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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULE 25(e) OF THE ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE

Supreme Court No. R-23-0010

Petitioner's Reply to the CIDVC's Comment in Opposition

Petitioner replies to the Comments made by the CIDVC, Mrs./Miss Rachel Mitchell, and the APAAC in sequence, as follows:

I. REPLY TO THE CIDVC

PREFACE

The CIDVC, a child of this Court – the child who created the mess that I'm trying to clean up – has run here to its daddy to comment in opposition to my Petition, saying "Daddy, believe me! It's true!"

So, as a first matter, to avoid the obvious appearance of impropriety inherent in this relationship, this Court should not entertain its incorrigible child. (The Legislature made nepotism a crime for a reason. (See A.R.S. § 38-481.)) If not for nepotistic reasons, then because of the obvious "home-court" advantage that a Committee of this Court has against an outsider.

ANALYSIS

The CIDVC continues to promulgate a lie that started almost 20 years ago, that "Rule 25(g) [that, in a civil Injunction Against Harassment (IAH), a judge may prohibit a defendant from possessing firearms] is consistent with the existing statutory framework for ensuring that the court can **grant relief necessary** ..."

No, Rule 25(g) is not consistent with the existing statutory framework. This because the phrase "grant relief necessary" is NOT sufficient to prohibit defendants from possessing firearms. Not in a civil IAH. Not in a criminal Domestic Violence Order Of Protection (DV OOP). For the phrase "grant relief necessary" in the civil IAH statute is also in the criminal DV Orders of Protection statute too! (See A.R.S. 21 13-3602(G)(6).) And that fact is crucial.

Here's the logic: If it were true that the phrase "grant relief necessary" was sufficient to prohibit defendants from possessing firearms, then the legislature would not have added language to the criminal DV OOP statute about firearms and the prohibited possessing of firearms.

But the legislature DID add language in the criminal DV statute. Language that the legislature knew was necessary. Language that specifically allows prohibiting defendants in DV OOP's from possessing firearms. (Below.)

Therefore, the fact that language was added to the criminal DV OOP statute proves that "grant relief necessary" is **not sufficient** to prohibit defendants from possessing firearms. Q.E.D.

Consistent with this logical conclusion, it can be proved that it never was the

legislature's intent to prohibit defendants in civil IAH's from possessing firearms. We know this from the canon of construction *expressio unius est exclusio alterius*. (That the express inclusion of one thing necessarily implies an intention to exclude others of that type.)

It goes like this: Since the Legislature expressly included firearms and the provision to prohibit defendants from possessing firearms in criminal DV OOP law, A.R.S. § 13-3602(G)(4), but did NOT include either in civil IAH law, A.R.S. § 12-1809, then these exclusions necessarily prove that it was **never the Legislature's intent** to allow judges to prohibit defendants from possessing firearms in civil IAH's. (See also *Welch v. COCHISE COUNTY BD. OF SUPERVISORS*, 494 P. 3d 580 - Ariz: Supreme Court 2021, where this Court said, "The canon of construction expressio unius est exclusio alterius [...] counsels us to construe **the legislature's exclusion of remedies as intentional**.)

Consequently, not only is Rule 25(g) inconsistent with the existing statutory framework, it is likewise inconsistent with the legislature's intent.

Quite frankly, the CIDVC/this Court have made up their own Red Flag "Law." [1]

Next, there is another reason why Rule 25(g) is not consistent with the existing statutory framework. Consider: Even if it had been the legislature's intent to

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[1] This lie started when, pre-*Heller*, a predecessor committee to the CIDVC added a line to the advisory DV Benchbook. That line was grandfathered in wholesale when the DV Benchbook was elevated to the ARPOP. It has remained since, even after *Heller* affirmed that the right to possess firearms is an individual right.

prohibit defendants in civil IAH's from possessing firearms, and even if the legislature had put the exact same language from the criminal DV OOP statute in the civil IAH statute, even these would not be enough to implicate a defendant's right to possess firearms. This because it would not pass constitutional muster in a civil IAH. This has already been proved in the AZ COA's *Savord v. Morton*. (330 P. 3d 1013 - Ariz: Court of Appeals, 1st Div. 2014.)

There, speaking about a criminal DV Order Of Protection (which, as we've seen, unlike civil IAH law, has the necessary language to make defendants prohibited possessors), "A higher standard of review applies when a court's order **implicates a defendant's right to possess firearms** under the Second Amendment to the United States Constitution or under Article 2, Section 26, of the Arizona Constitution..."

"A firearm restriction under the federal Gun Control Act [a.k.a. 'Brady,' **which is a defacto suspension of a defendant's U.S. and Arizona constitutional rights** to possess firearms] is triggered by an order of protection **only if** the order includes a finding that [the] person represents a credible threat to the physical safety of [the] **intimate partner** or child."

The key word here for our purposes is "intimate partner." You cannot lawfully suspend the constitutional rights of a defendant to possess firearms unless an **intimate** partner is involved.

But, by definition, there are no intimate partners involved in civil Injunctions Against Harassment. If there were, then the matter would be heard as a criminal DV

Order of Protection.

So no matter how much language one might add to the civil IAH statute, it wouldn't matter. Any firearm restriction in a civil IAH is a patent violation of a defendant's constitutional rights because a civil IAH never meets the necessary "intimate partner" requirement of *Savord*.

Next, continuing the lie, the CIDVC goes on to say that "Transfer of the firearms [in a civil IAH] is dependent on the defendant's **willingness** to comply with the court's order and is not a seizure of property..."

Oh, c'mon. This is like saying that paying Income taxes is voluntary. Except that you'll go to jail if you don't. Likewise, if you don't "willingly" comply with a court's order to give up your firearm, you will go to jail for Interfering with Judicial Proceedings. (A.R.S. § 13-2810) Even though the court's order is unlawful.

Let's not play word games. (Is it a "Tax" or a "Fee"? Is it a "War" or a "Conflict"?) It's not a "voluntary relinquishment." It's a seizure.

Even the CIDVC shows this when, talking about the lawful procedure under criminal DV law (A.R.S. § 13-3602(G)(4)), "the defendant is **directed to transfer any firearms owned or possessed to** a designated law enforcement agency ..."

Remarkably, the CIDVC still insists that this is not a seizure. But when you are ordered by an agent of the government to transfer your property to a government agency, THAT is a quintessential seizure. Even our legislators have said so.

Several legislators, when asked why they didn't want a Red Flag Law in Arizona, said "... that they will oppose the measure if there aren't sufficient

protections not only for an individual's Second Amendment rights to possess a gun, but also the **Fourth Amendment rights** against improper **seizure** of person and **property** [here, firearms] by the government."[2] They see it's a seizure.

Next, the CIDVC says that "the court does not issue a warrant authorizing a peace officer to search for or seize firearms." And earlier claims, "No part of an IAH is a warrant that authorizes a peace officer to seize - or even search for a firearm."

This is untrue also.

Apparently the CIDVC didn't bother to read the story I cited in my Petition about the Navy Vet defendant in an IAH who had his guns seized. By Police. Here's a key quote from an early version of the story. "The **judge attached a separate order** directing officers to take Bailey's guns... Glendale Police Department spokesman Sgt. David Vidaure confirmed ... that police received the court order and acted on it by **confiscating** Bailey's firearms."[3] (BTW, the Injunction was vacated on appeal. At the (unrecoverable) cost of $5000.[4])

So not only are judges in civil IAH's issuing warrants, they are sending these

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[2] See [https://tucson.com/news/local/
gov-doug-duceys-plan-to-make-arizona-schools-safer-faces-barrage-of-criticism/
article_3622beb8-9fc2-5e45-9adc-18753f9042de.html].
And
[https://cronkitenews.azpbs.org/2022/06/09/arizona-lawmakers-split-as-house-passes-gun-reform-after-uvalde-shooting/], where a legislator cited Due Process rights too.

[3] https://www.theblaze.com/news/2015/04/01/disabled-navy-vet-left-devastated-after-all-of-his-guns-are-confiscated-and-he-still-cant-believe-why

[4] While it cost Bailey's neighbor nothing to harass Mr. Bailey via the courts.

warrants/orders to the police! If you all lived in the Real World, you would know that judges do this all the time with civil IAH's.

It's your fault because you use the same form for both criminal DV OOP's and civil IAH's, calling them both "Protective Orders." (Which makes civil IAH's sound like criminal DV "Orders Of Protection.") Without making a distinction, you have confused judges into believing that civil IAH's are the same as criminal DV OOP's. So they wrongly initiate Brady for both.

This is NOT what the Legislature ever intended should happen in civil IAH's. As then-Representative Eddie Farnsworth said when explaining why the Legislature hasn't drafted a Red Flag Law, "We don't want to remove people's firearms simply on an allegation. There has to be proof that a **crime** has been committed and that **crime** has risen to the level that somebody is at risk of being harmed."[5]

Note the key word "crime." But civil IAH's are not about crimes. Nevertheless, you have essentially reduced defendants in civil IAH's to criminals, making them like felons – that is, prohibited possessors – via Rule 25(g). As then-Rep. Farnsworth said, this bizarre result was never the legislature's intent either.

Last, the CIDVC argues that because the legislature hasn't raised the standard for a seizure in A.R.S. § 13-3602(E),[6] this proves that the legislature doesn't view this "transfer" of firearms [to law enforcement] as a seizure.

This doesn't prove anything. There are many reasons that can explain why the

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[5] See FN 2

[6] The CIDVC incorrectly cited (G)(4).

legislature hasn't acted yet. I'll give one that disproves the argument.

A Representative who expressed an interest to me in amending A.R.S. § 12-1809, whose day job is a Constitutional Attorney, told me that "There's no point in wasting time on an amendment this Session with the current "Governor." (The implication being, she'll never sign the bill. Which is turning out to be correct.)

CONCLUSION I

Sorry, Daddy. But your precious daughter has been lying to you for years.

Now, you have three choices: 1) You can correct the lie and repeal Rule 25(g), your unlawful Red Flag "Law." 2) You can mitigate the harm your "Law" is causing by raising the standard in Rule 25(e) that is used to invoke Rule 25(g). You'll still be wrong and you'll still be sinning. But you'll harm fewer Arizonans with your sin. 3) You can do nothing and continue to promulgate the lie.

(Remember what Joseph Göbbels, the Nazi, said, "If you tell a lie big enough and keep repeating it, people will eventually come to believe it." Is that the company you wan to keep?)

As a precedent for Choice 2, even though it's a compromise with the devil, I point out that former Governor Ducey offered to raise the standard for the seizure of firearms in his proposed Severe Threat Order of Protection – a civil IAH Red Flag Law on steroids – to "clear and convincing" evidence.[7]

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[7] [https://www.azmirror.com/2020/02/13/ducey-flip-flops-on-red-flag-laws-says-they-wont-happen-on-his-watch/]

II. REPLY TO MRS./MISS RACHEL MITCHELL

PREFACE

Mrs./Miss Mitchell's Comment in Opposition is improper for at least two reasons. This Court should not entertain her Comment for either.

First, sadly, Mrs./Miss Mitchell has used the prestige of the Maricopa County Attorney's Office – and has misused the public's time and money – to express her personal opinion here. The MCAO has no business (literally) commenting on my Petition, since my Petition is about civil matter, not a criminal one.

Mrs./Miss Mitchell could have – and should have – commented on her own time, in her capacity as a private individual. But Mrs./Miss Mitchell chose, instead, to use the resources of the MCAO. Misuse of public monies is a felony, per A.R.S. § 35-301(A)(1).

Second, by using her prestige of Office, she is trying to sway this Court by using the MCAO to throw her weight around. That is, she has made this political. Which, on its face, raises the appearance of impropriety. (Quoting the late Justice Scalia, "What matters is not the reality of bias or prejudice**, but its appearance**." (*Liteky v. United States*, 510 US 540 - Supreme Court 1994.))

Therefore, this Court should not entertain her Comment because: 1) it might be the product of a criminal act. (Even if the Arizona Attorney General does not charge Mrs./Miss Mitchell with a crime, this Court should not condone such acts.) And, 2), if this Court really believes in the independence of the judiciary (per Sandra Day O'Connor), then this Court should not condone the obvious "playing

politics" here.

I also request that Bill Montgomery recuse himself. For when he was the Maricopa County Attorney, he also used his Office to comment against me in a related matter in this forum in 2019.[8] (Gives the appearance of prejudice.)

ANALYSIS

Mrs./Miss Mitchell begins by stating – through her taxpayer-funded Chief Deputy – that "[I] overlooked one glaring difference" in my petition as it goes to Rule 25(g), because "the court has discretion [to make a defendant a prohibited possessor of firearms via an order granting an Injunction Against Harassment] ..."

To which I respond, "They have overlooked one glaring difference. There is NO basis in law for Rule 25(g)."

I have already proved, in my Reply to the CIDVC above, that "grant relief necessary" is not sufficient to grant a court the discretion to prohibit a defendant in a civil IAH from possessing firearms.

And I have already proved, via *expressio unius est exclusio alterius*, it was never the legislature's intent to prohibit defendants in civil IAH's from possessing firearms.

And I quoted legislators saying same.

Next, as a new argument Mrs./Miss Mitchell/Mr. Ahler say that "Should the language of the Rule change, it would be in conflict with the language of [A.R.S. §

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[8] https://www.azcourts.gov/Rules-Forum/aft/971

12-1809(E)."

That is not exactly true.

Even if Rule 25(g) were lawful, raising the standard (in Rule 25(e)) from "reasonable evidence" to "clear and convincing evidence" in order to invoke Rule 25(g) does not create a conflict. Since "clear and convincing" is a higher bar than "reasonable evidence," the statute's bar will still be met to issue an Injunction against a defendant. No defendant will be harmed harm by setting a higher standard in Rule 25(e).

(As an aside, it's rather perverse that Mrs./Miss Mitchell attempts to "defend" the "rights" of plaintiffs. Plaintiffs don't have a right to a civil Injunction Against Harassment. Whereas defendants in civil IAH's do have rights. Constitutional rights.)

Next, after Mr. Ahler veers off to cite irrelevant criminal DV law, he says that, regardless of our law in Arizona, "it is still against federal law for an individual to possess or receive firearms while there is an active injunction or protective order against them." And, "In fact, the language in Arizona's statutes and rule ensure that the requirements of federal law, passed by the Brady Act, are complied with." And he cites 18 U.S.C. 922(d)(8) and (g)(8) for authority.

That last sentence is false on its face. The first is only half true.

Taking the last sentence first, the Brady Act is limited to court orders involving "intimate partners," as Mr. Ahler himself acknowledges. (Consistent with this fact, both of the memorandum decisions he cites involve intimate/domestic

partners in criminal DV matters.) But as he also acknowledged earlier, civil IAH's (per A.R.S. § 12-1809) do not involve domestic (i.e., intimate) partners. So the Brady Act doesn't – and can't – apply in civil IAH's. Therefore Rule 25(g) cannot – and does not – comply with the Brady Act.

Mr. Ahler should have instead cited *Savord v. Morton* (above), which was cited in both his cases and which IS precedent. As I pointed out in my Reply to the CIDVC (above), *Savord* requires an "intimate partner" be involved in order to make a defendant a prohibited possessor. (I.e., invoke Brady.)

So not only does Rule 25(g) not comply with Arizona law, it does not comply with federal law either.

As to the half-truth, similar to the above, it is only against federal law for an individual to possess firearms while there is a protective order against them ONLY when an intimate partner is involved. That is, only in criminal Domestic Violence orders only. Not civil IAH's.

Look, IAH's are not at all like criminal DV matters involving intimate partners. IAH's are low key matters involving neighbors, former friends or acquaintances. Sometimes even strangers. (One example from the news: A State Senator who didn't want a reporter snooping around the Senator's house.) IAH's are rarely serious, and often ridiculous, but granted (initially) anyway. (Per the State senator, above.) I personally know of two cases now where judges issued IAH's against bloggers because a plaintiff was upset by what someone wrote about them. On the Internet!

Next, Mrs./Miss Mitchell, through Mr. Ahler, makes a distinction without a difference that only Pharisees could love. Namely, that a "temporary" restriction to property is not a "seizure."

Oh, C'mon. The SCOTUS has already affirmed that a mere 25 second stop at a checkpoint is a seizure. (*Michigan v. Sitz*, cited in my petition.)

I won't argue with Pharisees. I've already quoted Arizona legislators who called the taking of firearms a "seizure."

So, split hairs all you want. But when the government restrains you or takes something from you, no matter how temporarily, it is a seizure.

Last, Mrs./Miss Mitchell, through Mr. Ahler, makes two political/emotional arguments as to why this Court should reject my petition. Their first is logically inconsistent. And so, is wrong.

They say that property subject to forfeiture/seizure must be tied to the commission of a criminal act. But they acknowledge that a firearm restriction (via this Court's Rule of Procedure 25(g), implied) has nothing to do with the commission of a crime.

Here's the inconsistency: The legislature said that you can only seize property when there is the (somewhat) high standard of clear and convincing evidence of a crime. But Mrs./Miss Mitchell/Mr. Ahler are saying that it's okay to seize property in a non-crime civil procedure using a LOWER standard?

That's wrong. A seizure is a seizure. The standards should be the same high standard.

As I stated previously, even former Governor Ducey offered to raise the standard for the seizure of firearms in his proposed Severe Threat Order of Protection to "clear and convincing" evidence.

For her second political argument, Mrs./Miss Mitchell, through Mr. Ahler, cites statistics.

Remember what Mark Twain said. "There are three kinds of lies: lies, damned lies, and statistics."

Even if their statistics are true, they are arguing that the Court should leave Rule 25(e) intact because, as they say, it is good "public policy." (See my previous aside, about how Mrs./Miss Mitchell is perversely advocating for the non-rights of plaintiffs.)

Well, I could list a bazillion cites quoting this Court's own lofty words about how you aren't supposed to make decisions based on policy, you're not supposed to correct the legislature, etc. (As recently as this year: "This is a policy argument for the legislature to address..." *STATE EX REL. DEP'T OF REVENUE v. TUNKEY*, 524 P. 3d 812 - Ariz: Supreme Court 2023.) But as the long history in this forum over Rule 25(g) demonstrates, you make policy when you want to.

Being a matter of policy, Mrs./Miss Mitchell's/Mr. Ahler's emotional appeal is only relevant for those who are allowed to make Policy. Legislators. Not judges in this Court.

CONCLUSION II

Look, I didn't make this mess. Nor did the legislature. YOU ALL made this mess.

So you all might as well put some lipstick on this pig and at least try to make it look like you're trying to comply with the legislature's intent to protect the Constitutional rights of Arizonans when you seize their property/firearm via your Rule 25(g). If you're going to keep enforcing your Red Flag "Law," then you need to raise the standard in Rule 25(e) to "clear and convincing evidence" when you seize firearms in civil Injunctions Against Harassment.

III. REPLY TO THE APAAC

PREFACE

As with Mrs./Miss Mitchell, why is the Arizona **Prosecuting** Attorneys' Advisory Council commenting here at all? My Petition is not about criminal matters. What interest does the APAAC have in this civil matter? Does the APAAC receive federal grant money (VAWA?) for pushing D.C.'s Red Flag Law? [9]

ANALYSIS

First, the APAAC begins by stating that "The proposed rule change effectively raises the burden of proof necessary to invoke Rule 25(g) of the Arizona Rules of Protective Order Procedure... "

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[9] https://www.justice.gov/opa/pr/justice-department-issues-proposed-rule-and-model-legislation-reduce-gun-violence

Second, and similarly, the APAAC dogmatically states, "However, [my proposed Rule change] is contrary to the statutory framework defining the burden of proof upon which Rule 25(e) and (g) are based."

The APAAC's use of the phrase "statutory framework" is suspiciously the same phrase used by the CIDVC. And so it appears that the APAAC is hinting at the same invalid argument used by the CIDVC. That "Rule 25(g) is consistent with the existing statutory framework for ensuring that the court can grant relief necessary ..."

To which I say, "Objection! Assumes facts not in evidence! The APAAC is assuming that Rule 25(g) is a legal and valid Rule of Procedure."

There is no evidence for Rule 25(g), as I've already proved in my Reply to the CIDVC. Nor, as I also proved, was Rule 25(g) the legislature's intent. And I have already shown that this (lack of) intent has been affirmed in public statements by legislators.

So the APAAC is wrong when it gives credence to Rule 25(g) as a lawful Rule (of Procedure) that can be invoked. It's not.

As for 25(e), the APAAC cites criminal law (A.R.S. § 13-3602(E)) for authority in a civil procedure.

What? Any argument trying to apply Title 13 criminal "Order of Protection" law to Title 12 civil "Injunction Against Harassment" law is D.O.A.

ARPOP Rule 25(e) is NOT based on a statutory framework from criminal law. Rather, Rule 25(e)'s statutory framework comes from the ONLY statute that

the Legislature gave us regarding civil IAH's: § 12-1809.

Last, the APAAC makes the same fallacious argument as the CIDVC, saying that because the legislature hasn't updated criminal DV law to require a higher standard of proof in the patent seizure of firearms in DV OOP's, it proves that forcing a defendant to transfer his/her property to law enforcement isn't really a seizure. (Essentially an argument from silence.) I've addressed this logical fallacy already.

CONCLUSION III

Frankly, I feel bad about my petition. I feel like a dad who's told his son not to have sex until he's married. (The purest position.) But if he's going to have sex before marriage, to wear a condom, so as to protect the girl. (A compromised position.)

Since this Court has historically demonstrated that it's not going to do the purest thing – repeal its Rule 25(g), it should at least provide some protection to defendants whom it touches.

This Court should raise the standard in Rule 25(e) to "clear and convincing evidence" when it seeks to invoke its baseless Rule 25(g).

SUBMITTED this 1st day of June 2023.

By /s/ Mike Palmer