Case No. 17-10448

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

JOSEPH M. ARPAIO,

Defendant/Appellant.

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

APPELLANT'S REPLY BRIEF

Dennis I. Wilenchik, #005350
John D. Wilenchik, #029353
Wilenchik & Bartness, P.C.
2810 North Third Street
Phoenix, AZ 85004
Tel.: (602) 606-2810
admin@wb-law.com

Mark Goldman, #012156
Goldman & Zwillinger, PLLC
17851 North 85th Street, Suite 175
Scottsdale, AZ 85255
Main: (480) 626-8483
docket@gzlawoffice.com

Attorneys for Appellant/Defendant Joseph M. Arpaio

May 13, 2019

TABLE OF CONTENTS

(Note: Click View and Navigation Pane to View Bookmarked Links)

Return to Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Return to Table of Contents

REPLY

Appellant hereby files his Reply brief. By filing this Reply, Appellant does not waive his request that the Court strike the brief by Christopher G. Caldwell on behalf of the "United States," since the United States is already represented by the Department of Justice in this matter.

While undersigned counsel prefers not to use the names of other attorneys in briefing, or to attribute the arguments that they express to anyone but their client, the Court's unprecedented decision to appoint Mr. Caldwell—and the resulting "dueling briefs" filed for the United States—leave counsel with no reasonable alternative but to refer to Mr. Caldwell's views as those of the "Special Prosecutor" or of "Mr. Caldwell," and not the United States. When this brief refers to the views of the United States (or the "Government"), it is referring to the views of the Department of Justice, as lawfully-appointed attorneys for the United States of America.

I. Response to "Jurisdictional Statement" by the "Special Prosecutor"

The Special Prosecutor argues that Appellant did not provide a "statement of jurisdiction." The Special Prosecutor entered this case late and so he may be forgiven for overlooking that Appellant was ordered to provide a separate jurisdictional statement over a year-and-a-half ago, which Appellant promptly provided. (See this Court's Order filed October 30, 2017, ordering that Appellant "show cause why it [the appeal] should not be dismissed for lack of jurisdiction" within ten days and suspending briefing; *see also* Appellant's "Response to Order filed Nov. 20, 2017,

Return to Table of Contents

Docket Entry # 8.) After Appellant filed a seven page statement of jurisdiction, the Ninth Circuit Motions panel made additional requests of the parties (it ordered the United States to indicate what its position on the appeal would be, and later requested briefing on the appointment of a special prosecutor); and then the panel subsequently made several orders regarding the appointment of a "special prosecutor," while merits briefing was suspended, effectively assuming jurisdiction over the matter, before setting deadlines for merits briefing. Appellant's jurisdictional statement was already contained in that 7-page statement, which is again incorporated herein. The United States' statement of jurisdiction is also in accord with Appellant's previously-filed statement.

With respect to the Special Prosecutor's position that the "Contempt Order" is not appealable: while the Special Prosecutor does not define "Contempt Order," Appellant assumes the Special Prosecutor is referring to the verdict entered on July 31, 2017 (Doc. 210). Appellant disagrees with the Special Prosecutor's statement that the verdict is unappealable "until the court imposes sanctions for it," inasmuch as that implies the lower court could still impose sanctions—because clearly, it never will. And strictly, the order at issue is the district court's October 17th, 2017 order denying Appellant's motion to vacate the verdict (Doc. 251), not the verdict itself. All parties, and the "Special Prosecutor," agree that the verdict itself is unreviewable due to mootness.

Return to Table of Contents

II. Response to Special Prosecutor's Statement of the Case

For what it is worth, the MCSO's authority was not "revoked" in 2009; instead, it expired, and the administration of Barack Obama decided not to renew it.

Both the United States' and the "Special Prosecutor's" briefs take some liberties with the actual language in the preliminary injunction order, which even this Court struggled to interpret during oral argument on appeal from it several years ago. The evidence presented at trial concerning the actual language in that order, and how it was understood by the MCSO and its own lawyer at the time, speaks directly to how unclear it actually was to those who were tasked with implementing it (to the point that an internal "training" class never came to fruition, because nobody at the department could understand what it really meant). Like the district court below, both the Government and the Special Prosecutor are selective in their quotation of testimony by the MCSO's former lawyer, Mr. Casey—who in fact testified that he explained to Appellant that he had a "good faith" argument that the MCSO's operations did not violate the Order, and that he believed the judge only "likely, *but not definitively*" would consider its policies to be a violation. (Trial transcript, Doc. 176, pages 148 and 230, emphasis added.)

The Special Prosecutor's brief incorrectly states that the PIO (preliminary injunction order) was "designed" to remedy the practice of turning over illegal aliens to ICE and Border Patrol—but in fact, that issue never came up until long after the PIO was entered, and the fact that the PIO did not explicitly contemplate or even address it was at the very heart of this case. The PIO was "designed" to address the MCSO's alleged practice of investigating and detaining persons solely for civil

Return to Table of Contents

immigration violations, even though the MCSO was no longer deputized to do so on its own as of 2011—i.e., it was no longer deputized to enforce federal civil immigration law under "287(g)." The PIO concluded that the MCSO, as a state criminal law enforcement agency, did not have the "inherent" authority to enforce federal civil immigration law, and therefore it could not detain anyone solely for a civil immigration issue, "without more." (See PIO, Doc. #494, *Melendres v. Arpaio*). The evidence showed that Appellant and MCSO believed the Order allowed them to continue to contact Border Patrol and transport suspected aliens at its direction, which was later found to be in civil contempt of the PIO. But the PIO only enjoined the MCSO from enforcing federal immigration law on its own and "without more" after the end of its 287(g) authority, the MCSO and Appellant reasonably believed that their (very public and open) policy was not in violation of the PIO, particularly given that federal law expressly authorizes state law enforcement to "cooperate" with federal agencies like Border Patrol, even in the absence of 287(g) authority. While this issue was addressed extensively in the final permanent injunction (which was never violated), it was not addressed in the PIO at all. Certainly, nobody—not even a trained attorney like Mr. Casey, or the members of this Court when it reviewed the PIO years ago—could conclude that the PIO was "clearly and definitely" "designed" to address the issue of cooperation with federal authorities, since it does not even mention it.

In light of all the foregoing, Appellant's public statements that he would continue to enforce federal immigration law are of little import, since even his own

Return to Table of Contents

lawyer had advised that his office could make a "good faith" argument for continuing to cooperate in enforcement with immigration authorities, and even the PIO provided that the MCSO could enforce immigration law, so long as the agency had something "more" than its own unilateral (and expired) 287(g) authority to do so.

The Special Prosecutor incorrectly writes that Appellant "falsely told his lawyers that he had been directed by federal agencies to turn over persons for whom he had no state charges."[1] The only evidence at trial showed that Border Patrol had in fact directed the MCSO to contact it regarding any illegal aliens that it encountered, and that Border Patrol's policy was to accept all aliens that the MCSO contacted it about, as well as to direct the MCSO to transport them to Border Patrol (unless Border Patrol could pick them up—in which case, Border Patrol would request that the MCSO detain them until Border Patrol could pick them up). (*See* testimony of Chris Clem, Salvador Hernandez, Joseph Sousa at trial.)

Finally, the Special Prosecutor fails to mention that the permanent injunction entered in May 2013 did squarely provide that the MCSO could not detain illegal aliens for purposes of transporting them as requested by Border Patrol—and that the evidence showed that there were zero subsequent violations of that very clear and definite permanent injunction order. While Appellant stipulated to being in civil contempt of the PIO, inasmuch as the judge's permanent injunction determined "after the fact" that cooperation with Border Patrol was to be enjoined, Appellant

[1] Confusingly, the Special Prosecutor appears to be citing documents from the *Melendres* civil case for statements such as this, as opposed to actual evidence from the criminal case at bar.

Return to Table of Contents

has always vigorously contended that the PIO was not clear and definite to him or the MCSO beyond a reasonable doubt on this issue at the time that it was issued, and therefore that he did not willfully violate the PIO.

III. Response to Special Prosecutor's "Standard of Review"

While the issue on appeal is somewhat *sui generis,* and no decision (including *United States v. Schaffer,* 240 F.3d 35 (D.C. Cir. 2001), appears to have articulated an explicit standard of review for it, this Court's decision in *United States v. Payton*, 593 F.3d 881, 884 (9th Cir. 2010) does seem to indicate that an abuse of discretion standard generally applies to a decision on whether or not to apply the rule of automatic vacatur. But as the United States points out, the district court committed an error of law in determining how to apply the law of automatic vacatur to this case. "A district court by definition abuses its discretion when it makes an error of law," and "[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon v. United States*, 518 U.S. 81, 100 (1996). Therefore, "[l]ittle turns" "on whether we label review of this particular question abuse of discretion or de novo, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Id.*

Vacatur is not an "extraordinary" remedy, in the sense that it is rarely granted – rather, "automatic" vacatur has long been the "established practice" in this Circuit and across the country. *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995)("we have treated automatic vacatur as the 'established practice,' applying whenever mootness prevents appellate review"). The principle of automatic vacatur is unanimously

Return to Table of Contents

recognized and consistently applied in federal courts nationwide, such as in cases where the defendant dies pending appeal. *See e.g. United States v. Volpendesto,* 755 F.3d 448, 452 (7th Cir. 2014)("[b]ecause mootness occurs before the conviction can finally be confirmed, the longstanding and unanimous view of the lower federal courts is that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him").

IV. Response to Special Prosecutor's "Summary of Argument"

Mr. Caldwell's inflammatory statements that Appellant is trying to "avoid being held accountable," or trying to "operate above the law," truly beg the question – whose view is he expressing here, and why did the Court[2] appoint him to do so? As the Supreme Court counseled in *In re Murchison*, 349 U.S. 133, 136 (1955), "to perform its high function in the best way justice must satisfy the appearance of justice." Given that the Ninth Circuit appears to have "personally" appointed Mr. Caldwell (through what must have been *ex parte* communications that have never been disclosed) to "prosecute" this case, his tone and rhetoric raise serious concerns about the appearance of judicial bias in this matter. The charge here is for contempt of a judge's order, tried without a jury, and now the case is on appeal to the judiciary—so there is already a perceptible appearance of bias in the case (not to

[2] Mr. Caldwell appears to have had *ex parte* communications with Judge Tashima of this Court, for whom he used to work, before Judge Tashima voted to appoint him as a "Special Prosecutor" for the United States (even though the United States is already represented by the DOJ in this matter).

Return to Table of Contents

mention the effect that the Appellant's own political views have on many people). Mr. Caldwell's inflammatory and improper rhetoric, as a "Special Prosecutor" appointed by this Court, serves sadly to heighten the already constitutionally intolerable appearance of bias by this Court.

Mr. Caldwell's claim that "no court has adopted" the automatic vacatur rule is odd, at least if this Court is to be believed: "[W]e have treated automatic vacatur as the 'established practice,' applying whenever mootness prevents appellate review." *Dilley*, 64 F.3d at 1369.

As the Government points out, Mr. Caldwell is also incorrect when he says that "no court has held that mooted criminal cases must be vacated." The Government supplied cases from this Court, as well as from the Supreme Court, applying the rule of automatic vacatur to criminal cases: *United States v. Pool*, 659 F.3d 761, 761-62 (9th Cir. 2011)(en banc); *Payton*, 593 F.3d at 883-86; *Claiborne v. United States*, 551 U.S. 87, 87-88 (2007) (per curiam). These cases were decided subsequent to the 2004 *Tapia-Marquez* case, in which this Court remarked that the "Supreme Court has never applied *Munsingwear* in a criminal case." In short: since *Tapia*, both the Supreme Court and this Court have indeed applied *Munsingwear* to criminal cases. This is to say nothing of the "longstanding and unanimous" view that federal courts must vacate criminal cases mooted by the death of the defendant, which is clearly contrary to the "Special Prosecutor's" bald statement. *Volpendesto*, 755 F.3d at 452; *see also United States v. Oberlin*, 718 F.2d 894, 895-96 (9th Cir. 1983).

Return to Table of Contents

Contrary to what the Special Prosecutor says, the district court in this case did not "determine[] that the equities here did not compel vacatur." (SP Brief, page 11.) The district court's order, which speaks for itself, did not weigh any equities, much less those discussed in *Munsingwear*. Rather, the district court concluded that Appellant was not entitled to vacatur because the court felt that the "question of his guilt" had already been resolved. In doing so, the lower court was at pains to distinguish the *Schaffer* case – in which the *Munsingwear* equities were correctly applied – using reasoning that, as the Government points out, does not hold up on appeal.

Mr. Caldwell simply recites and adopts the same inaccurate characterization made by the district court concerning the posture of the *Schaffer* case when Mr. Schaffer was pardoned (Answering Brief, pages 11-12). The actual posture of that case was already addressed in the Opening Brief at length, and Mr. Caldwell makes no serious argument against it.

The Special Prosecutor spends a great deal of time trying to make it sound as though there are no established equitable principles for the Court to follow in determining whether to grant vacatur; but clearly, the Supreme Court and this Court's prior rulings do indeed create an "established" precedent, and they are not to be ignored. Those rulings are unanimous in articulating one basic equitable principle, which is that it is unfair to treat a ruling as final that will never be subjected to meaningful appellate review—in other words, to hold that the Defendant is forever convicted, but can never appeal his conviction. A federal pardon – whose

Return to Table of Contents

effect is, by law, to *lessen* the penalties of a conviction, not increase them – cannot somehow cause the defendant to suffer greater penalties under the conviction than would otherwise exist at law. And by vacating the conviction, the Court is not finding the Defendant innocent, nor is it somehow "expunging" the fact of his conviction. It is merely recognizing that finality was never reached about his guilt, something the lower court stubbornly refused to do.

V. Biddle rejected the acceptance requirement suggested in *Wilson* and applied by *Burdick*

Biddle clearly rejected the acceptance requirement suggested in *Wilson*, in ruling that the "convict's consent is not required" for a pardon to be effective: "[j]ust as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). And of course, *Biddle* is the Supreme Court's latest jurisprudence on the subject, coming twelve years after *Burdick* (which applied the much older "acceptance of a deed" principle from *Wilson*, decided in 1833). Aside from reading *Biddle* as a flat rejection of the older "acceptance of a deed" concept that turns up in *Burdick*, we can read both *Biddle* and *Burdick* as sharing an underlying theme that pardons are not to be applied as *harming* the pardonee in any way. In the earlier decision (*Burdick*), the Supreme Court found that a pardonee could "reject" a pardon that was intended to force him to testify against his will (by granting him immunity, thereby depriving him of his Fifth Amendment rights). And in *Biddle*, the Supreme

Return to Table of Contents

Court found that the pardonee had no power to accept or reject a pardon that had the effect of preventing him from being put to death. In both cases, the Supreme Court allowed the pardon to have only those legal effects that would cause the criminal judgment to inflict less harm, not more. In both cases, the underlying motivation for the Supreme Court's opinion was that a pardon constitutes a "determination of the ultimate authority that the public welfare will be better served by inflicting *less* than what the judgment fixed." *Biddle*, 274 U.S. at 486 (emphasis added). In other words, a pardon's consequence on the normal operation of law, including the finality of judgments, must always result in *less* harm to the pardonee. Here, if not for the pardon, Appellant would have been sentenced to judgment, and then had the opportunity to appeal his conviction. Because of the pardon, he cannot appeal his conviction. If the Court were to deny vacatur, then it would in fact *increase* the penalties of his conviction, by making it both permanent and unappealable. This is clearly at odds with the Supreme Court's jurisprudence on pardons, which provides that as a "part of the Constitutional scheme," a pardon may only result in the judgment inflicting less punishment, not more.

While Mr. Caldwell curiously asserts that Appellant "lobbied" for a pardon, the record actually supports just the opposite – Appellant actually did *not* apply for a pardon, as nearly all pardonees typically do.[3] The Special Prosecutor also makes a

[3] Somewhere in his brief, the "Special Prosecutor" makes an argument that the pardon was not issued because of a belief in the Defendant's innocence. In support of this, the "Special Prosecutor" cites only a press statement by the President concerning the pardon (which is of course outside of the record on appeal), and which only mentions Defendant's record in law enforcement as a basis for the pardon. However, in the days before he granted a pardon, the President also made

Return to Table of Contents

spurious argument that Appellant is trying to "expand" the powers of the Executive, "to not just eliminate punishment by the executive, but vacate convictions by the judiciary." It is well-established that the President has the power to pardon criminal contempt of court, *see Ex parte Grossman*, 267 U.S. 87 (1925). And of course he could do so at any stage of the proceeding—well before a conviction, or even before a criminal contempt charge is brought. The notion that the issue on appeal carries some special harm in that regard, i.e. that pardoning someone after being convicted but before sentencing is somehow a special threat to the powers of judiciary, is completely unfounded. And of course, this line or argument is about as productive as accusing the judiciary of trying to "undermine" the President's pardon power, by making a pardoned conviction both permanent and unreviewable. The Court should give these attempts to create separation-of-power struggles no more consideration than the Supreme Court already gave to them in *Ex parte Grossman*, in which it squarely considered and disapproved of the notion that pardoning criminal contempt should be treated any differently than any other crime.

The Special Prosecutor cites *United States v. Buenrostro*, 895 F.3d 1160 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 438 (2018) (Answering Brief, Page 22), which Appellant already distinguished in his Opening Brief as being a case that concerned a final judgment and expungement thereof. Again, the equitable principle is that a

public statements that Appellant should have received a jury trial, and that he was convicted for doing his job. https://www.businessinsider.com/joe-arpaio-pardon-trump-arizona-rally-speech-2017-8. These statements clearly indicate that the pardon was issued due to a belief in Defendant's innocence and that there were flaws in the judicial process.

Return to Table of Contents

judgment which is not final should not be treated as one, especially not as the consequence of presidential pardon, whose legal effect must always be to *reduce* the legal penalties of a judgment or conviction, not increase them.

Finally, the Special Prosecutor quotes *Burdick* out of context (Answering Brief, page 22), and flatly mischaracterizes what the case said. When *Burdick* says that "Circumstances may be made to bring innocence under the penalties of the law," it is not referring to how a "defendant could vindicate himself on appeal" (as the Special Counsel says); the case is referring to how an innocent person can be convicted of a crime. Again, in support of its view that pardons should not be applied so as to *increase* the penalties on a pardonee, the Supreme Court in *Burdick* was making the point that a pardonee should have the right to reject a pardon if he does not want the suffer the stigma that certain members of the public may attach to it. When read in context, this is what the infamous "confession of guilt" language in *Burdick* really means: it is simply saying that some members of the public may see the "acceptance" of a pardon as implying guilt, and so some people may want to "reject" their pardon. The Supreme Court was certainly not trying to turn pardons into some kind of a "trap," by which the legal penalties of a judgment might actually *increase*, as the Special Prosecutor is explicitly arguing for. Not only would this defeat the express purpose and public policy behind pardons, but it would be clearly inconsistent with the actual holdings in all of the Supreme Court's pardon cases.

The Special Prosecutor accuses the Court of Appeals in *Schaffer* of "ignor[ing]" the Supreme Court's precedent – when in fact, the *Schaffer* court's

Return to Table of Contents

opinion contains a fuller and more honest discussion of Supreme Court precedent than he chooses to give (Answering Brief, page 25). And then the "Special Prosecutor" misrepresents to this Court that "the [*Schaffer*] defendant's conviction had been vacated when he was pardoned." As the Opening Brief carefully explained, Schaffer was actually sentenced at the time of his pardon, and the sentence had been stayed during appeal. The decision in *Schaffer* is in accord with the Supreme Court's jurisprudence on pardons, including *Biddle* and its determination that pardons are imposed without consent. According to *Biddle*, rather than being a "private act" of the defendant, or even of the President, a pardon is imposed by the public as part of the "Constitutional scheme." As a matter of law, a pardon is not a voluntary, private acts by a litigant to moot out an appeal, like the Supreme Court discussed in *Munsingwear*. Even the older jurisprudence that the Special Prosecutor wants to rely on, like *Burdick* and the even older nineteenth-century authorities which it cites, talk about pardons in terms of being acts of "grace." *Schaffer* correctly read the Supreme Court's jurisprudence as counseling for vacatur, and not for increasing the penalties of conviction by making the judgment permanent and unreviewable.

The Special Prosecutor claims that the "order vacating the verdict against Schaffer" "was still in effect" when he was pardoned (Answering Brief, page 28 n. 7 and elsewhere). Very simply, it was not. The mandate had not issued, and the appellate court's decision to grant a new trial was headed into a rehearing *en banc*. Undersigned counsel actually looked up the district court's docket in the *Schaffer* case (some time ago), and the last entry before his pardon was an order staying

Return to Table of Contents

Schaffer's sentence pending the appellate court's *en banc* rehearing. Finally, the exact posture of the *Schaffer* case makes no genuine difference anyway, as both the Opening Brief and Government's Answering brief argue. But the lower court and Special Prosecutor's persistent misrepresentation of the *Schaffer* case's actual posture at the time of his pardon is no less than frustrating (and appears deliberate).

VI. Response to the "Underlying Merits" Portion of the Special Prosecutor's Brief

Appellant generally agrees with the United States and the "Special Prosecutor" that the Court need not reach the underlying merits of what "would have been" his direct appeal of the verdict—although perhaps for slightly different reasons. Appellant included these arguments partly to demonstrate to this Court what his direct appeal would have been, and that it "would have had" merit, in case the Court does somehow find that a review would proper. Appellant also felt compelled to raise these issues, so as not to be accused of waiving them on appeal.

It is worth remembering that this is, ultimately, the reason for why the equitable rule of vacatur exists: there were very serious issues here for a direct appeal, including the fact that Defendant was wrongfully deprived of a trial by jury. It would be unfair for the Court to hold that because the conviction will never be "final," then it can never be reviewed; but that it is already so "final" that it can never be undone. Which is exactly what the Special Prosecutor argues for, on pages 29 and 30 of his Answering Brief and throughout.

Return to Table of Contents

The Special Prosecutor incorrectly implies that the basis for the rule that a pardon moots out substantive appeals has to do with "admitting guilt" (rather than mootness)(Answering Brief, page 31); a closer review of the authorities that he cites reveals no genuine support for that position. The Special Prosecutor strangely contends that *Burdick* "explicitly" created some kind of "choice" for pardonees to be pardoned or to "roll the dice on appeal," which of course appears nowhere in the actual *Burdick* opinion, which we can all read for ourselves. (Page 32.) Even more curiously, the Special Prosecutor claims that Appellant "cannot have his cake and eat it too"—but suffering a conviction that is both permanent and impossible to appeal is certainly not a blessing. If anything, it would allow the lower court to "have its cake and eat it too," by making its verdict both unreviewable and permanent. And in reality, to vacate a conviction is not to say that the Defendant was innocent or guilty – it just means that the ultimate legal question of the Defendant's guilt was never fully decided, and is therefore "lost" to mootness forever. *Schaffer*, 240 F.3d at 38. It is the only fair solution, by which nobody is "having and eating" their cake, but instead the record is made to accurately reflect that no final decision was ever reached.

The "Special Prosecutor" writes (and unfortunately, with a colorable degree of obnoxiousness that pervades his entire brief), that "It is no wonder, then, that Arpaio does not cite a single case holding that the collateral consequences doctrine – or any other—guarantees a pardoned defendant the right to appeal his conviction." (Answering Brief, page 33). While Appellant is (and always has been) content to

Return to Table of Contents

concede mootness on the merits of his conviction, there is in fact (in candor to the Court) state court jurisprudence holding that the proper remedy for mootness in a criminal case, when caused by a pardon, is to hear the merits on appeal, because of the collateral consequences doctrine. *See e.g. State v. Jacobson*, 348 Mo. 258, 262–63, 152 S.W.2d 1061, 1064 (1941):

> As to the proposition that the questions involved have been rendered moot by reason of the pardon, it may be said that the situation is not wholly unlike that presented where a defendant has served his sentence before the determination of his appeal. The weight of authority seems to be that this makes no difference, and does not affect his right to prosecute the appeal. [Citing cases in Indiana, Wisconsin, Alabama.]
> …
> Under the circumstances outlined, it seems clear that an accused is entitled to an opportunity, in the same judicial proceeding, to remove the discredit and stigma flowing from the judgment of conviction, notwithstanding the conviction may no longer be regarded as subsisting. The fact that he was convicted remains. In this connection it may not be amiss to observe that should defendant ever be so unfortunate as to be again charged with a crime punishable by imprisonment in the penitentiary, he would, upon conviction, be subject to the more severe penalties prescribed by our habitual criminal statute. By its very terms it is made applicable to subsequent offenders who shall have been previously *discharged, either upon pardon or upon compliance with the sentence* (Italics ours.) There is still a substantial element of controversy existing…

(Internal citations omitted.)

But, again: Appellant does not disagree with the United States, or even with the "Special Prosecutor," that the Court need not reach the merits of the underlying appeal, because of mootness. As the Government points out, a pardon in the federal system—in contrast to a state-law pardon (such as was discussed in Jacobson,

Return to Table of Contents

above)—should operate with exceptional strength to remove any legal consequences to a conviction, especially a nonfinal conviction. Therefore, a pardoned conviction should not have any collateral consequences that would make it worthy of addressing on appeal. It is for this reason—namely, to ensure that there are no collateral consequences in light of the federal pardon—that the Court should simply vacate the conviction and end the case.

VII. The "carveout" in Section 402 for actions "brought or prosecuted in the name of, or on behalf of, the United States" does not apply

Nevertheless, Appellant addresses arguments made by the Special Prosecutor regarding the merits. Again, in (gratuitously) noxious fashion, the court-appointed "Special Prosecutor" tries to chastise Appellant for "offer[ing] no authority to support his argument" regarding the carveout in Section 402 "beyond a single unexplained cite to *United States v. Pyle*." (Answering Brief, page 35.) In fact, Appellant's originally-filed Opening Brief contained a lengthy discussion of *Pyle* that ran several pages; but this Circuit summarily refused to allow for an extended brief, causing Appellant to file an Amended Brief that contained only this citation. (For the Circuit to be ordering Appellant to say less on the one hand, but appointing a "Special" prosecutor to chastise him for not saying more, does not seem fair.)

Appellant's original discussion of *Pyle* follows. But frankly, the "Special Prosecutor's" argument on this point hold very little merit on its face. The United States did not intervene in *Melendres* until after the case was over, and until after contempt proceedings had already been initiated—over three years after the PIO was

Return to Table of Contents

entered. The PIO was clearly not entered in a case that the United States "brought or prosecuted." Nothing the "Special Prosecutor" cites genuinely supports anything to the contrary.

In *United States v. Pyle*, the District Court for the Eastern District of Pennsylvania considered whether a criminal contempt proceeding brought by private parties, to which the Government was joined as a party, was subject to the exception in Section 402 for suits "brought or prosecuted in the name of, or on behalf of, the United States." 518 F. Supp. 139, 146 (E.D.Pa. 1981). The facts in this case are even stronger than those in *Pyle*, where the Court nevertheless held that the matter was not brought or prosecuted by the Government. In *Pyle*, as in this case, the suit was originally brought by private parties, and the alleged criminal contempt arose out of the violation of a preliminary injunction order; however, in *Pyle*, the private plaintiffs named the Government in the original Complaint (as a defendant, amongst other party defendants), and the Government joined in the plaintiffs' motion for preliminary injunction that resulted in the order out of which the criminal contempt arose (after the Government had taken a position in support of the plaintiffs, and otherwise given them "moral support"). *Id.* at 157. In contrast, the Government did not join[4] *Melendres* until four years, three months, and fifteen days after the plaintiffs filed their motion[5] which resulted in entry of the preliminary injunction (or three years, seven months, and twenty-one days after the preliminary injunction was

[4] Doc. #1239.
[5] Doc. #421.

Return to Table of Contents

actually entered,[6] and years after the last date on which it was allegedly violated, in 2013). Nevertheless, the district court in *Pyle* concluded that the exception to 402 did not apply, because the Government "was not charged with the prosecution of the case" and "that responsibility remained, in principle and in fact, in the hands of the plaintiff class [who filed the case]." *Id.* at 150. The Government "did not even initiate the motion for a preliminary injunction in response to which the order allegedly violated by defendants was issued; it merely joined the motion which had previously been raised by [the private plaintiffs]." *Id.* "[T]he litigation was brought and prosecuted throughout by the plaintiffs alone." *Id*. at 157–58. Following a lengthy and erudite discussion of the historical background, legislative history, intent, and case law surrounding section 402, the district court therefore concluded that section 402 applied, and that the defendants were entitled to a jury trial. *Id.* Clearly, if the facts in *Pyle*—where the United States was a party to the case at its commencement (unlike here), and it even joined in the motion for preliminary injunction (unlike here)—were insufficient to make the case subject to the exception in Section 402, then the facts of this case are also insufficient. Finally, the court in *Pyle* noted that in *Clark v. Boynton* (discussed in the Opening Brief), a case in which the United States also intervened long "after the fact" (i.e. long after the order out of which the contempt arose was entered), "it was clear that [the Government] had not" "brought or prosecuted" the action within the meaning of 18 U.S.C.A. § 402. *Id.* at 148. The "Special Prosecutor's" discussion of *Wright*—a case in which the Government also

[6] Doc. #494.

Return to Table of Contents

played an early, "substantial," "formal" role in the litigation, and was "so closely" aligned with the plaintiffs "for so long" that it participated in obtaining the order that the defendant was accused of violating—simply does not apply here. *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963), a case discussed by *Pyle* and in which the United States also played an early and substantial role, is also of "slight value," (*quoting Pyle*, 518 F.Supp. at 149)—not only for the reasons stated in *Pyle*, but also because the United States played no substantial role in the *Melendres* litigation whatsoever, much less before or even at the time that the preliminary injunction order was entered. Merely by appearing in the *Melendres* case many years later, and as a prelude to prosecuting the defendant for criminal contempt of an order issued three years prior, the United States cannot convert that order into one that was entered in a case that it "brought or prosecuted"—or else the term would have no practical meaning whatsoever (i.e., the Government could convert any order into one entered in a case that it "brought or prosecuted," merely by appearing in the case shortly before it begins prosecuting the defendant, thereby avoiding Section 402's guarantee of a jury trial). The purpose of Section 402 was to ensure that the Government does not manipulate cases in order to avoid a trial by jury. Such a broad construction of the statute would not only be in derogation of its plain meaning, but it would also allow the Government to manipulate the system to avoid a jury trial in every case.

Return to Table of Contents

VIII. Remaining Merits Arguments

Appellant will quickly address the remaining "merits" arguments. The Special Prosecutor mischaracterizes Appellant's arguments in various places, including falsely asserting that the Appellant argued that the text of the PIO is "not evidence." Appellant's argument is that the district court's own interpretation of the PIO four years later is not evidence, as opposed to the PIO itself. The Special Prosecutor's other points candidly have little substance that has not already been addressed above, e.g. in the Response to his Statement of the Case. The "Special Prosecutor" has an apparent and disturbing tendency to deliberately mischaracterize arguments that were carefully articulated by the Appellant, and to make unprofessional statements like calling a contention by the Appellant "ludicrous." This deserves mention only because he was personally appointed by certain judges of this Court, and so his demeanor and conduct reflect on their apparent bias.

A. Clear and Definite Argument, Due Process Argument

The "Special Prosecutor's" description, (Answering Brief, page 52), of Appellant's "contumacious conduct" as "detaining and delivering undocumented persons to the federal government based solely on their immigration status" of course ignores his entire defense that this was done in cooperation with federal authorities, namely Border Patrol. Again, the issue of whether and how the MCSO could cooperate with federal authorities was never addressed in the PIO (and was not addressed until the permanent injunction); nor would it naturally flow from Judge Snow's reasoning in the PIO—namely, that the MCSO could not enforce

Return to Table of Contents

federal law because it no longer had 287(g) authority to do so—that it could not still cooperate with federal authorities in turning over known or suspected aliens.

The Special Prosecutor claims that Appellant cited no case to support that the due process clause's requirement of fair notice applies to court orders; and so, in typically flippant fashion, the Special Prosecutor concludes that must be because "none exists." (Answering Brief, Page 53). In fact, without even searching further, Appellant already cited *United States v. Trudell*, 563 F.2d 889, 891 (8th Cir. 1977), in which the court expressly found that any distinction between applying the vagueness doctrine (and fair notice requirements) to court orders as opposed to statutes is "irrelevant." (*Id*. at 892, n. 4). And of course, the Special Prosecutor gives no meaningful reason for why the vagueness doctrine would not apply to a court order the same as it would to a statute (and so to use his logic, it must be that no such rational "exists"). Given that a preliminary injunction order essentially serves to "create" law that the defendant may then be accused of violating criminally, it is functionally indistinguishable from a criminal statute, in this respect. The requirement that an order be "clear and definite" beyond a reasonable doubt is clearly based on these due process principles.

For examples of orders that were found to be insufficiently "clear and definite" to support a conviction for criminal contempt: *see Walling v. Crane*, 158 F.2d 80, 84 (5th Cir. 1946)(finding that "[a] decree of the Court containing only a negative command that the Defendant shall not fail to pay" wages to its employees was "too indefinite to support a conviction in contempt," since it was only an order

Return to Table of Contents

to "pay money to un-named persons in unascertained amounts"); *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 299 (4th Cir. 2000)(reversing criminal contempt conviction, where the defendant news reporter opened a court envelope that was marked "TO BE OPENED ONLY BY THE COURT," because the "decree" on the envelope was "insufficiently specific to support a criminal contempt conviction"—the envelope was already open, and the "decree" could be reasonably read "as referring only to the *initial* opening of the envelope," making the "decree" insufficiently "definite, clear, specific"); *United States v. Joyce*, 498 F.2d 592, 596 (7th Cir. 1974)(reversing criminal contempt conviction based on an order that directed the defendant to "use his best offices" to obtain records that had been requested by the Internal Revenue Service, and finding the order was "vague and ambiguous in its language and direction" because it did not "prescribe in definite and precise terms exactly what appellant was commanded to do in order to produce the requested records"); *see also Downey v. Clauder*, 30 F.3d 681, 686 (6th Cir. 1994)(reversing criminal contempt conviction where district court's order was "hardly a model of clarity").

Here, again, the PIO simply made a general command the Defendant and MCSO not detain persons based solely on their immigration status, "without more." It did not specifically address how or whether the MCSO could turn over illegal aliens to federal authorities, or whether acting in cooperation with them or at their direction would be the "without more." The PIO was constitutionally insufficient to support a criminal conviction.

Return to Table of Contents

B. Public Authority Defense

At trial, Agent Hernandez of the Border Patrol testified that CBP would "request" that the MCSO transport (i.e. turn over) illegal aliens to CBP, and that "[i]f we [CBP] are short on manpower and they [MCSO] had bodies and we couldn't respond to that area, I have instructed them to bring them to our checkpoint, yes." (Doc. 191, 859:3-15; 862:9-13.) The agent in charge of the entire Casa Grande station at all relevant times, Chris Clem, further testified that "it was an expectation of cooperation" that "[i]f you suspected you had an illegal alien, and you were willing to hold them, and we were able to respond," to temporarily detain them in order for CBP to take custody. (Doc. 185, 784:11-20.) "[I[f they [agencies such as MCSO] catch somebody they think is illegal, if we are available, give us a call. If we could respond, we would. I mean, that's pretty much a common practice that we still do to this day." (Doc. 185, 775:20-23.) Mr. Casey's letter to Plaintiffs in *Melendres* (Trial Exhibit 26, ER 9, page 299) also stated this. Because the uncontroverted evidence—even when viewed in a light most favorable to the Government—demonstrates that the Defendant and MCSO had a "reasonable belief that [they] were acting as authorized government agent[s] to assist in law enforcement activity at the time of the offense charged," the public authority defense also provided a complete defense, as a matter of law.

CONCLUSION

For all the foregoing reasons, the lower court's conviction must be vacated in light of the Presidential pardon.

Return to Table of Contents

RESPECTFULLY SUBMITTED May 13, 2019.

/s/ Dennis and Jack Wilenchik
Dennis I. Wilenchik, #005350
John D. Wilenchik, #029353
Wilenchik & Bartness, P.C.
2810 North Third Street
Phoenix, AZ 85004
Tel.: (602) 606-2810
E-mail: admin@wb-law.com

/s/ Mark Goldman
Mark Goldman, #012156
Goldman & Zwillinger, PLLC
17851 North 85th Street, Suite 175
Scottsdale, AZ 85255
Main: (480) 626-8483
E-mail: docket@gzlawoffice.com

Attorneys for Appellant/Defendant

Return to Table of Contents

CERTIFICATE OF COMPLIANCE

This reply brief is **6,995** words, excluding the portions exempted by FED. R. APP. P. 32(f) and U.S. CT. APP. 9TH CIR. 32.1. The brief's type size and type face comply with FED. R .APP. P. 32(a)(5) and (6) and U.S. CT. APP. 9TH CIR. 32.1.

RESPECTFULLY SUBMITTED May 13, 2019.

/s/ Dennis and Jack Wilenchik
Dennis I. Wilenchik, #005350
John D. Wilenchik, #029353
Wilenchik & Bartness, P.C.
2810 North Third Street
Phoenix, AZ 85004
Tel.: (602) 606-2810
E-mail: admin@wb-law.com

/s/ Mark Goldman
Mark Goldman, #012156
Goldman & Zwillinger, PLLC
17851 North 85th Street, Suite 175
Scottsdale, AZ 85255
Main: (480) 626-8483
E-mail: docket@gzlawoffice.com

Attorneys for Appellant/Defendant

Return to Table of Contents

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 13, 2019.

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

By */s/ Christine M. Ferreira, Legal Assistant*