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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.

**PETITION TO AMEND RULE 404  
OF THE ARIZONA RULES OF  
EVIDENCE**

As permitted by Supreme Court Rule 28, the Pima County Attorney petitions this Court to revise Rule 404 of the Arizona Rules of Evidence by adding a new section 404(d) and making a conforming change in section 404(b) as set forth in the Appendix.

RESPECTFULLY SUBMITTED this 10th day of January, 2020.

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/s/  
BARBARA LAWALL  
PIMA COUNTY ATTORNEY

Domestic violence is one of the most pervasive crimes in our communities. The statistical measures range from sobering to shocking. *See* Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 Santa Clara L. Rev. 157, 157–58 (2007); <https://www.speakcdn.com/assets/2497/arizona.pdf> (last visited January 9, 2020). It is also one of the most difficult kinds of crime to prosecute because of the dynamic of domestic violence. Current evidence rules can sometimes make the search for truth and accountability difficult. This petition proposes a new Rule that would allow evidence of other instances of domestic violence committed by the defendant to be admitted in a domestic violence case for all purposes, including propensity. This proposed Rule should be adopted because it better enables jurors to understand and decide the truth of domestic violence allegations.

First, the proposed Rule takes into account the real-world dynamic of domestic violence, which is rarely an isolated event. “Domestic 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.” Isabell Scott & Nancy McKenna, *Domestic Violence Practice and Procedure* § 1:4 (2018). The cycle of domestic violence includes a tension-building stage, an acute battering incident, and then a phase of extreme repentance by the abuser. *Id.* And “[b]ecause any one battering episode is

likely to be but a small part of a larger scheme of dominance and control, domestic violence usually escalates in frequency and severity.” 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). As the Colorado legislature stated when it adopted a somewhat similar rule, “domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness.” Because of that, “evidence of similar transactions can be helpful and is necessary in some situations in prosecuting crimes involving domestic violence.” Colo. Rev. Stat. § 18-6-801.5(1). The prosecution of an abuser 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. Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 Fordham Urb. L.J. 953, 955 (2000).

Current Arizona Rules may allow evidence of other domestic violence incidents, but only for limited purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Ariz. R. Evid. 404(b). This evidentiary scheme “insulates defendants and misleads jurors into believing that the charged offense was an isolated incident, an accident, or a mere fabrication.” *People v. Nesbitt*, 2001 WL 1584377, at \*5 (Cal. Ct. App. Dec. 12,

2001), quoting Assem. Com. on Public Safety, analysis of Sen. Bill No. 1876 (1995-1996 Reg. Sess.) pp. 3-4. The current state of the law creates the danger that jurors will think that the charged offense is unlikely to have occurred because of a lack of vital evidence. “By forbidding the use of evidence concerning the ongoing nature of abuse within the relationship, the law denies reality, and asks the jury to do the same.” Stuart H. Baggish & Christopher G. Frey, *Domestic Physical Abuse: A Proposed Use for Evidence of Specific Similar Acts in Criminal Prosecutions to Corroborate Victim Testimony*, Fla. B.J., OCT 1994, at 57, 59. The proposed Rule would allow jurors to consider this evidence for all purposes, including propensity to commit the charged offense.

Propensity evidence is highly relevant and appropriate in domestic violence cases. As the California State Assembly noted, “The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases.” *People v. Hoover*, 77 Cal. App. 4th 1020, 1027-28 (2000), quoting Assem. Com. Rep. on Public Safety Report (Jun. 25, 1996) pp. 3–4. In such cases, there is not only “a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked.” *Id.*

“The propensity inference is appropriate precisely because of this ‘system of control’” that is common in 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, 388 (1996). This is exactly the kind of evidence that jurors need to be able to consider to understand the evidence and to determine the truth of the case they hear. “Denying jurors the right to draw the propensity inference perpetuates the myth that violent episodes committed by one intimate partner against the other are isolated events, slips, or outbursts.” *Id.* at 388-89.

The proposed Rule would allow evidence that is highly probative to rebut and explain victims’ recantation. See 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). This evidence is also very important in counteracting jurors’ 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.” *Id.* at 980-82, 999-1000.

Finally, the proposed Rule would not unfairly prejudice defendants or violate their rights. Even with the proposed Rule in place, a trial court could still exclude certain evidence “if its probative value is substantially outweighed by a danger of” unfair prejudice or other listed concerns. Ariz. R. Evid. 403. And the proposed Rule

is constitutional. Alaska courts have sustained their Rule, upon which the proposed Rule is based, against due process and equal protection challenges. *Fuzzard v. State*, 13 P.3d 1163 (Alaska App. 2000). California courts have also upheld their evidence rule against similar challenges. *See, e.g., People v. Johnson*, 185 Cal. App. 4th 520 (2010) (due process); *People v. Price*, 120 Cal. App. 4th 224 (2004) (equal protection).<sup>1</sup>

Domestic violence cases present unique challenges because of the complex array of human emotions and motivations. Current law does not account for those challenges. By adopting the proposed Rule, this Court would enable jurors to better understand the dynamics of domestic violence and give them the tools they need to accurately consider the evidence before them.

RESPECTFULLY SUBMITTED this 10th day of January, 2020.

/s/  
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<sup>1</sup> There are at least four states that allow evidence of other domestic violence acts for more than just the limited purposes set forth in our Rule 404(b). Those states are: Alaska, Alaska R. Evid. 404(b)(4); California, Cal. Evid. Code § 1109(a)(1); Illinois, 725 Ill. Comp. Stat. Ann. 5/115-7.4; Michigan, Mich. Comp. Laws Ann. § 768.27b.

## Appendix

Amend Rule 404(b) as follows:

(b) Other crimes, wrongs, or acts. Except as provided in Rule 404(c) **and (d)**, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Add Rule 404(d) as follows:

**(d) Other acts of domestic violence**

**In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, “domestic violence” has the meaning given in A.R.S. § 13-3601(A).**