IN THE ARIZONA SUPREME COURT

WILLIAM ALLEN LEAR, Petitioner, v. HON. RICHARD FIELDS, Respondent, and STATE OF ARIZONA, Real Party in Interest.	Supreme Court No. CV-11-0038-PR Court of Appeals No. 2 CA-SA 2010-0074 DEPARTMENT A Pima County Superior Court Cause No. CR-20092214

BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

¶1 *Amicus curiae* Arizona Attorneys for Criminal Justice ("AACJ") is a not-for-profit membership organization representing over 400 criminal defense lawyers licensed to practice in the State of Arizona, law students, and other associated professionals, which is dedicated to protecting the rights of the criminally accused in the courts and the legislature. AACJ respectfully urges the Court to grant William Lear's petition for review because it raises an important constitutional question of separation of powers.

¶2 This case involves a new statute, A.R.S. § 12-2203, that affects all civil and criminal cases in which expert witness testimony is introduced. AACJ offers this brief in support of Mr. Lear's petition for review because § 12-2203 allows AACJ's member attorneys to effectively attack the admission of "expert" testimony proffered by the prosecution, most notably that of Wendy Dutton (whose testimony is the subject of Mr. Lear's petition), which has been admitted for far too long in our State. As the trial court properly determined, Dutton's testimony, previously allowed under *State v. Varela*, 178 Ariz. 319 (App. 1993), and *State v. Curry*, 187 Ariz. 623 (App. 1996), would be inadmissible under § 12-2203. Mr. Lear's petition for review thoroughly addresses the arguments why this Court should overrule *Logerquist v. McVey*, 196 Ariz. 470 (2000), abandon the *Frye*[1]

[1] *Frye v. United States*, 293 F. 1013 (1923).

standard for admitting expert scientific evidence, and re-interpret Rule 702, Ariz. R. Evid., consistently with the interpretation of Rule 702, Fed. R. Evid., from *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).

¶3 Under the reasoning of this Court's recent opinion in *Seisinger v. Siebel*, 220 Ariz. 85 (2009), § 12-2203 must be upheld because it is no less a substantive law than that which was upheld in *Seisinger*. As evidenced not only by Judge Eckerstrom's concurrence in *Seisinger* but also by the Court of Appeals' ("COA") opinion in *Lear v. Fields*, __ Ariz. __, 245 P.3d 911 (App. 2011), however, *Seisinger* provides little guidance to lower courts that struggle with the question whether a legislative incursion into the rulemaking authority of the judiciary is "substantive or procedural" and violates separation of powers. For the reasons stated herein, AACJ requests this Court to grant the relief requested by Mr. Lear by upholding the statute's constitutionality and by modifying its own interpretation of Rule 702, Ariz. R. Evid. But in the event that this Court finds that § 12-2203 violates the separation of powers doctrine, then AACJ asks this Court to clarify its jurisprudence on "substantive versus procedural" laws and to provide guidance to lower courts so that other statutes that similarly offend separation of powers may also be struck down.

REASONS THE COURT SHOULD GRANT THE PETITION

A. This Court Should Uphold the Constitutionality of § 12-2203 under its previous decision in *Seisinger v. Siebel*

¶4 Article III of the Arizona Constitution creates the three branches of government and states: "such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." "The Arizona Constitution, written after generations of experience and experimentation under the United States Constitution, spells out the separation of powers doctrine even more specifically than does the national document." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997). Though separation of powers is explicit in the Arizona Constitution, "[t]he separation of powers does not require a 'hermetic sealing off' of the three branches of government." *State v. Prentiss*, 163 Ariz. 81, 84 (1989).

¶5 However, this Court has recognized that the powers of the three branches of government may be "blended" permissibly, so long as the result is not an outright usurpation of the powers of one branch by another. *Id.* at 276, *citing J.W. Hancock Enters. v. Registrar of Contractors*, 142 Ariz. 400, 405-06 (App. 1984). This Court approved *Hancock*, where the COA used four factors for consideration in determining whether a separation of powers violation has occurred. *Block*, 189 Ariz. at 276. As stated in *State v. Donald*, 198 Ariz. 406, ¶ 37 (App. 2000), those four factors are: "(1) the essential nature of the power

exercised; (2) the ... degree of control [that one branch assumes] in exercising the power [of another]; (3) the ... objective [of the exercise]; (4) the practical consequences of the action."

¶6 It is axiomatic that the admissibility of evidence in court proceedings is a rulemaking function that is reserved to this Court. Ariz. Const., art. VI, § 5; Rule 101, Ariz. R. Evid. Nevertheless, both this Court and the COA have permitted many statutes to withstand constitutional scrutiny despite their clear intent to regulate procedural law, on the ground that they are substantive in some manner. *See State v. Gilfillan*, 196 Ariz. 396, ¶ 27 (App. 2000) (upholding Arizona's Rape Shield Law because, in part, A.R.S. § 13-1421(B) merely provides requisite burden of proof for admission of evidence described in subsection A, and establishment of "burden of proof is substantive, not procedural"); *Seisinger*, 220 Ariz. 85, ¶ 41 (reluctance of qualified physicians to practice in Arizona due to increased medical malpractice rates was "serious substantive problem" that justified legislature enacting statute mandating additional necessary qualifications of experts in medical malpractice suits).

¶7 Other decisions of this Court and the COA make clear what constitutes a substantive law. *See, e.g., State v. Moody*, 208 Ariz. 424, ¶ 191 (2004) (change in statute is substantive if it deprives the defendant of a defense that existed at the time of offense); *Garcia v. Browning*, 214 Ariz. 250, ¶ 14 (2007)

(laws are substantive if they regulate primary conduct of defendant); *State v. Aguilar*, 218 Ariz. 25, ¶ 26 (App. 2008), *quoting In re Shane B.*, 198 Ariz. 85, ¶ 9 (2000) ("a criminal law is generally deemed substantive if it 'defines a crime or involves the length or type of punishment.'"). Even where the legislature evinces an unconstitutional purpose or preamble, this Court determines the law's constitutionality by looking only at the operative section of the law. *State v. Montes*, __ Ariz. __, ¶ 18, 245 P.3d 879, 883 (2011); *Cronin v. Sheldon*, 195 Ariz. 531, ¶¶ 30, 32 (1999).

¶8 The statute is constitutional for multiple reasons. First, the constitutionality of § 12-2203 should be upheld because the statute neither conflicts with nor engulfs the Rules of Evidence. Judges are already required to make preliminary determinations of relevance and reliability before any piece of evidence is admitted. *See Logerquist*, 196 Ariz. 470, ¶ 94, 1 P.3d 113, 140 (2000) (Martone, J., dissenting); Rule 104(a), Ariz. R. Evid. ("Preliminary questions concerning the qualification of a person to be a witness ... or the admissibility of evidence *shall* be determined by the court"); Rule 403, Ariz. R. Evid. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"). And as Justice McGregor noted in her dissent in *Logerquist*, "[t]he probative value of scientific evidence is connected inextricably to its

reliability; if the technique is not reliable, evidence derived from the technique is not relevant." *Id.* ¶ 103, 1 P.3d at 142 (McGregor, J., dissenting) (citation omitted). Thus, it is clear that under the Arizona Rules of Evidence, the trial courts already play a gatekeeping role in determining the admissibility of evidence prior to trial, and § 12-2203 merely provides a standard by which the trial courts can effectuate their duties under the various evidentiary rules.

¶9 Second, trial courts are already required to determine the reliability of expert testimony under the *Frye* "general acceptance" standard, *id.* ¶ 65, although *Frye* only applies to expert testimony based on novel scientific principles advanced by others. *Id.* ¶ 102 (McGregor, J., dissenting). There is no need to apply other factors, such as testability and verifiability, when scientific principles are generally accepted, because in order to gain general acceptance in the scientific community, these factors must have been proven to the community. *See State v. Bible*, 175 Ariz. 549, 578 (1993) ("*Frye* helps guarantee 'that reliability will be assessed by those in the best position to do so: members of the relevant scientific field who can dispassionately study and test the new theory.'" (citation omitted)). Now, in cases where there is no general acceptance of a principle, § 12-2203 supplements the *Frye* standard, by granting the trial court permission to consider the factors the relevant community would already have considered when deciding whether to accept or reject such a principle, thereby demonstrating the principle's reliability.

¶10 Third, the law is not merely procedural but is also substantive because it regulates qualification of expert witnesses in trials, just as the statute upheld in *Seisinger*. In *Seisinger*, this Court recently upheld A.R.S. § 12-2604(A), finding that the law regulating the qualifications of expert witnesses in medical malpractice cases conflicted with Rule 702, Ariz. R. Evid., but that the law had "substantive" qualities. The COA had previously held that the statute conflicted with Rule 702 in that it categorically excluded potential experts otherwise qualified to testify under Rule 702, and that it did not establish any substantive rights. *Id.* ¶ 5. As such, the COA held that the statute violated the separation of powers by impermissibly infringing upon this Court's rulemaking authority. *Id.*

¶11 This Court reversed, first noting that competency rules are "often intimately intertwined with a state substantive rule," particularly when expert testimony may be required to establish an element of the action, such as standard of care. *Id.* ¶ 39 (citation omitted). This Court noted that if the legislature is permitted to raise the burden of proof required for any claim or defense at trial, the legislature must also be permitted to require a heightened level of proof for the expert witness called to testify regarding that claim or defense. *Id.* at ¶ 40. This Court reasoned that the separation of powers doctrine does not "preclude[] the legislature from addressing what it believes to be a serious substantive problem – the effects on public health of increased medical malpractice insurance rates and

the reluctance of qualified physicians to practice here – by effectively increasing the plaintiff's burden of production in medical malpractice actions." *Id.* ¶ 41.

¶12 In *Lear*, the COA distinguished the statute at issue here from that at issue in *Seisinger* by suggesting that the legislature's interest in medical malpractice cases was somehow more defined whereas § 12-2203 was a general procedural law. *Lear*, ¶¶ 20-22. But the legislature's general interest in requiring competency from expert witnesses in civil and criminal trials is no different than its more specific interest in requiring competency from experts in medical malpractice cases. In fact, the statutes in *Lear* and *Seisinger* are functionally identical; both statutes provide a supplemental set of standards governing the admissibility of expert testimony which could preclude expert testimony otherwise admissible under the construction placed upon Rule 702 by the majority in *Logerquist*. And as § 12-2203 and the statute upheld in *Seisinger* are functionally equivalent, one cannot be struck down while the other is upheld. For these reasons, AACJ asks this Court to uphold the constitutionality of § 12-2203.

B. This Court's Separation of Powers Jurisprudence on Whether Statutes Governing Admission of Evidence are "Substantive or Procedural" is Confusing and Should Be Revisited

¶13 Alternatively, if this Court were to agree with the COA that § 12-2203 is a purely procedural law that conflicts with and engulfs the Rules of Evidence,

then this Court would be issuing contrary opinions in *Lear* and *Seisinger* that address statutes that involve the same type of legislative incursion into the judiciary's rulemaking authority. As described *infra*, this Court and the COA have issued several opinions that address the constitutionality of laws that clearly engulf and conflict with the Rules of Evidence. Yet there are at least two such unconstitutional statutes of criminal law that have remained on the books, and in at least one case the COA failed to strike down the law as a violation of separation of powers.

¶14 In his separate opinion concurring in the result, Judge Eckerstrom (sitting by designation) wrote in *Seisinger* that the lack of clarity in this Court's jurisprudence on whether statutes are "substantive or procedural" and whether a legislative measure intrudes on the province of the judiciary's rulemaking authority deprives, rather than provides, the legislature with guidance for future legislation. Noting that the judicial power of the State is constitutionally vested exclusively to the courts, "any such analysis would need to be securely tethered to traditional notions of that power as reflected in conventional understandings of institutional competence and judicial domain." 220 Ariz. 85, ¶ 50 n.10 (Eckerstrom, J., concurring in the result). "If Rule 702 is indeed an exercise of judicial power, ... it follows that a statute addressing the same subject must constitute an improper exercise of legislative authority to the extent the statute conflicts with the rule." *Id.*

¶ 51. Judge Eckerstrom reasoned that the power to regulate admissibility of expert evidence cannot simultaneously belong to the legislature and the judiciary. *Id.*

¶15 The COA noted in *Lear* that "the distinction between a substantive and procedural rule of law can be "'elusive."'" *Lear* ¶ 20, *quoting Seisinger*, 220 Ariz. 85, ¶ 29 (quoting in turn *Shane B.*, 198 Ariz. 85, ¶ 9). The lack of a bright line rule is reflected in the numerous inconsistent decisions in the trial and appellate courts. While the COA struck down § 12-2203 in *Lear*, other statutes that engulf and conflict with the Rules of Evidence have similarly been upheld by the COA. AACJ asks this Court to reconsider its jurisprudence on this issue in light of Judge Eckerstrom's separate opinion in *Seisinger*, and to resolve the many contradictory cases from the COA by upholding all the statutes, including § 12-2203, or by striking down statutes that clearly invade the province of the judiciary.

¶16 Arizona's rape shield law, A.R.S. § 13-1421, is a prime example of a statute that was upheld by the COA in spite of the clear fact that it controls purely evidentiary issues and engulfs and contradicts the Rules of Evidence. In *State v. Gilfillan*, 196 Ariz. 396, ¶¶ 24-28 (App. 2000), the COA was confronted with an unambiguous statute that does nothing but regulate the standard for admitting evidence related to the chastity of a victim, evidence that is otherwise governed by Rules 401-404, Ariz. R. Evid. *Gilfillan* acknowledged that the burden on defendants of proving the veracity of the proffered evidence to be admitted by

clear and convincing evidence,[2] stated in § 13-1421(B), is not contained in the Rules of Evidence and this Court's opinion in *State ex rel. Pope v. Superior Court*, 113 Ariz. 22 (1976). 196 Ariz. 396, ¶ 27. Yet the COA, without elaboration, said that "the burden of proof is substantive, not procedural." *Id.*

¶17 But a procedural rule does not become substantive merely because one part of the rule contains a substantive provision. *See, e.g., State ex rel. Napolitano v. Brown*, 194 Ariz. 340 (1999) (striking down statute limiting time to file Rule 32 petitions); *Pompa v. Superior Court*, 187 Ariz. 531, 534 (App. 1997) (Rules of Appeal procedural even though right to appeal substantive). Furthermore, that the burden of proof for admitting certain kinds of evidence is a judicial function is evidenced by this Court's holding in *State v. Terrazas*, 189 Ariz. 580, 582 (1997), that other act evidence sought to be admitted under Rule 404(b) (and, subsequently, Rule 404(c)) must be proven to the trial court's satisfaction to be true by clear and convincing evidence. Also, the federal rape shield law is found in Rule 412, Fed. R. Evid. (which closely mirrors the language in § 13-1421, but for the "clear and convincing" standard of proof for introducing the evidence). It is clear that § 13-1421 is a procedural rule that contradicts the Arizona Rules of Evidence. Thus, *Gilfillan* incorrectly asserted that § 13-1421 merely supplements

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[2] This Court has recently suggested that placing a burden on defendants of proving third-party other act evidence by "clear and convincing evidence" violates due process. *State v. Machado*, __ Ariz. __, ¶ 15, 2011 WL 519752 (Feb. 16, 2011).

the Rules of Evidence.

¶18 Another statute that dictates the procedure for admitting evidence in criminal trials is A.R.S. § 28-1323, governing the admission of breath test evidence in DUI cases. The rules of evidence that otherwise would govern the admissibility of such evidence are Rules 401-403 (for relevance and unfair prejudice), 701-706 (for expert testimony), and 801-804 (for hearsay). § 28-1323(A), on the other hand, usurps this judicial function by requiring a set procedure for trial judges to admit such evidence. This law clearly engulfs and conflicts with the Rules of Evidence because it specifically states in subsection B: "Compliance with subsection A of this section is the only requirement for the admission in evidence of a breath test result." A trial judge is stripped of discretion to gauge the reliability of this evidence on a case-to-case basis by an overreaching statute. Furthermore, the statute is clearly procedural, because it only applies at the evidentiary admission stage in a courtroom and in no way affects elements of an offense or otherwise affect substantive rights of a defendant or authority to act by police officers. The legislature might have an interest in keeping drunk drivers off the road, and it acts according to its constitutional authority when it defines that criminal offense and the punishment for committing it. This statute redefines rules of evidence in DUI cases, and as such it should be struck down for violating separation of powers.

¶19 On the other hand, in *State v. Robinson*, 153 Ariz. 191 (1987), this

Court invalidated A.R.S. § 13-1416, which authorized the admissibility of hearsay statements made by minors under the age of ten when the statements described acts of sexual or physical abuse. Since this statute was both more restrictive and less restrictive than the Rules of Evidence, the statute conflicted with and engulfed the rules. *Id.* at 196-97. Consequently, the statute was struck down because it infringed on this Court's exclusive authority, granted by the Arizona Constitution, "to makes rules relating to all procedural matters in any court." *Id.* And in *State v. Taylor*, 196 Ariz. 584, ¶¶ 4-11 (App. 1999), the COA applied the *Robinson* analysis and found that A.R.S. § 13-4252, the video statement statute, similarly engulfed the rules of evidence. The COA found the statute both less restrictive and more expansive than the rules of evidence and determined that the statute improperly replaced "the analytical framework provided by the Rules of Evidence." *Id.* ¶ 11. Consequently, the video statement statute unconstitutionally infringed on the rulemaking authority of this Court and violated the Separation of Powers Doctrine. Yet under *Gilfillan* or *Seisinger*, the statutes at issue in *Robinson* and *Taylor* easily could have been upheld as substantive laws because the legislature had an interest in protecting the harm done to young children testifying as victims in criminal trials.

¶20 In *Lear*, the COA distinguished *Seisinger* by finding that § 12-2604 regulated only witnesses in medical malpractice cases whereas § 12-2203 regulates expert witnesses in all civil and criminal trials. *Lear*, ¶¶ 20, 22. But as shown in

Argument A, *supra*, this is a distinction without a difference. The relevant issue is that both statutes regulate the procedure by which a court shall permit or exclude expert witness testimony. Neither statute creates a substantive right of parties or an element of a claim or crime. These laws, and the criminal laws described above, all appear to be procedural, and therefore they all appear to be unconstitutional invasions of this Court's rulemaking authority.

¶21 As Judge Eckerstrom said in *Seisinger*, the process of establishing a clear analytical framework for determining whether such legislation violates separation of powers would be complex. 220 Ariz. 85, ¶ 50 n.10 (Eckerstrom, J., concurring in the result). But AACJ requests this Court create such a bright line rule so that other statutes may be properly reviewed and consistency may be brought to this line of cases.

CONCLUSION

¶22 AACJ respectfully requests this Court to grant Mr. Lear's petition for review, overrule its holding in *Logerquist*, modify its interpretation of Rule 702, Ariz. R. Evid., and uphold the constitutionality of § 12-2203.

DATED: (electronically filed) March 3, 2011.

By /s/

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CERTIFICATE OF SERVICE

The undersigned has filed and served Brief of Amicus Curiae Arizona Attorneys for Criminal Justice in Support of Petition for Review this 3d day of March, 2011, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31.25(b)(1) and 31.19(c), I certify that the foregoing Brief of Amicus Curiae Arizona Attorneys for Criminal Justice in Support of Petition for Review uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 3,388 words.

Dated this 3d day of March, 2011.

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IN THE ARIZONA SUPREME COURT

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The undersigned counsel for William Allen Lear, pursuant to Rule 31.22, Ariz. R. Crim. P., consents to the filing of a brief *amicus curiae* in support of the petitioner by the Arizona Attorneys for Criminal Justice.

DATED: Feb. 23, 2011.

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WILLIAM ALLEN LEAR, Petitioner, v. HON. RICHARD FIELDS, Judge of the Superior Court of Arizona in and for Pima County, Respondent/Judge, and THE STATE OF ARIZONA, Real Party in Interest.	S. Ct. Case No. CV-11-0038-PR No. 2 CA-SA 2010-0074 DEPARTMENT A (Pima County Superior Court Cause No. CR-20092214) **CONSENT TO FILE A BRIEF *AMICUS CURIAE***

The undersigned counsel for State of Arizona, Real Party in Interest, pursuant to Rule 31.22, Ariz. R. Crim. P., consents to the filing of a brief *amicus curiae* in support of the petitioner by the Arizona Attorneys for Criminal Justice.

DATED: February 25, 2011.

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