

David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO ADD RULE 57.1 AND)	
RULE 57.2, ARIZONA RULES OF)	Supreme Court No. R-08-0027
CIVIL PROCEDURE)	Petitioner's Reply
_____)	

Pursuant to Arizona Supreme Court Rule 28(D)(2), David K. Byers, Director, Administrative Office of the Courts, respectfully submits this reply to comments that were filed regarding Petition No. R-08-0027.

The subjects of this petition are Rules 57.1 and 57.2 of the Arizona Rules of Civil Procedure. Rule 57.1 governs actions filed pursuant to A.R.S. §12-771 (determinations of factual innocence). Rule 57.2 applies to actions filed pursuant to A.R.S. §12-772 (determinations of improper party status). These rules were adopted at the December 9, 2008, Rules Agenda on an emergency basis, effective January 1, 2009. These rules as adopted will be referred to as the “existing rules”.

I. Reply to the Comment of the State Bar of Arizona. The State Bar has made a number of suggestions concerning these rules. Some of its suggestions are well-taken. Other suggestions would probably provide no improvement to the existing rules.

A. Proposals concerning Rule 57.1, Declarations of Factual Innocence.

The following proposals by the State Bar would probably not improve the existing rule.

1. Proposal to clarify that “either an aggrieved person or a prosecuting agency” may file a petition. (See the State Bar’s comment at pages 3-4.) A.R.S. §12-771(A) provides that “a person, or a prosecuting agency on behalf of the person”, may file a petition for a declaration of factual innocence. Therefore, directions about who may file a petition are already in the statute.

The language of the statute confirms that if a petition is filed by a prosecuting agency, then the agency would be filing on behalf of the victim of identity theft. The agency would not be a party, per se. The real party in interest, regardless of whether the petition is filed by the person or by the agency, would still remain the victim of identity theft, i.e., the “person” specified in the existing rule.

Petitioner also believes that carrying the proposed language of “an aggrieved person or a prosecuting agency on behalf of that person” throughout

Rule 57.1, as suggested by the State Bar, would confound the rule and would make it more cumbersome rather than clarifying it. Use of the simple word “person” in the existing rule is sufficiently descriptive.

2. Proposal to require service under Rule 4.1, A.R.C.P. (See the State Bar’s comment at pages 4-5.) The State Bar proposes a requirement that service of a petition be made pursuant to Rule 4.1. This compares to the Petitioner’s proposed language that service be made “in the manner prescribed by A.R.S. §12-771 and by these rules.”

A.R.S. §12-771 uses different nomenclature throughout its text on the manner of notice. If no criminal charge was filed, the statute requires that the petition shall be “served” on the arresting or citing law enforcement agency. See A.R.S. §12-771(D). If a criminal charge was filed, the statute requires that the petition shall be “served” on the prosecuting agency, and a copy shall be “provided” to the defense attorney. See A.R.S. §12-771(E)(1). If the prosecuting agency files the petition, it is required to “provide notice” to the victims. See A.R.S. §12-771(E)(2).

A uniform requirement of service under Rule 4.1, as proposed by the State Bar, would contravene the more relaxed notice requirements established under A.R.S. §12-771.

3. Proposal to require that the limited jurisdiction clerk provide records to the judge assigned to the case. (See the State Bar’s comment at pages 5-6.) Routine practice is that a clerk of one court transmits records to a clerk of another court, rather than directly to a judge of the other court. This practice permits the transmitted records to be properly docketed and filed by the receiving court. The State Bar’s proposal to by-pass this practice is not warranted.

4. Proposals regarding a hearing. (See the State Bar’s comment at pages 7-8.)

a) The State Bar has posed that the existing Rule 57.2(G)(2) “appears to require notice of a hearing to a victim of a criminal offense even if criminal charges were not filed, which is inconsistent with the statute.” (See page 7 of the State Bar’s comment, at lines 16-18.) The undersigned believes that the existing language is not only justified by A.R.S. §13-4440, but it is actually mandated.¹

b) The proposal to include language that in lieu of an affidavit, a declaration may be filed pursuant to Rule 80(i) of the civil rules is unnecessary. The process is ...

¹ A.R.S. §13-4440(A) provides: “A. The victim has the right to be present and be heard at any proceeding in which a person’s factual innocence is being considered pursuant to section 12-771.” This statute makes no distinction between hearings on factual innocence petitions for cases where a criminal charge had been filed and hearings in cases where no criminal charge was filed.

already allowed under Rule 80(i).²

c) Finally, the State Bar proposes that a notice of a ruling on a petition for a determination of factual innocence be provided not only when the petition is granted (which the State Bar acknowledges is the requirement of the statute), but also when a petition is denied. The legislation correctly presumed that a law enforcement agency or victim would need notice only upon the granting of a petition. A denial of a petition changes nothing. Although notice of a denial may be given by the court, notice of a denial should not be required.

The following suggestions by the State Bar would improve these rules, and these should be adopted. See Appendix 1.

5. Names and addresses. The State Bar has proposed that the names and addresses of parties entitled to notice be included in the content of a petition for a determination of factual innocence. This suggestion has been incorporated into the attached revised version of Rule 57.1, paragraph (B), as shown in Appendix 1.

6. Limitation on disclosures. The State Bar has also proposed that the limitation on discovery in the existing rule be extended to disclosures otherwise required under Rule 26.1. This suggestion has also been incorporated into the

² Rule 80(i), Ariz. R. Civ. P., provides in part: “Wherever, under any of these rules...any matter is required or permitted to be supported...by the ...affidavit of the person making the same..., such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn written declaration...subscribed by such person as true under penalty of perjury....”

attached revised versions of Rule 57.1 and Rule 57.2, as shown in their respective paragraphs (F).

7. Filings under seal and/or redacted filings. The State Bar’s suggestion to allow redacted filings and/or filings under seal has been incorporated within the attached revised version as a new paragraph (D). As shown in Appendix 1, this additional paragraph was included in Rule 57.1 as well as in Rule 57.2.

8. Denial of a petition without first holding a hearing. The State Bar has suggested that the court should be precluded from denying a petition without first holding a hearing. Such a provision might contradict the court’s inherent authority to summarily dispose of its cases. However, the undersigned acknowledges that paragraph (H) of existing Rule 57.1 and paragraph (H) of existing Rule 57.2 would be better presented if the option of the court entering an order upon submission of proof by affidavit was listed before, rather than after, the alternative of holding a hearing. Appropriate changes are shown in the attached versions of Rules 57.1 and 57.2.

B. Proposals regarding Rule 57.2, Declarations of Improper Party Status

The State Bar’s proposals regarding Rule 57.2 “largely track” the proposals for Rule 57.1. (State Bar’s comment, at page 8.) To that extent, Petitioner’s above-stated reply regarding Rule 57.1 is also applicable to Rule 57.2, except in the following respect.

The State Bar has correctly noted that a form of caption for a Rule 57.1 petition [“in re: (name of petitioner)”] has not been carried over in the existing Rule 57.2. This omission has been addressed in the version of Rule 57.2 set out in Appendix 1 by adding a form of caption in the text of paragraph (B).

II. Reply to Comments filed by the Arizona Prosecuting Attorneys’ Advisory Council, the Maricopa County Attorney, and the Commission on Victims in the Courts. These three comments all recommend a similar proposal to amend Rule 57.1.

The comments propose that a judicial officer in a criminal case be permitted to make a determination of factual innocence upon the entry of a guilty plea by a defendant, or upon a finding of guilt. New language for Rule 57.1(G)(4) proffered by the Maricopa County Attorney would permit a criminal court, “upon a determination of the defendant’s guilt in the criminal matter” to “contemporaneously enter a determination of a victim’s factual innocence without a hearing or submission of proof by affidavit.”

Petitioner believes that a proposal to allow a determination of factual innocence without proof contravenes the requirement in A.R.S. § 12-771(G) that a court must have “clear and convincing evidence.” Furthermore, sufficient facts to support a declaration of factual innocence may not be revealed in the course of determining a defendant’s guilt, so there is no assurance that the judge in the

criminal case would know enough about the identity issue to determine factual innocence without an evidentiary hearing. In most cases, the victim of the offense charged in the criminal case will not be the same person as the victim of an identity theft.³ Apparently in recognition of this difference, APAAC’s comment would include a provision to allow a judicial officer in a criminal case to make a finding of factual innocence after a defendant has pled guilty or has been found guilty of “an identity theft crime”. (APAAC comment, at page 1.) APAAC’s proposal would have only narrow impact because in the majority of cases, the victim of the crime charged in the criminal case and the identity theft victim who files a petition for a declaration of factual innocence will not be the same person.

Notwithstanding this concern, the suggestion that a factual innocence determination be made by the judge who presides over a related criminal case does have merit, since it could provide expedited relief to the victim of the identity theft. However, a judicial decision on a civil petition entered in the context of a criminal proceeding would require the unusual step of joining a civil matter with a criminal matter, which is likely to present logistical challenges from a case administration perspective, particularly in higher-volume courts where judicial assignments are limited to either criminal or civil calendars, but not both.

³ For example, D, using A’s identity, commits the crime of theft from XYZ Department Store. D is charged with theft. The “victim” of the theft is XYZ Department Store. Although A’s identity was used to commit the theft, A is not a victim of the charged offense.

Accordingly, should the Court wish to adopt such a procedure, Petitioner recommends that in lieu of revising the process set forth in civil Rule 57.1, an amendment to the Arizona Rules of Criminal Procedure would be appropriate. Petitioner suggests the following addition to the criminal rules, specifically, a new Rule 39.1, be adopted to authorize the judge to enter a finding of factual innocence:

Rule 39.1. Determination of Factual Innocence

If a petition for a determination of factual innocence is pending in the superior court at the time guilt is determined or sentence is pronounced in a criminal case, and the petition alleges that the defendant in the criminal case used the petitioner's personal identifying information in the commission of the offense charged in the criminal case, at the time of determination of guilt or pronouncement of sentence, the court may consider the merits of the petition, and the court may enter appropriate orders as provided in Rule 57.1 of the Rules of Civil Procedure.

III. Conclusion. Petitioner requests that Rule 57.1 and Rule 57.2 be amended as shown in Appendix 1.

RESPECTFULLY SUBMITTED this 25th day of June, 2009.

By _____
David K. Byers, Director
Administrative Office of the Courts
1501 W. Washington St.
Phoenix, AZ 85007

Electronic copy filed with the
Clerk of the Supreme Court
this 25th day of June, 2009.

Appendix 1

Rule 57.1. Declaration of Factual Innocence

A. Scope of rule. This rule governs the determination of factual innocence of a person who claims pursuant to A.R.S. ~~section~~ §12-771 that the person's personal identifying information was taken, and as a result the person's name was used by another person who was arrested, cited, or charged with a criminal offense, or entered as of record in a judgment of guilt in a criminal case.

B. Filing. A petition brought under this rule shall be filed in the Superior Court in the county in which the other person was arrested for, or cited or charged with, a criminal offense. The petition shall be assigned a civil case number. If applicable, the petition shall state the specific court location where the underlying charge was filed, or the judgment of guilt was entered, and the case number of that prior filing. The petition shall identify, as applicable, the names and mailing addresses of all persons and entities entitled under A.R.S. §12-771(H) to notice of a finding of factual innocence. The petition shall be captioned: In re: (name of petitioner).

C. Service. The Petitioner shall serve the petition in the manner prescribed by A.R.S. ~~section~~ §12-771 and by these rules.

D. Redacted Filings and Filings Under Seal. A person may request, and a court may order, that a filing containing potentially sensitive identifying information such as a person's birth date, social security number, or financial account numbers, be filed or retained in redacted form or under seal.

~~D~~ E. Transmission of Records. If the petition is related to a charge filed in a justice of the peace court or a municipal court, the Clerk of the Superior Court shall request the justice of the peace or presiding officer of the municipal court to transmit a copy of the file to the Clerk's office.

~~E~~ F. Discovery and Disclosure. Discovery may be conducted and disclosures under Rule 26.1 may be required only upon stipulation of the parties, or by order of the court.

~~F~~ G. Evidence. The Petitioner must establish factual innocence by clear and convincing evidence.

~~G~~ H. Hearing and Determination.

1. An order entered pursuant to this rule may be entered upon submission of proof by affidavit.

~~2.~~ 2. The Court may hold a hearing to determine the Petitioner's factual innocence.

~~3.~~ 3. If the Court holds a hearing, the victim of the offense identified in a judgment of guilt, or committed by the person arrested for, or cited or charged with, a criminal offense, has a right to be present and to be heard at the hearing.

~~3. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.~~

~~H I.~~ Order. On a finding of factual innocence related to an arrest, citation, or charge, the Court shall notify the following persons, if applicable: the Petitioner; the prosecuting agency which filed the charge; the law enforcement agency which made the arrest or issued the citation; the defense attorney.

Rule 57.2. Declaration of Factual Improper Party Status

A. Scope of rule. This rule governs petitions alleging factual improper party status pursuant to A.R.S. ~~section~~ §12-772, if as a result of a person's personal identifying information being taken, the person's name was entered as of record in a civil action or judgment.

B. Filing. A petition brought under this rule shall be filed in the Superior Court for the county in which the Petitioner's name was entered as of record in a civil action or judgment because of alleged improper use of the Petitioner's personal identifying information. The petition shall be assigned a civil case number. The petition shall state the specific court location where the underlying action was filed, and the case number of the prior filing. The petition shall be captioned: In re: (name of petitioner).

C. Service. The Petitioner shall serve the petition in the manner prescribed by these rules on all parties in the civil action in which the Petitioner's identity was allegedly used.

D. Redacted Filings and Filings Under Seal. A person may request, and a court may order, that a filing containing potentially sensitive identifying information such as a person's birth date, social security number, or financial account numbers, be filed or retained in redacted form or under seal.

~~D-E.~~ E. Transmission of Records. If the petition is related to a case filed in a justice of the peace court, the Clerk of the Superior Court shall request the justice of the peace to transmit a copy of the file to the Clerk's office.

~~E F.~~ F. Discovery. Discovery proceedings may be conducted and disclosures under Rule 26.1 may be required only on a petition brought pursuant to this rule upon stipulation of the interested parties, or by order of the court.

~~F G.~~ G. Evidence. The Petitioner must establish improper party status by clear and convincing evidence.

~~G H.~~ H. Hearing.

1. An order entered pursuant to this rule may be entered upon submission of proof by affidavit.

~~1. 2.~~ 2. The Court may hold a hearing on the petition.

~~2. If the Court does not hold a hearing, an order entered pursuant to this rule may be entered upon submission of proof by affidavit.~~

~~H I.~~ I. Order. The Court shall provide notice of the Court's findings to the Petitioner and to all parties in the civil action in which the Petitioner's identity was allegedly used.