

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF ARIZONA

3  
4 Manuel de Jesus Ortega )  
Melendres, et al., )  
5 )  
Plaintiffs, ) CV 07-2513-PHX-GMS  
6 )  
vs. ) Phoenix, Arizona  
7 ) December 4, 2014  
Joseph M. Arpaio, et al., ) 1:31 p.m.  
8 )  
Defendants. )  
9 \_\_\_\_\_ )

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11  
12  
13  
14  
15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE G. MURRAY SNOW

17 (Evidentiary Hearing)  
18  
19  
20  
21

22 Court Reporter: Gary Moll  
23 401 W. Washington Street, SPC #38  
Phoenix, Arizona 85003  
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25 Proceedings taken by stenographic court reporter  
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Deputy Monitor Don Anders  
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P R O C E E D I N G S

THE COURT: Thank you. Please be seated.

THE CLERK: This is CV 07-2513, Melendres v. Arpaio,  
on for evidentiary hearing.

13:31:53

Counsel, please announce your appearances.

MS. WANG: Good afternoon, Your Honor. Cecillia Wang  
of the ACLU for the plaintiff class. With me in court today  
are Stanley Young from Covington & Burling and Josh Bendor, who  
is not yet admitted but is a staff attorney with the ACLU of  
Arizona, and I believe some of my co-counsel are on the  
telephone.

13:32:06

THE COURT: All right. Good morning. Or good  
afternoon, Ms. Wang.

MS. IAFRATE: Good afternoon, Your Honor. Michele  
Iafrate and Tom Liddy on behalf of the defendants.

13:32:17

THE COURT: Good afternoon.

MS. IAFRATE: Also at counsel table, Your Honor, is  
Mr. Phil McDonald -- Mel McDowell, excuse me, sir -- in case we  
need him.

13:32:35

THE COURT: All right. Mr. McDonald, are you here  
representing the sheriff?

MR. McDONALD: Yes, Your Honor.

THE COURT: All right. And that would be to the  
extent that this matter involves criminal contempt?

13:32:43

1 MR. McDONALD: If it involves that, yes.

2 THE COURT: All right. What I intend to do is lay  
3 out -- I intend in today's proceeding first to do what was  
4 noted; and second, to lay out five areas of inquiry that I want  
5 counsels' participation on indicating why criminal contempt is 13:32:58  
6 at issue in this case. And I'll invite you to join with other  
7 counsel and with the United States Attorney, who I believe is  
8 also present, and I'll give you time to, if you need it, to  
9 consider what I'm asking and to make such evaluation. That  
10 will apply to Ms. Wang. 13:33:17

11 You, too, of course, Ms. Iafrate, and welcome.

12 MS. IAFRATE: Thank you.

13 THE COURT: First off, on November 20th -- I think I  
14 got it out on the 20th, it might have been on the 21st -- I set  
15 forth procedures going forward to accommodate both the 13:33:33  
16 statutory requirements that the sheriff's PSB is obliged to  
17 follow with the monitor's independent authority to investigate  
18 and his obligation to oversee PSB investigations without  
19 destroying the privilege, and I indicated that today I would  
20 entertain any comments or concerns regarding the procedure I'd 13:34:03  
21 set forth.

22 Ms. Wang.

23 MS. WANG: Your Honor, the plaintiffs agree with all  
24 the procedures set forth in Your Honor's order of November  
25 20th. 13:34:15

1           We do have one request for an amendment, which is in  
2 paragraph 5 of the enumerated new measures involving the  
3 monitor in the PSB unit, plaintiffs would request that we also  
4 receive notice of the same matters that the Court has ordered  
5 the defendants to give the monitor team notice of, subject to  
6 any appropriate protective orders. We believe --

13:34:37

7           THE COURT: When you say paragraph 5, which page?  
8 There are several paragraph 5s in the order.

9           MS. WANG: Page 18, paragraph 5. Specifically, the  
10 Court has directed that when MCSO undertakes a new  
11 investigation relating to the three enumerated categories of  
12 matters, that it will lodge under seal with the Court and  
13 provide the monitor with written notice. Plaintiffs would  
14 request that plaintiffs' counsel also receive such notice,  
15 subject to any appropriate protective orders.

13:34:52

13:35:09

16           THE COURT: All right. And that would be the same  
17 sort of seal that you've operated under previously in these  
18 matters?

19           MS. WANG: Yes, Your Honor.

20           THE COURT: Ms. Iafrate, any objection to that?

13:35:18

21           MS. IAFRATE: No, Your Honor.

22           THE COURT: All right. We'll make that amendment,  
23 then.

24           Anything else, Ms. Wang?

25           MS. WANG: No, Your Honor.

13:35:31

1 THE COURT: Ms. Iafrate.

2 MS. IAFRATE: Thank you, Your Honor.

3 Regarding the November 20th order, on page 16 where  
4 you're talking about orders concerning ongoing  
5 investigations --

13:35:51

6 THE COURT: Yes.

7 MS. IAFRATE: -- at line 10 it specifically talks  
8 about this case and PSB dealing with the constitutional rights  
9 of the members of the plaintiff class are guaranteed by MCSO  
10 going forward.

13:36:04

11 THE COURT: Yes.

12 MS. IAFRATE: And, of course, MCSO would agree with  
13 that, that that was the structure of this litigation.

14 However, in your order, at page --

15 THE COURT: Now, when you say "order" -- I'm sorry.

13:36:21

16 MS. IAFRATE: I'm talking about --

17 THE COURT: When you say "order," we're talking about  
18 November 20th's order --

19 MS. IAFRATE: November 20th.

20 THE COURT: -- or previous injunctive relief?

13:36:28

21 MS. IAFRATE: No, I'm sorry, Your Honor. I'm just  
22 dealing with November 20th.

23 THE COURT: All right.

24 MS. IAFRATE: So at page 17 of the November 20th order  
25 you talk about the monitor must necessarily have complete

13:36:36

1 access to defendants' Internal Affairs investigations.

2 THE COURT: Um-hum.

3 MS. IAFRATE: Our concern, Your Honor, is that some  
4 internal investigations do not deal with the underlying  
5 litigation in this matter, so I'd ask that that be curtailed 13:36:49  
6 ever so slightly to coincide with what you wrote on page 16,  
7 where it deals with investigations of MCSO personnel as it  
8 relates to either compliance with the order, meaning your  
9 injunctive order, or the constitutional rights of members of  
10 the plaintiffs' class. 13:37:09

11 THE COURT: Show me what line you're talking about.

12 MS. IAFRATE: I'm talking about page 17 --

13 THE COURT: Yes.

14 MS. IAFRATE: -- line 14.

15 THE COURT: How about if I do this, Ms. Iaftrate? One 13:37:18  
16 of the things we've discovered, and I think we've all  
17 discovered it, is there's a lot of things that relate to this  
18 case and to this -- to this suit in terms of Internal Affairs  
19 investigations, PSB investigations. That doesn't mean that  
20 everything does; I acknowledge that. 13:37:35

21 How about if I put in here -- I don't want to limit  
22 the monitor's right to have complete access to the PSB because  
23 you don't know what you don't know until you know it. But I  
24 will put in here the right for you to object, saying that the  
25 monitor is investigating matters that can have no relation to 13:37:54



1 this lawsuit and raise the matter to me.

2 Would that be acceptable to you?

3 MS. IAFRATE: That would be acceptable.

4 THE COURT: All right. Anything else?

5 MS. IAFRATE: I do have one further --

13:38:06

6 THE COURT: Sure.

7 MS. IAFRATE: -- issue, Your Honor, and it deals

8 with -- a lot of your November 20th order deals with the

9 monitor's team and PSB working together.

10 THE COURT: Yes.

13:38:19

11 MS. IAFRATE: There are some areas where it is

12 mentioned that if the monitor believes that an investigation

13 needs to occur, then they can take one up independently.

14 THE COURT: That's correct.

15 MS. IAFRATE: My concern, Your Honor, is if with those

13:38:30

16 investigations that are not dealing with PSB --

17 THE COURT: Um-hum.

18 MS. IAFRATE: If there becomes a determination that

19 PSB should get involved, they may not be able to discipline

20 appropriately because the statutes that -- I understand this

13:38:46

21 Court's previous ruling regarding that statute, but as to PSB,

22 it does apply and, therefore, it could adversely impact their

23 ability to discipline.

24 THE COURT: Well, so what you're suggesting is that

25 the monitor do independent investigations, and if it's going to

13:39:08

1 do an independent investigation, it's independent and it not  
2 involve the PSB.

3 MS. IAFRATE: Well, I was actually advocating for a  
4 cooperative agreement between PSB and the monitor team to do  
5 the investigations together, so that not only the monitor has 13:39:26  
6 access to what he needs, but also PSB has the ability to  
7 fulfill their duties pursuant to the statute, in case the  
8 monitor does uncover an investigation that ultimately would  
9 necessarily lead to discipline, and if we were -- if MCSO was  
10 not involved and did not follow the statute, they would be 13:39:49  
11 adversely impacted and could not discipline.

12 THE COURT: Well, how about we do this? You know,  
13 once bitten, twice shy. I do not want to restrict your ability  
14 to discipline, nor do I want to restrict my monitor's ability  
15 to conduct an independent investigation absent some of the -- 13:40:09  
16 some of the restrictions that you would be subject to.

17 So if my monitor begins an independent investigation,  
18 he believe so that it would be helpful, or the kind of thing  
19 that we want to involve PSB as training, showing him how to do  
20 it, or otherwise helpful, we will consult with you, and with 13:40:31  
21 Ms. Wang or Mr. Young or whoever, we'll do it under seal, and  
22 we'll see if we can work out a way that we can accomplish both  
23 of our objectives without hamstringing your ability to  
24 discipline officers.

25 It strikes me that another thing that we could do that 13:40:53

1 would avoid this problem is the monitor could conduct an  
2 independent investigation and he can publish his results. And  
3 then you can do whatever you need to do in terms of conducting  
4 your own investigation unhampered by whatever the monitor has  
5 done.

13:41:06

6 So there are several -- and I'm not -- you know,  
7 that's just sort of off the top of my head.

8 MS. IAFRATE: Right.

9 THE COURT: We want to be careful. There are several  
10 different ways we can peel this onion. But I'm certainly not  
11 adverse at this point, to the extent that what the real goal  
12 here is to have the MCSO engage in the kind of internal  
13 investigations that are serious and necessary and would qualify  
14 under the standard, and at some point that's going to involve  
15 bringing MCSO in if there are ongoing independent  
16 investigations.

13:41:16

13:41:34

17 I certainly don't have any problem bringing in you,  
18 Mr. Liddy, Ms. Wang, Mr. Young, the monitor, we can work it all  
19 out, or attempt to work it out, or just determine if we're  
20 going to have to keep it separate.

13:41:46

21 If you want some sort of an indication of that  
22 possibility in the order, I may make some sort of indication.  
23 But even if it isn't in there very clearly, I'm giving you  
24 authorization -- I'm telling you now that if my monitor  
25 believes that this is the sort of thing that would benefit from

13:42:04

1 involving PSB, and it's an independent investigation, I assume  
2 I have your right to signal you that we're going to have a  
3 closed hearing on the matter and invite the plaintiffs' counsel  
4 to be involved.

5 MS. IAFRATE: I would like that indicator, Your Honor, 13:42:19  
6 if you are asking my opinion, just so that we don't thwart  
7 certain proceedings in advance of other proceedings.

8 THE COURT: All right. We will certainly do our best.  
9 We, of course, do have to keep some walls in place, but we'll  
10 do our best to coordinate with you as well, so that our 13:42:39  
11 independent investigations don't track over your  
12 investigations, especially the ones that we believe are being  
13 adequately conducted.

14 Of course, if we don't believe they're being  
15 adequately conducted, the remedies are set forth in the order 13:42:54  
16 itself.

17 MS. IAFRATE: Understood.

18 THE COURT: All right. Anything else?

19 MS. IAFRATE: That's all, Your Honor.

20 THE COURT: All right. Now, we have present, I 13:43:02  
21 believe, in the courtroom, Ms. Strange from the United States  
22 Attorney's Office.

23 Ms. Strange.

24 MS. STRANGE: Yes, Your Honor.

25 THE COURT: Thank you for being here. 13:43:12

1 I do want to -- and Mr. McDonald, you're here.

2 I do want to explain why I've had you here, and I'll  
3 let you sit down but I'm going to call on you in a few minutes,  
4 and I'm going to go through five areas of my thinking. And I  
5 invite parties, and I'll get -- and we can discuss how much  
6 time you're going to need to address five areas of my thinking,  
7 these five areas, as we need to go forward.

13:43:32

8 I do acknowledge here the presence of the sheriff. I  
9 appreciate him being here. I have some deep concerns and I'm  
10 glad he's here to hear them. And I think he should hear them  
11 as we go forward. But that being said -- and I believe there  
12 have been some serious violations that require this Court to  
13 take action.

13:43:51

14 That being said, I do recognize that the sheriff is  
15 the duly elected sheriff of Maricopa County, and I want to give  
16 appropriate deference to his position where that is necessary  
17 and where it is indicated. But that all relates on these five  
18 areas, and I'm going to set them out first.

13:44:10

19 And we're going to be talking about the contempt  
20 statutes, so Lauren, will you please put up the contempt  
21 statute.

13:44:32

22 There are several contempt statutes in the United  
23 States Code. This is the most generic one, the one we're going  
24 to put up so everybody can see it. And if you want to look --  
25 oh, it's going to take us a second.

13:44:48

1           It indicates that "A court of the United States shall  
2     have power to punish by fine or imprisonment, at its  
3     discretion, such contempt of its authority, and none other,  
4     as --" and then if we'll hop down to (3) it says "Disobedience  
5     or resistance to its lawful writ, process, order, rule, decree,  
6     or command."

13:45:07

7           There have been several things, a number of things in  
8     which that might have been indicated, but we have been able to  
9     avoid them, I think, in this suit by making separate orders to  
10    the Sheriff's Office with which the sheriff has complied, or  
11    changing duties that the sheriff wasn't adequately fulfilling  
12    or didn't want to fulfill to the monitor, and then the County  
13    paid for that difference. And so we haven't had to, up to  
14    date, invoke this statute.

13:45:26

15           But it occurs -- and there are a number of things  
16    which may bear on it now; I'm not going to review all of them.  
17    But I am going to review two major areas and propose a way of  
18    going forward, and that's the area which -- to which I invite  
19    the parties' participation.

13:45:43

20           First, on December 23rd, 2011 --

13:46:01

21           Do you want to take up the preliminary injunction?

22           -- this Court entered a preliminary injunction against  
23    the Sheriff's Office, and this is the language in that  
24    injunction, or the pertinent language. It's the last page.  
25    There's a lot of logic and reasoning that I'll spare you.

13:46:19

1 Do you want to go to sub 5, Lauren, and show it on the  
2 screen?

3 "MCSO and all of its officers are hereby **enjoined** from  
4 detaining any person based only on knowledge or reasonable  
5 belief, without more, that the person is unlawfully present 13:46:32  
6 within the United States, because as a matter of law such  
7 knowledge does not amount to a reasonable belief that the  
8 person either violated or conspired to violate the Arizona  
9 human smuggling statute, or any other state or federal criminal  
10 law." 13:46:49

11 So that injunction went into effect on December 23rd,  
12 2011, and again, the Sheriff's Office, in conjunction with some  
13 recent investigations in -- on November 20th under seal, and  
14 since it has posed no objection to it coming out of seal, made  
15 a disclosure that is, you know, of some -- quite, quite serious 13:47:14  
16 to this Court.

17 Lauren, if you want to put that up, the relevant part.

18 It indicated to me that they wanted to alert me that  
19 in their review of the traffic stop videos, and those were the  
20 traffic stop videos that they had seized from 13:47:37  
21 Deputy Armendariz's home: "... we did identify one stop which  
22 has been referred to as the Korean stop that occurred on  
23 November 1st, 2012, which is significant because that was after  
24 this Court's order, this injunction to stop doing the  
25 interdiction patrols." which I assume meant immigration 13:47:52

1 interdiction patrols.

2 "Our review of that tape has led us to believe that it  
3 was an interdiction patrol, and that gave rise to an MCSO  
4 investigation and that investigation is ongoing. But so far in  
5 that investigation two lieutenants have been interviewed, and 13:48:06  
6 those interviews have revealed, and the MCSO has concluded,  
7 that this Court's order was not communicated to the line troops  
8 in the HSU." meaning the Human Smuggling Unit.

9 And I will just interlineate here that the Human  
10 Smuggling Unit, pursuant to my understanding of the evidence at 13:48:26  
11 trial, was the principal unit charged with immigration  
12 interdiction.

13 Then Mr. Liddy indicates that "...that has spawned an  
14 additional investigation up the chain of command as to exactly  
15 why they were not..." communicated. They did not receive any 13:48:38  
16 communication or training about my preliminary injunction and  
17 how that came to be.

18 "We have identified an e-mail from Mr. Casey to Brian  
19 Sands, Chief Brian Sands, Chief Jack MacIntyre, Chief Jerry  
20 Sheridan, and Lieutenant Sousa. Lieutenant Sousa has already 13:48:56  
21 been interviewed. And so that gives rise to reason for  
22 additional investigations and interviews.

23 "However, two of those personnel -- excuse me, one of  
24 those, Chief Sheridan, has already been -- has already  
25 testified under oath as to his actions..." in a related, I 13:49:09



1 gather, DOJ lawsuit. And later Mr. Liddy indicates that in the  
2 internal investigation, that was one of the matters that they  
3 would have -- they anticipated assigning to Investigator Vogel  
4 since this went up the MCSO chain of command.

5 That seems to meet -- I've also received information 13:49:32  
6 since that Sheriff Arpaio's position was that he could continue  
7 to detain immigrants who he didn't have a cause to hold on any  
8 state charges and turn them over to ICE pertaining to all other  
9 operations during the period.

10 Those two things indicate to me that the very unit 13:49:55  
11 that did most of the immigration patrol never received any  
12 indication that they shouldn't continue doing them, and in fact  
13 did continue doing them, and that is a serious violation in  
14 direct contradiction to this Court's authority that apparently  
15 lasted for months and months, more than a year at the minimum, 13:50:18  
16 it appears.

17 Now, the contempt statute which we put up authorizes  
18 both civil and criminal contemptual matters, and they can arise  
19 from the same underlying facts. And, in fact, based on the  
20 same facts, you can prosecute somebody for criminal contempt 13:50:44  
21 and at the same time have a proceeding for civil contempt for  
22 the very same matters.

23 But the difference is that civil contempt generally is  
24 coercive or compensatory; that is, you call somebody to  
25 testify, they won't testify or otherwise cooperate in the 13:51:02

1 middle of the trial, the trial judge can jail them for the  
2 pendency of the trial to see -- to coerce their testimony. And  
3 usually that authority ends when a trial ends.

4 Well, our trial's long since over. We still are in  
5 the period of injunctive relief that relates to that trial, 13:51:18  
6 however. But the compensatory purpose is the one that  
7 interests me also for some of the other matters that we'll  
8 discuss here today, and that is I can hold somebody in civil  
9 contempt if I can compensate the victims of the contempt.

10 The problem is that in this case that is extremely 13:51:35  
11 difficult to do. I imagine that with some considerable effort  
12 we could identify everyone -- probably could not identify  
13 everyone but we could identify some of the victims of Sheriff  
14 Arpaio's conduct, or his office's conduct during the 18 months  
15 in which he was apparently in violation of my preliminary 13:51:54  
16 injunction. But even if we could identify them, it is  
17 difficult to know if we could find them.

18 And we clearly couldn't identify, for example,  
19 American citizens who may have been stopped in a desire to do  
20 the kind of immigration patrols that were going on, and who 13:52:11  
21 thus had their constitutional rights violated.

22 And also there's nothing we can do about the fact that  
23 the Sheriff's Office, for 18 months, assumed authority that it  
24 did not have under the Constitution. And yet, it is impossible  
25 for me, because this is a federal court designed to protect 13:52:36

1 those rights, and I did enter -- and this Court did enter  
2 orders to protect those rights and those orders were violated,  
3 it is impossible for me to leave that and to let it go without  
4 some sort of appropriate response.

5 As I've indicated, I think that as the duly elected 13:52:55  
6 sheriff of Maricopa County, the sheriff is entitled to some  
7 deference by this Court if it can be offered. But I must say  
8 that in the past when I've fined the sheriff, the sheriff just  
9 passes the fine on to Maricopa County; and, in fact, depending  
10 upon who you believe, may be using my assessments of curative 13:53:14  
11 procedures to actually expand his operating budget.

12 He also happened to make a comment, I think it was in  
13 good jest, when he first met my monitor, that he loves to have  
14 confrontations with the federal court because every time he  
15 does his popularity goes up. 13:53:36

16 And so I really don't know, as I've thought about it,  
17 whether there is a civil remedy that would fit this situation,  
18 but I think that we ought to experiment -- we ought to think  
19 about it: Is there some sort of civil remedy that is available  
20 through a civil contempt process without resort to a criminal 13:53:58  
21 contempt process that would fit the violation that has occurred  
22 here?

23 If not, Mr. McDonald, I fully intend -- you will see  
24 for a minute my recommendation is going to be that we have a  
25 civil contempt proceeding first on several matters. But if at 13:54:21

1 the end of that civil contempt proceeding I do determine that  
2 the Sheriff's Office, the sheriff, or others should be held in  
3 civil contempt but I cannot find any appropriate civil remedy  
4 that will meet the nature of the infraction, I fully intend to  
5 make a criminal referral to the United States Attorney to try  
6 the sheriff, and as I've said, possibly others, and we'll go  
7 over this in a minute, for criminal contempt.

13:54:42

8 I realize that in that proceeding he would have  
9 procedural rights, and I would fully intend to authorize and  
10 exercise the full -- all of those rights. The difference, of  
11 course, as I think you know, Mr. McDonald, between a civil  
12 contempt proceeding and a criminal contempt proceeding is that  
13 a criminal contempt proceeding the purpose is not really to  
14 coerce, nor is it to compensate; it is to punish. And that's  
15 one of the reasons why it's criminal and can result in criminal  
16 sanctions such as incarceration or criminal fines.

13:55:01

13:55:24

17 Because that is a very real possibility, I think that  
18 you need to be -- the sheriff needs to be aware of it and you  
19 need to be aware of it for any proceedings that are going to  
20 continue. Ms. Iafrate filed the motion for determination of  
21 counsel and I appreciate that. She's not in a position to  
22 represent the sheriff.

13:55:43

23 I presume, Ms. Iafrate, you're not in a position to  
24 represent any other members of the Maricopa County Sheriff's  
25 Office who we may pursue for criminal attempt.

13:56:02

1 MS. IAFRATE: That is correct, Your Honor.

2 THE COURT: But I believe that, if I understood your  
3 motion correctly, you would be in a position to represent them  
4 as far as civil contempt proceedings go.

5 MS. IAFRATE: That is correct, Your Honor. 13:56:10

6 THE COURT: All right. And it does seem to me,  
7 Ms. Wang, Mr. Young, for what it's worth, that if I initiate a  
8 criminal contempt proceeding, that's actually a separate matter  
9 tried by the United States Attorney. Of course, you would be  
10 interested in that matter, but you would not have a role in 13:56:25  
11 that matter.

12 Nevertheless, to the extent that you have -- you are  
13 representing the class interests in this matter, I thought I  
14 would raise to you another statute which I'm not going to put  
15 on the monitor. It's 18, United States Code, Section 402 as 13:56:37  
16 opposed to 401, and it basically says that if a crime has been  
17 committed against victims of behavior that results from a  
18 contempt, individual assessments of \$1,000 can be made to be  
19 paid by the contemnor as well as the jail fine, and because you  
20 are representing people who may have been the victims of that 13:56:58  
21 crime, I guess I want your input as to whether or not it's  
22 worth pursuing such a contempt under that statute if civil  
23 contempt doesn't meet it.

24 I would suggest that there's language in there that  
25 the limit on the fine, if the fine goes to the United States, 13:57:11

1 is \$1,000, and frankly, that's not worth the candle to me. But  
2 if the thousand dollars can go to -- if more than a thousand  
3 dollars can go to individual victims of the crime, and if those  
4 can be located without an enormous amount of difficulty and  
5 trouble, I would appreciate it if you have any thoughts on  
6 that.

13:57:31

7 The second matter, and these, again, are only  
8 illustrative because there are a number of other matters, both  
9 that the MCSO, I believe, has under good faith investigation  
10 and other matters under investigation that are not appropriate  
11 to discuss today and that I can't discuss today, but another  
12 matter that I think involves the contempt statute is the  
13 language that allows me to punish for contempt, disobedience,  
14 or resistance to the lawful processes or rules of this Court.

13:57:46

15 In conjunction with the death of Sergeant Armendariz  
16 and the disclosure by the MCSO of what they found there, there  
17 was a number of recordings found that has led to, in subsequent  
18 investigation, a number of all kinds of recordings of different  
19 kinds, both audio and video, or at least knowledge of their  
20 existence; reports that existed at the time that were  
21 responsive to discovery that was requested that apparently were  
22 not provided; license plates, licenses, identification cards,  
23 credit cards, CDs, DVDs, purses, religious statuettes. Some of  
24 these are a matter of ongoing investigations by the MCSO and  
25 the monitor.

13:58:08

13:58:26

13:58:51

1 And I don't pretend, Ms. Wang, Mr. Young, if you're  
2 worried, I don't pretend that we have our arms fully around  
3 this material yet. I don't think that MCSO would contend that.  
4 But it appears that a great -- for my present purposes, it  
5 appears that at least a large amount of this material was 13:59:04  
6 requested by the plaintiffs prior to trial, was not delivered  
7 by the defendants to the plaintiffs prior to trial, and as a  
8 result may well have, and I'm not making a determination at  
9 this point, but may well have limited the plaintiff in its  
10 ability to present evidence concerning the unconstitutional 13:59:23  
11 behavior, supervision, and other problems at MCSO.

12 Again, we've previously had -- already gone around  
13 this bend once in this matter when MCSO destroyed evidence, and  
14 again, I don't know who Mr. Liddy may have --

15 Mr. Liddy, I'm sorry. 13:59:48

16 Mr. Casey indicated that he did transmit all the  
17 discovery requests to the MCSO. We know that he previously  
18 submitted them to Chief MacIntyre. We know that he submitted  
19 the contempt order to Chief MacIntyre. I don't know whether  
20 Chief MacIntyre was his contact or not. But to the extent that 14:00:04  
21 this demonstrates callousness on the part -- I mean, to the  
22 extent that it merely is a question of getting our arms around  
23 what you didn't get or having an idea what was destroyed, I  
24 think that my civil contempt power, as well as the inherent  
25 authority that this Court has to enforce its judgments and 14:00:26

1 orders, would allow me to, and allow you to discuss with the  
2 parties, the ability to refashion relief or retry this case.  
3 And would allow me, for example, to make sure that your  
4 attorneys' fees were regularly paid while you were retrying  
5 this case instead of waiting until the end or anything like  
6 that.

14:00:43

7 It seems to me I could do that through my -- as I  
8 said, through inherent authority and the civil contempt power.  
9 But to the extent that -- that it would reveal a callous  
10 attitude on the part of MCSO, Sheriff Arpaio, or any of its  
11 officers in terms of complying with their legal obligations, it  
12 also occurs to me, Mr. McDonald, that that could give rise to a  
13 criminal contempt proceeding after the civil contempt  
14 proceeding.

14:00:59

15 It also occurs to me, Mr. McDonald, and I say this not  
16 really to you but I say it so that people are aware --  
17 Ms. Iafrate, Mr. Liddy, I think it will be your obligation --  
18 it seems to me that it also implicates, perhaps,  
19 Chief MacIntyre, perhaps others, who may have been involved in  
20 a callous dealing with their requirements to produce and comply  
21 with the legal rules and orders of this Court.

14:01:13

14:01:32

22 I don't know, of course, if that's true, and I'm not  
23 trying to foreshadow that it's true. But as we have  
24 Mr. McDonald here to protect the sheriff's rights in case this  
25 matter goes to criminal contempt at this early proceeding, I'm

14:01:50



1 pointing out that Chief Deputy MacIntyre and/or others may  
2 require the same right.

3 And before we move on from that -- well, I think we  
4 can move on to this next matter, it flows right into the next  
5 matter, which is: Who should be the subject of the contempt  
6 hearings? 14:02:08

7 The defendants in this matter right now are MCSO and  
8 Sheriff Arpaio are the two defendants. I realize, or at least  
9 I was informed by Ms. GilBride some months ago, that Maricopa  
10 County was going to take the position that MCSO is not a jural  
11 entity and I understand that argument. I don't know that it  
12 changes much, and I think that that was our acknowledgment at  
13 the time, it doesn't change much the practical effect or power  
14 of this Court so long as Sheriff Arpaio is a defendant, and I  
15 don't think that was appealed but I don't know that. 14:02:27  
14:02:43

16 MR. LIDDY: Your Honor, yes, that was appealed.

17 THE COURT: That Sheriff Arpaio shouldn't have been a  
18 defendant?

19 MR. LIDDY: No, no, that MCSO is a non-jural entity.

20 THE COURT: All right. But Sheriff Arpaio as a  
21 defendant was not appealed. 14:02:53

22 MR. LIDDY: That's correct, because he was sued in his  
23 capacity as the elected sheriff of Maricopa County.

24 THE COURT: So it seems to me that Sheriff Arpaio is  
25 going to be the subject of the contempt hearings. MCSO may 14:03:01

1 also be the subject, but recognizing that that might be voided  
2 out depending upon what the Ninth Circuit does. But it won't  
3 really have a whole lot of practical difference, because  
4 Sheriff Arpaio is the party here.

5 But it also seems to me, and I give you this citation, 14:03:16  
6 all persons involved here, it's United States versus Baker,  
7 641 F.2d 1314. And it indicates that non-parties, both  
8 non-parties and non-parties in privity with a party who are  
9 aware of an order and violate it are liable for both civil and  
10 criminal contempt. 14:03:34

11 And so with all due respect, people like  
12 Chief MacIntyre, Deputy Chief Sheridan, Chief Sands, Lieutenant  
13 Sousa, those who you have identified as people who received,  
14 for example, the Casey e-mail saying, Do something with this,  
15 and apparently nothing was ever done, may also and should also 14:03:55  
16 be on alert that to the extent I cannot find some sort of civil  
17 remedy that works, criminal contempt is also something they may  
18 want to consider and obtain counsel for.

19 And again, that's a matter on which I invite the  
20 parties' comment if they wish to make comment, and that's why 14:04:20  
21 I've given you the case, it's a Ninth Circuit case, United  
22 States versus Baker, 641 F.2d 1314.

23 The timing of the prosecution. You can look at United  
24 States versus Rylander. I cited that case and I think you're  
25 nodding to indicate you've read it. And it says that you can 14:04:39

1 actually -- it says that it's not error to proceed in the same  
2 proceeding -- or it's not necessarily error to proceed in the  
3 same proceeding with criminal and civil contempt matters, but  
4 it recommends that you not do that; that if you're going to do  
5 both, that you do one and then you do another.

14:04:59

6 And it seems to me that that is a very good  
7 suggestion, and I would propose for your -- again for your  
8 comment, that I proceed with matters about which I currently  
9 have a belief that a civil contempt proceeding is appropriate  
10 by an order to show cause. That during that time I determine  
11 whether or not I believe that any civil remedy can  
12 appropriately address the violations that I identify, and that  
13 if I can't -- can't come up with one, then we will proceed with  
14 a criminal contempt proceeding if I believe that the evidence  
15 merits such a procedure.

14:05:17

14:05:39

16 Now, I also want to make it clear, I think I've  
17 already made it clear, but I do want to make it clear that  
18 there are a number of matters that are of considerable concern  
19 to me that I haven't raised today, and that does not mean that  
20 I won't raise them by either such a civil or a criminal  
21 proceeding.

14:05:56

22 But I think you appreciate, Ms. Iafrate, Mr. Liddy,  
23 that I also don't want to infringe on any ability, for example,  
24 to mess up any investigation you're now undertaking, and/or the  
25 monitor's undertaking, for that matter. So I'm just going to

14:06:19

1 let people know that there are other matters that are of great  
2 concern to this Court that may receive a similar treatment, and  
3 that's why I'm sort of laying out this treatment for your  
4 comment.

5 That being said, Ms. Wang, Mr. Young, because you 14:06:33  
6 don't have your arms around the scope of what may have gone  
7 wrong here, I can understand your desire, maybe, to say, We  
8 ought to wait until we know what went wrong. But I must say  
9 I'm somewhat disinclined to do that. I believe that if we wait  
10 too long, this matter, which has already gone on for too long, 14:06:56  
11 will remain -- justice delayed is justice denied, essentially.  
12 But I recognize that -- or at least I would like to give you  
13 the opportunity to comment on that.

14 And of course, Ms. Iafrate, you have that opportunity  
15 as well. And it seems to me, Mr. McDonald, that you have the 14:07:17  
16 opportunity to comment on that as well, to the extent you wish  
17 to do so.

18 And Chief Deputy Sheridan, to the extent that you feel  
19 like you, or Chief Deputy MacIntyre, or Chief Sands, or  
20 Lieutenant Sousa, or others who have been implicated as targets 14:07:31  
21 of investigation, or potential targets of investigation, may  
22 wish to obtain your own separate counsel. I would certainly  
23 welcome them to weigh in on that if they wish to do so before I  
24 proceed in any way.

25 There are additional matters that pertain to a 14:07:55

1 criminal contempt proceeding. I have asked the United States  
2 Attorney to be here and she is -- or the chief assistant is  
3 here. And the reason I've asked her to be here, just as  
4 I've -- as I think it's appropriate that Sheriff Arpaio's  
5 representative be here, because if we proceed with the civil 14:08:18  
6 proceedings there are, at least to some extent, possible  
7 criminal ramifications to those proceedings, and I want you to  
8 be aware of what's going on from the beginning and keep you  
9 apprised.

10 If you look at Criminal Rule of Procedure 42 -- 14:08:33

11 Do we have a copy of that to put up?

12 And I know you probably know this, Ms. Strange, but I  
13 have to give notice if I'm going to initiate a criminal  
14 contempt proceeding. And if I do that, when I give notice,  
15 which I have to state the time and place of the trial and allow 14:08:54  
16 the defendant a reasonable time to prepare a defense, I have to  
17 appoint a prosecutor.

18 And the rule requires that the contempt be prosecuted  
19 by an attorney for the government unless the interest of  
20 justice requires the appointment of another attorney, and if 14:09:09  
21 the government declines the request, the Court must appoint  
22 another attorney to prosecute the contempt.

23 And so it seems to me that that gives your office,  
24 your own office, an opportunity to evaluate whether this is  
25 something you feel comfortable handling if it comes your way, 14:09:25

1 and whether or not you wish to pursue it or whether or not you  
2 wish to tell me that if I'm going to pursue it, I need to find  
3 somebody else to pursue it.

4 And I realize that there can be conflicts and all  
5 kinds of other matters that you need to take into account, and 14:09:41  
6 so as this process develops I'm going to continue, as I have in  
7 the past, require that you be apprised of information that  
8 develops. In the past I've done that and made sure that that  
9 was under seal, just as Ms. Wang and the plaintiffs' counsel  
10 have received information under seal, and I would propose to do 14:10:00  
11 that, Ms. Iafate, unless you have any objection.

12 MS. IAFRATE: No, Your Honor.

13 THE COURT: Do you have any objection, Ms. Wang?

14 MS. WANG: No, Your Honor.

15 THE COURT: Mr. McDonald? 14:10:08

16 MR. McDONALD: Judge, should I -- when you provide  
17 this under seal, would I be provided that same information? I  
18 would request that we be provided any information that you're  
19 turning over to the United States Attorney.

20 THE COURT: All right. You know what? Now that I'm 14:10:22  
21 starting to go through areas I invite your comment on, I think  
22 that that is something that if you can just put in your writing  
23 that I'm going to have you submit, that will be good. That way  
24 I won't forget it, and I understand that request.

25 Any objection if we provide it to Mr. McDonald? 14:10:35

1 MS. WANG: Your Honor, I think that's something I'd  
2 want to do some research on. In an ordinary criminal case, at  
3 the initiation of a prosecution, by analogy, say, during grand  
4 jury proceedings, the defendant would not necessarily get  
5 discovery of documents, so I would respectfully ask --

14:10:51

6 THE COURT: Yeah, I think it's appropriate you  
7 consider that. I would point out that, though, that what we're  
8 talking about is pre-proceedings, because I have not appointed  
9 the prosecutor at the point.

10 But I do think it's fair -- I mean, while I understand  
11 your concern, I understand there are some investigative things  
12 that maybe need to be addressed. Mr. McDonald, after all, is  
13 not a potted plant. We want to have him here able to represent  
14 fully the interests of his client, as we'll want Chief Deputy  
15 Sheridan or Chief MacIntyre or whoever else might deem fit to  
16 hire counsel to be able to have their own representation.

14:11:05

14:11:22

17 I do realize that if I initiate a criminal prosecution  
18 for contempt, that the rights to a jury trial depend upon how  
19 seriously I intend to sentence the potential defendants. And I  
20 guess it seems to me that we can cross that bridge when we come  
21 to it, if and when we come to it. But if it's something that  
22 any of you want to comment on, you can comment on it in your  
23 written memorandum on this topic.

14:11:53

24 Now, it does -- how many pages are you going to need?  
25 Those are the topics I'm interested in. How many pages are you

14:12:18

1 going to need?

2 MS. WANG: Your Honor, we would propose 20 pages.

3 THE COURT: All right. How long do you want?

4 MS. WANG: Your Honor, that hinges in part on how

5 quickly the defendants respond to a discovery request we have 14:12:49

6 outstanding. We don't even have the documents that Mr. Casey

7 referred to that were discovered earlier this month in November

8 of 2014. Assuming that those documents are produced to us,

9 say, by next week, we'd ask for an additional week, so two

10 weeks. But that is contingent on getting the documents that 14:13:07

11 have already been referred to in court.

12 THE COURT: Do you have any idea on that, Ms. Iafrate?

13 MS. IAFRATE: Your Honor, I received a correspondence

14 from Ms. Wang either yesterday or today regarding this issue.

15 Obviously, I'm new to this case. We are looking into it right 14:13:23

16 after I got her request, so I do not know the status of that.

17 I have a call in to Mr. Casey as well regarding that. So I

18 can't even give you an estimate, because it would just be a

19 false estimate.

20 THE COURT: All right. Mr. Liddy, were these -- it 14:13:39

21 was, like, 23 boxes, or something like that? I've forgotten.

22 How many documents?

23 MR. LIDDY: Your Honor, I believe it was more than

24 that. It was a vast volume of documents, the most appear to be

25 photocopies, and Mr. Casey -- 14:13:56



1 THE COURT: So there are hard copy documents.

2 MR. LIDDY: There are hard copy documents. There are  
3 also, as Mr. Casey indicated, tapes -- well, electronic  
4 recordings. But Mr. Casey is in the process of going through  
5 them, as he's the only one that can do it in an efficient 14:14:08  
6 manner because he was the one who did the production back in  
7 2009. He'll be able to tell how many of them are duplicates of  
8 what was already produced.

9 Back in 2008, 2009, MCSO was told to gather documents  
10 that were requested. They were gathered. They were copied. 14:14:25  
11 They were presented to Mr. Casey. He needs to determine how  
12 many of these are those copies.

13 THE COURT: Well, let me ask, do you wish to go review  
14 them with Mr. Casey?

15 MS. WANG: Your Honor, let me amend what I said. 14:14:41

16 Plaintiffs believe that based on the information, the  
17 limited information we already have, there is a basis to  
18 proceed with civil contempt, and there is a basis for the Court  
19 to refer a criminal contempt investigation proceeding to a  
20 prosecutor, whether it's the U.S. Attorney's Office or 14:15:01  
21 otherwise.

22 Based on that, I think we'll be ready to brief this  
23 within two weeks whether or not we get the discovery that's  
24 outstanding. We would take up any discovery disputes with the  
25 Court separately, I think. But I do think that we have 14:15:14

1 sufficient information that if the Court were not issuing an  
2 order to show cause on civil contempt sua sponte plaintiffs  
3 would submit an application for an OSC.

4 THE COURT: All right.

5 Ms. Strange, do you want to brief anything that I've 14:15:30  
6 discussed, or do you want to weigh in on this at this point?

7 MS. STRANGE: No, Your Honor.

8 THE COURT: All right. Ms. Iafrate, how long will you  
9 need, and how many pages?

10 MS. IAFRATE: Well, Your Honor, the concern that I 14:15:42  
11 have are the -- that coverall issue that you talked about where  
12 there are issues that we are not discussing in open court.

13 THE COURT: I completely understand. So how do you  
14 want me to address that?

15 MS. IAFRATE: I guess that was, by way of explanation, 14:15:57  
16 that there are a number of those issues. Therefore, I believe  
17 that our briefing to you may need to be larger than 20 pages,  
18 because there -- within that grouping there are several issues  
19 that need to be addressed.

20 THE COURT: How many pages do you want? 14:16:14

21 MS. IAFRATE: Thirty.

22 THE COURT: All right. How long do you need?

23 MS. IAFRATE: January 15th.

24 THE COURT: I'm not going to give you that long.

25 MS. IAFRATE: Your question was: What do I want? 14:16:28

1 THE COURT: I want to be reasonable, but I want to  
2 move this matter along. I do recognize we're in the holidays.  
3 Today is the 3rd, happy holidays. I'll give you until --

4 MS. IAFRATE: Today is the 4th, Your Honor.

5 THE COURT: Oh, 4th.

14:16:52

6 MS. IAFRATE: One day matters, apparently.

7 THE COURT: Thank you. How about I give you till  
8 January 7th?

9 MS. IAFRATE: 7th?

10 THE COURT: Yeah. Well, I'll give you January 8th.

14:17:04

11 MS. WANG: Your Honor, is the proposal -- plaintiffs  
12 would propose that we have simultaneous --

13 THE COURT: I agree.

14 MS. WANG: -- opening briefing, and then perhaps a  
15 simultaneous response.

14:17:14

16 THE COURT: We're not going to do -- this isn't going  
17 to be a normal briefing thing.

18 MS. WANG: Right.

19 THE COURT: I've told you what I want you to comment  
20 on, you comment on it, and I'm making my decision.

14:17:19

21 MS. WANG: All right.

22 THE COURT: There's not going to be any responses,  
23 you're just going to get your chance to do it, and if you want  
24 to -- I suppose that what I will do, I will allow, Ms. Wang, if  
25 you want to do January 8th and you want to file a request for

14:17:33

1 an order to show cause, then I'll allow the defendants to  
2 reply -- or to respond, and then you can reply.

3 But otherwise, I just want to know, the 20 pages  
4 you've asked, and you can have 30 pages if you want, but spare  
5 me if you don't need them, it's just related to the questions  
6 I've asked. 14:17:49

7 MS. WANG: Yes, Your Honor.

8 THE COURT: And of course you can file whatever else  
9 you want whenever else you want to, and then there will be a  
10 normal briefing process. 14:17:59

11 MS. WANG: Just for the briefing the Court is  
12 requesting from both sides both of our briefs will be due  
13 January 7th.

14 THE COURT: That's correct.

15 MS. WANG: Okay. 14:18:07

16 THE COURT: Now, Mr. McDonald, do you want to weigh in  
17 on this as well?

18 MR. McDONALD: Yes, Your Honor. I've been on this  
19 case a total of 40 hours. I am just beginning to get a handle  
20 on this. I haven't filed a notice of appearance because I  
21 don't know whether it will ever be necessary. I'm hoping that  
22 it's not necessary. 14:18:17

23 During the process, every time the thought of  
24 something criminal coming into it, I want to receive notices of  
25 everything. Whatever will be referred to the U.S. Attorney, I 14:18:34

1 would want to know about.

2 THE COURT: With all due respect, then, Mr. McDonald,  
3 file a notice of appearance.

4 MR. McDONALD: Okay. I will file a notice of  
5 appearance. 14:18:46

6 THE COURT: And then do you want to have the same  
7 January 7 deadline?

8 MR. McDONALD: That would be fine.

9 Off-the-record discussion between the Court and the  
10 clerk.) 14:18:57

11 THE COURT: What did I say? 8th, I apologize. I'm  
12 really bad on the days today. January 8th deadline.

13 MR. McDONALD: Yes.

14 THE COURT: All right. You have it. How many pages  
15 are you going to need? 14:19:03

16 MR. McDONALD: Judge, I don't know enough about the  
17 case to even be able to --

18 THE COURT: All right. As long as you don't exceed 30  
19 pages, you can have them.

20 MR. McDONALD: All right. 14:19:09

21 THE COURT: And don't use them if you don't need them.

22 MR. McDONALD: All right.

23 THE COURT: All right. Now, are there other matters  
24 that need to be -- those were the matters that I intended to

25 address today. Are there other matters that need to be 14:19:18

1 addressed?

2 MS. WANG: Your Honor, just one point of clarification  
3 so the Court and the defendants are not surprised upon getting  
4 our brief. Plaintiffs believe that there is a long and  
5 voluminous record of noncompliance with this Court's several 14:19:37  
6 orders to date. And in the briefing we would intend to address  
7 not only the facts relating to the November 1st, 2012, stuff,  
8 but also other instances of noncompliance that may be the  
9 subject of a contempt proceeding. And so I would just advise  
10 the Court that and ask whether the Court sees any issue with 14:20:00  
11 that.

12 THE COURT: I'm not sure that I understand, Ms. Wang,  
13 but if I do, as I've indicated, I'm not necessarily making any  
14 determination right at this moment as to other matters on which  
15 I think a contempt finding may or may not be appropriate. If 14:20:14  
16 you want to raise those matters to my attention and I think  
17 that they may well, upon development, be appropriate topics of  
18 contempt if they aren't now, I will deny your motion to that  
19 respect without prejudice, but I have no problem if you raise  
20 them. 14:20:33

21 MS. WANG: Understood. Thank you, Your Honor.

22 MS. IAFRATE: I have nothing further, Your Honor.

23 THE COURT: All right. Thank you.

24 (Proceedings concluded at 2:20 p.m.)  
25

C E R T I F I C A T E

I, GARY MOLL, do hereby certify that I am duly  
appointed and qualified to act as Official Court Reporter for  
the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute  
a full, true, and accurate transcript of all of that portion of  
the proceedings contained herein, had in the above-entitled  
cause on the date specified therein, and that said transcript  
was prepared under my direction and control.

DATED at Phoenix, Arizona, this 5th day of December,  
2014.

s/Gary Moll