

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF ARIZONA

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4 Manuel de Jesus Ortega)
Melendres, et al.,)
5)
Plaintiffs,) CV 07-2513-PHX-GMS
6)
vs.) Phoenix, Arizona
7) January 15, 2015
Joseph M. Arpaio, et al.,) 3:03 p.m.
8)
Defendants.)
9 _____)

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15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE G. MURRAY SNOW

17 (Telephonic Status Conference)
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20
21

22 Court Reporter: Gary Moll
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25 Proceedings taken by stenographic court reporter
Transcript prepared by computer-aided transcription

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P R O C E E D I N G S

THE CLERK: This is civil case number 07-2513,
Melendres v. Arpaio, on for a telephonic status conference.

Counsel, please announce your appearances.

15:03:57

MS. WANG: Good afternoon, Your Honor. This is
Cecillia Wang of the ACLU for the plaintiffs.

Also on the phone for the plaintiffs are Dan Pochoda
and Andre Segura and Josh Bender of the ACLU, and Jorge
Castillo from MALDEF.

15:04:20

THE COURT: Thank you. Will you be doing the speaking
today, Ms. Wang, on behalf of plaintiffs?

MS. WANG: I will, Your Honor.

THE COURT: All right. Thank you.

MS. IAFRATE: Good afternoon, Your Honor. Michele
Iafrate and Tom Liddy on behalf of Sheriff Arpaio and MCSO.

15:04:29

THE COURT: Good afternoon, Ms. Iafrate.
Will you be doing the speaking on behalf of the
defendants?

MS. IAFRATE: Yes, Your Honor.

15:04:39

THE COURT: Okay. Thank you.

MR. McDONALD: Your Honor, a formal appearance,
Mel McDonald on behalf of Sheriff Arpaio, for the limited role
of the issue that you had raised about the possibility of
federal criminal contempt.

15:04:51

1 THE COURT: All right. Thank you. Good afternoon,
2 Mr. McDonald. I will say --

3 MR. McDONALD: Good afternoon.

4 THE COURT: I don't know if you're on the
5 speakerphone, but you're coming over very loud here. 15:05:01

6 MR. McDONALD: Okay. Let me turn my phone down here.

7 Is that better?

8 THE COURT: Much better. Thank you.

9 MR. McDONALD: You bet.

10 MR. BIRNBAUM: Good afternoon, Your Honor. This is 15:05:13
11 Gary Birnbaum appearing for Deputy Chief MacIntyre, and
12 Mr. MacIntyre is present with me.

13 THE COURT: Good afternoon, Mr. Birnbaum.

14 MR. BIRNBAUM: Thank you, Your Honor.

15 MR. STEIN: Good afternoon, Your Honor. Lee Stein and 15:05:28
16 Barry Mitchell appearing on behalf of Chief Deputy Sheridan, in
17 the limited capacity to deal with the issue of federal
18 contempt, criminal contempt.

19 THE COURT: Good afternoon.

20 CHIEF WARSHAW: Good afternoon, Your Honor. This is 15:05:44
21 Chief Warshaw, the Court's monitor.

22 THE COURT: Good afternoon, Chief.

23 I appreciate the parties appearing telephonically.

24 (Loud sound heard on telephone.)

25 THE COURT: Have we got a foghorn in the background? 15:05:54

1 Is everybody hearing that?

2 MR. McDONALD: I'm hearing it, Your Honor.

3 THE COURT: Well, I guess we'll just have to plow
4 through.

5 I appreciate everybody appearing telephonically. It 15:06:03
6 occurred to me, as I read the briefings that you've all filed,
7 and thank you for filing them, that in order to efficiently
8 proceed, we needed to resolve some matters, and so I've

9 scheduled this status conference early in the hope that we
10 could resolve some matters and proceed as efficiently as 15:06:24
11 possible. It requires me to raise some questions of
12 particularly the parties, but also the nonparties, since I have
13 raised the potential of a criminal referral for contempt.

14 Let me just say I'm going to start off dealing with
15 the matters that relate to both the parties and the nonparties, 15:06:46
16 and then I'll probably move into more of the party questions I
17 had, although, of course, the nonparties are welcome to listen.

18 That when we do hearings over the telephone, it's much -- I
19 will want to have everybody who wants to be heard be heard, but
20 it's much easier if you identify yourself for the record before 15:07:02
21 beginning to speak.

22 I will also remind those who are present in the
23 courtroom that we don't allow recordings, and I don't know if
24 you are making any recordings but I will remind you of that,
25 and signal to those who are on the telephone that there are 15:07:16

1 persons present in the courtroom listening to the proceedings.

2 It occurs to me that very long ago I began requiring
3 that investigative matters be referred to the United States
4 Attorney's Office, and I don't know whether a representative of
5 the U.S. Attorneys's Office is here, but that I required that 15:07:37
6 matters be referred to the United States Attorney's Office and
7 to the Maricopa County Attorney.

8 I did request and the United States Attorney's Office
9 did appear at the December 4th hearing in which I outlined the
10 reasons why I am contemplating seriously a criminal contempt 15:07:57
11 referral. And in that conference Mr. McDonald, who was also
12 appearing on behalf of Sheriff Arpaio, indicated that he would
13 like to receive the materials that go to the United States
14 Attorney. I think we had agreed in that meeting that
15 investigative materials could go to the United States Attorney 15:08:19
16 as long as the United States Attorney treated them as if they
17 were under seal.

18 Plaintiffs requested at that time to consider whether
19 or not they had an objection, and in a recent filing they
20 indicated they did not have any objection to Mr. McDonald 15:08:32
21 receiving such materials. But since then we have received the
22 limited appearances, and I don't want to prejudice anybody by
23 calling it a limited appearance, but perhaps a nonappearance by
24 Mr. Birnbaum and Mr. Ouimette on behalf of Deputy Chief
25 MacIntyre, Mr. Stein on behalf of Chief Deputy Sheridan, and 15:08:54

1 Mr. Stein, I believe you've also represented Mr. Mitchell in
2 this matter.

3 MR. STEIN: I'm sorry, Your Honor. Mr. Mitchell is my
4 partner, and he and I together represent Chief Sheridan.

5 THE COURT: All right. I understood from the monitor 15:09:10
6 that you were present during an interview representing Chief
7 Bailey as well.

8 MR. STEIN: That's correct, Your Honor. We represent
9 Chief Sheridan and Captain Bailey.

10 THE COURT: All right. 15:09:28

11 MS. STRANGE: Excuse me, Your Honor. And I don't mean
12 to interrupt, but this is -- I just wanted to make my presence
13 known. This is Elizabeth Strange from the U.S. Attorney's
14 Office on the call, and with me is assistant U.S. attorney
15 Lynnette Kimmins and assistant U.S. attorney Rosaleen O'Gara. 15:09:46

16 THE COURT: Thank you.

17 So my first question is, so that all the parties
18 understand, or all the nonparties understand, the monitor here
19 is serving a bifurcated function. It is his job to investigate
20 not only MCSO's self-investigative processes, but when he 15:10:08
21 concludes his reason to determine whether or not those
22 self-investigative processes are adequate, he has the right to
23 conduct his own investigations.

24 However, the self-investigative investigations can be
25 subject to some protections for the individual members of the 15:10:28

1 Sheriff's Department being investigated, and so we have a
2 bifurcated procedure with which you may or may not be familiar.

3 In that procedure, I require the Maricopa County
4 Sheriff's Office to file under seal with me the topic, and
5 subjects of, internal investigations. And while I am not bound 15:10:49
6 by the statutory protections that apply there, I do believe
7 that we want to, within the spirit of the statute, protect the
8 individuals to the extent that the statute protects them. And
9 that is the reason why from time to time the MCSO files things
10 under seal. 15:11:14

11 That is separate from the monitor's independent
12 interviews, and the monitor has, it is my understanding,
13 conducted a number of independent interviews in the last
14 several weeks.

15 And it's also my understanding, Ms. Iafrate, that you 15:11:27
16 have asked for transcripts of those interviews even though you
17 or a member of your staff was present at each of those
18 interviews, as they involved persons who either are now, or at
19 least were, in positions with your client.

20 I've instructed the monitor, it seems to me only fair, 15:11:46
21 if we're going to give you transcripts, that we give them to
22 the plaintiff, and I've heard no objection. And so I'm
23 wondering if there's any objection to the materials, once
24 they're provided to the parties, if there's a procedure by
25 which anybody wants to object if the individual attorneys 15:12:03

1 representing potential defendants in a criminal contempt matter
2 also have access to those interviews?

3 MS. IAFRATE: Your Honor, this is Michele Iafrate.

4 May I be heard?

5 THE COURT: You may.

15:12:20

6 MS. IAFRATE: Your Honor, I actually asked for the
7 digital cassette tapes because the interviews were
8 tape-recorded. So Mr. Warshaw -- excuse me, Chief Warshaw
9 indicated to me that I could have those tapes, but in the
10 future I would be bringing my own tape recorder and taping for
11 myself. So I didn't anticipate that the -- that the monitor
12 team would transcribe these for me.

15:12:38

13 That's the only clarification I have.

14 THE COURT: All right. And I appreciate that
15 clarification. I was just sort of putting forth my
16 understanding, but I do appreciate the clarification.

15:12:55

17 Do you have any objection, Ms. Iafrate, if the
18 interviews done by the monitor that are independent interviews
19 are provided both to the United States Attorney and/or any of
20 the attorneys for the specially appearing parties here, receive
21 the copies of those interviews?

15:13:13

22 MS. IAFRATE: Your Honor, on behalf of my client, I do
23 not. This is Michele Iafrate. On behalf of my client, I do
24 not have an objection. I think that the objection may be
25 better coming from the individual attorneys that represent

15:13:31

1 individuals in potential criminal matters. Because it's my
2 understanding that these interviews, people are mandated to
3 appear for these interviews, and if there is criminal concern
4 and they're mandated to be there, should they have been
5 Mirandized?

15:13:53

6 THE COURT: All right. Well, certainly I want to
7 explore any procedure by which any of the unrepresented -- or
8 the specially appearing parties would wish to make an objection
9 to requests made by persons for -- made by other defendants for
10 those interviews, but it seems to me they're public interviews
11 and what's said is said. Right, Ms. Iafrate?

15:14:13

12 MS. IAFRATE: Your Honor, this is Michele Iafrate.

13 I agree that what is said is said, but I'm not so
14 certain that I would characterize them as public interviews.

15 THE COURT: All right. Well, why don't we then come
16 up with a procedure.

15:14:32

17 Chief Warshaw, why don't you publish a list of the
18 interviews that you have done in independent interviews,
19 provide it to the parties, and provide it to the appearing
20 nonparties. And if anyone wishes to make a request for the
21 transcript or a copy of that interview they may do so, and any
22 other party may request -- or any other nonparty may object.

15:14:49

23 But I do believe that -- and if any nonparty wants to
24 make an objection, they can now, but I believe that plaintiffs
25 are entitled to have copies of those interviews.

15:15:09

1 Does any nonparty want to make an objection?

2 MR. McDONALD: Judge, this is Mel McDonald on the
3 criminal contempt issue with Sheriff Arpaio.

4 What I would ask to do is to be given the opportunity
5 to first review the interview and then make a decision after I 15:15:25
6 find out who's been interviewed and the nature of the
7 interview, to then, if I don't object, to make -- to file
8 something with the Court that I don't object; and if I do
9 object, to file something with the Court setting forth those
10 objections why I think it would be prejudicial to Sheriff 15:15:46
11 Arpaio to have that information transmitted either to the
12 plaintiffs or any other person in the case.

13 THE COURT: Well, what if any one of some of the other
14 nonparties object to your receiving those transcripts,
15 Mr. McDonald? 15:16:04

16 MR. McDONALD: Well --

17 THE COURT: I mean, I can't allow you to review them
18 all to determine whether you have an objection if some other
19 party has an objection to you receiving them.

20 MR. McDONALD: I think, perhaps, the procedure I would 15:16:17
21 recommend is that we identify the people interviewed, and -- to
22 get an idea who we're even dealing with; who are being
23 interviewed and how it might impact us.

24 THE COURT: All right. Chief Warshaw, can you provide
25 a list to the parties and the specially appearing nonparties of 15:16:35

1 the independent interviews that you have conducted?

2 CHIEF WARSHAW: We will do that, Your Honor.

3 THE COURT: All right. Thank you.

4 Then if any specially appearing nonparty -- or any
5 party -- has any objection to the materials being turned over 15:16:49
6 to the plaintiff or turned over to any other specially
7 appearing nonparty, including the United States Attorney, I'll
8 give you one week to file such concern, and then we can -- then
9 we can deal with the concern. All right?

10 MR. McDONALD: Fair enough, Judge. 15:17:17

11 THE COURT: That was Mel McDonald?

12 MR. McDONALD: Yes.

13 THE COURT: Mr. Birnbaum, are you okay with that
14 procedure?

15 MR. BIRNBAUM: I am, Your Honor. Thank you. 15:17:25

16 THE COURT: Ms. Stein, are you okay with that
17 procedure? Mr. Stein, apparently.

18 MR. BIRNBAUM: Yes, Your Honor. Thank you.

19 THE COURT: Ms. Strange, are you all right with that
20 procedure? 15:17:33

21 MS. STRANGE: Yes. Thank you, Your Honor.

22 THE COURT: All right. So we will proceed in that
23 fashion.

24 And Chief Warshaw, when we conduct additional
25 independent interviews, we'll just make lists and provide them 15:17:41

1 to the -- both of you parties and the nonparties. And once you
2 get that list, you will have one week in which to file any
3 objection to their being turned over to the parties and/or the
4 nonparties. All right.

5 CHIEF WARSHAW: Yes, Your Honor.

15:18:01

6 THE COURT: Now, I have read the briefings filed by
7 the parties. Again, I appreciate it. I want to proceed in a
8 manner that is efficient and fair and expeditious, and so I
9 have some questions of the parties today, and if the nonparties
10 want to intervene, they can, but I'm going to request that the
11 parties be heard first.

15:18:25

12 In the December 4 hearing I expressed concerns about
13 matters that I thought might give rise to civil contempt and
14 possibly -- and in some I think I indicated a likelihood would
15 result in criminal contempt proceedings. But I did acknowledge
16 that it was my understanding that even as to those matters that
17 I was going to -- that I thought might proceed to criminal
18 contempt I had to determine whether or not a civil contempt
19 would be sufficient to serve the Court's interests.

15:18:49

20 Among those I may -- I raised the violation of this
21 Court's preliminary injunction entered on December 23rd, 2011;
22 I discussed the failure of the MCSO to respond to discovery
23 requests that were timely delivered by plaintiffs prior to
24 trial; I also raised Chief Sheridan's failure to comply with
25 the Court's order of May 14, 2014, and I asked for the parties'

15:19:07

15:19:33

1 input on those, and the parties' input on whether or not there
2 were, for example, a suitable remedy in the case of the
3 preliminary injunction, since the preliminary injunction has
4 since been made permanent.

5 In the plaintiffs' response, the plaintiff asked only 15:19:50
6 that I issue an order to show cause as to the sheriff's
7 violation of the preliminary injunction and Chief Sheridan's
8 failure to comply with the Court's orders on May 14; has not
9 asked for any proceedings relating to failure to respond to
10 discovery. And I just want to ask a few questions, Ms. Wang, 15:20:19
11 principally of you about that.

12 I, of course, am not anxious to make matters more
13 complex than they have to be. But I just want to make sure
14 that if we're going to have hearings, as you've requested, in
15 which we're going to be bringing the players that you've 15:20:40
16 requested here for evidentiary hearings, and we would later be
17 bringing them back, due to the failure to respond to your
18 discovery, I'm wondering if we shouldn't begin that all at --
19 begin that all in a piece so that we can schedule it correctly,
20 even if we have to have separate hearings as to those matters. 15:21:02

21 That doesn't mean that I -- if you don't want to raise
22 the failures of discovery at any time, then that's fine with
23 me, we'll just proceed. But if you do want to raise those
24 failures of discovery, I guess I want to get that out on the
25 table and understand why we shouldn't proceed to determine 15:21:20

1 whether or not there's going to be a determination that there
2 was a failure to provide discovery, and then figure out what
3 the appropriate remedies for the plaintiff are.

4 Do you understand my question, Ms. Wang?

5 MS. WANG: I do, Your Honor. And plaintiffs would
6 request at this time that if the Court is going to order an
7 evidentiary hearing if we request it, that it should encompass
8 all three areas that Your Honor just mentioned.

15:21:37

9 The reason we didn't ask for an evidentiary hearing
10 specifically on the failure to turn over video and audio
11 recordings is that it seems that the facts are pretty clear on
12 that failure. But if there are any factual issues, or if
13 defendants wish to be heard on those issues, then it would be
14 our request that the evidentiary hearing cover that as well.

15:21:55

15 THE COURT: Ms. Iafrate?

15:22:17

16 MS. IAFRATE: Your Honor, this is Michele Iafrate.

17 There are factual issues that relate to the audio and
18 video recordings, specifically whether they fall within certain
19 date parameter, just to give you one example. So there are
20 factual issues.

15:22:37

21 I did note that plaintiffs' counsel did not touch on
22 that issue, and I was -- I was confused why or why not, but I
23 assumed that they wanted to pick their battles.

24 THE COURT: Well, and I'm not trying to dictate a
25 result. What I'm trying to do is, I think I said, proceed

15:22:58

1 efficiently, but also fairly and expeditiously.

2 And so I guess, Ms. Iafrate -- and I understand what
3 you're saying, because the discovery was only open for a
4 certain period and I understand what you're saying, but it
5 would be my preference if we're going to have an evidentiary 15:23:19
6 hearing, and it does seem to me, for reasons that I think
7 Ms. Wang sort of briefly alluded to and perhaps you have
8 acknowledged, it seems clear to me that there are items, or at
9 least there are potentially items that clearly were called for
10 and that clearly existed during the discovery period that were 15:23:39
11 not provided. And I realize that -- that the timing may -- may
12 factor into which were and which weren't, or maybe if any were
13 or any weren't. But I would like to do that all in an orderly
14 fashion if it's going to be done.

15 Do you have any objection to proceeding in that way, 15:24:00
16 Ms. Iafrate?

17 MS. IAFRATE: This is Michele Iafrate.

18 Your Honor, I'm just -- I want to make certain that I
19 understand what you're saying. That within the evidentiary
20 hearing, the issue regarding failure to respond to discovery 15:24:17
21 would also be an issue addressed in the evidentiary hearing?

22 THE COURT: Yes, because it seems to me that many of
23 the same players are going to be involved, and I just don't
24 want to keep dragging them back here. And if we do have to
25 bring them back for multiple hearings, I want them -- I want it 15:24:35

1 to be clear what the hearing is about, and I want them -- I
2 want to proceed in a timely fashion, so that we can resolve
3 what we need to resolve and go forward with whatever we need to
4 go forward with, including if we need to go forward with a
5 criminal contempt hearing, so that these -- these specially 15:24:52
6 appearing parties can know whether they're serving a purpose or
7 not, and what they may want to attend or not, so I'd like to do
8 that all at once.

9 And that may mean, for example -- I'm going to give
10 you some dates. It may mean that on day 1 we take the 15:25:10
11 preliminary injunction issue; day 2 we take the discovery
12 issue; and day 3, for example, if we determine that there is
13 going to be an issue that relates to whether or not the MCSO
14 tried to interfere with its own self -- or tried to interfere
15 with an appropriate self-investigation once these matters came 15:25:31
16 to light, that might be day 3. But simply so that we can take
17 it in an orderly fashion and do it all in a relatively
18 compressed period so we know where we're going with this.

19 Any objection to proceeding in that way?

20 MS. IAFRATE: This is Michele Iafrate. 15:25:51

21 No, Your Honor.

22 THE COURT: All right. Now, it does seem to me that
23 particularly as it relates to the failure to respond to
24 discovery, although the remedy for that can be contempt, and
25 I've looked that up, and would be contempt, there are also -- 15:26:04

1 there's also inherent authority and authority under certain
2 statutes and rules that I would be proceeding under, but I will
3 try to note those particular statutes and rules in my order to
4 show cause so that you, Ms. Iafrate, are made aware of what --
5 the legal authorities that are at play.

15:26:27

6 In conjunction with that, though, Ms. Iafrate, you may
7 remember that when you came into this case and Mr. Casey left,
8 he had advised the Court that he would expeditiously review the
9 materials that were discovered, I think they were documentary
10 materials, but there were other materials as well -- purses;
11 cell phones; things that were discovered in the offices of the
12 HSU, or the former offices of the HSU -- to determine whether
13 those materials had ever actually been provided to plaintiffs'
14 counsel.

15:26:46

15 Do you know where he stands on that review?

15:27:02

16 MS. IAFRATE: This is Michele Iafrate.

17 Your Honor, he has not reviewed the documents and the
18 materials. What I did two week -- no, last week, is I went
19 over and just collected all of it, sent it to an outside vendor
20 and had it copied so that we could begin the comparison, but
21 also provide a copy to plaintiffs' counsel so that she can have
22 the information and the documents that she has been requesting
23 since May.

15:27:30

24 THE COURT: All right. And so when do you -- when
25 will you be able to provide those materials to plaintiffs'

15:27:44

1 counsel?

2 MS. IAFRATE: If she hasn't received the first batch,
3 she should get it today. But I believe that we have already
4 sent the first batch to her.

5 So we have gathered all of the stuff, for lack of a 15:27:56
6 better word, Your Honor, and we are in the process of providing
7 that to Ms. Wang, who has been very patient in not receiving
8 this information.

9 THE COURT: All right. Then let me ask you to file a
10 notice with the Court, Ms. Iaftrate, the dates that that 15:28:18
11 material will be delivered to Ms. Wang.

12 And Ms. Wang, if when you receive it you will then
13 provide the Court with an estimate of how long it will take you
14 to ascertain whether or not you were previously provided with
15 these materials. 15:28:36

16 MS. WANG: Yes, Your Honor. I will do that.

17 Do you want us to file that with the Court formally?

18 THE COURT: I do.

19 MS. WANG: Okay.

20 THE COURT: The other matter, as it relates to whether 15:28:49
21 or not Chief Sheridan and/or others should be held in contempt
22 for their failure to comply with my directives of May 14, it
23 seems to me that those fit into, or arguably fit into the
24 larger question of whether Maricopa County Sheriff's Office,
25 the defendants, have done an appropriate self-investigation of 15:29:11

1 the Armendariz, the Cisco Perez, the other matters that have
2 been raised as a result of those, or whether they have
3 intentionally sought to obstruct such an investigation.

4 And frankly, while sheriff -- or Chief Deputy
5 Sheridan's failure to comply with my orders could, in and of 15:29:33
6 itself, be an appropriate matter of contempt, of a contempt
7 proceeding, and I'm still considering whether I should make it
8 so, it does seem to me that if we're going to try and make this
9 efficient, I know that some of the internal MCSO investigations
10 relate to those matters, and some of the monitor's independent 15:29:52
11 investigations wait -- or relate to those matters, and it seems
12 to me that both of those investigations are proceeding apace,
13 and we might well be well served to schedule this hearing with
14 enough time -- enough time out, not too much, but enough time
15 out to allow those investigations to be completed and the 15:30:17
16 monitor to provide an assessment which then the parties are
17 made aware of in terms of the monitor's assessment of whether
18 or not there has been intentional efforts or -- or potentially
19 intentional efforts to subvert full investigations into these
20 matters. 15:30:35

21 Do you have any idea, Ms. Iafrate, as to the
22 completion of the timing of the internal investigations at
23 MCSO?

24 MS. IAFRATE: This is Michele Iafrate.

25 Your Honor, are you encompassing the investigations 15:30:50

1 that were filed to you under seal?

2 THE COURT: Well, I think they've all -- that's
3 essentially what I mean, yeah. I think they've all been filed
4 under seal. I'm not --

5 MS. IAFRATE: Right --

15:31:08

6 THE COURT: Yeah.

7 MS. IAFRATE: I'm sorry, Your Honor. I am just
8 trying, without mentioning the investigations, I'm trying to
9 figure out the total amount of investigations that you would
10 like a time frame for.

15:31:17

11 THE COURT: Well, how about we do this? Would you,
12 similar -- similarly to filing a notice with the Court as to
13 when the materials have been provided to Ms. Wang, if you could
14 file a notice with the Court as to any estimates as to the
15 completion of the investigations that you have noticed, I do
16 note -- you know, you learn a lot of things being a judge, and
17 I have learned that you have time periods that you have to
18 complete these investigations in as a practical matter, and
19 so --

15:31:39

20 MS. IAFRATE: Right.

15:31:55

21 THE COURT: -- I think that you could -- I don't think
22 it's unreasonable, but, you know, of course, you can educate
23 me, because you know this better than I do, but I don't think
24 it's unreasonable to request when you believe the internal
25 investigations will be completed.

15:32:10

1 MS. IAFRATE: We can provide that to you, Your Honor.

2 THE COURT: All right. Now also, just as a practical
3 matter, I think I voiced before but I don't know whether or
4 not -- pardon me -- you were attorney then, it doesn't seem to
5 me that 38-1101 applies to Sheriff Arpaio himself because he's
6 not an employee of the MCSO; he is the sheriff.

15:32:31

7 Do you have a position on that one way or the other?

8 MS. IAFRATE: Your Honor, this is Michele Iafrate.

9 That was in one of your previous orders, and so I
10 believe that that is law of the case, that 38-1101 does not
11 apply to Sheriff Arpaio.

15:32:50

12 THE COURT: Would it be your position that it does?
13 I'll allow you to brief it if you believe that it does.

14 MS. IAFRATE: Well, Your Honor, I don't know the
15 answer to that question, so if you're giving me an opportunity
16 to look into it, I would appreciate the opportunity.

15:33:04

17 THE COURT: I will allow you to look into it. But I
18 would ask you to do that expeditiously.

19 MS. IAFRATE: Very well.

20 THE COURT: All right. Now, one of the issues for
21 which -- well, before we proceed, I did intentionally give
22 everybody all the pages that they wanted so that we wouldn't
23 have to go through a lot of pre-briefing about whether or not I
24 was going to issue an order to show cause; that I would just
25 make a determination based on a full opportunity to brief.

15:33:16

15:33:34

1 But it does occur to me as I've read the briefs that
2 some of you -- or that the parties may wish an opportunity to
3 respond to each other's briefs, which I'd be willing to at
4 least ask if you want to respond to each other's briefs.

5 MS. WANG: Your Honor, for the plaintiffs, this is 15:34:02
6 Cecillia Wang. We would be happy to respond to the defendants'
7 briefs. If Your Honor is going to -- if you're looking only at
8 the question of whether to issue an order to show cause, we
9 think that the -- the briefing so far is pretty clear that
10 there is a basis to issue the order to show cause. To the 15:34:22
11 extent that there are any questions, then we would be happy to
12 brief something very quickly.

13 THE COURT: Thank you.

14 Ms. Iafrate.

15 MS. IAFRATE: This is Michele Iafrate, Your Honor. 15:34:29

16 There are a couple points. Obviously, it won't be as
17 expensive as what we have provided to you, but if you set a
18 minimal page limit, we would do expedited responses, given the
19 opportunity.

20 THE COURT: Well, how about 10 pages each side, and 15:34:50
21 have it to me by the end of next Friday?

22 MS. WANG: That's fine with plaintiffs, Your Honor.

23 MS. IAFRATE: This is Michele Iafrate. That's doable.
24 Thank you, Your Honor.

25 THE COURT: All right. Now, let me just say, and I 15:35:01

1 don't mean that you shouldn't respond to these points if you
2 haven't, because I haven't yet issued an order to show cause,
3 but I also don't want to be too cute.

4 It seems to me that the case for -- that one of the
5 things we will be taking up almost certainly is the violation 15:35:17
6 of the preliminary injunction by the defendants in this case.
7 Again, I will consider carefully anything in the response, but
8 it does seem to me like in light of some of the positions taken
9 by both parties in their briefs, there's some other matters we
10 ought to address as it pertains to a civil contempt hearing for 15:35:38
11 the violation of the preliminary injunction by the defendants.

12 Let me just say that I realize that the burden of
13 proof and the standard of knowledge is different for civil and
14 criminal contempt. But if I determine after the civil contempt
15 hearing that this matter needs to be referred for a criminal 15:36:00
16 contempt hearing, then it seems to me that matters -- decisions
17 will have to be made by myself or by the assigned judge, or
18 another assigned judge if I decide to refer it out, that I'm
19 not going to presently prejudice by deciding.

20 However, and I think both parties have addressed this, 15:36:21
21 is there a coercive purpose behind holding a civil contempt
22 hearing on the violation of the preliminary injunction?

23 MS. WANG: Your Honor, for the plaintiff, this is
24 Cecillia Wang. Plaintiffs would ask, just to be clear, that
25 the Court conclude any civil contempt proceeding. We have 15:36:45

1 asked for certain remedies that are laid out in our brief that
2 we think are warranted just on the record that has developed so
3 far.

4 And after an evidentiary hearing we would ask for an
5 opportunity at that point to propose additional remedies. We 15:37:02
6 think that these remedies are meant to compensate members of
7 the plaintiff class for harm they've already suffered, and that
8 there is a coercive purpose to be served by issuing other
9 remedies through the civil contempt proceeding in order to stop
10 ongoing harm and prevent future noncompliance to the detriment 15:37:22
11 of the plaintiffs.

12 So, yes, in short, it's plaintiffs' position that we
13 believe there should be an evidentiary hearing; that we
14 should -- plaintiffs should have an opportunity to submit any
15 additional proposals on remedies in civil contempt, and that 15:37:39
16 that happen independently of any referral for criminal contempt
17 that the Court would like to make.

18 THE COURT: Ms. Iafrate?

19 MS. IAFRATE: Your Honor, if I understood your
20 question correctly, yes, there can be a coercive slash 15:37:57
21 compliance purpose in civil contempt remedies, and I think that
22 similar to plaintiffs' counsel, we set forth some suggestions
23 within our briefing as well.

24 THE COURT: All right. Well, then I will allow the
25 parties to brief that, and you don't have to brief that in the 15:38:17

1 10 pages, but I'll presume that there may be some sort of
2 coercive purpose that is available through civil contempt.

3 Both parties have seemed to acknowledge that there is
4 a potential compensatory purpose that is applicable to the
5 violation of the preliminary injunction, and that is the 15:38:35
6 reimbursement of the victims of the Sheriff's Office when it
7 detained people that it had no right to detain after the
8 preliminary injunction.

9 I will just make the observation that it did occur to
10 me when I listened to the trial testimony of Sheriff Arpaio and 15:38:53
11 Deputy Armendariz, and I believe one or two other deputies,
12 that it was clear that at least some -- there was some
13 occasional violations of my preliminary injunction going on,
14 but -- although I noted it in my findings of fact and
15 conclusions of law, none of the parties really addressed that 15:39:14
16 further at the trial.

17 And then it became clear through, I think, the MCSO's
18 own self-investigation -- and acknowledgment, to be fair to
19 MCSO; they brought forward and acknowledged it -- that in fact,
20 no communication was ever made by the sheriff's Office to any 15:39:33
21 of its patrol personnel.

22 I think I need to correct that. It seems to me that
23 that's the case, but I think the MCSO has only acknowledged
24 that there was no communication made to the HSU that it should
25 stop its immigration interdiction patrols, and so those 15:39:49

1 immigration interdiction patrols continued.

2 It also it seems to me, based on the material that I
3 received from plaintiffs but was not aware of, that Sheriff
4 Arpaio made pronouncements that, as a matter of policy, they
5 still turned over -- held and detained, turned over people to
6 ICE that they didn't have any basis to charge on a state-law
7 basis.

15:40:09

8 And I must say, without discussing the specifics of
9 any particular interview, that the monitor's briefings --
10 limited, though they are, to the Court of the interviews that
11 he has conducted -- suggest, at least, that the violations that
12 may have happened in a year and a half are quite numerous.
13 That interdiction patrols continued; that all of the patrol
14 personnel may have been involved in detaining persons.

15:40:23

15 And so I will tell you that -- okay. I just have
16 concerns, because I want to hold this order to show cause
17 relatively quickly, and it seems to me that whether or not we
18 can really determine the victims and seek remuneration on their
19 behalf is something that we ought to expeditiously pursue, but
20 I want to explore with you both the practicality of doing that
21 and how you anticipate doing that.

15:40:49

15:41:19

22 Ms. Wang.

23 MS. WANG: Yes, Your Honor. First, in answer to
24 question one, one thing I would propose is that the Court could
25 essentially bifurcate the civil contempt proceeding into a

15:41:37

1 liability and then a remedies phase, so that at the close of
2 the evidentiary hearing I think the Court could issue an order
3 that conclusively determines whether the respondents to any
4 order to show cause are liable for civil contempt.

5 Plaintiffs don't want to delay that finding, and I 15:41:59
6 think that to the extent that it could take a little bit longer
7 to identify and then to compensate individuals who were harmed
8 by that, that policy and those detentions, could happen after
9 that in a second stage.

10 As to how that second stage should happen, we 15:42:18
11 suggested in our briefing --

12 THE COURT: Can I interrupt you before you get to
13 that, Ms. Wang?

14 MS. WANG: Yes, Your Honor.

15 THE COURT: It seems to me that it may be that even if 15:42:29
16 we cannot obtain complete records of everyone who was the
17 victim of this conduct, that whether or not we can obtain the
18 records of everybody is pretty relevant to me as to whether or
19 not -- or at least could be relevant to me as to whether or not
20 a criminal contempt hearing ought to follow the civil contempt 15:42:50
21 hearing.

22 So Ms. Iafrate, do you have any notion whether or not
23 it is possible to determine, based on MCSO's records and
24 operative procedures that existed prior to this lawsuit,
25 whether or not you can ascertain in everybody that your 15:43:08

1 deputies detained without -- detained based only on the
2 assumption that they were in the country without authorization?

3 MS. IAFRATE: This is Michele Iafrate, Your Honor.

4 As I sit here right now, I would need to talk to my
5 clients about that capability, because your question was quite 15:43:34
6 specific whether I could find all of them. If, for example,
7 someone conducted a stop without anyone else's knowledge except
8 for that individual, deputy -- I could not find that.

9 However, if there is audio, video, or documentation,
10 then I think that we would be able to search and identify those 15:44:02
11 that have some sort of piece of evidence that would document
12 that stop.

13 THE COURT: All right. I'm sorry. Please proceed,
14 Ms. Wang.

15 Thank you, Ms. Iafrate. 15:44:17

16 MS. WANG: Yes, Your Honor. This is Cecillia Wang.

17 On the second phase, as to determine -- identifying
18 and then compensating individuals, or working out other
19 remedies, for that matter, we've set out some of the ways that
20 we think we could go about that, doing that. That's at pages 15:44:31
21 20 and 21 on our brief on civil contempt. There are certain
22 categories of information that I think would at least be the
23 first step on the road to identifying any individual victims of
24 illegal detention contrary to the Court's preliminary
25 injunction order. 15:44:53

1 THE COURT: Well, again, without violating any
2 particular right of any particular specially appearing party --

3 And Chief Warshaw, you can correct me if I'm wrong.

4 -- but it is my understanding from Chief Warshaw's
5 independent investigations --

15:45:10

6 And please, again, Chief, correct me if I'm wrong.

7 -- that they have discovered that, for example, the
8 practice of removing identification cards, driver's licenses,
9 credit cards, was fairly widespread throughout not only the
10 HSU, but potentially the entire MCSO; and that no documentation
11 was made, but the credit cards, the identification cards, are
12 the things that were sometimes thrown into bins; sometimes
13 collected as training devices, at least that's the position
14 taken by MCSO; sometimes deposited in drawers; and so it may be
15 extremely difficult to provide that information with any kind
16 of exactness.

15:45:31

15:45:53

17 Chief, have I misstated the facts there?

18 CHIEF WARSHAW: No, Your Honor. That was in fact the
19 practice, and they did reposit any number of types of
20 identification in various bins at the police districts, as well
21 as within the facilities of the HSU, so --

15:46:09

22 THE COURT: All right.

23 CHIEF WARSHAW: -- the Court is correct.

24 THE COURT: So you've requested expedited discovery,
25 Ms. Wang, and I'm inclined to grant it, for the reasons that

15:46:21

1 I've just gone over with you and Ms. Iafrate. But are you
2 going to separately request that expedited discovery, or are
3 you content with the expedited discovery that you asked for in
4 your motion?

5 MS. WANG: We have a few other categories, Your Honor, 15:46:35
6 and I could just briefly summarize them now.

7 Our intent is if the Court is going to set the
8 evidentiary hearing, and -- we would subpoena the individuals
9 that we have listed as respondents in our brief, and our intent
10 would be to issue a subpoena duces tecum to those witnesses, so 15:46:52
11 that we make sure we collect any documents that those
12 individual respondents have that would be relevant for their
13 testimony. And we would like to get that in advance of their
14 testimony so we have a chance to review it. That would include
15 prior statements that have been made regarding these matters. 15:47:11

16 We also would like to serve very limited
17 interrogatories on MCSO, or the sheriff as the head of MCSO,
18 that would be very targeted at determining certain factual
19 issues regarding these areas of contempt that have been
20 charged. 15:47:36

21 And then I think we would work with Ms. Iafrate, I
22 think our last two -- the outstanding document requests
23 probably encompass most of what we would like in terms of
24 documents, but we do want the additional information that's
25 aimed at identifying individual victims of illegal detentions. 15:47:53

1 THE COURT: All right. Well, then can I ask you to
2 file in conjunction with your response, or fairly close
3 thereafter, a thought-through, expedited discovery request?

4 And I'm going to ask you, Ms. Iafrate, if you have any
5 reason to object to her -- to Ms. Wang doing so, at least as a
6 matter of theory? 15:48:14

7 MS. IAFRATE: No objection, Your Honor.

8 THE COURT: All right. Now, Ms. Wang, one other quick
9 question: Are you going to end up calling an expert on
10 damages? And again, I'm just thinking off the top of my head;
11 I'm not saying I won't rethink this. 15:48:30

12 It doesn't seem to me like the vast major -- at least
13 a considerable majority of your clients are going to be able to
14 claim any damages from being removed from the country if they
15 didn't have a right to be here. But they do, of course, have a
16 claim for the process of being arrested and detained by
17 somebody who had no authority to arrest or detain them, but I
18 don't know how you value that. 15:48:46

19 Are you going to call some expert to do that?

20 MS. WANG: Your Honor, it's not our intent to call
21 such a witness. At this evidentiary hearing, as I said, I
22 think what we'd like to do is really -- we're proposing a
23 bifurcated process where the Court could very expeditiously
24 after the evidentiary hearing make any findings as to whether
25 respondents should be held in contempt. 15:49:00
15:49:20

1 I think that given everything Your Honor has said, and
2 some of the things we've addressed here, that the process of
3 identifying individuals make take some time, and the
4 plaintiffs' position is that we shouldn't delay a finding as
5 to, you know, liability, so to speak, on contempt; or the 15:49:37
6 Court's referral for any criminal contempt matters should not
7 be delayed by what may be a long process of identifying
8 individuals who have been harmed and determining their
9 compensations.

10 THE COURT: Ms. Iafrate, do you have any comment on 15:49:56
11 that?

12 MS. IAFRATE: Your Honor, I keep hearing about this
13 bifurcated process. My concern is this: that I think that,
14 whether they help or hurt me, I think that the numbers do
15 matter. And so if we are attempting to see if we can determine 15:50:11
16 if we can find these individuals that were impacted by this
17 conduct, I think that that is something that should be
18 presented to the Court in the evidentiary hearing, not at a
19 later date.

20 THE COURT: Well, it does strike me, Ms. Wang, that 15:50:31
21 even if we do bifurcate for purposes of liability, my ability
22 to assess whether or not all possible purposes have been served
23 or fulfilled by civil contempt and whether or not a criminal
24 contempt is then -- referral is then necessary is the extent or
25 lack of extent to which the victims can be identified and be 15:50:53

1 remunerated.

2 So even a damages hearing is going to play into that,
3 and I don't want to put that off too long, either. But I do
4 want to give you, of course, a necessary and full chance to see
5 what you can find on that point. 15:51:08

6 Now, the time for this call is running out, so let me
7 just say that even though it's further away than I would like,
8 I have four days at the end of April: April 21, 22, 23, and 24.
9 I'm going to put a hold on those days. And that's when I
10 intend to at least hold the liability and maybe the damages 15:51:28
11 hearing, if we can get enough discovery done for that to
12 happen.

13 Ms. Wang, does that work for you? Do those dates work
14 for you?

15 MS. WANG: Yes, Your Honor, that works for plaintiffs. 15:51:44

16 THE COURT: Ms. Iafrate?

17 MS. IAFRATE: Yes, Your Honor.

18 THE COURT: All right. Well, then we're going to hold
19 those dates, and if we can do liability and damages on those
20 dates, we'll do it; if we can only do liability, we'll do it; 15:51:54
21 if the parties can agree with the Court that it makes sense to
22 proceed in some bifurcated fashion, schedule things later.

23 But I would ask, in light of the matters that I've
24 raised today, that the parties help me think through these
25 things, so that we can proceed in a manner that is efficient, 15:52:12

1 orderly, fair to the parties, and fair to the potential victims
2 of this matter.

3 The other thing that I will raise, just to make sure
4 that it is -- that everybody is aware that it is an issue, and
5 it also bears, I think, on the specially appearing parties, it 15:52:27
6 seems to me that it is likely that Sheriff Arpaio,
7 Mr. McDonald, is going to be the individual subject of civil
8 contempt hearings on virtually all the matters that I discuss,
9 because he is the sheriff of Maricopa County and responsible to
10 implement the Court's orders. 15:52:46

11 But it also seems to me that even though they're
12 nonparties, the case law suggests that Chief Deputy Sheridan,
13 Chief Sands, Chief MacIntyre, Lieutenant Sousa, perhaps others,
14 are also appropriate topics of a civil contempt and even a
15 potential criminal contempt hearing, even as nonparties. 15:53:06

16 And so if the parties want to comment in their
17 responses as to what individuals ought to be named as parties
18 to the contempt hearing and why, I'll also consider that, but
19 whether or not you discuss it, it is something that the Court
20 is considering. 15:53:23

21 Is there any comment to that?

22 MR. McDONALD: Your Honor, Mel McDonald.

23 I would have to, I think, spend further time
24 considering this. One of the things that I've been balancing
25 is I try to be involved, but I realize there's a whole sphere 15:53:41

1 of things that are going in the civil end that I haven't been
2 anxious to run up the sheriff's personal fees in doing this.

3 So I guess what I'm suggesting is that I would like to
4 have an opportunity to confer. There's a good likelihood that
5 we would probably, at least I would probably want to appear at 15:54:06
6 those civil contempt hearings, I don't know whether I will be
7 permitted to participate or not, but I think because of that
8 cloud hanging over the sheriff's head that I would at least
9 like to be present, and possibly participate, in those
10 hearings. 15:54:29

11 THE COURT: Well, I'll certainly allow you to brief or
12 make your position known on that once you've thought and
13 researched it.

14 MR. McDONALD: Okay.

15 THE COURT: Anything else that anybody has to raise on 15:54:38
16 this hearing?

17 MR. BIRNBAUM: Your Honor, this is Gary Birnbaum for
18 Jack MacIntyre.

19 Your Honor, I think you know that there's a very
20 significant difference in many, many respects, including 15:54:52
21 responsibility for paying lawyers, between the civil contempt
22 proceedings and the criminal, the possibility of criminal
23 referral. I don't know exactly how to do this, but I'd like to
24 ask the Court to consider this.

25 As to Mr. MacIntyre -- and I speak only for 15:55:12

1 Mr. MacIntyre -- it seems to me, based even upon the submittals
2 that are now before the Court, that it is difficult for anyone
3 to suggest that a criminal contempt proceeding against
4 Mr. MacIntyre is appropriate or warranted or possible under the
5 existing case law standards. 15:55:44

6 If the Court were to advise us that Mr. MacIntyre was
7 not a subject of criminal contempt consideration, then
8 Ms. Iafrate, or others who are handling the civil contempt
9 matters, can in fact handle them, and handle them for Chief
10 MacIntyre as well. As we sit here today, we have an individual 15:56:15
11 who is forced to hire separate counsel out of his own pocket
12 for a criminal contempt possibility that we really do not
13 believe applies to him.

14 So we would ask the Court on the record that's now
15 before you to essentially advise Mr. MacIntyre and his counsel 15:56:38
16 that criminal contempt is not a matter that would apply to him,
17 and then Ms. Iafrate can proceed to represent Chief MacIntyre
18 in connection with the civil proceeding.

19 I hope I'm clear in that request, Your Honor.

20 THE COURT: Well, you know, let me say we're going to 15:57:07
21 lose this call, because we only reserved it for an hour, in
22 about four minutes. We can recall after -- if we take a break,
23 but I don't think we really need to. Let me respond,
24 Mr. Birnbaum.

25 I understand what you're saying, and I don't want to 15:57:23

1 hold anybody in here longer than is necessary. But I also
2 don't want to make adjudications without knowing the facts.
3 Let me tell you the two things that cause me concern, and I
4 don't know what might cause Ms. Wang concern.

5 Your client was already identified as the point of 15:57:38
6 contact for discovery at least for some purposes in this
7 lawsuit. It was based on his affidavit that he was held --
8 previously the MCSO was sanctioned based largely on his
9 inaction.

10 Because discovery, to me, the failure to respond to 15:57:54
11 discovery is a real live issue, and as far -- and I don't know
12 that your client was responsible for the specific discovery at
13 issue, but I do know that he was responsible for some
14 discovery, based on his own affidavit, and now we have what
15 appears to at least potentially be a great deal of information 15:58:14
16 that was never discovered or never turned over.

17 I'm hesitant at this point to say that I would not say
18 that the intention with which that may or may not have been
19 turned over is at this point something that I can affirmatively
20 discount as meeting the criminal standard, although I do 15:58:32
21 acknowledge, as you've suggested, it is a very high bar.

22 Also, your client was noticed as somebody receiving --
23 he's in some sort of a command position at MCSO, and he did
24 receive the notice, and I don't think it's contested from
25 Mr. Casey, about the preliminary injunction. 15:58:56

1 Now, I understand that he says he had no
2 responsibility to communicate that. That may or may not be
3 true; it's something I don't know. I am certainly receptive,
4 to the extent that you may wish to, with your client, go to
5 Ms. Wang and persuade her that the evidence simply isn't there,
6 I would be real happy to let your client out early or to figure
7 out a way that we could expeditiously limit his expense and
8 exposure.

15:59:12

9 Mr. BIRNBAUM: Your Honor, may I make one very brief
10 comment?

15:59:31

11 THE COURT: It will have to be brief.

12 MR. BIRNBAUM: I do understand what you just said, but
13 with all due respect, I believe it's based on a factual
14 misunderstanding.

15 Mr. MacIntyre was not responsible for discovery
16 responses. He is not charged with failing to respond to
17 discovery. Mr. MacIntyre did receive a letter about
18 instituting the electronic discovery hold, and that's where he
19 responded and said: I did not disseminate that with the speed
20 or propriety I was supposed to.

15:59:41

16:00:07

21 THE COURT: Well, let me just interrupt you,
22 Mr. Birnbaum. To the extent that that is true -- and I
23 recognize that it may be true; I'm certainly open to being
24 persuaded that that's true -- and if that's true, you can file
25 whatever proof you'd like with me if you're not persuaded by --

16:00:22

1 if you can't persuade Ms. Wang, and if I determine there's no
2 basis for criminal contempt based upon it, I'll let you out.

3 MR. BIRNBAUM: Very good. Thank you very much, Your
4 Honor.

5 THE COURT: All right. I think our time limit is up.
6 Does anybody else have anything they have to say?

7 MS. IAFRATE: No, Your Honor.

8 MS. WANG: No, Your Honor, not from plaintiff.

9 MR. BIRNBAUM: No, Your Honor.

10 THE COURT: I do appreciate the parties appearing
11 telephonically. I think it's been a productive conference for
12 moving forward. Thank you very much.

13 MR. McDONALD: Thank you, Your Honor.

14 MS. IAFRATE: Thank you, Your Honor.

15 (Proceedings concluded at 4:01 p.m.)
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16:00:36

16:00:49

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 16th day of January,
2015.

s/Gary Moll