

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
CENTRAL DIVISION, KEARNEY MESA BRANCH

PEOPLE OF THE STATE OF)
CALIFORNIA,)
Plaintiff,)
vs.) CASE NO. 19T049326C
MATTHEW STERLING HOUSER,)
Defendant.)
_____)

RE: TRANSCRIPTION
OF
AUDIO-RECORDED COURT PROCEEDINGS
FEBRUARY 4, 2020

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APPEARANCES:

COMMISSIONER NADIA KEILANI

NICOLE COLLEEN CUSACK, ATTORNEY AT LAW
FOR MR. HOUSER

JONATHAN I. LAPIN
DEPUTY CITY ATTORNEY
CITY OF SAN DIEGO

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Recorded Proceeding Number 1

(Begin transcription of recorded proceedings.)

THE COURT: Good morning, everyone.

MR. LAPIN: Good morning, Your Honor.

THE COURT: We are here on the 9:00 a.m. motion calendar. This is the Matthew Houser matter, and the Marshall Weber matter, items one and two this morning.

Ms. Cusack, I believe you are on both of these matters, correct?

MS. CUSACK: Yes, Your Honor.

THE COURT: All right.

MS. CUSACK: Colleen Cusack on behalf of Marshall Brandon Weber, who is present before the Court, and for Matthew Sterling Houser, who I am appearing for, 977.

THE COURT: All right.

MR. LAPIN: Good morning, Your Honor. Deputy City Attorney Jonathan Lapin, for the people.

THE COURT: Okay. Thank you, both. Both of these matters are going to be heard in Department KM-2 by Commissioner Rice. All right.

MS. CUSACK: I have a 170.6, Your Honor.

THE COURT: In both matters?

MS. CUSACK: Yes.

THE COURT: All right. All right. So, it is

1 Commissioner Rice. I don't know if you want to amend that.

2 MS. CUSACK: Okay. I stand corrected.

3 THE COURT: No problem.

4 MS. CUSACK: I'm trying to give him a promotion.

5 THE COURT: And then do you have a (inaudible).

6 Do you have a stamp for the signature?

7 Today is the 4th. Thank you.

8 All right. In that case, both of these matters

9 will be sent out to Department KN-1, Commissioner Singer.

10 MS. CUSACK: Thank you, Your Honor.

11 MR. LAPIN: Thank you.

12 (End of recorded proceedings.)

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Recorded Proceeding Number 2

(Begin transcription of recorded proceedings.)

THE COURT: Good morning.

MS. CUSACK: Morning.

MR. LAPIN: Good morning, Your Honor.

UNIDENTIFIED FEMALE SPEAKER: First item on the 9:00 calendar. Item number one is The People v. Matthew Houser.

MS. CUSACK: Colleen Cusack here, Your Honor, on behalf of Mr. Houser who is not present during 977.

THE COURT: Okay.

MR. LAPIN: Good morning, Your Honor. Deputy City Attorney Jonathan Lapin for the People.

THE COURT: Okay. Good morning. In examining this case, I have made a determination that pursuant to the Code of Civil Procedure 170.1, the Court is disqualified from handling this case.

I am going to send the case back to A court, and have the matter reassigned from there.

(End of transcription of recorded proceedings.)

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Recorded Proceeding Number 3

(Begin transcription of recorded proceedings.)

THE COURT: Good morning.

MR. LAPIN: Morning, Your Honor.

THE COURT: My apologies for the delay. There was quite a bit of reading that had to be done in each of these cases.

MS. CUSACK: And writing, Your Honor.

THE COURT: Yes, absolutely. The harder part.

So, I would like to begin with the Houser matter. And I must confess, Ms. Cusack, in reading the motions, I am unclear as to what remains outstanding in the Houser matter.

MS. CUSACK: In the Houser matter, I was given one body-worn camera by the order of the Court, not that I received through the subpoena. And in watching that body-worn camera, it's revealed that there were two other -- actually, three other police officers on the scene that day, one of which had a conversation while wearing a body-worn camera with my client. The camera that I saw, that I had, didn't -- wasn't given to me -- didn't allow me to hear that conversation. The officer was some distance away from the other officer who was talking to my client back and forth. But it did reveal that there are

1 additional defendant statements out there. I also was not
2 able to determine from watching the body-worn camera what
3 that other officer's name was. So, I have no way of
4 specifically requesting that more -- anymore than I have
5 already done in requesting all the body-worn cameras from
6 everybody at the scene.

7 THE COURT: Okay. So, this is how I would like to
8 address everything, because I believe between the two cases,
9 we have a total of five motions. So, on the Houser matter,
10 I see that there are three motions. One was filed on
11 November 4th. That is a motion to compel compliance with a
12 subpoena duces tecum, which was continued a couple of
13 times, but, ultimately, is on calendar today. A motion to
14 release documents produced pursuant to a subpoena duces
15 tecum. I don't see that that was ever --

16 MS. CUSACK: That was addressed on the day that I
17 filed it. That's what -- those motions are handled the day
18 of. It comes to trial, and a motion to release, and that
19 was addressed that day.

20 THE COURT: I see. All right. So, we have two
21 motions in each of these matters. The second motion was
22 filed on December 19th. It is a motion to compel
23 discovery. And then a contempt motion was filed both in
24 this case as well as in the Weber matter.

25 Before we proceed, Ms. Cusack, I have to tell you

1 that both of your contempt motions are procedurally
2 defective, and I will tell you why. If you are bringing a
3 motion for contempt under CCP 1211, which you are in both
4 of these motions, you rely on 1211, you are supposed to
5 file -- this one is when a contempt is not committed in the
6 immediate view and the presence of the court or the judge
7 at chambers, an affidavit shall be presented to the Court
8 or judge of the facts constituting the contempt or a
9 statement of the fact by the referees, or arbitrators, or
10 other judicial officers.

11 There is a declaration filed by you in each of
12 these two cases, which I have read. That declaration does
13 not comply with C.C.P. 2015.5, which gives a very specific
14 language that must be used when you are signing something
15 under penalty of perjury. Specifically, you are supposed
16 to state that you are declaring under the laws of the State
17 of California, and neither one of your declarations states
18 that.

19 These are defective motions, that it cannot go
20 forward. I just want to make sure you are aware of that,
21 as to both of these motions. Both of the motions for
22 contempt are procedurally defective, and will not be
23 addressed on the merits today.

24 MS. CUSACK: Your Honor, there were individuals served
25 on this motion, that should be present on those. That they

1 were procedurally defective should be raised by them.

2 THE COURT: No. I am sorry. I disagree with you.
3 The Court cannot proceed on a defective affidavit. The
4 Court will not issue an order in re contempt on a defective
5 affidavit. It is not something the Court needs to wait for
6 a party to raise --

7 MS. CUSACK: Can I correct that right now since the
8 declaration is in my name, and I could simply attest to
9 that, and swear as to all the facts in the declaration?

10 THE COURT: You would need to file it in writing.
11 That's what the statute says. 1211 says an affidavit in
12 writing. An affidavit has that requirement. So, I
13 wouldn't be able to accept that from you today.

14 When and if that motion does get filed properly,
15 it will have to be heard by a judge. And so, the minute
16 order from today's date is going to reflect that when and
17 if the contempt motions are re-filed in either one of these
18 cases, they are to be sent to the supervising criminal
19 judge, which is Judge Eugenia Eyherabide, for her to assign
20 for a judge to hear. It will have to be done downtown.

21 MS. CUSACK: Your Honor, it's my understanding that
22 the -- there are two stages for the contempt. The first is
23 to request that a contempt citation issues, and that that
24 is proper in this court. Once that contempt citation
25 issues, then it goes downtown to be resolved as to a

1 finding, similar to the impeachment proceedings. To say
2 that this court would issue the contempt citation, and that
3 another court would address the (unintelligible). Now, I
4 have a --

5 THE COURT: What is your authority for that?

6 MS. CUSACK: This was an M.C.L.E. training on a
7 commissioner's source of power. And it indicates:
8 "Contempt proceedings. A commissioner may initiate
9 contempt proceedings by preparing and presenting to the
10 court an affidavit, statement of facts constituting the
11 contempt; however a commissioner may not adjudicate the
12 contempt unless the parties stipulate that the commissioner
13 may do it."

14 THE COURT: Yes. That is because the commissioner was
15 the one writing the affidavit, which would imply that the
16 commissioner is the person who is the complaining person,
17 essentially. That -- well, for example, if there was a
18 direct contempt that happened in this courtroom, then I
19 would be the one writing the affidavit and initiating that.

20 But that is not the case here. This is a party
21 initiating the contempt proceedings.

22 MS. CUSACK: But the party is initiating the contempt
23 proceedings based on contempt that it has been made
24 visible. The contempt has been documented by the Court
25 that there is, along the way, they -- there have been

1 numerous assertions. In fact, there has been a stip- --
2 representations by counsel here that the subpoena was not
3 complied with.

4 THE COURT: So, Ms. Cusack, you are aware of the
5 difference between a direct or indirect contempt. This is
6 an indirect contempt. It did not happen in the Court's
7 presence, either mine or Commissioner Doft's. What you are
8 alleging in your paperwork is that an order issued by
9 Commissioner Doft, that there was a failure to comply with
10 the order. That is the classic example of an indirect
11 contempt. In order to have -- to initiate the process on
12 the indirect contempt, you need to have an affidavit.

13 Your declaration is procedurally defective, because you
14 failed to comply with C.C.P. 2015.5 regarding the specific
15 language which must be used. When you are signing
16 something under penalty of perjury, you must state that you
17 are doing so under the laws of the State of California, and
18 you did not do that in this case. So, I cannot proceed on
19 the contempt, either to reassign it downtown, or to do
20 anything with it here, because I would essentially be
21 sending downtown a defective document, which they would
22 then only turn around and tell you to correct.

23 So, I am telling you at this point so that you
24 can perhaps act more expeditiously to have your matter
25 heard. But your motions for contempt in both of these

1 matters are defective. They are not going to proceed on
2 the merits.

3 MS. CUSACK: Okay. Can I get --

4 THE COURT: All right.

5 MS. CUSACK: -- a continuance of the trial date? That
6 would allow me time in between then to correct the
7 declaration and re-file.

8 THE COURT: So, we are speaking still strictly of the
9 Houser matter. What is the trial date in this matter?

10 MS. CUSACK: It's the 15th, from today, the 19th.

11 THE COURT: The 19th of this month?

12 MS. CUSACK: Uh-hmm.

13 THE COURT: All right. So, would a 30-day continuance
14 suffice?

15 MS. CUSACK: Yes. March 20th, I know I have another
16 commitment.

17 THE COURT: What is the next court date after
18 March 15th? It would have to be March 23rd. So, should
19 that give you enough time? So, when you do re-file your
20 motion --

21 MS. CUSACK: Would I just need the --

22 THE COURT: -- the clerk should be able to give you --
23 at that point should be able to direct it to go downtown to
24 Judge Eyherabide.

25 MS. CUSACK: Okay. So, I would bring it here to file

1 it and it would get assigned to a judge downtown?

2 THE COURT: That -- it would be sent to Judge
3 Eyherabide who would then assign it to a criminal judge
4 downtown.

5 MS. CUSACK: Presiding?

6 THE COURT: Yes.

7 MS. CUSACK: Okay. And what date were we talking?

8 THE COURT: March 23rd. Okay. March 23rd at
9 1:00 p.m.

10 MS. CUSACK: Yes. I can do that.

11 THE COURT: And I have one more question with respect
12 to the contempt motions, Ms. Cusack. And that's just when
13 you tee them up next time that they could be heard on the
14 merits. In reading the motion, it's really unclear to me
15 what is -- what remains outstanding. The motions are not
16 framed in a way as to clearly let the Court know what you
17 requested, what was ordered, and what wasn't provided.

18 So, I say this as somebody who has read thousands
19 of motions, that it really doesn't jump out at me.

20 MS. CUSACK: Okay.

21 THE COURT: You at one point state that
22 Commissioner Doft ordered body-worn camera footage to be
23 turned over, and then you say it was turned over. So, I
24 would say -- I would more clearly highlight what
25 specifically you feel --

1 MS. CUSACK: And that would be the --

2 THE COURT: -- forms the basis of the contempt, of the
3 noncompliance that you feel gives rise to --

4 MS. CUSACK: Okay. The fact that the commissioner had
5 to order that body-worn camera, in and of itself, is
6 evidence of contempt, because the subpoena had demanded
7 that that body-worn camera be produced at that time. So,
8 the order of the body-worn camera was because the subpoena
9 had been willfully failed to be complied with. So, I was
10 not as clear --

11 THE COURT: So, you are not saying that they violated
12 Judge Doft's -- Commissioner Doft's order?

13 MS. CUSACK: No.

14 THE COURT: You are saying just by virtue of the
15 violation of --

16 MS. CUSACK: Yes.

17 THE COURT: Okay.

18 MS. CUSACK: So, I will make that more clear. Thank
19 you for your note.

20 THE COURT: Just as an observation, so what I see now
21 is that we have one motion to compel in each of those
22 matters. The motion to compel in the Houser matter was
23 filed on December 19th.

24 All right. Attorney -- is it Lapin?

25 MR. LAPIN: Lapin.

1 THE COURT: Lapin. All right. Sir, I did see your
2 opposition. I want to be clear. Is your opposition to
3 this motion?

4 MR. LAPIN: Yes.

5 THE COURT: Okay. All right. So, with respect to
6 this motion, you may proceed to oral argument. Do you have
7 any arguments?

8 MS. CUSACK: All right. Thank you, Your Honor.

9 I would start with a quote from
10 Judge Alex Kozinski, who said: When a public official
11 behaves with such casual disregard for his constitutional
12 obligations, and the rights of the accused, it erodes the
13 public's trust in our justice system, and chips away at
14 the foundational premises of the rule of law. When such
15 transgressions are acknowledged, yet forgiven by the
16 courts, we invite their repetition."

17 Your Honor, this has been going on for some time.
18 And the reason that I have expended all the hours and
19 effort into this pro bono matter as I have, is because this
20 -- I am seeking systemic changes going forward, and not
21 just changes in the initial -- in the instant case. But I
22 would like assurances going forward that when I submit a
23 letter to the City Attorney under 1054, that that letter is
24 actually responded to by them in a meaningful, substantive
25 way. And I --

1 THE COURT: Ms. Cusack, if I may interrupt you real
2 quickly. With respect to this case, though, what is it
3 that you are specifically seeking? I am not going to make
4 a ruling that is based on broader policy issues. The
5 ruling is going to be confined to this case. So, what are
6 the specific issues, specific items at issue in this case
7 that are the subject of your motion?

8 MS. CUSACK: Your Honor, this is not just a motion
9 to -- for compelling discovery. It is also for sanctions.
10 Those sanctions are not just for future discovery, but the
11 fact that it has taken this many hours, attorney hours,
12 that their noncompliance is forcing in every single case
13 that I do, 60 hours of work in every single case. And
14 so --

15 THE COURT: I am going to --

16 MS. CUSACK: -- the sanctions request --

17 THE COURT: -- reiterate -- I am sorry to interrupt
18 you.

19 MS. CUSACK: My sanctions request --

20 THE COURT: I am sorry to interrupt you. I will not
21 address every single case. I am only going to address this
22 case, because this is the case that is before me. With
23 respect to this case, you can seek sanctions, but you will
24 need to confine argument to this case.

25 MS. CUSACK: Okay. What is the rule that you are

1 relying on to exclude one of my arguments that is valid
2 under the law?

3 THE COURT: I am not excluding any of your arguments,
4 but you need to keep your arguments relevant to this case.

5 MS. CUSACK: The argument that has been filed before
6 the Court for their consideration is the systemic,
7 recurring violations. And so --

8 THE COURT: Okay. So --

9 MS. CUSACK: I would --

10 THE COURT: -- your statement was that you were
11 seeking sanctions, not only for their failure to give you
12 what you requested in this case, but as to other cases on
13 which you have spent many hours. And I am telling you that
14 sanctions will not be to address any other case. We are
15 going to limit the discussion to this case.

16 MS. CUSACK: Okay.

17 THE COURT: All right. Thank you.

18 MS. CUSACK: The -- had I -- had this been a
19 misdemeanor case, and I requested this, I wouldn't have
20 needed to request discovery, that the -- my facts
21 arraignment in the case would have alerted the prosecutor
22 that I was the attorney of record, and discovery would have
23 been provided to me without request. So, even the mere
24 request in this case of the discovery, is -- goes beyond
25 what is required in misdemeanors. We do requests in

1 misdemeanors now for additional stuff, that we don't get in
2 the initial routine discovery.

3 Today, I am here seeking the routine discovery
4 that still hasn't been complied with, the stuff that all --
5 that I am needing to use the court to negotiate what those
6 items are. And that is going to be the same in every
7 (inaudible). So --

8 THE COURT: Ms. Cusack, what have you been provided so
9 far in this case?

10 MS. CUSACK: What I have been provided, Your Honor,
11 has been filed and lodged with the Court.

12 THE COURT: So, I have your lodgements. I am looking
13 at Exhibit G, which is the SDT.

14 MS. CUSACK: So, Exhibit K is the envelope.
15 Exhibit L, which I do have the original envelope that Your
16 Honor can examine -- Exhibit L is the instructions. So,
17 instead of providing me with body-worn camera evidence, as
18 was required in the SDT, or as was requested in the 1054,
19 I was given instructions for obtaining that police
20 body-worn camera.

21 THE COURT: So, that is Exhibit L?

22 MS. CUSACK: Right. And exhibit M is the file copy of
23 the notice to appear, which is two pages. Let me turn to
24 that real fast. So, that, I had requested the officer's
25 copy of the citation, not the file copy. The officer's

1 copy of the citation with the officer's notes, and I was
2 given instead the court, or the file copy.

3 THE COURT: That is Exhibit M?

4 MS. CUSACK: Yes.

5 THE COURT: And that does not contain the officer's
6 notes?

7 MS. CUSACK: Right. There's no notes provided.

8 THE COURT: Okay.

9 MS. CUSACK: So, I still haven't received any
10 officer's notes. Again, Officer Green, as I have
11 indicated, was one of three officers that was visible on
12 the body-worn camera, that I eventually did see. I don't
13 have the names of the other three officers. They
14 weren't --

15 THE COURT: The other -- there were a total of four?

16 MS. CUSACK: A total of four. Officer Green, and
17 three others. I don't have the other three names. One of
18 those three had an extensive conversation with my client
19 with the -- that was too far away for me to be able to hear
20 the conversation, but it was sufficient to see that there
21 was a conversation that was taking place.

22 THE COURT: Okay.

23 MS. CUSACK: And there were parts of the recording
24 where I did hear, in fact, some of that conversation. Just
25 not all of it. I don't know that officer's name to request

1 that anymore specifically than I have already done.

2 Exhibit N shows -- it's labeled the unit
3 history. That is three pages. And then the expansion page
4 is the special detail page.

5 And I had asked the officer when he was present
6 in court last, I had also requested -- in the interim, I
7 requested a copy of this transcript with the Court. I had
8 made my request at the counter. I was told -- I asked that
9 the transcript be provided free of charge because my client
10 is indigent, and I submitted that paperwork. I have not
11 received any response from the Court at all as to whether
12 or not that transcript will be provided, whether it will be
13 provided for free, or whether it will be provided at cost,
14 or whether it will be provided at all.

15 And so --

16 THE COURT: Let me just interrupt you for a moment,
17 because we jumped from Exhibit N to a separate issue now.

18 MS. CUSACK: Well, I am trying to recall for -- what
19 was -- what happened at the last proceedings. And it would
20 have been more advantageous for everybody involved --

21 THE COURT: So, Ms. Cusack, you obviously know this
22 case inside and out. And so, I am at a disadvantage here
23 because I am trying to come up to speed. So, I would
24 really ask you, so as to not -- so as to not confuse me,
25 let's stick to whatever we are discussing at the moment.

1 We will get back to the issue of the transcript. I don't
2 see a request in the record, but we will come back to that.

3 MS. CUSACK: Well, it's making my offer to Your Honor
4 as to what is out there available a little less complete, a
5 little less strong, because there were, you know, things
6 stated on the record that I would like to be able to point
7 to right now, but I have been prevented from that access.
8 So, it's a further indication of just how complicated this
9 case is just to get the basic discovery. Now, in this
10 case, he was questioned -- the officer was -- about the
11 get-it-done app. The get-it-done app --

12 THE COURT: What is that?

13 MS. CUSACK: It is an app that is used for people to
14 report sidewalks that need repair or potholes that need
15 repair. But recently, there is a campaign to tell
16 homeowners that they should use this get-it-done app to
17 report people that are in their way that they would like
18 moved out of the way. And so, the get-it-done app is being
19 used to report violations of persons living in
20 homelessness.

21 THE COURT: Is this item number Exhibit N, or is
22 this --

23 MS. CUSACK: It is related to Exhibit N --

24 THE COURT: Okay.

25 MS. CUSACK: -- because I asked for information. I

1 asked for information about the get-it-done app. I asked
2 for it in the subpoena. I asked for it in the body-worn
3 camera, in the discovery requests, and then at the hearing
4 when the officer was here, I asked him about whether the
5 get-it-done app was used to report the complaint about
6 Mr. Houser that then resulted in the police contact in
7 this case.

8 THE COURT: All right.

9 MS. CUSACK: He said at the time he did not think so.
10 But looking at this unit history, which I hadn't had the
11 chance to inspect at the time when I had questioned him,
12 the unit history has in the comments "get-it-done app. Get
13 it done." And so, those comments suggest that that app
14 was, in fact, used, and I am entitled to the data from that
15 get-it-done app --

16 THE COURT: Or at least a statement that none exists.

17 MS. CUSACK: -- relative to my client.

18 THE COURT: All right.

19 MS. CUSACK: So, the body-worn camera evidence, if
20 it's not through the get-it-done app, the body-worn
21 evidence did indicate that the officers were responding to
22 complaints. And so, I had requested those complaints in my
23 discovery, and I have not received any of that as well.
24 So, whether it's get-it-done or another form of that
25 complaint, that is what I am requesting.

1 THE COURT: Okay. Anything else that is still
2 outstanding?

3 MS. CUSACK: Yes. There is building surveillance,
4 there is overhead surveillance cameras that I haven't
5 been -- that are requested in these, that haven't been
6 provided. There's been no statement as to whether or not
7 they exist. There is smart street light data. There was a
8 TACIDS, T-A-C-I-D-S --

9 THE COURT: T-A-C --

10 MS. CUSACK: I-D-S. That is an acronym. I'm not sure
11 exactly what it stands for. But that has been in use for
12 several years now by the San Diego Police Department.

13 THE COURT: Is that a surveillance --

14 MS. CUSACK: It is a system in which the police take a
15 photo of the individual that they are contacting, and then
16 that photo is run through facial recognition software.

17 THE COURT: Okay.

18 MS. CUSACK: And so, that -- although the TACIDS
19 program was recently ordered to be terminated, that was
20 after this contact. And so, I would like data -- I would
21 like the information as to my client's -- whether my
22 client's photo was submitted to that, and any data that
23 exists on TACIDS about my client.

24 THE COURT: All right.

25 MS. CUSACK: There is also a database that is being

1 collected on all homeless -- persons living in homelessness
2 right now. That database is used to justify arrests
3 indicating that we have had X number of contacts with you
4 over the time period, and that, therefore, your case can be
5 issued for violation, versus somebody else, who hasn't had
6 those contacts, cannot.

7 And, in fact, on the body-worn camera evidence,
8 you see the officer scrolling through the contacts that he
9 has had with -- that the SDPD had documented that they had
10 with Mr. Houser. So, I know that that exists somewhere,
11 and I have not been provided that at all.

12 THE COURT: So, are you asking for the entire
13 database, or are you asking --

14 MS. CUSACK: I am asking for it specific to
15 Mr. Houser.

16 THE COURT: Are you just seeking to know whether or
17 not Mr. Houser is in this database?

18 MS. CUSACK: I am seeking all of the data -- all of
19 the actual, quantitative data about what those contacts --
20 what those contacts were --

21 THE COURT: Okay.

22 MS. CUSACK: -- what they were about, when they
23 happened, who was involved, were pictures taken, was TACIDS
24 used. All of that.

25 THE COURT: With respect to Mr. Houser only?

1 MS. CUSACK: That is what I am --

2 THE COURT: Okay.

3 MS. CUSACK: -- limiting in requesting here.

4 THE COURT: All right. Okay. Okay. So, I am
5 looking, just so I am -- we are on the same page, you are
6 looking for a copy of the body-worn camera footage rather
7 than simply instructions on how to access it online?

8 MS. CUSACK: Yes, I am, Your Honor.

9 THE COURT: Okay. You are looking for the names of
10 the three officers who were with --

11 MS. CUSACK: I would make a qualification. I do have
12 the body-worn evidence of Officer Green. I have a copy of
13 that.

14 THE COURT: All right.

15 MS. CUSACK: It's the other officers at the scene,
16 and, it's, particularly, the officer having a conversation
17 with my client.

18 THE COURT: Is Exhibit L, does that -- if you were to
19 access it, would it give you the body-worn footage of the
20 other three officers?

21 MS. CUSACK: Your Honor, they keep telling me the
22 instructions for how to set up an evidence.com account.
23 And I have had an evidence.com account for a dozen years.
24 So, these instructions are, I think, just subterfuge. I --
25 but the -- if they --

1 THE COURT: So, you are looking for the names of the
2 three officers, and whether or not there -- any of them
3 have body-worn camera footage, correct? I am just going
4 over the list of items that I have.

5 MS. CUSACK: Correct.

6 THE COURT: Okay. Are you looking for any information
7 from the get-it-done app, or any other complaint format
8 that was used with respect to Mr. Houser?

9 MS. CUSACK: Yes.

10 THE COURT: You are looking for any surveillance
11 footage. You are looking for any TACIDS information, which
12 is facial recognition software. And you are looking for
13 any information regarding Mr. Houser, whether in the
14 database -- on the homeless database, that you think
15 exists?

16 MS. CUSACK: Yes.

17 THE COURT: Okay.

18 MS. CUSACK: Any contacts. Any prior contacts they
19 have had, documented, prior documents --

20 THE COURT: Right.

21 MS. CUSACK: -- with Mr. Houser.

22 THE COURT: Did I miss anything?

23 MS. CUSACK: Those are the things that I know exist,
24 Your Honor.

25 THE COURT: So, I do see that -- I am looking at your

1 SDT, item number one seeks the name and address of the
2 arresting officer and all other officers at the scene. So,
3 I do feel that that item is covered in your SDT.

4 Item number three, which is seeking real evidence
5 of all complaints from the community documented in writing,
6 visually, or electronically and upon which the responding
7 officer is relying as the basis for the instant enforcement
8 action, that would seem to cover the get-it-done app, or
9 any other form of complaint.

10 MS. CUSACK: Your Honor, I know you are looking at the
11 SDT, but that is not the motion that is pending. The
12 motion that is pending is the motion to compel discovery
13 broadly, not just under the SDT, also the 1054. And
14 because I am required to, there is an order that I filed
15 that I have lodged with the Court, that you could use for
16 your purposes, that mirrors the requests that were made in
17 the SDT and the discovery requests.

18 THE COURT: So, has there -- I am trying to see
19 whether or not there was a previous request for this
20 discovery.

21 MS. CUSACK: Okay.

22 THE COURT: So, do you want me not to do that?

23 MS. CUSACK: Oh, I'm sorry. I misconstrued where you
24 were --

25 THE COURT: It's your call, Ms. Cusack. If you --

1 MS. CUSACK: I just misconstrued where you were going.

2 THE COURT: Okay.

3 MS. CUSACK: I thought you were going -- I thought it
4 was -- you were --

5 THE COURT: All right. Is there another --

6 MS. CUSACK: -- going with the order.

7 THE COURT: -- (unintelligible) from the SDT where you
8 requested these items? I want to make sure that I am
9 looking at --

10 MS. CUSACK: The discovery letter. The info discovery
11 letter that I sent to the prosecutor.

12 THE COURT: All right. Is that part of your lodged
13 documents?

14 MS. CUSACK: Yes.

15 THE COURT: What exhibit is that?

16 MS. CUSACK: Exhibit E. E, as in elephant.

17 THE COURT: All right. So, I still see the complaints
18 from the community, that would cover the requests that you
19 are clarifying as the get-it-done app, or any other form of
20 complaint by the community.

21 Can you point me to the specific item? Because
22 this is forming the basis of your motion, this informal
23 discovery request. Can you point me to the item number
24 that would encompass the names of the three officers, the
25 three additional officers?

1 MS. CUSACK: The witness, last name and address of the
2 arresting officer, and all other officers at the scene.

3 THE COURT: What item number is that?

4 MS. CUSACK: Number one. Oh, I'm looking at the
5 subpoena. Sorry.

6 THE COURT: Ms. Cusack, are you able to point me --

7 MS. CUSACK: Not the names, Your Honor. But in the
8 SDT, it was, Your Honor.

9 THE COURT: All right. So -- but your motion is based
10 on this informal discovery letter, correct?

11 MS. CUSACK: It's based on everything. It's based
12 on --

13 THE COURT: It's based on everything. Do I have --

14 MS. CUSACK: -- Exhibits A through U.

15 THE COURT: So, all right. So, if it's based on
16 everything, then I am going to go back to look at the SDT,
17 because that's easier for me to follow. Okay?

18 MS. CUSACK: Okay.

19 THE COURT: So, with respect to the surveillance
20 footage, can you point me to either the SDT, or the
21 informal discovery letter to where that item is requested,
22 please?

23 MS. CUSACK: I think it would be covered, Your Honor,
24 under the real evidence request, "all real evidence seized
25 or obtained as part of the investigation."

1 THE COURT: A CT, or informal request?

2 MS. CUSACK: That is in -- on page 5 of 8 of
3 Exhibit E, the informal request.

4 THE COURT: What number is that? I am sorry.

5 MS. CUSACK: It's page 5 of 8, and it's number three.
6 Real evidence.

7 THE COURT: How do you --

8 MS. CUSACK: And then --

9 THE COURT: I'm sorry. If I may, because this request
10 says: "All real evidence seized or obtained as a part of
11 investigation of the offense charged. This request
12 includes the entirety of any video or audio recording
13 captured by camera mounts in the vehicle, or held or worn
14 by an officer and depicts the violation to include
15 30 seconds before the violation, and 30 seconds after the
16 officer/defendant contact concludes."

17 MS. CUSACK: What this request includes, Your Honor,
18 is simply in addition to -- I mean, the request is that for
19 the number three real evidence, which 1054 authorizes, and
20 that my -- this request includes does not limit at all --

21 THE COURT: Sure.

22 MS. CUSACK: -- that inclusion.

23 THE COURT: Sure. But --

24 MS. CUSACK: There's additional items in this
25 discovery request as well, that would encompass that.

1 THE COURT: We will get to those. But for the moment,
2 you directed me to this one, so let's just stay on this
3 one.

4 MS. CUSACK: So, this is --

5 THE COURT: It says "all real evidence seized or
6 obtained." So are you -- so, when you say surveillance
7 footage. Would that be --

8 MS. CUSACK: The smart --

9 THE COURT: -- the smart lights?

10 MS. CUSACK: -- the smart lights in which the police
11 department have access to that 24/7. And I have absolutely
12 no clue if they have used that in this case, or not, and
13 that that information, if it's --

14 THE COURT: I think that --

15 MS. CUSACK: They bragged recently about how it's used
16 in -- it's been used in 200 investigations. And so --

17 THE COURT: But I think seized or obtained, so whether
18 or not the police go back to look at that footage, or
19 whether or not that footage -- this is a type of violation
20 for which that footage would be seized, I think that that
21 is not entirely clear.

22 MS. CUSACK: I believe that it's been seized. I think
23 that just because the police haven't gone and picked up the
24 camera and brought it physically to their thing, that they
25 have -- they are seizing all of that every day. Every time

1 they go and look at that evidence, that constitutes a
2 seizure that I can attack under the Fourth Amendment.

3 THE COURT: Okay. So, are you specifically speaking
4 of the smart lights, or -- you are not speaking about
5 private parties?

6 MS. CUSACK: Yes. There is private party surveillance
7 in which the San Diego Police Department has agency
8 agreements in order to look at that footage whenever it
9 wants.

10 And so --

11 THE COURT: So, is that placing an affirmative duty on
12 them to go to that third party and seize that footage? Is
13 that what you are requesting in this case?

14 MS. CUSACK: Well, the --

15 THE COURT: For example --

16 MS. CUSACK: If they don't --

17 THE COURT: For example, if there's a business in the
18 area --

19 MS. CUSACK: No. No. That's not what they have to
20 do, because they sit in their police department, and they
21 have access to these private business security cameras,
22 because these private business securities have given them
23 the --

24 Yeah. But if it's not too close, then I am going
25 to struggle in the transcript hearing what I am saying, so

1 that is one of the problems.

2 THE COURT: Just keep a distance, so there's not the
3 feedback. Okay.

4 MS. CUSACK: So, the -- and now I lost my train.

5 So, the -- there is a program in place in which
6 you have a private security with the business. You go and
7 you sign paperwork, and the police now have access to that
8 security footage, and they can look at it. They don't have
9 to ask the business for it. They have access to it
10 whenever they want to look at it.

11 THE COURT: So, the fact that they have access, is
12 that the same as seized or obtained?

13 MS. CUSACK: I think yes. They have obtained that.
14 As soon as they got permission to have that footage shown
15 -- access to it, that that is evidence that they are
16 looking at.

17 And, yes, maybe these rules, when they were
18 written 20, 30 years ago, didn't anticipate all of this
19 technological stuff. But this is still evidence, that if
20 it hurt my client, you can be very sure that this would be
21 introduced against him.

22 And so, if it's favorable to my client, under
23 Brady, I should be entitled to see that as well.

24 THE COURT: All right. And with respect to the
25 TACIDS, so the facial recognition software, is that also

1 under this item?

2 MS. CUSACK: That would be number five, prosecution
3 trial witness statements and reports, audio recordings,
4 video recordings, digital transmissions, radio
5 transmissions related.

6 THE COURT: And the database on homeless?

7 MS. CUSACK: The same.

8 THE COURT: All right. And with respect to --

9 MS. CUSACK: And there is also --

10 THE COURT: Ms. Cusack --

11 MS. CUSACK: -- there's also exculpatory. There's
12 multiple requests throughout this. You know, it's relevant
13 and material evidence, Your Honor. But the exculpatory
14 evidence encompasses every request that I have stated to
15 you today. And there's specific requests, again, that flow
16 from it.

17 But everything I am asking for is evidence that
18 counters the defendant's guilt, that may tend to affect the
19 credibility of material prosecution witnesses, including
20 conflicting statements of those witnesses, expressed or
21 implied promises to those witnesses, prior false statements
22 by that witness, and any evidence contradicting the
23 statement and the report.

24 THE COURT: All right. Is this the entirety of the
25 items that remain at issue?

1 MS. CUSACK: Again, Your Honor, that I am aware of.

2 THE COURT: Okay.

3 MS. CUSACK: This negotiation with -- Your Honor,
4 there is a City Attorney that has been silent. There is a
5 witness in the room that has information on the body-worn
6 camera program, and SDT.

7 The duty to inquire of the prosecutor hasn't been
8 done here. So, my guess as to what is out there, there is
9 a big gap. Because what should happen is that the City
10 attorney should be talking to the police officer in this
11 and determining what exists, what of that I am entitled to.
12 They are required to work with the City Attorney -- the
13 police are -- and they are not required to work with me.

14 There is also referenced throughout this
15 discovery, the prosecutor's reply that there is this plan
16 in place, and this plan for informal discovery to be
17 provided by the police agency. And I would like evidence
18 of that plan, because that plan hasn't been made aware --
19 that plan hasn't been -- defense attorneys don't know that
20 plan -- at least I don't. It's not been made available to
21 the pro per defendant.

22 My client has specifically gone and asked for
23 discovery at the police department. And he -- and a client
24 of mine, who is in court today, and is available to
25 testify, and if he did, he would tell you that that officer

1 said, "If you want anything from us, you are going to have
2 to force us to provide this," that he asked for body-worn
3 cameras, and the officer laughed at him, and said, "Why are
4 you here? This is what your attorney should be doing. We
5 don't -- you have to go, and refer" -- and gave him a civil
6 subpoena, and said that is what he would have to do to get
7 this information.

8 So, there is a lot of assertions in this
9 motion, the prosecutor's response, that I find very
10 troubling, in these glib representations as to how easy
11 this is for individuals to do. And, in fact, there is
12 nothing written down as to this. The police are not even
13 aware of this plan that the City claims to exist for
14 providing informal discovery.

15 And, apparently, we have to subpoena just to get
16 the request -- the information on how to get it. Because
17 when he asked -- my client asked for the body-worn camera,
18 he wasn't given this request to get it. He was given a
19 subpoena, and he said, "You need a subpoena to get anything
20 from us."

21 THE COURT: All right. Mr. Lapin, I read your
22 opposition, and I would like to know the parameters of your
23 presence here today, sir.

24 MR. LAPIN: I am not sure how to answer that.

25 THE COURT: Because on the one hand, the City Attorney

1 is -- seems to assert that there is really no duty or
2 responsibility on these infraction cases.

3 MR. LAPIN: Correct.

4 THE COURT: And on the other hand, you present
5 argument regarding what Ms. Cusack is or is not entitled
6 to. So, I'm a little bit confused as to what you -- what
7 the City attorney's role is in this proceeding here today.

8 MR. LAPIN: So, when this motion was calendared in the
9 way that it was calendared, it was our understanding that
10 the City attorney's office, that we -- our presence was
11 requested by the Court in order to respond, and, therefore,
12 we did respond in that way.

13 THE COURT: So, that was with respect to the contempt.
14 I am looking at the November 4th order that was issued by
15 Commissioner Doft. Is that the order that you are speaking
16 of?

17 MR. LAPIN: There is two. I guess there's two. One
18 is the November order, which came, and was a direct order
19 to the City attorney's office to disclose the body-worn
20 camera, which we complied with. And second was this motion
21 to compel and the motion for sanctions, that was calendared
22 for this date. It was my understanding, based on that
23 motion, that the Court was requesting our presence here,
24 and so we filed a response accordingly.

25 THE COURT: So, the motion was filed by Ms. Cusack on

1 December 19th --

2 MR. LAPIN: The only motion I received -- my office
3 received in this regard was the motion that was filed,
4 dated -- it was filed on December 19th with today's hearing
5 date.

6 THE COURT: So, there were two motions that were
7 filed. One was the contempt motion, which has been taken
8 off calendar. And then the second motion, which is the one
9 to compel discovery, that one does not direct the City
10 Attorney to appear today. The minute order from
11 December 19th continues it to today's date, but I don't
12 see anything on that minute order.

13 MR. LAPIN: So, I see from the -- if the Court is
14 looking at the minute order, I could understand that. I am
15 talking about the motion that Ms. Cusack filed.

16 THE COURT: Okay.

17 MR. LAPIN: Ms. Cusack's motion that was filed is
18 titled notion -- motion --

19 THE COURT: That's fine, but I wanted to clarify the
20 Court did not direct the City Attorney to appear today on
21 this motion, so --

22 MR. LAPIN: Then that was our mistake.

23 THE COURT: All right. So, what are the parameters of
24 your presence here today?

25 MR. LAPIN: If the Court has not -- if the Court

1 hasn't directed us to be here, then our position would have
2 been the same as noted in our paper, is that we are not the
3 proper party to be here, because we are not part of the
4 prosecution team to represent in these infraction cases.

5 THE COURT: So, again, the only order that I see
6 directing any kind of action from the City Attorney is
7 Commissioner Doft's November 4th order. Ms. Cusack, feel
8 free to correct me if I'm wrong here, because as I
9 mentioned, you know this case inside and out. The
10 December 19th order does not appear to direct -- does not
11 direct the City Attorney to be here.

12 MS. CUSACK: Your Honor --

13 THE COURT: So, given the contempt issue is no longer
14 before the Court today, your opposition is not clearly
15 formulated to the contempt issue, and that's why I have
16 some confusion here. It seems to be more broadly framed as
17 to what Ms. Cusack is or is not entitled to.

18 MR. LAPIN: Correct. Under the idea of the -- under
19 responding to the motion to compel.

20 THE COURT: All right.

21 MR. LAPIN: And my understanding, just from the way
22 the motion was filed, that that Court had requested our
23 presence and/or a response from us.

24 THE COURT: Is it your position, that if there is a
25 motion to compel, that the City Attorney has standing to

1 appear on that motion?

2 MR. LAPIN: It's not that -- what has happened,
3 historically, is that if the -- that the Court has directed
4 the City attorney's office to appear and has scheduled a
5 hearing, and so, therefore, we have responded to that.

6 THE COURT: I don't see that in this case. So, is it
7 your position, that absent a Court order directing the City
8 Attorney to appear, that you would have standing to appear
9 to oppose a motion to compel discovery?

10 MR. LAPIN: No, unless the motion had been directed at
11 the City attorney's office.

12 THE COURT: If the motion was directed at the City
13 attorney's office, which this motion, in part, is, then you
14 do feel that you would have standing to appear?

15 MR. LAPIN: Yes.

16 THE COURT: Okay. All right. So, I did see your
17 opposition --

18 MS. CUSACK: Can I correct some items that were
19 stated?

20 THE COURT: Sure. Feel free.

21 MS. CUSACK: One was that the City Attorney did comply
22 with the November 4th order, and I just don't want to let
23 that stand uncorrected. I did receive the body-worn camera
24 evidence from the police officer directly. So, in that
25 regard, it was complied with.

1 The response that I got from the City Attorney's
2 office, however, was another copy of the instructions on
3 how to get the body worn-camera. They didn't provide the
4 actual body-worn camera. They gave me another instruction
5 sheet on that.

6 THE COURT: Okay. Thank you for that clarification.

7 MR. LAPIN: And I disagree with that. My
8 understanding is that I talked to the liaison officer in
9 our -- who is with San Diego Police Department, and who
10 advised on these -- as this motion was coming up, that he
11 had a copy made and delivered it to Ms. Cusack's office.

12 THE COURT: And so, that -- were you relieved of the
13 obligation at that point, in your view?

14 MR. LAPIN: As far as the order went, yes.

15 THE COURT: Okay.

16 MR. LAPIN: Because it was -- it was given on time. I
17 think the date was the 21st.

18 THE COURT: What matters here is that the body-worn
19 camera footage, that was ordered to be turned over, was
20 turned over, Ms. Cusack. I am not too hung up on how you
21 received that body-worn camera footage, so I think we can
22 move on from that point.

23 So, do you wish to make any argument with respect
24 to the opposition you filed, sir?

25 MR. LAPIN: I would like to make sure -- yes.

1 First, I want to make clear that we have two
2 aspects that are being discussed: Discovery under 1054,
3 and discovery under the subpoena duces tecum. To the
4 extent that counsel is relying on 1054, that prohibits the
5 subpoena duces tecum on the police department. And I have
6 made the citations in my papers in that regard with -- on
7 page 7, noting that discovery from investigating agencies
8 are required to proceed through the informal discovery
9 process or through hearing, and not through subpoenas.
10 Case law also under Barrett holds the same. So, to the
11 extent that counsel is saying that the City Attorney's
12 office has this obligation under 1054, then it would be
13 improper to be issuing subpoena duces tecums.

14 THE COURT: And you are relying on 1054.5?

15 MR. LAPIN: Correct.

16 THE COURT: All right. So, I think Ms. Cusack had
17 clarified that her motion relies on her informal discovery
18 requests.

19 MR. LAPIN: I do not understand that. I understand
20 her motion was on both.

21 MS. CUSACK: May I be heard on this, Your Honor?

22 THE COURT: Yes.

23 MS. CUSACK: It is so arrogant for the City Attorney
24 to stand here, and ironic for the City Attorney to stand
25 here after sending me a letter that said, "We are not

1 giving you discovery, go ask the police for it."

2 And then I go to the police, and I -- we -- there
3 is no informal discovery. They send me to the police.
4 They say, "We are not going to give you anything. Go to
5 the police."

6 The police have no informal discovery obligation.
7 They have no way of getting this information, except by
8 SDT. So, they can't, on one hand say that "I can't SDT the
9 police," while on the other hand, they have told me to
10 negotiate exclusively with the police.

11 I would like to call a witness as to that point,
12 Your Honor.

13 THE COURT: Do you have a response to that, Mr. Lapin?
14 Can you serve an informal discovery request on the police
15 department?

16 MR. LAPIN: Yes, she can. The informal discovery --
17 as noted in the papers, the informal discovery when one
18 comes to the City Attorney's office, they are directed to
19 contact the records unit of the police department.

20 THE COURT: And what happens when the records unit
21 receives an informal discovery request?

22 MR. LAPIN: They respond to that request.

23 MS. CUSACK: Your Honor, I think we need to swear this
24 witness in if he is going to be making these assertions
25 of fact that have no basis in fact.

1 THE COURT: Who is the witness?

2 MS. CUSACK: The attorney standing beside me.

3 THE COURT: Oh, I see.

4 MS. CUSACK: He is claiming that this, in fact,
5 happens. And I have a witness present to testify as to
6 what happens when somebody goes to 1401 Broadway and asks
7 for discovery. I am prepared to present that, and that is
8 what I was hearing. I indicated that we had two witnesses.
9 This is one of them. I would like this preserved at this
10 point.

11 THE COURT: So, Ms. Cusack, let's say that an informal
12 discovery request is served on the police department, and
13 it's promptly ignored. Does that mean that an SDT then is
14 your remedy?

15 MS. CUSACK: First of all, how do I even serve the
16 informal request on the police department? They will not
17 accept. All right. So, they don't take that document.
18 When I went to serve this particular motion, the Houser
19 motion, they -- you need to pick up the phone and let
20 the --

21 THE COURT: Can you step back a little bit from the
22 microphone, please?

23 MS. CUSACK: You need to pick up the phone and let the
24 custodian of records know that you are there. And I let
25 them know I was there. And they said, "What do you have?"

1 I said, "I have motions to file," and --

2 THE COURT: To file, or to serve?

3 MS. CUSACK: To serve.

4 THE COURT: Okay.

5 MS. CUSACK: Motions to serve. And they sent somebody
6 down from internal affairs to talk to me. Two officers
7 from internal affairs. So, I handed them the motions, and
8 they proceeded to argue with me, because they didn't know
9 where to give these motions to. I kept telling them, "That
10 is not my problem, and you figure that out when I leave
11 here. You now have them."

12 THE COURT: So, are we talking about motions, or are
13 we talking about informal discovery requests?

14 MS. CUSACK: Anything. They won't take informal
15 discovery requests.

16 THE COURT: So, let's focus -- let's just focus on
17 informal discovery requests for the moment.

18 MS. CUSACK: There's no -- my client went to
19 1401 Broadway, and said "I want to request discovery."
20 They said -- they told him, "The only way you are going to
21 get anything from us is to subpoena it."

22 I said -- he specifically asked for body-worn
23 cameras. He was given a civil subpoena form, and told to
24 go to the courthouse at 1100 Union Street to get that, that
25 that -- and I am continuing to represent that. I would

1 like to call my witness, Your Honor.

2 THE COURT: Just a moment, Ms. Cusack.

3 So, sir, how would somebody serve the police
4 department?

5 MR. LAPIN: By contacting the records division and
6 asking for the discovery related to it, and that could be
7 either the body-worn --

8 THE COURT: How do you contact the records division?

9 MR. LAPIN: There is a phone number that is given.
10 It's within defense counsel's lodgement of exhibits. I
11 think it's F.

12 MS. CUSACK: It is. Here it is.

13 MR. LAPIN: All right. So, there is both a phone
14 number and a website to contact the records unit and ask
15 for that discovery.

16 THE COURT: If the -- is there a way to electronically
17 serve the informal discovery request?

18 MR. LAPIN: No, I don't believe so.

19 THE COURT: So, you have to do it in person. And what
20 happens if you get to the police department and the records
21 custodian does not come out, and doesn't send anyone out to
22 receive the paperwork?

23 MR. LAPIN: I don't know.

24 THE COURT: What would a person do at that point?

25 MR. LAPIN: I don't know what a person -- I guess

1 maybe one option would be to come to court and ask the
2 court to get involved -- right -- the 1054 options, are
3 specifically stating that the informal discovery requests
4 are not sufficient --

5 THE COURT: What requests would you bring to the
6 court? You are not bringing a motion to compel, because
7 you have been precluded from serving your request to begin
8 with. So, what would you come to court to do?

9 MR. LAPIN: Oh, no. I didn't understand. Well, I
10 don't think that you have been precluded from serving it if
11 you have gone and given --

12 THE COURT: That is what Ms. Cusack just described.

13 MR. LAPIN: Yes, that is what she described.

14 THE COURT: Yes.

15 MR. LAPIN: And I can certainly see many scenarios in
16 which the interaction might be -- it's not clear what is
17 being communicated, and so the proper action isn't taken at
18 that time.

19 THE COURT: So, what is a party to do? A criminal
20 defendant, that is entitled to rights, what are they to do?

21 MR. LAPIN: I think that they should come back to
22 court, and advise the Court that when they went to the
23 records unit --

24 THE COURT: What does that court appearance look like?
25 How would we calendar it here?

1 MR. LAPIN: I believe it would be as a motion to
2 compel discovery.

3 THE COURT: To compel what? The discovery hasn't been
4 served. I mean, I don't want us to go in circles here, but
5 Ms. Cusack is saying that she is having difficulty even
6 serving the police department because the City Attorney
7 refuses to accept service on SDPD's behalf; correct?

8 MR. LAPIN: Correct.

9 THE COURT: So, what is a party to do if the City --
10 if the police department will not cooperative, essentially,
11 in accepting service?

12 MR. LAPIN: I think the police department can be
13 forced to accept service. That is the point.

14 THE COURT: How would that be done? Can you please
15 explain that to me? How --

16 MR. LAPIN: All that has to be done is the item has to
17 be left there. The Court is asking how is that done.
18 Ms. Cusack in delivering the motions can deliver it there.
19 If the police department chooses not to take it,
20 Ms. Cusack can come back to court and advise the court, "I
21 left it there, and the police department chose not to take
22 it --

23 MS. CUSACK: So, in the lobby?

24 MR. LAPIN: -- but it has been served."

25 MS. CUSACK: I can leave it in the lobby? Are you

1 representing, as a representation of the City Attorney,
2 that I can leave it in the lobby.

3 MR. LAPIN: No. The San Diego Police Department.

4 THE COURT: So, let's not -- please, not speak
5 directly to each other.

6 There's a whole lot of energy being expended in
7 having to remedy the City Attorney not accepting service on
8 behalf of SDPD. And so, what you are representing to this
9 Court today is that if she follows the instructions that
10 you are saying should be followed, and she is still unable
11 to serve that informal discovery request, that then
12 judicial resources should be expended in the form of a
13 court hearing, and perhaps multiple courting hearings,
14 simply in order to get that request delivered. And I am
15 having a hard time understanding how that serves the
16 broader, you know, public interest and judicial economy.

17 MR. LAPIN: I agree, it doesn't. I think that -- if
18 that is what is occurring -- which I don't agree that is
19 what is occurring -- then that would be problematic.

20 But what I will also say is that the Court is
21 asking -- if the City Attorney is not accepting service,
22 this is countywide. The district attorney's office does
23 not accept discovery. All the police agencies outside the
24 City are handled in the same way. The defense counsel has
25 to go to the police agencies -- the Sheriffs, El Cajon

1 Police Department, La Mesa Police Department. This is how
2 it is done.

3 THE COURT: So, what is the role of the City Attorney
4 with respect to infractions?

5 MR. LAPIN: The City Attorney's office subpoenas
6 witnesses, issues subpoenas for trials, and handles appeals
7 and appears when directed by the Court to appear.

8 THE COURT: All right. So, is it safe to say that you
9 cannot make any representations in this court with respect
10 to whether or not SDPD is making it possible for the
11 defendants to serve informal discovery requests?

12 MR. LAPIN: I can advise the Court that I was in the
13 group that met with San Diego Police Department when this
14 change was initiated back in November.

15 THE COURT: Would you like to be sworn in, sir?

16 MS. CUSACK: I would like him to be sworn.

17 THE COURT: I think we can swear you in if you are
18 going to testify as to your personal knowledge of --

19 MR. LAPIN: So, the Court is asking me to make those
20 representations? Because the Court just asked if I was
21 wanting -- if I was making those representations.

22 THE COURT: So, I asked you what a person was to do,
23 and then you proceeded to tell me your personal knowledge
24 from working within this working group. So, if you are
25 going to be making specific representations about your

1 direct knowledge of how the SDPD is handling these, then I
2 would like you to be sworn in. Yes.

3 MR. LAPIN: Okay.

4 THE COURT: All right. So, let's get him sworn.

5 (Mr. Lapin was sworn in by the clerk.)

6 THE CLERK: State your full name.

7 THE WITNESS: Jonathan Lapin, L-A-P-I-N.

8 THE COURT: All right. Mr. Lapin, you were making a
9 statement about your understanding of how a SDPD handles
10 informal discovery requests, you and mentioned you were
11 part of a working group?

12 MR. LAPIN: Correct.

13 THE COURT: All right.

14 MR. LAPIN: That in -- I take it it's November of --
15 November of 2017, the City Attorney's office decided to no
16 longer handle discovery requests with regard to infraction
17 cases. That came out of the Kearney Mesa courthouse. That
18 was in keeping with the practice that had already been
19 established by the District Attorney's office for at least
20 the last decade. That we met with the San Diego Police
21 Department, advised what was going to be happening, and
22 that their records unit would then need to respond to
23 discovery requests that came for these cases. The police
24 department representative acknowledged that, that the
25 records unit would be the proper place, that we advised, in

1 working together with them, that we would give a phone
2 number and address contact for defendants or defense
3 counsel to submit their discovery requests to those police
4 department units. And the one exception was with regard to
5 body-worn camera evidence. And for that evidence, the
6 police department liaison within the San Diego City
7 Attorney's office would make an appointment for defendants
8 in order to view body-worn camera evidence. If directed by
9 the Court to provide an actual copy, they would do so if
10 there was a court order.

11 THE COURT: But absent a court order, they would not?

12 MR. LAPIN: Correct. Absent a court order, they would
13 only allow the viewing of the body-worn camera evidence.

14 THE COURT: All right. Do you have -- was there any
15 discussion of how service of an informal discovery request
16 would take place?

17 MR. LAPIN: No.

18 THE COURT: All right.

19 MS. CUSACK: May I ask a question, Your Honor?

20 THE COURT: No, you may not.

21 All right. With respect to your opposition --
22 and we are just going to go back to argument at this point,
23 with respect to your opposition, where we got off on this
24 tangent is your reference to Penal Code Section 1054.5(a),
25 which states: "This chapter shall be the only means by

1 which the defendant may compel the disclosure or production
2 of information from prosecuting attorneys, law enforcement
3 agencies which investigated or prepared the case against
4 the defendants, or any other persons or agencies which the
5 prosecuting attorney or investigating agency may have
6 employed to assist them in performing their duties."

7 I do read this to mean that an SDT would not be a
8 proper means by which to obtain discovery in a criminal
9 case from a law enforcement agency. So, we are going to
10 rely on the informal discovery request that was submitted
11 by Ms. Cusack.

12 Given that the City Attorney does not represent
13 the SDPD with respect to informal discovery requests, the
14 only -- I think the parameters of what's left for you to
15 argue, sir, is whether or not sanctions should be imposed,
16 when and if we get to the point on that motion. I don't
17 think you want to argue the merits of what Ms. Cusack is
18 entitled to.

19 MR. LAPIN: Right.

20 THE COURT: Okay.

21 MR. LAPIN: Because -- based on our position within
22 the case.

23 THE COURT: All right. So, I think we are on the same
24 page there.

25 So, Ms. Cusack.

1 MS. CUSACK: Yes, Your Honor. I --

2 MR. LAPIN: I'm sorry. Would the Court --

3 THE COURT: Yes.

4 MR. LAPIN: -- like me to continue standing?

5 THE COURT: Oh.

6 MR. LAPIN: I'm not actually feeling well.

7 THE COURT: Sure. You may have a seat, sir.

8 MR. LAPIN: Thank you.

9 MS. CUSACK: Your Honor, the prosecutor has a duty,
10 not just under 1054, but under the Constitution, and under
11 Brady, to review and provide discovery. This exists irr-
12 -- separate and apart from 1054, but 1054 acknowledges that
13 it exists. And there's a litany of cases that I have cited
14 in my brief about this obligation to provide, under Brady,
15 that exists, regardless of any requests made.

16 THE COURT: Are you -- I'm sorry, Ms. Cusack, just for
17 clarification purposes, are you arguing that the City
18 Attorney specifically has this duty, or --

19 MS. CUSACK: Yes.

20 THE COURT: Okay.

21 MS. CUSACK: Yes, I am.

22 THE COURT: Okay.

23 (End of transcription of recorded proceedings.)

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1 Recorded Proceeding Number 4

2 (Begin transcription of recorded proceedings.)

3
4 THE COURT: I am not prepared to make a finding, and I
5 don't think that I need to make a finding in this case that
6 the City Attorney must represent SDPD in discovery matters.

7 MS. CUSACK: No. That is not what I am saying.

8 THE COURT: Okay.

9 MS. CUSACK: What I am saying is -- okay. I don't
10 want to step on you, Your Honor, so --

11 THE COURT: Go ahead.

12 MS. CUSACK: I am saying that there is a separate
13 obligation of the prosecutor here under Brady, that
14 regardless of any plan they work out with the police, that
15 they can't delegate that responsibility away under Brady,
16 that there is no constitutional framework that says that
17 their duty to review evidence to determine its
18 discoverability, that their duty is somehow waived because
19 they say, "Police, you do it instead." That -- there is no
20 authority for any of that.

21 THE COURT: What is your authority that, for the
22 proposition that it -- that the information must be
23 received through a particular method? Whether it comes
24 from SDPD, or whether it comes from the City Attorney, is
25 not what matters, that the defendant ultimately gets the

1 discovery to which he is entitled -- he or she is entitled,
2 or does it matter how -- who delivers that information to
3 you?

4 MS. CUSACK: I think that it -- it doesn't. It's not
5 just at the end of the day that we have everything. I
6 think the fact that it has taken us 40, 60, 80 hours to get
7 that information is evidence of the burdens placed on the
8 defendant in this case. And so, it doesn't exist in a
9 vacuum, that this -- that had they done their duty under
10 Brady, we wouldn't be here. That would have been just
11 disclosed as a matter of routine. So, it's --

12 THE COURT: Well --

13 MS. CUSACK: It's very -- to watch this City Attorney
14 just say -- not a prosecutor, that there is nothing in
15 Carlucci, absolutely nothing in Carlucci that says that
16 their entitlement not to appear thereby alleviates them
17 from these Brady requirements to provide this evidence
18 favorable to the defense.

19 THE COURT: So, Ms. Cusack, the way that I see it, so
20 long as the Court makes an order your client is to receive
21 the discovery that he or she is entitled, and as long as
22 you have remedies by which the amount of time that you have
23 expended, or to reach this point, is available to you.

24 MS. CUSACK: I don't have those remedies. What
25 remedies do I have, Your Honor?

1 THE COURT: Well, you have sought career monetary --

2 MS. CUSACK: That's what I sought here. Right --

3 THE COURT: Yes.

4 MS. CUSACK: -- that remedy. That --

5 THE COURT: But you are expanding it to say that this
6 court should issue an order somehow saying that the City
7 Attorney must accept service on behalf of SDPD.

8 MS. CUSACK: No. No. I am asking for sanctions. I
9 am putting all this stuff on the record --

10 THE COURT: Okay.

11 MS. CUSACK: -- because of all the violations of their
12 duty, and I am asking that the sanctions, that those be
13 ordered to such a degree that we are not back here in
14 another month.

15 THE COURT: All right. So, let's focus on what we
16 have at the moment. So, I am looking at your informal
17 discovery requests, and we have the items that we went
18 through earlier.

19 I am going to order SDPD to provide you the names
20 of three officers who were with the arresting officer in
21 this case, as well as any body-worn camera footage that
22 those officers may have.

23 I am ordering SDPD to provide you with any
24 complaints received through the get-it-done app, or any
25 other online complaint forum. However, they may redact any

1 identifying information regarding the complainant. The
2 complainant's name, address, anything else that would
3 identify the complainant may be redacted. However, the
4 dates on which the complaint was made, if that is part of
5 the app is to be provided.

6 I am directing SDPD to turn over any surveillance
7 footage, including smart light footage which is currently
8 in their possession. I am not going to direct SDPD to go
9 out and contact third parties in order to obtain
10 surveillance, but simply whatever surveillance footage is
11 in SDPD's possession and control.

12 I am ordering -- with all of these oral
13 statements to the effect that no such evidence exists, I am
14 ordering SDPD to turn over any TACIDS information
15 pertaining specifically to Mr. Houser, as well as any
16 entries in the database on homeless -- on homelessness
17 pertaining specifically to Mr. Houser. They shall do so
18 within 15 days of today's date.

19 I am denying your request for monetary sanctions
20 as against the City Attorney and as against the SDPD
21 because at this moment all that there has been is a
22 potential or possible failure to comply with an informal
23 discovery request. If SDPD fails to comply with the
24 Court's order today, Ms. Cusack, you may renew your request
25 for monetary sanctions at that time. This --

1 MS. CUSACK: Your Honor --

2 THE COURT: -- addresses the Houser matter.

3 With respect to the Weber matter, we cannot
4 address it right now. We have already gone well into the
5 lunch hour. Are you able to come back this afternoon?

6 MS. CUSACK: Yes, Your Honor.

7 THE COURT: All right. If you could be here, I would
8 like to address that motion following both of the trial
9 calls, which the last one will take place approximately at
10 3:00 p.m. So, if we could trail the Weber matter to
11 3:00 p.m. this afternoon. All right. I will need you to
12 come back, Mr. Lapin.

13 And, Ms. Cusack, one other thing. You mentioned
14 that you had a request for a fee waiver in the Houser
15 matter. There was an order issued by Commissioner Blair on
16 December 24th --

17 MS. CUSACK: Okay.

18 THE COURT: -- denying your request for a fee waiver.

19 MS. CUSACK: Lovely.

20 THE COURT: Okay. But you are, of course, welcome to
21 order those transcripts and then pay for them.

22 Would you like a copy of this order? We have
23 made a copy for you.

24 MS. CUSACK: Yes. Thank you.

25 THE COURT: All right. Thank you. So, I will see you

1 back at 3:00 p.m. on the Weber matter.

2 And we are off the record.

3 UNIDENTIFIED MALE SPEAKER: We are going to empty out
4 the courtroom until 1:00.

5 UNIDENTIFIED FEMALE SPEAKER: Before Ms. Cusack leaves
6 on this matter, can we get a continuous time waiver for the
7 trial set for March 21st?

8 MS. CUSACK: Yes. So waived.

9 THE COURT: All right. Thank you.

10 (End of transcription of recorded proceeding.)

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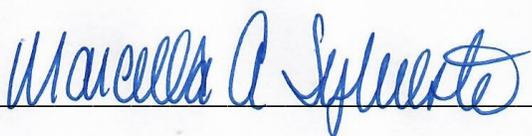
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REPORTER'S CERTIFICATE

I, Marcella A. Sylvester, a Certified Shorthand Reporter within and for the State of California, do hereby certify:

That the foregoing audio-recorded proceedings were transcribed stenographically by me and were transcribed through computerized transcription under my direction; that the foregoing is a true and accurate transcription of the testimony and proceedings taken at that time.

In witness whereof, I have subscribed my name this 11th Day of May, 2021.



Marcella A. Sylvester, CSR No. 12720