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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND RULE 38(e)
OF THE ARIZONA RULES OF
PROTECTIVE ORDER PROCEDURE

Supreme Court No. R-__-_____

**Petition to amend Rule 38(e) of the
Arizona Rules of Protective Order
Procedure to stop unlawful arrests
/ unreasonable Fourth Amendment
seizures**

Pursuant to Rule 28 of the Supreme Court, Mike Palmer petitions you all to amend Rule 38(e) of the Arizona Rules of Protective Order Procedure to comply with the Due Process right in the U.S. Constitution and Arizona statute as follows:

I. Preface

Rule 38(e), titled Court Security Measures, says, in full,

The court must take reasonable measures to ensure that the parties and any witnesses at the hearing are not subject to harassment or intimidation in the courthouse or on adjoining property. For each hearing, the judicial officer must determine whether there is a need to have a law enforcement officer or a security officer present to help ensure the hearing is orderly or to provide escort for either party. The court may direct the defendant to remain in the courtroom for a period of time after the plaintiff is excused.

While performing research for this Petition, I found that DV groups

throughout the country are quoting the same 2012 study to push their agenda. The study is titled "*Recommended Court Security Measures for Cases Involving Domestic Violence.*" (It's from a public-private partnership in New York State.)

But these Recommendations, even if valid, are ONLY for Domestic Violence matters. Defendants in civil IAH's are NOT defendants in criminal Domestic Violence matters. They are a distinctly different class of defendants. This is an important distinction which must not be overlooked.

II. Analysis/Purpose

My primary focus in this Petition is on "directing the defendant" **in a civil Injunction against Harassment** "to remain in the courtroom for a period of time after the plaintiff is excused."

a. It's an unlawful arrest

When a police officer orders (lawfully or not) someone to remain on scene, the person is no longer "free to leave." When a person is no longer "free to leave," he/she is under arrest, by definition. ("An arrest occurs when a person's 'freedom of movement is curtailed.'" (*State v. Cole*, quoted as late as 2023 by the Arizona Court of Appeals.))

In the same way, when a judicial officer "directs a defendant to remain in the courtroom," (i.e., when the officer "curtails the defendant's freedom of

movement") then, by definition, the judicial officer has placed a defendant under arrest.

So it's an arrest. Now, is it a lawful arrest?

No. The Arizona Peace Officer Standards & Training Board says it best: "At the very outset, there must be a crime! A violation of the law is the first thing that **MUST** happen to initiate the arrest process. Otherwise, there is no basis for the arrest and such action would violate the Fourth amendment." (AZPOST, *Laws of Arrest 2.2 Model Lesson Plan*.)

Civil IAH's are civil matters. Not criminal. So there's no crime at bar. So, as the AZPOST observes, there is no basis at all to arrest defendants in civil IAH's. Especially when no Injunction has been granted.

[As an aside: It's the same with defendants in DV OOP's where no OOP is granted. These defendants are not criminal DV'ers. They are innocent, having been found not to have committed an act of Domestic Violence.]

So because there is no crime from the outset, when a judicial officer directs a defendant in a civil IAH to remain in the courtroom, it is an unlawful arrest.

b. It's an unreasonable seizure

Since it's an unlawful arrest, ordering a defendant to remain in the courtroom is, by definition, an unreasonable seizure. A violation of the Fourth

Amendment, as the AZPOST affirms above.

Still, you'll probably tell me that it's a reasonable seizure due to the "threats" of safety. (Even though you've rejected the "safety" argument in the past, saying "While we understand the need for police officers to protect themselves in the course of their duties, we must balance that weighty interest against the 'inestimable right' of citizens to be free from unreasonable governmental searches and seizures." *State v. Serna*, 235 Ariz. at 276 ¶ 29, 331 P.3d at 411 (citing *Terry*, 392 U.S. at 8-9, 88 S.Ct. 1868).

I am simply asking that our inestimable Fourth Amendment right here be preserved.

I expect that you'll still argue that safety is a concern. So next, we could quote statistics to each other about court safety – if there are any - to see if yours is a valid concern.

The only statement that I could find to justify arresting defendants in DV OOP matters was from the above mentioned *Recommendation*. There they say "... CIDV's are often described by judges and court staff as having one of the highest, if not the highest, **potential** for violence in the courthouse." And then they cite a study (from 2012, which is no longer online) and say "In an analysis ... domestic violence offenders were the most commonly cited **threat** source." (Emphasis

mine.)

So now this degenerates into an argument between those who are willing to give up Liberty for a little (perceived) Safety, versus those who aren't. As with policy arguments over perceived threats like Global Warming v. giving up our rights in order to keep the earth from heating/cooling/whatever, the former make policy decisions based on potential threats, what might happen. Whereas the latter make decisions based on facts, what really happens.

But perceived "threats," are not actionable. You acknowledged this, for example, when you said (speaking of the scary Second Amendment), "the mere presence of a gun cannot provide reasonable and articulate suspicion that the gun carrier is presently dangerous..." (*Serna*, above.) Neither does the presence of a defendant in a civil IAH provide reasonable suspicion that he/she is dangerous.

Furthermore, arresting people because of what you think they might do, or because you're afraid of them, is patently wrong. (Pre-crime.) Especially when it's based on irrational fear. That's called paranoia. Which makes for irrational policy.

c. It's discriminatory

As far as I can tell, this is the only Rule in your Rules of Procedure that call for the arrest/seizure/detention of defendants - even innocent ones - after a hearing is over.

For example, I recently attended the criminal trial of a defendant who was found innocent of a Class 2 felony. (His accuser claimed that the defendant tried to kill him with a fork lift.)

After the jury declared the defendant innocent, and with the Prosecutor/plaintiff still in the courtroom, the judge did not tell the defendant that he had to remain in the courtroom until the plaintiff had left. The judge simply told the defendant, "You're free to go." ¹

One would think that if anyone would be enraged, it would be a defendant whose life had been put on hold by a false accuser, turned upside down enduring 3 years of trials, looking at a potential 15 years in prison. And rightly so.

Nevertheless, at the end of criminal trials, judges routinely tell innocent defendants "You're free to go."

But in civil IAH's, a judge can tell even an innocent defendant "You must remain." This is discriminatory on its face. It shows a prejudice in the courts against defendants in protective orders. (Which is rampant in court system in Arizona. For example, there are court provided pamphlets/on-line Guides for plaintiffs seeking "protective orders." But the court doesn't provide any Guides for defendants accused in same.)

¹ Which is proper to say here because in a criminal trial, the defendant was seized at arrest. The seizure continued during the criminal trial. By saying "You're free to go," a judge is ending the seizure/arrest.

d. Violates the Code of Judicial Conduct

The Arizona Code of Judicial Conduct says, "A judge shall perform the duties of judicial office ... without bias or prejudice "And "a judge shall not ... by words or conduct manifest bias or prejudice..."

In the case of a defendant where a civil IAH was not granted (and so is innocent of the charges), telling him/her that he/she has to remain in the courtroom despite not having done anything wrong is inherently prejudicial. The message is "Someone accused you of something bad. I've found no proof of that. But I still don't believe you. You're bad anyway and you have to remain here."

The Fourth Amendment violation aside, it's punishing an innocent defendant.

And when you arrest/seize someone who hasn't done anything wrong, you unfairly impugn them. That's an indignity. The COJC requires that " a judge shall be ... dignified." Arresting/seizing/detaining someone who has not done anything wrong is not dignified.

e. The solution

The cleanest thing to do is to delete the last sentence in Rule 3(e). No more false arrests/unreasonable seizures of only certain defendants, especially those

whose only "crime" is being accused of meritless accusations.

But since you probably won't do this, then the next cleanest thing to do is to amend Rule 38(e) to let the plaintiff decide if he/she wants to waive his/her Fourth Amendment right.

That is, you let the defendant go free, as you should. (Especially if no protective order ensued.) If the plaintiff wants to remain in the courtroom until the defendant has left the premises, fine.

If you have any responsibility to protect plaintiffs at all (you don't, as above per normal criminal trial policy), your jurisdiction ends outside the courthouse.

There are law enforcement officers in the court room if needed. Plaintiffs can request a police escort if they want. If a no-contact order was issued against a defendant, well, you did all that you can legally do, and it would be foolish of the defendant to engage with the plaintiff outside the courthouse.

You're not Mommy. Johnny is a grown-up who has constitutional rights. You do not have the authority to violate Johnny's Fourth Amendment right by making Johnny take a "Time-out."

III. Proposed Change to the Rule

The court must take reasonable measures to ensure that the parties and any witnesses at the hearing are not subject to harassment or intimidation in the courthouse or on adjoining property. For each hearing, the judicial officer must determine whether there is a need to

have a law enforcement officer or a security officer present to help ensure the hearing is orderly or to provide escort for either party. ~~The court may direct the defendant to remain in the courtroom for a period of time after the plaintiff is excused.~~

If, in either a criminal Order of Protection hearing or a civil Injunction against Harassment hearing, or a civil Injunction against Workplace Harassment hearing, if an Order or Injunction is not issued against the defendant, or if an existing Order or Injunction is quashed/vacated, the defendant shall not be prevented from leaving the courtroom.

If, in a criminal Order of Protection hearing, the court grants a no-contact Order of Protection or continues an existing no-contact Order, then the court may order the defendant to remain in the courtroom for five minutes after the plaintiff leaves.

If, after the end of hearing, a plaintiff wants to remain in the courtroom or another secured area of the courthouse for a time, the plaintiff may do so. The plaintiff may request a security officer escort the plaintiff to an exit of the courthouse.

IV. Disclosure

To the best of my knowledge no one has filed a similar petition within the previous five years.

SUBMITTED this 10th day of January 2024.

By /s/ Mike Palmer