

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 85

HON. JAMES C. CHALFANT, JUDGE

SAMUEL A. PERRONI,)
PETITIONER,)
vs.) NO. BS159430
)
MARK A. FAJARDO, ET AL.,)
RESPONDENTS.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, SEPTEMBER 27, 2016

FOR PETITIONER: SAMUEL A. PERRONI, IN PRO PER
FOR RESPONDENTS: DANIEL P. BARER, ATTORNEY AT LAW and
ANNA L. BIRENBAUM, ATTORNEY AT LAW

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LOS ANGELES, CALIFORNIA 90012

1 CASE NUMBER: BS159430
2 CASE NAME: SAMUEL PERRONI VS. MARK FAJARDO
3 LOS ANGELES, CALIFORNIA TUESDAY, SEPTEMBER 27, 2016
4 DEPARTMENT 85 HON. JAMES C. CHALFANT, JUDGE
5 REPORTER: BUFORD J. JAMES CSR 9296
6 TIME: 1:30 P.M.
7 APPEARANCES: (AS NOTED ON TITLE PAGE)

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11 THE COURT: Perroni versus Farjado, BS159430,
12 number five on calendar. Your appearance, please.

13 MR. BARER: Good afternoon, Your Honor, Daniel
14 Barer for respondents.

15 MS. BIRENBAUM: Good afternoon, Your Honor, Anna
16 Birenbaum for respondents.

17 MR. PERRONI: Your Honor, Sam Perroni,
18 petitioner.

19 THE COURT: All right. Good afternoon.

20 This is here on Mr. Perroni's petition for
21 writ of mandate. It is a CPRA petition. There are two
22 County Departments at issue here, the Coroner's office and
23 the Sheriff's Department, from whom Mr. Perroni asked for
24 records. Actually, I spent -- well, you don't care how
25 much time I spent on this, but I actually think that the
26 outcome is mostly straightforward.

27 Mr. Perroni says -- it's a little ambiguous,
28 but he says what he really wants are photographs of Natalie

1 Wood taken at the scene of her death and any autopsy
2 photographs subject to a protective order; Sheriff's
3 Department witness interviews; yacht examinations and
4 photographs, excluding analysis or conclusions by
5 investigators; and the Miller report. I say it's ambiguous
6 because in other portions of his briefs he points out that
7 there may be missing items, none of which fit into those
8 categories, I think. But, in any event, those are at least
9 things the that were most important to him.

10 So the first issue is waiver for
11 noncompliance. It is true that the CPRA requires the
12 public agency within 10 days from the receipt of a request
13 to respond to the requester and state whether it will
14 comply. That is Section 6252(c). There is no remedy for
15 noncompliance with that requirement other than to seek
16 mandamus to compel compliance. So there is no waiver for
17 noncompliance with the deadlines.

18 The majority -- or maybe all, but let's just
19 say the majority of what Mr. Perroni seeks are covered by
20 6254(f), Records of Investigations Conducted by a State or
21 Local Police Agency. In Haney, the court distinguished
22 between investigative files which are protected or not --
23 exempt from disclosure only if the prospect of enforcement
24 is concrete and definite. On the other hand, investigatory
25 records or investigation records are exempt forever as long
26 as the agency declines to produce.

27 Haney explained that they do not lose their
28 exempt status based on whether or not there is a prospect

1 of enforcement. And they -- whether or not disclosure
2 would endanger a witness or the investigation is
3 irrelevant. The agency does not have to show a valid need
4 to maintain the confidence of an exempt record of
5 investigation. And while Coroners are not law enforcement
6 agencies, they are a local agencies, and the Coroner
7 compiles -- I wrote "complies." I meant "complies" --
8 investigatory files as part of his local agency duties.
9 And Coroner's record are, therefore -- Coroner's
10 investigative records are also exempt under 6254(f). And
11 that exemption exists even after the investigation ends.

12 And Mr. Perroni argues, and I agree, despite
13 the conclusionary statements by the Sheriff's Department,
14 that there is no prospect of criminal enforcement in the
15 Natalie Wood matter. Mr. Perroni points out, and I agree
16 with this also, that the statute of limitation has long
17 since passed for any kind of negligent homicide for
18 anything except murder, which has no statute of limitation,
19 and there is no reason to believe that anyone thinks,
20 including the Sheriff or the Coroner, that anybody murdered
21 Natalie Wood. In any event, prospect of criminal
22 enforcement is irrelevant to disclosure of records exempt
23 as investigative records.

24 And sort of as an aside, Mr. Perroni's
25 contention that there are no witnesses or informers whose
26 identities or statements must be kept confidential and no
27 privacy interests at stake, meaning Natalie Wood's privacy
28 interest, is also irrelevant. Although, I tend to believe

1 that Mr. Robert Wagner has a privacy interest in keeping
2 his wife's records confidential. So the fact is that the
3 Sheriff's Department and the Coroner could have maintained
4 all investigative records into her death confidential, not
5 disclosed them to anybody, and there is no balancing of
6 public interest in that regard.

7 One point that Mr. Perroni raises that I
8 agree with is that the Coroner admits that confidential
9 items remain within the Coroner's microfilm files that have
10 not been released to any individuals, but they have
11 presented no reason as to why those items remain
12 confidential. Are they investigatory records, or is there
13 some other basis to maintain their confidentiality? The
14 Coroner has not asserted that.

15 I think the best way to go here is for the
16 Coroner to identify, not the record, but the reason why
17 records or categories of records that remain confidential
18 are, in fact, being maintained as confidential, the nature
19 of exemption. They can identify the records if they want,
20 but there is a case that says they are not required to
21 identify the records that they are withholding.

22 Okay. Photographs of Natalie Wood are
23 protected by the Code of Civil Procedure 129(a)(2). They
24 are absolutely protected absent a showing of good cause.
25 There is no good cause showing here. Whatever Natalie
26 Wood's privacy interests that died with her, there is
27 public policy against disclosing death records or autopsy
28 records -- pictures, I'm sorry, death pictures or autopsies

1 pictures. Whether or not there are family members still
2 around, there's a societal interest in not publishing such
3 pictures.

4 However, 60- -- now we get to 6254.5, which
5 provides that whenever a local agency discloses a public
6 record which is otherwise exempt to any member of the
7 public, this disclosure is waived. And that codifies the
8 court of appeal decision in Black Panther Party versus
9 Kehoe, K-e-h-o-e, which stated that the CPRA does not
10 permit selective disclosure, that is, disclosure to one
11 person, one member of the public, and not to all.

12 Interestingly, the Coroner could have
13 maintained probably everything confidential, but the
14 Coroner -- I believe that it was Noguchi who at the time
15 was described as the Coroner to the Stars, if I recall --
16 felt it incumbent to disclose some records. It appears
17 that the Sheriff's Department has disclosed less
18 information over the years than the Coroner's office.
19 That's just my belief. Could be wrong.

20 So the question is have records been
21 disclosed to members of public. Well, Mr. Perroni relies
22 on the authors who have received access to certain records,
23 most particularly, Suzanne Finstad, F-i-n-s-t-a-d, was
24 given records by the Sheriff, both before and after her
25 book was published. Sam Cashner, C-a-s-h-n-e-r, was given
26 access to the 1981 file. Artie Rulli, R-u-l-l-i, was given
27 documents from the files by Detective Hernandez.

28 The problem Mr. Perroni has, he has not

1 shown what documents they were given. And it is his burden
2 to prove that respondents have waived their right to claim
3 an exemption. And the fact that some documents were
4 disclosed does not create an inference that the author
5 received any more documents than Mr. Perroni or any other
6 member of the public has.

7 Nobody, apparently, knows exactly what was
8 disclosed to Ms. Finstad when she got five pages on March
9 5, 2003, but you can't draw an inference that it must be
10 something that was previously undisclosed. And, in fact, I
11 would have expected Ms. Finstad to publish something if she
12 got some previously undisclosed material.

13 An interesting point that I learned in
14 evaluating this is that CPRA exemptions do not work like
15 privileges under the Evidence Code. When something is
16 privileged under the Evidence Code and the subject matter
17 of that document is waived, then disclosure of that
18 document is required. The CPRA is a document-based
19 disclosure statute. It does not matter whether the subject
20 matter -- or the information contained in the document was
21 previously disclosed to someone, a member of the public.

22 You could have two documents discussing the
23 very same issue, one which gets disclosed, and one of which
24 has been maintained as confidential, and the second one
25 will always be confidential if it is an investigatory
26 record. So the question is not whether the information
27 contained in a record was disclosed to a member of the
28 public, but, rather, whether the document itself was

1 disclosed to a member of the public previously.

2 Mr. Perroni makes just such an argument with
3 respect to the Miller report, which was a report by a
4 fellow known by the Coroner Noguchi who was an expert,
5 apparently, in sailing. Sounded like Mr. Noguchi took a
6 sailing class from him or otherwise knew him from sailing
7 experience and asked him to evaluate the boat, the algae on
8 the boat -- let me back up.

9 I wrote this all down, exactly what he asked
10 him to do. Examine the stern of Wagner's yacht and the
11 dingy for any sign of violence; examine the algae on the
12 bottom of the yacht's swimming step to see if Natalie Wood
13 tried to reboard the yacht; and check the sides of the
14 dingy for fingernail scratches. He wrote a report. He was
15 not an employee of the Coroner, but he did perform the act;
16 wrote the report; submitted it to the Coroner, which
17 Mr. Noguchi used. He did not release, but wrote about in
18 his memoir. And he wrote, quote, rereading the report
19 today, I can see Isthmus Bay again in my mind's eye, dark
20 and threatening in the night, et cetera.

21 Now, Mr. Perroni argues that the Miller
22 report -- first of all, the Coroner's office representative
23 said that -- admitted that Coroner investigator narratives
24 are disclosable. Mr. Perroni found online a narrative by
25 Pamela Eaker, E-a-k-e-r, which he described as unmistakably
26 an investigative narrative, and the Miller report is no
27 different. There is no reasoned basis to distinguish the
28 Miller report from the Eaker report for purposes of

1 disclosure.

2 While I suspect he may be right, I don't
3 evaluate it in that way because it seems to me that,
4 despite the fact that Mr. Noguchi testified that he does
5 not have the Miller report, he also testified that he did
6 not take any Coroner documents with him when he retired, he
7 had to have had the Miller report when wrote the memoir.
8 Taking him at his own statement, he had it in his hand as
9 he was writing the memoir.

10 It's also true that in the reopening of the
11 case the Coroner -- the then Coroner met with Mr. Noguchi
12 and Mr. Miller as well as members of the Sheriff's
13 Department in 2012 and gave Mr. Miller a copy of his own
14 report for purposes of the meeting. And I think it was
15 pretty clear that Mr. Noguchi had the report also.

16 Now, whether he took it away from the
17 meeting, I don't know. I don't know there is evidence of
18 that, but it seems to me to be pretty -- I mean,
19 borderline -- how would I put it. The purposes of the CPRA
20 are not served by allowing Mr. Noguchi to take and use the
21 report for his memoir and then claim that it is part of an
22 investigative record that should not be disclosed. I
23 think, by giving it to him when he was no longer the
24 Coroner and no longer held public office, even if he gave
25 it back, it was disclosed to a member of the public and
26 there is a waiver.

27 Therefore, the tentative is to grant the
28 petition, in part, by requiring disclosure of the Miller

1 report by the Coroner's office, not the Sheriff's
2 Department, and requiring the Coroner at least state by way
3 of declaration the basis on which other records are being
4 withheld. That's what the tentative says.

5 Have you seen it?

6 MR. BARER: Yes, Your Honor.

7 MR. PERRONI: Yes.

8 THE COURT: Mr. Perroni, do you wish to be heard?

9 MR. PERRONI: Yes, Your Honor. I got it when --
10 I got it and read it when I got here.

11 THE COURT: Okay.

12 MR. PERRONI: Okay.

13 THE COURT: You want to be heard?

14 MR. PERRONI: Yes, sir, I do.

15 THE COURT: Go ahead.

16 MR. PERRONI: All right. Because I want to make
17 sure that I don't miss anything -- last time I was in here,
18 I made the mistake of trying to lip read because I just
19 have this issue about talking to people and not looking at
20 them. But because this is so important today, I am going
21 to have to look at this screen most of the time, and I
22 apologize for not looking at you when you are taking.

23 THE COURT: That's fine.

24 MR. PERRONI: That's number one. Two, I hope you
25 would indulge me a second on a little housekeeping before
26 we get going.

27 THE COURT: Okay.

28 MR. PERRONI: All right. May I ask the Court

1 what a Statement of Decision is?

2 THE COURT: I can't give you legal advice.

3 MR. PERRONI: All right.

4 THE COURT: It's in the Rules of Court.

5 MR. PERRONI: Well, I'm not asking you to give me
6 advice. I just read your local rules, and the local rule
7 says that when I get a tentative decision like this that I
8 can make a request for a Statement of Decision pursuant to
9 Rule 3.1590(d), as in "dog."

10 THE COURT: Yes. That's not a local rule.
11 That's a Rule of Court. That's a rule for the whole state,
12 in other words, not local, not for L.A. Superior Court.
13 That is a rule that governs all courts in the state.

14 MR. PERRONI: All right. Well, I apologize
15 again. I didn't mean to offend you by it --

16 THE COURT: No, I'm not easy to offend.

17 MR. PERRONI: Rule of California Court, I guess,
18 procedurally I am going to have to make a request for this,
19 since I don't thoroughly understand this tentative decision
20 issue and how these orders are supposed to finally get
21 final.

22 THE COURT: Okay. So this is my Statement of
23 Decision.

24 MR. PERRONI: All right.

25 THE COURT: It's a Tentative Statement of
26 Decision.

27 MR. PERRONI: All right. But my understanding is
28 that, under the law, that's not a final order. So how does

1 it get to be a final order?

2 THE COURT: It's going to be a final order
3 because, assuming I adopt it. Let me explain to you the
4 purpose of a Tentative Statement of Decision.

5 MR. PERRONI: Okay.

6 THE COURT: You, I believe, are a trial lawyer or
7 were a trial lawyer. After a court trial when a judge
8 makes a decision, often the judge asks the winning party to
9 prepare a Tentative Statement of Decision. Since that
10 winning party tends to slant the wording, the language, in
11 their favor, the Rules of Court were adopted that permit
12 the another side to object to the Tentative Statement of
13 Decision before it becomes final. That is the purpose of
14 the rule for Tentative Statement of Decision, and then you
15 have the right to object to the Tentative Statement of
16 Decision, and then the judge adopts the Final Statement of
17 Decision.

18 Where I write my own decisions, and I assure
19 you I wrote this, it makes no sense to me to have a
20 Tentative Statement of Decision and then have the parties
21 object to it. But if you want the right to object, you
22 have the right to object. I'm telling you right now I'm
23 going to overrule your objections if I adopt this tentative
24 as my -- whatever I do adopt. Sometimes I adopt the
25 tentative as modified at the hearing, but whatever I say at
26 the end of the today, I am like a shark, I go forward, I
27 don't go back. I'm not going to revisit this issue because
28 you have filed objections to my Tentative Statement of

1 Decision.

2 But you have every right to do so. If you
3 want me to call this -- that's why I don't call my
4 Tentative Decision a Tentative Statement of Decision, for
5 that very reason, because I don't want to invite
6 objections. But you have the right to have it called a
7 Tentative Statement of Decision, and if you want that,
8 that's what I'll call it.

9 MR. PERRONI: Oh. I appreciate that explanation.
10 I just wanted to make sure before we go forward if this
11 thing gets to some kind of appellate review that I didn't
12 do something I was supposed to do. So you have explained
13 it. I understand the procedure.

14 THE COURT: Okay.

15 MR. PERRONI: We can go forward. There is no
16 problem.

17 THE COURT: Okay. Go ahead.

18 MR. PERRONI: I appreciate it. All right.

19 The next thing is I know this is a tentative
20 ruling, Your Honor, but I've been around judges long enough
21 to know if they have made up their mind, I can argue with
22 them till the cows come home, and I'm not going to change
23 it, but what I would like to do, what I would like to do
24 this afternoon, is take a little time to reason with you
25 about some issues in this case that perhaps maybe I didn't
26 articulate well enough in my briefs but that I want this
27 Court to consider before we just merely adopt this
28 tentative decision.

1 So here is what I would like to do. First
2 of all, I would like to put this entire case in context,
3 number one, I looked, I didn't find any cases that even
4 remotely come close to the fact situation we have in this
5 case. None. That's number one --

6 THE COURT: I'm not sure what you mean, "facts."
7 You mean a criminal investigation that went nowhere? I
8 mean, it happens all the time.

9 MR. PERRONI: No. Where somebody makes a request
10 for public records in connection with police and coroner
11 files that are 35 years old.

12 THE COURT: I can think of many famous cases,
13 most of them Hollywood cases, where I would be surprised if
14 all of the records have been produced by the law
15 enforcement.

16 MR. PERRONI: Well, I am just saying I didn't
17 find any reported cases.

18 THE COURT: That is true.

19 MR. PERRONI: That's all. All right.

20 Number two. This case involves celebrity,
21 not only the celebrity that passed away, but celebrities
22 that were on the boat that night, Robert Wagner and
23 Christopher Walken, but as this Courts knows and would
24 agree with me there is no celebrity exception in the
25 California Public Records Act.

26 THE COURT: There is not.

27 MR. PERRONI: Okay. Now, we have this death 35
28 years ago. There is four people on the boat. One of them

1 ends up in the water. That leaves three folks. When --
2 the record is clear on this and it's undisputed. When the
3 Sheriff's office were sent out there, they were sent out
4 to, quote, investigate the circumstances of a celebrity
5 death.

6 Now, the Court has indicated in its
7 tentative ruling that there's just no other reason for them
8 to be going out there other than to investigate a crime.
9 And I submit to you -- and I can give you statutory
10 authority for it -- that there is. The Sheriff's office
11 and the Coroner's office have statutory authority to engage
12 in searches and rescues. They don't have to go out there
13 because they think there is a crime. They can go out there
14 because somebody is in the water or somebody is missing or
15 somebody needs to be dug out of there.

16 THE COURT: This isn't -- this is neither a
17 search, nor a rescue.

18 MR. PERRONI: Well --

19 THE COURT: She was dead.

20 MR. PERRONI: Judge, all I'm doing is I'm
21 reviewing the facts of the case. The undisputed facts are
22 they went out to investigate the circumstances of a
23 celebrity death.

24 THE COURT: Right.

25 MR. PERRONI: Okay. Now, number two. When they
26 got there, the very first person on the scene was a sheriff
27 who was on the island all the time. He was assigned to the
28 island. So what did he do, he prepared a report. And what

1 was his report, his report was the apparent, accidental
2 drowning of a celebrity. That's in the record. It's
3 undisputed.

4 Number two, 11 days later, 11 days later,
5 this file was inactivated. It wasn't closed. It is really
6 important. It was inactivated after 11 days, and it was
7 inactivated -- and this is in the file, this is in the
8 record, this is undisputed -- as a person dead, accidental
9 drowning.

10 Now, let's take Haney. Number one, in
11 Haney, there was a complaint of possible criminal --
12 criminal activity. That's why the police went there in the
13 first place. Number two, in Haney's case, Haney was the
14 suspect. He was the one who was stopped and handcuffed.
15 Why, because the complainant said that Haney had a pistol.
16 So he was stopped for suspicion of having an illegal weapon
17 in his possession, a crime. His request was made 11 days
18 after they started this.

19 Now, the Haney case specifically says in
20 there that the case is limited to the records in that case.
21 It didn't expand this 6254(f) exemption at all. It didn't
22 overrule Williams. It didn't overrule Uribe. It dealt
23 specifically with that case and a request made by the
24 suspect in a criminal activity for records. And what Haney
25 did was Haney addressed the circumstances behind a swift
26 request for public records in a suspicious criminal
27 activity.

28 THE COURT: Doesn't have to be suspicious. Look,

1 there is -- if you are trying to argue to me there was no
2 criminal investigation, I mean, that just isn't going to
3 fly. It is the potential to find out if a crime has
4 occurred that is important, and there is no reason for
5 the Coroner to conduct an autopsy if everybody knows it was
6 an accident. They do not autopsy accident victims unless
7 there is any possibility, and it can be a remote
8 possibility, of potential criminal activity.

9 MR. PERRONI: Judge, I agree with you 100
10 percent, but the issue is the records. We're not talking
11 about why they performed the autopsy. We're talking about
12 at the time the autopsy report prepared, was it an
13 investigatory record. And the only way -- the only way it
14 could be is if there's a concrete and definite prospect of
15 criminal law enforcement proceedings. And the record in
16 this case shows that by the time Dr. Noguchi finished his
17 autopsy and prepared his report, it was an accident.

18 THE COURT: You are confusing a file with a
19 record. That's what -- Haney makes a clear distinction
20 between an investigative file and an investigative record.
21 They are not the same. The file could have newspaper
22 articles in it, for example. It could have letters from
23 friends. Those are not investigative in nature, but they
24 would be in the file. And they are not protected from
25 disclosure unless there is a concrete prospect of criminal
26 enforcement, but the investigative record is protected
27 forever.

28 MR. PERRONI: Well, Judge, that's only if the

1 investigation of suspected criminal activity. That's what
2 Haney stands for, suspected criminal activity.

3 THE COURT: Potential.

4 MR. PERRONI: There was none in this case.

5 THE COURT: Potential. There is no reason for
6 them to go. There is no reason for the Sheriff to be
7 there. There is no reason for the Coroner to do an autopsy
8 unless this woman who -- I might add beautiful woman, this
9 beautiful woman who was in a nightgown drowned of a boat
10 with her husband and two other men on the boat unless
11 there's the potential for criminal activity.

12 The obvious question is what was she doing,
13 why was she getting into the dingy, why didn't they know
14 she was getting in the dingy. These are obvious questions,
15 and they all relate to the potential for criminal activity.

16 MR. PERRONI: But, judge, that's not what they
17 proved. See, what they have done is they have trapped you
18 into this mind set of assuming that that is why they went
19 out there. That's why I started my argument with the
20 proposition that this involves a celebrity. When you say
21 there is no reason other reason for them to be out there,
22 I'm sorry, Judge, but this lady was Hollywood royalty.

23 THE COURT: She was.

24 MR. PERRONI: There is all the reason in the
25 world for them to be out there.

26 THE COURT: You mean because they are just
27 curious?

28 MR. PERRONI: For instance, when John Kennedy

1 crashed into the ocean, they sent the military and everyone
2 else out there to find him. Not because they thought there
3 was a crime, but because it was John Kennedy.

4 THE COURT: Maybe so. Maybe you should file your
5 lawsuit in Massachusetts for reimbursement of the public.

6 MR. PERRONI: That's exactly what happened in
7 this case, Your Honor. Exactly. And, see, this is the --
8 this is what the record shows. This is not Sam Perroni.

9 THE COURT: Look, you are spending a lot time on
10 a nonissue. There's no way this was not investigation for
11 potential criminal activity. And Haney says even routine
12 investigations such as a traffic stop are protected. This
13 is completely protected. So you need to move on to an
14 issue that you can actually win on. This one is a
15 non-starter.

16 MR. PERRONI: Yes, sir. I will move on to
17 another issue here, another point. All right. And that is
18 this: This waiver issue. All right.

19 I made an objection to the two declarations
20 in this case on this ground. I said that it violates due
21 process of law for the respondents in this case to assert
22 and affirmative defense, refuse to answer questions about
23 it directly relating to it, and then to put a declaration
24 in front of you that speaks towards that particular
25 affirmative defense.

26 Now, I haven't seen a ruling, but I assume
27 you overruled that. Is that true?

28 THE COURT: Well, when you say "overruled," now

1 you mean your most recent filing?

2 MR. PERRONI: Yes.

3 THE COURT: Your supplemental objection document?

4 MR. PERRONI: My supplemental objection.

5 THE COURT: I looked at that this morning. As
6 you know and I know, those are not evidentiary objections.
7 You are attempting to raise a due process issue that's not
8 in the briefs, and the answer to your objection, which is
9 not evidentiary, therefore, I did not rule on it, is that
10 you should have made your motion to compel properly and
11 obtained answers to the questions that you were interested
12 in on waiver, if that's what your concern is.

13 I will also say that I didn't find the
14 declaration enormously persuasive. For example, I agreed
15 with you that I don't think it's a live investigation any
16 more than you do, even though the Declaration of Detective
17 Hernandez says it's an open investigation. So I don't know
18 that you should be too exercised about the declarations.

19 Even if you leave aside the declarations,
20 it's your burden to show on waiver that these -- some
21 documents were given to somebody else who is a member of
22 the public that were not given to you, and you haven't done
23 that.

24 MR. PERRONI: And that's exactly what I am trying
25 to address. In his deposition, I specifically asked
26 Detective Hernandez multiple questions. It took me five
27 pages to extracts this is out of him. I was specifically
28 telling him that I was asking these questions for a basis

1 of waiver, and I was asking him about what it was that he
2 gave -- that anybody in the Department gave Suzanne
3 Finstad.

4 He has testified under oath, Your Honor, in
5 that deposition that they wouldn't even let him have the
6 files and that he had no idea that -- he had no idea
7 whether Suzanne Finstad was even one of the persons they
8 gave the information to. Then he turns around in a
9 declaration and swears to you where I can't cross-examine
10 him that here is a list of things that were given to
11 Suzanne Finstad.

12 Now, here is what I submit at this point in
13 time that the Court should do, and the evidence rules that
14 you can do it. When a party has refused to answer
15 questions, you can use that hold as an adverse inference.
16 If you would like the pages in his testimony where he
17 testified to that, I can give them to you from the
18 appendix.

19 THE COURT: Where does he say what he gave to --
20 what Finstad was given?

21 MR. PERRONI: All right. If you will look at his
22 declaration on paragraph 6 and 7, he talks about -- about
23 what it is that he is saying now that was given to Suzanne
24 Finstad. However --

25 THE COURT: I mean, it does not really say.

26 MR. PERRONI: If you will look -- if you will
27 look at pages -- Exhibit 4, pages 36 and 37, and 39 and to
28 41 in the reply brief, the rebuttal brief. If you look at

1 Hernandez Exhibit 4. That's -- I think that's the next to
2 the last one, maybe. Okay. Then if you will look down at
3 the bottom, we've numbered them --

4 THE COURT: No, I saw this. Let me interrupt.
5 What does that mean? "I don't know because you see they
6 won't give me the file." What does that mean?

7 MR. BARER: Your Honor, that's under the Q. That
8 says that's what Mr. Perroni said, not what Detective
9 Hernandez said. Page 63, lines 15 and 16.

10 THE COURT: It's Mr. Perroni saying, "They won't
11 give me the file." Okay. So page 63 what?

12 MR. BARER: Lines 15 and 16.

13 MR. PERRONI: Your Honor, he's --

14 THE COURT: I don't have page -- yeah, you are
15 saying that's part of the question.

16 MR. BARER: Yes, Your Honor.

17 THE COURT: So where is the answer? It's not
18 here.

19 MS. BIRENBAUM: On page 64 Mr. Perroni rephrases
20 the question.

21 THE COURT: So he's not saying -- nowhere does
22 Detective Hernandez say he didn't have access to the file.

23 MS. BIRENBAUM: No, at 64, line 2, Mr. Perroni
24 says, "Let me start over. In other words, here is a new
25 question."

26 THE COURT: Yeah. Okay, it did give me pause to
27 see, "They won't give me the file." Okay.

28 So Mr. Perroni, back to you.

1 MR. PERRONI: All right. Judge, of course, you
2 know, I didn't hear exactly what was said --

3 THE COURT: Go ahead and read it.

4 MR. PERRONI: -- what was said a minute ago.

5 THE COURT: Go ahead and read it.

6 MR. PERRONI: Let me read this to you.

7 "Do you know if anyone else in the
8 Department has given Suzanne Finstad anything out of the
9 file?" This is Exhibit 4. We've labeled it as Exhibit
10 page 36.

11 Then I say, "This is personal knowledge."
12 So I am asking this witness his personal knowledge as to
13 whether or not anyone in the Department has given Suzanne
14 Finstad anything out of the files.

15 Then I say, "I'm just asking you do you
16 know." Then the witness goes, "To who? Given to who?" I
17 say, "Suzanne Finstad." And then it goes, "Actual
18 documents out of the file." I said, "Or information."
19 Then the answer, "What kind of information?" Then I say,
20 "Anything about the files. I don't know, you see, because
21 they won't give me the file. So I don't know how to ask
22 this other than you could either give somebody a file or
23 you can tell somebody what is in the file." Then it goes
24 over --

25 THE COURT: But that doesn't say it's an answer.

26 MR. PERRONI: -- then it says, "So what I'm
27 trying to do, I'm trying to find out if all you have waived
28 anything, given things to people who don't have a reason to

1 know about it other than they are trying to get information
2 from you. And my question, specifically to you" -- this is
3 on page 40 -- "do you know if anyone in the Department has
4 given Suzanne Finstad any information out of the file."

5 Answer, "Okay. No." It goes again, "No,
6 but I'm trying -- but I am under perjury here." So, see,
7 he's thinking about what he's saying -- "under oath, and
8 I'm just trying to think. I believe she was a -- I think
9 she was one of the authors, and the problem is I'm not
10 sure, and so that's why some of your questions are also
11 unfair" -- I am being unfair here -- "but I believe she was
12 one of the authors who gained access to the file when it
13 was closed and inactive."

14 Then I say, "Okay." Then answer, "I
15 couldn't tell you without a doubt who allowed her access.
16 Okay." Then he says this: "And I couldn't tell you it was
17 her that was given access back then." Then he comes along
18 and he swears in a declaration, not only was she given
19 access, but he swears to what she was given access to.

20 THE COURT: But he doesn't. He does not say what
21 she got.

22 MR. PERRONI: What I'm getting at, Judge, is, you
23 see, they should not be allowed to create an investigatory
24 exemption in 2016 on records that were created in 1981.
25 They shouldn't be allowed --

26 THE COURT: It's always been there. The flip
27 side of this is you shouldn't be -- I'm not saying you
28 can't, but you shouldn't be allowed to ask a witness

1 questions about access to files that took place in
2 ninety -- when did this -- when did this occur?

3 MS. BIRENBAUM: The original death, '81.

4 THE COURT: No. Finstad's access to file
5 information. When was the fax sent?

6 MR. PERRONI: She got access to the file about
7 2000, Your Honor.

8 THE COURT: So we're talking 16 years ago.

9 MR. PERRONI: That's right. He wasn't even there
10 then.

11 THE COURT: He was not. And it's pretty hard --
12 unless they kept a record of what they gave, which,
13 apparently, they didn't because, otherwise, he would have
14 been easily able to tell you what she got.

15 MR. PERRONI: Yes.

16 THE COURT: You are asking about 16 years ago so
17 nobody knows. The answer is nobody knows, except, by the
18 way, Ms. Finstad. Did you depose her?

19 MR. PERRONI: Oh, no, I could not find her, but I
20 did this. I asked him if he had talked to her, and he
21 said, yes, he talked to her in 2016. And I asked him,
22 "Well, what did you talk about?" And they told him not to
23 answer.

24 THE COURT: Well --

25 MR. PERRONI: Now, I think you can hold all of
26 that against them, Your Honor. They had access to Suzanne
27 Finstad. They could have gotten an affidavit from her or a
28 declaration from her about what she has got. Instead,

1 they Hernandez, who had testified under oath that he didn't
2 even know she was one of the authors that got access, do a
3 declaration and say exactly what she got.

4 My point of all this is, Your Honor, is
5 that I don't have to prove waiver by direct evidence. That
6 is, somebody saying, "Oh, I gave a document to so and so."
7 I can prove it by circumstantial evidence --

8 THE COURT: Sure, you could.

9 MR. PERRONI: -- and the circumstances
10 surrounding this show that Finstad and Cashner were given
11 access to the '81 files, and they -- they have the burden
12 of showing that it wasn't all of the file, not me.

13 THE COURT: Why didn't you ask Hernandez, "You
14 spoke to Finstad. What is her contact information? Give
15 me her address, her phone number so I can talk to her."

16 MR. PERRONI: They wouldn't let me have any
17 information.

18 THE COURT: Did you ask that question?

19 MR. PERRONI: I asked her what she talked about.
20 They said you are not going to answer it.

21 THE COURT: Yeah. Well, I do think that you
22 should have been able to ask that question, what you talked
23 to her about. She's not -- there is no privilege there.

24 MR. PERRONI: I know there is no privilege there.
25 That's one of the things I was arguing about. That's why I
26 think it's so unfair. They have a man testify under oath
27 in the deposition that he has no clue whether she was even
28 one of the people who get it, then they turn around in a

1 declaration that I can't cross-examine or examine any more
2 and say, well, this is what she was given.

3 THE COURT: His declaration -- his declaration is
4 pretty vague. That's my point. He doesn't really say
5 because he does not know what Ms. Finstad got.

6 MR. PERRONI: It is vague, Judge, but here is the
7 point. I think that, under the law, I have made a prima
8 facie case because they have admitted that they disclosed
9 these files to these two people. What is left in that
10 file, I don't know, but I've asked this Court to look at it
11 in camera.

12 THE COURT: Well, what would be the point of
13 looking at it in camera? That is, they are not withholding
14 it based on it being a file document. They are withholding
15 it based on it being an investigative report.

16 MR. PERRONI: Well, Judge, and I'm saying that
17 under the undisputed facts in this case in 1981 it was
18 definitely not. And what I am saying is is that --

19 THE COURT: I don't agree with that. So you are
20 arguing waiver. Well, what about -- Mr. Perroni's argument
21 is that the Sheriff's Department has admitted that various
22 authors received access to portions of the 1981 file. I'm
23 reading page 6 of the Hernandez declaration. Detective
24 Hernandez apparently does not know exactly what each author
25 was given access to.

26 Paragraph 7 says, "I was able to determine
27 that the persons who were provided access were provided
28 access to the following items," and then he lists them.

1 Mr. Perroni says, essentially, how does he know that. How
2 does he know what documents that Finstad and Cashner had
3 access to because he sure couldn't tell me.

4 That is your argument, right, Mr. Perroni?

5 MR. PERRONI: Yes, sir.

6 THE COURT: So what about that? How does he
7 know?

8 MR. BARER: Your Honor, in doing these
9 declarations, we dealt with Detective Hernandez. He was
10 able to determine after investigation, he is a detective,
11 into the files that portions of the files had been given to
12 various persons. He didn't know exactly what was given to
13 Suzanne Finstad or Sam Cashner, but he said these are the
14 documents that have been given to people. And there were
15 about 241 pages that are listed in paragraph 7. And once
16 we found that out, we gave them to Mr. Perroni.

17 THE COURT: Well, how did he know that these are
18 the documents that have been given to people?

19 MR. BARER: By reviewing the files and doing
20 investigation within the firm --

21 THE COURT: There must be something that he saw
22 or did that told him in paragraph 7 these are the only
23 documents, we don't know -- apparently, he does not know
24 what Finstad got, what Cashner got, but these are the
25 documents that have been disclosed. Right? There must be
26 some basis.

27 MR. BARER: Yes.

28 THE COURT: Mr. Perroni, if you want to depose

1 Mr. Hernandez again and ask him what his basis is for
2 paragraph 7, you may do so. Next issue.

3 MR. PERRONI: Thank you. I'll do it.

4 THE COURT: Okay. Next issue. What else you
5 got?

6 MR. PERRONI: All right. Let's see if I can go a
7 little further here, Judge. Just so -- may I do a little
8 bit of housekeeping for one second on what you just
9 permitted me to do.

10 THE COURT: Okay.

11 MR. PERRONI: Now, last time I took a deposition
12 of Detective Hernandez they instructed him not to answer
13 almost a hundred times.

14 THE COURT: Yeah, you can't do that in
15 California. I don't know about in Arkansas, but you can't
16 do that in California unless you are instructing the
17 witness based on privilege. If there is any other ground
18 besides privilege, you cannot instruct them not to answer.

19 MR. PERRONI: Well, but puking out privilege is
20 easy to do. All you've got to do is say "I object on the
21 basis of privilege."

22 THE COURT: Okay. Do you want to depose him in
23 the court house? You can do it in the court house if you
24 want.

25 MR. PERRONI: What I'm trying to is get
26 guidelines. Can I ask him about this Suzanne Finstad fax?

27 THE COURT: Yeah. You already have. You can't
28 ask -- you can't replew the same ground, but you are

1 certainly entitled -- I'm giving you -- not certainly. I
2 am giving you the right -- he says in paragraph 6 that, "We
3 disclose to Finstad and Cashner." Then paragraph 7 he
4 says, "Here is what we disclosed."

5 You are entitled to ask him, "How do you
6 know what was disclosed? What document or interviews or
7 communications did you have on which you are relying to say
8 these things were disclosed and these are the only things
9 that were disclosed?" You may ask that.

10 You may also ask, "Are you able to tell in
11 paragraph 7 which ones were given to Finstad and which ones
12 were given to Cashner or this other fellow Rulli?" That's
13 the scope of what you get to ask so far.

14 MR. PERRONI: Thank you. That's good enough.

15 Now I'd like to address these photographs.

16 THE COURT: Okay.

17 MR. PERRONI: All right. Here is what we're
18 dealing with. In this particular case we're dealing with,
19 apparently, three sets or types of photographs. We're
20 dealing with photographs -- or two types. We're dealing
21 with photographs that the Sheriff's Department took at the
22 scene that are still in their file, and we're dealing with
23 photographs that the Coroner's office took, presumably,
24 because I haven't been told and they didn't submit anything
25 to this Court to determine this, supposedly, I guess at the
26 autopsy. I don't know.

27 But, here is the thing. Here is what this
28 statute says. This statute says -- and they have to prove

1 this, Judge. This statute says that these photographs have
2 to be taken by or for the Coroner at the scene of death or
3 in the course of a postmortem examination or autopsy.

4 THE COURT: Right.

5 MR. PERRONI: Now, there is absolutely zero
6 evidence offered by them that the photographs that are in
7 the Sheriff Department file were taken by the Sheriff
8 Department for the Coroner.

9 THE COURT: I didn't say they were.

10 MR. PERRONI: Okay. If they didn't say they
11 were, then, this statute doesn't fit this section 12 --

12 THE COURT: Doesn't protect Sheriff's
13 photographs, no, but it protects the Coroner's photographs.

14 MR. PERRONI: Okay. So we got that down. All
15 right. So but in your tentative ruling it appears as
16 though that it says that this statute protects all
17 photographs.

18 THE COURT: No. Look at the first line on page
19 10 of my tentative.

20 MR. PERRONI: Okay.

21 THE COURT: Go ahead. Look at the first line on
22 page 10 of my tentative under section 3, "The photographs
23 are separately protected." First line.

24 MR. PERRONI: Let's see here. The one under
25 photograph. Can you tell me what page that is, Judge?

26 THE COURT: Ten. First line under the heading.
27 "The Coroner's photographs of Natalie Wood's body are
28 separately protected by statute."

1 MR. PERRONI: Then I misspoke. So let's deal
2 with the photographs taken by the Sheriff at the scene.

3 THE COURT: They are investigative records.

4 MR. PERRONI: They are protected by investigative
5 records. That's what you are saying.

6 THE COURT: Yes.

7 MR. PERRONI: Based on the evidence that's in
8 this record?

9 THE COURT: Yes.

10 MR. PERRONI: All right. And in that connection,
11 you have declined my request for in camera inspection of
12 those?

13 THE COURT: I don't know what the purpose of in
14 camera inspection would be here. That is, it's undisputed
15 what these things are. So if I were to look at a
16 photograph taken by the Sheriff of Natalie Wood's body, all
17 I would see is a photograph of Natalie Wood's body taken by
18 the Sheriff, which I have concluded that those photographs
19 are necessarily investigative records. I don't need to
20 look at the photograph in camera to know that.

21 MR. PERRONI: Okay. So then you are denying it.

22 THE COURT: I am denying it because the issue in
23 this case is waiver, and I can't tell waiver by looking at
24 the records in camera.

25 MR. PERRONI: All right. And but I'm also asking
26 you to look at them in connection with this investigative
27 exemption, which I don't believe is applicable.

28 THE COURT: Right. If they were relying on the

1 investigative file exemption, then I would have to look in
2 camera to see if all of the records in the file were
3 somehow protected, but they are relying on investigative
4 record exemption. You are asking for witness interviews
5 and photographs. I cannot think of anything that is more
6 investigative record in nature than witness interviews and
7 photographs of the alleged victim.

8 MR. PERRONI: All right. And just for the
9 record, just so you know, I think that that is an -- an
10 overexpansion of section 6254(f) and an overexpansion of
11 the ruling in Haney because that's what this Court has got
12 to be relying on to say that.

13 THE COURT: Okay. My answer to you is that's a
14 court of appeal issue.

15 MR. PERRONI: Okay. But I want to make sure I
16 have a record. I've asked you to look in camera at the
17 1981 file records that have not been given to me. I've
18 asked that.

19 THE COURT: For what reason?

20 MR. PERRONI: For the same reason. I believe
21 it's not applicable, Judge.

22 THE COURT: What --

23 MR. PERRONI: I believe that section 6254(f) is
24 not applicable.

25 THE COURT: Okay. Let me ask opposing counsel.

26 Is there any reason for me to look at
27 anything in camera?

28 MR. BARER: Your Honor, the investigative

1 records -- and we provided Detective Hernandez's
2 declaration they are investigative records and that are
3 sought in the L.A. Sheriff's Department records. There is
4 no reason to look at them in camera unless he makes a prima
5 facie showing that they have been wrongly withheld --

6 THE COURT: In other words, that they are not
7 investigative records.

8 MR. BARER: Right.

9 THE COURT: That they are newspaper articles or
10 something like that, which I would have to do if you were
11 relying on investigative file exception.

12 MR. BARER: Exactly.

13 THE COURT: But there is no reason for me to look
14 at a witness interview and say, oh, yes, this is
15 investigative record.

16 MR. BARER: In fact, there were newspaper
17 articles, magazine articles, and "48 Hours" recording we
18 offered to Mr. Perroni. We concluded the investigative
19 file exception does not apply and they were not
20 investigatory records. We gave Mr. Perroni the "48 Hours"
21 episodes. He didn't want the articles.

22 MR. PERRONI: No offense to opposing counsel, I
23 have read no law that says that I have to except what the
24 respondents are saying with respect to what is covered and
25 what is not covered.

26 THE COURT: Look, I agree with you, you don't.
27 If there was any issue that what they are withholding is
28 not -- but you are specifically asking for photographs and

1 witness interview summaries and yacht examinations and the
2 Miller report. All of those, by definition, are
3 investigatory records.

4 So there is no point in me looking at the
5 very things you have asked for. If you had asked for
6 something else that might not be an investigatory record,
7 that would be different, which is why I am saying they have
8 to -- the Coroner has to say anything they are withholding,
9 what is it. Is it investigatory record.

10 Now, if you want me to look at that and if
11 you want me to look at the records the Coroner is
12 withholding, I may do that.

13 MR. PERRONI: I understand, Judge. But here's
14 the state of the record. The state of the record is that
15 in 2000 and 2001 they allowed two authors to rummage
16 through those files.

17 THE COURT: Did they?

18 MR. PERRONI: Okay.

19 THE COURT: Did they? I'm not aware that the
20 authors were given the files to rummage through. I am
21 aware that they were given documents from the file.

22 MR. PERRONI: No. They were given access to the
23 file.

24 THE COURT: If they were given the file to look
25 through, the whole file is disclosable.

26 MR. PERRONI: That is exactly what I have been
27 trying to say. And if you look at the declaration of
28 Hernandez, he says "access."

1 THE COURT: Doesn't mean "rummage." Doesn't mean
2 they got to look at the file, that they got to know what is
3 in the file. It does not mean that.

4 MR. PERRONI: All right. Let's just take this
5 proposition. Let's just take the state of the record that
6 in 2000, 2001, that they allowed two authors to look at
7 something. We could all agree to that.

8 THE COURT: Yes.

9 MR. PERRONI: All right.

10 THE COURT: I can't remember if it was the
11 Sheriff who did that.

12 MR. PERRONI: Now they are coming back and
13 saying, well, in 1981, there is other things in the file.
14 We don't want you to have those because those are protected
15 by the investigatory exemption they are claiming.

16 THE COURT: Right.

17 MR. PERRONI: Right.

18 THE COURT: Right.

19 MR. PERRONI: Okay. Here is what I think. I
20 think this. I think I've established a prima facie case
21 when they admit that they have allowed the public to look
22 at these files and they --

23 THE COURT: You would have --

24 MR. PERRONI: -- can't tell us what.

25 THE COURT: You would have to show that. I don't
26 believe you have shown that. Finstad or Cashner get to
27 rummage through the file.

28 MR. BARER: No, Your Honor. Paragraph 6 says

1 portions of the 1981 files. Detective Hernandez's
2 paragraph 6. And paragraph 7 of that declaration says
3 these are the portions they were given.

4 THE COURT: Yeah, it's provided access. I cannot
5 draw any conclusion other than that somebody went through
6 the file at the Sheriff's Department and decided to give
7 these people certain documents. Why they did so, I don't
8 know. Whether Finstad was buddies with the Sheriff. I
9 don't know why they decided to cough up this information.
10 They didn't have to cough up any of it, as near as I can
11 tell. But they did, and those are public.

12 MR. PERRONI: Well, in their Request for
13 Admission they admitted that they gave access to Sam
14 Cashner and Suzanne Finstad. Access.

15 THE COURT: Right.

16 MR. PERRONI: Okay. It's in the record.

17 THE COURT: You can ask Hernandez in your
18 followup deposition if "access" means --

19 MR. PERRONI: See, Judge, that's why it's so
20 unfair that they admit --

21 THE COURT: It's not. I'm giving you a followup
22 deposition.

23 MR. PERRONI: Yes, Judge, it is because they
24 admit they gave them access, then they turn around and try
25 to convince you, well, it was only these little items right
26 here.

27 THE COURT: "Access" does not mean "rummaging."
28 No matter what inference you want to draw, it does not mean

1 that.

2 MR. PERRONI: I think "giving access" is arguably
3 "rummaging."

4 THE COURT: "Access to portions of the file" does
5 not mean "rummaging."

6 MR. PERRONI: Okay. Well, I am -- all I'm
7 trying -- for the record, are you denying my request to
8 look at the balance of the 1981 file to determine whether
9 or not they fit within the investigatory exemption that the
10 respondents are claiming in this case?

11 THE COURT: Is there something you want me to
12 look at?

13 MR. PERRONI: I want you to look at the balance
14 of the 1981 files that have not been given to me that they
15 are claiming fall within this exemption. I want you to
16 look at them --

17 THE COURT: You mean you want me to decide
18 whether these are investigatory records?

19 MR. PERRONI: Because --

20 THE COURT: If that's what you want me to do? I
21 have concluded, and you are not going to move me off the
22 point, that an investigatory record is exempt. Are you
23 asking me to review what has been withheld to determine
24 that it is or is not an investigatory record?

25 MR. PERRONI: Yes.

26 THE COURT: All right. Bring it in. I'll have
27 to look at the file and see if it's an investigatory
28 record.

1 MR. PERRONI: And the reason why I am asking you,
2 not to burden you with this, is because I don't believe
3 them. With all due respect to opposing counsel, with the
4 information that's been given to me, I don't believe these
5 people. I'll believe you, but I won't believe them.

6 THE COURT: Well, it's nice to be believed.
7 Okay. What else? So let's back -- let me summarize so
8 far. You get to depose Hernandez on paragraph -- what is
9 it, 6 and 7 -- yes, of his declaration. And you get to --
10 now you get to ask Hernandez what he means by "access."

11 Okay.

12 MR. PERRONI: Right.

13 THE COURT: Okay. I'll look at -- it's the 1981
14 file you want me to look at; right?

15 MR. PERRONI: Right, the balance.

16 THE COURT: The undisclosed portion to see-- I'm
17 only going to be looking at one thing, are they
18 investigatory records. For example, I would assume that a
19 telephone message is not an investigatory record. Am I
20 right? Is that why it was disclosed?

21 MR. BARER: Your Honor, it was disclosed because
22 it had been disclosed to people, members of the public so
23 we have to give -- It's waived.

24 THE COURT: I doubt a phone message from Suzanne
25 Finstad is an investigatory record. Maybe if it was a
26 phone message from Robert Wagner, it would be. I don't
27 know whether that would be an investigatory record. I
28 don't know.

1 MR. PERRONI: That's the point. That's all I'm
2 getting at.

3 THE COURT: Okay. What else?

4 MR. PERRONI: May I -- I don't have anything
5 further. I do have some procedural questions.

6 THE COURT: Okay. We got the Miller report
7 hanging over their heads. So go ahead.

8 MR. BARER: Your Honor --

9 THE COURT: Wait. Before you do that, do you
10 have any problem with the Coroner having to explain what
11 they are relying on for withholding the rest of the
12 microfilm information?

13 MR. BARER: No, Your Honor. We submit on that
14 portion of the tentative.

15 THE COURT: Okay. Fine.

16 MR. BARER: Your Honor, should I address the
17 Miller Report? I would also like to address the Hernandez
18 deposition ruling, if I may.

19 THE COURT: Well, let's address Miller. That's
20 the one I was interested in when we started this hearing.

21 MR. BARER: Certainly, Your Honor.

22 Your Honor made a finding in the tentative
23 that he, not only did Dr. Noguchi not only use the Miller
24 report, but possessed it. So the question is whether the
25 evidence preponderates that he possessed it, considering
26 that, as Your Honor pointed out in both the written and
27 oral tentative, Dr. Noguchi testified that he didn't take
28 anything with him when he left office, and he doesn't have

1 anything now. Plus, at page --

2 THE COURT: That's what he said.

3 MR. BARER: Plus at pages 318 to 319 of the
4 Appendix, he was asked by Mr. Perroni did he have access to
5 the Miller document when he wrote the book, and he said he
6 didn't know. So that's a neutral point on the evidence.
7 So we got two indications that he didn't take it with him.
8 He does not have it. He does not know at this point.

9 What evidence is there that he had it.
10 There's the passage in the book, "Rereading the report now,
11 I can see the Isthmus Bay in my mind's eye."

12 THE COURT: Yes.

13 MR. BARER: First of all, the statement in a
14 book, "rereading the report today," to say that he was
15 rereading the report when was writing that is hearsay.
16 It's introduced to prove the truth of the matter asserted.

17 THE COURT: It's a prior inconsistent statement,
18 is it not?

19 MR. BARER: It's a prior inconsistent -- prior
20 inconsistent with taking it with him?

21 THE COURT: With the statement that he didn't
22 take anything with him, is it a prior inconsistent
23 statement?

24 MR. BARER: I'm not sure if it even qualifies as
25 that, considering he had a coauthor. I'm not sure if he
26 wrote that particular segment.

27 THE COURT: I think he's saddled every word.
28 Whether he had a coauthor or not, he's saddled with every

1 word in the book as his own. It's inconsistent with his
2 statement that he didn't take anything with him.

3 Now, you can argue he didn't take anything
4 with him, but he was given access when he wrote his memoirs
5 so it's not inconsistent. That requires an explanation.
6 On its face, it's inconsistent.

7 You know, then we have this 2002 interview.
8 Not interview, memorandum.

9 MR. BARER: The 2012 reopening the investigation?

10 THE COURT: Yes. I'm sorry. Yes. What page is
11 that?

12 MR. BARER: That's attached to the --

13 THE COURT: 361, is that it? No.

14 MR. BARER: It's attached to the petition.

15 And --

16 THE COURT: It's in Mr. Perroni's Appendix.

17 MR. BARER: Yes.

18 MS. BIRENBAUM: I've got it at App 79.

19 MR. BARER: Page 79 of the Appendix.

20 THE COURT: What do we have there? We have
21 Dr. Noguchi present with Mr. Miller. It doesn't say
22 Dr. Noguchi was given a copy. It says a copy was given to
23 both L.A.S.D. and Mr. Miller.

24 MR. BARER: Yes.

25 THE COURT: Now, I don't know how Mr. Miller
26 could be given a copy without Dr. Noguchi also having a
27 copy. That's what they are talking about.

28 Now, here is where Mr. Perroni, I think, is

1 entitled to an inference. The inference is Noguchi had a
2 copy at this meeting, whether he's looking over Miller's
3 shoulders or not does not really matter. It doesn't say
4 that they have left the meeting with their own copies,
5 but -- well, leave it there.

6 MR. BARER: Well, of course, this is unconnected
7 with the writing of the book "Coroner" because "Coroner"
8 was published in 1983. This is in 2012.

9 THE COURT: Right. I understand.

10 MR. BARER: The context in which Dr. Noguchi and
11 Mr. Miller were present here was a reevaluation of the case
12 with the Sheriff's Department and the Coroner acting
13 together.

14 THE COURT: Right.

15 MR. BARER: In terms of cases that are
16 investigated where somebody Commissioned a report or read a
17 record who then leaves public service, I would submit that
18 the purposes of investigative exemption as put forth in
19 Haney are furthered by being able to call in former
20 coroners, people would did investigations for them, to be
21 involved in reopened or reevaluated law enforcement
22 investigations to ask them, you wrote this, what did you
23 mean by it, or, you wrote it, can I ask you a few questions
24 about it.

25 THE COURT: Right. I don't disagree with that,
26 which is why I said I don't need to decide whether giving
27 the document to Miller was a waiver, and I said probably
28 not. And I said probably not for the very reason you are

1 arguing, which is, okay, he's an agent of the Coroner when
2 he wrote it. Even though he is an unpaid volunteer agent,
3 he's still an agent of the Coroner. He created a report.
4 It's the -- what does the Coroner call that, investigative
5 narrative.

6 And then when he's called back in 15 years
7 later, whatever it is, they say, you know, you wrote this
8 report, let me refresh your memory, take look at it, what
9 did you mean by this, what did you mean by that, I tend to
10 think that it may be covered.

11 So my point was not so much that Miller was
12 given access in this May 20th, 2012, meeting, but that
13 Noguchi was there. And he is -- it does not say anything
14 about him having or not having his own copy of the report.

15 But here is where I think, you know, the
16 circumstantial evidence on which Mr. Perroni wants to rely
17 starts to add up. Noguchi has said in his book, "Rereading
18 the report, I see the Isthmus Bay." I've been there many
19 times. I've never seen the Isthmus look like this
20 description. That's just my personal aside. I can't
21 remember what he says.

22 But so he said when he wrote his memoirs
23 he's rereading the report. Then in 2012 he's there at
24 least when the report is given to Miller, and they are
25 certainly talking about the report. And he's a public
26 employee and Miller -- I'm sorry. He's a former public
27 employee -- and Miller never was a public employee. He was
28 probably an agent of the Coroner's office.

1 And maybe if all they did was show it to the
2 two of them and retrieve it from them after asking them
3 about it, maybe any privilege -- not privilege, any
4 exemption would still apply. I tend to agree that it
5 would. But it doesn't say we took the report back from
6 them. It doesn't say we treated it as confidential. It
7 doesn't say that at all. It says it was given to Miller.
8 In fact, as near as I can tell, the inference would be that
9 Miller walked away from the meeting with a copy of his own
10 report.

11 Now, under those circumstances, if Miller
12 didn't retain his -- you know, people who write things tend
13 to keep it on their computers or wherever, handwritten
14 copy. If he didn't keep a copy in his files, which
15 apparently he didn't because they wouldn't have to give him
16 a copy, if they let him walk out of the meeting with a copy
17 of his own report, I think that's a waiver.
18 I think that's a waiver.

19 So there is an inference here. Mr. Perroni
20 is arguing circumstantial evidence, and I -- and you didn't
21 rebut it. You could have presented evidence. 2012 isn't
22 that long ago. We could have had evidence from the author
23 of this report that says, oh, no, we did not give them a
24 copy of the Miller report to take out of the meeting. We
25 retrieved them from them as they left. I don't have that
26 declaration.

27 MR. BARER: Well, doesn't say they took them with
28 them, and the evidence is that Dr. Noguchi doesn't have it.

1 He testified to that. And there is no statement from Mr.
2 Miller that he has it or so the inference that they walked
3 away from this meeting with this report that Dr. Noguchi
4 filed away without releasing I would submit is not
5 supported by the record or any sworn evidence.

6 THE COURT: You know, the statement by the
7 Sheriff that a copy was given to both L.A.S.D. and
8 Mr. Miller. Doesn't say we retrieved it, we gave them a
9 copy. I think the inference is he walked out of the
10 meeting with his copy of his own report.

11 MR. BARER: I would not say that unless there is
12 something in this fairly comprehensive report by the Dr.
13 Lachmanian that he left with the report, and there isn't.

14 THE COURT: Yeah. I mean, I -- you know, the
15 interesting thing here is -- at least I found this
16 interesting, that the investigative reports are protected
17 and the Coroner's investigation is all protected, and yet
18 Dr. Noguchi gets to pick and choose what he's going to
19 disclose. Of course, once it's disclosed, it's disclosed
20 forever, but he gets to decide what he's going to disclose.
21 There is no criteria for that. It's just whatever he feels
22 like disclosing. I found that to be an interesting fact.

23 I think that's what the law is. I think he
24 gets to decide. I think the Sheriff gets to decide what
25 they are going to disclose if it is otherwise exempt. And
26 nobody -- I guess they could be criticized for either being
27 over-inclusive or under-inclusive. Other than being
28 criticized, they are perfectly within their legal right in

1 doing that. I mean, I found that interesting, but that's
2 kind of an aside.

3 So the Miller -- you know, the Miller report
4 hangs on, you know -- I don't know, it hangs on a fairly
5 slim reed. But, you know, we have the fact that Noguchi
6 debated whether or not to cough up the Miller report in the
7 first place and decided against it. Now, here we are 35
8 years later. It's definitely been used by him in writing
9 his memoirs. He claims he was rereading it. It was
10 definitely given to Miller at the 2012 meeting. I have no
11 evidence that it was taken back.

12 And -- in the meeting, I tend to think it's
13 protected, but if Miller left the meeting with a copy of
14 the report given to him by the Coroner's office, I do not
15 think it's protected. And I have no reason to believe that
16 he didn't walk out of the meeting with a copy of his own
17 report. So I think it's -- the waiver rule applies.

18 You wanted to ask -- comment about the
19 deposition?

20 MR. BARER: Certainly, Your Honor. First an
21 argument, then a housekeeping question in case I lose on
22 the argument. The argument is that we filed our brief and
23 served it July 28th, 2016. That was almost two months now
24 because of continuances two months before this trial.
25 Their discovery was still open. Was still the right to
26 make motions to compel further discovery. In fact,
27 Mr. Perroni made a motion to compel further discovery and,
28 specifically, a further deposition of Detective Hernandez.

1 That was denied.

2 He has made this argument about due process
3 and the right to cross-examine Detective Hernandez a few
4 days ago. Why didn't he make a motion when there was still
5 time to make a timely discovery motion and move for -- to
6 compel the deposition of Detective Hernandez then, instead
7 of now when we're done with briefing, we're at trial, and
8 the production of more evidence, I would assume, would lead
9 to supplemental briefing at another hearing.

10 THE COURT: I don't know about supplemental
11 briefing. I think there's an answer to that. This is
12 something I wanted to explain to Mr. Perroni. CPRA cases
13 by definition are supposed to be expeditiously done. They
14 are narrow in scope. Discovery, in my view -- the Supreme
15 Court is going to decide this issue -- discovery is
16 limited. They are not only decided expeditiously,
17 supposedly, by the trial court, they are reviewable only by
18 mandamus in the court of appeal. And all of this is
19 because CPRA cases do not involve the same type of legal
20 rights as a civil action for damages or declaratory relief
21 between opposing parties. It is an access to public
22 records case, which is limited.

23 Now -- and to answer your question, I mean,
24 I do quite a few of these now. It is often the case where
25 we get to trial in a CPRA case and one side, typically the
26 petitioner, says, well, they said in their declaration
27 something that I would like to test its accuracy. If it is
28 within the scope of a CPRA case, typically, that is we

1 looked here, we looked there, we looked high, we looked
2 low, we could not find anything. And the petitioner said,
3 "Well, I don't -- I don't trust them. I don't believe
4 that. I would like to test that." I sometimes let them do
5 that.

6 Here, we have not a "I want to test the
7 search" statement by Mr. Perroni, but, rather, "I want to
8 test what he said about -- relative to waiver because, in
9 my view, it's not something consistent with what he said at
10 his deposition." Well, if Hernandez had provided no
11 declaration, I would not be permitting him to reopen
12 discovery. This is an issue of evidence presented in the
13 opposition for trial.

14 Your argument is when the opposition was
15 filed he still could have taken discovery. And, okay, but
16 I don't think he has waived his right to argue to me in a
17 very limited and narrow way, I don't expect this to be an
18 expansive deposition, but on the two things I said he could
19 ask about, to receive his assurance due process or
20 otherwise that Mr. Hernandez's statements in his
21 declaration are accurate, you know, I am exercising my
22 discretion to permit that.

23 MR. BARER: That raises a housekeeping question
24 that, once Mr. Perroni has taken Detective Hernandez's
25 deposition and has his testimony, what is he to do with it?
26 Are we going to have a further hearing in which it's
27 submitted?

28 THE COURT: You are, because he wants me to look

1 in camera at -- whose file, Mr. Perroni, the Sheriff's file
2 or the Coroner's file?

3 MR. PERRONI: Well, okay, let me see if I can
4 answer you this way. I thought in this tentative decision
5 that you are ordering them to tell you in Winters'
6 declaration where in the world that he has come up with
7 this confidentiality on the remaining items in the file.

8 THE COURT: I am.

9 MR. PERRONI: Okay. Well, I am fine with that.
10 I want to see it. Okay. So now we're talking about
11 Sheriff's file. To answer your question, we would just be
12 talking about the Sheriff's file right now.

13 THE COURT: Okay. So housekeeping, you take your
14 deposition of Hernandez on the two issues I said you can
15 do. You come back for the in camera hearing where I look
16 at the Sheriff's file only to decide whether they are
17 investigative records. In addition to that, the Coroner's
18 office presents a declaration that says what exemption they
19 are relying on for the remaining microfilm records that
20 have been withheld.

21 Does that take care of everything except
22 setting a date for that appearance?

23 MR. BARER: So no further briefing, but we will
24 be submitting, A, the declaration; and, B, the records of
25 the 1981 L.A.S.D. investigation to be reviewed in camera.
26 And Mr. Perroni, by whatever deadline the Court sets, will
27 submit any further deposition testimony from a transcript
28 from Detective Hernandez.

1 THE COURT: Yeah. You will have to bring the
2 Custodian of Records for the in camera review, the
3 Sheriff's Custodian of Records.

4 MR. PERRONI: Judge --

5 THE COURT: Because I will be asking the
6 custodian, you know, what have you brought me and where is
7 it from to be sure that I have everything that I'm supposed
8 to have. And that happens in chambers under oath without
9 Mr. Perroni present.

10 MR. PERRONI: Judge, point of order here on this
11 Coroner's -- remaining Coroner stuff.

12 THE COURT: Yes.

13 MR. PERRONI: They give some kind of declaration
14 or something about the remaining things in that file.
15 Based on what they say, I may ask this Court to look at
16 that information, too, to determine whether or not it's
17 what they say.

18 THE COURT: Well, there isn't going to be another
19 hearing so if you want to see that declaration and make
20 that decision, then that has to happen sometime before the
21 next hearing.

22 MR. PERRONI: Okay. So what I would like for you
23 to do is set some dates.

24 THE COURT: All right.

25 MR. PERRONI: What is this -- may I ask you this.
26 What is an OSC re judgment? What is that?

27 THE COURT: An order to show cause.

28 MR. PERRONI: Order to show cause. OSC. Sorry.

1 Well, if we could -- Your Honor, I have to
2 fly from Arkansas here. So --

3 THE COURT: Well, how long will it take you to
4 complete your deposition?

5 MR. PERRONI: Well, based on what you've said
6 that I could ask, it shouldn't take me very long at all.

7 THE COURT: I don't mean how long will the
8 deposition be. How long will it take you to fly back out
9 here and complete the deposition? How long do you want for
10 that?

11 MR. PERRONI: Well, what I'm trying to do is
12 coordinate it with any other appearances. If I'm supposed
13 to be back here October 20th, perhaps we can coordinate it
14 to where when I fly back the next time, we can do this
15 deposition, and I could get an expedited transcript. It
16 shouldn't be too long. And then they could also get the
17 declaration from the Coroner's office, and we can address
18 all this at that time.

19 THE COURT: Well, how long before the hearing do
20 you want the deposition, then?

21 MR. PERRONI: Well, I guess what I'm saying is if
22 I could do the deposition the day before the hearing.

23 THE COURT: I don't know. Is that workable?

24 MS. BIRENBAUM: Well, my instinct is the
25 Custodian of Records is most likely Detective Hernandez.
26 That's asking an on duty sheriff to take two days, one day
27 for the deposition and the next day to be in court away
28 from other duties. I can certainly check with him --

1 THE COURT: There are lots of deputy sheriffs.
2 What are you saying, they are going to have a need for him?
3 There are a lot of deputy sheriffs in the Sheriff's
4 Department.

5 MR. BARER: He is a homicide detective, Your
6 Honor. There is not as many homicide detectives as deputy
7 sheriffs.

8 THE COURT: I don't know how many there are, but
9 homicides are up this year. Whatever you can work out.
10 What are you -- I'm going to set a date for the hearing and
11 a date for the declaration of the Coroner's office. How
12 about a week from today for the declaration from the
13 Coroner's office? Is that fine?

14 MS. BIRENBAUM: I am in court the rest of the
15 week.

16 MR. BARER: Could we get more time for that, Your
17 Honor.

18 THE COURT: All right. How much time do you
19 want?

20 MS. BIRENBAUM: I could probably get it by next
21 Friday. Monday is a holiday for me.

22 THE COURT: Next Friday, the 7th?

23 MS. BIRENBAUM: It's cutting so close for me.

24 THE COURT: That's 10 days.

25 MS. BIRENBAUM: I know.

26 THE COURT: Yeah. Let's do the 7th.

27 Declaration -- you don't need to file it with me. Provide
28 it to Mr. Perroni by the 7th. And then he will decide

1 based on that whether he wants the Coroner's custodian to
2 be present at the hearing for the same purpose that the
3 Sheriff's custodian will be present. And all -- so there
4 wasn't anything magic about October 20th. If you need more
5 time from the 7th to prepare -- why don't I move it to
6 November 10th at 9:30 for the continued hearing on the writ
7 at which I will at a minimum do in camera examination.

8 Now, as to when the Hernandez additional
9 deposition occurs, I'm going to leave that up to you to see
10 if you can work it out.

11 Okay. Does that take care of everything?

12 MR. PERRONI: Except for this. The tentative
13 decision says I'm supposed to prepare something --

14 THE COURT: I mean, you can't prepare a judgment
15 until the case is over. The case isn't over until November
16 10th. The hearing is continued until November 10th.

17 MR. PERRONI: All right. That's good.

18 THE COURT: Nothing to prepare judgment-wise
19 right now.

20 MR. PERRONI: Right. Thanks a lot.

21 MR. BARER: Only remaining issue, Your Honor, is
22 Mr. Perroni sounds like is prevailing, at least in part, so
23 he's going to be entitled to costs under 6259(d), but there
24 was an issue about whether he was entitled to attorney
25 fees. We cited law that said he isn't. He says he is and
26 hasn't cited any law saying he is.

27 THE COURT: Attorneys fees motions are
28 customarily made post judgment. They are not required to

1 be made at the trial on the merits. So I am not going to
2 worry about that right now is what I'm saying. The Rules
3 of Court, Mr. Perroni, tell you when you have to make your
4 motion for attorneys fees.

5 MR. PERRONI: Thank you. I will.

6 THE COURT: Okay. So the only thing -- I've made
7 some orders and continued the hearing. You want to waive
8 notice?

9 MR. PERRONI: Yes, sir.

10 MR. BARER: Notice is waived, Your Honor.

11 THE COURT: Okay. Thank you.

12 (Proceeding adjourned at 3:45 p.m.)

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