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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: PETITION TO AMEND ARIZONA RULES OF EVIDENCE AND RULE 17.4(f) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE.	R-10-0035 MARICOPA COUNTY ATTORNEY'S COMMENTS TO PETITION TO AMEND ARIZONA RULES OF EVIDENCE AND RULE 17.4(F) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE

The Maricopa County Attorney hereby comments to the Petition to Amend the Arizona Rules of Evidence and Rule 17.4(f) of the Arizona Rules of Criminal Procedure.

Respectfully submitted this 16th day of May, 2011.

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BY: _____
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I. Introduction

The Ad Hoc Committee on Rules of Evidence by its staff, the Honorable Mark Armstrong, has filed R-10-0035, a petition to the Arizona Supreme Court to amend the Arizona Rules of Evidence to conform to the proposed restyled Federal Rules of Evidence. Throughout the Petition and the accompanying Appendix A, the reader is assured that "[t]he federal restyling is intended to update the language of the rules and make them more easily understood. No substantive changes are intended by the restyling..." Petition, p. 2. This assurance appears in nearly every comment following the proposed rule changes, as well as the addition that "[t]here is no intent in the restyling to change any result in any ruling on evidence admissibility." Appendix A. However, in several very important circumstances—outlined in more detail within this comment—these assurances are simply false. While many of the proposed rule changes are merely stylistic, others are incredibly substantive in nature and could severely hinder the administration of justice in Arizona. Most notably, the proposed changes to Rule 801(d)(1)(A), which would make any prior inconsistent statement not made under oath inadmissible, is a fundamental substantive change which ignores decades of criminal law jurisprudence in Arizona. Amending Rule 801(d)(1)(A) in such a manner would seriously undermine the prosecution of domestic violence and gang-related cases in which victims often recant their statements to police. This is but one example of a substantive change hidden in a document which purports to contain only stylistic changes, as detailed further herein.

In addition to making unnecessary and detrimental substantive changes, some of the proposed rules contradict the stated purpose of mirroring the federal rules, as they contain a jumble of Arizona and federal language. For example, the Committee ignored the federal language in Rules 104(d) and 408, even though such changes would have been innocuous; yet the Committee chose to adopt the federal language verbatim in Rules 201(f), 405(b), 410(a)(2), and 801(d)(1)(A),

to name a few—changes that may lead to major changes in how cases are handled in Arizona.

Another stated purpose of the Petition is to make the rules more easily understood. Yet some of the proposed changes, such as to Rule 410, simply add confusion to an area of the law that is currently very clear.

Arizona is not the federal system. The criminal cases tried in state courts differ dramatically from those tried in federal courts. Federal precedent and procedural rules also differ. While the Maricopa County Attorney's Office supports the effort to clarify the Arizona Rules of Evidence where they are unclear, merely restyling rules for the sake of consistency with the federal system, as the Petition proposes here, amounts here to shortsighted tinkering that will have an immediate and detrimental impact on the prosecution of cases throughout Arizona. For these reasons, the Maricopa County Attorney's Office opposes the following proposed changes, listed in the order in which they appear in the Petition.

II. Specific Responses to Proposed Rule Changes

A. Proposed Amendment to Rule 201(f), Arizona Rules of Evidence

The proposed change to Rule 201(f) would alter the manner in which juries are instructed regarding judicially noticed evidence. Under the current Arizona language, juries are instructed to accept any judicially noticed fact as conclusive. The proposed language would instruct jurors that they may or may not accept the judicially noticed fact as conclusive.

While the proposed change is truly nothing more than restyling from the standpoint of federal practice, it would constitute a reversal of Arizona practice. Judicial notice is taken of known information to avoid the time and expense of presenting evidence regarding that information. If the jury will now be instructed that it can disregard the judicially noticed information, the presenting

party is much more likely to present additional evidence so that the jury has independent proof of what should be a simple fact. Such a requirement is unnecessary and potentially wasteful.

B. Proposed Amendment to Rule 405(b), Arizona Rules of Evidence

The proposed change to Rule 405(b) would delete the reference to Rule 404(c), which deals with other act evidence in the prosecution of sex offenses. Despite the assurances in the Petition and Appendix that changes are stylistic only, this proposed change could easily be interpreted as deleting the exception in Rule 405(b) that allows the introduction of evidence of specific instances of conduct that fall under 404(c), resulting in probative evidence being excluded in the prosecution of sex crimes. While character evidence is admissible if it falls under Rule 404, the scope of what specific evidence may be admitted and the method by which such evidence is admitted are controlled by Rule 405.

Such other act evidence is extremely probative in the prosecution of sex crimes. Evidence of specific acts admitted under Rule 404(c) is used to show that the defendant possesses a character trait that gives rise to an aberrant sexual propensity to commit the sex offense alleged. If the trier of fact is limited to hearing only that a defendant molested someone in the past, without hearing the details of the molest, this would offer little insight into whether the defendant actually has a character trait that gives rise to an aberrant sexual propensity. For instance, it is much easier to show that a defendant has a character trait, such as an attraction to children, if the trier of fact hears that all victims were children, that the acts perpetrated on them were all done in a similar manner, and that the defendant provided the same explanation in every incident.

The Comment to Rule 404(c) states that Rule 404(c) is:

> [I]ntended to codify and supply an analytical framework for the application of the rule created by case law in State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977), and State v. McFarlin, 110 Ariz. 225, 517 P.2d 87 (1973). The rule announced in

> Treadaway and McFarlin and here codified is an exception to the common-law rule forbidding the use of evidence of other acts for the purpose of showing character or propensity . . . .

While the Maricopa County Attorney's Office understands the desire to have the Arizona Rules of Evidence follow the Federal Rules of Evidence, a potentially significant change should not be made at the expense of well-established Arizona case law regarding the admissibility of other act evidence in sex crimes prosecutions. The proposed change to Rule 405 could result in probative evidence being excluded in sexual misconduct cases, thus frustrating this Court's precedent in cases such as *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977), *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973) and *State v. Varela*, 178 Ariz. 319, 873 P.2d 657 (App. 1993), which acknowledged the importance of evidence of other specific acts of sexual misconduct. By deleting the reference to Rule 404(c), this proposed amendment could have an unintended but disastrous effect on the ability to effectively prosecute these crimes.

C. Proposed Amendment to Rule 410, Arizona Rules of Evidence

Rule 410 is essentially the criminal law counterpart to Rule 408, which provides that any pleas of guilty, including nolo contendere or no contest, even if subsequently withdrawn, are not admissible in any civil, criminal or administrative proceeding. The prohibition of use extends to any statements made in connection with the guilty plea.

The proposed amendment to Rule 410 would delete the phrase "no contest" and use only the Latin phrase "nolo contendere." The reason given for the change is to "conform" to its federal counterpart in order to make style and terminology consistent throughout the rules. The effect of this deletion, however, would be to create confusion and inconsistency, not clarity. The Maricopa County Attorney's Office opposes this proposal. At present, the phrase "no contest" is frequently used elsewhere in the rules, statutes and in the Arizona Constitution. For example, A.R.S. Const.

Art. 6.1 § 3, A.R.S. § 5-395, A.R.S. § 10-851, A.R.S. § 10-3851, A.R.S. § 12-693, A.R.S. § 13-607, all contain the "no contest" not the "nolo contendere" wording. Moreover, the deletion of "no contest" would create inconsistency and confusion with A.R.S. § 13-807 and Rule 17.4, Arizona Rules of Criminal Procedure, which specifically reference "no contest" pleas. If Rule 410 was to be changed and the reference to "no contest" omitted, many other statutes, rules and other references would also need to be changed. The Maricopa County Attorney's Office is concerned about this change for the reason that it does not appear to achieve the stated goal of "making the rules more easily understood." We believe that this change in the Rule is unnecessary and would create confusion and inconsistency.

D. Proposed Amendment to Rule 609(a), Arizona Rules of Evidence

The proposed changes to Rule 609 constitute another example of unnecessary tinkering with the Arizona Rules of Evidence. The Petition does not propose to adopt the federal rule outright. Instead, it picks parts of the federal rule's language and reorganizes the rule completely. While the increased clarity offered as a reason for the proposed amendment and is a laudable goal, the proposed changes to Rule 609 will only add confusion and uncertainty to a rule that is already easily understood.

For example, the Petition seeks to modify Rule 609 to divide witnesses into two classes – those who are witnesses in a civil or criminal case and those who are testifying criminal defendants. While this distinction is reflected in the federal rules, the reason for that distinction has no applicability to Arizona. In 1990, the federal rules were modified to address a specific case that had held that there was no requirement to conduct a Rule 403 analysis when deciding the admissibility of prior convictions for any witness other than a criminal defendant. *See Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989). The federal rule was then amended to specify that Rule 403

applied to the admissibility of priors for both types of witnesses. This history caused the separate treatment of witnesses.

The language and interpretation of Arizona Rule 609, however, even in 1990, already clearly required courts to conduct a Rule 403 type analysis when determining the admissibility of prior convictions for impeachment. The proposed change to the Arizona Rule is therefore completely unnecessary and will likely cause more confusion than clarity. In the proposed change, the first section deals with witnesses who are not criminal defendants and it requires the admission of felony convictions "subject to Rule 403." Petition, Appendix A, Rule 609(a)(1)(A). Subsection B deals with criminal defendants and it requires admission of the prior conviction "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Petition, Appendix A, Rule 609(a)(1)(B). Nothing in the Petition or accompanying Appendix provides any reason why Rule 403 is just referenced in the first subjection but specifically described in the second. This disparate treatment is likely to lead to confusion as courts struggle to discern whether they are expected to conduct a different analysis depending on who the witness is. This confusion is caused by picking bits of language from the federal rule that was added to fix problems that Arizona never had. Indeed, Arizona Rule 609 clearly states that the prior conviction is only admissible "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect. . ." Ariz. R. Evid. 609(a).

Arizona's current rule is clear and straightforward – it requires the same balancing test for all witnesses in all types of cases. Arizona Rule 609 has never had the confusion that the federal rule was attempting to clarify. Indeed, the federal rule was modified to work more like the Arizona Rule and now the petition seeks to take some operative language from the federal rule and put it into the Arizona Rule on the basis that this will somehow add clarity. Quite simply, the proposed

changes to Rule 609 are solutions in search of a problem.

Additionally, the Petition does not provide any specific justification for further qualifying the types of non-felony convictions that can be used as impeachment. The current language in Rule 609 simply states any conviction that "involved dishonesty or false statement…" is admissible. The proposed amendment adds "if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement." Petition, Appendix A, Rule 609(a)(2). Although this language is similar to language in the federal rule, again, there is no explanation for why the Arizona Rule needs to have this language added. Furthermore, the federal rule has a lengthy comment that helps explain how this additional language should be applied in practice, which includes instruction that "a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the fact finder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted." Advisory Committee Notes to Federal Rule 609, 2006 Amendments. No such comment or explanation would accompany the change to Arizona Rule 609. Thus, the language would be amended to conform to similar language in the federal rule but without the guidance the federal rules provide. This proposed change will add more confusion than clarity. Arizona's current rule is clear and the Maricopa County Attorney's Office asks that this Court leave it as currently written.

E. Proposed Amendments to Rules 701 and 702, Arizona Rules of Evidence

The Maricopa County Attorney's Office does not support changes to Arizona Rule 702 (and the corresponding changes to Rule 701) to conform to the Federal Rules of Evidence. The existing rules in conjunction with the test for the admissibility of novel scientific expert evidence based upon *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) have served Arizona well for many years.

A change in the language of the rules to conform to the federal versions and corresponding switch to the admissibility tests set forth in *Daubert* and its progeny offer more uncertainty than benefit.

The Ad Hoc Committee on Arizona Rules of Evidence was divided on whether to retain the current version of Rule 702 of the Arizona Rules of Evidence or adopt Federal Rule of Evidence 702. The Petition therefore provides three options for the Court's consideration:

> Three Committee members favored retaining the current Arizona rule, citing considerations of predictability and the right to a jury trial, and opining that the current rule is not broken. Three Committee members favored adopting the federal rule, citing considerations of uniformity and the interest in ensuring that unreliable evidence is screened, particularly in criminal cases. The remaining two Committee members suggested a hybrid proposal recommended by Professor Thomas Mauet of the James E. Rogers College of Law. Under this approach, the last prong of the federal rule ("the expert has reliably applied the principles and methods to the facts of the case") would not be included under the assumption that this issue should generally be left to the fact-finder.

Petition at 11.

The current version of Arizona Rule 702 (Testimony by Experts) provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Option A of the Petition would retain this language.

Option B in the Petition would read as follows:

> Rule 702. Testimony by Expert Witnesses
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> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue: (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Comment to 2012 Amendment

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise. The amendment is intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues. However, the rejection of expert testimony should be the exception rather than the rule. And, the trial court's gatekeeping function is not intended to serve as a replacement for the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

The preceding comment has been derived from the Notes to Federal Rule of Evidence 702. The Court also incorporates by reference the remaining Notes to the federal rule. Option C of the Petition would not include the subpart (d) of Option B.

There are presently two primary standards for the admissibility of expert opinion testimony in the United States. One is based on *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), and the other is premised on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) either alone, or as supplemented by subsequent cases. Under the *Frye* test, trial judges are charged with determining whether a scientific principle has "gained general acceptance" in the relevant scientific community such that an expert, whose testimony is based on that principle, may be regarded as sufficiently reliable to be permitted to testify. *Frye*, 293 F. at 1014. Arizona adopted the *Frye* test of "general acceptance" in 1962. *See State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962). Since that date, Arizona has used the *Frye* standard as the prevailing standard concerning the admission of scientific/expert testimony and opinions.

Even when Arizona adopted its version of the Rules of Evidence in 1977, Arizona courts continued to consistently apply *Frye*. In Arizona, *Frye* has usually been applied to cases involving the results of physical scientific tests. *State v. Bible*, 175 Ariz. 549, 576-82, 858 P.2d 1152, 1179-85

(1993) (DNA evidence); *State v. Velasco*, 165 Ariz. 480, 486-87, 799 P.2d 821, 827-28 (1990) (silica gel blood alcohol test.) In a variety of other situations, *Frye* has been found inapplicable. *See e.g. State v. Roscoe*, 145 Ariz. 212, 219, 700 P.2d 1312, 1319 (1984) (dog tracking); *State v. Varela*, 178 Ariz. 319, 325-26, 873 P.2d 657, 663-64 (App. 1993) (general characteristics of child sexual abuse victims).

In 1993, the United States Supreme Court was faced with interpreting Rule 702 of the Federal Rules of Evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579 (1993). The Court noted that *Frye* preceded the adoption of the Federal Rules of Evidence and concluded that Rule 702 of the Federal Rules of Evidence actually liberalized the use and admission of opinion evidence. The Court then crafted the *Daubert* standard, by interpreting Rule 702 to have an implied reliability screen that would permit a trial judge to determine the reliability of a qualified expert's testimony. In *Daubert*, the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony.

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony: (1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. 509 U.S. at 592-94.

But *Daubert* was really just the beginning. The next two cases in the *Daubert* trilogy expanded the court's reliability inquiry and made the *Daubert* test far broader than *Frye*. In *General*

Electric Co. v. Joiner, 522 U.S. 136, 151-52 (1997), the Supreme Court held that abuse of discretion was the proper standard by which to review a trial court's decision to admit or exclude scientific evidence. In addition, although *Daubert* had stated that the trial court was not to focus on an expert's conclusions in determining reliability and admissibility, *Joiner* made it clear that a trial court could actually scrutinize the expert's reasoning process (conclusions) as well as the expert's methodology. *Daubert* and its progeny have put judges in the role of actually evaluating the methods and conclusions of scientists to determine if such expert testimony should be presented to the jury.

In the third decision of the *Daubert* trilogy, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that the *Daubert* test applied to all Rule 702 experts and not just scientific experts. This was a significant expansion of both the *Frye* and *Daubert* decisions, which had been limited to experts who based their opinions on scientific techniques, tests and experiments. The Federal Rules of Evidence were amended in 2000 to reflect the holdings of the *Daubert* trilogy and to add the following factors to Rule 702: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

As can be seen from the foregoing, what is known as the "*Daubert* test" used in federal courts actually incorporates the holdings of three different Supreme Court decisions. Not every state that has adopted the holding of the *Daubert* case has adopted the holding of all three cases in the trilogy. Only nine of the *Daubert* states have either explicitly or implicitly adopted all of the holdings of the trilogy; six states have adopted the reasoning and holdings of both *Daubert* and

Kumho Tire, but have not adopted *Joiner*.

Thus, labeling a state as a "*Daubert*" state does not reveal whether the state has adopted all of the holdings of the cases in the *Daubert* trilogy, whether the *Daubert* test is applied to experts' reasoning processes and conclusions (*Joiner*) or just their methodology (*Daubert*) to scientific experts only (*Daubert* and *Frye*) or to all experts (*Kumho*) and it also does not reveal whether the standard of appellate review is for abuse of discretion (*Joiner*) or the *de novo*[1] standard required in most *Frye* jurisdictions. David E. Bernstein and Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 Jurimetrics J. 351, 356-57 (Spring 2004). To the extent that these jurisdictions do not embrace the complete *Daubert* trilogy, they also do not conform to the current form and interpretation of Federal Rule 702.

While the *Daubert* control of the states may have been overstated, the remaining influence of the *Frye* standard throughout the nation has been understated. While 17 "*Frye*" states still represents a substantial minority of the jurisdictions, that number includes jurisdictions such as California, Florida, Illinois, New York, Pennsylvania, and Washington. Since these jurisdictions are among the most populated and litigious states, even today *Frye* is still the governing law at most state trials. Professor Edward J. Imwinkelreid, *Expert Testimony Trends in State Practice and the Uniform Rules of Evidence*, American Law Institute (2008).

It has been 18 years since *Daubert* was decided by the United States Supreme Court. In that time, in case after case, the Arizona Supreme Court has declined to jettison *Frye* and replace it with *Daubert*. *State v. Bible*, 175 Ariz. 549, 858 P.2d (1993); *State v. Johnson*, 186 Ariz. 329, 331, 922 P.2d 294, 296 (1996); *Logerquist v. McVey*, 196 Ariz. 470, 473, 1 P.3d 113, 125 (2000). As the

[1] In Arizona, under *Frye*, appellate courts conduct a de novo review to determine whether a scientific principle used as a basis for expert testimony is generally accepted in the relevant scientific community. *State v. Johnson*, 186 Ariz. 329, 334, 922 P.2d 294, 299 (1996).

Logerquist Court noted when rejecting the *Daubert* standard, "nothing in the comments of this Court or its committees indicated that a reliability standard was contemplated by our adoption of Ariz.R.Evid. 702." *Logerquist*, at 485, 1 P.3d at 128. The Court further found that based on the Rule's text and on case law decided after the adoption of Rule 702, it could not now "discover such a standard implicit in the language of the rule." *Id.* Similarly, in *Bible, supra*, the Arizona Supreme Court noted that *Daubert* was a departure from Rule 702 as it has been interpreted by Arizona courts. *Bible*, at 580, 858 P.2d at 1183.

Another conflict identified by the Arizona Supreme Court between the *Daubert* trilogy and the Arizona Rules of Evidence related to the type of testimony to which each applies. Our rules of evidence use the *Frye* test, which only applies to novel scientific principles. *Logerquist*, at 485-86, 1 P.3d at 128-29. Unlike *Frye*, however, the *Daubert* line of cases is not so limited. They apply to *all* cases involving expert testimony. *Logerquist*, at 486, 1 P.3d at 130; *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

As discussed above, *Frye* has been found inapplicable to many types of expert testimony in Arizona. These types of evidence do not fit neatly into the reliability evaluation criteria of the *Daubert/Kumho Tire* box. For instance, the Arizona Supreme Court has determined that child abuse is an appropriate topic for the introduction of expert testimony. *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000); *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (1986); *State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (App. 1996). Yet, the area of child sexual abuse characteristics cannot be tested to show the demonstrable error rates and testing results that areas such as DNA analysis or gas chromatography may show. One of the reasons for that difference is the limitations of scientific study that are ethically permissible in this area. It is not ethical or legal to establish a control group of children, sexually abuse them, and then observe and study the children afterwards to see how

they behave.

When the Arizona Supreme Court rejected *Daubert*, it also specifically pointed out that *Daubert's* gatekeeper role would allow judges to improperly "encroach on the province and independence of the jury" in violation of Arizona constitutional guarantees. *Logerquist*, 196 Ariz. at 490, 1 P.3d at 133.

> Our constitution preserves the "right to have the jury pass upon questions of fact by determining the credibility of witnesses and the weight of conflicting evidence." *Burton v. Valentine*, 60 Ariz. 518, 529, 141 P.2d 847, 851 (1942). The framers' intent does not contemplate giving judges the power to determine reliability and credibility of a qualified expert as a prerequisite to submission of the expert's conclusions to a jury for its determination of the weight to be given to the testimony.

Id. at 487, 1 P.3d at 130.

After noting that Ariz. Const. Art. 6, § 27 prohibits judges from instructing juries with respect to "matters of fact" and from commenting on the evidence, the *Logerquist* Court further stated:

> It would be strange that a judge forbidden to comment on the reliability or credibility of testimony would be empowered to preclude the jury from hearing the testimony at all because the judge believes it to be unreliable or not worthy of belief. Reduction or obliteration of the jury function may be seen by some as the ultimate tort reform, but it is one prohibited by our organic law.

The current version of Rule 702 and the *Frye* test have served Arizona well for many years. *Logerquist* pointed out the multiple downsides of *Daubert* and its progeny more than ten years ago and those criticisms are still sound. The prediction that Arizona will be left behind in the dust by a nation of *Daubert* states has been built on claims of consistency between state standards that are in a large part illusory. Even many of the federal decisions are conflicting. Amending Rule 702 to adopt the *Daubert* trilogy will result in time-consuming and costly litigation marked by repetitive *Daubert* mini-trials and attempts to reconcile and apply the conflicting federal decisions applying

Daubert and its progeny. As if our judges do not have enough to do with their already spiraling caseloads and overcrowded dockets, they must now study all manner of scientific disciplines prior to trials. And not just a cursory study – the judges must learn enough to determine not only if the experts' methods are valid, but also if their conclusions are sound.

Cases have been, and can be, effectively handled with the rules presently available to the courts without amending Rule 702. Given the fact that judges have a great deal of authority under Rules 104(a), 105, 702 and 403 to preclude evidence from unqualified witnesses, to limit the use of evidence, and to exclude evidence that is more prejudicial than helpful belies the need for change. The Maricopa County Attorney's Office urges maintaining the status quo in Arizona for the admissibility of expert witness testimony and evidence.

F. Proposed Amendments to Rule 801(d)(1)(A), Arizona Rules of Evidence

The Petition seeks to amend Rule 801(d)(1)(A) "to require that a prior inconsistent statement be made under penalty of perjury in order to be considered non-hearsay under this rule." There is no further discussion of the merits of the change contained in the petition.

The concepts embodied in the current Rule were first discussed and adopted by the Arizona Supreme Court in *State v. Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973). In addressing issues similar to those raised by the Petition the Court stated:

> ...we believe that the better rule is to allow the substantive use of such statements, when properly admitted, and not limit them for impeachment only. In doing this we are persuaded by the futility of requiring that the trier of fact, be it judge or jury, consider such statements for the purpose of impeachment only and not for the truth of the facts stated.

110 Ariz. at 142, 515 P.2d at 887.

Conversely, the current federal rule was not adopted by the U. S. Supreme Court. In fact, it is the product of political compromise. See H. R. Conf. Rep. 93-1597 at p. 6. The federal rule was enacted by Congress despite the fact the U. S Supreme Court proposed a rule that was similar to the Arizona Rule. See *Skinner*, 110 Ariz. at 141, 515 P.2d at 886.

It is important to note that the proposed amendment to the Rule is not merely cosmetic, as the Petition indicates. The change will have a profound impact on criminal trial practice in our courts. Such a sea change in a rule of evidence deserves a much more thorough and thoughtful discussion of the merits and impact of the proposed amendment. The pros and cons--whether the change aids or inhibits the truth finding process, whether there will be an impact to public safety, whether costs to litigants and/or the court will increase—these questions should all be answered before 28 years of jurisprudence are abandoned.

In certain criminal cases victims or witnesses tend to recant their original statements to police. For instance, in gang related cases it is not uncommon for victims or witnesses to recant because of intimidation from the defendant's gang. Similarly, in domestic violence cases victims frequently recant—because they still love the defendant, they fear retaliation, they depend on the defendant for financial support, they don't want to deprive their children of a father, and a number of other reasons. This is also the case in many child sexual and physical abuse cases. In all of these cases, the proposed rule change creates a barrier to the truth finding process. It is also an impediment to justice, as the trier of fact would not be allowed to consider arguably the most accurate statement of the witness—the statement made to police immediately following the event.

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Many commentators have decried the language in the Federal Rule for these reasons.[2]

If the proposed rule change is made, costs to the criminal justice system would certainly increase. State prosecutorial agencies do not have the resources to have every witness deposed. Prosecutors across the state would most likely obtain sworn witness statements in the most convenient forum available to them—the preliminary hearing. The increase in preliminary hearings would not just lead to greater costs for courts, prosecution agencies and criminal defenders, but it would also greatly inconvenience victims and witnesses subpoenaed to testify at these proceedings. In short, the criminal justice system would become more costly and less efficient.

The alternative, however—not preserving the statements of witnesses who are likely to recant—would have an immediate and detrimental impact on public safety. Without the ability to present the witness's contemporaneous statements to the trier of fact, prosecutors would be less likely to go to trial when the victim or witness is recanting. In those cases that did go to trial,

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[2] "Many batterers continue to prevent the truth from being told in the courtroom by instilling fear in their victims. The legal system provides the coerced victim ample opportunity to prevent the introduction of reliable evidence. When a victim recants or fails to appear at trial, the victim's words or actions combine with the hearsay rule to exclude the victim's reliable out of court statements. In turn, exclusion results in inadequate or a lack of substantive evidence with which to prove the offense. Since the hearsay rule excludes reliable prior statements of the abuse, victim recantation and no-show at trial results in failure to charge, dismissal, or acquittal in cases of domestic violence." Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3 (2002); "I propose that the solution to this unnecessary obstacle to domestic violence prosecutions and to this undeserved benefit to the defendant is to allow the jury to consider prior inconsistent statements of a testifying witness as substantive evidence of the charged crime. Such an amendment is well-founded for numerous reasons. ...current Federal Rule of Evidence 801(d)(1)(A), which imposes a requirement that the prior statement be made under oath, seems to contradict Crawford. In addition, the Crawford Court recognized that cross-examination is the only constitutionally relevant reliability determinant. As a result, by requiring an oath, Rule 801(d)(1)(A) imposes a separate and unnecessary reliability aspect. Additionally, allowing substantive use of prior inconsistent statements recognizes the intent behind the rule as originally proposed: preventing witness intimidation. In 1972, the Supreme Court proposed allowing the substantive use of prior inconsistent statements of witnesses who testified in court and were subject to cross-examination. Largely due to the impact of Watergate, Congress rejected the Supreme Court's rule. Restoring the Supreme Court's proposed rule is even more relevant today in light of Crawford's new limitations and the witness intimidation that is rampant in domestic violence cases." Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in a Post-Crawford World*, 27 Pace L. Rev. 199, 200 (2007).

conviction would be less likely, as the trier of fact would be unable to consider compelling and incriminating evidence.

For these reasons, the Maricopa County Attorney strongly opposes the proposed amendment to Rule 801(d)(1)(A).

G. Proposed Amendments to Rule 801(d)(2), Arizona Rules of Evidence

The Petition seeks to amend Rule 801(d)(2) to include the final sentence of its federal counterpart, which reads:

> The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Rule 801(d)(2), Federal Rules of Evidence.

This language was added in 1997 specifically to address the holding in *Bourjaily v. United States*, 483 U.S. 171 (1987). In *Bourjaily*, the U.S. Supreme Court granted review of a criminal case in which the Petitioner challenged his convictions for possession of cocaine with intent to distribute and conspiracy to distribute cocaine, in violation of federal law. *Bourjaily*, 483 U.S. at 173-74. The Supreme Court noted that it granted review specifically to resolve three issues:

> (1) whether the court must determine by [only] independent evidence that the conspiracy existed and that the defendant and the declarant were members of this conspiracy; (2) the quantum of proof on which such determinations must be based; and (3) whether a court must in each case examine the circumstances of such a statement to determine its reliability.

Id. at 173. The Supreme Court concluded that trial courts may consider (indeed must consider) the co-conspirator's statement itself in determining whether the conspiracy existed. *Id.* at 180-184.

Additionally, prior to this rule change, the federal appellate courts had already determined that some quantum of independent evidence of the conspiracy must exist to obtain a conviction on a

charge involving conspiracy.[3] Thus, in the federal system, the amendment to the rule did nothing more than state the previous substantive holdings of the various federal courts, and after *Bourjaily*, the U.S. Supreme Court.

The Maricopa County Attorney's Office opposes the proposed amendment, as it is a substantive and disruptive change to Arizona practice.[4] The federal language directs the finder of fact to attribute to a co-conspirator's statement(s) a certain amount of weight, an issue which, according to existing Arizona case law, is for the jury to decide. *State v. Fimbres*, 222 Ariz. 293, 297, 213 P.3d 1020, 1024 (App. 2009); *State v. Fischer*, 219 Ariz. 408, 420, 199 P.3d 663, 675 (App. 2008).

The proposed change will not clarify the rule; instead, it will confound trial courts and juries, who would be told, contrary to current jury instructions, that they must now have independent evidence of a conspiracy before deciding that one exists.

While this Court certainly has authority to make procedural rule changes, that authority does not extend to increasing the statutory elements of a crime or changing the burden of proof imposed upon the State, which is exactly the impact this proposed amendment could have *Lear v. Fields*, 226 Ariz. 226, 245 P.3d 911 (App. 2011).

This proposal, rather than being merely stylistic or clarifying, could very substantively interfere with the State's ability to prove the existence of criminal conspiracies via a co-conspirator's statements. *See State v. Nightwine*, 137 Ariz. 499, 502-03, 671 P.2d 1289, 1292-93 (App. 1983). Under Arizona law, such statements alone are sufficient to establish the accused's

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[3] Notes of Advisory Committee on Rules – 1997 Amendment (http://www.law.cornell.edu/rules/fre/ACRule801.htm).

[4] MCAO does not oppose that part of the amendment concerning the modification of the word "admission(s)" in Rule 801(d)(2) to "statement(s)".

participation in, and knowledge of, the conspiracy. *Id.*; *see State v. Dunlap*, 187 Ariz. 441, 458-59, 930 P.2d 518, 535-36 (App. 1996) (co-conspirator's diary admissible to show defendant's participation in scheme to commit murder); *see also State v. Robinson*, 153 Ariz. 191, 204, 735 P.2d 801, 814 (1987) (citing to *U.S. v. Inadi*, 475 U.S. 387 (1986) ("co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence").)

For these reasons, the Maricopa County Attorney's Office opposes this proposed amendment and urges further discussion before such a potentially disruptive change is contemplated.

H. Proposed Amendments to Rule 804(b)(1)(B)

There is no opposition to the proposed amendments to Rule 804(b)(1)(B), Arizona Rules of Evidence, as it is truly just a stylistic change. However, there is a drafting error that should be pointed out. The proposed changes to 804(a)(5)(A), include a reference to Rule 804(b)(1) or (5). However, the proposed changes to Rule 804 also include the deletion of section (b)(5). It is assumed that 804(b)(6) was intended to be renumbered as (b)(5). The Maricopa County Attorney's Office simply requests that these sections be reviewed and that the appropriate corrections be made.

III. Conclusion

While consistency and clarity are absolutely laudable goals, the proposed changes listed above do not achieve those goals. To the contrary, they will be disruptive and potentially damaging

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to a system which is not in need of such changes. At a minimum, further discussion and research should occur before such changes are seriously considered.

Respectfully submitted this 26th of May, 2011.

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BY: _____
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