Rosemarie Pena-Lynch
Bar No 023400
Mcpa. Cnty. Ofc. of Public Defense Svc.
620 W. Jackson, Suite 3076
Phoenix, AZ 85003
(602) 506-7228
Rosemarie.Pena-Lynch@maricopa.gov

Gary Kula
Bar No. 012507
Mcpa. Cnty. Public Defender's Ofc.
620 W. Jackson, Suite 4015
Phoenix, AZ 85003
(602) 506-7711
Gary.Kula@maricopa.gov

Steve Koestner
Bar No. 011566
Mcpa. Cnty. Ofc. of Legal Advocate
222 N. Central, Suite 154
Phoenix, AZ 85004
(602) 506-4111
Steve.Koestner@maricopa.gov

Shannon Burns
Bar No. 015976
Mcpa. Cnty. Ofc. of Public Advocate
106 E. Baseline Rd.
Mesa, AZ 85210
(602) 372-2815
Shannon.Burns@maricopa.gov

Sherri McGuire Lawson
Bar No. 013605
Mcpa. Cnty. Ofc. of Legal Defender
222 N. Central, Suite 8100
Phoenix, AZ 85004
(602) 506-8800
Sherri.Mcguire@maricopa.gov

ARIZONA SUPREME COURT

In the matter of: PETITION TO AMEND RULE 611 ARIZONA RULES OF EVIDENCE	Supreme Court No. R-23-0025 Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies Re: Petition to Amend Rule 611 Arizona Rules of Evidence

The Maricopa County Indigent Defense Offices, which collectively represent most indigent individuals charged with criminal offenses in our jurisdiction, suggest four changes to the Proposed Rule 611. These changes commit the policy goals of the proposed rule to their appropriate areas, establish notice and timing standards, affirm chain of custody requirements, and define the judicial role in safeguarding the public and evidentiary record.

I. An administrative order is the appropriate vehicle to regulate the conduct of court personnel, while a procedural rule is appropriate to regulate the conduct of litigants seeking court orders regarding hazardous evidence.

The proposed Rule 611 attempts to address issues more appropriately served by an administrative order accompanied by a procedural rule. The concerns and policy rationales announced in Arizona Supreme Court Administrative Order 2022-62 ("A.O. 2022-62") and the Rule 28 Petition to Amend Rule 611 Arizona Rules of Evidence ("Petition") focus on the conduct of court personnel to safeguard the public and uphold the integrity of the evidence. However, the text of the proposed Rule 611 would regulate *both* the conduct of court personnel *and* prescribe conduct for individual litigants throughout the state.

A. Administrative orders and procedural rules implicate separate parties and serve separate goals, calling for separate instruments to address the concerns in the Petition and A.O. 2022-62.

The Arizona Constitution gives the Supreme Court the power of administrative supervision over all courts of the state. Ariz. const. art. VI, § 3. This

includes promulgating administrative orders managing the conduct of officers of the court, including attorneys and court personnel. *Goldman v. Sahl*, 248 Ariz. 512, 527 ¶ 49, 462 P.3d 1017, 1032 (App. 2020) (citing *In re Shannon*, 179 Ariz. 52, 76-77, 876 P.2d 548, 572-72 (1994)).

An administrative order embodies an internal statement of policy not directly applicable to litigants or their counsel, to provide more efficient management and disposition of cases. *State ex rel. Romley v. Ballinger*, 209 Ariz. 1, 2-3 ¶ 7, 97 P.3d 101, 102-03 (2004). On the other hand, a procedural rule is one that prescribes a course of conduct that litigants are required to follow, such that the failure to comply with it may deprive the parties of substantial rights. *Id.*

The Petition's proposed addition of section (d) to Rule 611 regulates the conduct of court personnel insofar as it prohibits hazardous evidence inside a courtroom, and prohibits the clerk of court from accepting or retaining hazardous evidence during the pendency of a case. At the same time, it also regulates the conduct of individual litigants seeking to have hazardous evidence permitted inside the courtroom, directly affecting the rights of the parties to litigation.

B. Both A.O. 2022-62 and the Petition mean to develop standards of conduct for court personnel regarding hazardous evidence, but the proposed Rule 611 blends those standards with setting procedural rules for litigants, which should be bifurcated or clarified.

The Arizona Supreme Court promulgated A.O. 2022-62 in June of 2022 to create the Task Force to Create Guidelines for the Handling of Fentanyl Evidence

and Other Toxic Evidence in the Court House ("Task Force"). Citing "little guidance […] issued for court personnel who may have to handle packaged evidence of fentanyl, carfentanil, their analogs, and other toxic evidence," A.O. 2022-62 directed the task force to develop guidelines for handling such substances when they are presented as evidence in judicial proceedings. To this end, A.O. 2022-62 presented a list of policy issues for the Task Force to address:

1. Whether court personnel should inspect and approve hazardous substances before being allowed into a courthouse;
2. Whether law enforcement should retain exclusive possession of packaged hazardous substances, and whether they could be handled by court personnel, attorneys, witnesses, court clerks, and jurors;
3. The protocols to be adopted for handling and packaging of hazardous substances;
4. Whether hazardous substances should remain in a courthouse or a related facility, and whether policies on secure and safe storage should be established;
5. Whether courthouse personnel should be trained to address possible exposure to hazardous substances, and identify what training is currently available; and
6. Whether naloxone should be kept in courthouses, and whether court administration or security should be trained to administer naloxone in the event of opioid toxicity.

The Petition was made in response to the second question that A.O. 2022-62 posed, regarding hazardous substance handling by court staff. However, the proposed Rule 611 blends the regulation of court personnel conduct that administrative orders generally control with the regulation of litigant conduct, generally handled by procedural rules. Given the separate parties regulated and different goals served by each type of instrument, the Court should consider

bifurcating the standards into different instruments insofar as they relate to different parties. Alternatively, the Court should clarify standards for the different parties within a unitary Administrative Order.

II. Amend Proposed Rule 611 to establish standards and deadlines for notice and the opportunity to object, and affirm chain of custody requirements.

As drafted, Proposed Rule 611 does not explicitly determine how the parties are provided notice and an opportunity to be heard when seeking orders to have hazardous evidence permitted in the courtroom. Moreover, Proposed Rule 611 does not explicitly guarantee chain of custody requirements for digital representations of hazardous evidence.

A. Proposed Rule 611 should be amended to set standards and deadlines for notice and opportunity to object when a party seeks orders to bring hazardous evidence into the courtroom.

As drafted, Proposed Rule 611 offers few explicit standards for the timing, pretrial disclosures, and procedure for determining whether hazardous evidence will be allowed into the courtroom. Amendments establishing explicit notice requirements would help to avoid unnecessary surprise litigation shortly before trial, and better afford parties the ability to be heard on the issue.

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature

of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

Likewise, procedural rules regarding the disclosure and presentation of evidence have policy bases in avoiding surprise and eliminating unjustifiable expense and delay. *See*, *e.g.*, Ariz. R. Ev. 102; Ariz. R. Crim. P. 1.2; *State v. Stewart*, 139 Ariz. 50, 59, 676 P.2d 1108, 1117 (1984) (underlying principle of Criminal Rule 15 reciprocal discovery rules to avoid undue delay and surprise at trial by both sides); *Schwartz v. Arizona Primary Care Physicians*, 192 Ariz. 290, 296 ¶ 21, 964 P.2d 491 (App. 1998) (policy behind Civil Rule 26.1 disclosure is to deter "litigation by ambush").

In criminal cases, parties generally must make all pretrial motions no later than twenty days before trial unless the court modifies the deadline. Ariz. R. Crim. P. 16.1(b). In the civil context, motion deadlines are fixed through joint scheduling orders otherwise the default filing deadline for motions in limine for which pretrial rulings are desired is thirty days before a trial management conference or the trial date. Ariz. R. Civ. P. 7.2(b), 16(c).

Just as existing civil and criminal procedural rules prescribe robust notice and disclosure requirements for pretrial disclosures and motions, so too should the Proposed Rule 611. Adding in more explicit timing requirements would promote procedural due process, and reduce the potential for undue surprise and delay caused

by parties seeking court orders regarding hazardous evidence shortly before trial. Moreover, explicitly requiring the proponent of a digital representation of hazardous evidence to give notice and produce the digital representations before trial would better allow courts to consider the rights of the parties and the sufficiency and effectiveness of presenting digital representations before issuing pretrial rulings. Finally, other jurisdictions such as Minnesota, Oregon, and Virginia have successfully implemented hazardous exhibit rules with more rigorous notice and timing requirements.[1]

B. Proposed Rule 611 should be amended to explicitly affirm chain of custody requirements for presenting digital representations of hazardous evidence.

The Petition recognizes the value of upholding the integrity of the evidentiary record. However, the Petition makes an assumption that the custodian will "in all likelihood be a law enforcement agency," complying with marking and packaging requirements throughout the case. This fails to account for the fact that Proposed Rule 611 is silent on maintaining chain of custody requirements.

1

Oregon: Or. Uni. Trial Ct. R. 6.140 – Procedures for Use of Hazardous Substance. https://www.courts.oregon.gov/rules/UTCR/2022_UTCR_ch6.pdf

Virginia: Va. R. Evid. 2:107 – Ultrahazardous Items as Exhibits. https://www.vacourts.gov/courts/scv/amendments/rule_2_107.pdf.

Minnesota: Minnesota Judicial Branch Policy 507, "Potentially Hazardous Exhibit Policy" (2004). https://www.mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/507-Potentially-Hazardous-Exhibit-Policy.pdf?ext=.pdf

Other jurisdictions have made explicit what the Petition simply assumes: that chain of custody and authentication requirements must be met before the exhibit may be offered in court.

For example, Virginia's evidentiary rule regarding "ultrahazardous items as exhibits" explicitly notes that it "does not excuse the party offering such evidence from proving chain of custody."[2] Likewise, Minnesota's Judicial Branch Policy on "potentially hazardous exhibit[s]" state that "[n]othing contained in [this policy] is intended to override the inherent power of the Court to render rulings, consistent with the rules of evidence and the rules of criminal procedure, on the handling of exhibits being offered into evidence before the Court."[3]

Adding simple language affirming these requirements does not detract from the public safety goals of prohibiting hazardous materials in the courtroom. Instead, Amending Proposed Rule 611 to explicitly account for chain of custody requirements would promote the policy goal of safeguarding the evidentiary record.

III. Amend Proposed Rule 611 to further define the judicial role in regulating the handling, use, and disposition of hazardous evidence in cases where it is allowed into the courtroom.

Proposed Rule 611 is silent on standards for trial courts to consider in the event that hazardous evidence is allowed into the courtroom, beyond prohibiting

2 *Id.*
3 *Id.*

juror handling of hazardous evidence. Adding a non-exhaustive list of discretionary factors that trial courts may use to regulate the handling, use, and disposition of hazardous evidence promotes the goal of protecting court staff, security personnel, jurors, attorneys, and litigants from accidental exposure. Minnesota and Oregon have both issued court rules including factors that courts may consider before issuing orders.[4]

IV. Amend Proposed Rule 611 to provide a balancing of probative value and prejudicial effect, and consider a standard jury instruction to cure any prejudicial effect inherent in showing juries exhibits categorized as a "digital representation of hazardous evidence."

Proposed Rule 611 promotes interests of public safety and courtroom security against exposure to hazardous materials. At the same time, offering "digital representation[s] of hazardous evidence" by its own terms suggests the potential for prejudicial effect on the jury. To minimize the risk for undue prejudice, Proposed Rule 611 should be amended to include a judicial determination of prejudicial effect on a case-by-case basis, and require the proponent of a digital representation of hazardous evidence to give written notice of its intent to offer the digital representation as an exhibit. The Court should also consider a curative standard jury instruction in the alternative.

4 *Id.*

A. Provide a balancing test in Proposed Rule 611 and consider creating a standard curative jury instruction.

Security or public safety concerns weigh in favor of insulating court staff, attorneys, and jurors against the risk of accidental exposure to hazardous substances being used as exhibits during trial. At the same time, the term "hazardous evidence" implies dangerousness by its very nature. Moreover, the packaging and markings used to identify substances like fentanyl (hazard or poison symbols used by public health, poison control, and law enforcement; "skull-and-bones" symbol used to signify poisonous substances[5]) suggest the inherent dangerousness of the substances.

To analogize, in *Deck v. Missouri*, the United States Supreme Court examined the issue of allowing juries to see defendants shackled during capital cases. 544 U.S. 622, 633 (2007). There, the Court noted that:

> "[t]he appearance of the offender […] in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community [….] and it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death."

Id.

While hazardous evidence would likely be proffered in non-capital cases as well, there is a risk that the term "hazardous evidence" and the use of hazardous

5 *Know Your Hazard Symbols*, Princeton Univ. Environment Health and Safety (August 22, 2016), https://ehs.princeton.edu/news/know-your-hazard-symbols-pictograms

materials symbols could be misused by the jury. Like in *Deck*, a jury could improperly infer a party's dangerousness by the simple terminology or symbols used to describe the substance being shown to them as a digital representation.

Whether in civil toxic tort cases or criminal drug cases, adding a balancing test to Proposed Rule 611 would allow courts to evaluate the potential for undue prejudice on a case-by-case basis while upholding public safety goals. For the same reasons, a curative standard jury instruction should be considered.

V. The Maricopa County Indigent Defense Offices recommend the following amendments to Proposed Rule 611.

Assuming that Proposed Rule 611 is the vehicle through which hazardous evidence standards will be promulgated, the Maricopa County Indigent Defense Offices propose the following alternative language:[6]

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, notwithstanding reasonable safety precautions, 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~~ Digital Representations of Hazardous Evidence in the Courtroom Upon Court Order. ~~A party seeking to have~~

[6] Deletions are struck through. Additions are underlined.

~~hazardous evidence permitted in the courtroom must file a written motion.~~ A party seeking to offer digital representations of hazardous evidence as an exhibit in lieu of the hazardous evidence shall give written notice subject to the timing requirements of this Rule. The court may order that digital representations of hazardous evidence be permitted in the courtroom only if the court finds that the petitioning party has demonstratesd ~~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~~ the evidence offered as an exhibit is hazardous evidence.

~~(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) If the court orders that hazardous evidence is to be offered as an exhibit, its orders regarding the handling, use, and disposition of hazardous evidence may include:

(a) the appointment of a custodian, subject to court policies or administrative orders, or policies of the clerk of court regarding taking custody of hazardous evidence;
(b) the amount of hazardous evidence to be transported or viewed;
(c) the container in which the hazardous evidence is to be stored;
(d) the location and duration of handling and storage of hazardous evidence, subject to court policies or administrative orders, or policies of the clerk of court regarding the storage and handling of hazardous evidence;
(e) the disposition of the hazardous evidence; and
(f) other matters that, in the court's discretion, are reasonable measures to safeguard court personnel, the litigants, counsel, the public, and the evidentiary record.

(3) In any trial in which a party intends to offer digital representations of hazardous evidence as an exhibit, the party must:

(a) provide notice and a copy of the digital representations to the opposing party no later than 45 days before trial; and

(b) file a copy of the notice and digital representations with the court on the day the notice is provided to the opposing party.

(4) If a digital representation of hazardous evidence is to be presented as an exhibit in lieu of the hazardous evidence, the court shall consider whether the probative value of presenting a digital representation of hazardous evidence in lieu of the hazardous evidence substantially outweighs its prejudicial effect. If the court finds that the probative value of presenting the digital representation of hazardous evidence as an exhibit does not substantially outweigh its prejudicial effect, the court may issue orders to limit, partially or wholly redact, or preclude the digital representation of 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. This rule does not excuse the party offering hazardous evidence from establishing chain of custody. A party may offer properly authenticated photographs of hazardous evidence as part of establishing chain of custody.

VI. Conclusion

The Maricopa County Indigent Defense Offices, which jointly represent most indigent individuals charged with criminal offenses in our jurisdiction, suggest four main changes to Proposed Rule 611.

The first suggestion is to promulgate the Proposed Rule 611 standards alternatively as an administrative order or rule of procedure. This would ensure that the proper policy goals are targeted by each type of instrument. Furthermore, this would promote continuing conformity of the Arizona Rules of Evidence with the Federal Rules of Evidence.

The second suggestion is to establish notice and timing requirements within the scope of the rule. This would accomplish the goals of reducing unnecessary waste, delay, and surprise litigation. Other jurisdictions have adopted similar approaches. Moreover, explicitly affirming chain of custody requirements within the Proposed Rule's scope does not detract from its public safety function.

The third suggestion is to further define the judicial role in shaping the handling, use, and disposition of hazardous evidence in cases where it is permitted in the courtroom. The proposed language affords judicial officers discretion to shape the manner of hazardous evidence presentation while protecting public safety.

The fourth suggestion is to provide a balancing test between probative value and prejudicial effect within the Proposed Rule for when digital representations are used, and to require the proponent of the digital representation to give written notice before the digital representation is permitted. This would allow judicial officers discretion to make individualized determinations of evidentiary value and the danger

for prejudice on a case-by-case basis. Moreover, a standard curative jury instruction should be considered to the same effect.

///

///

///

///

///

Respectfully submitted this 1st day of May, 2023,

By /s/ *Rosemarie Pena-Lynch*
Rosemarie Pena-Lynch, Director
Mcpa. Cnty. Ofc. of Public Defense Svc.

By /s/ *Gary Kula*
Gary Kula, Director
Mcpa. Cnty. Public Defenders Ofc.

By /s/ *Steve Koestner*
Steve Koestner, Director
Mcpa. Cnty. Ofc. of Legal Advocate

By /s/ *Shannon Burns*
Shannon Burns, Director
Mcpa. Cnty. Ofc. of Public Advocate

By /s/ *Sherri McGuire Lawson*
Sherri McGuire Lawson, Director
Mcpa. Cnty. Ofc. of Legal Defender