Exhibit G

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

IN RE: No. EP-19-MC-205-FM

AJAY KUMAR El Paso, Texas

August 19, 2019

EMERGENCY MOTION HEARING

BEFORE THE HONORABLE FRANK MONTALVO

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by stenotype. Transcript produced by computer-aided transcription.

13:39 1 COURTROOM DEPUTY: EP-19-MC-205, Ajay Kumar.
2 MS. SAENZ: Angelica Saenz and Manuel Romero for the
3 United States.
4 MS. COYLE: Good afternoon, Your Honor. Lynn Coyle
5 and Chris Benoit on behalf of Ajay Kumar.
6 THE COURT: Very well. And I take it that Mr. Kumar
7 speaks English?
8 MS. COYLE: Your Honor, he does speak some English.
9 We would ask -- we have an interpreter available
10 telephonically. If he has some trouble, we would ask that we
11 be able to use that interpreter.
12 THE COURT: Of course. Yes.
13 MS. COYLE: Thank you, sir.
14 THE COURT: Will you just let me know?
15 MS. COYLE: Absolutely.
16 THE COURT: Sounds good, thank you.
17 I take it that both you, Mr. Romero and Ms. Saenz, and
18 Mr. Benoit and Ms. Coyle, you have reviewed my order appointing
19 counsel for Mr. Kumar, and you are aware of the issue that we
20 are here to deal with, right?
21 MS. COYLE: Correct, sir, we are. We know that order
22 was signed prior to the application for force-feeding and the
23 order for force-feeding.
24 THE COURT: Right.
25 MS. COYLE: Help me out if I am making an incorrect

assumption. We have assumed that the force-feeding issue will be addressed as part of our status hearing this afternoon.

THE COURT: Exactly. Exactly.

MS. COYLE: Okay. So yes.

THE COURT: So, procedurally, we can, I guess, start from the affidavit of the government being the government's prima facie case and then your response to it would be to cross-examine the two affiants on the government's two affidavits.

MS. COYLE: That's correct, sir, yes.

THE COURT: So call your first witness.

MS. SAENZ: Your Honor, may we approach the bench --

THE COURT: Of course.

MS. SAENZ: -- with regards to some preliminary matters?

THE COURT: Yes, of course.

MS. SAENZ: Thank you.

(Discussion at the bench on the record)

THE REPORTER: On the record?

MS. SAENZ: Yes.

Your Honor, we understand the Court's order that none of the government witnesses be referenced by name.

THE COURT: Right.

MS. SAENZ: We have the request due to an article that came out last Friday after another hearing. We know that the

Court can't order anybody in the gallery not to use her name. We were wondering if the Court would be inclined to ask them not to further disseminate their name if they are here.

THE COURT: So for purposes of the record, you can call them Witness 1 and Witness 2, and then give Nalene the name of the witness. So when either you, Ms. Coyle, or you, Mr. Benoit, when you cross-examine them, just simply avoid using the name. Just simply say, Okay, ma'am or sir.

MS. COYLE: Or Doctor.

THE COURT: Or Doctor, as the case might be --

MS. COYLE: Their title.

THE COURT: -- and move along.

MS. SAENZ: And, Your Honor, we would also point that we only have one witness here this afternoon. My understanding that it was just going to be about the necessity for the medical intervention, and so only our doctor is present this afternoon, Your Honor.

MS. COYLE: Right. Well, that's -- I mean, it would be helpful, I guess at some point, to visit with the -- it was the detention officer, correct, yeah, but if --

THE COURT: There are two affidavits, right?

MS. SAENZ: Yes, sir.

MS. COYLE: Right.

THE COURT: So, frankly, my impression was that you were going to have them both here. You were going to have both

the layperson and the doctor, and not here necessarily in terms of physically, but at least available to be cross-examined. So, for example, if it's a problem with having the doctor here because of whatever it is, you can have him on the phone so that they can cross-examine him because it is the only way, unless they bring a witness to contest that. Their own witness is the only way that I can pass on the reasonableness of the medical procedures themselves.

MS. SAENZ: Yes, sir. And our doctor is here. It is just the detention officer is not here.

THE COURT: I'm sorry I misunderstood you. Okay, so the doctor is here?

MS. SAENZ: Yes, sir.

THE COURT: Okay, so we are good to go then.

MS. COYLE: Okay.

MR. BENOIT: To be honest, I think our position regarding Mr. Witness regarding his affidavit are addressed in a motion that we -- a response that we filed today, just insofar as we are only addressing his testimony on affidavit. I think we provided a response to why we think that's --

THE COURT: Okay. I'm -- frankly, I'm okay with the -- with the detention aspect of this. In other words, I'm okay with just considering your argument and considering your argument in terms of the detention aspect of this. The medical, of course, that's different.

13:44 MS. SAENZ: Okay.
THE COURT: So we are good.
MS. COYLE: Okay.
MS. SAENZ: Thank you, Your Honor.
(Open court)
MR. BENOIT: Your Honor, the respondent calls the doctor in this case to the stand.
THE COURT: Very well. And, Nalene, the physician is going to be referred to as "Doctor" without using her name. And at the end of the hearing, counsel will give you her information, okay?
Please raise your right hand, ma'am.

DOCTOR, SWORN

THE COURT: Please be seated, ma'am. If you would be kind enough and pull the microphone down and speak directly into the microphone at all times.
THE WITNESS: Okay.
THE COURT: Thank you. Go ahead.

DIRECT EXAMINATION

BY MR. BENOIT:
Q. Good afternoon, Doctor.
A. Good afternoon, sir.
Q. You understand that we are here today to talk about the application of a nasogastric tube to force-feed my client, Ajay Kumar, correct?

13:46 1 A. Yes.
2 Q. And the application of nasogastric tubes, the simple
3 application is a painful and somewhat dangerous procedure; is
4 that right?
5 A. It can be.
6 Q. In fact, I think you have testified before that it can
7 result in serious complications if not done correctly, right?
8 A. Yes, sir.
9 Q. Those complications include perforation of the esophagus?
10 A. Yes.
11 Q. Perforation of the stomach potentially?
12 A. Yes.
13 Q. The tube, which I think you have described as about the
14 diameter of a straw; is that right?
15 A. Yes.
16 Q. That can go into the mouth, as opposed to down the
17 esophagus as it's supposed to?
18 A. Yes.
19 Q. And so that would require pulling the tube out, which can
20 be painful to the patient?
21 A. Yes.
22 Q. The tubes, in fact, in some instances can actually go up
23 into the brain? Have you heard of that happening?
24 A. I have heard of it, yes, sir.
25 Q. And so if any one of these things happened that we just

13:46 talked about, that's something you would want to transfer Mr. Kumar or any patient out of your facility to an emergency medical facility; is that right?

A. Yes.

Q. And so given all those possibilities, wouldn't you say that it would be preferable to conduct a procedure like this in a facility that can deal with the potential contingencies that may come up?

MS. SAENZ: Objection, relevance, Your Honor.

THE COURT: Overruled.

A. No. This could be done at our facility.

Q. But you agree with me that if those contingencies came up, you may have to rush the patient to another facility that has different treatment options, right?

A. If there was a perforation, yes, sir.

Q. Now, we are here today -- and you have actually already conducted that procedure on Mr. Kumar, right?

A. Yes.

Q. When you conducted the procedure on Mr. Kumar, you had six guards ready to restrain him, correct?

MS. SAENZ: Objection, relevance.

THE COURT: Overruled.

A. Yes, that's part of any procedure when we are doing this.

Q. And prior to conducting this procedure, he was in medical isolation, right?

13:48 A. He was located in our medical housing unit, sir, in our large room.
Q. But before you brought him into the large room, he was in an individual room; is that right?
A. Not on that day, no, sir.
Q. That's your testimony today?
A. Yes.
Q. But you brought -- you are saying that when you conducted the procedure, he was in a larger room, correct?
A. Yes.
Q. And in this larger room, there were other hunger strikers who were also on a hunger strike, correct?
A. Yes.
Q. And you conducted the procedure in front of those other hunger strikers; is that right?
A. They were also present in the room, yes.
Q. They were able to watch the procedure, correct?
A. Had they sat up from their beds, yes, they could have seen the procedure, but they were all laying down.
Q. Did you speak with any of the other hunger strikers while you conducted this procedure on Mr. Kumar?
A. While I was conducting his procedure, no, sir. I was focused on Mr. Kumar.
Q. And, in fact, you didn't conduct the procedure; you actually have nurses do it; is that right?

13:48 A. We have -- we have a setup that we use when we are inserting NG tubes, and so I was present there, but it was an actual nurse who inserted the tube. And I verified placement, correct placement.

Q. And, you know, we have had a chance to look over some of the medical records. My understanding is that the nurse had to insert the tube two times before she was able -- she or he -- was able to get it right; is that correct?

A. It's not that this nurse was unable to get it right. It's the fact that the tube actually coiled in the esophagus, which I was able to verify through an x-ray, and so we had to repeat the procedure.

Q. And the procedure was repeated three times before it was done correctly, right?

A. It was the third time that it was inserted into the stomach and did not coil.

Q. In both nostrils, correct?

A. Yes. Once we moved to the right nostril, that's when we were able to get it through the esophagus without any -- any issue. It was able to enter -- insert the stomach.

Q. Did Mr. Kumar, when you conducted this procedure, look pained, like he was in pain?

A. He looked uncomfortable, yes.

Q. And what kind of bleeding did you see occur during the procedure?

13:50 A. Something that we commonly see when we are inserting a nasogastric tube is we will have some bleeding through the nostril.
Q. And, in fact, that bleeding has continued over the last several days; is that right?
A. It usually tends to irritate the nostril, so we will have minimal bleeding or we will see some presence of some dried blood, yes.
Q. And it creates irritation all the way down the esophagus, correct?
A. It can cause irritation, yes, sir.
Q. And, in fact, I think as you testified before, the introduction of a foreign object like this into the esophagus does increase the risk for infection, right?
A. Yes.
Q. And one of the other complications you mentioned before was that you can actually -- the tube could go down the windpipe as opposed to the esophagus, right?
A. That's a potential complication, yes, sir.
Q. And if that were to happen, the patient could end up with potential pneumonia, right?
A. Yes.
Q. Now, the bottom line is this is a serious invasive procedure. Would you agree with me on that?
A. I wouldn't call it a serious invasive procedure. I don't

13:51 1 think it is comparable to other things that we call serious and
2 invasive.
3 Q. Well, for a procedure where you are not putting the patient
4 to sleep, would you agree with me that it is pretty invasive?
5 A. It is an invasive procedure, yes.
6 Q. One that you wouldn't be recommending unless you felt like
7 Mr. Kumar's condition was life-threatening; is that right?
8 A. Yes.
9 Q. So let's talk a little bit about Mr. Kumar's condition, and
10 we have had a chance to look over some medical records that I'm
11 sure you are familiar with?
12 A. Yes.
13 Q. So are you familiar with all of the records that have been
14 approved in this case from -- from -- from the Immigration &
15 Customs Enforcement?
16 A. I believe so. I haven't seen what was provided to you-all,
17 but I am very familiar with his medical records.
18 Q. Okay. A couple of things that struck me as I look through
19 the records, and I think you would agree with me, Mr. Kumar has
20 always been alert and oriented during his time in the medical
21 unit; is that right?
22 A. Yes.
23 Q. Never had a problem communicating with him?
24 A. No. It's -- I mean, it's limited English, but he always
25 answers my questions, and we have used interpreters.

13:52 1 Q. And your staff uses interpreters, right?
2 A. Yes.
3 Q. The medical records stated that he was cooperative and
4 respectful, cooperative with treatment, calm and relaxed.
5 Would you agree to that characterization of my client?
6 A. Yes.
7 Q. And you are not a mental health expert, correct?
8 A. No.
9 Q. But you make sure that you have social workers present in
10 providing mental health evaluations during -- while he is in
11 the medical unit?
12 A. Yes.
13 Q. And in the medical records, I noted that as recently as
14 August 14, the day that the procedure took place in this case,
15 a social worker did do an evaluation -- a mental health
16 evaluation -- of my client. Do you recall that?
17 A. I asked her to, yes.
18 Q. She found that he did not have any suicidal ideation,
19 right?
20 A. That's correct.
21 Q. That he denied symptoms of depression and anxiety?
22 A. I do believe he is depressed.
23 Q. Okay. But that -- but do you have anything -- do you have
24 any reason to believe that his denial -- that he did not deny
25 depression and anxiety or symptoms of that?

13:53 A. I am not sure if he denied it to her that day, sir. I just know what I have clinically observed.
Q. But you are not a mental health expert, right?
A. No.
Q. Okay. My understanding is that she also did not find him in his hunger strike to be a, quote, symptom of a mental illness; is that fair?
A. That she stated that? Yes.
Q. Yes. Okay. And she stated that his attention, his concentration, and his memory were all within normal limits when she did her evaluation, right?
A. Yes.
Q. So he has been fully competent to make decisions regarding his medical treatment, correct?
A. Yes.
Q. And at no point has he ever consented to nutritional treatment?
A. Correct.
Q. At no point has he ever consented to receiving food?
A. Correct.
Q. And he has informed you that he is doing so on the basis of principle, right?
A. He is doing so because he wants to be released from custody. That's what he has stated to me numerous times.
Q. But he is not suicidal?

A. He is not suicidal.
Q. And he is fully competent and rational to make that decision, right?
MS. SAENZ: Asked and answered, Your Honor, objection.
THE COURT: Overruled.
A. Yes.
Q. Now, I do want to talk a little bit about his condition and particularly about the condition that you testified to in your declaration to this court on August 14, 2019, just last week. I understand from that declaration that you felt that this condition was life-threatening. I think you said you felt like you had to initiate force-feeding within 48 hours?
A. Yes.
Q. Because you were worried about his life?
A. Yes.
Q. And from your -- you provided a few metrics, so I wanted to go through some of those medical metrics. One of the metrics that you discussed in your testimony previously was that body weight loss as a percentage of total body weight is a key factor in determining kind of the health of a hunger striker; is that right?
A. Yes.
Q. And I understood from your testimony that loss of 16 percent is where there's a heightened risk of organ failure, right?

13:55 A. Anything over 10 percent, but anything over 18 is very alarming and has been shown to be a point where we see irreversible organ damage.
Q. And I believe I recall you saying that between 16 and 18, that's where you start to get concerned about irreversible organ damage?
A. I said he had 16, but it's -- there's no set number. It's anywhere from 10 to 18. He currently has 16 percent body loss -- weight loss.
Q. But 18 is kind of your no turning back number. Wouldn't you agree with me on that?
A. It's not mine. It's what research has shown, and it's one of the parameters that we use.
Q. And as of last week, I understand that Mr. Kumar, in the medical notations, had lost about 14 pounds; is that correct?
A. Last week?
Q. Yes, as of August 13th.
A. I don't know what he was at August 13. I know what he is at right now, and that's 22 pounds, and he's at a 16 percent weight loss.
Q. Well, I -- you know, we are here to talk about a declaration that you signed last week, so I want to really focus on that to begin with. My understanding of that declaration is you said something about 17.7 pounds, is what his weight loss was.

13:56 1 A. That would make sense, about a week ago, yes.
2 Q. Okay. And my understanding from the medical records is it
3 was, in fact, at 14 pounds?
4 A. I would need to see those medical records.
5 Q. Sure. Would it refresh your memory to look at some of
6 those records?
7 A. Yes.
8 MR. BENOIT: Your Honor, may I approach?
9 THE COURT: Of course.
10 Q. Do you recognize this document?
11 A. Yes. Yes, I do.
12 Q. And this is a notation by one of your nurse practitioners
13 at 5:25 p.m. on August 13; is that correct?
14 A. Uh-huh, yes.
15 Q. And I just want to make a note that on the front page where
16 it states "hunger strike" -- do you see that?
17 A. Yes.
18 Q. There's total weight loss in pounds. It says 14.6.
19 A. That's an error, because if you look below on his vital
20 signs that were obtained that day, it shows that that day, on
21 August 18, he weighed 18 -- 118 pounds -- 118.2. His initial
22 weight, July 11, at the start of his hunger strike, he weighed
23 in at 139.6 pounds. So the math on top was never updated. But
24 if you look to the correct -- the vital signs that were
25 obtained on August 13, that does indicate 118, which would put

him at about a 20-pound weight loss.
Q. You would agree with me that this document says that he came in on August 13 at 14.6 pounds weight --
A. No, I would say that the vital signs -- they are all clearly just on the bottom. That's exactly what he -- what his vital signs -- that day and time, at 4:00 p.m. on August 13, he weighed in at 118.2 pounds.
Q. That's correct. And we don't have anything on this document telling us what his body weight was at the time that he started the hunger strike, do we?
A. If you look down our records where all these encounters are, sometimes they put it, sometimes they don't, but we have it, and we have exactly what he weighed in on, and that's 139.6 pounds. I actually have a copy of that on my desk.
Q. We will give your attorneys an opportunity to address that. But you would agree with me that this notation on August 13 says 14.6 pounds?
A. I think what's most important is that he weighed in at 118. She did not update his weight loss for that day. But it is updated what he weighed that specific day under -- under his vital signs.
Q. And you can't make that note -- you can't make that calculation unless you have the original weight; is that right?
A. Yes. Because she would compare it to the initial weight starting his hunger strike.

13:59 1 Q. And we don't have that in front of you, right?
2 A. On this one that you gave me, no.
3 Q. Okay. Now, I understand that Mr. Kumar also had to -- I
4 understand that on August 3, Mr. Kumar was sent to the
5 hospital; is that right?
6 A. Yes.
7 Q. And at that time he was sent to the hospital because of
8 dizziness, high ketones, and some pain in his right flank; is
9 that correct?
10 A. The reason why he was sent out was because he was reporting
11 right flank pain.
12 Q. But he was also reported as having dizziness and high
13 ketone levels, correct?
14 A. On that specific day, I'm not sure, but he did always
15 experience -- he always reported dizziness. I can't recall his
16 ketone level that specific day. But he was sent out because he
17 was reporting severe right flank pain.
18 Q. And a ketone rate of four plus is pretty severe. Would you
19 agree with me on that?
20 A. Any -- we -- the highest number it could read is four plus,
21 and so any level of ketones is going to show some -- tells us
22 about hypovolemia or dehydration. But the reason why he was
23 sent to the hospital was specifically because he was in a lot
24 of pain.
25 Q. And what was your concern about that pain?

14:00 A. Because of the location that he was reporting the pain, it was possible that he -- we needed to rule out a kidney stone, which can happen from dehydration, or potentially an ulcer in the stomach from not eating.

Q. And when -- when he was sent, he agreed to receive all necessary treatment at the ER; is that correct?

A. When we sent him, he didn't tell us if he was going to accept any type of treatment at the hospital. We just knew we had to send him because I was worried about the pain. At the hospital, he then denied any medical -- any medications or any further intervention. He did allow a CT abdomen that was done that day at the hospital.

Q. Well, he accepted treatment of an IV supplement, correct?

A. Of IV fluids, yes.

Q. Right. And he also agreed to pretty extensive imaging at the hospital. Would you agree with me?

A. Yes, he agreed to a CT scan.

Q. That imaging was imaging that you were not able to do in your facility at the processing center, correct?

A. Which is exactly why I wanted him sent out, yes, sir.

Q. And when that imaging came back, it was found that he may have had a mild colon infection, correct?

A. Coli- -- yes, sir, colitis.

Q. And that he had very high glucose; isn't that right?

A. I don't remember that.

14:01 Q. Would you agree with me that 359 milligrams per deciliter is pretty high in terms of glucose reading?
A. Yes.
Q. And when he came back, that was the issue that the doctors had flagged, that he had high glucose and they were concerned about his glucose? Will you agree with me?
A. I wasn't aware of that. I'm not even sure what type of IV fluids the hospital gave.
Q. Have you taken a look at the records from Sierra Medical?
A. I have. I have seen them before. I looked at them to see what the diagnosis was for his abdominal pain.
Q. Okay. Would it help and refresh your memory to take a look at those records again?
A. Yes.
MR. BENOIT: Okay. May I approach, Your Honor?
THE COURT: Yes.
Q. Do you recognize these records, Doctor?
A. Yes.
Q. I am going to ask you to move towards page -- at the top, there is a handwritten notation, 1 of 20, 2 of 20. Do you see that?
A. Yes, sir.
Q. I'm going to ask you to go to page 9 of 20, please.
A. Okay.
Q. There is a glucose reading there. What is the glucose

reading?
A. 359.
Q. So you previously said that would be a glucose reading that would concern you, correct?
A. That's a high glucose reading, yes, sir.
Q. Glucose spikes like that generally when glucose is entered into the system, correct, or dextrose?
A. Dextrose in itself has the equivalent of about 12 to 20 grams of sugar, so it's not much. Dextrose provides us with very little sugar, actually.
Q. Well, the only sugar entering Mr. Kumar's body in the previous 20 -- 15 to 20 days was from IVs that you were administering, correct?
A. Yes, we would need to know how much dextrose he has received. Dextrose in itself, especially one bag or one liter, could not raise him to 359. What can raise him to 359 is colitis, which he was found to have. That's an inflammatory response of the intestines, which can possibly be from infection. Any source of infection, any source of inflammation will increase the glucose level on the body.
Q. Well, Doctor, if we look at page 10 of 20, that is not the conclusion that the physician at Sierra Medical came to, correct? They were concerned about other issues. They were concerned about his high sugar level and potentially being onset of diabetes.

14:04 A. Let me -- let me read this. You said to look at page 10?
Q. 10 of 20, yes.
A. Okay, I'm going to just explain a little bit of this. So -- well, I think it is --
Q. I have to ask you a question first. So if you want to explain it, you will have an opportunity to do so when your counsel asks you questions, okay?

But I just want to make clear that the doctor in no way in this section at Sierra Medical made an indication that he thought the high blood sugar was a result of colitis. Do you see that anywhere here?
A. Actually, that is incorrect, sir. So he does mention here a recommendation for an ultrasound due to superior mesenteric vein. So what happens is that is what's affected in the intestine, which is very painful, which is -- which causes the colitis. So they do mention twice the mesenteric vein.

They are also noting, as they need to -- and this is a physician who is not familiar with our detainee -- he is saying this person also has a blood glucose of more than 200, which we have to ask any patient coming into a hospital above 200, does this patient have diabetes and perhaps doesn't know it. So it needs to be brought up to the attention. But, most importantly, is the fact that this physician correctly pointed out something might be going on with the superior mesenteric vein, which would cause his abdominal pain, which happens from

14:06 1 hypovolemia, which also leads to colitis, which he was found to
2 have, and that is a diagnosis that they did diagnose that day
3 in the hospital.
4 Q. Doctor, this doctor does not make any connection between
5 the high blood pressure and the colitis or the issues with the
6 need for scanning of the superior mesenteric vein.
7 A. If this doctor was concerned about diabetes, like I think
8 you are saying, insulin would have been given.
9 Q. I'm asking a very simple question.
10 THE COURT: Wait, wait, wait. Stop. No, let her
11 finish.
12 Back to you, ma'am.
13 A. If this physician was concerned, as much stress as you are
14 putting with this 300 -- or plus 300 of glucose, then insulin
15 would have been given. And an A1C would have been ordered.
16 That is standard practice from a physician at a hospital with
17 any patient above 200. It's just what we do automatically.
18 This was not done in this individual. He is truly taking a
19 look at a CT abdomen and more concerned about a mesenteric vein
20 ischemia. But he does mention the 300 because we have to say,
21 Hey, maybe this patient has diabetes. Let's pay attention to
22 the 300. But if it was truly a concern, I think in this case
23 he knows and the patient clearly denies any history of
24 diabetes. Then there was no further medical intervention to
25 chase after the glucose of 300.

14:07 1 Q. Doctor, when Mr. Kumar returned to your facility, there was
2 no notation made of his high blood sugars in the medical
3 record; is that right?
4 A. So if you were -- if we were able to pull up the next
5 encounter, we check his sugar every single day. He allows us
6 to do that. So we would have had to show that he then had a
7 normal glucose, or else I would have addressed the high
8 glucose.
9 Q. And do you recall ever addressing high glucose when he came
10 back to your care?
11 A. No, which means he had to have had a normal glucose.
12 Q. Doctor, something else that I noted from your declaration
13 was that you put a lot of stress on a blood urea nitrogen
14 levels or BUNs. Do you recall that?
15 A. Yes.
16 Q. And that generally, BUN -- normal BUN is somewhere
17 between -- I think your declaration said between 9 and
18 20 milligrams per deciliter. I think I have seen in the
19 literature 7 to 21. Does that sound right to you?
20 A. Yes.
21 Q. And your concern was that on August 4, he had -- I believe
22 in your declaration you specifically cited to August 4 as a
23 time when his BUNs were lower than you would like to see. Do
24 you recall that?
25 A. I don't have that in front of me, but he has been found

14:09 1 multiple times to have lower BUN creatinine ratio.
2 Q. And I just want to make sure I understand, in paragraph 6
3 of your declaration, you stated that on August 4, his results
4 returned with abnormal blood urea nitrogen and creatinine ratio
5 levels. This test measures the amount of nitrogen in the
6 blood. Normal levels are 9 to 20. And Mr. Kumar's BUN level
7 was 6, suggesting liver disease or damage due to decrease in
8 the formation of urea and malnutrition.
9 That's what you stated. Do you stand by that?
10 A. Yes.
11 Q. But the hospital, Sierra Medical, also conducted a blood
12 analysis or a urinalysis. So it would have been a urinalysis,
13 right?
14 A. They probably did both.
15 Q. And in the hospital's records, they indicated that his BUN
16 levels were actually closer to 9 milligrams per deciliter? Do
17 you recall seeing that?
18 A. No. But I'm looking.
19 Q. Okay. I will direct your attention --
20 A. Yes, it's here. It's on page 5.
21 Q. It's on page 5.
22 A. Uh-huh.
23 Q. So, in fact, just one day earlier or even maybe a half day
24 before the date that you mentioned in your declaration, his
25 BUNs were significantly higher and within normal ranges,

14:10 1 correct?
2 A. Well, so when he arrived, he was given two liters of NS
3 fluid. It immediately brings up the number easily two to three
4 points per liter given. So then when they conducted these
5 tests, he was found to have a BUN of 9.
6 Q. They conducted these lab tests to make -- to assess his
7 entire body function, right, at the hospital?
8 A. They are routine labs that we order on everyone. Everyone
9 is going to get a CBC and a CMP, which is where you get the BUN
10 number.
11 Q. And this lab indicates that his BUN number was at 9,
12 correct?
13 A. Yes.
14 Q. Now, last Friday, you were asked about some of the medical
15 professional standards for force-feeding. Do you recall that?
16 A. Yes.
17 Q. And as I recall, you agreed that the American Medical
18 Association is a member of the World Medical Association?
19 A. Yes.
20 Q. And that they set the professional standards for physicians
21 here in the United States; is that correct?
22 A. Yes.
23 Q. And you would agree with me that medical standards don't
24 change depending on who your employer is, correct?
25 A. Yes.

14:11 Q. And you also testified that you were aware of the medical association's Declaration of Malta regarding hunger strikers? Do you recall that?

MS. SAENZ: Objection, relevance, Your Honor.

THE COURT: Overruled.

A. Yes.

Q. And the Declaration of Tokyo?

A. Yes.

Q. And these are considered, essentially, the consensus by the World Medical Association, adopted by the American Medical Association, the consensus regarding medical ethics with regards to hunger strikes. Would you agree with me on that?

A. Yes.

Q. And I believe you were aware that the AMA has taken the position that when a prisoner refuses nourishment and is making unimpaired and rational judgment, he should not be fed artificially; is that correct?

A. That it states that?

Q. Yes.

A. Yes.

Q. And it is for this reason that you have stated that it's essentially accepted medical standard outside of the detention context in our community that no doctors would conduct involuntary force-feeding, correct?

A. Yes.

14:12 1 Q. You said that no one at the hospital would do it, right?
2 A. No.
3 Q. And so you are here asking the Court to permit you to do
4 something that is not the accepted medical standard in your
5 field, right?
6 A. Because this is a detainee that's in custody. And there's
7 a different policy. And I would need to request a court order
8 to ever consider something like this.
9 Q. But, on Friday, I heard you testify that you don't think
10 doctors in the private medical sphere here in El Paso would
11 even comply with the court order?
12 A. We -- we can't do that. In the private world, which is
13 very different from being in a detention center, there's
14 different -- there's different policies. And we don't do that
15 in the private section.
16 Q. But your medical standards, your medical ethics, these are
17 not things that change depending on who your employer is,
18 right?
19 MS. SAENZ: Asked and answered, Your Honor.
20 THE COURT: Sustained.
21 Q. Well, let's take a look, then, at the ICE protocols that we
22 have here. You have referred several times to the hunger
23 strike protocol. I think that shows up in some of the medical
24 records, correct?
25 A. Yes.

14:13 Q. And that is a protocol that comes from the Immigration & Customs Enforcement Performance-Based National Detention Standards that were revised in 2011, correct?
A. Yes, revised in 2016, but yes, that's correct.
Q. Revised again in 2016?
A. Yes, sir.
Q. And I believe the hunger strike protocol is referred to as protocol 4.2, right?
A. Yes.
Q. You are very familiar with those standards, right?
A. Yes.
Q. Those standards were created, essentially, to guide medical professionals like yourself who are working for ICE and to make sure that medical care is provided humanely, correct?
A. Yes.
Q. But balancing the institutional interests of holding civil detainees?
A. Yes.
Q. These -- what we will call PBNDS, the standards, they guide what you can and cannot do in providing medical care to detainees, correct?
A. Yes.
Q. And we stated earlier that on August 14, in your declaration, you asked for involuntary force-feeding because it was life-threatening? Mr. Kumar's condition in your

14:14 estimation, in your medical judgment was life-threatening, right?
A. Yes.
Q. I believe I heard you testify that you were concerned that death could happen the next day if action wasn't taken, right?
A. It was possible, yes.
Q. That's what you were concerned about when you asked for the order?
A. Yes.
Q. These PBNDS standards also have standards with regards to life-threatening situations, do they not?
A. Yes.
Q. And I want to refer you to standard 4.7. Are you familiar with that standard in PBNDS?
A. Let me look for it. Regarding the medical documentation of detainee monitoring?
Q. Regarding terminal illness advanced directives and death.
A. I don't know the exact number, but, yes, I'm familiar overall.
Q. Well, and I can -- if the Court may, I can approach and provide you with that standard.
A. Yes, I have seen that, yes.
Q. Do you recognize the standard, Doctor?
A. Yes.
Q. In Section 5A on the second page, the PBNDS standard states

14:16 that you as the clinical medical authority shall arrange the transfer of a detainee to an appropriate off-site medical or community facility if appropriate and medically necessary if a medical condition is life-threatening, correct?

A. Yes.

Q. You have not asked the Court to do that, have you, in this circumstance?

A. Asked the Court to move him to a hospital?

Q. Well, let me ask it differently. You have not sought to transfer Mr. Kumar to a hospital for his life-threatening condition, correct?

A. Aside from August 3?

Q. Right.

A. Yes. That's correct.

Q. Well, I mean, you have asked the Court to order the involuntary force-feeding of my client because you believe it's life-threatening, right?

A. Because I believe what he needs for his medical condition is to be fed, so that is why I requested a court order so that I would have the ability to feed him.

Q. Well, we have heard numerous times today you testifying that you felt his condition was life-threatening and that he may die the next day, right?

A. I cannot determine when he would die. What I knew is that within the next 48 hours, it was my recommendation that he

needed to be fed.
Q. Well, you said that because it would be a life-threatening condition, right?
A. Because it can be. Starvation, yes, sir, it can be.
Q. Well, not just starvation. I mean, starvation is a condition of malnutrition. But his specific medical condition, when you asked for this order, your testimony was you were concerned that it was life-threatening?
A. Yes, that's true.
Q. And you have not sought to move him to an outside community health facility, have you?
A. The hospital --
Q. Have you?
A. No. Because the hospital would not be able to force-feed. So even if I were to have sent him out, as I have before, he would not allow the treatment that he needs. So I had to ask for a court order because what I know he needs would not even be able to be done in a hospital.
Q. Have you spoken to any hospitals regarding Mr. Kumar's condition?
A. Yes, yes, I have spoken to about three hospitals.
Q. None of that's before the Court today, is it? The conversations or opinions from other hospitals regarding what they would and wouldn't do?
A. No.

14:18 Q. And that is what the ICE standard requires, right, that you send somebody who is in a life-threatening condition out of a detention facility because, as you said earlier, you don't have the facilities necessary to deal with emergencies that he may be confronting, correct?
A. Well, every medical emergency is different, sir. We have what we need in this facility to handle his medical emergency. But every medical emergency is very different. And in many cases, it requires hospitalization. In this case, the hospital cannot do for my patient what we could do for him at the facility.
Q. If you had a detainee who had a heart attack, you would send him to an outside facility?
A. Absolutely.
Q. Do you have any idea how much it costs to administer nasogastric feeding to Mr. Kumar?
A. Not at all.
Q. So you don't come with any of that information for us, do you?
A. Financial cost, no, sir.
Q. Mr. Kumar has made clear to you that if ICE chose to release him, he would start eating again, correct?
A. Yes.
Q. Is it your understanding that the agency has the discretion to release him?

14:19 1 MS. SAENZ: Objection, relevance, Your Honor.
2 THE COURT: Sustained.
3 Q. Doctor, have you considered at any point sending Mr. Kumar
4 to an outside medical facility for his condition since
5 August 14 of 2019?
6 A. No.
7 MR. BENOIT: Pass the witness, Your Honor.
8 MS. SAENZ: Thank you, Your Honor.
9 CROSS-EXAMINATION
10 BY MS. SAENZ:
11 Q. Doctor, approximately how long has Mr. Kumar been under
12 your care?
13 A. 42 days.
14 Q. And how long has his hunger strike lasted to date?
15 A. 42 days.
16 Q. And approximately how many meals has Mr. Kumar missed to
17 date?
18 A. Approximately 128 meals.
19 Q. And are you familiar with the effects of a hunger strike on
20 the body?
21 A. Yes.
22 Q. And please explain what those effects are.
23 A. So the effects of the starvation are going to be
24 determinate on how many days somebody has been undergoing
25 starvation. In Mr. Kumar's case, he's -- he's hydrated, so he

would drink water, and he would -- we would provide IV fluids, which he would allow us to do so. So he's remained well hydrated.

Now, however, he has always refused all food, including, you know, Boost when we have offered him some. The body needs a source of energy in order to sustain life. It changes throughout the course of days of starvation. But, specifically, after 20 days, literature has shown that, at that point, the body starts using a different source of energy for life and to keep organs healthy. So usually after 20 days, we see muscle breakdown, which the body then converts to a form of energy. Mr. Kumar, at the time of the requested declaration, was at day thirty-something. I can't recall exactly. But at this point, he is at 42 days. So based off what we know from starvation, especially at this amount of length of days, he's definitely in danger. We have muscle breakdown, which includes cardiac muscle, which has been a concern for me with him is his heart and potential irreversible organ damage, usually affecting the kidneys.

Q. And would you say that you have seen these effects on Mr. Kumar?

A. Yes.

Q. Prior to seeking court orders, how would you describe Mr. Kumar's physical condition, physical appearance?

A. He had become very weak. He had absolutely no energy. He

was always seen laying in bed sleeping. I rarely saw him communicate. He was always pleasant and respectful, but just didn't communicate much. And, again, I would never even see him sitting down. He was just laying down. I never saw him ambulating. He appeared very sad and depressed. And that was definitely deteriorating prior to the court order.

Q. And have you seen a change in Mr. Kumar since you received the first court order?

A. From the IV fluids?

Q. Yes, ma'am.

A. From the IV fluids, I definitely saw a change in his actual vital signs, his blood pressure, which was previously very low, definitely improved into much more stable blood pressure readings. His urinalysis that we do daily showed a decrease in ketones. He was previously having ketones almost daily, if not daily. And that resolved after the fluids. I saw a significant difference once he was provided with the actual meal replacement supplementations. I now for the first time see him ambulating in his room, going outside. Yesterday, I observed him sitting down, talking to the guys. He looks much better, in my opinion, definitely looks much more stronger. I observed his gait yesterday as he was going to the restroom. And he just walks better and just seems much more stable.

Q. Now, we are here today to provide the Court with a status as to the two orders that have been entered. As of today, what

14:24 is your medical recommendation as to -- as to both of those orders?
A. That they remain in place.
Q. So I would like to discuss the medical care that Mr. Kumar has received during his hunger strike while under your care. First, can you tell us where the detainees who are on a hunger strike, where are they generally housed?
A. We keep them in an area inside our -- inside our clinic, called the medical housing unit. It's a very large room with six beds, so we have them together.
Q. And by being placed in that area, what kind of access do the hunger strikers have to you?
A. It's -- it's definitely easier to monitor them. We are able to see them 24 hours a day. There's an area right next to their room of nurses, so it's a nurses' station, it is a glass wall, so we can see them at all times. So we are able to closely monitor and observe them, make sure that they are safe.
Q. And do you have a staff that assists with monitoring the medical housing unit?
A. Yes.
Q. And besides yourself, what other personnel is involved with this?
A. So we have nurses that monitor them daily and provide these encounters. We have nurse practitioners. There's at least one that has to round on them every day. We have behavioral health

people that do the mental evaluations on them and are available if any of them would like to speak to somebody, a mental health provider. That's all that we have there.

Q. When Mr. Kumar first came into your care, what sorts of evaluations did you do on Mr. Kumar? Specifically, what kind of tests were run on him?

A. So we had to do a full medical evaluation -- medical and mental evaluation. So we do a screening for any chronic medical conditions he may -- he may report or any use of medications. And then we do our own screening, which includes blood work to check the thyroid and the glucose level and liver and kidney function, and basically just to give us some sort of a baseline on how healthy this individual is, so that we could be able to monitor him throughout the course of the hunger strike. He gets an EKG done, and he gets urinalysis to check the protein, and then he gets a full mental evaluation to look for signs of suicide, suicidal ideations or depression or any type of condition that would be causing this hunger strike.

Q. And do you recall how soon after he came into your care you asked for that first court order?

A. I think it was about a week or two after he came to our facility.

Q. So my understanding, it was on July 24, so it would have been about a week. Why did you ask for a court order for non-consensual hydration and medical exams at that point?

14:27 A. I had been asking him to drink more water because we had consistently seen ketone levels in the urine. At that point, it was safe to just assume that it was due to dehydration, so I was just encouraging him to drink orally, so that he could have a healthy -- a healthy volume state in his body. But he quickly deteriorated to like -- he had low systolic blood pressures. And, again, his urine consistently showed ketones, so I knew he was dehydrated, and it was increasing -- the amount of ketones was increasing, and his blood pressure kept dropping.

Q. Besides what you have already discussed, what are other dangers of dehydration?

A. Well, dehydration will lead to acute or chronic kidney disease. It puts a lot of strain on the heart because the blood pressures tend to drop, so it's more stressful on the heart. It definitely leads to postural hypotension, so it is dangerous when they stand up, they always report dizziness, and they are definitely at a risk of fall.

Q. And now that you have a court order, is Mr. Kumar hydrating?

A. Yes.

Q. How is he hydrating?

A. Usually on his own. I always ask him to try to have at least 2 liters, which is the recommended amount -- minimum amount. 1.5 to 2 liters is what's recommended to keep healthy

kidney levels and blood pressures, and so I always try to encourage him to hit the 2-liter mark so that we don't need to provide any IV fluids.

Q. And if IV fluids are provided, is anything else included in that IV solution?

A. We base the dextrose -- so it is usually normal saline. But if they are found to have a glucose level less than 60 -- so if he is found to be in the 50s, only then would we provide some dextrose, which provides a little bit of sugar in the IV fluids to put him into a safe range.

Q. Would IV fluids, even with the added dextrose alone, be enough to sustain Mr. Kumar long term?

A. No, there is no way we would be able to provide sufficient caloric intake to sustain life.

Q. Now, since obtaining the order for the non-consensual medical exams, have you had a chance to run more labs and more test results and more tests?

A. We complete our weekly labs every Monday, so they were obtained -- or at least they should have been obtained this morning from him. And we would get the newest values on Wednesday.

Q. So not talking about the ones that were taken today, but the ones that you have been able to do since July, when that first court order was entered, what would you say is the general trend of those results?

14:30 A. Improvement. Improvement to his kidney -- his renal function. His urinalysis, which we -- he allows us to obtain every day, have now shown they are negative for any ketones, which is a really big deal. He previously has had trace amount of blood, and he doesn't have it. So his urinalysis looks completely clean, healthy, free of infection, free of any ketones.

Q. Why are these ketones a big deal, as you said?

A. Because at this point, with how many days of starvation we have, even if we properly hydrate him, which we have been, and he's been doing so, we are still worried about muscle breakdown. And ketones is what comes out in the urine due to muscle breakdown. So we use that to let us know his state of muscle breakdown. That's really all we could go off.

Q. During this time, what have been your observations of Mr. Kumar's mental health condition?

A. Since he has arrived, I believe that he has become more depressed. Like I said, he just appeared very sad to me, irritated, maybe frustrated, very quiet. I mean, he just slept all day. He didn't appear to have any desire to really communicate with anybody.

Q. And have you seen a change in Mr. Kumar since obtaining -- in his mental condition -- since obtaining either of those two orders?

A. I have. Like I said, yesterday, I really paid attention to

him, watching how he was talking to the other guys. He -- it's the most I have ever seen him speak. He was sitting down on his bed, and he was talking to everyone. And it was the first time we really had such a full conversation.

Q. When you communicate with Mr. Kumar, is that always documented in the medical file?

A. No.

Q. Why not?

A. Again, because a lot of times it is just like an informal visit. Every time I go to the facility, I always stop by and see how they are doing. I will look up on the most recent vital signs for that day. I will see how they are doing. I will ask them if they want any pain medication or how they feel. So I don't document all my informal visits with them. But I try to see them every time I go to the facility.

Q. When you examine Mr. Kumar, do you provide him with information about how he is doing with perhaps results of his lab work?

A. Yes. I will explain what I'm concerned about, why I'm concerned about it, what I'm recommending to him. Every opportunity I get, I always try to encourage him to just drink a Boost.

Q. And what have you told him about those results?

A. I have explained to him previously why I was going to, you know, request. Even when I was requesting for the IV fluids, I

made it very clear why, what the numbers were showing, what I was concerned about, what I felt the solution needed to be for him. So I have explained, along the course of everything I have done, why I'm doing what I'm doing.
Q. Has Mr. Kumar told you why he is on a hunger strike?
A. Yes.
Q. And have you provided him with any alternatives to a hunger strike?
A. I have made it clear that I have nothing to -- no say with his status or his deportation status. But I have always offered him the opportunity to drink three Boosts a day, which would be breakfast, lunch, and dinner, and not remove the hunger strike protocol. So I have made it very clear that he can remain on hunger strike and just drink three Boosts to keep him somewhat healthier and more stable.
Q. And is this an option that's given -- is this an option that was given to Mr. Kumar before the placement of the NG tube?
A. Absolutely.
Q. How often are you and your staff giving Mr. Kumar this option?
A. Every day.
Q. Do you recall when the NG tube was placed?
A. I believe it was August 14th.
Q. Now, why wasn't this order for the NG tube at -- why wasn't

it requested at the same time that you requested the first order for the non-consensual hydration and medical exams?
A. Simply because I was trying to avoid any type of invasive procedure. And I was hoping that he would drink Boost on his own.
Q. In your medical opinion, what would have happened if Mr. Kumar had not received the involuntary nutrition?
A. As we have said before, death is always a possibility. It is very hard to tell when that would occur, but I was very worried -- specifically with Mr. Kumar, I was very worried about his low blood pressure, so I was very concerned about the status of his heart. My fear was that he would have an arrhythmia or a heart attack based off the starvation.
Q. What changes would you expect to see in Mr. Kumar's body if he continues to not receive enough nutrients?
A. He will continue to deteriorate, and I believe that every day is still a possibility of, you know, potential irreversible organ damage. It is always difficult to determine what type of damage has already been done until an individual starts eating again.
Q. And how would you describe the effect on the body of not receiving enough nutrients? Is there a way to describe how that itself presents in the body?
A. I think the most easiest way to explain it would be that the body basically eats itself. It runs out of forms of energy

14:37 to use. And so at the very last state, especially in a very thin individual with very low fat reserves, it will turn to muscle to convert that into a form of energy to attempt to keep the brain and the heart alive.
Q. And would you say that that in and of itself is painful?
A. Yes. These individuals tend to really experience generalized muscle aches, which Mr. Kumar has always complained about. These muscle aches occur from not only the malnutrition and the lack of nutrients and the lack of protein and the muscle breakdown, but you end up having -- it could lead to tissue necrosis because of all the hypovolemia and the malnutrition. So that in itself tends to be very painful.
Q. How much time is generally needed to see any effect of the NG tube placement; in other words, how long before you see any change in his condition?
A. Clinically, my experience has been on a clinical presentation, within two to three days, we see some improvement. Detainees usually or always tell me they feel better. On lab work, an improvement to different organ systems, it takes about two weeks.
Q. Now, you testified earlier about sending Mr. Kumar out for some right flank pain. Does Mr. Kumar have any other medical issues that you have discussed with him, any other medical concerns?
A. I know that he has a history of a previous abdominal

surgery. He has never been able to provide me with much information about it. But he has reported a previous abdominal surgery. However, he wasn't sure why it happened. But I do know that he must have had some sort of abdominal complication in the past.

Q. So I would like to talk a little bit about the placement of the NG tube. Were you physically present when it was inserted into Mr. Kumar?

A. Yes.

Q. And why is that?

A. I always make myself present to verify proper placement of the NG tube.

Q. You testified about it coiling on Mr. Kumar a few times. Do you have an opinion as to why that may have happened in this case?

A. I have an opinion. I have never seen that before, not in the hospital when these were done when I was a resident and not in the cases of the hunger strikes and the force-feedings that I have worked with. It was very interesting to me with his case because the actual insertion itself went down smoothly. He was very cooperative. He swallowed, which we strongly encourage, so that the tube will flow down smoothly. I was -- I was right in front of him and I was observing that, and that went down very well.

What seemed to happen was once it went down -- so we

measure the length of tape we are going to need based off everyone's body. We mark the tube so we know when we anticipate that we have hit the stomach. We noticed with him that, after a certain point, it seemed to get stuck. So we stopped, and we obtained an x-ray. It was then that I saw that it had correctly gone down the esophagus. But it went down to the esophagus, seemed to hit a certain point in his esophagus and turned right back up. So it didn't perforate the tip, just turned right back up. That was interesting to me because I didn't know what would have blocked it from continuing any further.

So we reinserted again. The nurse inserted again. Again, it went down smoothly and, again, got stuck at the same point. So I asked them that they stop because I had noticed, again, it was the exact same length that it seemed to get stuck. We took him for another x-ray, and sure enough, it had coiled again.

At that time, I was considering -- I was remembering his history about a previous medical abdom- -- major. He has a scar for an abdominal surgery. So sometimes with any type of surgery, you could have scarring. So I was wondering if there was some sort of scarring or if there was any strictures that had developed in his esophagus from so much starvation or if there was a stenosis, a narrowing of the esophagus.

So then I became really concerned, because I thought,

14:42 1 if that's the case and we can't get through to the stomach,
2 what are we going to have to do to feed him? So I asked that
3 the nurse use the other nostril, so we could be more to the
4 right side of the esophagus, in which it smoothly went down
5 without any problems.
6 So although I cannot -- it is just my medical opinion,
7 I would advise him to get an endoscopy whenever he can to make
8 sure that there's nothing that's causing some sort of
9 narrowing. Because when we looked at this x-ray, when I
10 verified proper placement, something I had never seen before
11 was that his tube is actually, like, pressed against the wall
12 of the esophagus. It's almost like it doesn't have room to
13 freely be in his esophagus. Usually we see the tube just like
14 hanging in the esophagus. But with him, it's directly across
15 the line of the right side of his esophagus, so I'm not sure
16 what is going on there. But I believe that's the reason why we
17 had the coiling.
18 Q. Now, you were asked about other complications, such as
19 perforations. Did anything like that occur during Mr. Kumar's
20 placement?
21 A. No.
22 Q. How many times a day is Mr. Kumar receiving these nutrients
23 through the NG tube?
24 A. We have advanced him to three times a day, breakfast,
25 lunch, and dinner.

14:43 Q. And from what did you advance him?
A. So there's always a risk, because of how many days he has gone without eating, of something called refeeding syndrome. The shakes we use, the meal replacements that we use have carbohydrates. That is what could potentially be dangerous in refeeding syndrome. So I never want to give too much carbohydrates because I don't want the body to respond to that in a negative way. So I always start with two, usually for two to three days, and then I advance to three.
Q. And now that the tube is in place, what's the procedure for feeding Mr. Kumar?
A. So the end of the tube has -- it's a little -- like it's closed, and we put a lock on it. So whenever we want to feed him, we hang the bag, we pour one shake into it, and then it just drips into the tube and goes directly into his stomach.
Q. Is there a medical alternative to the NG tube?
A. A least invasive or just in general?
Q. Well, is there a less invasive method than the NG tube?
A. There's no less invasive. I think the only other alternative would be something much more invasive, which is known as the PEG tube, and that's when you do an insertion. It's a surgical procedure into the stomach to have a tube where you would just pour the shake directly into the stomach. But that is much more invasive and carries more significant risks.
Q. If the court orders were to be rescinded, what would you

14:45 1 expect would eventually happen to Mr. Kumar if he continues to
2 not eat?
3 A. He would continue to deteriorate.
4 Q. Is it your medical opinion that both of the orders should
5 remain in place?
6 A. For this time being, yes.
7 MS. SAENZ: May I have a moment, Your Honor?
8 THE COURT: Yes.
9 Q. Doctor, how common is the application of an NG tube? How
10 common of a procedure is that?
11 A. It is very common.
12 Q. Now, you talked a little bit about sending Mr. Kumar to the
13 hospital. What has been your experience with sending hunger
14 strikers to the hospital? What happens once they get there?
15 A. They always end up sending them right back. If the
16 detainee allows them to do any type of monitoring, like blood
17 tests or imaging, then that will definitely get done. But
18 usually they usually refuse everything, and they immediately
19 send the detainee right back. They usually tend to call me and
20 ask to speak to the physician, I'm sure because they are
21 alarmed by what they are seeing. And they always state that
22 they cannot do anything with someone on hunger strike. So they
23 send them right back to me. They will usually give me their
24 opinion on what they were hoping to obtain or what tests they
25 did do, and then they will send me whatever results they have.

But they are always returned back to our facility.

MS. SAENZ: Pass the witness, Your Honor.

THE COURT: Mr. Benoit.

REDIRECT EXAMINATION

BY MR. BENOIT:

Q. Doctor, how common are involuntary placements of nasogastric tubes to force-feed somebody?

A. I would say very uncommon.

Q. It is very uncommon, right? And you mentioned earlier that if Mr. Kumar -- well, you had some concerns and some issues with the application of his nasogastric tube, right?

A. Yes.

Q. And those issues, if he continues on his hunger strike, are issues that you are going to have to continue to deal with, right?

A. If we needed to reinsert the tube or what do you mean?

Q. I have heard you testify that you, in fact, have to reinsert the tube every so often just for purposes of infection; isn't that right?

A. The tube can remain in place every 30 days.

Q. So every month you will have to replace it, right?

A. Yes.

Q. Have you sent -- and you said that you -- an endoscopy would help you understand why there were concerns with the nasogastric placement, right?

14:48 A. It would be my medical recommendation to a patient that he undergo an endoscopy to see if there is anything that might have led to him coiling.

Q. You have made no request for a transfer for Mr. Kumar to go to a facility where he can have that endoscopy take place, right?

A. No.

Q. That is something that you can do, right?

A. I can have it done, yes.

Q. Now, we talked a lot about alternatives to a hunger strike. And if this court order were rescinded or were denied, you and your agency would have to consider alternatives, right, to the nasogastric placement?

A. Yes.

Q. First, I heard you mention that one would be that he can stay on Boost, but consider himself still on hunger strike, right?

A. Yes.

Q. That kind of defeats the purpose of a hunger strike, doesn't it?

A. I don't believe so.

Q. On Friday, I heard you testify that it does defeat the purpose of a hunger strike; isn't that true?

A. No, I don't recall saying that. I believe for them, for their sake, they would like to remain known as being on a

14:49 1 hunger strike because of the reason why they are doing it.
2 Q. The reason that you say that they can remain on a hunger
3 strike is simply because that fits the protocol within the
4 guidelines that they are officially hunger strikers, right?
5 A. Because they get to be addressed as being on a hunger
6 strike, yes.
7 Q. It's because they fall under the hunger strike protocol,
8 correct?
9 A. Yes.
10 Q. But if somebody is on a hunger strike, doesn't taking
11 nutrition kind of defeat the purpose of it?
12 A. I don't believe it defeats their purpose. I think that
13 they -- from what I have been told by Mr. Kumar and other
14 hunger strikers, they are on a hunger strike, not because they
15 are truly trying to starve themselves, but because they are
16 hopeful that it might change the course of their deportation
17 status.
18 Q. Well, and, hopefully, we will have an opportunity to hear
19 from him. You mentioned that you have seen a change in
20 Mr. Kumar's mental state. It's something that you described as
21 depression, right?
22 A. Yes.
23 Q. But, again, you are not making a clinical diagnosis that
24 Mr. Kumar is depressed, correct?
25 A. Yes, I am able to do so, and I am making a clinical

diagnosis that he is clinically depressed.
Q. Your medical health professionals who have done mental health evaluations on him have not made that diagnosis?
A. There has been no other physician who has done that type of evaluation. The other person you referred to earlier is a social worker.
Q. You stated earlier that you are not a mental health expert. Is that clear?
A. But as a family medicine physician, I am able to make that diagnosis. And I, in fact, treat many cases of depression, both in the facility and in the private clinic.
Q. And in a private clinic, if you saw somebody with depression, you would refer them to a mental health expert, right?
A. No. They would be under my care. I would refer them to cognitive therapy, and if needed, I would provide medical therapy.
Q. But for mental health therapy, that's not something that you would do?
A. A psychologist would provide cognitive therapy, so I would recommend that they find a therapist.
Q. Have you provided any sort of psychological or psychiatric recommendation or referral for Mr. Kumar?
THE COURT: Mr. Benoit, you have addressed that completely. Move along.

14:51 1 MR. BENOIT: Understood, Your Honor.
2 Q. I understand, Doctor, that, knowing Mr. Kumar's health, you
3 said that you believe that his health would improve if he
4 started eating, correct?
5 A. Yes.
6 Q. And he has told you that he would eat if he was given his
7 freedom, correct?
8 A. Yes.
9 Q. If I understand your testimony correctly -- I just want to
10 make sure I understand -- you won't send him to a medical
11 facility outside of the detention center because doctors -- you
12 understand that doctors in a private medical center will not
13 ethically conduct an involuntary force-feeding; is that right?
14 A. That is not correct. I will most definitely send him to a
15 hospital if I feel that something acute is going on. But if I
16 would send him so that somebody could feed him, I will not.
17 Q. And you have come to the Court because you thought that
18 there was an acute life-threatening condition with Mr. Kumar,
19 right?
20 A. That can be fixed with feeding, yes.
21 Q. Would you welcome a second opinion from an independent
22 medical physician regarding the need to force-feed Mr. Kumar?
23 A. Absolutely.
24 MR. BENOIT: Pass the witness, Your Honor.
25 MS. SAENZ: Nothing further, Your Honor.

14:52 THE COURT: Doctor, what was his BMI at the time you came for the order of force-feeding him?

THE WITNESS: It was a 16.

THE COURT: And what is a healthy BMI?

THE WITNESS: He would -- it would be recommended that he be above a 19.

THE COURT: Fair enough. So to summarize, there is no alternative to the nasogastric tube for someone that does not want to ingest voluntarily; is that correct?

THE WITNESS: Correct.

THE COURT: The other alternative is a direct feed into the stomach, I take it?

THE WITNESS: Yes, sir.

THE COURT: But there is nothing below, so to speak, the nasogastric tube; is that correct?

THE WITNESS: Correct.

THE COURT: So is there something else?

THE WITNESS: I have strongly recommended -- because I have done this in the past with other hunger strikers -- if he would agree to drink the Boost orally, he would remain on a hunger strike. And he could have the tube removed, and he could just drink it three times a day and still remain on a hunger strike.

THE COURT: So what I want to understand is that Mr. Benoit suggested that you would welcome another opinion --

14:54 THE WITNESS: Yes.

THE COURT: -- about alternatives to the nasogastric tube. And I want to make sure I understood that, in essence, there are two alternatives. For someone that refuses to voluntarily ingest food, and by "food" I'm saying regular food, or the --

THE WITNESS: The Boost.

THE COURT: -- the Boost. For someone that refuses to do that, there are only two alternatives: The nasogastric tube or -- I didn't quite get -- what was the name of the other one?

THE WITNESS: It is called a PEG tube.

THE COURT: Okay. Spell that for me, please.

THE WITNESS: It is P-E-G, PEG tube.

THE COURT: Parenteral gastric?

THE WITNESS: Uh-huh.

THE COURT: Oh, okay, got it.

So I understood you, then, to say that there's just two alternatives then?

THE WITNESS: Yes.

THE COURT: So there is no other way to accomplish a nasogastric tube, other than what you described?

THE WITNESS: Yes.

THE COURT: Fair enough, thank you.

Anything else?

MS. SAENZ: Nothing, Your Honor.

MR. BENOIT: Not for this witness.

THE COURT: Can the witness be excused?

MR. BENOIT: Yes, Your Honor.

MS. SAENZ: Yes, Your Honor.

THE COURT: Ma'am, thank you for your time. You are excused.

Off the record for a second.

(Discussion at the bench off the record with marshal.)

(Open court)

THE COURT: Next witness, please.

MR. BENOIT: Your Honor, we call Ajay Kumar to the stand.

THE COURT: Very well. Do we need to make arrangements for the interpreter?

MR. BENOIT: Yes, Your Honor. We discussed it with the court coordinator.

THE COURT: Okay. So we will take a short break to set that up.

And, Adriana, to the extent possible, let's just make sure that he remains where he is at, okay?

COURTROOM DEPUTY: Yes, sir.

THE COURT: Very well. Thank you. We will be back in ten minutes.

(Recess)

THE COURT: Thank you very much. Please be seated.

15:17 Mr. Kumar.

THE WITNESS: Yes, sir.

THE COURT: Is the interpreter on?

THE INTERPRETER: Yes, sir. This is the interpreter here, Charan.

THE COURT: Thank you, Mr. Charan.

Mr. Kumar, raise your right hand, please.

AJAY KUMAR, SWORN THROUGH INTERPRETER CHARAN

DIRECT EXAMINATION

BY MR. BENOIT:

Q. Good afternoon, Mr. Kumar. I am going to ask you to speak very clearly into the microphone so that we can all hear each other today, okay?

A. Yes. Okay, of course.

Q. And, Mr. Kumar, even though I understand you know some English, we do need you to wait for the interpretation to finish before answering, okay?

A. Okay.

Q. Mr. Kumar, we have heard testimony that you started your hunger strike on July 9; is that fair?

THE INTERPRETER: This was August 9, you said?

MR. BENOIT: On July 9.

A. Yes, of course.

Q. Mr. Kumar, why did you decide to go on hunger strike?

A. Because I want my freedom. That's why I took this

15:20 decision.
Q. Mr. Kumar, at any point in the last 40 days, have you consented to eat at any time?
A. No, not even once.
Q. Mr. Kumar, we have heard testimony today that you were offered a protein shake and did not drink it. Why did you decide not to drink the protein shake?
A. I want my freedom. After that, I will take protein shake or whatever food is given to me.
Q. Mr. Kumar, while you have been on hunger strike, have you spoken to any other detainees in the detention center, other than other hunger strikers?
A. Because, no, sometimes they used to put me in with others. Sometimes they kept me in a small room by myself.
Q. And so you were kept separately from other detainees; is that right?
A. Most of the time I have been kept separately.
Q. We heard testimony about when the medical staff at the detention center placed the tubes in your nose that you have today. I want to talk a little bit about that, okay?
THE INTERPRETER: Could you repeat that, sir?
Q. We have spoken about when the tubes were placed in your nose that you have in your nose today, and I want to talk about how those were placed, okay?
A. Yes, you may.

15:23 Q. Mr. Kumar, where were you before you were taken to have the tubes placed in your nose?
A. I was locked up in a small room.
Q. Were you by yourself?
A. Yes, I was alone.
Q. Were you moved for the procedure?
A. I was taken to the room where other people who are on hunger strike were there, and then in front of them, tubes were put into my nose.
Q. Will you describe that procedure for us, Mr. Kumar?
A. Before the tubes were put in, five, six officers came. One came. Another officer came with a camera. And I think one was their captain or officer in charge. He came with them. There was a doctor there and some assistants that were there. Total, about 12 or 15 people were there. Then five or six persons got ahold of me and then the tubes were put into me.
Q. And describe how the tubes were placed in your nose.
A. Okay. You see, the nurse -- when they had got ahold of me, the nurse took the tube and tried to insert it into my nostril. It was not going in, so she pressed hard, pushed hard, and it went in, and she started asking me to swallow. But by that time, the bleeding had started severely from my nose and inside my mouth, and I was finding it difficult to breathe.
So then they took me to another x-ray room from there. They did an x-ray. And then after doing the x-ray, the nurse

said, We will have to take out this tube and put it back in. So they brought me back into the same room where they had put the tube in, they took out the tube, and she again attempted to put it in. Again, there was difficulty.

After that, again, they took me for x-ray, and again, she said, No, this time again also it does not happen, so we will have to take it out and put it back in. So then she was -- before she did it, she said, You drink this, what we are trying to give you to drink. If you don't drink, then we are going to put this tube in you again. And this process will continue until the tube can go in.

So then I refused, and then she put in the tube again the third time. But by that time, my nose had become very swollen. So then they took me again for x-ray, and then they said, This nostril is very swollen, so let us try on the other nostril. Then they were discussing amongst themselves, and they were also telling me that, You better start drink this, otherwise this is going to be a process which we will have to follow every time.

So then, amongst themselves, they decided that one nostril is already swollen. If the other nostril also swells up, then we won't be able to do it. So then they are -- after the third attempt, which they admit, they did not do it anymore.

Q. Mr. Kumar, when those -- when this procedure took place,

where were the other hunger strikers located in comparison with you?
A. They were all -- they were all able to see it. In fact, they were doing it on the bed, on a bed where others were also on the beds, and they were wanting to show it to the other people about the process of putting the tube into the nose. They wanted to show it to them.
Q. Did any members of the medical staff that were conducting the procedure with you speak to the other hunger strikers?
A. They were saying something, laughing and smiling at them, as if telling them that now next is going to be your turn. But what they were saying, I couldn't hear because I was having a lot of pain, and I was not concentrating.
Q. Will you please describe --
A. I was not able to hear.
Q. Will you please describe for the judge, Mr. Kumar, the pain that you have suffered as a result of this procedure?
THE INTERPRETER: Would you repeat that, Your Honor?
Q. Would you please describe for the judge the pain that you felt since the tubes were placed?
A. The process of putting in the tubes was extremely painful, excruciatingly painful, and it was very difficult for me to express. The pain had limited -- the pain had reached its limit. But this was a question of my freedom, so I bore it.
And it's been seven days now, and even after, during

15:33 the seven days, I'm having difficulty in sleeping at night. I'm not able to take anything by the tube inside, nor drink or eat anything. And I'm having difficulty in breathing, plus there is some small amount of blood which still comes because of this tube from my nose.

Q. Will you describe the bleeding a little bit more that you have suffered over the last six days?

A. Bleeding is continuing. Bleeding is continuing ever since that day. When the water is coming, I wipe my nose with the water -- with the wipes. I see blood spots, blood in them. And if I want to clean my nose and I try to spit out, even with the spit, I see blood every time I do that.

Q. Mr. Kumar, even with the tubes in place, will you continue your hunger strike?

THE INTERPRETER: I'm sorry. Could you repeat that?

Q. Even with the tubes in place, will you continue your hunger strike?

A. Yes, until I get freedom I will keep this hunger strike.

Q. Mr. Kumar, would you -- would you allow an independent doctor to examine you to see if you need to be force-fed?

A. Yes, you may. I am ready to be examined by any doctor.

Q. Mr. Kumar, if you were released, would you start eating again?

A. Yes, whatever you tell me to, I will eat.

Q. Mr. Kumar, have you observed any other force-feedings or

15:36 placements of nasogastric tubes in the last six days of other people?
A. Yes, they put the tubes on three other people yesterday. Two of them, they could put, but the third one became so serious, he was almost dying because he couldn't breathe.
Q. So you said that -- and it's important that we don't mention names -- but you said the third person was almost dying. Why do you believe that?
MS. SAENZ: Objection, relevance, Your Honor.
THE COURT: Sustained.
A. You can ask the doctor. His bed was right next to me. In fact, I believe he had stopped breathing completely and died. His hands and feet had blistered, and he had stopped breathing completely. It was by grace of God he got saved.
MR. BENOIT: Your Honor, I pass the witness.
THE COURT: Thank you.
MS. SAENZ: No questions, Your Honor.
THE COURT: Thank you for your time, Mr. Kumar. Thank you.
THE WITNESS: (In English) You are welcome, sir.
MR. BENOIT: Your Honor, the respondent would next call Linda Corchado, immigration counsel for Mr. Kumar.
THE COURT: Very well.
MS. SAENZ: Your Honor, we would object as to the relevance of this witness.

15:38 1 THE COURT: Approach the bench, please.
2 COURTROOM DEPUTY: Do you still need the interpreter?
3 THE COURT: Go ahead and excuse the interpreter.
4 (Discussion at the bench on the record)
5 THE COURT: You got it, okay?
6 Give me an offer of proof as to what you anticipate
7 Ms. Corchado's testimony would be.
8 MR. BENOIT: Ms. Corchado, under the test that we have
9 been looking at, whether it is *Youngberg* or *Turner*, requires an
10 assessment of the institution's alternatives, not just the
11 medical alternatives, but the institution's alternatives to --
12 for less invasive procedures or regulations. Ms. Corchado will
13 testify very shortly and very briefly as to what the
14 alternatives are with regards to his immigration relief.
15 THE COURT: In other words, she would testify as to
16 the alternative with respect to what?
17 MR. BENOIT: As to what ICE has discretion to do with
18 regards to Mr. Kumar's detention.
19 THE COURT: In other words, the regulatory-wise?
20 MR. BENOIT: Yes, regulatory-wise, as to what ICE can
21 do and what she's asked them to do and what is in their full
22 discretion without consideration of other institutions that are
23 a party to this proceeding.
24 THE COURT: Okay.
25 MS. SAENZ: Your Honor, I believe your order is very

clear that it is limited to the medical concerns with regard to the force-feeding. Ms. Corchado is an attorney, and I believe she is trying to argue that he should be released on bond, which Your Honor would not have jurisdiction to order.

THE COURT: Well, she's not going to get into that. I mean, I'm taking him at face value -- I mean at face value. He was talking about options that ICE has with respect to his conditions and with respect to alternative to the nasogastric tube and all that. I will entertain that. So --

MR. BENOIT: Well, to be clear, the alternative that we are considering is what discretion they have to do with regards to his detention in general, as opposed to other alternatives not having him in detention.

THE COURT: Well, here is the issue. The issue is this: I don't have authority to entertain an evaluation of ICE's exercise of discretion.

MR. BENOIT: And I understand that, Your Honor. We are not asking you to order that in any way. But it is a factor that has to be considered as part of the *Turner* analysis.

MS. COYLE: And, if I may, Your Honor, the doctor herself testified that there were institutional considerations, right? Because she already testified if he was in a hospital or a medical clinic, there's no question there would be no force-feeding.

15:41 THE COURT: Right.

MS. COYLE: So the doctor has raised -- and legitimately, okay, she's made this claim that since she is in an institutional setting, that this is something that she feels that she's required to do. But we know under the law that institutional considerations then need to be considered -- all institutional considerations. And his ongoing detention and the decision to keep him detained is absolutely part of that reason for force-feeding.

So these two things are not mutually exclusive. They are absolutely part of the analysis that the Court is confronted with. And, again, we are not asking for you to order Mr. Kumar's release. We understand your limited authority here in the agency discretion. But we absolutely have a right to put before you the institutional consideration in detaining him.

THE COURT: I will hear that.

MS. COYLE: Okay. Thank you, sir.

(Open court)

MR. BENOIT: Your Honor, we ask that Linda Corchado take the stand.

THE COURT: Raise your right hand, please.

LINDA CORCHADO, SWORN

THE COURT: If you would be kind enough and speak directly into the microphone.

15:43 THE WITNESS: Yes.
THE COURT: Go ahead.
MR. BENOIT: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. BENOIT:

Q. Would you please state your full name for the record.

A. Linda Corchado.

Q. And, Ms. Corchado, you are Mr. Kumar's immigration counsel; is that correct?

A. That's correct.

Q. Where do you currently work?

A. At Las Americas Immigrant Advocacy Center.

Q. And how long have you been practicing immigration law?

A. For about five years.

Q. How many detained cases -- in other words, how many cases involving people who are in detention -- do you handle on an annual basis?

A. I would say Las Americas takes on about 15 to 20, sometimes more, cases a month, of detained asylum seekers like my client.

Q. And so how many detained cases do you personally handle per year?

A. At varying capacities, I would say 50, around 50.

Q. So you have experience on what the agency, Immigration & Customs Enforcement, can and cannot do with regards to releasing detained individuals; is that right?

15:44 1 A. I do.
2 Q. With regards to Mr. Kumar, does any agency in the federal
3 government have discretion to release Mr. Kumar?
4 MS. SAENZ: Objection, relevance.
5 THE COURT: Overruled.
6 A. At this point, ICE has the sole ability to release my
7 client.
8 Q. In your estimation, are there any factors that weigh in
9 favor of his release?
10 A. There are many. I had called Ruben Garcia, the executive
11 director of Annunciation House and asked him to lend his
12 support so that my client could stay with him at Annunciation
13 House. At that point, he was en route to Ciudad Juarez to meet
14 with some asylum seekers who are being returned back to Mexico.
15 Once I sent that notice out to him, he immediately stopped in
16 his tracks, returned back to the office to write a letter of
17 support.
18 So he has strong community support here in El Paso.
19 He is not a flight risk. He is not a criminal. He is an
20 asylum seeker. Moreover, he presented his case pro se. A lot
21 of awful things happened to my client during his detention. He
22 is a political activist in India. And a few days before his
23 merits hearing, his father was killed by his persecutors, and
24 he was not allowed to submit that evidence.
25 So, now, I am lending him my full support to represent

him before the Board of Immigration Appeals.
Q. And as you represent him in front of the Board of Immigration Appeals, does ICE have the authority to release him pending that application?
A. They do have that authority.
Q. If ICE wants to ensure his appearance at future hearings, does the agency have any programs in place to ensure that, short of detention?
MS. SAENZ: Objection, relevance.
THE COURT: Sustained.
MR. BENOIT: No further questions, Your Honor.

CROSS-EXAMINATION

BY MS. SAENZ:
Q. Ms. Corchado, your client has the right to seek release during his BIA appeal; is that correct?
A. That's correct.
Q. And you are currently pursuing that, right?
A. Yes.
MS. SAENZ: No further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. BENOIT:
Q. I just want to make sure that we are clear, Ms. Corchado. Mr. Kumar is asking for release; is that correct?
A. Yes.
Q. Through -- through -- to ICE as an agency, correct?

15:47 1 A. Through ICE, exactly. I cannot present this case before an
2 immigration judge at this point. Only ICE officers can make
3 that decision.
4 Q. And has the agency provided a response?
5 A. They have not. They have told me that this is before the
6 field office director, but they have not provided a response
7 since then.
8 MR. BENOIT: Thank you. No further questions,
9 Your Honor.
10 THE COURT: Thank you for your time, ma'am.
11 THE WITNESS: Thank you.
12 MR. BENOIT: Your Honor, the respondent does not have
13 any more witnesses to call.
14 MS. SAENZ: We have nothing further, Your Honor.
15 THE COURT: Very well. Any argument?
16 MR. BENOIT: We would request it, Your Honor.
17 THE COURT: Go ahead.
18 MR. BENOIT: Your Honor, the respondent -- we have
19 laid out some of our legal argument in a response that we filed
20 today. I apologize for the timeliness. But we are asking for
21 two things: First, that the Court deny this under the
22 *Youngberg* standard, *Youngberg v. Romeo*. And, second, under the
23 *Turner* standard, we believe that even though that standard
24 applies to convicted inmates, that the government has still not
25 met its burden in this case.

15:49 The position in our brief, which we raised -- and which I won't repeat here -- is that there is a history of 100 years in which civil detainees have been considered differently and entitled to different treatment than convicted inmates. The *Youngberg* test is not a case involving --

THE COURT: Mr. Benoit, that jurisprudence that you are referring to, when you talk about civil commitments, talks about individuals, say, for instance, being held in contempt of court. It talks about individuals committed against their will for lack of competence, as in the case of a probate matter, for example. It speaks to individuals committed against their will under the civil commitment statutes for violent sexual offenders. So there is a range of civil commitments -- modalities, for lack of a better word. So there are these modalities of civil commitment. Then there's, of course, individuals being committed pursuant to a judgment of conviction. Right?

MR. BENOIT: That's correct.

THE COURT: Then here in the middle are the individuals that are being committed or detained -- the first ones are commitments, the first group. The second ones are convictions. Here in the middle are the immigration detainees that, yes, it's a civil commitment like that first group that I -- that I described. However, none of those has anything to do with the enforcement -- with the executive branch of the

government enforcement of immigration law. Right?

MR. BENOIT: Well, I don't -- I respectfully disagree. I think that civil detainees, like people who are in immigration detention, have clearly since *Zadvydas* been considered civil detainees that are afforded the right to civil detainees as opposed to --

THE COURT: Believe you me, I have no disagreement with you on that. I have no disagreement. What I'm trying to make sure I understand from you is that there's a difference between all these other cases, all these other instances, because none of those instances has to do with the enforcement of the immigration regulations.

MR. BENOIT: But their constitutional protections are -- our client and civil immigration detainees in general enjoy the constitutional protections that are afforded civil detainees in that broad range, as compared to convicted inmates who, of course, are in a different constitutional posture.

THE COURT: Without -- without a doubt. And I recognize that in the order in which I appointed you and Ms. Coyle. And that's the reason why I made it very clear in that order what were the -- what were the metes and bounds of your representation because I can clearly not get into something that I have no authority about.

MR. BENOIT: But certainly, Your Honor, what we are here today to address is whether our order [sic] can be forced

15:53 to have nasogastric tubes placed in his nose as a detainee. And we are not asking -- we are not -- I'm certainly not going to make an argument regarding his First Amendment rights. I understand the Court's position on that. But I do believe that the Court and the government have made arguments that *Turner* applies. It's my position that -- or it's the respondent's position that the *Turner* factors have not necessarily been addressed in their totality. But that *Youngberg* also applies. And I think we agree that *Youngberg* is a standard that is set up to apply to numerous different situations and has been applied in numerous different situations.

It is certainly respondent's argument that this is one of them. And simply that it's not that different than the *Turner* standard, but it certainly requires a balancing of liberty interests with state interests. And it's important that there be qualified professional testimony that's provided with regards to what are the standards in the profession, in this case the medical profession, and with regards to the other ICE individual, who I won't name, but who is in the record, with regards to the institutional standards at ICE. And that's what we are here to address.

So it would be our argument, Your Honor, under *Youngberg* that the testimony that we have heard from the doctor regarding her judgment deviates substantially from what she has admitted are the standards in her field. Under the *Turner*

15:54 standard, Your Honor, it's our position that the government has not provided evidence to support all of the *Turner* factors. First, simply -- they simply say that there's institutional needs that require them to force-feed, so that Mr. -- so that Mr. Kumar does not die. But that's based on what considers --

THE COURT: Mr. Benoit, what's the alternative to the force-feeding if, as he said -- and I heard him say it from the witness stand -- he will refuse to ingest food unless he is set free? What are the alternatives that ICE has?

MR. BENOIT: The alternative that the institutions have, Your Honor, which is relevant to the second and fourth factor of the *Turner* standard is either that they comply with 4.7 of the performance-based national detention standards and send him to an outside facility; or in the alternative, that they consider release, the institution. We understand the doctor who is present today cannot consider that, but that is certainly an alternative that is available to them.

Again, our position is not that the Court is here in a position to order that. But it is a relevant alternative that must be considered as part of the *Turner* analysis with regards to the order that's before the Court.

THE COURT: Spell them out. Tell me precisely what are the alternatives, other than force-feeding Mr. Kumar, given that he refuses to ingest food? What are the alternatives?

MR. BENOIT: Well, first of all, that he be sent to an

15:56 outside facility so that that can be considered. I think if -- I would direct the Court to *U.S. v. Sing*. It's an --

THE COURT: Forgive me, forgive me, Mr. Benoit, you are not answering my question. Spell them out for me. So I order ICE to send him to an outside facility. What is that outside facility going to provide me with? Or what is their analysis? What report are they going to give me?

MR. BENOIT: They can provide treatment alternatives that they ethically can provide in that treatment -- in that treatment facility with regards to the first alternative.

THE COURT: The doctor testified that, other than the nasogastric tube, the alternative is a parenteral gastric tube. She already talked about it. So show me where it says that, for someone that refuses to ingest food, there is some other alternative than those two?

MR. BENOIT: Your Honor, performance-based standard 4.7 states that when they are -- when somebody is in a life-threatening situation and sent to an outside facility, they are under the care and under the standards of that outside facility. So I couldn't answer that, and I don't think the doctor providing testimony today could answer that. But that is part of why they are required to transfer people out of their facility.

THE COURT: She addressed that. Her testimony clearly carved out the voluntary refusal to take food. She talked

about Mr. Kumar having the right flank pain, and Mr. Kumar feeling dizzy. She was concerned about that, so she ordered him transferred to a facility to evaluate that. But she clearly said when it comes to force-feeding, an outside facility cannot do that because, ethically, they are prohibited from doing that because they are not the individuals charged with treating someone under immigration detention. That business of the force-feeding is strictly within ICE's medical providers.

MR. BENOIT: Well, that is correct, that the reason that she wouldn't send him or she speculated that she couldn't send him because she never has tried to send him to another facility to see if -- what treatment options they would have.

But the reason for it was, as you say, because they, under the standards in the medical profession, they cannot offer that. But we -- that alternative in the standards requiring him to be sent to an outside facility if he has a life-threatening condition, that is in ICE's standards. That is their protocol. That is their assessment of what the lesser alternative is for a situation like this. And it just hasn't happened. We have a speculation as to what would happen if he was sent to an outside facility specifically for this purpose. But it hasn't happened.

THE COURT: Specifically for what purposes? Specifically for the purpose of to see whether the outside

15:59 1 facility has an alternative to the nasogastric tube or the PEG
2 tube to provide nourishment to someone that refuses to
3 voluntarily ingest food?
4 MR. BENOIT: Or, Your Honor, whether his condition is
5 at a point where that is what they would recommend if he were
6 to voluntarily ask to do it. It was very clear that when he
7 came back from the visit on August 3, there was no such order
8 from the Sierra Medical that they would recommend that he be
9 provided nasogastric tube or nasogastric feeding. That has not
10 been --
11 THE COURT: He didn't go there for that. He went
12 there to address the conditions that the doctor testified to.
13 You yourself asked her that: Why did you send him outside?
14 And she specifically said -- I may be a little fuzzy on this,
15 but it was basically two things -- it was the right flank pain,
16 and he was diagnosed with colitis. And, of course, there, they
17 noticed the very high glucose that was probably associated with
18 the colitis. So she testified to all that.
19 MR. BENOIT: That's correct, Your Honor. But on
20 August 14, ten days later, when she came to this court for a
21 force-feeding, we don't have that life-threatening situation.
22 He was not sent to an outside facility to assess whether they
23 can or cannot do this.
24 THE COURT: Because their standard says that if
25 someone's body mass index drops below 19, and she sees the

indication that blood pressure is going down, that that is indicated because his BMI was at 16. So she is following the procedure she is supposed to follow.

Now, you are suggesting that, looking at what she is looking at, what she needs to do is refer him to an outside facility here in El Paso, and ask them to evaluate him -- to evaluate him as to whether, when someone has a BMI of 16, has refused to voluntarily ingest food under those conditions, that they should provide an opinion as to whether they should insert a nasogastric tube because, frankly, they cannot do it. You and I agree on that, don't we?

MR. BENOIT: I would agree that the medical establishment has decreed it is a form of torture and something that doctors should not do. That's what the testimony was that we heard.

THE COURT: We are saying that the Tokyo agreement you mentioned that was adopted by the AMA says that for individuals that are not in some kind of custodial setting, that is unacceptable because individuals that are not in custodial settings have an absolute right to refuse treatment. We are past that. I am not disagreeing with you on that, Mr. Benoit.

All I'm trying to get clear from you is, what are you suggesting? Are you suggesting that the doctor, when faced with the picture she is faced, that she has to refer him to one of the local hospitals?

16:02 MR. BENOIT: Your Honor, to be fair, the Declaration of Tokyo and the Declaration of Malta, as we mentioned in our briefing, actually assessed specifically the condition of prisoners or people who are in detention and the use of nasogastric feeding for those people. It's not just people in the general public.

But to get back to your question, the procedure requires that. Mr. Kumar has not had the opportunity to be assessed by an independent physician. And the procedures require it, because if it is as life-threatening as it has been stated in Ms. -- in the doctor's declaration, then that's what is required to do.

We would be in a different position if we were here after an outside facility had sent him back and said that they wouldn't do the procedure, but that's not what is before the Court today. And that's what the procedures require. That is what the -- the balancing that ICE has already done with regards to civil detainees. That's what they require under their own procedure.

The other alternative, Your Honor, that we have set forth is obviously -- is obviously release. The government in this procedure -- in this proceeding has not presented any evidence to explain why Mr. Kumar cannot be released with an ankle bracelet or any alternative.

THE COURT: Well, that's out of the scope of my

authority. So that would be a useless exercise for the government to say, I'm going to call someone to explain to you, Judge Montalvo, why he hasn't been released, because I have no authority over that, Mr. Benoit.

MR. BENOIT: You do not, but it is a part of the alternatives. The institutional alternatives, not just the medical alternatives, are required to be considered by this court in making a determination under the *Turner* standards. That evidence has not been brought before the Court today, and, in fact, what has been brought in front of the Court is evidence that the institution of ICE has the full discretion to release Mr. Kumar and to give him his freedom as he awaits his BIA appeal.

So there are already alternatives. We believe the factors weigh in our client's favor, and for those reasons, we do ask the Court to deny the order authorizing the use of a nasogastric tube. Thank you.

THE COURT: Thank you.

Ms. Saenz, let me hear from you.

MS. SAENZ: Your Honor, the doctor has testified as to Mr. Kumar's condition, and we believe the evidence is clear that he will continue to decompensate if the orders are rescinded. We would ask that the order -- the Court not rescind those orders, and they remain in place. We can provide the Court with an update after lab results are obtained.

As the doctor testified, labs are taken on Mondays and results are generally available by Wednesday. And so if the Court would like either weekly or biweekly updates, we can provide those to the Court, and we would ask that those orders, again, remain in place. Thank you, Your Honor.

THE COURT: Could you address the argument that Mr. Benoit is making about this court having to consider ICE's authority or ICE's exercise of discretion in releasing -- actually, not releasing Mr. Kumar?

MS. SAENZ: Well, as Your Honor knows, this court doesn't have jurisdiction to release Mr. Kumar. The case of *In Re: Soliman* is probably the most analogous case that we raise in our brief, Your Honor.

ICE has an interest in maintaining order and also has an interest in making sure that the people in its custody don't essentially starve themselves to death, Your Honor. And that's the reason why we have come to this court asking this court for an order for the nasogastric tube. And those are the facts before this court.

THE COURT: Thank you.

Mr. Benoit, anything else?

MR. BENOIT: I just want to address the issue with regards to *In Re: Soliman*. That case is a good example of what the Court did. These are case-by-case decisions. And in that case, there was a full evidentiary hearing regarding the

institutional needs.

In this case, we have an affidavit full of conclusory and speculative statements made by an ICE official. We believe that the standard requires -- not that the Court order this, the Court order ICE to do anything -- but that they do appear and explain their institutional interest in his continued detention.

What if they have no good reason for his continued detention? That is -- that's not evidence that's been presented to the Court. And it's evidence that needs to be considered.

THE COURT: You just posed, I guess, a rhetorical question: What if they don't have no good reason for his continued detention?

MR. BENOIT: If that were the case, Your Honor, then -- yeah, it is a rhetorical question. But if that were the case, then that -- there would be a clear alternative that is at de minimis cost to the government that would allow them to stop force-feeding and allow Mr. Kumar to begin nutrition. I mean, that is -- that is an alternative that is institutional, not necessarily medical, but that must be considered by the Court under the factors.

THE COURT: So, according to Ms. Corchado, ICE is taking her request for bond for her client, right?

MR. BENOIT: That's correct. They have -- they have

16:08 1 the discretion to do it at any time.
2 THE COURT: Right. So then of the standards that you
3 mentioned, the only one that I need to address is whether ICE
4 should have sent Mr. Kumar for an independent medical
5 evaluation as to whether he should be force-fed?
6 MR. BENOIT: That's one of the alternatives, and the
7 other alternative is a consideration of what interest they have
8 in continued detention.
9 THE COURT: Well, the bond addresses that, right?
10 MR. BENOIT: Well, the bond addresses it in
11 immigration context, but that -- that is one of the
12 alternatives, and proof needs to be considered if we raise an
13 alternative. This standard requires the Court to consider it,
14 not with regards to whether it should happen or shouldn't
15 happen, but whether -- in regards to whether there is a
16 legitimate alternative being considered.
17 THE COURT: What's there for me to consider with
18 respect to the bond if the request is already properly before
19 ICE?
20 MR. BENOIT: What ICE is considering with regards to
21 why they will continue to detain Mr. Kumar or not. What is
22 their interest? What are their interests in his continued
23 detention? That's a different question than whether he gets
24 bond or not.
25 THE COURT: How do you propose that would work? So

every time somebody is detained by ICE pending, say, an appeal to the BIA, that person could come to court and say, Order ICE to show you what is it that they are considering in determining whether that person should be allowed on bond?

MR. BENOIT: If that person is potentially about to be subjected to something that requires a constitutional analysis to decide whether it is constitutional or not -- in this case, nasogastric feeding or force-feeding -- we do believe that if the respondent raises that issue, that's evidence that the government needs to present. We don't have any evidence before us regarding why that alternative is simply not available to ICE at this time.

THE COURT: Ms. Saenz, is the government going to file a response to the pleading that was filed this morning?

MS. SAENZ: Yes, Your Honor. We would ask for seven days to file that response.

THE COURT: No. Today is Monday. I need it by the end of business Thursday. And in the meanwhile, the force-feed order will stay in place. Thank you all very much.

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I N D E X

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signature: /s/Nalene Benavides Date: September 9, 2019
Nalene Benavides, RMR, CRR