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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: ) No. R-25-0004  
)  
) CONSOLIDATED REPLY TO  
PETITION TO AMEND THE ARIZONA ) COMMENTS RE: PETITION TO AMEND  
RULES OF EVIDENCE ) ARIZONA RULES OF EVIDENCE TO  
) ADOPT RULE 807.01  
\_\_\_\_\_)

Petitioners have reviewed comments submitted by the Maricopa County Indigent Defense Agencies (“Indigent Defense”), Arizona Attorneys for Criminal Justice (“AACJ”), the Arizona Advisory Committee on Rules of Evidence (“Advisory Committee”), as well as others, and now file this consolidated reply.

**I. Proposed Rule 807.01 is designed to provide more accurate information for the trier of fact to consider along with in-court testimony. It is not intended, nor can it be a substitute for live testimony by a child witness.**

Several of the comments seem to be under the mistaken impression that this rule would create a substitute for a child testifying during trial or that its intended purpose is to spare a child witness—especially a victim—from the trauma associated with giving live in-

court testimony. *See e.g.*, Advisory Committee 6-7. The purpose of this rule is to present statements by a child witness made under the conditions most likely to produce accurate information in the child's own words. This is done by using open-ended questioning, age-appropriate questioning, non-leading or non-suggestive questioning, in a quiet and safe environment. The courtroom is not a safe environment for a child, at least not from their perspective.<sup>1</sup> Giving testimony is stressful and nerve-wracking to all but the most seasoned witnesses. Questioning during trial, even under the best of circumstances, is not open-ended. Narrative seeking questions are not permitted by the rules. Leading and suggestive questions are often used during cross-examination, which calls into question the validity of the child's answers given in response to those questions. The trier of fact should be able to consider the in-court testimony in conjunction with the forensic interview and decide what weight to give any of the statements made.

A forensic interview's design is constructed to provide a child a means to disclose accurate information about what the child hears, sees, and experiences. The neutral setting, the questions used, the training that goes into understanding how children respond to suggestibility, and how children respond to complex ideas such as memory retrieval are all reasons why forensic interviews are considered as the best possible practice in any case involving a child witness/victim. As stated in the petition, a jury who has to decide what the facts of any particular case are should have access to all of the tools that any fact-finder

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<sup>1</sup> Kirsten Hanna, et al., *Child Witnesses' Access to Alternative Modes of Testifying in New Zealand*, 19 *Psychiatry, Psychology and Law* 184, 189 (April 2012); Rachel Zajac, et al., *The 'Good Old Days' of Courtroom Questioning: Changes in the Format of Child Cross-Examination Questions Over 60 Years*, 23 *Child Maltreatment* 186, 186 (2018); Hayden M. Henderson, et al., *Examining children in English High Courts with and without implementation of reforms authorized in Section 28 of the Youth Justice and Criminal Act*, 33 *Appl. Cogn. Psychol.* 252, 254 (2019).

would demand – and that would in the case of a child witness/victim certainly include a forensic interview. Currently, the jury may only review testimony from a child in evaluating credibility absent some very specific exceptions. Given that research is quite clear that testimony is given under circumstances of extreme discomfort and in many ways is designed to limit the ability of a child to answer non-leading, narrative questions, we give the jury a very skewed view of the facts. This is not to say theoretically a child could testify comfortably and with all the detail of a forensic interview provides for at trial, but in this petitioner’s experience that has never been the case over the course of watching many children testify. There are many times a child who was able to describe an event in detail will shut down on the stand, begin to dissociate, and force an attorney to ask direct questions only to give one-word answers. There are times a young child is confused by question complexity and may provide conflicting answers to questions. Leading questions can be dangerous if the child feels the pressure to agree with whatever the adult is suggesting they should say, creating inconsistencies that have nothing to do with credibility.

This is confirmed in research:

“How might the unique combination of leading, complex, and credibility-challenging questions asked during cross-examination affect the veracity of children’s testimony? Unfortunately, the answer to this question is very concerning (see Zajac, O’Neill, & Hayne, 2012, for a review). When their memory reports are challenged using a laboratory analogue of cross-examination, children become inconsistent. Furthermore, the changes that they make to their earlier reports have little to do with the truth. Overall, cross-examination style questions exert a detrimental effect on children’s accuracy (Zajac & Hayne 2003). Although young children are more vulnerable to this effect than older children and adolescents (Jack & Zajac, 2014; Zajac & Hayne, 2006), the effect is strikingly robust. It occurs even when controlling for the potential effects of delay (Righarts, Jack, Zajac, & Hayne, 2015) and repeated interviewing (O’Neill & Zajac, 2013). In fact,

even when children are lying about the event in question, the nature of their responses to cross-examination questions is not diagnostic of their accuracy (Zajac, Irvine, Ingram, & Jack, 2016).”<sup>2</sup>

The concern is not limited to cross-examination either. Questions from a prosecutor or a judge, either untrained in the difficulties asking children questions or constrained by the rules of the Court can be just as troubling. “...many children are unfamiliar with or misunderstand terms commonly used in the courtroom (e.g., Flin, Stevenson, & Davies, 1989; Saywitz, Jeanicke, & Camparao, 1990) and this limits their ability to answer accurately (Evans, Lee, & Lyon, 2009; Perry et al., 1995). Other researchers have suggested that children are unable to comprehend many aspects of syntax that are commonly used in legal settings (e.g., Brennan & Brennan, 1988; Carter et al., 1996; Saywitz & Snyder, 1993), and that increased structural and syntactical complexity reduces the accuracy of children’s reports (Cashmore & DeHaas, 1992; Zajac & Cannan, 2009; Zajac et al., 2003).”

There are many developmental and psychological reasons for these uncontested findings but suffice to say that even under the best of intentions, trial testimony is likely to be the cause of mistakes or error given the questions asked, the setting, and the level of the child’s understanding. Rather attempt to make all lawyers and judges experts in this extensive body of research, the proposed rule offers a more practical solution.

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<sup>2</sup> Rachel Zajac, et al., *The ‘Good Old Days’ of Courtroom Questioning: Changes in the Format of Child Cross-Examination Questions Over 60 Years*, 23 *Child Maltreatment* 186, 187-88 (2018)

The point of admitting the forensic interview is to provide the jury additional evidence in order to put the testimony into context. It is not to simply bolster a child's testimony – in fact many times the forensic interview may contradict an answer the child may give in trial or provide additional detail that the child simply would not provide in front of a crowd of strangers. Again, it is universally accepted that forensic interviews are the ideal forms of gaining accurate, narrative disclosures from children. Most jurisdictions require forensic interviews be done in child abuse investigation protocols. It is also why most states allow the admission of forensic interviews (those states are not attempting to circumvent constitutional protections or circumvent the other rules of evidence).

Arizona should allow its juries to hear these interviews as well in deciding a child's credibility. A lot of times these interviews contain some of the most traumatic experiences a child can go through – sexual and physical abuse – and juries under the current Arizona rules do not get to see these interviews without some sort of exception being alleged. That is inviting mistakes, and mistakes in how cases are presented affect everyone negatively – criminal defendants included. Perhaps a forensic interview really demonstrates a child's lack of understanding of the underlying facts, but on the stand two years later the child is answering with a lot more detail about what happened. The opposing party should not have to wait to see if the victim answers something completely contrary in order to impeach them with one statement or if the victim says they do not remember something (which incidentally is a difficult question for a child to answer in any circumstance as they may have a difficult time understanding what it means to

remember something at one point in time versus another). The interview may still not be admitted, and a defendant may be stuck with whatever view the jury has from the child on the stand. Perhaps the child cries on the stand emotionally because they are traumatically affected by being in court, but the jury wrongfully believes it is because of the abuse. The better practice would suggest allowing a jury to see the child's forensic interview in the neutral setting to avoid those emotions potentially confusing a jury. We should all want the jury to review forensic interviews because the best chance at getting accurate information from child witnesses generally comes from the forensic interview.

Forensic interviews are not perfect, and nobody is alleging they are. But the rule itself provides for this very scenario as it is anticipated some interviews (or parts of the interview) may not meet a reliability standard for admission. If the interviewer is doing a poor job by asking leading questions, that will be part of the pretrial hearing that is involved in discussing whether the jury even sees/hears that part of the interview. Or perhaps the interview is precluded if the interview is badly done overall. Additionally, not every part of the interview may be relevant. The rapport building may include information that one party wishes to preclude. The pretrial hearing is the part of the rule that covers all these scenarios and implies a reliability finding on the part of the Court before admitting the interview in trial. This reliability finding will ensure that interviews merely termed "forensic" are still scrutinized to make sure the interview is not just a badly done interview of a child by a novice with no training or experience.

AACJ argues that adopting this rule will lead to more wrongful convictions. AACJ 16-17. But why? This is nothing more than a conclusory statement without any evidence to

back it up. AACJ states that this rule is nothing more than another way to “[strip] away opportunities to challenge the veracity of a child’s story.” Some of the other examples that AACJ provides to prove their point are Arizona’s Rape Shield Law (A.R.S. § 13-1421) and Rule 404(c), Rules of Evidence (evidence of aberrant sexual behavior is admissible in some instances). *Id.* The problem with this argument is that the provisions listed by AACJ increase the accuracy of the fact-finding process, not decrease it. *See United States v. Torres*, 937 F.2d 1469 (9th Cir. 1991) (rape shield laws were enacted for several reasons including preventing the wasting of time on distractive collateral and irrelevant matters); *State v. Gilfillan*, 196 Ariz. 396 (App. 2000) (adopting the reasoning of the United States Supreme Court in *Michigan v. Lucas*, 500 U.S. 145 (1991), that rape shield laws are designed to prevent a victim from being subject to irrelevant questions concerning their past sexual behavior); *State v. Treadaway*, 116 Ariz. 163 (1977) (in discussion of the precursor to Rule 404(c), this Court found that the commission of other deviant sex acts should be admitted based on the “strong relevancy” that the other acts provided that the accused committed the charged sexual offenses). The addition of this proposed rule will be a step forward in providing more accurate and complete evidence for the trier of fact to consider when rendering their verdict. It is not, as AACJ puts it, going to strip away at the accused’s ability to challenge the veracity of a child witness.

**II. The residual hearsay exception does not adequately address the admissibility of forensic interviews and provides little guidance to courts and practitioners.**

In its current form, Rule 807, Rules of Evidence, a.k.a, the residual hearsay exception, does not adequately address the purposes set forth in the petition. First, Rule 807

provides little guidance to trial courts and attorneys. Second, case law on the matter is sparse. In one case, this Court affirmed the trial court's decision to admit evidence under Rule 807 involving a young child's first and unprompted disclosure of sexual abuse. *See State v. Robinson*, 153 Ariz. 191 (1987) (stating that a child's unprompted disclosure of sexual abuse is often "striking in its clarity and ring of truth."). There are several other cases where appellate courts have held that statements made by a child out of court should not have been admitted under Rule 807. *See State v. Allen*, 157 Ariz. 165 (1988) (statements made by six-year-old sexual abuse victim two months after the abuse occurred should not have been admitted pursuant to the residual hearsay exception and was reversible error); *State v. Taylor*, 196 Ariz. 584 (App. 1999) (admission of videotaped statements made by child describing sexual abuse two days after the incident occurred was reversible error because it did not satisfy all of the requirements of the residual hearsay exception); *State v. Thompson*, 167 Ariz. 230 (App. 1990) (residual hearsay exception would not permit the admission of a videotaped interview with the child victim of sexual abuse that was conducted by a social worker). Of note to any litigant should be the caselaw's finding that if the statements are admitted incorrectly, the appellate courts found reversible error. Practically speaking, the caselaw has chilled any attempt to admit forensic interviews under the residual hearsay exception for fear that the parties (and specifically child witnesses/victims) may have to suffer through a trial twice if appellate courts interpret the rule differently.

The court in *Thompson* discusses something of a catch-22 that renders the residual hearsay exception unhelpful in instances where a party seeks to admit a child's forensic

interview. When a declarant is unavailable to testify, the requirements of the residual hearsay exception other than reliability are often easily satisfied. But when the declarant testifies, the requirements other than reliability are more difficult to meet. *Id.* at 233-34. The court also noted, and properly so, that when the declarant testifies at trial and is subject to cross-examination, that concerns over the circumstantial guarantees of reliability of the out-of-court statements are significantly diminished. *Id.* at 233. There can be no doubt that a forensic interview regarding the central issue in a trial is material so what remains is the “more probative than other evidence that can be obtained through reasonable efforts” requirement. And for the reasons stated in the petition and this reply, a properly conducted forensic interview should satisfy that requirement as well.

**III. The proposed rule is necessary to provide guidance to both litigators and judges and provide a framework for thorough analysis that will lead to a well-developed record for appellate review.**

Even though Rule 807, Rules of Evidence, *could* provide a possible avenue for the admission of a child witness’s forensic interview, the proposed rule is necessary for several reasons. As Rule 807 is written currently, it provides little guidance for courts as to how to conduct a thorough analysis that will clearly delineate the reasons for the admission of this evidence and will lead to not only inconsistent results among trial courts but an inadequate record for appellate review.

An apt analogy that applies here is the creation of Rule 404(c), Rules of Evidence, in 1997. Rule 404(c) was originally created by case law in 1973 by this Court in *State v. McFarlin*, 110 Ariz. 225 (1973), and later clarified in 1977 by *State v. Treadaway*, 116 Ariz. 163 (1977). The Court created a limited exception to the bar on character evidence

pursuant to Rule 404(b), Rules of Evidence, for cases involving the prosecution of sexually motivated crimes. This exception would permit the admission of evidence of other acts that gave rise to a reasonable inference that the defendant had relevant aberrant sexual character traits. In the comments to Rule 404(c) upon its creation, this Court made it clear that the purpose of this new rule was to codify case law and to provide an analytical framework for the use of the rule. Rule 404(c) provides extensive guidance to litigators and judges on what is required for the admission of evidence under the rule as well as what is expected in a comprehensive ruling on the admissibility of such evidence.

Certainly, this Court did not need to take the extra step of creating Rule 404(c). Everyone could have continued to operate under the framework of *McFarlin* and *Treadaway*. Except that this approach led to inconsistent applications of the rule. It led to unclear standards being applied. This proposed rule will accomplish the same goals that Rule 404(c) accomplished for the admission of evidence of aberrant sexual character traits in trial. The proposed rule will provide a solid roadmap for trial courts to use when determining the admissibility of forensic interviews.

#### **IV. Proposed Rule 807.01 comports with the demands of the Confrontation Clause.**

Both AACJ and the Advisory Committee argue that proposed rule 807.01 violates the Confrontation Clause in some manner. Specifically, AACJ suggests that the Confrontation Clause is violated unless the defendant would have the opportunity to cross-examine the child witness at the time of the forensic interview. AACJ at 7. However, this argument is not correct. So long as the declarant (in this case, the child witness) is subject

to cross-examination in front of the trier of fact, then the Confrontation Clause is satisfied. *State v. Lopez*, 217 Ariz. 433, 438, ¶ 17 (App. 2008); *State v. Real*, 214 Ariz. 232, 234, ¶ 5 (App. 2007). The Advisory Committee takes issue with the part of the proposed rule that would allow the forensic interview to be admitted in the rare circumstances that the child witness is not present at trial but has given prior sworn testimony in another proceeding and that child was subject to cross-examination in that prior proceeding leading to that prior sworn testimony being admitted pursuant to Rule 804(b)(1)(A), Rules of Evidence. Advisory Committee at 8. However, testimony admitted under Rule 804(b)(1)(A) does not violate the Confrontation Clause. *California v. Green*, 399 U.S. 149 (1970); *State v. Armstrong*, 218 Ariz. 451 (2008). Given how the proposed rule is currently written, there is no application of the rule that would violate a defendant's Confrontation Clause rights.

**V. Other hearsay exceptions do not adequately address the purpose of adopting the proposed rule.**

All three of the responses suggest that the proposed rule is unnecessary because of several already-existing hearsay exceptions. However, this argument falls short when the other hearsay exceptions are scrutinized.

AACJ and the Advisory Committee both suggest that some statements made by the child witness during a forensic interview would be admissible under Rule 803(2), Rules of Evidence, the excited utterance exception. AACJ at 10; Advisory Committee at 4. However, only in rare cases would that be true—even when applying a generous definition of what qualifies as an excited utterance. *See State v. Starcevich*, 139 Ariz. 378 (App. 1983) (a statement made 24 hours after a startling event can be classified in some instances as an

excited utterance if the victim is still in a state of shock from the event). The vast majority of child sexual abuse cases begin with a delayed disclosure rendering this exception inapplicable.

AACJ and the Advisory Committee also suggest that a child's statements to a forensic interviewer may be admissible under Rule 803(4), Rules of Evidence, the hearsay exception for statements made to a medical provider for the purposes of diagnosis and receiving medical treatment. AACJ at 10; Advisory Committee at 4. Again, the use of this exception is very limited, as it should be. To use the exception in the manner suggested in the responses would expand the purpose of the hearsay exception to situations that it was not clearly intended to address. Furthermore, what statements will qualify as being pertinent to diagnosis and treatment is often heavily limited by the appellate courts. *See e.g., State v. Thompson*, 169 Ariz. 471 (App. 1991) (finding that statements made during a forensic interview do not qualify under this exception). This Court has stated in at least one case that statements made to a psychologist regarding past sexual abuse could be pertinent to diagnosis and treatment and therefore admissible under Rule 803(4). *State v. Robinson*, 153 Ariz. 191 (1987). However, these statements do not contain the same indicia of reliability that a forensic interview would have, and it would almost certainly lead to the disclosure of very private counseling records of a victim of sexual abuse—a result that should be disfavored as it is contrary to public policy. We should adopt policies that encourage people to seek treatment for mental health issues without the fear that their deepest innermost thoughts could be exposed to the world. Additionally, following *Robinson* to its logical conclusion would risk allowing the exception to engulf the entire rule

as just about any statements made during a counseling session could be considered pertinent to the diagnosis and treatment of a psychological issue by a mental health provider.

All three responses suggest that the Petitioner's proposed rule is unnecessary because of Rule 803(5), Rules of Evidence, the prior recorded recollection hearsay exception. Indigent Defense at 6; AACJ at 11 (referred to as "refresh recollection"); Advisory Committee at 4. Again, this suggested solution misses the point of the proposed rule. It is not to fill in gaps in a child witness's in-court testimony. It is to put before the trier of fact both in-court testimony and the forensic interview as the latter is conducted under conditions most likely to produce accurate statements. The recorded recollection exception is solely designed to provide the trier of fact with out-of-court statements that were made by the declarant at a time when they remembered the incident in question better and at the time of testimony, they can't remember the incident with sufficient clarity. In practice, what happens is the trier of fact only hears the forgotten portions of the recorded statements. They will rarely hear the entire interview, and the parties often fight about what is necessary for the trier of fact to hear. Courts often err on the side of caution and limit the admissible statements to the bare minimum rendition of what the child witness previously said. This leads to confusing excerpts—excerpts often without sufficient context—being presented in court. When presented to a jury, this is especially problematic as they will often be confused as to why they are only hearing a few minutes of an interview that they often find probative and would want to see in its entirety. Without the trial court explaining the rule and its limitations, the jury is often left wondering and speculating as to why they could

only see a small portion of the forensic interview. This particular exception is not adequate to cover the purposes of the proposed rule.

Moving over to Rule 801, Rules of Evidence, (not technically hearsay exceptions but rather statements that are defined as non-hearsay), several of the responses suggest that the child witnesses can simply be impeached if they give prior inconsistent statements at trial. Indigent Defense at 5; Advisory Committee at 3-4. While this can be true in theory *in some instances*, it does not create a cohesive presentation of evidence for the trier of fact. It also confuses the witness, slows down the proceedings, and ultimately impedes the truth-finding function of the trial process. Judges and seasoned litigators know that the impeachment process is cumbersome and clunky. It requires multiple trips to the witness stand. Having witnesses refresh their recollection. Confronting them with statements made in the past with confusing, long-winded questions that incorporate the previously made statements in the questions. Having the witness give an explanation for why their testimony is different now than it was back when the statements were made—assuming that they even remember making the previous statements. Finally, admitting extrinsic evidence of the previously made statements, often through another witness, if the trial court deems it appropriate pursuant to Rule 313, Rules of Evidence. This procedure is confusing for the jury and the witnesses. It is often challenging for the attorneys and full of leading questions. It is often done lazily or improperly and subject to multiple objections. With an adult witness, it is challenging for everyone involved.

For a child witness, especially a child who is the victim of abuse, this process is confusing, upsetting, and potentially terrifying. It does not produce accurate testimony. It

will also potentially only lead to the admission of very small portions of the forensic interview and likely provided to the jury with little context. Consider for instance a child who is attempting to testify and unintentionally misremembers a detail that the attorney knows is different from the interview. Going back and highlighting that the child has said something different may inform the child that they have made a mistake. The child going forward may now avoid providing additional detail for fear of doing something wrong. Adults may have similar thoughts, but a child is especially vulnerable to this process because children look to adults for guidance about how even conversations are supposed to work. Then, pretend that the child is confronted with a statement (either written or videotaped, it does not matter). When asked if the statement in the past is true, a child is likely to simply agree that they told the truth back in the interview. Children have difficulty understanding how it is they know what they know and asking a complex question about why an answer may be different today than back then is more likely to prompt an “I don’t know” answer and further complicate testimony going forward as the child now feels as if they have done something wrong. The proposed rule will be more efficient and provide more accurate information to the trier of fact. The jury will have the forensic interview to evaluate and both parties can point out the discrepancies or differences without the need for creating additional trauma for the child.

As for prior consistent statements made pursuant to Rule 801(d)(1)(b)(ii), Rules of Evidence, which are statements that are used to rehabilitate the declarant’s credibility as a witness when attacked on another ground, the responses provided suggest that this is the answer that Petitioners were really looking for to solve their problems and that the proposed

rule is unnecessary. Indigent Defense at 4-5; AACJ at 11; Advisory Committee at 3. Petitioners are going to go out on a limb and say what they believe many practitioners and judges are thinking. No one understands how this rule is to be used. The language is incredibly vague. There is no guidance provided by comments or case law. In fact, as of the time of the writing of this reply, a search of relevant case law reveals that there are no published Arizona cases on the use of this rule and only three unpublished cases (none of which spend more than a few sentences discussing the use of the rule). The review of federal case law reveals a dearth of useful information. Depending on how a trial court interprets the rule, a large number of statements could come in under this rule because most trials involve attacking declarants' credibility on "other grounds." This is especially true of abuse victims when there is often a lack of forensic evidence. It is hard to imagine any trial involving a child witness who is the victim of physical or sexual abuse where the defendant is not going to challenge the credibility of the child victim. But conversely, another judge may interpret the rule as being restrictive and not admit any statements from a forensic interview. This means there will be large inconsistencies between trial courts as to the admission of the same evidence which is never good for anyone. The fact that there is no case law is an indication that no one is using the rule, partly because no one understands the rule. Litigants need guidance as to the use of the rule and cannot rely on case law alone to carve out the proper boundaries of usage. This would lead to potentially many cases being retried after reversal on appeal. A better plan is for this Court to adopt the proposed rule.

One other issue worth addressing about the use of Rule 801(d)(1)(A) and Rule 801(d)(1)(b)(ii) is whether evidence presented for impeachment purposes (and by analogy,

also evidence presented to rehabilitate a witness whose credibility has been attacked) can be used as substantive evidence of the defendant's guilt. That answer has not been made clear in the past and must be considered when weighing the points raised in the responses. *See State v. Skinner*, 110 Ariz. 135 (1973) (suggesting that impeachment evidence can be used as evidence of defendant's guilt); *State v. Cruz*, 128 Ariz. 538 (1981) (impeachment evidence cannot be used as substantive evidence of guilt if it has the dual purpose of both impeaching the witness and proving the guilt of the defendant); *State v. Allred*, 134 Ariz. 274 (1982) (attempting to strike a balance between *Skinner* and *Cruz* which may in some cases lead to the exclusion of impeachment evidence depending on the amount of prejudice that may ensue from its admission).

One final note about the use of Rule 801(d)(1)(A) and Rule 801(d)(1)(B)(ii) is that neither rule requires pretrial notice or a hearing to determine admissibility. Petitioners can only surmise this is likely because evidence admitted under said rules are not to be used as substantive evidence for the truth of the matter, but for rebuttals to different attacks on credibility. It is not clear from the rules themselves. Petitioners are confused by suggestions that our rule proposal lacks a reliability finding but then in the same document suggest that the non-hearsay rules would be an equivalent method of admitting the same evidence. In fact, the rule proposal out of all the potential other methods of admitting evidence is the only one absent the residual exception itself that requires both the pretrial notice and hearing. The proposed rule explicitly addresses concerns about reviewing the admissibility of evidence with an eye to reliability, prejudice, and probative value.

**VI. The responses have shown that there is room for improvement in the drafting of the proposed rule and petitioners will indicate those changes in an amended version of the proposed rule.**

Based on suggested amendments provided by Indigent Defense, as well as consideration given to some of the issues raised in the responses, petitioners see fit to suggest several amendments. *See* Indigent Defense at 9-15. Petitioners recommend the following changes to the original draft of the proposed rule (amendments attached to this reply):

- 1) Amending proposed rule 807.01(b) to alter the notice requirement by requiring exceptional cause be found by the court when deciding if an untimely notice will be excused.
- 2) Adding a definition of “forensic interview.”
- 3) Removing proposed rule 807.01(g) which addressed conformity with any future legislative changes.
- 4) Removing language from proposed rule 807.01(e) that references an “in the interest of justice standard” and replacing it with language that is consistent with Rule 403, Rules of Evidence.
- 5) Adding language that states that admissibility under the proposed rule will not affect admissibility under any other rule.

There are several proposals that petitioners do not believe are appropriate but warrant a short discussion. Indigent Defense recommended that a forensic interview should only be admissible at trial if the child witness is still a minor at the time of the trial. Indigent Defense at 15. Petitioners believe this amendment is unwise for two reasons. First, the age of child witnesses at the time of trial has no impact on the accuracy of the forensic interview. A forensic interview conducted with a child under fifteen years of age continues to have substantial probative value even if many years have gone by and the child witness is

now an adult. Second, making admissibility conditional on when a case goes to trial is potentially problematic as it may lead to strategic decision-making aimed at taking advantage of the time limitations of the rule. For example, it could encourage a party to delay proceedings long enough for the child witness to turn eighteen or conversely, encourage a party to attempt to rush to trial or even charging a case prematurely in hopes of having the forensic interview qualify for admission under this proposed rule. There are also factors that are outside of the control of the litigants which could delay a trial. None of these conditions should impact the admission of substantive evidence at trial.

Petitioners are also not supporting the removal of this specific language in proposed rule 807.01(a)(2): “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).” This language complies with both the other Rules of Evidence and satisfies the requirements of the Confrontation Clause.

## CONCLUSION

Adopting the proposed rule would be another step forward in improving the accuracy of the trial process. For the reasons stated in the petition and the reply, petitioners urge this Court to adopt the proposed rule with the included amendments.

Respectfully submitted June 2nd, 2025.

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**Rule 807.01. Hearsay Exception; Statement Made by a Child to a Forensic Interviewer (amended draft)**

(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 extraordinary 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.
- (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 the probative value of the questions and the corresponding answers is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
- (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) **Admissibility Pursuant to Other Rules.** Nothing in this rule should be construed as to affect the admission of any statements made by a witness during a forensic interview pursuant to any other rules of evidence.
- (h) **Definitions.** For the purpose of this rule, the term “forensic interview” is defined as a semi-structured, cognitive interview

using research informed questions designed to elicit accurate information from a child witness.

COMMENT TO RULE:

While this rule does not expressly prohibit the trial judge from requiring the child who made the statements during a forensic interview to testify at an evidentiary hearing held pursuant to Section (c), it is presumed that it will not be necessary. Exceptions to this presumption should be exceedingly rare. In deciding whether to require the child to testify at an evidentiary hearing held pursuant to Section (c), the trial court should consider all of the circumstances but give special consideration to the potential adverse effects it will have on the child, the specific need stated as to why the child needs to testify at the hearing, if there are alternative means of obtaining the evidence required for the evidentiary hearing, and to the constitutional mandate that victims be treated with fairness, dignity, and respect and to be free from intimidation, harassment, or abuse throughout the criminal justice process.