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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-20-0011
	)	
	)	**COMMENT OF ARIZONA**
Petition to Amend Arizona Rule of Evidence 404(b)	)	**ATTORNEYS FOR CRIMINAL JUSTICE AND PIMA COUNTY PUBLIC DEFENDER'S OFFICE REGARDING PETITION TO AMEND ARIZONA RULE OF EVIDENCE 404(B)**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") and the Pima County Public Defender's Office ("PCPD") hereby submit 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.

PCPD is the second largest indigent defense agency in Arizona tasked with defending those accused of felony offenses. Its eighty attorneys represent many thousands of clients every year on felony charges, both in Superior Court and in Juvenile Court. PCPD has a small appellate unit that represents clients in criminal cases before the Arizona Court of Appeals, the Arizona Supreme Court, and, on occasion, the Supreme Court of the United States. The appellate courts of this state publish opinions in several of PCPD's cases every year.

AACJ and PCPD support the proposal of the Advisory Committee on Rules of Evidence to amend Ariz. R. Evid. 404(b). First, it will harmonize Arizona's rule with the Federal Rule of Evidence. Second, it will ensure that the State and the defense comply with their disclosure obligations. Third, it will provide much needed guidance to trial court judges and practitioners who often struggle with the nuances of Rule 404(b).

When this Court established the Advisory Committee on Rules of Evidence in 2012, its mission was to continue the work of the previous Ad Hoc Committee on Rules of Evidence that accomplished a comprehensive restyling of the Rules and

helped them come into conformity with the Federal Rules where appropriate. In particular, by affirmatively choosing to use the same language as the federal rules, our state can look to other jurisdictions for persuasive authority in interpreting our own rules. *See Phillips v. O'Neil*, 243 Ariz. 299, 302 ¶ 13 (2017) (citing *State v. Salazar-Mercado*, 234 Ariz. 590, 592-93 ¶ 7 (2014)). "Although the federal courts' interpretation of the Federal Rules of Evidence does not control our interpretation of our own evidentiary rules, federal precedent is particularly persuasive given that we have expressly sought to conform our rules to the federal rules." *State v. Winegardner*, 243 Ariz. 482, 485 ¶ 8 (2018). As it relates to Rule 404(b), this Court has historically found that defendants are entitled to greater protection from admission of other-act evidence by requiring a higher standard of proof. *Compare Huddleston v. United States*, 465 U.S. 681, 689-91 (1988) (other-act evidence admissible if it is established by preponderance of the evidence), *with State v. Terrazas*, 189 Ariz. 580, 584 (1997) (rejecting *Huddleston* and requiring proof by clear and convincing evidence).

As evidence rules are procedural and not substantive laws, there is value in having judges and practitioners who are experienced in both state and federal court avoid confusion between two different sets of rules when interpreting our own state's rules. This is especially true when the change in the rule does not impact what kind of evidence is admissible but only the notice requirements for the parties.

Improved notice requirements will be extremely valuable not only in the trial court, but for the appellate practitioners and courts that may be asked to review claims of erroneous admission. Currently, Rule 404(b) merely states that other-act evidence may be admissible for a proper purpose, and Ariz. R. Crim. P. 15.1(b)(7) requires only that the State provide "a list of the defendant's other acts the State intendsd to use at trial." Without any rule that requires the parties to explain which proper purpose applies to a particular piece of other-act evidence, the parties lack the proper motivation to analyze the admissibility of that evidence. Instead, it is common for parties to rely on common use of the words in Rule 404(b), rather than interpretations from appellate cases or treatises.

PCPD encounters countless cases each year where prosecutors seek, and judges grant, admission of other-act evidence on bases that have been repeatedly rejected by this Court and the court of appeals. Most notably, eight years after this Court explained in *State v. Ferrero*, 229 Ariz. 239, 243 ¶ 20 (2012), that evidence should not be admitted to "complete the story" unless it falls into the narrower category of evidence that qualifies as intrinsic evidence, motions and transcripts of trial court proceedings are still replete with examples of reliance on "completing the story" without any citation to *Ferrero*. Because appellate courts must then affirm the trial court's evidentiary ruling if it is correct for any reason, *see State v. Andriano*,

215 Ariz. 497, 503 ¶ 26 (2007), appellate attorneys and courts are then left to resolve whether any of the proper purposes in Rule 404(b) could apply.

A classic example of the need for the proposed rule change is the case of *State v. McKerlie*, 2 CA-CR 2015-0305, 2017 WL 977021 (mem., March 14, 2017). In that case, the defendant was charged with possession of child pornography while he was on federal probation for a prior conviction for possession of child pornography. The State filed a motion to admit that prior conviction, citing numerous pre-*Ferrero* authorities for "completing the story" and only providing the full list of Rule 404(b) purposes without any explanation which purposes apply and why. Motion at 3-4.[1] At the motions hearing, the State, rather than articulate any basis for admission rooted in Rule 404(b), repeatedly used the word "pattern" to describe the proper purpose for admission:

> He has used peer-to-peer sharing software. He downloaded when he was alone, given the time frames of his work schedule and his wife's statement. And FBI also finds evidence that he tried to delete these files, but, again, they remained
> on the shared files.
>
> So because of that pattern, it's essential for the State to be able to present that evidence of his scheme, his plan, his absence of mistake, his pattern of downloading, how he does it, what his affinity is for these downloading, and also the fact that he tries to delete these files but they remain on the hard drive shared.
>
> THE COURT: [ ] so are you requesting that the Court consider all of the information that you just indicated as 404(B) or 404(C)?

[1] Division Two's e-filer system allows for hyperlinking to the court file. This comment uses that capability.

> [PROSECUTOR]: I am asking for both. I think the past definitely shows the 404(B), the motive, the plan
> THE COURT: Absence, mistake.
> [PROSECUTOR]: All of that. And that's important. As far as the 404(C), it's also essential to come in because that goes to the propensity. It goes to the propensity.

5/28/15 RT 6-7. After defense counsel articulated that there was no evidence "that shows who the person was who downloaded what went into the computer in this 2011 case," *id*. at 9, the prosecutor again argued the "pattern" of his conduct and that McKerlie "can't stop." *Id*. at 10, 11. The trial court then ruled the evidence of the prior conviction was admissible under Rule 404(b) but not under Rule 404(c):

> THE COURT: The Court finds that the prior conviction of the 2009 prior conviction is relevant and admissible.
> The Court finds that the probative value outweighs the danger of any substantial unfair prejudice to Mr. McKerlie.
> The Court finds that the evidence is admissible in order to show, among other things, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id. at 13. The prosecutor then argued to the jury why the prior conviction was important: "you may use it to determine identity, motive, absence of mistake -- it wasn't a mistake that he downloaded those images – a plan, a pattern. That's how you may use that powerful evidence." 7/1/15 RT 111.

As a result of this trial court record, which appellate counsel characterized as a "kitchen sink" approach, appellate counsel was left guessing which proper purpose actually applied. Opening Brief at 18. The State's Answering Brief argued in favor of admission to show identity, Answering Brief at 13, knowledge, *id*. at 15, *modus*

operandi, *id*. at 16, and lack of mistake or accident, *id*. at 17, which thus necessitated a rebuttal of each alleged proper purpose, Reply Brief at 2-4. In the end, the court of appeals found that identity was a proper purpose, because there were notable similarities between the evidence supporting the prior conviction and the charged acts such as an identical misspelling of a search term in both cases. *McKerlie*, 2017 WL 977021, ¶¶ 10-19. The court did acknowledge the full list of inapplicable e404(b) purposes that were offered and accepted in the trial court but it affirmed the ruling "if legally correct for any reason." *Id*. ¶ 22 (citing *State v. Boteo-Flores*, 230 Ariz. 551, 553 ¶ 7 (App. 2012)).

If this Court adopts the proposed changes to Rule 404(b), prosecutors will be required not only to state which proper purpose permits the use of the other-act evidence but also to "articulate in the disclosure … the reasoning that supports the purpose." Using *McKerlie* as an example, minimal research would have shown that none of the exceptions applied except for identity; had the prosecutor disclosed that the prior conviction would help establish identity and cited a single case for support, then substantial confusion could have been avoided. This rule change would increase the quality of litigation in trial courts. As one member of the Advisory Committee noted, "the proposed changes would give direction to litigants and the trial court and prevent awkward oral arguments where parties attempt to talk around what may be propensity purposes." Minutes of Advisory Committee on Rules of Evidence, p.4.

For these reasons, AACJ and PCPD request this Court grant the petition and amend Rule 404(b) in accordance with the petition.

DATED: May 1, 2020.

By /s/ David J. Euchner
David J. Euchner

This comment e-filed this date with:

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