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ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND ARIZONA
RULE OF EVIDENCE 615

Supreme Court No. R-23-0003

Joint Comment by the Directors of the
Maricopa County Indigent Defense
Agencies

We are the directors of the public defender agencies that handle most indigent felony cases filed in Maricopa County. Pursuant to Rule 28(e) of the Arizona Supreme Court

Rules, we submit this comment in opposition of the proposal to amend Arizona Rule of Evidence 615.

We agree with the court that Arizona need not always adopt amendments to the Federal Rules of Evidence. As the Petitioners note, unlike our federal counterparts, Arizona courts have not struggled with interpreting Rule 615, and our caselaw supports its purpose: “to prevent witnesses from ‘tailoring’ their testimony to that of earlier witnesses and to aid in detecting testimony that is less than candid.” *See Spring v. Bradford*, 243 Ariz. 167.

In addition, we are fortunate that in criminal trials, the court bulwarks against potential juror taint by reading criminal jury instructions, including an explanation of “The Rule of Exclusion of Witnesses” and an “Admonition” against obtaining information outside the courtroom. *See Revised Arizona Jury Instructions—Criminal 5*. In our opinion, the Petition’s addition of subsection (b), “Additional Orders to Prevent Disclosing and Accessing Testimony,” subverts those protections and defeats the purpose of mandatory sequestration. We believe that the court should stay the course with the mandatory requirements of Rule 615. In our opinion, the addition of subsection (b) will create disparate rulings regarding previously sequestered witnesses disclosing or accessing witness testimony, which is the opposite of what the proposed rule seeks to avoid.

From our perspective, there is always the potential that a judge will fail to exercise discretion in prohibiting a witness from disclosing and accessing testimony. This becomes a perilous situation for our clients, especially ones facing the death penalty, because such a failure could result in witnesses engineering their testimony to align with a previously testifying witness, and/or conforming their testimony with evidence that has been presented

(or excluded) during trial.

While we understand why the Petition seeks to “codify” the Court’s authority to enter orders concerning sequestered witnesses’ access to previous testimony, we agree that as written, an objection is necessary. However, we understand that it would be unfair of us to make such an objection without a solution. We believe the court should adopt the following proposal:

(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.”

Respectfully submitted this 30th day of April, 2023.

By /s/ Rosemarie Pena-Lynch
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