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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-10-0035
	)	
	)	**COMMENT OF ARIZONA**
Petition to Amend Arizona Rules of	)	**ATTORNEYS FOR CRIMINAL**
Evidence and Rule 17.4(f), Arizona	)	**JUSTICE REGARDING PETITION**
Rules of Criminal Procedure	)	**TO AMEND ARIZONA RULES OF**
	)	**EVIDENCE AND RULE 17.4(F),**
	)	**ARIZONA RULES OF CRIMINAL**
	)	**PROCEDURE**
	)	

¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submits the following comment to the above-referenced petition. AACJ is a not-for-profit membership organization representing four hundred criminal defense lawyers licensed to practice in the State of Arizona, as well as law students and other associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature.

¶2 The rule change petition at issue focuses primarily on modifying the language in the Arizona Rules of Evidence so they conform to the Federal Rules of Evidence, and in most instances the changes do not affect the substance of the rules. AACJ submits this comment to address two substantive changes included within the petition, the modification to Rule 702 that would affect the admissibility of expert witness testimony, and the modification to Rule 801(d)(1)(A) that would require prior inconsistent statements to be made under oath to be admitted as non-hearsay.

¶3 For the reasons stated herein, AACJ requests this Court adopt the proposed changes to Rule 702 that would result in the abandonment of the *Frye*[1] / *Logerquist*[2] standard and make Arizona a "*Daubert*[3] state" and bring Arizona in line with the law of the federal courts and those of thirty-seven other states. And for the reasons stated herein, AACJ also supports the modification to Rule 801(d)(1)(A) so that prior inconsistent out-of-court statements may only be admitted as substantive evidence if they are made under oath under penalty of perjury at a trial or deposition or other similar proceeding. This will in no way affect the continuing admissibility of prior inconsistent statements as impeachment evidence.

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[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
[2] *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000).
[3] *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

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¶4 AACJ requests this Court adopt the proposed "Option B" to Rule 702, Ariz. R. Evid., with the result that Arizona adopts the corresponding federal rule and becomes a "*Daubert* state." Such a change ensures that the scientific and technical evidence presented to juries is of sufficient quality and reliability that admission of the evidence serves the interests of justice. In so doing, this Court should retreat from its holding in *Logerquist* maintaining Arizona as a "*Frye* state," which has been attacked by commentators since the case was decided in 2000. *See, e.g.*, D.H. Kaye, "Choice and Boundary Problems in *Logerquist*, *Hummert*, and *Kumho Tire*," 33 Ariz. St. L.J. 41 (2001); Margaret Berger, "When is Clinical Psychology Like Astrology?," 33 Ariz. St. L.J. 75 (2001); David Faigman, "Embracing the Darkness: *Logerquist v. McVey* and the Doctrine of Ignorance of Science is an Excuse," 33 Ariz. St. L.J. 87 (2001).

¶5 According to statistics compiled by the Arizona Justice Project, since 1989, there have been 259 post conviction DNA exonerations nationwide. Seventeen people have been sentenced to death in the United States before DNA proved their innocence and led to their release. The average time served before exoneration was thirteen years in prison. Yet only 10% of criminal cases involve DNA evidence.

¶6 In March 2009 the Virginia Law Review published a study which examined the role of forensic science in what at that time were the 232 DNA exonerations nationwide. Garrett & Neufeld, "Invalid Forensic Science Testimony and Wrongful Convictions," 95 Va. L. Rev. 1 (2009). The authors identified 156 of those exoneration cases as having involved testimony by forensic analysts called by the prosecution in their trials. The study found that in 60% of those cases, the analyst called by the prosecution provided invalid testimony (defined as testimony with conclusions misstating empirical data or wholly unsupported by empirical data). The invalid testimony consisted mostly of serology and microscopic hair analysis, but also bite mark, shoe print and fingerprint comparisons. The invalid testimony was not limited to isolated instances. The invalid testimony involved 72 forensic analysts, employed by 52 agencies from 25 states. The study concluded that "the courts policed the introduction of forensic evidence in a highly deferential manner, typically trusting the jury to access the expert testimony."

¶7 Due, at least partially, to a concern about the number of DNA exonerations, Congress tasked the National Academy of Sciences with examining ways to improve the quality of forensic sciences. The NAS produced a report in 2009 that contained some startling and relevant conclusions. Among those conclusions: "There are serious flaws regarding the capacity and quality of the current forensic science system, yet courts continue to rely on forensic evidence

without fully understanding and addressing the limitations of different forensic science disciplines." The study found that hair microscopy, bite mark comparisons, firearm and tool mark analysis, and shoe print comparisons have never been subjected to rigorous scientific evaluations. "With the exception of DNA analysis….no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between a specific individual and a specific individual or source." Yet, as we know, that is precisely how forensic evidence is used in criminal trials.

¶8 The NAS found that crime laboratories and forensic analysts remain remarkably free of oversight and still lack basic scientific standards to govern their conclusions. The report concluded that "we must limit the risk of having the reliability of certain forensic science methodologies condoned by the courts before the techniques have been properly studied and their accuracy verified."

¶9 The Ray Krone case is a prime example locally of the NAS report's criticisms. At Krone's trial, a forensic odontologist testified that the bite mark on the victim "matched" Krone's teeth, and this evidence was instrumental in obtaining a death sentence against Krone. Yet, eventually, DNA eventually proved Krone was wrongfully convicted. Writing about the Krone exoneration, Henry Weinstein reported in the Los Angeles Times on April 10, 2002, that 63.5% of bite

mark investigations resulted in false positives and another 22% resulted in false negatives.

¶10 AACJ believes that amending Rule 702 to mirror the federal rule will add an extra layer of protection against junk science making its way into the courtroom, and thus it might, hopefully, prevent more cases like Ray Krone's from occurring in the future. The role of forensic testimony in the exoneration cases as well as the NAS report suggest that, at least in criminal cases, cross-examination and the presentation of contrary evidence by the opposing party are too often not enough to prevent wrongful convictions.

¶11 The state of forensic science as reflected in the NAS report has particular importance with regard to the effect of Rule 702 on criminal cases. Due in part to limited funding, the presentation of forensic evidence during the majority of criminal trials is provided only by analysts testifying for the prosecution. In civil cases the jury more easily understands that experts called by a party are advocates for that party's position, particularly because the witnesses must inform the jury through cross-examination how much they are paid for their work. Expert witnesses called on behalf of criminal defendants are similarly cross-examined. Yet forensic analysts who are employed by the government and called by the prosecution are represented to the jury as free of any bias.

¶12 One argument against amending Rule 702 has been that precluding forensic evidence invades the province of the jury. That argument ignores the fact that courts routinely decide preliminary evidentiary questions and frequently preclude evidence deemed irrelevant, unfairly prejudicial, or unreliable. In addition, an expert is often permitted to offer an opinion on the ultimate issues in the case and is often permitted to rely upon inadmissible evidence. When such testimony is not reliable, it is the expert who has invaded the province of the jury.

¶13 The *Frye* / *Logerquist* rule has failed the criminal justice system. First, because *Logerquist* expressly rejected the application of the *Frye* test to technical, non-scientific evidence, which is commonly introduced in criminal proceedings. On the other hand, in *General Electric v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), the United States Supreme Court extended the *Daubert* rule to all kinds of technical evidence where an expert witness is called. For this reason, criminal defendants in Arizona are not even entitled to a *Frye* hearing to gauge the legitimacy of a forensic analyst's opinions in the area of technical, non-scientific analysis. Second, because *Frye* permits a witness to testify to his or her own observations, in those circumstances a theory need not be generally accepted in order to be presented to the jury. Third, once a theory meets general acceptance under *Frye*, it is extraordinarily difficult to shake it off its perch as newly-

discovered scientific evidence demonstrates the weakness of that theory. The *Daubert* / *Kumho Tire* rule, on the other hand, takes great precautions to ensure that only reliable scientific or technical evidence is presented to the jury.

¶14 Federal Rule 702 essentially requires trial judges to determine whether there is a genuine nexus between the expertise offered by a witness and the conclusion reached. The issues relevant to Federal Rule 702 – testing, peer review, error rates and acceptance within the relevant scientific community – are all consistent with what we know as the scientific method. In order to guard against wrongful convictions, expert testimony should be grounded in an accepted body of learning or experience and the expert should be able to explain how the conclusions are so grounded. For that reason, AACJ supports adopting "Option B" to the rule change petition so that Rule 702, Ariz. R. Evid., mirrors Rule 702, Fed. R. Evid.

Rule 801(d)(1)(A)

¶15 Rule 801(c), Ariz. R. Evid., defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(d) then defines the kinds of out-of-court statements that are not hearsay though they otherwise meet the definition of hearsay in Rule 801(c). Among these are statements made when

"(1) the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony." Rule 801(d)(1)(A), Fed. R. Evid., on the other hand, is identical except that, in order to be admitted substantively as non-hearsay, the prior inconsistent statement must have been "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in deposition." Admissibility of prior inconsistent statements offered for impeachment purposes is governed by Rule 613, not the hearsay rules. Such statements are not offered to prove the truth of the matter asserted in the prior statement; rather, they are offered to show that the witness made the inconsistent statement and thereby challenge the credibility of witness at trial.

¶16 The federal version of Rule 801(d)(1)(A) emerged from debates within the Advisory Committee on 1972 Proposed Rules and within Congress which was charged with approving or rejecting the rules. Prior federal law permitted prior inconsistent statements to be used only as impeachment. This rule was proposed to permit the use of such statements substantively, for the truth of their content. Parties on both sides of the debate agreed that such an expansion was desirable but differed on the need for assurance of reliability of the prior statements. On the one side were those who advocated adoption of the rule without any safeguards – the equivalent of today's Arizona Rule. This group believed that

cross–examination of the witness at the proceeding at which the prior statement was introduced provided all the assurance that was necessary. On the other side were those who insisted that in order to be admissible as substantive evidence prior inconsistent statements ought to carry some indicator of trustworthiness. They recognized that cross-examination of the witness at the time the prior statement was introduced, which might be long after the statement had been taken, was no substitute for assurance that the statement had been taken under reliable circumstances.

¶17 Both sides recognized that the proposed Rule 801(d)(1)(A) would not change existing law and practice with respect to using such statements as impeachment evidence. Rule 801, Fed. R. Evid., Notes of Advisory Committee on Proposed 1972 Rules. The debate carried over into the Congressional committees, with the Senate Committee reporting out the equivalent of today's Arizona Rule with no safeguards and the House Committee adopting a version which included the requirement that for such statements to be considered not hearsay they must not only be sworn, but have been given at a trial or hearing and subject to cross–examination. *See* Rule 801, Fed. R. Evid., Notes of Committee on the Judiciary, House Report No. 93–650; Notes of Committee on the Judiciary, Senate Report No. 93–1277. The Conference Committee rejected the requirement that the

statement had been subject to cross–examination and adopted what is essentially today's federal rule, saying:

> * * * [T]he rule now requires that the prior inconsistent statements be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness.

Rule 801, Fed. R. Evid. 801, Notes of Conference Committee, House Report 93–1597. Thus the present federal rule requires that the prior inconsistent statement have been made under oath at a trial, hearing or other proceeding in the hope that the solemnity of the proceeding might encourage the witness to be truthful. It may be argued that this compromise is imperfect, but it is a balance that has served well in the federal system for nearly forty years without alteration in substance.

¶18 On May 4, 2011, the State Bar of Arizona filed a comment to this rule change petition arguing, at pages 10-12, that the proposed change to Rule 801(d)(1)(A) would be detrimental to both prosecutors and criminal defense lawyers. AACJ believes that the State Bar misunderstands the nature of the proposed change and the impact it would have on criminal practice. Contrary to the State Bar's understanding, the proposed rule will have no impact whatsoever on present pretrial discovery practice, nor will it adversely affect the defense of criminal cases. It will end, however, a grossly unfair practice whereby a criminal defendant can be convicted of a crime solely or principally on the unsworn,

inherently unreliable statement that, but for the present Arizona rule, would and should be considered inadmissible hearsay.

¶19 The State Bar's comment argues that if the rule change is made, then neither prosecutors nor defense lawyers will be able to use prior unsworn statements in criminal trials. Its comment details the myriad differences in procedural rules and practice between state and federal court and Arizona's civil and criminal rules, particularly noting that civil litigants depose witnesses while criminal attorneys use informal pre-trial interviews to obtain witness statements except in unusual circumstances where a deposition must be ordered pursuant to Rule 15.3, Ariz. R. Crim. P. But criminal defendants rarely, if ever, have a need to introduce prior inconsistent statements as substantive evidence; rather, the utility of such statements to the defense is their value for impeachment. The differences between state and federal discovery practices are irrelevant when the prior inconsistent statement is offered for impeachment purposes, and practitioners in federal court routinely use unsworn statements for impeachment. As stated by the Senate Judiciary Committee, "Rule 801 defines what is and what is not hearsay for the purpose of admitting a prior statement as substantive evidence. *A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness'*

credibility." Notes of Committee on the Judiciary, Senate Report No. 93-1277 (1972) (emphasis added).

¶20 When the prosecution offers as substantive evidence of guilt an out-of-court statement made by the alleged victim or another witness, the fairness of the proceedings is adversely affected. This Court has recognized the danger of unfair prejudice to defendants in allowing the prosecution to introduce a prior statement of the testifying witness, particularly in situations where the statement is the only substantive evidence of guilt. In *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982), this Court noted that Rule 403 may require the exclusion of an otherwise-admissible statement in circumstances where the reliability of the prior statement is in question, the witness denies making the prior statement, and the profferer of the statement has an interest in the proceeding. Applying the standard set out in that case, this Court affirmed the use of the statement against Mr. Allred but found the trial court abused its discretion in admitting the statement against Mrs. Allred, and thus Mrs. Allred's conviction for hindering prosecution was reversed.

¶21 The State Bar specifies three types of statements that could not be used substantively if the federal rule is adopted: "(1) statements made during interviews conducted by police and later recorded in police reports; (2) statements made by a co-defendant during 'free talks'; and (3) statements by a witness

regarding the criminal offense(s) at issue that were made to others before the witness's in–court testimony." In these examples, the State Bar has inadvertently illustrated exactly why the federal rule should be adopted, for these statements are inherently unreliable and highly suspect. They are often made by witnesses who have a motive to distort or fabricate out of self–interest or anger, or to brag, and in the first and third examples the statements are often inaccurately reported. When such statements can be admitted substantively, the witness's testimony under oath at trial becomes largely irrelevant. The thing that matters the most is what was written down (or not) months or years earlier under circumstances that were inherently unreliable.

¶22 The prosecution can rely on such an unreliable statement to avoid a directed verdict or even to obtain a conviction. The opportunity to cross–examine the witness at trial on these historical statements does not ameliorate the problem. The witness is often nervous, confused or in fear, or may not even recall what was said at the earlier interview. The witness who relates the earlier statement, usually a professional witness such as a police officer, is confident, composed and articulate. If such statements were confined to use as impeachment, as they are under the federal rule, a measure of fairness will be returned to the system.

¶23 With regard to the comment posted by Arizona Coalition Against Domestic Violence to the Court Rules Forum on May 17, 2011, it correctly claims

that the current rule makes it easier for prosecutors to introduce prior inconsistent statements as substantive evidence. Nevertheless, our Rules of Evidence do not exist for the purposes of creating "an important tool for prosecutors," as ACADV argues, but as a mechanism to ensure fairness to all parties to the proceeding, including the accused. ACADV's claim that adopting the federal rule "would severely negatively impact the way domestic violence cases are prosecuted" lacks merit, because prosecutors who bring charges by preliminary hearing may call the alleged victim to testify and preserve that testimony for use at a later trial.

¶24 Federal Rule 801(d)(1)(A) recognizes common sense principles about the way people provide information. First, a witness's statement is more reliable and more likely to be true if it is sworn to be true and made with the knowledge that making a false statement may result in perjury charges. Second, law enforcement officers have an interest in charges that are ultimately brought against a criminally accused, and they are capable of having undue influence on the witnesses from whom they take statements, even if unintended. Third, it is harder for a witness or alleged victim to falsely accuse a person in that person's presence, and for this reason the Confrontation Clause protects not only the right to cross-examine but also the right of the accused to physically confront the witnesses. *See Coy v. Iowa*, 487 U.S. 1012, 1019-20, 108 S.Ct. 2798, 2802 (1988).

¶25 Finally, the accuracy of a statement is improved if the witness is questioned by attorneys representing not only the government but also the criminally accused, and any potential biases that may affect the truthfulness of the statement may be explored. ACADV refers to undue influence that may be placed on an alleged victim by the criminally accused; while that does occur in some domestic violence cases, what occurs with far greater frequency is undue influence placed on the alleged victim by third parties with interests adverse to the criminally accused. Particularly in child sex cases, parents who are embroiled in a bitter divorce and custody battle will manipulate their children into manufacturing molestation claims in order to gain an advantage in family court. The current Arizona rule, on the other hand, fails to take into account these principles, and as a result there is a greatly increased risk of wrongful conviction in cases where the primary evidence – or worse, the only evidence – of guilt is the prior unsworn statement.

¶26 For these reasons, AACJ urges this Court to adopt the proposed change to Rule 801(d)(1)(A) so that the Arizona rule mirrors the federal rule. Furthermore, in light of the State Bar's comment, AACJ also suggests a comment to the rule, similar to that quoted above from the 1972 Senate Judiciary Committee, explaining the difference between use of the statement as substantive evidence and use as impeachment.

CONCLUSION

¶27 For these reasons, AACJ respectfully requests this Court grant the petition insofar as it seeks to adopt the "Option B" changes to Rule 702, and adopt the petition insofar as it modifies Rule 801(d)(1)(A).

DATED: May 20, 2011.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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