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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION FOR ADOPTION OF AMENDMENTS TO THE ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE AND THE ARIZONA RULES OF FAMILY LAW PROCEDURE	Supreme Court No. R-15-0010 **Comment in Opposition to the adoption of proposed Rule 25(g) of the proposed amended Arizona Rules of Protective Order Procedure**

The CIDVC proposes to amend the entire Arizona Rules of Protective Order Procedure ("ARPOP"). Most of the proposed changes are simply a renumbering of current Rules. Among them is Rule 25(g), which is essentially a renumbered version of current Rule 6(E)(4)(e)(2).

The undersigned writes in opposition to the adoption of Rule 25(g), citing three main reasons: First, the Rule constitutes an unreasonable seizure, a violation of the Fourth Amendment. Second, as the CIDVC itself has shown, the Rule violates the Second Amendment. (Along the way, it also violates other constitutional rights and a truism in an old Mill's Brothers song.) Third, even if the Rule does not violate the Fourth or Second Amendments, Rule 25(g) extends the scope of Legislation, which is unlawful, as case law shows.

ARGUMENTS

Regarding civil injunctions against harassment, proposed Rule 25(g) would say "The judicial officer must ask the plaintiff about the defendant's use of or access to firearms. If necessary to protect the plaintiff or any other specifically designated person, the judicial officer may prohibit the defendant from possessing, purchasing, or receiving firearms for the duration of the order." (The word "shall" in current Rule 6(E)(4)(e)(2) was changed to "must," and the words "or weapons" were deleted in the proposed Rule.)

I. Rule 25(g) violates the Fourth Amendment

Because this Court said in *State v. Serna* that probable cause (to believe that a crime is afoot) is required for an agent of the government to seize a citizen's firearm, and because probable cause that a crime is afoot cannot arise of itself from a petition for a civil injunction against harassment, it follows that seizing a defendant's firearm in a civil injunction constitutes an unreasonable seizure.

The undersigned has a petition pending in this forum to repeal current Rule 6(E)(4)(e)(2) on these grounds. If the Court repeals Rule 6(E)(4)(e)(2), it stands to reason that the Court will not adopt Rule 25(g). As such, the details of that argument will not be repeated here.

Suffice it to say that, for all the reasons given in the undersigned's pending petition, R-15-0016, Rule 25(g) should not be adopted because it constitutes a Fourth Amendment violation.

II. Rule 25(g) violates the Second Amendment & Article 2, Section 26 of the Arizona Constitution

Although the Second Amendment violations of Rule 25(g)'s predecessor have previously been raised in this forum, they have not been raised by the CIDVC itself, in the way the CIDVC raises them here and now.

Specifically, in its petition to amend the ARPOP, the CIDVC cited the case of *Savord v. Morton* as good law to clarify substantive changes to proposed Rule 23. (To clarify that a petitioner cannot spring new evidence without Notice on a defendant at a contested hearing.[1])

Good.

Since the CIDVC acknowledged that *Savord* is good law, the Court must also acknowledge the other findings in *Savord*. Specifically, as it goes to the prohibition of firearms in an Order of Protection, *Savord* says "**A higher standard of review applies** when a court's order implicates a defendant's **right** to possess firearms under the Second Amendment to the United States Constitution or under Article 2, Section 26, of the Arizona Constitution." (*Savord* at ¶ 20, emphasis mine.)

Since *Savord* acknowledges that the Second Amendment is a defendant's constitutional right, and since Rule 25(g) clearly implicates/violates that right (by allowing a judicial officer to suspend a defendant's Second Amendment right), Rule

[1] That "the due process protections under the Fourteenth Amendment and Article 2, Section 4, of the Arizona Constitution, guarantee that a defendant receive notice, reasonably calculated to apprise her of the action in order to adequately prepare her opposition." *Savord* at ¶ 16.

25(g) cannot stand because it does not meet the higher standard set in *Savord*.

Specifically, *Savord* says (citing federal law for authority), "A firearm restriction under the federal Gun Control Act is triggered by an order of protection only if the order includes a finding that [the] person represents a credible threat to the physical safety of [the] intimate partner or child." (Internal quotes omitted.)

That is, there are three prongs in *Savord* which must all be met to implicate/suspend a defendant's Second Amendment rights. Specially, to trigger a firearm restriction, there must be 1) a "finding" that the person represents 2) a "credible threat" to the physical safety of 3) [the] "intimate partner."

The last requirement is the most critical and cannot be met in a civil injunction against harassment. So we take it first.

A. There is no "intimate partner" in a civil injunction

The most critical requirement to suspend a defendant's right to possess firearms is that the defendant must be an "intimate partner" of the plaintiff. The federal Gun Control Act cited in *Savord*, which provides for a constitutional prohibition against firearms, applies **only** to matters involving "intimate partners." (See 18 U.S.C. § 922(g)(8)(C)(i).)

There's a reason that both the federal and state versions of criminal domestic violence law only provide for prohibition of firearms in situations involving "intimate partners" — those who live (or have lived) in the same house, those who share (or have shared) the same bedroom. (Per definitions in 18 U.S.C. § 921(32) and A.R.S. § 13-3601.) The fact that they share a bedroom is a critical distinction

between criminal domestic violence situations and civil injunction situations.

As it goes to domestic violence: as sometimes happens to all lovers at some point in their lives, intimate partners sometimes get into passionate, emotional, (usually stupid) arguments with each other.

In the close (and closed) confines of their house, intimate partners sometimes get into heated arguments and say hurtful things to each other. As the old Mill Brothers song wryly observes, "You always hurt the one you love."

Sometimes, in the heat of an argument, their words escalate to physical violence. Sometimes the partners do hurtful things to each other. If there's a loaded gun in the drawer of the bedroom night stand (originally purchased for self-defense), one partner might impulsively reach for it. And, intentionally or not, one partner might use the weapon against the other.

This scenario is the narrow grounds that the state and federal Legislatures (i.e., Congress) used to revoke a constitutional right in domestic situations. The respective Legislatures felt that intimate partners, who had already established a history of domestic violence, could cause irreparable harm to one another while arguing in close proximity to a loaded gun. The Legislatures felt that the potential harm to one partner outweighed the other partner's constitutional right to keep and bear arms. (Per *U.S. v. Emerson*, 270 F. 3d 203,263 - 5th Cir. 2001.) And so both the federal and state Legislatures specifically implicated the Second Amendment rights of defendants in criminal domestic violence situations on the grounds above.

But none of these grounds are applicable to civil injunctions against

harassment situations. The parties in civil injunctions are, by definition, not lovers or ex-lovers. They do not, by definition, live in the same house. They haven't shared a bedroom. There is no love lost between them, no passion to make them go berserk. They are not "partners," but rather "parties."

In fact, there's been no violence. (A corollary of the Mill's Brothers song: you don't hurt one you don't love.) Had there been any violence, there would be criminal prosecution, with the commensurate constitutional prohibition against possessing firearms resulting from arrest and/or conviction as remedy.

And even if there was some passion between parties, there's no night stand in a common bedroom from which one party could grab a loaded gun and impulsively shoot the other party in a rage.

Since the situation in a civil injunction is not at all the same as in a criminal violence domestic situation, and because there is no clear threat of imminent harm in civil injunctions against harassment, neither Congress nor the Arizona Legislature could justify the suspension of a defendant's constitutional right in civil injunctions against harassment.

Consequently, the prohibition against firearms in both the federal Gun Control Act and Arizona's criminal domestic violence law (A.R.S. § 13-3602(G)(4)) does not apply to civil injunctions. Case in point - *Savord* was a criminal domestic violence matter.

Therefore, Rule 25(g), which prohibits firearms in civil injunctions, should not be adopted. Fundamentally, it does not meet the "intimate partner" requirement

needed by law to suspend a defendant's constitutional rights.

B. As to a "finding"

Even if the federal and/or state prohibition against firearms for "intimate partners" somehow applied to non-intimate parties in civil injunctions against harassment, *Savord* requires a finding of fact before implicating a defendant's Second Amendment right.

But Rule 25(g) does not require a finding. It only says that "the judicial officer must ask the plaintiff about the defendant's use of or access to firearms."

Holding here for a moment, here's nothing in the statute that says a judicial office must ask anyone about anything. Not even the statute governing criminal domestic violence, A.R.S. § 13-3602, calls for a judge to ask such a leading question.

Requiring a judicial officer to solicit incriminating "evidence" from one party is, on its face, inherently prejudicial. It's like handing out a free gift. Who is going to say "No" to such an offer?

Telling judicial officers that they must ask such a leading question implicates a defendant's Fourteenth Amendment right to a fair hearing. (Especially when done ex parte). It also violates due process protections. Moreover, the law doesn't call for it. Therefore, Rule 25(g) should not be adopted on Fourteenth Amendment grounds.

Even if it's not prejudicial to the administration of a defendant's justice for a judicial officer to ask the plaintiff a leading question about the defendant's use of firearms, the plaintiff's answer does not constitute a finding of fact. One person's side of a story, even if "under penalty of perjury" is not credible evidence. (As the Court

knows, witnesses often lie, despite that perjury is a Class 4 felony.)

Even if a plaintiff is telling the "truth" (as the plaintiff sees it), the judicial officer doesn't know if the plaintiff is of sound mind, a requirement to accept sworn testimony in a civil matter. (See A.R.S. § 12-2202 and Rule 35 of the Arizona Rules of Civil Rules.) So a plaintiff's answer to a judicial officer's query cannot constitute a bona fide finding. Especially when ex parte.

Even the Fifth Circuit highlighted the need for hard, credible evidence before issuing injunctions.

> A trial court **may not** issue a temporary injunction except to prevent a threatened injury.... The commission of the act to be enjoined **must be more than just speculative**, and the injury that flows from the act **must be more than just conjectural**.... **The trial court will abuse its discretion if it grants a temporary injunction when the evidence does not clearly establish that the applicant is threatened with an actual, irreparable injury**." *U.S. v. Emerson*, 270 F. 3d 203,262 - Court of Appeals, 5th Circuit 2001

Even the Arizona Prosecuting Attorneys' Advisory Council, in an earlier Comment in opposition to repeal Rule(6)(E)(4)(e)(2), highlighted the requirement for "the plaintiff to present credible evidence" before a court revokes a defendant's Second Amendment right. (See 15203559558.pdf, submitted 05/20/2013 in this forum.) But neither Rule 25(g) nor the underlying statute requires a finding before implicating a defendant's Second Amendment right. (The statute doesn't require a finding in civil injunctions it because it was never the Legislature's intent to implicate a defendant's Second Amendment right in civil injunctions.)

Therefore, because *Savord* requires a "finding" before suspending a

defendant's Second Amendment, but because Rule 25(g) does not require a finding, Rule 25(g) should not be adopted.

C. As to "credible threat"

In order to implicate the Second Amendment rights of a defendant, federal law mandates that a defendant must be a "credible threat." (This explains why Arizona law echoes the same "credible threat" language in our state criminal Domestic Violence law that's in federal law.)

But Rule 25(g) doesn't say anything about "credible threat." It merely says that "the judicial officer *must* ask the plaintiff about the defendant's use of or access to firearms."

So, on its face, Rule 25(g) cannot pass constitutional muster because it doesn't have the requirement in *Savord* for "credible threat." Therefore, it should not be adopted.[2]

Even if having a judicial officer ask a plaintiff a leading question was not prejudicial, and even if such an answer could constitute a finding, an affirmative answer to the question "does the defendant use or have access to firearms" cannot support a conclusion that a person is a "credible threat." As this Court said in *State v. Serna*, "In a state such as Arizona that freely permits citizens to carry firearms . . . **the mere presence of a gun cannot provide reasonable and articulable**

[2] Nor, per Section III, is it for this Court to cure this defect by adding "credible threat" language to the Rule, as it apparently proposed to do in response to a similar challenge to the Rule 6(E0(4)(e)(2) a couple years ago.

suspicion that the gun carrier is presently dangerous." *State v. Serna*, 331 P.3d 405,410 (2014).

Nor can a judicial officer constitutionally suspend the Second Amendment rights of a defendant simply because a plaintiff is afraid of guns. To grant an injunction, "there must be more than an unfounded fear on the part of the applicant." *Emerson,* above.

Rule 25(g) essentially accuses every citizen in Arizona who owns a gun of being dangerous. That doesn't seem like the proper position for this Court to take in a gun friendly state like Arizona, especially considering that there has not been a rise in gun crime since SB1108 became law.

If there truly were credible evidence in a civil injunction against harassment that a defendant was a credible threat, then it stands to reason that there would be probable cause for law enforcement to make a criminal arrest. (Brandishing a weapon, for example.) Absent credible evidence and probable cause for arrest, a judicial officer abuses her discretion if she grants [even a] temporary injunction when the evidence does not clearly establish an actual threat. (Per *Emerson*, above.) [3]

This is the final nail in the *Savord* coffin. Therefore, because a plaintiff's

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[3] In a way, a civil injunction against harassment is essentially forum-shopping. For example, a plaintiff, who doesn't have evidence to show police officers that there is probable cause for an arrest, can essentially reduce a defendant to a felon (prohibited possessor) anyway via a civil injunction. As such, Rule 25(g) also implicates a defendant's Fifth and Sixth Amendment constitutional guarantees to a fair trial, especially when victimized ex parte.

answer to the leading question asking whether a defendant uses or has access to firearms does not constitute a finding that a defendant constitutes a credible threat, Rule 25(g) should not be adopted.

III. No Legislative intent

Even if the Court believes that criminal domestic violence law can be and/or should be smeared over to cover civil injunction law (the distinctions and requirements above notwithstanding), the Court cannot lawfully do it.

It has been shown previously in this forum that there is nothing in the statute governing civil injunctions (A.R.S. § 12-1809) that *specifically* provides for the prohibition of firearms. As such, it has previously been argued in this forum that it was never the Legislature's intent to prohibit possession of firearms, never the legislature's intent to violate a defendant's constitutional right in a civil injunction against harassment. In fact, the Court of Appeals acknowledged this, saying of A.R.S. § 12-1809, "we do not attribute to the legislature any intention to authorize unconstitutional injunctions." *LaFaro v. Cahill*, 203 Ariz. 482, 56 P. 3d 56 (App. 2002) at FN 7.

New to the table is the fact that 1) since the Legislature specifically mentioned the prohibition of firearms in criminal domestic violence law; 2) but since the Legislature did not mention prohibition of firearms in civil injunction law, 3) even if it were the Legislature's intent to prohibit firearms in civil injunctions against harassment, the Court is prohibited from saying so.

Specifically, the CIDVC's proposed Rule 25(g) says "If necessary to protect

the plaintiff or any other specifically designated person, the judicial officer may prohibit the defendant from possessing, purchasing, or receiving firearms for the duration of the order."

But none of this language is in the only law governing civil injunctions against harassment. None of the words "protect the plaintiff," "prohibit a defendant," "possessing," "purchasing," "receiving," or "firearms" are in A.R.S.§ 12-1809. Whereas, in criminal domestic violence law, they are.

And consistent with the fact that there is no language in A.R.S. § 12-1809 that provides for prohibition of firearms in a civil injunction against harassment, there is no language in the statute that provides a mechanism to make it happen. Whereas, in criminal domestic violence law, there is.

For example, A.R.S. § 13-3602 G(1)(4) specifically mentions both the prohibition of firearms and the mechanism to do it. ("If the court prohibits the defendant from possessing a firearm, the court shall also order the defendant to transfer any firearm owned or possessed by the defendant immediately after service of the order to the appropriate law enforcement agency for the duration of the order.")

Given the contrasting statutory constructions then, and borrowing from *American Helicopters, LLC v. Arizona Department of Revenue*, ¶ 19, Ariz: Court of Appeals (1st Div. 2015) with the appropriate substitutions [in brackets] to make it applicable here,

> The legislative history [for civil injunctions against harassment] does not refer to [firearms or the prohibition thereof]. That is not to say that the same reasoning that prompted the Legislature to [prohibit firearms

> in criminal domestic violence matters] would not also justify [a prohibition of firearms in civil injunctions against harassment matters.] It well may. **Nevertheless, it is for the Legislature, not this court, to extend the scope of this [prohibition.]**

Therefore, because the Legislature clearly spoke about firearm prohibition in criminal domestic violence law, but did not speak about same in civil injunction law, it is for the Legislature to "correct" its oversight. Not the Court.

Nor is the Court allowed to extend the scope of legislation to make a law "better," to make a law conform to its own peculiar sociological views, even if for the perceived safety of one party over another.

> The most basic rule of statutory construction is that in construing the legislative language, **courts will not enlarge the meaning of simple English words in order to make them conform to their own peculiar sociological and economic views.** *Kilpatrick v. Superior Court*, 105 Ariz. 413, 466 P.2d 18 (1970). **And this is true even though the interpretation which the court renders is harsh and uncompassionate. Equally fundamental is the presumption that what the Legislature means, it will say.** Hence, had the Legislature intended [to prohibit firearms in civil injunctions against harassment], it would have said so. *Padilla v. Industrial Commission*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976)

Since there is the fundamental presumption "that what the Legislature means it will say," it is clear that, because the Legislature didn't say it, the Legislature never intended to prohibit firearms in civil injunctions.

Nevertheless, the CIDVC suggests that the Legislature, in total disregard of the Constitution, meant for judicial officers to act willy nilly. That the Legislature gave judicial officers *carte blanche* to violate the Second Amendment rights of defendants in civil injunctions via the phrase "grant relief necessary." This despite the fact that the Legislature made sure to cross its "t's" and dotted its "i's" when it implicated the

Second Amendment rights of defendants in criminal domestic violence law. And this despite the fact that the legislature cannot give judicial officers license to violate the Constitution.

If it had been the intent of the Legislature to prohibit possession of firearms in civil injunctions against harassment, it would have simply copied and pasted language from criminal domestic violence law into civil injunction against harassment law. It didn't, because as previously shown, it couldn't.

It's more reasonable to conclude that the Legislature never intended to violate the constitutional rights of defendants when it said judicial officers could grant relief necessary in civil injunctions against harassment. It's also reasonable to conclude that the Legislature never expected this Court would extend the phrase "grant relief necessary" to violate the constitutional rights of defendants either.

Therefore, no matter whether a judge, or a prosecutor, or an Association of Judges or Prosecutors think that it would be a good idea to prohibit possession of firearms in civil injunctions against harassment (and so violate the constitutional rights of defendants' without cause), it is not the Court's place to do it. If a judge, or a prosecutor or an Association of Judges or Prosecutors thinks it's a good idea to change the law, they should lobby the Legislature to change the law. They should not lobby this Court to add to the law.

Any attempt to unlawfully sidestep the Legislature is not good for orderly society. Current events show that the natives are already getting restless over what

they perceive as lawless in government. For the sake of orderly society, the Court should uphold the law. Not undermine it.

CONCLUSION

The undersigned has shown, in the undersigned's pending petition to repeal Rule 6(E)(4)(e)(2), that this equivalent Rule 25(g) violates the Fourth Amendment right of defendants. In this Comment, the undersigned has also shown that Rule 25(g) cannot meet any of the three standards for a court's order to implicate a defendant's Second Amendment (or Article 2, Section 26) constitutional right(s), as set by *Savord* and 18 U.S.C. § 922(g)(8)(C)(i).

As such, Rule 25(g) violates the Fourth and Second — and potentially the Fifth, Sixth and Fourteenth Amendment — right(s) of defendants.

Furthermore, the undersigned has shown that 1) even if the Legislature meant to violate all these rights of defendants in civil injunctions against harassment, 2) because it didn't say it in writing, it's not for this Court to say it.

For any or all of these reasons, the Court should immediately repeal Rule 6(E)(4)(e)(2) now and should not adopt Rule 25(g) in the future.

RESPECTFULLY SUBMITTED this 18th day of May 2015.

By /s/ Victoria Timm