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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	No. R-24-0018
Petition to Amend Ariz. R. Evid. 412.	**Comment of Arizona Attorneys for Criminal Justice regarding Petition to Amend Arizona Rule of Evidence 412**

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 412.

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.

Petitioner, the Advisory Committee on Rules of Evidence, cogently lays out the history of the rape shield in the federal system and under Arizona law. Petition at 2-3. AACJ takes no issue with Petitioner's argument in favor of a civil rape shield law, since one has existed in Federal Rule of Evidence 412 for thirty years. AACJ also agrees with the Petition insofar as it asks this Court to adopt a rape shield law in Arizona Rule of Evidence 412 while diverging from some of the procedural requirements included in the corresponding federal rule.

AACJ disagrees with the Petition in two regards: 1) it eschews *all* procedural requirements and thus would perpetuate the chaos that permeates trial court proceedings; and 2) it defers to A.R.S. § 13-1421 even though admission of evidence is a procedural matter that is properly the province of this Court rather than the legislature. This comment focuses on those areas of disagreement and offers a counter-proposal that is substantively consistent with the federal rule and procedurally consistent with the overall thrust of the Arizona rules.

I. Ariz. R. Evid. 412 should include rules for admission of evidence in criminal cases, borrowing from but not mirroring A.R.S. § 13-1421.

The purpose of rape shield laws is to "protect victims of rape from being exposed at trial to harassment or irrelevant questions concerning their past sexual behavior." *Michigan v. Lucas*, 500 U.S. 145, 146 (1991). States have a legitimate

interest in determining that rape victims "deserve heightened protection against surprise, harassment and unnecessary invasions of privacy." *Id*. at 150; *State v. Oliver*, 158 Ariz. 22, 26 (1988). The rationale behind such laws is to eliminate antiquated assumptions concerning the sexual morality of women and consent in rape cases. *Oliver*, 158 Ariz. at 26; *see also State ex rel. Pope v. Superior Court*, 113 Ariz. 22 (1976). However, those interests must be carefully balanced on a case-by-case basis against the defendant's important interest in challenging the motive and credibility of the State's witnesses or any other aspect of the State's evidence and in presenting the defendant's version of the facts to the jury. *Olden v. Kentucky*, 488 U.S. 227, 231 (1988); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974); *Washington v. Texas*, 388 U.S. 14, 19 (1967).

A. The enactment of A.R.S. § 13-1421.

In *Oliver*, this Court allowed a defendant to present incidents of an alleged child victim's prior abuse to show motive, propensity or ability to fabricate evidence because it was being "introduced for purposes other than to impugn or cast doubt on a victim's moral character." 158 Ariz. at 27. And in *State v. Lujan*, 192 Ariz. 448, 451 ¶ 8 (1998), the defendant was charged with molesting a nine-year-old girl in a swimming pool; his defense was that he dunked her in the pool but he never touched her in her private parts and she was hypersensitive because of a recent molest she had suffered. The trial court precluded the evidence, but this Court reversed, holding

that such evidence was admissible because it was not offered to cast doubt on the alleged victim's moral character but to help explain circumstances that may have affected her perception of the defendant's actions. *Id*. at 452 ¶ 13.

In the same year that *Lujan* was decided, the Legislature enacted A.R.S. § 13-1421, which generally excludes reputation and opinion evidence "relating to a victim's chastity" in a criminal case, with five specific exceptions:

1) Showing a victim's past sexual conduct with the defendant.
2) Explaining the source or origin of the semen, pregnancy, disease, or trauma with specific instances of sexual activity
3) Supporting a claim that the victim has a motive to accuse the defendant of the offense.
4) To impeach when the prosecutor puts the victim's prior sexual conduct in issue.
5) Demonstrating false allegations of sexual misconduct previously made by the victim against others.

§ 13-1421(A)(1)-(5). The standard for admissibility for a defendant to introduce evidence under subsection (A) is clear and convincing evidence. § 13-1421(B).

B. Problems with the current standards of admissibility in criminal cases under § 13-1421.

Under the Due Process Clause of the Fifth and Fourteenth Amendments as well as the Compulsory Process and Confrontation Clauses of the Sixth Amendment, criminal defendants are guaranteed a meaningful opportunity to present a complete defense. *See, e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 302 (1973); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *R.S. v. Thompson (Vanders II)*, 251 Ariz. 111, 117 ¶ 13 (2021).

"Although the exercise of a defendant's right to present a defense generally must comply with those established rules of evidence 'designed to assure both fairness and reliability in the ascertainment of guilt and innocence,' such rules 'may not be applied mechanistically to defeat the ends of justice.'" *State v. Machado (I)*, 224 Ariz. 343, 351 ¶ 13 (App. 2010), *affirmed*, *State v. Machado (II)*, 226 Ariz. 281 (2011) (quoting *Chambers*, 410 U.S. at 302). These constitutional rights cannot be unreasonably or arbitrarily limited by state rules governing the admission of evidence. *Holmes*, 547 U.S. at 324-25. Evidentiary rules must bend to the constitutional right to present a complete defense when they are in conflict. *State ex rel. Montgomery v. Duncan*, 228 Ariz. 514, 517 ¶ 8 (App. 2011).

1. "Clear and convincing" standard of admissibility places an unconstitutionally onerous burden upon criminal defendants.

Placing a burden of proof of "clear and convincing evidence" upon a defendant is an unconstitutionally onerous burden on his ability to put on a defense. There is no other provision in Arizona law for a defendant to meet this burden before evidence can be admitted on his behalf. There are certain affirmative defenses, which, when raised, must be proven by the defendant by clear and convincing evidence, such as insanity or entrapment. *See* A.R.S. §§ 13-206(B) & 13-502(C); *see also* § 13-4033(C) (defendant whose absence from verdict delays sentencing more than ninety days must prove by clear and convincing evidence that absence was

involuntary or else waive right to appeal from verdicts of guilt). The United States Supreme Court has held that Arizona's insanity laws do not violate due process, *see Clark v. Arizona*, 548 U.S. 735 (2006). But this Court has negated the application of the clear and convincing evidence standard to third-party culpability evidence, finding that "if Rule 404(b) were interpreted to exclude highly probative evidence … other due process concerns might be implicated." *Machado II*, 226 Ariz. at 284 ¶ 15 (citing *Chambers*, 410 U.S. at 302-03).

It is precisely this kind of onerous burden on the introduction of defense evidence that the Supreme Court unanimously ruled unconstitutional in *Holmes*. Though rape shield laws exist in almost every state as well as the federal system, the "clear and convincing evidence" burden is exceptional; other jurisdictions require only the balancing test of relevance versus unfair prejudice. For example, Federal Rule 412(b) requires that the probative value substantially outweigh the risk of unfair prejudice, which the Petition correctly recognizes reverses the balance of Rule 403; but Federal Rule 412(a) requires no such reversal in criminal cases, thereby maintaining the Rule 403 balance.

2. Strict application often conflicts with a defendant's constitutional right to present a complete defense.

Notwithstanding the statutory bar, evidence may be admissible if that evidence "'has substantial probative value and when alternative evidence tending to prove the issue is not reasonably available.'" *Duncan*, 228 Ariz. at 516 ¶ 5 (quoting

State v. Gilfillan, 196 Ariz. 396, 403 ¶ 22 (App. 2000); *see also State ex rel. Romley v. Hutt*, 195 Ariz. 256, 259 ¶ 7 (App. 1999) ("[I]n some cases some victims' rights may be required to give way to a defendant's federal constitutional rights."). *Gilfillan* specifically permitted that, in appropriate cases, the statutory bar would have to give way to constitutional concerns. 196 Ariz. at 403 ¶ 22 (citing *Olden*).

In *Duncan*, the defendant was charged with four counts of sexual conduct with a minor. 228 Ariz. at 515 ¶ 2. The defendant sought to introduce evidence that the alleged victim told the defendant that she had engaged in oral sex with two other individuals. *Id*. ¶ 3. The defendant asserted this was admissible because it goes to his belief that the alleged victim was eighteen or older. *Id*. The trial court ruled that the evidence was not prohibited by Arizona's rape shield law, *id*., and the State filed a special action.

First, the court found that the plain language of Arizona's rape shield statute prohibited the evidence. *Id*. at 516 ¶ 4. But the court went on to state that evidence may be admissible notwithstanding the statutory bar if that evidence "has substantial probative value and when alternative evidence tending to prove the issue is not reasonably available." *Id*. ¶ 5. The court noted that the trial court did not engage in any balancing to determine whether there was a due process or other constitutional violation that would occur if the statute was given effect and the testimony was precluded. *Id*. ¶ 6. Thus, the case was remanded to the trial court to determine

whether there was such substantial probative value that the defendant's constitutional rights would be impermissibly offended by the failure to permit the evidence. *Id*. at 517 ¶ 8.

3. Application of the admissibility procedures provided by the statute violates separation of powers.

The rape shield statute covers much the same ground as Evidence Rules 401-404 & 608. *Oliver*, 158 Ariz. at 27-29. In *Gilfillan*, the court of appeals held the statute does not violate the separation of powers doctrine because it involves a substantive matter (burden of proof) and does not conflict with the rules of evidence. 196 Ariz. at 403-04 ¶¶ 24-28. This analysis is unpersuasive and must be rejected. Arizona's rape shield statute engulfs and conflicts with the rules of evidence as to a procedural matter, and as such it is an unconstitutional abridgement of this Court's rulemaking power as protected by the separation of powers doctrine.

Article 3 of the Arizona Constitution creates the three branches of government and states: "such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." "The Arizona Constitution, written after generations of experience and experimentation under the United States Constitution, spells out the separation of powers doctrine even more specifically than does the national document." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997). Though separation of powers is explicit in the Arizona Constitution, "[t]he separation of powers does not require a

'hermetic sealing off' of the three branches of government." *State v. Prentiss*, 163 Ariz. 81, 84 (1989). The powers of the three branches of government may be "blended" permissibly, however, so long as the result is not an outright usurpation of the powers of one branch by another. *Block*, 189 Ariz. at 276 (citing *J.W. Hancock Enters. v. Registrar of Contractors*, 142 Ariz. 400, 405-06 (App. 1984)). This Court approved *Hancock*, which used four factors for consideration in determining whether a separation of powers violation has occurred. *Block*, 189 Ariz. at 276. As stated in *State v. Donald*, 198 Ariz. 406, 416-17 ¶ 37 (App. 2000), those four factors are: "(1) the essential nature of the power exercised; (2) the … degree of control [that one branch assumes] in exercising the power [of another]; (3) the … objective [of the exercise]; (4) the practical consequences of the action."

It is axiomatic that the admissibility of evidence in court proceedings is a rulemaking function that is reserved to this Court. Ariz. Const., art. 6, § 5; Ariz. R. Evid. 101. In the case of Arizona's rape shield, A.R.S. § 13-1421 conflicts with and engulfs Ariz. R. Evid. 401-404 and 608 as well as the analysis of *Oliver*. That is, the statute has improperly replaced the analytical framework provided by the Rules of Evidence. For example, the statute limits prior sexual conduct to five specific exceptions, without provision for a "catch-all" exception to cover unanticipated, exceptional circumstances. *See* § 13-1421(A)(1)-(5). The Rules of Evidence are crafted so that the trial courts have wide discretion to admit relevant evidence, and

this threshold is not particularly high so long as the evidence is not unfairly prejudicial. *See Oliver*, 158 Ariz. at 28. Other acts are admissible to show motive, opportunity, intent, plan, knowledge, and this list is not exclusive. *See* Rule 404(b). In addition, pertinent character traits of a victim may be admissible and witness, including the victim, may be impeached with specific instances of conduct that relate to credibility. *See* Rules 404(a) and Rule 608(b). Except for evidence of other bad acts by the defendant, governed by Rules 404(b) and 404(c), there is no requirement that the prior act be established by clear and convincing evidence. *See State v. Terrazas*, 189 Ariz. 580, 582 (1997); *Oliver*, 158 Ariz. at 29; *see also* Rule 404(a); Rule 608.

Without elaboration, *Gilfillan* said that "the burden of proof is substantive, not procedural." 196 Ariz. at 404 ¶ 27. But there is a distinction between the burden of proof of an element of an *offense* or cause of action, which is substantive, and the burden of proof for admitting evidence, which is procedural.

A procedural rule does not become substantive merely because one part of the rule contains a substantive provision. *See, e.g., State ex rel. Napolitano v. Brown*, 194 Ariz. 340 (1999) (striking down statute limiting time to file Rule 32 petitions); *Pompa v. Superior Court*, 187 Ariz. 531, 534 (App. 1997) (rules of appeal procedural even though right to appeal substantive). The fact that the burden of proof for admitting certain kinds of evidence is a judicial function is demonstrated by this

Court's holding in *Terrazas*, 189 Ariz. at 582, that other act evidence sought to be admitted under Rule 404(b) (and, subsequently, Rule 404(c)) must be proven to the trial court's satisfaction to be true by clear and convincing evidence.

Numerous cases show the error of *Gilfillan*'s reasoning on what constitutes a substantive law. *See, e.g.*, *State v. Moody*, 208 Ariz. 424, 466 ¶ 191 (2004) (change in statute is substantive if it deprives the defendant of a defense that existed at the time of offense); *Garcia v. Browning*, 214 Ariz. 250, 253 ¶ 14 (2007) (laws are substantive if they regulate primary conduct of defendant); *In re Shane B.*, 198 Ariz. 85, 88 ¶ 9 (2000) ("substantive law either defines a crime or involves the length or type of punishment.") (cites omitted). The Arizona rape shield statute is plainly a procedural rule that contradicts the Arizona Rules of Evidence.

This Court recently struck down two statutes as procedural and conflicting with rules of procedure in *State v. Reed*, 248 Ariz. 72 (2020), and *State v. Bigger*, 251 Ariz. 402 (2021). Whereas *Reed* involved striking down a statute as facially unconstitutional because it sought to regulate procedure, 248 Ariz. at 77 ¶ 17, *Bigger* found a procedural statute unconstitutional as applied to any case where the statute conflicted with the rule, 251 Ariz. at 413 ¶ 37. Notably, *Bigger* involved a conflict between a statute enacted in the 1980s and a rule modification that was adopted in 2020. Because this Court governs the domain of procedural rules, it is free to adopt

rules of evidence that conflict with statutes, because it is the rule that trumps the statute and not the other way around.

C. Like Fed. R. Evid. 412, the admissibility standards under Ariz. R. Evid. 412 should apply to criminal cases as well as civil.

The ultimate judicial authority, the United States Supreme Court, has promulgated Rule 412, Fed. R. Evid., which closely mirrors the language in A.R.S. § 13-1421, but for the "clear and convincing" standard of proof for introducing the evidence.

The cases that are most analogous to the rape shield statute, and thus the cases which must control the outcome of this discussion, are *State v. Robinson*, 153 Ariz. 191 (1987), and *State v. Taylor*, 196 Ariz. 584 (App. 1999). In *Robinson*, this Court invalidated A.R.S. § 13-1416, which authorized the admissibility of hearsay statements made by minors under the age of ten when the statements described acts of sexual or physical abuse. Since this statute was both more restrictive and less restrictive than the Rules of Evidence, the statute conflicted with and engulfed the rules. *Id*. at 196-97. Consequently, the statute was struck down because it infringed on this Court's exclusive authority, granted by the Arizona Constitution, "to makes rules relating to all procedural matters in any court." *Id*. And in *Taylor*, the court of appeals applied the *Robinson* analysis and found that A.R.S. § 13-4252, the video statement statute, similarly engulfed the rules of evidence because it was both less

restrictive and more expansive than the rules of evidence and improperly replaced "the analytical framework provided by the Rules of Evidence." *Id*. at 588 ¶ 11.

Like the rape shield statute, the statutes involved in *Robinson* and *Taylor* were enacted to protect child sex victims. The relevant issue, however, is not whether the legislature has an interest in protecting victims of crime, but whether the legislature can invade the province of the judiciary in creating rules of court for admission of evidence. This Court's rape shield doctrine, established through *Pope, Oliver*, and *Lujan*, *inter alia*, sufficiently protected crime victims from inquiry into irrelevant matters that served no purpose but to harass the victim. A.R.S. § 13-1421, on the other hand, expanded the reach of the protections of victims and narrowed the breadth of the defendant's right to present a defense in such a manner that it clearly conflicts with and engulfs the rules of evidence.

II. Ariz. R. Evid. 412 should include procedural requirements so that parties will know what is required and trial judges can police disclosure violations and enforce motion deadlines.

Federal Rule 412(c) contains strict procedural rules, some of which are sensible and others of which are inconsistent with Arizona law. The Committee rejected inclusion of these requirements: "These sorts of timing and notification issues may be set by individual judges in consultation with parties, and this Committee tends to consistently recommend that procedural rules not be melded into the evidentiary rules absent compelling reason." Petition at 7.

The draft minutes of the Committee meeting at which it approved the filing of this Petition do not reflect what specific concerns the Committee may have had. One judge member agreed with omitting procedural requirements, "noting that it is a trap for the unwary to put procedures into the rules of evidence." This statement is inconsistent with Arizona Rule of Criminal Procedure 16.1(b)[1] and Arizona Rule of Evidence 404, both of which set deadlines for pretrial motions. Some judges exercise their discretion by setting earlier deadlines than the 20-day deadline in Criminal Rule 16.1(b). *See Findlay v. Lewis*, 172 Ariz. 343, 346 (1992) ("A trial court has broad discretion over the management of its docket."). The admission or exclusion of evidence based on application of rape shield laws is of paramount importance in a case where such evidence may be at issue; it is hardly a burden to ask attorneys to comply with the motions deadline. Furthermore, for evidence to be admitted under Evidence Rule 404(b)-(c) against a criminal defendant, the State is required to give pretrial notice in accordance with Criminal Rule 15.1(b)(7), and in the case of Rule 404(c), the court must also hold a hearing and make particularized findings. In codifying the rape shield, the legislature included the following procedural requirement:

> Evidence described in subsection A shall not be referred to in any statements to a jury or introduced at trial without a court order after a

[1] It is also inconsistent with the rules of procedure in all other cases. As an association of criminal defense lawyers, AACJ focuses on the criminal rules.

> hearing on written motions is held to determine the admissibility of the evidence. If new information is discovered during the course of the trial that may make the evidence described in subsection A admissible, the court may hold a hearing to determine the admissibility of the evidence under subsection A.

A.R.S. § 13-1421(B). Though not the model of clarity, the legislature expects some kind of procedure to be followed before admitting such evidence.

To the extent that "the unwary" may include *pro se* litigants, it is well settled that "[w]e hold unrepresented litigants in Arizona to the same standards as attorneys." *Flynn v. Campbell*, 243 Ariz. 76, 83 ¶ 24 (2017) (citing *Smith v. Rabb*, 95 Ariz. 49, 53 (1963)). It is exceedingly unlikely that a rape-shield issue would appear in a jury trial with self-representing litigants, but if it did, the judge could raise the issue. In a criminal case, even if a self-representing defendant is unaware of the law, the prosecutor and the judge can raise the issue.

III. AACJ proposes alternative language that tracks the federal rule.

AACJ asks that the Court adopt AACJ's proposal for a new Rule 412 that more closely tracks the federal rule. This is the language of AACJ's proposal:

> **Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition**.
>
> **(a) Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
>
> > **(1)** evidence offered to prove that a victim engaged in other sexual
> > behavior; or
> > **(2)** evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

> **(1) Criminal Cases.** The court may admit the following evidence in a criminal case:
>
> > **(A)** evidence of the victim's past sexual conduct with the defendant;
> >
> > **(B)** evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
> >
> > **(C)** evidence that supports a claim that the victim has a motive in accusing the defendant of the crime;
> >
> > **(D)** evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue; or
> >
> > **(E)** evidence of false allegations of sexual misconduct made by the victim against others.
> >
> > **(F)** any other circumstance where admission of evidence is required in order to ensure that the defendant receives a fair trial.
>
> **(2) Non-criminal Cases.** In non-criminal cases, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

This is identical to Federal Rule 412(a)-(b) except for proposing language in Rule 412(b)(1) that modifies the rape shield for criminal cases. AACJ's proposed Rule 412(b)(1) tracks the five exceptions stated in A.R.S. § 13-1421(A)(1)-(5), but it also provides a "catch-all" exception that ensures that defendants receive a fair trial, as

required by *Oliver* and *Duncan* as well as U.S. Supreme Court cases interpreting the right to present a complete defense. An additional distinction is this proposal removes § 13-1421(B)'s unconstitutional clear-and-convincing-evidence burden.

CONCLUSION

For these reasons, AACJ requests that this Court adopt Rule 412, but that this Court use the language proposed in this Comment.

DATED (electronically filed): May 1, 2024.

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