BARBARA LAWALL
PIMA COUNTY ATTORNEY
32 N. Stone, 14TH Floor
Tucson, AZ 85701
Telephone: (520) 740-5600
Facsimile: (520) 740-5495
State Bar No. 004906
Law Firm No. 69000
Barbara.LaWall@pcao.pima.gov

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	)	Petition No. R-10-0035
	)	
ARIZONA RULES OF EVIDENCE, ARIZONA RULES OF CRIMINAL PROCEDURE	)	COMMENT OF THE PIMA COUNTY ATTORNEY RE THE PETITION TO CHANGE RULE 801 OF THE ARIZONA RULES OF EVIDENCE

BARBARA LAWALL, the Pima County Attorney, hereby opposes the proposed change to Rule 801, Arizona Rules of Evidence.

DATED this 20th day of May, 2011.

s/Barbara LaWall
BARBARA LAWALL
PIMA COUNTY ATTORNEY

TABLE OF CONTENTS

Table of Authorities....3

Preliminary Statement....4

Argument....5

1. There is no need to change the definition of a prior inconsistent statement....5

2. Adopting federal Rule 801(d)(1) would have negative and expensive consequences for the criminal justice system in our state....8

Conclusion....14

Certificate of Service....16

TABLE OF AUTHORITIES

CASES

State v. Allred, 134 Ariz. 274, 655 P.2d 1326 (1982) 7

State v. Ortega, 220 Ariz. 320, 206 P.3d 769 (App. 2008) 7

State v. Salazar, 216 Ariz. 316, 166 P.3d 107 (App. 2007) 7

State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973) 5, 7

RULE

Ariz. R. Crim. P. 15.3.....13

OTHER

O. Holmes, *The Common Law* (1881) 7

PRELIMINARY STATEMENT

¶1 Along with other prosecutors throughout Arizona, the Office of the Pima County Attorney is dedicated to protecting public safety by holding criminal offenders accountable while simultaneously upholding the constitutional rights of both offenders and their victims. Amending Rule 801(d) of the Arizona Rules of Evidence to change and substantially narrow the definition of prior inconsistent statements would have a devastating effect on the ability of prosecutors across the state to secure justice in many cases.

¶2 Our rule currently permits the use of recorded interviews of victims and witnesses if they should later testify in court in contradiction of their earlier statements. These statements usually come from two sources. First, victims and witnesses make statements during the law enforcement investigation of the crime. Second, under prevailing custom and practice, defense attorneys typically conduct pretrial interviews of the State's witnesses. Statements made in those interviews may be admitted at trial as prior inconsistent statements, often to the benefit of defendants. They are a great asset to juries in determining the truth of a matter. Adopting federal Rule 801(d)(1) would deprive both prosecutors and defendants of this crucial evidence, making the search for truth more difficult while providing no countervailing benefits.

¶3 The proposed change would effect a seismic shift in the way our criminal justice system functions, at considerable cost to the State, defendants, the courts, and

ultimately the public. These costs are more than monetary. The greatest loss would be the loss of important evidence. There also would be emotional costs to victims and witnesses. Conversely, on the other side of the ledger, we would receive little, if any, real benefit from the change. In short, adopting the federal rule would be detrimental to the people of Arizona. There is simply no convincing reason to adopt the federal definition.

ARGUMENT

1. There is no need to change the current definition of a prior inconsistent statement.

¶4 The only justification proponents offer for adopting federal Rule 801(d)(1) is the "belief that statements made under the threat of perjury are more reliable." This is theoretical nonsense. This belief appears to rest on the assumption that victims and witnesses always lie in their out-of-court statements and always tell the truth when they are under oath, an assumption that has no factual basis in the real world.

¶5 The reliability and use of out-of-court statements have been the subject of Arizona criminal jurisprudence since at least 1973, when this Court held in *State v. Skinner*[1] that "the better rule is to allow the substantive use of [prior inconsistent] statements, when properly admitted, and not limit them for impeachment only." In so holding, the Court relied on the then-proposed federal Rule 801(d)(1). The Court

1. 110 Ariz. 135, 142, 515 P.2d 880, 887 (1973).

quoted a highly pertinent part of the Federal Advisory Committee's Note to Rule 801(d), which in turn quoted a comment to the California Evidence Code. That comment acknowledges the reality of what happens before and during trial:

> [The California Evidence Code] admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, [the California Evidence Code] will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

¶6 In other words, our current rule accords with everyday reality, not theory. Real life experience teaches that statements made under "threat of perjury" are not consistently any more or less reliable than those made under different circumstances. Except for the fact that most out-of-court statements are now electronically recorded, nothing in the practical realities of criminal prosecutions has changed since 1973. Although no longer referred to as "turncoat" witnesses, those witnesses who recant, forget, or feign forgetfulness still appear regularly in Arizona criminal cases.

¶7 In addition, we now have more than three decades' worth of settled jurisprudence guiding the interpretation and implementation of our current Rule 801(d)(1). This jurisprudence recognizes the "real world" challenges of holding criminals accountable for their conduct while guarding the integrity of the criminal justice system by ensuring the reliability of any out-of-court statements admitted in evidence.[2]

¶8 As Justice Holmes famously noted, "The life of the law has not been logic: it has been experience."[3] Experience shows that out-of-court statements are often just as reliable, if not more reliable, than statements made under oath. This Court was correct in *Skinner* in 1973. The standards for out-of-court statements embodied in our Rule 801(d)(1) have worked effectively for more than 30 years in allowing the admission of crucial evidence in criminal cases while still preventing the wholesale use of unreliable hearsay in our courtrooms. There is no need to change our thoughtful and

---

2. *See, e.g., State v. Allred*, 134 Ariz. 274, 277, 655 P.2d 1326, 1329 (1982) (listing factors to consider in weighing danger of unfair prejudice from use of prior inconsistent statements); *State v. Ortega*, 220 Ariz. 320, 330, ¶¶ 33-34, 206 P.3d 769, 779 (App. 2008) (where witness either did not remember or denied making prior statements, prosecutor could use prior statements for impeachment; to the extent testimony "was unreliable because it was inconsistent, this was an issue of credibility for the jury to resolve"); *State v. Salazar*, 216 Ariz. 316, 319-20, ¶¶ 15-16, 166 P.3d 107, 110-11 (App. 2007) (affirming admission of prior statements when victim had feigned forgetfulness).

3. O. Holmes, *The Common Law* 1 (1881).

well-reasoned case law merely for the sake of conforming to the Federal Rules of Evidence.

2. Adopting Federal Rule 801(d)(1) would have negative and expensive consequences for our state's criminal justice system.

¶9 Recorded interviews, whether conducted by law enforcement officers or attorneys, are integral to the effective prosecution of dangerous defendants who commit homicides, gang crimes, domestic violence offenses, and child sexual abuse. With these types of crimes in particular, the recanting or "forgetful" witness is common. Witnesses and victims are generally cooperative with law enforcement in the early stages of a criminal investigation. Their initial statements to investigators typically provide the best evidence of what crime was committed, how it was committed, and by whom it was committed. Later, driven by fear of retaliation, witnesses to gang crimes often change their stories on the witness stand in homicide or aggravated assault cases, frequently because they or their families have been threatened. The State's ability to use prior inconsistent statements at trial is essential in these cases to provide the jury with all of the relevant evidence and let it decide issues of credibility.

¶10 The State's ability to use prior inconsistent statements is especially critical in child sexual abuse cases. The only witness to these crimes is typically the victim. Tragically, most child sexual abuse perpetrators either reside in the same household as their victims or are closely related to them. Consequently, most victims of childhood

sexual abuse delay disclosing the abuse for months or even years. Quite often this disclosure is made to a friend, teacher, or counselor. When the disclosure is reported to law enforcement authorities, child victims are formally interviewed by qualified forensic interviewers trained to obtain the most accurate and reliable information about the crimes that have been committed.

¶11 Once sexually abused children finally gather the courage to disclose, many are pressured by their offenders and other family members to recant. It is of vital importance that juries hear of those initial disclosures and the specialty interviews conducted before the child was pressured to recant. The alternative under the proposed rule would require the child, and perhaps the friend or teacher to whom she first disclosed the abuse, to testify under oath. Typically this would occur at either a grand jury proceeding or a preliminary hearing, neither of which affords the safeguards of a forensic interview. Both settings would cause additional stress and fear for the child. In other words, there would be great harms involved, both to the truth-finding process and to the child victim, while the corresponding benefits would be minimal, at best.

¶12 Amending Rule 801(d)(1) as proposed also would have a direct, adverse effect on the prosecution of domestic violence offenses. These cases already pose unique challenges that make it difficult to hold offenders accountable. The proposed change to Rule 801(d)(1) would render those challenges nearly insurmountable.

¶13 In a typical domestic violence case, a victim calls 911 and makes statements to law enforcement seeking protection and safety for herself and her family during, or in the immediate aftermath of, an assault. But later, the overwhelming majority of victims choose not to cooperate in the prosecution of their abusers. At the very least, these victims will frequently minimize the offender's behavior in their testimony. Some choose to claim they don't remember the events. Others tell a completely different version of events at trial than the version they told police initially. Only by introducing those prior out-of-court statements can the State hold offenders accountable when their victims fail to cooperate.

¶14 There are several factors that account for these victims' behavior. First, during the time between the offense and trial, victims of domestic violence often are harassed, intimidated, and pressured to tell prosecutors that they lied so the prosecutor will dismiss the charges. When an offender realizes that a case will not be dismissed, he then often harasses, threatens, and pressures the victim to testify in court either that she does not remember what happened or that she lied to police. Our prosecutors have listened to hundreds of recorded jail calls in which an offender has pressured a victim directly. Our prosecutors have also listened to calls in which an offender has pressured family and friends to pressure the victim. Second, the same factors that lead victims to return to an abusive relationship also lead them to minimize or recant at trial. These factors include economic dependence, emotional dependence, fear of losing their

children, and fear of being harmed or killed if they leave the abuser. Thus, there are significant and logical reasons for victims of domestic violence to offer inconsistent statements in court by the time a case goes to trial.

¶15 For the same reasons, these victims' initial out-of-court statements to law enforcement officers are often the most reliable and accurate description of events. Such statements are typically made immediately after the events occurred and usually when a victim is seeking assistance or protection. In addition, they are made before the abuser has had an opportunity to intimidate, harass, or influence the victim and before the victim has had time to consider any of the factors listed above. Under our current rule, these out-of-court statements can be introduced at trial so that a jury can decide, based on all the evidence, what really happened.

¶16 If Rule 801(d)(1) is changed, the challenges that already make domestic violence prosecutions so difficult could well become insurmountable. Although prosecutors do have the ability to take felony cases to preliminary hearings in order to preserve victims' testimony, we do not have that option in misdemeanor domestic violence cases. Importantly, holding offenders to account for misdemeanor acts of domestic violence often prevents escalation to much more serious crimes. It is thus reasonable to fear that, if we lose the ability to successfully prosecute these less serious offenses, the domestic violence homicide rate will rise.

¶17 Changing Rule 801(d)(1) would have two immediately harmful consequences. As already discussed, juries in pending cases will not hear critical evidence gathered in pretrial interviews when witnesses later change their stories. Some guilty and dangerous defendants will go free. Violent offenders and child abusers will be able to more effectively evade justice by using threats, intimidation, and further violence to coerce recantations.

¶18 Over the longer term, there would be other significant consequences to Arizona's criminal justice system. Without the ability to introduce pretrial interviews and statements made to law enforcement officers, prosecutors would need to have virtually every prospective witness testify before trial, either in a preliminary hearing or before a grand jury. In Pima County, we already use preliminary hearings in most felony domestic violence cases.[4] Often, the victim and the case detective are the only witnesses at the preliminary hearing. Even conducting preliminary hearings in just this one kind of case and presenting only two witnesses at those hearings, we have significantly burdened the Justice Court and our office. By requiring us to hold preliminary hearings in many more felony cases and to call more witnesses at each of those hearings, the proposed rule change would clearly result in higher prosecution costs statewide in return for little demonstrable benefit.

---

4. We do not use preliminary hearings in most other kinds of felony cases, which are typically presented to the grand jury instead.

¶19 In addition, victims have the right to refuse to be interviewed or deposed by a defendant or the defendant's attorney. But under the proposed rule, unless a victim testified before the grand jury or at a preliminary hearing, the victim would have to be deposed to preserve his or her statements for possible future use. The result would be a significant erosion of the constitutional protections afforded crime victims in Arizona.

¶20 Under the current rule, depositions are not often taken in criminal cases. Most witnesses agree to an interview with defense counsel, which can be scheduled at the convenience of the participants. The interviews are recorded and can be transcribed, if necessary, by the parties. Such interviews are an important aspect of pretrial discovery and have been managed smoothly over the years. Potentially unavailable or uncooperative witnesses can be subject to deposition pursuant to Rule 15.3 of the Arizona Rules of Criminal Procedure.

¶21 Adopting federal Rule 801(d)(1) would change all that. Because pretrial interviews could no longer be introduced at trial as prior inconsistent statements, they would have limited use. Depositions would be necessary, but Rule 15.3 provides for depositions only of unavailable or uncooperative witnesses. As long as a witness is available and willing to grant an interview, no deposition can be ordered under Rule 15.3. In addition, taking a deposition means paying a court reporter. Countless thousands of interviews are conducted in criminal cases in Arizona every year. In this

time of deep budget cuts and dire economic forecasts, prosecutors and public defenders can ill afford the increased costs of taking depositions that the proposed rule change would impose.

¶22 Requiring all witnesses to testify at a preliminary hearing or before a grand jury would entail significantly greater costs in money, personnel, and time just to initiate a criminal proceeding. And those costs would not be borne only by prosecutors and defendants, but also by victims, witnesses, law enforcement agencies, and the courts. Ultimately, the greater societal costs of changing the rule would be borne by the public at large. Those costs are too great, and the benefits too few, to justify the change.

CONCLUSION

¶24 There are many good reasons not to change Arizona's existing definition of prior inconsistent statements. We have a well-developed framework for determining the admissibility of such statements under Rule 801(d)(1) as it now exists. There is nothing wrong with the current rule, and the justifications offered for changing it are flimsy at best. For all the reasons discussed, narrowing the definition of prior inconsistent statements would exact a high price from victims, witnesses, courts, and parties, while returning no comparable benefit. Amending the rule would significantly handicap our efforts to hold offenders accountable, protect victims, and keep the

community safe. I respectfully urge this Court to reject the proposed change to Rule 801(d)(1).

RESPECTFULLY SUBMITTED this 20th day of May, 2011.

s/Barbara LaWall
BARBARA LAWALL
PIMA COUNTY ATTORNEY

CERTIFICATE OF SERVICE

I certify that, on the 20th day of May, 2011, the original of the foregoing document was electronically filed in Word format and PDF format with:

Clerk of the Court
Arizona Supreme Court
1501 West Washington St.
Phoenix, AZ 85007

One copy was mailed to:

Mark W. Armstrong, Esq.
Ad Hoc Committee on Rules of Evidence
1501 West Washington St., Suite 445
Phoenix, AZ 85007

s/Barbara LaWall
BARBARA LAWALL
PIMA COUNTY ATTORNEY