No. _____

In The
Supreme Court of the United States

IN RE: JOSEPH M. ARPAIO,
Petitioner,

On Petition for Writ of Mandamus
to the Arizona District Court

PETITION FOR WRIT OF MANDAMUS

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May 24, 2017

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QUESTIONS PRESENTED

Did the district court err in denying Petitioner's request for a jury trial?

Is Petitioner entitled to mandamus relief on his claim that the District Court wrongly deprived him of the right to a jury trial?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are as follows:

1. Petitioner/Defendant Joseph M. Arpaio
2. Respondent/Plaintiff United States of America.

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PETITION FOR MANDAMUS

Joseph M. Arpaio ("Petitioner") respectfully petitions for a writ of mandamus to the District Court of Arizona granting his request for a trial by jury at his upcoming trial for criminal contempt scheduled to begin on June 26th, 2017.

OPINIONS BELOW

The Ninth Circuit Order denying the Petition, without opinion, is Docket Entry 11 in Case No. 17-71094, and is included in the Appendix at Exhibit "A."

The orders of the Arizona District Court denying Petitioner's requests for jury trial are Dkt. 83 and Dkt. 132 in Arizona District Court Case No. 2:16-cr-01012-SRB. They are attached as Exhibits "B" and "C" to the Appendix, respectively.

STATEMENT OF JURISDICTION

The order of the Ninth Circuit denying the Petition is dated May 18th, 2017. Petitioner filed a request for a rehearing on May 18th. The Ninth Circuit has not yet ruled on Petitioner's request for rehearing. However, because Petitioner's trial begins in one month (June 26th), Petitioner cannot afford to wait to file this Petition until after a ruling on the request for rehearing, which may take weeks. The Petition is therefore filed,

strictly, under this Court's Rule 11. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 1651 provides that: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

18 U.S.C.A. § 3691 provides that: "Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases. This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of

justice, nor 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."

18 U.S.C.A. § 242 provides that: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death."

18 U.S.C.A. § 241 ("Conspiracy against rights"); 18 U.S.C.A. § 1509 ("Obstruction of court orders"); A.R.S. § 13-2810 ("Interference with judicial proceedings"); and A.R.S. § 13-1303 ("Unlawful imprisonment") are also involved, and their pertinent text is set forth in Appendix "F."

STATEMENT OF THE CASE

Petitioner requests a jury trial under 18 U.S.C.A. § 3691 at his trial for criminal contempt scheduled to begin on June 26th, 2017. Petitioner is the former democratically-elected Sheriff of Maricopa County, Arizona. The district court referred the Petitioner for criminal prosecution on August 19th, 2016,[1] and entered a formal Order to Show Cause pursuant to Fed.R.Crim.P.42 on October 25th, 2016.[2] Petitioner requested a trial by jury under 18 U.S.C.A. § 3691 on January 25th, 2017.[3] The

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[1] Doc. 1 in Arizona District Court Case No. Case 2:16-cr-01012-SRB (hereinafter referred to as the "District Court Case").

[2] Exhibit "D" to the Appendix. (Doc. 36 in the District Court Case.)

[3] Doc. 69 in the District Court Case.

district court denied the request in a footnote.[4] Petitioner again requested a trial by jury under 18 U.S.C.A. § 3691 on April 10th, 2017.[5] The district court again denied the request, without analysis, on April 10, 2017,[6] and stated on the record that it will not entertain any further requests for a trial by jury. Petitioner filed a Petition for Mandamus to the Ninth Circuit on April 14, 2017.[7] On May 18th, 2017, the Ninth Circuit Motions Panel denied the request without opinion.[8] Petitioner filed a Petitioner for a Rehearing the same day, May 18th, 2017. Because Petitioner's trial is scheduled to begin on June 26th, Petitioner cannot afford to wait for a ruling on the Motion for Rehearing before filing this Petition, and Petitioner requests that the

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[4] Exhibit "B" to the Appendix, at footnote "1." While the district court's Order states that the court "explained in its December 13, 2016 Order" why Defendant's conduct "does not constitute a separate criminal offense," the December 13, 2016 Order in fact does not address this. See Exhibit "E" to the Appendix, Doc. 60.

[5] Doc. 130 in the District Court Case.

[6] Exhibit "C" to the Appendix.

[7] Docket Entry 1 in Ninth Circuit Case No. 17-71094.

[8] Docket Entry 11 in Ninth Circuit Case No. 17-71094.

Court consider this matter at its conference on June 15th.

REASONS FOR GRANTING THE PETITION

Petitioner is entitled to a jury trial under 18 U.S.C.A. § 3691, because Defendant is charged with criminal contempt for willfully arresting persons without cause. 18 U.S.C.A. § 3691 provides that a defendant is entitled to a jury trial if his criminal contempt, as charged, constitutes a separate crime. Arresting persons without cause and under color of state law is a crime under 18 U.S.C.A. § 242. Therefore, Defendant is entitled to a trial by jury. The wrongful deprivation of a jury trial is traditionally reviewable by mandamus. But even if it were not, the Defendant's right here is so clear, that there is nothing gained by reserving this issue for a direct appeal. Defendant will suffer a wrongful trial and could suffer a wrongful sentence. If Defendant, who is eighty-four years old, dies before a reversal on direct appeal, then the sentence will stand. Judicial economy also counsels in favor of review by mandamus, since ordering a jury trial in the first instance is less "trying" on the court than conducting a wrongful bench trial and second retrial by jury. Finally, this case is of extraordinary public interest, which uniquely counsels in favor of issuing mandamus to direct a trial by jury. This is a prosecution for criminal contempt that was

initiated by the district court against a democratically-elected Sheriff. If mandamus does not issue, then the district court will be sitting in judgment of its own prosecution of the defendant, an elected officer in a "competing" branch of government. This already subjects any verdict to a certain degree of public suspicion, other than raising the specter of something undemocratic. But if the verdict is reversed on direct appeal (for failure to grant a jury trial), then it strongly signals to the public that the district court lacked independence or fealty to our democratic system. By issuing mandamus now, the Court avoids such public scrutiny and disapproval.

The issue of whether mandamus must issue to correct the wrongful deprivation of a jury trial also implicates a long-unresolved circuit split, which Justice Byron White identified in his dissent to *Kamen v. Nordberg*, 485 U.S. 939 (1988).

Because Petitioner's trial is set for June 26th, 2017, Petitioner files a Motion for Expedited Consideration herewith, and requests that the Court consider this Petition at its conference on June 15th. Each of the foregoing points is addressed in more detail below.

I. Defendant is entitled to a jury trial

18 U.S.C.A. § 3691 provides that the defendant is entitled to a jury in any criminal contempt case where the "contempt charged…also constitutes a criminal offense

under any Act of Congress, or under the laws of any state in which it was done or omitted." The contempt charged in this case constitutes a criminal offense under 18 U.S.C.A. § 242 ("Deprivation of Civil Rights"), and so Defendant is entitled to a trial by jury.[9]

Defendant is 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."[10] This

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[9] The charged contempt also constitutes other federal and state criminal offenses, but this one is the most obvious, and fully encompasses the conduct charged. Other offenses include 18 U.S.C.A. § 241 ("Conspiracy against rights"); A.R.S. § 13-1303 ("Unlawful imprisonment"); 18 U.S.C.A. § 1509 ("Obstruction of court orders"); and A.R.S. § 13-2810(A)(2)("Interference with judicial proceedings").

[10] *See* Order to Show Cause, attached as Exhibit "D" to the Appendix. 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."

constitutes 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 18 U.S.C. § 242).[11] 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. This undisputed conclusion is amply supported by the decisions of this Court, in cases such as *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).

The contempt that was charged in this case constitutes the same offense described above. Petitioner, a county Sheriff, was charged

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[11] 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."

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 contempt with which Petitioner was charged also constitutes a criminal offense, Petitioner is entitled to a trial by jury as a matter of law.

II. Defendant is entitled to mandamus relief

The issue then becomes whether mandamus relief is available to Petitioner at this stage of the proceedings. The Ninth Circuit Motions Panel's Order simply stated that "Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus." The decision by the Ninth Circuit Motions Panel to deny Petitioner's request on the grounds that the issue is not "extraordinary" enough to "warrant" its intervention is inconsistent not only with the clear precedent of the Ninth Circuit and many others, but also with the precedent of this Court. The Ninth Circuit has held that "where, as here, the mandamus petition alleges the erroneous deprivation of a jury trial…the only question presented is whether the district court erred in denying petitioner's request for a jury trial." *In*

re Cty. of Orange, 784 F.3d 520, 526 (9th Cir. 2015), *cert. denied sub nom. Tata Consultancy Servs. Ltd. v. Cty. of Orange, Cal.*, 136 S. Ct. 808 (2016)(internal ellipsis omitted). "The right to a jury trial has occupied an exceptional place in the history of the law of federal mandamus." *Id.*, 784 F.3d at 526. "For that reason, we will grant mandamus where necessary to protect the constitutional right to trial by jury. If the plaintiffs are entitled to a jury trial, their right to the writ is clear." *Id.* (citing Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3935.1 (3d ed.2014)). The First Circuit reached the same conclusion in a criminal case concerning a statutory right to jury trial: "We take the position that mandamus would be appropriate if a jury trial were required, and any denial of mandamus should be made only if either the case has not been adequately presented or there is no such right to a jury trial." *In re Union Nacional De Trabajadores*, 502 F.2d 113, 116 (1st Cir. 1974), vacated on other grounds, 527 F.2d 602 (1975).[12] The Court's Opinion in *In re Peterson*, 253 U.S. 300, 305–06 (1920) provided the rationale for these decisions: "if proceedings…would deprive petitioner of his right to a trial by jury, the order

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[12] Also cited by Justice White in his dissent to the denial of certiorari in *Kamen v. Nordberg*, 485 U.S. at 939.

should, as was said in *Ex parte Simons*,[13] be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a proceeding that ultimately must be held to have been required under a mistake." (Internal quotations and citations omitted, emphasis added.) This Court has stated that "[w]hatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959).[14]

The rationale for issuing mandamus to direct a jury trial is even more compelling in this case. Petitioner's right to a jury trial is simple, and clear. There is nothing to be gained by "pushing off" a decision on the issue until after the court has already conducted a bench trial, wrongfully. Defendant will be subjected to the harm and expense of an unnecessary criminal trial, and could be subjected to a wrongful conviction and sentencing, which can never be fully

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[13] Referring to *Ex parte Simons*, 247 U.S. 231, 239 (1918).

[14] *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288 n.13 (1988)(right to mandamus for an "order that deprives a party of the right to trial by jury" is "clear").

"undone." Defendant is eighty-four years old, and the possibility that he may not outlive a conviction and appeal, i.e. that he may die after a conviction but before it is reversed—such that the conviction stands—cannot be overlooked. *See Timonds v. Hunter*, 169 Iowa 598, 151 N.W. 961, 962 (1915)(finding that defendant's health and age of eighty-six years old were factors supporting grant of an interlocutory appeal on the right to a jury trial, because "his expectancy of life is very brief"; "[a]n adverse judgment would fix his status for the time being"; and "[i]f he should die before his appeal could be heard and determined, it is doubtful at least whether his appeal would not be abated thereby"). Correcting the deprivation of a jury trial by mandamus also offers benefits in terms of judicial economy, because one jury trial is always less burdensome than a bench trial followed by another retrial to a jury. Because there is a strong constitutional preference for jury trials, especially in a criminal case, and because conducting a jury trial is very rarely (if ever) deemed erroneous *per se,* courts rarely refuse them. So in practical terms, encouraging the review of this issue by mandamus will not "open a floodgates" or otherwise overwhelm the appellate courts. (Nor has it overwhelmed any of the circuits that do encourage mandamus on this issue, such as the Ninth.) Given the importance of jury trials to the American judicial system, courts of review should not be "shy" of aggressively protecting the right.

Finally, the public interest in this case uniquely counsels in favor of issuing mandamus to grant a jury trial, as partly addressed above. The court's use of its criminal contempt power to initiate a criminal prosecution is, *ab initio*, a rare incursion into authority that is normally reserved for the executive branch. When the court accedes to such executive powers, it should be especially careful to avoid exercising the full extent of its adjudicative authority, and it should cede that authority whenever possible to another independent body, such as a jury. This not only avoids the appearance of bias, but it helps to preserve a fundamental separation of powers in between the judicial and executive branches. These kinds of concerns are dramatically heightened in this case, because the Defendant is charged with committing criminal contempt as a democratically-elected sheriff, i.e. a member of the executive branch. This case presents a direct "clash" of the authority of the judicial and executive branches, which only a jury can decide in a way that inspires plenary confidence by the public in the result. If the court refuses to grant a jury, then no matter what the outcome, it will be wrongful—and viewed with suspicion—because it did not come from a jury. This is harmful to the public's faith in the independence and integrity of the judicial system, which is why we have juries to begin with. The trial will also be heavily publicized, making the conduct of a second trial by jury difficult, since potential

jurors will have already seen and heard evidence presented during the first trial to the court.

III. There is a circuit split on the issue of mandamus relief for deprivation of a jury trial

In 1988, Justice Byron White identified a circuit split on this exact same issue, of "when mandamus relief will be available to a party who claims that the District Court wrongly deprived him of the right to a jury trial." *Kamen v. Nordberg*, 485 U.S. 939 (1988)(White, J. dissenting). "…[T]he Seventh Circuit [holds] that mandamus will lie to enforce a party's demand for a jury trial only when, first, the party's right to a jury trial is clear and indisputable and, second, the party has no other adequate means to attain the relief he desires….[This] conflicts with the decisions of other Courts of Appeals, which hold that mandamus relief is available to review an order denying a claimed right of trial by jury, and that a proper petition for mandamus in these circumstances obliges the Court of Appeals to address the merits of the claimed right to a jury trial." *Id.* "It may also be inconsistent with this Court's prior decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), which emphasize the responsibility of the Courts of Appeals to grant mandamus relief where it is necessary to protect the constitutional right to trial by jury." This split and ambiguity in the law

of mandamus has persisted over the years, and perhaps only broadened. *See e.g.* Nathan A. Forrester, Mandamus As A Remedy for the Denial of Jury Trial, 58 U. Chi. L. Rev. 769 (1991)("[a]lthough it has had the opportunity, the Supreme Court has not yet resolved this circuit split"); Shay Lavie, Are Judges Tied to the Past? Evidence from Jurisdiction Cases, 43 Hofstra L. Rev. 337, 358 (2014)("much ink has been spilled in an attempt to decipher or suggest the exact boundaries of the federal final judgment rule"; discussing interlocutory appeals from wrongful deprivation of a jury trial as an example); "Mandamus or prohibition as remedy to enforce right to jury trial," 41 A.L.R.2d 780 (Originally published in 1955)("The courts are divided as to whether mandamus and prohibition are appropriate remedies to test a party's right to a jury trial"). While Petitioner has a clear and present right to relief in his particular case, the Court may regard this circuit split, and the need for reaffirmation or clarification of its views on this subject, as supportive of granting this Petition.

CONCLUSION

Petitioner respectfully asks the Court to grant this Petition by directing the district court to conduct a trial by jury. Because Petitioner's trial is scheduled to begin on June 26th, 2017, Petitioner respectfully requests expedited briefing and consideration of this Petition, and submits a Motion for Expedited Consideration together herewith.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOSEPH M. ARPAIO, Sheriff.

JOSEPH M. ARPAIO, Sheriff, Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, PHOENIX,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

No. 17-71094 D.C. No. 2:16-cr-01012-SRB-1 District of Arizona, Phoenix

ORDER

Before: REINHARDT, CALLAHAN, and NGUYEN, Circuit Judges.

To the extent that petitioner's motion to file an oversized reply in support of this petition for a writ of mandamus (Docket Entry No. 7) is necessary, it is granted. The reply has been filed.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. Accordingly, the petition is denied.

All other pending requests are denied.

DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,
Plaintiff,
v.
Joseph M. Arpaio,
Defendant.

No. CR-16-01012-001-PHX-SRB

ORDER

At issue are the Government's Brief in Support of Request for Bench Trial ("Gov.'s Mot.") (Doc. 61) and Defendant's Cross-Motion Requesting Jury Trial ("Def.'s Mot.") (Doc. 62).

I. BACKGROUND

This case comes to the Court by way of a criminal contempt referral from Judge Snow. (Doc. 1, Order Re Criminal Contempt.) On October 11, 2016, the Court held a Status Conference where the Government asked the Court to limit Defendant's potential penalty to no more than six months in prison and requested a bench trial. (Doc. 27, Rep.'s Tr. of Proceedings Status Conference 9:5-16.) Defendant indicated that he wanted time to research the ques-

tion of whether he was entitled to a jury trial. (Id. 15:19-16:2.) The Court declined to resolve the issue at the Status Conference. (Id. 38:19-39:15.) On October 25, 2016 the Court issued an Order to Show Cause setting forth the essential facts constituting the charged criminal contempt. (Doc. 36.) The Government submitted its Brief in Support of Request for Bench Trial on December 15, 2016, Defendant submitted a Cross-Motion Requesting Jury Trial on December 27, 2016, and briefing concluded on January 9, 2017. (See Docs. 61, 62, 63, 66, 69.) The Court heard argument on January 25, 2017. (*See* Doc. 71, Minute Entry.) The Court now rules on the Government's Request for Bench Trial and Defendant's Cross-Motion Requesting Jury Trial.

II. LEGAL STANDARD AND ANALYSIS

The Government argues that there is no constitutional right to a jury trial for criminal contempt charges if the possible sentence of imprisonment is no greater than six months. (Gov.'s Mot. at 1.) Defendant concedes that there is no constitutional right to a jury trial when the maximum sentence of imprisonment cannot exceed six months, but argues that the Court should, in its discretion, grant a jury

trial. (Def.'s Mot. at 1.)[1] Defendant argues that the Court should grant a jury trial because "the objectives and motives of Judge Snow" will be called into question and "a trial by jury avoids any appearance of bias or impropriety" on the part of any of the judges in the District of Arizona. *(Id.* at 2-3.) A defendant charged with criminal contempt does not have a constitutional right to a jury trial where the conviction can result in a sentence of imprisonment not longer than six months. *See Muniz* v. *Hoffman,* 422 U.S. 454, 475-76 (1975); *United States* v. *Rylander,* 714 F.2d 996, 1005 (9th Cir. 1983).

At the January 25, 2017 argument, Defendant, through his counsel, stated "Judge, if the question you posed to me was if it goes jury, all bets are off, if it goes court, it's capped, I would vote court." (Doc. 74, Rep.'s Tr. of Proceedings Pretrial Conference 19:19-21.) The case law is clear, if the Court limits Defendant's potential sentence to six months or less, there is no right to a jury trial. *See Muniz,* 422 U.S. at 475-76. Furthermore, the Court has found no precedent for granting a jury trial for a charge of

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[1] Defendant also argues that a jury trial is statutorily required under 18 U.S.C. § 3691. (Doc. 69, Def. Joseph M. Arpaio's Supp. to Reply to Gov. Resp. in Supp. of Def.'s Mot.) Section 3691, however, confers a statutory right when the contumacious conduct also constitutes a separate criminal offense. 18 U.S.C. § 3691. As the Court explained in its December 13, 2016 Order, Defendant's conduct arising out of his disobedience of Judge Snow's preliminary injunction does not constitute a separate criminal offense, and therefore, § 3691 does not apply. (*See* Doc. 60, Dec. 13, 2016 Order at 2-3.)

criminal contempt when the possible sentence was limited to a maximum of six months in prison. *See e.g., Taylor v. Hayes*, 418 U.S. 488, 496 (1974) ("[A] State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months"); *United States v. Aldridge*, 995 F.2d 233 (9th Cir. 1993) (Table) (concluding that Defendant had no right to a jury trial because the district court did not sentence him to more than six months' imprisonment or fine him more than $500); *United States v. Berry*, 232 F.3d 897 (9th Cir. 2000) (Table) (concluding that when the trial court stipulates that it will not impose a sentence longer than six months, Defendant was not entitled to a jury trial).

The Court finds that this case is appropriate for a bench trial. This case focuses on the application of facts to the law to determine if Defendant intentionally violated a court order. It does not necessitate an inquiry into the "'motives of the referring judge". At oral argument, Defendant further explained that he thought there was "anger" on the referring judge's part in making the referral. (*Id*. at 17:2-7.) As the Court pointed out at oral argument, the referring judge's motives are not relevant in determining if Defendant's violations were in fact willful. (*Id*. at 17:11-16.) While Defendant argues that a jury trial will prevent any appearance of impropriety, this Court does not believe there is any such appearance. Therefore, the Court grants Government's Request for a Bench Trial and denies Defendant's Cross-Motion Requesting Jury Trial.

IT IS ORDERED granting the Government's Brief in Support of Request for Bench Trial (Doc. 61).

IT IS FURTHER ORDERED denying Defendant's Cross-Motion Requesting Jury Trial (Doc. 62).

Dated this 1st day of March, 2017.

[Signature]

Susan R. Bolton

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,
Plaintiff,
v.
Joseph M. Arpaio,
Defendant.

No. CR-16-01012-001-PHX-SRB

ORDER

The Court has reviewed Defendant's Motion to Dismiss, or in the Alternative, Motion for Trial by Jury (Doc. 130). The motion will be denied for two reasons. First, the motion was filed after the deadline set by the Court for pre-trial motions. Second, the Court has already considered and ruled on the issues raised in Defendant's motion. See, Docs. 60 and 83.

IT IS ORDERED denying Defendant's Motion to Dismiss or in the Alternative Motion for Trial by Jury (Doc. 130).

Dated this 11th day of April, 2017.

[Signature]
Susan R. Bolton
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,
Plaintiff,
v.
Joseph M. Arpaio,
Defendant.

No. CR-16-01012-001-PHX-SRB

ORDER TO SHOW CAUSE

This Order is entered pursuant to 18 U.S.C. § 401 and Rule 42 of the Federal Rules of Criminal Procedure. On October 11, 2016, the Government stated its intention to prosecute Joseph M. Arpaio for contempt under 18 U.S.C. § 401(3) based on the Order Re Criminal Contempt entered by United States District Judge G. Murray Snow on August 19, 2016, in the *Melendres* matter. See *Melendres v. Arpaio*, no. 2:07-cv-02513 (D. Ariz. Aug. 19, 2016), Order Re Criminal Contempt, ECF No. 1792. For the reasons set forth below, the Court issues this Order to Show Cause as to whether Joseph M. Arpaio should be held in criminal contempt for willful disobedience of Judge Snow's preliminary injunction of December 23, 2011, entered in *Melendres*. *See Melendres*, Order, ECF No. 494.

The essential facts constituting the charged criminal contempt are as follows:

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. *See Melendres*, Order, ECF No. 494. The preliminary injunction also ordered that the mere fact that someone was in the country without authorization did not provide, without more facts, reasonable suspicion or probable cause to believe that such a person had violated state law. *See id.* Judge Snow noted that Sheriff Arpaio admitted he knew about the preliminary injunction upon its issuance and thereafter. (Doc. 1677 ¶ 15.) Sheriff Arpaio's attorney stated to the press that the Sheriff disagreed with the Order and would appeal it, but would also comply with it in the meantime. (*Id.* ¶ 14.) Sheriff Arpaio's attorney and members of his command staff repeatedly advised him on what was necessary to comply with the Order.

Almost immediately after the court entered its original October 2, 2013 injunctive order, (Doc. 606), Judge Snow had to amend and supplement the order and enter further orders because: (1) the Sheriff refused to comply in good faith with the order's requirement that he engage in community outreach, (Doc. 670; *see also* Doc. 1677 ¶¶ 368, 368 n.13), and (2) the Sheriff and his command staff were mischaracterizing the content of the order to MCSO deputies and to the general public, (Doc. 680; *see also* Doc. 1677 ¶ 367). Within one month of those revisions, the

Defendants disclosed to the court the arrest, suicide, and subsequent discovery of misconduct of Deputy Ramon "Charley" Armendariz who had been a significant witness at the trial of the underlying matter. Among other things, the disclosure of Armendariz's misconduct eventually resulted in the determination that the Sheriff had intentionally done nothing to implement the court's 2011 preliminary injunctive order; and the Sheriff was not investigating the allegations of misconduct in good faith—especially those that pertained to him or to members of his command staff.

The MCSO continued to stop and detain persons based on factors including their race, (*id.* at ¶ 161), and frequently arrested and delivered such persons to ICE when there were no state charges to bring against them, (*id.* ¶¶ 157–61). 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. (*Id.* ¶¶ 58–60.) Since Sheriff Arpaio had previously taken some of his arrestees to the Border Patrol when ICE refused to take them, he determined that referral to the Border Patrol would serve as his "back-up" plan for all similar circumstances going forward. (*Id.* ¶¶ 40–41.) Sheriff Arpaio's failure to comply with the preliminary injunction continued even after the Sheriff's appeal to the Ninth Circuit Court of Appeals was denied. (*Id.* ¶¶ 42–44.) When Plaintiffs accused Sheriff Arpaio of violating the Order, he falsely told his lawyers that he had been directed by federal agencies to turn over persons whom he had stopped but for whom he had no state charges. (*Id.* ¶¶ 50–52.) Nevertheless, Sheriff Arpaio's lawyer still advised him that he was

likely operating in violation of the preliminary injunction. (*Id.* ¶ 53.) Although 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. (*Id.* ¶¶ 55–57.) After exhausting "all of its other methods to obtain compliance," Judge Snow referred Sheriff Arpaio'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. (Order Re Criminal Contempt at 12.)

THEREFORE, the Court issues a notice to show cause as to whether Joseph M. Arpaio should be held in criminal contempt for willful disobedience of Judge Snow's preliminary injunction of December 23, 2011.

IT IS FURTHER ORDERED that Trial for this matter is set for **December 6, 2016 at 9:00 a.m.** in the Sandra Day O'Connor U.S. Courthouse, 401 W. Washington Street, Courtroom 502, Phoenix, Arizona 85003.

Dated this 25th day of October, 2016.

[Signature]

Susan R. Bolton

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,
Plaintiff,
v.
Joseph M. Arpaio,
Steven R. Bailey,
Michele Iafrate, and
Gerard Sheridan
Defendants.

No. CR-16-01012-PHX-SRB

ORDER

At issue are Defendants' Memoranda Re: Statute of Limitations (Docs. 34, 35, 37, & 38).[1]

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1 Each Defendant filed a separate memorandum briefing the applicable statute of limitations. The briefs all raise similar arguments, so the Court will refer to one brief throughout.

I. BACKGROUND

This case arises from Judge G. Murray Snow's Order Re Criminal Contempt directing this Court to determine whether Defendants Joseph M. Arpaio, Steven R. Bailey, Michele Iafrate, and Gerard Sheridan should be held in criminal contempt for their conduct during their civil case. (Doc. 1, Aug. 19, 2016 Order at 31-32.) This order addresses the criminal contempt referral of Sheriff Arpaio and Chief Deputy Sheridan involving the non-disclosure of 50 Montgomery hard drives and the criminal contempt referral of Chief Deputy Sheridan, Captain Bailey, and Ms. Iafrate involving the concealment of 1,459 IDs. (Order at 6-7, 10, 15, 18-19, 27.) These aspects of Judge Snow's civil contempt proceeding have a long history which the Court briefly summarizes here. In the underlying civil suit, Judge Snow appointed a Monitor to oversee various Maricopa County Sheriff's Office internal affairs investigations. Defendants were required to turn over various related materials to the Monitor. Judge Snow ordered Sheriff Arpaio to oversee preservation and production of the Montgomery materials, which he did not do. (Order at 6-7.) Chief Deputy Sheridan also did not produce the 50 Montgomery hard drives. (Order at 15.) The Monitor discovered the hard drives in July 2015. (Order at 16.) Chief Deputy Sheridan also concealed 1,459 IDs that were found during the course of an internal affairs investigation and ordered Captain Bailey to suspend the investigation. (Order at 10, 18.) Chief Deputy Sheridan consulted Ms. Iafrate about whether they had to disclose the IDs to the Monitor, and she told them not to disclose the IDs. (Order at 19, 27.) Captain Bailey told the Monitor that they had not found any new

IDs. (Order at 20, 25.) The Monitor was informed about the IDs on July 22, 2015. (*Id.*) Judge Snow held a hearing on July 24, 2015, wherein each Defendant testified regarding their participation in the concealment of the IDs and/or the Montgomery materials.

Judge Snow issued his Order Re Contempt on August 19, 2016 directing this Court to determine whether Sheriff Arpaio, Chief Deputy Sheridan, Captain Bailey, and Attorney Iafrate should be held in criminal contempt. (Doc. 1, Order at 32.) Judge Snow's order set forth three categories of contumacious conduct: Defendant Arpaio's violation of the court's preliminary injunction, Defendants Arpaio and Sheridan's participation in the non-disclosure of the Montgomery hard drives, and Defendants Sheridan, Bailey, and Iafrate's concealment of the IDs. (*See* Order at 1-2.) The Court held a status conference on October 11, 2016. (Doc. 24, Minute Entry.)

At the status conference, the Government asserted that there were two statutes governing criminal contempt, 18 U.S.C. § 401 and 18 U.S.C. § 402. (Doc. 27, Rep.'s Tr. of Status Conference at 5.) Section 401 addresses disobedience of court orders. (*Id.*) Section 402 addresses a subset of that conduct, conduct that also constitutes a criminal offense. (*Id.*) The Government argued that Sheriff Arapio's contumacious conduct of violating Judge Snow's preliminary injunction order is punishable under Section 401, but because non-disclosure of the Montgomery hard drives and concealment of the IDS also constitute obstruction of justice, a separate crime, this contumacious conduct is punishable under Section 402. (*Id.* at 6.) Contumacious conduct subject to Section 401 does not have a statute of limitations;

however conduct subject to Section 402 has a one-year statute of limitations, which the Government claimed had run. 18 U.S.C. § 3285; (Rep.'s Tr. of Status Conference at 7-8.) The Court directed counsel to file briefs regarding the statute of limitations and possible tolling of the statute as relevant to the Government's position on the charges arising from the Montgomery hard drives and the IDs. (Doc. 24, Minute Entry.) The parties entered into an agreement tolling the statute of limitations that day awaiting a determination of the issue by the Court. (*Id.*) The Court now considers whether the statute of limitations applicable to contumacious conduct under 18 U.S.C. § 402 has run.

II. LEGAL STANDARD AND ANALYSIS

Defendants argue that a criminal contempt prosecution related to the nondisclosure of Montgomery materials and the IDs cannot be brought because 18 U.S.C. § 3285 sets a one year statute of limitations for contumacious conduct punishable under Section 402, which expired prior to Judge Snow's order. (Doc. 34, Mem. Regarding Expiration of Statute of Limitations under 18 U.S.C. § 3285 at 2-3.) "No proceeding for criminal contempt within section 402 of this title shall be instituted against any person, corporation or association unless begun within one year from the date of the act complained of." 18 U.S.C. § 3285. Defendants Arpaio and Sheridan's contumacious conduct arose from their actions regarding the Montgomery hard drives and Defendants Sheridan, Bailey, and Iafrate's contumacious conduct arose from concealment of the IDs. At latest, their conduct ceased on July 24, 2015 when they were called to the hearing before Judge Snow because at that time the Monitor had possession of the

undisclosed evidence. Judge Snow's order was not issued until August 19, 2016, more than three weeks after the statute of limitations expired. Additionally, there is no basis for tolling the statute of limitations because any potentially excludable time periods occurred prior to the July 24, 2015 hearing. Therefore, the Court cannot proceed with criminal contempt charges against Defendants Arpaio and Sheridan for their conduct regarding the nondisclosure of the Montgomery hard drives or against Defendants Sheridan, Bailey, and Iafrate for their conduct regarding concealment of the IDs.

III. CONCLUSION

Because 18 U.S.C. § 3285 provides a one year statute of limitations for criminal contempt that is also a crime and the contumacious conduct at issue ended more than one year ago, the Court dismisses Defendants Sheridan, Bailey, and Iafrate from the criminal contempt proceedings and will proceed against Defendant Arpaio only for those allegations of criminal contempt in the Order to Show Cause (Doc. 36).

IT IS ORDERED dismissing Defendants Sheridan, Bailey, and Iafrate.

Dated this 13th day of December, 2016.

[Signature]

Susan R. Bolton

United States District Judge

APPENDIX F

18 U.S.C.A. § 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C.A. § 1509

Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a

court of the United States, shall be fined under this title or imprisoned not more than one year, or both.

No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime.

A.R.S. § 13-2810

A. A person commits interfering with judicial proceedings if such person knowingly:

1. Engages in disorderly, disrespectful or insolent behavior during the session of a court which directly tends to interrupt its proceedings or impairs the respect due to its authority; or

2. Disobeys or resists the lawful order, process or other mandate of a court; or

3. Refuses to be sworn or affirmed as a witness in any court proceeding; or

4. Publishes a false or grossly inaccurate report of a court proceeding; or

5. Refuses to serve as a juror unless exempted by law; or

6. Fails inexcusably to attend a trial at which he has been chosen to serve as a juror.

B. Interfering with judicial proceedings is a class 1 misdemeanor.

A.R.S. § 13-1303

A. A person commits unlawful imprisonment by knowingly restraining another person.

B. In any prosecution for unlawful imprisonment, it is a defense that:

1. The restraint was accomplished by a peace officer or detention officer acting in good faith in the lawful performance of his duty; or

2. The defendant is a relative of the person restrained and the defendant's sole intent is to assume lawful custody of that person and the restraint was accomplished without physical injury.

C. Unlawful imprisonment is a class 6 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place before arrest in which case it is a class 1 misdemeanor.

D. For the purposes of this section, "detention officer" means a person other than an elected official who is employed by a county, city or town and who is responsible for the supervision, protection, care, custody or control of inmates in a county or municipal correctional institution. Detention officer does not include counselors or secretarial, clerical or professionally trained personnel.