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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

ARIZONA RULE OF EVIDENCE 804

Arizona Supreme Court No. R-24-_____

PETITION TO AMEND ARIZONA
RULE OF EVIDENCE 804

PETITION TO AMEND ARIZONA RULE OF EVIDENCE 804

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Advisory Committee on Rules of Evidence (the “Committee”), by and through its Co-Chairs, the Honorable Sara Agne and the Honorable Maria Elena Cruz, petitions the Court to amend Arizona Rule of Evidence 804, as reflected in the Attachment hereto, effective January 1, 2025.

I. INTRODUCTION AND BACKGROUND

The Arizona Rules of Evidence were first adopted by this Court in September 1977, and were based on the Federal Rules of Evidence, adopted in 1975. In the more than forty years since the adoption of the Arizona Rules of Evidence, the Federal Rules of Evidence have been amended on several occasions, but not all of these amendments have become part of the Arizona Rules of Evidence.

In June 2012, the Arizona Supreme Court established the Advisory Committee on Rules of Evidence (“the Committee”) with the following purpose:

The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

Given this directive, the Committee has reviewed Arizona Rule of Evidence 804 in light of proposed amendments to Federal Rule of Evidence 804. The Committee has decided that there are multiple valid reasons for this particular proposed federal rule change to become part of Arizona Rule of Evidence 804.

II. FEDERAL ACTION TO AMEND RULE 804

Evidence Rule 804(b)(3) provides a hearsay exception for declarations against interest. For admission, the statement must be against the declarant's interest and be "supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3).

Federal courts have split, however, regarding the meaning of the corroborating circumstances requirement. [Report to the Standing Committee, Advisory Committee on Evidence Rules](#), pg. 7 (May 10, 2023).¹ "Most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest as well as independent evidence corroborating (or refuting) the accuracy of the statement." *Id.* Others, though, do not allow inquiry into the independent evidence. *Id.* This limits judges to considering just inherent guarantees of trustworthiness. *Id.*

The federal committee concluded the latter view—refusing inquiry into independent evidence—is "inconsistent with the 2019 amendment to Rule 807," the residual exception. *Id.* That amendment requires courts to look at corroborative evidence, if it exists, to determine whether a hearsay statement is sufficiently trustworthy. The reasoning for this rule is that corroborative evidence can shore up

¹ Available at https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_may_2023_0.pdf.

potential concerns regarding reliability. *Id.* This rationale is consistent with other contexts, including the admissibility of co-conspirator hearsay and tips from informants when determining probable cause. *Id.*

Public comments supported a rule that would require courts to consider additional supporting or contradicting evidence. *Id.* at 8.

To align Rule 804 with Rule 807 and resolve the tension, the federal bodies have proposed the following amendment, which awaits assent by the U.S. Supreme Court and Congress:

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions.

* * * * *

(3) Statement Against Interest. A statement that:

* * * * *

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness, ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability—~~after considering the totality of circumstances under which it was

made and any evidence that supports or undermines it.²

Although Rule 807 was part of the impetus for the change, the committee decided not to repeat the language of Rule 807. This is because doing so would have used the word *corroborating* in two manners, thereby introducing possible confusion. [Report to the Standing Committee, Advisory Committee on Evidence Rules](#), pg. 8 (May 10, 2023).³ To avoid that confusion, but still align with the purpose of the Rule 807 amendment, the federal bodies instead opted to refer to “any evidence that supports or undermines” the statement against interest. *Id.*

It is expected this modification will go into effect on December 1, 2024.

III. COMMITTEE RECOMMENDS ADOPTION OF FEDERAL RULE AMENDMENT TO ARIZONA’S RULE 804

The Arizona Advisory Committee on the Rules of Evidence met several times, including on December 1, 2023, to discuss amending Arizona Rule 804 to conform to the proposed federal rule change. Current Arizona Rule 804 is identical to its federal counterpart.

² Available at https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf at pages 01090--01091.

³ Available at https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_may_2023_0.pdf.

It appears this amendment is consistent with Arizona’s current law regarding statements against interest. In *State v. LaGrand*, this Court set forth several non-exclusive factors to consider when evaluating the trustworthiness of a statement against interest:

1. The existence of corroborating and contradictory evidence.
2. The relationship between the declarant and listener.
3. The relationship between the declarant and defendant.
4. The number of times the statement is made and its consistency.
5. The amount of time that passed between the event and statements.
6. Whether the declarant will benefit from the statement.
7. The psychological and physical environment surrounding the statement.

State v. LaGrand, 153 Ariz. 21, 27-28 (1987). Six of these seven factors focus on inherent guarantees of trustworthiness. But the first factor—the existence of corroborating and contradictory evidence—indicates this Court already incorporated the consideration of additional evidence. Further illustrating this conclusion, in *State v. Harrod*, this Court summarized the rule broadly: “The trial court must examine *any* evidence that corroborates or contradicts the statement to find whether a reasonable person could conclude that the statement is true.” *State v. Harrod*, 200 Ariz. 309, ¶ 16 (2001) (emphasis added), *vacated on other grounds*, 536 U.S. 953 (2002).

Moreover, this Court adopted the same change to Rule 807 that prompted the federal committee to propose this conforming change. *See* Order on R-18-0003. The amendment to Rule 804 is thus needed to bring it in alignment with Rule 807.

By a unanimous vote, the Committee thus proposes Rule 804 be modified consistent with the expected change to Federal Rule of Evidence 804:

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions. * * *

(3) Statement Against Interest. A statement that:

- (A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and
- (B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness, if offered in a criminal case as one that tends to expose the declarant to criminal liability—after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.

CONCLUSION

Petitioners respectfully request that this Court consider this Petition and proposed rule change at its earliest convenience. Petitioners additionally request that the Petition be circulated for public comment until May 1, 2024, and that the Court adopt the proposed rule as presented, or as modified in light of comments received from the public and any replies, with an effective date of January 1, 2025.

DATED this 9th day of January, 2024.

/s/ Sara J. Agne

Sara J. Agne

Co-Chair, Advisory Committee on Rules of Evidence

/s/ Maria Elena Cruz w/ permission

Maria Elena Cruz

Co-Chair, Advisory Committee on Rules of Evidence

ATTACHMENT⁴

ARIZONA RULE OF EVIDENCE 804

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

- (a) [No change]
- (b) **The Exceptions.** [No change to text in (b)]
 - (1)-(2) [No change]
 - (3) **Statement Against Interest.** A statement that:
 - (A) [No change]
 - (B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness, ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability~~—after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.
 - (4)-(6) [No change]

Comment to 2025 Amendment

Subsection (b)(3)(B) was amended to conform to the 2024 amendment to Federal Rule of Evidence 804(b)(3)(B).

⁴ Additions to rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.