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 AMENDED 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 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 the conviction be vacated. (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 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. The lower courts and their procedure are 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 their decision. This is

[1] ER21.

[2] ER22.

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 a bench trial is fundamentally tainted, in the same way that trying a case for assault on a police officer to a jury of police officers would be.

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 "irrebuttable presumption"[4] that a criminal conviction carries such consequences (as well as the actual effect of a conviction on federal and even state sentencing, as addressed below). Defendant's conviction must be vacated "on the merits" and for all of the reasons given in Defendant's Motion for a New Trial (ER35) and Motion for Judgment of Acquittal (ER36), on which the district court refused to "order any further relief"—chief among which is that Defendant was wrongfully deprived of a jury trial under 18 U.S.C. § 3691.

STATEMENT PURSUANT TO 9TH CIR. R. 28-2.4

Pursuant to 9th Cir. R. 28-2.4, on August 25, 2017, Defendant was pardoned by the President of the United States (ER38.). He is, therefore, not detained and no bail is required.

[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).

ISSUE(S) PRESENTED

Whether the District Court erred by declining to vacate its verdict of conviction and other decisions in a criminal matter, or to enter "any further orders," where the Defendant received a Presidential pardon following his conviction but prior to his sentencing or direct appeal; and where before the pardon was issued, Defendant had filed Motions for New Trial (ER35) and for a Judgment of Acquittal (ER36) that raised and preserved numerous issues for a direct appeal, and which would have resulted in the reversal of the court's verdict.

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 the relatively novel (but far from unique) question of what effect a Presidential pardon has on a "live" criminal proceeding. It is well-settled that pardons can be issued at any time with respect to a criminal proceeding.[5] *Ex parte Garland*, 71 U.S. 333, 380 (1866)(the presidential power to

[5] "…[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.

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 it is before charges are ever filed (or seriously contemplated), or before there is a conviction;[6] after conviction but before sentencing (as here); after sentencing but before a final decision on appeal;[7] or several years after a final decision on appeal.[8]

Questions regarding the fundamental meaning and effect of a full 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 self-contradictory: compare *Ex parte Garland*, 71 U.S. 333, 380–81 (1866) (holding that a "pardon reaches both the punishment prescribed for the offence and the guilt of the offender ... and [it] 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

[6] The 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" mass amnesties (including George Washington's first pardon, 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).

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

[8] 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).

the offence") with, infamously, *Burdick v. United States*, 236 U.S. 79, 94 (1915) (holding that pardon could be rejected because it "carries an imputation of guilt; 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 view of pardons. "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. 87, 120–21 (1925). The issue that was certified in *Ex parte Grossman* was whether the President can pardon criminal contempt of court. The Supreme Court not only found that the President can do so, but that it was critical to the "co-ordinating checks and balances of the Constitution" for the President to have that power, in part 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, under which they are defined only by what they accomplish; and their

purpose may be as much to mitigate a "harsh" punishment, as to correct an "evident mistake" by the court. 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—overruling older decisions like *United States v. Wilson*, 32 U.S. 150 (1833) and *Burdick v. United States*, 236 U.S. 79, 88 (1915), 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;[9] *see also Haugen v. Kitzhaber*, 353 Or. 715, 736, 306 P.3d 592, 605 (2013).[10]

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); *Hirschberg v. Commodity Futures Trading Comm'n*, 414 F.3d 679, 682 (7th Cir. 2005); *Nixon v. United States*, 506 U.S. 224, 232 (1993); *United States v.*

[9] "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]."

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

Noonan, 906 F.2d 952, 953 (3d Cir. 1990)(finding expungement improper, where defendant was pardoned eight years after his conviction). 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 years later. Doing so comports with basic notions of due process: the defendant has already had his "day in court," and so his judgment should remain final.

The question presented by this case is radically different. Here, a pardon was issued before a final judgment was entered and before any appeal. The Defendant had outstanding post-trial motions for a new trial, and for a judgment of acquittal. The Defendant is not seeking expungement; nor does he seek to "erase" any record of conviction. He simply seeks 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 judgment and filed an immediate direct appeal of the conviction and judgment, just as he is doing now—but without the specter of mootness clouding the entire appeal. It is unfair for the court to hold that the Defendant is convicted on the one hand, but forever unable to appeal his conviction, due to mootness. The fair solution is 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. The case had a "long and curious

history" (not unlike the instant case), but in short: Schaffer was convicted by a jury on two counts in 1998, one of which was a charge under the "Meat Inspection Act." The district court judge then granted his post-verdict motion for acquittal on both counts, prompting the prosecutor to appeal ("*Schaffer I*"). In June 1999, the D.C. Circuit affirmed the judgment of acquittal on one count, 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 granted a Motion for New Trial on the Meat Inspection Act charge (based on newly discovered evidence). The prosecutor appealed again from that decision ("*Schaffer II*"), and the D.C. Circuit again reversed, remanding the Meat Inspection Act charge for sentencing (again). The *Schaffer II* panel expedited its mandate, and accordingly the district court sentenced Schaffer to one year in prison. Finally, Schaffer filed petitions for rehearing and rehearing *en banc* of the *Schaffer II* decision with the 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 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 the entire case moot.

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*, 62 F.3d 1434, 1437 (D.C.Cir.1994), *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 the case was still on appeal. 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 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 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[11] to a ruling that, due to mootness, was never subjected to meaningful appellate review." *Tapia-Marquez*, 361 F.3d at 538; *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,[12] and the First Circuit have all acknowledged an exception for "when the appellant has by his own act caused the dismissal of the appeal," e.g. by settling the case or entering into a plea agreement; but the D.C. Circuit concluded that the "voluntary dismissal" exception does not apply to 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." (ER7, p. 258, line 13.) In fact, Schaffer was still sentenced at

[11] As discussed in the following Section, a criminal conviction has preclusive effects, including on future sentencing in other criminal matters. *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).

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

the time of his pardon. (It was the *mandate* which "set [his sentencing] in motion" that had been recalled.) This 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[13] the pardon"—which is false, as a matter of law. (ER7, p. 258, lines 18-20.) In fact, Schaffer had already been convicted by a jury and sentenced at time of his pardon. The lower court's Order erroneously continues: "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." (ER7, p. 258, lines 20-23.) In fact, Schaffer's sentence was still very much in place when his pardon was issued; indeed, on December 14th (eight days before his pardon), the court of appeals 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 uncertain, given that his conviction had already been affirmed twice—leading to what even the circuit court itself called an "uncertain juncture"

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

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 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 (presumably, a pending direct appeal) at the time of the pardon would logically mean that the conviction should not be vacated under *Munsingwear*. *Munsingwear* 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 Defendant had not yet even *begun* the process 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 (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.

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 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 to never vacate the judgment, which is circular reasoning and again unfair.

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 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." (ER7, p. 259, lines 1-5.) First of all, as discussed above, the United States Supreme Court has found that a pardon is effective without being "accepted"—*see Biddle,* 274 U.S. at 486—and so neither 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 can never appeal that conviction, so that they must remain convicted "forever."

Finally, this Circuit has consistently applied the same rule when a criminal case becomes moot due to a 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 death and the mootness caused by a pardon—in either case, any meaningful prospect of punishing the defendant disappears. And 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 wrongful 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 *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 its first example (in footnote two). *Tapia-Marquez*, 361 F.3d at 538, n.2. Unlike the instant case, Tapia-Marquez's appeal did not concern a conviction (which has consequences that outlast the completion of a sentence, as the first footnote to *Tapia-Marquez* notes); rather, his appeal concerned a decision to revoke his probation, which has little meaningful preclusive effect 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 merits. This is again in distinction to the instant case, where Defendant raises numerous issues for appeal, including that he was wrongfully deprived of a jury trial 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 which he was convicted of violating 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 went uncontradicted but ignored 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 guilt or innocence will remain forever undetermined. 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—this 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 integrity by refusing to make final a conviction that never was, and which Defendant will never have the opportunity to appeal or re-try.

Finally, that the President 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. 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 here was ever completed, and whether the defendant has 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 the merits. In short, either his conviction is moot and should be vacated; or it is not moot, and so it should be vacated on the merits, as it would be in a 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 to 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, an apparent exercise in futility. Clearly, the Court's better course is merely to vacate the conviction.

Nevertheless, 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).[14] "In this day of 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

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

of this is also true of Defendant's conviction, in spite of the pardon.[15] *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 heard on the merits due to the pardon. When the lower court declined to "to order any further relief," both motions were effectively denied. Defendant's conviction must be reversed on the merits, for all of the reasons that follow (which were also raised in the motions).

I. Defendant's prosecution was barred by a one-year statute of limitations, 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 the 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 his motion

[15] 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).

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 Attorneys' Manual 9-39.770 (2017);[16] *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.

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

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 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[17]—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[18] at a November 20, 2014 status

[17] 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 ER24 at p. 541, n. 5.

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

conference with Judge Murray Snow.[19] 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 appropriate subjects both of criminal and civil contempt."[20] At the following hearing[21] 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."[22] 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).[23] 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.[24] 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

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[19] ER 11.

[20] ER11 p. 307:12-23.

[21] *See* ER12.

[22] ER12, p. 309:2-6.

[23] ER3.

[24] ER12, p. 309:2-9; p. 315:1-9.

you apprised."[25] 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 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..."[26]) 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...."[27] (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…"[28]) At the December 4, 2014 hearing, Judge Snow continued: "Those two things indicate to me…a serious

[25] ER12, p. 315:1-9.

[26] ER4, pp. 235-236:28-5.

[27] ER12, p. 311:5-9.

[28] ER4, p. 237:7-10.

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."[29] Judge Snow then specifically noted—again, for the benefit of the Government, which was 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.*"[30] 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 it 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[31]). 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]…."[32]

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[29] ER12, p. 311:10-16.

[30] ER12, p. 311:17-22 (emphasis added).

[31] *See* ER4.

[32] ER12, p. 315:10-11; pp. 315-316:23-3.

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 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 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).[33] 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 (ER12). To encapsulate even that concise summary, at issue was whether the Defendant willfully

[33] ER12, p. 313-314:12-6.

disobeyed Judge Snow's preliminary injunction of December 23, 2011. "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] 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.)[35] 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."[36] 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

[34] ER4, p. 235-236:28-5 (citing Doc. 494 in *Melendres*, the preliminary injunction).

[35] ER4, p. 237:7-14 (citing Doc. 1677 in *Melendres*, Judge Snow's civil contempt findings, at ¶¶ 157-161, 58-60).

[36] ER4, p. 237-238:25-3 (citing Doc. 1677 in *Melendres*, at ¶¶ 55-57)(Judge Snow's Findings of Fact after the civil contempt hearing).

conduct for which Defendant was charged 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,[37] 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."[38] (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.[39] 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 Snow that "*during the latter part of 2012*," "Arpaio directed [Lieutenant] Jakowinicz to call the Border

[37] ER2, pp. 72-73, ¶¶ 157-161.

[38] ER2, p. 73, ¶ 161.

[39] Plaintiff's Exhibits 208 and 209, which Lt. Jakowinicz testified about on the second day of the evidentiary hearing in the civil contempt matter, ER13 at pp. 316:4–14, 318:16–22.

Patrol if ICE refused to take custody of an individual for whom the MCSO did not have state charges justifying detention." (Emphasis added.)[40] 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 ignored,"[41] meaning that the act ended in 2013. During the initial December 4, 2014

[40] ER2, p. 54, ¶57, 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).

[41] ER3, p. 207:10-12.

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).[42] Finally, Judge Snow's civil findings[43] 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" (ER2, p. 73, ¶ 164).

The bottom line here is that there is no factual allegation contained either in the OSC in this case (ER4), in the criminal referral order in *Melendres* (Doc. 1792), or even in the underlying civil contempt findings or proceedings in *Melendres* (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.

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.

[42] ER12, p. 312:13-16, 22-24.

[43] *See, i.e.,* his findings at ¶¶ 157-163, which he references at ER3, p. 206:21, and p. 207:12 of his criminal referral.

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. <u>Defendant's charged act of criminal contempt would also constitute a criminal offense under several Arizona state and federal statutes</u>

The Defendant's charged criminal contempt fell within 18 U.S.C.A. § 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 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 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."[44] This would constitute a criminal offense under 18 U.S.C.A. § 242, which "authorizes the punishment of two different 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

[44] *See* 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."

18 U.S.C. § 242).[45] 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.[46] 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.

c. <u>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"</u>

The December 23, 2011 preliminary injunction was entered in an action brought and prosecuted by private parties, namely Manuel de Jesus Ortega-

[45] 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."

[46] *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).

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[47] 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 [48] (with its intervention being granted on August 13, 2015).[49] 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…"[50] The Government acknowledged that it sought intervention "well after the disposition of the lawsuit" and "shortly after the Defendants' recently admitted contumacious conduct";[51] 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."[52] 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

[47] ER8, p. 260.

[48] ER15, p. 393.

[49] ER16, p. 399.

[50] ER14, p. 330:11-12.

[51] ER14, pp. 326:13, 328:22-23.

[52] ER14, p. 325:24-26.

was brought and prosecuted by private parties. *See also Pyle,* 518 F. Supp. 139, 146-158.

d. <u>There is no tolling of 18 U.S.C.A. § 3285</u>

The one-year statute of limitations for Section 402, 18 U.S.C.A. § 3285, does not allow for any tolling. *See* ER 19 pp. 418-421 (incorporated herein by reference) (ER17) and (ER18 at pp. 411-414); (ER20 at pp. 424-425). *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. <u>Defendant was entitled to a trial by jury under 18 U.S.C.A. § 3691</u>

For all 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 twice),[53] and again in a post-trial motion,[54] all under 18 U.S.C. § 3691. The lower court denied all motions and gave only the explanation (which was contained in a footnote no less) that it had summarily concluded without taking any argument that 18 U.S.C. § 3691

[53] See ER 21 and ER22, requesting jury trial under Section 402. Doc. 62 also requested a jury trial generally.

[54] ER35.

did not apply, because the charged contempt did not constitute a crime.[55] Of course, for all of the foregoing reasons, the lower court was summarily "wrong"; and therefore the conviction should be vacated.

II. The verdict of conviction must be vacated because the 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 does not use email.[56] 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

[55] See ER 5, p. 240, footnote 1. 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.

[56] "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." (ER26, p. 576:4-7).

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 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 MCSO 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

There was no evidence to support that the Preliminary Injunction was clear and definite *to its audience* (the Maricopa County Sheriff's Office), *at the time it was issued* (2011), that holding illegal aliens for immediate turnover to federal authorities was enjoined (as the lower court found in its verdict)—much less that holding them at the express direction and encouragement of federal authorities was enjoined. This evidence was needed[57] to meet the substantive elements of the crime of criminal contempt, including that there was a "clear and definite order."[58] The

[57] *United States v. Jenkins*, 633 F.3d 788, 801 (9th Cir. 2011).

[58] *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980) . Also, "[w]here there is ambiguity in the court's direction, it precludes the essential finding in a criminal

only evidence that the Court cited in support of this element was testimony by 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) (ER25, p. 567:10-19.) But as the lower court knew, Mr. Casey's actual 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)(Emphasis added.) (ER25, p. 567:18-19.)

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 this 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" (ER25, pp. 572-573:17-24.)
- Mr. Casey testified that the Order did not discuss the issue of turnovers to ICE "anywhere" (ER25, p. 571:15-17.)
- Mr. Casey testified that the language in the Order was "unclear" on that

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contempt proceeding of willful and contumacious resistance to the court's authority." *United States v. Joyce*, 498 F.2d 592, 596 (7th Cir. 1974).

issue (*id.*).

- Mr. Casey testified that there was "ambiguity" in the Preliminary Injunction Order (ER25, p. 574:20-22.)
- 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" (ER25, pp. 568-569.)

As Mr. Casey himself testified, "context matters."[59] The lower court's verdict cited none of this testimony, and apparently ignored 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 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.

[59] Day 1 Trial Transcript (ER25, p. 570:17 *inter alia*.)

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" (ER6, p. 254:23-24); 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, its counsel, and Defendant—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 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.[60] 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 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

[60] *See e.g.* testimony of Michael Trowbridge, Day 3 Transcript PM (ER29, pp. 585-586:22-14; 587:13-21); Brian Jakowinicz on Day 3 AM (ER28, pp. 580-581:17-1. 582-583:18-17); testimony of Timothy Casey, Day 2 AM (ER27, p. 578:15-23).

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.[61] In contrast to the lower 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

[61] 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 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.

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 persons to whom the Order was actually addressed—the over 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 case, testified that the PIO was clear and definite to them on this issue when it was entered. Lieutenant Jakowinicz testified that when he read the order, he interpreted it to mean that "we cannot stop people based on race" (ER30, p. 589); 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." (ER30, pp. 593-594.) 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." (ER31, p. 604.) Lieutenant Sousa testified that he shared his view of the PIO with the Defendant and other executive MCSO staff, as well as with Timothy Casey, and that none of them disagreed or expressed that they understood the Order to clearly and definitely say otherwise. (ER31, pp. 605-607:3-21.) Sergeant Michael Trowbridge also testified that the Order did not appear at the time to require any change in the MCSO's operations. (ER30, pp. 590:16-18; 591:4-6; 592:4-7; 595:20 – 25, 596:5-7.)

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 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,[62] 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.

[62] Testimony by Joseph Sousa, Day 4. (ER31, pp. 604:6-17; 605:3-6.)

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.[63] In other words, and to quote Judge Graber, because the PIO 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 various interpretations to begin with. Further, the PIO did not direct the Defendant to personally implement it; in fact, the PIO was

[63] Trial Transcript, Day 3 PM (ER30, p. 592:4-7*, et seq*.)

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 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" 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. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 833–34 (1994)(Scalia, J.). 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

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).

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 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.

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 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 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." *See* Ninth Circuit Manual of Model Criminal Jury Instructions, Instruction 6.11 (2010 Edition, last updated 6/2017).

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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 **13,789** 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).

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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 February 19, 2019.

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/ Christine M. Ferreira, Legal Assistant*