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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

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| In the Matter of: | ) | No. R-25-0004 |
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| Petition to Amend the Arizona Rules of Evidence | ) | **Comment of Arizona Attorneys for Criminal Justice regarding Petition to Amend Arizona Rules of Evidence to Adopt Rule 807.01** |
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Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submits the following comment in opposition to the petition to adopt Arizona Rule of Evidence 807.01.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was established to advocate for the rights of the criminally accused and the attorneys who defend them. 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.

The proposal at issue would create an exception to the rule against hearsay for statements of a child under fifteen that meet certain criteria, "to make admissible as evidence in a criminal proceeding against the defendant." Those criteria include that (1) the statements describe an act of sexual contact or sexual intercourse as defined by A.R.S. § 13-1401, an act of sexual conduct as defined by A.R.S. § 13-3551, an act of prostitution as defined by A.R.S. § 13-3211(5), an act of luring as defined by A.R.S. § 13-3554, or an act of child abuse or neglect as defined by A.R.S. § 8-201; (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 in a forensic interview; and (4) the court finds the following circumstances regarding the forensic interview to be true: (a) the recording of the interview is both visual and aural and recorded by appropriate means; (b) the recording is accurate and unaltered; (c) the statement(s) were not made in response to leading questions or undue influence; (d) the forensic interviewer is available to testify and be subject

to cross-examination; and (e) the defendant is able to view the recording before it is offered into evidence.

The proposed rule further provides that at a hearing held at the court's discretion to address the admissibility of statements under this rule, there would be a rebuttable presumption that the child may not be called as a witness at that hearing absent a showing of extraordinary circumstances. There would also be a presumption that the *entire* forensic interview would be admissible unless the court orders removal of certain statements if in the interests of justice to do so. Any statements made by the child that would be inadmissible under A.R.S. § 13-1421 would not be admissible under the proposed rule.

Petitioners, the Maricopa County Attorney's Office and Arizona Voice for Crime Victims, seek to solve a problem that does not appear to exist, and their proposal would create serious problems, not only for the criminally accused but also for the courts. The proposed rule violates the Confrontation Clause by admitting testimonial hearsay without meaningful cross-examination. It would also impose significant financial burdens, invite abuse by permitting the admission of unreliable interviews, and create confusion about what constitutes an opportunity for cross-examination. Existing hearsay exceptions already provide a sufficient and balanced framework for admitting reliable child statements. By presuming reliability without

rigorous safeguards, the rule increases the risk of wrongful convictions in the most serious criminal cases. Each issue is addressed in-depth below.

## I. Proposed Rule 807.01 violates the Confrontation Clauses of the U.S. and Arizona Constitutions.

In the U.S. Constitution, the Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right [. . .] to be confronted with the witnesses against him." This protection applies to both federal and state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). Article II, § 24 of the Arizona Constitution likewise guarantees a defendant's right to confront the witnesses against him "face to face." This right is primarily implemented through cross-examination. *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *State v. Vess*, 157 Ariz. 236, 237–38 (App. 1988).

Prior to 2004, the United States Supreme Court had held that, regardless of a defendant's right to confrontation, an unavailable witness's out-of-court statement could be admitted so long as it had adequate indicia of reliability, *i.e.*, that it fell within a firmly rooted hearsay exception or bore a particularized guarantee of trustworthiness. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Crawford v. Washington*, the Court rejected the *Roberts* rule, instead holding that the "Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination" when testimonial evidence is at issue. 541 U.S. 36, 68 (2004). Arizona has recognized that a statement may be considered

testimonial under *Crawford* "if the declarant would reasonably expect it to be used prosecutorially or if it was made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial." *State v. Parks*, 211 Ariz. 19, 25 ¶ 28 (App. 2005) (quoting *Crawford,* 541 U.S. at 51-52); *see also Michigan v. Bryant*, 562 U.S. 344, 358 (2011). Furthermore, the *Crawford* Court clarified that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 60 n.9.

Whether a statement is testimonial is a factually driven inquiry that must be determined on a case-by-case basis, depending "on the circumstances existing when the statement was made" and considering "the totality of the circumstances surrounding [the statement]." *Parks*, 211 Ariz. at27 ¶ 40, 30 ¶ 52. In making that inquiry, there must be a focus on the purpose of the particular exchange. *See State v. Alvarez*, 213 Ariz. 467, 471 ¶ 15 (App. 2006). One of the primary purposes of a forensic interview is "to obtain information from a child that may be helpful in a criminal investigation." Forensic Interviews, *Children's Advocacy Center of Southern Arizona*, https://www.cacsoaz.org/forensic-interviews/ (last visited April 25, 2025).

Applying this Court's definition of a testimonial statement from *Parks*, it is evident that statements made during a forensic interview are indeed testimonial in

nature. *See, e.g.*, *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 245 (Ky. 2009) (finding that statements made during victim's interview with a sexual assault nurse examiner were testimonial in nature, as they involved past events, were not related to an ongoing emergency, and took on the nature of a formal interview); *Phillips v. State*, 316 So.3d 779, 785 (Fla. App. 2021) (determining that the primary purpose of the child victim's forensic interview was "an evidence-gathering mission conducted by a person specialized in carefully extracting said details from a child victim"); *State v. Richmond*, 935 N.W.2d 792, 801 (S.D. 2019) (finding the child victim's forensic interview statements to be testimonial, as copies of the interview were distributed to law enforcement and then used to build a criminal case against defendant); *see also United States v. Eagle*, 515 F.3d 794, 802 (8th Cir. 2008) (declaring forensic interviews as testimonial without discussion).

Proponents of the rule allege that defendants would not be deprived of the opportunity to both confront and cross-examine children about statements made during a forensic interview. Petition at 9. This argument, however, is misleading, suggesting that because defendants will have the opportunity to confront their accusers at trial, the requirements of the Confrontation Clause are satisfied, and thus a blanket admissibility of statements made during a forensic interview is justifiable. This is a misguided interpretation of the current rules regarding hearsay, which only permit a declarant-witness's prior statement at trial in a number of specific

circumstances. Ariz. R. Evid. 801(d)(1); *see infra* Section III. Instead, petitioners contend that admitting entire forensic interviews into evidence would "give[] context to the jury to decide credibility." Petition at 9.

Courts have warned against the dangers of introducing out-of-court statements to provide context for juries in order to avoid "backdoor introduction of highly inculpatory statements" that would serve no purpose other than to bolster the credibility of their own case. *United States v. Hamann*, 33 F.4th 759, 763, 770 (5th Cir. 2022) (internal citations omitted); *see also State v. Prasertphong*, 210 Ariz. 496, 499 ¶ 15 (2005) (holding that the rule of completeness requires only the admission of portions of the statement that are "necessary to qualify, explain, or place into context the portion already introduced") (internal citations omitted). Essentially, the proposed rule seeks to bolster the testimony of testifying child-victims, *i.e.*, by offering evidence solely for the purpose of enhancing the child's credibility before that credibility is attacked. *U.S. v. Lindemann*, 85 F.3d 1232, 1242 (7th Cir. 1996).

Because defendants do not have the right to cross-examine child victims at the time of a forensic interview, the proposed rule creates a significant violation of essential constitutional protections afforded by the Confrontation Clause.

## II. The proposed rule invites abuse by expanding the admissibility of police-conducted interviews and victim statements without meaningful cross-examination.

The proposed rule invites abuse by creating broad opportunities for the State to admit police-conducted interviews as "forensic interviews" and by allowing admission of victim statements without clear standards for meaningful cross-examination.

### A. Proposed Rule 807.01 creates a loophole for the admission of police interviews of victims.

Many police officers and detectives are provided basic training on forensic interview techniques. When they conduct interviews, they may use some of these techniques and may conduct them in a hybrid fashion along with other interview tools. It is likely that under the proposed rule, the State will seek to admit recordings of interviews of children conducted by police officers and detectives under the guise of claims they are "forensic interviews" because the officer or detective received training on forensic interview techniques. This again will require the expensive process of question-by-question parsing with experts. More importantly, the issue shows that the proposed rule is ripe for abuse.

### B. What constitutes an "opportunity for cross-examination" is unclear and ripe for abuse.

The same is true regarding all manner of victim statements. The proposed rule only requires an opportunity for cross-examination to permit the admissibility of the

complete interview. So, naturally, the question arises as to what constitutes a sufficient opportunity for cross-examination. Courts—both federal and state—have yet to specifically answer this question. As such, adoption of the rule would leave Arizona courts to make that determination, which would easily result in scattered interpretations.

Petitioners contend that "[t]he use of forensic interviews during trial will assist the jury in being able to evaluate both live testimony in court and disclosures obtained through […] forensic interviewing. It is not unusual for disclosures and testimony to be the key piece of evidence for a jury to consider." Petition at 11. This contention fails to acknowledge the nature of the Confrontation Clause and *Crawford*: the requirement that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68–69. *Crawford* specifically addresses the constitutional concern that petitioners aim to circumvent: when inculpating statements are made in a testimonial setting (*i.e.*, one in which factors of reliability are present), that only triggers the Clause's demand more urgently. *Id.* at 65.

In an attempt to avoid such constitutional concerns, the State could, for example, invite defense counsel to appear and cross-examine at a grand jury proceeding, or could even extend such an invitation to cross-examine following a

forensic interview (assuming the subject is sworn first) or deposition (which may occur, for example, if there is an ongoing family law case), thus arguably satisfying the requirement for an opportunity to cross-examine. Similarly, an alleged victim could request an order of protection, which would provide the defendant an opportunity for cross-examination at that hearing. However, Petitioners' proposal provides no details regarding when and how this opportunity for cross-examination—particularly as applied to forensic interviews—would transpire. Absent such specificity guaranteeing this constitutional protection, this creates a substantial potential for abuse should the proposed rule be adopted.

## III. The proposed rule is unnecessary given the existing hearsay exceptions.

The concerns that proposed Rule 807.01 seeks to address can be remedied under the current Arizona Rules of Evidence without creating a new blanket exception. Courts can and do admit out-of-court statements of child victims when those statements satisfy established exceptions or other evidentiary principles.

For instance:

- **Excited utterance**: If a child's disclosure of abuse was made in an excited state or under the stress of the event (*i.e.*, immediately after an incident), it may be admitted as an excited utterance. Ariz. R. Evid. 803(2).

- **Statements made while seeking medical treatment**: If the child spoke to a medical professional or counselor for purposes of diagnosis or treatment, those statements describing abuse may be admitted under the medical treatment exception. Ariz. R. Evid. 803(4).

- **Refresh recollection**: If the child testifies at trial but cannot fully recall the details (perhaps due to the young age or trauma), the State may use the child's prior recorded statement to refresh recollection or as a recorded recollection under Rule 803(5). In fact, Arizona courts have held that a video-recorded interview can qualify as a recorded recollection, allowing it to be played to the jury when a child witness forgets, so long as proper foundation is laid. *See State v. Martin*, 225 Ariz. 162, 165 ¶ 12 (App. 2010). This addresses situations where a child's memory has faded by the time of trial.

- **Prior consistent statements**: If the child does testify, but the defense attacks the child's credibility or suggests the story is a recent fabrication, the State may introduce portions of the prior interview as a prior consistent statement to rebut that charge, but only after the child's credibility has been challenged, and only to the extent necessary to rehabilitate. Ariz. R. Evid. 801(d)(1)(B). This limited use ensures the jury can hear the earlier statement to evaluate consistency, without wholesale admission of the entire interview in every case.

- **Hearsay exception for unavailable witnesses**: If the child is truly unavailable to testify at trial (for example, due to significant trauma, incapacity, or other extraordinary circumstance), and the child made important statements about the abuse, those statements might be admissible through Rule 804(b) exceptions. The most fitting would be former testimony if the child had previously testified under oath and was subject to cross-examination. Ariz. R. Evid. 804(b)(1). If the prior opportunity for cross-examination was adequate, this existing rule already permits use of that testimony (*i.e.*, reading a transcript or playing a video of a deposition).

- **Residual hearsay exception**: In the rare event a child's statement does not squarely fit any specific hearsay exception, Arizona's Residual Hearsay Exception may be invoked. Ariz. R. Evid. 807. This rule gives courts discretion to admit a hearsay statement with equivalent

> circumstantial guarantees of trustworthiness, if the statement is highly probative and justice so requires, provided advance notice is given. A genuinely reliable and crucial child statement from a forensic interview could be evaluated under this standard. The residual exception is deliberately used sparingly and on a case-by-case basis, which is appropriate for sensitive and variable evidence like child interviews.

The existing framework requires the State to justify the admission of a child's hearsay statements in each instance, showing why a particular statement is reliable and necessary under an established exception. This case-specific approach is a strength, not a weakness: it ensures that the jury will hear only statements meeting rigorous criteria (or carrying inherent guarantees of trustworthiness). Proposed Rule 807.01 would flip this approach, making recorded child interviews presumptively admissible across the board for certain crimes and ages, without requiring particularized guarantees of trustworthiness beyond the general conditions in the rule. This broad brush is neither necessary nor prudent. Arizona's trial courts have adequate tools to admit reliable evidence from child victims and to exclude or carefully limit unreliable or marginally relevant statements.

## IV. The proposed rule relies on the presumed reliability of forensic interviews, ignoring the fact that such interviews are susceptible to error and child suggestibility.

Although forensic interviews are a useful investigative tool, they are only as reliable as the techniques and conditions under which they are conducted. Strict protocols exist to safeguard the accuracy of these interviews, but in practice, they

are not always consistently followed. Compounding these concerns, the proposed rule seeks to replace the traditional safeguard of cross-examination with imperfect substitutes, increasing the risk that unreliable statements will be admitted without proper testing.

**A. Forensic interviews are not infallible.**

While forensic interviews of children are a critical investigative tool and often conducted by trained professionals, they are only as reliable as the techniques employed and the child's own consistency. Proposed Rule 807.01 assumes a level of reliability in recorded forensic interviews that is not scientifically or empirically justified. Even with the proposed safeguards in the rule (requiring that the interview be conducted to avoid undue influence, that the recording is both visual and aural, etc.), the reality is that interviews can and often do vary in quality.

Minor deviations from best practices can significantly affect the accuracy of a child's account. For example, if an interviewer asks slightly leading questions, or if the child is interviewed multiple times about the same events, the child's recollection can be altered or reinforced in inaccurate ways. Research in developmental psychology has repeatedly shown that children are susceptible to suggestion and may incorporate interviewers' cues (even unintentional ones) into their narratives. Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, LAW & CONTEMP. PROBS., Winter 2002;

Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 51 (2000); Maggie Bruck & Stephen J. Ceci, *The Suggestibility of Children's Memory*, 50 ANNU. REV. PSYCHOL. 419, 427 (1999). Young children especially may have difficulty distinguishing between memory and suggestion, or may be eager to please the adult interviewer, resulting in unintended false or distorted statements. Bruck & Ceci, *supra* at 427.

Strict protocols are critical to ensuring the proper procedures for forensic interviews, yet they are not always followed. Professional guidelines for child forensic interviews emphasize asking open-ended questions, avoiding repetition of questions on the same topic, and refraining from offering feedback or reactions that could influence the child.[1] These protocols were developed precisely because of past cases where poor interview techniques led to unreliable testimony. If every forensic interview strictly adhered to best practices, the trustworthiness of the statements would be less variable.

In practice, however, adherence can be uneven. Interviewers may diverge from the protocol due to inexperience, pressing time constraints, or the child's

[1] *See* National Institute of Justice, *Program Profile: NICHD Investigative Interview Protocol* (2012), https://crimesolutions.ojp.gov/ratedprograms/nichd-investigative-interview-protocol#1-0; The Professional Society on the Abuse of Children, *Practice Guidelines* (2023) https://www.apsac.org/guidelines.

behavior during the interview. Oversights happen; an interviewer might ask a leading question in a moment of frustration, fail to clarify an ambiguous statement, or unconsciously prompt the child with feedback such as "we know something happened"—all of which can contaminate the child's account. When such an interview is later presented via video in court, the nuances of what went wrong may not be apparent to the judge or jury. The factfinder only sees a coherent video and might assume it is a faithful description of events, not realizing that certain answers may have been influenced by the way questions were posed.

### B. The proposed rule replaces cross-examination with imperfect proxies for reliability.

The traditional safeguard to test reliability is cross-examination of the declarant. With hearsay, that safeguard is absent. Proposed Rule 807.01 attempts to substitute other conditions (recording, availability of the interviewer, etc.) as proxies for reliability; however, these substitutes are imperfect. Cross-examining the interviewer is not the same as cross-examining the child who made the statements. The interviewer can testify about their interview technique(s) but cannot fully speak to what the child meant or whether the child's statements were truthful. The defense also cannot effectively probe the child's perception, memory, or honesty if the child is not on the stand. Playing the video skips the crucial step in testing the statement's veracity in adversarial questioning. This raises the risk of wrongful convictions based on unchallenged assertions.

The fact that a statement is recorded on video can give a false aura of accuracy. Viewers tend to trust what they see and hear on a recording more than second-hand reports. But a video is not immune to containing falsehoods; it simply captures them in real time. Jurors may be tempted to think, "We saw the child say it, therefore it must be true," thus overlooking the possibility that the child's mind was influenced or that the child's recollection is mistaken. The proposed rule does allow a judge to excise parts of an interview that are overtly leading or irrelevant, but if the entire interview is admitted by default, the judge may not catch every subtle instance of unreliability.

Reliability must be firmly established, not presumed. Existing law places that burden on the proponent of the evidence, and the proposed rule would lessen that burden in a way that could let unreliable statements slip through too easily. The better practice is to continue requiring prosecutors to demonstrate in each case why a child's out-of-court statement is reliable enough to be heard in court, rather than presuming reliability based on a checklist.

## V. The ultimate concern: unreliable and prejudicial evidence increases the likelihood of wrongful convictions.

The proposed rule increases the likelihood of wrongful convictions. Child testimony is easily manipulated. While it is understandable and perhaps noble that the State and victims' rights organizations would want to shield legitimate victims from the trauma of appearing in court and being subjected to cross-examination to

the greatest extent possible, that desire must be balanced against the rights of a person who stands accused.[2] Stripping away opportunities to challenge the veracity of a child's story—particularly where defense rights are already limited by victims' rights, rape shield laws, and Rule 404(c), among other provisions of law—while allowing the State to present unchallenged, one-sided, and misleading interviews is a veritable invitation to wrongful convictions. When dealing with cases involving allegations of sexual abuse of a child, we must always be mindful that while these are generally considered among the worst crimes, they are also the worst crimes of which a person can be falsely accused, and often the most difficult crimes against which to defend given the general predisposition of most jurors to believe children.

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[2] Every defense attorney would agree that the most difficult part of the job is knowing that at times, counsel must challenge victims in a manner that will be very upsetting to them. But no matter how deep our sympathy may run, the criminal justice system simply cannot function unless defense attorneys do their jobs as necessary in defending the constitutional rights of their clients.

## CONCLUSION

For the foregoing reasons, AACJ respectfully recommends that this proposed amendment to the Arizona Rules of Evidence be denied.

Respectfully submitted, the 1st day of May, 2025.

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