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8  
9 **UNITED STATES DISTRICT COURT**  
10 **DISTRICT OF ARIZONA**

11 United States of America,

12 Plaintiff,

13 v.

14 Joseph M. Arpaio,  
Steven R. Bailey,  
Michelle Iafrate, and  
15 Gerard Sheridan,

16 Defendants.

NO. 2:16-CR-01012-SRB

**DEFENDANT SHERIFF  
ARPAIO’S BRIEF RE: THE  
STATUTE OF LIMITATIONS  
APPLICABLE TO 18 U.S.C. § 402**

17 Pursuant to this Court’s October 11, 2016, Minute Entry, Defendant Arpaio  
18 submits the following Memorandum of Points and Authorities regarding whether the one  
19 year statute of limitations applicable to 18 U.S.C. § 402, found at 18 U.S.C. § 3285, has  
20 run on Judge Snow’s criminal contempt referral for Sheriff Arpaio regarding the  
21 Montgomery documents. It is Sheriff Arpaio’s position that the United States is correct;  
22 the one year statute of limitations applicable to 18 U.S.C. § 402 has run on any criminal  
23 contempt count arising out of Judge Snow’s criminal referral involving the Dennis  
24 Montgomery documents.  
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**MEMORANDUM OF POINTS AND AUTHORITIES****I. BACKGROUND FACTS.**

On April 23, 2015, Sheriff Arpaio, took the stand during the underlying civil contempt evidentiary proceedings. After the Plaintiff Class concluded its redirect examination of Sheriff Arpaio, Judge Snow independently began to question the Sheriff on whether MCSO had ever investigated Judge Snow or his wife. In response to this surprise inquiry, which was based upon Phoenix New Times stories never disclosed by the Court to counsel or the Sheriff, Sheriff Arpaio testified that MCSO and an informant, Dennis Montgomery, exchanged communications and materials regarding certain investigations conducted by MCSO. After Judge Snow concluded questioning Sheriff Arpaio on this subject, he ordered Sheriff Arpaio to personally take charge of preserving and disclosing this information. [Doc. 1027<sup>1</sup> at Tr. 659-660; Doc. 1677 ¶ 351]. On April 27, 2015, MCSO provided the Court's Monitor with a hard drive containing information regarding Dennis Montgomery's investigations involving MCSO. [Doc. 1032]

On May 22, 2015, Sheriff Arpaio moved to recuse Judge Snow from this action based on his questioning of Sheriff Arpaio on the stand regarding matters personally related to the Court without any sufficient due process notice that such questioning would occur. [Doc. 1117]. That same day, the Court vacated the status conferences set for June 5 and June 12, 2015 and noted that it "shall issue no further orders until the Motion is fully briefed and/or a ruling has been issued." [Doc. 1120]. The Court further ordered the parties to continue to hold dates in June for continued civil contempt hearings or for discovery. [*Id.*].

On July 10, 2015, Judge Snow denied the Motion for Recusal. [Doc. 1164]. The Court also noted that "any stay on pre-hearing discovery and/or the activities of the Monitor related to the resumption of the show-cause hearings is lifted." [*Id.* at 40:4-5].

On July 14, 2015, Sheriff Arpaio moved to stay the proceedings so the

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<sup>1</sup> Unless otherwise indicated, references to "Doc." refer to the official record in the underlying civil contempt case before Judge Snow, *See* No. CV-07-2513-PHX-GMS.

1 Ninth Circuit could decide a Writ of Mandamus filed by Sheriff Arpaio regarding Judge  
2 Snow's denial of Sheriff Arpaio's Motion for Recusal. [Doc. 1171]

3 On July 20, 2015, Judge Snow denied Sheriff Arpaio's Motion to Stay.  
4 [Doc. 1179].

5 On July 24, 2015, the Monitor requested MCSO provide the 50 hard drives  
6 that Dennis Montgomery gave MCSO, but were not previously given to the Monitor. [See  
7 Docs. 1190; 1192; 7/24/15 RT at 7:11-15:17]. This request arose as a result of the  
8 Monitor's discovery during its July 2015 site visits that MCSO was in possession of these  
9 additional hard drives. Upon receiving the Monitor's request, the Court held a hearing  
10 that same day, and then ordered MCSO to provide the requested documentation and sent  
11 its Marshalls to collect the 50 hard drives MCSO had in its possession. [*Id.*].

12 On August 19, 2016, Judge Snow referred Sheriff Arpaio for criminal  
13 contempt involving, among other things, his alleged concealment of the 50 Montgomery  
14 hard drives. [See Doc. 1792 at 1-2].

15 On October 11, 2016, Sheriff Arpaio filed a tolling agreement regarding the  
16 statute of limitations under 18 U.S.C. § 402 and Sheriff Arpaio's conduct involving the  
17 non-disclosure of the Montgomery hard drives. [See No. 2:16-CR-01012-SRB, Doc. 21].

18 **II. THE STATUTE OF LIMITATIONS HAS RUN ON ANY 18 U.S.C. § 402**  
19 **CHARGE AGAINST SHERIFF ARPAIO FOR CRIMINAL CONTEMPT**  
20 **INVOLVING THE 50 MONTGOMERY HARD DRIVES.**

21 An action for contempt under 18 U.S.C. § 402 has a one-year statute of  
22 limitations and begins to run "from the date of the act complained of:"

23 No proceeding for criminal contempt *within section 402* of  
24 this title shall be instituted against any person, corporation or  
25 association *unless begun within one year from the date of the*  
26 *act complained of*; nor shall any such proceeding be a bar to  
27 any criminal prosecution for the same act.

18 U.S.C. § 3285 (Emphasis added).

26 Generally, a statute of limitations begin to run when the crime is complete.  
27 *Pendergast v. United States*, 317 U.S. 412, 418 (1943); *United States ex rel. Louisville*  
28 *Cement Co. v. Interstate Commerce Comm'n*, 246 U.S. 638, 644 (1918); *see also U.S. v.*

1 *Irvine*, 98 U.S. 450 (1879). The purpose of a statute of limitations is to limit exposure to  
2 criminal prosecution to a certain fixed period of time following the occurrence of those  
3 acts the legislature has decided to punish by criminal sanctions. *Toussie v. United States*,  
4 397 U.S. 112, 114–15 (1970). Such a limitation is designed to protect individuals from  
5 having to defend themselves against charges when the basic facts may have become  
6 obscured by the passage of time and to minimize the danger of official punishment  
7 because of acts in the far-distant past. *Id.* Such a time limit may also have the salutary  
8 effect of encouraging law enforcement officials promptly to investigate suspected criminal  
9 activity. *Id.* Concluding, the Supreme Court in *Toussie* recognized the long standing  
10 tradition that “criminal limitations statutes are ‘to be liberally interpreted in favor of  
11 repose.’” *Id.* (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932)).

12 Accordingly, as a general rule, exceptions will not be implied to statutes of  
13 limitations for criminal offenses unless it contains an express exception or condition that  
14 will toll its operation. *See e.g., Toussie*, 397 U.S. at 115 (“Congress has declared a policy  
15 that the statute of limitations should not be extended ‘(e)xcept as otherwise expressly  
16 provided by law.’”) (quoting 18 U.S.C. § 3282(a) (statute of limitations should not be  
17 extended “[e]xcept as otherwise **expressly** provided by law”)) (emphasis added); *see also*  
18 *State v. Bragg*, 774 S.E.2d 182, 185 (2015); *Morgan v. People*, 158 N.E.2d 182 (1959).  
19 Some examples of express exceptions to a statute of limitations are as follows:

20 (1) when the person committing the crime is unknown or the  
21 crime is unknown.

22 (2) when the defendant is “continuously absent from the  
23 State,”

24 (3) when the defendant “has no reasonably ascertainable place  
25 of abode or work within the state,” or

26 (4) when a State prosecution is pending against the defendant.

27 *See e.g., Model Penal Code* § 1.06(6). Here, however, 18 U.S.C. § 3285 and § 402  
28 contain no explicit exception to the one year statute of limitation.

1           **A. Sheriff Arpaio’s alleged failure to disclose the 50 Montgomery hard**  
2           **drives falls under the one year statute of limitations for 18 U.S.C. § 402.**

3           For Sheriff Arpaio, the “act complained of” under § 402 is his alleged  
4 concealment of the 50 Montgomery hard drives. [See Case 2:07-cv-02513-GMS, Order re  
5 Criminal Contempt (Dkt. 1792) at 5:13-6:14]. Importantly, the one year statute of  
6 limitations under 18 U.S.C. § 402 began to run, at the latest, on **July 24, 2015**, because  
7 that is when the Monitor definitively knew of the 50 hard drives in possession of MCSO,  
8 brought the issue to the Court’s attention, and the Court actually took possession of the 50  
9 Montgomery hard drives through its Marshalls.<sup>2</sup> The Statute of limitations, therefore, ran  
10 one year from this date, on **July 24, 2016**. This occurred well before Judge Snow’s  
11 **August 19, 2016**, criminal referral and the tolling agreement filed by Sheriff Arpaio in  
12 this Court on **October 11, 2016**.

13           Accordingly, the Government is correct that any 18 U.S.C. § 402 claim  
14 involving any potential claim that Sheriff Arpaio concealed the materials from Dennis  
15 Montgomery has run.

16           **B. Section 402’s one year statute of limitations has not been tolled.**

17           There is no tolling of the statute of limitations involving § 402 in this  
18 matter. As stated above, the latest the “date of the act complained of” could have  
19 occurred under the applicable statute of limitations was on July 24, 2015, fourteen days  
20 after the stay imposed by the Court regarding Sheriff Arpaio’s recusal motion was  
21 vacated. [See Doc. 1164 at 40:4-5 (Noting that as of July 10, 2015, “any stay on pre-  
22 hearing discovery and/or the activities of the Monitor related to the resumption of the

23           <sup>2</sup> While the “continuing offense” concept may be applicable to criminal contempt  
24 actions, *see United States v. J. Myer Schine*, 260 F.2d 552, 555-56, (2nd Cir. 1958), cert.  
25 denied, 358 U.S. 934 (1959), to the extent there is any argument that the Sheriff’s failure  
26 to disclose the 50 Montgomery hard drives was a “continuing offense”, case law is clear  
27 that any statute of limitations began to run from the date the offense concluded, which  
28 occurred on July 24, 2015, when the Court’s marshals took possession of the 50  
Montgomery hard drives. *See e.g., United States v. Krstic*, 558 F.3d 1010, 1017 (9th Cir.  
2009) (“[P]ossessory offenses have long been described as ‘continuing offenses’ that are  
not complete upon receipt of the prohibited item. Rather, the statute of limitations does  
not begin to run until the possessor parts with the item.”); *see also U.S. v. Smith*, 373 F.3d  
561, 568 (4th Cir. 2004).

1 show-cause hearings is lifted.”)]. Moreover, 18 U.S.C. § 402 and § 3285 contain no  
2 express exceptions or circumstances that toll the one year statute of limitations, nor do any  
3 of the common exceptions identified in other statutes above apply to toll the statute of  
4 limitations applicable to § 402.<sup>3</sup> Thus, there is absolutely no tolling issue at play in this  
5 action for any 18 USC § 402 claim asserted against Sheriff Arpaio.

### 6 **III. CONCLUSION.**

7 Based on the foregoing, Sheriff Arpaio agrees with the United States in this  
8 matter, the statute of limitations on any 18 U.S.C. § 402 charge by the United States has  
9 run on both the second and third counts of Judge Snow’s criminal referral regarding  
10 Sheriff Arpaio’s non-disclosure of the communications and documents in his possession  
11 related to Dennis Montgomery.<sup>4</sup>

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18 <sup>3</sup> While other jurisdictions have recognized, under very limited circumstances, that  
19 equitable tolling may apply in the criminal context, *see e.g., United States v. Atiyeh*, 402  
20 F.3d 354, 367 (3d Cir. 2005), undersigned counsel has not found *any* reported case (in the  
21 Ninth Circuit or otherwise) in which a court applied equitable tolling to a violation under  
22 Title 18. In any event, federal courts invoke the doctrine of equitable tolling “only  
23 sparingly”, *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998), and “absent a  
24 showing of intentional inducement or trickery by the defendant, a statute of limitations  
25 should be tolled only in the rare situation where equitable tolling is demanded by sound  
26 legal principles as well as the interest of justice.” *Atiyeh*, 402 F.3d at 367 (internal  
27 quotations omitted). As stated above, no such rare circumstances exists in the underlying  
28 civil contempt proceeding to justify invoking the doctrine of equitable tolling in this  
action.

<sup>4</sup> Importantly, Judge Snow’s criminal referral for Sheriff Arpaio does not involve  
MCSO’s failure to disclose the existence of approximately 1500 IDs in its possession to  
the Monitor – the referral for that non-disclosure was solely directed at Chief Deputy  
Sheridan, Captain Bailey, and Michele Iafate. [See Doc. 1792 at 1-3]. In any event, the  
statute of limitations for a § 402 claim has equally run on any non-disclosure of the 1500  
IDs because the Monitor raised the non-disclosure of the 1500 IDs on the same day (July  
24, 2015) that it raised the issue of non-disclosure regarding the 50 Montgomery hard  
drives. [See Doc. 1190; 1192; 7/24/15 RT at 7:11-15:17].

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RESPECTFULLY SUBMITTED this 25th day of October 2016.

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

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of October, 2016, I electronically filed the foregoing filing with the Clerk of Court through the CM/ECF System which will send notification of such filing to the attorneys of record for the defendants.

/s/Karen Gawel