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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND RULE 36(a),
ARIZONA RULES OF
PROTECTIVE ORDER PROCEDURE

Supreme Court No. R-16-_____

**Petition to Amend Rule 36(a),
Arizona Rules of
Protective Order Procedure**

(Expedited Adoption Requested)

Pursuant to Rule 28, Rules of the Supreme Court, Mike Palmer petitions this Court to amend Rule 36(a) of the Rules of Protective Order Procedure. This Rule governs Admissible Evidence in a Contested Hearing (for criminal Domestic Violence Orders of Protection; for civil Injunctions against Harassment; and for civil Injunctions against Workplace Harassment, implied).

Because this petition relates to a defendant's Fourteenth Amendment right to a fair trial, and because defendants are currently suffering Fourteenth Amendment deprivations in contested hearings, and because "[i]t is well settled that the issuance of an order of protection is a very serious matter. Once issued, an order of protection carries with it an array of collateral legal and reputational consequences that last beyond the order's expiration," I request this petition be adopted on an Expedited Basis. (If not on an Emergency Basis.)

(The quote above from *Savord v. Morton*, 330 P. 3d 1013, 1016 (Ariz. Ct. App. 1 2014). Internal quotes and citations omitted.)

I. Background

To set the stage for this Rule change, it is necessary to first begin with a discussion of Rules 23(b), 25(b), & 26(b) and how they came to be amended.

In January of 2015 the CIDVC (Committee on the Impact of Domestic Violence and the Courts) proposed a sweeping revision to the Arizona Rules of Protective Order Procedure. (ARPOP.) While most of the revision to the ARPOP were simply a restyling of the existing Rules, there were some substantive changes called out by the CIDVC. Among them was new Rule 23(b).

In its petition to amend the ARPOP, the CIDVC asked, sua sponte, to adopt a new Rule 23(b) so as to "clarify[] language regarding the scope of the petition ... as a result of *Savord v. Morton*, 235 Ariz. 256, 330 P.3d 1013 (Ariz. Ct. App. 1 2014). In *Savord*, the Court of Appeals directs courts to either limit the scope of the [contested] hearing to the allegations of the petition or allow the plaintiff to amend the petition and reschedule the hearing to give the defendant the opportunity to prepare a defense against new allegations."

The underlying problem in *Savord*, which spawned the CIDVC's Rule 23(b), was that the plaintiff in a **contested** hearing over a Domestic Violence Order of Protection sneaked in new evidence to slime the hapless defendant, evidence that had not previously been disclosed at petition. Unfortunately, despite objection, the trial court allowed the undisclosed evidence anyway.

Fortunately, the Court of Appeals recognized that "In permitting Mother to testify as to matters outside of the Petition, the court deprived Father of due process. Due process protections provided under the Fourteenth Amendment of the United States Constitution and Article 2, Section 4, of the Arizona Constitution, guarantee that Father receive notice, reasonably calculated to apprise him of the action in order to adequately prepare his opposition." (At 1017.)

So the CIDVC asked to add Rule 23(b) which says that petitions for criminal DV OOP's must "allege each specific act that will be relied on at hearing." The new Rule became effective January 1, 2016.

Having been a victim of the same kind of sneak attack myself in a civil Injunction against Harassment hearing, and realizing that the CIDVC's new Rule only covered criminal DV OOP's, I petitioned this Court afterward to modify the two similar Rules for civil Injunctions against Harassment with similar language. (Rules 25(b) & 26(b).) My petition was granted and those two Rules were changed as of January 1, 2017. They now contain language that petitions must allege a series of acts that will be relied on at hearing.

I thought that these Rule changes would be enough to prevent others from suffering the same fate that I had suffered. Unfortunately, real life has shown that these Rule changes do not go far enough to ensure that a defendant's Fourteenth Amendment rights are preserved in contested hearings. (As below.)

II. Purpose of Proposed Rule Amendments

The fundamental problem with the new Rules is the problem I call "Read

my mind." (Often observed between husbands & wives.) Although the CIDVC's (and my) reason for its (and my) Rule change was fairly obvious to readers at the time of petition - fairly obvious because we both cited *Savord* in our petitions, and one could read *Savord's* reference to the Fourteenth Amendment for oneself - the reasons behind Rules 23(b), 25(b) & 26(b) are not obvious nowadays. One has to read the CIDVC's (and my) mind to realize that it (and I) meant the Rules to guarantee that a defendant's Fourteenth Amendment right extends beyond the initial hearing for an OOP or IAH. The right extends all the way through to a contested hearing.

It's also likely that because Rules 23(b), 25(b) & 26(b) are early in the process, they are forgotten (or thought not to relate) by the time Rule 36 comes around for contested hearings. Thus this petition to amend Rule 36.

Two real life stories to show that the "read my mind" isn't being received.

1) I was privileged to have a meeting last year with a high-ranking Legislative aide of a high-ranking Arizona Senator. We were discussing the Court's ARPOP.

Although the aide was familiar with the adoption of Rule 23(b), he didn't have a clue that it was meant to prevent violations of our Fourteenth Amendment right in a contested hearing. That's because the new Rule does not say what *Savord* said, that a plaintiff (and judge) "must limit the scope of the [contested] hearing to the allegations of the petition."

2) I was contacted last year by a distraught young wife who had tripped

across my petition to amend Rules 25(b) & 25(b).

She told me that she had been the defendant in a criminal Domestic Violence Order of Protection that year and that her husband pulled a *Savord* -like sneak attack on her at her contested hearing, introducing new evidence at trial that he did not disclose at petition.

Unfortunately for her, despite the plain language of the Fourteenth Amendment, and despite the precedent in *Savord*, and despite the fact that new Rule 23(b) had been in effect since the beginning of last year, the trial judge did not limit the scope of the hearing to the allegations in the petition so as to preserve the wife's Fourteenth Amendment right. She lost.

Sadly, the new Rules are not enough.

III. Contents of Proposed Rule Amendment

Therefore, I propose that language be added to Rule 36(a) from *Savord*, to make it abundantly clear that our Fourteenth Amendment right persists through contested hearings. (Rule 36(a) is under Part VIII, titled *Contested Hearings*, which should help bring this in focus.)

(a) **Relevant Evidence and Exclusions.** The court must limit the scope of the hearing to the allegations of the petition. Relevant evidence is admissible provided, however, that the court must exclude evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, undue delay, wasting time, needlessly presenting cumulative evidence, or lack of reliability.

SUBMITTED this 10th day of January 2017.

By /s/Mike Palmer