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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of

PETITION TO AMEND RULE 611
ARIZONA RULES OF EVIDENCE

Supreme Court No. R-23-

RULE 28 PETITION

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Task Force to Create Guidelines for the Handling of Fentanyl Evidence and Other Toxic Evidence in the Courthouse (“Task Force”) respectfully petitions this Court to amend Rule 611, Rules of Evidence for Courts in the State of Arizona, by adding a new subsection (d) concerning hazardous evidence in the courtroom.

I. Introduction and Background

The Center for Disease Control’s National Institute for Occupational Safety and Health has identified emergency responders and healthcare workers as at-risk groups for exposure to fentanyl and its analogs. Guidance on standard operating procedures, training, personal protective equipment, and other relevant information

for preventing occupational exposure to fentanyl and its analogs has already been developed for these identified groups. However, little guidance has been issued for court personnel who may have to handle packaged evidence of fentanyl, carfentanyl, their analogs, or other toxic evidence. For the judicial branch, the “first responders” are the judges, clerks of court, jurors, parties, witnesses, and the public. In 2019, the National Judicial Opioid Task Force released a briefing on the subject stating, “it is important for personnel who work in courthouses and other court-related facilities to accurately understand what this evidence is, what risks it presents, and to understand the policies and precautionary measures adopted by courts.”

Established on June 15, 2022, by Administrative Order 2022-62, and extended by Administrative Order 2022-161, the Task Force was asked to create guidelines for handling Fentanyl and other toxic substances when they are presented as evidence in the courthouse. The Task Force members are comprised of court administrators, a clerk of court, the Department of Public Safety crime laboratory director, a county deputy legal advocate director, a county attorney, judicial officers from three different counties, a sheriff, and a legal advisor from a city police department. The policy questions presented to the Task Force were:

1. Whether these drugs should be inspected and approved by designated court personnel before being allowed into a courthouse.
2. Whether these packaged drugs must always remain in the exclusive possession of law enforcement personnel, except by approval of the court, and whether these drugs should be given to, or handled by,

- court personnel or others involved in judicial proceedings, including attorneys, witnesses, court clerks, and jurors.
3. The protocols that should be adopted for handling of the packaging for these drugs.
 4. Whether these drugs should remain in a courthouse or court-related facility during non-business hours. If court rules pertaining to the handling of exhibits prevent removal from the courthouse, policies on secure and safe storage should be established.
 5. Whether courthouse personnel should be trained to address possible exposure to fentanyl and other toxic evidence and to properly identify opioid toxicity; and identify what, if any, training is currently available.
 6. Whether naloxone should be kept in courthouses and other court-related facilities for emergencies and whether court administration or court security should be trained on the administration of naloxone in the event of opioid toxicity.

The Task Force met five times in 2022 to consider these issues. This rule petition is particular to question #2, above. The purpose is to ensure orderly conduct of judicial proceedings by protecting court staff, judicial officers, the parties, jurors, and the public from substantial or serious risk of harm while also preserving the integrity of evidence and the due process of law.

The rule changes sought in this petition are the product of significant study, deliberation, drafting, and revision by the Task Force. In addition, the Task Force heard from Court Security Directors, the Arizona High Intensity Drug Task Force, and the Administrative Office of the Courts specialist who is coordinating the implementation of digital evidence protocols. The Task Force also received various materials relevant to its discussions. All meeting information and materials can be found on the Task Force's website: [Fentanyl and Toxic Evidence Task Force](#)

azcourts.gov). Two draft rule amendment options based upon these discussions were presented to the Task Force, and then to the Superior Court Presiding Judges and the Arizona Judicial Council. *Appendix A* to this petition is the option approved by all three bodies.

It is noted that a minority of the Task Force was of the opinion that a rule to prescribe the handling of hazardous evidence was not necessary and any requirement could be prescribed by Administrative Order. A majority of the Task Force rejected that proposal as did the Superior Court Presiding Judges and the Arizona Judicial Council.

Also discussed was whether a proposed rule should be limited to Fentanyl and Carfentanil, cover other substances that could be absorbed or injected into the body, or should include other hazardous materials. Ultimately, based upon comments received during the various discussions, the Task Force recommends that in order to protect persons of the public, parties, and court staff, the proposed rule should include other hazardous materials.

The Task Force discussed whether the scope of a proposed court rule should be limited to the courtroom during the pendency of a case or should also apply to the entire courthouse at all times. This petition, reflecting the product of these discussions, limits the rule's application to the courtroom. The Task Force's position is that a court rule should govern court cases and proceedings leaving other

courthouse procedures to be addressed by Administrative Order, the Code of Judicial Administrations, or other mechanisms.

II. Intentions of the Proposed Rule Amendment.

A. To define and protect.

The proposed addition of subsection (d) to Rule 611 provides a uniform, statewide definition of hazardous evidence and explicitly states the court's the responsibility to protect all persons from harm when hazardous evidence (i.e. Fentanyl/Carfentanyl, explosives, etc.) is present in a courtroom, which also safeguards the rights of the parties and victims. "Hazardous Evidence" is defined as any physical evidence that a party seeks to bring into the courtroom that may create a substantial and serious risk of harm if ingested or absorbed, or if otherwise determined by the court to create a substantial and serious risk of harm.

B. To direct that hazardous evidence not be brought into a courtroom without a court order.

Rule 611(d)(1), in essence, presumes that hazardous evidence will not be brought into the courtroom unless a court order has been issued. The proposed subsection (d), paragraph (1), considers the rights of the parties and the sufficiency and effectiveness of digital evidence in lieu of the physical evidence.

C. To protect jurors

In an effort to protect jurors and others who might come into physical contact with the hazardous evidence, the proposed subsection (d), paragraph (2), of Rule 611 requires a digital representation of the evidence to be admitted in lieu of the hazardous evidence. The jury is not permitted to take custody of the hazardous evidence but may view it in the courtroom.

Online digital evidence portals are being implemented in trial courts throughout the state. Having an online evidence portal available for introducing digital forms of evidence, such as photos and videos that are a sufficient substitute for hazardous evidence, allows the clerk, court staff, and litigants to safely upload, process, and access evidence that could otherwise cause harm if physically brought into the courtroom. Even absent the availability of an online portal in a particular court, there are still mechanisms to process, present, and admit digital evidence. It is noted that the Court of Appeals always uses digital evidence in its case reviews. An online portal typically assists with transferring evidence electronically from a lower court.

D. To protect clerks.

The proposed addition of subsection (d), paragraph (3), to Rule 611 prohibits the clerk of the court from accepting possession of hazardous evidence for any purpose. It is contemplated that a clerk will neither handle nor assume custody of

the hazardous evidence when it is admitted by court order. The clerk will prepare the exhibit tag and give it to the custodian of the hazardous evidence, who will then attach it to the evidence under the eye of the clerk. The clerk will not store the hazardous evidence. Instead, the hazardous evidence would be retained by the custodian of that evidence as provided in the proposed Rule 611(d)(4), discussed below.

E. To uphold the integrity of the evidence.

Instead of the clerk retaining hazardous evidence, the evidence and chain of custody will remain with the custodian, which will in all likelihood be a law enforcement agency. The custodian will also ensure that all tags, markings and packaging stays secure throughout the entire case, including post-verdict proceedings and appeals.

III. Summary of the Proposed Rule Changes.

A. Amending Rule 611.

The proposed amendments to Rule 611, Rules of Evidence for Courts in the State of Arizona, are written to ensure the orderly conduct of judicial proceedings by protecting court staff, judicial officers, the parties, jurors, and the public from substantial or serious risk of harm while also preserving the integrity of the evidence and the due process of law. A draft of the proposed amendment is provided in the attached *Appendix A*.

APPENDIX A

(Additions are shown by underline)

Article VI. Witnesses

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) {No Changes}

(b) {No Changes}

(c) {No Changes}

(d) Hazardous Evidence. Hazardous Evidence is not permitted inside the courtroom, except as provided in this subsection. For the purposes of this rule, “hazardous evidence” means any physical evidence that a party seeks to bring into the courtroom that may create a substantial and serious risk of harm if ingested or absorbed, or if otherwise determined by the court to create a substantial and serious risk of harm.

(1) Presence of Hazardous Evidence in the Courtroom Upon Court Order. A party seeking to have hazardous evidence permitted in the courtroom must file a written motion. The court may order that hazardous evidence be permitted in the courtroom only if the court finds that the petitioning party has demonstrates that the need for the physical evidence substantially outweighs the potential health risks associated with its presence in the courtroom. In making the determination, the court must take into consideration all relevant factors, including:

(a) the rights of the parties; and

(b) the sufficiency and effectiveness of presenting digital representations of hazardous evidence in lieu of the hazardous evidence.

(2) Admitted Hazardous Evidence. If the court orders that hazardous evidence is permitted in the courtroom under (1) and a motion is made to admit such evidence, any order granting admission of the hazardous evidence must provide that a digital representation of the evidence is admitted in lieu of the hazardous evidence. At no time may the jury take custody of the hazardous evidence, but the jury is permitted to view hazardous evidence in the courtroom.

(3) Clerk of Court. Hazardous evidence may not be accepted by or be in the possession of a clerk of the court.

(4) Retention of Hazardous Evidence. Hazardous evidence must be retained by the custodian of the evidence during the pendency of the case, any post-verdict proceedings, and appeals. All evidence tags issued by the clerk, other identifying markings, and packaging must remain in place and not be disturbed.