Case No. 17-10448

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

JOSEPH M. ARPAIO,

Defendant/Appellant.

On appeal from the United States District Court
for the District of Arizona
2:16-cr-01012-SRB

APPELLANT'S OPENING BRIEF

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INTRODUCTION

On January 25th, 2017[1] (and again on April 10, 2017),[2] Defendant requested a trial by jury under 18 U.S.C. § 3691 in his prosecution for criminal contempt (Excerpts of Record ["ER"] 21 and 22). The trial court declined to grant a trial by jury and held a five-day bench trial in late June/early July 2017, after which it entered a verdict of conviction (ER6). Defendant filed a "Motion for a New Trial, and/or to Vacate the Judgment" (again requesting a trial by jury under 18 U.S.C. § 3691) (ER35) and a "Motion for a Judgment of Acquittal" on June 29, 2017 (ER32); but on August 25, 2017, Defendant was pardoned by the President of the United States (ER38). On August 28th, Defendant filed a motion requesting that the prosecution be dismissed with prejudice, and that the conviction be vacated due to mootness. (ER35.) The trial court, after requesting various briefs, dismissed the matter with prejudice but declined to vacate the conviction or "to order any further relief." (ER7.)

Defendant's conviction must be vacated for either of two reasons:

1) The Presidential pardon made the case and conviction moot; and because the Defendant was deprived of the opportunity to appeal his conviction (and his Motions for New Trial and a Judgment of Acquittal were never heard), the rule of automatic vacatur required that the conviction be vacated because Defendant never had a meaningful opportunity to appeal it. The lower courts and their procedure are

[1] Doc. 69, ER21.

[2] Doc. 130 in the lower court docket, ER22.

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designed as part of a structure in which appellate review is available; and it undermines the integrity of that system to allow a district court judge to find that a defendant is at once guilty but forever unable to appeal that decision. This is particularly true for this case, where the conviction was never tested by a jury and was for criminal contempt of court—a charge, in the words of the United States Supreme Court, that is "liable to abuse,"[3] and where the deprivation of a jury trial is of heightened importance. *See e.g. Ex parte Grossman*, 267 U.S. 87, 122 (1925)(discussed *infra*); *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831–32 (1994)(Scalia, J.)("Contumacy often strikes at the most vulnerable and human qualities of a judge's temperament, and its fusion of legislative, executive, and judicial powers summons forth the prospect of the most tyrannical licentiousness. Accordingly, in criminal contempt cases an even more compelling argument can be made than in ordinary criminal cases for providing a right to jury trial as a protection against the arbitrary exercise of official power.")

2) In the alternative, the Presidential pardon did not make the conviction moot for purposes of appeal, because of the "collateral consequences" exception to mootness, and the "irrebutable presumption"[4] that a criminal conviction carries such collateral consequences (as well as the reality that it affects federal and even state sentencing guidelines, as discussed *infra*). Defendant's conviction must therefore be vacated for all of the reasons given in Defendant's Motion for a New

[3] *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994).

[4] *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994).

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Trial (ER35) and Motion for Judgment of Acquittal (ER36), which remained pending at the time of the pardon, and on which the district court "decline[d] to order any further relief."

ISSUE(S) PRESENTED

Whether the District Court erred by declining to vacate its verdict of conviction and other decisions in a criminal matter, where the Defendant received a Presidential pardon following his conviction but prior to his sentencing or filing a direct appeal; and where prior to the pardon being issued, Defendant had pending a Motion for New Trial[5] and a Motion for a Judgment of Acquittal[6] on which the trial court declined to rule, but which would have separately warranted a vacatur of the conviction.

STATEMENT OF THE CASE

Please see introduction, *supra* (incorporated as if set forth herein).

SUMMARY OF THE ARGUMENT

Please see introduction, *supra* (incorporated as if set forth herein).

ARGUMENT

A. The Presidential pardon made the case moot; and because the Defendant was deprived of the opportunity to appeal his conviction, the rule of automatic vacatur required that the conviction be vacated

In general, this case presents a relatively novel (but far from unique) question of what effect a Presidential pardon has on a "live" criminal proceeding.

[5] ER35.

[6] ER36.

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It is well-settled that pardons can be issued at any time with respect to a criminal proceeding.[7] *Ex parte Garland*, 71 U.S. 333, 380 (1866)(the presidential power to pardon "may be exercised at any time…either before legal proceedings are taken, or during their pendency, or after conviction and judgment"). And indeed, pardons have been issued at every stage of a criminal proceeding – whether before charges are ever filed (or seriously contemplated) or before a conviction;[8] after conviction but before sentencing (as here); after sentencing but before a final decision on appeal;[9] or several years after a final decision on appeal.[10]

Questions regarding the fundamental meaning and effect of a full

[7] "…[T]he rule has been announced that if the Constitution does not expressly prohibit the exercise of the power until after conviction, it may be exercised at any time after the commission of an offense—before legal proceedings are taken, during their pendency, or after conviction and judgment." 59 Am. Jur. 2d Pardon and Parole § 49.

[8] The "pre-emptive" pardon of former President Richard Nixon is an oft-cited example. Various well-known amnesties also qualify, including the Civil War-era amnesties issued to ex-Confederate soldiers, and other "post-rebellion" amnesties that were issued without respect to whether charges had been filed (including the very first pardon, by George Washington, which was issued to members of the Whiskey Rebellion). *See* e.g. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex. L. Rev. 569, 639 (1991)(discussing history of pardons).

[9] As in *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001), discussed *infra*.

[10] Current Department of Justice guidelines encourage applicants to wait five years after their conviction or sentencing to apply for a pardon; and so, presumably, that is when most pardons are issued. 28 C.F.R. §§ 1.1 *et seq.*; *see also* "Pardon Information and Instructions," https://www.justice.gov/pardon/pardon-information-and-instructions (accessed on January 9, 2018).

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Presidential pardon rarely reach the United States Supreme Court, which appears to have last addressed such issues head-on in 1927. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). The United States Supreme Court's earliest decisions on the nature of pardons are fairly self-contradictory: compare e.g. the dicta in *Ex parte Garland*, 71 U.S. 333, 380–81 (1866)(stating that a "pardon reaches both the punishment prescribed for the offence and the guilt of the offender ... and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence"); with, infamously, the dicta in *Burdick v. United States*, 236 U.S. 79, 94 (1915)(pardons can be rejected because of the "imputation of guilt," with "acceptance a confession of it"). In *Biddle v. Perovich*—and in another opinion issued two years before it, *Ex parte Grossman*—the Supreme Court finally settled on its modern-day view of pardons, which gives little weight to its earlier opinions. "We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927)(citing *Grossman*). "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt." *Ex parte Grossman*, 267 U.S. at 120–21. The issue that was certified in *Ex parte Grossman* was whether the President can pardon criminal contempt of court; and

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the Supreme Court not only found that the President can, but that it was critical to the "co-ordinating checks and balances of the Constitution" for the President to have this power, because a judge "who thinks his authority is flouted or denied" can wrongfully convict without a jury. *Id.*, 267 U.S. at 122. "May it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?" *Id.* In *Grossman* and *Biddle*, the Supreme Court embraced a practical, "matter-of-fact" view of pardons, which defines them only by what they accomplish, and even selflessly acknowledges that their purpose may be as much to correct an "evident mistake" by the court as it is to mitigate a "harsh" punishment. Finally, in *Biddle*, the Supreme Court also found that pardons are effective when issued, and that they do not need to be "accepted" by the defendant—rejecting older decisions like *Burdick* and *United States v. Wilson*, 32 U.S. 150 (1833), which had found that a pardon must be "delivered and accepted" in order to become effective, like a deed. *Biddle*, 274 U.S. at 486;[11] *see also Haugen v. Kitzhaber*, 353 Or. 715, 736, 306 P.3d 592, 605 (2013).[12]

[11] "Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done [with respect to a pardon or reprieve]."

[12] "[T]he question directly presented in that case [*Burdick*] was the effect of an unaccepted pardon—that is, whether acceptance of a pardon is necessary for it to be effective. Relying on *Wilson*…the Court squarely held that a pardon must be accepted by the recipient to be effective….The *Biddle* court reasoned that

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For a pardon issued years after a final decision on appeal (or after the defendant's right to appeal has lapsed or been waived), the general weight of authority holds that the pardon does not have the effect of "overturning" the conviction, much less "expunging" it. The pardon operates only to mitigate punishment for the crime (i.e., to release the person "from the disabilities attendant upon conviction"). *See e.g. United States v. Crowell*, 374 F.3d 790, 794 (9th Cir. 2004);[13] *Hirschberg v. Commodity Futures Trading Comm'n*, 414 F.3d 679, 682 (7th Cir. 2005);[14] *Nixon v. United States*, 506 U.S. 224, 232 (1993);[15] *United States*

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requiring the recipient consent effectively would deprive the President of his power to grant clemency. Thus, *Biddle* rejected the acceptance requirement suggested in *Wilson*."

[13] "One who is pardoned is merely released from the disabilities attendant upon conviction and has his civil rights restored. He is not entitled to erasure of the record of his conviction." *Crowell* dealt with a defendant who was seeking "expungement" eleven years after her conviction. She never received a pardon, and her case had nothing to do with one. The Court discussed the various forms of collateral relief *in dicta*, including pardons; and it was essentially commenting that even a pardon recipient is not entitled to expungement of the criminal record. Of course, the Defendant here does not seek expungement, but rather for his conviction to be vacated, so that it has no preclusive effect.

[14] "A pardon in no way reverses the legal conclusion of the courts; it does not blot out guilt or expunge a judgment of conviction." *Hirschberg* dealt with a defendant who was pardoned in 2000, nine years after his convictions in 1991 (and no doubt after his right to appeal had been exhausted). In 2001, he applied to register as a "floor trader" with a federal trading commission, but his registration was denied because of the prior conviction, and so he appealed the denial to the Seventh Circuit. On appeal, he argued unsuccessfully that the pardon automatically "blotted out" the conviction, so that it could not be considered by the trading commission in rejecting him.

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v. Noonan, 906 F.2d 952, 953 (3d Cir. 1990)(finding expungement improper, where defendant was pardoned eight years after his conviction).[16] But it is natural to hold that a conviction which has already withstood the crucible of a full appeal (or which the defendant chose not to appeal) must stand, in spite of his pardon

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[15] "[T]he granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is '[a]n executive action that mitigates or sets aside *punishment* for a crime.'" But this statement is very much *in dicta*, and extremely limited when put into context. The *Nixon* case actually had nothing to do with a pardon (and certainly nothing to do with *that* Nixon). The appellant was a federal judge who was tried and impeached by the Senate. He sought judicial review of the Senate proceedings, but the district court dismissed his suit on the grounds that it was a non-justiciable political question. The circuit court affirmed, primarily because the Constitution's Impeachment Clause provides that the Senate "shall have the sole Power to try all Impeachments." The judge then argued to the Supreme Court (in part) that the Senate did not actually have "sole" authority, because if it did then then there would be no reason for the Constitution to say, in the Pardons Clause, that the President can pardon offenses "except in Cases of Impeachment." (In other words, that it would render "except in cases of impeachment" superfluous, because the President clearly would not have any authority over impeachments either.) It is in response to that argument that the Court makes the comment quoted above; and so in context, what it is really saying is just that a Presidential pardon is not equivalent to judicial review or anything like it, so the Pardons Clause sheds no light on how the Framers felt about judicial review of impeachment proceedings.

[16] *See also In re North*, 62 F.3d 1434 (D.C. Cir. 1994), finding expungement improper (based on *Noonan*) where defendant was pardoned after the jury verdict but before the entry of a judgment of conviction; but not addressing the question of whether his conviction should have been vacated. (In fact, the sole issue in *In re North* was attorneys' fees – the defendant argued that he was entitled to attorneys' fees under a statute which awarded fees to the subject of a criminal investigation if no indictment resulted from the investigation. In the defendant's case, an indictment had indeed been brought, but then he was pardoned – so the issue was whether the pardon "expunged" the fact of the indictment for purposes of awarding him fees.)

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years later. Doing so comports with basic notions of due process, because the defendant has already had his "day in court," and so he remains subject to a final preclusive judgment.

The question presented by the case *sub judice* is radically different. Here, a pardon was issued before a final judgment, and before any direct appeal. At the time of the pardon, the Defendant had pending post-trial motions for a new trial, and for a judgment of acquittal. The Appellant here is not seeking expungement; nor does he seek to "erase" the record of conviction. What he seeks is an order vacating the conviction, which ensures that it has no preclusive effect. Very simply, if the Defendant had not been pardoned, then he would have vigorously resisted sentencing and filed an immediate direct appeal of the judgment and conviction, just as he is doing now—but without the specter of mootness clouding the entire appeal. It is unfair for the lower court to hold that the Defendant is convicted, but also that he is forever unable to appeal his conviction, due to mootness. The fair solution is for the court to vacate the conviction, leaving the legal question of his guilt or innocence "lost to mootness" forever, as the D.C. Circuit concluded in *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001). *See also United States v. Tapia-Marquez,* 361 F.3d 535, 538 at n.2 (9th Cir. 2004)(citing *Schaffer*). *Schaffer* is directly on point, despite the lower court's strained effort to distinguish it. In *Schaffer*, the defendant (Archie Schaffer) received a presidential pardon in the midst of his appeal(s). The case had a "long and curious history" (not unlike the instant case), but in short: Schaffer was

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convicted by a jury on two criminal counts in 1998, one of which was a charge under the "Meat Inspection Act" (or "MTA"). The district court judge then granted his post-verdict motion for acquittal on both counts, prompting the prosecutor to appeal (in "*Schaffer I*"). In June 1999, the D.C. Circuit affirmed the judgment of acquittal on one of the two counts, but reversed on the Meat Inspection Act charge, reinstating the jury verdict on that count and remanding it for sentencing. However (to further complicate matters), in the meantime, the trial court had also granted a Motion for New Trial on the Meat Inspection Act charge (based on newly discovered evidence). The prosecutor appealed (again) from the decision to grant a new trial on the MTA charge ("*Schaffer II*"), and the D.C. Circuit reversed (again) the lower court's decision to grant a new trial, remanding the MTA charge for sentencing (again). This time, the *Schaffer II* panel expedited its mandate; and so the district court proceeded to sentence Schaffer to one year in prison.[17] Finally, Schaffer filed petitions for rehearing and rehearing *en banc* of the *Schaffer II* decision with the D.C. Circuit court. The petition for rehearing was denied; but on November 22, 2000, the full Circuit court granted Schaffer's petition for rehearing *en banc* and vacated the *Schaffer II* decision. The full Circuit court recalled the expedited mandate "which had set in motion" the sentencing; and it scheduled oral argument for April 2001. It was at this "uncertain juncture" that President Clinton pardoned Schaffer, rendering his entire case (including the conviction and sentence) moot.

[17] The lower court's order in the instant appeal falsely states that the "sentencing order was recalled." It was not.

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After his pardon, Schaffer moved to dismiss the case. The prosecutor (an "independent counsel") conceded that the appeals were moot, and that the pardon ended all litigation; but he "advance[d] the odd suggestion that Schaffer's conviction is established as a matter of law." *Schaffer*, 240 F.3d at 38. The D.C. Circuit flatly disagreed: "[f]inal judgment never has been reached on this issue, because the appeals process was terminated prematurely." *Id*. "Certainly, a pardon does not, standing alone, render Schaffer innocent of the alleged Meat Inspection Act violation." *Id.* (citing *In re North, U.S. v. Noonan, Burdick v. U.S. supra*). "In other words, the pardon acts on Schaffer's supposed conviction, without purporting to address Schaffer's innocence or guilt." *Id.* But "[f]inality was never reached on the *legal question* of Schaffer's guilt," because his appeals had not concluded when he was pardoned. The court therefore applied the rule of automatic vacatur, which holds that "[w]hen a case becomes moot on appeal, whether it be during initial review or in connection with consideration of a petition for rehearing or rehearing en banc, this court generally vacates the District Court's judgment, vacates any outstanding panel decisions, and remands to the District Court with direction to dismiss." *Schaffer*, 240 F.3d at 38. The D.C. Circuit court concluded that "[g]iven the posture of the case, the efficacy of the jury verdict against Schaffer remains only an unanswered question lost to the same mootness that the independent counsel so readily concedes. The same is true of Schaffer's claim of innocence. That claim will never again be tried." *Id.* "Accordingly, under well-established principles governing the disposition of cases rendered moot during the pendency of

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an appeal, we hereby vacate the disputed panel decision in this case and all underlying judgments, verdicts, and decisions of the District Court." *Id*., 240 F.3d at 36.

This Circuit has embraced the same rule of automatic vacatur—even referring to it as an "established practice." *See e.g. Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995)("we have treated automatic vacatur as the 'established practice,' applying whenever mootness prevents appellate review"). The rule was affirmed by the United States Supreme Court in *United States v. Munsingwear, Inc*., 340 U.S. 36 (1950). "The purpose underlying the vacatur rule in *Munsingwear* is to deny preclusive effect[18] to a ruling that, due to mootness, was never subjected to meaningful appellate review." *United States v. Tapia-Marquez*, 361 F.3d 535, 538 (9th Cir. 2004); *see also Munsingwear*, 340 U.S. at 41 (the practice of vacatur is "utilized…to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences"). The Supreme Court, our Circuit,[19] and the First Circuit (amongst others) have all acknowledged an exception for "when the appellant has by his own act caused the dismissal of the appeal," e.g. by withdrawing the appeal or entering into a plea agreement; but the D.C. Circuit concluded that the "voluntary dismissal" exception does not apply to

[18] As discussed in the following Section, a criminal conviction has preclusive effects on future sentencing in other criminal matters, *inter alia*. *See e.g. Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994) (finding that presumption that a criminal conviction has collateral consequences that defeat mootness has become irrebutable).

[19] *Dilley*, 64 F.3d at 1370.

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the "unpredictable grace of a presidential pardon." *Schaffer*, 240 F.3d at 38 ("[b]ecause the present mootness results not from any voluntary acts of settlement or withdrawal by Schaffer, but from the unpredictable grace of a presidential pardon, vacatur is here just and appropriate").

The lower court's Order in the instant case discusses *Schaffer*, but it erroneously states that when Schaffer's pardon was issued, the "sentencing order [had been] recalled." (Page 3, line 13.) (ER7.) In fact, Schaffer was still sentenced at the time of his pardon. (It was the *mandate* which "set [his sentencing] in motion" that was recalled.) Whether or not he had been sentenced has no genuine bearing on the reason why the D.C. Circuit vacated the conviction in *Schaffer*, which was "that the appeals process was terminated prematurely." *Schaffer*, 240 F.3d at 38. But our lower court decided to make this false fact into the lynchpin of its entire effort to stubbornly distinguish *Schaffer*. The lower court wrote: "[a]s far as the law was concerned, no findings concerning Schaffer's guilt or innocence had been made at the time he accepted[20] the pardon"—which is false, as a matter of law. (Order, page 3, lines 18-20.) (ER7.) In fact, Schaffer had already been convicted by a jury and sentenced at time of his pardon. Our lower court's Order also erroneously continued: "Thus, the D.C. Circuit's seemingly broad order of vacatur in *Schaffer* actually asked very little of the district court, which was already poised to try Schaffer anew when the pardon issued." (Order, page 3, lines 20-23.) (ER 7.) In fact, Schaffer's sentence was still very much in place when his

[20] The lower court also erroneously concluded that a pardon must be "accepted," citing *Burdick* but overlooking *Biddle*, discussed *supra*.

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pardon was issued; indeed, on December 14th (eight days before the pardon), the D.C. Circuit court had granted his motion to continue release pending the appeal. And when Schaffer's pardon was issued on December 22, 2000, the oral argument on his *en banc* appeal had been set for April 2001. So the trial court was not "poised" to do anything but await a final decision from the *en banc* circuit court on whether the judgment against Schaffer would stand. Further, the final decision of the *en banc* circuit court was by no means certain, given that his MTA conviction had already been affirmed twice—leading to what even the circuit court itself called an "uncertain juncture" when he was pardoned. The contention by our district court that Schaffer had already been cleared when his pardon was issued, and that Schaffer was merely "poised" to be tried again, is clearly without merit.

Our district court also seems to think that *Schaffer* is distinguishable because Schaffer was already in appeals at the time that his pardon was issued, but "no appeal was pending" in this case when his pardon was issued – which is in fact false, first of all. Defendant had indeed filed an interlocutory appeal of the lower court's denial of a trial by jury, which remained pending at the time that the pardon was issued. (ER22.) But more importantly, the lower court articulates no reason for why not having a "pending" appeal (meaning, presumably, a pending *direct* appeal) at the time of the pardon would logically suggest that the conviction should not be vacated under *Muningswear*. *Muningswear* requires vacatur of a judgment that is "never subjected to meaningful appellate review." *Tapia-Marquez*, 361 F.3d at 538. If anything, the fact that the Defendant had not yet even *begun* the process

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of a direct appeal at the time of his pardon counsels even more strongly in favor of vacatur, since the process was clearly "terminated prematurely," and no "final judgment" was ever reached (and in fact, no "judgment" at all). *Schaffer*, 240 F.3d at 38. Further, it was impossible for the Defendant to have filed a direct appeal at the time of the pardon, since the lower court had not yet sentenced him (or even ruled on his Motions for New Trial and Acquittal or Motion for Vacatur [ER35]). To fault the Defendant for not having filed a direct appeal at the time of his pardon is therefore senseless and unfair, since there is nothing that the Defendant could have legally done to change that.

The district court also appears to have found it significant that "[n]o new trial was ordered" in our case, in alleged contradistinction to *Schaffer*—but 1) again, the district court in *Schaffer* was not "poised" to have a new trial either; and 2) the reason why there was no new trial in our case was that the same judge refused to hear or rule on the Motion for New Trial (ER35) (which was pending at the time of the pardon). In other words, the district court used its own decision not to rule on Defendant's "Motion for New Trial, and/or to Vacate the Judgment" (ER35) as an excuse never to vacate its own judgment, which is clearly circular reasoning and unfair, because it permanently foreclosed the Defendant from ever obtaining any relief.

Finally, the lower court concluded that "unlike Schaffer, who elected to accept a pardon before the legal question of his guilt could be retried, Defendant accepted the pardon after that question was resolved, but before a judgment of

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conviction was entered. Therefore, the only matter mooted by the pardon was Defendants' sentencing and entry of judgment, the hearing for which was duly vacated." (Order, page 4, lines 1-3.) (ER7.) First of all, as discussed above, the United States Supreme Court has unequivocally found that a pardon is effective without being "accepted"—*see Biddle*, 274 U.S. at 486—and so neither the Defendant nor Mr. Schaffer "elected to accept" their pardons. But even setting this aside, it must again be pointed out that Schaffer was indeed sentenced at the time of his pardon; and so whatever point the lower court was trying to make here is without merit. Following the rule of automatic vacatur, the Defendant's conviction must be vacated. It is simply unfair to hold that a person is convicted, but that they can never appeal that conviction, and so they must remain convicted "forever."

Finally, this Circuit has consistently applied the same rule when a criminal case becomes moot due to the defendant's death. "Death pending appeal of a criminal conviction abates not only the appeal but all proceedings in the prosecution from its inception." *United States v. Oberlin*, 718 F.2d 894, 895 (9th Cir. 1983)(citing *Durham v. United States*, 401 U.S. 481, 483 (1971)). "[T]he interests of justice ordinarily require that [the defendant] not stand convicted without resolution of the merits of his appeal, which is an integral part of our system for finally adjudicating his guilt or innocence." *Id*. at 869 (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)(internal bracketing and quotation marks omitted). From a legal perspective, there is little difference between the mootness caused by a defendant's death and the mootness caused by a pardon—in either

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case, any meaningful prospect of punishing the defendant disappears. And if anything, there is a stronger reason to apply the rule of automatic vacatur to a living defendant rather than a dead one, given that a living defendant still stands to suffer the stigma of a conviction.

The matter on appeal is clearly distinguishable from *United States v. Tapia-Marquez*, 361 F.3d 535 (9th Cir. 2004), in which the defendant asked for automatic vacatur simply because he had completed his sentence. In its Opinion in *Tapia-Marquez*, this Court first noted that neither the Supreme Court nor the Ninth Circuit had ever applied *Munsingwear* to a criminal case; but then the Court identified circumstances in which *Munsingwear* could apply in a criminal context, citing *Schaffer* as the first example (in footnote two). *Tapia-Marquez*, 361 F.3d at 538, n.2. Unlike the instant case, Tapia-Marquez's appeal did not seek to undo his conviction (which has consequences that outlast the completion of a sentence, as the first footnote to *Tapia-Marquez* notes); rather, his appeal sought to reverse a decision to revoke his probation, which has no meaningful collateral or preclusive effects once the sentence is served. As the Court noted, the purpose of *Munsingwear* is to deny "preclusive effect to a ruling that, due to mootness, was never subjected to meaningful appellate review"; but a decision that has no meaningful preclusive effect does not warrant automatic vacatur. Further, the Court remarked that Tapia-Marquez's appeal raised only one issue, which had already been "squarely foreclosed" by a recent decision in a (somewhat) related case; and so his appeal was indeed subject to meaningful appellate review on the

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merits. This is again in distinction to the instant case, where Defendant raises numerous issues for appeal (as addressed in the next Section), including that he was wrongfully deprived of the right to a trial by jury under 18 U.S.C. § 3691; that the entire matter was barred by the statute of limitations under 18 U.S.C. § 3285; that the lower court deliberately violated his right to be present for the verdict; that the order for which he was convicted was unconstitutionally vague; that there was no evidence to support that the Order was clear or definite to him or any other member of his office; that his reliance on counsel and public authority defenses were uncontradicted but entirely overlooked by the lower court; etc. These issues will be forever "lost to mootness" (unless this Court decides to hear them, as discussed below).

Finally, vacating a conviction is of course not a finding of innocence or of guilt, as the *Schaffer* court noted. It is merely an act to remove the conviction, so that it has no future preclusive effect; and the "legal question" of the Defendant's guilt or innocence will remain forever unanswered. To those who care about legal orders—which, despite the lower court's cavalier findings otherwise, the Defendant does and always has, as a law enforcement officer of over fifty years—vacating an order has meaning; and the Defendant is entitled to seek such relief. No matter what this Court's feelings are about putative criminal contempt offenders, or about the Defendant personally, this Court must demonstrate a level of integrity that the lower court fell short of, by vacating a conviction that the Defendant will never have the opportunity to re-try (including to a jury) or to

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challenge on appeal. The Court must not render permanent a conviction that was never intended to be so, and that was wrongful, as discussed in Section 2 below.

Finally, that the President of the United States should have the power to issue a pardon in the midst of litigation, which has the effect of causing the district court's decision to be vacated, is not some kind of phantom threat to the constitutional separation of powers, or otherwise improper in any way. The President clearly has the power to pardon someone before they are even charged, or even after they are charged and before they are ever convicted (etc.), for no reason or for any reason at all.[21] What should guide this Court's analysis is not the demands of some imaginary struggle for authority with the executive branch—which often seemed to infect the lower court's decisions in this case—but rather whether the courts' work was ever completed, and whether the defendant truly had his day in court. In other words, the Court should look to ordinary and basic principles of due process and finality in a judgment. Here, the courts' work clearly was not "done," and the defendant did not have his day in court. The non-final conviction must therefore be vacated.

B. In the alternative, Defendant's appeal is not moot, and his conviction must be vacated on the merits

In the alternative, Defendant urges that his conviction must be vacated on

[21] Of note: the President's public comments on August 22nd, 2017 do suggest that he issued the pardon, at least in part, due to an evident mistake by the lower court in refusing to grant a trial by jury: ("Was Sheriff Joe convicted for doing his job? He should have had a jury.") https://www.theguardian.com/us-news/2017/aug/23/joe-arpaio-donald-trump-signals-presidential-pardon-for-controversial-sheriff.

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the merits. In short, either his conviction is moot and should be vacated, or it is not moot and it should be vacated on the merits, as in a "normal" direct appeal.

As the D.C. Circuit concluded in *Schaffer*, it does indeed seem that a pardon would render any appeal on the merits moot. ("The parties agree that the pardon rendered moot the ongoing appeals. They are quite right on this point." *Schaffer*, 240 F.3d 35, 36.) And from a practical perspective, there seems to be little point in arguing over issues like whether the defendant deserved a trial by jury, when there would be little point to actually *having* another trial. The only purpose to such a trial would be to decide if the defendant committed a crime for which no punishment will ever be imposed, a seeming exercise in futility. Clearly, the Court's better course is merely to vacate the conviction.

Nevertheless, there is precedent in this Circuit which clearly suggests that the issue of whether a conviction was wrongful does not become moot, even if (for example) the defendant has already served his sentence. The Supreme Court has held that a conviction is not moot if there is any "possibility that any collateral consequences will be imposed on the basis of the challenged conviction"; and this Court has "repeatedly reaffirmed the presumption that collateral consequences flow from any criminal conviction." *Sibron v. State of New York*, 392 U.S. 40, 57 (1968); *Hirabayashi v. U.S.*, 828 F.2d 591, 605–06 (9th Cir.1987).[22] "In this day of

[22] "No court to our knowledge has ever held that misdemeanor convictions cannot carry collateral legal consequences. Any judgment of misconduct has consequences for which one may be legally or professionally accountable." *Hirabayashi v. United States*, 828 F.2d 591, 606–07 (9th Cir. 1987)(*citing Miller v. Washington State Bar Ass'n*, 679 F.2d 1313, 1318 (9th Cir.1982), finding that a

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federal sentencing guidelines based on prior criminal histories…the *Hirabayashi* presumption is an irrebuttable one." *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994). "Once convicted, one remains forever subject to the prospect of harsher punishment for a subsequent offense as a result of federal and state laws that either already have been or may eventually be passed. As a result, there is simply no way ever to meet the *Sibron* mootness requirement: that there be 'no possibility' of collateral legal consequences." *Id.* All of this is also true of the Defendant's conviction, in spite of his pardon.[23] *See Carlesi v. New York*, 233 U.S. 51, 55, 59 (1914)("the contention as to the effect of the pardon here pressed [that a pardoned federal conviction could not be used to enhance a sentence for a subsequent conviction] is devoid of all merit....").

Defendant filed a Motion for New Trial (ER35) and Motion for Acquittal (ER36) following his conviction, both of which were never ruled on and remained pending at the time of the pardon. In response to the pardon, the lower court

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"letter of admonition in attorney's permanent record for which he is professionally accountable constitutes sufficient adverse consequence for Article III").

[23] Defendant's conviction would still qualify as a "prior sentence" for purposes of totaling points under the sentencing guidelines (USSG, § 4A1.1) pursuant to USSG, § 4A1.2 (a)(1), (3), and/or (4): "[t]he term 'prior sentence' means any sentence previously imposed upon adjudication of guilt…A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence…"

Defendant's conviction could also be used to enhance sentencing under Arizona law, if he were convicted of the same crime again within two years. *See* A.R.S. § 13-707(B), (D).

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dismissed the case with prejudice and "decline[d] to order any further relief," meaning that both motions were effectively denied. Defendant's conviction must be reversed on the merits, for all of the numerous and lengthy reasons that follow (and which were raised in both of the foregoing motions).

…

…

I. Defendant's prosecution was barred by a one-year statute of limitations pursuant to 18 U.S.C. § 402, which also required a trial by jury

Defendant argued in the Motion for Acquittal (ER32, ER36), and in an earlier Motion to Dismiss (ER22), that this entire was proceeding was barred by the one-year statute of limitations for criminal contempt in 18 U.S.C. § 402 (see 18 U.S.C. § 3285). The same statute required a trial by jury, as Defendant argued both before trial (in two motions for a trial by jury under that statute) and after trial (in a motion for new trial). The lower court denied all motions, with little to no explanation, as discussed below.

a. 18 U.S.C. §§ 401 and 402

The general criminal contempt statute is 18 U.S.C. § 401, to which a five-year statute of limitations applies. (18 U.S.C. § 3282.) "If, however, the contemptuous act also constitutes a criminal offense under any statute of the United States or under the laws of any state in which the act was committed, then the contempt must be prosecuted under 18 U.S.C. § 402," which carries a one-year statute of limitations under 18 U.S.C. § 3285. U.S. Dep't of Justice, United States

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Attorneys' Manual 9-39.770 (2017);[24] *see also* "Prosecution-on-Notice Contempt—Trial by Jury," 3A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 711 (4th ed.)("If disobedience to a court order also is a federal or state criminal offense," then Section 402 applies); *United States v. Pyle*, 518 F. Supp. 139, 146 (E.D. Pa. 1981), *aff'd*, 722 F.2d 736 (3d Cir. 1983)(cited by *Wright & Miller*, and discussed *infra*)(holding that section 402 applies "where the conduct constituting the contempt charged also happens to constitute a federal or state criminal offense"). "It should be noted, however, that 18 U.S.C. § 402 is inapplicable to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." U.S. Dep't of Justice, United States Attorneys' Manual 9-39.770.

The meaning of Section 402 is clear, and "in §§ 402 and 3691 [which guarantees the right to a jury trial under § 402], Congress meant what it said." *Pyle*, 518 F. Supp. at 156.

For the reasons given below, Defendant's charged act of criminal contempt would also constitute a criminal offense under several Arizona state and federal statutes, making the contempt subject to 18 U.S.C. §§ 402, 3285, and 3691. Further, the Defendant's charged contempt was not committed in disobedience of an order entered in a "suit or action brought or prosecuted in the name of, or on

[24] Available at https://www.justice.gov/usam/criminal-resource-manual-770-defenses-statute-limitations.

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behalf of, the United States." Section 402 therefore applied, along with its one-year statute of limitations and the right to a trial by jury. Finally, because the Order to Show Cause ("OSC") was not supported by any facts which demonstrated that Defendant committed a contemptuous act within one year before this proceeding was brought—and the Government even conceded to this Court that Defendant is "likely correct" that the charge was well beyond a one-year statute of limitations[25]—the case should have been dismissed with prejudice.

Relevant Procedural History

The lower court first raised the possibility of criminal contempt charges against Defendant in the *Melendres* litigation[26] at a November 20, 2014 status conference with Judge Murray Snow.[27] In response to a question from counsel for the party-defendant in that case (the Sheriff's Office) about whether the court was contemplating criminal or civil contempt proceedings, the lower court stated: "Well, I mean, that is one of the interesting things I'm looking at….There is civil contempt and there is criminal contempt….and it may be that matters are

[25] In response to the Defendant's interlocutory appeal – which never reached the merits of whether Section 402 applied – the Government wrote: "Petitioner is likely correct as to the end point of his contumacious conduct. The latest date on which evidence of Petitioner's contumacious conduct arose was May 2013" (which was more than one year before the OSC was entered, on October 25, 2016). See Case no. 17-71094, Dkt. 5 (ID 10418736), page 16 of 40 of the "pdf" (numbered 10 at the bottom). (ER24)

[26] *Melendres, et al. v. Arpaio, et al*., No. CV-07-02513-PHX-GMS.

[27] *See* Doc. 803, transcript. (ER11.)

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appropriate subjects both of criminal and civil contempt."[28] At the following hearing[29] on December 4, 2014, Judge Snow then laid out his "charges" against Defendant, or in the Judge's words, why he felt that criminal contempt was "at issue."[30] That hearing occurred a full one year, eight months, and fifteen days before the Judge Snow's order of referral for criminal contempt (which led directly to the OSC in this case).[31] At the December 4, 2014 hearing, Elizabeth Strange of the United States Attorneys' Office was present on behalf of the Government, as well as the Defendant's former criminal defense counsel.[32] Judge Snow stated: "I have asked the United States Attorney to be here and she is – or the chief assistant is here. And the reason I've asked her to be here…I want you to be aware of what's going on from the beginning and keep you apprised."[33] At the hearing, the Court displayed a copy of 18 U.S.C.A. § 401 on the courtroom monitors, and proceeded to identify exactly the same issues that appear in the Order to Show Cause in this matter: first, whether Defendant violated the December 23, 2011 preliminary injunction's prohibition on detaining persons "based only on

[28] Doc. 803, page 39, lines 12-23. (ER11)

[29] See Doc. 817, transcript of hearing. (ER12.)

[30] Doc. 817, page 5, lines 5-6. (ER12.)

[31] On August 19, 2016 (Doc. 1792). (ER3.)

[32] Doc. 817, page 5, lines 2-9; page 29, line 1-9. (ER12.)

[33] Doc. 817, page 29, line 1-9. (ER12.)

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knowledge or reasonable belief, without more, that the person is unlawfully present within the United States" by continuing to conduct traffic stops in violation of that Order. (Compare with the OSC in this case: "In December 2011, prior to trial in the *Melendres* case, Judge Snow entered a preliminary injunction prohibiting Sheriff Arpaio and the Maricopa County Sheriff's Office ('MCSO') from enforcing federal civil immigration law or from detaining persons they believed to be in the country without authorization but against whom they had no state charges..."[34]) Second, Judge Snow stated: "…Sheriff Arpaio's position was that he could continue to detain immigrants who he didn't have a cause to hold on any state charges and turn them over to ICE...."[35] (Compare again with the allegations in the OSC: "[t]he MCSO continued to stop and detain persons based on factors including their race, and frequently arrested and delivered such persons to ICE when there were no state charges to bring against them…"[36]) At the December 4, 2014 hearing, Judge Snow continued: "Those two things indicate to me…a serious violation in direct contradiction to this Court's authority that apparently lasted for months and months, more than a year at the minimum, it appears."[37] Judge Snow then specifically noted—again, for the benefit of the Government, which was

[34] Doc. 36 at page 1, line 28 to page 2, line 5. (ER4.)

[35] Doc. 817, page 17, lines 5-9. (ER12.)

[36] Doc. 36 at page 3, lines 7 – 10. (ER4)

[37] Doc. 817 at page 17, lines 10-16. (ER12.)

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present—that "the contempt statute which we put up [18 U.S.C.A. § 401] authorizes both civil and criminal contemptual matters, *and they can arise from the same underlying facts. And, in fact, based on the same facts, you can prosecute somebody for criminal contempt and at the same time have a proceeding for civil contempt for the very same matters.*"[38] Around two months later (on February 12, 2015), the Court proceeded to enter an Order to Show Cause regarding civil contempt on these matters. However, despite the Court effectively telling the Government in open court that is had a cause of action as of December 4, 2014, the Government did not file charges—or even indicate an intent to prosecute Defendant—for nearly another two years after that date (until October 25 and October 11, 2016, respectively[39]). Judge Snow even showed the Government a copy of Rule 42 (regarding the procedure for initiating criminal contempt prosecutions) at the December 4, 2014 hearing, and stated that the Rule "gives your office, your own office, an opportunity to evaluate…whether or not you wish to pursue [this]…."[40]

Finally, at the same hearing—and again, before Judge Snow referred the criminal contempt prosecution to another judge—he indicated that be believed that Section 402 would apply to the prosecution: "…[I]f I initiate a criminal contempt

[38] Doc. 817, page 17 at lines 17-22 (emphasis added). (ER12.)

[39] *See* Doc. 36 in this matter, the Order to Show Cause. (ER4.)

[40] Doc. 817, page 29, lines 10-11; page 29, line 23 through page 30, line 3. (ER12.)

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proceeding, that's actually a separate matter tried by the United States Attorney….I thought I would raise to you another statute which I'm not going to put on the monitor. It's 18, United States Code, Section 402 as opposed to 401, and it basically says that if a crime has been committed against victims of behavior that results from a contempt, individual assessments of $1,000 can be made to be paid by the contemnor as well as the jail fine, and because you are representing people who may have been the victims of that crime, I guess I want your input as to whether or not it's worth pursuing such a contempt under that statute if civil contempt doesn't meet it." In other words, Judge Snow believed that that the allegedly contemptuous behavior in this case would constitute a crime, and that the plaintiffs would be the "victims" of that crime if proven, such that 18 U.S.C.A. § 402 would apply (and so that the fines under 18 U.S.C.A. § 402 might be used to compensate them).[41] Indeed, he was correct on this point—the charges in the OSC would constitute a federal crime under 18 U.S.C.A. § 242 ("Deprivation of Civil Rights") *inter alia*, as discussed below.

Allegations in the Order to Show Cause

The essential facts constituting the charged criminal contempt in this matter are contained in the District Court's OSC entered on October 25, 2016 (Doc. 36, ER12). To encapsulate even that concise summary, at issue was whether the Defendant willfully disobeyed Judge Snow's preliminary injunction of December 23, 2011. "In December 2011, prior to trial in the *Melendres* case, Judge Snow

[41] Doc. 817, page 21, line 12 to page 22, line 6. (ER12.)

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entered a preliminary injunction prohibiting Sheriff Arpaio and the Maricopa County Sheriff's Office ('MCSO') from enforcing federal civil immigration law or from detaining persons they believed to be in the country without authorization but against whom they had no state charges."[42] The OSC alleges that "[t]he MCSO continued to stop and detain persons based on factors including their race, and frequently arrested and delivered such persons to ICE when there were no state charges to bring against them. Judge Snow concluded that Sheriff Arpaio did so based on the notoriety he received for, and the campaign donations he received because of, his immigration enforcement activity." (Internal citations omitted.)[43] The OSC continues: "[a]lthough Sheriff Arpaio told counsel on multiple occasions either that the MCSO was operating in compliance with the Order, or that he would revise his practices so that the MCSO was operating in compliance with the Order, he continued to direct his deputies to arrest and deliver unauthorized persons to ICE or the Border Patrol."[44] The OSC alleges no other conduct specific to Defendant and relative to violations of the original December 23, 2011 injunction; and this is precisely the same conduct that Judge Snow raised during the December 4, 2014 hearing (*supra*). Therefore, the conduct for which Defendant was charged

[42] Doc. 36 at page 1, line 28 to page 2, line 5 (citing Doc. 494 in *Melendres*, the preliminary injunction), ER4.

[43] Doc. 36 at page 3, lines 7 – 14 (citing Doc. 1677 in *Melendres*, Judge Snow's civil contempt findings, at ¶¶ 157-161, 58-60), ER4.

[44] Doc. 36 at page 3, line 25 to page 4, line 3 (citing Doc. 1677 in *Melendres*, at ¶¶ 55-57)(Judge Snow's Findings of Fact after the civil contempt hearing). (ER4.)

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clearly occurred prior to that December 4, 2014 hearing, which was more than one year before the OSC (and to be precise, one year, ten months, and twenty-one days before).

Further, if these allegations in the OSC are actually broken down, and "sourced" back to the original *Melendres* proceedings: the allegation that the "MCSO continued to stop and detain persons based on factors including their race, and frequently arrested and delivered such persons to ICE when there were no state charges to bring against them" references Judge Snow's Findings of Fact after the civil contempt proceeding,[45] in which he found that "*during the period that the preliminary injunction was in place*, the MCSO used pre-textual stops to examine a person's citizenship and enforce federal civil immigration law."[46] (Emphasis added. The preliminary injunction terminated with the entry of a permanent injunction on October 2, 2013.) This, in turn, referenced testimony and exhibits admitted at the civil contempt hearing, which show that the MCSO turned persons over to ICE in between January 4, 2012 and December 28, 2013.[47] The allegation that "Sheriff Arpaio…continued to direct his deputies to arrest and deliver unauthorized persons to ICE or the Border Patrol" references a finding by Judge

[45] Doc. 1677 at ¶¶ 157-161.(ER2.)

[46] Doc. 1677 at ¶ 161. (ER2.)

[47] Plaintiff's Exhibits 208 and 209, which Lt. Jakowinicz testified about on the second day of the evidentiary hearing in the civil contempt matter, Doc. 1051 at Tr. 384:4–14, 386:16–22. (ER13)

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Snow that "*during the latter part of 2012*," "Arpaio directed [Lieutenant] Jakowinicz to call the Border Patrol if ICE refused to take custody of an individual for whom the MCSO did not have state charges justifying detention." (Emphasis added.)[48] Again, all of these events occurred well more than one year before the instant proceedings began. This is regardless of whether the word "began" (as used within 18 U.S.C.A. § 3285) means the date on which the OSC was entered (October 25, 2016), or the date that this case number was opened (August 19, 2016)—i.e., regardless of whether October 25, 2015 or August 19, 2015 is used as the "cutoff" for the one-year statute of limitations.

Finally, while the OSC states that Judge Snow referred Defendant's "intentional and *continuing* non-compliance with the court's preliminary injunction to another judge to determine whether he should be held in criminal contempt" (emphasis added), neither the OSC nor Judge Snow's Order of referral for criminal contempt references any specific act occurring within one year of when this proceeding began. In fact, Judge Snow's Order referring Defendant for criminal contempt, when discussing "the violation of this Court's preliminary injunction of December 23, 2011," refers to the alleged contempt as "Sheriff Arpaio's violation of [the preliminary injunction] Order over the ensuing 17-months that it was

[48] Paragraph 57 of Doc. 1677 in *Melendres*, which in turn cites the testimony of Mr. Jakowinicz at an evidentiary hearing before Judge Snow (and in particular, a comment played from Mr. Jakowinicz's video-recorded deposition); as well as the testimony of Defendant during the same evidentiary hearing (in which Defendant was asked about the same segment of Mr. Jakowinicz's deposition). (ER2.)

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ignored,"[49] meaning that the act ended in 2013. During the initial December 4, 2014 hearing to raise the possibility of criminal contempt (discussed at length *supra*), the Judge also made reference to "Sheriff Arpaio's conduct…during the *18 months* in which he was apparently in violation of my preliminary injunction," and that "the Sheriff's Office, *for 18 months*, assumed authority that it did not have…" (emphasis added).[50] Finally, Judge Snow's civil findings[51] reveal that he did not find, nor did the Plaintiffs in *Melendres* even allege, that Defendants "continued to enforce federal civil immigration law after this Court issued its findings of fact and conclusions of law on May 24, 2013" (Doc. 1677 at ¶ 164). (ER2.)

The bottom line here is that there is no factual allegation contained either in the OSC in this case (Doc. 36) (ER4), in the criminal referral order in *Melendres* (Doc. 1792), or even in the underlying civil contempt findings or proceedings in *Melendres* (Doc. 1677) (ER2), which supports that Defendant committed any contemptuous act in between August 19, 2015 and October 25, 2016. In fact, by August 19, 2015, four days of evidentiary hearings had already occurred in the civil contempt matter, and the Court had already implemented and enforced numerous orders, for years, regarding monitoring the MCSO and preventing violations of the Court's preliminary and permanent injunctions.

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[49] Doc. 1792 in *Melendres* at page 5, lines 10-12. (ER3.)

[50] Doc. 817, page 18 at lines 13-16, 22-23. (ER12.)

[51] I.e., his findings at Doc. 1677 at ¶¶ 157-163, which he references at page 4, line 21, and again at p. 5, line 12 of his criminal referral, Doc. 1792. (ER2.)

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Pursuant to FED.R.CRIM.P. 42, the OSC in a prosecution for criminal contempt must "state the essential *facts* constituting the charged criminal contempt" (emphasis added). This is analogous to a criminal Complaint filed under FED.R.CRIM.P. 3, which must also contain "a written statement of the essential facts constituting the offense charged"; and so the Court should apply the same pleading standards to an OSC that it applies to a criminal Complaint. A criminal Complaint "must not only set forth facts establishing the commission of an offense under federal law, it must also present facts evidencing probable cause"; and a criminal Complaint is defective if it fails to set forth a factual basis for the allegations, or if it contains merely general conclusory statements in support of the crime. *United States v. Beasley*, 485 F.2d 60, 62 (10th Cir. 1973); *Giordenello v. United States*, 357 U.S. 480, 486 (1958). The Court "should not accept without question the complainant's mere conclusion" that the person charged "has committed a crime." *Id*. Because the OSC was devoid of facts supporting that the Defendant committed a contemptuous act in between August 19, 2015 and October 25, 2016, and because the acts of contempt for which Defendant was charged were time-barred, the OSC should have been dismissed with prejudice.

b. Defendant's charged act of criminal contempt would constitute a criminal offense under several Arizona state and federal statutes

The Defendant's charged criminal contempt fell within 18 U.S.C. § 402, and therefore a one-year statute of limitations applied under 18 U.S.C. § 3285, because the Defendant's alleged act of criminal contempt would have constituted a crime

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under 18 U.S.C.A. § 242 ("Deprivation of rights under color of law"), 18 U.S.C.A. § 241 ("Conspiracy against rights"), 18 U.S.C.A. § 1509 ("Obstruction of court orders"), A.R.S. § 13-2810(A)(2)("Interference with judicial proceedings"), and/or A.R.S. § 13-1303 ("Unlawful imprisonment"), *inter alia*. If such charges had been brought, Defendant would be entitled to a trial by jury; and therefore in fairness, 18 U.S.C.A. § 3691 also guaranteed the Defendant a trial by jury under Section 402 (discussed below).

In *Clark v. Boynton*, 362 F.2d 992 (5th Cir. 1966), contempt proceedings were instituted against a sheriff for "failure to comply with [a] private suit injunction restraining interference with voting registration efforts and demonstrations." Unlike the proceeding *sub judice*, the lower court in *Boynton* did not clearly designate its proceedings as either criminal or civil contempt; and because the lower court failed to follow the correct rules for either civil or criminal contempt proceedings, the Fifth Circuit vacated its finding of contempt. *Id.* at 999. In reviewing whether the trial court followed the rules for criminal contempt, the Fifth Circuit discussed whether there should have been a jury trial: "the District Court was from the beginning inescapably faced with the problem arising under §§402 and 3691, the effect of which is to grant a jury trial for criminal contempt in non-government actions where the actions alleged to have transgressed the order constitute a violation of Federal or State law." *Id.* at 997. "On this point we agree with the candid statement by the Government as amicus that if this were a criminal contempt proceeding, the conduct asserted to be

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contemptuous was, at least arguably, a violation of 18 U.S.C.A. § 242, or of 18 U.S.C.A. § 241, if not of 18 U.S.C.A. § 1509. In either situation, §§ 402 and 3691 assured a jury trial unless it were waived." *Id.* Therefore conduct that is, at least arguably, chargeable under any of those statutes will implicate section 402. In turn, section 402 guarantees not only the right to a jury trial, but it also carries a one-year statute of limitations in 18 U.S.C.A. § 3285 (which provides, "[n]o proceeding for criminal contempt within section 402 of this title shall be instituted against any person…unless begun within one year from the date of the act complained of…")

In particular, the alleged criminal acts for which Defendant was charged would clearly constitute a crime under A.R.S. § 13-2810(A)(2)("Interference with judicial proceedings"), which occurs when the defendant "knowingly…[d]isobeys or resists the lawful order…of a court." They would also clearly qualify under 18 U.S.C.A. § 242 ("Deprivation of Civil Rights"). Defendant was charged with "stop[ping] and detain[ing] persons based on factors including their race, and frequently arrest[ing] and deliver[ing] such persons to ICE when there were no state charges to bring against them."[52] This would constitute a criminal offense under 18 U.S.C.A. § 242, which "authorizes the punishment of two different

[52] *See* Order to Show Cause, ER4. The Order to Show Cause alleged that these acts were committed in violation of a district court order enjoining Defendant "and the Maricopa County Sheriff's Office…from enforcing federal civil immigration law or from detaining persons they believed to be in the country without authorization but against whom they had no state charges."

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offenses. The one is willfully subjecting any [person, under color of law] to the deprivation of rights secured by the Constitution; the other is willfully subjecting any [person, under color of law] to different punishments on account of his color or race, than are prescribed for the punishment of citizens." *United States v. Classic*, 313 U.S. 299, 327 (1941)(describing section 20 of former 18 U.S.C.A. § 52, now 18 U.S.C. § 242).[53] A state enforcement officer who, under color of state law, willfully, without cause, arrests or imprisons a person or injures one who is legally free, commits an offense under 18 U.S.C.A. § 242.[54] The contempt that was charged in this case constituted the same offense described above. Defendant was charged with willfully detaining and arresting persons without state charges, "based on factors including their race." This is clearly the same as "willfully subjecting any [person, under color of law] to the deprivation of rights secured by the Constitution," or "willfully subjecting any [person, under color of law] to different punishments on account of his color or race, than are prescribed for the punishment of citizens." Because the contemptuous acts with which Defendant was charged would constitute crimes under federal or state law, section 402 applied.

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[53] 18 U.S.C.A. § 242 and the former 18 U.S.C.A. § 52 are identical in all relevant parts, except that the word "inhabitant" has been replaced with the word "person."

[54] *See e.g. Ex parte State of Virginia*, 100 U.S. 339 (1879); *United States v. Classic*, 313 U.S. at 299; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Powell v. Alabama*, 287 U.S. 45 (1932); and *Moore v. Dempsey*, 261 U.S. 86 (1923).

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c. The Defendant's charged criminal contempt was not committed in disobedience of an order entered in a "suit or action brought or prosecuted in the name of, or on behalf of, the United States"

The December 23, 2011 preliminary injunction was entered in an action brought and prosecuted by private parties, namely Manuel de Jesus Ortega-Melendres (who filed the action on December 12, 2007); Jessica and David Rodriguez; Velia Meraz; Manuel Nieto, Jr.; and "Somos America" (all of whom filed the Motion for Partial Summary Judgment[55] on April 29, 2011 that resulted in the preliminary injunction being issued). The United States did not move to intervene in that action until much later, on July 20, 2015 [56] (with its intervention being granted on August 13, 2015).[57] Further, in the Government's Motion to Intervene, it expressly argued that "the other parties will not be prejudiced" because "the United States seeks only to intervene in future proceedings…"[58] The Government acknowledged that it sought intervention "well after the disposition of the lawsuit" and "shortly after the Defendants' recently admitted contumacious

[55] Doc. 421. (ER8.)

[56] Doc. 1221. (ER15)

[57] Doc. 1239. (ER16)

[58] Doc. 1177, page 12 at lines 11-12. (ER14)

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conduct";[59] and it stated that it did "not seek to reopen litigation concerning the scope of defendants' unconstitutional conduct, but only to participate in proceedings concerning defendants' compliance with the remedial orders in this case going forward."[60] It is clear that Government did not "bring or prosecute" the action in which the December 23, 2011 preliminary injunction was entered, and that the action was brought and prosecuted by private parties.

In *United States v. Pyle*, the District Court for the Eastern District of Pennsylvania considered whether a criminal contempt proceeding brought by private parties, to which the Government was joined as a party, was subject to the exception in Section 402 for suits "brought or prosecuted in the name of, or on behalf of, the United States." 518 F. Supp. at 146. The facts in this case are even stronger than those in *Pyle*, where the Court nevertheless held that the matter was not brought or prosecuted by the Government. In *Pyle*, as in this case, the suit was originally brought by private parties, and the alleged criminal contempt arose out of the violation of a preliminary injunction order; however, in *Pyle*, the private plaintiffs named the Government in the original Complaint (as a defendant, amongst other party defendants), and the Government joined in the plaintiffs' motion for preliminary injunction that resulted in the order out of which the criminal contempt arose (after the Government had taken a position in support of

[59] Doc. 1177, page 8 at 13, page 10 at lines 22-23. (ER14)

[60] Doc. 1177, page 7 at line 24-26. (ER14)

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the plaintiffs, and otherwise given them "moral support"). *Id.* at 157. In contrast, the Government did not join[61] *Melendres* until four years, three months, and fifteen days after the plaintiffs filed their motion[62] which resulted in entry of the preliminary injunction (or three years, seven months, and twenty-one days after the preliminary injunction was actually entered, and years after the last date on which it was allegedly violated, in 2013).[63] Nevertheless, the district court in *Pyle* concluded that the exception to 402 did not apply, because the Government "was not charged with the prosecution of the case" and "that responsibility remained, in principle and in fact, in the hands of the plaintiff class [who filed the case]." *Id.* at 150. The Government "did not even initiate the motion for a preliminary injunction in response to which the order allegedly violated by defendants was issued; it merely joined the motion which had previously been raised by [the private plaintiffs]." *Id.* "[T]he litigation was brought and prosecuted throughout by the plaintiffs alone." *Id*. at 157–58. Following a lengthy and erudite discussion of the historical background, legislative history, intent, and case law surrounding section 402, the district court therefore concluded that section 402 applied, and that the defendants were entitled to a jury trial. *Id.* Clearly, if the facts in *Pyle*—where the United States was a party to the case at its commencement (unlike here), and it

[61] See Order granting intervention by the USA (Doc. 1239 in *Melendres*). (ER16)

[62] Plaintiffs' Motion for Partial Summary Judgment on April 29, 2011 (Doc. 421 in *Melendres*). (ER8)

[63] December 23, 2011 (Doc. 494 in *Melendres*). (ER1.)

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even joined in the motion for preliminary injunction (unlike here)—were insufficient to make the case subject to the exception in Section 402, then the facts of this case are also insufficient. Finally, the court in *Pyle* noted that in *Clark v. Boynton* (discussed *supra*), a case in which the United States also intervened long "after the fact" (i.e. long after the order out of which the contempt arose was entered), "it was clear that [the Government] had not" "brought or prosecuted" the action within the meaning of 18 U.S.C.A. § 402. *Id.* at 148.

d. There is no tolling of 18 U.S.C.A. § 3285

The one-year statute of limitations for Section 402, 18 U.S.C.A. § 3285, does not allow for any tolling. *See* Doc. 37 at pages 3-6 (incorporated herein by reference) (ER18) ; Doc. 34 (ER17) and Doc. 35 (ER18) at pages 3-6; Doc. 38 at pages 2-3 (ER20). *See also Toussie v. United States*, 397 U.S. 112, 115 (1970): "criminal limitations statutes are 'to be liberally interpreted in favor of repose'" (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932)).

e. Defendant was entitled to a trial by jury under 18 U.S.C.A. § 3691

For all of the same reasons, Petitioner was also entitled to a jury trial under 18 U.S.C.A. § 3691. *See* 18 U.S.C. § 402 (any persons subject to Section 402 "shall be prosecuted for such contempt as provided in section 3691…"); 18 U.S.C. § 3691 (a contempt to which Section 402 applies "shall be entitled to trial by a jury"). Defendant asked for a jury three times before trial (citing Section 402

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twice),[64] and again in a post-trial motion,[65] all under 18 U.S.C. § 3691. The lower court denied all motions and gave only the explanation (contained in a footnote no less) that it had summarily concluded without taking any argument that 18 U.S.C. § 3691 did not apply because the charged contempt did not constitute a crime.[66] For all of the foregoing reasons, the lower court erred; and therefore the conviction should be vacated.

II. The verdict of conviction must be vacated because the lower court violated the Defendant's constitutional right to be present for the verdict.

The lower court violated the Defendant's constitutional right to be present for the verdict when it issued its verdict via electronic notice (email) to the lawyers alone, instead of rendering the verdict in his presence, as required by the Sixth Amendment Confrontation Clause and the Fifth Amendment Due Process Clause. Before the verdict, the lower court admitted to its awareness that the Defendant

[64] See Doc. 69 and Doc. 130, requesting jury trial under Section 402. Doc. 62 also requested a jury trial generally. (ER21, ER 22.)

[65] Defendant's Motion for New Trial, Doc. 217. (ER35.)

[66] See Doc. 83, footnote 1 on page 2. The footnote falsely states that the lower court "explained [this] in its December 13, 2016 Order"; but in fact, neither that Order nor any other statement that the lower court ever made on the record explains why it believed that the charged contempt did not constitute a separate criminal offense. Further, the lower court refused to take argument on the issue. (ER5, ER 41.)

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does not use email.[67] Defendant had the right to be present at all stages of the trial, including the verdict; and Defendant was entitled to more dignity from the lower court than having to be first told about his verdict by the media. The lower court's seemingly deliberate error affected "the integrity and legitimacy of the entire judicial process" and was not harmless, as a matter of law. *United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997). "The announcement of the decision to convict or acquit is neither of little significance nor trivial; it is the focal point of the entire criminal trial. To exclude the public, the defendant, the prosecution, and defense counsel from such a proceeding—indeed not to have a proceeding at all—affects the integrity and legitimacy of the entire judicial process." *Id.* In *Canady*, the district court mailed out its verdict following a criminal bench trial, instead of calling a hearing to announce it in the presence of the defendant; as the result of which, the defendant first learned about his own conviction "by reading a newspaper." *Canady*, 126 F.3d at 355. The Second Circuit deemed this to be a fundamental structural error and vacated the verdict. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of" the defendant. *Lewis v. United States*, 146 U.S. 370, 372 (1892); *see also Rushen v. Spain*, 464 U.S. 114, 117-18 (1983). The defendant's right to be present at every stage of trial is "scarcely less important to the accused than the right of trial itself," *id*. at 455, and it is rooted in both the

[67] "Q….[W]hy is the sheriff not included on this e-mail?" "THE COURT: I think we all know it's because he didn't have e-mail." (Day 1 PM, page 143, lines 4-7.) (ER26.)

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Sixth Amendment Confrontation Clause and the Fifth Amendment Due Process Clause. *See Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Arizona v. Levato*, 186 Ariz. 441, 924 P.2d 445, 448 (1996)(en banc)(recognizing Sixth Amendment guarantee to be "physically present for the return of jury verdicts" absent exceptional circumstances); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934); *Hopt v. Utah*, 110 U.S. 574, 579 (1884). The Defendant's right to be present extends to all stages of trial, including the verdict. *Rogers v. United States*, 422 U.S. 35, 39 (1975); *see also* FED.R.CRIM.P.43(a)(2). "There is a distinctly useful purpose in ensuring that the pronouncement of the defendant's guilt or innocence by the court is both face-to-face and public. It assures that the trial court is keenly alive to a sense of its responsibility and to the importance of its functions." *Id.* at 361 (quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984))(internal quotation marks omitted). "In the jury context, several courts, in rejecting the argument that the defendant's presence is useless, have pointed to the fact that the defendant's mere presence exerts a psychological influence upon the jury. This is because the jury in deliberating towards a decision knows that it must tell the defendant directly of its decision in the solemnity of the courtroom. We fail to see how the situation is any different when the fact finder is the district judge." *Id.* at 361-362. And clearly, it is not. Because the lower court violated the Defendant's right to be present for the verdict, and this is a fundamental structural error, its verdict of conviction must be vacated.

III. The lower court's conclusion that the Preliminary Injunction was "clear and definite" to the Maricopa County

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Sheriff's Office in 2011 was unsupported by the evidence; and the lower court's own cold reading of the Order nearly six years later is not evidence, much less of any probative value, concerning whether the preliminary injunction was clear to its audience in 2011.

The lower court convicted the Defendant for criminal contempt on the basis that Judge Snow's Preliminary Injunction was allegedly clear and definite to its audience (the Maricopa County Sheriff's Office, including Defendant) at the time that it was issued (2011) that holding illegal aliens for immediate turnover to federal authorities was enjoined. ER6. There was no evidence to support this finding—much less to support that the Preliminary Injunction enjoined the Defendant's office from detaining illegal aliens at the express direction and encouragement of federal authorities and for the sole purpose of transporting them to federal authorities, which was the sole basis for Defendant's conviction. This evidence was needed[68] to meet the substantive elements of the crime of criminal contempt, including that there was a "clear and definite order."[69] The only

[68] "A court reviewing for sufficiency of the evidence must first view the evidence in the light most favorable to the prosecution and then determine whether this evidence, so viewed, is adequate to allow any rational trier of fact to find **the essential elements** of the crime beyond a reasonable doubt." *United States v. Jenkins*, 633 F.3d 788, 801 (9th Cir. 2011)(emphasis added). "Reversal is warranted when the evidence so construed may still be so supportive of innocence that no rational juror could conclude that the government proved its case beyond a reasonable doubt or is insufficient to establish **every element of the crime**." *Id.* (quotation marks omitted)(emphasis added).

[69] "Criminal contempt is established when there is [1] **a clear and definite order of the court**, [2] the contemnor knows of the order, and [3] the contemnor willfully disobeys the order." *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980)(emphasis added). Also, "[w]here there is ambiguity in the court's

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evidence that the Court cited in support of this element was testimony by the Defendant's former lawyer, Timothy Casey, that Mr. Casey "told Defendant that his [the Defendant's] backup plan of transporting people to Border Patrol was 'likely' a violation of the Order." (Trial Tr. Day 1-PM 148:10-19.) (ER25.) But in fact, Mr. Casey's full testimony was:

> THE WITNESS: I told the sheriff that in my judgment it was likely, **not definitively**, but likely a violation.

(Trial Tr. Day 1-PM 148:18-19.)(Emphasis added.) (ER25.)

In other words, the lower court deliberately omitted *the next two words* (and/or the preceding two words)—"not definitively"—from its verdict. This concisely demonstrates that Defendant did not receive a fair trial from an impartial factfinder, which in turn casts doubt on the legitimacy of the lower court's verdict and its motivations in refusing to grant the Defendant a trial by jury. A reasonable and unbiased trier of fact could not accord one word of Mr. Casey's testimony credibility, but ignore the rest of the same sentence; as well as ignore the entirety of the rest of Mr. Casey's uncontroverted testimony on this critical element of the case:

- Mr. Casey testified that "we weren't sure what it [the Order] meant" (Day 1, pps. 253-254). (ER25.)

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direction, it precludes the essential finding in a criminal contempt proceeding of willful and contumacious resistance to the court's authority." *United States v. Joyce*, 498 F.2d 592, 596 (7th Cir. 1974), *citing Traub v. United States*, 232 F.2d 43, 47 (D.C. Cir. 1955).

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- Mr. Casey testified that the Order did not discuss the issue of turnovers to ICE "anywhere." (Day 1, p. 218: 15-17.) (ER25.)
- Mr. Casey testified that the language in the Order was "unclear" on that issue (*id.*). (ER25.)
- Mr. Casey testified that there was "ambiguity" in the Preliminary Injunction Order. (Day 1, p. 258:20-22.) (ER25.)
- Mr. Casey testified that he "shared with the [Defendant] sheriff that we could make a good faith argument that under Judge Snow's order, there was some language about there needed to be something more, the magic words something more, that perhaps this [cooperating with federal authorities] was the something more, that we can make a good faith argument." (Day 1, pps. 149-150.) (ER25.)

As Mr. Casey himself testified, "context matters."[70] The lower court's verdict cited none of this testimony and apparently overlooked it. The lower court appears to have accorded *one word* of one sentence by Mr. Casey credibility, but to have entirely disregarded everything else that he said on exactly the same subject, including the rest of the same sentence. This demonstrates a bias and improper motive on behalf of the lower court—namely, to disregard the evidence in order to vindicate the authority of a fellow judge, and to effectuate what the lower court perceived to be his intent in making a criminal referral. These are not proper reasons to convict an innocent man; and in doing so, the lower court did even

[70] Day 1 Trial Transcript, page 183, line 17 *inter alia*. (ER25.)

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greater damage to the authority, the credibility, and the esteem of the Court. It made a mockery of the concept of being proven guilty beyond "a reasonable doubt," where the court had to strain to even find even a reasonable basis to support its verdict.

The lower court cited only its own cold interpretation of the Preliminary Injunction Order ("PIO"), nearly six years after it was issued, for statements such as, "[t]hese detentions, in violation of the Fourth Amendment, were exactly what the preliminary injunction intended to stop" (verdict, Doc. 210 at 13, lines 23-24)(ER6); and the lower court relied only on its own "full reading" of the preliminary injunction in July 2017 to conclude that the order was "clear and definite." The lower court's own reading and interpretation is not evidence; but even if it were, it would be of no probative value with regard to whether the Order was clear and definite to *its audience*—the Sheriff's Office, the Defendant and his former counsel—in 2011. Nor could the lower court decide whether the Order was clear and definite as a matter of law: "[t]he reasonableness of the specificity of an order is a *question of fact* and must be evaluated in the *context in which it is entered and the audience to which it is addressed*. For example, it may well be necessary that the specificity of orders directed to laypersons be greater than that of orders to lawyers." *United States v. Turner*, 812 F.2d 1552, 1565 (11th Cir. 1987)(emphasis added). And to "serve as a valid basis for contempt, the court's direction must be clear and unequivocal *at the time it is issued*." *Traub v. United States*, 232 F.2d 43, 47 (D.C. Cir. 1955). Every member of the Sheriff's Office and

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its counsel who testified on this subject said, without *any* controverting evidence, that the preliminary injunction was not clear and definite to them at the time that illegal aliens could not still be detained for the sole purpose of immediate turnover to federal authorities (and at the express request and encouragement of federal authorities no less), which was and is a common practice by law enforcement agencies; and this was not clarified until Judge Snow's permanent injunction was issued in 2013.[71] Every witness who testified on the subject said—again without controverting testimony or evidence—that the 2013 *permanent* injunction *was* a clear order, which provided explicit directions to the Sheriff's Office; and that this caused the Sheriff's Office to issue an equally clear directive to stop turnovers to federal authorities. The lower court failed to articulate any theory to explain away this inconvenient and uncontroverted fact, i.e. why the Sheriff's Office stopped turnovers immediately after the permanent injunction was issued, and at no time before. The obvious and only inference is that the permanent injunction was clear on this issue, but the preliminary injunction was not. There was absolutely no evidence from which a reasonable trier of fact could conclude, much less beyond a reasonable doubt, that the preliminary injunction *actually was* clear and definite to the Sheriff's Office in 2011 that such turnovers were enjoined. In reality, the preliminary injunction contained confusing conditions and qualifications that you

[71] *See e.g.* testimony of Michael Trowbridge, Day 3 Transcript PM, pps. 739:22-740:14; 745:13-21 (ER29); Brian Jakowinicz on Day 3 AM, pps. 601:17-602:1, 615:18-616:17 (ER28); testimony of Timothy Casey, Day 2 AM, page 309:15-23 (ER27).

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could drive a "Mack truck" through—"detaining any person based only on…without more"—and it did not address whether and how the Sheriff's Office could or should continue to interact or cooperate with federal authorities *at all*, much less specify any "clear and definite" changes that the Sheriff's Office would need to make to its operations in this respect. It is clear that Judge Snow left such ambiguity in the Preliminary Injunction because he did not want his Order to be so restrictive that it would be reversed on appeal, and because he could not and did not foresee at that time how it would actually affect the Sheriff's operations. But in doing so, he merely enabled it to be interpreted and enforced arbitrarily, which violates the Due Process Clause in a criminal context, as discussed below. Finally, for the lower court to say—with the benefit of six years' hindsight—that Judge Snow was clearly ordering specific changes to the Sheriff's operations to occur, and that Defendant willfully defied such a "clear and definite" directive, lacks any rational basis in fact.

Further, there *was* evidence admitted in this case of how three Judges of the Ninth Circuit interpreted the Order in 2013: Judges Clifford Wallace, Susan Graber, and Marsha Berzon (Exhibit 45). Even their interpretation, which was made *at the time* and with more knowledge of the context in which the Order was entered than the lower court had in 2017, disagreed with the lower court's interpretation that the preliminary injunction was "exactly" intended to stop holding illegal aliens for turnover to federal authorities.[72] In contrast to the lower

[72] Of course, the opinions of Judges Clifford, Graber, and Berzon in 2013 are of limited evidentiary value because the Ninth Circuit was not the audience to

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court's conclusion that the preliminary injunction was intended to stop the Sheriff's Office from "delivering [its] detainees to the nearest Border Patrol station," Judge Susan Graber said in 2013: "all [Judge Snow's] enjoined is stopping someone for human trafficking on the sole ground that the person themselves, that people themselves are here unlawfully. So I don't understand what's wrong with that." (Exhibit 45.) Judge Clifford Wallace interpreted the PIO much more narrowly than the lower court, to mean that the Sheriff's Office was enjoined from only "one process," which was from "stop[ping]" persons for being illegal aliens. (Exhibit 45.) His full statement, which was admitted into evidence in this case (trial exhibit 45), was:

> The only thing we really have before us is an Order. We don't have an Opinion, we have an Order. And the Order says that the Sheriff cannot enforce federal civil cases. **That's all it says**. And it says the officers are hereby enjoined from detaining any person based upon knowledge or reasonable belief, without more –**he's put the "without more" in**– that the person is unlawfully present within the United States. And he explains that's a civil not a criminal case **so you can't stop them**. And he said specifically in here he's not enjoining the police officers from going ahead and processing their own cases, their own crimes. You're **only stopped for one process**. Now, assuming that that's right, that there's enough in here that he could enforce this temporary injunction, in two weeks or three weeks **we're going to find out what he really means**.

(Trial exhibit 45)(emphasis added).

Finally, there was copious evidence and testimony introduced that the

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whom the Order was directed either; but their opinion still holds greater evidentiary value than the opinion of the lower court in 2017, which has none.

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persons to whom the Order was actually addressed—the more than four thousand hard-working men and women of the Sheriff's Office—had various and conflicting interpretations of the Order at the time, even after reading it for themselves. Not a single person in the entire trial testified that the PIO, when it was entered, was clear and definite to them on this critical issue that formed the sole basis for Defendant's conviction. Lieutenant Jakowinicz testified that when he read the order, he interpreted it to mean that "we cannot stop people based on race" (Day 3, page 665) (ER30); and Sergeant Trowbridge testified that when he read the order, he believed that it was "essentially an injunction against stopping people on the basis of race and detaining them on that basis" "[o]r that they're here illegally." (Day 3, pages 730-731.) (ER30.) Lieutenant Sousa testified that when he read the PIO, his interpretation was that "[i]f ICE or Border Patrol says, yeah, we wanted them, then we considered it their detainment.…So when I read this, my first thought is hey, we're not in violation of this." (Day 4: p. 874.) (ER31.) Lieutenant Sousa testified that he shared his view of the PIO with the Defendant and other executive MCSO staff, as well as with the attorney Timothy Casey, none of them disagreed or expressed that they understood the Order to clearly and definitely say otherwise. (Day 4, 877:3 - 879:21.) (ER31.) Sergeant Michael Trowbridge also testified that the Order did not appear at the time to require any change in the MCSO's operations. (722:16-18; 723:4-6; **727:4-7**; 755:20 – 25, 756:5-7.) (ER30.)

The lower court cited various public statements by Defendant that he would continue to enforce immigration laws, but it is unclear what probative value the

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lower court believed that these statements have, since the Defendant *was* entitled, if not obligated, to enforce immigration laws, including state immigration laws—i.e., the employer sanctions law and the human smuggling law, which even Judge Snow's Order acknowledged were valid and enforceable state immigration laws *at the time*. While the lower court gives weight to Defendant's statements that he would not change anything after the PIO, the lower court also fails to identify a single thing that the PIO clearly required to be changed. Lieutenant Sousa testified that he believed that no changes were needed because the MCSO was not arresting people just for being in the country illegally;[73] it was stopping them for violations of state law (or other criminal laws) then holding them as directed by and in cooperation with federal authorities, which the PIO did not clearly (or even logically) enjoin. This was clearly a reasonable interpretation of the PIO, given that (as the PIO itself reflects), the background and legal basis for the PIO was that the MCSO had merely lost its own immigration enforcement authority. There was no reason why the MCSO could not "solve" that by cooperating with federal immigration enforcement, and indeed the MCSO was obligated to continue to enforce immigration laws under state law (as discussed in Section IV below). Sergeant Michael Trowbridge also testified that based on his own independent reading of the PIO at the time, it did not clearly require any changes to the MCSO's practices.[74] In other words, and to quote Judge Graber, because the PIO

[73] Testimony by Joseph Sousa, Day 4, p. 874:6-17; 877:3-6. (ER31.)

[74] Trial Transcript, Day 3 PM, 727:4-7 *et seq.* (ER30.)

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only appeared to enjoin the MCSO from stopping someone for human trafficking (or some other crime) on the sole ground that the person was an illegal alien—something that the MCSO did not have a practice of doing—then the MCSO did not believe that anything needed to change. Nor did the PIO give any clear or specific directions to the MCSO to change anything, such as the final permanent injunction did, which is fatal to this case.

Further, the lower court's finding that Defendant did not do anything to implement the PIO is completely unsupported by the evidence; but it would support only a civil contempt finding (on a negligence standard) at best, not the willfulness that is required for a criminal conviction. The finding is also irrelevant, because the PIO did not clearly and definitely specify any changes that needed to be made, much less order that the Defendant himself make them. The evidence in fact showed that the Defendant directed Tim Casey to work with Joe Sousa and the Human Smuggling Unit on training the MCSO on whatever they needed to be trained on under the PIO; but that this process effectively broke down at the lower levels, mainly because the PIO did not clearly spell out any particular change to the MCSO's practices and did not appear to require any, and because it was a turbid and legalistic order that was open to varying interpretations to begin with. Furthermore, the PIO did not direct the Defendant to personally implement it; in fact, the PIO was addressed to the entire MCSO. For the lower court to conclude that the PIO created a specific and definite obligation for the Defendant to personally involve himself in following up on its implementation was not

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supported by any evidence in this case. Again, the lower court was taking advantage of the vagueness in the PIO to enforce it arbitrarily, by claiming that it created some clear obligation for the Defendant to personally oversee the implementation of changes that it did not even specify to any definite degree.

The bottom line is that the lower court's conclusion that Judge Snow's order was clear to the MCSO at the time (2011-2013) that the MCSO could not hold illegal aliens for immediate turnover to federal authorities was not supported by any actual evidence in this case. It was supported only by the lower court's own gloss of the order in 2017, which is inadmissible, and which was in turn clearly influenced only by its desire to vindicate the authority of Judge Snow. (See e.g. the lower court's statements, "[t]he Court concludes that *Judge Snow*'s order was clear and definite," and "the Court finds that *Judge Snow* issued a clear and definite order," rather than merely referring to "the court order" being clear.) But the lower court in fact did more harm to the authority and dignity of the Court by issuing a verdict that was completely contrary to the evidence at trial, and the truth. And the lower court played to the worst weaknesses of judicial temperament, and "summon[ed] forth the prospect of the most tyrannical licentiousness," by finding an innocent man guilty of contempt. *Bagwell,* 512 U.S. at 833–34. For all of the foregoing reasons, the verdict must be vacated.

IV. The lower court's finding that the Preliminary Injunction Order was "clear and definite" does not pass constitutional muster under the Due Process Clause of the Fifth Amendment.

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The Fifth Amendment requires at a minimum that in order to convict a defendant for criminal contempt of a court order, the order must give notice to a person of "ordinary intelligence" that his conduct was "plainly and unmistakably" criminal, and the order must have been definite enough that men of "common intelligence" need not guess at the order's meaning and could not differ as to its application. *United States v. Lanier*, 520 U.S. 259, 266 (1997); *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *United States v. Bass*, 404 U.S. 336, 348 (1971). In other words, the order cannot be unconstitutionally vague as applied to the defendant's conduct. *See United States v. Trudell*, 563 F.2d 889, 892 (8th Cir. 1977)(analogizing criminal contempt element of "clear and definite" to the constitutional vagueness doctrine). The lower court violated the Defendant's Fifth Amendment due process rights by finding him guilty of violating an ambiguous order that was "hedged about by conditions and qualifications which cannot be performed, or which may be confusing to one of ordinary intelligence." *N.L.R.B. v. Bell Oil & Gas Co*., 98 F.2d 405, 406 (5th Cir. 1938). The PIO was so inherently vague – providing only that the MCSO could not detain "based solely on" illegal alienage, "without more," and failing to address the obvious question of whether the MCSO could still hold illegal aliens for immediate turnover to federal authorities, for which Defendant was convicted – that it could not support any action for criminal contempt at all on that issue. The injunction was clear that the MCSO was enjoined from *stopping* illegal immigrants solely for being illegal immigrants; but it simply did not clearly address whether the MCSO could still

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continue to detain them after legally stopping them on other grounds, and for the sole purpose of cooperating with federal immigration authorities. The only testimony at trial on this subject, even when viewed in a light most favorable to the Government, showed that the Defendant believed and was advised by his attorney that there was a "good faith argument" that cooperation with federal authorities was the "something more" required by the Preliminary Injunction. Further, the actual context of the preliminary injunction was that the MCSO had lost its *own* immigration enforcement authority (under U.S.C. § 1357(g), a.k.a. "287(g)") years prior, leading Judge Snow to enter the PIO.[75] The immigration laws themselves remained enforceable, and the PIO did not clearly enjoin the Defendant's office for cooperating with federal authorities. If Judge Snow had intended to order that the MCSO could not cooperate with federal authorities in holding or turning over illegal aliens, then he needed to have said that. To hold the Defendant culpable in the absence of such a "plain and unmistakable" direction from the lower court is to allow the lower court to arbitrarily enforce its own orders criminally. This is violative of the Constitution, which provides that a criminal defendant must be put on fair notice that his conduct is plainly and unmistakably criminal. Finally, in the context of this case, it also raises *ex post facto* issues. A year and a half after the preliminary injunction was entered, Judge Snow entered a permanent injunction that clearly enjoined the MCSO from detaining illegal aliens for the sole purpose of turnover to federal government. The MCSO's conduct before the permanent

[75] This is evident from the full text of the Preliminary Injunction itself, which of course was admitted as an exhibit at trial. (ER1.)

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injunction was not clearly in violation of the preliminary injunction, but it was clearly enjoined by the permanent injunction (which then caused the Sheriff to issue an express order halting it, see Exhibit 107 at trial [ER10]). Judge Snow nevertheless ordered that the Defendant be prosecuted for his conduct that occurred before the permanent injunction, even though it was not clearly illegal when it occurred.

In addition—at the time (and even today), federal and state law expressly authorized, and even *required*, the MCSO to cooperate with federal authorities to hold or turn illegal aliens over to federal authorities, which the Preliminary Injunction did not discuss or otherwise address. (*See* A.R.S. §§ 11-1051(B)(requiring that state law enforcement agency make a "reasonable attempt" to verify immigration status with the federal government, where reasonable suspicion exists that the person is unlawfully present in the United States); 11-1051(D)(providing that "notwithstanding any other law," a state law enforcement agency may "securely transport an alien who the agency has received verification is unlawfully present in the United States and who is in the agency's custody to federal facility in this state…"); 8 U.S.C. § 1373(a)(providing that no person or entity may restrict state law enforcement from contacting and communicating with ICE or Border Patrol with respect to a person's immigration status).[76]

The lower court's interpretation of the PIO appears to be that the MCSO

[76] See also Exhibit "A" to Defendant's Motion for a Judgment of Acquittal (Doc. 218) (ER36), discussing these statutes and cases interpreting them.

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simply had to release illegal aliens without cooperating with federal authorities, which would clearly undermine federal immigration enforcement. A person of ordinary intelligence would not conclude that is "exactly what the preliminary injunction intended." Even a person of extraordinary intelligence, like Justice Antonin Scalia, wrote in an Opinion that was decided just months after the Preliminary Injunction was entered in this case that it would be an "assault on logic"[77] to say that a known or suspected illegal alien could not be detained at least for the time that it takes to contact immigration authorities for direction. And ironically, even the lower court has ruled in other cases that detaining persons pursuant to direction from Border Patrol and holding or transporting them for federal detainment (again, exactly what Defendant was convicted for doing) is not illegal. *Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB (October 8, 2010); *Sol v. Whiting*, CV-10-01061-PHX-SRB (September 4, 2015).

Finally, where the order that is the subject of a criminal contempt proceeding contains any ambiguity, such ambiguity must be resolved in favor of the Defendant, following the Rule of Lenity which is likewise applied to the interpretation of vague criminal statutes. *See e.g. Bass*, 404 U.S. at 348.[78] What the lower court did here was just the opposite. It chose to resolve all doubts against the Defendant, and to conclude—based on no actual evidence in the case, but merely

[77] *Arizona v. United States*, 567 U.S. 387, 410, 427 (June 25, 2012)(Scalia, J.)

[78] See also Defendant's Memorandum of Law, section 1 on pages 3-5, incorporated herein by reference. (ER34.)

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its "own reading" of the PIO six years later—that the PIO was clear and definite to the MCSO in 2011, beyond a reasonable doubt.

V. The uncontroverted evidence sustained a defense of reliance on the "good faith" advice of counsel

Reliance on the "good faith" advice of counsel is a defense to criminal contempt. *In re Eskay*, 122 F.2d 819, 822 (3d Cir. 1941). "It is a good defense to an attachment for criminal, but not civil contempt that the contemnor acted in good faith upon advice of counsel." *Id*. This Court distinguishes between "good faith reliance upon counsel's advice that what the defendant did was not a violation of the court's order," which is a valid defense to criminal contempt; and advice by counsel to disobey an "unambiguous" order of which the defendant was aware, which is not a defense, and "in such a case the attorney is also in contempt." *United States v. Snyder*, 428 F.2d 520, 523 (9th Cir. 1970); *United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986). The uncontroverted evidence showed that even Defendant's former lawyer Mr. Casey – whose understanding of the "context in which [the Order was] entered" clearly surpassed the lower court's own understanding of the PIO (which was based only on her own reading of the order six years later) – did not believe that the PIO was clear or definite at the time, and that he advised the Defendant of this and that the Defendant could make a good faith argument in support of cooperating with federal authorities. By finding that the Defendant committed criminal contempt in spite of such advice being given, the lower court must also be finding that Mr. Casey was in criminal contempt of an "unambiguous" order—in which case, the lower court's failure to

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refer him for prosecution, and the prosecution's failure to charge him (or the entire MCSO for that matter), should be viewed as evidence of wrongful selective prosecution (see Section VII below). But the reality is that the Order *was* ambiguous to Mr. Casey, and even more so to the laypeople at the MCSO, including Defendant, when it was issued. Further, the uncontroverted evidence at trial demonstrated that that the MCSO's practice of turning over illegal aliens without state charges was and is a "common practice" by law enforcement agencies across the state, and that it was encouraged and directed by federal authorities.[79] The MCSO would not reasonably believe that Judge Snow was ordering them to undermine the mission of federal law enforcement, or to refuse to cooperate with federal authorities in their mission to enforce federal immigration laws. A reasonable and unbiased trier of fact could not conclude, based on this evidence, that the PIO was clear and definite that cooperation with federal authorities was enjoined, where the PIO does not even mention the subject, or the subject of holding people for the sole purpose of turning them over to federal law enforcement, at all.

VI. The uncontroverted evidence sustained Defendant's public authority defense

Defendant raised an affirmative defense, the "public authority" defense, which was sustained by the undisputed evidence but entirely overlooked by the lower court. "The public authority defense is properly used when the defendant

[79] *See e.g.* testimony of Christopher Clem, Day 3 PM, p. 775:20-777:10, 784:11-20 (ER30); testimony of Salvador Hernandez, Day 4 AM, 859:3-15, 862:9-13. (ER31.)

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reasonably believed that a government agent authorized her to engage in illegal acts." *United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006). The Ninth Circuit Criminal Jury Instruction on the Public Authority defense states that:

> The defendant contends that if he committed the acts charged in the indictment, he did so at the request of a government agent. Government authorization of the defendant's acts legally excuses the crime charged. The defendant must prove by a preponderance of the evidence that he had a reasonable belief that he was acting as an authorized government agent to assist in law enforcement activity at the time of the offense charged in the indictment… If you find that the defendant has proved that he reasonably believed that he was acting as an authorized government agent as provided in this instruction, you must find the defendant not guilty.

Ninth Circuit Manual of Model Criminal Jury Instructions, Instruction 6.11 (2010 Edition, last updated 6/2017)(alternative bracketing omitted, as inapplicable).

The Government has of course never claimed that the Defendant himself detained persons in violation of the Order. Rather, its theory—although it never clearly acknowledged it as such—was that the Defendant was an "accomplice" to this act, because he allegedly "commanded" or otherwise directed persons to violate the Order, per 18 U.S.C. § 2 ("[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"). And so the public authority defense must be applied in a slightly different way, so that if the Defendant's "principals"—i.e., the MCSO—committed the acts charged, and they did so at the request of a government agent, i.e. Border Patrol (or ICE), then that authorization

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by Border Patrol (or ICE) legally excused the crime charged. The uncontroverted evidence, and particularly the testimony of the Border Patrol agents who testified at trial, demonstrated by more than preponderance of the evidence that the Defendant and MCSO had a "reasonable belief that [they] were acting as authorized government agent[s] to assist in law enforcement activity at the time of the offense charged." At trial, Agent Hernandez of the Border Patrol testified that CBP would "request" that the MCSO transport (i.e. turn over) illegal aliens to CBP, and that "[i]f we [CBP] are short on manpower and they [MCSO] had bodies and we couldn't respond to that area, I have instructed them to bring them to our checkpoint, yes." (Day 4 AM, 859:3-15; 862:9-13.) (ER31.) The agent in charge of the entire Casa Grande station at all relevant times, Chris Clem, further testified that "it was an expectation of cooperation" that "[i]f you suspected you had an illegal alien, and you were willing to hold them, and we were able to respond," to temporarily detain them in order for CBP to take custody. (Day 3 PM, 784:11-20.) (ER30) "[I[f they [agencies such as MCSO] catch somebody they think is illegal, if we are available, give us a call. If we could respond, we would. I mean, that's pretty much a common practice that we still do to this day." (Day 3 PM, 775:20-23, ER30.) Timothy Casey's letter to the Plaintiffs in *Melendres* (attached to Exhibit 26) (ER9) also stated this. Because the uncontroverted evidence—even when viewed in a light most favorable to the prosecution—demonstrated that the Defendant and MCSO had a "reasonable belief that [they] were acting as authorized government agent[s] to assist in law enforcement activity at the time of

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the offense charged," the public authority defense also provided a complete defense, as a matter of law.

VII. The prosecution of Defendant constituted impermissible selective prosecution for the exercise of political speech

The Government proceeded with charges against only the Defendant, even though the PIO was addressed to the entire MCSO (including its lawyer), numerous MCSO members testified that they read the Order (including of course its lawyer), and they would all have been "guilty" of the same imaginary crime (including the lawyer). Further, the Government decided to proceed only with charges against Defendant and to dismiss the three other defendants who were initially referred by Judge Snow for criminal contempt, claiming that "only" the other defendants' charges were barred by the statute of limitations, even though all of their charges were clearly subject to the same one-year statute of limitations in 18 U.S.C.A. § 3285. These things, as well as the Government's decision to "announce" that it would charge Defendant just two weeks before his election, and the Government's heavy use of his own political First Amendment-protected speech against him at trial (TV interviews), all reek of unconstitutional selective prosecution in violation of the Defendant's First Amendment rights, which separately warrants the vacating of the verdict.

VIII. The verdict was tainted with prejudice

The referral from Judge Snow to the lower court stated, in the first

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substantive paragraph dealing with Defendant, that Judge Snow had already found Defendant guilty to a civil burden of proof, based on allegedly "extensive" testimony. (From the fist document in the case: "Based on the extensive testimony set forth at the hearing, the Court has already concluded under the civil standard of proof that Sheriff Arpaio knew of the December 2011 preliminary injunction and intentionally disobeyed it."[80]) So from "day one," the trier of fact—namely, the lower court—was prejudiced by her fellow judge, who was essentially signaling how to rule on the case. Even without this, the risk of prejudice was already overwhelming, given that this was a case for contempt of court that was being tried to a judge—something that is about as fair as trying a charge for assault on a police officer to a jury of police officers, who are on the same squad as the victim. (Judge Snow and the lower court judge were two of only around eight active district court judges together for nine years.) But this made it even worse—like the "victim" police officer telling tell his jury of his squadmates that the defendant is guilty based on "extensive" testimony that he already saw before trial.

To no-one's surprise, the Court's verdict thoroughly tracked Judge Snow's criminal referral—even making the same mistakes about the evidence—and effectively ignored the actual testimony at trial (and even quoted it misleadingly, as described above). It is apparent that its verdict was improperly motivated by prejudice—namely the Court's desire to defer to, and vindicate the authority of, a fellow judge of the same court, to the exclusion of evidence and the truth. Further,

[80] ER3 (Doc. 1), page 4, lines 3-5.

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the lower court's refusal to grant a trial by jury, despite all the authority requiring one; the Court's obvious affiliation with Judge Snow (sitting together on a relatively small court for over nine years); and the prejudice inherent in trying a contempt of court case to the bench, which is effectively the "victim" of the alleged crime; as well as certain other statements made by the Court during the course of this case, demonstrate that the verdict was tainted by prejudice and bias, warranting vacatur of the conviction.

At the initial status conference in this matter, the lower court stated that "I feel that I need to inquire myself in order to attempt, as best I can, to effectuate Judge Snow's Order [referring Defendant for criminal contempt], to be satisfied other than on the say-so of four well-respected attorneys and whoever else has been doing the research behind the scenes…I just feel that I have to satisfy myself."[81] The lower court's comment demonstrates that it pursued a policy of trying to "follow" what it believed Judge Snow wanted to be done, regardless of the actual argument or testimony in the case; and of course the lower court knew before trial that Judge Snow had already found that Defendant committed willful acts constituting criminal contempt, as part of his "civil contempt" proceeding. The lower court clearly read Judge Snow's criminal referral before trial—in fact, the lower court copied it when it composed the Order to Show Cause. Both the criminal referral and the Order to Show Cause cite heavily to Judge Snow's civil findings that the Defendant acted willfully. At a pretrial hearing in this matter, the

[81] ER43, transcript of October 11, 2016 status conference, page 35, lines 17-22.

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lower court stated that "I agree with the government that the Order [civil contempt findings] of Judge Snow is not evidence in this case" (ER45, transcript of 4-12-17 hearing, page 9, lines 23-24); but these words ring hollow, because the lower court's verdict nevertheless hewed so closely to Judge Snow's criminal referral and civil findings, that it even misreported the same testimony in the same way. For example, Judge Snow wrote in his criminal referral (and the lower court's Order to Show Cause also stated) that Defendant "continued to direct his deputies to arrest and deliver" aliens to federal authorities, for which Judge Snow cited paragraph fifty-seven of his civil findings.[82] However, paragraph fifty-seven only referenced testimony by Lieutenant Jakowinicz that Defendant told Mr. Jakowinicz to "call" Border Patrol, not "arrest and deliver" or "take" persons to Border Patrol.[83] This is an important distinction, since there was no dispute that contacting Border Patrol was legal, even under Judge Snow's inexact preliminary injunction. During the trial in this case, Mr. Jakowinicz—whom the Government interviewed at least twice before trial, and once again even during trial[84]— at first testified that the Sheriff told him to "take" persons to Border Patrol, but then he immediately clarified that he could not recall verbatim what the Sheriff told him that day;[85] and

[82] ER4, Doc. 36, p.4, 1-3, citing ¶ 57 of Doc. 1677 in *Melendres*, case no. 2:07-cv-02513-GMS (ER2).

[83] *See* ER2, ¶ 57 of Doc. 1677 in *Melendres*, referring to civil contempt trial transcript 371:9-372:9 (ER48).

[84] On January 9, 2017; March 10, 2017; and June 28, 2017.

[85] ER46, day 3 AM, 583:24-584:3.

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then when confronted with his prior testimony before Judge Snow that the Defendant only told him to "call" federal authorities, he admitted that this is what the Sheriff said. (ER46, day 3 AM, 622:10-11, 16-19;[86] 623:1-3.) Nevertheless, the lower court again mischaracterized his testimony in exactly the same way that Judge Snow did: "Lieutenant Jakowinicz stated that…Defendant told him '[y]ou take them to Border Patrol.'" (ER6, verdict, page 4, lines 21 to 24.)

As another example, the lower court—when confronted during trial with the issue of whether testimony by Defendant's former attorney was attorney-client privileged—originally ruled that it was privileged; but then when confronted with an order from Judge Snow in the civil case concluding that it was not privileged (erroneously, as discussed below), the lower court quickly reversed course and ruled that it was not attorney-client privileged, stating "the Court respects that decision, will assume that that is correct…"[87] Finally, the lower court's verdict sets an unusual emphasis on identifying the judge to whom the Order belongs—that "Judge Snow's order was clear and definite," "Judge Snow's order was clear," "Judge Snow issued a clear and definite order," "the Defendant knew of Judge Snow's preliminary injunction," etc. (instead of "the order," "the preliminary

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[86] Q. He didn't say to take anyone down there. He said call them, right?
A. Yes. I can't tell you one way or the other the exact verbiage.
…
Q. Can we rely then that that is your best recollection at the time what the Sheriff actually said?
A. Yes. (ER47, day 3 AM, 622:16-19; 623:1-3.)

[87] ER44, day 1 AM, p. 86, lines 8-9.

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injunction")—suggesting that its conclusion was influenced by something other than an assessment of whether the order was clear to the Defendant in 2011; i.e., because it belonged to a fellow judge of the same court.

The lower court clearly received evidence at trial with an eye toward reaffirming what Judge Snow had already found civilly. This is a *de facto* "guilty until proven innocent" standard, and it is unconstitutional. Further, the lower court's steadfast refusal to allow a jury—the only constitutionally independent body available in these circumstances—to hear the case, and despite a clear requirement that it do so, shows prejudice. Instead, the lower court forced the Defendant to try the case to his alleged victim—i.e. the court—resulting in a show trial whose verdict was so tainted by prejudice that it cannot be justified by the actual or complete evidence and testimony presented in the case. The conviction must therefore be vacated.

IX. Attorney-Client Privileged Testimony was Improperly Compelled and Admitted at Trial

The Court improperly compelled and admitted attorney-client privileged testimony by Timothy Casey[88] and related attorney-client privileged exhibits at trial. Neither Maricopa County (the Sheriff's Office) nor the Defendant ever waived the privilege; and no party ever claimed that it was waived expressly in this

[88] To the extent that the Court concluded, albeit falsely, that Jack MacIntyre was a legal advisor to the MCSO, then his testimony was also attorney-client privileged and improperly admitted.

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proceeding.[89] (*See* ER45, Trial Transcript, Day 1 AM, at 54:1 – 6.) The lower court found that Judge Snow's erroneous order finding of an implied waiver in *Melendres*, which was a civil case brought against the County (i.e., against the Sheriff in his official capacity alone), allowed for the admission of attorney-client privileged testimony in this case. Even an actual implied waiver of the privilege in one case does not constitute an automatic waiver of the privilege in another case. *See Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003)(finding that implied waiver of attorney-client privileged materials in a habeas proceeding for ineffective assistance of counsel did not render the materials admissible for purposes of a re-prosecution of the defendant: "the court must impose a waiver no broader than needed to ensure the fairness of the proceedings before it"); *see also generally Transamerica Computer*, 573 F.2d at 651 ("a party does not waive the attorney client privilege for documents which he is compelled to produce"); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977)(holding that disclosure of documents to one third-party does not waive as to other third-parties

[89] Defendant held the privilege. An attorney-client relationship "is proved by showing that the party sought and received advice and assistance from the attorney in matters pertinent to the legal profession." *Matter of Petrie*, 154 Ariz. 295, 299, 742 P.2d 796, 800 (1987). The test is a subjective one, in which "the court looks to the nature of the work performed and to the circumstances under which the confidences were divulged." *Alexander v. Superior Court in and for Maricopa County*, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984) (citing *Developments of the Law—Conflicts of Interest in the Legal Profession*, 94 Harv.L.Rev. 1244, 1321–22 (1981)). Another important factor is whether the client believed an attorney client relationship existed. *Petrie*, 154 Ariz. at 300, 742 P.2d at 801; *Alexander*, 141 Ariz. at 162, 685 P.2d at 1314. At the trial in this matter, Defendant's lawyer, Timothy Casey, testified that he believed that the Defendant reasonably believed that Mr. Casey was his lawyer and that their conversations were attorney-client privileged.

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requesting same documents). But Judge Snow's finding of an implied waiver in the civil case was also erroneous, as a matter of law. On May 14th, 2015, Judge Snow held that the privilege had been waived in the civil matter, because the Defendant had allegedly asserted an "advice of counsel" defense in that matter. (ER49, Doc. 1094 in Case 2:07-cv-02513-GMS.) However, reliance on the advice of counsel is not a defense to civil contempt, and Judge Snow's order was therefore erroneous. *See In re Eskay*, 122 F.2d 819, 822 (3d Cir. 1941)("[i]t is a good defense to an attachment for criminal, **but not civil contempt** that the contemnor acted in good faith upon advice of counsel")(emphasis added); *see also Crystal Palace Gambling Hall, Inc. v. Mark Twain Indus., Inc.,* 817 F.2d 1361, 1365 (9th Cir.1987)(civil contempt "need not be willful," and a "good faith exception to the requirement of obedience to a court order has no basis in law" in the civil context); *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir.1983)("[i]ntent is not an issue in civil contempt proceedings"); *In re Dual–Deck Video Cassette Recorder Antitrust Litigation,* 10 F.3d 693, 695 (9th Cir. 1993); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir.1986). Further, the Defendant, for his part, did not assert any defense at all in the civil proceeding (he conceded liability for civil contempt, i.e. that the office was negligent). Therefore, he clearly did not waive the attorney-client privilege by asserting a "reliance on counsel" defense in that matter; and Judge Snow's order compelling Mr. Casey to testify in that matter, on which the lower court's determination was based, was in error.

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Further, simply because the attorney-client privilege was illegally breached by Judge Snow in the civil contempt proceeding, does not mean that the privilege was forever waived because it was "out of the bag," or that the privilege was not preserved for further proceedings. The attorney-client privilege is supposed to be sacred, and in order to fully honor and preserve the privilege—and to discourage potential judicial abuse of it—attorney-client privileged testimony that was compelled in one matter should still be excluded in another, especially where the testimony was wrongfully compelled in the first instance. In such cases, the Court should apply something akin to the exclusionary rule, and find that the attorney-client privileged material remains privileged and must be excluded from subsequent proceedings. Otherwise, there is no meaningful deterrent to a court that intends to wrongfully abuse the privilege, because the court knows that once something has been revealed—no matter how wrongfully—such evidence can and will be used against the defendant in subsequent criminal proceedings.

Up until the lower court wrongfully compelled Mr. Casey to testify to attorney-client privileged matters, the Defendant did not assert a reliance on counsel defense; and Defendant's undersigned counsel made this extremely clear on the record.[90] Only subject to the admission of such testimony, did Defendant argue that a reliance on counsel defense indeed applied, which was later raised during trial and in the Motion for Judgment of Acquittal that was filed.

[90] See ER44, Trial Day 1 AM, page 82, lines 13-16; ER45, transcript of April 12, 2017 hearing at page 34, lines 22-23; page 35. Line 13.

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This error is not harmless, because the only actual evidence that the lower court cited in its verdict in support of its finding that the PIO was "clear and definite" was testimony (albeit only partially quoted) from Defendant's attorney Mr. Casey. In fact, the lower court's verdict cited Mr. Casey's testimony on all but three pages, for a total of twenty-eight times. *Id.* Because Mr. Casey's testimony was attorney-client privileged and improperly compelled by the lower court, the conviction must be vacated.

CONCLUSION

For all of the foregoing reasons, the Court must vacate the Defendant's conviction and all other decisions made by the lower court in this matter.

RESPECTFULLY SUBMITTED this 18th of January, 2018.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the following is a list of "any known related case pending in this Court":

There are no other pending appeals in this case (2:16-cr-01012-SRB). However, the following appeals are pending, and generally concern the "same transaction or event" (per 28-2.6(d)), since they arise out of the same underlying civil case from which this case also arises (2:07-cv-02513-GMS):

1) Case No. 16-16661 – *Manuel De Jesus Ortega Melendres, et al v. Maricopa County, et al.*

2) Case No. 16-16663 – *Manuel De Jesus Ortega Melendres, et al v. Paul Penzone, et al.*

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CERTIFICATE OF COMPLIANCE

This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2(a) and is **20,081** words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

RESPECTFULLY SUBMITTED this 18th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 18, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By */s/ Aileen De Los Angeles*