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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-20-0023
	)	
	)	**COMMENT OF ARIZONA**
Petition to Amend Rule 404 of the Arizona Rules of Evidence	)	**ATTORNEYS FOR CRIMINAL JUSTICE REGARDING PETITION TO AMEND RULE 404 OF THE ARIZONA RULES OF EVIDENCE**
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Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submits the following comment to the above-referenced petition.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a

statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ opposes the Pima County Attorney's petition to add a new subsection (d) to Ariz. R. Evid. 404. Not only are the factual assumptions supporting the proposal fundamentally flawed, but the proposal undercuts the basic principle in criminal law that the accused is to be tried for what they did in this case, and not for who they are or what they have done in the past. Rule 404, as it currently stands, is careful to strike the right balance and is sufficient to address other acts in domestic violence cases. Moreover, the societal problems the petition seeks to address through propensity evidence are either already addressed in other contexts or would be more appropriate for the Legislature to consider and address through legislation.

1. <u>Background</u>

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977). Long ago, the U.S. Supreme Court reiterated the universal conclusion of courts of the common-law tradition—that propensity evidence, though

relevant, must generally be excluded to prevent undue prejudice and prevent confusion of the issue at hand during a trial. *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). "The rationale in the exclusionary rule concerning evidence of other bad acts or crimes is the prejudice to the accused and the questionable relevancy of such evidence to the offense charged." *State v. McFarlin*, 110 Ariz. 225, 228 (1973), *superseded by* Rule 404(b). Today, the Federal Rules of Evidence and Arizona Rules of Evidence continue to uphold this guiding principle, with a number of carefully crafted exceptions. *See generally* Ariz. R. Evid. 404. Most notably, Rule 404 permits the introduction of character evidence when the defendant opens the door to the issue, Ariz. R. Evid. 404(a)(1), when the character of a victim is placed in issue, Ariz. R. Evid. 404(a)(2), to challenge the character of a witness, Ariz. R. Evid. 404(a)(3), or, in the case of specific acts, to support some evidentiary theory other than propensity, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b); *see State v. Ramirez Enriquez*, 153 Ariz. 431, 432-33 (App. 1987) ("If [the evidence] tends to show a disposition toward criminality from which guilt on this occasion is to be inferred, it is inadmissible. If it establishes guilt in some other way, it is admissible.").

Even under these exceptions, however, Arizona courts have emphasized the danger of propensity evidence:

> Such evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge. . . . Studies confirm that the introduction of a defendant's prior bad acts can easily tip the balance against the defendant. . . . Because of the high probability of prejudice from the admission of prior bad acts, the court must ensure that the evidence against the defendant directly establishes that the defendant took part in the collateral act, and to shield the accused from prejudicial evidence based upon highly circumstantial inferences. . . . We have recently noted the potentially prejudicial effects of prior bad acts evidence and cautioned trial courts and counsel to exercise extreme care in its use, even where it is admissible.

State v. Terrazas, 189 Ariz. 580, 584 (1997) (internal quotations and citations omitted). Based on these concerns, the Court concluded that, before admitting other acts evidence under Rule 404(b), a clear-and-convincing standard a proof applied. *Id.* at 582; *see also* Ariz. R. Evid. 403 (balancing test addressing undue prejudice).

Regardless of these procedural safeguards, however, parties in Arizona have demonstrated sufficient capacity to pursue and support arguments based on other acts evidence using proper, non-propensity theories. *See, e.g.*, *State v. Williams*, 183 Ariz. 368, 375-76 (1995); *State v. Schackart*, 153 Ariz. 422, 424 (App. 1987), *citing State v. Jeffers*, 135 Ariz. 404, 417 (1983) ("[I]f evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts.").[1]

[1] This trend is consistent with cases from other states that, like Arizona, do not interpret Rule 404(b) as an exhaustive list of non-propensity purposes. *See*

2. <u>The Factual Basis Underlying The Petition Is Flawed</u>.

The petition proposes an amendment to Rule 404(b) and addition of a new subsection to Rule 404 that would permit the admission of other acts of domestic violence as character or propensity evidence. The petition's factual justification for this proposal is that "[d]omestic violence is very rarely a momentary loss of temper. It is, instead, a pattern of abuse that is obsessional in nature rather than a onetime event." Petition at 2, *quoting Isabel Scott & Nancy McKenna*, Domestic Violence Practice and Procedure § 1:4 (2018). Based on this assumption—that almost all cases of domestic violence stem from this cycle or repetition of abuse—the petition proposes a rule that would apply to all acts of domestic violence, including acts committed against other victims.

The three-phase cycle of domestic violence described by the petition—tension building, battery, and the honeymoon—appears to relate to intimate-partner violence (IPV) and was first described by Lenore Walker's 1979 book, *The Battered Woman*.

Jeffers, 135 Ariz. at 417; *e.g.*, *State v. Gunby*, 144 P.3d 647, 658-59 (Kan. 2006) (listing myriad of applications but emphasizing procedural safeguards); *State v. Mills*, 562 N.W.2d 276, 285 (Minn. 1997) (permitting other acts to show "strained relationship"), *overruled on other grounds*, *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004); *Ortega v. State*, 669 P.2d 935, 944 (Wyo. 1983) (other act demonstrated "complete lack of respect for the spouse as a human being"), *overruled on other grounds*, *Jones v. State*, 902 P.2d 686 (Wyo. 1995); *see also State v. Tanner*, 675 P.2d 539, 546-47 (Utah 1983) (in child abuse case, pattern of prior ill treatment directed at specific victim distinct from defendant's disposition for violence or ill-will), *abrogated on other grounds*, *State v. Doporto*, 935 P.2d 484 (Utah 1997).

In Arizona, however, our legislature has defined domestic violence to broadly include many forms of relationship that do not involve intimacy. Section 13-3601, A.R.S., defines domestic violence as any situation in which:

> 1. The relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household.
>
> 2. The victim and the defendant have a child in common.
>
> 3. The victim or the defendant is pregnant by the other party.
>
> 4. The victim is related to the defendant or the defendant's spouse by blood or court order as a parent, grandparent, child, grandchild, brother or sister or by marriage as a parent-in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law.
>
> 5. The victim is a child who resides or has resided in the same household as the defendant and is related by blood to a former spouse of the defendant or to a person who resides or who has resided in the same household as the defendant.
>
> 6. The relationship between the victim and the defendant is currently or was previously a romantic or sexual relationship. . . .

Because of this expansive definition, domestic violence in Arizona can include a crime committed by a college student against his or her roommate, a troubled child against his or her parents, or any person against a member of the extended family. Moreover, as acknowledged by one of the scholars cited by the petition, even in the context of an intimate relationship, the three-phase cycle "does not fit every case of domestic violence." Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of*

Evidence and Justice for Victims of Domestic Violence, 8 Yale J.L. & Feminism 359, 381 (1996) ("*Bridging the Gap*"). As a result, the factual premise underlying the petition—that all domestic violence is systemic—is flawed. Instead, because of the wide variety of forms in which domestic violence can occur in Arizona, as defined by § 13-3601, a case-by-case analysis is more appropriate. That case-by-case analysis is exactly what the current rule provides, as described below.

3. <u>The Current Rule Provides Adequate Tools To Overcome The Evidentiary Obstacles Referenced By The Petition</u>.

As noted by the comment filed on April 25, 2020, by the Advisory Committee on Rules of Evidence, the petition does not reference any evidentiary problems, "either empirically or anecdotally," in the state of Arizona in the context of domestic violence. At most, the petition asserts that "[t]he prosecution of an abuse usually takes place during the last, 'honeymoon,' stage of the cycle, which makes it more difficult to investigate and even leads to the victim recanting or refusing to testify." Petition at 3, 5.

Rule 404(b) already provides the prosecution with the ability to address evidentiary problems through the use of other acts that may arise in the event that a victim recants or refuses to testify. For example, other acts are admissible to rebut a claim that the defendant committed the act but asserts it was a mistake, accident, or self-defense, as well as intent or motive. *Williams*, 183 Ariz. at 377. Similarly, if a defendant denies that the act occurred, modus operandi or plan may be an

appropriate theory of admissibility; or, if a defendant admits the act occurred but disputes being the perpetrator, other acts may be admissible under an identity theory of admissibility. In every case, Rule 404(b) already suggests theories of admissibility to address these sorts of defenses, amplifying the scope of evidence a prosecution can use to meet those defenses, and provides due process protection to defendants in so doing. And because Rule 404(b) is stated in non-exhaustive terms, practitioners are free to pursue other, non-propensity theories of admissibility, thereby providing litigants with the flexibility required under the circumstances of a particular case. *See Jeffers*, 135 Ariz. at 417.

Moreover, this Court has previously affirmed the use of "expert testimony that explains a victim's seemingly inconsistent behavior [in order] to aid jurors in evaluating the victim's credibility." *State v. Haskie*, 242 Ariz. 582, 586 ¶16 (2017). In so doing, the Court acknowledged that such evidence may "describe[] or refer[] to a perpetrator's characteristics"—*i.e.*, propensity evidence—so long as the evidence is relevant, related to a proper purpose, and not unduly prejudicial. *Id.*

The petition also references difficulties in investigating cases that involve uncooperative victims. Petition at 3. This complaint is repeated by many of the scholarly authors cited by the petition, but most those articles were published twenty years ago or more. Maybe in the past it was true that domestic violence cases boiled down to swearing matches that hinged on a victim's credibility; but today, advances

in technology and training have helped law enforcement generate objective, reliable evidence for prosecution. Almost all law enforcement officers have body-worn cameras that can easily document the state of the victim at the time the event. Specially trained officers are dispatched to domestic violence incidents to document subtle signs of domestic violence, such as signs of strangulation (blood-shot eyes, petechiae, a hoarse voice, flush skin, and a swollen tongue or lips, etc.). Perhaps most importantly, advances in the understanding of domestic violence victims and an increase in resources for those victims have helped prosecutors and victim advocates better communicate with victims and provide them with the resources they need in order to establish the independence necessary to confront their abusers. *See* Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 Fordham Urb. L.J. 953, 956-63 (2000) ("The probability of victim cooperation has been better predicted by the conduct of the prosecutor than by the conduct of the victim or defendant."); *see also* Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 Tex. J. Women & L. 89, 109 (1997).

Even after *Crawford v. Washington*, 541 U.S. 36 (2004), courts recognize that some out-of-court statements are not testimonial and thus may be admitted pursuant to hearsay rules. Calls to 911 are routinely recorded, capturing admissible "cries for help." *See Davis v. Washington*, 547 U.S. 813 (2006). Statements made for the

purpose of medical treatment are also admissible as nontestimonial. *State v. Hill*, 236 Ariz. 162 (App. 2014). If a victim makes a statement to police and then recants, then the victim's unsworn prior inconsistent statements are admissible under Rule 801(d)(1)(A), not just as impeachment but as substantive evidence of the defendant's guilt. In 2011, when considering Petition R-10-0035 that restyled the Arizona Rules to largely conform to the federal rules, this Court specifically chose not to adopt the language of the federal rule that restricted such use of prior inconsistent statements to those that are sworn, as requested by prosecutors as well as the Arizona Coalition Against Domestic Violence.

Lastly, the petition briefly references difficulties with biased juries in the context of domestic violence. Specifically, the petition states that propensity evidence is necessary to "'counteract[] juror's mistaken beliefs—including gender and class biases and the myth that the victim would leave her abuser if she had really experienced the alleged violence.'" Petition at 5, *quoting* Linell A. Letendre, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 Wash. L. Rev. 973, 979, 998-1000 (2000). But this alleged problem is also sufficiently addressed under our current legal system. First, prosecutors are entitled to explore such juror biases through *voir dire*, and they can have jurors removed either through challenges for cause or by using peremptory strikes. Ariz. R. Crim. P. 18.4. Moreover, as this Court explained

in *Haskie*, expert testimony can and has been used to dispel such myths. Thus, absent any specific examples or empirical evidence from the petitioner demonstrating a substantial problem, it appears that none of the trial and evidentiary obstacles alleged in the petition actually exist in present-day Arizona.

4. <u>Proposed Rule 404(d) contains no due process protections</u>.

As observed by both the Advisory Committee on Rules of Evidence and the Arizona Prosecuting Attorneys Advisory Council, proposed Rule 404(d) provides none of the due process protections that exist in Rule 404(c) for admitting evidence of the defendant's aberrant sexual propensity. AACJ agrees with those criticisms.

However, AACJ is more concerned with the logic of the proposal that if Rule 404(c) allows evidence of one's aberrant sexual propensity, then there is no reason not to allow the same kind of evidence in for domestic violence. This is a slippery slope argument. If there is a Rule 404(d) for domestic violence evidence, then why should there not also be a proposal for Rule 404(e) to allow prior drug convictions as evidence in a drug possession trial, since drug addiction results in a propensity to use drugs? Arizona courts recognize that such evidence serves no purpose but to invite the jury to conclude that the defendant did it before and must have done it again. *See State v. Torres*, 162 Ariz. 70, 73 (App. 1989) ("The evidence of prior use of heroin was relevant for only one purpose—to show that because the defendant

had once at some unspecified time in the past used heroin, he must have been in the car for the purpose of purchasing the drug on this occasion.").

Moreover, the proposal fails to note that past acts of violence are particularly likely to inflame the passions of the jury against the defendant:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.

State v. Hughes, 189 Ariz. 62, 68 (1997), *quoting* 1A John H. Wigmore, Evidence § 58.2, at 1212 (Tillers rev. 1983). For this reason, "'[t]he discretion of the trial judge under Rule 403 to exclude otherwise relevant evidence because of the risk of prejudice should find its most frequent application in this area [of Rule 404(b) evidence].'" *State v. Taylor*, 169 Ariz. 121, 125 (1991), *quoting* 1 Morris Udall et al., *Arizona Practice: Law of Evidence* § 84 (3d ed. 1991). Even if the court gives a limiting instruction, where the evidence is extremely inflammatory, there is little assurance that the jury will follow the limiting instruction. *State v. Anthony*, 218 Ariz. 439, 446 ¶ 40 (2008) ("The danger of prejudice is markedly heightened when the 'other act' allegation is that the defendant molested his step-daughter.").

5. **Conclusion.**

There is no question that domestic violence is a serious crime and that repetitive offenders need to be punished more severely. The Legislature responded to this policy rationale by creating the offense of aggravated domestic violence, a class 5 felony with mandatory minimum jail sentences. *See* A.R.S. § 13-3601.02(A), (B), (C). But the Pima County Attorney has provided no compelling rationale to upset generations of scholarship and case law describing the dangers of admitting other-act evidence for propensity purposes. For these reasons, AACJ requests this Court deny the petition.

DATED: May 1, 2020.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ David J. Euchner
Grant Wille & David J. Euchner

This comment e-filed this date with:

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