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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-24-0038

**Petitioner's Reply to the AZ
Comm'n on Access to "Justice,"
the CIDVC and the APAAC,
citing new case law from the
California Supreme Court**

This is a "mashup" reply to the Comments made by the ACOATJ, the CIDVC and the APAAC, mixing and matching replies as needed. Into the mix I add an instructive ruling on the 4th Amendment made recently by the California Supreme Court.

I. REPLY

Both the ACOATJ and CIDVC directly manifest the inherent (albeit, perhaps unintentional) prejudice in today's court system when it comes to parties in criminal DV Orders of Protection and civil Injunction Against Harassment Injunctions.

The source of the prejudice is subtle, but visceral nevertheless. For when judicial officers refer to plaintiffs in criminal OOP or civil IAH matters as "victims" (as they have done here) then, logically, the defendants must be

“victimizers.” And no one likes a victimizer — regardless of whether a defendant is really guilty or not. And most people believe the victim if she is a woman, whether she is telling the truth or not. (As in the story about Potiphar’s wife accusing Joseph. Even though innocent, Joseph was sent to prison on a mere allegation. *Genesis 39*.)

So not only is there visceral prejudice (if not outright hatred) against alleged defendants in OOP or IAH matters, but there is a subtle prejudice in favor of the alleged “victim.” For who doesn’t want to help a damsel in distress? Especially if the helper is a man. Knight in shining armor sort of thing. (This is why women cry when they want something.)

All the Commenters demonstrate this double-pronged prejudice (even though the APAAC didn’t use the word “victim”) when they tacitly assume the premise that there is a need to “hold back” one party (don’t call it a “seizure”) to allow the other party to leave as a “safety measure.” (Not just the courtroom, but the building.)

Wanna guess which party is which?

The ACOATJ itself highlights the courts’ inherent favoring of plaintiffs in its Comment by 1) referring to plaintiffs as “victims,” 2) presuming a priori that these “victims” need the “protection of the courts,” and 3) sacrificing the rights of real defendants for a concern over nebulous future plaintiffs. (That it’s okay to seize/punish defendants so that future plaintiffs can have a “safe space” in the courthouse.)

Now to the legal arguments. I'm going to quote excerpts from a recent Opinion by the California Supreme Court, which focused on Fourth Amendment issues when it ruled that a person can't be detained for evading police officers. It's *The People v. Marlon Flores*, Ca.; Supreme Court 2024.

First, as it goes to "seizures" that implicate the Fourth Amendment, our own AZ COA said, "Whether a person was seized for purposes of the Fourth Amendment depends on whether a reasonable person would have felt free to leave under the totality of the circumstances." (*Stave v. Mason*, Ariz: Court of Appeals, 1st Div. 2020)

It's indisputable that when a judicial officer in a courtroom tells a defendant to remain in the courtroom, a defendant does not feel free to leave.

Next, "It is settled that a person may decline to engage in a consensual encounter with police. The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." (Flores, page 8.)

But in this instant matter, a defendant can't tell the judge "We're done. I'm ending consent." (As CJ Brutinel suggested we do with police officers. (Per oral arguments in *State v. Serna*.) In fact, if, after being told by a judge to remain in the courtroom, a defendant formally asked "Am I free to leave," the obvious answer will be "No. Not until I say so."

So, in total, when a judge tells a defendant to remain in the courtroom, it is a 4th Amendment seizure.

The ACOATJ kinda concedes that it's a 4th Amendment seizure, but says, in essence, that it's a consensual one. This because the defendant waived his/her constitutional rights when he/she "subjected themselves to the jurisdiction of the court by their physical presence." I'll come back to this in moment.

The CIDVC refuses to admit that it's a seizure.

The APAAC, to their credit, allows that it could be a seizure, but argues that it's a reasonable one for reasons of "safety."

The ACOATJ says, in essence, that defendants waive their constitutional rights when they physically enter a courtroom. (The CIDVC kinda hints at this too, claiming that a judge has authority over defendants, to the point of commanding respect.)

Even if it's the case that anyone who physically enters a courtroom waives all of their constitutional rights, in this instant matter of defendants trying to get a monkey off their back and exonerate their good name, they're under duress because they have no cure for the harm inflicted on them but to go to court.

"But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was **no duress** or coercion, actual or implied." *State v. Kananen*, 399 P. 2d 426 - Ariz: Supreme Court 1965. And, "Whether consent is voluntary or the product of duress or coercion, express or implied, is a factual issue resolved by reviewing the totality of circumstances ..."
State v. Lopez, Ariz: Court of Appeals, 2nd Div. 2021

As I said earlier, a defendant, who is suffering harm via an OOP or an IAH has no other remedy but to come into a courtroom. Although it's not "coercion" in the fullest sense of the word, it is duress. By definition then, defendants aren't willingly waiving their right to be free from unreasonable seizure when they enter a courtroom.

Next, all of the commenters cite "safety" as justification for Rule 38(e).

But, "before officers may detain someone they must be able to articulate a legally cognizable reason to infringe on that person's liberty." And, "before an officer can compel compliance with a show of authority, articulable facts must support a reasonable suspicion of criminal activity. (*Flores*, pages 21,22.)

None of the commenters articulated that actual harm will come to anyone if a defendant is not told to remain in the courtroom. Or that there is a reasonable suspicion of criminal activity. (History hasn't shown any.)

Instead, the ACOATJ says that the real reason for seizing defendants via Rule 32(e) is not for actual safety. Rather, the purpose of the Rule is to make plaintiffs "feel safe."

Making people feeling safe is NOT reasonable grounds for seizure. In *State v. Serna* you said that "without reasonable suspicion {that a crime was afoot}, police could not justify a frisk {a seizure} based on officer safety concerns alone." *State v. Serna*, 331 P. 3d 405 - Ariz: Supreme Court 2014.

But their only suspicion that something might go wrong is a "hunch." But "a

mere hunch does not create reasonable suspicion...” (*Flores*, page 4.) Especially for defendants who have been found “not guilty” of DV or Harassment.

The commenters’ Chicken Little-like the “Sky is Falling” paranoia is reminiscent of when the Arizona Legislature (and Governor) gave Arizonans back our 2nd Amendment right to carry concealed. Oh how the opposition howled about that, saying that there would be put in the streets with everyone armed. It hasn’t happened. The people of Arizona are better than you treat them.

(If a defendant has an OOP or an IAH issued against him/her after a hearing, then simply have the judge the “Riot Act” to the defendant: To not have contact with the plaintiff as they leave the courtroom. And that such contact could lead to immediate arrest. And that the judge will leave the courtroom open for 10 minutes after for the defendant’s convenience.

My guess is that most defendants will elect to remain in the courtroom. But that will be their choice. Not yours.

The ACOATJ says that when plaintiffs don’t feel safe, it may “chill” plaintiffs from seeking the protection of the courts.

This is backward. You “chill” someone when you deny them their Constitutional rights. For example, you chill defendants by seizing them, as a favor to plaintiffs, even when defendants haven’t done anything wrong. (I could argue that you are depriving defendants their Access to Justice when you do this. You leave such a bad taste in their mouth that they aren’t likely to want to come back to court to defend themselves again.)

Next, the CIDVC argues that, because judges are bound by the Code of Judicial Conduct, a judge can violate the constitutional rights of defendants. The argument seems to be invoking the balancing/weighing of “government” interests against the individual’s.

If that’s its argument, there is nothing of weight on a judge’s side of this scale. Just because a judge took an oath doesn’t mean that litigants are bound by that oath.

A judge’s obligations to the Code ends when they infringe on constitutional rights that litigants are unwilling to waive. For example, a judge cannot constitutionally force a litigant to address a “he” as a “she,” implicating a defendant’s First Amendment right to Free Speech and Freedom of Religion, just because the Code says to.

Adding insult to injury, both the ACOATJ and the CIDVC say, rather heartlessly, I think, that defendants who are commanded to take a “Time Out” are not being punished.

The ACOATJ tries to trivialize the offense by saying that it’s only for a “short time.” But, from *Terry v. Ohio*, even a short seizure **“is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”** (Flores, page 7.)

It is certainly a great indignity/embarrassment for defendants who were adjudicated to not to have done anything wrong.

Last, the APAAC says, in essence, that this Court’s public Rules Forum is

not the place to petition to abrogate Rule 25(g). 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.

Also, see *Amos 5:15*, “Hate evil, love good. Maintain justice in the courts.”

SUBMITTED this 3rd day of June 2024.

By /s/ Mike Palmer