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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

4:19-cv-00035-TUC-RM (LAB)

PLAINTIFF'S RESPONSE TO STATE DEFENDANTS' OBJECTIONS TO ORDER (DOC. 223)

Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified Classes ("Plaintiff"), through the undersigned counsel, pursuant to Federal Rule of Civil Procedure 72 and Arizona Local Rule 7.2, hereby submits this Response to the State Defendants' Objections (the "Objections") (Doc. 223) to Magistrate Judge Bowman's Order granting Plaintiff's Motion to Compel Production of Documents (the "Order") (Doc. 195).[1]

A. THE COURT SHOULD AFFIRM THE MAGISTRATE'S ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL

In arguing that they did not place the content of attorney-client communications at issue in this proceeding, State Defendants exalt form-over-substance and provide a revisionist account of their actions in this litigation. Magistrate Judge Bowman properly rejected these arguments as unfounded (Order 6), and her decision was neither "clearly erroneous" nor "contrary to law" Fed. R. Civ. P. 72(a); *e.g.*, *Jones v. Davis*, CV-19-08055-PCT-MTL-JZB, 2021 WL 2012667, at *1 (D. Ariz. May 20, 2021) (affirming magistrate ruling on non-dispositive matter under clearly erroneous standard of review, citing Fed. R. Civ. P. 72(a)). This Court should affirm the Order without modification.

The Court should also deny State Defendants' request for oral argument or *in camera* review. The issues presented are straightforward, the State Defendants had a full and fair opportunity to air them before Magistrate Judge Bowman, and her decision granting Plaintiff's motion applied settled law to uncontested facts. Accordingly, neither oral argument nor *in camera* review is likely to change the outcome, but it certainly will delay the conclusion of discovery and the resolution of Plaintiff's civil rights claims, given that remaining depositions have been held in abeyance pending State Defendants' production of the documents at issue in the Motion. To the extent State Defendants have asserted more specific arguments about the nature of the documents

[1] Capitalized terms shall have the same meaning as attributed to such identical terms in Plaintiff's Motion to Compel (Doc. 195) and Reply in Support of the Motion (Doc. 205), unless otherwise defined herein.

included on their privilege log in support of *in camera* review, they failed to do so before Magistrate Judge Bowman (despite seeking *in camera* review there), and this Court should decline to entertain them.

ARGUMENT

I. THE STATE DEFENDANTS AFFIRMATIVELY PLACED ADVICE OF COUNSEL AT ISSUE.

The Order correctly holds that State Defendants waived the attorney client privilege by affirmatively asserting legal advice about the legality of the Exclusion, and their alleged understanding of the law, to support their contention that they "harbored no discriminatory intent" in maintaining the Exclusion. (Order at 1.) A party who substantively relies on advice of legal counsel to defend its motivation or intent in taking certain action cannot then assert the attorney client privilege to shield that same advice from discovery. (Plaintiff's Motion to Compel (the "Motion" or "Mot.") (Doc. 195) 9-12 (citing *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992); *Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 12911719, at *2-3 (D. Ariz. May 14, 2015)); Plaintiff's Reply in Support of the Motion (the "Reply") (Doc. 205) 3-7.) This doctrine is one of fairness and equity, and is "often expressed in terms of preventing a party from using the privilege as both a shield and a sword." (Order 4 (citing *United States v. Sanmina Corp.*, 968 F.3d 1107, 1117 (9th Cir. 2020)).)

State Defendants seek to engage in the same gamesmanship that the implied waiver doctrine is designed to prevent. State Defendants assert that they did not violate Title VII or the Equal Protection Clause because their decision to maintain the Exclusion was motivated by non-discriminatory reasons. Plaintiff therefore served an interrogatory asking State Defendants to explain the "reasons why" they maintain the Exclusion. In response to the interrogatory, State Defendants stated that they maintained the Exclusion because they received legal advice—including specific legal memoranda—advising them that the State of Arizona "was not required to provide such coverage under the

then-existing law."[2] (Objections 3; *see also* Doc. 195-3, Ex. 5, Nos. 1 and 7.) Witness testimony from key figures has corroborated that State Defendants' reliance on this legal advice was the primary motivation for maintaining the Exclusion, and that the decision was *not* motivated by cost concerns. (Motion 6, 11 n.4.) State Defendants nevertheless assert that they do not have to disclose the documents they identified in Interrogatory No. 1 that formed the basis of their allegedly non-discriminatory decision to maintain the Exclusion.[3]

Magistrate Judge Bowman properly rejected the State Defendants' gamesmanship, and State Defendants have failed to show that her Order was "clearly erroneous" or "contrary to law." Fed. R. Civ. P. 72(a); *Jones*, 2021 WL 2012667, at *1. **First**, State Defendant's argument that the Order's finding of wavier is not based on affirmative acts is incorrect. (Objections 2.) The Order identifies several affirmative acts taken by State Defendants putting the legal advice they received about the legality

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[2] State Defendants gloss over that they provided this answer in response to Plaintiff's interrogatory explicitly asking them to "[i]dentify and describe all *reasons why* the State of Arizona's self-funded health plan . . . excludes coverage for 'gender reassignment surgery.'" (Doc. 195-3, Ex. 4, No. 1 (emphasis added).) The Order correctly identified this response to Plaintiff's Interrogatory No. 1 and other actions as comprising an affirmative assertion of the advice of counsel defense, which waived any privilege with respect to the subject matter of that advice. (Reply 4-5; Order 4.)

[3] State Defendants disingenuously claim that their response to Plaintiff's Interrogatory No. 1 "nowhere states who provided legal advice, what the legal advice was, or even that the State relied on the legal advice . . . ." (Objections 3.) State Defendants' argument only makes sense if you ignore the prompt of Plaintiff's Interrogatory No. 1 and their responses to Plaintiff's other interrogatories. State Defendants ignore that (1) they responded to an interrogatory explicitly asking them to "[i]dentify and describe all *reasons why*" they maintain the Exclusion, evidencing their reliance on the legal advice they referenced in their response thereto; and (2) they elsewhere identify not only the legal counsel involved in the decision-making on the Exclusion, who include Mike Liburdi, then General Counsel at the Governor's Office, John M. Fry, then of the Arizona Attorney General's Office, and Nicole A. Ong, then General Counsel of the ADOA (Doc. 195-3, Ex. 5, No. 4), but also acknowledge the memoranda relied on was either directed to Mr. Liburdi, or was prepared by their current legal counsel in this dispute, Fennemore Craig. (*Id.*, No. 7.)

of the Exclusion at issue, including: (1) State Defendants' written interrogatory responses, stating that they maintain the Exclusion "'because the State concluded, under the law, that it was not legally required to change its health plan to provide such coverage'"; (2) State Defendants' identification of legal memoranda that were "considered, reviewed, or relied on" by the State Defendants in maintaining the Exclusion; and (3) the testimony of current and former ADOA employees that "the deciding factor" or the "primary reason" for the Exclusion was that "the law did not require gender reassignment surgery to be covered." (Order 4-5.) Courts in this Circuit have held that similar affirmative acts in the course of discovery constituted the assertion of an advice of counsel defense, even if impliedly, resulting in waiver of privileged material. *Chevron*, 974 F.2d at 1162 (holding implied advice of counsel defense through submission of declaration); *Melendres*, 2015 WL 12911719, at *2-3 (holding that waiver doctrine was "implicitly invoked" through witness testimony).

Second, State Defendants' contention that their reliance on the advice of counsel may be invoked only through use of certain magic words is at odds with the law and logic. The implied waiver doctrine does not require that the waiving party formally raise an advice of counsel defense or ceremoniously admit that it is relying on advice of counsel. (Motion 10 (citing *Chevron,* 974 F.2d at 1162-63, *Melendres*, 2015 WL 12911719 at *4); Reply at 5-6.) Rather, courts analyze the *substance* of the parties' claims when considering this doctrine, and have based findings of waiver on acts taken during discovery that imply a reliance on advice of counsel, even where a party *explicitly disclaims* reliance on advice of counsel. (Reply at 5-6 (citing *Melendres*, No. 2:07-cv-02513 (D. Ariz. Dec 12, 2007), Doc. 1045-3, Ex. N, at Resp. to Interrog. No. 9).)

Third, State Defendants' insinuation that their understanding of the law "could be based on several non-privileged sources" such as "newspaper articles" (Objections 3) is directly at odds with State Defendants' interrogatory responses. As Magistrate Judge Bowman observed, if State Defendants understanding of the law was solely based on

non-privileged sources such as newspaper articles, then the State Defendants would not have affirmatively stated that the "legal advice that the State received regarding [the Exclusion] is covered by the attorney-client privilege." (Order 5-6.) Indeed, if this were the case, they would not have even needed (let alone cited) such legal advice in response to Plaintiff's Interrogatory No. 1. Witness testimony further contradicts State Defendants' claim. ADOA's former Director of Benefits testified that ADOA "sought *legal counsel* and that – *with the legal counsel's recommendation* and meeting with the governor's office there was a decision made[.]" (Order 5 (emphasis added).)

II. STATE DEFENDANTS' ARGUMENT REGARDING WITNESS TESTIMONY IS WRONG AND MISPLACED

State Defendants argue that testimony of decision-making officials at ADOA—officials whom State Defendants affirmatively put forwarded as witnesses regarding the Exclusion (Doc. 146), and whom State Defendants prepared for and defended in their depositions—cannot be used as a basis for waiver. This argument is wrong and misplaced.

State Defendants' assertions about witness testimony are wrong as a matter of law. Courts have found implied waiver based on witness testimony, specifically where the witness was a high level official offered to testify on the governmental decision-making over which they had oversight. *See Melendres*, 2015 WL 12911719, at *2-3 (holding waiver based on deposition testimony of Sheriff, who impliedly put forth advice of counsel to support claim that Sheriff Department's intended to comply with a preliminary injunction). Ms. Isaacson and Mr. Bender, each of whom testified to the centrality of the legal advice ADOA received regarding the legality of the Exclusion, are similarly situated as the Sheriff in *Melendres*, and their testimony effected a waiver.

State Defendants' further contention that Ms. Isaacson, as the former Director of Benefits at the ADOA (albeit during one of the key relevant periods), and Mr. Bender, the current Plan Administration Manager at the ADOA, lack authority to waive privilege on behalf of State Defendants (Objections 6-7) is a recycled red herring. As Plaintiff

argued (Reply 6-7), and the Order concludes, neither Ms. Isaacson nor Mr. Bender themselves waived privilege; rather *State Defendants* waived privilege through their affirmative conduct. (Order 1-2.) To the extent such waiver could stem from Ms. Isaacson's or Mr. Bender's disclosure during their depositions of the content of legal advice State Defendants received,[4] that waiver results from State Defendants' failure to timely object to the disclosure and to preserve privilege. (Reply 6.) Courts have rejected State Defendants' arguments that waiver can be avoided through "strategic spokesperson[s]" who can supposedly testify to a party's benefit, but also categorically shield against waiver. *Melendres*, 2015 WL 12911719, at *3 n.1 (rejecting argument that employee who testified on behalf of defendant was not authorized to waive privilege). State Defendants have offered no response to this point or *Melendres*, which Plaintiff briefed below.

State Defendants' argument about witness testimony is also misplaced because the Order's finding of implied wavier is not based solely on witness testimony. Rather, the Order points to the entirety of the record, including State Defendants' affirmative responses to written discovery, as bases for implied wavier. (See Order at 4-6.) State Defendants have no credible argument rebutting their waiver of privilege based on other affirmative acts.[5]

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[4] The Order did not reach this alternative argument put forward by Plaintiff. (Order 2.)

[5] Although the Order did not reach Plaintiff's alternative arguments for waiver, including State Defendants' sharing of privilege material with the Governor's Office, whom they have maintained is a separate and distinct entity for all other purposes, the Court has discretion to consider these points in assessing whether the Order commits clear error or is contrary to the law. 28 U.S.C.A. § 636 (b)(1)(C); *see also*, *Ceyala v. Toth*, No. CV1700529TUCDCBLAB, 2020 WL 5868427, at *3 (D. Ariz. Oct. 2, 2020) (considering an argument raised in briefing, but not reached by Magistrate Judge Bowman, and adopting Judge Bowman's Report and Recommendation).

III. THE ORDER IS CONSISTENT WITH PUBLIC POLICY.

State Defendants' public policy arguments fail because they do not account for either the issues central to the case, or to the simple maxim underpinning this waiver doctrine and the Order: "[f]airness." (Order 6.) First, State Defendants do not dispute that discovery about their intent "concerns an indispensable element of [Plaintiff's] causes of action" and documents reflecting their intent or rationale remain relevant. (Doc. 187, p. 5.)[6] Second, State Defendants cannot credibly contest that the legal advice they received regarding the legality of the Exclusion is part of their rationale for maintaining the Exclusion. *See supra* Section I. Third, the "'fairness principle'" dictates that a party may not use "privilege as both a shield and a sword." (Order 4 (quoting *Sanmina Corp.*, 968 F.3d at 1117 (9th Cir. 2020)).) Without access to the documents implicated by the Order, Plaintiff "cannot adequately dispute" State Defendants' claim that the Exclusion is non-discriminatory because it was based on legal advice and the State's alleged understanding of the law. (*See* Order at 5.) The Objections provide no explanation for why this fairness-based wavier doctrine is not applicable here, or how applying it in this instance violates public policy.

IV. THE ORDER IS NEITHER AMBIGUOUS NOR OVERBROAD.

State Defendants acknowledge that the Order does not require production of *all* documents withheld on the basis of attorney client privilege, but instead for those privileged documents that "*[State Defendants] received on the legality of the Exclusion.*" (Objections 9 (citing Order).) Courts routinely decide motions to compel by reference to "subject matter." (Reply 9-10 (listing cases where courts issued categorical orders).) The Objections cite no authority for State Defendants' contention that an order granting a motion of this sort must provide a precise list of exactly which documents are to be

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[6] Dr. Toomey continues to preserve the argument that the Exclusion is facially discriminatory and evidence of discriminatory intent is unnecessary. But Magistrate Judge Bowman has issued a Report and Recommendation concluding that Dr. Toomey must provide evidence that discriminatory intent. (Doc. 134.)

produced.[7] Such a detailed requirement would be nonsensical, since prior to the issuance of such an order compelling production, neither the moving party nor the Court can see the withheld documents. It would also be unnecessary (as would the *in camera* review State Defendants' seek), as parties are charged with preparing a privilege log sufficient to permit other parties and the Court to assess the nature of the withheld documents for this exact purpose. State Defendants' have had ample time and opportunity to prepare such a privilege log, and in fact have revised their privilege log on three occasions. To the extent the Order would require production of most or all documents remaining on State Defendants' privilege log (Doc. 195-3, Ex. 9), this is because the documents are responsive to Plaintiff's documents requests and concern, at least in some part, the "legality of the Exclusion."[8]

To be clear, Plaintiff seeks documents related to (i) the State Defendants' decision-making regarding the Exclusion (including any legal advice that may have informed that decision-making) but not (ii) documents that relate solely to State Defendants' defense in the instant litigation.[9]

---

[7] State Defendants raise for the first time in their Objections more specific arguments about the documents reflected on their privilege log, and the supposed ambiguity about whether they are properly covered by the Order. (*Compare* Objections 8-10, *with* Doc. 201 at 17.) Although this Court has discretion to address new arguments raised for the first time in State Defendants' Objections, *Escalante v. Shinn*, No. CV-19-00256-TUC-RM, 2021 WL 794183 (D. Ariz. Mar. 2, 2021) (Márquez, J.), it should decline to do so because State Defendants had ample opportunity to raise these same arguments before Magistrate Judge Bowman and failed to do so.

[8] Assuming that State Defendants continue to withhold any documents on the basis of attorney client privilege, Plaintiff maintains that they should provide a privilege log which makes clear such documents are not implicated by the Order *i.e.* that they do not relate to legal advice considered in the State's decision-making regarding the Exclusion, and to which of Plaintiff's document requests/issues such withheld documents are responsive. *See* Fed. R. Civ. P 26(b)(5) (withholding party must "describe the nature" of withheld documents in a manner that "enable other parties to assess" the privilege claim).

[9] In their Objections, State Defendants represent that decision-making regarding the Exclusion was finalized in 2016. (*See* Objections at 9). However, discovery has

CONCLUSION

For the foregoing reasons, the Court should affirm the Magistrate's Order, granting Plaintiff's Motion to Compel.

Dated: July 23, 2021

Respectfully submitted,

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revealed that the State may have conducted a re-evaluation regarding whether or not to cover gender reassignment surgery after 2016. (Doc. 180-3, Exhibit 4 at 292.) To the extent decision-making occurred after 2016, Plaintiff maintains that the Order should apply to any privileged documents that informed such post-2016 decision-making.

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

/s/ Christine K. Wee
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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

4:19-cv-00035-TUC-RM (LAB)

DECLARATION OF CHRISTINE K WEE IN SUPPORT OF PLAINTIFF RUSSELL B. TOOMEY'S RESPONSE TO STATE DEFENDANTS' OBJECTIONS TO ORDER (DOC. 223)

I, Christine K. Wee, submit this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a Senior Staff Attorney at ACLU Foundation of Arizona, licensed to practice law in the State of Arizona, and represent Plaintiff Russell B. Toomey ("Dr. Toomey" or "Plaintiff").

2. I submit this declaration in support of Plaintiff's Response to State Defendants' Objections to Order (Doc. 223).

3. I base this declaration on my personal knowledge and on information obtained in the course of the above-captioned matter.

4. **Exhibit 1** as attached to Plaintiff's Motion is a true and correct copy of the unreported decision in *Jones v. Davis*, CV-19-08055-PCT-MTL-JZB, 2021 WL 2012667 (D. Ariz. May 20, 2021).

5. **Exhibit 2** as attached to Plaintiff's Motion is a true and correct copy of the unreported decision in *Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 12911719 (D. Ariz. May 14, 2015).

6. **Exhibit 3** as attached to Plaintiff's Motion is a true and correct copy of Doc. 1045-3 in the unreported *Melendres, et al. v. Penzone, et al.*, No. 2:07-cv-02513 (D. Ariz. Dec 12, 2007).

7. **Exhibit 4** as attached to Plaintiff's Motion is a true and correct copy of the unreported decision in *Ceyala v. Toth*, No. CV1700529TUCDCBLAB, 2020 WL 5868427 (D. Ariz. Oct. 2, 2020).

8. **Exhibit 5** as attached to Plaintiff's Motion is a true and correct copy of the unreported decision in *Escalante v. Shinn*, No. CV-19-00256-TUC-RM, 2021 WL 794183 (D. Ariz. Mar. 2, 2021).

I declare under penalty of perjury that the foregoing is true is and correct.

Dated this 23th day of July 2021.

/s/ Christine K. Wee
Christine K. Wee

EXHIBIT 1

2021 WL 2012667
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Edward Lee JONES, Sr., Plaintiff,

v.

R. DAVIS, et al., Defendants.

No. CV 19-08055-PCT-MTL (JZB)
|
Signed 05/19/2021
|
Filed 05/20/2021

Attorneys and Law Firms

Edward Lee Jones, Sr., Florence, AZ, Pro Se.

Pari Komalahiranya Scroggin, Grasso Law Firm PC, Chandler, AZ, for Defendants R. Davis, Y. Rydren.

ORDER

Michael T. Liburdi, United States District Judge

***1** Plaintiff Edward Lee Jones, Sr., who is currently confined in the Arizona State Prison Complex-Eyman, brought this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the Court are Defendants' Motion for Summary Judgment[1] (Doc. 107) and Plaintiff's Objections to the Magistrate Judge's Orders (Docs. 138 and 140).[2]

I. Background

On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated an Eighth Amendment excessive force claim against Defendant Davis based on Plaintiff's allegations that while handcuffed, he was "abruptly slammed into a bar on a fence, resulting in a laceration" to his chin, and "at the time the altercation occurred, Plaintiff was compliant and did not resist being handcuffed or walked by Defendant Davis through the intake door" (Doc. 30 at 8), and a First Amendment retaliation claim against Defendant Rydgren based on the following allegations. (Doc. 30 at 9; Doc. 9 at 8-9.)

On June 15, 2018, Defendant Rydgren issued a disciplinary infraction charging Plaintiff with filing a vexatious grievance in retaliation for Plaintiff filing 26 grievances since arriving at the facility on April 25, 2018, and filing an informal complaint on June 13, 2018, accusing Defendant Rydgren's subordinate of failing to do her job. (Doc. 9 at 8-9.) Plaintiff asserts Defendant Rydgren's charge related to a May 2018 grievance Plaintiff filed against Defendant Tyler, but Defendant Rydgren assigned a case number to that grievance and requested an "extension of time frames [until] June 5, 2018," to address it, which "clearly demonstrated that Defendant Rydgren had previously reviewed the grievance and had already determined the grievance was made in good faith and would be processed." (*Id.*) Plaintiff alleges he was kept in maximum custody approximately three weeks longer than necessary while the disciplinary charge was processed, and the disciplinary infraction was ultimately "modified and resolved informally." (*Id.*)

The Court dismissed the remaining claims and Defendants. (Doc. 30.)

II. Plaintiff's Objections (Docs. 138 and 140)

Plaintiff objects to the Magistrate Judge's March 25, 2021 Order denying Plaintiff's Motion for Sanctions and to Hold ADC and Centurion in Contempt (Doc. 126) and objects to the Magistrate Judge's April 19, 2021 Order denying Plaintiff's Motions for Subpoenas (Doc. 135). (Docs. 138 and 140.)

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, parties may file objections to a magistrate judge order within fourteen days after being served with a copy of the order. The Court must then consider these objections and "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a).

***2** Plaintiff's objections consist of rambling narratives about the history of the case, and unfounded accusations that the Magistrate Judge is biased against him. Plaintiff identifies no portion of the Magistrate Judge's Orders that are "clearly erroneous" or "contrary to law." The Court has reviewed Plaintiff's Motions and the Magistrate Judge's Orders and the Orders are neither clearly erroneous or contrary to law. Accordingly, the Magistrate Judge's Orders will be affirmed and Plaintiff's objections will be overruled.

III. Defendants' Motion for Summary Judgment

Defendants assert that they are entitled to summary judgment because they did not violate Plaintiff's constitutional rights.

A. Summary Judgment Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

B. Defendant Davis

Defendant Davis asserts that he is entitled to summary judgment on Plaintiff's Eighth Amendment excessive force claim because he acted to maintain order when Plaintiff and other prisoners became disruptive and verbally abusive to staff during the intake process.

1. Facts

a. Plaintiff's Version

Plaintiff asserts that immediately following the intake process at Kingman Prison, Officer Tyler began giving prisoners their property, but would not return Plaintiff's identification card to him because of an alleged "change of appearance." (Doc. 127 at 6.) Plaintiff explained to Tyler that he did not need a new identification card and had a religious shaving waiver allowing him to have a beard, but Tyler told Plaintiff that his current identification card did not match his appearance. (*Id.*) Tyler told Plaintiff that she threw away his religious shaving waiver. (*Id.*)

***3** When the other prisoners began to leave intake to go to their housing, Tyler asked Plaintiff if he wanted to stay behind to address his issue with a sergeant and when Plaintiff said yes, Tyler locked him in a holding tank. (*Id.* at 8.) Tyler then returned to the holding tank with Davis and Plaintiff handed Davis his legal documents, but Davis tossed the documents into the air and told Plaintiff to sit down and that Plaintiff could not "say anything to women" and accused Plaintiff of calling Tyler "satan" and a "harlot." (*Id.* at 9.)

Davis then told Plaintiff to apologize to Tyler and to shave his beard within 24 hours "or be held down [while his] beard [was] forcefully shaved off." (*Id.* at 10.) Plaintiff refused to apologize, but told Davis that he would explain to the COO that he could not shave his beard for religious reasons and would contact his attorneys. (*Id.*)

Plaintiff then stood up "in a non-aggressive manner" and turned around in order to be handcuffed, and after Davis handcuffed Plaintiff, he walked Plaintiff a short distance and then abruptly slammed Plaintiff into a fence causing a laceration on Plaintiff's chin and then lifted Plaintiff by his handcuffs, which were still behind his back. (*Id.* at 10-11.) Plaintiff was then taken to the health unit for treatment of his injuries. (*Id.* at 11.)

b. Defendant's Version

Defendant Davis was employed at Kingman Prison as a correctional officer, and asserts that while Plaintiff and the other prisoners were being processed for intake on April 25, 2018, the prisoners, including Plaintiff, became disruptive —yelling and verbally abusive to the staff members. (Doc. 108 ¶¶ 12, 14.) Defendant Davis, along with other officers, handcuffed and restrained the prisoners and Defendant Davis restrained and handcuffed Plaintiff. (*Id.*) Defendant Davis asserts that he did not engage in specific verbal exchanges with Plaintiff, other than to get him to be cooperative during the restraint process. (*Id.* ¶ 15.) Defendant Davis does not recall if Plaintiff was holding any paperwork in his hands at the time, but Defendant Davis asserts that he did not specifically take any papers from Plaintiff. (*Id.*)

Defendant Davis asserts that his only interaction with Plaintiff was to place him in restraints and cuff him due to his disruptive behavior during the intake process. (*Id.*)

Defendant Davis asserts that he used only the needed force to place Plaintiff in restraints as he was disruptive during the intake process, applying only the necessary force to restrain Plaintiff. Defendant Davis asserts that he does not have personal knowledge about any actions taken or not taken regarding the shaving of Plaintiff's beard. (*Id.* ¶ 18.)

2. Legal Standard

Use of excessive force against a prisoner violates the prisoner's Eighth Amendment right to be free from cruel and unusual punishment. *See Graham v. Connor*, 490 U.S. 386, 393-94 (1989). The use of force is constitutional if it is used in a good faith effort to keep or restore discipline; it is unconstitutional if it is used "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. 312, 320-21 (1986).

A court considers five factors in determining whether a defendant's use of force was sadistic and malicious for the purpose of causing harm: (1) the extent of the injury, (2) the need to use the force, (3) the relationship between the need and the amount of force used, (4) the threat "reasonably perceived" by the officials, and (5) "any efforts made to temper the severity" of the force. *Hudson v. McMillan*, 503 U.S. 1, 7 (1992) (citing *Whitley*, 475 U.S. at 321).

3. Discussion

***4** Here, nearly every fact leading to the use of force is disputed by the Parties. The Court must accept Plaintiff's facts as true when ruling on Defendants' Motion for Summary Judgment, and Defendant Davis makes no argument that he is entitled to summary judgment under Plaintiff's version of facts. The Court cannot decide credibility disputes at the summary stage.

Defendants argue that Plaintiff's testimony is self-serving. Generally, "[t]hat an affidavit is self-serving bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact." *United States v. Shumway*, 199 F.3d 1093, 1104 (9th Cir. 1999). Here, Plaintiff's Response is signed under penalty of perjury, and he has personal knowledge to testify as to facts in his personal knowledge and, therefore, his testimony is admissible evidence. *See* Fed. R. Civ. P. 56(c)(4). While there are certain circumstances where testimony may be so self-serving that the testimony cannot defeat summary judgment, such circumstances are not present with regard to Plaintiff's version of events. *See Nilsson v. City of Mesa*, 503 F.3d 947, 952 n.2 (9th Cir. 2007) ("a conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

Here, Plaintiff provides detailed facts within his personal knowledge to support his excessive force claim. That his testimony is also self-serving is to be expected since it is offered in support of his claims. *See Shumway*, 199 F. 3d at 1104 (Defendant's "affidavit was of course 'self-serving,' ... [a]nd properly so, because otherwise there would be no point in submitting it."); *S.E.C. v. Phan*, 500 F.3d 895, 909 (9th Cir. 2007) (same). As such, Defendants' argument that Plaintiff's testimony cannot create a genuine issue of material fact is simply incorrect under the circumstances of this case.

Under Plaintiff's version of events, Defendant threw him against a fence resulting in a cut to Plaintiff's chin and then lifted him up by handcuffs while the handcuffs restrained Plaintiff's arms behind his back. It is undisputed that Plaintiff sustained a cut to his chin during this interaction. Plaintiff asserts that he was complying with Defendant Davis's orders and there was no need for any force. Under this version of facts, a reasonable jury could find in Plaintiff's favor. In his Reply, Defendant Davis suggests that he was permitted to use force because Plaintiff refused to apologize to Tyler.

(Doc. 139 at 3 ("Defendant Davis stepped up to maintain order during the intake process and to curb Plaintiff's behavior towards another correctional officer (Officer Tyler). [*See, e.g.*, Doc. 122/127 at ¶ 28, Plaintiff admits he told Davis he refused to apologize to Officer Tyler].").) A reasonable jury could find that that Plaintiff refusing to apologize did not justify the use of force under the circumstances.

For the foregoing reasons, the Motion for Summary Judgment will be denied as to the Eighth Amendment excessive force claim asserted against Defendant Davis.

C. Defendant Rydgren

Defendants assert that although Plaintiff claims that Defendant Rydgren retaliated against Plaintiff by issuing a ticket following a May 2018 grievance against Officer Tyler, because the ticket was processed by a hearing officer for the unit and resolved informally,[3] the ticket was not a basis for Plaintiff's maximum custody classification as Defendant Rydgren was not involved in any classification determinations related to Plaintiff.

***5** Defendants further argue that by allowing Plaintiff and other prisoners additional time in which to process grievances, and by processing Plaintiff's grievance (M62-113-08), Defendant Rydgren did not act in retaliation to Plaintiff's First Amendment rights, but rather she processed his paperwork in accordance with policy.

1. Facts

At the time of the incident alleged in Plaintiff's Complaint, Defendant Rydgren was employed at GEO Group, Inc. (Geo) at Kingman Prison, a private prison contracted with the State of Arizona. (Doc. 108 ¶ 3.) Rydgren was a Programs Manager and part of her duties involved administrative processing of inmate grievances. (*Id.*) Plaintiff, who was incarcerated beginning in 2008, was transferred from Arizona State Prison Complex-Florence to the Kingman Prison from April 25, 2018 until July 5, 2018 (approximately 2.5 months). (*Id.* ¶ 5.)

Throughout his time at Kingman Prison, Plaintiff was classified as medium/high custody. (*Id.* ¶ 6.)

On June 14, 2018, Defendant Rydgren issued a disciplinary report regarding Plaintiff with a charge of 17 A "Filing of Vexatious Grievances" stating that

> On 6/14/18 at approximately 1700 hours I, CPS Rydgren, completed a review of all twenty-six processed and unprocessed grievances submitted by inmate Jones, Edward #190298 since his arrival at ASP-Kingman on 4/24/18. During this review, I found that at least one grievance submitted by inmate Jones ... met the criteria of vexatious grievance by being groundless, not made in good faith and/or being submitted with the intent to harass staff. Inmate Jones ... was verbally placed on report by Officer Hernandez....

(Doc. 127-5 at 2.) After a disciplinary hearing on June 21, 2018, the Disciplinary Hearing Officer found an informal resolution was appropriate. (*Id.* at 3.)

Because of the influx of prisoners while Plaintiff was housed in Kingman Prison, and in accordance with ADC Policy 802.01, Defendant Rydgren permitted additional times to process grievances to many prisoners, including Plaintiff. (Doc. 108 ¶ 8.) The additional time was not determinative of any basis for the grievance. (*Id.*) Rather, the additional time frame provided was allowed to provide an extension not to exceed 15 workdays, as permitted by ADC Policy 802.01. (*Id.*)

Defendant Rydgren processed Plaintiff's grievance (dated June 6, 2018 and assigned Case No. M63-113-018), which alleges he had issues with Officer Tyler and Defendant Davis, who was at the time a correctional officer, at intake on April 25, 2018. (*Id.* ¶ 9.) Grievance, M63-113-018 was processed and responded to by the Deputy Warden, who determined on July 9, 2018 that there was no support for the Grievance. (*Id.*) When the response was issued, Plaintiff was no longer housed at Kingman Prison. (*Id.*) Plaintiff appealed the Grievance (M62-113-08) to the Director of the ADC, who affirmed the Deputy Warden's Response to the grievance. (*Id.*)

2. Legal Standard

"[A] viable claim of First Amendment retaliation entails five basic elements: (1) [a]n assertion that a [government] actor took some adverse action against an inmate (2) because of (3) that inmate's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

3. Discussion

***6** Defendant does not address Plaintiff's argument that Defendant Rydgren issued a false disciplinary ticket in retaliation for Plaintiff filing a grievance against her subordinate. Defendant argues that because a disciplinary hearing officer was in charge of the hearing on the disciplinary ticket, Defendant Rydgren was not responsible for any punishment suffered by Plaintiff as a result of the issuance of the ticket. Defendant cites to no law supporting this position and the Court is not aware of any law supporting this position.

Rather, Defendant has the burden of coming forward with evidence demonstrating that there are no disputed issues of material fact, but Defendant does not provide any evidence that Defendant Rydgren issued the disciplinary ticket to advance a legitimate correctional goal. Although Defendant Rydgren submitted a declaration with her Motion for Summary Judgment, she does not address Plaintiff's allegations regarding the June 15, 2018 disciplinary ticket. Defendant also argues that because Plaintiff continued to file grievances, his First Amendment rights were not "chilled." However, the Court must not examine whether Plaintiff was actually chilled; rather, an objective standard governs the chilling inquiry, and the question is whether the adverse action at issue "would chill or silence a person of ordinary firmness from future First Amendment activities." *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (citation omitted). Defendant does not explain the possible consequences of a guilty charge on this allegedly false disciplinary ticket from which the Court could conclude that issuing this false disciplinary charge would not have chilled a person of ordinary firmness from filing future grievances.

Accordingly, the Motion for Summary Judgment will be denied as to Plaintiff's claim that Defendant Rydgren retaliated against Plaintiff for filing a grievance against Defendant Rydgren's subordinate by issuing a false disciplinary ticket on June 15, 2018.

The Motion for Summary Judgment will be granted as to Plaintiff's claim that Defendant Rydgren retaliated against him by extending the time frames for prison officials to respond to his grievances. There is no evidence suggesting that allowing an extension of time frames for a response to a grievance would "chill or silence a person of ordinary firmness from future First Amendment activities." *Brodheim*, 584 F.3d at 1271. Accordingly, to the extent Plaintiff's First Amendment retaliation claim is premised on Defendant Rydgren extending the time frames for prison officials to respond to his grievances, that claims is dismissed.

4. Successive Motion for Summary Judgment

In the Court's discretion, the Court will allow Defendant Rydgren to file an additional motion for summary judgment as to Plaintiff's First Amendment retaliation claim. *See Hoffman v. Tonnemacher*, 593 F.3d 908, 911-12 (9th Cir. 2010) (district courts have discretion to permit successive motions for summary judgment).[4]

IT IS ORDERED:

(1) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion for Summary Judgment (Doc. 107) and Plaintiff's Objections to the Magistrate Judge's Orders (Docs. 138 and 140).

(2) Plaintiff's Objections (Docs. 138 and 140) are **overruled** and the Magistrate Judge's Orders (Docs. 126 and 135) are **affirmed**.

***7** (3) Defendants' Motion for Summary Judgment (Doc. 107) is **granted in part and denied in part** as follows:

(a) Defendants' Motion is **granted** to the extent Plaintiff's First Amendment retaliation claim is based on Defendant Rydgren extending the time for responses to grievances.

(b) The Motion for Summary Judgment is otherwise **denied**.

(4) Within **20 days** of the date of this Order, Defendant Rydgren may file a second Motion for Summary Judgment as to Plaintiff's First Amendment retaliation claim.

(5) The remaining claims in this action are a First Amendment retaliation against Defendant Rydgren based on Defendant Rydgren allegedly issuing a false disciplinary ticket on June 14, 2018 in retaliation for Plaintiff filing a grievance against her subordinate and an Eighth Amendment excessive force claim against Defendant Davis.

All Citations

Slip Copy, 2021 WL 2012667

Footnotes

1 Plaintiff was informed of his rights and obligations to respond pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc) (Doc. 79), and he opposes the Motion. (Doc. 127.)

2 Plaintiff's filings are nearly illegible because they are not dark enough for the Court to read all of the words, rendering the process of deciphering Plaintiff's filings unnecessarily laborious. Plaintiff is warned that if his future filings are difficult to read in the future, they will be stricken from the record and will not be considered when ruling on future Motions.

3 The Parties do not address the nature of the "informal resolution."

4 Because there are credibility disputes that cannot be resolved at the summary judgment stage, there is no reason to permit another motion for summary judgment as to the excessive force claim.

End of Document

EXHIBIT 2

2015 WL 12911719
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Manuel de Jesus Ortega MELENDRES, on behalf of himself and all others similarly situated; et al., Plaintiffs,

v.

Joseph M. ARPAIO, in his individual and official capacity as Sheriff of Maricopa County, AZ; et al., Defendants.

No. CV-07-2513-PHX-GMS
|
Signed 05/14/2015

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR DISCOVERY

Honorable G. Murray Snow, United States District Judge

***1** Plaintiffs seek leave to take document discovery and deposition testimony from Maricopa County Sheriff's Office personnel and counsel for Defendants Sheriff Arpaio and the MCSO concerning communications relating to the Court's December 23, 2011 Preliminary Injunction and May 14, 2014 orders on the collection of traffic stop recordings. (Doc. 1045.) The information sought is potentially subject to attorney-client privilege and/or the work-product doctrine. In particular, Plaintiffs request all e-mails and other documents in Defendants' possession or within their control relating to Defendants' interpretation of or compliance with the Preliminary Injunction and the May 14, 2014 orders, without regard to any assertable privilege/immunity, that were (1) held, sent, or received by MCSO personnel; (2) in Timothy Casey's client file, in paper or electronic form; (3) in the paper or electronic files of the Maricopa County Attorney's Office; (4) held, sent, or received by Mr. Casey, Thomas Liddy, Christine Stutz, or other relevant attorneys; or (5) listed on either Defendants' April 17, 2015 or previously produced privilege logs. (*Id.* at 14–15.) For the following reasons, the Court finds that Defendants have waived privilege over at least some of the materials in question by invoking their reliance on advice of counsel as a defense to their non-compliance with the orders of the Court. Plaintiffs are also entitled to depose defense counsel on the subject of any legal advice given or sought by Defendants pertaining to their implementation or disregard of the Preliminary Injunction and the Court's May 14, 2014 orders.

In addition, consistent with this Court's document production orders, rulings on attorney-client privilege and work-product immunity, and discussions with the Parties at the status conferences held in these matters on May 08 and 14, 2015, Plaintiffs may question counsel on the subject of any legal advice given or sought by Defendants pertaining to the Grissom inquiry and the retention of Don Vogel to conduct that inquiry. (*See* Docs. 1046, 1053.)

DISCUSSION

Issues of privilege in federal question cases are determined by federal law. Fed. R. Evid. 501. The proponents of the privilege bear the burden of establishing its existence as to each communication being withheld. *See United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009) (citing *United States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir. 2000)). In the Ninth Circuit, "[w]here legal advice of any kind is sought from a professional legal advisor in his capacity as such, communications relating to that purpose made in confidence by [a] client are, at his instance, permanently protected from disclosure by himself or by the legal advisor, unless protection be waived." *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977) (internal numbering omitted). A related, qualified immunity also protects discovery of "documents and tangible things that are prepared in anticipation of litigation or for trial" by a party or his representative, absent a showing of special need by the requesting party. Fed. R. Civ. P. 26(b)(3)(A); *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989).

***2** The doctrines that "protect[ ] attorney-client communications may not be used both as a sword and a shield." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)). The safeguards afforded confidential materials by virtue of the attorney-client privilege or work-product immunity are forfeited when a party, in the course of litigation, (1) makes an affirmative act injecting privileged materials into a proceeding, (2) thereby putting the materials at issue, (3) where application of the privilege would deny the opposing party access to information needed to effectively litigate its rights in the adversarial system. *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999) (quoting *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995)). For example, it is axiomatic that the intentional disclosure of the content of a protected attorney communication in a selective, misleading, or unfair manner effects a waiver of the privilege or immunity as to all communications on the subject of the disclosure. *Weil v. Inv./Indicators, Research & Mgmt.*, 647 F.2d 18, 24 (9th Cir. 1981).

Similarly, when a client raises a claim or defense that puts protected information at issue, such as a client's assertion that it relied on legal counsel's advice in defense of its allegedly infringing behavior, the client also waives any attorney-client privilege that may have existed as to communications with counsel relevant to that claim or defense. *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033, 1042 (9th Cir. 2009). Under Federal Rule of Evidence 502, a waiver of privilege/immunity extends to all other documents on the same topic of a protected communication that the party selectively disclosed, or otherwise placed at issue, that should in fairness be considered along with the voluntary disclosure. Fed. R. Evid. 502(a). "[A]n overarching consideration is whether allowing the privilege to protect against disclosure of the information would be 'manifestly unfair' to the opposing party." *Home Indem. Co.*, 43 F.3d at 1326. Nevertheless, the Ninth Circuit has cautioned against finding a complete waiver of the attorney-client privilege, noting that "[t]he breadth of the waiver finding, untethered to the subject-matter disclosed, constitutes a particularly injurious privilege ruling." *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010).

I. Subject-Matter Waiver

As noted, a holder of the attorney-client privilege or work-product immunity cannot claim that legal advice from his attorney justifies his actions while simultaneously shielding that advice from disclosure. *Chevron*, 974 F.2d at 1156. Whether Plaintiffs are entitled to the discovery they seek turns on whether the documents sought by Plaintiffs are subject to attorney-client privilege or work-product doctrine, and, if so, whether Defendants placed their communications with counsel at issue in the evidentiary hearing (or elsewhere) in a way that constituted a waiver of the privilege/immunity. Because the circumstances surrounding Defendants' possible reliance on advice of counsel with respect to the Preliminary Injunction and the May 14, 2014 orders trigger different considerations, the Court will separately address them.

A. Preliminary Injunction

As a threshold matter, this Court has previously found that communications regarding the Preliminary Injunction similar to those that Plaintiffs now request may be privileged from discovery based on the attorney-client privilege or work-product doctrine. (*See* Docs. 986, 1000.) Defendants assert, and Plaintiffs do not challenge, that the documents in question were made for the purpose of giving or obtaining legal counsel on behalf of Defendants or in anticipation of litigation, bringing them within the scope of materials protected from compelled disclosure, absent a showing of waiver. However, for the reasons set forth below, the Court finds the three-prong waiver test, *see Amlani*, 169 F.3d at 1195, has been satisfied because MCSO command staff and personnel have raised advice of counsel as a defense in the contempt hearing.

***3** First, Defendants affirmatively brought information subject to attorney-client privilege and/or the work-product doctrine to the forefront of the contempt proceedings. Defendant Sheriff Arpaio implicitly invoked the defense of advice of counsel by testifying that he delegated MCSO's compliance with the Preliminary Injunction to "counsel and relied on them to abide by this order." (Evidentiary Hr'g Tr. 482:22–25, April 21–24, 2015, ECF No. 1051.) Sheriff Arpaio testified that his "attorneys look into" orders issued by judges in cases involving MCSO, and that the way he gleans information regarding lawsuits is "usually the attorney." (Hr'g Tr. 593:22–594:1, ECF No. 1027.) Further, when asked if he could recall taking any steps to ensure that his office complied with the Preliminary Injunction, Sheriff Arpaio replied, in part, that "counsel was looking into it" and that counsel "reviewed" the order. (Hr'g Tr. 483:22–484:12, ECF. No. 1051.) Sheriff Arpaio also testified that he directed Executive Chief Brian Sands to disseminate the Preliminary Injunction only to members of the HSU, rather than the entire MCSO, "[p]ursuant to the advice of [his] attorney." (Hr'g Tr. 487:13–18, ECF No. 1051.)

At various times during direct and cross examination, Sheriff Arpaio also referenced consulting with counsel on the legal aspects of MCSO's policies and practices during the time that the Preliminary Injunction had enjoined the agency from enforcing federal immigration law or detaining persons for whom there was no state law basis for detention. In particular, Sheriff Arpaio stated that he "may have talked to counsel" about what to do with undocumented immigrants against whom MCSO could not bring state charges, and that he also may have consulted counsel on "some legal aspects" of his so-called back-up plan to transfer undocumented immigrants to Border Patrol when Immigrations and Customs Enforcement began to decline custody. (Hr'g Tr. 489:19–22, 558:21–559:6, ECF Nos. 1027, 1051.)

Defense counsel's examination of other MCSO personnel voluntarily injected privileged communications into the litigation as well. During questioning by counsel for Sheriff Arpaio and MCSO, Lieutenant Sousa[1] explained that he spoke with Mr. Casey regarding the Preliminary Injunction and was not directed to change anything with respect to how HSU was operating after December 23, 2011. (Hr'g Tr. 758:19–25, ECF No. 1027.) Counsel for Defendants further prompted testimony that implied Mr. Casey's non-responsiveness was a reason training scenarios drafted by Lieutenant Sousa and Sergeant Brett Palmer were never completed and implemented throughout the HSU or the MCSO generally.

Second, through this testimony, Defendants placed the content of privileged discussions between counsel and MCSO personnel at issue. In general, disclosing that legal counsel was consulted, the subject about which advice of received, or that action was taken based on that advice, does not necessarily waive the privilege protection. *See in re Cnty. of Erie*, 546 F.3d 222 (2d Cir. 2008) (concluding in the context of the legality of strip searches in a prison that the fact that a prison official revealed that legal counsel was consulted about the legality of the practice did not waive the privilege protection for those communications because the success of the defense turned on the objective legality of what was done, not the subjective state of mind of the prison officials). In this case, by comparison, Defendants' affirmative use of attorney-client communications went beyond divulging the general character of the legal services provided by defense counsel. Rather, Defendants' questioning and the responsive testimony given touched on the role counsel played in informing key MCSO executives on the existence and terms of the Preliminary Injunction and the directions given by counsel as to the constitutionality of MCSO's continued patrol operations. Furthermore, by eliciting testimony that suggested the necessity for action by counsel in the chain of approving court-compliance mechanisms within MCSO, Defendants inserted into the litigation factual issues relevant to the Court's assessment of the reasonableness of steps taken by Defendants to comply with the Preliminary Injunction that can only be resolved by inquiring further into protected communications.

***4** Third, a result of Defendants' assertion of attorney-client privilege has been to deprive Plaintiffs of information necessary to respond to Defendants' advice of counsel defense. Even though Defendants' intent is not technically an element that Plaintiffs must prove in order for the named contemnors to be found in civil contempt, *Stone v. City of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992), the protected information is germane to Plaintiffs' burden of proving Defendants failed to take all reasonable steps to comply with the Court's December 23, 2011 order. Plaintiffs also bear the responsibility of laying a sufficient evidentiary foundation such that the Court can make findings of fact that support any relief it orders. Contempt proceedings are driven and shaped by the purpose sought to be accomplished by the punishment imposed. *Shillitani v. United States*, 384 U.S. 364, 369 (1996); *Falstaff Brewing Corp. v. Miller Brewing*

Co., 702, F.2d 770, 778 (9th Cir. 1983). The state of mind of Sheriff Arpaio and other MCSO officials impacts the Court's ability to craft remedies that are tailored to the particular problems that gave rise to the contemptuous act in the first place. Accordingly, all of the elements of an implied waiver have been met and Defendants have waived their right to withhold documents pertaining to MCSO's implementation of the Preliminary Injunction on the grounds of attorney-client privilege or work-product immunity. Because Defendants placed the privileged materials at issue, it must reveal the legal advice it received with respect to the Preliminary Injunction.

Fairness requires that Plaintiffs be given the opportunity to fully test the legitimacy of Defendants' advice of counsel defense, Fed. R. Evid. 502(a), which involves permitting Plaintiffs inquiry into the basis and facts surrounding the advice provided by counsel, not just those materials that communicated the advice to Defendants. *See Dunhall Pharm., Inc. v. Discus Dental, Inc.*, 994 F. Supp. 1202, 1204 (C.D. Cal. 1998).[2] Work product, including uncommunicated work product, may reveal communications between Defendants and their counsel and would be highly probative of what information Defendants' counsel considered, the reasonableness of its advice, and whether Defendants relied on the advice in good faith. Plaintiffs' need to discover this information, out of fairness, outweighs Defendants' interest in protecting work product, especially considering that counsel's litigation strategy as it relates to these matters has long since been made irrelevant by the Court's entering of a Permanent Injunction. Accordingly, the Court finds that Defendants' reliance on advice of counsel waives work-product protection over all materials generated by counsel relating to the Preliminary Injunction.

In sum, Defendants' advice-of-counsel defense waived attorney-client privilege and the work-product doctrine for all attorney-client communications on the subject matter of the Preliminary Injunction, for all work product which referenced such communications, and for all work product on the Preliminary Injunction which was used by defense counsel in formulating the advice communicated to Defendants. Because the Court finds Defendants' waived privilege/immunity by testifying about its reliance on advice of defense counsel, it does not reach Plaintiffs' narrower argument that Defendants waived the privilege by selectively disclosing the content of particular confidential communications, except to incorporate by reference the conclusions previously set forth in its April 2, 2015 Order Denying Defendants' Motion for a Protective Order. (Doc. 986.)

B. May 14, 2014 Orders

On the other hand, Plaintiffs have failed to demonstrate that Defendants have expressly or implicitly waived attorney-client privilege or work-product immunity with respect to all communications between Defendants and counsel regarding the Court's May 14, 2014 orders. But, neither have Defendants met their burden of establishing that any communications with counsel pertaining to the Court's directives earlier that day were ever made in confidence for the purpose of securing legal advice, or with an eye toward future litigation. As the Court noted during the evidentiary hearing with respect to Ms. Stutz, the mere presence of an attorney during a conversation related to ongoing litigation does not bring that communication within the attorney-client privilege. *See Fischel*, 557 F.2d at 212 (explaining that the attorney-client privilege does "not conceal everything said and done in connection with an attorney's legal representation of a client in a matter"). Because waiver principles should not be applied in the abstract and must be considered in the context of the relevant issues in each case, the Court reserves its determination as to whether any attorney-client privilege or work-product immunity exists as to the documents requested by Plaintiffs concerning the Court's May 14, 2014 orders pending specific objections to disclosure by Defendants with an accompanying privilege log.

II. Depositions of Attorneys of Record

***5** There is no express prohibition in the Federal Rules of Civil Procedure against deposing an attorney of record in a case. *See* Fed. R. Civ. P. 30(a)(1) (a party may take the deposition of "any person"). Nevertheless, the Supreme Court has suggested that the practice of deposing counsel is general disfavored, because forcing attorneys to testify may have a negative impact on the litigation process and compromises the standards of the legal profession. *See Hickman v. Taylor*, 329 U.S. 495, 510–12 (1947). For this reason, some courts have allowed attorney depositions, even for fact discovery, only in the limited instances when the party seeking the deposition shows that no other means exist to obtain the information, the information sought is relevant and non-privileged, and the information is crucial to the preparation of the case. *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). The Ninth Circuit has never adopted the *Shelton* rule, and sister Courts of Appeals have reasoned that the standards set forth in Federal Rule of Civil Procedure 26 require a more flexible approach to lawyer depositions whereby the judicial body overseeing discovery takes into consideration all of the

relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship. *See in re Friedman,* 350 F.3d 65, 72 (2d Cir. 2003). These considerations include "the need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted." *Id.*

In the context of the instant proceedings, *Shelton* does not provide the appropriate framework for determining whether to permit Plaintiffs to depose members of Defendants' legal team. The primary interest underlying the *Shelton* test was protecting against the "ills of deposing opposing counsel in a pending case which could potentially lead to the disclosure of the attorney's litigation strategy," added time and expense for the litigants, and encouraging other abuses of the discovery process. *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 730 (8th Cir. 2002). *Shelton* is distinguishable from cases, such as this, where Plaintiffs only seek information about earlier stages of litigation, factually relevant to the pending action and uniquely known by defense counsel.

The balance of factors weighs in favor of permitting Plaintiffs to take limited depositions of Mr. Casey and specified members of the MCAO. First, none of the attorneys whom Plaintiffs seek to depose are actively involved in Defendants' ongoing defense. Mr. Casey withdrew from this case in November 2014, prior to the instigation of the show cause proceedings, and Mr. Liddy and several of his colleagues filed a similar motion last month. (*See* Docs. 773, 795, 1015, 1028.) Moreover, the scope of representation that is at issue is narrow and relates mostly to objective events that occurred before—in some cases, years before—they became relevant in the context of the current contempt hearings. Therefore, the depositions are unlikely to have a disruptive effect on the attorney-client relationship or ongoing aspects of the litigation.

Second, counsel's testimony on communications between or concerning counsel, the named contemnors, and their agents is of critical importance to Plaintiffs' case. Defendants have engaged in a course of witness examination that raises the legal advice given, or omitted, by Mr. Casey and/or the MCAO as a defense to liability in contempt for Defendants' failure to observe the terms of the Preliminary Injunction. Courts may allow depositions of counsel relied on for an advice of counsel defense, which, as noted above, waives attorney-client privilege. *Cf. Friedman*, 350 F.3d at 72 (discussing attorney depositions in cases where party had asserted affirmative defenses based on the business judgment rule and advice of counsel). In addition, Defendants elicited testimony from Sheriff Arpaio regarding counsel's purported failure to object to Chief Deputy Sheridan's order that Chief Trombi send an e-mail to all MCSO command staff, which is the factual predicate underlying one of the three bases for contempt in the Order to Show Cause. Ms. Stutz has further been identified on the record as a percipient witness to later conversations between Chief Deputy Sheridan and Chief Trombi regarding Sheridan's directions to e-mail command staff, certain aspects of which are contested. *See Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 558 (D. Ariz. 2011) (permitting deposition of agency attorney where party asserting privilege waived attorney-client privilege by injecting the attorney into the litigation as a fact witness); *accord Younger Mfg. Co. v. Kaenon, Inc.*, 247 F.R.D. 586 (C.D. Cal. 2007) (citing *Friedman* and allowing the deposition of general counsel who was a witness to communications between parties). Moreover, the manner in which Defendants have invoked the advice of counsel defense tends to inform the appropriateness of particular remedies the Court could impose. However, all of Defendants' witnesses testified that they have little to no memory of the events in question, including the cited discussions with counsel. Under these circumstances, deposing counsel, especially those relied on for an advice of counsel defense, is the only realistically available approach to developing a complete evidentiary record. Counsel's testimony is relevant to Plaintiff's case-in-chief for impeachment purposes as well.

***6** Third, the discovery Plaintiffs have already conducted has proved insufficient to provide comprehensive answers to several issues central to the Court's determination of liability and the scope of remedies to impose concomitant with any findings of civil contempt. Defendants persist in failing to produce the full catalog of documents responsive to Plaintiffs' outstanding requests, and engaged in prolonged and inconsistent assertions of attorney-client and purported statutory privileges in the months leading up to the contempt hearing. Further, with respect to matters on which counsel's testimony is sought, there does not appear to be any alternative record available and the other parties involved have disclaimed any recollection of the meetings, conversations, or correspondence at issue. Deposing the attorneys is the only way Plaintiffs can obtain this information prior to the hearing and conduct any prudent follow-up discovery in time to resume the contempt proceedings in June.

Lastly, although deposing counsel presents a risk of encountering privilege issues, the risk of actually exposing any privileged matter is de minimis in light of the Court's previous rulings on these matters and the aforementioned discussion of subject-matter waiver resulting from Defendants' election to advance an advice of counsel defense. To the extent that Plaintiffs' line of inquiry during the attorneys' depositions impinges on either the attorney-client privilege or work-product doctrine, the deponents may make objections to improper questions at that time. The only perceived "risk" involving work-product or information subject to privilege in this context is the possibility of devoting substantial judicial time and resources to litigating privilege issues if and when they arise, *see Friedman*, 350 F.2d at 72, which itself does not justify withholding otherwise discoverable information from Plaintiffs. Accordingly, Plaintiffs may take depositions of defense counsel concerning any advice given by Mr. Casey and attorneys with the MCAO that relates to Defendants' compliance with the Preliminary Injunction or the May 14, 2014 orders.

Plaintiffs may also inquire of counsel information regarding the Grissom investigation. Although the majority of disclosures pertaining to the Grissom investigation and the Court's assessment of its relevance to the contempt proceedings occurred after Plaintiffs filed their Motion for Discovery, Plaintiffs have indicated their intention to depose counsel on these matters at the status conferences held on May 08 and 14, 2015. Although the attorney-client privilege and work-product immunity may have once applied to communications between Mr. Casey and Defendants as to the Grissom inquiry, the Court has already determined that any such privilege and immunity was waived, at least in large part, by the testimony of Sheriff Arpaio and Chief Deputy Sheridan at the show cause proceedings. (*See* Doc. 1053.) Any lingering work-product immunity has been further impinged by Chief Deputy Sheridan's voluntary disclosure of Mr. Casey's mental impressions or opinions during an interview with the *Arizona Republic*[3] As it stands, Mr. Casey has factual knowledge of these events that is relevant to the issues to be presented at the resumed contempt hearing and that bears on the credibility of other witnesses. The other factors discussed above apply with equal measure here, and compel the conclusion that the Grissom matter is fairly within the scope of any deposition Plaintiffs may seek to take of Mr. Casey.

CONCLUSION

Throughout the show cause proceedings in April 2015, Defendants raised the legal advice they received from counsel as a defense or mitigating factor to their failure to take any steps to implement the December 23, 2011 Preliminary Injunction. In so doing, Defendants waived the attorney-client privilege and work-product doctrine as to communications on the subject matter of the Preliminary Injunction necessary to Plaintiffs' evaluation or refuting of this advice of counsel defense. Plaintiffs may also depose defense counsel on whose legal advice Defendants claim to have relied regarding the implementation of the Preliminary Injunction or the Court's May 14, 2014 directives, or on the subject of the Grissom inquiry.

***7 IT IS THEREFORE ORDERED** that Plaintiffs' Motion for Discovery (Doc. 1045) is **GRANTED** in part and **DENIED** in part.

All Citations

Not Reported in Fed. Supp., 2015 WL 12911719

Footnotes

1 Defendants argue that Lieutenant Sousa has no right to assert an advice-of-counsel defense nor waive attorney-client privilege on behalf of Sheriff Arpaio and MCSO. (Doc. 1056 at 4–5.) Nevertheless, in the context that the Court is concerned with here, it is Sheriff Arpaio and MCSO that placed advice of counsel at issue by having counsel solicit the contested testimony from individuals like Lieutenant Sousa and, later, Chief Deputy Sheridan for the benefit of Sheriff Arpaio and MCSO. It would eviscerate the privilege and waiver doctrines if a party could immunize its voluntary disclosure in contravention of privilege simply by doing so through a strategic spokesperson.

2 Waiver of the attorney-client privilege does not necessarily lead to waiver of work-product immunity. *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 926 (N.D. Cal. 1976). However, like with waiver of the attorney-client privilege, fairness principles should be applied in considering whether work product immunity has been waived. Fed. R. Evid. 502(a); *Mushroom Associates v. Monterey Mushrooms, Inc.*, No. C-91-1092 TEH (PJH), 1992 WL 442892 (N.D. Cal. May 19, 1992).

3 *See* Yvonne Wingett Sanchez, *How Mexican Food Drew Couple Into Heart of Arpaio Case*, Ariz. Republic, May 08, 2015, *available at* http://www.azcentral.com/story/news/local/phoenix/2015/05/07/mexican-fooddrew% 20-grissom-couple-heart% 20-sheriff% 20-joe-arpaio-civil-contempt% 20-case/70990098/.

End of Document

EXHIBIT 3

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CV 07-02513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF JOHN MacINTYRE

Phoenix, Arizona
March 16, 2015
9:02 a.m.

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED

(CERTIFIED COPY)

injunction issued by the Honorable Judge Snow.

And you responded you cannot --

A. Yes.

Q. -- is that right?

As we sit here today, do you remember when you first became aware of that preliminary injunction?

A. I cannot give you a hard-and-fast date, no.

Q. If the injunction was issued on December 23rd, 2011, can you give us an estimate when you heard about it after that date?

A. Sometime in January of 2012.

Q. And what was the occasion that you heard it, if you recall?

MS. IAFRATE: And I'm going to object as to --

THE WITNESS: Heard.

MS. IAFRATE: -- privilege if you heard about it from an attorney.

MR. POCHODA: Well, I'm not asking what anyone told him.

BY MR. POCHODA:

Q. I'm just saying, what was the occasion? You could tell us if an attorney's name was there, but not what anyone said.

A. I believe I received it in an e-mail that -- or I was given a copy of the preliminary injunction. I think I

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CV-07-2513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF JOSEPH SOUSA
Phoenix, Arizona
April 2, 2015
9:07 a.m.

REPORTED BY:
Kellie L. Konicke, RPR
AZ Certified Reporter
No. 50223

PREPARED FOR:
ASCII/Copy

MR. MITCHELL: Barry Mitchell in limited appearance on behalf of Chief Gerald Sheridan from the firm Mitchell Stein Carey.

MR. COMO: Greg Como, Lewis Brisbois Bisgaard & Smith, representing Brian Sands.

THE VIDEOGRAPHER: You may swear the witness.

JOSEPH SOUSA,

a witness herein, having been first duly sworn by the Certified Reporter to speak the truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MS. WANG:

Q. Good morning, Lieutenant.

A. Good morning, ma'am.

Q. Is there any reason that you can't testify truthfully and completely today?

A. No, ma'am.

Q. You're feeling quite well physically and mentally for purposes of testifying?

A. My usual self, ma'am.

Q. Is that a "yes"?

A. Yes, ma'am.

Q. Okay. What did you do to prepare for today's

deposition?

A. Met with my attorneys this week and last week and reviewed a string of e-mails. That was about it.

Q. Okay. Which attorneys did you meet with?

A. I met with Tom Liddy, I think it was last week, and I met with my attorney, Dave Eisenberg, yesterday.

Q. Okay. For about how long did you meet with each of them?

A. Yesterday I met with Dave Eisenberg probably maybe 30 minutes; I got called out.

And with Tom Liddy and Dave Eisenberg, I was there -- whatever that was, a few weeks ago, probably 45 minutes to an hour.

Q. Okay. You mentioned that you reviewed some e-mails to prepare for the deposition. Can you give me the general gist of what those e-mails were about?

A. Training scenarios reference to a judge's order, is what the title was, I believe.

Q. Okay. Did you review any other documents to prepare for the deposition?

A. No, ma'am.

Q. Did you talk to anybody else about this deposition besides --

A. No.

Q. -- Mr. Liddy and Mr. Eisenberg?

Q. Okay. What was his role at MCSO during the time you were --

A. I'm sorry, ma'am. Correction. Repeat that question.

Q. Well, the last question I was about to ask you is what was his role at MCSO while you were --

A. The one before that.

Q. -- at HSU.

A. I just want to make sure I give you the --

Q. I wanted to ask -- I asked you whether you ever interacted with Chief MacIntyre while you were the head of HSU.

A. Yes. That string of e-mails, at one point when we got the scenarios typed up and sent to the attorney, he was copied on that string of e-mails. I just noticed that on the review yesterday.

Q. Okay. We'll get back to that in a bit.

Do you recall -- you were the head of HSU when this lawsuit was filed, right?

A. Yes, ma'am.

Q. That would have been 2008?

MR. LIDDY: Form.

THE WITNESS: Yes, ma'am.

Q. BY MS. WANG: Okay. And you stayed until about three months after the Court's preliminary injunction

A. Yes, ma'am.
Q. While you were at HSU, did anyone ask you to look specifically for recordings of traffic stops?
A. I don't recall anybody ever asking me to look for them, other than I believe -- I know Deputy Armendariz had gotten a citizen's complaint and Chief Trombi had called me about it. Now, I -- I can't remember if he asked me for video or I said, I'll see if there is video on it.
Q. Okay. And that's the only instance in which you recall anyone asking you to look for a video recording of a traffic stop while you were at HSU?
A. Yes. And I'm not sure he asked. I'm -- I'm -- I think I might have said I might have video on it.
Q. All right. You mentioned that in the past year you also have been asked for certain e-mails that you exchanged with Lieutenant Jakowinicz around the time that you transitioned command of HSU over to him; is that correct?
A. Yes, ma'am.
Q. And that was a request from the monitor team?
A. Through Russ Skinner, the Court Compliance Unit, yes, ma'am.
Q. Did they ask you for anything besides the e-mails back and forth with Lieutenant Jakowinicz?

A. There were some -- I think -- I believe prior to that there were some requests. I'm -- I'm not sure if it was strictly about -- I don't know if it was an office-wide type of request. I know the e-mails -- that request was very specific to me and Jakowinicz.

Q. Okay. Do you recall anything else about other requests you've gotten to search for documents in the last year?

A. I -- I know Jakowinicz asked me to look for some documents, some PowerPoints, some training PowerPoints, see if I had anything. We -- it probably happened more than once. I'm pretty sure -- I'm trying to think of -- I know I dealt with Sergeant Armer on some kind of a request that was coming down too. I can't remember off the top of my head, but there was more. I just can't remember right now.

MS. WANG: Okay. Can you flip to Exhibit 100? It's probably not in that binder. Maybe Mr. Liddy can help. Thank you.

MR. LIDDY: Hand me that book.

Q. BY MS. WANG: Okay. Have you ever seen Exhibit 100 before?

A. Can I review it real quick?

Q. Yes, please. Of course.

A. I -- I don't -- I can't -- I don't remember it.

Q. Okay. Can you turn to page 2? I'm going to focus your attention on paragraph A. Has anyone asked you since February 12th of 2015 to search for copies of identification documents seized by MCSO personnel from apparent members of the plaintiff class in the Ortega Melendres case?

MR. LIDDY: Objection to form.

THE WITNESS: What was the date on that?

Q. BY MS. WANG: The date of the order, so that's up at the top here, since February of this year.

A. I was -- the only thing I remember is during interviews, Internal -- it was Professional Standards interviews and interviews with the monitors, they asked me about IDs, and I didn't remember anybody having IDs. But I was asked -- we were asked to go through our division. It was -- once again, it was an e-mail to all the commanders and lieutenants, walk through your division. I believe it was Trombi that sent it out and see if there is anything out of place, anything that we need to address. Do an inspection of your division.

And I believe that stemmed from them finding identifications in vehicles or in offices and also stemming from license plates.

Q. Okay. Was that before your interview with the monitor team, like November or so of last year?

A. I believe it was before because I mentioned that to the monitor team when I did my interview, I think.

Q. Okay. Since --

A. I think I did.

Q. Pardon me.

Since February 12th of this year, has anyone asked you to search for copies of identification documents seized by MCSO from members of the Melendres plaintiff class?

A. I can't remember, as I sit here right now.

Q. Okay. Since February 12th of 2015, has anyone asked you to look for what's listed in paragraph B here, "All documents relating to any individuals who were the subject of any U.S. ICE or U.S. CBP inquiry and/or individuals who were detained by MCSO after December 23rd, 2011, based upon suspected unlawful presence in the United States, and who were not charged with or cited for any crime"?

A. As I sit here right now, I don't remember, but I've routinely been walking the division, looking for anything out of place that doesn't belong to it since all this started.

Q. Okay. But you haven't gotten any requests to look for such documents in the last two months and a

half?

MR. LIDDY: Objection to form.

THE WITNESS: I -- if I did, I don't remember. I don't know -- it could be something that went directly to my captain.

Q. BY MS. WANG: Okay. In the last two months, have you gotten any requests to search for documents relating to information concerning the circumstances and length of any detention as described in paragraph B?

A. Not -- not that I remember, ma'am.

Q. Okay. Did anyone ask you to look through incident reports, DRs, FI cards, anything like that in the last two months?

MR. LIDDY: Form.

THE WITNESS: That, no, ma'am. That, I'm pretty confident.

Q. BY MS. WANG: Okay. In the last two months, has anyone asked you to look for communications between MCSO and either ICE or CBP after the 2011 preliminary injunction order?

MR. LIDDY: Form.

THE WITNESS: I -- I don't -- I seem to vaguely remember a request like that, but I can't say with 100 percent certainty.

Q. BY MS. WANG: Okay. In the last couple months?

A. In the last couple of months, I don't believe so, ma'am.

Q. All right. How about paragraph E, has anyone in the last two months asked you to look for documents relating to the Court's December 23rd, 2011, preliminary injunction order and/or the LEAR policy?

MR. LIDDY: Form.

THE WITNESS: I want to say in the last three months I sent up to the Court Compliance Unit -- I can't remember who it was -- one of the current SOPs or one of the SOPs where the cameras ended up showing up on the SOP. That's all I can remember.

Q. BY MS. WANG: Okay. But that related to video recordings?

A. I believe so.

Q. Okay. Do you recall ever getting a request in the last two months to search for documents that had to do with the Court's December 2011 preliminary injunction order?

A. No, I don't remember getting any requests.

Q. All right. Have you made any search for such documents --

MR. LIDDY: Form.

Q. BY MS. WANG: -- in the last two months?

A. Yes. When I came across -- when the monitor

team -- when the monitor team made that request of any e-mails between me and Lieutenant Jakowinicz, I can't remember the time frame, but 30 days before, 30 days after my transfer, and when I came across those training scenarios, I did a thorough search to see if there was anything else that was relevant.

Q. Okay. And that was in response to the monitor's request through CCID?

A. Correct. And -- but I took it further just to make sure I didn't have anything else.

Q. All right. But you don't recall getting any other request to specifically look for documents about the December 2011 court order?

A. I don't remember --

MR. LIDDY: Form.

THE WITNESS: I don't remember getting any -- any specific instructions to do that specifically from somebody else. I kind of did it on my own.

Q. BY MS. WANG: All right. Thank you.

Okay. I'm going to hand you -- what did you find when you did that search on your own?

A. I found that string of e-mails for training scenarios, and I also found an e-mail from approximately eight months after I was transferred. I can't remember what I titled the e-mail, but it was -- it was eight

months after I transferred out. It was like about October of 2012.

And the e-mail I sent -- let's see -- to Lieutenant Jakowinicz, and by reading the e-mail, the best I could come up with is that, once I transferred out, for the first several months Chief Sands was calling me accidentally and -- and that's what I'm assuming happened here, because I forwarded the information, and the e-mail had something to do with getting some training out reference the order. And I ended up forwarding it to Jakowinicz and copying Tim Casey.

MS. WANG: Okay. I'm going to hand you Exhibit 168.

(Exhibit No. 168 was marked for identification.)

Q. BY MS. WANG: Okay, sir. Is Exhibit 168 the memo you sent to Captain Skinner in response to his request for e-mails between you and Lieutenant Jakowinicz around the time of your transfer out of HSU?

A. Yes, ma'am.

Q. Okay. And you note that you found 12 such e-mails, correct?

A. Yes, ma'am.

Q. BY MS. WANG: Okay. What did Chief Sands say to you during this conversation on the phone?

A. I -- I don't remember. I don't remember. I -- I know he didn't tell me "you're wrong and stop what you're doing," because I would have.

Q. Did you think that HSU needed to take any steps to carry out the judge's December 2011 order?

MR. LIDDY: Form.

THE WITNESS: Yes, ma'am. When I came -- basically, I -- I'm trying to -- for the last few days I've been trying to think about what my mindset was back then because, based on my personal belief and the e-mail string I found that -- all I could think of is that, yeah, that was my personal belief, but we needed something in writing and put something out office-wide. Because the e-mail string I found to Sergeant Palmer was based on our conversations. This was several days after the order. Based on our conversations and based on attorney conversations, to start putting some scenarios together so we can put something out via e-learning system and training reference this.

And so he put about four scenarios together that were rough drafts of -- it was just a thought process at this point, and then once -- and when I made that request via e-mail to him, I copied our attorney,

Chief Sands, Chief Trombi, and I also copied the director of training, Director Seebert.

At some point -- let me see if I can remember this -- he put the training scenarios together, and he sent them back to me, as I requested, and he copied the other sergeant, Sergeant Trowbridge, on it, at which point I took those scenarios and forwarded it to our attorney for review to see what else we have to do with it.

And let's see. And then I copied -- on that I copied Chief Trombi, Chief Sands, Chief MacIntyre, Eileen Henry, the paralegal for Tim Casey, and Tim Casey. And I'm basing this on this e-mail string because I'm having a hard time remembering this, but -- and then I didn't get a response for quite awhile, so I ended up sending another e-mail saying, hey, have you ever looked at these?

MR. LIDDY: Excuse me. I'm going to object. It's not clear to me what he's talking about. If you're referring to a communication that you sent to your counsel, I would object to that as attorney-client privileged communication and instruct you not to provide -- not to include that in your answer.

MR. EISENBERG: Well, I have no objection to him answering anything that pertains to privilege.

MS. WANG: Okay.

MR. LIDDY: But it's not clear to me that's what he was doing. I'm just -- I think he was.

MS. WANG: Let's figure this out.

Q. BY MS. WANG: So, for the record, let me hand you -- well, take a look at Exhibit 156. That's probably in a different binder.

MR. LIDDY: 156?

MS. WANG: Correct. I think this is a copy of Exhibit 156 that I'm handing to counsel now. Maybe I can ask Mr. Liddy to verify that what I've handed him is --

MR. LIDDY: Well, I'll show you. Is that what you're --

MS. WANG: Yes, that's it.

MR. LIDDY: If you just give me a moment to look at it.

MS. WANG: Okay.

MR. LIDDY: Okay. Just for the record, I think we went through this yesterday, this is a document that is a string of e-mails, appears to be, some of which include -- some of which were authored by Tim Casey, some of which include him as an addressee, and to the extent that they reveal any attorney work product or attorney-client communication, I would object to its use

directing me to do this. That's normally how I would do it.

Q. No attorney directed you to ask Brett Palmer to draft those training scenarios, correct?

MR. LIDDY: Objection. If the question, in my opinion, calls for the revelation of attorney-client communications, then I instruct the witness not to answer.

MR. EISENBERG: I have no objection if he does answer.

Q. BY MS. WANG: Are you going to follow Mr. Liddy's instruction not to answer?

A. Well, I'm going to answer it because I don't remember. I don't remember if I was -- like I said, I'm pretty sure it was my initiative, but I can't -- I can't say with 100 percent certainty.

Q. Okay. Let's look at the earliest e-mail in the string on Exhibit 156. This was an e-mail on January 11th from you to Brett Palmer, and you copy Tim Casey, Rollie Seebert, Brian Sands, David Trombi, Eileen Henry, and you cc'ed yourself, actually, too.

Do you see that?

A. Okay. Where it says "Work Product"?

Q. Yeah. It's all redacted out by the --

MR. LIDDY: Standing objection.

Q. BY MS. WANG: -- defense counsel.
A. Page 5 of the e-mail?
Q. Correct.
A. Yes, I'm there, ma'am.
Q. Okay. Was that -- was that the first time you communicated with Brett Palmer about drafting some training scenarios, or had you talked to him about it earlier?
A. From reviewing the e-mail that I wrote, it -- we had conversations prior.
Q. All right. Was any lawyer involved in those conversations?
A. From reviewing the e-mail, it was from input from talking to the attorneys too.
Q. All right. Lieutenant, was any training on the Court's December 2011 order ever done with HSU deputies?
A. No, ma'am.
Q. Why not?
A. I never got the responses and everybody on board to formulate the training, and I don't have that kind of power, because this was designed -- from reading this, this was our thought process, was this needed to go office-wide. But it was important enough to me that it's one of the last e-mails I sent saying, hey, we need to get this done. We need to get this done.

MR. LIDDY: Join.

THE WITNESS: I don't have any memory of it, so I can't question it.

Q. BY MS. WANG: Okay. But sitting here now, is there any reason to think that this is wrong, that this didn't happen?

MR. LIDDY: Form.

MR. MITCHELL: Same.

THE WITNESS: I have no reason either way.

Q. BY MS. WANG: Okay. Did Tim Casey ever brief HSU about the Court's December 2011 order?

MR. LIDDY: I object to these -- to the extent that the question calls for the revelation of attorney-client communications. If you can answer it without revealing that, go ahead.

THE WITNESS: I know Casey had been to our office and spoken with me. I just can't put it for what, what was the reason.

Q. BY MS. WANG: Okay. Did he participate in any briefing with all of HSU personnel?

A. I don't remember anything like that --

Q. All right.

A. -- happening.

Q. Do you think that would have been a good idea?

MR. LIDDY: Objection; form.

is that right?

MR. LIDDY: Form.

THE WITNESS: We didn't have an official -- it wasn't an official relationship anymore, but if we had some questions about something, I'm sure we did. I know I probably did.

Q. BY MS. WANG: All right. You know those ICE agents, so --

A. Yes.

Q. -- it would make sense to call them if you knew they had the information you were looking for, correct?

MR. LIDDY: Form.

THE WITNESS: Yes.

Q. BY MS. WANG: All right. You mentioned that some months after you transferred out of HSU you sent an e-mail to Lieutenant Jakowinicz and Tim Casey about training scenarios. Do you recall that?

A. Yes, ma'am.

Q. Okay. You said that was about maybe eight months after you transferred out of HSU?

A. Roughly, yes, ma'am.

Q. All right. What -- you said that was triggered by a call Chief Sands made to you. I think you said it was accidental. He meant to call Lieutenant Jakowinicz; is that right?

A. Based on the e-mail, that's how I interpreted it because once I transferred, he would still call me accidentally several times, and I'd be like, oh, remember, I got transferred.

Q. Okay.

A. Tell Brian this. And then he would -- I would just go tell him until he stopped calling.

Q. And what did Sands say to you when he contacted you?

A. I -- I don't remember the conversation. It's -- once again, I came across that e-mail. I think based on the e-mail that I wrote he wanted some training put out. This was probably a three-, four-minute conversation again, and I e-mailed Brian Jakowinicz about, hey, Chief Sands wants some training to go out reference the order. And I believe I put something in there also to the fact that, once again, that I didn't believe we were violating the order, but Chief Sands wanted something to go out officially.

Q. Okay. And when you say "the order," you're talking about the Court's December 2011 order?

A. Yes, ma'am.

Q. All right. And to your knowledge, at that point that this happens, eight months after your transfer out of HSU, had any training taken place?

MR. LIDDY: Objection; form.

THE WITNESS: No, ma'am. And when I came across that e-mail, you know, when I was looking at it, and my thought -- I was thinking, you know -- and then when I came across those e-mails, the first set of e-mails, I was thinking did they not do anything with that, the first set of -- of scenarios.

Q. BY MS. WANG: Okay. And did you follow up to find out whether they had done anything after the first set of e-mails in January?

A. I just thought of that when I found those e-mails a couple of months ago. That's when it kind of dawned on me when I found those e-mails that, hey, I sent this. It's obvious they didn't do anything with this.

Q. All right. So your impression was that eight months after you transferred out of HSU, still no training had happened on the Court's December 2011 order?

A. Yes. But when I found those e-mails a few months ago, that's just what I -- that's just what I figured as -- that must have been what I thought.

Q. Okay. During the three months or so between the Court's December 2011 order and the time you transferred out of HSU, did you speak to any attorneys

MR. LIDDY: Actually, if I may, I'm going to show this to you briefly so you know exactly what it is.

MS. WANG: All right. Thank you.

Q. BY MR. MURDY: Sir, just so the record is clear, Exhibit 35 is Defendants' Joseph M. Arpaio and Maricopa County Sheriff's Office's Response to Plaintiffs' Amended First Set of Interrogatories to Defendants Regarding Contempt.

If you go to page 8, at line 7 is interrogatory 10. Just take a moment and read the interrogatory and then read the response, and I'm specifically interested in the response at lines 17 and 18.

A. Yes, sir.

Q. Okay. The response indicates that on December 30th, 2011, Tim Casey conferred with Lieutenant Joseph Sousa and Former Chief Brian Sands for approximately one hour and five minutes.

My first question is, do you have an independent recollection of that meeting?

A. As I sit here, no, sir.

Q. Okay. Given that answer, I think I know the answer to my next question. Do you recall anything that Chief Sands may have said during the course of that meeting?

MR. LIDDY: I object to the extent that that question calls for the revelation of attorney-client privileged communication, and the privilege of course is held by the sheriff and he has not waived it.

Instruct the witness -- if you're going to answer "yes" or "no" whether you recall, that's fine. But I would instruct you not to answer as to the substance of any communication of any participant in that privileged meeting.

Q. BY MR. MURDY: So let's make it a "yes" or "no" question. Do you recall any specific statements made by Chief Sands during the course of that meeting?

A. No, sir.

Q. Okay. Do you recall any specific conversation you had with Chief Sands concerning the distribution of Judge Snow's December 2011 order?

A. No, sir, I don't recall any specific conversations.

Q. Do you recall any specific conversations with Chief Sands concerning the enforcement or compliance with Judge Snow's December 2011 order?

A. Other than that conversation I've already talked to or I gave him my -- what I personally thought, I don't recall his responses or what he said.

Q. Now, I take it, it was your intent to comply

A. No, sir, I don't.
Q. Okay. Did Chief Sands ever direct you not to finish the training materials?
A. No, sir. I'd remember that.
Q. Okay. Now, as I understand it, the initial set of training materials were prepared, they were provided to you, correct?
A. By Sergeant Palmer, yes, sir.
Q. And then you forwarded them to Mr. Casey?
A. Yes, sir.
Q. And you -- then you were waiting for Mr. Casey to respond back to you?
A. Yes, sir.
Q. Okay. Now, as I understand your testimony, the training materials were developed on your initiative?
A. Yes, according to the e-mail string, that's what I determined.
Q. Do you have any recollection as to whether Chief Sands directed you to prepare those materials?
A. I don't remember that, sir.
Q. Okay. Now I'm getting into the realm of possibilities and speculation, but is it possible that he directed you to prepare those materials?
A. It's possible.
Q. Okay. Now, this is a "yes" or "no" question.

Do you recall ever getting any response from Mr. Casey with regard to the training materials that were provided?

A. I don't think I can answer that with a "yes" or "no" and answer it accurately.

Q. Okay. Well, can you answer it accurately without revealing anything that Mr. Casey may have said to you?

A. No. I would have to give you his one sentence to accurately describe it.

Q. Okay. And as we sit here today, you have a recollection of that one sentence?

A. Yeah. I reviewed it last night.

Q. Okay. Did you ever request authority to provide the training and that request was denied?

A. No, sir.

Q. Now, as I understand it, you spoke with Sheriff Arpaio and Chief Sands and you told them, in your opinion, MCSO was not in violation of the Court's order, correct?

A. I believe I told them my personal opinion.

Q. Did Chief Sands ever dispute your interpretation?

A. No. I would -- if he did, I would -- I would have remembered that because then I would have -- like,

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CV-07-02513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF JOSEPH SOUSA
VOLUME II

Phoenix, Arizona
April 14, 2015
4:23 p.m.

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED

(CERTIFIED COPY)

Q. Okay. I think you testified that when you first realized you were going to be deposed again in this case, and particularly about the Court's preliminary injunction order in December of 2011, you didn't have a very complete memory of that time period.

Is that fair to say?

A. When this all started, yes, ma'am.

Q. And is it fair to say that you went and looked at these e-mails, including the one about eight months after your transfer, to refresh your recollection of those events?

A. Yes, ma'am.

MS. WANG: Okay. At this time, I'm going to ask that the defendants produce the October 2012 e-mail.

MR. SCHWAB: And we are going to object based on attorney-client privilege just to preserve the objection, but we understand the judge has overruled that objection based on 612 --

MS. WANG: Okay.

MR. SCHWAB: -- so...

MS. WANG: Let's go off the record so I can take a look at this.

THE VIDEOGRAPHER: Okay. The time is 4:42 p.m. We're going off the record ending Volume II, media 1.

(Recess from 4:42 p.m. to 4:44 p.m.)

there.

Do you see that?

A. Yes, ma'am.

Q. Where'd you get that paragraph?

A. Oh, I think that was right from the cut and paste from Tim Casey's e-mail.

Q. Okay. Do you recall whether Tim Casey told you anything about what the order meant other than this paragraph?

MR. SCHWAB: Objection.

He can answer yes or no.

THE WITNESS: I told him what I thought. He never corrected me if I was wrong.

BY MS. WANG:

Q. Okay. And what did you tell him that you thought?

A. My --

MR. SCHWAB: Objection. Attorney-client privilege.

MS. WANG: Are you instructing him not to answer?

MR. LIDDY: Would you read the question back.

(The requested record was read.)

MR. SCHWAB: Yes, we're instructing him not to answer.

(Next page, please.)

BY MS. WANG:

Q. Are you following that instruction?

A. I have to. I won't -- or else I won't have lawyers. I could be wrong.

Q. You're a smart man.

A. I think that's how it works.

Q. Okay. Let me ask you a different question.

A. All right.

Q. I think you testified last week that you read the Court's December 2011 order yourself; correct?

A. Yes, ma'am.

Q. And you formed an opinion about what it meant for HSU's work; correct?

A. I had a personal opinion, what I thought.

Q. Okay. What was that opinion?

A. My opinion was after we lost the 287(g) training that we couldn't detain folks that are in this country illegally or anything like that. So, basically, what we -- what the training was after 2009 was we -- I guess I can take these off -- was during -- if you make a traffic stop for a -- a violation, a state statute violation, and you have reasonable suspicion someone's in the country illegally during the course of that traffic stop, back in the day, they used to always teach us 20 minutes, but now new training said that's not necessarily true. You could make a call to ICE,

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CV-07-2513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF BRIAN JAKOWINICZ
Phoenix, Arizona
March 26, 2015
9:32 a.m.

REPORTED BY:
Kellie L. Konicke, RPR
AZ Certified Reporter
No. 50223

PREPARED FOR:
ASCII/Copy

A. Not that I recall, no.
Q. Were you told anything about an order on -- in this case in February of this year about producing certain documents to plaintiffs?
MR. LIDDY: Form.
THE WITNESS: Restate that, please.
Q. BY MR. SEGURA: Sure. Did anyone talk to you since February of this year about producing documents for this case?
A. We're in the middle of producing documents since the first of the year. That's all we've done is produce documents. We haven't done casework. It's what we do.
Q. Has anyone instructed you to search your own files for documents or e-mails for this case since February of this year?
A. For this case? I don't know if that -- does that include the monitors?
Q. Sure.
A. Then, yes.
Q. And what files have you instructed -- what of your own files have you been instructed to search?
MR. LIDDY: I want to make an objection. To the extent that his question calls for you to reveal instructions you got from your attorneys, I instruct you

not to answer. If you received instructions from anyone that's not an attorney, go ahead and answer if you can.

THE WITNESS: Can you ask me one more time?

Q. BY MR. SEGURA: Sure. You said you were instructed to search your files since February of this year, whether it's from the monitor or for this case. What files were you instructed to search?

A. I received a document request from the CID for e-mail -- e-mail correspondence between myself and Lieutenant Sousa for a time period back in 2012.

Q. Were you asked to search for anything else?

A. Pertaining to?

Q. To anything.

A. Yes, several -- several requests.

Q. About what? Just the search of your own files.

A. I'm sorry?

Q. Were you asked to search your files for any other categories of documents other than correspondence between you and Lieutenant Sousa?

MR. LIDDY: Form.

THE WITNESS: Which files?

Q. BY MR. SEGURA: Your own files, your e-mails, your documents that you maintain.

MR. LIDDY: Form.

THE WITNESS: If I'm understanding correctly,

you're talking about any e-mail-related stuff?

Q. BY MR. SEGURA: Sure. Let's start with that. Were you asked to look for any of -- were you asked to collect any of your e-mail correspondence in addition to that between you and Lieutenant Sousa?

A. Not that I recall.

Q. Do you know why you were asked for correspondence between you and Lieutenant Sousa?

A. The monitors made that decision.

Q. Why do you understand that to be the case?

MR. LIDDY: Form.

THE WITNESS: Because I got -- I received these document requests from CID saying they came from the monitors. We need to reveal this -- we need to turn this stuff over to the monitors.

Q. BY MR. SEGURA: Do you recall any document requests or requests for e-mails as a result of plaintiffs' request for those doc- -- for such documents?

MR. LIDDY: Form.

THE WITNESS: Restate that.

Q. BY MR. SEGURA: Sure. And were you ever told something like the plaintiffs have made requests for documents from us. Please search your documents for these categories, anything like that?

MR. LIDDY: Form.

THE WITNESS: Nothing that comes to mind right now.

MR. SEGURA: Let me take a quick break and then I can probably finish within 30 to 40.

THE VIDEOGRAPHER: The time is 4:31 p.m. We are going off the record ending media 7.

(Recess taken from 4:31 p.m. until 4:41 p.m.)

THE VIDEOGRAPHER: My name is Mary Onuschak with the firm of Legal Video Specialists, Phoenix, Arizona. This begins media 8 of the videotaped deposition of Brian Jakowinicz. The time is 4:41 p.m.

We are now back on the record.

Q. BY MR. SEGURA: So I'd like to talk to you a little bit about the use of video recording devices within MCSO. When was the first time you recall anyone at MCSO using a recording device while out on patrol?

MR. LIDDY: Form.

THE WITNESS: I believe it was HSU.

Q. BY MR. SEGURA: When you arrived at HSU, that was the first time you learned that anyone at MCSO had, like, a personal recording device?

MR. LIDDY: Form.

THE WITNESS: No. I don't -- I can't think of anybody that I knew that had a personal recording

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. CV-07-02513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF BRIAN JAKOWINICZ

VOLUME III

Phoenix, Arizona
April 16, 2015
10:10 a.m.

REPORTED BY:

TERESA A. VANMETER, RMR
Certified Reporter
Certificate No. 50876

PREPARED FOR:
ASCII/Condensed

(Certified Copy)

MR. LIDDY: Objection to form and lack of foundation.

THE WITNESS: Because I wasn't -- I wasn't paying specific attention to dates of when and what was going over to the CID group. It was just a -- just a lot of stuff being put over to them.

BY MR. BENDOR:

Q. Have you had any conversations since October 2012 about this e-mail or your subsequent conversations with Tim Casey, Joe Sousa or Brian Sands?

MR. LIDDY: Objection to form.

THE WITNESS: I spoke with counsel today.

BY MR. BENDOR:

Q. And before then?

A. Did I talk about this with somebody? Not that I recall. Nothing stands out.

Q. Has anyone instructed you not to say why no steps were taken by the Court's order?

MR. LIDDY: Object to form, and to the extent that the question calls for the revelation of attorney-client privilege information, we'd object.

But as to anyone other than counsel, if you understand, go ahead and answer.

THE WITNESS: I'm sorry. Could you restate the question?

Q. So you saw this e-mail yesterday?
A. Yes, sir.
Q. Did you see any other e-mails yesterday that were relevant to this matter or Exhibit 193?
A. Yes.
Q. What did you see?
A. There were three other e-mails to Tim Casey.
Q. And have you produced those to your attorneys?
A. I believe so.
Q. Were there any other -- what were the dates on those e-mails to Tim Casey?
A. It was October 2012. I don't remember dates.
Q. Were there any e-mails other than those to Tim Casey?
A. There may have been, but nothing that stood out.
Q. And how did you go about finding this e-mail yesterday?
MR. LIDDY: Form and lack of foundation.
THE WITNESS: I searched my e-mail. There's a search at the top that they showed me Friday on how to do it. Typed in 2012 and searched it from there.
BY MR. BENDOR:
Q. And then you just scrolled down?
A. Yeah.
Q. And just to clarify your testimony, when you looked for e-mails on Friday, had you come across this e-mail, Exhibit

193, at that time as well?

A. That's what I'm saying. I believe so.

Q. So you believe you saw this e-mail both on Friday and yesterday?

A. Right. On Friday I wasn't reading things, though, like I said.

Q. I see.

A. I just was dragging stuff over.

Q. And the e-mails that you found to Tim Casey yesterday, had you also found those on Friday?

A. That's -- I don't know what was exactly. I believe so.

MR. BENDOR: Okay. No further questions.

MR. LIDDY: I have no questions. Do you have any?

MR. DODD: Yeah, I have just a couple questions.

EXAMINATION

BY MR. DODD:

Q. The three e-mails that you sent to Tim Casey that you discovered in your search yesterday, did you CC anyone on those or --

MR. LIDDY: Objection, form and lack of foundation.

Go ahead. If you understand the question, answer

it.

THE WITNESS: Ask it again.

BY MR. DODD:

Q. Okay. When you -- you just testified a moment ago about three e-mails that you discovered in your search yesterday, correct?

A. Yes.

Q. And those three e-mails were to Tim Casey, correct?

A. They were correspondence with him, yes.

Q. Were any other individuals CCed or included on those conversations?

A. Other -- I don't recall who -- I don't recall.

MR. DODD: No further questions.

MR. BENDOR: I don't have any follow-ups.

MR. LIDDY: I have a question.

EXAMINATION

BY MR. LIDDY:

Q. The three e-mails from you to Tim Casey, which you've just testified that you reviewed yesterday, did you find them last Friday when you were reviewing all your e-mails with your attorneys?

A. I believe so.

MR. LIDDY: I have no more questions.

THE VIDEOGRAPHER: The time is 11:02 a.m. This

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CV-07-02513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF MIKE TROWBRIDGE

Phoenix, Arizona
March 30, 2015
8:34 a.m.

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED

(CERTIFIED COPY)

A. No, I do not.

Q. Do you recall any meetings within HSU about the December 2011 order after it was issued?

A. No. Not within HSU, no.

Q. How about outside of HSU?

A. There was a meeting held at Wells Fargo with the sheriff's attorneys and stuff.

Q. And when was that?

A. It was -- it was after the initial order, the 2011 one, but I'm not sure of the exact time frame.

Q. Was this -- was there another meeting after the May 2013 order was issued?

A. That I don't know. I wasn't in the unit anymore.

Q. And do you recall when this meeting at Wells Fargo happened?

A. Not exactly, no.

Q. Do you recall what was discussed?

A. I believe --

MS. IAFRATE: I just want a yes or no, because --

THE WITNESS: No.

MS. IAFRATE: -- it's attorney-client privileged.

THE WITNESS: No, I don't. I don't remember specific conversation, no.

order?
A. I believe so, yes.
Q. Do you know why there was more than one meeting?
A. No, I don't.
Q. And just answering yes or no, were you told to do something about the December 2011 order?
MS. IAFRATE: Objection. Attorney-client privilege. Don't answer.
BY MR. SEGURA:
Q. How long did the first meeting about the December 2011 order last?
A. It's been a while, but I'd say probably an hour roughly.
Q. And the second meeting?
A. Probably about the same amount of time.
Q. And how were you notified about these meetings?
A. I believe the lieutenant said, hey, we're going to a meeting at Wells Fargo. Maybe the day -- day or two before.
Q. Is this something you would have been told about over e-mail?
A. I don't believe so.
Q. Do you know of any documentation that came out of these meetings?
A. No, I do not.

BY MR. SEGURA:

Q. Why's that?

A. I -- I'm -- I'm not sure if it would be in the e-mails or not.

Q. Have you searched your e-mails regarding the December 2011 order?

A. No.

Q. Do you know if anyone has searched your e-mails about the December 2011 order?

A. No. I'm not sure.

Q. Were you surprised that no changes were implemented after the December 2011 order?

A. No. At the time, no, I guess not.

Q. Why not?

A. I guess if there's something to come down to say we're changing the way we're doing business, like I said, it would be instructed to me, hey, you know, you guys do something different on the road or we're not going to do interdiction and stuff like that. So nothing like that ever came.

Q. Did you anticipate that there were going to be changes after you read the December 2011 order?

A. Not that I remember, no.

Q. You don't recall reading it and thinking, this is going to change what we do?

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CV-07-02513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF BRETT PALMER
VOLUME II

Phoenix, Arizona
April 7, 2015
9:58 a.m.

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED
(CERTIFIED COPY)

would affect my job in the sense of whether we would be able to continue enforcing the state statutes or not or how we would have to go about doing that with respect to the judge's order.

BY MS. WANG:

Q. And did you discuss those questions that arose for you with anybody else?

A. Lieutenant Sousa, Sergeant Trowbridge, I think Sergeant Madrid had -- had already been out of the unit at that point. So Sergeant Trowbridge and I would have discussed it, because I -- I would have had to have had those conversations with my local chain of command at HSU.

Q. Okay. And who would that have included?

A. Sergeant Trowbridge and Lieutenant Sousa --

Q. All right.

A. -- and Cesar Brockman.

Q. Did you have any discussions with anyone above Lieutenant Sousa in the chain of command about the preliminary injunction order?

A. No, not to my recollection.

Q. Did you learn of any direction from the chain of command above Lieutenant Sousa concerning the preliminary injunction order?

MS. IAFRATE: Form.

THE WITNESS: Yes.

MR. RAPP: Form.

BY MS. WANG:

Q. Tell me about what you learned.

A. After the order came down on December 23rd, 2011, at some point quickly following that -- I don't know if it was a day later or a few days later or a week later, whatever, but some point quickly following it, we were given instruction. I had read a copy of the order. Somehow it was provided to me. And we were given instruction through the chain of command coming from Lieutenant Sousa that the -- the MCAO, Maricopa County Attorney's Office, and -- had been in -- in -- talked with the sheriff's office and that how we were going to enforce this was as long as we were still conducting criminal investigations of the state human smuggling statutes, for the purposes of that investigation, detainments, arrests, could still be made, charges could still be brought.

When the -- it became apparent there were no criminal charges, there -- there was no longer a criminal investigation afoot, that probable cause and reasonable suspicion had been -- had been tossed for one reason or another, that at that point we could no longer detain anybody based on just believing that they're -- they're possibly in the country illegally.

Q. And what would you be required to do at that point

BY MS. WANG:

Q. Okay. And what specifically did you think needed to change in order to be in compliance with the prelimin- -- preliminary injunction order?

MR. RAPP: Form.

THE WITNESS: This kind of took a couple different stages. The initial stage, to the best of my recollection as I sit here today, is that when I read the order and understood it and then got the information from the H -- MCSO chain of command on how we were to continue to do daily business and -- and investigate the criminal statutes under Arizona State law, my question was, okay, so we're okay to still detain the occupants of the vehicle and remove them back to Enforcement Support Division for investigation?

The information that I was provided through the chain of command that I recall being told came from the county attorney, with input from them was that, yes, as long as you're investigating and have reasonable -- reasonable suspicion or probable cause for the investigation of those state crimes, then, yes, you're able to do that.

I didn't raise a question about the -- the occu- -- or what to do with occupants after the investigation was complete and you determine that some we're not going to be able to make state charges on until I was faced with that situation around approximately in the area of January 2012.

BY MS. WANG:

Q. Okay.

MR. RAPP: Cecillia, whenever --

MS. WANG: You need a break?

MR. RAPP: -- you've got a chance for a break.

MS. WANG: Okay. Let's take a break now.

MR. RAPP: Okay.

THE VIDEOGRAPHER: The time is 10:41 a.m. We're going off the record ending Volume II, media 1.

(Recess from 10:41 a.m. to 10:55 a.m.)

THE VIDEOGRAPHER: My name is Mary Onuschak with the firm of Legal Video Specialists, Phoenix, Arizona. This begins Volume II, tape 2, of the videotaped deposition of Brett Palmer. The time is 10:55 a.m. We're now back on the record.

BY MS. WANG:

Q. Okay. Sergeant, before the break, you mentioned that after the preliminary injunction order came down, you were told that the order meant that HSU, once it determined it could not make a criminal charge against an individual, would have to release that individual; was that correct?

A. Yes.

Q. And you said that MCAO informed you of that through your chain of command; was that correct?

MS. IAFRATE: Form.

MR. RAPP: Form.

THE WITNESS: They were -- my understanding was they were involved in -- in the information being provided to us, both the MCAO and the MCSO.

BY MS. WANG:

Q. Who at MCAO was involved in providing that information?

MS. IAFRATE: Form and foundation.

THE WITNESS: I don't know.

BY MS. WANG:

Q. Did you have a regular contact at MCAO at -- during that time period?

A. The HSU had regular contacts with the specific county attorneys that charged the criminal statutes that we were arresting under. I don't recall their names as I sit here today.

Q. Was Vicki Kratovil one of them?

A. Yes. Her, and there was at least one other gentleman or two other gentlemen that were primarily responsible for charging them. So contacts -- they were our contacts for charging. I do not know if they were the -- the ones that were involved in the dissemination of information.

My recollection, as I sit here today, is that the MCSO chain of command and the MCAO were providing us the direction that we had gotten, but I believe that everything I

got came from the MCSO chain of command.

Q. Okay. You also mentioned that you briefed HSU about that direction; is that right?

A. Yes.

Q. Okay. In conducting that briefing with M -- HSU, did you consult with anyone in the chain of command?

A. I don't recall specifically, but I'm sure I consulted with Sergeant Trowbridge and Lieutenant Sousa. I would not have just done it on my own without their involvement or their knowledge.

Q. Did you consult with any attorneys in putting together that briefing?

A. Me personally, no, not to my recollection.

Q. Did anyone else in HSU consult with an attorney about that briefing?

MS. IAFRATE: Form. Foundation.

THE WITNESS: I don't know.

BY MS. WANG:

Q. Do you recall ever meeting with anyone in the chain of command above Lieutenant Sousa about the preliminary injunction order?

MR. RAPP: I'm going to object to form.

THE WITNESS: As I sit here today, no, not to my recollection.

(Next page, please.)

being the Detention Removal Office in Downtown Phoenix for ICE. They -- it was the first time they had refused us following that order to accept any illegal immigrants that we had detained at that time.

So we were doing highway interdiction. HSU interdiction teams were working -- I don't know what highway. It -- I want to say it was SR-87, but it could have been I-17. I don't remember specifically.

But with good reasonable suspicion for a traffic stop, we stopped a vehicle. It had -- it was -- through the traffic stop investigation, it was determined to be a human smuggling load vehicle. The driver was detained. There were several, my recollection as I sit here today is that it was somewhere on the order of 10 or 12 give or take passengers in the vehicle. We had reasonable suspicion, possibly probable cause for others on scene at the traffic stop for investigation of the criminal state statutes for human smuggling.

In accordance with what I -- instructions I had been given to the MCS -- MCSO, what I had been told the MCAO said was okay and based on my interpretation of the order, we detained everybody and removed them back to the Enforcement Support Division offices for further investigation.

You can't do these investigations on the side

There were another couple of individuals. I don't recall how many. I want to say it was somewhere around three to five. I know that there were at least a couple of children, is my recollection. Young children, probably around -- between seven and 10 ages. Somewhere in that range. I want to say there was definitely a female, if not two females in the group, and a male subject.

In any case, through the investigation, we determined we were not going to be able to make state charges for coconspirators on those individuals for various mitigating reasons and -- and instructions we'd received through the MCAO.

Now we have these individuals, and I don't have state charges on them. So applying the judge's order, I have to release them immediately. This was significant because it was, okay, what do I do now with them? Because neither does the -- I have the judge's order. I know what I've been told by the MCSO chain of command and what I've been told the MCAO says they'll file on. So we went through these motions, and now I had these individuals. I have to get -- I have to get rid of them.

Q. Can I break --

A. But --

Q. -- in here?

You said a few minutes ago that ICE-DRO

So we are building and building and building on the reasonable suspicion that there's something else going on here.

You add to that clothing, dishevelledness. We're looking for individuals who look like they came out of the desert quite literally within the last few days to the last week. We're looking for indicators of individuals who will not look in -- or identify themselves to law enforcement at all. The coyotes are very brazen and very ruthless in many respects. They instill fear -- control through fear in their -- in their people they're smuggling. And they -- our intel and what we've developed over the time that I was there was that a lot of the smugglers will coach their occupants on how to respond to law enforcement.

So additionally to everything else I've stated, we're looking for people who will not look at the officer or deputy. They'll look forward. They'll look down. When you go to talk to them, they -- you can tell they're shy. They do not want to acknowledge the officer. That's another indicator.

None of these by themselves standing alone, absent anything else, is reasonable suspicion or qualifies for us to take the vehicle back. But building upon this, when we establish four, five, six, several indicators, then the -- it's building to a point of the county attorney had --

we received instructions from the chain of command and the county attorney that you can -- you can under reasonable suspicion detain the -- detain the vehicle for further investigation.

Once we're able to -- I commented earlier that you can't investigate this vehicle on the side of the road. It's -- it's -- it's not an investigation -- a street investigation that you can simply start pulling 10 people out one at a time and do a thorough interview with, with Miranda rights and everything else. It's impossible to do. It would take hours. It takes literally us hours to investigate a human load vehicle just by the nature of the work that we're doing.

So back at Enforcement Support, when we get individuals that are occupants alone, they're more willing to talk to the detective when they're not in line of sight to the coyote, to the driver. When they're not -- and that fear, we try to remove some of that fear from them, that you're in a safe place now. You can talk to us.

And that's when we start getting our -- more of our admissions on payment. Many times they would provide us information on the drop house and where that was located. Plenty of drop house investigations spun from interdiction load vehicles from the passengers identifying the house to us and -- and we're able to get into the house at that point.

ICE refuses to take some illegal immigrants from MCSO?

MS. IAFRATE: Form.

MR. RAPP: Form.

THE WITNESS: I -- that I do not recall, ma'am.

BY MS. WANG:

Q. Okay. Do you recall any meetings where you witnessed the sheriff giving directions on -- on that subject to anyone at MCSO?

MS. IAFRATE: Form.

THE WITNESS: No, not specifically. I'm sorry.

BY MS. WANG:

Q. Okay. I'm going to have you turn to -- and I don't have a copy of this exhibit. Can you turn to Exhibit 100. I think it's in book 3 in those binders next to you. This is the Court's February 12th, 2015, order.

A. I'm sorry, ma'am. What page?

Q. It's Exhibit Number 100. Is it in that book?

A. Yeah, I have Exhibit 100 here.

Q. Okay.

A. Is this maybe --

Q. So Exhibit 100 should be an order from the Court dated February 12th, 2015; is that correct?

Look at the top of the -- the front page.

MS. IAFRATE: Very top.

THE WITNESS: Yes.

BY MS. WANG:

Q. Okay.

A. Yes, it is.

Q. Okay. Turn to the second page of that order. And you'll see in paragraph --

MR. RAPP: If I get my tie in this.

BY MS. WANG:

Q. In paragraph -- there -- there are four paragraphs -- excuse me -- five paragraphs setting out various categories of documents.

Do you see that?

A. Yes, ma'am.

Q. Okay. Can you read those five paragraphs. And let me know if anyone has asked you to search for any of those documents since February 12th of 2015.

A. No, ma'am. I don't recall anybody asking me to research anything contained in those five paragraphs, A through E.

Q. Thank you.

A. Okay to close this?

Q. Yes. Thank you.

Did you believe that Deputy Armendariz was doing a good job as a deputy in HSU?

Q. Okay. Did you -- I think I asked you already whether you got any input from counsel for MCSO before doing that informal briefing, but can you remind me what the answer is.

MS. IAFRATE: Form.

MR. RAPP: Form.

THE WITNESS: We received information through the MCSO chain of command, and I understood that it included information from the MCAO as far as what we could and could not do respective to these investigations.

BY MS. WANG:

Q. Did you have any input from the Training Division of MCSO before you gave that informal briefing to HSU --

A. No.

Q. -- personnel?

A. Not to my recollection.

Q. Before Lieutenant Jakowinicz took over for Lieutenant Sousa as the commander over the Human Smuggling Division, what was his assignment in MCSO? If you know.

A. I -- I don't recall what he did prior to that assignment.

Q. Do you recall whether he was in the Training Division at that point in time?

A. I don't recall.

Q. Okay. You said in response to a question from

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CV-07-02513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF DAVID TROMBI

Phoenix, Arizona
March 31, 2015
9:01 a.m.

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED

(CERTIFIED COPY)

THE WITNESS: No, sir.

Sorry.

BY MR. POCHODA:

Q. Now, you had mentioned that at -- later in the day at some point, you had a discussion with Chief Warshaw about the e-mail that was sent out; is that right?

A. Yes.

Q. Had you had any discussion with Chief Sheridan prior to that later meeting with Chief Warshaw?

A. Yes.

Q. And what did -- was stated at that meeting?

A. It --

MS. IAFRATE: Is -- one moment.

Is -- can you reveal this without revealing attorney-client privilege?

THE WITNESS: I don't believe so given the fact that Christine Stutz was present.

MS. IAFRATE: Then I'm going to object on attorney-client privilege and tell you not to answer.

BY MR. POCHODA:

Q. Who else was present at this meeting with Chief Sheridan?

A. Myself and Christine Stutz and Chief Sheridan.

Q. And what was the topic at that meeting?

MS. IAFRATE: You can give general, not

specific.

THE WITNESS: The topic? I'm trying to generalize.

MS. IAFRATE: Can you give a topic?

BY MR. POCHODA:

Q. Who -- who called the meeting?

A. At --

Q. Withdraw that question.

Who called the meeting?

A. What do you mean? I'm sorry.

Q. With -- who called this meeting with Chief Sheridan and yourself and Christine Stutz?

A. No one called it.

Q. How did it come about?

A. I walked by the open door to the executive conference room and saw Chief Sheridan and Christine Stutz seated in there.

Q. And you walked in?

A. I -- to the doorway, yes.

Q. And that's how the -- the meeting commenced? The three of you were in the same room?

A. I -- yeah. You're labeling it a meeting. It was a conversation.

Q. That's how the conversation began, because you walked into that room?

A. Yes.
Q. They didn't call you in?
A. No. The door was open, and I walked by and saw them seated there.
Q. And at that meeting, was the topic of the e-mail that you had sent out to collect videos discussed?
A. That conversation focused on the fact.
MS. IAFRATE: Can you answer without revealing attorney-client privilege?
THE WITNESS: I don't think so.
MS. IAFRATE: Then I'm going to instruct you not to answer.
BY MR. POCHODA:
Q. Did -- what did you say at that meeting?
MS. IAFRATE: Same objection. Attorney-client privilege.
THE WITNESS: With all due respect, counsel's advising otherwise, sir.
MR. POCHODA: We object, and -- and we'll see after the judge has -- opines on that.
BY MR. POCHODA:
Q. The -- in any event, the -- the -- after leaving that meeting, what actions, if any, did you take?
A. None --
Q. The --

A. -- related to the issue.
Q. None relating to the e-mail or collection of videos?
A. No.
Q. Was the topic of the judge's concerns at the May 14th hearing raised at all?
A. No.
Q. Was the topic of the monitor's concerns about the method of collecting videos raised at all?
MS. IAFRATE: Objection.
Can you answer without revealing attorney-client privilege?
THE WITNESS: I don't believe I can.
MS. IAFRATE: Then I'm going to instruct you not to answer.
BY MR. POCHODA:
Q. Let me ask, did you at any point in that day after the initial assignment from Chief Sheridan to send out or to collect these videos report back to Chief Sheridan that you had taken some action?
A. Yes.
Q. When was that?
A. In -- in answering that, I'm -- I might be discussing what was mentioned in the instance where I walked into the open door of the meeting room.

EXHIBIT N

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al. Plaintiffs, vs. Joseph M. Arpaio, et al., Defendants.	NO. CV07-02513-PHX-GMS **DEFENDANTS JOSEPH M. ARPAIO AND MARICOPA COUNTY SHERIFF'S OFFICE'S RESPONSE TO PLAINTIFFS' AMENDED FIRST SET OF INTERROGATORIES TO DEFENDANTS REGARDING CONTEMPT**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendants Joseph M. Arpaio and Maricopa County Sheriff's Office respond to Plaintiffs' Interrogatories as follows:

INTERROGATORIES

INTERROGATORY NO. 1

IDENTIFY the individual(s) responsible for the failure to communicate the Court's December 23, 2011 preliminary injunction order to MCSO deputies upon the issuance of the order in December 2011.

RESPONSE: Defendants Arpaio and the Maricopa County Sheriff's Office object to this interrogatory because it is vague and Plaintiffs fail to define "responsible" and "failure to communicate". In the spirit of discovery and without waiving their objections, Defendants respond that Sheriff Arpaio, former Chief Sands, Chief Sheridan, and Lieutenant Sousa were responsible for communicating the December 23, 2011 preliminary injunction to MCSO deputies.

INTERROGATORY NO. 2

During the period from December 2011 to October 2013, which unit(s) and individual(s) within the MCSO were responsible for communicating Court orders in state of federal litigation involving the Maricopa County Sheriff's Office to relevant personnel?

RESPONSE: During this time period, MCSO did not have a specific mechanism established to communicate litigation information to relevant personnel. It was expected the assigned attorneys would communicate the court orders with the relevant personnel.

INTERROGATORY NO. 3

What is the date on which the Court's December 23, 2011 preliminary injunction order was communicated to personnel within MCSO? If the order was communicated on different dates to different groups of personnel, IDENTIFY the recipient(s) with the date on which the order was communicated.

RESPONSE: On December 23, 2011, the preliminary injunction order was communicated to Sheriff Arpaio, former Chief Sands, Chief Sheridan, and Lieutenant Sousa.

INTERROGATORY NO. 4

What is the earliest date on which any MCSO deputy used a video or audio recording device to record a traffic stop?

RESPONSE: The earliest date documented by a recording and verified is September 24, 2008.

INTERROGATORY NO. 5

What is the earliest date on which any MCSO personnel with a rank of sergeant or above became aware that any MCSO deputy was using a video or audio recording device to record traffic stops?

RESPONSE: Defendants Arpaio and the Maricopa County Sheriff's Office object to this interrogatory because it is vague and Plaintiffs fail to define what is meant by the phrase "became aware that any MCSO deputy was using a video or audio recording device." MCSO did not have any policy regarding the recording of traffic stops. However, in the spirit of discovery and without waiving their objections, the earliest date documented by a recording and verified is September 24, 2008.

INTERROGATORY NO. 6

In or after December 2007, how many MCSO deputies or sergeants (a) had any responsibility for conducting traffic stops and also (b) made at least one audio or video recording of a traffic stop?

RESPONSE: Defendants Arpaio and the Maricopa County Sheriff's Office object to this interrogatory because it is vague. However, in the spirit of discovery and without waiving their objections, Defendants respond that all MCSO deputies are responsible for conducting traffic stops. (a) In 2007, MCSO had 797 sworn officers responsible for traffic stops; in 2008, MCSO had 765 sworn officers responsible for traffic stops; in 2009, MCSO had 736 sworn officers responsible for traffic stops; in 2010, MCSO had 702 sworn officers

responsible for traffic stops; in 2011, MCSO had 668 sworn officers responsible for traffic stops; in 2012, MCSO had 650 sworn officers responsible for traffic stops; in 2013, MCSO had 647 sworn officers responsible for traffic stops; and in 2014, MCSO had 700 sworn officers responsible for traffic stops. (b) Defendants previously provided Plaintiffs this information in Bates stamped documents numbers MELC099560-MELC099562.

INTERROGATORY NO. 7

IDENTIFY all MCSO personnel who participated in any traffic stop listed at pages 5-8 of Plaintiffs' Request for OSC, Doc. 843, including any personnel involved in follow-up to such a stop, such as supervisor review or an internal investigation.

RESPONSE: Defendants previously provided Plaintiffs with this information in Bates stamped document numbers MELC099560-MELC099562.

INTERROGATORY NO. 8

IDENTIFY the individual(s)--by name and, if applicable, assigned MCSO unit and rank--who were responsible for the collection of DOCUMENTS that (1) related to the Human Smuggling Unit and (2) were required to be disclosed in litigation matters involving MCSO during the period 2008-2012.

RESPONSE: (1) The Chiefs who oversaw the HSU during this timeframe were:

Chief B. Sands S0708
Chief D. Trombi S0948

January 30, 2006
Capt. T. Tyo S0564 (commanded enforcement support until his retirement February 15, 2008).

April 2006
Lt. C. Siemens S1081 (reassigned out of the division September 2008)
Sgt. G. Rios S1084 (reassigned out of the division March 2007)
Dep. S. Ross S1654 (reassigned out of the division June 2008)

Dep. C. Rangel S1528 (currently in the division out of HSU February 2014).

March 2007
Dep. J. Cosme S1501 (currently in the division)
Dep. H. Martinez S1593 (reassigned out of the division December 23, 2013)
Sgt. R. Baranyos S1297 (reassigned out of the division January 2009)
Dep. A. Navarrette S1474 (reassigned out of the division April 2009) currently in custody
Dep. E. Quintero S1331 (reassigned out of the division September 2011)

June 2007
Ofc. V. Navarrette A6235 (reassigned out of the division November 2013)
Ofc. R. Montoya A8052 (currently in the division)
Ofc. P. Plata A8936 (reassigned out of the division August 19, 2013)
Ofc. M. Murillo A5617 (resigned November 2009)
Sgt. M. Madrid S1376 (reassigned out of the division February 2011)

July 2007
Sgt. C. Brockman S1513 (reassigned out of the division January 2014)
Dep. G. Almanza S1376 (reassigned out of the division November 2013)
Dep. T. Sedlacek S1413 (reassigned out of the division September 2007)
Dep. L. Ruiz S1634 (resigned February 4, 2009)
Dep. G. Doster S1661 (reassigned out of the division August 2010)
Dep. Dep. B. Komorowski S1507 (reassigned out of the division January 2011)

September 2007
Lt. J. Sousa S1180 (reassigned out of the division April 2012)
Dep. J. Templeton S1804 (reassigned out of the division September 2008)

January 2008
Dep. D. Frei S1570 (currently in the division)
Dep. C. Griffin S1523 (reassigned out of the division June 2009) resigned

August 2009
Dep. T. Brice S1767 (reassigned out of the division June 2009)

February 2008
Capt. R. Jones S0491 (commanded enforcement support until his retirement April 30, 2009)

March 2008
Dep. D. Joya S1739 (currently in the division)
Dep. C. Garcia S1399 (reassigned out of the division November 2008) resigned October 2008

April 2008
Dep. S. Monroe S1713 (reassigned out of the division January 2013)

May 2008
Dep. D. Beeks S1722 (reassigned out of the division January 2010)
Ofc. T. Henley B0742 (reassigned out of the division May 2009) resigned March 6, 2009

June 2008
Dep. C. Armendariz S1764 (reassigned out of the division August 19, 2013)

November 2008
Dep. C. Lopez S1760 (currently in the division)
Dep. R. Gonzalez S1783 (currently in the division)
Dep. Cisco Perez S1346 (reassigned out of the division 2011) terminated October 2013

March 2009
Dep. A. Ortega-Rodriguez S1717 (reassigned out of the division September 2012)
Dep. R. Lopez Jr. S1835 (reassigned out of the division December 2012)
Dep. J. Jerez S1226 (reassigned out of the division December 2012)

April 2009
Sgt. B. Palmer S1409 (reassigned out of the division May 2012)
Dep. G. Fernandez S1587 (reassigned out of the division July 2009) resigned July 2009

June 2009
Dep. W. Voeltz S1658 (reassigned out of the division October 2012)
August 2010
Dep. D. Gandara S1906 (currently in the division)

October 2010
Capt. Letourneau S0945 (reassigned out of the unit September 2, 2013)

February 2011
Sgt. M. Trowbridge S1703 (reassigned out of the division September 2, 2013)

March 2011
Dep. J. Silva S1615 (reassigned out of the division September 2012

September 2011
Dep. C. Hechavarria S1851 (reassigned out of the division out of HSU September 2013)

May 2012
Lt. M. Summers S1641 (reassigned out of the division August 2012)
Lt. B. Jakowinicz S1237 (currently in the division)

September 2012
Dep. Frank Gamboa S1924 (currently in the division)
Dep. D. Ochoa S1802 (currently in the division)
Sgt. Glenn Powe S1259 (currently in the division)

October 2012
Dep. J. Henderson S1456 (currently in the division)

December 2012
Dep. M. Garcia S1244 (reassigned out of the division May 12, 2014)

November 2013
Dep. S. Locksa S1312 (currently in the division)

The following supervisory personnel were promoted on the following dates.
Lt. Jakowinicz promoted to lieutenant on 06/04/2007
Lt. Siemens promoted to lieutenant on 01/30/2006
Lt. Sousa promoted to lieutenant on 07/03/2006
Lt. Summers promoted to lieutenant on 09/17/2012
Sgt. Powe promoted to sergeant on 07/03/2006
Sgt. Trowbridge promoted to sergeant on 02/11/2008
Sgt. Brockman promoted to sergeant on 01/20/2014
Sgt. Baranyos promoted to sergeant on 02/26/2007
Sgt. Rios promoted to sergeant on 12/18/2006
Sgt. Palmer promoted to sergeant on 07/03/2006
Sgt. Madrid promoted to sergeant on 06/04/2007

INTERROGATORY NO. 9

IDENTIFY any advice of counsel defense DEFENDANTS intend to make in response to any of the charged grounds for civil contempt listed in the Order to Show Cause.

RESPONSE: Defendants do not assert an "*on the advice of counsel*" defense to any of the alleged grounds for civil contempt.

INTERROGATORY NO. 10

IDENTIFY, by reference to date, time, location, duration and participants, all meetings and conversations RELATING TO (1) the Court's preliminary injunction order of December 23, 2011 or (2) the Court's oral orders of May 14, 2014 RELATING TO the collection of video and audio recordings of traffic stops.

RESPONSE: On December 26, 2011, Tim Casey conferred (location unknown) with the following individuals:

Sheriff Arpaio for approximately twenty-one to twenty-six minutes;
Former Chief Brian Sands for approximately fifteen to twenty minutes;
Chief Jack MacIntyre for approximately four to eight minutes; and
Lieutenant Joseph Sousa for approximately twenty-seven to thirty-two minutes.

On December 30, 2011, Tim Casey conferred with Lieutenant Joseph Sousa and former Chief Brian Sands for approximately one hour and five minutes.

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On January 19, 2012, Tim Casey conferred with the following:
Brad Keogh and Tom Liddy for approximately two hours and six minutes;
Tom Liddy for approximately thirty minutes (location unknown); and
John Masterson approximately six minutes (location unknown).

DATED this 13th day of March, 2015

IAFRATE & ASSOCIATES

By: Michele M. Iafrate
Michele M. Iafrate
Attorney for **Defendants Joseph M. Arpaio and Maricopa County Sheriff's Office**

MARICOPA COUNTY ATTORNEY
CIVIL SERVICES DIVISION

By: for Michele M. Iafrate
Thomas P. Liddy
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ORIGINAL of the foregoing mailed and/or e-mailed this 13th day of March, 2015, to:

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By: _____

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,	)	
Plaintiffs,	)	
vs.	)	No. CV-07-02513-PHX-GMS
Joseph M. Arpaio, et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE G. MURRAY SNOW

Phoenix, Arizona
April 7, 2015
9:04 a.m.

REPORTED BY:
CATHY J. TAYLOR, RPR
Certified Reporter
Certificate No. 50111

PREPARED FOR:
ASCII/CONDENSED

(CERTIFIED COPY)

category of documents that were used to refresh the memories at least of Sheriff Arpaio and Chief Sheridan for their depositions. They testified that they looked at a timeline. We've asked for the production of that, and that's been refused.

So those are the general categories of things that we bring before the Court, and we seek, Your Honor, your guidance as to how to proceed.

THE COURT: All right. Thank you.

Ms. Iafrate?

MS. IAFRATE: Thank you, Your Honor. First of all, regarding Sheriff Arpaio's immigration file, as you are aware, I was not part of this original lawsuit, and that is my error. I have since reviewed the immigration file. It essentially is duplicative of things that have already been provided, however, I have had it copied. And I know that that is late, and I apologize, but it will be given to plaintiffs' counsel today.

Regarding searching for certain things that relate to the compliance with the injunction, I have gone through the Court Compliance Division, and that request did go out to the troops to look for items that were responsive to the request.

So the -- the argument that defendants have not looked is not accurate. We have looked. And, in fact,

Court's discovery order.

When we probed Lieutenant Sousa, he said, by the way, that he had heavily relied upon the so-called training scenarios e-mail exchange that he had in January of 2012 through about March of 2012 in order to testify on those matters.

And we would mention that in advance, that we do plan to rely on Rule 612 as to that current dispute that's ongoing, and we'll -- we'll cite that rule in our briefing that's due today.

But -- but the main point is that Lieutenant Sousa's testimony, along with that of the sheriff and Chief Deputy Sheridan and Chief Sands, all point to the fact that this was not an oversight. It's not a matter of, you know, an ongoing rolling production that's still in progress. A charged contemnor in this case has not even been asked to search for documents. He hasn't been asked to search his e-mails, and he hasn't been asked to search any of his other files for the categories of documents that your -- Your Honor ordered to be disclosed.

THE COURT: All right. Let's take them up category -- category by category.

First off, you indicated, Ms. Iafrate, that -- well, the first thing was the February 12th order. And you indicated, Ms. Iafrate, that requests have gone out to MCSO

for this information. Let me say, without trying to be pejorative, that one of the reasons, of course, that this contempt suit has been noticed is that the MCSO, leading up to this lawsuit, simply did not provide a number and a -- what I gather is a very large number of responsive information to production requests.

And so I guess I want to understand a little bit more with a little bit more detail, Ms. Iafrate, about what kind of request has gone out to who.

MS. IAFRATE: Your Honor?

THE COURT: For the information that is included in my February 12th order.

MS. IAFRATE: Your Honor, the request was funneled through the Court Compliance Division that is run by Russ Skinner, Captain Russ Skinner. Then it went out to the various chiefs and down the chain of command, and then we required a response back regarding what people had done or had not done.

THE COURT: You required a response back from whom?

MS. IAFRATE: From whoever the Court Compliance sent the request out to.

THE COURT: Well, I -- I would suggest that -- I'm -- I'm going to require, I guess, you to provide to the plaintiffs a complete listing of whom was requested and what

specific responses were received.

And then, Mr. Young, I'll be available all the rest of today and tomorrow. If, in fact, no specific responses were received from the contemnors or the other persons who have been disclosed in this discovery as having been intimately involved in the events at issue, I -- I am going to require the defendants to make specific inquiries of specific people if they have any documents responsive and if they've looked for them, because I think that at this point, you know, part of the reason we're having this whole hearing is because we didn't get the original discovery prior to the lawsuit as requested, and I want to make sure we have it now.

And so, number 1, I'm going to require you to disclose to the plaintiffs what the process was by which such discovery was sought, who was given the request to provide such discovery, and what responses were received, because it simply isn't sufficient for the MCSO at this point to ask in a general e-mail, or something else, everybody if they have such responsive documents, and then if they all ignore that e-mail and you don't get responsive documents, that's not efficient for purposes of responding to discovery.

Do you understand what I'm saying?

MS. IAFRATE: I do.

THE COURT: Do you know, I note, by the way, I apologize. I note I have a habit of saying stuff like, do

you understand what I'm saying? I don't mean to be overbearing, and it comes across sometimes as being overbearing on a transcript. I just want to make sure that what I'm trying to convey comes across. That is, simply requesting in a broadcast e-mail that anybody who has information -- responsive information reply isn't sufficient in this case, and I think demonstratively so, a guarantee that -- that we have the information requested.

And so I am going to order you -- how much time do you -- well, I'm going to order you to provide within a day the process that Russ Skinner went through to request such information and all specific answers he received and provide that to plaintiffs. Then I would provide to plaintiffs, if I were you, the specific persons you will follow up with.

And plaintiffs, you might provide your suggestions as to specific persons they might follow up with. And if those aren't adequate -- if you can't arrive -- and I think you have worked together professionally to try to accomplish discovery. But if you can't arrive at a process by which you can get confirmation about such documents, then you can call me. And I am available all -- all of tomorrow afternoon, and I'll make myself available on that point.

Any further questions as to how we're going to proceed with the February 12th order?

MS. IAFRATE: So -- yes, I do have a question, Your Honor. This is Michele Iafrate.

So I understand your first directive to me, which is to identify the process and what was responsive to it. Then you mentioned a list of people to follow up with.

THE COURT: Yes. I mean -- yeah, let me restate that. Well, let me -- I'm sorry. Finish your question.

MS. IAFRATE: That -- my question mark is there.

THE COURT: All right.

MS. IAFRATE: I guess I just need some further guidance.

THE COURT: Okay. In addition to the process and who was -- to whom the request was -- was sent, I want you to detail the actual people, individuals, who responded to the e-mail --

MS. IAFRATE: Okay.

THE COURT: -- so that we know actually who responded one way or the other. And then when we know to whom the request was made and who responded, we know the number of people who did not respond.

And apparently Lieutenant Sousa was not one of those. And he apparently considered it, based on his deposition testimony, as not having ever been requested. And

apparently, based on his deposition testimony, whatever method went out, he did not cognize or recognize as such a request.

MS. IAFRATE: Okay. I understand.

THE COURT: So I want you then to -- based on people who actually responded, I want you to identify to the plaintiffs the people you will personally -- or -- or you will have Lieutenant Skinner or Captain Skinner follow up with to make sure they realize such a request was made and any other steps necessary to accumulate the information that I have required to be delivered and to deliver it.

MS. IAFRATE: Understood.

THE COURT: And if plaintiffs can't -- and you can't agree on appropriate steps to do the follow-up to make sure that such documents as MCSO has are identified and delivered promptly, then I'll be available tomorrow afternoon to resolve any problems in that scope.

Does that help?

MS. IAFRATE: Yes.

THE COURT: All right. Now, any -- any questions by plaintiffs as to what I've ordered?

MR. YOUNG: I have none, Your Honor. Thank you.

Ms. Wang?

MS. WANG: I don't have any questions. I

EXHIBIT P

IAFRATE & ASSOCIATES
Attorneys at Law

Michele M. Iafrate

649 N. 2nd Ave.
Phoenix, AZ 85003
(602) 234-9775
Fax (602) 254-9733
Tax ID 20-1803233

April 13, 2015

VIA E-MAIL

Cecillia Wang
ACLU Immigrants' Rights Project
39 Drumm Street
San Francisco, California 94111

RE: *Arpaio, et al. adv. Melendres, et al.*
U.S. District Court Case No: CV07-02513-PHX-GMS

Dear Counsel:

We have completed the search of the computers. Just to recap and update, following are the end results:

The following people do NOT have documents/e-mails responsive to the Court's February 2015 Order:

- Sheriff Arpaio, who does not have a computer; therefore, I searched his assistant's computer Amy Lake;
- Chief Deputy Sheridan;
- Director MacIntyre;
- Executive Chief Trombi;
- Retired Executive Chief Sands;
- Sergeant Rangel;
- Sergeant Palmer; and
- Lieutenant Jakowinicz.

Documents are being provided from the following that are responsive to the Court's February 2015 Order:

- Sergeant Trowbridge (Bates Stamped MELC172504-172614).
- Lieutenant Sousa (Bates Stamped MELC172485-172503).

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

IAFRATE & ASSOCIATES

Michele M. Iafrate

MMI:CS/jdl
Attachments

EXHIBIT Q

MELENDRES, et al. v. ARPAIO, et al.
CV07-2513-PHX-GMS
Defendants' Privilege Log
4-17-15

BATES RANGE	DATE	AUTHOR	RECIPIENT(S)	DESCRIPTION	PRIVILEGE
1.	3/27/12 10:24 am	Tim Casey	Joseph Sousa, Michael Trowbridge, Cesar Brockman, Brett Palmer, Alejandro Ortega-Rodriguez, Carlos Rangel, Charley Armendariz, Christopher Hechavarria, Christopher Lopez, Daniel Gandara, Darrin Frei, David Joya, Gabriel Almanza, Gabriel Doster, Hector Martinez, Jesus Cosme, Jesus Jerez, Juan Silva, Perla Plata, Ralphaelita Montoya, Richard Lopez, Jr., Roland Gonzalez, Susan Monroe, Victor Navarette, Wade Voeltz. CC: Brian Jakowinicz, Tim Casey, Eileen Henry, Tom Liddy	Discussion re litigation hold	Attorney-Client; Work Product
2.	10/18/2012 11:51 pm	Tim Casey	Joseph Sousa CC: Eileen Henry	Melendres Order on Summary Judgment	
3.	10/19/2012	Joseph Sousa	Brian Jakowinicz	Melendres Order	Attorney-Client

BATES RANGE	DATE	AUTHOR	RECIPIENT(S)	DESCRIPTION	PRIVILEGE
	12:22 pm		CC: Tim Casey, Eileen Henry, David Garland	on Summary Judgment	
4.	10/27/12 9:15 am	Joseph Sousa per T. Casey	Michael Trowbridge, Cesar Brockman, Brett Palmer, Alejandro Ortega-Rodriguez, Carlos Rangel, Charley Armendariz, Christopher Hechavarria, Christopher Lopez, Daniel Gandara, Darrin Frei, David Joya, Gabriel Almanza, Gabriel Doster, Hector Martinez, Jesus Cosme, Jesus Jerez, Juan Silva, Perla Plata, Ralphaelita Montoya, Richard Lopez, Jr., Roland Gonzalez, Susan Monroe, Victor Navarette, Wade Voeltz. CC: Brian Jakowinicz, **Tim Casey**	Operations e-mails	Work Product; Attorney-Client
5.	10/27/12 10:24 am	Tim Casey	Joseph Sousa, Michael Trowbridge, Cesar Brockman, Brett Palmer, Alejandro Ortega-Rodriguez, Carlos Rangel, Charley Armendariz, Christopher Hechevarria,	E-mails for lawsuits	Attorney-Client

BATES RANGE	DATE	AUTHOR	RECIPIENT(S)	DESCRIPTION	PRIVILEGE
			Christopher Lopez, Daniel Gandara, Darrin Frei, David Joya, Gabriel Almanza, Gabriel Doster, Hector Martinez, Jesus Cosme, Jesus Jerez, Juan Silva, Perla Plata, Ralphaelita Montoya, Richard Lopez, Jr., Roland Gonzalez, Susan Monroe, Victor Navarette, Wade Voeltz. CC: Brian Jakowinicz, Eileen Henry, Tim Casey, Tom Liddy		
6.	10/29/12 12:15 pm	Brian Jakowinicz	Tim Casey	Melendres Order on Summary Judgment	Attorney-Client
7.	10/29/12 12:27 pm	Tim Casey	Brian Jakowinicz CC: Tom Liddy, James Williams, Eileen Henry	Summary judgment Order	Attorney-Client

EXHIBIT R

CASE NO. 2:07-cv-02513-GMS

Manuel de Jesus Ortega Melendres, et al.

VS. Joseph M. Arpaio, et al.

PLAINTIFF'S EXHIBIT 187

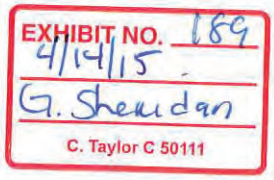
DATE: _____ IDEN.

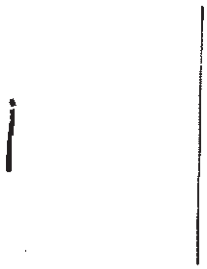
DATE: _____ EVID.

BY: _____

Deputy Clerk

E-MAIL 1





Elleen Henry

From: Tim J. Casey
Sent: Friday, December 23, 2011 5:22 PM
To: Sands Brian; John MacIntyre - SHERIFFX; Jerry Sheridan - SHERIFFX; Joseph Sousa - SHERIFFX
Cc: Liddy Thomas; tomliddy@aol.com; Elleen Henry; James L. Williams
Subject: Melendres Order On Summary Judgement
Importance: High
Attachments: Order re MSJ 122311.pdf

Folks,

In follow-up to my recent telephone call, attached is the Court's Order on the dueling summary judgement motions and class certification motion.

Here is a quick summary:

1. There is **NO** finding as a matter of law that the MCSO is racial profiling. The racial profiling claim must be resolved at trial (Plaintiffs' motion is denied; Defendants' motion is denied);

2. The Plaintiff Rodriguez Fourth Amendment Claim is dismissed but there racial profiling claim appears to exist;

3. The Plaintiffs Melendres and Meraz and Nieto's Fourth Amendt claims as to traffic stops will go to trial;

4. Melendres' Fourth Amendment claim is granted on oral motion of the Plaintiffs as to his DETENTION. The Court ruled that Deputy Louis DiPietro did not have reasonable suspicion that Melendres may have violated the human smuggling statute (in other words, he did not have reasonable suspicion that all the elements of the crime may have been satisified).

5. **The Court is enjoining the MCSO "from detaining any person based solely on knowledge, *without more*, that the person is in the country without unlawful authority. To be clear, the Court is not enjoing MCSO from enforcing valid state laws, or detaining invidudals when officer have reasonable suspicion that individuals are violating a state criminal law. Instead, it is enjoing MCSO from violating federal, rights protected by the United States Constitution in the process of enforcing valid state law based on an incorrect understanding of the law.: p. 37-38.**

6. Class certification is granted.

Where do go from here:

1. Declare victory on plaintiffs' failure to prove (so far) racial profiling. They themselves said they would win as a matter of law and did not want a trial;
2. Plaintiffs were granted only a very narrow victory on detention issues
3. Nothing stops the MCSO from conducting saturation patrols or crime suppression operatios ;
4. The MCSO will appeal the narrow area of victory given to Plaintiff Melendres.

Timothy J. Casey, Attorney at Law
SCHMITT SCHNECK SMYTH CASEY & EVEN, P.C.
1221 East Osborn Road, Suite 105 Phoenix, AZ 85014
Phone: 602.277.7000
Fax: 602.277.8663
Email: timcasey@azbarristers.com
www.azbarristers.com

From: Chelsea Arancio
Sent: Friday, December 23, 2011 4:45 PM
To: Tim J. Casey
Subject: Melendres Order

Chelsea Arancio, Paralegal
SCHMITT SCHNECK SMYTH CASEY & EVEN, P.C.
1221 E. Osborn Road, Suite 105 Phoenix, AZ 85014
Phone: 602.277.7000
Fax: 602.277.8663
Email: chelsea@azbarristers.com
www.azbarristers.com

EXHIBIT S

CASE NO. 2:07-cv-02513-GMS

Manuel de Jesus Ortega Melendres, et al.

VS. Joseph M. Arpaio, et al.

PLAINTIFF'S EXHIBIT 187

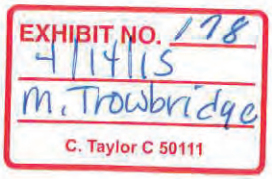
DATE: _____ IDEN.

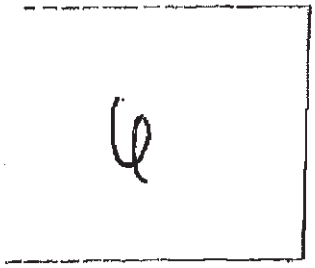
DATE: _____ EVID.

BY: _____

Deputy Clerk

E-MAIL 6A




6

Eileen Henry

From: Tim J. Casey
Sent: Tuesday, January 24, 2012 11:14 AM
To: Liddy Thomas
Cc: Eileen Henry; James L. Williams
Subject: FW: Scenarios for review based on judge's order

FYI for your proposed revision and feedback. thanks

tim

Timothy J. Casey, Attorney at Law
SCHMITT SCHNECK SMYTH CASEY & EVEN, P.C.
1221 East Osborn Road, Suite 105 Phoenix, AZ 85014
Phone: 602.277.7000
Fax: 602.277.8663
Email: timcasey@azbarristers.com
www.azbarristers.com

From: Joseph Sousa - SHERIFFX [mailto:J_Sousa@MCSO.maricopa.gov]
Sent: Tuesday, January 24, 2012 10:20 AM
To: Tim J. Casey
Cc: Brian Sands - SHERIFFX; David Trombi - SHERIFFX; Rollie Seebert - SHERIFFX; Brian Jakowinicz - SHERIFFX; John MacIntyre - SHERIFFX
Subject: Scenarios for review based on judge's order

Hi Tim,

Give me a call once you have reviewed the scenarios listed below. I am going to copy you on all these emails so attorney client privilege applies until we get a final training product out to the troops.

Thanks,

Joe

From: Brett Palmer - SHERIFFX
Sent: Thursday, January 19, 2012 11:24 PM
To: Joseph Sousa - SHERIFFX

Cc: Tim Casey; Michael Trowbridge - SHERIFFX
Subject: RE: Putting out training reference the court order

Lt. Sousa –

Below is my rough construction of an eLearning segment based on Judge Snow's order. I constructed this in accordance with the many conversations you & I have had, as well as taking into account the information conveyed to us both from Tim Casey concerning Judge Snow's order. Also, in accordance with my own personal experience in this matter, I think it is imperative that Tim Casey review this and any training material I am asked to create that could be used to instruct Deputies in this very sensitive area. Also note, I created these scenarios with Patrol Deputies as the focus.

Training Directive
Maricopa County Deputies in a wide range of assignments could come across individuals through their lawful contacts whom they suspect through reasonable suspicion of being illegal aliens in the United States. It is important the Deputies and the Supervisors understand the scope to which they are empowered to act in these scenarios, as limits have recently been set by Judge Murray Snow in a Federal court case. The order issued by Judge Snow states that MCSO cannot detain any person based solely on the suspicion they are an illegal alien present in the United States. What this means is that any Deputy who has contact with a person and during the contact, the Deputy arrives at the reasonable suspicion through articulable indicators that the person may be an illegal alien in the United States, cannot and will not detain or further the detainment of this person without having more than just this singular suspicion.

The most common articulable indicators giving rise to the reasonable suspicion that a person may be an illegal alien in the United States are:

1) The person speaks no English or difficult/broken English
2) The person has no form of ID or no form of ID issued by the United States.

Scenario 1
A Patrol Deputy working at 2AM is patrolling a residential area known to have been hit recently with car burglaries. The Deputy comes across an adult male walking in the area and decides to make contact. The Deputy quickly finds this person speaks no English and the only ID he has is a Mexico Driver License issued by Mexico. After talking with this person for several minutes, the Deputy determines there is no crime being committed under state law, but the Deputy reasonably believes based on the two indicators listed above that this person may be an illegal alien in the United States. DO NOT DETAIN – The Deputy has no other articulable indicators to show a crime has, is, or is about to be committed under state law. The Deputy cannot detain based solely on the reasonable suspicion this person may be an illegal alien. In this scenario, the Deputy should end his contact and allow the person to continue on their way.

Scenario 2
A Patrol Deputy conducts a traffic stop on a vehicle for speeding. The Deputy finds the vehicle is occupied by four adult male subjects. The driver speaks only Spanish and provides a valid Arizona driver license as his ID. As a matter of good policing practice, the Deputy asks for ID from the three passengers. All three passengers provide Mexico Consular Cards issued by the Mexican Consulate as ID (not a U.S. ID). All three passengers speak only Spanish. Within about 15 minutes, the Deputy has determined no criminal offense has, is or is about to be committed. The only violation is the civil speeding. However, the Deputy does reasonably believe based on the two indicators listed above that

the three passengers may be illegal aliens in the United States. DO NOT DETAIN - The Deputy has no articulable indicators of a crime under state law. The Deputy cannot detain based solely on the reasonable suspicion these passengers may be illegal aliens. In this scenario, the Deputy should use their discretion to issue either a written citation or a verbal warning to the driver and release the vehicle with all of the occupants.

Scenario 3

A Patrol Deputy conducts a traffic stop on a vehicle for expired registration. The Deputy finds the vehicle is occupied by an adult male driver and an adult male passenger. The driver speaks only Spanish and presents an expired California Driver License as ID. The passenger speaks only Spanish and presents a Mexico Voter Registration Card as ID (not a U.S. ID). The fact that the passenger does not speak English and has no form of U.S. ID causes the Deputy to reasonably believe the passenger may be an illegal alien in the United States. During the traffic stop investigation, the Deputy discovers the passenger is in possession of an open alcohol container and has been consuming alcohol out of that container while riding in the vehicle. In this scenario, there are two aspects to consider… With respect to the driver, the Deputy should write the driver a civil citation for expired registration and driving with an expired driver license. The driver should ultimately be released after being issued the citation. While the driver speaks only Spanish, he did present a valid form of U.S. ID. It does not matter that the ID was expired. The expired California license is still a valid form of U.S. ID. There is no reasonable suspicion the driver is an illegal alien. With respect to the passenger, the Deputy should write a criminal citation to the passenger for the Title Four violation. While in the course of writing both citations, the Deputy can simultaneously place a phone call to ICE to advise them of his suspicion that the passenger may be an illegal alien in the U.S. If ICE clearly instructs the Deputy to detain the passenger for subsequent turn over to an ICE facility or officer, then the Deputy can make the physical detainment of the passenger based on the directive from ICE. The difference in this scenario from the first two is that there was a criminal offense under state law committed by the passenger. The passenger was not detained because of suspicion he was an illegal alien. The passenger was detained for a state law violation and in the course of the ongoing investigation ICE was contacted.

Notes for Discussion – Scenario 3:

1) Per our many conversations LT, patrol needs very clear & direct instructions on how to handle these situations.
2) Is the Office going to require that criminal offenders in these instances be booked as a matter of policy, having removed the Deputy's discretion? If yes, then this in my opinion removes any idea of ever having patrol turn over a suspected illegal alien to ICE. They would all be booked.
3) There is the Florence ERO issue… Unless the Deputy is working in District One or Six, any turnover of an alien to ICE would conceivably take at a minimum 1 hour to as much as 3 hours or more given that the Deputy would have to drive to Florence or wait for ICE Officers to come to him from Florence. If the Deputy is going to be authorized to drive there, this is an out of county travel assignment and the training would need to address the Deputy obtaining supervisory permission for the out of county travel – just my opinion thinking about liability.

Scenario 4

A Patrol Deputy conducts a traffic stop on a vehicle for speeding. The Deputy finds the vehicle is occupied by 10 Hispanic subjects – a driver and nine passengers. The passengers all appear to have either no ID or only ID issued by another country other than the U.S. The passengers all appear to have a disheveled look, are dirty in appearance, look as if one or more of them were very recently in a desert

environment, and all appear nervous. There is a lack of luggage in the vehicle. The nine passengers are taking up space in the vehicle meant to comfortably seat six or less. The driver provides a story about their travel that cannot be corroborated in totality by the passengers or there are conflicting stories of their travel between the driver and passengers. The driver eventually admits he is being paid for driving these passengers to a specific destination (could be he is receiving money for gas). In this scenario, the Deputy should contact the on-call HSU Sgt. through Radio as these observations are good observations that human smuggling is taking place – a state felony crime.

Notes for Discussion – Scenario 4:

1) Not all of these observations need to be present to reasonably believe human smuggling is taking place. Any two or more of these observations would be sufficient to justify a call to the on-call HSU Sgt.
2) This would also apply to drop houses and stand-up loads, those caught traveling through the open desert on foot with a coyote/guide.

Sgt. Brett Palmer
Maricopa County Sheriff's Office
Human Smuggling Unit

Mailing Address
102 W. Madison Street – Phoenix, AZ 85003
602-876-1895 Office
602-526-4433 Cell
b_palmer@mcso.maricopa.gov

From: Joseph Sousa - SHERIFFX
Sent: Wednesday, January 11, 2012 11:16 AM
To: Brett Palmer - SHERIFFX
Cc: Tim J. Casey (tim@azbarristers.com); Rollie Seebert - SHERIFFX; Brian Sands - SHERIFFX; David Trombi - SHERIFFX; Eileen Henry (eileen@azbarristers.com); Joseph Sousa - SHERIFFX
Subject: *Putting out training reference the court order*

Bret,

Per our phone conversation write up a couple of scenarios (right way and wrong way) based on Judge Snows order to MCSO and your conversations with Tim Casey. I will have Tim review what you write up and have Chief Sands sign off on it. Once all that is done we will get with training reference putting something out in E-Learning.

Judge Snows order:

The Court is enjoining the MCSO "from detaining any person based solely on knowledge, without more, that the person is in the country without unlawful authority. To be clear, the Court is not enjoing MCSO from enforcing valid state laws, or detaining invidudals when officer have reasonable suspicion that individuals are violating a state criminal law. Instead, it is enjoing MCSO from violating federal, rights protected by the United States Constitution in the process of enforcing valid state law based on an incorrect understanding of the law.: p. 37-38.
(See attached for full ruling).

Thanks,

Joe

EXHIBIT 4

2020 WL 5868427
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Refugio CEYALA, Plaintiff,

v.

Unknown TOTH, et al., Defendants.

No. CV-17-00529-TUC-DCB (LAB)
|
Signed 09/29/2020
|
Filed 10/02/2020

Attorneys and Law Firms

Paul Joseph Gattone, Law Office of Paul Gattone, Tucson, AZ, for Plaintiff.

Marshall Humphrey, III, Humphrey & Petersen PC, Tucson, AZ, for Defendants.

ORDER

David C. Bury, United States District Judge

***1** This matter was referred to Magistrate Judge Leslie A. Bowman, pursuant to the Rules of Practice for the United States District Court, District of Arizona (Local Rules), Rule (Civil) 72.1(a). On March 5, 2020, Magistrate Judge Bowman issued a Report and Recommendation (R&R). (Doc. 71.) She recommends that the Court grant summary judgment for the Defendants because the shooting of Carlos Valencia was tragic but not an excessive use of force. She recommends summary judgment be granted on the state law claims because Plaintiff failed to comply with the notice of claim provisions in A.R.S. § 12-821.01. The Court accepts and adopts the Magistrate Judge's R&R as the findings of fact and conclusions of law of this Court and grants summary judgment for Defendants.

STANDARD OF REVIEW

The duties of the district court in connection with a R&R by a Magistrate Judge are set forth in Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). The district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1). Where the parties object to a R&R, " '[a] judge of the [district] court shall make a de novo determination of those portions of the [R&R] to which objection is made.' " *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985) (quoting 28 U.S.C. § 636(b)(1)).

This Court's ruling is a *de novo* determination as to those portions of the R&R to which there are objections. 28 U.S.C. § 636(b)(1)(C); *Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc). To the extent that no objection has been made, arguments to the contrary have been waived. Fed. R. Civ. P. 72; see 28 U.S.C. § 636(b)(1) (objections are waived if they are not filed within fourteen days of service of the R&R), *see also McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980) (failure to object to Magistrate's report waives right to do so on appeal); Advisory Committee Notes to Fed. R. Civ. P. 72 (citing *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974) (when no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation)).

The parties were sent copies of the R&R and instructed that, pursuant to 28 U.S.C. § 636(b)(1), they had 14 days to file written objections. *See also*, Fed. R. Civ. P. 72 (party objecting to the recommended disposition has fourteen (14) days to file specific, written objections). The Court has considered the objections filed by the Defendants, and the parties' briefs considered by the Magistrate Judge in deciding the Motion for Summary judgment.

OBJECTIONS

The Plaintiff, Refugio Ceyala, brings this action in her capacity as personal representative of the estate of her deceased son, Carlos Valencia, who was shot and killed by Defendant Toth. The Plaintiff filed objections to the R&R. She argues that the Court "cannot simply accept the officer's subjective version of events, but rather must reconstruct the event in the light most favorable to the non-moving party and determine whether the officer's use of force was excessive under those circumstances." (Objection (Doc. 72) at 2.) The Plaintiff is of course correct. Other than the Defendants and Mr. Valencia, deceased, there were four witnesses to the event, but, unfortunately, they did not see

the actual shooting. Discovery has been completed. It is undisputed that both Defendants were in marked police cars and uniforms, therefore, there are no issues regarding any failure by Defendants to announce their identities or that Mr. Valencia's non-compliance was due to confusion because it was not clear the Defendants were police officers.

***2** The Court relies solely on the Plaintiff's statement of facts (Doc. 56), supporting her assertion that summary judgment should be denied, as stated below.

The circumstances of the case, which the Court finds dispositive begin with the 911 phone call from the manager of the GRM, Gospel Rescue Mission, who reported that Mr. Valencia had created a disturbance, was asked to leave, and had stolen a fire extinguisher as he left. It is undisputed that the 911 transcript reflects Mr. Valencia was described as being a large man, over six feet tall and weighing more than 200 pounds, who was "unstable." The caller described him as having "anger rising up in his voice" and the caller sensed "the aggression in him." (Ps' SOF (Doc. 56) ¶¶ 2-3.) Plaintiff's assertion that Defendants had no information that Mr. Valencia was violent is simply not true. Defendants knew that he was unstable, agitated, and exhibiting signs of aggression and anger.

Police Officer Toth was the first Defendant to engage Mr. Valencia. He saw him walking with the fire extinguisher, which was two to two and a half feet long and 10 to 15 pounds, and saw that Mr. Valencia was a large individual as described by the 911 caller. *Id.* ¶ 6-7. Defendant Toth yelled from inside his marked police car at Mr. Valencia to stop. *Id.* ¶ 11. Mr. Valencia did not stop. Instead, he walked faster. Defendant Toth contacted dispatch over his radio and reported that Mr. Valencia was being noncompliant. *Id.* ¶ 13. Defendant Toth brought his police car to a stop in front of Mr. Valencia, got out and again made contact by standing in front of him, telling him to stop and drop the fire extinguisher. When Mr. Valencia again failed to comply with Defendant Toth's directive, Defendant Toth deployed pepper spray. *Id.* ¶¶ 16-19. At this point, Defendant Toth knew the information gleaned from the 911 call related to Mr. Valencia being mentally unstable, angry and aggressive, and he knew that Mr. Valencia was refusing to comply with the police directive to stop and drop the fire extinguisher.

In response to being pepper sprayed, Mr. Valencia raised the fire extinguisher over his head and threw it at Defendant Toth, hitting Defendant in the leg, and Mr. Valencia turned and ran, with Defendant Toth giving chase. *Id.* ¶¶ 19-20.

At this time, Defendant Nunez arrived on the scene. He existed his vehicle and ordered Mr. Valencia to stop and get on the ground. Mr. Valencia did not comply. Defendant Nunez got out his taser and was surprised that Mr. Valencia ran towards him first, before turning and running away. Ignoring Defendant Nunez' depiction of Mr. Valencia's behavior as aggressive, it is undisputed that the two Defendants gave chase, with Officer Nunez continuing to order Mr. Valencia to stop, and get on the ground, and Mr. Valencia ignoring Defendants' commands, running, and yelling profanities at the Defendants. *Id.* ¶¶ 26-27.

Eventually, Defendant Nunez got close enough to Mr. Valencia to deploy his taser. It hit him in the back, but was ineffective. *Id.* ¶¶ 34-36. After being tased, Mr. Valencia confronted Defendant Nunez, "yelling, with his arms up and fists clenched in a fighting stance but did not attack Defendant Nunez. *Id.* ¶ 34. Defendant Nunez again tried to use his taser, but it did not work. *Id.* ¶¶ 35, 43. At this point, Defendant Toth caught up to Officer Nunez and Mr. Valencia, and attempted to physically subdue Mr. Valencia. *Id.* ¶ 36. While Plaintiff disputes whether Mr. Valencia hit Defendant Toth with his fists and knocked him to the ground, Plaintiff admits that Defendant Toth fell to the ground. *Id.* ¶ 37.

***3** Nunez called over his radio that they were engaged with a suspect who was physically assaulting officers and requested assistance. *Id.* ¶ 41. With his taser not working, Defendant Nunez deployed his firearm. All three were now walking because they were tired; Mr. Valencia leading, followed by the Defendants. *Id.* ¶ 45. Again, Defendant Toth attempted to physically subdue Mr. Valencia, using pepper spray, but his pepper spray was depleted. *Id.* ¶ 46. This time, Mr. Valencia knocked Defendant Toth down and hit him in the head with his fists. *Id.* ¶ 48. Again, Mr. Valencia approached Defendant Nunez with his hands up, yelling obscenities and acting aggressive. *Id.* ¶ 54. Mr. Valencia punched Defendant Nunez in the head. *Id.* ¶ 56. Because Defendant Nunez had his firearm out, he focused on protecting his firearm from being grabbed by Mr. Valencia. *Id.* ¶¶ 55 56. Then Mr. Valencia turned to Defendant Toth, who had deployed his firearm after his pepper spray was depleted. *Id.* ¶ 57. Mr. Valencia knocked Defendant Toth to the ground twice, and they were struggling in close contact. *Id.* ¶ 60. Defendant Nunez was on the radio to advise responding officers of their location. *Id.* ¶ 59. During

this engagement, Defendant Toth shot Mr. Valencia twice. *Id.* ¶ 60.

These undisputed facts construed in favor of the Plaintiff reflect that Mr. Valencia refused to comply with police directives to stop and surrender to their arrest. He assaulted both officers when they attempted to arrest him, and he gave them no choice but to physically subdue him by force. They first used nonlethal force which was ineffective before turning to the use of their guns.

To prevail on a section 1983 claim based on the Fourth Amendment, the Plaintiff must show that the Defendants' conduct was an unreasonable seizure. (R&R (Doc. 71) at 7 (citing *Sandoval v. Cty. of Sonoma,* 912 F.3d 509, 515 (9th Cir. 2018)). The reasonableness calculation allows for the fact that police officers, like the Defendants, are often forced to make split-second judgments in uncertain and tense circumstances that are rapidly evolving. *Id.* at 7-8 (citing *Graham v. Connor,* 490 U.S. 386, 396-97 (1989)). Use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' " *Id.*

The Court finds that the Magistrate Judge correctly found the Defendants did not use excessive force. It was objectively reasonable to pepper spray and taser Mr. Valencia because he refused to comply with verbal commands to stop, drop the fire extinguisher, and get on the ground. Rather than complying, Mr. Valencia not only ran away, he assaulted both Defendants. Under the circumstances, it was reasonable for the Defendants to draw their weapons to obtain compliance. When Mr. Valencia again attacked Defendant Toth, who's weapon was drawn, it was reasonable for Defendant Toth to believe he needed to shoot Mr. Valencia to keep him from getting the gun and using it on them. The Magistrate Judge correctly assessed the graduated use of force employed by the Defendants which culminated in lethal force when Officer Toth shot Valencia twice. (R&R (Doc. 71) at 8-11.)

This is not a case where an unarmed emotionally disturbed person, who has committed no serious offense, did not pose a risk of flight and presented no objectively reasonable threat to officer safety or other individuals. (R&R (Doc. 11) (citing *Deorle v. Rutherford,* 272 F.3d 1272, 1285 (9th Cir. 2001)). Mr. Valencia posed a serious threat to officer safety. Not addressed by the Magistrate Judge, the Court also finds that he posed a risk to the community at large. Officers, like Defendants, may have reasonably believed that a mentally disturbed person willing to take on police officers might injure some member of the community if let go.

The Magistrate Judge did not reach the question of qualified immunity, which requires a court to consider both: (1) whether there has been a violation of a constitutional right, and (2) whether that right was clearly established at the time of the officer's alleged misconduct. *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014). Because the Magistrate Judge found no constitutional violation, there was no need to reach the second prong of the qualified immunity analysis. This Court agrees that the question of whether there has been a constitutional violation does not involve disputed facts which, when viewed most favorably to the Plaintiff, could support a rational jury finding in Plaintiff's favor. The Court has, however, also reviewed the case law submitted by the Plaintiff and finds that there is no clearly established law that would have led reasonable police officers to understand the actions taken here were unlawful. The law does not "require a case directly on point, but existing precedent must have placed the ... constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 740 (2011). There must be precedent involving similar facts to provide an officer notice that a specific act is constitutionally unlawful. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curium). The Plaintiff has offered none and the Court has found no case to suggest deploying lethal force is excessive in circumstances like those faced by the Defendants here.

***4** Finally, the Defendants seek summary judgment on the state law claims based on A.R.S. § 12-821.01, which requires the claimant, Plaintiff, to have filed a notice of claim and settlement offer. Here, she sues the Defendants individually but served her notices of claim on the City Clerk of the City of South Tucson. Plaintiff's argument that such service is proper was rejected in *Simon v. Maricopa Med. Ctr.,* 234 P.3d 623, 629 (Ariz. App. 2010). The Court adopts the Magistrate Judge's recommendation that summary judgment be granted for Defendants on Plaintiff's state law claims.

CONCLUSSION

The Court finds that Magistrate Judge Bowman issued a well-reasoned R&R, which explains the law and the facts. After *de novo* review of the issues raised in Plaintiff's objections, this Court agrees with the findings of fact and conclusions of law made by the Magistrate Judge in her R&R for determining the pending Motion for Summary Judgment. The Court adopts

it, and for the reasons stated in the R&R, the Court grants summary judgment for Defendants.

Accordingly,

IT IS ORDERED that after a full and independent review of the record, in respect to the objections, the Magistrate Judge's Report and Recommendation (Doc. 71) is accepted and adopted as the findings of fact and conclusions of law of this Court.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Doc. 48) is GRANTED.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter Judgment, accordingly.

All Citations

Slip Copy, 2020 WL 5868427

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EXHIBIT 5

2021 WL 794183
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Gilberto ESCALANTE, Petitioner,

v.

David SHINN, et al., Respondents.

No. CV-19-00256-TUC-RM

|

Signed 03/02/2021

ORDER

Rosemary Márquez, United States District Judge

***1** Petitioner Gilberto Escalante, an inmate in the Arizona State Prison Complex in Safford, Arizona, constructively filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("§ 2254 Petition") on April 26, 2019. (Doc. 1.)[1] Respondents filed a Limited Answer (Doc. 15), and Petitioner filed a Reply (Doc. 20). On February 12, 2020, Magistrate Judge Leslie A. Bowman issued a Report and Recommendation ("R&R"), recommending that the § 2254 Petition be denied because Petitioner's claims are all either time-barred or procedurally defaulted. (Doc. 21.) Petitioner filed a timely Objection to the R&R (Doc. 28), and Respondents filed a Response to the Objection (Doc. 31).

After Petitioner's Objection to the R&R had been fully briefed, attorney Siovhan Sheridan Ayala filed a Notice of Appearance on Petitioner's behalf (Doc. 34) and moved to continue these habeas proceedings (Doc. 35). The Court granted the Motion to Continue and held the Petition, R&R, and Objection under advisement for a period of two months to allow Petitioner's counsel time to investigate Petitioner's actual innocence claim. (Doc. 38.) Petitioner thereafter filed a supplemental brief in support of his Objection to the R&R (Doc. 39), and Respondents filed a supplemental response (Doc. 42).

For the following reasons, the Court will overrule Petitioner's Objection, accept and adopt the R&R, and deny the § 2254 Petition.

I. Background

A. State Proceedings

On November 29, 2012, Petitioner was charged with conspiracy, conducting a criminal enterprise, money laundering, and fraudulent schemes and artifices. (Doc. 16 at 3-8.)[2] Petitioner was convicted after a plea of guilty to one count of money laundering. (*Id.* at 10-44.) The factual basis for the plea was Petitioner's admission that he, along with his sister Angelica Escalante and his ex-wife Niomi Escalante, used proceeds from racketeering activities to build a home in Pirtleville, Arizona. (Doc. 42-1 at 120-121.) On November 7, 2013, Petitioner was sentenced to an eight-year term of imprisonment. (Doc. 16 at 40-44.)

On December 18, 2013, Petitioner filed his "of-right" Notice of Post-Conviction Relief ("PCR") pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. (Doc. 16 at 46-47.) In his PCR Petition, filed on June 30, 2014, Petitioner argued that (1) his trial counsel was ineffective for failing to conduct a thorough pretrial investigation, (2) his trial counsel was ineffective at sentencing for failing to challenge aggravating evidence and failing to present mitigating evidence, and (3) there are newly discovered material facts that would have resulted in acquittal at trial or would have changed the sentence. (*Id.* at 49-59.) On September 5, 2014, the PCR court denied the Petition on the merits. (*Id.* at 61-62.) Petitioner did not seek review in the Arizona Court of Appeals. (Doc. 15 at 3-4.)

***2** Petitioner constructively[3] filed a second Notice of Post-Conviction Relief on February 20, 2015. (Doc. 16 at 64-66.) After his appointed counsel filed a notice stating that he was unable to find any colorable claims (*id.* at 68-71), Petitioner filed a pro se PCR Petition alleging that (1) his trial counsel was ineffective for failing to move for severance and dismissal, (2) his first PCR counsel was ineffective for failing to secure documents, and (3) material facts existed that would have changed the outcome of his case had they been investigated (Doc. 17 at 3-17). The PCR court denied the Petition on November 30, 2016, finding no colorable claim. (*Id.* at 26.) Petitioner filed an unsuccessful Motion for Reconsideration. (*Id.* at 28-30, 32.) He thereafter filed a Petition for Review (*Id.* at 34-42), which was dismissed as untimely (*id.* at 51).

On October 31, 2018, Petitioner filed a Motion for Emergency Special Action with the Arizona Supreme Court, setting forth claims challenging his conviction and sentence. (Doc. 19 at

3-23.) The Arizona Supreme Court dismissed the Motion as procedurally improper on February 5, 2019. (*Id.* at 55.)

On November 14, 2018, Petitioner filed a third PCR Petition, claiming that (1) PCR counsel was ineffective for failing to present exonerating information, (2) newly discovered material facts existed that would have resulted in an acquittal at trial or would have changed the sentence, (3) trial and PCR counsel were ineffective for failing to challenge false aggravating evidence, (4) trial counsel was ineffective for failing to challenge the prosecution's nine-year pre-accusation delay, (5) newly discovered evidence proved prosecutorial misconduct, malicious prosecution, and fraud by the State, and (6) Petitioner received an illegal sentence because the aggravating factors were based on inaccurate information. (Doc. 18 at 20-44.) On February 19, 2019, the PCR court denied the Petition as precluded. (*Id.* at 141.) Petitioner did not seek review in the Arizona Court of Appeals. (Doc. 15 at 6.)

B. Federal Habeas Petition

On April 26, 2019, Petitioner constructively filed his § 2254 Petition in this Court. (Doc. 1.) Petitioner raises five claims: (1) his right to face his accuser was violated because the State did not disclose the existence of confidential informants; (2) he received an illegal sentence because the aggravating factors were based on inaccurate information; (3) the State's nine-year pre-accusation delay violated his Sixth and Fourteenth Amendment rights; (4) newly discovered evidence proves prosecutorial misconduct, malicious prosecution and fraud by the State; (5)(a) trial counsel was ineffective; and (5)(b) PCR counsel was ineffective.[4] (*Id.* at 6-17.)

On September 30, 2019, Respondents filed a Limited Answer, arguing that Petitioner's claims should be dismissed because they are time-barred, non-cognizable, waived, and procedurally defaulted. (Doc. 15.) Petitioner filed a Reply on October 21, 2019, arguing that he is innocent of the charge of conviction; that he signed a plea only because the trial court refused to sever his case from his co-defendants' cases; and that the prosecution targeted him, violated his rights, and withheld evidence. (Doc. 20.)

II. Magistrate Judge Bowman's R&R

***3** Magistrate Judge Bowman's R&R finds that some of Petitioner's claims are time-barred and the remainder are procedurally defaulted. (Doc. 21.) Specifically, the R&R finds that Claim (2), Claim (3), Claim (4) except as it relates to the tardy disclosure of informants, Claim (5)(a) and Claim (5)(b) are time-barred. (*Id.* at 4-6.) The R&R finds that Claim (1) and Claim (4) as it relates to the tardy disclosure of informants, although not time-barred, are procedurally defaulted. (*Id.* at 6-8.) The R&R further finds that Petitioner has not made a credible showing of "actual innocence" to rescue his procedurally defaulted and untimely claims. (*Id.* at 8-9.) The R&R does not reach Respondent's alternate arguments that Petitioner's claims should be dismissed as non-cognizable and/or waived. (*Id.* at 4.)

In his Objection, Petitioner reiterates arguments in support of the merits of his claims. (Doc. 28.) In addition, he argues that his claims are timely and that he is actually innocent. (*Id.* at 6-10.) Petitioner attaches various documents and excerpts of documents as exhibits to his Objection. (Doc. 28-1.)

In response to the Objection, Respondents argue that Petitioner has waived any challenge to Magistrate Judge Bowman's procedural findings with the exception of her determination that Petitioner's claim of newly discovered evidence was procedurally defaulted and her rejection of his actual innocence claim. (Doc. 31.) Respondents urge this Court to adopt Magistrate Judge Bowman's determinations on those matters. (*Id.* at 4-8.) They further argue that the new evidence attached to Petitioner's Objection need not be considered and does not establish Petitioner's innocence. (*Id.*)

III. Supplemental Briefs

In his supplemental brief in support of his Objection to the R&R, Petitioner argues that even if his claims are untimely or procedurally defaulted, they may be heard on the merits pursuant to the miscarriage of justice exception because newly discovered evidence establishes that Petitioner is actually innocent. (Doc. 39 at 5-7.) He also makes brief arguments concerning equitable tolling and cause-and-prejudice to excuse a procedural default. (*Id.* at 5, 7-8.) To support his assertion of innocence, Petitioner provides various affidavits and other evidence that he argues show that his sister and ex-wife purchased the Pirtleville property at issue as an investment and that the prosecution's valuation of the property was inflated. (*Id.* at 6-7; *see also* Doc. 39-1 to 39-6.) Petitioner further argues that his statements from his change-of-plea hearing "should not be considered" because he entered into his plea agreement "based on limited knowledge of the State's evidence and the ineffective assistance of his trial counsel." (Doc. 39 at 9.)

In their supplemental response, Respondents argue that Petitioner's evidence is insufficient to establish an actual innocence claim. (Doc. 42.) Specifically, Respondents argue that there is little evidentiary value in Petitioner's self-serving affidavit and the affidavits of family members whose interests lie in supporting his innocence claim; that Petitioner's evidence does not account for all of the outlay of money used to pay for the construction of the Pirtleville property; and that Petitioner's plea refutes any claim of actual innocence. (*Id.* at 11-14.) Respondents also argue that, in cases where the prosecution forgoes more serious charges in the course of plea bargaining, a habeas petitioner's showing of actual innocence must extend to those foregone charges, and Petitioner's evidence here does not extend to the two class-two felonies—conspiracy and fraudulent schemes and artifices—with which he was initially charged. (*Id.* at 14-15.)

IV. Standard of Review

A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations" made by a magistrate judge. 28 U.S.C. § 636(b)(1). The district judge must "make a de novo determination of those portions" of the magistrate judge's "report or specified proposed findings or recommendations to which objection is made." *Id.* "When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation" of a magistrate judge. Fed. R. Civ. P. 72(b), advisory committee's note to 1983 addition. *See also Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error."); *Prior v. Ryan*, CV 10-225-TUC-RCC, 2012 WL 1344286, at *1 (D. Ariz. Apr. 18, 2012) (reviewing for clear error unobjected-to portions of Report and Recommendation).

V. Discussion

***4** Although Petitioner's Objection largely fails to raise specific challenges to the R&R's findings concerning timeliness and procedural default, the Court will liberally construe the Objection as disputing the R&R's findings that the majority of Petitioner's claims are time-barred, that Claim 1 and Claim 4 as it relates to the tardy disclosure of informants are procedurally defaulted, and that Petitioner has not made a credible gateway claim of actual innocence.

A. Timeliness

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a one-year period of limitation applies to petitions for writ of habeas corpus filed by persons in custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d)(1). The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2244(d)(1). The limitation period is tolled during the time in "which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2).

Magistrate Judge Bowman correctly found that Claim 2, Claim 3, Claim 4 except as it relates to the tardy disclosure of informants, Claim 5(a), and Claim 5(b) are untimely. The judgment in Petitioner's case became final on October 10, 2014, with the expiration of the deadline for filing a Petition for Review of the denial of Petitioner's of-right PCR Petition. *See Summers v. Schriro*, 481 F.3d 710, 711 (9th Cir. 2007) (an "of-right" Rule 32 proceeding is form of "direct review" under § 2244(d)(1)(A) that delays the start of the running of the statute of limitations). AEDPA's limitation period began to run the next day and ran until February 20, 2015, when Petitioner constructively filed his second PCR Notice, which statutorily tolled the limitation period. *See* 28 U.S.C. § 2244(d)(2). The limitation period resumed upon the conclusion of Petitioner's second PCR proceedings and expired on August 18, 2017, prior to the filing of Petitioner's § 2254 Petition.

Petitioner argues that the discovery of new evidence, through due diligence, commences the one-year period of limitation under 28 U.S.C. § 2254(a)(1)(D), and that "[t]he moment [he] discovered and uncovered exculpatory evidence that

would exonerate him, he immediately wrote a new PCR and Special Action." (Doc. 28 at 6-7.) As the statutory provision cited by Plaintiff does not exist, the Court assumes that Plaintiff intended to refer to 28 U.S.C. § 2244(d)(1)(D), which provides that AEDPA's one-year statute of limitations on a claim does not begin to run until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Magistrate Judge Bowman found in her R&R that Claim 1 and Claim 4 as it relates to the tardy disclosure of informants were not time-barred because the limitation period for those claims began to run in the fall of 2018 pursuant to 28 U.S.C. § 2244(d)(1)(D). (Doc. 21 at 6.) In so finding, Magistrate Judge Bowman relied upon Petitioner's representation in his § 2254 Petition that he discovered evidence regarding the State's use of informants in the fall of 2018. (Doc. 1 at 17.) In his Objection, Plaintiff does not specify any other newly discovered evidence or the date upon which any such evidence was discovered. Accordingly, to the extent that Petitioner is challenging the R&R's application of 28 U.S.C. § 2244(d)(1)(D) only to Claim 1 and a portion of Claim 4—as opposed to other claims asserted in the § 2254 Petition—his objection fails.

***5** AEDPA's limitation period is subject to equitable tolling under certain circumstances, *Holland v. Florida*, 560 U.S. 631, 634 (2010), but equitable tolling "is justified in few cases," *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). A petitioner is entitled to equitable tolling only if he establishes: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649 (internal quotation marks omitted). The phrase "stood in his way" means that "an external force"—as opposed to the petitioner's own "oversight, miscalculation, or negligence"—"cause[d] the untimeliness." *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009). The party seeking to invoke equitable tolling "bears the burden of showing that this extraordinary exclusion should apply to him." *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002).

Petitioner argues in his supplemental brief that he is entitled to equitable tolling of AEDPA's statute of limitations because he diligently pursued "post-conviction relief multiple time[s], and at multiple levels" and "just recently" accessed documents and information regarding the valuation of the Pirtleville property. (Doc. 39 at 7-8.) However, Petitioner has not explained why he failed to discover the documents attached to his Objection and supplemental brief earlier, nor has he shown that an "external force" prevented him from timely filing his § 2254 Petition. *See Waldron-Ramsey*, 556 F.3d at 1011.

Nothing in Petitioner's Objection or supplemental brief casts doubt on the R&R's conclusion that Claim 2, Claim 3, Claim 4 except as it relates to the tardy disclosure of informants, Claim 5(a), and Claim 5(b) are untimely.

B. Procedural Default

A § 2254 petition subject to AEDPA cannot be granted unless it appears that (1) the petitioner has exhausted all available state-court remedies, (2) there is an absence of available state corrective process, or (3) state corrective process is ineffective to protect the rights of the petitioner. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). In cases not carrying a life sentence or the death penalty, "claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them." *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999) (per curiam). To properly exhaust state-court remedies, the petitioner must "fairly present" his claims to the state courts in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). A claim is fairly presented if the petitioner has described the operative facts and the federal legal theory on which the claim is based. *See Picard v. Connor*, 404 U.S. 270, 277-78 (1971).

A claim is considered procedurally defaulted and thus precluded from federal review if (1) the claim was not presented in state court and no state remedies are currently available because the court to which the petitioner would be required to present the claim in order to meet the exhaustion requirement would find the claims procedurally barred under state law, or (2) the petitioner raised the claim in state court but the state court rejected the claim based on "independent" and "adequate" state procedural grounds. *See Coleman*, 501 U.S. at 729-32, 735 n.1.

Because the doctrine of procedural default is based on comity rather than jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, courts will do so only if the petitioner demonstrates cause and prejudice, or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. To demonstrate cause, a petitioner must show that "some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

***6** Petitioner argues that he presented new evidence to the Arizona state courts in "a new PCR motion, as well as a Special Action." (Doc. 28 at 6.) To the extent that this argument constitutes an objection to the R&R's finding that Claim 1 and Claim 4 as it relates to the tardy disclosure of informants are procedurally defaulted, the objection fails. Petitioner's filing of a procedurally improper Special Action did not serve to exhaust these claims. *See Coleman*, 501 U.S. at 732 ("a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance"). And though the claims appear to have been raised in Petitioner's third PCR Petition (Doc. 18 at 20-42), Petitioner nevertheless failed to exhaust them because he failed to file a Petition for Review of the trial court's denial of that Petition. *See Swoopes*, 196 F.3d at 1010. The claims are procedurally defaulted because "it is clear that the state court would hold [them to be] procedurally barred" if Petitioner were to attempt to raise them in a subsequent PCR Petition. *Harris v. Reed*, 489 U.S. 255, 263 n.9 (1989); *see also* Ariz. R. Crim. P. 32.2(a).

Petitioner appears to argue in his supplemental brief that he has established cause and prejudice to excuse the procedural default of his claims because he "presented his claims and challenge to his conviction multiple times" and the prejudice to him "would be great if he were unable to argue his claims on the merits." (Doc. 39 at 5.) However, Petitioner has not shown that an "objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule," and thus he has failed to establish cause under the cause-and-prejudice standard. *Murray*, 477 U.S. at 488.

C. Actual Innocence

Actual innocence may serve "as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or ... expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). However, "tenable actual-innocence gateway pleas are rare." *Id.* To invoke this "miscarriage of justice" exception to AEDPA's statute of limitations, "a petitioner must show that it is more likely than not that no reasonable juror would have convicted him," *id.* at 399, in light of "new reliable evidence —whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

In his Reply to Respondents' Limited Answer, Petitioner made the conclusory assertion that "every single dollar the State claimed originated from money laundering can legally be accounted for." (Doc. 20 at 2.) As Judge Bowman found, that assertion is contradicted by statements that Defendant made under oath at his change of plea hearing on August 12, 2013. (Doc. 42-1 at 115-16, 119-20.) At that hearing, Petitioner admitted that he used the proceeds of racketeering offenses to build a home in Pirtleville, Arizona, and that he utilized the name of a business and straw purchasers to conceal the actual ownership and control of the property. (*Id.* at 119-20.) "Statements made by a defendant during a guilty plea hearing carry a strong presumption of veracity...." *United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008).

Petitioner presents for the first time in his Objection and supplemental brief evidence that he contends supports his actual innocence claim. Specifically, Petitioner attaches to his Objection various documents and excerpts of documents relating to the construction, financing, and valuation of the Pirtleville property. (Doc. 28-1.) He re-attaches the same documents to his supplemental brief (Doc. 39-4, 39-5) and also attaches (1) an affidavit in which he avers he is innocent (Doc. 39-1); an affidavit in which his sister Angelica Escalante avers that she purchased the Pirtleville property as an investment and financed the purchase through a second mortgage on her home (Doc. 39-2); an affidavit in which his ex-wife Niomi Escalante avers that she paid $90,000 for the construction of the Pirtleville home using a home equity loan from a property her father owned in California (Doc. 39-3); and documents relating to an investment by an individual named Alfredo Olivares Ballesteros (Doc. 39-6).

***7** A district court has discretion to consider supplemental evidence presented for the first time in a party's objection to a magistrate judge's report and recommendation. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000). However, the district court is not required to consider the evidence. *Id.* Most of the documents attached to Petitioner's Objection and supplemental brief were attached to Petitioner's Motion for Emergency Special Action filed in state court on October 31, 2018—before this habeas action was filed. (*Compare* Doc. 19 at 24-51, *with* Docs. 28-1, 39-4, 39-5.) Petitioner has not explained why he failed to present those documents earlier in these habeas proceedings.

Even if the Court were to consider the evidence attached to Petitioner's Objection and supplemental brief, it is insufficient to establish a gateway actual innocence claim. Contrary

to Petitioner's arguments, the evidence does not show that "every single dollar the State claimed originated from money laundering can legally be accounted for." (Doc. 20 at 2.) At most, the evidence indicates that the purchase of land in Pirtleville was funded through a $78,000 loan against another property owned by Petitioner's sister, and that portions of the money used to build a house and other structures on the land came from a loan from Petitioner's ex-father-in-law and an investment from Ballesteros. The evidence does not account for the total amount of money used to build the house and other structures on the property, nor does it show that Petitioner or his family members had sufficient legitimate income to fund the remaining amounts expended on the construction. Evidence concerning the valuation of the Pirtleville property is of little consequence, because the focus is not on the value of the property but on the source of the money expended in purchasing and constructing buildings on the property. Finally, the affidavits of Petitioner, his sister, and his ex-wife are of questionable credibility, considering that the affiants (1) have a vested interest in establishing Petitioner's innocence and (2) made conflicting statements under oath at their change-of-plea proceedings. (*See* Doc. 42-1 at 115-122.) Petitioner has not shown that it is more likely than not that no reasonable juror would have convicted him in light of the evidence attached to his Objection and supplemental brief.

D. Certificate of Appealability

Petitioner asks this Court to issue a certificate of appealability. (Doc. 28 at 14-18.) A certificate of appealability must issue before Petitioner can appeal this Court's judgment. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1). A certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is made if "reasonable jurists could debate whether ... the petition should have been resolved in a different manner," or that "the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000) (internal quotation marks omitted). Upon review of the record in light of the standards for granting a certificate of appealability, the Court concludes that a certificate shall not issue as the resolution of the Petition is not debatable among reasonable jurists and the issues presented are not adequate to deserve encouragement to proceed further.

Accordingly,

IT IS ORDERED that Petitioner's Objection (Doc. 28) is **overruled**, and Magistrate Judge Bowman's Report and Recommendation (Doc. 21) is **accepted and adopted in full**.

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is **denied**. The Clerk of Court is directed to enter judgment accordingly and close this case.

***8 IT IS FURTHER ORDERED** that the Court declines to issue a certificate of appealability.

All Citations

Slip Copy, 2021 WL 794183

Footnotes

1 The Petition was docketed on May 6, 2019, but Petitioner averred that he placed the Petition in the prison mailing system on April 26, 2019. (Doc. 1 at 17.) "Under the 'prison mailbox rule' ... a prisoner's federal habeas petition is deemed filed when he hands it over to prison authorities for mailing to the district court." *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001).

2 All record citations herein refer to the page numbers generated by the Court's electronic filing system.

3 Petitioner placed the Notice in the prison mailing system on February 20, 2015; the Petition was filed on February 23, 2015. (Doc. 16 at 64-66.)

4 Petitioner does not explain whether he believes his first PCR counsel was ineffective, his second PCR counsel was ineffective, or both. Because an ineffective-assistance claim against his second PCR counsel would not be cognizable in a federal habeas proceeding, 28 U.S.C. § 2254(i), this Court assumes—as did Magistrate Judge Bowman (Doc. 21 at 4)—that Petitioner is complaining about the attorney from his first, of-right PCR proceedings.

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