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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-20-0023
)
PETITION TO AMEND RULE 404)
OF THE ARIZONA RULES OF)
EVIDENCE) COMMENT OF THE ADVISORY
) COMMITTEE ON THE ARIZONA
) RULES OF EVIDENCE
)
_____)

**COMMENT OF THE ADVISORY COMMITTEE ON THE ARIZONA
RULES OF EVIDENCE TO DENY PETITION R-20-0023**

In Petition R-20-0023, the Pima County Attorney’s Office asks this Court to adopt new section (d) in Arizona Rule of Evidence 404 allowing other acts evidence to be used for propensity purposes in domestic violence cases. The Arizona

Prosecuting Attorneys' Advisory Council (APAAC) supports that petition and suggests an amendment to explicitly add due process considerations to a court's evaluation of whether to admit the propensity evidence. The Advisory Committee on the Arizona Rules of Evidence has been studying Rule 404 for more than six months and recommends denying the petition. If the Court adopts the petition, the Advisory Committee generally supports the incorporation of APAAC's proposed due process considerations, and offers its own suggested amendment prohibiting the use of other acts evidence committed against "another person" who is not the victim in the current prosecution.

I. The Petitioner Has Not Referenced a Problem, Either Empirically or Anecdotally, in the State of Arizona Regarding Domestic Violence Prosecutions.

Arizona Rule of Evidence 404, like its federal counterpart, generally disallows introduction of other acts evidence to prove a person acted in conformance with prior acts. *See* ARIZ. R. EVID. 404(a). The policy for prohibiting this use is that the factfinder, often a jury, may overvalue this evidence and convict a person based on these prior acts, rather than on what the defendant did on this particular occasion. *See* 22B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Evidence* § 5243 (2d ed. 2019 update). Arizona Rule 404(b), also like its federal counterpart, still permits other acts to be used for non-propensity purposes, such as to prove intent, plan, or lack of accident, among other reasons. *See* ARIZ. R. EVID.

404(b). But these non-propensity reasons are purposely limited and do not allow—and indeed are meant to prohibit—the propensity inference that proposed Rule 404(d) permits.

Petition R-20-0023 seeks to amend Rule 404 by adding section 404(d), which would permit other acts evidence in domestic violence cases to be used not just for the permitted purposes listed in Rule 404(b) (the non-propensity purposes), but also to demonstrate propensity itself—that is, to show that because a defendant did an act in the past, he or she likely committed the act in question as well. Proposed Rule 404(d) is modeled on an Alaska Rule, ALASKA R. EVID. 404(b)(4), and the petition and APAAC’s comment discuss three other states that have similar rules. *See* CAL. EVID. CODE § 1109(a)(1); Ill. Comp. Stat. Ann. 5/115-7.4; Mich. Comp. Laws Ann. § 758.27b.¹ The petition also cites a variety of secondary sources advocating for the use of propensity evidence in domestic violence cases. APAAC’s comment cites a handful of non-Arizona cases suggesting there may be difficulties in proving domestic violence cases.

¹ Preliminary research suggests that there may be additional states not cited by Petitioner or APAAC with similar rules, *e.g.*, Wis. Stat. Ann. § 904.04, and that still other states may permit other acts evidence under theories broader than those listed in Rule 404(b), *e.g.*, Comment, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 SANTA CLARA L. REV. 157, 173 n.22 (2007) (discussing Colorado, Kansas, and Minnesota).

What neither the petition nor the APAAC comment cites, is a problem that needs to be solved in *Arizona* courts. Noticeably absent are empirical studies or even anecdotal accounts of Arizona domestic violence cases where other acts evidence did not have a permissible purpose under current Rule 404(b), or where the case could not be prosecuted despite the permissible purposes of current Rule 404(b). In fact, other acts evidence seems particularly likely to be admissible in domestic violence cases as evidence of, for example, modus operandi, plan, or lack of mistake, as similar prior conduct may show that this occasion was no accident and is instead part of a larger pattern. *See State v. Cleveland*, No. 1 CA-CR 17-0758, 2018 WL 6217114, *3, ¶20 (Ariz. App. Nov. 29, 2018) (trial court properly admitted other-act evidence, including a “pattern of violent behavior,” which State offered to show victim’s “state of mind and provide context for her compliance” with defendant) (mem.) (cited for persuasive value only pursuant to ARIZ. R. SUPREME CT. 111(c)(1)(C)). The lack of a showing of any concrete cases in which such evidence was excluded—or was admitted but the prosecutor was nonetheless hamstrung in proving the case—suggests that the proposal is a solution in search of a problem, at least for Arizona courts.

Of course, if the other acts evidence is being admitted under the current rules, the factfinder will be instructed not to consider those acts as evidence that the defendant has a propensity to commit the type of offense at issue and therefore more

likely committed the offense this time, while under the Petitioner's proposed rule the factfinder would be permitted to make such an inference. But is that additional inference necessary? The federal Advisory Committee has not thought so, and nor have the overwhelming majority of the states. The policy behind Rule 404(b)'s general exclusion of such an inference is a fundamental tenet of American criminal law: A defendant should be found responsible because he or she committed the charged act this time, not because he or she has a propensity to commit such acts and is therefore more likely to have committed the act this time or is generally a bad person who would commit bad acts like that charged. With the dearth of evidence that there is a problem in Arizona to solve, Arizona should not depart from the federal rules.

II. The Federal Rules of Evidence Do Not Contain an Exception for Domestic Violence Cases.

The Arizona Rules of Evidence generally track the Federal Rules of Evidence, and Arizona courts "look to the federal rule and its interpretation by federal courts for guidance." *Phillips v. O'Neil*, 243 Ariz. 299, 302, 407 P.3d 71, 74 (2017) (citations omitted). The federal rules do not contain a propensity exception for domestic violence cases, and the Federal Advisory Committee is not considering such a change, per its public records of deliberations.

Propensity evidence in sex-based cases is already an area in which Arizona's rules do not mirror the federal rules. If Arizona were to adopt this petition and permit

propensity evidence in domestic violence cases, Arizona would be placing itself even further out of line with the federal rules. The Federal Rules of Evidence contain Rules 413–415, which permit propensity evidence in sexual assault and child molestation cases, whether civil or criminal. Arizona has a somewhat similar provision for criminal sexual misconduct cases in Arizona Rule 404(c). But Arizona has not adopted that exception in civil cases, and Rule 404(c) departs from the federal rules in other respects as well. Adopting the proposed change to Rule 404(d) would take Arizona further out of line from the federal rules. This would be contrary to Arizona’s considered decision for its rules to remain in line with the federal rules, insofar as is appropriate for our system of justice.

III. If the Court is Inclined to Adopt Rule 404(d), the Advisory Committee Generally Supports Adding Due Process Considerations.

Arizona Rule 404(c) (permitting other acts in sexual misconduct cases) requires the court to make specific findings that the evidentiary value of the other acts evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other factors listed in Rule 403. Rule 404(c) then provides a nonexhaustive list of such factors. APAAC recommends that the language of proposed Rule 404(d) be amended to add *some* of these same considerations enumerated in Rule 404(c). APAAC’s proposed list is not identical to the list in Rule 404(c), and APAAC does not explain why the enumerated factors should be different in Rules 404(c) and (d).

The Court's Advisory Committee supports denying the petition. However, if the Court considers granting the petition to add Rule 404(d), the Committee agrees that providing some guidance to the courts on when to admit other acts evidence to prove propensity is better than providing no guidance at all. At this time, the Committee has not studied the truncated list of APAAC's proposal against the fuller list of Rule 404(c) and cannot advise on which list is better (or, indeed, whether a different set of factors entirely may be appropriate in this situation). If forced to make a decision on this record, the fuller list of Rule 404(c) seems appropriate, as this was the list adopted to comport with due process concerns in sexual misconduct cases.

IV. If the Court Adopts Rule 404(d), It Should Decline Petitioner's Invitation to Permit Other Acts Committed Against a *Different* Victim.

Proposed Rule 404(d) proposes that evidence of other acts the defendant committed against the victim "or another person" should be admissible to prove the defendant's proclivity toward domestic violence. If the Court adopts Rule 404(d), it should reject the portion that allows acts committed against another person to be admitted at a criminal trial. The interpersonal dynamics commonly in play in domestic violence cases may make such broad admissibility of other acts unreliable and inappropriate. *Cf. State v. Garcia*, 200 Ariz. 471, 476 (App. 2001) (For decades, "our courts have continued to recognize evidence of a defendant's lewd disposition

toward *a particular victim* as a distinct exception to the general rule excluding character evidence.”) (emphasis added). Further study would be necessary to strike the appropriate balance between the rights of the accused and the needs of the prosecution in any rule change proposed in this area.

Conclusion

The Court’s Advisory Committee on the Rules of Evidence urges the Court to deny the petition to permit the use of propensity evidence in domestic violence cases. If this Court adopts the change proposed by the petition, it should then (a) deny the request to permit as propensity evidence other acts evidence committed against “another person” who is not the victim of the charged offense(s), and (b) consider a modification to add the full list of due process considerations enumerated in Rule 404(c) to Rule 404(d).

DATED this 25th day of April, 2020.

_____/s/ Sara J. Agne _____

Sara J. Agne
Co-Chair, Advisory Committee on Rules of Evidence

_____/s/ Maria Elena Cruz w/ permission _____

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