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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of: PETITION TO REPEAL RULE 6(E)(4)(e)(2), ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE	Supreme Court No. R-__ -_____ Petition to Repeal Rule 6(E)(4)(e)(2), Arizona Rules of Protective Order Procedure (Emergency Action Requested)
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Pursuant to Rule 28 of the Supreme Court, petitioner petitions this Court to summarily repeal Rule 6(E)(4)(e)(2) of the Arizona Rules of Protective Order Procedure on Fourth Amendment grounds in light of this Court's recent unanimous ruling in *State v. Serna*, 235 Ariz. 270, 331 P.3d 405 (2014).

This rule of procedure for *civil injunctions* tells judicial officers that they can seize property from defendants—specifically weapons or firearms—absent any suspicion of criminal activity. As such, this Rule patently violates the Fourth Amendment, as recently clarified by this Court in *Serna*.

Accordingly, pursuant to Rule 28(G) of the Arizona Supreme Court and

pursuant to the Ninth Circuit's Rule for Emergency Motions, petitioner requests emergency action to immediately repeal Rule 6(E)(4)(e)(2) since this Rule does violence, and will continue to do violence, to the Fourth Amendment.¹

¹ The Ninth Circuit grants Emergency Motions when a movant certifies that relief is needed to avoid irreparable harm. (FRAP 27.3) Further, the Ninth Circuit says "an alleged constitutional infringement will often alone constitute irreparable harm." *Assoc. Gen. Contractors v. Coal. For Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991). This instant m

Moreover, the irreparable harm that can be caused by this Rule is not limited to the philosophical "harm" cited in free speech cases. This Rule deprives unfortunate defendants access to arms if needed to defend themselves (or their children) from criminals in, say, a home invasion. As such, the potential "irreparable harm" from not being able to defend oneself can result in the ultimate irreparable harm: Death. Since death is irreversible, immediate action to repeal this Rule is necessary (as with capital cases) before a defendant loses her life.

Emergency action is also warranted so as to immediately comply with A.R.S. § 12-109, which prohibits the Court from promulgating rules of procedures which abridge substantive rights of a litigant, as this Rule does. Since Rule 6(E)(4)(e)(2) does not point to any statute for authority, this Court's public forum is the proper venue to challenge this Rule's constitutionality. (Since there is no obvious law to challenge, a conventional legal challenge to the Rule is not actionable in a court of law.)

For the reasons above and below, petitioner requests that Rule 6(E)(4)(e)(2) be summarily repealed at the earliest Rules Committee meeting.

I. Distinguishing Between Civil and Criminal

Before quoting the text of Rule 6(E)(4)(e)(2) and showing its constitutional violations, it's necessary to point out that the Rule is only about *civil* injunctions against harassment ("IAH's"), governed under A.R.S. Title 12. It should not be confused with *criminal* Domestic Violence procedure, which is entirely different and governed under Title 13.

The distinction, as it relates to this Court's ruling in *Serna* about seizing weapons, is that when a defendant is charged with Domestic Violence, there is de facto probable cause to believe that a crime had been committed. So, in a criminal matter of DV, there is good cause to justify a Fourth Amendment seizure of weapons (as in any arrest for a crime), since a crime was alleged to have been

"afoot."

However, there can never be good cause to justify a Fourth Amendment seizure of weapons in a civil IAH. That's because it does not follow—and it cannot follow—that there is reasonable suspicion that a crime was afoot by way of a civil IAH. That's simply because civil harassment is not a crime. So even if a defendant is accused of civil harassment (usually *ex parte*), or even found "guilty" of civil harassment, that does not provide reasonable suspicion that a crime is afoot.

II. Analysis

Now, Rule 6(E)(4)(e)(2), in its current incarnation, says:

The judicial officer shall ask the plaintiff about the defendant's use of or access to weapons or firearms. If necessary to protect the plaintiff or other specifically designated person, the judicial officer may prohibit the defendant from possessing, purchasing or receiving firearms and ammunition for the duration of the Injunction Against Harassment.

This Rule of Procedure for civil injunctions tells judicial officers that they can seize property from defendants—specifically weapons or firearms—absent any suspicion of criminal activity. According to the Rule, the *only* requirement needed for judicial officers to seize weapons in a civil IAH is that a defendant use, or have access to, firearms.²

This flies in the face of *Serna* at two points.

² Typically defendants are ordered to surrender their property to the local sheriff.

First, in *Serna* this Court said that "In a state such as Arizona that freely permits citizens to carry weapons . . . the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous." (*Serna*, ¶ 22, 410.)

But Rule 6(E)(4)(e)(2) equates the mere ownership of a gun (the use or presence thereof) with being dangerous. That is contrary to this Court's ruling in *Serna*. Therefore, on its face, the Rule violates the Fourth Amendment.

Second, in *Serna* this Court also said that for there to be a constitutional seizure of weapons, there also must be a "reasonable suspicion that the person was engaged or [is] about to engage in criminal activity." (At ¶ 1, 405.) But reasonable suspicion that a person is about to engage in criminal activity cannot follow from a civil injunction for the simple reason that civil harassment is not criminal activity.

If there truly were reasonable suspicion of criminal activity in a civil IAH—that a defendant were truly a credible threat to a plaintiff—then the proper remedy to protect a plaintiff is to call the police and report a crime, say of *criminal* Harassment (A.R.S. § 13-2921). If probable cause existed to believe the crime of criminal Harassment had occurred, the defendant would be arrested. Problem solved.

There are plenty of laws that criminalize people for abuse of weapons which can result in seizure if necessary. ("Misconduct involving Weapons" (A.R.S. § 13-

3102), or "Aggravated Assault" (A.R.S. § 13-1204), or "Disorderly Conduct" for example.) Some even rise to the level of felonies, prohibiting gun ownership or possession after conviction. But a civil IAH is not one of those laws. A civil IAH cannot be used to get around the Fourth Amendment to seize a defendant's weapons when there's not even probable cause to support an arrest for criminal Harassment or a gun crime.

To put this in perspective, since this Court ruled in *Serna* that peace officers cannot seize weapons—even for officer safety—when no criminal activity is afoot, neither can judicial officers seize weapons—even for another's safety—in civil injunctions where no criminal activity *can be* afoot.

Even if the Court's second requirement for seizure of weapons could be articulated in a civil IAH, Rule 6(E)(4)(e)(2) does not require “reasonable suspicion that a defendant was engaged or [is] about to engage in criminal activity” for a seizure. Therefore, the Rule patently violates the Fourth Amendment.

Even if someone is found "guilty" of civil harassment, and even if that could somehow be construed to give reasonable suspicion of criminal activity, that still does not give cause for a Fourth Amendment seizure in a civil IAH. Two reasons:

First, a finding in a civil IAH that a defendant is "dangerous" in a criminal sense (to justify a Fourth Amendment seizure) simply is inapposite civil law.

Second, the constitutional safeguards embodied in the Fourteenth

Amendment—the right to a fair trial and due process—are not in place in a civil IAH. Specifically, the standard to find civil harassment is not the same high standard that is required for a finding of criminal Harassment. ("Reasonable evidence" vs. "Beyond a reasonable doubt.") As such, any finding arising purely out of a *civil* IAH that a defendant has committed, or is about to commit, a *criminal* act cannot stand, because it violates the defendant's Fourteenth (and perhaps Fifth) Amendment right to due (criminal) process.

Furthermore, since the rules of evidence are compromised in civil injunctions, any finding of criminal activity arising out of evidence presented in an IAH are a further abridgement of a defendant's Fourteenth Amendment right to a fair trial. (See Rule 5 of the Arizona Rules of Protective Order Procedure.)

Thus, any Fourth Amendment seizure arising from a compromised Fourteenth Amendment civil matter is untenable.

III. the supreme Law of the Land

History in this forum shows that this Court interprets the phrase "grant relief necessary" in A.R.S. § 12-1809(F)(3)—the sole statute governing civil IAH's—to justify a seizure. But this interpretation is inconsistent with the Court's interpretation of sister law A.R.S. § 12-1810, the statute governing injunctions against workplace harassment.

A.R.S. § 12-1810 has the exact same phrase—"grant relief necessary"—as §

12-1809 (At F(2).) Nevertheless, Rule 6(F)(4)(d) of Protective Order Procedure, which applies to injunctions against workplace harassment, is not the same as Rule 6(E)(4)(e)(2). Specifically, Rule 6(F)(4)(d) does not tell judicial officers that they can seize firearms in IAWH's. Whereas as Rule 6(E)(4)(e)(2) does. (Neither of the controlling statutes mentions firearms.) Stare decisis (and common sense) requires the same interpretation of the same phrase that appears in both A.R.S. §§ 12-1809(F)(3) and 12-1810(F)(2). Rule 6(F)(4)(d) interprets the statute correctly. Rule 6(E)(4)(e)(2) does not.

Even if A.R.S. § 12-1809 could be construed to allow judicial officers to seize firearms without reasonable suspicion of criminal activity, and even if that's what the Legislature intended, such a seizure would still be unenforceable, per Judge Norris in her dissent in *Serna*. There she argued against a similar misconstrue of a statute to abridge the Fourth Amendment, saying "this Constitution shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby . . ." (See Footnote 14 in *State v. Serna*, 232 Ariz. 515, 307 P.3d 82 (App. 2013).) So neither the Legislature—nor the Judiciary—can lawfully override the Fourth Amendment.

Last there is the violation of state law. A.R.S. § 12-109 says "The Rules [of Procedure] shall not abridge . . . substantive rights of a litigant." Since Rule 6(E)(4)(e)(2) abridges the substantive constitutional Fourth Amendment (and

arguably, the Fourteenth Amendment) rights of defendants, it must be repealed.

IV. Venue

This Court's public forum (as opposed to a courtroom) is the proper venue for a constitutional challenge to this Rule because this matter, one of great public importance, is capable of evading review.

First off, it is not clear what law a litigant would challenge in court to repeal this Rule, since Rule 6(E)(4)(e)(2) does not cite any statute for authority to seize weapons or firearms.

The only statute governing civil Injunctions Against Harassment is A.R.S. § 12-1809. But there is no language in that statute that refers to, or even hints at seizure, let alone a seizure of firearms. As such, there's no explicit, or even implicit, Fourth Amendment violation in the statute to challenge in a court of law. (Perhaps the Legislature knew it could not violate the Fourth Amendment rights of defendants, and so did not provide for the seizure of weapons in a civil IAH?) As such, there is nothing in the statute that a court could enjoin to remedy unconstitutional seizures proximately caused by Rule 6(E)(4)(e)(2).

Nor can a judge order the Legislature to add language to A.R.S. § 12-1809 to nullify this Rule. For example, a judge could not order the Legislature to add language from the sister law governing injunctions against workplace harassment which says "This section does not permit a court to issue a temporary restraining

order or injunction that prohibits activities that are constitutionally protected." (See (A.R.S. § 12-1810(L)(2).)

Nor can a judge order the Supreme Court to repeal this Rule. So even if this matter were actionable and a litigant could somehow bring a Special Action in the court of appeals to challenge this Rule, and even if the defendant drew Judge Norris (the dissent in *Serna I*), and even if Judge Norris believed that it's unconstitutional for (judicial) officers to seize weapons without suspicion of any criminal activity (as was ultimately affirmed in *Serna II*), she cannot repeal this Rule. Nor can she enjoin the Supreme Court from enforcing it.

Ultimately, then, a challenge to this Rule would have to be heard by those who sanctioned it, the Justices of the Arizona Supreme Court. But a legal challenge to this Rule before the Arizona Supreme Court is impossible because the Rules for IAH's provide for only one level of appeal. At best, the highest court before which a defendant could appear to challenge an unlawful seizure is the court of appeals. (But only if it was a Superior Court judge who initially seized a defendant's property in a civil IAH).³

³ Federal court does not appear to be a viable alternative either. Who would one sue? County Sheriffs, to enjoin them from following court orders? That won't fly. Even if a federal court didn't abstain from what appears to be a state matter, the Federal Rules of Civil Procedure also point to this Court's public forum as the proper venue to challenge Rule 6(E)(4)(e)(2).

For example, Rule 5.1(a) of the Federal Rules of Civil Procedure, which operates under the assumption that all laws originate in the Legislature, requires that notice be given to the Attorney General when there's a federal constitutional challenge to a state

For all these reasons, bringing a lawsuit to challenge the constitutionality of this Rule is not viable. Frankly, this Rule appears to be a creature of the Judiciary's own making. So, as the Judiciary giveth, the Judiciary can taketh away. The Court's public forum is the proper venue for repealing this Rule.

V. Conclusion

In *State v. Serna* this Court unanimously ruled that peace officers cannot seize weapons from citizens absent "reasonable suspicion that criminal activity is afoot." Specifically, this Court, upholding the Fourth Amendment, said that there were two requirements that must be met for officers to seize weapons of individuals. There must be "[1]a reasonable suspicion that the person to be searched has engaged or is about to engage in criminal activity and [2] a reasonable belief that the person is armed and dangerous." (With the proviso that "the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous.") (*Serna*, 235 Ariz. 270 ¶ 28, 331 P.3d 405, 411 (2014).)

But Rule 6(E)(4)(e)(2) fails to uphold these requirements and so fails to uphold the Fourth Amendment of the Constitution. Moreover, the Court's

statute. Once the AG is put on notice, the AG can take corrective action to remedy a constitutional violation without the state enduring the burden of a lawsuit.

But even if the AG saw the Fourth Amendment violation in Rule 6(E)(4)(e)(2), the AG would be powerless to remedy the unconstitutional seizures. For the AG cannot tell judges what to do. But this Court can.

requirements for a constitutional Fourth Amendment seizure (that a crime is afoot) can never be met by way of a *civil* Injunction Against Harassment. (Because it's a civil fact finding procedure, not a criminal one.)

For all these reasons, Rule 6(E)(4)(e)(2) is unconstitutional and must be repealed. And it must be repealed immediately before a defendant, disarmed as a consequence of this Rule, is irreparably raped or murdered.

RESPECTFULLY SUBMITTED this 9th day of January 2015.

By /s/ Victoria Timm