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August 06, 2015

No.:	15-72440
D.C. No.:	2:07-cv-02513-GMS
Short Title:	Joseph Arpaio, et al v. USDC-AZP

Dear Petitioner/Counsel

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. Always indicate this docket number when corresponding with this office about your case.

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Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re JOSEPH M. ARPAIO, in his official capacity as Sheriff of Maricopa County, Arizona, Defendant/Petitioner, and GERARD A. SHERIDAN, Specially appearing non-party/Petitioner, vs. UNITED STATES DISTRICT COURT for the District of Arizona, Respondent Court, and MANUEL DE JESUS ORTEGA MELENDRES, et al., Plaintiffs/Real Parties in Interest.	No. U.S. District Court No. CV 07-02513-PHX-GMS

PETITION FOR WRIT OF MANDAMUS

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Pursuant to 28 U.S.C. § 1651 and Rule 21, Fed. R. App. P., Petitioners Joseph M. Arpaio and Gerard A. Sheridan respectfully request the Court to enter a Writ of Mandamus directing the United States District Court for the District of Arizona, Honorable G. Murray Snow, to recuse himself from further proceedings in this action. The district court's actions require recusal under 28 U.S.C. § 455(a) and (b). Sheriff Arpaio and Chief Deputy Sheridan have no other plain, speedy, or adequate remedy by appeal.

ISSUE PRESENTED

The record demonstrates that Judge Snow's recusal was mandated under 28 U.S.C. § 455(a) and (b). Was the court's refusal to grant the motion to recuse clear error requiring mandamus relief?

RELEVANT FACTS AND STATEMENT OF THE CASE

A. Events leading up to the civil contempt hearing.

In December 2007, Latino motorists brought a § 1983 class action against the Maricopa County Sheriff's Office ("MCSO") and Sheriff Arpaio in his official capacity, among others, alleging that Defendants engaged in a custom, policy, and practice of racially profiling Latinos, and had a policy of

unconstitutionally stopping persons without reasonable suspicion in violation of Plaintiffs' Fourth and Fourteenth Amendment rights.[1] [Doc. 1, Ex. 30, amended by Doc. 26, Ex. 29]. Plaintiffs sought declaratory and injunctive relief. [Doc. 1 at 19-20, Ex. 30].

After discovery closed, the parties filed competing motions for summary judgment. Plaintiffs' motion included a request for a preliminary injunction. [Docs. 413, Ex. 27; 421, Ex. 26]. The court granted Plaintiffs' motion in part, and entered a preliminary injunction on December 23, 2011. [Doc. 494, Ex. 25]. The injunction prohibited MCSO from "detaining individuals in order to investigate civil violations of federal immigration law," and from "detaining any person based on actual knowledge, without more, that the person is not a legal resident of the United States." [*Id.* at 39, Ex. 25]. Absent probable cause, officers could detain individuals only based on reasonable suspicion that "criminal activity may be afoot." [*Id.* at 5, Ex. 25].

A bench trial took place, and the court issued Findings of Fact and Conclusions of Law, finding that MCSO's operations and procedures were unconstitutional. [Doc. 579 at 115–31, Ex. 22]. After allowing the parties to attempt to negotiate the terms of a consent decree, in October 2013, the court

[1] This Court recently ordered the dismissal of MCSO, a non-jural entity, as a named defendant and the substitution of Maricopa County in its place. *Melendres v. Arpaio*, 784 F.3d 1254, 1260 (9th Cir. 2015).

ordered supplemental injunctive relief to remedy the violations and defined enforcement mechanisms for such remedies. [Doc. 606, Ex. 21].

On May 14, 2014, Defendants, on their own initiative, informed the court and Plaintiffs' counsel that a former member of the MCSO Human Smuggling Unit, Deputy Charley Armendariz, who testified at the bench trial, had committed suicide; and that MCSO had discovered in Armendariz's garage numerous items such as driver's licenses and license plates apparently confiscated from people Armendariz had stopped, and video recordings of traffic stops Armendariz had conducted. [Doc. 880 at 3-4, Ex. 18]. Some of those videos revealed what MCSO characterized as "problematic activity" by Deputy Armendariz. [*Id.*, Ex. 18].

In light of the Armendariz videotapes and the uncertainty as to whether other officers had also recorded stops, the court ordered Defendants to quietly retrieve all stop recordings. [*Id.*, Ex. 18]. The Court also found documents apparently requiring some officers to make such recordings during the time relevant to Plaintiffs' claims, which had not been disclosed to Plaintiffs. [*Id.* at 5, Ex. 18].

The Armendariz videotapes resulted in administrative interviews with MCSO personnel. Those interviews revealed that for seventeen months after the court issued the preliminary injunction, Defendants conducted immigration

interdiction operations, and detained persons in violation of the court's preliminary injunction order.

The court ruled that civil contempt proceedings were necessary to determine whether Defendant Sheriff Arpaio and others at MCSO, including non-party Chief Deputy Gerard Sheridan, should be held in contempt for: (1) failing to implement and comply with the preliminary injunction; (2) violating discovery obligations; and (3) acting in derogation of the court's May 14, 2014 Order. [*Id.* at 26, Ex. 18]. The court opined that the record in the contempt proceedings will help the court evaluate whether civil remedies will vindicate the rights of the Plaintiff class, or whether a criminal contempt referral is necessary and appropriate. The court also ordered a number of MCSO supervisors, including Chief Deputy Sheridan, to attend the contempt hearing as potential contemnors. Each obtained separate criminal counsel.

B. Motion to vacate contempt hearing.

On March 17, 2015, Sheriff Arpaio and Chief Deputy Sheridan ("Movants") consented to the imposition of civil contempt sanctions against them, and moved to vacate the contempt hearing. [Doc. 948, Ex. 17]. Movants stipulated to the facts stated in the Court's Order to Show Cause [Doc. 880, Ex. 18], to the entry of a civil contempt order [Doc. 948 at 3, Ex. 17], and expressed

sincere remorse that they had violated the preliminary injunction. [*Id.* at 2, Ex. 17].

The court made it clear that before it would accept Movants' proposal, Arpaio would need "skin in the game," which Movants understood to mean that he would need to pay a sanction from his personal funds (though this lawsuit names Defendant Arpaio only in his official capacity). Movants proposed a non-exclusive list of remedial measures, including: (1) the payment of $100,000 from Defendant Arpaio's personal funds to a public interest group; (2) acknowledging the violations in a public forum; (3) the creation and initial funding of a reserve to compensate victims of MCSO's violation; (4) a plan to identify victims of the violation; (5) permitting the Monitor to investigate any matter that related to the violations; (6) moving to dismiss the then-pending Ninth Circuit appeal; and (7) paying Plaintiffs' reasonable attorney's fees necessary to ensure compliance with the court's orders. [Doc. 948 (Ex. B), Ex. 17]. Given these proposals, Movants asked the court to vacate the evidentiary hearing. [*Id.* at 4, Ex. 17]. The court refused.

Not only did the court refuse to vacate the contempt proceedings and enter judgment as stipulated to by Movants [Doc. 1007, Ex. 16], but the court asked the United States Attorney's Office for the District of Arizona to attend the contempt settlement proceedings to determine, among other things, whether

the evidence would justify holding the individuals in criminal contempt. The U.S. Attorney's Office declined the invitation to participate in this capacity, noting that its participation was against departmental policy. [Doc. 1164 at 5:16-18, Ex. 8].

C. The court's *sua sponte* inquiry into irrelevant subjects during the contempt hearing.

The civil contempt hearing commenced on April 21, 2015. On April 23, 2015, after both parties had finished questioning Sheriff Arpaio while he was on the stand, [4/23/15 Tr. at 624, Ex. 15], the court *sua sponte* initiated its own inquiry into matters (described below) that no party had raised, and which are wholly unrelated to any of the three defined grounds for the contempt proceeding.[2]

The court's questions stemmed entirely from hearsay statements the court had apparently read in a Phoenix New Times blog post by Stephen Lemons. [Doc. 1117 (Ex. 2), Ex. 11; *see also* 4/23/15 Tr. at 643, 648-649, Ex. 15]. This blog post had never been disclosed to the parties during the hearing or to their counsel. Neither was any advance notice given to anyone involved in the contempt proceeding that the article would be discussed or relied upon by the

[2] Again, those issues are: (1) failing to implement and comply with the preliminary injunction; (2) violating discovery obligations; and (3) acting in derogation of this Court's May 14, 2014 Orders. [Doc. 880 at 26, Ex. 18].

court in any way.[3] Instead, the court waited until Sheriff Arpaio was on the stand, under oath, to raise the issues for the first time, depriving him of the opportunity to prepare for the questioning or to consult with his counsel. Such conduct would never have been tolerated from a litigant.

The following day, the court continued this inquiry into these matters during Chief Deputy Sheridan's testimony.[4]

1. The Grissom Investigation.

The court reviewed the New Times blog post in open court, despite it not being marked as an exhibit, and showed it to Sheriff Arpaio without giving Sheriff Arpaio the opportunity to review it with his counsel, and then asked Sheriff Arpaio whether he was aware that the court or any of his family members had ever been investigated by anyone. [4/23/15 Tr. at 647:8-17, Ex. 15]. In response, Sheriff Arpaio stated that MCSO had not investigated the court or the court's family, but there was investigation of other people about

[3] Indeed, the court recognized that it "opened [a] can of worms" by inquiring into the Grissom/Montgomery investigations. [4/24/15 Tr. at 941:25-942:2, Ex. 14].

[4] Although Sheriff Arpaio's counsel initiated questioning of Chief Deputy Sheridan regarding the Grissom/Montgomery investigations, counsel only inquired into these matters in order to clarify Sheriff Arpaio's testimony that was solely elicited by the court the prior day. [4/24/15 Tr. at 920-22, 955:12-15, Ex. 14]. Moreover, after counsel began questioning the Chief Deputy, the court proceeded to interject itself several times, and directly examined the Chief Deputy once the Grissom investigation came up. [*Id.* at 961:24-25, 963:13-18, 964:7-966:21, Ex. 14].

statements the court's wife made to those people. [*Id.* at 647-48, Ex. 15]. In August 2013, Karen Grissom sent the Sheriff a Facebook post stating that Judge Snow's wife told Mrs. Grissom in a restaurant that Judge Snow hated Sheriff Arpaio and would do anything to get Sheriff Arpaio out of office. [*Id.* at 654-55, Ex. 15; 4/24/15 Tr. at 962:14-16, Ex. 14; Doc. 1117 (Ex. 5), Ex. 11]. The court's wife made this statement in the restaurant to Mrs. Grissom during the litigation of this case, just prior to the bench trial.[5] [*See* Doc. 1117 (Exs. 6-7), Ex. 11]. Mrs. Grissom was upset enough about the statement to report it to the MCSO. [Doc. 1117 (Ex. 5), Ex. 11].

As a result of Mrs. Grissom's message, the Sheriff's then-attorney hired a private investigator to interview three individuals: Karen Grissom, her husband Dale Grissom, and their adult son Scott Grissom (not the court's wife or family members), to assess the truth of Mrs. Grissom's report. [4/23/15 Tr. at 655, Ex. 15]. The Grissoms have been unwavering in their recollection of Judge Snow's wife's statement that Judge Snow hated the Sheriff and would do anything to get him out of office. [Doc. 1117 (Exs. 6-8), Ex. 11].[6] Of course, MCSO's

[5] The interview of Mrs. Grissom revealed that she had known the court's wife for many years, since they both grew up in Yuma, Arizona. [Doc. 1117 (Ex. 6 at 7-8), Ex. 11].

[6] Even though these individuals were deemed credible, and even though they verified that Judge Snow's wife made the statements, Sheriff Arpaio never "went any further than just verifying that [a] conversation [between Karen

investigation into Mrs. Grissom's report had absolutely nothing to do with the Sheriff's Office's failure to comply with the preliminary injunction; its violation of discovery obligations, or the district court's May 14, 2014 Order. Despite this, the court continued to interrogate Sheriff Arpaio and Chief Deputy Sheridan regarding this issue during the contempt proceedings.

2. The Montgomery Investigation.

Judge Snow also questioned Sheriff Arpaio and Chief Deputy Sheridan about a second investigation, equally unrelated to the three contempt issues. This inquiry related to MCSO's use of a confidential informant named Dennis Montgomery who claimed he had information of alleged e-mail breaches (including the e-mails of the Sheriff's attorneys), wiretaps of the Sheriff and judges, and computer hacking of 50,000 bank accounts of Maricopa County citizens. [4/23/15 Tr. at 647:1-3, 649, Ex. 15; 4/24/15 Tr. at 1003:9-11,1006:6-10, Ex. 14]. Judge Snow himself later recognized that the documents involved in the Montgomery investigation "appear to allege or suggest that this Court had contact with the Department of Justice about this case before the Court was ever assigned to it." [5/14/15 Transcript at 45:17-19, Ex. 12]. Moreover, Judge Snow stated on the record that the Montgomery Investigation appears to allege

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Grissom and the court's spouse] . . . occurred." [4/24/15 Tr. at 966:11-16, Ex. 14].

that the random selection process of this court was subverted so that the case was deliberately assigned to him and that he had conversations with Eric Holder and Lanny Breuer about this case. [*Id.* at 45:19-25, Ex. 12]. Again, this inquiry stemmed entirely from hearsay statements in a Phoenix New Times blog post and were entirely unrelated to the three clearly defined topics of the contempt hearing.[7]

D. Judge Snow's Post Hearing Expansion of the Monitor's Duties.

After this part of the contempt hearing concluded, Judge Snow authorized the Monitor (who had been appointed to oversee the injunctive remedies) to investigate these unrelated issues and any other areas he deemed fit. [*See* 5/14/15 Tr. at 49:15-21, 50:24-51:6, Ex. 12].

Sheriff Arpaio's counsel objected to (a) the court morphing the contempt proceeding into an inquiry into matters unrelated to the areas of contempt that had been noticed by the court and (b) the expansion of the Monitor's powers as a violation of Sheriff Arpaio's due process rights. The court overruled the

[7] During an emergency hearing on July 24, 2015, defense counsel raised an objection regarding the relevancy of the Montgomery Investigation materials requested by the Court through his Monitor because they did not relate to the three distinct issues in the contempt proceedings. In response, overruling counsel's objection, the court admitted it was unsure of the relevance of the Montgomery Investigation, stating as follows: "I'll tell you this. They may not be relevant. I realize that they may not be relevant. But they also may be very relevant. And they were demanded to be produced and they haven't been produced." [7/24/15 Tr. at 21:6-10; Ex. 1].

objection and refused to "unduly shackle [the Monitor]." [*Id.* at 56-57, Ex. 12]. The court declared that it is "not going to limit the Monitor's authority and . . . not going to require [the Monitor] to provide [Defendant Arpaio's counsel] with advance notice of what [the Monitor] wants to inquire into." [*Id.* at 53:15-21, 58:1-7 Ex. 12].

The expansion of the Monitor's powers also comes shortly after the Ninth Circuit recently vacated portions of the court's permanent injunctive order so the powers of the Monitor would be narrowly tailored to address the constitutional violations at issue. *See Melendres v. Arpaio*, No. 13-16285, 2015 WL 1654550, at *10 (9th Cir. Apr. 15, 2015) ("We therefore vacate these particular provisions and order the district court to tailor them so as to address only the constitutional violations at issue."). In short, the court gave the Monitor unbridled investigative powers that are not even available to the FBI or other federal law enforcement agencies.[8]

E. Recusal Motion and Further Proceedings.

In light of the foregoing events, Petitioners moved to recuse Judge Snow. [Doc. 1117, Ex. 11]. The primary focus of the motion was the spontaneous

[8] The Monitor's most recent quarterly report verifies this increased authority and power. [*See* Doc. 1170, Ex. 7 ("Subsequent to my appointment, and as a result of further Court proceedings, my duties have been expanded in the areas of . . . oversight of internal investigations and independent investigative authority.")].

injection of the Grissom/Montgomery investigations into the contempt hearing, the court's independent investigation of these issues, and any other issues, through its Monitor, in contravention of the recent Ninth Circuit decision limiting the role of the Monitor to issues involving the violation of the Fourth and Fourteenth Amendments, and the court's failure to recuse itself in light of his brother-in-law's partnership with Covington & Burling. The motion was fully briefed [*see* Docs. 1150, Ex. 10; 1158, Ex. 9] and denied [Doc. 1164, Ex. 8]. The court then set a hearing to discuss, among other things, "the status of MCSO's remaining internal investigations" (which include the Grissom and Montgomery matters, *see* Doc. 1164 at 40, Ex. 8) and "the Department of Justice's request to see the database of documents given by Montgomery to the MCSO." [*Id.*, Ex. 8]. Petitioners requested a stay of the proceedings in anticipation of filing this Petition for Writ of Mandamus [Docs. 1171, Ex. 6; 1175, Ex. 5; 1176, Ex. 4], which the court denied. [7/20/15 Tr. at 10-15, Ex. 2; Doc. 1179, Ex. 3].

THIS RECORD CLEARLY CALLS FOR MANDAMUS RELIEF

Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977), sets forth five factors to consider in determining whether mandamus relief is appropriate:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression.

Id. at 654-55; *see also Organization for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (4th Cir. 1987).

A petitioner need not satisfy all five *Bauman* factors. *Taiwan v. United States Dist. Ct. for No. Dist. Of Calif. (Tei Yan San)*, 128 F.3d 712, 719 (9th Cir. 1997) (mandamus granted even though fourth factor, recurring error, not satisfied); *Valley Broadcasting Co. v. United States Dist. Ct.*, 798 F.2d 1289, 1293 n. 3 (9th Cir. 1986) (where three of five Bauman factors were satisfied, deciding factor was whether trial court decision was clearly erroneous). The

third factor, a determination that the lower court's decision is clearly erroneous, is dispositive. *See Calderon v. United States Dist. Ct*., 98 F.3d 1102, 1105 (9th Cir. 1996); *Survival Systems of Whittaker Corp. v. United States Dist. Ct*., 825 F.2d 1416, 1418, fn. 1 (9th Cir. 1987).

The district court's refusal to recuse itself in this case satisfies all five of the *Bauman* factors, making mandamus relief appropriate. Petitioners address the third *Bauman* factor (clearly erroneous) first, however, because it is dispositive. *Calderon*, 98 F.3d at 1105; *Survival Systems*, 825 F.2d at 1418, n.1.

I. AUTOMATIC RECUSAL WAS REQUIRED; THUS THE COURT'S DENIAL WAS CLEARLY ERRONEOUS

"Clearly erroneous" in a mandamus analysis means the "district court has erred in deciding a question of law." *In re Cement Antitrust Litig. (MDL No. 296),* 688 F.2d 1297, 1307 (9th Cir. 1982). But even if an error cannot be characterized as "clearly erroneous," this Court may exercise its mandamus authority where the issue is particularly important to trial court administration -- especially in the context of the denial of a recusal motion. *In re Cement Antitrust Litig.,* 688 F.2d at 1306-07 ("we see no legitimate reason for refraining from exercising our supervisory authority where we can determine that an error has been made but cannot, for whatever reason, characterize the error as 'clearly' erroneous.").

The district court's refusal to recuse itself here satisfies the third *Bauman* standard no matter how it is characterized. Petitioners sought recusal under 28 U.S.C. § 455, which is a self-enforcing provision – i.e., recusal does not require any action by the parties (though parties may also enforce it). *United States v. Holland*, 519 F.3d 909, 915 (9th Cir. 2008). Section 455 has two recusal provisions. Subsection (a) covers circumstances that *appear* to create a conflict of interest, even if there is no actual bias. *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991). The section states that a "judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). An objective standard applies to disqualification under § 455(a), so recusal is required when a "reasonable person with knowledge of all the facts would conclude the judge's impartiality might reasonably be questioned." *Taylor v. Regents of Univ. of Cal.,* 993 F.2d 701, 712 (9th Cir. 1993).

Subsection (b) covers situations in which an *actual* conflict of interest exists, even if there is no appearance of impropriety. *Preston*, 923 F.2d at 734. It requires a judge to recuse himself, even if there is no appearance of impropriety:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

…

> (4) He knows that he, individually, or as a fiduciary, or his spouse . . . has a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding; [or]
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> …
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; [or]
>
> (iv) Is to the judge's knowledge likely to be a material witness to the proceeding.

28 U.S.C. § 455(b)(1)-(5).[9]

A. <u>Recusal is mandatory under § 455(b)(5)(iv) because the court turned himself and his wife into material witnesses.</u>

Under 28 U.S.C. § 455(b)(5)(iv), a judge shall disqualify himself if he or his spouse is likely to be a material witness to the proceeding. Here, the court made both himself and the his wife material witnesses to the proceedings by *sua sponte* interrogating Sheriff Arpaio and Chief Deputy Sheridan about the Grissom investigation. [*See* Doc. 1117 (Exs. 5-8), Ex. 11]. The court examined

[9] As is shown below, the trial court's conduct also falls outside the seven traditionally identified judicial actions this Court has enumerated "which will not ordinarily require recusal under § 455." *See United States v. Holland,* 519 F.3d 909, 914, n.5 (9th Cir. 2008).

Sheriff Arpaio and Chief Deputy Sheridan about why the MCSO investigated Mrs. Grissom's report that Mrs. Snow said her husband hated Sheriff Arpaio and would do anything to get Sheriff Arpaio out of office; and whether the MCSO investigated the court's family when ascertaining the truth of Mrs. Grissom's report of Mrs. Snow's comment. Although the Grissom report had nothing whatsoever to do with the contempt proceedings,[10] the court examined the witnesses about this matter, directed Sheriff Arpaio to preserve and turn over all evidence related to this investigation, and directed his Monitor to further investigate the matter on behalf of the court.

As Petitioners noted in their recusal motion, if Mrs. Grissom's report is true (and all three Grissoms maintain it is), then both Judge Snow and his wife are material witnesses regarding whether he did in fact tell his wife that he hates the Sheriff and would do anything to get him out of office. It hardly needs stating how blatantly material it is to a (potentially criminal) contempt proceeding that the judge presiding over that proceeding hates the potential contemnor so much that the judge would do anything to make sure that party is never re-elected.

[10] Even Magistrate Judge Boyle noted that the Grissom investigation was irrelevant to the contempt proceedings. [*See* Doc. 1053 at 6-7, Ex. 13].

Accordingly, on this record, the recusal motion was most certainly not just an "unsubstantiated suggestion of personal bias or prejudice" as the court below stated. [Doc. 1164 at 34:10-11, Ex. 8].[11] No reasonable person with knowledge of the facts could deny that the court injected himself and his wife as witnesses to an issue that should not have been, but is now apparently part of, the contempt proceeding. Not only that, the court has ordered the Monitor to ensure that documentation related to the Grissom investigation is preserved and produced to the court, thus making himself the investigator of this matter as well as the judge and the finder of fact. [*See* Doc. 1164 at 21:18-20, Ex. 8]. Under no circumstances could this conduct escape mandatory recusal under § 455(b)(5)(iv). *See United States v. Alabama,* 828 F.2d 1532, 1545 (11th Cir. 1987) (disqualification required when the judge was "forced to make factual findings about events in which he was an active participant.").[12] The court's refusal to recuse himself was clearly erroneous.

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[11] The court's order stated that "Movants do not suggest a single example of admissible testimony that the Court's wife could offer." [Doc. 1164 at 33:13-17, Ex. 8].

[12] Given this record, the court inaptly relied on a 2013 memo from the Sheriff's former defense counsel for the proposition that recusal was unnecessary. Not only are counsel's comments stale in light of the court having injected the Grissom issue into the contempt hearing, but one attorney's subjective opinion is not a substitute for the objective impartial observer standard under § 455(a). *Clemens v. U.S. Dist. Ct. for Central Dist. of*

B. The court's expansion of the Monitor's powers and authority was in contravention of this Court's previous order, violated Petitioners' Due Process Rights, and violated § 455(b)(1), (a).

At a minimum, a court must provide an alleged contemnor with notice and an opportunity to be heard, *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827 (1994), which means prior disclosure and provision of documents to be used at trial, and prior identification of areas of examination. *See generally, Stuart v. United States*, 813 F.2d 243, 251 (9th Cir.1987), rev'd on other grounds, 489 U.S. 353 (1989); *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 846-47 (9th Cir. 2001). Such notice is consistent with an alleged contemnor's right to present a defense. *See United States v. Powers*, 629 F.2d 619, 625 (9th Cir. 1980). Further, the law requires progressively greater procedural protections for indirect contempts of complex injunctions that necessitate more elaborate and in-depth fact finding, as in this case. *See Bagwell*, 512 U.S. 821 at 833-34.

The record is uncontested that Judge Snow ordered only ***three*** issues to be determined during the April 2015 OSC hearing. [Doc. 880 at 26, Ex. 18]. None of these issues included MCSO internal investigations. Moreover, neither the Court nor any other party gave notice that Sheriff Arpaio nor Chief Deputy

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California, 428 F.3d 1175, 1178 (9th Cir. 2005) (In determining whether disqualification is proper, courts apply an objective test).

Sheridan would be questioned regarding the Grissom and Montgomery internal investigations or that MCSO's internal investigations would be at all relevant to the contempt proceedings. While a court may examine witnesses and comment on evidence, as the court noted [Doc. 1164 at 23:15-25, Ex. 8], the court cannot inquire into matters entirely ***unrelated*** to the current proceeding, and which ***directly*** implicates the court's impartiality. *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994) (new trial necessary when judicial remarks and questioning of witnesses projected the "appearance of advocacy or partiality.").[13]

Finally, Judge Snow subsequently directed his Monitor to investigate further into these irrelevant matters. [Doc. 1117 (Ex. 9), Ex. 11; 5/14/15 Transcript at 49:15-21, 51, Ex. 12]. Over Petitioners' objections, Judge Snow ruled that his Monitor would not be "shackled" by Petitioners' constitutional rights. [*See id.* at 56, Ex. 12]. Indeed, Judge Snow indicated in his Order that he will continue an investigation into "the status of MCSO's remaining internal investigations," which includes the Grissom and Montgomery investigations. [*See* Doc. 1164 at 40, Ex. 8]. The Court's comments outlined above are

[13] Petitioners have always maintained that it is the court's *sua sponte* inquiry into these irrelevant matters in violation of Petitioners' due process rights that demonstrates the perception of bias and requires recusal – not the due process violations themselves.

particularly alarming in light of the Ninth Circuit's recent decision limiting the powers of the Monitor to ensure they are "narrowly tailored to addressing only the relevant violations of federal law at issue here." *Melendres v. Arpaio*, 784 F.3d 1254, 1267 (9th Cir. 2015). In contempt proceedings, procedural protections such as prior notice are crucial "in view of the heightened potential for abuse posed by the contempt power." *Taylor v. Hayes*, 418 U.S. 488, 498 (1974). The court's failure to abide by these fundamental and basic constitutional requirements further demonstrates his bias under § 455(a) and (b)(1) requiring his disqualification and recusal.

C. The court, by *ex parte*, extrajudicial investigation, gained personal knowledge of disputed evidentiary facts requiring recusal under §§ 455(b)(1), (a).

During the contempt hearing, the court admitted that he engaged in improper, *ex parte* communication "over the lunch hour" by which he gained personal knowledge of disputed evidentiary facts he believed were relevant to the contempt hearing.[14] [*See* Doc. 1164 at 20:4-12, Ex. 8].

Sheriff Arpaio had testified about the source of funding for the Montgomery Investigation, indicating that Maricopa County had not paid for investigatory personnel trips to Seattle for that investigation. [Doc. 1164 at

[14] The court made clear in its order that it believed the funding of the Montgomery Investigation was at issue in the contempt hearing. [*See* Doc. 1164 at 27:21-28:6, Ex. 8].

20:4-9, Ex. 8]. During the lunch break, outside the presence of the parties, the court spoke with someone who told the court "that the Cold Case Posse may have separate finances from MCSO." [*Id.* at 20:9-10, Ex. 8]. The court did not reveal to the parties the source of this information. [*Id.*, Ex. 8]. He simply stated on return from lunch: "*I was told over lunch* that posse funds like Mr. Zullo – Mr. Zullo's the head of one of your posses … *I was told* that you also have various sources of funding within the MCSO, like the Cold Case Posse has its own funds. Is that possible?" [4/23/15 Tr. 657:20-21, 657:25-58:2 (emphasis added), Ex. 15].[15] Clearly, by the court's own admission, he had received new information, *ex parte*, regarding matters directly related to, and which the court believed was at issue in, the contempt hearing.[16] The court then interrogated Sheriff Arpaio on the record regarding this new information. [4/23/15 Tr. at 657:18-60:8, Ex. 15].[17]

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[15] It was not until much later, when the court issued the order denying recusal, that the source of those *ex parte* communications (the Monitor) was revealed. [*See* Doc. 1164 at 20:9-10, Ex. 8].

[16] The court attempted to justify its *ex parte* communication with the Monitor as part of the Monitor's role to "oversee and coordinate Defendants' compliance with existing judicial orders on the Court's behalf." [Doc. 1164 at 20:15-17, Ex. 8]. But nothing in the court's existing judicial orders gives the Monitor a right or duty to advise the court regarding the accuracy of testimony given during the contempt proceeding. *See Melendres v. Arpaio,* No. CV-07-02513-PHX-GMS, 2013 WL 5498218, at *32, ¶ 126 (D. Ariz. Oct. 2, 2013).

[17] Thus, the information the court received was, in fact, from an "extrajudicial source," contrary to the court's statement in its order denying

Under 28 U.S.C. § 455(b)(1), a judge *shall* disqualify himself "[w]here he has, . . . *personal knowledge* of disputed evidentiary facts concerning the proceeding." (Emphasis added). The information relayed by the Monitor to the court is a disputed fact. When the court directly questioned Sheriff Arpaio regarding whether the Cold Case Posse has its own funds, Sheriff Arpaio answered "No." [4/23/15 Tr. 657:25-58:3, Ex. 15]. Nothing in the Sheriff's further testimony contradicted this statement. [*See id.* at 657-58, Ex. 15]. Moreover, as stated in the previous section, the relevance of *any* fact regarding the Montgomery Investigation to the contempt proceedings is disputed. The court, therefore, violated § 455(b)(1) by gaining personal knowledge of disputed evidentiary facts through an *ex parte* communication with the Monitor during the lunch break of the contempt hearing.

The Court's *ex parte* conversation with the Monitor itself also requires recusal under § 455(a) because "[a] judge should ... except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or

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recusal. [Doc. 1164 at 24:24-25:12, Ex. 8]. Statements received by a judge outside of judicial proceedings are extrajudicial. *See In the Matter of Edgar v. K.L., et al.,* 93 F.3d 256, 259 (7th Cir. 1996) ("Knowledge received in other ways, which can be neither accurately stated nor fully tested, is 'extrajudicial.' . . . What information passed to the judge, and how reliable it may have been, are now unknowable. This is 'personal' knowledge no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated.").

procedures affecting the merits, of a pending or impending proceeding." *In the Matter of Edgar v. K.L., et al.,* 93 F.3d 256, 258 (7th Cir. 1996) (quotations omitted). Regardless of whether Sheriff Arpaio's subsequent testimony confirmed or refuted the Monitor's information, it is the court's *ex parte* conversation that gave him personal knowledge regarding evidentiary matters at issue that constitutes the appearance of impropriety and requires recusal. [*See* Doc. 1164 at 20:10-12, Ex. 8]. *See, e.g.*, *SCA Services, Inc. v. Morgan,* 557 F.2d 110, 116 (7th Cir. 1977), where recusal was required regardless of whether *ex parte* communications confirmed accurate information:

> [T]he judge's 'Memorandum of Decision' suggests that he made a confidential inquiry, presumably to his brother, to determine in what capacity Donald A. Morgan was involved in this case. Counsel were not present and were unaware of the inquiry at the time it was made. While it is understandable why the judge may have felt his brother could present the most accurate evidence as to his role in the pending litigation, the judge's inquiry creates an impression of private consultation and appearance of partiality which does not reassure a public already skeptical of lawyers and the legal system.

Id.; see also Edgar, 93 F.3d at 259 (mandatory disqualification under § 455(b)(1) required when trial judge was briefed off the record regarding the litigation and declined to inform parties about the briefing's contents); *Price Bros. Co. v. Philadelphia Gear Corp.,* 629 F.2d 444, 446-47 (6th Cir. 1980)

(noting that gaining information from a law clerk's independent investigation of disputed facts would be a violation of Canon 3(c)(1)(a) and § 455).

Surely a thoughtful observer aware of all the facts (the standard under § 455(a), *see Liljeberg v. Health Svcs. Acq. Corp,* 486 U.S. 847, 865 (1988)) would conclude that a preview of evidence carries an unacceptable potential for compromising impartiality. *Edgar*, 93 F.3d at 259-60. That is exactly what occurred here. Moreover, the appearance of impropriety is more intensified because the record is not even clear that the Monitor gave Judge Snow accurate information, as the court claimed. [Doc. 1164, 20:10-12, Ex. 8]. In short, the court's conferring *ex parte* during the lunch hour about disputed facts to the proceeding, not to mention its subsequent failure to disclose the details of that conference, required recusal under § 455(b)(1) and (a). The court's refusal to do so was clearly erroneous under *Bauman*, warranting mandamus relief.

D. Recusal is mandatory under § 455(b)(5)(iii) because Judge Snow's brother-in-law is an equity partner in Covington & Burling, counsel for Plaintiffs.

1. The court's brother-in-law's equity partnership interest in Plaintiffs' law firm creates an unwaivable conflict under § 455(b)(5)(iii).

28 U.S.C. § 455(b)(5)(iii) requires that a Judge shall disqualify himself when a "[p]erson within the third degree of relationship of [the Judge or his spouse]…[i]s known by the judge to have an interest that could be substantially

affected by the outcome of the proceeding." *See also* Code of Conduct for United States Judges, Canon 3(C)(1)(d)(iii) (mirroring § 455(b)(5)(iii)). Commentary to Canon 3C(1)(d)(ii) provides that "if … the relative is known by the Judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' under Canon 3C(1)(d)(iii), the judge's disqualification is *required*." (emphasis added). Judge Snow's brother-in-law is an equity partner with Covington & Burling, the Plaintiffs' law firm. As an equity partner in the Plaintiffs' counsel's law firm, Judge Snow's brother-in-law has an interest in this case that could be "substantially affected by the outcome of the proceeding," requiring the court's mandatory recusal.

Judicial Ethics Advisory Opinion No. 58[18] states a categorical rule of recusal when a relative within the third degree of relationship is an equity partner in a law firm in the case, notwithstanding his residence in a different office and the lack of any involvement or effect on his income. *Fiore v. Apollo Educ. Grp. Inc.*, 2015 WL 1883980, at *2 (D. Ariz. Apr. 24, 2015). The Committee concluded that:

[18] "The Judicial Conference of the United States has established a committee, consisting of federal judges, '[t]o provide advice on the application of the Code of Conduct for United States Judges.' Jurisdictional Statement of the Committee on Codes of Conduct of the Judicial Conference of the United States. Although judges are neither required to consult the committee nor bound by its rulings, the committee provides invaluable guidance and a detached viewpoint." *In re Bernard*, 31 F.3d 842, 844 (9th Cir. 1994).

> an equity partner in a law firm generally has "an interest that could be substantially affected by the outcome of the proceeding" **in all cases where the law firm represents a party before the court**. Therefore**,** "if the relative ... is an equity partner in a law firm that represents a party, the judge must recuse."

Id. (emphasis added) (quotations omitted). As the Committee noted, "one might reasonably question a judge's impartiality when his or her relative is an equity partner in a law firm that represents a party before that court." *Id.* at *3. Other cases are in accord. *See Postashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980) ("when a partner in a law firm is related to a judge within the third degree, that partner will ***always be*** 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partner's firm."); *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 115 (7th Cir. 1977) (recusal required because judge's brother was a senior partner in a party's firm, though not directly involved in the case).

In refusing to recuse himself, Judge Snow stated that "the Advisory Opinion's per se rule is contrary to the Code of Conduct and the commentaries thereto which make clear that '[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge.'" [Doc. 1164, n. 18, Ex. 8; Doc. 542, Ex. 23]. Respectfully, this misinterprets Advisory Opinion No. 58. The Advisory

Opinion does not state that *relation alone* constitutes disqualifying interest, but rather, an *equity interest* in the firm does. In fact, Opinion 58 notes that "recusal is not mandated" when the family member in the firm before the court is "an associate or non-equity partner . . . [whose] compensation is in no manner dependent upon the result of the case." Opinion 58 thus does not conflict with the commentary to the Judicial Canons, as the court posited.[19]

In refusing to recuse himself, the court also relied on his June 2012 order, which noted that recusal was not required at the time because there was only a "remote possibility" that Plaintiffs would be awarded attorney's fees (and if they did it would "be very small"); thus it "was speculative" whether the court's brother-in-law had a financial interest in the outcome of the case. [Doc. 542, Ex. 23]. As of 2015, however, Covington & Burling has been awarded nearly $3.5 million in fees and costs [Doc. 742, Ex. 20], and have requested nearly half a million dollars more in fees and costs for the appeal of the bench trial.[20] This

[19] The district judge in *Fiore v. Apollo Educ. Grp. Inc.*, 2015 WL 1883980, at *2 (D. Ariz. Apr. 24, 2015), refused to recuse himself citing this inaccurate ruling by Judge Snow, and failing to consider adequately the equity partner's non-economic interests. *Id.* at *2-3. In addition, *Fiore* did not involve a multi-million dollar award of fees and costs to the judge's relative's law firm.

[20] *See* Ninth Circuit Case No. 13-16285, 13-17238, Dkt. 89, Declaration of Stanley Young, Ex. E. The Court can take judicial notice of this fee request. *U.S. ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (Federal courts may "take notice of proceedings in other

is hardly a "very small" amount. *See* Canon 3(C)(3)(c) (holding that "'financial interest' means ownership of a legal or equitable interest, *however small* …") (emphasis added). And the record is devoid of evidence that the court's brother-in-law did not receive some financial benefit (either directly or indirectly) from this substantial award.

Regardless, as the Advisory Committee notes, § 455(b)(5)(iii) serves to protect both economic and *non-economic* interests.[21] Indeed,

> This "general interest" reflects the big picture-the equity partner's stake in the law firm's profits as well as in its continued existence, which requires lasting client relationships and a respected name in the profession. An equity partner stands to benefit when his or her law firm does good work no matter who does that work or where that work is done.

Fiore, 2015 WL 1883980 at *3; *see also In re Kansas Pub. Employees Ret. Sys.,* 85 F.3d 1353, 1359 (8th Cir. 1996) ("The interest described in § 455(b)(5)(iii) includes noneconomic as well as economic interests.").

In short, based on this record, the statutes, Advisory Opinion 58, and relevant case authority, the court's recusal is mandated. The court's brother-in-

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courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.").

[21] The Committee has rejected the line of cases from the Second Circuit that focuses only on economic interests. *Fiore*, 2015 WL 1883980 at *3; *see also In re Kansas Pub. Employees Ret. Sys.,* 85 F.3d 1353, 1359 (8th Cir. 1996) ("The interest described in § 455(b)(5)(iii) includes noneconomic as well as economic interests.")

law has both economic and noneconomic interests that could be substantially affected by the outcome of the proceeding.[22] Judge Snow's failure to recuse himself was, therefore, clearly erroneous.

2. Petitioners did not waive the conflict.

One of the court's reasons for refusing to recuse was that the Sheriff waived the "appearance of impartiality" conflict back in 2012. [Doc. 1164, pp. 36-37, Ex. 8; Doc. 541, Ex. 24]. This was incorrect for two reasons (aside from the enormous attorneys' fees and costs award recently granted to Covington & Burling, which greatly enhanced the conflict). First, conflicts under § 455(b)(5)(iii), such as those occurring when the court's relative has an interest that could be affected by the proceeding's outcome, are simply not waivable.[23]

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[22] Even if this Court is disinclined to adopt a categorical rule of recusal expressed under Advisory Opinion No. 58, based the specific facts of this case, recusal was still necessary under 455(b)(5)(iii).

[23] Moreover, courts generally frown on waiver from counsel because "Judges should not be able to pressure a waiver of disqualification by figuratively cloaking the judge's iron fist in a velvet glove." Ronald D. Rotunda & John S. Dzienkowski, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 10.2-2.11; *see also United States v. Kelly*, 888 F.2d 732, 745-46 (11th Cir. 1989) ("as a general rule, 'a federal judge should reach his own determination [on recusal], without calling upon counsel to express their views.... The too frequent practice of advising counsel of a possible conflict, and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.'") (quoting *Matter of National Union Fire Ins. Co.*, 839 F.2d 1226, 1231 (7th Cir.1988)); *see also Andros Compania Maritima, S.A. v. Marc Rich & Co.*, A.G., 579 F.2d 691, 699 (2d Cir.1978) ("Generally, a

28 U.S.C. § 455(b)(5)(iii), (e); *Postashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1115 (5th Cir. 1980) ("The express language of section 455(e) dictates that a judge cannot accept a waiver of disqualification on section 455(b)(5)(iii) grounds, such as when a relative of the judge has an interest which could be affected by the outcome of the proceeding."). Thus the court, as a matter of law, could not accept a waiver of the conflict from Sheriff Arpaio. Second, the potential civil contemnors, including Petitioner Chief Deputy Sheridan, could not have waived anything, as they were not parties to the case in 2012. They were not civilly or criminally at risk until the court made them a part of contempt proceedings in 2015. These individuals have the right to be separately informed of and have a chance to object to the conflict.

Moreover, if this conflict was waivable (which it is not), before the contempt proceedings began, the court should have: (1) disclosed the conflict, (2) permitted counsel to confer with their clients outside his presence, and (3) provide either a written waiver or note their waiver on the record. *See* Canon 3D. At a minimum, the court's failure to follow this process creates the appearance of bias under § 455(a) and violates the ethical canons.

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federal judge may not state for the record possible disqualifying circumstances and ask the parties to decide whether they want him to continue.").

Finally, recusal was required regardless of the courts' timeliness concerns. Our courts have an "unwavering commitment to the perception of fairness in the judicial process." *United States v. O'Brien*, 18 F. Supp. 3d 25, 32 (D. Mass. 2014) (finding recusal motion untimely but nevertheless addressing the merits and finding recusal necessary); *S.E.C. v. Loving Spirit Found. Inc*., 392 F.3d 486, 494 (D.C.Cir.2004) (recusal motion untimely but addressing merits). The court therefore had a continuing duty under § 455 to recuse himself, regardless of the timeliness of the motion. *United States v. Sibla,* 624 F.2d 864, 868 (9th Cir. 1980); *Bradley v. Milliken*, 426 F.Supp. 929, 931 (E.D. Mich. 1977).

E. An objective independent observer would recognize the appearance of bias under § 455(a).

On this record, a reasonably objective observer would perceive the appearance of bias by the court. 28 U.S.C. § 455(a); *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) ("The relevant test for recusal under § 455(a) is whether "a reasonable person would have a reasonable basis for questioning the judge's impartiality, not whether the judge is in fact impartial."); *United States v. Holland*, 519 F.3d 909, 911 (9th Cir. 2008) (when a case is close, the balance should tip in favor of recusal).

- Sheriff Arpaio and Chief Deputy Sheridan consented to a finding of civil contempt.

- The court ordered the Sheriff to put "skin in the game" by pledging his own funds to settle the contempt allegations, though the suit is only against him in his official capacity.

- The court *sua sponte* turned the contempt hearing into an investigation into matters personal to the court but entirely unrelated to the preliminary injunction, in violation of Petitioners' due process rights, cross-examining the witnesses on a matter involving the judge's wife, thereby making himself and his spouse material witnesses.[24]

- The court also inquired into MCSO's investigation involving Dennis Montgomery, which the Court characterized as a "bogus" conspiracy theory to discredit the court.[25]

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[24] The court repeatedly insinuated – with no evidence whatsoever -- that Petitioners "may have hired a confidential informant at least partly in an attempt to discredit this Court by linking it to a speculative conspiracy" and that "to the extent that Movants are responsible for creating the circumstances that they now offer as grounds for their Motion, the Montgomery materials provide no basis for judicial recusal." [*See* Doc. 1164 at 24:19-20, 29:4-16, Ex. 8]. The accusation is baseless, as the record is entirely devoid of any evidence that Petitioners ever solicited information from either the Grissom family or Dennis Montgomery. It is undisputed that two different sources voluntarily approached MCSO with information regarding Judge Snow and his alleged bias against Sheriff Arpaio. The Grissom/Montgomery matters would never have been mentioned had the court not injected them into the proceeding. From the court's scornful remarks alone, a reasonable observer in this case ***would*** find an appearance of bias under § 455(a). *Fairley v. Andrews*, 423 F. Supp. 2d 800, 821 (N.D. Ill. 2006) ("In this case, none of this Court's individual statements, when viewed in their proper context, warrant recusal under section 455(a). However, in doing the required self-evaluation under this section, this Court finds that all of this Court's statements and interactions with Defendants in this case, taken together, may give pause to a non-legal observer, not versed in the ways of the courtroom and the risks of litigation.").

[25] *See* 5/14/15 Tr. at 46:23-47:7, Ex. 12.

- The court, clearly angry over the suggestion that he hates the Sheriff and would do what it takes to get him out of office, morphed from objective adjudicator into an advocate, giving his own testimony, asking leading questions, becoming argumentative with the putative contemnors when they testified, and taking "evidence" from outside of court.

- The court then directed his Monitor to investigate further into these irrelevant matters after the contempt hearing, refusing to "shackle" the Monitor when the movants objected to the unprecedented and unbridled power given to the Monitor, despite recently being reversed by the Ninth Circuit for giving the Monitor too much authority.

- In denying recusal, the court indicated and has in fact continued to, investigate the status of "MCSO's remaining internal investigations" (which include the irrelevant matters).

These are the facts on which the recusal motion was based.[26] And based on the foregoing facts, a reasonably objective observer would perceive the appearance of bias necessitating the court's recusal.[27] *See United States v. Conforte*, 624

[26] Contrary to the court's order [Doc. 1164 at 26:10-12, 25, 33, Ex. 8], the motion was thus not based on "[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, or similar non-factual matters."

[27] Judge Snow impermissibly cited statements by Sheriff Arpaio, Chief Deputy Sheridan, and their defense counsel in concluding that a reasonable person would not believe recusal necessary under 28 U.S.C. § 455(a). [*See e.g.,* Doc. 1164 at 26-27, 31, Ex. 8]. A party to the litigation is not an objective impartial observer under § 455(a). *In re U.S.*, 572 F.3d 301, 313 n.12 (7th Cir. 2009) (rejecting trial court's reliance on fact that party did not desire recusal as meeting the objective standard under 28 U.S.C. § 455(a)). Moreover, the

F.2d 869, 881 (9th Cir. 1980) ("It is a general rule that the appearance of partiality is as dangerous as the fact of it."); *Alexander v. Primerica Holdings, Inc.,* 10 F.3d 155, 163, 166 (3d Cir. 1993) ("When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced."); *see also In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (an independent outside observer is "less inclined to credit judges' impartiality and mental discipline than the judiciary…."); *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1998) ("[p]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."); *Holland*, 519 F.3d at 911 (To the extent the facts are disputed, the balance tips in favor of recusal).[28]

The court also misplaced reliance on *Liteky v. United States,* 510 U.S. 540 (1994), for the proposition that Petitioners' recusal motion did not offer a valid basis for bias or partiality. [*See* Doc. 1164 at 15:9-20, 24:24-25:10, Ex.

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statements cited were made *before* the court injected irrelevant matters into the proceeding, before the court gave unbridled power to the Monitor, and before the enormous award of attorneys' fees to Plaintiffs' counsel.

[28] Judge Murguia previously recused herself under § 455(a), because comments allegedly made by her *sister* and her sister's *organization* were highly disparaging of Sheriff Arpaio. [Doc. 138 at 26-27, Ex. 28]. Recusal in this instance is even stronger under § 455(a) because the undisputed allegations from the Grissoms demonstrate that Judge Snow ***himself*** may have made highly disparaging comments regarding Defendant Arpaio. [*See* Doc. 1117 (Exs. 5-8), Ex. 11].

8]. *Liteky* actually recognizes that judicial rulings and comments ***do*** provide a basis for recusal under § 455, and a recusal motion is ***not*** required to be grounded in an extrajudicial source. *Liteky*, 510 U.S. at 551 (an extrajudicial source is a "*common* basis [for disqualification] but not the *exclusive* one.") (emphasis added); *id.* at 541 (judicial rulings "*almost* never constitute a valid basis for a bias or partiality motion.") (emphasis added); *id.* at 555 ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings" "constitute a basis for a bias or partiality motion" if "they display a deep-seated favoritism or antagonism that would make fair judgment impossible."). Indeed, the *Liteky* Court explained that remarks made during judicial proceedings will require disqualification when they: (1) reveal an extrajudicial bias, or (2) reveal an excessive bias arising from information acquired during judicial proceedings. *Id.* at 555. We have both here. The court's obvious anger at the Grissom investigation (seeing as Mrs. Snow's statement to Mrs. Grissom clouds any reasonable observer's perception of the court's objectivity in this case), coupled with: (a) the court's reactive cross-examination of the witnesses into Grissom (and other) matters, (b) giving the Monitor unbridled authority to intrude into every investigation at MCSO (regardless of its relevance to the preliminary injunction or contempt hearing), (c) the court's insistence that it was going to

continue investigating these irrelevant matters, and (d) the court's unfounded accusation that Petitioners might have hired a confidential informant to try to discredit the court – at the very minimum give the perception of both extrajudicial bias and bias arising from information acquired during the proceedings. Recusal was required and its refusal was clear error.[29]

II. PETITIONERS HAVE NO OTHER ADEQUATE REMEDY TO OBTAIN RELIEF.

This Court has recognized that a denial of a motion for recusal is exactly the kind of "exceptional circumstance" for which a writ of mandamus is designed:

> It is not necessary to create a general rule permitting immediate appeal of all recusal decisions in order to resolve the exceptional situations. *See Firestone Tire & Rubber Co. v. Risjord*, [449 U.S. 368, 378 n. 13, 101 S.Ct. 669, 676 n. 13, 66 L.Ed.2d 571 (1981)]. Ultimately, if dissatisfied with the district judge's decision and confident that the litigation will be greatly disrupted, a party may seek a writ of mandamus from the court of appeals. ***It is for just such an exceptional circumstance that the writ was designed.***

[29] Even if bias had to be based on an extrajudicial source, we have those here, including (but not limited to): (1) an *ex parte* communication from the Monitor regarding MCSO funding sources, (2) statements from the Grissoms and Dennis Montgomery, and (3) the court's brother-in-law's equity partnership at Covington & Burling. These are all extrajudicial sources. *See United States v. Johnson,* 610 F.3d 1138, 1147 (9th Cir. 2010) (describing an extrajudicial source as "something other than rulings, opinions formed or statements made by the judge during the course of trial).

In re Cement Antitrust Litig., (MDL No. 296), 673 F.2d 1020, 1025 (9th Cir. 1982) (emphasis added). Moreover, given that this case is in the remedial stage of litigation, the district court will not be issuing a "final order" that can be appealed. Petitioners have no remedy other than mandamus to obtain relief.

III. PETITIONERS WILL BE PREJUDICED IN A WAY NOT CORRECTABLE ON APPEAL

Absent mandamus relief, Petitioners will be prejudiced in a way not correctable on later appeal. It is axiomatic that Judge Snow's continued participation in the contempt proceedings and compliance phase of this action endangers not only the Petitioners' rights, but also the appearance of the court's fairness and impartiality. For this reason, Petitioners requested a stay of all proceedings pending resolution of this Petition [Docs. 1171, Ex. 6; 1176, Ex. 4], which the court denied. [7/20/15 at 10-15, Ex. 2; Doc. 1179, Ex. 3]. Because the compliance and contempt proceedings are continuing, mandamus relief is necessary to prevent further prejudice to Petitioners, which cannot be corrected on later appeal.

IV. THE ORDER REFUSING RECUSAL MANIFESTS PERSISTENT DISREGARD OF THE FEDERAL RULES

The district court's refusal to recuse itself comes only after the court engaged in an *ex parte* conversation and then questioned witnesses regarding that *ex parte* information, refused to disclose the source of its information until

much later, injected irrelevant yet very personal matters (personal to the court) into the contempt hearing, and gave the Monitor unbridled and unprecedented authority to investigate those matters. This evidences persistent disregard of not only the federal rules, but also the parties' due process rights.

V. THE ORDER REFUSING RECUSAL RAISES NEW AND IMPORTANT ISSUES OF LAW OF FIRST IMPRESSION.

This Court has not yet adopted the Committee's Advisory Opinion No. 58, setting forth a categorical rule of recusal when a relative within the third degree of relationship is an equity partner in a law firm in the case. As such, this is an important legal issue of first impression that satisfies the last element of *Bauman* test.

VI. PETITIONERS' RECUSAL MOTION WAS TIMELY.

The district court repeatedly asserted that Petitioners' recusal motion was untimely because Petitioners knew about the Grissom/Montgomery investigations for some time prior to their recusal motion. [Doc. 1164 at 2, 27, 32, and 33, Ex. 8].[30] In truth, the recusal motion was timely. It was filed within one month of the court's April 23, 2015 injection of the Grissom and

[30] A motion for recusal under § 455(a) does not have a strict time deadline. *U.S. v. Kehlbeck*, 766 F.Supp. 707 (S.D. Ind. 1990); *see also Conforte*, 624 F.2d at 880 ("we leave open here the question whether timeliness may be disregarded in exceptional circumstances.").

Montgomery matters into the contempt proceedings.[31] Furthermore, the court's subsequent order directing that the Monitor be given unfettered access to investigate these and other irrelevant matters did not occur until May 14, 2015. The recusal motion was filed within a week of that, on May 22, 2015. [Doc. 1117, Ex. 11]. Recusal motions are timely even if filed a year or more after the case begins, where the grounds for recusal do not arise until later. *See, e.g., Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991) (recusal motion timely when filed eighteen months after assignment to trial judge; grounds for recusal did not arise until ten days before recusal motion filed); *Edgar v. K.L.*, 93 F.3d 256, 257-58 (7th Cir. 1996) (recusal motion timely after a year because defendants, only two weeks before the motion, learned that judge was discussing merits of case with experts). Here, the recusal motion was not untimely.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to (1) issue a writ of mandamus directing Judge Snow to recuse himself from all proceedings in this action and (2) appoint a new judge to preside over this case.

[31] Petitioners never argued that the grounds for recusal arose out of the Grissom/Montgomery investigations themselves. It was the court's improper inquiry into these matters during the April 2015 contempt hearings that suddenly made these investigations supposedly relevant to the proceedings.

RESPECTFULLY SUBMITTED this 6th day of August, 2015.

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Signature	/s/ John T. Masterson
Attorney for	Defendants/Petitioners Joseph M. Arpaio and Gerard A. Sheridan
Date	August 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing PETITION FOR WRIT OF MANDAMUS 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 the 6th day of August, 2015.

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/s/Karen Gawel

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