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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-14-0004
)
) COMMENT OF PIMA COUNTY
Petition to Amend Rule 111, Ariz. R.) PUBLIC DEFENDER IN
Sup. Ct., Rule 28, ARCAP, and Rule) OPPOSITION TO PETITION TO
31.24, Ariz. R. Crim. P.) AMEND ARIZ. R. SUP. CT. 111(C),
) ARIZ. R. CIV. APP. P. 28(C), AND
) ARIZ. R. CRIM. P. 31.24
)
)

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Pima County Public Defender’s Office (“PCPD”) submits the following comment to the above-referenced petition. PCPD is the second largest indigent defense law firm in Arizona with approximately 80 assistant public defenders providing indigent legal services in the Pima County Superior Court, Juvenile Court, and appellate courts.

PCPD disagrees with the proposed rule change that would permit citation to unpublished dispositions. Foremost, the current rules already accommodate the goals stated in the Petition. Second, allowing citations to unpublished dispositions places an undue hardship upon appellate courts by altering the import of decisions rendered in *Anders* briefs. Third, contrary to the Petitioner’s assertion, the current

rules do not restrict advocacy tools. Finally, as a practical consideration, allowing citation to unpublished dispositions would detrimentally impact the rights of self-represented litigants and disadvantage lesser-funded practitioners. PCPD endorses the positions taken in the comment filed on May 14, 2014, by Court of Appeals Judges Eckerstrom, Howard, Espinosa, and Vasquez.

Alternatively, PCPD also supports the creation of an ad hoc committee, as suggested in the comment filed on May 8, 2014, by Court of Appeals Judges Miller and Kelly and Superior Court Judge Harrington. As this proposal continues to appear every few years, it would be beneficial to have a committee, consisting of practitioners of civil, criminal, domestic, and juvenile law, as well as judges at the trial and appellate levels, review the comments, hold public hearings, and submit a report to this Court.

1. The current Rules already accommodate the stated goals.

The proponents of the rule change argue that citation to unpublished decisions promotes consistency, certainty, and equality. Petition at 5-6. However, this is a solution in search of a problem. The present rule structure already contemplates such goals and provides a mechanism by which a party may ensure the courts meet these goals.

Rule 111, Ariz. R. Sup. Ct., indicates that an unpublished disposition may be cited if it is law of the case or to inform “the appellate court of other memorandum

decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review.” From this perspective, if an appellate court has reached an answer with which the party agrees, the party may cite to unpublished dispositions to encourage publication of the decision. If an appellate court has, from the perspective of a party, inconsistently applied the law, the party is free to cite unpublished dispositions in a motion to reconsider or petition for review. Far from presuming that courts will misapply the law, the present rule structure expects the appellate courts to consistently apply the law and provides a mechanism for citation to unpublished dispositions when a court fails to meet this expectation. The proposed rule change, however, operates under the presumption that courts will not consistently apply the law. Such a presumption is not warranted.

Rule 111 also accommodates the goals of the proposed rule change by setting forth guidelines for the publication of opinions. Opinions are appropriate for publication where the disposition, “[e]stablishes, alters, modifies or clarifies a rule of law,” “[c]alls attention to a rule of law which appears to have been generally overlooked,” “[c]riticizes existing law,” “[i]nvolves a legal or factual issue of unique interest or substantial public importance,” or the disposition has a separate concurring or dissenting voice. By their nature, unpublished dispositions do not establish, alter, modify, clarify, call attention to, or criticize the law.

Unpublished dispositions apply regularly-followed and well-understood rules of law.

One of the primary issues addressed by the petitioner is the application of a rule of law to certain facts. Petition at 5-6. However, if an appellate court believed the factual issue was of unique interest, such a disposition would be published pursuant to the rule. Most rules of law can be readily understood and consistently applied. Where the rule of law is not readily understood or consistently applied, published opinions result. Further, if a party believed the disposition was appropriate for publication because of the uniqueness of the facts, the party could move to publish an unpublished disposition. Citation to unpublished dispositions would provide no real assistance. The application of a rule to an unspectacular set of facts does not require citation to unpublished dispositions; courts are currently capable of such an analysis without citation to unpublished cases.

2. Citation to unpublished dispositions places an undue hardship upon courts.

Unpublished dispositions are a method by which courts may quickly dispose of cases. This is necessary in a large number of criminal appeals, particularly when an *Anders*¹ brief is filed. Quite often in criminal appeals an attorney decides there are no issues that warrant review. A criminal defendant is then afforded the

¹ *Anders v. California*, 386 U.S. 738 (1967); *see also State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

opportunity to raise issues to the Court of Appeals in a *pro se* supplemental brief. Where an issue raised by a criminal defendant appears to have merit, the Court of Appeals may order the attorney to provide supplemental briefing.² This ensures that the court has the input of an attorney on issues. However, where issues do not appear to have merit on their face, the court will not order additional briefing and will merely evaluate the claim on the existing record, often finding no error. In such a circumstance, the court does not have a legally trained and licensed advocate briefing issues on a defendant's behalf. Such a system appropriately empowers a defendant to raise issues the defendant wants addressed while ensuring lawyers are not forced to raise claims the lawyer believes are frivolous.

In Arizona, citation to unpublished decisions would inevitably permit citation to dispositions reached in an *Anders* setting. Such a circumstance should be avoided. The merits of an issue can be evaluated differently by different attorneys and by different courts. While an issue may be reasonably considered frivolous at one point in time, legal developments may open the issue for question. One attorney's conclusion that an issue is without merit at that time should not constitute a waiver of that issue for future attorneys. Thus, the Court of Appeals would be required to handle *Anders* briefing in a very unusual manner. The court would have to recognize the precedential value (even if just "persuasive") of

² See *State v. Thompson*, 229 Ariz. 43, 270 P.3d 870 (App. 2012).

Anders-based decisions. In such a circumstance, the court would not be required to merely determine the answer; it would need to evaluate arguments raised by defendants in a more comprehensive manner. Without an attorney advocating on behalf of the defendant, the burden would be placed upon the Court of Appeals to conduct more extensive research on behalf of the defendants. To do otherwise would permit an otherwise simple decision to carry “persuasive” weight in the future when a legally trained advocate never briefed the reasons in favor of a defendant’s claim.

3. Restricting citation to published cases does not overly restrict advocacy tools.

The proponents of the rule change focus on a single hypothetical to justify the position that advocacy tools are limited. Petition at 6. The syllogism of this hypothetical is premised upon the following presumption: “At times, a memorandum decision may be the only available authority that advances a client’s position.” *Id.* This presumption ignores the realities of legal advocacy. There are two methods of advocacy available to attorneys which undercut the reliability of this presumption. First, unpublished dispositions rely upon jurisprudence just as any legal argument would. While it may be impermissible for an attorney to *cite* to the unpublished disposition, there is no restriction upon *relying* upon the unpublished disposition as guidance. An advocate who has found an unpublished disposition is free to model his or her argument after the unpublished disposition

and to cite the published cases relied upon by the court which has issued the decision.³ The vast majority of appellate work relies upon legal authority to reach conclusions. To this extent, it is unlikely a memorandum decision is ever the *only* authority to support an attorney's argument. An attorney who models an argument after an unpublished decision is free to rely upon the legal authority cited within a memorandum decision.

Second, even in the very limited circumstance in which an attorney cannot find a single published case anywhere in the nation to support an argument and there is no authority cited within a memorandum decision upon which the attorney relies, the attorney may still make that argument in good faith. The ethical rules very broadly articulate that attorneys are free to argue the law should be extended, modified, or reversed:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Ariz. R. Sup. Ct. 42, E.R. 3.1. A lawyer who has modeled an argument on an unpublished decision has a good faith basis for the argument and is free to argue

³ The comment of Judges Eckerstrom, Howard, Espinosa, and Vasquez, at 2-3, also makes this point: "Nor is a rule change required to allow practitioners to harvest any nuggets of wisdom from appellate memorandum decisions. The current rules do not prohibit attorneys from extracting the reasoning of an unpublished decision to the extent that reasoning is persuasive."

rules should be extended, modified, or reversed. If the appellate court rules against the attorney, the attorney is then free to discuss the unpublished disposition from which the attorney drew the argument in a motion to reconsider or petition for review. Ariz. R. Sup. Ct. 111(c).

Because most unpublished cases still rely upon authority in reaching a decision, the presumption employed by the petitioner is likely invalid. However, even if there was a factual scenario under which the presumption might apply, the ethical rules are sufficiently broad to empower an attorney to advance the argument and the present citation rule would empower the attorney to cite to the memorandum decision in a motion to reconsider or petition for review, thereby accommodating the goals of the proposed rule change.

4. The proposed rule change would disproportionately benefit larger firms and agencies, thus placing smaller firms, sole practitioners, and self-represented parties at a comparative disadvantage.

While attorneys in Arizona, by the benefit of the State Bar Fastcase subscription, have the ability to include unpublished decisions in online research, the present rule would further compel attorneys to pay for access to research tools such as Westlaw and Lexis, or suffer a significant comparative disadvantage. Fastcase, as well as free online legal research tools such as Findlaw and Google Scholar, lack a primary tool which is available in either Westlaw or Lexis:

headnotes and keynotes. Headnotes and keynotes are vital to cross-reference cases based on subject matter and individualized holdings.

Because tools like Westlaw attach keynotes to unpublished cases as well, an attorney at a well-funded office with a Westlaw subscription would be able to conduct keynote searches and obtain targeted results including unpublished cases. A sole practitioner or small office which lacks the financial ability to pay for Westlaw or Lexis is placed in a distinct disadvantage. Under the current rules, such an attorney would be able to access the same information as better funded offices by simply going to the library and consulting an Arizona or regional digest to look for other published cases under the same keynote. However, the attorney would not be able to access unpublished cases through such a digest search. In a circumstance where time may be of the essence, such as during trial or on a short deadline to respond to a motion, an attorney may well find himself or herself unable to fully address an opponent's citation to unpublished decisions. Thus, such a rule change would impose an additional and unnecessary burden upon sole practitioners and small firms.

The divide becomes even greater when considering self-represented litigants. Online research tools such as Fastcase, Westlaw, and Lexis allow for attorneys to conduct word and Boolean searches and find unpublished cases consistent with the word searches. Each of the online research tools conducts word

and Boolean searches for the entire database of unpublished cases. A quick review of Findlaw.com, one of the primary free research websites used by non-lawyers, indicates that text searches are limited to published cases. Additionally, any search on Findlaw is limited to either the Court of Appeals or the Supreme Court. Google Scholar conducts word searches in unpublished cases but limits the ability to conduct Boolean based research. The indigent and self-represented litigant is placed at an even more substantial disadvantage when unpublished dispositions may be cited as authority because there is simply no avenue by which the self-represented defendant could research and fully understand and respond to the citation of such cases.

Finally, many criminal defendants represent themselves, either by choice pursuant to *Faretta v. California*, 422 U.S. 806 (1975), or out of necessity because they are no longer entitled to appointment of counsel. Of these, most are incarcerated. The Department of Corrections is statutorily authorized “to limit inmate access to the internet through the use of a computer, computer system, network, computer service provider or remote computing service.” A.R.S. § 41-1404(A)(9). The policy that has been set forth expressly prohibits most inmates from using computers for legal work:

The Department shall not make computers or typewriters available to inmates in the unit Library for the purpose of enabling inmates to do legal work. Only inmates who

have a qualifying disability may be provided a personal typewriter pursuant to a court order.

AZ DOC Policies, Ch. 900, Dept. Order 902 “Inmate Legal Access to the Courts,” Order 902.02 “Legal Resources and Accommodations,” § 1.8, at 4.⁴ Thus, even though both divisions of the Court of Appeals have made its memorandum decisions available to the public through their websites, inmates still have no access to those decisions.

5. Alternatively, if this Court is considering the adoption of a rule change that would permit citation to memorandum decisions, this Court should first appoint an ad hoc committee to study the matter as suggested by Judges Miller, Kelly, and Harrington.

Although this is a rule that affects all areas of practice, based on the comments filed so far, there seems to be a divide between civil and criminal practitioners and/or between those who practice in the Phoenix area versus those who practice south of the Gila River. At a forum recently hosted by Division Two and attended by five of the six Court of Appeals judges and approximately thirty practitioners of criminal appellate law (including attorneys from multiple prosecuting agencies, multiple public defender agencies, and sole practitioners with indigent defense contracts), the issue was discussed and the practitioners voiced unanimous opposition to the petition. On the other end of the spectrum, those who have filed comments in support of the petition all hail from Phoenix,

⁴ <http://www.azcorrections.gov/Policies/900/0902.pdf> (last accessed May 20, 2014).

and other than the three judges from Division One of the Court of Appeals, all are civil practitioners.

PCPD believes having this Court create an ad hoc committee would benefit the bar as a whole. The difference of opinion on this issue is strong but honest. Most notably, the difference is not ideological; this is not as simple as having prosecutors on one side and defense attorneys on the other of an issue affecting procedural rights of the litigants. PCPD, staffed by attorneys whose work is 100% criminal defense, does not pretend to understand the reasons why civil practitioners are eager to have this rule change based solely on their comments filed under this petition. Yet in a committee where different voices can air differing opinions and public hearings can be held, there is greater likelihood that parties may come together and find some common ground.

It is possible that the best result is for a different rule for civil practitioners that allows for citation of memorandum decisions that would not apply to criminal cases (or special actions and other proceedings arising out of criminal cases). PCPD's opposition to this rule change petition is based on the civil bar's attempt to change the criminal rules. If the rule change petition were modified so that Rule 111(c) was maintained in its current form but provided an exception as stated in Ariz. R. Civ. App. P. 28(c), then PCPD would have no reason to object to such a change.

