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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-24-0039
PETITION TO ABROGATE RULE 38(d) OF THE ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE	**Petitioner's Reply to the CIDVC, the AZ Comm'n on Access to "Justice," and the APAAC**

I first reply to the Comment made by the CIDVC, then the ACOATJ and last, the APAAC.

I. REPLY TO THE CIDVC

First, I appreciate the CIDVC's candor here, acknowledging that there is no statutory authority for Rule 38(d). On this fact alone you need to summarily repeal this Rule.

(Per A.R.S. §12-109(A), you are allowed to "regulate" judicial proceedings. Judicial proceedings are criminal or civil matters prescribed by the Legislature via statute, like petitioning for a criminal DV Order of Protection or a civil Injunctions Against Harassment as here. You are allowed to make rules of procedure in order to implement these statutes, to fulfill the Legislature's intent. Except for internal housekeeping matters within the judicial branch, you do not have the authority to make a rule absent statute/legislative intent.)

The CIDVC admits that "this rule was specifically developed {I say "created"} to address issues highlighted in the case of *Savord v. Morton*."

So then this was a court created Policy Decision to address a perceived issue. But you're not allowed to make Policy. (You have your own Lobbyists. Ask our Legislature to create new/amend existing statutes.)

The CIDVC cites dicta from three judges as authority for this new Rule. But the musings of three judges is not a substitute for the Legislature. If nothing else, the three judges did not consider all sides of the issue. (Certainly not defendants'.)

Furthermore, by adopting the musings of your own judges (which is prejudicial on its face), you have bypassed not only our Legislature (and so the will of the people), but also our system of Checks & Balances. (E.g., a governor to oversee the Legislature, and ironically the Judicial, to hear constitutional challenges — which has consequently been short-circuited here.)

The CIDVC says that the "COA in reviewing *Savord* concluded that the best practice would be to allow the plaintiff to amend her petition and reschedule the hearing..."

No, that's not exactly what the COA said. The COA got it right at first, saying "the better practice would be to ... limit the scope of the hearing to the allegations of the petition..." THIS is exactly what I'm asking for in my Petition.

II. REPLY TO THE ACOATJ

After an introduction about the ACOATJ – which includes the mention of

money (i.e., "funding options"), Judge Thumma starts with the premise that there is an "access to justice" issue in the court system for victims of DV.

I'm sorry, but as with charities always perpetuating their "good causes" in order to exist, I'm automatically suspicious of motives whenever money is involved. (Especially if it's grant money. For then the recipient is merely parroting its owner.)

But, assuming, for the sake of argument, that there really is some kind of "access to justice" issue in the courts, which, further, assumes that there is a constitutional right for a certain class of people to have special access to the courts (carving out an entitlement for them), the ACOATJ argues that it's okay to allow plaintiffs in DV matters to amend their petitions after issue, with no oversight by a judge, and then spring it on their defendant at the last moment at a contested hearing.

Even if that wasn't a patent violation of a defendant's right to Due Process, the act — by the court! — of favoring one class (plaintiffs) over another (defendants) is prejudicial on its face.

So then this is a de facto violation of Due Process, because Due Process requires "Equal (Access To) Justice for All."

Look, if pro se plaintiffs have an "access to justice" issue, then so do pro se defendants. Pro se defendants too are often rushed and make mistakes/omissions when under the strain caused by having to defend themselves from potentially

bogus allegations. Especially, and ironically, more so now since you've dropped Rule 38(d) on them, where now, right at the beginning of a contested hearing, a defendant has to suddenly scramble to defend himself/herself from a slew of new, never heard before, potentially inadmissible allegations.

The ACOATJ goes on to say that if you don't allow plaintiffs to amend their petitions (after the fact), that plaintiffs could be "chilled" from seeking recourse through the courts.

There are several things wrong with this reasoning.

First, and fundamentally, you "chill" someone when you deny them their Constitutional rights. The only ones being chilled here are defendants when you deny them Due Process.

Second, the ACOATJ claim that "prohibiting amendments would create an environment in which respondents become aware that a victim is seeking an order of protection but did not have the opportunity to include all relevant allegations."

Considering that almost everything a plaintiff files is sealed, I don't see how this can be true. But even if it were true, it is not the duty of the Judicial to protect plaintiffs' pre-issuance of an OOP or an IAH.

Besides, you're tacitly assuming that it's Justice to let those plaintiffs who really aren't victims, play the game and amend their deficient petitions until they add on enough allegations to be rewarded with an OOP or IAH. (I see this game played all the time. And ex parte judges help them do it.)

But the more normal way that this scenario plays out is that the plaintiff has already been granted an OOP/IAH. It is only after learning that the defendant is going to challenge when the plaintiff wants to pile on more allegations, in an attempt to make the OOP/IAH stick. This is exactly what happened in the CIDVC's cite of *Savord*, above.

Last, the ACOATJ says that Rule 38(d) does not violate Due Process because "the law allows for amendment of pleading in many circumstances." But as even the CIDVC acknowledged, there is no "law" here that allows amending these petitions in these unique matters.

III. REPLY TO THE APAAC

The APAAC starts off by conflating criminal DV OOP and civil IAH petitions with the other litigation, claiming that because filings in Post-Conviction Relief or run of the mill civil Complaints can be amended, so can petitions in criminal DV OOP's and civil IAH's.

As a first matter, speaking to at least civil Injunctions Against Harassment, IAH's are unlike any other normal litigation. By statute, they're not even like R.Civ.P 65 Injunctions & restraining Orders. (See A.R.S § 12-1809(E).[1])

Basically, civil IAH's live in their own little universe of A.R.S. §12-1809. I

[1] For any administrative wonk reading, there's an error in the A.R.S. The statute incorrectly cites Rule 65(e). Apparently the Rules of Civ P have changed. The statute should refer to Rule 65(c).

submit the same is the case for criminal DV OOP's. (§13-3601 through -3602.)

And so I argue that no other Rules or case law that allow a petitioner to amend their complaint applies in these unique hearings. (Especially since the statutes don't provide for it. The Legislature knew that to allow amendments after the fact would further cripple a defendant's already compromised right to Due Process.)

But even if I'm incorrect, I fail to see how the APAAC's cite of *State v. Shrum* makes its point. Rather, it makes my point. "By requiring that all post-conviction claims be raised promptly, Rule 32.2(a) not only serves important principles of finality, ... but also allows any relief to be issued at a time when the interests of justice, **from the perspectives of the defendant**, the State, and the victim, can be best served." (Emphasis mine.)

But as Rule 38(d) is now, no one asks the defendant his/her perspective on facing an amended petition. In fact, the defendant cannot even object to an amended petition.

Due Process requires that a defendant have the right to object/not consent to accepting the new allegations.

Then the APAAC cites R.Civ.P 15 about amending petitions.

But Rule 15 doesn't apply to criminal DV OOP or civil IAH petitions at contested hearings. Three reasons:

First, in these instant matters, the defendant is currently suffering harm, has

a sword of Damocles hanging over his/her head. (A defendant in an OOP or IAH is in constant jeopardy of being instantly arrested, at the whim of the plaintiff (because there's no officer discretion for the arrest) as long as an OOP or IAH is in effect). As such, by statute, the defendant has a Due Process right to end the harm **on the very day** that he/she invoked his/her right to a contested hearing. (In contrast, a defendant in a garden-variety Rule 15 civil matter does not have such a dangerous sword hanging over his/her head.)

Second, in contrast to Rule 15, Rule 38(d) does not allow a defendant to object to the new allegations/evidence. The defendant has no say as to whether an amended Complaint would "unfairly prejudice that party's claim or defense on the merits." Under Rule 38(d), the plaintiff's amended petition is always sustained, never overruled. Whereas in Rule 15, the court can rule the evidence inadmissible.

If Rule15 applies, then it helps my position. Quoting Rule 15(b), Amendments During Trial, "If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court **may** permit the pleadings to be amended. {So doesn't have to.} The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would unfairly prejudice that party's claim or defense on the merits." In Rule 15, the court has say whether to allow amendments to pleadings. And the defendant has a right to object. But in Rule 38(d), none of those safeguards exist.

The APAAC then says "Thus, the defendant is specifically given the opportunity to address any new charges in an amended petition, providing him all due process rights."

Hardly. Added to all that I have pointed out already, "Justice delayed is Justice denied."

And last, the APAAC says, in essence, that this Court's public Rule's Forum is not the place to petition to abrogate Rule 38(d). It claims that a defendant can challenge the constitutionality of the Rule, to the Arizona Court of Appeals. (Implied.)

Well, first, the COA is generally not available to appeal criminal DV OOP's or civil IAH's. First, by law, defendants are allowed only one appeal. (Yet another violation of Due Process.) Appeals from the Justice Courts go to the Superior Court. Only petitions originating in Superior Court can go to the Court of Appeals. And those are very rare, since most petitions are heard in the Justice Courts. (And even then, I know of one petition heard by a Superior Court judge who captioned it "In the Justice Court.")

But even if one could appeal to the COA, it is not true that one can challenge a Rule of Procedure there. Here's the money quote from the COA itself. "Appellant then is asking this Court, an intermediate appellate court, to declare unconstitutional a rule of procedure adopted by our highest court. It is true that we frequently construe the effect of the rules of criminal or civil procedure, but this is

quite different from asking this Court to rule upon the constitutionality of a rule of criminal or civil procedure which has been promulgated by the Supreme Court of Arizona. If we did so, we would in effect be passing judgment upon the same court that passes judgment upon our actions. We have been recently reminded in regard to prior decisions of our Supreme Court that this is not our obligation." *State v. Meek*, 445 P. 2d 463 - Ariz: Court of Appeals 1968

Aside from a challenge in federal court, this forum is the proper venue.

As even this Court observed this year, citing our Arizona Constitution, "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government,". *Beck v. Neville*, Ariz: Supreme Court 2024

IV. CONCLUSION

All of the three groups above, officers of the court all, summarily say that forcing defendants to defend against unassailable amended petitions, served on them at the last minute (at the beginning of a contested hearing), is fair.

Would YOU think it fair if it happened to you?

I am always saddened when people, especially judges, do not know what "fair" is. But this is a problem of the heart, which I cannot change.

"Hate evil, love good. Maintain justice in the courts." *Amos 5:15*

SUBMITTED this 3rd day of June 2024.

By /s/ Mike Palmer