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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: AMENDMENT OF RULE 404 OF THE ARIZONA RULES OF EVIDENCE	Supreme Court No. R-20-0023 **RESPONSE TO COMMENTS TO PETITION TO AMEND RULE 404 OF THE ARIZONA RULES OF EVIDENCE**

RULE 404(B) IS INSUFFICIENT TO ADDRESS THE UNIQUE DIFFICULTIES IN PROSECUTING DOMESTIC VIOLENCE IN ARIZONA.

There are unique difficulties in prosecuting domestic violence cases across the nation and in Arizona. And the current Rules of Evidence, including the current Rule 404(b), do not sufficiently address those issues. Thus, we urge the Court to grant the petition to permit the use of propensity evidence in domestic violence cases.

a. Domestic violence cases present unique difficulties in prosecution.

Any prosecutor in Arizona will speak of the problems in prosecuting

domestic violence cases in Arizona. For decades, articles and studies have repeatedly shown that victims of domestic violence recant, refuse to cooperate, refuse to testify, refuse to assist in prosecution, refuse to talk about the abuse, refuse to come to court, seek the dismissal of charges, withhold information from police, disclose information late, minimize the abusers involvement, and blame themselves. *See* Andrea M. Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future*, 2003 U. Ill. L. Rev. 1115, 1126 (2003); Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 Santa Clara L. Rev. 157, 160 (2007); Jay A. Abarbanel, *In Light of Crawford v. Washington and the Difficult Nature of Domestic Violence Prosecutions, Maryland Should Adopt Legislation Making Admissible Prior Acts of Domestic Violence in Domestic Violence Prosecutions.*, 39 U. Balt. L. Rev. 467, 472 (2010); Ed Furman, *Addressing Evidentiary Problems in Prosecuting Domestic Violence Cases Post-Crawford*, 25 Temp. Pol. & Civ. Rts. L. Rev. 143, 147 (2016).

In fact, evidence suggests that "eighty to ninety percent of domestic violence victims will recant as some point." Abarbanel, 39 U. Balt. L. Rev. at 472. But prosecutors also face other hurdles including lack of other witnesses, additional documented evidence, and juror biases against domestic violence victims. 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, 974 (2000). Studies further show that even if a victim testifies at trial, without evidence of prior abuse jurors "tend to believe the violence did not occur." *Id*.

What is more, this reluctant behavior seen in victims of domestic violence can be directly traced to "the significant control that the batterer exerts over the victim." Abarbanel, 39 U. Balt. L. Rev. at 472. And the "propensity inference is appropriate precisely because of this 'system of control.'" 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, 388 (1996); *See also* Letendre, 75 Wash. L. Rev. at 998–99 (citing American Medical Association study showing that "47% of batters who beat their intimate partners do so at least three times a year").

b. Rule 404(b) is insufficient to address the difficulties in prosecuting domestic violence cases.

Rule 404(b) does not address these many challenges associated with prosecuting domestic violence cases in Arizona. The issue with 404(b) is that prior incidents of domestic violence towards the victim often do not fit within any exception of 404(b). Part of this difficulty arises because acts of domestic violence often "share conceptual similarities but not factual similarities" and are thus not

usually admissible under Rule 404(b). Abarbanel, 39 U. Balt. L. Rev. at 492.

For example, a defendant on one occasion may break the victim's apartment window, on another he may threaten to harm the victim's child, and on another he may punch the victim. Months later when he strangles the victim, the jury does not get to hear any of the prior incidents. Even when the victim takes the stand and recants or minimizes, nothing in the current rule allows a prosecutor to discuss these prior acts that certainly would influence the victim's testimony or show the pattern of power and control that lead to the strangulation. The prior acts do not show Defendant's intent or motive for the strangulation, and identity is rarely the issue because the victim knows the abuser. The prior acts do not show a plan, lack of mistake, modus operandi, or any other permissible purpose suggested under 404(b). What the prior incidents do show is a pattern of power and control that have influenced the victim—a pattern that is documented and recognized by every domestic violence expert.

While those prior acts would be highly relevant, very rarely would a judge ever allow that evidence at trial. As one commentator noted, under Rule 404(b) "the narrow openings through which evidence of prior acts may be admitted […] do not reflect the realities of domestic violence." Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*,

47 Santa Clara L. Rev. 157, 175–76 (2007) (internal quotations and citations omitted).

What is needed is a rule akin to Rule 404(c), a rule that allows for propensity evidence in sexual misconduct cases precisely because of the recognized difficulties in prosecuting such cases. *See* Letendre, 75 Wash. L. Rev. 973 at 999 ("Like victims of sexual assault and child molestation, domestic violence victims are normally the only witnesses to the crime, thereby making the victim's credibility central to a prosecutor's case."); Furman, 25 Temp. Pol. & Civ. Rts. L. Rev. 143 at 162 (noting that "[e]xemptions for sexual offenses exist because evidence showing propensity has a probative value that sufficiently outweighs any prejudicial effect" and "the recidivism rate of domestic violence batterers is higher than that of other sexual offenders.").

The Advisory Committee's comment cites one unpublished opinion from Maricopa County to imply that courts routinely allow other act evidence in Domestic Violence and suggests that Rule 404(b) is sufficient. But that is not the case across Arizona. In fact, we are not aware of a single case in Pima County where a judge has allowed evidence of prior domestic violence acts under Rule 404(b).

CONCLUSION

Domestic violence presents many unique challenges and the current Rule 404(b) is insufficient address those challenges. Thus, we urge the Court to grant the petition to permit prior acts of domestic violence.

RESPECTFULLY SUBMITTED this 1st day of June, 2020.

/s/
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