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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-23-0025

REPLY TO COMMENTS

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”) hereby submits the following reply to the comments filed in the above-captioned matter.

**I. Discussion of Comments**

This petition received two comments. The first comment was from the Advisory Committee on Rules of Evidence (“Advisory Committee”) regarding placement of the proposed rule. The second comment was filed jointly by the Directors of the Maricopa County Indigent Defense Agencies (“Defense Directors”) recommending several changes to the proposed rule.

### **A. Advisory Committee on Rules of Evidence**

The Advisory Committee on Rules of Evidence submitted a comment recommending the new rule on hazardous evidence be moved to Rule 124 in the Arizona Supreme Court Rules. The Advisory Committee co-chair, Hon. Maria Elena Cruz was gracious in inviting undersigned to meet with the Advisory Committee, leading to a very productive discussion.

While placement in Rule 611, Arizona Rules of Evidence may be appropriate, the Task Force acknowledges the wisdom of the Advisory Committee's analysis and comment, and recognizes the similarity of the proposed rule to Rule 122, Rules of the Supreme Court regarding the use of portable devices in the courtroom. After review and consideration of the comment, the Task Force agrees with the comments of the Advisory Committee and supports the proposed change and recommendation of the Advisory Committee. Petitioner has incorporated the Committee's recommendation into the proposed Rule 124 as shown in the *Appendix*.

### **B. Directors of the Maricopa County Indigent Defense Agencies**

The Directors of the Maricopa County Indigent Defense Agencies submitted a comment that recommended an administrative order for court personnel, notice and timing standards, chain of custody requirements, and a standard jury instruction. Initially, it is noted that the undersigned reached out to one of the Defense Directors' comment signatories, Maricopa County Public Defender, Gary Kula. Undersigned

met with Mr. Kula and Lina Garcia, the Deputy Public Defender, prior to filing this Reply in order to better understand the Defense Directors' perspective and explain the Task Force's perspective.

Regarding the Defense Directors' first recommendation for an administrative order that governs court personnel, the Task Force plans to submit a request to the Chief Justice for an administrative order to be signed in conjunction with this new hazardous evidence rule. While the proposed rule establishes requirements for handling hazardous evidence inside the courtroom, the proposed administrative order would require supplemental policies and procedures be implemented to ensure the safety and security of all persons who enter any courthouse or judicial facility. This administrative order, if signed, would cover many of the Defense Directors' concerns for regulating the conduct of court staff and security personnel.

Concerning the Defense Directors' comment on the need to ensure due process for the defendant, the Task Force is in agreement and included a provision in (a)(1)(A) of the proposed rule requiring the judge to consider the rights of all parties.

The Defense Directors' next recommendation is to establish notice and timing standards. To this point, the Task Force favors judicial discretion in managing the evidence and has confidence that many of the concerns regarding notice will be resolved during the Rule 15 (Rule 15, Ariz. R. Cr. Pr.) disclosure process without

inserting an additional level of timeframes. The judge will have discretion to make a finding that a digital representation of the evidence is sufficient and effective while still upholding its integrity. It is noted that the Task Force considered that something that is not, per se, illegal, could still be determined by a judge to be potentially dangerous in court and therefore would be considered hazardous. Further, the defense should recognize the nature of the evidence through the charging document.

The Defense Directors' concern with chain of custody could also be noted as a concern for the evidence's foundation. The purpose of this proposed rule is not to supplant the disclosure requirements set forth in various case specific rules (e.g., Rule 15 of the Rules of Criminal Procedure or Rule 26 of the Rules of Civil Procedure) or the foundational requirements in the Rules of Evidence. The purpose of the proposed rule is to provide safety to all persons in the courtroom.

The fact that this rule does not affect specific disclosure, foundational, or chain of custody requirements is made clearer by adopting the Advisory Committee's recommendation that the rule be adopted as Rule 124 of the Rules of the Supreme Court and not as a part of the Rules of Evidence. This proposed rule does not diminish the proponent's responsibility to properly disclose or prove foundation and chain of custody to the satisfaction of the court. It simply substitutes digital evidence in place of the hazardous evidence when the evidence is introduced.

Additionally, it is essential that the Clerk of Court does not bear the responsibility of handling and taking custody of the hazardous evidence. The Defense Directors recommend removing the provision of the Task Force proposal that would protect the Clerk of Court from handling and taking custody of the hazardous evidence. Whether they are in the courthouse or in the courtroom, the proposed rule and administrative order both aim to protect clerks from harm as well as protect the parties' due process of law by maintaining the hazardous evidence in the custody and control of law enforcement for the pendency of the case.

The duties of the Clerk are found in the Arizona Constitution (Article 6, Section 23), Arizona Revised Statute (Title 12, Chapter 2, Article 8), and Supreme Court Rules (Rules 91 and 94), as well as some local Rules of Practice in Superior Court, such as Rule 2.8, Local Rules of Practice, Superior Court, Maricopa County and Rule 17, Local Rules of Practice, Superior Court, Gila County. Therefore, any concerns regarding the integrity or foundation of the evidence and the Clerk's rule in handling evidence are already covered.

The Defense Directors similarly recommend removing the requirement that the jury not take custody of the hazardous evidence. Anecdotally, that is the case now. In any event, similar to that of the Clerk, it is essential that the jury does not bear the responsibility of handling and taking custody of the hazardous evidence.

The Task Force recognizes and agrees with the Defense Directors' comment for a jury instruction. It is a priority of the Task Force that the hazardous evidence be kept out of the hands of the jury. Trial courts will be able to consider their own jury instruction at the appropriate time. Additionally, the report filed by the Task Force will recommend that a jury instruction be developed. Therefore, the Task Force will defer to the State Bar's decision on the request for a jury instruction to be developed by the Arizona State Bar's Jury Instruction Committees in both civil and criminal matters.

## **II. Conclusion**

For the foregoing reasons, Petitioner respectfully requests the Court approve the proposed Rule 124, Arizona Rules of the Supreme Court, as proposed in the attached *Appendix*.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of May, 2023.

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## APPENDIX

### Rules of the Supreme Court of Arizona

#### XII. Miscellaneous Provisions

(deletions shown with ~~striketrough~~, new language is underlined)

#### Rule 124. Hazardous Evidence.

(a) 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 demonstrated 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.