

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

Erin K. Sutherland, SB#027627
David J. Euchner, SB#021768
33 N. Stone Ave., 21st Floor, Tucson, AZ 85701
TEL: (520) 724-6800
E-Mail: erin.sutherland@pima.gov; david.euchner@pima.gov;

Amy P. Knight, SB#31374
1714 Franklin St. #100-806
Oakland, CA 94612
TEL: (520) 878-8849
E-Mail: a.knight@phillipsblack.org

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-23-0004
)
) **COMMENT OF ARIZONA**
Petition to Amend Arizona Rule of) **ATTORNEYS FOR CRIMINAL**
Evidence 702) **JUSTICE (AACJ) IN SUPPORT OF**
) **PETITION TO AMEND ARIZONA**
) **RULE OF EVIDENCE 702**
)
_____)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment on the petition to amend Arizona Rule of Evidence 702.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law

students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ supports the proposal and urges the Court to grant the petition and amend Rule 702. By adopting the proposed amendment to the rule, this Court would 1) bring Arizona's Rule 702 in line with the federal rule after which it is modeled, 2) provide greater guidance to the lower courts still struggling with application of the correct standard, and 3) simplify the application of the standard by incorporating interpretive case law into the rule itself.

1. History of Arizona and Federal Rules of Evidence Rule 702

For decades, state and federal courts determined the admissibility of expert testimony using the standard first set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), that “while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye*, 293 F. at 1014. In 1975, Congress enacted the Federal Rules of Evidence, and in 1977, Arizona adopted evidentiary rules modeled on those federal rules. *State v. Winegardner*, 243 Ariz.

482, 485 ¶ 8 (2018); *Logerquist v. McVey*, 196 Ariz. 470, 484 ¶ 44 (2000). At the time, both Rules 702 read: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

After the adoption of Rule 702 (Federal and Arizona), a majority of jurisdictions continued applying the *Frye* general acceptance standard for determining the admissibility of novel scientific evidence at trial. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 585 (1993). Eventually, however, the Supreme Court declared that the *Frye* test had been superseded by the adoption of the Federal Rules of Evidence because nothing in FRE 702 established “general acceptance” as a prerequisite to admissibility. *Daubert*, 509 U.S. at 585, 587-88. Instead, the Court found that Rule 702 requires courts to perform a gatekeeping function by determining, by a preponderance of the evidence, that the proposed scientific evidence is reliable and relevant, which necessarily requires the testimony to be sufficiently tied to the facts of the case and the reasoning or methodology underlying the testimony to be scientifically valid. *Id.* at 592-93. The Court went on to cite a list of factors lower courts should consider when making this determination, including whether the theory or technique 1) can be or has been tested, 2) has been subjected

to peer review and publication, 3) has a known or potential rate of error, and 4) is accepted within the community. *Id.* at 593-95.

The Supreme Court subsequently clarified the scope of *Daubert* in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). In *Joiner* the Court held that *Daubert* applies to an expert's conclusions and not just the principles and methodologies used to reach those conclusions. 522 U.S. at 146. Then, in *Kumho Tire*, the Court concluded that the gatekeeping obligation applies to all expert testimony, not just scientific testimony. 526 U.S. at 146-47. The next year, effective December 1, 2000, FRE 702 was amended to its current form to reflect and codify the holdings in *Daubert*, *Joiner*, and *Kumho Tire*. 5 Handbook of Fed. Evid. § 702:5 (9th ed.).

Arizona, however, continued to use the *Frye* test for Ariz. R. Evid. 702 post-*Daubert*, a practice challenged “with increasing frequency,” until this Court explicitly ruled in 2000 that the *Daubert/Kumho* interpretation of FRE 702 did not apply to Arizona's Rule 702. *Logerquist*, 196 Ariz. at 471 ¶ 2, 491 ¶ 65. Finding nothing in the comments of the court or its committees to indicate they contemplated a reliability standard when adopting Ariz. R. Evid. 702, the *Logerquist* Court held that Arizona would “continue to apply Ariz. R. Evid. 702 as written and interpreted by our cases,” despite the federal courts' different interpretation of their identical rule. *Id.* at 485 ¶ 46, 491 ¶ 65. This Court further held that the continued use of the

Frye standard would only apply to scientific evidence; observational or experiential evidence would be held to no standard at all. *Id.* at 480 ¶ 30, 482 ¶ 37.

After living with this rule for a decade, the legislature enacted A.R.S. § 12-2203 in 2010, essentially codifying the federal standard of admissibility for expert testimony in Arizona. This statute was found unconstitutional for violating the separation of powers doctrine. *Lear v. Fields*, 226 Ariz. 226, 233 ¶ 22 (App. 2011). Simultaneously, in March 2010, this Court established the Ad Hoc Committee on Rules of Evidence, charged with comparing the Arizona Rules to the restyled Federal Rules and providing input on possible conforming changes to the Arizona Rules. [Ariz. Supreme Ct. Admin. Order No. 2010-42](#). The committee, however, was split on the issue of expert testimony, and its December 2010 Petition to amend the Arizona Rules of Evidence took no position with respect to Rule 702, instead laying out three options for the Court's consideration: keeping Rule 702 as it was, revising it to conform to the federal rule, or taking a hybrid approach of partial adoption of the federal rule. [Rule Petition R-10-0035](#). In September 2011, this Court adopted an amendment to Arizona Rule 702 conforming it to its federal counterpart; amended Rule 702, which mirrored the *Daubert* standard, went into effect on January 1, 2012.

2. The federal and state rules should conform, as Arizona courts frequently rely on federal caselaw when determining whether expert testimony was properly admitted/precluded under Rule 702.

As the Petition explains, FRE 702, the rule this Court was emulating with its 2012 amendment, is currently undergoing a revision expected to take effect at the end of the year. Once FRE 702 is amended, the Arizona Rule will no longer conform. As the Arizona legislature and this Court have previously made efforts to conform Ariz. R. Evid. 702 to its federal counterpart, the same should be true with the new amendment to FRE 702.

“When an Arizona evidentiary rule mirrors the corresponding federal rule, [Arizona courts] look to federal law for guidance.” *Winegardner*, 243 Ariz. at 485 ¶ 8 (citing *Hernandez v. State*, 203 Ariz. 196, 198 ¶ 10 (2002); Ariz. R. Evid. Prefatory cmt. to 2012 amendments). Federal precedent, although not controlling, “is particularly persuasive given that we have expressly sought to conform our rules to the federal rules.” *Id.* By amending Arizona Rule 702 in 2012 to bring our state rule back in sync with the federal rule, Arizona courts gained “the advantage of being able to learn from and follow the reasoning of other courts as they develop and apply Rule 702.” *Logerquist*, 196 Ariz. at 498 ¶ 100 (McGregor, J., dissenting). Since then, Arizona courts have routinely relied on the comment to the federal rule and federal precedent when determining whether expert testimony is admissible under Rule 702. *See, e.g., State v. Romero*, 236 Ariz. 451, 456 ¶ 14 (App. 2014) (firearms

identification testimony), *opinion vacated in part*, 239 Ariz. 6, ¶ 14 (2016); *State v. Salazar-Mercado*, 234 Ariz. 590, 593 ¶¶ 8-10 (2014) (“cold” expert testimony); *State v. Delgado*, 232 Ariz. 182, 186-87 ¶¶ 11-17 (App. 2013) (strangulation expert). If the current rule is not amended to reflect the change to the corresponding federal rule, Arizona will once again be at a disadvantage.

3. The Rule should be amended to provide greater guidance to the lower courts on how to properly apply the standard.

The impetus behind the pending amendment to the federal rule (to which this Petition now seeks to conform the Arizona rule) was the fact that the lower federal courts were not properly applying the new standard and were failing to perform the required gatekeeping function. In its final report recommending the amendment to FRE 702, the Committee on Rules of Practice and Procedure noted that the amendment was “designed to reject the view of some courts that the reliability requirements set forth in Rule 702(b) and (d)—that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology to the facts—are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible.” [Standing Committee Report to the Judicial Conference](#), ep 25-26. Indeed, a study by the Lawyers for Civil Justice “revealed that in 61% of federal judicial districts (57 of 93), courts split over whether to apply the preponderance standard when assessing admissibility.” Mark A. Behrens & Kateland R. Jackson, [Federal Judiciary’s Standing Committee Approves Changes](#)

[to Federal Rules of Evidence, Including Rule 702 Governing Expert Testimony](#), The Federalist Society, June 2022.

The same is true in Arizona, where courts have incorrectly continued to presume that expert testimony is admissible and to rely on pre-*Daubert* caselaw or practices for the proposition that “[q]uestions about the accuracy and reliability of [an expert] witness’ factual basis, data, and methods go to the weight and credibility of the witness’ testimony and are questions of fact” to be decided by the jury. *See, e.g., State v. Foshee*, 2014 WL 346110, at *4 ¶ 21 (App. 2014) (Mem. Dec.) (quoting *Logerquist*, 196 Ariz. at 488 ¶ 52); *State v. Craft*, 2014 WL 729893, at *8 ¶ 29 (App. 2014) (Mem. Dec.) (citing *Pipher v. Loo*, 221 Ariz. 399, 404 ¶ 17 (App. 2009)); *State v. Leary*, 2016 WL 3021945, at *5 ¶ 23 (App. 2016) (Mem. Dec.) (citing *Pipher*, 221 Ariz. at 404 ¶ 17). In other cases, the court of appeals has failed to acknowledge or has minimized clear legal errors by the trial court. *See State v. Brown*, 2016 WL 4256875, at *4 ¶¶ 15-16, *5 ¶ 19 (App. 2016) (Mem. Dec.) (trial court misapplied Rule 702(c) when it stated that medical doctor’s testimony is “experience-based” and not governed by guidelines for scientific testimony; court of appeals refers to analysis as “not entirely accurate”); *State v. Hunter*, 2017 WL 4173605, at *8 ¶ 40, *9 ¶ 44 (App. 2017) (Mem. Dec.) (despite trial court’s unequivocal language that Rule 702 does not apply to cadaver dog-sniff evidence,

court of appeals asserted, “Nonetheless, the court analyzed the canine handlers proffered testimony “within the framework of Evidence Rule 702...”).

Furthermore, lower courts in Arizona often rely on the purported presumptive admissibility of expert testimony, and thus fail to rigorously enforce the requirements of Rule 702, particularly subsections (b) and (d). Instead, courts frequently revert to the *Frye* test, finding evidence reliable and admissible if the subject of the testimony is generally accepted in the relevant community. Moreover, trial judges tend to rely on their own experience and that of their colleagues, and without a clear message from the court of appeals that the trial judge’s analysis was flawed, trial judges will likely repeat those errors. The proposed amendment would, as the federal advisory committee concluded, resolve many of these issues and provide the lower courts with proper guidance on how the rule should be applied.

4. Amending the rule simplifies its application by incorporating interpretive case law into the rule itself.

The federal rules require FRE 702 determinations to be made using a preponderance of the evidence standard, as dictated by FRE Rule 104, which provides that preliminary questions concerning the qualifications of a person to be a witness must be established by a preponderance of proof. *Daubert*, 509 U.S. at 592-93. Arizona caselaw likewise requires (but courts do not always properly apply, as noted *supra*) the preponderance of the evidence standard for these determinations. *See State v. Bernstein*, 237 Ariz. 226, 228 ¶ 9 (2015) (citing *Salazar-Mercado*, 234

Ariz. at 593-94 ¶ 13, *citing in turn State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590 (1984) & Fed. R. Evid. 702, Advisory Committed Notes, 200 amend.). Thus, to perform the correct analysis of the admissibility of proffered expert testimony, courts must refer to and cite not only the rule itself, but also the interpreting caselaw, and that second step is frequently lost. Amending the Rule as requested by the Petition would simplify its application by removing the need to cite additional authority, but instead, allow practitioners and the courts to simply cite the Rule, producing more consistent and accurate results.

Conclusion

For these reasons, AACJ requests this Court grant the petition to amend Rule 702.

DATED (electronically filed): May 1, 2023.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By: /s/ David J. Euchner
Erin K. Sutherland
David J. Euchner
Amy P. Knight

Comment electronically mailed to:

Hons. Sara Agne & Maria Elena Cruz
Advisory Committee on Rules of Evidence