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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-15 -0016 **Reply re: Petition to Repeal** **Rule 6(E)(4)(e)(2),** **Arizona Rules of** **Protective Order Procedure** **(Emergency Action still Requested)**

Petitioner replies to the CIDVC and the State Bar, and also introduces some new evidence and new case law that was not available at the time of petition.

I. Reply

Since both the CIDVC and the Bar make many of the same arguments in opposition to petitioner's petition, they will be rebutted as one.

A. As to precedent

Both the CIDVC and the Bar start off by observing that this is the third challenge to repeal Rule 6(E)(4)(e)(2). Presumably their implication is that because the Court has denied two prior challenges to repeal this Rule, the Court should deny a third petition simply based on "precedent."

But as both correctly observe, this instant petition is markedly different from the first two. The first two petitions cited the Second Amendment (of the U.S.

Const.) as grounds to repeal Rule 6(E)(4)(e)(2). This petition cites the Fourth Amendment.[1] So, because this third petition is different from the first two, the Court should consider it anew.

Even if this petition were like the first two, it should not be denied out of hand. Like bringing the same arguments over and over again to repeal slavery, which was upheld by the courts for a long time, challenges to this Rule will likely continue (or result in an Underground and civil disobedience) until this Rule is abolished. The court should abolish this slavery now.

B. As to applicability of *Serna*

Next, both the CIDVC and the Bar focus on the same sentence in *State v. Serna* to say that the Court meant for its ruling in *Serna* to apply only to police officers. Not to judicial officers. (That "Our holding governs only those circumstances in which the police wish to search a person with whom they are engaged in a consensual encounter.")

Of course, the Justices know what they meant when they wrote that sentence. Since the same Justices are still seated, petitioner hesitates to put words in their mouths. But a review of the oral arguments suggests that the Court crafted this sentence because the Court was very cognizant of the dangers police officers face. So the Court did not want police officers concluding that they could never seize

[1] Although petitioner does site new case law regarding the Second Amendment in petitioner's Comment in Opposition to the CIDVC's proposed Rule 25(g).

firearms during stops. Rather, the Court wanted to be very clear about when a legitimate Fourth Amendment seizure of firearms was warranted, and when not.

So petitioner suggests that the Court really meant to say "Our holding governs those circumstances in which police wish to search a person only with whom they are engaged in a consensual encounter." If correct then *Serna* is not automatically limited to police officers as the CIDVC and the Bar claim.

Even if the Court meant for *Serna* to apply only to police officers, the Court's reasoning regarding the Fourth Amendment extends to any seizure of firearms, be it by a police officer or by a judicial officer. Both officers are agents of the state and both are constrained by the Fourth Amendment. It's incidental that *Serna* just happened to be about police officers. It could have been about dog catchers and it would still uphold the Fourth Amendment. So even if *Serna* doesn't apply directly, the reasoning in *Serna* applies indirectly.

C. It's a seizure

The CIDVC hints, and the Bar explicitly argues (citing *Florida v. Bostick*) that when a judicial officer orders a police officer to seize someone's firearms in a civil injunction against harassment, it's not really a seizure because there is no show of authority.

But there is a show of authority. Both officers — the judicial officer and the police officer — are acting under color of law, ultimately threatening force to take weapons from defendants in civil injunctions. (For the police, a defendant who refuses to turn over her firearms can be arrested for "Interfering with a judicial

proceeding" (A.R.S. § 13-2810). Similarly, a judicial officer can bring civil contempt charges, possibly jailing a defendant who refuses to turn over her firearms.) This meets the Bar's own test of *Bostick* to show that a seizure has occurred.

The Bar further argues that since it's not a judicial officer proper who is taking physical possession of firearms, it's not a seizure by a judicial officer.

That's like saying that if a Police Chief tells her officers to seize firearms from citizens in consensual stops (in violation of *Serna*), then the Chief cannot be held liable for unlawful seizures because she did not do the deed herself. The Bar's argument is not supported by real life.

For example, many a civil lawsuit has been won against Sheriff Joe (Arpaio) for his policies that led to the violations of defendants' rights, even though the Sheriff did not do the deeds himself. Therefore, when judicial officers order defendants to turn over their firearms to police or sheriffs, it is a seizure by judicial officers. (They are called "court orders." Not "court requests.")

Last, the Bar says that it's not a seizure because the gun owner does not lose ownership of their firearms. They simply can't have their firearms for a time.

Wait. What?

This doesn't pass the "straight face test." Nor does it comport with this Court's ruling in *Serna*. In *Serna,* this Court ruled that, absent probable cause that a crime is afoot, taking a firearm from a citizen, even for a minute, constitutes a seizure. Moreover, it constitutes an unconstitutional Fourth Amendment seizure.

Therefore, taking a firearm from a defendant under show of authority in a civil injunction when no crime is afoot, no matter how short the time, constitutes an unconstitutional Fourth Amendment seizure.

D. Relying on "Relief Necessary"

As pointed out in this forum ad infinitum, there is nothing in the statute governing civil Injunctions against Harassment that specifically provides for the seizure of firearms in civil injunctions. (Contrast this with criminal domestic violence law, where there is.)

Since there's nothing directly on point, both the CIDVC and the Bar go off point, relying heavily on one phrase in the statute governing civil injunctions for the relief they seek. "If the court issues an injunction, the court may do any of the following: *Grant relief necessary* for the protection of the alleged victim and other specifically designated persons proper under the circumstances." (A.R.S. § 12-1809(F)(3).)

Implicit in their reliance on this phrase, both the CIDVC and the Bar presume that the Legislature meant that a judicial officer could suspend any constitutional right of a defendant to grant relief necessary. But that does not comport with Arizona case law.

Ironically, the Bar cites *LaFaro v. Cahill* to say it was the legislature's intent to allow violations of the Constitution in the civil injunctions to be constitutional. But in fact, *LaFaro* says, "we do not attribute to the legislature any intention to authorize unconstitutional injunctions." (At FN 7.)

An "unconstitutional injunction" is one that, by definition, violates the constitutional rights of defendants, be it their Fourth, Second or First Amendment right. (In the case of Mr. LaFaro, the court vacated the injunction against him because it violated his First Amendment right.)

If, for the sake of argument, "relief necessary" really allowed judicial officers to violate a defendant's constitutional right in a civil injunction against harassment, then it stands to reason that a judicial officer could order a particularly incorrigible defendant to jail in order to protect the plaintiff. History (in domestic violence situations anyway) has shown that a mere piece of paper (that is, a mere court order) will not keep the most incorrigible defendants from acquiring and using a firearm. So wouldn't it be reasonable then in some cases in civil Injunctions to seize such a defendant? After all, if (for the sake of argument) a judicial officer can seize a defendant's property, why can't a judicial officer seize the defendant?

But not even the CIDVC allows for seizing a defendant in civil Injunctions against Harassment. Nor does the CIDVC allow for seizures of firearms in Civil Injunctions against Workplace Harassment, which are virtually the same as Civil Injunctions against regular Harassment. This shows that not even the CIDVC believes that "relief necessary" can ever support a "reasonable" Fourth Amendment seizure in civil Injunctions against Harassment.

E. Bad law

The Bar cites a California law, *Richie v. Conrad* [sic], to justify the Arizona Supreme Court's Rule 6(E)(4)(e)(2). (Petitioner cannot find a case captioned *Richie*

v. Conrad. Per the Bar's citation, the case is actually captioned *Ritchie v. Konrad*.)

The Bar says that the case was about "a civil injunction for harassment similar to the Arizona statute." That's not true at all.

Ritchie was not about a civil IAH. Rather, it was about a criminal Domestic violence OOP. (As it says in the first paragraph. Ritchie and Konrad had dated each other, as it says in the second paragraph.)

Moreover, the judge in *Ritchi*e actually tried to do what Petitioner is trying to do here. The judge sought to reinstate a defendant's Second Amendment right. (But was not allowed to do so because, per California statute, firearm restrictions are mandatory in California criminal DV OOP's.)

Even if *Ritchie* (or *Richie*) were about civil Injunctions against Harassment, Arizona is a "gun friendly state." (As then-Chief Justice Berch stated during oral arguments in *Serna*.) California is not a gun friendly state. Even if some other state had case law saying that a judicial officer could suspend a defendant's Second Amendment right in a civil Injunction against Harassment, that law would be bad law when forced on Arizonans.

F. On the Second Amendment

As it goes to a Second Amendment deprivation, the CIDVC argues (in its Reply to petitioner's Comment in Opposition to Rule 25(g)[2]) that the higher standard

[2] The proposed next version of Rule 6(E)(4)(e)(2)

set in *Savord* when the Second Amendment is implicated does not apply to civil Injunctions against Harassment. This because *Savord* involved a criminal domestic violence matter, not a civil Injunctions against Harassment matter.

But due to the CIDVC's Rule 6(E)(4)(e)(2), that's a distinction without a difference. *Savord* says that "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." As currently practiced (due to Rule 6(E)(4)(e)(2)), a court order in a civil Injunction against Harassment implicates a defendant's right to possess firearms just as much as a court order in a criminal Order of Protection. (In practice, both are also put on the Brady List, whether intended or not.) Since both orders implicate a defendant's Second Amendment right in the same way, the same standard must apply to both.

It is true that *Savord* was a case concerning criminal domestic violence orders of protection. But that is not limiting. Rather, it is instructive.

That is, because it was about a criminal DV OOP, *Savord* began by quoting the criminal domestic violence statute for authority as a prelude to its statement that "a higher standard of review applies" when a defendant's Second Amendment right is implicated. The controlling statute quoted plainly says "a court may prohibit the possession of firearms if it finds the defendant poses a credible threat to the physical safety of the plaintiff."

But there is no similar statute to quote for authority in civil injunctions against

harassment. Because there is no standard given by statute, no standard can ever be met in a civil injunction to implicate the Second Amendment. Therefore, by law, a judicial officer can never prohibit firearms in a civil Injunction against Harassment.

If we were to take the CIDVC's premise that *Savord's* higher standard only applies to criminal domestic violence matters, the logical conclusion is: There is a high standard required to suspend a defendant's Second Amendment right in a criminal domestic violence situation, but there is no standard required at all to suspend a defendant's Second Amendment right in a civil injunction. But it's the same constitutional right!

This illogic results from the CIDVC's Rule 6(E)(4)(e)(2). Therefore, it follows that the Rule is illogical and should be repealed.

II. New Evidence on forum shopping

In petitioner's Comment in Opposition to Rule 25(g), petitioner opined in FN 3 that civil Injunctions Against Harassment were essentially a form of forum-shopping, where one party, who did not have probable cause to establish that another party was a credible threat, could go to a judge and implicate a defendant's Second Amendment right anyway. And so this essentially violates a defendant's Fifth and Sixth Amendment rights to a fair (criminal) trial by doing an end run around the system. This has happened before and it recently happened again.

Unknown to petitioner, a month before petitioner's Comment in Opposition to Rule 25(g), such a real-life example had occurred. According to a national news report (available as of this writing at http://www.theblaze.com/stories/2015/04/01/

disabled-navy-vet-left-devastated-after-all-of-his-guns-are-confiscated-and-he-still-cant-believe-why/), two neighbors were having a neighborly dispute. The first neighbor called the police because he thought his next door neighbor (a landscaper) was leaving toxic chemicals around. When the police arrived to investigate, the next door neighbor told the police that the first had threatened to shoot him.

Threatening to shoot someone is a crime. But apparently there was no probable cause to sustain a credible threat because the police did not arrest the first neighbor. (Nor did the police arrest the next door neighbor for filing a fraudulent police report.)

Nevertheless, the next day, the next door neighbor obtained an ex parte IAH and the police seized the first neighbor's guns. While most of the claims of harassment were silly (it's harassment to ask your neighbor to move his truck, move his boat?), one claimed act was that the first neighbor threatened to "stuff me in my dump truck."

Again, such a threat is a crime. And yet, apparently it wasn't a credible threat, since the police made no arrest. (According to the news report, the first neighbor is disabled with a bad back, presumably incapable of stuffing anyone anywhere.)

Despite the laughable allegations, the first neighbor's Fourth and Second Amendment rights were summarily violated when a judge ordered the police to seize his firearms.

The Court might recall that an earlier petitioner in this forum suffered the loss of his Fourth and Second Amendment rights via a civil Injunction against

Harassment simply because he once called his Town Councilman a "turd."

With these stories in mind, the Bar says that the purpose of A.R.S. § 12-1809 is to provide Arizona citizens with a method to help protect themselves from stalkers, violence and harassment through civil orders.

That's difficult to believe since the legislature already provides methods to protect citizens from stalkers, violence and harassment. Specifically, the legislature has already passed laws against stalking (A.R.S. § 13-2923), laws against violence (murder & assault are illegal), and laws against harassment (Disorderly Conduct and criminal Harassment (A.R.S. § 13-2921)). So even if it were the legislature's intent to provide Arizona citizens with a method to help protect themselves from stalkers, etc., that intent has been satisfied and superseded by criminal law. If a defendant truly stalks, violates or harasses a plaintiff, there are criminal remedies which can result in the lawful seizure of firearms from defendants (after arrest), if not the seizure of the defendant herself. Problem solved.

And, as seen from the news report above, even if it were the legislature's intent to provide Arizona citizens with a method to help protect themselves from stalkers, etc., that is not how civil injunction against harassment law is being used and granted. So called "victims" are using civil Injunctions against Harassment as weapons to punish defendants.

As such, the Court's policy of seizing firearms and implicating defendants' Second Amendment rights via civil Injunctions against Harassment, no matter how well intended, is unnecessary. Since it is unnecessary, and since it can cause

irreparable harm to a defendant (who is now unable to defend herself), it is also bad policy. There is no need for Rule 6(E)(4)(e)(2). Consistent with this, the legislature did not provide for it. The Rule should be repealed.

III. New Case Law

Earlier this month, this Court again unanimously upheld the Fourth Amendment in *State v. Wilson*. Even better, this Court upheld Arizona's right to privacy, as codified in art. 2, § 8 of the Arizona Constitution. ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.")

This is another reason to repeal Rule 6(E)(4)(e)(2). (And its proposed replacement, Rule 25(g).)

Citizens in Arizona are not required to register their firearms. Although purchasing a firearm at a dealer or at a gun show requires filing federal paperwork (effectively "registering" them), firearms may also be legally acquired as a gift, through barter, or bought used from private individual, all without the requirement to notify the state.

Many citizens prefer acquiring firearms through the latter means. Whatever their reasons for preferring this, it is their right to privacy.

But when a judicial officer orders them to turn over all their firearms to the state, it is a violation of Article 2, Section 8 of the Arizona Constitution.

For example, before a defendant is served with an Injunction against Harassment, the state has no idea how many firearms or the type of firearm a defendant has. After a defendant is served and her firearms seized, the state knows.

Moreover, it's likely that the state records the serial number of each firearm — if for no other reason than to issue a valid property invoice. It's also likely that the state keeps a record of defendant's firearms, even after an ex parte injunction vacated, just as the state keeps fingerprint records of defendants even after defendants are released before trial and/or found not guilty. Even if, in the best case, the state were discarding records of those serial numbers, it still constitutes a violation of a defendant's right to privacy.

IV. CONCLUSION

For all these reasons, Rule 6(E)(4)(e)(2) and its proposed progeny, Rule 25(g) should be repealed. And it should be repealed immediately.

Now, when petitioner filed her petition, petitioner was under the mistaken belief that the Court met monthly to consider new rules. As such, petitioner mistakenly requested that Rule 6(E)(4)(e)(2) be repealed at the earliest Rules meeting. But this can't wait any longer.

Petitioner renews her request for Emergency Action for this petition. It has been demonstrated from a variety of angles that this Rule should be repealed. It is currently harming defendants in Arizona. Petitioner implores the Court to please grant Emergency status to this petition and repeal this Rule immediately before someone is irreparably harmed.

RESPECTFULLY SUBMITTED this 30th day of June 2015.

By /s/ Victoria Timm