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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11 Manuel de Jesus Ortega Melendres, on behalf
12 of himself and all others similarly situated; et
13 al.,

14 Plaintiffs,

15 v.

16 Joseph M. Arpaio, in his individual and official
17 capacity as Sheriff of Maricopa County, AZ; et
18 al.,

19 Defendants.

20 NO. CV-07-02513-PHX-GMS

21 **SHERIFF JOSEPH M. ARPAIO'S**
22 **MEMORANDUM REGARDING**
23 **CRIMINAL CONTEMPT**

24 **INTRODUCTION**

25 There is not a sufficient basis to refer Sheriff Arpaio to the United States
26 Attorney's Office for criminal prosecution. The Sheriff is, and has always been,
27 committed to carrying out the Orders of the Court, and avows that he will strive to be in
28 full compliance with all past, present and future court orders, ensure that those Orders are
clearly communicated to his entire office, and ensure that effective policies and protocols
are established to maintain compliance with those Orders.

The following reasons, as more fully explained below, demonstrate that the
Court should not refer Sheriff Arpaio for criminal contempt:

- Sheriff Arpaio has a 55-year history of exemplary service to this country, the federal government, and Maricopa County that should weigh heavily against a criminal referral.

- 1 • MCSO has made significant efforts, under Sheriff Arpaio’s leadership, to comply with the Court’s Orders.
- 2 • Sheriff Arpaio’s public commentary on the Court’s Orders
- 3 was not intentional defiance of the Court’s Orders.
- 4 • Sheriff Arpaio’s reliance on his counsel’s legal analysis
- 5 regarding his “back up plan” does not evidence willful
- 6 defiance of the Court’s Orders.
- 7 • Sheriff Arpaio did not and could not control certain aspects
- 8 of MCSO’s conduct that caused the OSC.
- 9 • Collateral matters discussed during the contempt
- 10 proceedings should not provide a basis for a criminal
- 11 contempt referral.
- 12 • The Court has entered adequate civil remedies that
- 13 sufficiently redress the interests of the Plaintiff class for
- 14 the violations the Court has found.

15 Sheriff Arpaio readily concedes that serious mistakes were made in the communication
16 and, in some instances, implementation of the Court’s Orders. In fact, over a year ago, for
17 the first time in his 55-year career, Sheriff Arpaio and his Chief Deputy admitted to “civil
18 contempt” because there had been multiple breakdowns in implementation of the Court’s
19 Order. The Sheriff genuinely regrets those mistakes, vocalized those regrets to the Court,
20 and is committed to working with the Court and its Monitor to carry out existing
21 directives and move toward full compliance. He is working almost daily with his team of
22 lawyers and compliance officers at MCSO to aggressively move forward to reach full
23 compliance with the Court’s Orders. While he ultimately bears responsibility for the
24 breakdown in communications, none of his actions were done with contemptuous, willful
25 disregard of this Court’s Orders. He is not guilty of criminal contempt, and he
26 respectfully urges the Court to refrain from making a referral for criminal contempt. This
27 is particularly true given the new and challenging tasks provided to his office arising out
28 of the May 31, 2016 hearing. Sheriff Arpaio vows to commit his full energy to seeing the
Court’s directives implemented.

1 **I. THE COURT SHOULD NOT CRIMINALLY REFER SHERIFF ARPAIO**
2 **BECAUSE HE DID NOT WILLFULLY DISOBEY THE COURT'S**
3 **ORDERS.**

4 Criminal contempt is appropriate where there is a clear and definite court
5 order, the contemnor knows of the order, and he or she *willfully disobeys it*. *United States*
6 *v. Rose*, 806 F.2d 931, 933 (9th Cir.1986) (emphasis added). “Willfulness” for purposes
7 of criminal contempt means “a deliberate or intended violation of the court’s order.”
8 *Clement v. U.S.*, 766 F.2d 1358, 1367 (9th Cir. 1985). It implies a “deliberate or intended
9 violation, as distinguished from an accidental, inadvertent, or negligent violation of an
10 order.” *United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986). In criminal
11 contempt proceedings, willful disobedience of a court order must be proved beyond a
12 reasonable doubt. *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 782 (9th
13 Cir. 1983); *In re Kirk*, 641 F.2d 684, 687 (9th Cir. 1981).

14 In addition, a court should not make a criminal referral unless probable
15 cause exists to believe the alleged contemnor has willfully violated a court order. *See*
16 *United States v. Masselli*, 638 F. Supp. 206, 210, n. 14 (S.D.N.Y. 1986) (showing of
17 probable cause required before criminal contempt may be prosecuted); *U.S. ex rel. Vuitton*
18 *Et Fils S.A. v. Karen Bags, Inc.*, 592 F. Supp. 734, 749 (S.D.N.Y. 1984) (similar), *aff'd*
19 *sub nom. U.S. ex rel. Vuitton et Fils S.A. v. Klayminc*, 780 F.2d 179 (2d Cir. 1985) *rev'd*
20 *on other grounds sub nom. Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987);
21 *In re United Corporation*, 166 F. Supp. 343, 345 (D. Del 1958); *United States v. Kelsey-*
22 *Hayes Co.*, 476 F.2d 265, 266 (6th Cir. 1973) (dismissing criminal contempt proceedings
23 after order to show cause on the basis of court’s determination of a lack of probable cause
24 and that there was no willful violation of the relevant order).

25 Sheriff Arpaio did not willfully violate the Court’s orders sufficient to give
26 rise to a criminal contempt referral in light of Sheriff Arpaio’s: (1) combined 55 year
27 history of service to this country and Maricopa County; (2) direction of MCSO during the
28 compliance phase of this litigation; (3) right to publicly express disagreement with the
Court on the Court’s Orders (while still complying with them); (4) execution of certain

1 policy decisions regarding the preliminary injunction pursuant to advice of counsel and;
2 (5) his inability to control certain aspects of MCSO employees' conduct that caused the
3 contempt proceedings. These factors either mitigate or entirely foreclose the necessity for
4 this Court to criminally refer this matter to the United States Attorney's Office for
5 prosecution.

6 **A. Sheriff Arpaio's history of service to this country and Maricopa County**
7 **demonstrate a lack of intent to violate the Court's Orders.**

8 Sheriff Arpaio has devoted almost his entire adult life to serving his country,
9 both in the military and as a law enforcement officer. He has served not only throughout
10 the United States, but around the world in many foreign countries. Sheriff Arpaio was
11 born on June 14, 1932. Sheriff Arpaio's mother, knowing that her life would be imperiled
12 with the pregnancy, lost her life giving birth to Sheriff Arpaio after refusing medical
13 advice to get an abortion. After a challenging childhood where he was moved from
14 family to family, at age 18, Sheriff Arpaio joined the U.S. Army in 1950, near the
15 beginning of the Korean conflict. He served on active duty from 1950-1953, eventually
16 leaving active duty as a Staff Sergeant. After his honorable discharge from active duty,
17 the Sheriff continued his military service for years as a member of the Army Reserve,
18 serving as a Warrant Officer in the Criminal Investigation Division from 1954-1964.

19 Sheriff Arpaio began his law enforcement career in 1954, becoming a patrol
20 officer with the Washington D.C. Police Department. It was 62 years ago that he first
21 walked a beat in one of the toughest areas of Washington D.C. He worked as a street cop
22 for three years, from March of 1954 to June of 1957. In June of 1957, he was hired by the
23 Las Vegas Police Department, serving in Las Vegas for six months. In November of
24 1957, he was hired as a Special Agent with the Federal Bureau of Narcotics. He served in
25 Chicago from 1957-1961.

26 In 1961, Sheriff Arpaio was transferred by the Federal Bureau of Narcotics
27 to serve as Special Agent in Charge in Istanbul, Turkey. During his three years of service,
28 from 1961-1964, he was involved in many significant investigations, including the

1 “French Connection.” He was widely recognized for his service in Turkey, which
2 covered not only Turkey, but major portions of the Middle East.

3 In 1964, Sheriff Arpaio returned to the United States and was appointed
4 Special Agent in Charge of the San Antonio, Texas field office of the Federal Bureau of
5 Narcotics. He served in that assignment from October of 1964 to January of 1968.

6 In January 1968, Sheriff Arpaio was assigned to serve as Special Agent in
7 Charge of the Washington D.C. field office. Later that year, the Federal Bureau of
8 Narcotics was merged with the Bureau of Drug Abuse Control to create the Bureau of
9 Narcotics and Dangerous Drugs. After the merger, Sheriff Arpaio was transferred to
10 Maryland to serve as Deputy Regional Director of the Bureau of Narcotics and Dangerous
11 Drugs. He served in that capacity until December of 1969.

12 In December of 1969, Sheriff Arpaio was appointed Regional Director of
13 the Bureau of Narcotics and Dangerous Drugs. As the Regional Director, he moved to,
14 and lived in, Mexico City, having close contact with government leaders, including the
15 President of Mexico and other governmental leaders of Latin American countries, during
16 his service. He was Regional Director from January 1970 to July of 1973. His
17 investigative jurisdiction covered all of Latin America.

18 In 1973, during the Nixon presidency, a decision was made to consolidate
19 the Bureau of Narcotics and Dangerous Drugs, the Office of Drug Abuse Law
20 Enforcement, and the Bureau of Customs into a single agency, thereafter known as the
21 Drug Enforcement Administration (DEA). After this merger, Sheriff Arpaio was assigned
22 as Section Chief of Intelligence for the entire Middle East. He served in that position
23 from July 1973 to July 1974. His duties involved the collection and classification of
24 evidence and intelligence and strategic planning in the war on drugs.

25 In July of 1974, Sheriff Arpaio was appointed Deputy Regional Director of
26 DEA for the New England states, with headquarters in Boston. He held that position from
27 August 1974 to July 1978. In 1978, Sheriff Arpaio was appointed Special Agent in
28 Charge of the Arizona office of DEA. He served in that assignment for four years, from

1 1978-1982. In 1982, he retired from federal government service, ending 31 years of
2 federal service (which includes his military service). This government service took him
3 around the world and earned him great respect from American and foreign law
4 enforcement leaders. He worked closely with federal judges during this service and
5 always honored and respected their decisions and directives. Even in areas where he
6 disagreed with judicial decisions, he has recognized the authority of the federal courts
7 when it came to constitutional rule of law and would follow those orders and mandates.

8 In 1992, with the encouragement of friends and supporters, Sheriff Arpaio
9 ran for and was elected Sheriff of Maricopa County. He has been reelected as Sheriff six
10 times and is the longest serving sheriff in Maricopa County's history. His federal and
11 state service, including military service, totals over 55 years. At age 84, he continues to
12 serve the people of this state even though he could have retired on state and federal
13 retirement benefits. He currently has the longest record of service for any law
14 enforcement officer in the state.

15 His awards and achievements during his years of federal law enforcement
16 service are noteworthy. Those awards include Outstanding Italian-American for Arizona,
17 Sons of Italy (2003); Anslinger Award for Counterdrug Activity, International Narcotic
18 Enforcement Officers Association (2000); Special Award of Honor from International
19 Narcotic Officers Association (1982); Award from Arizona Association of Chiefs of
20 Police (1982); Outstanding Contribution in the Field of Narcotic Enforcement Award,
21 presented by the International Narcotic Enforcement Officers Association at Minneapolis,
22 Minnesota (1981); Sustained Superior Performance Award, U.S. Drug Enforcement
23 Administration, Department of Justice (1980); Excellence of Performance Award, U.S.
24 Drug Enforcement Administration, Department of Justice (1978); Letter of
25 Commendation, U.S. Ambassador to Mexico (1973); Letter of Commendation, U.S.
26 Attorney General, Washington, D.C. (1972); Award from Mexico's Attorney General,
27 Mexico City (1971); Award from Baltimore, Maryland, Police Department (1969);
28 Special Service Award, U.S. Bureau of Narcotics & Dangerous Drugs (1968); Letter of

1 Commendation, U.S. Attorney General, Washington, D.C. (1968); Award from San
2 Antonio, Texas, Police Department (1968); Extraordinary Service Award from Office of
3 Special Investigations, U.S. Air Force, Washington, D.C. (1968); Exceptional Service
4 Award from General Director, Turkish National Police (1964); and Superior Performance
5 Awards, U.S. Treasury Department (1963, 1964, and 1967).

6 In addition, Sheriff Arpaio has been affiliated as a Life Member of the
7 International Association of Chiefs of Police; Past President and Life Member of
8 International Narcotic Enforcement Officers Association; Life Member of National
9 Sheriffs' Association; Member of the Arizona Association of Chiefs of Police; Charter
10 Member of the Association of Former Federal Narcotics Agents; Commissioner of the
11 Governor's Arizona Criminal Justice Commission; Member of the American Legion;
12 Member of the National Italian-American Foundation; and numerous other affiliations and
13 memberships in organizations since taking office as Maricopa County Sheriff on
14 January 1, 1993. He has also received dozens of awards as Sheriff of Maricopa County.

15 During Sheriff Arpaio's 55 years of service, he has been a key figure in the
16 criminal justice system in both federal and state governments. As part of this system, he
17 has worked with federal and state court judges, not only in Arizona, but throughout the
18 country and around the world. The Sheriff has been a staunch supporter and advocate of
19 the criminal justice system. The Sheriff has NEVER knowingly and willfully disregarded
20 an Order of any court. [4/22/15 RT at 19-23]. While the First Amendment gives him
21 every right to disagree with decisions made by the United States Supreme Court, the
22 federal courts, the state courts, and the executive or legislative branches of the federal and
23 state government, he would never, and has not in this case, knowingly, willfully, or
24 contemptuously ignored Orders of this Court. MCSO has spent many millions of dollars,
25 devoted thousands of man-hours of training to, and demonstrated a commitment to
26 implementing programs to implement, and comply with this Court's directives. His
27 remarkable career, and lifetime of service, should carry great weight in the Court's
28 consideration of a criminal referral.

1 **B. MCSO's efforts during the Compliance phase of this litigation, under**
2 **the leadership of Sheriff Arpaio, evidences a clear intent to implement**
3 **and comply with the Court's Orders.**

4 Sheriff Arpaio has overseen an overwhelming and, at times, expansive
5 undertaking to substantially restructure MCSO's entire law enforcement operation in
6 order to comply with this Court's Orders. It should be quite clear that MCSO, under the
7 direction of Sheriff Arpaio, has a deep and profound commitment to complying with the
8 Order. Sheriff Arpaio's compliance efforts, taken as a whole, does not evidence the intent
9 and desire of MCSO's leader to willfully violate or ignore the Court's Orders. In fact,
10 they demonstrate the exact opposite.

11 To begin, when the Court issued its December 2011 preliminary injunction,
12 MCSO did not have a specific individual or unit assigned to receive and communicate the
13 Court's Orders to other personnel. This was also one of the issues raised by the Court in
14 its October 2013 Order. In response to this problem, and one of the directives issued by
15 the Court in the October Order, Sheriff Arpaio and his MCSO team implemented the
16 Court Compliance and Implementation Division ("CCID"). [11/10/15 RT at 4093-94].
17 The CCID is staffed by a captain, lieutenant, four sergeants, two detectives, and an
18 administrative assistant; the captain is designated as the point of contact. The CCID is
19 responsible for creating Briefing Boards, updating and disseminating new policies,
20 keeping updated records, and acting as an internal audit system to ensure that MCSO is
21 compliant with Court Orders. Some of the other notable steps taken to comply with the
22 Court's Order include, but are not limited to, the following:

23 **(1) Using Attestation Logs to ensure that all MCSO**
24 **personnel read and review the Court's Findings of Fact,**
25 **Orders, and Corrective Statement.** To date, 100% of sworn
26 Supervisors, 99% of compensated, sworn Deputies (with the
27 exception of one on leave), 100% of reserve Deputies, 99.9%
28 of Detention Officers, and 99% of Detention Supervisors have
29 done this.

30 **(2) Implementing policies related to Bias-Free Policing,**
31 **Code of Conduct, and Traffic Enforcement.** Since October
32 2013, MCSO has issued at least 18 different Briefing Boards
33 on various aspects of the Court's Order, changed its Code of
34 Conduct, and promulgated at least 12 new policies and

1 procedures that were also approved by the Monitor. These
2 policies emphasize race-neutral, bias-free policing, and
3 prohibit deputies from enforcing immigration laws for
4 unauthorized presence in the United States.

5 **(3) Improved training requirements and curricula.** The
6 Court outlined three areas of training: (1) Bias-Free Policing;
7 (2) Detentions, Arrests, and Enforcement of Immigration-
8 Related Laws; and (3) Supervisor training. In September
9 2014, training on Bias-Free policing, and the 4th Amendment
10 issues began, and as of December 2014, 1,083 posse members,
11 68 reserve officers, and 681 deputies (all but three who are on
12 extended leave) have been trained on the 4th and 14th
13 Amendments and Bias-Free Policing.

14 **(4) Improvements in supervision.** The Court required
15 that MCSO have a 1:12 ratio¹ of supervisor to subordinate
16 officers. Sheriff Arpaio promoted 35 sergeants to supervisory
17 roles, and required all supervisors to attend training to ensure
18 uniformity and effective supervision. Supervisor roles were
19 revised to clarify their responsibilities and emphasize proper
20 supervision of their subordinates to ensure that their
21 subordinates performed their duties properly and lawfully.

22 **(5) Creation of the Early Identification Unit (EIU) and
23 Bureau of Internal Oversight.** These units identify
24 problematic behavior, conduct self-audits, and allow
25 supervisors to intervene and correct inappropriate activity.

26 **(6) Improvements in data collection.** MCSO has
27 implemented a TraCS system, which electronically captures
28 data at vehicle stops, and updating deputies' Mobile Data
Terminals (MDT) so patrol officers can collect the data
requested by the Court. This also allows supervisors to review
their subordinates' activities, and provides supervisors an
early warning system to address any potential problems.

**(7) Establishment and implementation of the
Professional Standards Bureau (PSB)** to address complaints
and claims of misconduct, both internally and from the public.

**(8) Complete re-structuring of MCSO's Internal
Affairs ("IA") division.** After the Court's most recent
Findings of Fact (Doc. 1677), Sheriff Arpaio has worked with
the Plaintiff class and the Court to create new policies and
procedures that will govern MCSO's IA investigations. In
addition, Sheriff Arpaio has agreed to the Court re-opening
old IA investigations and instituting new ones under an
independent investigator and disciplinary officer.

¹ The Court has subsequently indicated that having a bright line ratio requirement may not be in the best interest of MCSO. Nevertheless, Sheriff Arpaio will to adhere to any requirements this Court will issue in the near future regarding supervisory ratios.

1 [See also Captain Skinner's 11/10/15 Reporter's Transcript ("RT") at 4093-4166].

2 In addition, it must be understood that compliance with a court order that, in
3 effect, drastically changes the culture and patterns, practice, and policies of a law
4 enforcement agency the size of MCSO is an enormous task. The Maricopa County
5 Sheriff's Office is one of the largest Sheriff's Offices in the Nation with 3,394 sworn,
6 detention, and civilian employees. It serves over 4 million people and covers 9,226
7 square miles. Despite the enormity of the undertaking, the MCSO is moving forward
8 toward accomplishing this goal. In FY 2016/2017 a total of \$10.2 million has been
9 budgeted for *Melendres* compliance. This expense covers the addition of 72 employee
10 positions, training, body worn cameras, and other costs. Because of the massive
11 undertaking that this Court's Orders have placed on a law enforcement agency the size of
12 MCSO, Sheriff Arpaio admits that there have been delays in getting all aspects of MCSO
13 into compliance with the Court's injunctive orders. Some compliance efforts are complex
14 and, at times, have been slowed due to numerous issues that arose from the inherent
15 nature of the changes necessary, NOT because there has been a lack of effort by the
16 Sheriff or anyone at MCSO.

17 Accordingly, Sheriff Arpaio submits that his oversight and implementation
18 of these massive training, supervision, and policy reforms within MCSO evidence a clear
19 and unmistakable intent to implement and comply with this Court's Orders.

20 C. **Sheriff Arpaio's public commentary on the Court's Orders was not an**
21 **intentional defiance of the Court's orders.**

22 In connection with his responsibilities as Sheriff, Sheriff Arpaio engages in
23 public speaking to inform, maintain, and garner support from the community. His
24 statements commenting on the Court's Orders or illegal immigration were not intended to
25 direct his deputies to disobey the law. Unlawful immigration and criminal conduct related
26 to illegal immigration are genuine and legitimate areas of public concern. The public
27 looks to law enforcement to identify what actions are being taken to protect them. As
28 part of that political process, political and law enforcement leaders are expected to address

1 these public concerns on an almost daily basis. Sheriff Arpaio's statements were never
2 intended to stir up discontent within the community, or promote illegal activities or
3 encourage defiance of any Order of this Court. Sheriff Arpaio would not, and did not
4 make these statements with the intent to willfully disobey the Court's Orders. There is
5 never a decision from the United States Supreme Court, the 9th Circuit Court of Appeals,
6 or Federal Courts within Arizona that should be beyond the bounds of criticism. The very
7 essence of our First Amendment guarantee of free speech to each individual, particularly
8 an elected official charged with protecting the public safety, is the right to voice opinions
9 or disagreements. Sheriff Arpaio respects this Court, and he respects the authority of this
10 Court. For over 55 years, cases prepared for prosecution by Sheriff Arpaio have
11 undergone judicial scrutiny. That is the very essence of our judicial system – the final
12 word rests with the Court, and Sheriff Arpaio respects and supports the separation of
13 powers, and the role that the courts play in our free democracy. Thus, with regard to the
14 specific comments made by Sheriff Arpaio to the news media noted in the Court's
15 Findings of Fact, (*see e.g.*, Doc. 1677 at ¶¶ 27-31, 42, 44, 58-59, 63), Sheriff Arpaio
16 submits that his intent to **lawfully** stop illegal immigration was not synonymous with an
17 intent to willfully defy the Court's Orders and is protected free speech under the United
18 States Constitution.

19 Accordingly, Sheriff Arpaio submits that the exercise of his first amendment
20 right cannot be interpreted as an intent to violate this Court's Orders. Rather, Sheriff
21 Arpaio points the Court to the significant compliance efforts outlined above as evidence
22 that although he may have freely exercised his first amendment rights regarding some of
23 the Court's Orders, he respects the Court and its Orders, and has directed MCSO to fully
24 comply with them.

25 **D. Sheriff Arpaio's "back-up-plan" was not intended to undermine the**
26 **Court's preliminary injunction.**

27 To the extent the Court found that Sheriff Arpaio intentionally implemented
28 a "back-up-plan" in order to willfully subvert the Court's Preliminary Injunction by

1 transporting individuals to the U.S. Border Patrol, Sheriff Arpaio points the Court to
2 Timothy Casey's October 18, 2012 Letter, submitted as Plaintiffs' Exhibit 2514.
3 [10/18/12 Casey Letter to ACLU, **attached as Ex. 1**]. Mr. Casey's letter, dated October
4 18, 2012, unequivocally asserts that MCSO's practice of transporting individuals with
5 insufficient evidence to arrest them on state charges to the U.S. Border Patrol was *not* a
6 violation of the December 23, 2011 injunction. In Mr. Casey's own words to Mr. Segura:
7 "Your letter dated October 11, 2012 raises questions concerning three Maricopa County
8 Sheriff's Office ("MCSO") News releases pertaining to three events. It also accuses my
9 clients of 'apparent' violations of the Court's December 23, 2011 injunction. The
10 accusation lacks merit. My investigation and review of the three events indicates *no*
11 *violation of the Court's December 23, 2011 injunction.*" (Emphasis added). *Id.* ("In
12 none of the foregoing three events/cases did the MCSO detain any individual based on
13 knowledge or reasonable suspicion that he was unlawfully present in the United States,
14 without more. Rather, MCSO moved swiftly in each case to determine whether state
15 charges could be brought and, if not, to obtain and comply with the direction of federal
16 agents regarding the individuals."). Accordingly, in that letter, Mr. Casey specifically
17 approved of a "back up plan" where detainees who were not suspected of state crimes
18 could be referred to ICE and, if rejected by ICE, could be referred to the Border Patrol.
19 Sheriff Arpaio was entitled to rely on Mr. Casey's legal analysis regarding whether this
20 practice violated the Court's preliminary injunction.

21 In addition, Mr. Casey's legal assertions in the October 11, 2012 letter
22 appear to be in direct contradiction with his testimony in this matter regarding his views
23 on the validity of transporting individuals rejected by ICE to the U.S. Border Patrol. [*See*
24 Doc. 1677 at ¶¶ 49-57 (asserting that after the ACLU contacted Sheriff Arpaio regarding
25 MCSO's news releases, Mr. Casey told Sheriff Arpaio that the preliminary injunction did
26 not allow MCSO to detain persons against whom it could not bring state charges in order
27 to turn them over to ICE, the Border Patrol, or any other federal agency). Moreover, Mr.
28 Casey's October 11, 2012 letter corroborates Sheriff Arpaio's testimony during the

1 contempt hearings on this issue. [See 4/23/15 RT at 600:16-18, 601:11-21 (Sheriff
2 Arpaio's testimony that at the time the implementation of his "back-up-plan" occurred, he
3 did not personally know that it was a violation of the preliminary injunction, and no one
4 told him that it was); 611:20-612:1 (Sheriff Arpaio's testimony that he did not intend to
5 willfully violate the Court's preliminary injunction)]. Thus, even assuming this practice
6 violated the Court's preliminary injunction, it was certainly not conducted in a willful and
7 intentional manner.²

8 **E. Sheriff Arpaio did not and could not control certain aspects of MCSO's**
9 **conduct that caused the OSC.**

10 Sheriff Arpaio never intended to disobey or defy the Orders of this Court.
11 When the Court issued the December 2011 injunction, the Sheriff testified unequivocally
12 that he was aware of it, but relied upon his legal team and others to distribute the
13 information accordingly and to abide by the Order. [4/22/15 RT at 478:23-479:2, 479:11-
14 17, 480:9-12, 482:20-25, 484:1-3, 11-12]. He did not know how the information was
15 disseminated or whether it was actually passed down through the ranks. When the
16 Sheriff learned that this Court's Orders were not effectively communicated to personnel at
17 all levels of the department, he implemented new communication protocols to ensure that
18 future Orders of this Court would be effectively relayed throughout MCSO.

19 With regard to Deputy Armendariz, Sheriff Arpaio should not be
20 responsible for the actions of a "rogue" officer. He did not know, and could not have
21 known, that Armendariz was allegedly violating the law and possibly improperly
22 processing confiscated items from traffic stops. Upon discovering this information,
23 Sheriff Arpaio directed MCSO to begin the gathering and review of all audio and video
24 recordings. This monumental task required over **63,000 man-hours** to complete.
25 [Sheridan 9/24/15 RT at 1193:5-15]. Sheriff Arpaio's top aides directed this
26 investigation, and implemented several other significant changes to MCSO training,

27 ² Similarly, Sheriff Arpaio testified that he only passed along the preliminary
28 injunction to the Human Smuggling Unit pursuant to the advice of his attorney. [4/22/15
RT at 487:13-18].

1 policies, data collection, and other policies and protocols to ensure more accountability
2 and compliance with the Court's Order.

3 In addition, other events detailed during this litigation, which gave rise to
4 many of the Courts' Findings of Fact, were outside the control of the Sheriff. For
5 example, with regard to the violation of the preliminary injunction, Chief Sands was
6 MCSO's primary liaison for the *Melendres* matter. [Doc. 1043 at 950:22-951:9].
7 MCSO's counsel's testimony confirms this. Mr. Casey testified that Chief Sands, until he
8 left MCSO, was his primary client contact at MCSO. In addition, the handling of the
9 1459 ID's did not involve the Sheriff and there is no evidence that he instructed anyone to
10 conceal that matter from the Monitor. Finally, Sheriff Arpaio, neither himself nor through
11 others, ever directed Dennis Montgomery to investigate the Court. Moreover, Mike
12 Zullo's apparent continued communication with Dennis Montgomery up to and during the
13 pendency of the contempt proceedings were not directed by Sheriff Arpaio.

14 **II. "COLLATERAL" MATTERS CANNOT PROVIDE A BASIS FOR A**
15 **CRIMINAL CONTEMPT REFERRAL.**

16 The Court raised the possibility of criminal contempt proceedings against
17 Sheriff Arpaio based on three areas of alleged "non-compliance" in its Order to Show
18 Cause ("OSC"): (1) failing to implement and comply with the Court's preliminary
19 injunction; (2) violating discovery obligations; and (3) acting in derogation of the Court's
20 May 14, 2014 Order. [Doc 880]. Just because certain investigations were raised for the
21 first time during the contempt proceedings and discussed does not mean they were
22 adequately noticed prior to the contempt hearing or fully and adequately litigated before
23 the Court. Specifically, the Court's OSC is devoid of any mention that the Court would
24 inquire into the Sheriff's dealings with Dennis Montgomery or the "Seattle Operation"
25 (either as a whole or in part). In addition, neither Sheriff Arpaio nor his defense team had
26 any advance notice that the Court would be questioning the Sheriff on issues related to
27 two Phoenix NewTimes news articles.

28 In fact, the OSC does not even mention that the contempt proceedings may

1 inquire into any separate and unrelated investigations purportedly initiated by the Sheriff
2 or anyone else. The omission of these topics is critical to the issue of whether this Court
3 can make a criminal referral based upon them because the OSC is the critical document
4 which provides a defendant with notice of the charges against him and the opportunity to
5 prepare a defense. *U.S. S.E.C. v. Hyatt*, 621 F.3d 687, 695 (7th Cir. 2010) (“the show-
6 cause order satisfies the due-process notice requirement by giving the nonmoving party
7 notice of his opportunity to respond before the substantive request for relief is
8 entertained.”); *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 518 (9th Cir. 1992)
9 (“procedural requirements necessary to impose criminal contempt were not followed”
10 because “[t]he order to show cause issued by the district court did not give Execuair the
11 required notice that a criminal proceeding would take place.”); *see also Yates v. United*
12 *States*, 316 F.2d 718, 723 (10th Cir. 1963); *Martinez v. City of Avondale*, CV-12-1837-
13 PHX-LOA, 2013 WL 5705291, at *1 (D. Ariz. Oct. 18, 2013). Moreover, the Plaintiffs’
14 request for an order to show cause did not even mention Dennis Montgomery or any
15 issues related to him. [See Doc. 843 at 28:3-18].

16 Finally, even this Court recently recognized the tenuous connection these
17 issues have toward the interests of the Plaintiff class. During the July 8th, 2016 hearing,
18 this Court recognized that it made a number of factual findings regarding Sheriff Arpaio’s
19 conduct involving Dennis Montgomery and the Seattle Operation that are only
20 *collaterally* related to the interests of the plaintiff class. [See Doc. 1677 at pp. 62-70, ¶¶
21 349-381]. In light of this, the Court recognized that these collateral issues could not form
22 an independent basis for the Court’s exercise of its contempt powers. [7/8/16 RT at
23 41:13-42:24; 53:1-17].

24 Accordingly, because the OSC did not specifically provide any notice that
25 the hearing would involve any issues connected to Dennis Montgomery or the so-called
26 “Seattle Operation,” the Court’s findings related to these issues should not provide any
27 independent basis for a criminal contempt referral and to do so would violate Sheriff
28 Arpaio’s due process rights.

1 **III. THE COURT HAS ENTERED ADEQUATE CIVIL REMEDIES THAT DO**
2 **NOT REQUIRE A CRIMINAL CONTEMPT REFERRAL OF SHERIFF**
3 **ARPAIO.**

4 The “least possible power” rule requires that the Court must first look to
5 determine whether civil contempt sanctions may appropriately cure any injuries to the
6 Plaintiff class before criminal contempt sanctions can be imposed. *See United States v.*
7 *Powers*, 629 F.2d 619, 625 (9th Cir. 1980) (citation omitted); *Young*, 481 U.S. at 801. A
8 court should resort to criminal sanctions only after it determines, for good reason, that a
9 civil remedy is inappropriate. *Shillitani v. United States*, 384 U.S. 364, 371, n.1 (1966).

10 Sheriff Arpaio’s conduct in relation to the Preliminary Injunction arose
11 because he delegated its implementation to his chain of command. However, as Sheriff
12 Arpaio has repeatedly acknowledged, as the leader of MCSO, the failure to implement the
13 preliminary injunction order lies with him. [See Doc. 948; 4/22/15 RT at 475:6-25;
14 4/23/15 RT at 589:22-590:3]. In light of the violations involved with the preliminary
15 injunction, Sheriff Arpaio has acknowledged that civil sanctions to compensate the
16 plaintiff class are warranted and that structural changes to supervision and internal affairs
17 within MCSO are necessary. These remedies will completely overhaul MCSO’s internal
18 procedures and processes at an institutional level, and install multiple safeguards to make
19 sure the events that led to these contempt proceedings will not be repeated. In addition,
20 these remedies also include bringing in an independent party to oversee IA investigations
21 and invalidating certain relevant IA investigations and instituting new IA investigations,
22 including investigations which involve the handling of the Preliminary Injunction.
23 Finally, the Court’s Monitor will have increased oversight and power over IA
24 investigations unrelated to the Plaintiff class. This, in itself, is a reasonable and
25 appropriate civil remedy to redress the violations found by this Court involving Sheriff
26 Arpaio. In addition, this expansive and, essentially, all-encompassing injunctive relief is
27 commensurate with the violations found by the Court. Moreover, there is simply no
28 evidence that Sheriff Arpaio is doing anything other than devoting all necessary resources
to the implementation of these comprehensive, institutional changes. In sum, the

1 expansive overhaul and the many new policies and procedures already ordered by the
2 Court and undertaken by MCSO will provide greater oversight of MCSO and necessary
3 protections of the Plaintiff class. The new oversight by the Court's Monitor will also
4 ensure the Sheriff's future compliance with the Court's Orders. Finally, even today, this
5 Court ordered a supplemental and expansive injunction to further remedy violations found
6 by the Court involving Sheriff Arpaio. [See Doc. 1748].

7 The Court found violations of its Orders. The Court has ordered reasonable
8 relief commensurate with the violations. The Plaintiff class has been protected. There is
9 no need for this Court to take the drastic and destructive step of referring Sheriff Arpaio
10 for criminal prosecution. *See Young*, 481 U.S. at 801 (1987); *Shillitani*, 384 U.S. at 371,
11 n.1 (1966).

12 CONCLUSION

13 To prove criminal contempt, a jury must find, beyond a reasonable doubt,
14 that Sheriff Arpaio "willfully" disobeyed the Court's Order. *See Falstaff Brewing Corp.*
15 *v. Miller Brewing Co.*, 702 F.2d 770, 782 (9th Cir. 1983). Based on the foregoing, Sheriff
16 Arpaio submits that there is not sufficient evidence, beyond a reasonable doubt, that
17 Sheriff Arpaio wilfully violated the Court's Orders. Neither is there is any evidence
18 showing that Sheriff Arpaio willfully withheld evidence from Plaintiffs in the underlying
19 lawsuit. In addition, a criminal referral and possible federal criminal jury trial would have
20 devastating consequences to the efficient operation of the Maricopa County Sheriff's
21 Office and the implementation of the changes ordered by the Court. It would not only
22 bring personal financial hardship to Sheriff Arpaio and his team of leaders at MCSO, but
23 it would be grossly unfair—MCSO has made significant changes to its training, policies,
24 supervision, and chain of command, which clearly demonstrates its commitment toward
25 complying with the Court's Orders and directives. It would severely undermine these
26 positive changes and unfairly tarnish the legacy of a public servant who has given over a
27 half century of extraordinary service to the citizens of this country.

28 The Sheriff and his team have certainly received the message from the

1 Court, loud and clear. The attitude of the Sheriff and MCSO is not one of defiance or
2 disregard to the Court's Orders; rather, there is a clear commitment to implement the
3 directives of this Court through training, policy revisions, new IA investigations and
4 compliance with this Court's Orders. Sheriff Arpaio urges this Court to not make a
5 criminal contempt referral and to allow the Sheriff and his team to continue implementing
6 the Court's directives, and to take note of all that has been done to date, and will be done
7 in the future.

8 RESPECTFULLY SUBMITTED this 20th day of July, 2016.

9 JONES, SKELTON & HOCHULI, P.L.C.

10
11 By /s/A. Melvin McDonald

12 A. Melvin McDonald
13 40 North Central Avenue, Suite 2700
14 Phoenix, Arizona 85004

15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on this 20th day of July, 2016, I caused the foregoing
17 document to be filed electronically with the Clerk of Court through the CM/ECF System
18 for filing; and served on counsel of record via the Court's CM/ECF system.

19
20 /s/Karen Gawel

EXHIBIT 1

CASE NO. 2:07-cv-02513-GMS
Manuel de Jesus Ortega Melendres, et al.
VS. Joseph M. Arpaio, et al.
PLAINTIFF'S EXHIBIT 2514
DATE: _____ IDEN.
DATE: _____ EVID.
BY: _____
Deputy Clerk

Haines Simon

From: Tim J. Casey <Tim@azbarristers.com>
Sent: Thursday, October 18, 2012 10:43 AM
To: Sands Brian; Sheridan Gerard; Jakowinicz Brian; Madhyre John
Cc: Uddy Thomas; James L. Williams; Eileen Henry
Subject: Melendres v. Arpaio (MCSO Response to Plaintiffs' Accusation of Violation of Court's 12/23/11 Injunction)
Attachments: DOC101812.pdf

ATTORNEY CLIENT PRIVILEGED/CONFIDENTIAL

Chiefs et al.,

Please find attached my letter response on behalf of Defendants to Plaintiffs' accusation that the MCSO is violating the Court's 12/23/11 injunction.

I will keep you posted on all developments regarding this issue. Unlike my earlier belief, they have not rushed to court this week (so far) to seek contempt so they are being deliberate on this issue. Perhaps they are awaiting the documents. I still anticipate that they will "cry foul" in a very public court filing and issue a new release right before the election.

tim

Timothy J. Casey, Attorney at Law
 SCHMITT SCHNECK SMYTH CASEY & EVEN, P.C.
 1221 East Osborn Road, Suite 105 Phoenix, AZ 85014
 Phone: 602.277.7000
 Fax: 602.277.8663
 Email: timcasey@azbarristers.com
www.azbarristers.com

9/15/12	EXH # 2514
WITNESS <i>Sheridan</i>	
PAMELA A. GRIFFIN, RPR, CRR	
CERTIFIED COURT REPORTER #50010	

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-----Original Message-----

From: Toshiba 850 [mailto:scanner@ezbarristers.com]
Sent: Thursday, October 18, 2012 10:24 AM
To: Tim J. Casey
Subject: Scanned from toshiba 10/18/2012 10:23

Scanned from toshiba.
Date: 10/18/2012 10:23
Pages:4
Resolution:200x200 DPI

Here is a scan sent from the Toshiba 850 MFP. Have a nice day.

SCHMITT SCHNECK SMYTH CASBY & EVEN, P.C.

ATTORNEYS AT LAW

Timothy J. Casby
e-mail: timcasby@azbarristers.com

Client No.: 5754.030

October 18, 2012

VIA EMAIL AND REGULAR MAIL

Andre Sagura, Esq.
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
125 Broad Street, 18th Fl.
New York, NY 10004-2400

Re: *Ortega v. Arpaio, No. CV 07-2513-PHX-GMS*

Dear Andre:

Your letter dated October 11, 2012 raises questions concerning three Maricopa County Sheriff's Office ("MCSO") News Releases pertaining to three events. It also accuses my clients of "apparent" violations of the Court's December 23, 2011 injunction. The accusation lacks merit. My investigation and review of the three events indicates no violation of the Court's December 23, 2011 injunction.

1. **September 21, 2012 Event.**

The September 21, 2012, MCSO News Release concerned a multi-agency desert patrol with, among others, the United States Border Patrol and MCSO's Special Investigation Division ("SID") in the area of Interstate 8 and Freeman Road. This area is known by local and federal law enforcement as a location of high-volume drug and human smuggling from Mexico into Maricopa County. Typically, at this area, human smugglees will also smuggle drugs. The smugglees carrying drugs will wait near a highway for two cars – one car to receive the drugs and another car to pick up the smugglees after the drugs are already picked-up.

Consistent with this pattern known to law enforcement, SID discovered five (5) individuals hiding under a tree in the desert area approximately 60 yards southeast of mile marker 133 on Interstate 8. Two of these individuals were dressed in camouflage attire (which indicates to law enforcement a pre-planned and organized effort to avoid detection), and the other individuals were dressed in non-customary dark-colored clothing (which also indicates to law enforcement an effort to avoid detection for night smuggling). The individuals presented with an appearance of having hiked through the desert for days based upon their physical appearance, body odor, water bottles, makeshift backpacks, and other indicia of such activity and drug smuggling.

Andre Segura
 October 18, 2012
 Page 2

SID deputies provided humanitarian assistance and water to these individuals and talked with them. These individuals indicated that they entered illegally into the United States from Mexico. One of the men seemed to SID deputies to be in a position of control/authority over the others. U.S. Border Patrol directed MCSO to proceed with investigating these individuals for drug smuggling and/or human smuggling under Arizona criminal law. These persons were, therefore, turned over to MCSO's Human Smuggling Unit ("HSU") for investigation, which transported them from MCSO's Gila Bend substation to Enforcement Support for further questioning. The individuals admitted that they had crossed the border illegally carrying bundles of marijuana and that a "friend" of one of the men was going to pick them up but would require payment for transportation to a home. The individuals also stated that half of the smuggling fee (5,000 pesos) was paid at the outset of the smuggling agreement to the person who guided them through the desert and the remaining half was due upon their arrival in Phoenix. The individuals stated that they had been walking through the desert for five (5) days when their desert guide abandoned them after an unknown person obtained the marijuana loads they had been smuggling.

Three of these individuals were booked on state criminal charges, but there was insufficient evidence to arrest the other two persons on state criminal charges. HSU contacted ICE concerning these two individuals reasonably believed to have illegally entered the United States. ICE advised that it would not take custody of the individuals but directed HSU to contact U.S. Border Patrol regarding federal handling and custody of the two individuals. HSU immediately contacted U.S. Border Patrol Agent Hernandez at Ajo, Arizona, who directed the MCSO to deliver these suspects to U.S. Border Patrol at a specified meeting point. Accordingly, there is no violation of the Court's December 23, 2011 injunction. See Order (Dkt#494) at pp. 37:21 to 38:3; 40:19-23.

2. September 27, 2012 Event.

The September 27, 2012 MCSO News Release concerned a criminal employment investigation during which a court issued search warrant was executed on a local business and fourteen (14) arrests were made on individuals on state law charges of forgery and identity theft. During execution of the search warrant, MCSO observed a company vehicle belonging to the employer being investigated attempting to leave the employer's premises. The vehicle's driver admitted he was an employee of the employer being investigated. The Mexican Consular identification provided by one of the passengers identified him as Luis Alberto Torres-Murillo, which MCSO believed to be a possible match to one of the persons listed on the search warrant and suspect list, Luis De La Torre-Murillo. Two other individuals initially suspected to be employees of the company were discovered inside the vehicle. However, a review of the employer's records revealed that these individuals were not employed by the employer being investigated, but the individuals admitted that they were not lawfully present in the United States. MCSO called ICE concerning these two individuals. When ICE declined to take custody of these individuals, MCSO called the U.S. Border Patrol office in Ajo. The U.S. Border Patrol (Supervisor Bonilla) advised that it would take custody of these two individuals, directed MCSO deputies to deliver these individuals to it Ajo, Arizona, and in fact, took custody of these individuals. There is no violation of the Court's December 23, 2011 injunction. See Order (Dkt#494) at pp. 37:21 to 38:3; 40:19-23.

Andre Segura
October 18, 2012
Page 3

3. October 8, 2012 Event.

The October 9, 2012 MCSO News Release concerned an October 8, 2012 traffic stop of a truck with a camper that was reasonably suspected of serving as a human smuggling load vehicle. The MCSO stopped the truck for a violation of Arizona law. When the truck's driver failed to present identification compliant with Arizona law he was placed in the MCSO patrol truck. The truck's passenger voluntarily presented identification in the form of a Mexican passport, and the MCSO deputy proceeded to run a check on the identification provided by the driver and passenger. This identification check revealed that the truck's driver was a suspect in a strong-arm robbery case. The identification check returned no results for the passenger based on the identification he voluntarily provided and there was an identification-authentication issue. MCSO, therefore, contacted ICE concerning the passenger, who admitted to ICE that he was unlawfully present in the United States. ICE declined to take custody of the passenger, and while the impounding of the truck was still in process, MCSO contacted the U.S. Border Patrol. Just as the tow truck arrived to remove the impounded truck, the U.S. Border Patrol (Agent McLellan) took custody of the passenger and volunteered to send a transport vehicle or, in the alternative, directed MCSO to deliver the passenger to a U.S. Border Patrol office. There is no violation of the Court's December 23, 2011 injunction. See Order (Dkt#494) at pp. 37:21 to 38:3; 40:19-23.

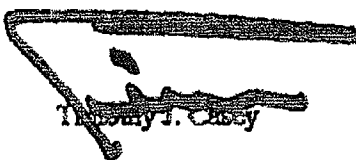
In none of the foregoing three events/cases did the MCSO detain any individual based on knowledge or reasonable suspicion that he was unlawfully present in the United States, without more. Rather, MCSO moved swiftly in each case to determine whether state charges could be brought and, if not, to obtain and comply with the direction of federal agents regarding the individuals.

Attached with the hard copy of this letter are the documents related to each of the foregoing three events. I am unable to send the materials to you via email given volume. I am confident that, after you review the enclosed with a fair and objective bearing, you will independently conclude that the MCSO has fully complied with the Court's December 23, 2011 injunction.

If you desire additional information or wish to personally discuss or confer about the foregoing events, please do not hesitate to contact me. Similarly, if you have any other factual information or legal authority you believe I should consider as part of my analysis, I welcome the same.

Sincerely,

SCHMITT SCHNECK SMYTH CASEY & EVEN, P.C.



Timothy J. Casey

Andre Segura
October 18, 2012
Page 4

Enclosures

cc. Thomas P. Liddy, Esq. w/o enclosures
James L. Williams, Esq. w/o enclosures
Chief Brian S. Sands, Maricopa County Sheriff's Office