Press Release – FOR IMMEDIATE RELEASE

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"And The ~~Truth~~ *Lies* Shall Set You Free"

Now that the Court has unsealed the records in the *New Times* grand jury investigation, the real truth can be told about the matters blown out of proportion by the media, and the actions the Special Prosecutors took in good faith to pursue an investigation of what appeared to be a violation of Arizona law. We represented the interest of our clients at all times with honor and dignity and never commented in the Press until after our integrity was besmirched by many who knew nothing of the facts and who had motives to undermine the investigation. The misinformation campaign launched by the *New Times and others* may have been successful in harming the grand jury process in Arizona, as it freed them from prosecution for their potential violations of A.R.S. § 13-2812 in the process. But now, those who tried to stay silent and obey the law have the opportunity to set the record straight.

The Grand Jury Subpoenas – No First Amendment or Privacy Concerns

The subpoenas issued to the *New Times* and their former reporter, John Dougherty, were negotiable documents that were a starting point for the investigation. This was made clear by me on August 31, 2007, following a telephone call I had with the *New Times'* lawyer, Tom Henze, when he sought a continuance. I made it clear that if he had any problem with producing any documents to let me know and we would work with him. It must be emphasized that the nature of the crime was a continuing one, hence the scope of the three years of documents requested, since the *New Times* had refused to remove the Sheriff's address from their web site. The Sheriff's home address has been published, not linked to, in an article on the *New Times* web site since July 8, 2004. During this time, the *New Times* has continually been a source of extremely negative articles about the Sheriff, providing a hostile and threatening context for that continuing publication. The pertinent part of the statute of which we were retained to investigate a potential violation states:

> A. It is unlawful for a person to knowingly make available on the world wide web the personal information of a peace officer, justice, judge, commissioner, public defender or prosecutor if the dissemination of the personal information poses an imminent and serious threat to the peace officer's, justice's, judge's, commissioner's, public defender's or prosecutor's safety or the safety of that person's immediate family and the

> **threat is reasonably apparent to the person making the information available** on the world wide web to be serious and imminent.

There is little doubt what the *New Times* was hoping for in providing the Sheriff's home address in its own publication, knowing that it would be available to its readers who it hoped to inflame with its articles criticizing the Sheriff.

It should also be pointed out clearly that if the *New Times* did not maintain the documents requested, they could not produce them. The Special Prosecutors even sent a letter to *New Times* counsel Tom Henze, explaining our flexibility in requesting documents, which has not been reported:

> "…If necessary, we will consider providing your clients additional time to respond to the Subpoenas at a later date. As discussed, we will expect your clients to respond to these Subpoenas in good faith, but we will not expect your clients to waive any objections to the Subpoenas in whole or in part. **Notwithstanding, feel free to contact me to discuss any problems that you perceive with the Subpoenas**. **If you foresee any problems with the Subpoenas, we would appreciate it if you would contact us well in advance of the deadline to produce the documents**."

On September 21st, after realizing that *New Times* had no intention of so cooperating, and after they ignored the ENTIRE subpoena, not just part of it, and did not comply, the Special Prosecutors sent a letter demanding compliance, but still keeping the door open for negotiation:

> "We are willing to make reasonable accommodations, but we also expect good faith efforts from your client to comply with our subpoenas."

It is critical to understand that at no time did we seek to learn who had hit the web site for any purpose at all other than to compare the list with a list we requested of the Sheriff of persons who were known to have made threats, to determine if those persons had accessed the web site. That was my only purpose in approving that particular part of the subpoena in question. In fact, we never saw any list, had no intention of pursuing anyone on that list or investigating anyone on the list. Moreover, the entire list of whatever would be produced ultimately, if anything, would have been subject to the grand jury secrecy rules, which would not and could not have been violated, and was critical to proving an essential element of the crime investigated. That crime has never before been tested or challenged and is unique. The elements have to be proven beyond a reasonable doubt and that is what we were retained to determine–whether such a crime could be proven or should be pursued. The extent of where the web information was being accessed and by who, was certainly critical to pursue the matter regardless of the cheap shots made by many who were not charged with having to potentially prove those elements. One of those elements is proof that persons under investigation intended at the time of publication (continuing publication) to place the Sheriff or his family in immediate threat of danger or harm. This is not something that can just be inferred, but

must be proven with evidence. By showing that the targets had reason to know that their publication was reaching persons who have known motives to harm the Sheriff, this can be deduced and proven.

Mr. Henze never sent any correspondence to us objecting to the scope of the subpoenas nor do I recall him ever saying he did when he requested the continuances. The *New Times* never articulated their concerns with any First Amendment issues, or complained of the burden of producing the documents, particularly if they did not have them, nor did they offer any explanation for why documents could not or should not be produced. The first objections to the subpoenas came in the form of a Motion to Quash filed on October 4, 2007, several days after the due date for the requested documents.

What is particularly galling is the failure and irresponsibility of some of the media to focus on the fact that we never received any documents because the matter was under advisement by the Court, where it should be if there were any legitimate objection raised to it. That is who gets to rule on such matters, not the media or the court of popular opinion controlled by the media accounts. In that regard, we certainly would have honored the Court's decision on what could and could not be produced and the conditions of the production. We will never know how that ruling would have come out since the *New Times* flagrantly violated not only the clear law on grand jury secrecy, but a specific court order to keep the proceedings secret, which is also a misdemeanor offense in and of itself. Now, some of the media have whipped up the public as to the "rule of law" without even bothering to report these flagrant violations or that any information the COURT would have ordered would have been kept secret and not shared with the victim or the public or any other officials.

It would have been highly imprudent and dangerous in my opinion, to first release to the people at the *New Times* under investigation the names of persons who have reasons to threaten the life of the Sheriff and ask them to voluntarily report whether they have accessed their site. Their irresponsible actions and those of some in the public and the media who have foolishly and recklessly supported the *New Times*' willful violation of the sanctity of the secrecy of grand jury proceedings notwithstanding, I know that our actions were never intended to invade anyone's privacy. Even to the extent they may have for the purpose of proving the elements of a crime, any such information would have been carefully monitored by the Court and opposing counsel in the context of the grand jury investigation and the limited purposes for which it was sought, and not used for any improper purpose whatsoever even were it ordered to be produced.

None of the information sought by the subpoenas would have been made available to Sheriff Arpaio or Andrew Thomas. Whatever information was eventually ordered to be collected would have been presented to the sitting grand jury for the purpose of determining whether to indict the targets of the investigation only. Since we were never given the opportunity of even appearing at an investigative grand jury proceeding to pursue the nature and extent of the potential criminal violations, it is impossible for anyone thus far quoted anywhere to wildly speculate on the use of any such information, even if ordered by the Court. Since those proceedings were to be kept secret, whether or

not an indictment was eventually even handed down, that information would have remained sealed, had normal grand jury procedures been followed. Whether such information would have been used beyond that at a trial is speculative at this time, as it would have depended on what witnesses would have admitted at the actual grand jury proceedings based on the documents produced.

Furthermore, contrary to the misreporting by some in the news media, the subpoenas were not seeking any personally identifiable information about the readers of the *New Times*. The requested IP addresses were intended to be matched up with a list of IP addresses of persons already known to be a threat to the Sheriff–no research would have been done to determine the owners of the IP addresses submitted by the *New Times*. Also, in item 16 of the published *New Times* subpoenas, the subpoenas called for "a compilation of aggregate information" about web site traffic. <u>None of that information would be personally identifiable to any particular user</u>. These web site related requests were supported by documented cases where the Sheriff was receiving threats from as far away as Canada.

The fact is, new, far less intrusive subpoenas were already being drafted by the time the *New Times* went public with the subpoenas they had received. The Special Prosecutors were never given a chance to consult with the recipients of the subpoenas, nor did the Court have a chance to decide whether to quash the subpoenas. If they were correct, and had the *New Times* exercised restraint and followed the lawful process, the allegedly unconstitutional subpoenas would have been quashed and replaced with new ones approved by the Court.

New Times Sought To Disqualify The Prosecutors

Instead of dealing with the Special Prosecutors and the subpoenas, the *New Times* filed a motion to disqualify them from handling the matter, based on what I perceive to be frivolous grounds. Here too, I told Mr. Henze that I understood his need to file such a Motion given his responsibilities and that I had no problem with it if done in a professional manner, which I believe he honored. Such motions are rarely granted and are looked upon with suspicion by the courts because targets of an investigation do not get to choose their prosecutor. On September 19, 2007, Tom Henze sent a letter to the Special Prosecutors demanding that they step down from the case. On September 20th, the Special Prosecutors responded, carefully pointing out the flaws in Henze's legal arguments in detail. On September 21st, Henze made good on his demand by filing a motion with the Court to have the Special Prosecutors removed from the investigation. That motion was treated by the Court as the threshold issue in the case, preventing any other action by the Court. It was never ruled upon. However, in the process, a detailed Affidavit was prepared and filed by me as to the issues and my knowledge of pertinent facts concerning the allegations and refuting them.

The Court Denied *New Times'* Motion To Make The Grand Jury Proceedings Public

The *New Times* specifically asked the Court to open the proceedings to the public, which motion was denied without prejudice. On October 3rd, the *New Times* filed a motion to make their subpoenas public information and subject to debate in the media. On October 5th, before the Special Prosecutors even had a chance to respond, <u>the Court denied the *New Times* request pending further consideration</u>. That means that when they publicized their subpoenas, they were not only violating Arizona law, but were also <u>violating a direct Court order</u>. The Court further made this clear in open court to the *New Times* and Mr. Lacey.

Grand Jury Secrecy Violated

By October 18, 2007, when the *New Times* published their grand jury information for public consumption, accompanied by their commentary thereon, the Court had not ruled on <u>any</u> motion of the *New Times*, other than to order them NOT to publish the grand jury proceedings (e.g., hearing transcripts, subpoenas), which is a violation of law, and to order the action on the subpoenas to be stayed. That's right, <u>the subpoenas were stayed by the Court at the time the *New Times* went public</u>. Their rights were being fully protected as the Court had yet to rule on the continued representation by the Special Prosecutors, and the subpoenas were of no effect. Despite this procedural status, the *New Times* felt obligated to violate the law protecting grand jury secrecy and to sensationalize the matter out of proportion. The rest of the media followed suit, claiming some larger issue at stake that did not exist and was not even imminent, and blowing the matter up to create a story and poison the public. I tried to remain silent but could not continue to allow the misinformation to escalate. People may legitimately disagree, but to besmirch my character and reputation with half truths and *ad hominem* attacks is disgraceful. I allowed the *New Times* personnel to get away with challenging me to a physical fight and cursing at me in open court without charging them with assault, and any statement that I challenged them is a complete lie. I even asked Mr. Rubin at the time if he were actually challenging me to a physical fight. He said yes, but would do it outside the courtroom. I then told their attorney to control his clients or I would, meaning I would take action to deal with their threats and intimidation, which were joined in by Mr. Suskin and Mr. Lacey as well.

The policy behind grand jury secrecy is not a new one, nor is it exclusive to Arizona. The policy goes back hundreds of years. The Supreme Court of the United States described the need for grand jury secrecy as follows:

> "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. [citation and footnote omitted] In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that

> testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule."

Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 208-219, (1979). An appellate court in Arizona described its concerns about grand jury secrecy in *Samaritan Health System v. Superior Court In and For the County of Maricopa*, 182 Ariz. 219, 221, 895 P.2d 131, 133 (App. Div. 1 1994):

> "Confidentiality promotes three goals. First, it insulates the grand jury process from public pressure. Second, it protects witnesses, targets of investigation and others from negative publicity. Third, it encourages prospective witnesses to come forward and testify fully and frankly by ensuring that those against whom they testify will be unaware of the testimony."

The *New Times* was well aware of these concerns when it violated the Court's orders and the secrecy of the grand jury proceedings. They knew they were putting *undue* public pressure on the grand jury process. They were hoping to create negative publicity about anyone who would dare step forward as a witness against them. The purpose of grand jury secrecy is to prevent what the *New Times* did from happening. But the public pressure that was predicted by courts came to bear on the County Attorney, so he did what any right-minded politician would do with a hot potato–he dropped it. The false statements and misrepresentations of the facts in the news media created an undue public outcry that could not be ignored, however misplaced and ill founded it might have been.

Federal Action Filed

On October 18, 2007, not only were the rights of the *New Times* still to be determined by the Presiding Criminal Judge in the Maricopa County Superior Court, but the *New Times* filed a federal action against me as well pending the Court's rulings. On October 5, 2007, the same day the *New Times* was in Superior Court seeking various remedies, they filed a federal civil rights action, basically seeking to enjoin any prosecution until the federal court could determine whether the Arizona law was unconstitutional. Putting aside for the moment the argument whether the federal action was wrongful, at the time the *New Times* sought to try this matter in the court of public opinion, the Special Prosecutors had not even had a chance to answer the complaint in the federal court. There was no opportunity for reasonable consideration of the option to test the statute's constitutionality before the *New Times* irresponsibly blew the whole matter wide open with their self serving and sensationalized story.

Arrests Of Lacey And Larkin

The arrests of Mike Lacey and Jim Larkin (who was released almost immediately for health issues) were the result of a miscommunication. My knowledge and intent was to have them cited for violating A.R.S. § 13-2812, understanding that if they refused to accept the citations, they could be taken to jail and booked, then cited. The direction from me was apparently misunderstood by the other Special Prosecutors, which resulted in a request that the MCSO deputies arrest, book and cite Messrs. Lacey and Larkin, rather than attempting to just issue them citations. The actions against Messrs. Lacey and Larkin were completely legal, and some might argue more than justified, given the offenses they knowingly and openly admitted they committed, as detailed above. Nonetheless, the County Attorney, Sheriff Arpaio and I had no personal knowledge that Messrs. Lacey and Larkin would be arrested that evening until after they were, nor would they or I have condoned such action in advance I am sure as a matter of policy of the County Attorney's Office.

Alleged Contact With The Court

Having practiced in this community my entire professional life, and having been a bailiff to the Presiding Criminal Judge, I fully understand the rules relating to *ex parte* communications on a pending matter. No such communication occurred by me and none was ever intended. My discussion with Carol Turoff, who was a known close friend to the Presiding Criminal Judge, was solely in the context of whether she would determine if the Court was interested in a meeting with the County Attorney's Office and the Presiding Judge and others in court administration regarding the relationship between the offices that in my judgment had deteriorated. Both Carol and I agreed that the misunderstandings that might have been occurring, given the disagreements we perceived, were not in the best interests of the public. It was specifically discussed that I was not necessary in any such discussion or meeting. She was to determine only if the Court had any interest in any such discussion, and that it did not pertain to any matter in front of the Court, nor would it involve any specifics of any matter, and that the Court, if interested, could determine who should be present and the parameters of any such discussion. That is all. It would be foolish of me to ever think or assume that Judge Baca would ever discuss any pending matter with Ms. Turoff or anyone else including me, and that was never the intention. Mr. Thomas knew nothing of this conversation at all. It was simply to see if there was any interest by the Court so as to not play out any further disagreements in the public eye, which I deemed to be an unfortunate setting for such disagreements in the future, and if there was any interest, to see if the County Attorney was interested. I explained this to Judge Baca when she placed on the record the extent of her call with Ms. Turoff.

I wish to finally make it clear that in no way did I force or provide any incentive of any kind to Ms. Turoff to make such a call, other than what both she and I believed to be in the public interest, and after she considered it overnight, she called to say she agreed such a call to gauge the Court's interest would be a positive thing in the public interest. In no way did any of this have anything to do with the *New Times* or any matter pending before

the Court and that was made clear. In fact, the record will reflect that I had already filed a peremptory Change of Judge Notice on Judge Baca to remove her from the matter prior to this contact occurring.

Conclusion

Had the *New Times* followed the legal process as proscribed by law, they would have spared many people much unnecessary concern and angst. But that is what the media appears to thrive on rather than reporting the sober truth. All the persons who angrily wrote comments at the bottoms of newspaper articles online could have been spared the embarrassment they should now feel, having been misled as to our motives. My concern has always been for the victims of crime and for the public. The County Attorney now finds his address similarly being made public by newspapers wanting to get in on the action. I find such actions of the media to be disgraceful in whipping up public anger over what to me has always been an important and legitimate issue, as to whether the statute protecting not just Sheriff Arpaio, but prosecutors and Judges and other public officials alike, from needless dissemination of their home addresses for no other reason than to intend harm, should be pursued and tested, which I believe was the case here. Sheriff Arpaio and his family, who are the victims in the underlying investigation, is now being victimized more than ever. And, finally, those who have recklessly and carelessly attempted to wrongfully tarnish my personal and professional reputation and integrity, and to thereby harm my family, by the outright lies and irresponsible comments made in the media, should further reflect on their own irresponsible motives in doing so.