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Attorney for the State of Arizona

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF:	)	
	)	R-10-0035
	)	
PETITION TO AMEND ARIZONA RULES OF EVIDENCE AND RULE 17.4(f) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE.	)	COMMENT OF THE PINAL COUNTY ATTORNEY TO PETITION TO AMEND THE ARIZONA RULES OF EVIDENCE AND RULE 17.4(f) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE
_____	)	

James P. Walsh, the Pinal County Attorney, hereby submits the following Comment to the Petition to Amend the Arizona Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure. As further developed in the arguments listed below, I have serious concerns about the proposed changes to Rules 702 and 801(d)(1)(A) of the Arizona Rules of Evidence.

RESPECTFULLY SUBMITTED this 19th day of May, 2011.

JAMES P. WALSH
PINAL COUNTY ATTORNEY

BY: _____
James P. Walsh
Pinal County Attorney

I. Introduction

As a general matter, I applaud the efforts of the Ad Hoc Committee on the Rules of Evidence in its effort to update the language of the Arizona Rules of Evidence and to make them more easily understandable. In fact**,** there are repeated assurances made throughout the Petition and the attached Appendix A which indicate that no substantial changes are intended by the restyling. However, there are some proposed substantive changes that will in my opinion be detrimental to public safety and which are not in the best interests of this state.

II. Specific Areas of Concern

A. Proposed Amendment to Rule 702, Arizona Rules of Evidence

As Pinal County Attorney, I do not support any changes to Rule 702 of the Arizona Rules of Evidence which deals with testimony by expert witnesses. I join with and support the arguments set forth by Maricopa County Attorney's Office in their comment to this Rule. They have very capably set forth the reasons for retaining the *Frye/Logerquist* standards for assessing and determining the admissibility of expert witness testimony and rejecting the Federal approach under Rule 702 which relies upon *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

What is important to note is that beginning with *State v. Valdez*, 91 Ariz. 274, 371 P2d 894 (1962) through the landmark case of *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000) the Arizona Courts for almost fifty (50) years have created an impressive body of legal precedent which has guided Arizona practitioners in this area. To cast aside this precedent for a different standard should be strictly scrutinized. Proponents of the *Daubert* approach have provided scant and at best anecdotal information on why the *Frye/Logerquist* standards are insufficient. They have failed to show how applying these standards has resulted in unreliable

findings and rulings. They have failed to show that moving to the Federal approach will be an improvement over the path taken by our courts for the last half century.

The debate over *Frye/Loberquist* and the *Daubert* trilogy has sparked a wide divergence of viewpoints. The State Bar in its comment to the Petition specifically noted that "because its numbers hold strongly divergent views on this issue, the State Bar is unable to take a position as to whether Federal Rule 702 should be incorporated into our state rules". The Ad Hoc Committee itself was hopelessly deadlocked, unable to make a specific recommendation and in fact put forth three options for the Supreme Court's consideration. Prosecutors statewide uniformly oppose any changes to current Rule 702 and believe that the Rule and case law developed over the past fifty years more than adequately protects the rights and interests of all parties involved.

Finally, moving to the Federal/*Daubert* approach will be costly and time consuming because it will spawn considerable litigation as practitioners argue over its scope and applicability to expert witness testimony. One only has to look as far as the legislature's attempt last year to statutorily establish the *Daubert* approach through the enactment of A.R.S. 12-2203. While the Court of Appeals in *Lear v. Fields*, 226 Ariz. 226, 245 P.3d 911 (App. 2011), ultimately held that the statute was unconstitutional as a violation of the separation of powers doctrine, prosecutors (including my own office) expended considerable resources in litigating this issue.

The old maxim is: "if it isn't broke, don't fix it." Rule 702 of the Arizona Rules of Evidence as currently written and interpreted by the Arizona courts is not broken. It doesn't need to be fixed or tampered with. The *Frye/Logerquist* approach adequately protects the rights and interests of Arizona litigants.

B. Proposed Amendment to Rule 801(d)(1)(A), Arizona Rules of Evidence

I join with the Comments filed by the Maricopa County Attorney's Office and the State Bar of Arizona in opposing changes to Rule 801(d)(1)(A) which deals with the admissibility of prior inconsistent statements.

Under the current Arizona rule and supporting case law a declarent's out of court statements are admissible if the declarent testifies at trial, is subject to cross examination concerning the statement, and the statement is inconsistent with the declarent's testimony. The proposed change to this Rule would mandate that the prior inconsistent statement be made under oath.

This change would have a profound impact on the handling of criminal cases, particularly gang, domestic violence, and sexual offenses involving children where victim/witness recantation is quite common. Under current practice, the prior inconsistent statement of the declarent/witness is seldom under oath. It is introduced however, as substantive evidence. The jury has the responsibility of weighing the trial testimony against the prior inconsistent statement and determining which statement to believe. This is a good process and one that enhances the truth finding function of the jury.

The State Bar of Arizona's Comment does an excellent job of outlining the differences between Arizona practice and the Federal system on the use of prior inconsistent statements. Both Arizona prosecutors and defense counsel share some of the same concerns in taking such a radical departure from our current practice. No evidence suggests that the current Arizona practice of admitting prior inconsistent statements that have not been made under oath has resulted in unjust and unfair verdicts. Furthermore, it is unreasonable to expect that statements made in the course of a criminal investigation are going to be under oath. Building

in a requirement that prior inconsistent statements be made under oath will adversely impact the prosecution of serious offenders and undermine our ability to protect some of our most vulnerable victims.

To the extent that there is concern about admitting out of court statements inconsistent with a witnesses' trial testimony, the Arizona Courts have developed a body of case law utilizing Rules 102 and 403 of the Arizona Rules of Evidence to address these issues.

In *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982) this Court outlined several factors for the trial courts to consider when a prior inconsistent statement is being used for substantive purposes and there is a concern of unfair prejudice to the defendant. The Court listed the following factors to be considered:

1) The witness being impeached denies making the impeaching statement, and
2) The witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or
3) There are other factors affecting the reliability of the impeaching witness, such as age or mental capacity, …
4) The true purpose of the offer is substantive use of the statement rather than impeachment of the witness,
5) The impeachment testimony is the only evidence of guilt.

655 Ariz. P.2d at 1329.

Using the *Allred* factors, Arizona Courts for the past thirty (30) years have conducted an analysis pursuant to Rule 403 of the Arizona Rules of Evidence to determine whether the probative value of the prior inconsistent statement is substantially outweighed by the danger of prejudice, confusion, or misleading the jury. *State v.Sucharew*, 205 Ariz. 16, 66 P.3d 59 (App. 2003) *State v. Miller*, 187 Ariz. 254, 928 P.2d 678 (App. 1996) *State v. Savant*, 146 Ariz. 306, 705 P.2d 1357 (App. 1985).

Used in conjunction with Rule 102 of the Arizona Rules of Evidence "which mentions both the ascertainment of truth and the just determination of proceedings", *Allred* and

the line of cases interpreting and applying the various *Allred* factors have created a good balance between admitting prior inconsistent statements and keeping out statements which are deemed too prejudicial.

III. Conclusion

Rules 702 and 801(d)(1)(A) of the Arizona Rules of Evidence should not be changed. Both have served Arizona well. They have withstood the test of time. The proponents of adopting Federal Rules 702 and 801(d)(1)(A) have simply not made their case for making such significant and impactful changes to Arizona law.

RESPECTFULLY SUBMITTED this 19th day of May, 2011.

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