencing minute entry was filed. Similarly, in *State v. Montgomery*,[25] Leroy Montgomery filed his notice of appeal 24 days after the oral pronouncement of his sentence but only 20 days after the sentencing minute entry was filed.[26]

Arizona Rule of Criminal Procedure 31.3, as it existed at the time of these cases, required "[th]e notice of appeal [to] be filed with the clerk of the trial court within 20 days after the entry of judgment and sentence."[27] Herein lies the problem: under this rule, both defendants filed untimely notices of appeal if "entry of judgment and sentence" occurs at the time of sentencing itself. On the other hand, if "entry of judgment and sentence" does not take place until the minute entry is actually filed, then both notices of appeal adhered to the rule requirement. Both defendants argued for an interpretation that would put their filings in compliance with the rules, and in both cases, the Court had to expound the meaning of "entry of judgment and sentence" using principles of statutory construction. In *Whitman I*, the

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21. *Salazar-Mercado*, 325 P.3d at 998 ("We interpret court rules to effect the rule-makers' intent, using the same principles we apply when interpreting statutes.").

22. State v. Whitman (*Whitman I*), 301 P.3d 226, 227 (Ariz. Ct. App. 2013), *vacated*, 324 P.3d 851 (Ariz. 2014).

23. *Id.*

24. *Id.*

25. 312 P.3d 140 (Ariz. Ct. App. 2013).

26. *Id.* at 141.

27. ARIZ. R. CRIM. P. 31.3. As a result of the Court's ruling on the matter, this rule has since been amended by court order to read, "[t]he 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 when the judge pronounces sentence* . . . ." Order Amending Rules 26.9 & 31.3, Arizona Rules of Criminal Procedure at 1, *In re* Rules 26.9 & 31.3, Rules of Criminal Procedure, No. R-14-0021 (Ariz. Sept. 9, 2014) (emphasis added) (taking effect Jan. 1, 2015).

court held that the rule was ambiguous, and that "entry of judgment and sentence" occurred at the time the minute entry was filed. The dissent in that case and the court in *Montgomery* both argued that the statute was not ambiguous, and that entry of judgment and sentence took place at the time of oral pronouncement.[28] In *Whitman II*, the Court agreed with the *Whitman I* majority that the statute was ambiguous, but agreed with the *Montgomery* court and the dissent from *Whitman I* that entry of judgment and sentence occurs at the time of oral pronouncement.[29] The next Part will compare the courts' analyses and outcomes.

## III. THE PROBLEM IN ACTION: ANALYSES UNDER THE CURRENT FRAMEWORK

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.
>
> —Justice Thomas[30]

The threshold question in this or any other statutory interpretation exercise is whether ambiguity exists. As discussed above, where there is no ambiguity, courts must apply the plain meaning of the statute or rule.[31] But what factors are courts permitted to consider in determining the plain meaning? Certainly the judge's job is made easier if the legislature or rule-maker has already defined the term.[32] Such a scenario is hardly the norm, however; in the Arizona Rules of Criminal Procedure definitions section, only four terms are specifically defined, out of the hundreds of terms that make up the rules.[33] In those instances where statutory definitions exist, they control the analysis.[34]

Absent such guidance, courts next rely on statutory context. Where context prescribes a special meaning, that meaning outranks common usage meanings, such as those provided by dictionaries.[35] When neither statutory definition nor context

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28. *Montgomery*, 312 P.3d at 142.

29. State v. Whitman (*Whitman II*), 324 P.3d 851, 854 (Ariz. 2014).

30. Conn. Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992) (internal quotation marks omitted).

31. *See* Janson v. Janson, 808 P.2d 1222, 1223 (Ariz. 1991) ("[I]f we find no ambiguity in the statute's language, we must give effect to that language and we may not employ other rules of construction to interpret the provision."); *but see* Harper v. Canyon Land Dev., L.L.C., 200 P.3d 1032, 1033 (Ariz. Ct. App. 2008) (noting that the court may use other principles of statutory construction where interpreting the plain meaning would lead to an absurd result).

32. *See, e.g.*, ARIZ. R. CRIM. P. 1.4.

33. *See id.*; *see generally* ARIZ. R. CRIM. P.

34. *See* Kessen v. Stewart, 990 P.2d 689, 692 (Ariz. Ct. App. 1999) ("[W]e will give terms 'their ordinary meanings, unless the legislature has provided a specific definition or the context of the statute indicates a term carries a special meaning.'" (quoting Wells Fargo Credit Corp. v. Tolliver, 903 P.2d 1101, 1103 (Ariz. Ct. App. 1995))).

35. *See, e.g.*, State v. Reynolds, 823 P.2d 681, 682 (Ariz. 1992) ("We look primarily to the language of the statute itself and give effect to the statutory terms in accordance with their commonly accepted meanings, 'unless the legislature has offered its

compels a certain reading, however, courts will consult respected dictionaries to help ascertain the meaning of relevant words.[36] All of these are only the initial considerations to answer the first question: is the language itself ambiguous?

The question is not as straightforward as it appears. For instance, one of the problems the courts encountered in *Whitman I* & *II* and *Montgomery* was a disagreement as to what qualified as the "context" of the rule.[37] Because context overcomes dictionary definitions,[38] the broader the scope of the "context," the more likely a court will find a prescribed meaning embedded in the statute or rule. On the other hand, the broader the scope, the greater the risk that a court might inappropriately adopt a legislative intent that did not exist.[39] A specific example of this issue in *Whitman I & II* and *Montgomery* is the disagreement over whether the context of the language is limited to the particular rule in which it appears, or rather extends to include the Rules of Criminal Procedure as a whole. In both *Montgomery* and in the dissent in *Whitman I*, the judges cast a fairly broad net[40] to include Ariz. R. Crim. P. 26.16(a) in their analyses of whether the language in Rule 31.3 was ambiguous.[41] That rule states that "[t]he judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court."[42] Finding that the rule applied, the judges determined that the plain meaning of "entry of judgment" referred to the time of pronouncement in court.[43] By contrast, in its decision in the *Whitman II* case the Arizona Supreme Court looked only to

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own definition of the words or it appears from the context that a special meaning was intended.'" (internal citation omitted) (quoting Mid Kansas Fed. Sav. & Loan v. Dynamic Dev. Corp., 804 P.2d 1310, 1316 (Ariz. 1991))).

36. *See* Stout v. Taylor, 311 P.3d 1088, 1091 (Ariz. Ct. App. 2013) ("To determine the ordinary meaning of a word, we may refer to established and widely used dictionaries.").

37. *Compare Montgomery*, 312 P.3d at 141–42 (finding that other rules of criminal procedure provide context for the analysis), *with Whitman II*, 324 P.3d at 852 (looking only to Rule 31.3 itself).

38. *See* State v. Gray, 258 P.3d 242, 245 (Ariz. Ct. App. 2011) ("We recognize that a dictionary definition may not be conclusive and, because 'context gives meaning,' statutory terms should not be considered in isolation." (quoting United States v. Santos, 553 U.S. 507, 512 (2008))).

39. *See e.g.*, State *ex rel.* Pennartz v. Olcavage, 30 P.3d 649, 654–55 (Ariz. Ct. App. 2001) (rejecting an argument that context offered by ARIZ. REV. STAT. §§ 32-1456 and 36-471 should not be used to determine definitions in § 28-1388(A), because the legislative purpose in adopting the statutes was different).

40. This scope, while broad, is not unprecedented. Other courts have examined entire chapters to find whether the statutory context suggests a different meaning. *See, e.g.*, *Gray*, 258 P.3d at 245 (disposing first of the possibility of a special meaning prescribed by title 13, chapter 28 or the associated legislative history before adopting the dictionary definition).

41. *See Whitman I*, 301 P.3d at 236 (Miller, J., dissenting); *see also Montgomery*, 312 P.3d at 141–42.

42. ARIZ. R. CRIM. P. 26.16(a).

43. *See Whitman I*, 301 P.3d at 236 (Miller, J., dissenting); *see also Montgomery*, 312 P.3d at 141–42.

Rule 31.3 itself for context, finding that it "does not define the phrase 'entry of judgment and sentence.'"[44]

This draws a confusing line for future courts to follow. After all, in determining what is ambiguous, courts are permitted[45] to consult definitions prescribed by the statutes themselves. For example, Ariz. R. Crim. P. Rule 1.4, labeled "Definitions," offers definitions for specific terms to be used in interpreting the rules generally.[46] Clearly the rule-makers did not intend for these definitions to apply only to Rule 1.4. For instance, suppose a court was presented with the task of interpreting what "courts of limited jurisdiction" means in Ariz. R. Crim. P. 2.1(b). That term is defined in Ariz. R. Crim. P. 1.4(d).[47] The court would have to look outside of Rule 2.1(b) to find the statutorily defined definition, but it would be inappropriate for the court to ignore that definition because it was outside the scope of the rule in question. In that sense, these definitions are viewed as part of the context.

Rule 1 is intended to apply to all of the Rules of Criminal Procedure.[48] Nevertheless, if a court were to resolve ambiguity using the narrowest approach, it would not be permitted to look outside a given rule to find Rule 1 in the first place, since that would require it to rely on outside context. This suggests at least a degree of leniency is necessary in the search for context. And if the courts may consider the context of the Rules at large, it stands to reason that they may glean context from any of the other rules constructed under the same definitional standards introduced by Rule 1.4.[49] Following that logic, Rule 26.16(a) establishes that an entry of

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44. *Whitman II*, 324 P.3d at 852 (Ariz. 2014). The majority in *Whitman I* arrived at a similar conclusion, finding that "[t]he rules do not, however, expressly state when the 'entry of judgment and sentence' occurs." 301 P.3d at 228. Interestingly, though, the court included in its determination a definition of "sentence" prescribed by a comment to Arizona Rule of Criminal Procedure 26.1. *Id.* This suggests a willingness to look to other rules in determining whether ambiguity exists. The apparent discrepancy between the two positions may be reconciled by the court's reluctance to apply a definition that identifies when a judgment becomes complete and valid to the timing issue of "entry." *See id.* at 230.

45. In fact, this may be more of an expectation than an option. *See* US West Commc'ns, Inc. v. City of Tucson, 11 P.3d 1054, 1059 (Ariz. Ct. App. 2000) ("A statute is to be read and applied in accordance with any special statutory definitions of the terms that it uses.").

46. ARIZ. R. CRIM. P. 1.4.

47. *See, e.g.*, *id.* 1.4(d) (defining "Court of Limited Jurisdiction"); *see also id.* 2.1(b) (using the same term).

48. This is clear in several ways. First, it is the only rule to appear under the first category, "I. General Provisions." *See* ARIZ. R. CRIM. P. tit. I. Second, Rule 1 itself is titled: "Scope, Purpose and Construction, Computation of Time, Definitions, Size of Paper, and *Other General Provisions*." *Id.* 1 (emphasis added). Finally, it begins with the instruction that "[w]henever they appear in these rules the terms below shall carry the following meaning . . . . " *Id.* 1.4.

49. In fact, courts have an obligation to construe statutes of the same subject-matter harmoniously. KZPZ Broad., Inc. v. Black Canyon City Concerned Citizens, 13 P.3d 772, 777 (Ariz. Ct. App. 2000). To the extent that the Rules of Criminal Procedure all deal broadly with matters of criminal procedure, they cover the same subject matter; on the other hand, the Rules are divided into sections. *Compare* ARIZ. R. CRIM. P. tit. I (General Provisions), *with* ARIZ. R. CRIM. P. tit. VI (Trial).

judgment is valid and complete at the time of oral pronouncement;[50] therefore, in the context of Arizona's Rules of Criminal Procedure, there is no ambiguity. For both the dissent in *Whitman I* and the court in *Montgomery*, this is where the question of statutory interpretation ended. Without having found ambiguity, the courts could not proceed to the question of legislative intent.

However, Arizona's Supreme Court, which did not include Rule 26.16(a) in its initial discussion, elected to use it *after* reaching its finding that the Rule was ambiguous.[51] This again invites confusion—the Court chose not to include Rule 26.16(a) as context for Rule 31.3 when deciding whether it was ambiguous, but *did* use it to determine legislative intent. Specifically, the Court cited Rule 26.16(a) to demonstrate how "[i]nterpreting 'entry' to occur at the time of oral pronouncement of judgment and sentence permits the most consistent reading among the Rules of Criminal Procedure."[52] In other words, the Court acknowledged the value of Rule 26.16(a) stems from its ability to provide context in light of other rules.[53]

But if context drives the inclusion of Rule 26.16(a) in the interpretation analysis, why did the Court skip the rule in its initial threshold determination of ambiguity—where context of the rule is one of the factors to be considered? The Court appears to answer this question by giving "context" two different meanings—with the narrower meaning reserved for ambiguity. Its only comment on the subject of ambiguity is to note that "Rule 31.3 yields two reasonable interpretations."[54] This offers little guidance for future courts hoping to apply the same principles of statutory construction.

On the other hand, if the legislature intended for the description of "entry of judgment and sentence" found in Rule 26.16(a) to apply to the Rules as a whole, it already had the vehicle in place to do so—it could have placed that definition in Rule 1.4. To the degree that courts trust the legislature to know what it is doing, it would be inappropriate to presume a definition provided in another, non-general rule was intended to apply to all rules. The most probable explanation for not including Rule 26.16(a) in the initial ambiguity analysis is likely a combination of an unwillingness to look beyond the scope of the rule itself for plain meaning and the fact that Rule 26.16 itself creates some ambiguity. Once it did turn to Rule 26.16, the Court correctly noted that, while the rule describes a judgment as complete and final at the time of sentencing, it also refers to "entry" in the context of taking the court's minutes.[55] Taken together, then, the Court found that "Rule 26.16 does not resolve the meaning of 'entry' for purposes of Rule 31.3."[56] It is difficult to argue that this interpretation of the rule—couched as it is in a holistic reading of Rule 26.16 itself—is less valid than that used by the dissent in *Whitman I* or the court in

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50. ARIZ. R. CRIM. P. 26.16(a).
51. *See Whitman II*, 324 P.3d at 852–53.
52. *Id.*at 852.
53. *See id.*
54. *See id.*
55. *Id.* at 852–53; *see also* ARIZ. R. CRIM. P. 26.16(b) ("The court or person authorized by the court shall forthwith enter the exact terms of the judgment and sentence in the court's minutes.").
56. *Whitman II*, 324 P.3d at 853.

*Montgomery*. To the contrary, it is exactly the fact that both interpretations are valid that creates confusion.

As another example, one point not addressed by either the *Whitman I* majority or the Court in *Whitman II* in their ambiguity analyses is the dictionary definition of "entry of judgment." *Black's Law Dictionary* defines the term as "[t]he ministerial act of recording a court's final decision, usually by noting it in a judgment book or civil docket."[57] This suggests an unambiguous interpretation that entry of judgment occurs at the time of transcription, based on a plain meaning interpretation of the statute, yet neither of the *Whitman* opinions address this or any other dictionary definition as part of the ambiguity analysis.[58] Absent internal context within the rules or a prescribed definition, a dictionary definition such as this one should be dispositive. [59] Yet under the current framework, courts may consider such a definition or not at their discretion.

In these cases, discretionary determinations necessarily ruled not only the initial ambiguity analysis, but also subsequent analyses. The *Whitman* courts—the only two to proceed past the threshold question of ambiguity—reached opposite conclusions. In fact, the Court in *Whitman II* criticized the lower court for its reliance on pre-1973 criminal cases (the criminal code underwent large revisions in 1973), civil cases, and juvenile cases.[60] Looking instead to other Rules of Criminal Procedure, the history of Rule 31.3, and a comment to Rule 26.11 that recommends that a trial court use Form 23 to advise a defendant of his right to appeal, it determined that these provided a better sense of context.[61] Form 23, which the Arizona Supreme Court quoted directly in its decision, states that, "[t]he entry of judgment occurs at the time of sentencing."[62] This nonmandatory form proved dispositive, with Arizona's highest court finding that it "provides clear guidance" to the question of which interpretation applies.[63]

Rule 41 does not require courts to use the forms; rather, it describes the forms as "sufficient to meet the requirements" described throughout the Rules.[64] In other words, the forms are sufficient but not necessary, and had the Supreme Court relied exclusively on the language in Form 23 to reach its conclusion, that would have raised some concerns as to the validity of its ruling. After all, had the rule-makers intended for the form's instructions to be mandatory, they could either have required its use or included its instructions in the rules themselves. However, as used here, the Court offered the form merely as probative evidence of the rule-makers'

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57. BLACK'S LAW DICTIONARY 613 (9th ed. 2009).

58. *See* Stout v. Taylor, 311 P.3d 1088, 1091 (Ariz. Ct. App. 2013) ("To determine the ordinary meaning of a word, we may refer to established and widely used dictionaries.").

59. Arizona law does not require courts to limit themselves to "common" uses of language, such as those identified by regular dictionary definitions; "[t[echnical words and phrases and those which have acquired a peculiar and appropriate meaning in the law shall be construed according to such peculiar and appropriate meaning." ARIZ. REV. STAT. § 1-213 (2014).

60. *Whitman II*, 324 P.3d at 853–54.

61. *Id.* at 852–54.

62. *Id.*; *see also* ARIZ. R. CRIM. P. 41, Form 23.

63. *Whitman II*, 324 P.3d at 853.

64. ARIZ. R. CRIM. P. 41.

likely intent. In addition to this evidence, the Court offered contextual interpretation from Rule 31.8 (which suggests that entry of judgment occurs at sentencing by requiring that a court reporter transcribe it),[65] Rule 31.3's history,[66] and the implicit acknowledgment of the sentencing pronouncement interpretation by post-1973 criminal cases.[67]

The *Whitman II* ruling on intent, like its ambiguity analysis, shows that "context" is a moving target. Although on the surface the *Whitman* courts both appear to have looked broadly to find the context of Rule 31.3, in *Whitman II* the Court limited the scope of its contextual analysis to the Rules of Criminal Procedure.

Rather than argue the merits of extending the juvenile and civil decisions cited in *Whitman I*, the Court dismissed them altogether.[68] In doing so, it reasoned that the civil and juvenile codes were simply too dissimilar.[69] *Whitman I*, *Whitman II*, and *Montgomery* therefore leave things in a somewhat uncomfortable position: the ambiguity analysis—intended as a gateway question—was skipped without reference to either to context or dictionary definitions; the meaning of "context" seemed to vary between the ambiguity and intent analyses; and the intent analysis involved a subjective determination of which pieces of background context should weigh more heavily than others. All in all, the decision and the tension between the courts' analyses illustrate the difficulty judges faces in navigating statutory interpretation under the current framework.

## IV. STRIKING A BALANCE: GAINING CLARITY WITHOUT SACRIFICING FLEXIBILITY

To reiterate, judicial flexibility is not inherently bad.[70] There are significant advantages to a system that affords judges the freedom to adapt to the extraordinary circumstances that inevitably arise in the practice of law—just as there are advantages to a system that sacrifices flexibility for clarity.[71] However, the problem here is not that judges have flexibility; it is that they have flexibility even in those situations where they might prefer more guidance. After all, the court's goal in

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65. *Whitman II*, 324 P.3d at 853.

66. *Id.* at 853. These arguments articulate that: since 1940, defendants have been unable to file notice of appeal until after the judgment was entered; judgments traditionally have not been final until they have been both orally pronounced and entered in the minutes; and when the Rule was adopted the Court rejected language that would put entry of judgment at the time the minutes were recorded.

67. *Id.* at 854 (noting that in certain cases courts have found appeals untimely where the defendant filed more than 20 days after the date of the orally pronounced sentence).

68. *Id.* ("For civil and juvenile cases, specific rules provide that entry of judgment occurs upon filing. The criminal rules do not contain a similar provision. We therefore find these cases unhelpful in construing the current criminal rules.").

69. *Id.*

70. *See* Frederick Schauer, *Statutory Construction and the Coordination Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232 (articulating the ways in which flexibility among decision-makers can create a benefit).

71. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 395–96 (1950) (describing various systems of statutory construction and arguing that all are correct).

statutory interpretation is to adhere to legislative intent.[72] Yet with so many tools at its disposal and few guidelines on how to use those tools, judges applying the same principles of construction with the same goal of legislative deference can reach opposite results, as they did in *Whitman I* & *II* and *Montgomery*. Even a judge facing an unexceptional legal question—for instance, whether a notice of appeal may be filed 20 days after the minute entry is filed—must undertake a complicated and subjective analysis, with few clear boundaries and a high risk of being overturned.

In *Whitman II*, within a framework that suggests using context and dictionaries to discover plain meaning,[73] the Arizona Supreme Court validly chose not to include either Rule 26.16 or the *Black's Law Dictionary* definition of "entry of judgment" in its initial analysis.[74] Moreover, the Court reached a different conclusion without discussing the merits of the ambiguity arguments presented by either the *Montgomery* court or the *Whitman I* dissent, leaving future courts to grapple with the uncertainty of where they may look to find context for their analyses. Currently, courts have few objective tools to rely on when faced with an ambiguous statute.[75]

Under the current framework, not only were the four disparate opinions in *Whitman I* & *II* and *Montgomery* possible—they were inevitable. Judges are asked to rely on their own experiences and subjective values to determine which external evidence to include, both in the initial question of ambiguity and later when answering the broader question of legislative intent. It is also unclear where the boundaries lie. When may a judge use her own understanding to determine that a word may be reasonably interpreted in two ways? When should she rely on dictionary definitions? How far may she look to determine the context of the statute—and does "context" span a different set of statutes for the initial ambiguity question and for the subsequent legislative intent analysis?[76] With so much left up to the determination of an individual judge, it is no surprise to see that many reach

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72. *See supra*, Part I.

73. Although Arizona prioritizes plain meaning, there is some debate in the legal community over whether that is the correct approach. While that question is not at issue in this Note, it is important to recognize that Arizona's use of plain meaning interpretation signals that it prioritizes consistency and clarity over flexibility. *See* Schauer, *supra* note 70, at 232 ("[F]or the Court to lessen its reliance on plain meaning would serve only to substitute for the community's contingent normative choices the equally contingent and equally normative choices of individual interpreters. The reliance on plain meaning, therefore, [is] one form of a solution to a coordination problem.").

74. *See supra*, Part III.

75. Instead, courts are left to balance competing priorities. *See, e.g.*, Schauer, *supra* note 70, at 237 (describing different considerations that can affect rule interpretation, including intent, plain language, purpose, policy, and justice).

76. Legal scholars agree that judicial creativity is sometimes required under interpretive frameworks; however, there is some dispute as to the frequency. *See* Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 259 (1961) (noting two significant scholars who both suggest "that perfectly legitimate use of standard legal tools often leaves the judge with a choice which calls for the exercise of judicial creativity[,]" but finding the scholars differ in their finding of frequency).

opposite opinions—and this raises doubts as to whether the intent of the legislature is actually being realized.[77]

Instead of leaving judges in such a difficult position, Arizona's rule-makers should provide a clearer framework for statutory interpretation. Because legislative deference drives all statutory interpretation questions,[78] it stands to reason that the legislature could do better about signaling what its intent actually was.[79] As the rule-making body, it is in the better position both to know its own intent and to convey it—and has incentive to do so.[80]

On the surface, this raises several separation of powers issues—the very same that judges seek to avoid by not "legislating from the bench." However, in actuality, this would not be inconsistent with current Arizona law, which already includes guidance for statutory construction.[81] Arizona already allows its legislature to explain how courts should interpret terms, both generally[82] and specifically.[83] More importantly, courts have described separation of powers doctrine as "not absolute,"[84] and the test is not whether the legislature has infringed on the judiciary's authority, but rather "whether the legislative act 'unreasonably limits or hampers' the judicial system in performing its function.'"[85] Telling the court what a specific law means infringes on the court's authority; telling the court in general terms how to approach the process of ascertaining the meaning does not.[86]

Indeed, if legislative deference is a primary objective of statutory construction, the legislature should take a more prominent role in identifying what a court should use to interpret statutes generally. It already does this to some degree,[87] but in a broader sense it affords courts little direction. For instance, current

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77. Unlike constitutional interpretation, about which there is a fierce debate regarding whether courts ought to defer to original intent, in statutory interpretation this remains the chief objective. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 59 (1988).

78. Not to be confused with questions regarding the validity or constitutionality of the statute.

79. *See e.g.*, ARIZ. R. CRIM. P. 1.4 (providing clear guidance to Arizona's courts and people as to the intent behind the use of specific words).

80. The so-called "rule of lenity" incentivizes the legislature to clarify its intent to avoid having its statutes interpreted against it. *See generally*, Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004). After *Whitman II*, however, it is unclear how much the rule of lenity continues to apply in Arizona; the Court never addressed the issue when it interpreted the ambiguous statute against the criminal defendant. *See Whitman II*, 324 P.3d at 851.

81. *See* ARIZ. REV. STAT. §§ 1-211 to 1-218 (2014) (identifying general rules of statutory construction, which include guidelines on interpreting definitions of words).

82. *See, e.g.*, § 1-213 (describing how words and phrases should be construed).

83. *See, e.g.*, § 1-215 (defining dozens of terms used in the statutes).

84. State v. Rios, 237 P.3d 1052, 1058 (Ariz. Ct. App. 2010).

85. *Id.* (quoting State v. Prentiss, 786 P.2d 932, 935 (Ariz. 1989)).

86. *See id.* ("The Legislature has the exclusive power to declare what the law shall be and usurps the function of the judiciary *only* when it declares the meaning of an existing law.") (emphasis added); *see also* ARIZ. REV. STAT. § 1-215 (informing the court of the specific meanings of certain words without triggering separation of powers concerns).

87. *See,* ARIZ. REV. STAT. §§ 1-211 to 1-218.

statutory construction principles state that a court *may* use dictionary definitions to help it determine whether a meaning is ambiguous; the enacting body could not only formalize this as an acceptable method (by stating explicitly that "common and approved use of the language"[88] can be derived from such sources), it could identify a suggested or presumptive dictionary for courts to use.[89] This suggested dictionary could vary by chapter or as needed, such that specialized statutes using technical language could still benefit from the clarity of a suggested dictionary. Similarly, it falls within the purview of the rule-makers to identify the context in which a plain meaning could be considered.[90] They already pass general provisions when they enacts rules and statutes,[91] and it would be fairly simple to add another section to the general provisions that guides courts in interpreting the rules or statutes contained therein. For instance, in this case, if there had been a rule that admonished courts not to look outside the context of the individual rule in question for ambiguity, no court would have looked to Rule 26.16(a) in conducting its initial ambiguity analysis and the result would have been more consistent with the rule-makers' intent. Conversely, as two opinions contended, if it had been clear that "context" included any of the rules in the Arizona Rules of Criminal Procedure, every court could have considered that in its determination.[92] Such instruction could be as statute-specific or as broad as the rule-makers wished; for particularly specialized rules, courts could be given a specific set of interpretive instructions. Ironically, this would give judges more freedom to employ unusual interpretive methods for unusual statutes or cases, because they would not have to operate under the one-size-fits-all interpretive framework they do today. Although more legislative signals would obviously increase clarity, in that sense they would improve flexibility as well.

## CONCLUSION

Overall, the decisions in the *Whitman I* & *II* and *Montgomery* cases offer insight into the difficulties faced by judges under the current framework of statutory interpretation. In both cases, the judges tried to reach objective conclusions, but those attempts were undercut by a toolset that promotes subjectivity. Judges are given broad discretion—they may refer to dictionaries or not; look broadly for context or not; base a finding of ambiguity on what they themselves find to be reasonable or not. This offers flexibility at the expense of consistency—and leaves room for judges to be reversed despite adhering to the principles.

The ruling reflects Arizona's strong policy preference for judicial freedom, though the trio of cases taken as a whole offers more of a cautionary tale. Even when courts attempt to apply these principles of statutory interpretation, they are guided

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88. § 1-213.

89. This could vary between groups of statutes to adapt to different needs. Certain industries may use specific definitions known to others within the industry but different from common usage; such a provision would allow the legislature to use these trade terms without sacrificing clarity. For an example of a situation in which the dispute between the trade usage and common usage was dispositive, see Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

90. *See, e.g.*, ARIZ. R. CRIM. P. 1.4.

91. *See, e.g.*, *id.* at R. 1.

92. *See supra*, Part III.

by boundaries that are unclear. "Context" as it relates to a finding of ambiguity may span a smaller set than "context" as it applies to legislative intent; persuasive authority in the form of comments in a criminal statute may supersede binding authority from a civil or juvenile case. Afforded so few parameters, judges are often forced to rely on their own discretion—something the Court demonstrated in *Whitman II* when it abruptly concluded that the term "entry of judgment" supported two reasonable interpretations without discussing how it reached that determination. And, unfortunately for the courts, this undermines their goal of legislative deference by putting judges in the position of being policymakers.

Ironically, it is the same legislative deference that ties judges' hands under the current framework. They cannot impose stronger interpretive guidelines themselves without the risk of interfering with the legislature's original intent. If, however, rule-makers take a more active role in proscribing methods of interpretation, and embedding these methods in the law itself, courts may be able to reach more consistent conclusions.