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**IN THE SUPREME COURT  
IN AND FOR THE STATE OF ARIZONA**

In the matter of:

Petition to Amend [Rule 615, Arizona Rules of Evidence](#)

Arizona Supreme Court  
No. R-23-0003

Pinal County Public Defender  
Comment in Opposition to Petition to Amend [Ariz. R. Evid. 615](#)

Pursuant to [Rule 28\(e\) of the Arizona Supreme Court Rules](#), the Pinal County Public Defender respectfully submits this comment opposing the proposed amendment to [Rule 615 of the Arizona Rules of Evidence](#) as it is currently written.

Although it is generally desirable to be consistent with the Federal Rules of Evidence, the current proposal drastically alters Arizona law by undermining the effectiveness of sequestration orders unless a trial judge takes an additional discretionary step to also prohibit the witness from receiving the trial testimony. Rather than lockstep with this change in its federal counterpart, Arizona should maintain its mandatory interpretation of [Rule 615](#) to ensure the fairness of jury trials.

## I. Pinal County Public Defender Interest Statement

The Pinal County Public Defender provides legal defense services to indigent adults and juveniles facing criminal charges and/or mental health commitments when appointed by the Pinal County Superior Court or a Justice Court within Pinal County. Our goal is to provide superior legal representation, safeguard fundamental individual rights, and ensure equal access to the protections afforded by the United States Constitution, the Arizona Constitution, and the laws of Arizona.

The Pinal County Public Defender opposes the proposed amendment to [Rule 615 of the Arizona Rules of Evidence](#) because the proposal will undermine the reliability of jury trials by effectively ending the mandatory sequestration of witnesses. Under the proposed amendment, trial courts must take an additional—but discretionary—step to prohibit sequestered witnesses from receiving trial testimony.

This change will inevitably result in trial witnesses tailoring their testimony to that of earlier testimony when judges fail to exercise discretion in ordering that witnesses excluded from the courtroom also be forbidden from receiving the testimony. Such a result will undermine the ability of jury trials to “encourage the discovery of truth, and detection and exposure of falsehood.” [Spring v. Bradford](#), [243 Ariz. 167, 170-71, ¶14 \(2017\)](#) (internal citation omitted).

**II. Upon invocation, the sequestration of witnesses should continue to be mandatory inside and outside of the courtroom.**

This Court should reject the proposed amendment to [Rule 615](#) because it will weaken sequestration orders and reduce the fairness of jury trials. If the Court is concerned with whether the current Rule provides fair notice, the better path would be to amend [Rule 615](#) in so that it retains its scope and mandatory application.

**A. The proposal should be rejected as it is currently worded.**

The Petition recommends amending [Rule 615 of the Arizona Rules of Evidence](#) to conform to an expected change to its federal counterpart. Petition at 4. Most of the proposed amendments to [Rule 615](#) are stylistic. But the Petition proposes a drastic change to how the sequestration of witnesses operates during jury trials by adding a new subsection concerning “Additional Orders to Prevent Disclosing and Accessing Testimony.” Petition at 3-4; Proposed [Ariz. R. Evid. 615\(b\)](#). The proposal was developed because of some confusion arising in federal courts concerning the scope of an order excluding witnesses at trial. Petition at 2; *see, also Summary of Proposed New and Amended Federal Rules of Procedure at 224-225, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Oct. 19, 2022)*.

However, as the Petition notes, Arizona courts have not been split or otherwise confused about the operation of [Rule 615](#). Petition at 3. Rather, [Rule 615](#) has been

interpreted in Arizona to prohibit sequestered witnesses from reading the testimony of other witnesses. *Spring*, 243 Ariz. at 171, ¶15. Arizona’s view is consistent with common law, which also generally required sequestration inside and outside the courtroom. See John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, Vol. 3 at §1840, 912 (1923).

When invoked, trial courts are obligated to enforce a party’s request for the sequestration of witnesses. *Spring*, 243 Ariz. at 171, ¶15 (citing Ariz. R. Crim. P. 9.3<sup>1</sup> cmt. to 1989) (stating that under Rule 615 “the trial court in both civil and criminal cases no longer has discretion and sequestration is a matter of right.”).

Yet, the Petition would alter the mandatory nature of Rule 615 by giving trial judges discretion to decide whether mandatory sequestration also prohibits prospective witnesses from nonetheless receiving the trial testimony. Petition at 3-4; Proposed Ariz. R. Evid. 615(b). The Petition asserts the addition of subsection b to Rule 615 will merely “codify the Court’s authority to enter such orders.” Petition at 3. But the proposed amendment would not codify existing law by transforming a mandatory rule into a discretionary one.

If adopted as written, Proposed Rule 615(b) would undermine the reliability of the trial process by increasing the likelihood that sequestered witnesses will tailor

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<sup>1</sup> The Pinal County Public Defender respectfully asserts that Ariz. R. Crim. P. 9.3(a)(1) merits its own revision to plainly reflect that enforcement of the Rule is mandatory upon invocation.

their testimony to align with previously given testimony. Full sequestration makes “available the raw reactions and the individual recollection of each witness unaided by the stimulation of the evidence of any other witness.” *Dunlap v. Reading Co.*, 30 F.R.D. 129, 131 (E.D. Pa. 1962). The full sequestration of witnesses inside and outside the courtroom “is so powerful and practical a weapon of defense that no contingency can justify its denial.” *Wigmore at §1839, 909 (1923)*.

Accordingly, the Pinal County Public Defender opposes the Petition as written.

**B. Rule 615 could be amended so that it provides fair notice.**

When interpreting a rule, “the careful lawyer or judge trusts neither memory nor paraphrase but examines the very words of the instrument.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 56 (2012) (explaining the “Supremacy-of-Text Principle” of statutory construction). But the current federal and state version of *Rule 615* does not expressly address the prohibition of sequestered witnesses from receiving trial testimony. The absence of such language has given rise to the interpretive confusion in federal courts. *See Sarah Chapman Carter, Exclusion of Justice: The Need for A Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 U. Dayton L. Rev. 63, 72–79 (2004) (describing the 2004 split between federal courts).

Rule 615 could be improved by amending it to provide fair notice to witnesses and parties that its invocation also applies outside the courtroom.

If the Court finds it desirable to clarify the scope of Rule 615, the preferable route would be to amend the Rule so that the scope of its mandatory application is expressly included within the language of the Rule.

The Pinal County Public Defender respectfully recommends the following changes to the proposed amendment to Rule 615(b):

**(b) Additional Orders to Prevent Disclosing and**

**Accessing Testimony. An order under (a) operates only to**

**exclude witnesses from the courtroom. But Upon ordering the**

**exclusion of a witness from the courtroom, the court ~~may~~ must**

**also, by order:**

**(1) prohibit disclosure of trial testimony to witnesses who**

**are excluded from the courtroom; and**

**(2) prohibit excluded witnesses from accessing trial**

**testimony.**

If incorporated within the proposal, this modified amendment to Rule 615 would alleviate any hypothetical confusion concerning the scope of the Rule and give fair notice to all litigants that sequestered witnesses are also prohibited from

receiving trial testimony. See Daniel J. Capra & Liesa L. Richter, *"The" Rule: Modernizing the Potent, but Overlooked, Rule of Witness Sequestration*, 63 Wm. & Mary L. Rev. 1, 32–34 (2021) (explaining notice and fairness issues with current iteration of the Rule).

### **III. Conclusion**

The Pinal County Public Defender opposes the adoption of Proposed [Rule 615\(b\) of the Arizona Rules of Evidence](#) because the proposal will substantially change the scope of the Rule and unnecessarily undermine the ability of juries to assess the truthfulness of witnesses. The sequestration of witnesses—inside and outside the courtroom—should remain mandatory upon invocation in Arizona.

To the extent that [Rule 615](#) could be improved by expressly requiring trial courts to order sequestered witnesses to refrain from receiving trial testimony outside the courtroom, the Pinal County Public Defender respectfully recommends that [Rule 615](#) be amended to mandatorily require such an order rather than leave it to the trial judge's discretion.

Respectfully submitted this 1<sup>st</sup> day of May, 2023

By: /s/ Kate Milewski  
Kate Milewski  
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