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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Nina Alley, as Guardian and Conservator for and on behalf of Louis Taylor, a single man, Plaintiff, vs. Pima County, a body politic; The City of Tucson, a body politic, Defendants.	**No. 15-cv-00152-TUC-RM** **MEMORANDUM RE: EQUITABLE ESTOPPEL** **Judge Márquez**

INTRODUCTION

At the conclusion of the April 11, 2024, status conference, Taylor's counsel stated it would move to amend the complaint to conform to the evidence and ask the

Court to equitably bar Defendants from asserting the "*Heck* bar" affirmative defense due to misconduct. Equitable estoppel would also be appropriate if the jury makes the findings that the Court previously determined would warrant expungement: (1) that the prosecution in 2013 leveraged Taylor's existing incarceration in order to obtain a no-contest plea to charges that it knew could not be proven beyond a reasonable doubt at a retrial, and (2) that the prosecution did so for purposes of creating a *Heck* bar to civil liability.

District courts may invoke equitable estoppel *sua sponte,* to avoid injustice. *Henry Law Firm v. Cuker Interactive*, LLC, 950 F.3d 528, 534 (8th Cir. 2020). *In re Winters*, Case No. 18-40304 (Bankr. W.D. Mo. Sep 15, 2020); *see also Taylor Corp. v. XL Ins. Am.*, CIVIL 22-1151 (JRT/TNL) (D. Minn. Feb 06, 2024) ("the Court will grant summary judgment sua sponte for Taylor on equitable estoppel."); *Karcsh v. Bd. of Dirs. Ventura Country Club Cmty. Homeowners Ass'n*, CIV. NO. 10-4965 (E.D. Pa. May 04, 2011) (citing *Kosakow v. New Rochelle Radiology Associates*, *P.C.* 274 F.3d 706, 725 (2d Cir. 2001)); *Lawson v. Consolidated Rail Corp.*, 1999 WL 171431, at *4 n. 5 (E.D. Pa. March 29, 1999) (considering possibility of equitable estoppel sua sponte); *Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1343 (D. Kan. 1996) (raising equitable estoppel sua sponte); *see also In re Shape, Inc.*, 138 B.R. 334 (Bankr. Me. 1992).

This issue has long since been preserved and a motion to amend is likely unnecessary. All of Taylor's prior complaints, including the operative Third Amended Complaint, include a request for "such other relief as the Court deems appropriate," in

addition to his requests for monetary compensation, costs, and attorney's fees under 42 U.S.C. § 1985.[1] This would necessarily include any and all equitable relief.

Although it appears unnecessary, if directed by the Court, Taylor will file a motion to amend to conform to the evidence and will request an expedited response. Most if not all the evidence needed to invoke equitable estoppel is already in the record before the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

POINT 1

A PARTY MAY NOT BENEFIT FROM ITS OWN MISCONDUCT.

District courts have broad equitable relief powers. *S.E.C. v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998). The federal doctrine of equitable estoppel applies to actions brought in federal courts at law and equity. *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232-233 (1959); *Heckler v. Community Health Servs.*, 467 U.S. 51 (1984); *Cange v. Stotler and Co., Inc.*, 826 F.2d 581, 585 (7th Cir. 1987).

It is a deeply rooted principle that "a party should not be allowed to benefit from its own wrongdoing." *Estate of Amaro v. City of Oakland*, 653 F.3d 808, 813 (9th Cir. 2011). In multiple prior cases, the Ninth Circuit has applied equitable estoppel to prevent defendants from asserting affirmative defenses. In *Amaro*, a § 1983 case, Oakland City police officials dissuaded plaintiff Amaro from bringing her § 1983 action by affirmative misrepresentations and stonewalling. *Id.* at 809. When the City

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[1] "Wherefore, Plaintiff respectfully requests that this Court grant him judgment against the Defendants as follows … e. Such other relief as the Court deems appropriate." (Doc. 169 at 26).

later attempted to assert its statute of limitations affirmative defense, the district court refused, barring the City from doing so, on equitable estoppel grounds. *Id.* at 814.

The Ninth Circuit affirmed the district court:

> [T]he doctrine of equitable estoppel does apply where a plaintiff believes she has a 42 U.S.C. § 1983 claim but is dissuaded from bringing the claim by affirmative misrepresentations and stonewalling by the police.

Id. at 815.

In doing so, the Court relied on the principle that a party should not be allowed to benefit from its own wrongdoing. *Id.* at 813 (citing *Collins v. Gee West Seattle LLC*, 631 F.3d 1001, 1004 (9th Cir.2011)); *see also In re Santos*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990) ("application of estoppel … takes its life from the principle that no person will be permitted to profit from his or her wrongdoing in a court of justice."); *see also Haft v. Dart Group Corp.*, 877 F.Supp. 896 (D. Del. 1995) ("[b]ecause defendants are the cause for plaintiff's failure to exercise these options, defendants cannot benefit from their wrongdoings") (citing *Bertero v. National General Corp.*, 254 Cal.App.2d 126, 62 Cal.Rptr. 714, 726 (1967)).

The *in pars delicto* principle is similar and bars a party who has participated in wrongdoing from recovering damages resulting from the wrongdoing. *See In re Commercial Money Center, Inc.*, 350 B.R. 465, 486 (B.A.P. 9th Cir. 2006).

POINT 2

THE *HECK* BAR IS AN AFFIRMATIVE DEFENSE THAT CAN BE WAIVED OR FORFEITED AND THAT HAS HAPPENED HERE

The *Heck* bar is an affirmative defense that may be waived or forfeited. *Hebrard v. Nofziger*, 2024 U.S.App. LEXIS 760 (9th Cir. Jan 11, 2024)

("[w]e agree with Hebrard that *Heck* is an affirmative defense that may be waived or forfeited" (citing *Washington v. Los Angeles County Sheriff's Department*, 833 F.3d 1048, 1056 & n.5 (9th Cir. 2016)). *Washington* states:

> [C]ompliance with *Heck* most closely resembles the mandatory administrative exhaustion of PLRA claims, which constitutes an affirmative defense and not a pleading requirement.

Id. at 1056 (cleaned up). Thus, the *Heck* bar is an affirmative defense that may be waived or forfeited.

In *Carr v. O'Leary*, the Seventh Circuit found that the State of Illinois waived the *Heck* bar by failing to timely assert it. 167 F.3d 1124, 1126-27 (7th Cir. 1999) ("the failure to plead the Heck defense in timely fashion was a waiver").

POINT 3

PIMA COUNTY COMMITTED MISCONDUCT BY IMPROPERLY INTERFERING WITH THE PIMA COUNTY ATTORNEY'S INVESTIGATION

No person will be permitted to profit from his or her wrongdoing in a court of justice. Equitable estoppel warrants the Court barring either Defendant (or, at a minimum, the County) from asserting the *Heck* bar because of misconduct that preserved that bar's very existence.

The first such misconduct involved threats/pressure on Conover that prevented her from seeking dismissal of Taylor's criminal charges. Had dismissal occurred, the *Heck* bar would have disappeared.

There is ample basis for this Court to find unduly influential misconduct by Pima County. Much of the necessary evidence is contained in the Court's January 19, 2024, summary judgment ruling. (Doc. 869) and in Taylor's November 2, 2023

statement of facts re: supplemental Conover and Chin brief. (Doc. 793). The depositions of Jack Chin and Laura Conover are part of the record. (Doc. 793, Ex. 1 and 2). The March 9, 2023, affidavit of Nina Trasoff is also part of the record. (Doc. 575, Ex. 14).

The Court previously found that under A.R.S. § 11-532, Arizona county attorneys have sole responsibility for felony criminal prosecutions originating in their county. *See* Doc. 869 at 31. *See also* *Robichaud v. Ronan*, 351 F.2d 533, 537, n. 2 (9th Cir. 1965); *Smith v. Superior Court*, 422 P.2d 123, 124, 101 Ariz. 559, 560 (Ariz. 1967). *State v. Nuckols*, 229 Ariz. 266, 274 P.3d 536, 538 n. 2 (App. 2012). The Pima County Board of Supervisors has no legal say regarding criminal prosecutions – the County Attorney represents the State in those matters. The County Board's pressure, influence, and threats to Conover (discussed below) exceeded the Board's authority under Arizona law (set forth in A.R.S. § 11-201). This statute confers no right or authority to interfere with criminal prosecutions.

Black's Law defines "corruption" as "an act done with an intent to give some advantage inconsistent with official duty and the rights of others." A.R.S. § 11-223 makes it a violation of law for any Board member to "corruptly attempt[ ] to perform an act as supervisor unauthorized by law..." If evidence demonstrates the Board influenced the Pima County Attorney in a criminal matter, this would fit the definition of corruption and violate A.R.S. § 11-223.

Professor Chin, County Attorney Conover, and the entire CSIU team concluded that Taylor did not have a fair trial in 1972 and that he should have been exonerated in 2013. (Doc. 816 at 2) (citing Doc. 793, Ex. 1 and 2). The ABA has publicly and

vociferously agreed and concluded "there was - and is - no proof beyond a reasonable doubt to support" Taylor's convictions. (Doc 343-3 at 3). Chin and Conover were aware of the ABA position. (Doc. 816 at 2).

As Chin testified, around late May 2022, Conover unequivocally decided to file a motion seeking dismissal of Taylor's criminal charges. (Doc. 793, Ex. 2 at 72).

> Q. It's okay. Any doubt at all, Jack, in your mind that when the decision was made to call the stakeholders, that Laura Conover had unequivocally decided to dismiss Louis Taylor's criminal charges?
>
> A. Well, Laura Conover can't unilaterally dismiss criminal charges in Louis Taylor. But I think I understand what you're saying, to file a motion to ask the Court to dismiss, *and the answer is yes*. [Emphasis added]

Chin confirmed this fact:

> Q. All right. So important information. I need to break it down and ask some follow-up questions. So first of all, at the time this exhibit, the 24.2 motion was filed -- well, not filed, it was never filed. At the time it was finalized, from your perspective, it was Laura Conover's unequivocal position that the criminal charges should be dismissed?
>
> A. Yes.

(Doc. 793, Ex. 2 at 79).

Substantial evidence corroborates Chin's testimony that Conover had unequivocally decided to seek dismissal of Taylor's charges. In late May 2022, Conover completed a press release announcing Taylor's exoneration. (Doc. 575, Ex. 4). She stated, "Last week, I concluded that the Pima County Attorney's Office could no longer support the criminal conviction against Louis Taylor in the Pioneer Hotel

fire of 1970." *Id.* The Rule 24.2 motion to dismiss itself was finalized and ready to file. (Doc. 793, Ex. 2 at 79). The motion is part of the record. (Doc. 793, Ex. 3).

The affidavit of Conover's close friend Nina Trasoff further confirms Conover's unequivocal decision to exonerate Taylor: "Shortly after Ms. Conover took office in 2021, Ms. Conover told me that she had reviewed Mr. Taylor's case and planned to exonerate him." (Doc. 575 at ¶ 11). Trasoff further testified, "Ms. Conover prepared a press release to that effect, and I helped with editing and verbiage of that press release." (*Id.* at ¶ 12). Trasoff further testified that "In May 2022, Ms. Conover told me a complete review of the files had been made and that she proposed to issue a press release to the Tucson media. (*Id.* at ¶ 16).

There is strong evidence in the record that the only reason Conover did not file the motion was because the County interfered. Chin testified that a call from (co-conspirator) Acedo was the only reason the motion wasn't filed:

> Q. All right. But so is it your understanding that because of the communication and the discussions with the Struck Love firm, that is why Ms. Conover paused?
>
> A. Yes.
>
> Q. Any other reason that she paused?
>
> A. I am not aware of any other reason.

(Doc. 793, Ex. 2 at 79). The communication was a phone call between Acedo of Struck Love and Conover. (*Id.* at 84). Taylor emphasizes that according to Chin, the motion to dismiss Taylor's criminal charges would have been filed but for the call from Acedo.

Because Acedo was the County's lawyer, the County is responsible for his conduct. And there is actual evidence that the County instructed Acedo to interfere.

David Berkman, a former LaWall administration official, urged the Board to instruct Acedo to interfere. As reflected in the Court's January 19, 2024, summary judgment order:

> On May 30, 2022, David Berkman, who had run the criminal division during the prior Pima County Attorney administration under Barbara LaWall, sent an email to County Supervisor Rex Scott regarding Conover's plan to file a motion to exonerate Taylor's convictions, warning that if the convictions were to be set aside, Taylor would "be able to get damages which may cost the County a ton." Berkman advised that the "lawyer for Pima County needs to be directed to get involved."

(Doc. 869 at 26). Though not specifically mentioned in the Court's summary judgment ruling, Berkman further suggested that Acedo "make a stink" and that the Board could "embarrass" Conover. The full Berkman email is Ex. 7 to Doc. 575.

What was the nature of the phone call between Acedo and Conover? According to Trasoff, Acedo "threatened" Conover:

> When I next talked to Ms. Conover on this matter, after her August 2022 contrary statement, she told me she had not gone forward with the original press release, which had been scheduled for May 28, because Phoenix lawyers had threatened bar discipline and possible disbarment if she went forward with the plan to exonerate Mr. Taylor.

(Doc. 575, Ex. 14, ¶ 16). While Conover would not acknowledge an actual "threat," she testified that after telling Acedo the dismissal motion would likely be filed, "Acedo's 'volume and speech pattern increased dramatically,' and 'he seemed to be beside himself that this could possibly be happening and indicated that [Conover] couldn't undertake this because [she] was the county attorney, and it didn't align with what he wanted, and he referenced that he thought the state bar … would have

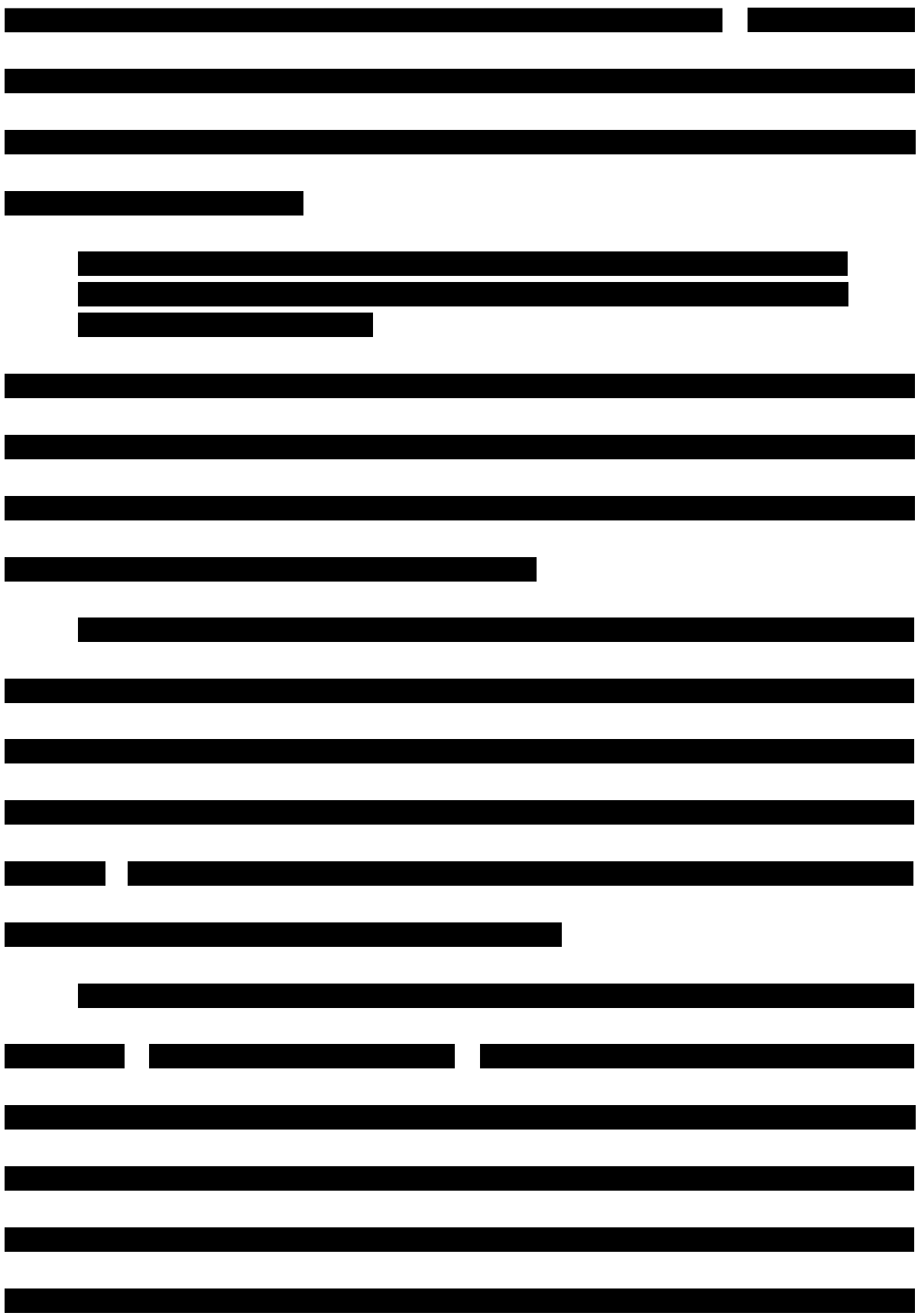
something to say about this.'" (Doc. 869 at 26-27).[2] The Court's order goes on to expressly state that "[a]fter speaking to Acedo, Conover changed her mind and decided not to file the motion to exonerate."

Conover herself complained at her deposition that she "wasn't being allowed to do her job." At page 216 of her deposition, Conover stated: "and I would just like the parties to consider why no one has moved to allow me to do my job."

The County has never contested any of this evidence. Following Taylor's discovery of Chin's exoneration report and the Rule 24.2 dismissal motion, and following the depositions of Conover and Chin, the County disclosed no controverting evidence. Thus, the evidence discussed herein is uncontested.

[redacted]

[2] Conover's full (unsealed) deposition transcript was included as Exhibit 1 to Taylor's November 2, 2023, supplemental statement of facts. (Doc. 793). The sealed testimony referenced herein can be found at Doc. 811, Exhibit 11.



[redacted]

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POINT 5

BUT FOR THE MISCONDUCT, TAYLOR'S CRIMINAL CHARGES WOULD HAVE BEEN DISMISSED, VITIATING THE *HECK* BAR

If the motion to dismiss Taylor's criminal charges had been filed, it would likely have been granted. Taylor's criminal lawyers certainly would not have opposed it. It is axiomatic that, barring extremely unusual circumstances, unopposed motions are granted. The Court can and should take judicial notice that the motion would probably have been granted.

A dismissal of Taylor's criminal charges would have constituted a "declaration of invalidity by a state tribunal authorized to make such a determination" under *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). But for the County's misconduct, there would be no *Heck* bar.

[redacted]

POINT 6

THE COURT SHOULD NOT ALLOW DEFENDANTS TO ASSERT THE *HECK* BAR

As discussed above, the *Heck* bar is an affirmative defense that may be waived or forfeited. *Hebrard v. Nofziger*, *Washington v. Los Angeles County Sheriff's Department* [citations omitted]. And at least one circuit (the Seventh) has upheld an

order prohibiting a government defendant from asserting the *Heck* bar. *Carr v. O'Leary*, 167 F.3d 1124, 1126-27 (7th Cir. 1999).

The County and its lawyers engaged in plain misconduct by interfering with Conover, threatening her, and directly preventing her from obtaining the dismissal of Taylor's criminal charges and then hiding critical new evidence from her. That conduct directly resulted in the continued existence of Taylor's criminal convictions.

While Taylor has found no case directly on point (where a government defendant was precluded from asserting the *Heck* bar due to affirmative misconduct), the equitable authorities cited herein plainly support such a result. As the California Court of Appeals observed nearly 60 years ago:

> Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention."

Bertero v. National General Corp., 254 Cal.App.2d 126, 62 Cal.Rptr. 714 (Cal. App. 1967).

In *Bomba v. W. L. Belvidere, Inc.*, the Seventh Circuit recognized that no person "will be permitted to profit from his own wrongdoing in a court of justice." 579 F.2d 1067, 1070 (7th Cir. 1978); *see also Theriot v. Captain James Sprinkle, Inc.*, 30 F.3d 136, n. 8 (7th Cir. 1994) (noting that equitable estoppel "takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice.").

. . .

. . .

POINT 7

IF THE COURT PRECLUDES THE *HECK* BAR, EXPUNGEMENT IS MOOT

If the Court agrees Defendants should be equitably precluded from asserting the *Heck* bar, it would not be necessary for the Court to consider expungement or the constitutionality of the 2013 convictions. Trial would be substantially shorter. For purposes of the instant lawsuit, Taylor's 2013 convictions could and would remain intact and they would not matter.

POINT 8

ANY EQUITABLE RULING WOULD BE REVIEWED FOR ABUSE OF DISCRETION

Should this Court agree with Taylor and grant equitable relief, that decision would be reviewed on appeal for abuse of discretion. *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001); *In re First Alliance Mortg. Co.*, 471 F.3d 977, 1006 (9th Cir. 2006).

A ruling on *Shipp* expungement, in contrast, would likely be a question of law reviewed *de novo*.

CONCLUSION

It is a bedrock principle of American jurisprudence that no party may benefit from its own misconduct. Here, the interference with criminal prosecutorial decisions and hiding critical new evidence from the County officer in charge of criminal prosecutions is inexcusable. There is compelling evidence that the overzealous County lawyers, improperly influenced, coerced, and threatened Laura Conover, the duly elected Pima County Attorney, and hid evidence from her, preventing her from

obtaining the dismissal of Taylor's criminal charges, such that the *Heck* bar could remain in place. Moreover, the Court already has all the evidence necessary to equitably estop the *Heck* bar; nothing more is required.

Equity does not wait upon precedent, which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. If there were ever a case demanding such equitable intervention, it is this one.

Dated April 18, 2024.

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I hereby certify that on April 18, 2024, I electronically transmitted the attached document to the Clerk's Office using the CM/ECR System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECR registrants:

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