GOLDMAN & ZWILLINGER PLLC
ATTORNEYS AT LAW

17851 N. 85th Street, Suite 175
Scottsdale, Arizona 85255
(480) 626-8483 Office - (480) 502-7500 Fax

WILENCHIK & BARTNESS
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION FOUNDED IN 1991

The Wilenchik & Bartness Building
2810 North Third Street Phoenix Arizona 85004
Tel.: 602-606-2810 Fax: 602-606-2811
contactwb@wb-law.com

Media Contact:

Jack D. Wilenchik, Esq.
Email: jackw@wb-law.com
(602) 606-2810 (Office)
(602) 475-6453 (Cell)

Mark D. Goldman, Esq.
Email: mgoldman@gzlawoffice.com
(480) 626-8483 (Office)
(480) 363-3773 (Cell)

STATEMENT REGARDING JOE ARPAIO

Joseph M. Arpaio was not convicted for "racial profiling," as certain news outlets have inaccurately reported.[1] His conviction had nothing to do with race.

The court's verdict, which can be found here,[2] does not even mention race. In fact, prosecutors admitted before trial that the Government was "unaware of facts" that would support "that he [Sheriff Joe] and other MCSO officers detained plaintiffs on the basis of race." (See here,[3] at page 27 of the pdf, which is numbered 21 at bottom.)

Mr. Arpaio respectfully requests that these statements be corrected, and that the correction be published in a manner comparable to that of the original publication and be disseminated to the same audience.

The 2011 Order that Mr. Arpaio was convicted of "willfully" violating can be accurately described as an order not to detain illegal aliens based solely on their status as illegal aliens, "without more." The actual Order read as follows:

> MCSO [Maricopa County Sheriff's Office] and all of its officers are hereby enjoined from detaining any person based only on knowledge or reasonable belief, without more, that the person is unlawfully present within the United States, because as a matter of law such knowledge does not amount to a

[1] As an example, an article dated today incorrectly states: "Arpaio was convicted for willfully disobeying the law **after a court ordered him to stop singling out drivers based on ethnicity** and detaining them without charges…He defied the orders of US District Court Judge G. Murray Snow **to stop the racial profiling** that was the subject of civil rights litigation." http://www.cnn.com/2017/08/28/politics/trump-arpaio-judges/index.html

[2] http://www.wb-law.com/wp-content/uploads/2017/08/07-31-17-Bench-verdict.pdf

[3] http://www.wb-law.com/wp-content/uploads/2017/08/05-02-17-US-Answering-Brief-5.pdf#page=27

reasonable belief that the person either violated or conspired to violate the Arizona human smuggling statute, or any other state or federal criminal law.

More Background on the Order and Conviction

An Arizona federal judge, sitting without a jury, convicted Joseph M. Arpaio of willfully disobeying a 2011 temporary Order ("preliminary injunction") which provided that the Maricopa County Sheriff's Office ("MCSO") could no longer act as federal immigration officers to enforce immigration law. President Obama's administration de-certified the MCSO as an immigration enforcement agency in October 2009, during the first year of President Obama's own term. The Bush administration had previously given the Sheriff's Department such authority, under the "287(g)" program.[4]

The 2011 temporary Order was not clear as to whether the Sheriff's Department could still cooperate with federal immigration officers by turning over illegal aliens who were apprehended for violating some other law, i.e. during the course of a lawful stop, which was and is a "common practice" by law enforcement agencies in southern Arizona (according to the testimony of the Special Agent in Charge of the Casa Grande Station at the time, who testified at trial).[5] Whether the Sheriff's Office could still detain illegal aliens for the sole purpose of immediately turning them over to federal authorities was not clarified until a 2013 Order from the court, which specifically provided that it could not. And it was at that time, out of respect for the court's clear 2013 order, that Sheriff Arpaio issued an order to his deputies to stop turnovers to federal authorities.

Every witness who testified at trial on this issue testified that the 2011 Order was unclear as to whether turnovers were legal or not—including MCSO Lieutenants, a Sergeant, and even the MCSO's own lawyer. The MCSO's lawyer testified that he

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[4] *See* 8 U.S.C. § 1357(g). The Department of Homeland Secretary, under former Secretary Janet Napolitano, declined to renew the Maricopa County Sheriff Office's "patrol" authority under Section 287(g) in around October 2009. Under the program, Sheriff's deputies were deputized to act as federal immigration officers, with the unilateral authority to investigate and detain suspected illegal aliens solely for being illegal aliens.

[5] As a (real) example: the vehicle of a man who was wanted on suspicion of armed robbery was pulled over by a Maricopa County Sheriff's deputy in 2012. When asked for his license and registration, the driver replied in Spanish that he did not have a driver's license, and produced only a Mexican passport. The passenger in the car, identified as the driver's brother, was also unable to produce any ID other than a Mexican passport and he spoke Spanish. The deputy asked if they were illegal aliens, and in response both admitted to being undocumented. The Sheriff's deputy booked the driver on suspicion of armed robbery, and contacted Border Patrol to ask what to do with the passenger. Border Patrol instructed the deputy to transport the passenger over to the Border Patrol station. The judge found that holding people like this and transporting them to Border Patrol was criminal contempt of court.

advised the Sheriff that he could make a "good faith" argument that it was permissible to continue to turn illegal aliens over to federal authorities under the Order, even though the lawyer thought the Judge "likely, not definitively" could say just the opposite too. The lawyer said that the Order was "ambiguous" even to him, and that "we weren't sure what it [the Order] meant." What they understood it to mean was simply that they could not stop someone solely for being illegal alien; but they never had a practice of doing that, and only detained people on the suspicion of violating some other state law or crime (like the human smuggling law). Accordingly, the Sheriff made numerous statements to the media that his office had not changed its policies with respect to cooperating with federal law enforcement and turning over illegal aliens, because he did not believe that the 2011 Order required any change to those policies, and Order did not clearly direct any changes.

What is clear is that under federal law, a defendant cannot be convicted of criminal contempt of court unless the court's order was "clear and definite." The judge has to order you to do "X," and you don't do "X." (For example: not rising when the bailiff says "please rise," and the Court orders you to do so.) It is not criminal contempt when the court issues an ambiguous and poorly defined order, accuses you of not knowing exactly what was inside the judge's head when it was issued, and then convicts you of a crime for not understanding. Further, the decision to charge Mr. Arpaio merely two weeks before his re-election (and no-one else in his office) for this particular "crime," and using his own political statements in support of enforcing the law as "evidence," reeks of an unconstitutional selective prosecution that was motivated by the Defendant's exercise of his First Amendment rights.

The Sheriff repeatedly asked for a jury trial, and he was clearly entitled to one under a federal statute, 18 U.S.C. § 402. And the judge can always grant a trial by jury, even when one is not required. There were numerous reasons to do so in this case, where the court's independence would clearly be viewed with suspicion—after all, this was a case for contempt of court, and the court was basically the "victim." Not only did the court deny the Sheriff a jury, but it went out of its way to avoid his constitutional right to one (by arbitrarily limiting the potential sentence to below the constitutional minimum). This resulted in a trial for "criminal contempt of court" to the court, which was about as fair as trying a crime to the victim.[6] Further, the civil judge informed the criminal judge in his referral that he had already found that the Sheriff committed what amounted to criminal contempt, making the Sheriff "guilty until proven innocent" even before trial, and making the trial seem like a "show trial" where the judge had already decided the guilt of the accused.

[6] Or, in what is perhaps a closer analogy, it was like trying a case for assault on a police officer to the officer's squadmate of many years—since the judge who issued the 2011 order and the criminal judge are two different judges on the same court with only six active judges, who sat together for nine years.

It is clear by his comments at the rally last Tuesday that the President of the United States believed that the Sheriff's conviction was wrongful, and that the Sheriff was convicted—as we have contended—for merely "doing his job."

To quote Justice Oliver Wendell Holmes, the President's power to pardon "is a part of the constitutional scheme," and it is a check on the system. While the authority of judges must be respected, it is also not absolute. If it were, then our Constitution would not give the power that it does to juries, and to the President, to keep the system in check.

Because the court refused to let this case go to a jury, then the people had to speak through their President.

Appeals are not a viable option, because they can take years to resolve, and more time taxpayer money which just goes to pay lawyers—all over what would have likely amounted to no more than $5,000 fine, for a petty and non-existent crime. The Sheriff, who is eighty-five years old, is not a young man, and there is no guarantee that he would outlast the appeals. And as a law enforcement officer of over fifty years—and the longest-serving Sheriff of Maricopa County—there are more positive things that he can and should be doing for his community, than waiting for justice.

For more information, please feel free to contact Jack Wilenchik, Esq. or Mark Goldman, Esq. at the numbers and emails listed above.