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## ARIZONA SUPREME COURT

In the matter of:

PETITION TO AMEND ARIZONA  
RULE OF EVIDENCE 702

Supreme Court No. R-23-0004

Joint Comment by the Directors of the  
Maricopa County Indigent Defense  
Agencies

We are the directors of the public defender agencies that handle most indigent felony cases filed in Maricopa County. Pursuant to Rule 28(e) of the Arizona Supreme Court Rules, we submit this comment in favor of the proposal to amend Arizona Rule of Evidence

702. We believe that the alignment with the federal rule will reinforce the court's gatekeeper role by promoting the admission of sound and reliable scientific evidence. It has been over a decade since the National Academy of Sciences cast doubt on forensic expert testimony unrelated to DNA. (National Research Council, 2009. *Strengthening Forensic Science in the United States: A Path Forward*). Now is the time to explicitly impose a preponderance of proof standard and make changes that guard against expert overstatement.

We expected, following the release of the National Academy of Sciences findings, that trial courts would engage in a more rigorous application of its gatekeeping function than before the study was published. From our perspective, however, the report has not resulted in a heightened appreciation of the need to screen-out poorly supported expert opinions that have caused wrongful convictions and the incarceration or condemnation of innocent persons. (The Innocence Project found that “problems in forensic science contributes to many wrongful convictions, as seen in nearly half of DNA exoneration cases and one-quarter of all exonerations in the United States.” <https://innocenceproject.org/forensic-science-problems-and-solutions>. The Project highlights unreliable or invalid forensic discipline, insufficient validation of a method, and misleading testimony as the principal causes.)

In our opinion, rather than serve the function of evidentiary gatekeeper, trial courts tend to admit expert testimony comforted by the fact that the opponent to its admission will be afforded the opportunity to cross-examine on issues of reliability and opinion overstatement. We don't dispute that there are cases where expert opinions differ. We see

this all the time, and we readily acknowledge that experts, applying reliable methodology and basing their measured opinions on sufficient facts or data, may come to opposing conclusions. What we object to is the approach, taken by some courts, that the opinions are allowed simply because of the existence of the adversary process. The threshold of admissibility should not depend on the fact that the parties are given the opportunity to cross-examine experts. We don't think that a statement such as "it goes to the weight rather than the admissibility" should be threshold requirement of admissibility. We fully support efforts that encourage courts to engage in pre-trial assessments of the reliability of the evidence.

By writing the preponderance standard into the text of the rule, and placing the burden of proof on the proponent, we think that judges will focus on whether expert testimony will be based on sufficient facts or data, be the product of reliable principles and methods, and be a reliable application of those principles and methods to the facts of the case. We agree with the Advisory Committee on the Rules of Evidence that this will help avoid the "misapplication" of the rule (Petition to Amend. R.702, p. 4), and we think this will avoid opinions containing "confusing or misleading language." (*Id.*) If the amendment is adopted, we anticipate that trial court minute entries will include findings that the proponent of the evidence has (or has not) carried its burden demonstrating that "it is more likely than not" that the expert testimony is based on sufficient facts or data and the product of reliable principles and methods. We expect that this inclusion in the rule will avoid the temptation to allow the admission of the evidence simply because the parties will have the opportunity to challenge it through the adversary process.

We also agree that it is appropriate to address expert overstatement by amending Rule 702. We have observed that experts, at times, overstate the certainty of their opinions beyond what can be reliably supported by the methodology underlying the expert's opinion. Even after the National Academy of Sciences report, experts have been permitted to testify about similarities using language that suggests certainty and ignores error rates. We think that courts should limit overstatement whenever possible, and that the suggested language change in subsection (d) of Rule 702 helps to some degree. Having said that, we also believe that replacing "the expert has reliably applied" language with "the expert's opinion reflects a reliable application" does not go far enough. We appreciate that the Committee's proposed comment indicates that the change was meant to "address the issue of expert overstatement," (Petition p. 7) but we would strengthen the language by more directly drawing the court's attention with language inserted into the rule itself. Overstatement is a problem that seeps into many of our cases and should be dealt with head-on. We think that a below-the-line reference to the issue is too subtle. In our judgment, failing to be explicit within the rule invites litigators and judges to overlook the goal of clamping down on overstatement. We therefore believe that language should be added to the rule itself. We suggest that the following be added to the end of amended subsection (d):

. . . AND DOES NOT DRAW CONCLUSIONS THAT EXCEED OR OVERSTATE THESE PRINCIPLES AND METHODS AS APPLIED TO THE FACTS OF THE CASE.

This language, copied from the federal Advisory Committee on Evidence Rule’s report (see [https://www.uscourts.gov/sites/default/files/2022\\_scotus\\_package\\_0.pdf](https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf), at page 254), is more likely to be followed if included in the rule itself rather than just the comment.

Respectfully submitted this 30<sup>th</sup> day of April, 2023.

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