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## ARIZONA SUPREME COURT

In the Matter of:

Petition to Adopt Arizona Rule of  
Evidence 807.01

Supreme Court No. R-25-0004

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

The Maricopa County Indigent Defense Agencies collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate

(OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment in opposition to the proposal to adopt Arizona Rule of Evidence 807.01.

**I. Proposed Rule 807.01 unnecessarily erodes the protections to criminal defendants provided by the Rules Against Hearsay – the concerns addressed in the Petition can be resolved by introduction of the forensic interviews under established hearsay exceptions.**

Criminal defendants are afforded certain protections under the Arizona Rules of Evidence to ensure a fair and impartial trial. Article VII of the Rules of Evidence provide rules to protect the parties from the improper introduction of hearsay evidence (“Rules Against Hearsay”), and to clearly establish the exceptions to those rules. When drafting exceptions, a criminal defendant’s Constitutional rights to due process and to confront the witnesses against them must be honored if those rights conflict with the procedural and policy goals of the proposed exception.

Proposed Rule 807.01 is intended to allow introduction of a child’s full forensic interview at trial, with no consideration as to the individual child’s ability to overcome the pressures of testifying at trial or the substance of their trial testimony. The goals and concerns addressed in the petition to adopt Rule 807.01 can be satisfied by introducing portions of the forensic interviews themselves or the statements made within the interviews under other already established Rules of Evidence, as described below. However, the adoption of this proposed rule will unduly erode the protections that the current Rules Against Hearsay provide for criminal defendants, limit their due process rights, and limit

their right to confront their accusers, all without serving any additional purpose to further the integrity and fairness of the trial proceeding.

- a. Proposed Rule 807.01 is unnecessary to allow a jury to observe the victim's behavior and mannerisms because the muted video can be played under established Rules of Evidence and is not barred by the Rules Against Hearsay.

Proposed Rule 807.01 is framed as an exception to the Rules Against Hearsay, and thus, the adoption of this rule is unnecessary to the extent a party is introducing a muted forensic interview to allow the jury to witness a child's body language while being forensically interviewed. In the arguments portion of the petition to adopt Rule 807.01, members of the Maricopa County Attorney's Office and Arizona Voice for Crime Victims argue that Rule 807.01 would serve the valuable purpose at trial of allowing jury members to watch a child witness make their disclosures during their forensic interview so the jurors can "verify" the child's disclosures. Page 11. Assuming, for the purposes of this comment, that it is possible to verify the truth of the child's disclosures based on body language, this is still not an adequate basis for the adoption of Rule 807.01. Forensic interviews have been introduced during trial for this purpose under the already established Rules of Evidence. The standard procedure is that the parties play the video or portions of the video without sound. This allows the jurors to watch the child's body language and demeanor at the time of that earlier disclosure when they were not subjected to the added pressures of testifying in a full courtroom but limits the prejudicial effects of bolstering a victim's statements by, for example, playing audio of past consistent statements. Ultimately, an exception to the Rules against Hearsay is not necessary if the purpose of introduction is to be able to see

the child while they make their disclosures during the forensic interview because that purpose is served by playing the muted video and allowing the jurors to watch the child's body language.

- b. Established exceptions to the Rules against Hearsay already provide avenues for the admission of crucial statements from a forensic interview at trial if offered to serve a permitted purpose, and thus, proposed Rule 807.01 is unnecessary.
  - i. Prior consistent statements are already admissible for limited purposes and admission beyond those purposes would only serve to improperly bolster testimony.

While the Rules of Evidence contemplate confronting a witness with their past inconsistent statements at length, past consistent statements are significantly more limited. A past consistent statement may be offered as non-hearsay when it is offered to rebut claims of recent fabrication, improper influence, or motive in so testifying, or to rehabilitate credibility when attacked on other grounds. Arizona Rules of Evidence 801(D)(1)(b). In a case involving a minor victim, if the defense were to raise a claim of recent fabrication, malicious or otherwise, the state could seek to admit the minor's consistent statements about the alleged abuse as non-hearsay. The admissibility of this evidence is limited by a concern that "the statement was made for the express purpose of corroborating or bolstering other testimony." *State v. Martin*, 135 Ariz. 552, 554 (1983); *see also, State v. Tucker*, 165 Ariz. 340 (1990). When a claim of recent fabrication is not raised but credibility is put at issue, the State can still seek admission of the past consistent statement to rehabilitate the victim's credibility. Arizona Rules of Evidence 801(d)(1)(B)(ii). The proposed Rule 807.01 would serve to expand this admission beyond those instances in which credibility or

fabrication is at issue and would allow the bolstering of a child's statements in trial by past repetition despite the prohibition on this exact sort of bolstering for any other witness or victim.

- ii. If the State seeks to introduce the forensic interview to impeach the child witness, they can do so without the adoption of Rule 807.01.

The established Rules of Evidence already permit either side to impeach any witness with their prior inconsistent statements. See Arizona Rule of Evidence 607. If testimony that the child provides at trial is inconsistent with their statements made during the forensic interview, the State or Defense, regardless of who called that witness to testify, may then impeach them with their prior inconsistent statements. Although oftentimes the parties confront the witness about the prior statement without playing the video of the forensic interview for the jurors, this process indeed allows the jurors to hear what the initial disclosures were and determine for themselves which statements are or are not truthful. Thus, adopting a new exception to the Rules Against Hearsay to allow jurors to learn about a child's prior inconsistent statements made during their forensic interview is entirely unnecessary.

- iii. If the child is unavailable to testify, the State can introduce statements from the forensic interview under established exceptions to the Rule Against Hearsay, such as recorded recollections.

Proposed Rule 807.01 is an unjustified response to the recurrent, but already curable issue of the child witness being deemed unavailable at trial. One common way that children are deemed unavailable as a witness is by testifying that they do not remember the incident.

See Ariz. R. Evid. 804(a)(3). This exact issue has been litigated repeatedly in Arizona. *See State v. Alatorre*, 191 Ariz. 208 (App. 1998) (abrogated in part on other grounds); *State v. Garcia*, 256 Ariz. 488 (App. 2023); and *State v. Martin*, 225 Ariz. 162 (App. 2010). Rule 803(5) of the Arizona Rules of Evidence allows for admission of a record that is on a matter the witness knew about previously but can no longer recall well enough to testify fully and accurately, provided it was made when the matter was fresh in the witness's memory and accurately reflects the witness's knowledge. A videotape can qualify as an appropriate medium for a past recorded recollection under Rule 803(5) of the Arizona Rules of Evidence. *See State v. Martin*, 225 Ariz. 162, 165, 235 P.3d 1045, 1048 (App. 2010).

If the concern the State is seeking to alleviate with proposed Rule 807.01 is the difficulty of testimony for a child and the risks of forgetting or confusing information, Rule 803(5) is already available to ameliorate that risk. In *State v. Martin*, a child witness testified to having forgotten a specific incident of sexual conduct that they had previously described to a forensic interviewer. *State v. Martin*, 225 Ariz. at 164. At trial, that child testified that she “remembered talking to ‘a lady’ to whom she told ‘the truth’ at a time when [the child] could better remember ‘some other stuff that happened with [defendant].” *Id.* This description was sufficient both to establish that the child lacked sufficient recollection of the alleged incident and to meet the foundational requirements of admitting the videotape as a recorded recollection. *Id.* at 165. Rule 803(5) solely prohibits the recorded recollection from being admitted into evidence and made available to the jury during deliberations.

Further, Rule 807.01 is not justified, even to address cases where a child witness is otherwise unavailable to testify or may not meet the requirements to introduce a forensic interview as a past recorded recollection because additional rules already address these problems. Rule of Evidence 803 lists various additional exceptions to the Rule Against Hearsay which may serve to allow the admission of forensic interviews regardless of whether the child is available to testify at trial. Rule of Evidence 804(b) provides exceptions for when the child is unavailable to testify. Rule of Evidence 807 also provides a residual exception to introduce hearsay with additional guarantees of trustworthiness.

- c. Because there are already various avenues for statements from a forensic interview to be admitted at trial and proposed Rule 807.01's purpose can already be met within our existing rules, this issue can and should be addressed by the trial courts on a case-by-case basis.

The State has various avenues, predominantly set out in Rules 803, 804, and 807 of the Rules of Evidence to seek admission of statements from a forensic interview. Each of these exceptions were carefully designed to allow the court to admit hearsay statements which are supported by "particularized guarantees of trustworthiness." *See State v. Robinson*, 153 Ariz. 191, 197 (1987) (citation omitted). These established hearsay exceptions can and should be explored if a party is looking to introduce the video of a child's forensic interview to the jury. Proposed Rule 807.01 allows for the broad introduction of the forensic interviews, even absent any individualized justification or particularized guarantee of trustworthiness for all forensic interviews to be admitted under the proposed rule. This broad allowance is not needed, and it does not follow the justification of the other hearsay exceptions as providing sufficient indicia of reliability.

- i. The State can seek admission of a forensic interview from the trial court when there is a demonstrated need to do so or can seek a court order for closed circuit testimony.

The presumption of admissibility in proposed Rule 807.01 is excessive without a showing of necessity. It overrides due process without weighing the specific circumstances, the purpose for which the recording is offered, and the due process rights of the defendant. Under the current proposed rule, the forensic interview would be admissible even in a situation where the child testified identically to what was stated during the forensic interview. If there is a demonstrated need within a specific case for admission of a recorded forensic interview, the state can seek that admission through the hearsay exceptions set out above. If there is no demonstrated need, then the court should preclude admission as the recorded forensic interview would serve no proper purpose as evidence in the specific case.

Proposed Rule 807.01 appears to be motivated by an understanding that involvement in the court system can be particularly stressful and traumatizing for children. The State in their explanation of the need for proposed Rule 807.01 describes instances of particularly traumatized children who are unable to adequately testify. As the State has contact with these individuals leading up to trial, the State is in the best position to judge when a particular child would struggle to testify. The State already has a remedy for this issue outside of proposed Rule 807.01. The State has the ability under Arizona Revised Statutes (“A.R.S.”) § 13-4253 to request that the court order that testimony of a minor be taken in another room and televised into the courtroom to be viewed by the court and finder

of fact; that mode of confrontation would allow the minor to be questioned at trial in a manner that more closely mimics the environment of a forensic interview.

- ii. Even when admission is appropriate under the current rules of evidence, that admission should be limited only to the relevant portions of the interview.

Under proposed Rule 807.01, the presumption would be for the entire forensic interview to be admissible other than statements inadmissible based on A.R.S. § 13-1421 pertaining to victim chastity. While the proposed rule does allow that the court may remove questions and answers if objectionable pursuant to statute or other rules of evidence, or if they are the product of leading or suggestive questioning, it does not limit admission to relevant evidence. Forensic interviewing protocol discourages interviewers from cutting off or redirecting a child, the interview may also include unrelated issues throughout actual questioning that have no bearing on the criminal matter, including rapport building and building towards a neutral closing. These sections may lack probative value and are in need of a specific determination to determine admissibility. Additionally, rather than the burden of showing why information is probative rather than prejudicial or impermissible being on the moving party, the burden shifts to the party seeking to preclude the evidence.

**II. If proposed Rule 807.01 is adopted, IR recommends the following amendments to the proposed rule.**

Proposed Rule 807.01, as written, contains vague language that will improperly infringe on the rights of criminal defendants to confront their accusers. The following suggested edits attempt to minimize the anticipated harmful effects of this proposed rule:

**Rule 807.01. Hearsay Exception; Statement Made by a Child to a Forensic Interviewer**

- (a) **Admissibility of Statement.** A statement made by a child who is under the age of fifteen at the time the statement is made that is not otherwise admissible by statute or court rule, is admissible as evidence in a criminal proceeding against the defendant if the court finds, by a preponderance of the evidence, all of the following:
- (1) The statement made by the child describes any of the following:
    - (A) An act of sexual contact, sexual intercourse, or oral sexual contact, as defined by A.R.S. § 13-1401, performed with or on the child by another person or by the child at the direction of another person;
    - (B) An act of sexual conduct, as defined by A.R.S. § 13-3551, performed with or on the child by another person or by the child at the direction of another person;
    - (C) An act of prostitution, as defined by A.R.S. § 13-3211(5);
    - (D) An act of luring, as defined by A.R.S. § 13-3554;
    - (E) An act of child abuse or neglect of the child by another, as defined by A.R.S. § 8-201;
    - (F) An act of sexual contact, sexual intercourse, oral sexual contact, sexual conduct, prostitution, luring, child abuse or neglect of another child observed by the child making the statement.
  - (2) The child testifies at trial and is subject to cross-examination ~~or the court finds that the child is unavailable to testify and that the child has provided prior sworn testimony deemed admissible pursuant to Rule 804(b)(1);~~
  - (3) The child made the statement during a forensic interview;
  - (4) The court finds that all of these circumstances surrounding the forensic interview are true:
    - (A) The recording is both visual and aural and is recorded on film or videotape or by any other electronic means;
    - (B) The recording is accurate, has not been altered, and reflects what the child said;

- (C) The statement, in the context of the entire interview, was made in response to questioning that was conducted in a manner that would avoid undue influence of the child or was not made in response to specific questions that were calculated to lead the child to make a particular statement;
- (D) The person conducting the forensic interview of the child is available to testify and be subject to cross-examination;
- (E) The opposing party is afforded the opportunity to view the recording before it is offered into evidence.
- (b) **Notice.** The party seeking to admit the recorded statements of the child must provide notice to the opposing party at least twenty days before trial of its intention to admit evidence under this rule. ~~The court may excuse the party seeking to admit evidence pursuant to this rule from this requirement upon a finding of good cause.~~
- (c) **Hearing.** The court may hold a hearing prior to the commencement of trial to determine the admissibility of any statements that a party seeks to admit pursuant to this rule. There shall be a rebuttable presumption that the child who made the statements shall not be called as a witness at the hearing. This presumption can only be overcome by a showing of extraordinary circumstances that would necessitate the calling of the child who made the statements.
- (d) **Age of Child.** ~~The age of the child, at the time of trial, is immaterial as to admission of statements pursuant to this rule.~~ The forensic interview may only be admissible under this rule if the child is under the age of eighteen years old at the time they are called to testify at trial.
- (e) **Admissibility.** If all of the requirements for admission pursuant to this rule are met, the presumption shall be that the entire forensic interview shall be admissible. The court may find that certain statements made by the child in the forensic interview are objectionable pursuant to statute, other Rules of Evidence, or are the product of leading or suggestive questioning. The court, in its discretion, may order the removal of these questions and the corresponding answers if it is in the

interest of justice to do so but otherwise admit the forensic interview in its entirety.

- (f) **Otherwise Inadmissible Statements.** Any statements made by a child during a forensic interview that are inadmissible pursuant to A.R.S. § 13-1421 shall not be admissible pursuant to this rule.
- (g) **Conformity.** If the definitions above are altered by future legislation, this rule is automatically deemed to conform to the changes in the law once those changes go into effect.

- a. The protections afforded by the Confrontation Clause and the reported justifications supporting adoption of the proposed rule require the removal of the portion of the proposed rule which allow for the introduction of forensic interviews when the child is unavailable to testify at trial.

Defendants in a criminal trial have the right, except under very limited circumstances, to confront their accusers. These rights are enshrined in both the United States and Arizona Constitutions. The Sixth Amendment of the United States Constitution holds that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...” Similarly, Article 2 Section 24 of the Arizona Constitution states that “[i]n criminal prosecutions, the accused shall have the right to ... meet the witnesses against him face to face ...” In practice, the Confrontation Clauses protect a defendant’s right of cross-examination by limiting the prosecution’s ability to introduce statements made by unavailable witnesses or victims. However, the provisions proposed in Rule 807.01(a)(2) appear to create an exception which would allow a victim’s forensic interview to be introduced in its entirety at trial, even when that victim is not present at trial or has been deemed unavailable to testify. Specifically, as proposed, Rule 807.01(a)(2) requires, as one element of introduction, that “[t]he child testifies at trial and

is subject to cross-examination *or the court finds that the child is unavailable to testify and that the child has provided prior sworn testimony deemed admissible pursuant to Rule 804(b)(1).*” (emphasis added).

As written, the vagueness of the proposed rule appears to allow the introduction of the victim forensic interview if the child is entirely unavailable to testify and has, in the past, testified at any deposition or prior hearing in which they were sworn to testify under oath and subject to cross examination. While this may seem like a rare exception, the consequences are critical and must be avoided. If this portion is not removed, the rule, at a minimum, should clarify that if the child is deemed unavailable at trial, that “the opposing party must have had the opportunity to cross-examine after notice was given under Rule 807.01(b)”.

While the aforementioned addition to the language would provide some necessary protections to the defendant, it still would not be consistent with the assurances provided by those who drafted the proposed Rule 807.01. In the Petition to adopt the proposed Rule of Evidence 807.01, members of the Maricopa County Attorney’s Office and Arizona Voice for Crime Victims reason that the “proposed rule will not eliminate the child from being present and subject to cross examination.” Pages 9 – 10. They further state that “[i]t should be emphasized that this new rule is not meant to replace live testimony. The child will still be required to testify and be subject to questioning from the defense.” *Id.* at 11. However, despite giving those concrete assurances, the stricken language in Rule 807.01(a)(2)

provides a clear method for the forensic interview to be introduced absent any live testimony from the child.

A criminal defendant's right to a fair and impartial trial, as well as their right to confront their accusers, must be protected. Codifying this avenue for a forensic interview to be played when the child is unavailable to testify at trial directly undermines a defendant's rights under both the Arizona and Federal Constitutions.

- b. An exception for *good cause* is vague and the Notice requirement should be mandated.

Proposed Rule 807.01 requires the party seeking to admit the forensic interview to provide notice to the opposing party at least twenty days before trial to ensure the opposing party isn't unduly prejudiced by late or no notice. However, the rule then provides an exception, where no notice is required if the court finds good cause by the party seeking to admit the video. Good cause is not further defined in this context and is vague. It is unclear what types of actions or circumstances would need to arise for a court to find good cause and dispense with the notice requirement. Given that the party seeking admission will know that a forensic interview exists from the inception of the case, it is difficult to foresee a scenario in which a good cause exception would be appropriate or necessary. As written, this exception allows a party to circumvent the notice requirement and will cause undue prejudice to the opposing party who prepares for trial and may even conduct portions of the trial without the knowledge that the forensic interview will be played for the jury. This lack of notice establishes a due process issue without a demonstrated need for a good cause exception.

- c. Rule 807.01(d) should be modified to only allow the introduction of forensic interviews if the witness is under the age of 18 years old at the time the case proceeds to trial to reduce unfair prejudices to the defendant.

Proposed Rule 807.01(d) attempts to remedy concerns regarding the pressures children face when testifying about traumatic incidences they've faced, but these justifications are no longer necessary if years have passed since the alleged incident and the "child" victim is an adult. 807.01(d) allows for the forensic interview to be played, even if the victim is an adult by the time the case proceeds to trial. The concerns regarding difficulty in asking age-appropriate questions or heightened pressures of in-court testimony for a child do not apply to adult witnesses. Rather than serving the stated functions, admission of the child forensic interviews for adult witnesses would improperly serve to invoke an emotional response from the jurors, thereby unfairly prejudicing defendants. If the rule change occurs, the language should be modified to state that, "The forensic interview may only be admissible under this rule if the child is under the age of eighteen years old when they testify at trial." This language would more evenly balance the desires of the State to admit forensic interviews with the defendant's right to a fair and impartial trial.

### **III. Conclusion**

The Maricopa County Indigent Defense Agencies, which jointly represent most indigent individuals charged with criminal offenses in our jurisdiction, adamantly oppose the adoption of Arizona Rule of Evidence 807.01 because the State's reported goals of introducing the forensic interviews can be satisfied by admitting certain portions of the

forensic interview under already established Rules of Evidence, without eroding the protections afforded by the Rules against Hearsay. However, if the proposed Rule 807.01 is codified, adopting the recommended changes in Rule 807.01 would limit the introduction of forensic interviews and reduce the prejudicial impact to a defendant's due process and confrontation rights.

Respectfully submitted this day of April 30, 2025.

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