

FILED
PATRICIA A. NOLAN
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BY: E. BRADFORD,
DEPUTY

1 **LAW OFFICES OF**
2 **THOMAS WILSON, P.C.**
3 177 North Church, Suite 1000
4 Tucson, AZ 85701
5 (520) 624-2728
(520) 623-1716 (fax)
6 State Bar No. 020958
7 Pima County No. 65534
8 Attorney for Petitioner

6 IN THE PIMA COUNTY SUPERIOR COURT
7 STATE OF ARIZONA, COUNTY OF PIMA

8 ANGELA KOPERSKI,
9 Petitioner,

10 vs.

11 TUCSON MUNICIPAL COURT and
12 the HONORABLE JUDGE LEX, a judge
thereof,

13 Respondent,

14 and

15 TUCSON CITY PROSECUTOR'S OFFICE,

16 Real Party in Interest.

SUPERIOR COURT CASE NO:

~~C20106548~~

(Tucson City Court Case TR711554)

C20106548

EMERGENCY PETITION FOR
SPECIAL ACTION AND
APPLICATION FOR
INTERLOCUTORY STAY OF
PROCEEDINGS AND ORDER

(Jury Trial began August 17,
2010 and is going on presently)

Oral Argument Requested

Honorable "To Be Assigned"
Division

18 NOW COMES, Angela Koperski, by and through undersigned counsel, pursuant to the
19 Rules of Procedure for Special Actions, 17A A.R.S., the due process clause of the United States
20 Constitution and the Arizona Constitution, and to grant the relief requested by virtue of Article 6
21 Section 5 of the Arizona Constitution, Rule 4, Rules of Procedure for Special Actions, 17A, A.R.S.,
22 and A.R.S. § 12-2021. and hereby petitions this Court for an Order vacating the order of Judge Lex,
23 which order would allow the prosecutor's office to sit in the row in front of the Defendant's expert,
24 and video tape the witness's testimony holding up a cellular phone video camera in front of the jury.
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PAID

1 A Memorandum of Points and Authorities follows.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. STATEMENT OF FACTS**

4 This case was filed November 17, 2007, and has been pending in Tucson City Court for
5 nearly 3 years. The Jury trial at issue began yesterday, August 17, 2010. In the pendency of this
6 case there are many evidentiary motions and hearings. The witness in question was disclosed to
7 the State on November 21, 2007. In the nearly 3 years since Defendant disclosed this witness, the
8 prosecutor failed to conduct, or even ask to interview this witness. On the first day of trial both
9 parties address multiple motions in limine, and again this issue was not raised. The state presented
10 testimony of 2 witnesses and then rested. Defense began on day 2 (today) by calling its first
11 witness, a Tucson Crime Lab employee who had conducted some testing of a breath device in the
12 case. Defense then began to call its second witness, Charles Laroue. The Court granted a 15
13 minute recess prior to Mr. Laroue's testimony.

14 The trial was being conducted by 2 prosecutor's of the City Prosecutor's office. A 3rd and
15 4th prosecutor then entered the court room at the start of the break, and they advised Judge Lex
16 they wished to video tape the testimony of Mr. Laroue. Defense objected. Judge Lex asked if the
17 witness himself objected. Defense indicated the witness does. Judge Lex inquired as to how the
18 state intended to do this. The layout of the courtroom has the jury on the opposite side of the Judge
19 from the witness stand. There are 2 short benches directly in front of the witness stand, which
20 would accommodate 2 or 3 seated people each. The state proposed to have a 3rd prosecutor sit in
21 the front row in front of the witness and hold up an I-phone brand cellular telephone with video and
22 audio taping capabilities while the witness testifies.

23 Judge Lex inquired as to the purpose, as the proceedings are already recorded, and this is
24 already an official record being produced. Prior to the state's answering the question, Judge Lex
25 provided the answer to them "is it for training or something.?" The state responded "ya" and the
26 motion was granted. Defense requested leave to file an emergency special action. Judge Lex
granted this and declared a recess for this purpose. Defense inquired as to a minute entry of the

1 verbal motion for purpose's of the special action. Judge Lex instructed Defense counsel to "avow"
2 to the Superior Court as to what the motion was and what his ruling was. Defense counsel
3 undersigned here avow's to the above facts.
4

5 **II. JURISDICTION**

6 Special action review is appropriate where a judge has exceeded his authority and the
7 petitioner does not have a plain, speedy, and adequate remedy by appeal. State ex rel. Romley v.
8 Superior Court, 172 Ariz. 109, 834 P.2d 832 (App. 1992).

9 **III. ISSUE PRESENTED**

10 WHETHER THE CITY COURT JUDGE LEX HAS EXCEEDED HIS AUTHORITY
11 AND ABUSED HIS DISCRETION BY ALLOWING A PROSECUTOR TO HOLD A
12 VIDEO CAMERA PHONE IN FRONT OF A SINGLE DEFENSE WITNESS WHILE HE
13 TESTIFIES BEFORE A JURY, SUCH MOTION MADE DURING TRIAL,
14 IMMEDIATELY BEFORE THE WITNESS IS TO TESTIFY

15 **IV. ARGUMENT**

16 17A ARS Sup.Ct.Rules, Rule 122 is entitled "**Electronic and Photographic Coverage**
17 **of Public Judicial Proceedings**"

18 Subsection (b) of this rule advises judges give due consideration to the following factors:

- 19 (i) The impact of coverage upon the right of any party to a fair trial;
20 (ii) The impact of coverage upon the right of privacy of any party or witness;
21 (iii) The impact of coverage upon the safety and well-being of any party, witness or juror;
22 (iv) The likelihood that coverage would distract participants or would detract from the dignity
23 of the proceedings;
24 (v) The adequacy of the physical facilities of the court for coverage;
25 (vi) The timeliness of the request pursuant to subsection (f) of this Rule; and
26 (vii) Any other factor affecting the fair administration of justice.

1 Defendant here puts forth the impact of this proposed event creates an intimidating impact
2 upon the witness. Additionally, this separate and different treatment of the witness sends a clear
3 message to the jury, something is unusual or strange about this witness as opposed to all others.
4 This directly imbues the credibility of the witness. By creating this 'circus like' atmosphere the
5 defendants ability to present her defense is directly impacted.

6 Consideration (vi) addresses the timeliness of the request, pursuant to subsection (f) of the
7 rule. Subsection (f) states:

8 "(f) Requests by the media for coverage shall be made to the judge of the particular proceeding
9 sufficiently in advance of the proceeding or portion thereof as not to delay or interfere with it.

10 Unless the judicial proceeding is scheduled on less than three days notice, the request to tape or
11 photograph a proceeding must be made no less than two days in advance of the hearing. The
12 judge shall notify all parties and witnesses of the request. If there is any objection to a request
13 for camera coverage or an order allowing electronic or still photographic coverage, the court
14 shall hold a hearing promptly.

15 (g) Objections of a party to coverage must be made on the record prior to commencement of the
16 proceeding or portion thereof for which coverage is requested. Objections of a non-party
17 witness to coverage of his or her appearance or testimony may be made to the judge at any time.
18 Any objection not so made will be deemed waived."

19
20 The state here failed to comply with any portion of subsection (f). The request did not come
21 2 days before trial, or at any point in the 3 years leading up to trial, or even as a motion in limine
22 prior to trial, but rather, an oral motion right before the witness is to take the stand. Such motion
23 was then granted with no adequate opportunity to respond by the defendant. (Indeed, the judge had
24 already gotten up from the bench for the 15 minute break when the state hastily advanced the oral
25 motion, and the states oral motion and the judges granting of it occurred while the judge was
26 standing near the bench, having made the decision without even sitting back down.) After

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receiving oral notice of the motion, Defendant had less than 90 seconds to respond to the motion prior to its having been granted.

In addition, the witness, Mr. Charles Larouc, defendant's only expert, explicitly objects to this, and feels both threatened and intimidated. Mr. Laroue, present voluntarily and NOT under subpoena by the court, has indicated a refusal to testify under these conditions. Under Judge Lex's ruling, defense would be forced to rest, having put forth no evidence at all to rebut the state's theory of the case.

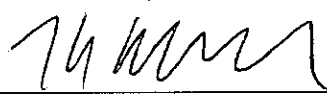
That the petitioner will suffer immediate irreparable injury if a stay of the proceedings is not granted.

V. CONCLUSION

Defendant here asks this Court to reverse the trial ruling of Judge Lex, and not permit a prosecutor to hold up a video phone in front of Defendant's witness and videotape his testimony in front of the jury. In the alternative, Defendant requests a stay of the trial in order to secure a new expert witness who is willing to testify under the conditions set forth by the prosecutor.

Respectfully submitted: August 17, 2010.

**THE LAW OFFICE OF
THOMAS WILSON, P.C.**

By:  _____

Thomas Wilson
Attorney for Petitioner

A copy of the foregoing delivered/
Faxed: August 17, 2010, to:

Tucson City Prosecutor's Office

Honorable Judge Lex

Tucson City Court