

1 **IAFRATE & ASSOCIATES**
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3 Michele M. Iafate, #015115

4 Attorney for Detention Officer Adam Stoddard

5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
6 **IN AND FOR THE COUNTY OF MARICOPA**

7	STATE OF ARIZONA,)	NO. CR2009-006227-001 DT
)	
8	Plaintiff,)	MARICOPA COUNTY SHERIFF'S
)	OFFICER STODDARD'S MOTION TO
9	v.)	UNSEAL RECORD
)	
10	ANTONIO LOZANO,)	(Expedited Ruling Requested)
)	
11	Defendant.)	(Honorable Gary E. Donahoe)
12)	

13 Maricopa County Detention Officer Adam Stoddard ("Officer Stoddard")

14 moves this Court to unseal the record in this case to allow him to present evidence

15 in his Special Action. Access to the letter, that was sealed by the Court on
16 November 10, 2009, is necessary to afford Officer Stoddard his due process rights
17 under the Fourteenth Amendment. Furthermore, Defendant Lozano and his counsel
18 waived any attorney-client privilege regarding the letter by moving the Court for an
19 Order to Show Cause hearing. Officer Stoddard supports his motion with the
20 following Memorandum of Points and Authorities.

21 ///

22 ///

23 ///

1 2d 626 (N.Y. Sup. 2004). Here, the letter at issue was discussed throughout the
2 public Order to Show Cause hearing; however Officer Stoddard's counsel never
3 reviewed the letter for fear it would impinge on the attorney-client privilege.

4 However, even the court recognized that without access to the letter, Officer
5 Stoddard cannot fully defend himself against his contempt allegations. (Ex. 1, p. 56
6 ll. 5-10; p. 57 ll. 4-9). Instead of unsealing the letter and allowing a complete
7 opportunity to defend, the Court created a "partial waiver". (Ex. 4, November 5,
8 2009 Transcript p. 28, ll. 1-6). Officer Stoddard's counsel objected, explaining that
9 unsealing merely a few words would increase the prejudice to his client and make it
10 impossible to defend his client. (Ex. 4, p. 26 ll. 5-7). The Court's ruling allowed only
11 partial testimony. Based on the Court's ruling, Counsel was not able to adequately
12 defend Officer Stoddard; thus, denying him of his due process rights. Officer
13 Stoddard testified that the few words he was allowed to say in court were not what
14 motivated him to remove the document and have it photocopied. (Ex. 4, p. 32 ll.
15 18-20.). Further, Officer Stoddard testified that after reading the entire letter, he
16 formed additional security concerns. (Ex. 4, p. 57 ll. 19-22; pp. 60, l 19 to p. 61, l 9;
17 p.62, ll. 11-14). The Court did not allow the contents of the letter as evidence to
18 support those concerns.
19

20
21 Due to the Court's Ruling and Amended Ruling alleging that Ms. Cuccia's
22 reputation was somehow tarnished by the actions of Officer Stoddard, it is
23 necessary to unseal the letter.
24

1 **B. Ms. Cuccia and Defendant Lozano Waived The Attorney-Client**
2 **Privilege Regarding the Letter When They Placed Its Contents "At**
3 **Issue".***

4 By filing the Motion for an Expedited Order to Show Cause Hearing and
5 the "partial waiver" by Defendant Lozano, Ms. Cuccia and Defendant Lozano placed
6 the letter at issue and waived any privilege regarding it. The "at issue," or implied
7 waiver exception to the attorney-client privilege is invoked when the contents of the
8 legal advice are integral to the outcome of the legal claims of the action.

9 *Metropolitan Life v. Aetna Casualty*, 730 A.2d 51, 60 (1999). Further, when a
10 petitioner is free to use the attorney-client privilege as a "shield," it is improper to
11 also use it as a "sword" by seeking to deprive an opposing party of material by which
12 that party may defend against the claim raised. *Smith v. Alyeska Pipeline Service*
13 *Co.*, 538 F.Supp. 977, 979 (D.Del.1982). Further, a Defendant may not use the
14 attorney-client privilege by selectively waiving only portions to benefit his case. See
15 *State v. von Bulow*, 475 A.2d 995 (1984). Here, Defendant Lozano and Ms. Cuccia
16 placed the letter at issue when questioning Officer Stoddard about its contents and
17 when Ms. Cuccia discussed its contents at the Order to Show Cause hearing.
18 Defendant Lozano attempted to waive the privilege only as to a certain portion of the
19 letter to benefit his argument.

20 A judge is within his discretion to require the defense to turn over any
21 items contained in a sealed file that were put in issue by that witness' testimony.
22 *Maxie v. Gimbel Brothers*, 423 N.Y.S.2d 802, 807 (1979). Here, defendant put the

24 _____

* The holder of the privilege is Defendant Lozano not Ms. Cuccia.

1 letter at issue and attempted to only waive a portion to the detriment of Officer
2 Stoddard's defense.

3 **III. CONCLUSION**

4 For the foregoing reasons Officer Stoddard respectfully requests access to the
5 letter at issue to defend his claim and file a Petition for Special Action.

6 **DATED** this 30th day of November, 2009.

7 **IAFRATE & ASSOCIATES**

8
9 By: *Michele M. Iafrate*
10 Michele M. Iafrate
11 Attorneys for Detention Officer Stoddard

12
13 By: *Michel M. Iafrate*
14 for Thomas P. Liddy
15 Maricopa County Attorney's Office
16 Deputy County Attorney
Attorneys for Detention Officer Stoddard

17 **ORIGINAL** of the foregoing filed
18 this 30th day of November, 2009, with:

19 Clerk of the Superior Court
20 Maricopa County Superior Court
21 201 W. Jefferson
22 Phoenix, Arizona 85003
23
24

1 **COPY** of the foregoing hand-delivered
2 this 30th day of November, 2009, to:

3 Honorable Gary Donahoe
4 Presiding Criminal Judge
5 East Court Building, Suite 511
6 101 West Jefferson Street
7 Phoenix, AZ 85003

8 **COPY** of the foregoing mailed
9 this 30th day of November, 2009, to:

10 Jennifer Linn
11 Maricopa County Attorney
12 100 W. Washington
13 Phoenix, Arizona 85003

14 Maria Schaffer
15 Maricopa County Legal Defenders
16 222 N. Central, Ste. 8100
17 Phoenix, Arizona 85004

18 David Bodney
19 Steptoe & Johnson
20 201 E. Washington Street
21 Suite 1600
22 Phoenix Arizona
23 85004-2383

24 Craig Mehrens
Mehrens and Willemon PA
99 E. Virginia Avenue, Suite 220
Phoenix, AZ 85004-1195

By: *Susan Hummer*

EXHIBIT 1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

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STATE OF ARIZONA)
vs.)
ANTONIO LOZANO (001)) No. CR2009-006227-001DT

Phoenix, Arizona
October 30, 2009

BEFORE THE HONORABLE GARY E. DONAHOE
REPORTER'S TRANSCRIPT OF PROCEEDINGS
ORDER TO SHOW CAUSE HEARING

PREPARED FOR:
(Copy)

PREPARED BY:
Rochelle L. Dobbins, RPR
AZ Certified Court Reporter #50721

1 issue, I guess my first question -- and just thinking
2 out loud here. I thought about this after I reviewed
3 the documents -- is that I have potentially three copies
4 of these -- it looks to me like I've got the original
5 and two copies. And my intent was to -- unless
6 Mr. Liddy or someone has some objection -- is return two
7 of those copies to you and retain one in the sealed
8 file, in case there's some appellate review of this. So
9 I just don't -- I think you are entitled to have these
10 documents back.

11 MR. LIDDY: The Sheriff has no objection,
12 your Honor.

13 MS. SCHAFFER: Judge, I would ask that
14 you keep one for the record as you suggested. We'll
15 take the other two copies back.

16 THE COURT: And if you want to come up to
17 my bench, you can look at these and just confirm that
18 the copies are all the same and that the one on top, the
19 one that's stapled appears to me -- and Ms. Cuccia can
20 probably tell me if they are -- if it's the original,
21 but they all appear the same to me. And, again, the one
22 on top simply because it's folded in half, appears to be
23 the original, but I don't know. But I want to return
24 the original and one copy to you and keep a copy for the
25 Court file.

1 in order to even hold this hearing. And, again, I'm
2 being asked to hold this detention officer and a deputy
3 in contempt and they're not allowed to put on the record
4 the reasons for the seizure.

5 So I'm still not sure I'm even going to
6 entertain a contempt finding at this time, so I'm
7 letting this play out to see what evidence I get. But
8 right now, unless they're entitled to fully defend
9 against this contempt allegation, I'm not going to hold
10 them in contempt.

11 MR. MEHRENS: And what you are
12 suggesting, it seems to me, your Honor, is that this
13 gentleman has to waive his attorney/client privilege so
14 we can have this hearing. And the reason you are
15 suggesting he has to do it is because these gentlemen
16 seized documents from a file they clearly knew was
17 legal. There was a number of other alternatives they
18 could have pursued, which I was going to ask him about
19 in a few minutes, that they didn't do. But you and I
20 just have a difference on what should have happened.

21 THE COURT: But the waiver can be easily
22 dealt with. There's -- as I understand it, we can
23 either agree that there's an ethical wall between
24 Mr. Liddy and the criminal division of the County
25 Attorney's office or I can disqualify the County

1 Attorney's office in further criminal proceedings
2 against Mr. Lozano and they can get somebody else to
3 come in here.

4 So the waiver is not going to go any
5 further than this courtroom. I can seal the record in
6 this proceeding. It's not -- I can control any spill
7 over or rub off in the criminal proceeding, but unless
8 you are going to let these gentlemen fully defend
9 against them, I'm not going to hold them in contempt.

10 MR. MEHRENS: May I have a moment, your
11 Honor?

12 THE COURT: Yes.

13 (COUNSEL CONFER)

14 MR. LIDDY: Your Honor, may I briefly go
15 on the record to be clear.

16 THE COURT: Sure.

17 MR. LIDDY: There was a statement made
18 and a gesture made pointing toward me saying that this
19 detention officer stole the document and then handed
20 them to the people who are prosecuting his client and
21 then he gestured toward me. I just want the record to
22 be clear that the Sheriff's Office does not prosecute
23 defendants and that the civil division does not
24 prosecute defendants and that I have not read the
25 documents.

EXHIBIT 2

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/17/2009

HON. GARY E. DONAHOE

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

JENNIFER K LINN
THOMAS PURCELL LIDDY

v.

ANTONIO LOZANO (001)

MARIA L SCHAFFER
BRENT E GRAHAM
CRAIG MEHRENS
JOANNE CUCCIA
DAVID JEREMY BODNEY

D & C MATERIALS-CSC
EXHIBITS-CCC
VICTIM SERVICES DIV-CA-CCC

UNDER ADVISEMENT RULING

Joanne Cuccia's request to hold Detention Officer (DO) Adam Stoddard and Deputy Sheriff Francisco Campillo in contempt of court was taken under advisement following the conclusion of the hearing on November 10, 2009. The Court has considered the testimony of the witnesses, the exhibits and the argument of counsel.

Preliminary Matter

Before turning to the merits of the contempt proceeding, it is clear from the evidence that Ms. Cuccia did nothing wrong. She was appointed to represent a defendant in a criminal

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/17/2009

proceeding and she did her job. She achieved a favorable non-trial resolution for Defendant and was in the midst of arguing for a favorable sentence when the events in question occurred. Ms. Cuccia is a dedicated attorney and there is no evidence that she engaged in any misconduct. Any news release or media report to the contrary is false.

Defendant's counsel advised the Court that she will be filing a motion to dismiss, motion for change of venue and a motion to disqualify the Maricopa County Attorney as the prosecutor. Defendant's interests directly related to his criminal case will be addressed when those motions are ruled on by this Court. The other interests affected by the events in question will be addressed in this ruling.

The Law

The law that applies is well established. The first applicable principle is the security officers' status in the court. In carrying out their security duties in the courtroom, the Sheriff's employees are acting as officers of the court. *See Arpaio v. Baca*, 217 Ariz. 570, ¶ 27, 177 P.3d 312 (App. 2008).

The second principle pertains to the court's authority to address in a contempt proceeding behavior that adversely impacts people in a courthouse. In *Hirschfeld v. Superior Court In and For County of Maricopa*, 184 Ariz. 208, 211 – 212, 908 P.2d 22, 25 – 26 (App. 1995), the court addressed the issue of a court's authority to control the behavior of an officer of the court when in the courthouse and wrote:

This case is not about a refusal to obey a court order. * * * Thus, the basic question is whether rude and harassing behavior between persons involved in a court proceeding which occurs out of the presence of the judge when court is in recess can be a contempt of court. * * *

We conclude that such behavior is a contempt of court for the very reason expressed by the trial judge—that the court has the right and the duty to protect litigants, witnesses, attorneys and jurors from misbehavior and harassment while they are in or near the courtroom, whether they are arriving, waiting, or departing. Conduct like Hirschfeld's, because it impinges on that right and duty, lessens the dignity and authority of the court. There are a number of cases which support this conclusion. We pass over, without comment, those many cases in which the conduct actually disrupted or delayed court proceedings. The cases we do rely on all concern misbehavior that occurred while court was in recess. All of them were decided under definitions of contempt that we believe equate to “contumacious conduct which lessens the dignity or authority of the court.”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/17/2009

Unlike the events in *Hirschfeld*, the conduct in question occurred in front of a judge of this court. Like *Hirschfeld*, the conduct in question was done by an officer of the court. The conduct in question disrupted and delayed the sentencing proceeding. The principles discussed in *Hirschfeld* apply here and teach that control of the conduct of all those appearing in court, whether inside or outside the courtroom, must remain in the hands of the presiding judicial officer.

As noted during the hearing, this Court is aware of the competing interests involved. On one hand is the interest that court security personnel be willing and able to immediately respond to legitimate security threats occurring in the courthouse and courtrooms. To impair that interest would jeopardize all who are present in courthouses and courtrooms everyday. Court security personnel should not hesitate to respond to a legitimate threat at a critical time because of a fear that sanctions will be imposed if, in twenty-twenty hindsight, a different course of action might be deemed to have been more reasonable.

On the other hand is the competing interest of assuring that the dignity of court proceedings is not diminished. As noted above, conduct that disrupts and delays a court proceeding impacts the dignity of the court, but it also impairs the court's ability to deliver timely justice. This Court has a responsibility to ensure that counsel are not subjected to unreasonable searches and seizures by court security personnel while performing their duties in the courthouse. No attorney, either State's counsel or defense counsel, should have to be worried that a file left momentarily unattended on counsel's table in a courtroom will be searched and documents seized without a prior determination by a judicial officer of probable cause or the existence of exigent circumstances based on a good faith belief that an immediate threat exists or that immediate criminal conduct justifies a warrantless search. No attorney should have to be concerned that while they are in the courthouse, unreasonable and unlawful conduct of court security personnel will cause damage to counsel's professional reputation or result in a breach of the attorney-client privilege. To paraphrase from *State v. Hampton*, 208 Ariz. 241, ¶ 11, 92 P.3d 871 (2004), "our system of justice cannot function if dedicated defense counsel face threats of" misbehavior and harassment while in the courthouse.

Deputy Sheriff Campillo

Ms. Cuccia's request to hold Deputy Sheriff Campillo in contempt of court is denied. Deputy Campillo did not remove the documents from counsel's file. He was asked by his colleague to copy the documents and he did that. He returned the documents to DO Stoddard. Deputy Campillo did not read the documents. This Court finds that there is no evidence of contumacious conduct on the part of Deputy Campillo.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/17/2009

Detention Officer Stoddard

The evidence regarding DO Stoddard compels a different result. DO Stoddard testified that he moved behind Ms. Cuccia, who was standing at the podium with Defendant, to stand by defense counsel's table so he could be in a better tactical position because of the things that he had observed in the courtroom that day and other circumstances, including his training about the tactics of the Mexican Mafia and the jail intelligence he had heard about Defendant. DO Stoddard testified that while in that position, he could see three to four inches of a document protruding from defense counsel's file. He "briefly reviewed it [the document] with his eyes" and picked up "key words." According to DO Stoddard, those key words were "going to steal" and "money," all in the same sentence. Those words do appear in the last paragraph of the first page of the document. Therefore, DO Stoddard had to have been looking at the bottom of the page while it was in the correct reading orientation. In other words, the document was not upside down from DO Stoddard's viewing position.

The FTR recording (Exhibit 2) shows the timing of the events. After moving to the table area, DO Stoddard looked down at defense counsel's file at approximately 9:26:03 a.m. and began looking at a document contained in that file. After approximately 16 seconds, at 9:26:19 a.m., DO Stoddard pulled the document farther out of the file and continued to view the document for approximately another 21 seconds (until 9:26:40 a.m.). At 9:26:41 a.m., DO Stoddard looked up and gestured to Deputy Campillo to come over to him. DO Stoddard had as many as 37 seconds to read a paragraph consisting of three lines and 28 words.

The FTR recording is revealing in another way too. To anyone who has been involved in a sentencing proceeding, the FTR recording shows what appears to be a normal sentencing proceeding. Ms. Cuccia and Defendant are standing at the podium in the well of the courtroom. Judge Flores calls the case, establishes that Ms. Cuccia is Defendant's counsel as opposed to advisory counsel and confirms Defendant's date of birth. Counsel for the State, Ms. Linn, makes her recommendation that Defendant be sentenced to the maximum aggravated prison term, consecutive to his current prison sentence. Ms. Cuccia begins to make her sentencing recommendation and everything appears normal. Ms. Linn expresses no concern about anything taking place in the courtroom. Ms. Cuccia continues her presentation. DO Stoddard is standing at the far end of the jury box and nothing about his demeanor indicates anything out of the ordinary is happening in the courtroom. Judge Flores is not heard to express any concern regarding anything going on in the courtroom. In other words, what the FTR recording shows is a totally uneventful, normal sentencing hearing until Defendant sees DO Stoddard remove the document from counsel's file. At no time is there any indication of any immediate security threat to anyone in the courtroom or any indication that criminal conduct is afoot.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/17/2009

Ms. Cuccia's testimony rebuts DO Stoddard's testimony that the document was seized and reviewed because it had not previously been searched by jail personnel. Ms. Cuccia testified that the document had been in her file for approximately two months. She testified that it had not been given to her that day while reviewing the presentence report with Defendant in the jury box. The date on the document supports Ms. Cuccia's testimony that the document had been in her possession prior to October 19, 2009. Having considered all of the evidence and the demeanor of Ms. Cuccia while testifying, the Court finds Ms. Cuccia's testimony credible.

The Court finds that DO Stoddard's conduct was unreasonable. This Court finds that there was no security threat justifying the seizure of the document from counsel's file. Nor was there any evidence that a crime was being committed or about to be committed. There was no immediate or future security threat that would have justified a reasonable detention officer in DO Stoddard's situation removing, seizing and copying a document from a defense attorney's file. A reasonable detention officer would have recognized after spending approximately 37 seconds reading the paragraph in question, that the "key words" had nothing to do with an immediate or future security threat to the jail or anyone else. Even giving DO Stoddard the benefit of the doubt that he had a right to scan the entire paragraph which was in plain sight after seeing the "key words" to determine if Defendant presented an immediate security risk, nothing in that paragraph justified DO Stoddard's continued conduct of removing the document from counsel's file and having the document copied.

Like the *Hirschfeld* case, this case is not about disobeying a court order. It is about protecting a defense attorney from misbehavior and harassment by another officer of the court. It is about protecting the sanctity of the attorney-client privilege. It is about enforcing the boundaries of the 4th Amendment. This Court is of the opinion that DO Stoddard's conduct in removing the document from counsel's file and copying the document was misbehavior that impacted the court's duty to protect attorneys from unreasonable conduct and thereby lessened the dignity and authority of the court. For proof of that point, one need look no further than the media reports about this event; those reports have cast everyone involved in a negative light. The seizure violated the 4th Amendment to the Constitution of the United States. There was no prior determination by a judicial officer of probable cause. There were no exigent circumstances justifying a warrantless search. The "crime-fraud" exception is inapplicable because even a thirty-second review of the paragraph should have revealed to any reasonable person that no crime was being proposed. There was no lawful or good faith basis for the search of counsel's file and seizure of the document.

The question then becomes what remedy should be ordered? Ms. Cuccia testified that she has three concerns – retaliation against Defendant, damage to her professional reputation and the precedent that such a search of an attorney's file might set. Ms. Cuccia's concern about her professional reputation is based on her feeling that she has been linked, in information

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/17/2009

disseminated to the media, to two other attorneys, one of whom has been convicted of smuggling contraband into the jail for a member of the Mexican Mafia and the other who now stands accused of criminal misconduct for allegedly passing contraband while in court to an incarcerated member of the Mexican Mafia. *See* Exhibit 4.

The search is a *fait accompli* and cannot be undone by anything ordered by this Court. The document and copies have been returned to counsel except for the copy sealed by this Court. As noted above, Defendant's primary interests will be resolved in conjunction with the motions that his counsel has advised will be filed. Whether this search and seizure sets any precedent for future conduct by court security personnel may be influenced by this ruling. The only concern left to be addressed is Ms. Cuccia's perception that her professional reputation may have been damaged in the eyes of the public and her colleagues. Because it was the public dissemination of the information that may have damaged Ms. Cuccia's reputation, perhaps by the public dissemination of information, any damage can be corrected or at least lessened. Accordingly, the purge condition focuses on that concern.

For the above reasons,

IT IS HEREBY ORDERED denying the request to hold Deputy Sheriff Francisco Campillo in contempt of court.

IT IS FURTHER ORDERED holding Detention Officer Adam Stoddard in indirect civil contempt of court.

IT IS FURTHER ORDERED that unless timely purged as set forth below, DO Stoddard shall on December 1, 2009, report to the Maricopa County Jail and be incarcerated therein until such time as proof is presented to this Court that he has purged the finding of contempt. Failure to comply will result in the issuance of a warrant for the arrest and incarceration of DO Stoddard.

IT IS FURTHER ORDERED that Detention Officer Stoddard may purge the finding of contempt and the jail sanction by arranging, on or before November 30, 2009, at a time convenient for Ms. Cuccia, a news conference to take place in the plaza on the north side of the Central Court Building where he is to give Ms. Cuccia a sincere verbal and written apology for invading her defense file and for the damage that his conduct may have caused to her professional reputation. DO Stoddard shall assure that the press release announcing the news conference is sent by email and fax to all news media outlets (print and broadcast) serving Maricopa County at least 24 hours in advance of the news conference. If at the news conference, Ms. Cuccia does not state that the apology is sufficient, DO Stoddard shall report to the jail on

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/17/2009

December 1, 2009 and be detained until further order of this Court upon a finding that he has complied with the purge clause.

SEALED: Envelope entitled "Submission for In-Camera Review"

FILED: Exhibit Worksheet

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>

EXHIBIT 3

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/19/2009

HON. GARY E. DONAHOE

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

JENNIFER K LINN
THOMAS PURCELL LIDDY

v.

ANTONIO LOZANO (001)

MARIA L SCHAFFER
BRENT E GRAHAM
CRAIG MEHRENS
JOANNE CUCCIA
DAVID JEREMY BODNEY

VICTIM SERVICES DIV-CA-CCC

AMENDMENT OF RULING

Arizona law requires that the "keys to the jail house door" be in the contemnor's hand in order to allow the contemnor to purge the jail sentence imposed upon a finding of civil contempt. *See Korman v. Strick*, 133 Ariz. 471, 474, 652 P.2d 544, 547 (1982) (The contemnor must be able to remove the jail term by "compliance with the court's order."); *Martin v. Reinstein*, 195 Ariz. 293, ¶ 24, ftnt. 11, 987 P.2d 779 (App. 1999) (Imprisonment for an indefinite term is lawful provided the contemnor can be released upon compliance with the order.); *State v. Cohen*, 15 Ariz.App. 436, 439, 489 P.2d 283, 286 (App. 1971) ("Thus, when the contempt orders are remedial the contempt is civil rather than criminal. * * * And when the petitioners carry 'the keys of their prison in their own pockets,' *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902), the action is essentially a civil remedy designed for the benefit of other parties.") Accordingly, the purge clause contained in this Court's November 17, 2009, order is modified to read as follows:

IT IS FURTHER ORDERED that Detention Officer Stoddard may purge the finding of contempt and the jail sanction by arranging, on or before November 30, 2009, at a time convenient for Ms. Cuccia, a news conference to take place in the plaza on the north side of the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-006227-001 DT

11/19/2009

Central Court Building where he is to give Ms. Cuccia a sincere verbal and written apology for invading her defense file and for the damage that his conduct may have caused to her professional reputation. DO Stoddard shall assure that the press release announcing the news conference is sent by email and fax to all news media outlets (print and broadcast) serving Maricopa County at least 24 hours in advance of the news conference.

All other provisions of the November 17, 2009 order remain unchanged.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>

EXHIBIT 4

1 the keywords, I think for the limited scope of this
2 proceeding, to determine whether or not this public
3 servant had a good faith basis for doing what he did. We
4 can arrive at an answer without unsealing any of this
5 document. And I think unsealing merely a few words will
6 prejudice this proceeding and making me unable to
7 adequately defend my client.

8 THE COURT: I'm not so sure of that. He
9 said he saw -- if I recall the testimony correctly, he
10 said he saw, interpreted three words on this document and
11 that in the context of everything else that was going on
12 in the courtroom, including this gentleman, either that
13 Mr. Lozano was looking at, and the prior experience
14 between Mr. Lozano and one of the prosecutors, and the
15 tattoos he saw on this gentleman in the back of the
16 courtroom, it seems to me that these words are all that's
17 necessary for him to completely defend himself against
18 this allegation of improper conduct.

19 MR. LIDDY: Your Honor, if -- I believe it
20 was four words and not three.

21 THE COURT: Three, four. I thought it was
22 three, but --

23 MR. LIDDY: Okay. We'll find out if you
24 unseal that portion of it. But if this proceeding is
25 limited in scope to the allegations against my client, to

1 attorney. And so what I'm -- what is being requested here
2 is that you waive the attorney-client privilege as to
3 those two or three words, or -- I'm sorry, three or four
4 words that this witness says he saw -- saw in the first
5 few inches of that letter.

6 THE DEFENDANT: Yeah, I'm okay with it.

7 THE COURT: You're okay with that?

8 THE DEFENDANT: Yeah.

9 THE COURT: Again, has anybody forced or
10 threatened you in any way in order to get you to make this
11 waiver?

12 THE DEFENDANT: No.

13 THE COURT: All right. I'm going to allow
14 the testimony, so, Mr. Mehrens, if you want to repeat your
15 question, you may.

16 MR. MEHRENS: Yes, sir.

17 Q. BY MR. MEHRENS: What were those three words that
18 you saw when you looked down at the document that was
19 sticking out of the file before you touched the document?

20 A. They were four words going to steal and money.

21 Q. Going to, T-0 --

22 A. Going to steal and money.

23 Q. T-E-A-L or S-T-E-E-L?

24 A. A-L.

25 Q. And --

1 MR. LIDDY: A civil lawyer read the
2 document. I am a civil lawyer. I don't know if they're
3 referring to me or not, but I avow to you I have not read
4 the document with -- except as I said in my affidavit, I
5 did see to whom it was addressed and who the author was.

6 THE COURT: I'm going to grant Mr. Liddy's
7 request for a recess. So we're going to recess for about
8 15 minutes.

9 (Recess was taken from 2:53 p.m. to 3:05 p.m.)

10 THE COURT: We're back on the record in the
11 Lozano matter. Everyone is present. Our witness is back.
12 Mr. Mehrens.

13 Q. BY MR. MEHRENS: So it was based upon those four
14 words that you decided to take the documents you took and
15 had them copied from that file; is that correct?

16 A. That was a part of it.

17 Q. Oh, but there weren't any other words, right?

18 A. Well, it was the totality of the circumstances.
19 It wasn't the four words that made me remove the document
20 and go have Deputy Campillo photocopy it.

21 Q. Okay. Now, but we now have at least, as a part
22 of the equation at -- or the reason that you decided to
23 take these documents and copy them, the only words, out of
24 all of this whole package have those four?

25 A. Specifically those are the only ones I can

1 Q. Once it was returned to you, the original and the
2 copy, what did you do with the original?

3 A. I placed the original down in front of
4 Ms. Cuccia. She watched me do it. I took the copy and
5 put it in my pocket.

6 Q. Did you read it before you put it in your pocket?

7 A. I did not. I folded it up and placed it in my
8 pocket.

9 Q. Did you read it later that day?

10 A. Later that day, yes. I -- I don't know if it was
11 complete in its entirety, but I definitely briefed through
12 it again and looked to find more key parts.

13 Q. When you read it in its entirety, did it validate
14 your concerns that the document was either, as you
15 testified previously, evidence of a future crime or an
16 illegal communication from inside the jail to outside the
17 jail?

18 A. No.

19 Q. Were there any other things in the letter when
20 you read it in its entirety that gave rise to a security
21 concern?

22 A. Yes.

23 Q. What was that?

24 MR. MEHRENS: Could I just ask for
25 foundation when all of this was happening and who was

1 MR. LIDDY: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. LIDDY: I think he's already testified
4 that after he read it in its entirety, he concluded that
5 his initial concerns of those two that we mentioned were
6 not validated by the entirety of the document.

7 THE COURT: Right. And then he said it gave
8 rise to an additional concern.

9 MR. LIDDY: That's correct, Your Honor.

10 THE COURT: And why don't you ask him if he
11 arrived at that conclusion at the same time? I think
12 that's the objection.

13 MR. LIDDY: Okay.

14 THE COURT: When --

15 Q. BY MR. LIDDY: Did you arrive at the conclusion
16 that there might be another security concern at the time
17 that you read the document?

18 A. Yes.

19 Q. What was your security concern?

20 A. My security concern was knowing Inmate Lozano is
21 associated with the Mexican Mafia, and knowing some of the
22 Mexican Mafia history on how they get information from the
23 inside to the outside, the outside to the inside of the
24 jail, that he could be trying to solicit Ms. Cuccia to
25 help him in some way, shape, or form in this misconduct of

1 getting information in or on the --

2 Q. Was your concern that he would solicit her to do
3 this willingly or that he would solicit her to do this via
4 manipulation or coercion?

5 A. Manipulation or coercion. It seemed that he was
6 -- I don't know if the proper word is fishing -- it seemed
7 like he was trying to develop a foundation to whether he
8 could use Ms. Cuccia on more than just a legal counsel
9 basis.

10 Q. Are you aware of any instances in Maricopa County
11 where members of the Mexican Mafia have successfully so
12 manipulated their counsel?

13 A. Yes, I am.

14 Q. Would you describe those for the Court, please?

15 A. Two of the most recent that I'm aware of where
16 the public is aware of are just recently -- I don't know
17 if he's an attorney, Keller -- I don't know if he's an
18 attorney anymore. He brought cell phone parts and drugs
19 into a secure facility after being solicited by a Mexican
20 Mafia member to do so. Recently there's been another
21 incident where drugs were seized while in the process of
22 being brought in by an attorney.

23 Q. And that -- was that other instance with regard
24 to Mr. De Costa?

25 A. It was.

1 Q. Was it your understanding that Mr. De Costa was
2 manipulated by the Mexican Mafia?

3 A. I do, very much so.

4 Q. How so?

5 A. I believe he was manipulated by the Mexican Mafia
6 because he was -- he was given -- I don't know if you
7 would call it a gift. He was allowed to sleep with the
8 defendant's girlfriend.

9 Q. So he was put in a compromising position?

10 A. He was put in a very compromising position.

11 Q. When you read this letter in its entirety, did
12 you have a concern that Mr. Lozano was attempting to put
13 his attorney in a compromising position?

14 A. I did.

15 Q. Did you -- do you have any evidence that he
16 succeeded in putting her in a compromising position?

17 A. I don't.

18 MR. LIDDY: Your Honor, I have no further
19 questions.

20 THE COURT: Sir, you may step down.

21 MS. SCHAFFER: Judge, I do have questions.

22 THE COURT: I thought you already asked
23 questions?

24 MS. SCHAFFER: I have a few more questions
25 now that there's been more information elicited in this