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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO REPEAL RULE 6(E)(4)(e)(2) OF THE ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE	Supreme Court No. R-12-0007 **Comment on (Emergency) Petition to Repeal Rule 6(E)(4)(e)(2) of the Arizona Rules of Protective Order Procedure**

I write in support of Mr. Roth's petition to repeal ARPOP Rule 6(E)(4)(e)(2). In this comment, I narrowly focus on Mr. Roth's claim that, by promulgating and enforcing a creation of its own, this Court is violating Article III of the Arizona Constitution by making "law"—a power reserved exclusively for the Legislature. In this comment I cite past and present actions by the Court's CIDVC (Committee on the Impact of Domestic Violence on the Courts) to demonstrate that, when it comes to Rule 6(E)(4)(e)(2), the Court has—and is—legislating from the bench.

NOTICE

Rule 6(E)(4)(e)(2) is being challenged in federal court as well as in this forum. (*Palmer v. Judge Kenton Jones, Justices Brutinel, Pelander, Bales, Hurwitz*

and Berch, 11-CV-1896 in the District of Arizona.)

Since the Court refused to repeal Rule 6(E)(4)(e)(2) two years ago, and since my Second Amendment right has again been unlawfully revoked via this Rule (an ex parte Brady disqualification. . . for blogging[1]), having exhausted my administrative remedies, I have been forced to sue the Justices to seek a permanent Injunction, a la SB 1070, to enjoin the Justices from enforcing Rule 6(E)(4)(e)(2) on Arizonans. (A case of first impression.) Since it is the Justices of this forum who are being sued over their own Rule, and since it is the Justices who rule over this Rule, there is an obvious conflict of interest here.

Therefore, due to the conflict of interest, I submit that Mr. Roth's petition must be heard by an outside agency or retired Justices so that the public doesn't see the appearance of impropriety of the fox guarding the hen house. (Public confidence in the judiciary and all that.)

I. Background

Two years ago I filed a petition in this forum similar to Mr. Roth's, to repeal ARPOP Rule 6(E)(4)(e)(2). (See R-09-0045.) While I hinted at an Article III problem, saying "I submit the Committee erred here, going beyond the law the Legislature gave," I did not specifically state the objection. I do so now.

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[1] See three minute video at www.youtube.com/watch?v=tcznFkhpOIYI.

A. The history

I have exhaustively searched the CIDVC's minutes, going back to February 2002 (the earliest posted on its website) to find the genesis of Rule 6(E)(4)(e)(2). If it's there, I cannot find it.

Now, there was only a singular Rule 6(E)(4)(e) in the early days. It could be that when that was changed, to create Rule 6(E)(4)(e)(2), the language prohibiting firearms in civil injunctions was slipped in. It's not clear from the October 2006 minutes, which say the CIDVC decided "to change the **language** and the title of the paragraph [in paragraph E(4)(e)] to "Other Relief" and moving the language to subdivision 2 and adding language to made [sic?] subdivision 1." But I cannot find any discussion of the language change in those minutes or prior minutes.

If that's when it happened, then the Committee clearly acted on its own, effectively making a law the Legislature did not give the Court.

If the firearm restriction wasn't added to civil injunctions in October 2006, then, as I postulated in my petition two years ago, it appears the policy spontaneously "evolved" from lumping criminal Domestic Violence law with civil Injunction law and calling them both "Protective Orders." Kudos to former Judge Ronald Karp of the CIDVC who foresaw the problem, expressing his concern in using the "one form fits all" approach for criminal DV and civil Injunctions. (See

May 2005 minutes.)

Going back further, the earliest mention I can find to firearm "law" is in the "DV Benchbook" (apparently the progenitor of the ARPOP) and a discussion of Brady disqualification from the November 2004 minutes. It appears firearm prohibitions had not been codified at this time in the Benchbook and were under discussion. Here's the pertinent text, with [my comments]:

> The direction the Chief and Vice Chief asked of Judge O'Neil relates to the concept that if a judge does not mark one of these boxes [the box saying "If checked, order the defendant not to possess firearms or ammunition."] . . . then an individual who has an order of protection [is that distinct from a civil injunction against harassment?] issued to him or her can still have a weapon. The Chief's directive to Judge O'Neil is to find out from the Committee that if *Emerson* arguably applies, to grant discretion to a judge to either state that Brady applies or not, that the defendant can have a weapon or not have a weapon even after a hearing. [*Emerson* was solely about criminal domestic violence. See *US v Emerson*, 83 Fed. Appx. 696, 2004 WL 180360 (C.A.5 (Tex.))] The Chief would like some direction from the Committee. [As opposed to the Legislature?] Specifically, does this committee recommend, regardless of whether *Emerson* applies or not, that a judge should have discretion to allow an individual—who has been issued an order of protection [as distinct from a civil injunction against harassment?] and has been given an opportunity to appear or after a hearing—the right to continue to carry a firearm?

The Committee moved to table the discussion/action on the language for the "one form fits all" order of protection forms until the next meeting in February. However, unless there is an Obama-like Hawaii missing birth certificate cover-up, there was no meeting in February and I cannot find any more discussion of the

matter. So we may never know how the language slipped in.

Even before this, one can see from the June 2003 meetings that there was some concern and confusion over lumping criminal DV with civil injunction law.

> Various members expressed concerns regarding the proper application of the Brady firearms prohibition on protection orders. Despite a variety of training opportunities, benchbooks and letters, there appears to be a large variance among judicial officers in the application of the Brady flag.

As so it is today. Whatever happened back then, the troubling takeaway is that the CIDVC relied solely on itself and not the Legislature for its Rules. But just because "it's always been this way" does not make it right. Especially in light of recent affirmations by the SCOTUS and the Arizona Legislature affirming our individual constitutional right to keep and bear arms, as detailed by Mr. Roth in his petition.

B. The Present

So two days ago, after reading Mr. Roth's petition and tripping across a recent meeting minutes from the Arizona Supreme Court's CIDVC, I filed complaints of judicial misconduct against five judges in the CIDVC for violating Conduct Rule 1.1 ("A judge shall comply with the law. . ."). The five judges supported and unlawfully added to ARPOP Rule 6(E)(4)(e)(2) at the CIDVC's

November 2011 meeting.[2]

I include excerpts from my complaints here to buttress Mr. Roth's petition.

II. Argument

I refer readers to the action of the CIDVC during its November 8, 2011 meeting, as reported in the CIDVC's meeting minutes for same.[3]

On page 2 of the minutes is Item II.B., Petition to amend ARPOP Rule 6(E)(4)(e)(2).

The Arizona State Bar—an arm of this Court—lobbied the CIDVC to "add the same 'credible threat' language that is currently applied to [Title 13 - Criminal] Orders of Protection to [Title 12 - Civil] Injunctions against Harassment. That is that a judge may prohibit the defendant from possessing, purchasing, or receiving firearms for the duration of the order if the judge finds that the defendant poses a credible threat to the physical safety of the plaintiff or another person protected by the order."

The language "credible threat" that the CDICV proposes to add to civil injunctions is from criminal Domestic Violence law, A.R.S. §13-3602.

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[2] Judges Emmet Ronan, Keith Barth, Lynn Fazz, Carey Hyatt and Wendy Million. (The remaining three judges were absent and did not vote that day.)

[3] Available at www.azcourts.gov/Portals/74/CIDVC/Nov8FinalMinutes.pdf

Judge Million of the CIDVC moved to support the above amendment to this Rule. It was seconded and approved unanimously by members of the CIDVC. (See page 3 of the minutes.)

Now, even if the statute for civil injunctions (A.R.S. § 12-1809) gave judicial officers the authority to prohibit firearms in civil injunctions (but the word "firearm" does not appear anywhere in A.R.S. §12-1809), the law is only a Title 12 civil law. It is not a Title 13 criminal Domestic Violence law. Nor did the Legislature codify -1809 as criminal law.

But when the Committee moved to add verbiage from Title 13 criminal law to a rule on Title 12 civil injunctions, the Court took on the role of the Legislature. Specifically, per the meeting minutes, "Upon review of the [] proposal, Dana Martinez pointed out that there are domestic violence situations in which ex-partners enlist third parties to harass and intimidate their victims. Following discussion, **members agreed that victims of harassment should receive the same protection as domestic violence victims.**"

But IT IS NOT THE ROLE OF JUDGES TO MAKE SUCH DETERMINATIONS! (Yes, I am shouting.) Such determinations are for Legislators.

The Arizona Constitution, which judges swear to support, plainly says “The

legislative authority of the state shall be vested in the legislature . . . " Ariz. Const. art. IV, pt. 1, § 1(10). "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, **not the judiciary**, is the main guardian of the needs to be served by social legislation." *Haw. Housing Auth. v. Midkiff,* 467 U.S. 229, 239 (1984).

It is not the role of judges to make laws "better" in their opinion. ". . . it is to be presumed that their Legislatures, being chosen by the people, understand and correctly appreciate their needs. . . . and **their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.**" *Arizona Copper Co. V. Hammer*, 250 U.S. 400 (S. Ct. 1919)

If the Legislature wanted to give "victims" of harassment the same protection as victims of domestic violence, then the Legislature would have done so. "When construing a statute, one presumes that 'what the legislature means it will say.'" (Former Attorney General Terry Goddard quoting *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976))

The Arizona Supreme Court has acknowledged that "The legislative, executive, and judicial branches of Arizona government are 'separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.' Ariz. Const. art. 3." *State v. Montes*, 226 Ariz. 194, 245 P.3d

879. Yet the Court here has exercised power properly belonging to the Legislature.

I have shown a pattern and practice by the CIDVC of exercising the power of the Legislature when it comes to firearm restrictions in civil Injunctions against Harassment. As such, this Court has violated Article III of the Arizona Constitution.

Therefore, Rule 6(E)(4)(e)(2), being unconstitutionally created, must be repealed on this basis alone.

ENDNOTE

Parenthetically, if the State Bar, an arm of this Court, wants to change the law, it should follow the law and lobby the Legislature. It should not skirt the law by doing an end run around the Legislature, lobbying its own body, the Court.

DATED this 13 day of April, 2012

By /s/ Mike Palmer

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