SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

CR 72787

Vol. 5

92101

Supreme Court No. 24

KEVIN COOPER.

Defendant-Appellant.

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

HONORABLE DAVID C. MERRIAM, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

FRIDAY, SEPTEMBER 23, 1983

APPEARANCES:

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IN PROPRIA PERSONA

COPY

NOEMI LUCCHESI, C.S.R. Official Reporter, C-3136

IN THE SAN BERNARDINO COUNTY MUNICIPAL COURT DISTRICT 1 WEST VALLEY DIVISION, COUNTY OF SAN BERNARDINO 2 STATE OF CALIFORNIA 3 4 THE PEOPLE OF THE STATE OF CALIFORNIA, 5 Plaintiff, 6 OCR-9319 vs. 7 FWV-13949 and KEVIN COOPER, 8 FWV-13950 Defendant. 9 10 11 MOTIONS BEFORE HONORABLE DAVID C. MERRIAM, JUDGE, DEPARTMENT A 12 FRIDAY, SEPTEMBER 23, 1983 13 14 15 16 **APPEARANCES:** DENNIS KOTTMEIER 17 For the People: District Attorney 18 DENNIS KOTTMEIER District Attorney 19 By: JOHN P. KOCHIS Deputy District Attorney 20 CHARLES E. WARD 21 For the Defendant: Public Defender By: DAVID W. NEGUS 22 Deputy Public Defender 23 24 NOEMI LUCCHESI, CSR #3136 25 Reported by: Official Reporter 26

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ONTARIO, CALIFORNIA; FRIDAY, SEPTEMBER 23, 1983; 8:35 A.M.

(The following proceedings were held in chambers:)

THE COURT: Mr. Negus, you have requested that before we proceed into the courtroom, that you be heard in chambers. The record may reflect that Mr. Cooper is present with his counsel, and the District Attorney's Office is represented.

Do you wish to be heard?

MR. NEGUS: Yes, Your Honor.

With respect to this particular hearing, I filed a notice, requested that the hearing be held in a closed courtroom without access to the press. I believe that our reasons are set forth in the motion that I -- in the motion that I filed. That would have been the first motion that I filed.

It would seem that if one is going to have a motion on a Penal Code Section 868 matter, that it would be futile to have the notion and give all the reasons in open court of why the material should be -- at the preliminary hearing should be closed. And for that reason I think that it -- that in order to be able to address the issues that are necessary for the 868 motion, that we should be able to do that without the press being present. Otherwise, it would be self-defeating.

In addition, with respect to the discovery motion,

most of the matters in the discovery motion are matters which again are evidence which will be educed at the preliminary hearing. And in order to insure that Mr. Cooper receives a fair trial, I believe that the hearing should be closed for those matters as well.

THE COURT: Do you wish to be heard?

MR. KOCHIS: I have no objection to that request.

THE COURT: Okay. The matters that we're going to be hearing today, as I can best detail them, are going to be motions to quash certain subpoenas, a variety of those, defense counsel's formal motion for discovery which is directed only in part to the District Attorney's Office, but in part to other agencies as well -- presumably there will be those other agencies here to be heard on that -- and also the 868 motion to close the preliminary hearing.

I'm going to deny the motion at this time to close these proceedings.

Do you have any other motions at this time, any other issues to address?

MR. NEGUS: I would request then that somehow when we're talking about the various items with the 868 motion, that we do that in chambers. If you don't wish to close the open courtroom, there has to be some sort of mechanism for addressing these issues outside the presence of the --

THE COURT: The question as presented in the 868 motion is whether or not the closing or keeping the preliminary

hearing open will provide -- will deny Mr. Cooper a fair trial if the matter proceeds to trial. Why can't those issues be openly discussed?

MR. NEGUS: The problem is -- one of the problems is that in making that motion it's going to be necessary to refer to, A, inflammatory publicity which has occurred in the past, and in so doing you only re-emphasize that inflammatory publicity, and, E, to the evidence which will be educed at the preliminary hearing. And if you have to refer to that evidence in open court in order to have the hearing closed, it becomes self-defeating. And so when we have to refer to those kind of matters, which I think will be for the 868 -- for most of the 868 hearing, it would seem to me that we're put in a position that either I don't present all the evidence or I am creating the same sort of climate I'm trying to avoid.

THE COURT: What we'll do at this time -- I've denied the motion at this time, Mr. Negus, but what we'll do is we'll try and handle first the motions to quash the subpoenas. When we get to the 868 motion, if there are aspects of it -- there are certain aspects of it that I think the closed hearing won't make much difference, and that is if you wish to -- you've indicated you're going to submit certain video tapes. You've asked they be marked, and they have been marked, and certain newspaper things in those matters.

Those things I think can be received by the court in

open court, and that won't affect your case.

If we get to specific issues that you think are of such a nature, I'll allow you to make that request in court, and I'll rule on it, and then we'll either proceed in open court, or we'll -- if I grant your request, we'll hear portions of the motion in chambers.

MR. NEGUS: One logistical problem: There is one witness that should be here at 9:00 o'clock, that is, Mayor Walker of the City of Chino who has asked that he be put on as quickly as possible to testify, so that he could be out of court by 10:00 o'clock. I would imagine his testimony would take something like 15 minutes or 20 minutes. Therefore — and he is — his testimony will be concerning some of the inflammatory things which have been said about Mr. Cooper in the City of Chino.

I wouldn't wish to re-emphasize those things and have them back on the evening news again, because I think that would jeopardize Mr. Cooper's ability for a fair trial.

Therefore, I would request that sometime in the time frame of 9:00 to 10:00, we take Mayor Walker's testimony outside the presence of the cameras, either in chambers or having the cameras leave the courtroom.

THE COURT: Counsel, do you have any authority at all -- you have authority, but -- and I grant you that 868 in its amended form is relatively new.

MR. NEGUS: Well, there's lots of authority which I

have cited to the court as to, A, the court has a duty to protect the defendant's right to a fair trial, and, B, the court can make orders denying access, temporarily, to evidence, to exhibits, to -- you can restrict the right of the parties, the witnesses, any participant, to discuss the matter with the press. You can have closed hearings as to the admissibility of evidence. You can have closed hearings as to any number of things.

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The Allegrezza case that I talked about was a closed hearing as to the admissibility of evidence. The Younger versus Superior Court case has to do with stopping people's ability to talk about the case. There are other cases that are -- have been -- that have come down which have indicated you have a right to close off exhibits, you have a right to seal transcripts, you have a right to close off any number of things.

The only case by the U.S. Supreme Court on pretrial hearings held that you had a right to exclude the public from those pretrial hearings. The only case by the U.S. Supreme Court which has come down on the cite of access has been access at trial in the Richmond Newspaper case, which was cited, where the trial judge made no findings as to any necessity for a closed hearing.

All the cases indicate that upon a finding, such a closed hearing is necessary to protect the right to a fair trial, that such an order not only can be made but should be

made.

THE COURT: Okay. Let's go out in open court in just a few minutes, and we'll commence with the motions to quash the subpoenas, parties who wish to be heard on those.

When your witness, Mr. Walker, arrives, you can inform the court, and we'll address that issue then. Okay?

MR. NEGUS: Could Mr. Cooper again be unshackled for the court appearance?

THE COURT: Yes, the court will order that.

(The following proceedings were held in open court:)

THE COURT: Morning, ladies and gentlemen, Counsel.

This is the time and place set for a number of motions in the case of People of the State of California versus

Kevin Cooper. The record may reflect that defendant is present with counsel, and the District Attorney's Office is represented.

We have a number of items on the agenda today. I don't really know how long or how short they'll take, but we'll try and indicate what they are, and if counsel have some priorities as to whether they have to be elsewhere, we'll try and take their cases first. We'll just work our way down till we get them done.

We're first going to address a number of motions to quash subpoenas. Mr. Hanoian was here previously and is here today.

And you have a number of agencies that you're representing, I understand; is that right?

MR. HANOIAN: That's correct, Your Honor. I'm representing the Department of Corrections, various branches of the Department of Corrections, Special Services as well as personnel from the California Institute for Men.

Specifically we would move to quash the subpoenas for the Special Services records as well as the subpoenas for personal appearance on the Superintendent, Mrs. Carroll, and on the public information officer as regards the 868 motion.

I'm also here to oppose certain items in the discovery motion request as well.

THE COURT: Yes. We're going to be requesting that independently of the motions to quash.

We also have, I think -- is it Mr. Terry?
MR. TERRY: Yes, Your Honor.

THE COURT: You're here in regards to some motions to quash personal subpoenas and subpoena d.t.'s on Senator Ayala and Senator Bader; is that correct?

MR. TERRY: That's correct.

THE COURT: Do we have any other persons appearing on motions to quash subpoenas?

Okay. We then have also on calendar today a discovery motion by the defense which addresses a number of departments and agencies, California Institution for Men.

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Mr. Hanoian, you'll be addressing those issues as The District Attorney's Office --

Do we still have issues in contention as regards to that motion with your office, Mr. Kochis?

MR. KOCHIS: No, we don't, Your Honor.

THE COURT: Okay. We'll just --

So that's the discovery part of it, and then lastly we have on calendar for today the 868 motion by the defense to close the preliminary hearing.

We have an indication of some attorneys for -- or an attorney for NBC, Mr. --

MR. MENDEZ: Robert Méndez, Your Honor.

THE COURT: Mr. Méndez. Excuse me, Mr. Méndez.

We'll address first the issue of your standing to address the court, and then, depending on that ruling, we'll hear what you have to present.

. Okay. Let's proceed, Mr. Hanoian, with your matters. And if among the growing pile of paperwork I can find the subpoenas we're actually dealing with, we'll go through them.

Okay. Mr. Hanoian, if you would indicate the particular subpoena you wish to address and make sure that counsel is able to locate it, and I locate it, and then you can be heard on it.

Actually, the first one I have in front of me is a subpoena d.t. to Rick Minjares, the custodian of records, Special Services Unit, Department of Corrections.

MR. HANOIAN: Yes, Your Honor.

Specifically with regard to the subpoena with the records there, we would indicate that the request lacks specificity. It's overbroad. It's irrelevant to the charge, the charge being escape for this particular case. And without a further showing by the defendant, he's not entitled to irrelevant records.

THE COURT: Well, where it refers to any and all records, documents, notes, tapes, photos and other writings concerning the investigation of the escape of Kevin Cooper, why isn't -- why aren't all of those relevant to the escape charges?

MR. HANOIAN: To the extent there are any of those types of records, perhaps they would be -- they would be relevant. But he's asked for the entire file regarding anything in the Kevin Cooper matter, all records, notes, tapes, photos and --

THE COURT: Yes, but it specifies it's concerning the investigation of the escape. Doesn't that limit it?

MR. HANOIAN: To the extent that it limits it to that particular factor, Your Honor, we would claim the governmental privilege. Any items that were in fact investigated were investigated confidentially, and the records are not available to the public, and we would claim the privilege on those.

THE COURT: You're telling me that when there's an

escape from State Prison and your people participate in an investigation of that and then there's a prosecution of that, that the -- that investigation is not discoverable when the escape is prosecuted?

MR. HANOIAN: Certain -- certain -- what we've done, Your Honor, is bring to the court all the documents from the file regarding Mr. Cooper -- from Special Services, and I'm not certain exactly what it is that Mr. Negus wants. With regard to the escape, there was no investigation by Special Services to apprehend Mr. Cooper.

THE COURT: Well, then as to the Item No. 1, you're telling me that there is no -- there are no documents at all whatsoever by your institution regarding the escape.

I find that a slight bit hard to comprehend, that you would have had someone escape from one of your institutions, and there have been no investigations, no record of any such escape?

MR. HANOIAN: Well, that's -- this is a particular branch of the Department of Corrections, Special Services.

THE COURT: Okay.

MR. HANOIAN: And the records that they have, they did an investigation, and there's a public record of such an investigation that was released to an assembly committee regarding reasons, possible reasons for an escape from the California Institute for Men. I believe Mr. Negus has a copy of that particular report.

THE COURT: Okay. So --

MR. HANOIAN: We do have that. And --

THE COURT: Okay. In other -- what you're telling me is that the Special Services Unit has no individualized report concerning the facts, the investigation of the escape, the alleged escape, of Mr. Cooper?

MR. HANOIAN: That's correct, Your Honor.

THE COURT: Okay. So then you have no objection to that. You're just indicating that you have no such records?

MR. HANOIAN: That's correct, Your Honor. There was an investigation with regard to the Cooper matter that is peripheral to the escape. Perhaps that specific report the court would like to look at in camera, and if the court is of the view that it does relate to the escape, then we would be willing to hand that over.

THE COURT: Is this the report that you released to the State Legislature?

MR. HANOIAN: No. This is a different report.

THE COURT: A different report.

MR. HANOIAN: Yes.

THE COURT: It relates to the alleged escape of Mr. Cooper?

MR. HANOIAN: No, it doesn't relate to the alleged escape. It relates to Mr. Cooper, but not as to the escape.

THE COURT: Counsel, do you wish to be heard?

MR. NEGUS: It would seem that if it relates to

Mr. Cooper, it's something that they should give me, Your Honor, and I am under the impression that there is an investigation that was taking place with trying to apprehend Mr. Cooper after the -- after the escape.

THE COURT: Okay. We haven't gotten to that. That's Point 2.

MR. NEGUS: I thought -- I thought counsel said that there was no such investigation. Perhaps I misunderstood him.

MR. HANOIAN: That's what my clients tell me, and that's what the records reflect.

MR. NEGUS: There are records that we've already received from the Department of Corrections indicating that an agent of the Special Services Unit, who I know to be an agent of the Special Services Unit, a John Laudeman, was out conducting an investigation, looking for Mr. Cooper.

Now, Mr. Kochis, when Mr. Hanoian was last here, called up a person by the name of Zeke Hernández who is an investigator down at C.I.M., and Mr. Kochis asked Mr. Hernández was Mr. Laudeman involved. Mr. Hernández said no. However, after that I went back and looked at a report filed by Mr. Hernández which I have received from the institution, and it indicates that Mr. Laudeman was right along with him as part of the investigation. Therefore, I have somewhat difficulty crediting their denials that the Special Service Unit was involved in that investigation,

because Mr. Hernández' report indicates he was.

THE COURT: Counsel?

MR. HANCIAN: With regard to any report by Mr.

Laudeman, we would again ask the court to consider the privilege and view in camera to determine whether or not that relates to the charge in front of the court. That is a privileged document, and we would so claim the privilege.

THE COURT: Okay. As to the second item, any and all records, documents, notes, tapes, photos or other writings concerning the attempts to apprehend Kevin Cooper after his escape, do you wish to address that issue?

MR. HANOIAN: I believe that pretty much is the same kind of a request. As I indicated to the court, there is no such specific report. And again I have brought the entire file for the court to look at and determine whether or not such a report exists.

THE COURT: Can you give me an idea of what the entire file looks like? It's not in boxes, is it?

MR. HANOIAN: No.

THE COURT: That's a relief.

MR. HANOIAN: This size.

THE COURT: Okay.

Well, okay. Your motion to guash the subpoena of these records as specified in the subpoena d.t. is denied, and the court will grant your request for an in-camera proceeding. I think that's Evidence Code 1040, is it not?

MR. HANOIAN: That's correct, Your Honor.

THE COURT: So let's pass that for the moment, and court will have the in-camera session on your -- exercise your privilege with regards to those matters.

What's the next one you wish to address, Mr. Hanoian? MR. HANOIAN: There is a subpoena for Oscar Peña, but it is identical to the one for Mr. Minjares. Mr. Peña is a Special Services representative out of Sacramento, and he has no records other than those of Mr. Minjares. were forwarded to Sacramento from Mr. Minjares, and there are no subsequent records.

THE COURT: Okay. The motion to quash will be denied. The request for -- regards to the exercise of the privilege under Evidence Code 1040 will be granted, and the court will hear that concurrent with the other matter.

Any other matters?

MR. HANOIAN: There is the subpoena of Mrs. Carroll and the public information officer for the 868 hearing, if the court would like to take that up at this time. It may be that the same issues, at least legal issues, are going to arise with regard to all of the subpoena quashing and the 868.

THE COURT: Okay. Let me just hold off on that and try and compartmentalize our handling of these matters.

MR. HANOIAN: Certainly.

THE COURT: Those are all the motions to quash that

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you have at this time.

MR. HANOIAN: That's correct.

THE COURT: Except for the 868 issue --

MR. HANOIAN: Right.

THE COURT: -- motions. Okay.

Thank you, Mr. Hanoian.

MR. HANOIAN: Thank you, Your Honor.

THE COURT: I guess we might as well go to the Ayala and Bader motions to quash at this time.

MR. TERRY: Excuse me.

MR. HANOIAN: Oh, sure.

MR. TERRY: Your Honor, I'm Mark Terry from the Office of Legislative Counsel, representing Senator Ayala and Assemblyman Bader.

An attempt was made to serve them with identical subpoenas requiring their personal presence and for them to produce certain records, specifically letters from their constituents involving prison construction, prison security, the presence of the correctional facilities in Chino and Kevin Cooper, and what basically would be a statistical summary of mail, telegrams, records of phone messages or other communications from constituents on related issues.

We feel that these subpoenas are invalid for a couple of technical reasons:

One is that they were not properly served on the members. They were merely mailed to their district offices

at a time when the members were in session in Sacramento and, second, that the attempt was made during session itself when they are constitutionally immune to civil process.

We decided for the convenience of the court, however, to also combine with these technical objections in our motion some more substantive legal and constitutional issues which we feel were raised, that is, that we feel that this constituent mail is privileged under 1040 of the Evidence Code, and we also feel that for the judicial branch to require the attendance of busy Legislators when no compelling reason for their personal appearance has been established and for the judicial branch to require the production of these confidential constituent communications would amount to a separation of powers violation. And those basically are our objections to these subpoenas and why we are moving to quash them.

THE COURT: Thank you.

Mr. Negus, do you wish to be heard?

MR. NEGUS: With respect to the first, Your Honor, as there is a denial of proper service, I'd like to file with the court the subpoena, originals of the subpoenas with proof of service on the back.

As you can note, both of the subpoenas were personally served upon representatives of the Assemblyman and the Senator. They were not mailed.

The persons who accepted those services when Mr. --

when Mr. Forbush went to their representative offices in Southern California, indicated that they were authorized to accept service on behalf of the Assemblyman and the Senator.

I am aware from personal communications from Assemblyman Bader's staff that he in fact has received personally the subpoena.

And I am made to believe, from statements of Senator Ayala and the press, that he likewise has personally received the subpoena.

The Penal Code does not require that one go out and actually tag the individual, but merely that people -personal service be effected on people or people who will transmit those documents. If counsel has any doubt as to that, I am sure we can get the people from their offices into court and ask them whether or not they did what they said they would do and transmitted the documents on to the Assemblyman and the Senator. Judging from the fact that counsel is here, I sort of suspect they did.

With respect to the issue of service when a -- when the Legislature is in session, the particular provision that counsel cites is -- has to do with civil process, and this of course is not a civil case. And so I would submit that Article 4 Section 14 doesn't apply to the services of criminal subpoenas.

When I talked to Mr. Terry's associate, Mr. Bassett, he indicated that his belief was that civil process meant

all process. However, you'll note in Code of Civil Procedure 1985 and in Penal Code Section, I think it's 1328 that counsel cites, that they define a subpoena as a process of the court by which a person is compelled to attend. And indicating by just the use of the word "process," that process is divided into criminal process and civil process. And in fact our subpoenas are so divided. It says at the top "Criminal Subpoena" and "Civil Subpoena." So I don't think that that particular -- that particular provision applies.

The cases cited by counsel in his Points and Authorities, getting to the more substantive issue as to whether or not one can subpoena quote, "highly placed, busy public officials," has to do with situations in which, in the case of the Deukmejian case, and in the case of the Civiletti case which he cited -- have to do with situations where it is acknowledged that the official being summoned had no personal knowledge of the matters about which he was going to -- he was being required to testify.

In the Deukmejian case the subpoena was served on the Governor, asking him to testify as to the conditions at San Quentin. And it was acknowledged that Governor Deukmejian had no personal knowledge of what it was like inside the prison, but that they were trying to get him in because he had some sort of -- he had been instrumental in the policies which had created those conditions. And in

that situation, they found that there was other people who would be better situated to testify about the actual -- the actual conditions.

The Civiletti case had to do with a similar -- a similar-type issue. And so basically -- and I think that the other case that was cited, the Board of Pharmacy case, had to do with the situation in which the Attorney General was subpoenaed to give an expert opinion as to attorney's fees.

Again, this is an issue in which that particular official would have no greater knowledge than any other lawyer practicing in the area, and there was no showing of any personal knowledge.

The personal knowledge element is the element which is -- is -- which recurs throughout these -- throughout these cases in which public officials have been required not to attend proceedings.

In this particular case, in looking at what kind of evidence that is required under the new statute to make a showing for a closed hearing, with respect to Penal Code Section 868, I submitted Points and Authorities which indicate that the same factors which are involved in making decisions as to change of venue motions are the factors which are to be taken into account in 868 motions.

The reason for that is that the thing that you're trying to do with both of those remedies is to preserve the defendant's right to a fair trial, to preserve the right to

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have a situation in which publicity prior to trial doesn't create a climate of opinion which makes it impossible for him to have a fair trial, and preserve a situation in which the jury learns of the evidence of the case as it comes from the witness stand, rather than learns of the evidence of the case when it is published in the press.

Throughout the cases that have dealt with the nature of prejudicial publicity which can prevent somebody from receiving a fair trial, the most recent one is Odle versus Superior Court which I cited in the Points and Authorities. That's found at 32 Cal.3d 932. And it plainly — it plainly indicates that when the case or the participants are involved in a political controversy, that is a very strong factor which can be taken into account as far as the adjudging the publicity in the case as to whether or not the defendant will receive a fair trial. And that's an old principle of law. It goes back to the original case that ever dealt with that in this jurisdiction, Maine versus Superior Court.

In this particular case the need for those -- for both Senator Ayala's and Assemblyman Bader's personal participation is that the particular political controversy that this case has become the particular political controversy which has to do in two -- two-fold:

One, it has to do with the opposition in San

Bernardino County to the expansion of prisons within the

county, both in Chino and in Adelanto. It also has to do

with a sub part of that -- a sub part of that has to do with a longstanding feeling on the part of Legislators of resentment against Los Angeles County because San Bernardino County had the prisons present in our community, and our local Legislators, judges, supervisors have made numerous public statements saying that we're having to deal with prisoners from Los Angeles County, and that's a problem, a responsibility of Los Angeles County's, shouldn't be our problem, shouldn't be our responsibility. So there is that ongoing political opposition, the prison's ongoing resentment against cases from Los Angeles County.

In this particular case, with respect to Senator Ayala, Senator Ayala also has been involved in attempts to mitigate the fiscal impact of this particular case on this particular county.

Frazier versus Superior Court, which is at 2 Cal.3d cited in the briefs, likewise says that political debate about fiscal impact of a case is another thing which can be taken into account in adjudging the prejudicial nature of the publicity.

Senator Ayala has been a leader against prison expansion in this particular area. He has made use of the Ryen killings and the public prejudice against Kevin Cooper in mobilizing opposition to that expansion. The press has even credited the Ryen killings and public opposition, public feeling against Mr. Cooper to the recent defeat in the

Legislature of the Governor's plan to convert Youth Training School into a facility in which Adult Authority Prisoners would be housed.

The Senator therefore has unique and personal knowledge which only he -- which testimony only he can give about the role that this particular case has taken in that ongoing political controversy.

THE COURT: Counsel, let me -- ultimately you've got to tie it into the ability for the defendant to have a fair trial and for a court here or somewhere to impanel jurors who can render a fair and impartial verdict.

MR. NEGUS: Right.

THE COURT: Now, how are you tying in Senator Ayala's political knowledge with that ultimate concern?

MR. NEGUS: Because Senator Ayala's political knowledge is -- it has to do with Senator Ayala's political use of this case in mobilizing the opposition to the expansion of prisons.

When a case becomes mired in a political controversy, as this case has, and I would -- I have submitted to the court partial exhibits of some of the newspaper publicity which has occurred in this particular case, you will note that there are -- have been almost daily mentions in the last couple of weeks of this particular case in the newspaper articles which concern Senator Ayala's and Assemblyman Bader's fight in Sacramento to prevent the conversion of

Y.T.S. Again and again and again it -- this particular case is used as the -- one of the main reasons why that should not take place. That shows a couple of things:

It shows, one, that this particular case has become a symbol in this particular area of that particular political conflict. And further publicity which would -- which would heighten that, which I'm afraid we're giving right here today by doing this in public, as I indicated, but especially more if it were to come up at the preliminary hearing, only increases that -- that involvement of the case in a political controversy.

If jurors are coming in, have taken sides in a political controversy, and that case is a part of the political controversy, jurors are inevitably going to have their opinions as to the guilt or innocence of Mr. Cooper colored by the use that that case has been made in the political controversy.

Secondly, the emphasis of this again re-emphasizes a fundamental problem of trying to receive a fair trial in this particular case is that the only reason to connect the Ryen killings with the problems of C.I.M. expansion is the underlying assumption which is based upon prejudice rather than having heard any evidence that Mr. Cooper is responsible for those killings. If that underlying assumption, that underlying prejudice didn't exist, there would be no connection, and that particular testimony of Senator Ayala is, I believe,

the only way that that particular controversy can be established.

I also alluded to the fiscal impact. Senator Ayala,

I believe, is the person who has been working in the

Legislature to carry or plan to carry Legislation which

would reduce the fiscal impact of this particular case on

this particular -- on this particular county. And again he's

the only one that knows about that, and that's why I need to

ask him questions.

With respect to the burden that it places on Mr. -Senator Ayala and Assemblyman Bader, I have offered to
conduct whatever testimony, with consent of the District
Attorney, which I am reasonably -- I'm led to believe would
be forthcoming from my conversations with Mr. Kochis, either
doing it in a form where we submitted questions to him, to
either both the Assemblyman and the Senator, and asked them
to sort of dictate a response to those questions in
declaration form so they would not actually have to come to
court or, in the alternative, to conduct the examination by
telephone.

I have -- my purpose in doing this was not to try and vex the senators or to make it impossible for them to carry out their other -- their other public business. But they are the only people that can give me the information that I need to establish an essential element of the 868 motion.

With respect to the constituents' mail, again, I indicated to Mr. Bassett, and I also indicated to Assemblyman Bader's office, that they -- I was not particularly concerned about the names and identification of the individual people that wrote the letters and that I was perfectly willing to have those letters excised so that if they did wish to assert the confidentiality of that, that any personal messages from the constituent to the Assemblyman and the names and addresses and identification of the people writing the letters could be excised. So what I'm really concerned about is the expressions of opinion to the Assemblyman and the Senator rather than the identification or breaching any privileges -- any privilege, any confidential communications that they may have had with their -- with their constituents.

Finally, just as to the issue of imposing upon their schedule, I am led to believe, at least that as far as testimony, not the aspect of giving up the -- giving in to court the letters, but as far as testimony, that Assemblyman Bader has no real objection to testifying. At least that was the impression that I received from his administrative assistant.

THE COURT: Thank you.

Mr. Terry?

MR. TERRY: Your Honor, defense counsel has stated that this case is mired in a political controversy, and certainly it is. But political controversies are the very

business which assemblymen and senators are elected to become involved in. And one of the oldest principles in our system of separation of powers is the privilege for Legislators to be able to speak freely in the course of their official duties on the floor of the Houses, whatever it is they wish to say. That's the principle that dates from the time of the Magna Carta and antedates our constitution.

Now, if the court, as urged by defense counsel, becomes the rule in this case, and the rule generally, it will mean that this very ancient privilege will not mean very much. It will mean that whenever there is a case which involves the political controversy, a member's privilege could be stripped from him by his being called into court to testify. Certainly he can't be attacked for what he says on the floor, but that could be subject to an end run where a Legislator could be called into court to testify on the very sort of thing he would not be held to answer to from stating it on the floor.

One of the things which defense counsel has just mentioned is the knowledge of Senator Ayala about legislation which he may be carrying. This I feel would be a very serious breach of the separation of powers. If you can — if you could call a member of the Legislature into a court to testify under oath about legislation which he may plan to carry, he may not plan to carry, this goes to the types of negotiations which go on within the Houses in terms

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25 26 of legislation or the types of things which a court should definitely stay out of. This is the type of political controversy which is the domain of the legislative branch, and I feel that it would be a dangerous precedent if this court were to follow that course.

With regard to the constituents' mail, we understand that defense counsel is not interested in the names and identification of the people who have written this mail, and we understand that he does want to minimize the type of breach of confidentiality this would be. But we would hold that as a rule the letters which constituents send to their members of the Legislature are meant to be confidential. These are the types of communications between -- between members of the community and their elected representatives which are the very life blood of the regulationship of the relationship of the Legislature to the community. This is the way legislators find out how their -- how their voters and potential voters think about various issues, and for a court to intervene, to place itself between people in the community and their legislators we feel would be a branch of the -- a breach, rather, of the separation of powers.

And to return to a more minor issue, that is, the issue of the -- of whether the constitutional privilege applies in this case, we submit that the meaning of the word "civil" in civil process as it's used in Section 14 of Article 4 of the constitution is not coextensive with the

meaning of that word with regard to the difference between a civil subpoena and a criminal subpoena.

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We feel that if you look at the constitutional history of that provision, what it intends is for a legislator to have this privilege except when the legislator himself or herself is a party to a criminal action. That is when the -- that is when that privilege does not apply. Otherwise, if you look at the obvious intent of that constitutional provision, that is that legislators should be undisturbed during session. It would mean that in any criminal action to which they may not be a party, they could be brought in, and we feel that that violates what is clearly the intent of that constitutional provision.

> THE COURT: Okay. Thank you.

Anything further, Counsel?

MR. NEGUS: Just one -- I'm not intending to, by what I do -- to inhibit the Assemblyman or the Senator's ability to speak out on issues or even -- I'm not intending to criticize it. That's not -- and there's nothing about asking a person to testify about things to which they have personal knowledge which is in any way a criticism. We have victims testify all the time about crimes, and that's not a criticism of the victim. So I think that counsel's comments about how we're going to interfere with the legislators are not true.

With respect to the last point, it's a standard maxim

of legal construction that one construes statutes to get full meaning to all the words and phrases. If the framers of Article 14 Section -- excuse me, Article 4 Section 14 had intended to say "process," which is the general word for subpoena, rather than "civil process," I think they could have.

THE COURT: Thank you.

I'd prefer, in resolving this issue, to not rely on the procedural problems raised, but rather to address the fundamental ones, because otherwise I think it will just stretch out the proceeding longer than it's going to be.

I'm principally concerned here as to whether or not there's a reasonable connection or a nexus between the subject matter of the subpoena d.t.'s and the subpoenas for the personal appearances of the Senator and the Assemblyman and the ability of the defendant at some time to receive a fair trial in this community or some other community.

At this time I'm not convinced that there is a sufficient nexus between them to overcome the requirement of there being a compelling reason for a public official to be called to testify on the subject matter of the 868 motion, and I think that there is a strong presumption of the confidentiality of the communications between a constituent and his elected official, and therefore on those bases and on that reasoning, I'm going to grant the motions to quash both the personal subpoenas and the subpoena d.t.'s regarding

Senator Ayala and Assemblyman Bader.

Thank you, Counsel.

MR. TERRY: Your Honor, we have prepared an order which --

THE COURT: If you'd like to submit that to the clerk, I'll take a look at it.

MR. TERRY: Yes.

THE COURT: Thank you.

MR. TERRY: Thank you, Your Honor.

THE COURT: Mr. Hanoian, I cut you off previously because we weren't going into the 868 matter, but actually we went into the 868 matter with Mr. Terry. So I'm going to let you be heard again at this time regarding the subpoena on Miss Carroll.

MR. HANOIAN: Regarding both the subpoenas for the C.I.M. personnel, Your Honor, I believe the same rationale applies as was just indicated by counsel. The defense has to show a compelling need for the testimony of a busy public official of which the superintendent of the California Institute for Men certainly qualifies, as well as the public information officer for that institution. So absent a compelling showing, meaning it would be impossible for the defense to put on testimony or evidence which would reach the same results, we would feel that the Deukmejian versus Superior Court case applies with equal weight to Mrs. Carroll and the public information officer, and with that in mind we

would ask that the court quash the personal appearance subpoenas.

I would add that when speaking with my clients, they had been in contact with Mr. Negus, and Mr. Negus indicated to them that he was interested in testimony with regard to community outrage at the escape of the defendant.

I believe that it is certainly possible for the defense to demonstrate community outrage absent calling the officials from the California Institute for Men.

On that basis I think we would submit the motion.

THE COURT: Okay.

Mr. Negus?

MR. NEGUS: The cases cited by Mr. Terry, and apparently relied on by inference, I guess, by Mr. Hanoian, without citing them, deal with either the Governor of the State or the Attorney General of the State or the Attorney General of the State or the Attorney in which -- on which they rely, talks about highly placed public officials. I suspect that what we're talking about with an administrator of a prison is not what was had in mind.

Leaving aside that particular problem, the -
Mrs. Carroll has personal knowledge of a variety of things
which cannot be obtained in any other way. She has personally
been a recipient of much of the public outrage in this
particular case. She attended a meeting on June 14 at a
Glenmeade school in which she received a lot of that outrage.

She attended a meeting on August the 17th, a Rotary meeting, in which she received similar outrage. She is a part of a citizens committee which has been reactivated as a result of this particular case where she is attempting to alleviate citizen concerns and to find out what those citizen concerns are. She has, in response to this particular case, taken innumerable administrative measures with respect to changing the conditions at C.I.M. as a result of these particular cases in response to public pressure.

I think that she has the kind of personal knowledge about that particular public pressure on the prisons which again involves an implicit assumption that Mr. Cooper is responsible for the Ryen killings which can be obtained in no other way.

THE COURT: Counsel, what -- what about the suggestion or the possibility that much of what you're suggesting, that is, that although this person may have particular knowledge of complaints that have been raised in the community regarding matters that may inferentially have some concern with this case, that those same concerns and that same information is adequately displayed in the other evidence which you're going to be presenting, and that is the tapes of news -- of TV coverage, of --

I have here your exhibit of the newspaper coverage.

What are these potential witnesses going to be presenting
that really isn't presented there already?

MR. NEGUS: Additional information which I think will increase the weight of newspaper reports, Your Honor. That is to say, the -- I believe that Mrs. Carroll will -- will be able to testify as to the constant impact this particular case has had on the prison.

THE COURT: But --

MR. NEGUS: And that's different than the nature of the publicity.

THE COURT: Well, but here again I want to try and connect it with ultimately the issue of whether or not the an open preliminary hearing could affect Mr. Cooper's opportunity to have a fair trial sometime in the future. And what the prison does in response to complaints I find difficult to connect with an open preliminary hearing and ultimately with a fair trial.

MR. NEGUS: San Jose Mercury-News indicates that one of the reasons why you have closed preliminary hearings is when there's a problem of community sentiment against the defendant, and in measuring that community sentiment against the defendant, the fact that community pressure, as a result of a prejudice against the defendant, is constantly brought to bear on a public institution, and can force changes in that institution, I think is a fact which is much more significant as to the extent and depth of that community pressure than a bunch of newspaper articles. And it is in order to demonstrate that we're not just dealing with a

Mr. Cooper's guilt without hearing any evidence against him, but we're dealing with a situation in which people have so deeply absorbed that assumption that they are taking political action, they're forcing changes in their institution, they are using this particular case as a vehicle for social change. That puts it in a much different situation with respect to the ability to get a fair trial in this particular area than just prejudicial publicity.

One point I'd like to comment on in your -- which you mentioned earlier. At this particular stage the law requires us to assume that the trial will be in this particular area and soon. That is, we can't use the -- we can't use the possibility of a change of venue or some other alternate remedy or a continuance in order to -- in order to adjudge whether or not to close the preliminary hearing. San Jose Mercury-News, I think makes that fairly clear. And so we have to try and do as best we can to preserve this particular area as a place where ultimately this trial could be held.

Mercury-News says it's relevant. So I think we're sort of bound by the Superior Court -- the Supreme Court in doing it, but I think that the rationale, the reason why they say it's relevant is that it is one index of the likely effect that further publicity about this case will have on the

community. And the -- if you're putting out publicity about a case into a situation in which people say, ho-hum, that publicity is going to have one sort of impact. If you are having daily publicity and coverage like we're having now about a case in which it's deeply mired in political controversy, each of those facts is going to have a different significance, and it's going to have a different weight in the community. Publicity -- not all publicity is created equal, and some publicity has greater impact on the defendant's ability to obtain a fair trial than others.

In a situation which I'm trying to demonstrate by calling these witnesses that this -- the feelings about this case run very, very deep, then it's even more important to close the preliminary hearing and to minimize the publicity about the case prior to its actually going to the jury.

Again, it's a situation where one has to -- that by presenting -- by presenting this particular evidence one is not -- it's not that -- that one is trying to cut off information about the case forever, but only until the evidence can reach the jurors from a witness stand.

THE COURT: Okay. Thank you. Anything further, Counsel?

MR. HANOIAN: Only two things, Your Honor:

First of all, with regard to the Deukmejian case, it says a busy public official. It doesn't say the Governor or the Attorney General, and I think that a member of the

executive staff, the superintendent of C.I.M. and her executive staff are definitely busy public officials, and they fall under the holding of the Deukmejian case which relied on another case, State Board of Pharmacy versus Superior Court.

Secondly, everything counsel said is an indication that any testimony these witnesses could possibly give would be cumulative. Just looking at the document the court has at the bench looks two inches thick, and they will be taking testimony regarding community outrage, and I don't think that these particular witnesses should be required to absent themselves from their public duties, their official duties, to come in and testify to something that will be adequately documented or -- it will -- which the defendant will attempt to adequately document with the reams of materials that he has provided the court.

THE COURT: Thank you, Counsel.

In regards to the two subpoenas on Mrs. Carroll and also the public information officer at C.I.M., the court will grant the motion to guash their personal appearance on the basis that there's an insufficient nexus or connection between what they can show and the ultimate question under 868 as to whether or not an open or closed preliminary hearing will affect the defendant's ability to have a fair and impartial trial.

Now, do we have any other motions regarding the

quashing of subpoenas?

Okay. We have left only in that regards the requests for the hearing in chambers.

MR. NEGUS: Your Honor?

THE COURT: Excuse me.

MR. NEGUS: As I indicated in chambers, Mayor Walker of Chino is present and, I believe, last I talked to him, willing to testify. I indicated to him that I would try to get him out of here by 10:00 o'clock. Could we take his testimony now, and could we take the testimony in chambers?

THE COURT: Okay. Answer to Question 1, we may take his testimony now; answer to Question 2, do you wish to be heard on why his testimony should be heard in chambers?

MR. NEGUS: Basically I'm going to be asking Mayor Walker about matters which have occurred which I believe indicate an inflammatory feeling in the community against Mr. Cooper. It would seem that further publicity about that would defeat the purpose of trying to have a closed preliminary hearing, so that if in making the 868 motion I have to further fan the flames of prejudicial publicity in order to demonstrate the necessity of the closed preliminary hearing, seems like I'm put in a self-defeating situation, and that — that evidence should be taken in-camera.

THE COURT: Counsel?

MR. KOCHIS: I have no objection to that procedure.
THE COURT: Okay.

Counsel, I'm concerned with the difference between the material that might be presented at a preliminary hearing as regards to the specific evidence that might be presented which might affect public opinion, public attitude, public knowledge, as regards it might -- it's -- the defendant's ability to have a fair trial versus mere statements, conclusionary statements that this is a case that has got a lot of people interested in it.

Seems to me those are two different issues, and your offer of proof as regards to Mayor Walker is that it's simply going to be of the latter nature, and that is that people are aware of this case and have certain attitudes towards the case.

How does that affect, do you think, ultimately, the question of whether or not the openness of a preliminary hearing will affect the defendant's ability to have a fair trial?

MR. NEGUS: Well, the testimony is not that people are interested, because I think that that's the kind of testimony that publicity proves, but that people are angry. And if you introduce testimony to people who haven't heard it before about why other people are angry, what you're doing is what we're doing here. I think we're increasing the likelihood that other people are going to say, well, I'm angry too. I mean, these emotions tend to have -- they tend to grow by people sharing other people's emotions. And by

emphasizing, well, all these people are angry about this case, we're encouraging other people to be angry about the case, and we're making it less and less likely, with every minute that we go on, that Mr. Cooper will ever receive a fair trial.

THE COURT: Okay. I think there's a clear legislative intention that the proceedings of the court be held in open court. And the matters I have to weigh, in order to overcome that sort of presumption, that preference, is I have to find some good reason why there should not, and I think on this particular issue at this point, I'm going to deny your request that the evidence of Mayor Walker be held out of the presence of the public.

This -- I would indicate to you, this does not preclude you from making the request as to other evidence that you may wish to present in the 868 hearing, because it may have different results.

If you'd like to call your witness, you may.
MR. NEGUS: I would.

MR. BIERSCHBACH: Your Honor, before the proceedings start, my name is Robert Bierschbach. I'm an attorney with the law firm of Surr & Hellyer of San Bernardino. I'm appearing on behalf of The Sun Company of San Bernardino and The Press Enterprise of Riverside, and we would like to be heard in the matter of the closure of the hearing.

THE COURT: Okay. We also have another counsel from

KNBC, and I've indicated to him, and I will indicate to you, that we will address that issue, first the question of the standing of yourself and other counsel will be heard, and once that's resolved, to others --

MR. BIERSCHBACH: Very well.

THE COURT: Thank you for making your presence known, Counsel.

Mayor Walker, would you come forward and approach the witness stand to my left. Before you take the stand, sir would you face the clerk, raise your right hand and be sworn.

W A L K E R, called as a witness by and on LAPRY behalf of the defense, was sworn and testified as follows

THE CLERK: You do solemnly swear that the testimony you are about to give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do.

THE CLERK: Please state and spell your name for the court.

THE WITNESS: Do you want a full name, or is Larry Walker okay?

THE COURT: Just use the name you normally use, Mayor.

THE WITNESS: Larry Walker, W-a-l-k-e-r.

THE COURT: Thank you.

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You may proceed.

DIRECT EXAMINATION

4 BY MR. NEGUS:

- Q Mayor Walker, you're the mayor of the City of Chino?
- 6 A Ves
 - Q How long have you been in the public office of the City of Chino?
 - A Since March 14, 1978.
- 10 Q When you first ran for the City Council, was the expansion of the prison at C.I.M. an issue in the campaign?
- 12 A Yes, it was.
 - Q What was your stand on that issue?
 - A My stand at that time was that the then administration was proposing to build additional prisons on the state property in the vicinity of C.I.M., that the then-existing Chino City Council had not responded quickly enough to oppose that effort, and that I felt that the City of Chino should oppose very strongly any effort to increase the population or the buildings at C.I.M. in any amount whatsoever.
 - Q Is it fair to say that since that time you have been one of the leaders in opposing expansion of C.I.M. in the Chino area?
 - A Yes.
 - Q What was your feeling at that point in time about the

responsibility that San Bernardino County was taking for prisoners from Los Angeles County?

- A Of course that's from the county's perspective. I was dealing with the perspective of the City of Chino, and I'm not sure at this time I have a recollection of how I felt about that particular sub-issue. It was obvious, statistically, that Chino and the County of San Bernardino had a much higher number, percentage, of the State's prisoners than they provide of the State's prisoners.
- Q At that point in time was testimony being taken in -- by various State agencies with respect to legislation to expand the prisons at Chino?
- A I recall a hearing -- I recall a select committee that
 was set up composed of both senators and assembly persons
 that had a hearing in May of '78, after I was elected.
- Q And did you attend that hearing?
- A Yes, I did.

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- Q Do you recall making a statement at that hearing that "Prisons cause crime. Let the prisoners from Los Angeles stay in Los Angeles"?
- A I don't recall the specific statement, but that's probably an accurate paraphrase, at least.
- Q Is that -- was that an accurate reflection of your feelings at the time?
- A I suggested a specific site in Los Angeles County that might be an appropriate one where they had just torn down

an office building in downtown Los Angeles.

Q Why did you suggest that?

A Because it was obvious that Los Angeles County did not have its share of the prisons.

- Q Do you feel that that -- do you still hold that sentiment?
- A Yes.

- Q And is that a sentiment that is also widely held by your constituency?
- A Let me qualify, as far as my sentiment, Los Angeles

 County does not have its proportionate share of prisoners

 although I have advocated that perhaps it would be more

 appropriate to locate all prisoners outside of urban

 areas, rather than try to distribute them equally among

 the counties providing them.

As far as my constituency, I can only say that I believe I have the support of the citizens of Chino in the positions I have taken.

- What effect has the Ryen killings on June 5th and the accusation that Kevin Cooper is responsible for those killings had upon the political opposition to the prisons in Chino?
- A I'm not so sure that it's had an effect. It hasn't had any effect on my opposition. I think it's probably had more effect on the ability of that opposition to be heard in places like Sacramento.
- Q Can you explain what you mean by that?

ers?

- 1 Q Well, I think it's harder for assemblymen and senators
 2 from other areas of the State to turn a deaf ear on our
 3 complaints, because they feel it's a more sensitive
 4 issue for them to ignore.
 5 Q Have you personally used that issue in lobbying in
 6 Sacramento against prison expansion?
 7 A I haven't had the opportunity to lobby in Sacramento
 - since the issue took place.
 - Q Have you used the issue in any other political forums?
- 10 A No, I don't believe so.

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- 11 Q To the best of your knowledge, what is the sentiment 12 in Chino about the Ryen killings?
 - A Well, that it's a horrible tragedy, and there is obviously a large degree of publicity that an escape from the prison is connected with it.
 - Q What do you think that the sentiment in Chino is right now about Mr. Cooper?
 - A I -- I'd be guessing.
- 19 | O What about C.I.M.?
- 20 A C.I.M. is -- I think there's a substantial feeling in
 21 the community that the City of Chino would be better off
 22 if C.I.M. were not there.
- 23 Q Is that connected with the Ryen killings?
 - A I would be hard pressed to say the Ryen killings had nothing to do with it, but I would say, just from my frame of reference and the issue that I've dealt with,

that the Ryen case may have added five percent to that 1 feeling that already strongly existed before the Ryen 2 murder ever occurred. 3 So would it be fair to say that the Ryen killings have 4 sort of added to and solidified a pre-existing opposition 5 to the prison? 6 Or words to that effect. 7 8 Thank you. I have nothing further. 9 THE COURT: Counsel? 10 MR. KOTTMEIER: No questions. 11 MR. KOCHIS: No questions. 12 THE COURT: Thank you. 13 Mayor, thank you for coming in. You may be excused. 14 I believe --MR. NEGUS: 15 BY MR. NEGUS: Did you bring some documents to submit to 16 the court in response to the subpoena duces tecum? 17 I have something, but it's not much, and I -- it's a 18 questionable -- actually, it's whether counsel wishes to 19 define correspondence from prisoners as constituent mail. 20 That's about half of I will take your representation. 21 what I have. And --22 THE COURT: Maybe we'd best not get into that issue. 23 BY MR. NEGUS: Do you have any from --24 I have one record of a telephone call that actually came 25 in when I was out of town. Councilman Kenealy responded 26

to that. He's under the subpoena of the court.

Prine.

Thank you.

THE COURT: Thank you, Mayor. You may be excused.

Did you have any other requests for -- to call

witnesses at this time?

MR. NEGUS: I haven't been approached by anybody else who asked to --

THE COURT: All right.

What I think we'll do is we'll take a brief recess till about 10:10. Then at 10:10 I'm going to ask Mr. Hanoian meet with me in chambers, and we'll proceed on the subpoena d.t.'s in which he's exercised the privilege. I really don't know how long that will take, but as far as the open court is concerned, we'll be still in recess at that time. And as soon as I complete the in-camera session, then we will resume our proceeding out here.

Court will be in recess until 10:10 or as soon thereafter as I complete the proceedings in chambers. Court is in recess.

(Court was in recess until 10:10, after which proceedings were held in chambers which were reported but are not transcribed herein.)
(The following proceedings were held in open court:)

THE COURT: Court has conducted an in-camera hearing

in regards to Mr. Hamoian's exercise of the privilege under Evidence Code Section 1040 and makes its findings and rulings as follows:

Presented to the court was a file that was in response to the subpoena d.t.'s to Mr. Minjares and Mr. Peña. It involved six reports, one involving a report by Mr. Brown dated 6-20 consisting of 40 pages;

Another one a supplemental report by Mr. Brown dated 7-7 consisting of 13 pages;

Another one was an assembly report, a response to an Assembly Resolution 85, containing 80 pages --

Which was represented to the court, Mr. Negus, that you already have; is that right?

MR. NEGUS: The reports submitted by the Department of Corrections I got from Mr. Guthrie by just requesting it.

THE COURT: Okay. Another one was a report on fingerprint cards taken of the defendant dated 6-22-83;

Another one was a report dated 6-17-83, consisting of five pages;

An overview of C.I.M. escapes next was -- described as a homicide report by Mr. Laudeman. I don't have the date of that.

Mr. Hanoian, do you recall that date?

MR. HANOIAN: I can get that for the court.

THE COURT: If you would look it up.

Also a supplemental report by Mr. Laudeman regarding

the defendant being taken in custody on August the 3rd, consisting of two pages.

MR. HANOIAN: Mr. Laudeman's report initially was issued on 6-22-83.

THE COURT: The court has considered the request for confidentiality there and thinks that in these instances it is not necessary. So the court will deny the motion to quash the subpoena duces tecum and will order that it remain in full effect.

As to the assembly report, you may not wish to have an extra 80 pages in your file.

MR. NEGUS: I don't need the extra 80 pages.

THE COURT: That's up to you.

Okay. Thank you.

MR. HANOIAN: I'm sorry. I missed -- did the court the court ruled in defense favor on all of them?

THE COURT: That's right, except that Mr. Negus says that if you wish to take out the eighty-page assembly report, he would be just as happy since he already has it.

MR. HANOIAN: Okay.

THE COURT: Okay?

This brings us down to this point: We have left some witnesses that Mr. Negus wishes to call in support of his 868 motion.

MR. NEGUS: Right. If I could call -- at the present I think two witnesses that will not take too long.

THE COURT: Okay.

I would also intend to give counsel for the press and the television station opportunity to be heard on standing, and then after I rule on that, I'll ask you, if I determine that you have standing to be heard, whether you wish to present evidence, or just wish to present argument. And that will determine as to where we can fit you in.

The one remaining matter we have is the written discovery motion, and I think, because of the peculiar nature of the representations that will have to be made regarding that, I'll be hearing that matter in chambers out of the public presence.

Okay. Let me start at this time and give counsel for the press --

MR. NEGUS: Could I have one witness, and maybe a second witness, just -- one witness will take about five minutes at the maximum.

THE COURT: All right. We'll grant you that, certainly. You may call your witness.

MR. NEGUS: Captain Schuyler.

THE COURT: Captain Schuyler, will you approach the witness stand to my left and be sworn by the clerk before you're seated.

PEILIP KENNETH SCHUYLER, called as a witness by and on behalf of the defense, was sworn and testified as follows:

THE CLERK: You do solemnly swear that the testimony you are about to give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do.

THE CLERK: Please state and spell your name for the record.

THE WITNESS: It's Philip Kenneth Schuyler,

S-c-h-u-y-l-e-r.

THE COURT: Thank you.

You may proceed.

DIRECT EXAMINATION

BY MR. NEGUS:

- Q Captain Schulyer, what's your occupation?
- A I'm a captain for the San Bernardino County Sheriff's Office.
 - Q What is your assignment as Captain?
- A At the present time I'm the commander of the sheriff's public affairs division.
 - Q And does that involve handling relationships with the press and the public?
 - A It does, indeed.

- 1 Q Has the sheriff's department received any threats with respect to Mr. Cooper's life?
- 3 A To my knowledge, I have received one.
 - Q Were you aware -- are you aware of a report in the
 Riverside Press Enterprise that there were 45 threats?
- 6 A I have heard about it. I did not see it.
- 7 Q Do you know the source of that particular number?
- 8 A No, I don't.

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- 9 Q Is the area of the Chino Hills part of the jurisdiction
 10 that the Sheriff of San Bernardino County patrols and
 11 provides police services to?
- 12 A Yes, it is.
- 13 Q Have there been budget hearings with respect to the
 14 sheriff's budget in San Bernardino County in the last
 15 two months?
- 16 A Yes.

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- Q At those hearings were people from the various communities served by the sheriff, appear at those hearings and testify in favor of the sheriff's budget request?
- 20 A Yes, there were.
- 21 Q Were there people there from the Chino Hills?
 - A Yes, there were.
 - Q What was their reaction towards the Sheriff's department providing protection to them?
- 25 A Well, they were very adamant that they wanted to not only continue the level of protection that they presently have,

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but add to -- asked that it be increased.
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        Did the Ryen killings figure in those requests?
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         I would suspect they did.
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    Α
        Were you present?
     Q
        Yes, I was.
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    Α
        Did in fact one of the Ryens' neighbors, Linda Edwards,
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         testify?
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         I believe that's correct.
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         Did she make reference to those killings?
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         Yes.
         Do you recall what she said?
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         No, I don't.
12
         Thank you.
13
             Nothing further.
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             THE COURT: Anything, Counsel?
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             MR. KOCHIS: No.
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             MR. KOTTMEIER: No, Your Honor.
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             THE COURT: You may sit down.
18
             Thank you for coming in, Captain. You may be
19
20
     excused.
             THE WITNESS: Thank you.
21
             THE COURT: Do you have any other witnesses, Counsel
22
             MR. NEGUS: Mrs. Katz. She might take a little
23
     longer, but it's up --
24
             THE COURT: Let's do Mrs. Katz.
25
             Excuse me, Counsel. We'll just do this one witness,
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and then we'll be back.

Mrs. Katz, would you approach the witness stand to my left and be sworn by the clerk before you're seated.

Raise your right hand, please.

NAIDA KATZ, called as a witness by and on behalf of the defense, was sworn and testified as follows:

THE CLERK: You do solemnly swear that the testimony you are about to give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: I do.

THE CLERK: Please state and spell your name for the court.

THE WITNESS: Naida, N-a-i-d-a, Katz, K-a-t-z.

THE COURT: Would you be seated, please.

You may proceed, Counsel.

DIRECT EXAMINATION

BY MR. NEGUS:

- Q Mrs. Katz, are you the treasurer of a citizens group called Citizens Opposed to Prison?
- A Yes, I am.
- Q When was that group founded?
- A Well, we are a very informally organized group. I don't think we have any official founding date. I think we --

I would say we've been in existence for about six months
or so.

- Q And where is the group located?
- A Well, we have members really from all over the county, but primarily the high desert.
- Q Was the impetus for forming the group to oppose the construction of a prison in Adelanto?
 - A The purpose of our group is to oppose any more prisons in San Bernardino County.
 - Were you specifically, though, directed at the construction of prisons in Adelanto? Was that the thing that got you going?
- A Well, I -- I will say that most of our members live in the high desert. So that's our primary focus of concern, because nobody else seemed to be speaking up in opposition to that particular site.
- Q Prior to June 5th, 1983, were you -- was your group attempting to circulate petitions to gather signatures of people opposed to the construction of the prison in Adelanto?
- 21 A Yes.

- Q And did you -- had you gathered by that time approximately 700 signatures?
 - A Oh, no. We had more than that. We had approximately 2,000.
 - Q Since that time, since June 5th, 1983, how many

1 signatures have you gathered? 2 We have gathered about 7,000 more. 3 And you began gathering signatures approximately February of 1983; is that correct? 5 I would say around there, yes. 6 Since June of 1983 have you obtained the assistance of 7 a variety of political leaders in San Bernardino County, 8 including the Victorville City Council, all five members 9 of the Board of Supervisors, the sheriff, the District 10 Attorney, and the acting public defender? 11 Those people have always been opposed to any more prisons 12 in the county. 13 Were they working with your group prior to June 5, 1983? 14 Α Yes. 15 All of them? 0 16 A Yes. 17 Had you had formal contacts with all of them? 0 18 Α Yes. 19 Subsequent to that point in time, however, you presented 20 a formal declaration to an aide of Governor Deukmejian 21 signed by all of these people; is that correct? 22 Yes, that is correct, because we made a trip to 23 Sacramento, and we wanted to have something tangible 24 to show the Governor -- Governor that all of these people

were in fact opposed to any other prisons here.

The signatures of -- the 7,000 signatures that you've

```
gathered since June 5th, approximately 5,000 of those
        were gathered at the San Bernardino County Fair in
2
3
        Victorville?
4
        Yes.
        At that fair did you have a booth?
5
6
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7 Can you describe the booth?

Yes, we did.

A

13

23

- Well, it was sort of designed to look like a prison cell, 8 and we had different -- we had literature, a fact sheet 9 and various things that we handed out to people, and 10 of course we had the petitions for them to sign if they 11 were opposed to more prisons in the county. 12
 - Were there any signs on the booth?
- Well, yes. We had signs that said, "Stop" -- like the 14 stop sign, that said, "Stop prisons" or "Stop the 15 prison," or something like that. 16
- Did you also have a sign that said, "Do you want this 17 man to be your neighbor?" 18
- No, that wasn't a sign. 19 Α
- What was that? 20
- Well, it was a little note that was written under the --21 under a wanted bulletin. 22
 - Showing you --
- If I could approach the witness, Your Honor? 24 Certainly. 25 THE COURT:
 - BY MR. NEGUS: -- Plaintiff's Exhibit K or Exhibit K,

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anyway, is that a Xerox copy of the wanted bulletin that
1
2
         you had there?
         Yes, and our sign didn't say "Do you want this man to be
3
         your neighbor?" It just said, "Your future neighbor"
4
         question mark.
5
         Did you also have copies of that Exhibit K made?
6
7
    Α
         Yes.
8
        How many?
         Oh, several hundred. I didn't count them, and I didn't -
9
         I didn't make them. One of our members had them run off.
10
         Did you give them all out?
11
12
     Α
         No.
13
     0
         You still have some?
14
     Α
         Yes.
         Approximately what percentage?
15
         Oh, I'd say more than half.
16
         So you gave out how many, couple hundred?
17
         Probably about that.
18
        Did you also give out a piece of literature that's
19
         been marked as Plaintiff's Exhibit No. L?
20
21
         Yes, we did.
         And how many pieces of that piece of literature did you
22
23
         give out?
         Well, I -- I can't -- I really can't say with any degree
24
         of accuracy. Not too many. I wasn't in the booth all
25
         the time, of course, but -- not too many people were
26
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interested in taking this, because it has so much writing on it. But I'd say maybe we passed out approximately 50 or 60 of them.

- Q Did you also run an ad in the newspapers which -- showing you Plaintiff's Exhibit No. M.
- 6 A Yes.

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- Q Which newspapers did you run that ad in?
- 8 A In The Sun Newspaper and The Daily Press.
- 9 Q And were those ads all run after June 5th, 1983?
- 10 A Yes.
- 11 Q And do they have a place for a coupon for people to send 12 back signing that, agreeing with your position?
- 13 A Yes.
- 14 Q How many of those did you receive back?
 - A About a thousand.
 - Q Have you used the Ryen killings and the accusation that Kevin Cooper is responsible for those killings as part of your campaign against prisons in San Bernardino County?
 - A We used the fact that he was an escapee, which was the important issue from our point of view. There had been so many arguments from the Department of Corrections that people don't escape from prisons, and we know better.

 And we used -- we used this to illustrate the fact that someone did escape, and someone in our county -- someone escaped in our own county.

Q	Is it fair to say that prior to the Ryen killings a lot
	of people in your area were sort of soft in their
	position against the prison, but that the Ryen killings
	have solidified that opposition?

- A No, I wouldn't put it that strongly. The people in our area were very much opposed to the prison prior to the Ryen killings, and of course the Ryen killings certainly brought it more to their attention.
- Q Is Katherine Egan a member of your group?
- A Yes, she is.
- Are you familiar with a statement that she made to the press that "Before the jail incident we had a lot of people that were soft on their decision. Now they have changed their position considerably and have signed our petition"?

MR. KOTTMEIER: Objection. Argumentative.

THE COURT: Counsel?

MR. NEGUS: Argumentative?

THE COURT: How is it relevant whether or not she's aware of it, in any event?

Q BY MR. NEGUS: Would you agree with that statement?

MR. KOTTMEIER: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: Well, I -- I think I answered it the best way I could in my answer to your last question. I think -- I think certainly people became concerned, more

concerned than they had been previously. Whether -- whether it 1 actually solidified any opposition, I really -- I couldn't 2 say for sure about that. 3

- BY MR. NEGUS: Did you yourself ever make a statement to April Foran, a reporter of the Victorville paper, to the effect that "We don't want to have happen in Adelanto what happened in Chino"?
- Yes. Yes, I probably said something like that.
- By that, were you referring to the Ryen killings?
- I was referring to the escape.
- After the Ryen killings, did your group increase its organizational efforts to try and strike while the iron 12 13 was hot?
 - We've been working very hard right along.
 - The president of your group, Mrs. Sarter, was quoted in the press as saying essentially that. Would you agree with that?
 - That's her remark. I -- I wouldn't agree or disagree.
 - Why did you choose the Kevin Cooper wanted poster to pass out at the fair?
 - Well, for the obvious reason that he had already gotten so much publicity in the news media, and it was -- it was something that had happened in our community, and we -- we felt that people would -- would look at this and, you know, there would be some recognition, because his picture had been in the paper so much already.

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Robert

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Was he a symbol to you of the problems you were trying
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         to avoid by having a prison in Adelanto?
2
3
         In a sense, yes.
        Thank you.
5
             I have nothing further.
             THE COURT: Any questions, Counsel?
6
7
            MR. KOCHIS: No.
             THE COURT: Counsel?
8
             MR. KOTTMEIER: No.
9
             THE COURT: Mrs. Katz, thank you for coming in. You
10
    may be excused at this time. Just leave those right there
11
12
     on the table.
13
             THE WITNESS: Oh.
             THE COURT: And the bailiff will take care of those.
14
             Before we address the issue of the standing of the
15
    parties to appear for the newspaper and the television
16
     station, let me inquire, is there anyone who is going to raise
17
    any objection to their standing to address the issue in court
18
             MR. NEGUS: I would.
19
             THE COURT: Okay. Do you wish to be heard on that?
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             MR. NEGUS: Generally.
21
             THE COURT: In fact, let me perhaps -- since you will
22
    respond to it, let me let Mr. Méndez first be heard on the
23
     issue. Then you may respond to that.
24
25
             Mr. Méndez?
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MR. MENDEZ: Thank you very much, Your Honor.

Mendez appearing on behalf of National Broadcasting Company.

With respect to the standing question, Your Honor, it's our position that the Supreme Court, the United States Supreme Court, has clearly found that the public have a right to attend these proceedings, and Penal Code Section 868 makes it clear that the public has a right to attend preliminary hearings. The Supreme Court and the Ninth Circuit in Brook Lier makes it clear also that before a preliminary hearing can be closed, the public must be provided an opportunity to be heard.

As far as we're concerned, I don't think there's much question but that we have standing. I don't think these proceedings can be closed until the public has an opportunity to be heard, and entities like NBC are best able to represent the public. We have the facilities, we have the wherewithal to represent the public best, we think.

THE COURT: Okay. Thank you.

Counsel?

MR. BIERSCHBACH: Yes, Your Honor.

I would just like to say that the --

THE COURT: Would you give your name again for the record.

MR. BIERSCHBACH: Yes. Robert Bierschbach of Surr & Hellyer appearing for The Sun Company and The Press Enterprise Company.

THE COURT: Yes.

MR. BIERSCHBACH: I would just like to say, Your
Honor, that it would be a very ludicrous situation if the
Legislature has given the opportunity for the examination
to be open in public, except after a finding by the magistrate
that it's necessary, in order to protect the defendant, to close
the hearing. The District Attorney has indicated to us that
he does not intend to take a position on this. If we're
not allowed to be heard, no one with be heard except the
defendant, and we think that this is no hearing at all if only
one side is heard. So in order to give real meaning to the
Legislature's intent, I think it's incumbent that we be
heard.

THE COURT: Okay. Thank you.

Counsel?

MR. NEGUS: Basically the right to a public hearing is most strong in a jury trial or a trial situation. And the cases -- the case of the United States Supreme Court which gave a limited right of the First Amendment access to those dealt with trial.

Gannett Company versus DePasquale, 443 U.S. 368, specifically upheld a finding closing pretrial proceedings. And Richmond Newspaper Company, the case that gave the -- gave a right to a public trial, which we've never opposed in this county, at least that I'm aware of, made a distinction between the pretrial proceedings and a jury trial proceeding.

In Gannett versus DePasquale, it was said that -- on

Page 384, that in our adversary system of criminal justice, it's "premised upon the proposition that the public interest is fully protected by the participants in the litigation."

That is to say, if the District Attorney's Office makes a finding in their own minds that they don't wish to oppose the motion, basically, I would assume, on the grounds that they wish to minimize the likelihood of a change of venue motion being granted in this particular case, that that decision on their part is entitled to great weight and should be respected because they likewise have a duty to ensure, if they can, that Mr. Cooper gets a fair trial. If they have made the decision that not opposing the motion is the best way to ensure that he gets a fair trial, I would submit that that is all that is required under Penal Code Section 868.

Penal Code Section 868 does not say anything about a hearing on the part of any public -- of anybody other than the two parties to the litigation.

THE COURT: Thank you.

MR. MENDEZ: Your Honor, if I might respond to that, I think that is our very point. The D.A. in this case is an interested party. He is not an advocate for the public in this case. His interest is very narrow in this case. He wants to make sure that he doesn't do anything that will cause this case to be overturned on appeal, and I don't think that we can expect the D.A. to represent the public.

He's got different interests at stake and can't be an advocate for the public.

THE COURT: What issue would you be addressing to the court, Counsel, other than the issue of whether or not the keeping open of the preliminary hearing might deny the defendant a fair trial?

MR. MENDEZ: Well, it's our position that the public has a right, grounded in the First Amendment and in Penal Code Section 868, to be at this hearing.

THE COURT: I think everybody grants you commence -you commence with that premise, and you commence--indeed,
as the statute has been amended, it says that it shall be
open. So then the sole question that allows a judge or a
magistrate to depart from that premise is a determination
that the openness of the hearing would prevent or, to use
the specific words, that "The exclusion of the public is
necessary in order to protect the defendant's right to a
fair and impartial trial."

MR. MENDEZ: Exactly, Your Honor. We would like an opportunity to respond to the defendant's claim, and we believe it is his burden to prove under 868 -- to prove that closure of the preliminary hearing is necessary to protect his fair trial rights, and we simply want an opportunity to respond to that, to his claims.

THE COURT: Thank you.

Okay. The court I think will -- will find that both

parties have standing to present their arguments.

Now, do I understand that you're going to simply present arguments, or do you expect to present some evidence as well? Mr. Bierschbach?

MR. BIERSCHBACH: I don't contemplate presenting evidence, Your Honor, but I think we should be allowed to examine witnesses who might be introduced or might be produced by the defendant. Otherwise, whether their evidence is sufficient will never be tested.

MR. MENDEZ: I join in that, Your Honor.

THE COURT: That's perhaps another issue as well.

Counsel, do you wish to be heard on that?

MR. NEGUS: There's no case that I'm aware of that gives them any such right. They have — the only — the cases that have — give an opportunity to be heard doesn't necessarily join them as parties to the litigation, and I think that there's a vast difference between listening to what they have to say and having who knows how many people potentially coming in as additional parties. Basically their right is no greater than the general public. So presumably any person on the street could come in and start cross—examining witnesses, and I would submit that that procedure was never contemplated, and it would be an absurd one to start now.

MR. MENDEZ: Your Honor, it's not crucial to our position, I don't think, but if we're going to be allowed -- if we're going to have an opportunity to respond to their

claims -- I don't intend to put on any witnesses, but I certainly think it's necessary for me to be able to cross-examine in order to rebut any of the claims that counsel is trying to establish.

MR. BIERSCHBACH: There is no authority, Your Honor, as far as I know. There are two cases in the District Court of Appeal now, one in the Fourth District, one in the Fifth District, concerning the nature of the hearing, and, I assume touching on this particular point. But I can't conceive that the Supreme Court or the Ninth Circuit Court intended that the press and the public would not have an opportunity to test the evidence upon which the magistrate is basing his or her decision. And I think that it's incumbent that we have that right in order to give meaning to the hearing.

THE COURT: Okay.

Absent any authority at this time, the court is going to restrict the participation of counsel to present evidence on their own if they wish to and of course to present argument, because I -- I take it, essentially, Mr. Mendez, you wish to -- at the completion of the presentation of the evidence here, essentially to argue the insufficiency of showing by the defense --

MR. MENDEZ: Yes.

THE COURT: -- to their claim.

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That will be the ruling that the court will make on
that.
        MR. BIERSCHBACH: Do I understand the court we are
not allowed to examine witnesses?
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THE COURT: That's right.

Okay. Mr. Negus, did you have any additional witnesses that you wished to call at this time?

MR. NEGUS: I was going to call Sergeant Arthur.

THE COURT: Okay.

Sergeant Arthur, would you approach the witness stand to my left and be sworn by the clerk.

ARTHUR, called as a witness by and on behalf 13 B I L L of the defense, was sworn and testified as follows:

THE CLERK: You do solemnly swear that the testimony you are about to give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God.

THE WITNESS: Yes, ma'am, I do.

THE CLERK: Please state and spell your name for the record.

THE WITNESS: Bill Arthur, A-r-t-h-u-r.

THE COURT: You may proceed, Counsel.

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DIRECT EXAMINATION 1 2 BY MR. NEGUS: Sergeant Arthur, what's your occupation? 3 I'm employed by the County of San Bernardino, Sheriff's 5 Department. And you work with the homicide department? 6 7 Yes, sir. And were you the administrator in the sheriff's 8 department who was put in charge of the investigation of 9 10 the Ryen killings? 11 Yes. In that capacity have you had occasion to assess the 12 amount of false information which you've received in 13 14 this particular case? 15 I believe so. 16 Have you received a lot? 17 Yes. Much more than -- than normally in a homicide investigation? 18 19 Α Yes. Did the sheriff introduce a policy early on in the 20 investigation of not releasing information about the 21 physical evidence in the case? 22 I don't believe that was done. 23 Have statements been made about the physical evidence? 24 25 Α Yes. Has that physical evidence been described fully and 26

completely?

- A I -- I think you would have to go into each piece of physical evidence which you're talking about.
- Q In assessing the false information that's been received, has a lot of that information been determined false basically because you possessed information that the person making the false report didn't have and which hadn't been released to the public in general?
- A No, sir. I'm talking -- the false information I am referring to is the sightings of Kevin Cooper. That kind of information is more than abundant.
- Q All right.

And people gave detailed statements about their contacts with Mr. Cooper?

- A That's correct.
- Q And at the time that they were making those detailed statements, you were able to determine that they were false only after you later learned from other sources where Mr. Cooper had been from June 10th to July the 30th?
- A That's basically correct.
- Q And that information was not generally available to the people making the false reports at the time that they made them; is that correct?
- A No.
- Q In connection with your duties did you travel to Santa

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Barbara on July the 30th?
1
2
         Yes, I did.
         And on July 31st did you drive Mr. Cooper back to the
3
         San Bernardino County Jail?
5
         Yes.
         Along the way was Mr. Cooper recognized?
6
7
         Yes, he was.
         Were there any reactions to him as you drove back?
8
9
    A
         Yes.
         What were those reactions?
10
         People would point at him as we were driving alongside
11
         them or by them. They would make gestures, they would
12
         cheer, obviously cheer that he was in custody.
13
         Were some of the gestures obscene gestures?
14
         I wouldn't classify them as obscene, no.
15
         Gestures of anger at Mr. Cooper?
16
         Some anger and -- yes, there were some anger.
17
         When you arrived back at the San Bernardino County Jail,
18
         was there a crowd of civilians there?
19
20
         Yes.
21
         How many peole would you guess?
22
         I dc not know.
         What was that -- what was that -- was that crowd engaged
23
         in any unusual behavior?
24
25
         Yes.
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26

What was that?

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They were chanting from the location they were maintained
1
    A
        at. They were chanting things toward the defendant.
2
3
        What?
        I believe the common phrase was that "You're in custody
4
        now. You'll never kill again," or something of that
5
6
        nature.
        Any cries with respect to whether or not Mr. Cooper should
7
8
        be put to death?
        I do not recall any of those.
9
        Were there any obscenities being shouted at him?
10
        There may have been. I don't know what those would be.
11
             MR. NEGUS: Nothing further.
12
             THE COURT: Mr. Kochis?
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             MR. KOCHIS: No.
14
             THE COURT: Mr. Kottmeier?
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             MR. KOTTMEIER:
                            No.
16
             THE COURT: You may step down.
17
             THE WITNESS: Thank you.
18
             THE COURT: Do you have any additional witnesses to
19
20
     call at this time?
21
             MR. NEGUS:
                         No.
                        Okay.
22
             THE COURT:
             Let's review at this point then as to what additional
23
     evidence you expect to present on the 868 motion, what we
24
     have present at this time and what we don't have present and
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what you propose in that regard.

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MR. NEGUS: I have lodged and asked that it be marked as exhibits with the court, the ten video tapes that were submitted by the Los Angeles television stations in response to the subpoena duces tecums that I issued. I would request that those be admitted into evidence on this -- at this particular hearing.

I have in my office, which have not yet been completely collated, the scripts that were also submitted by those television stations and the ratings which were also presented by those television stations in response to the subpoena duces tecum. I will be having prepared transcripts of the video cassettes that you already have.

I also have not submitted yet to the court scripts and some tapes from radio stations of broadcasts about the case and also some ratings information from some of the stations.

I expect also to present more newspaper clippings. I have already presented you with those from four newspapers up to a couple of days ago, and there are several local newspapers which I have not yet gathered, clipped and prepared. I will have those as soon as I -- as soon as I can.

In addition, I am attempting to find a person who is an expert in the field of communications who can give some testimony as to the effect of this material on the -- on what on what -- Mr. Cooper's ability to obtain a fair trial and the effect of having an open preliminary hearing on his

ability to get a fair trial. I would be expecting to present that person's testimony on October 7th if the court grants my motion to continue the hearing till that day.

THE COURT: Well, we've -- you've got certain items which have already been marked. And I suppose you can move at this time that they be admitted for the purpose of this 868 hearing.

MR. NEGUS: So moved.

THE COURT: Okay.

Mr. Kottmeier, Mr. Kochis, do you wish to be heard on that?

MR. KOCHIS: No objection, Your Honor.

MR. KOTTMEIER: No objection.

THE COURT: Those items already marked may be received.

Mr. Negus, this document was presented to the court as an exhibit on your motion and Points and Authorities. I don't know. Do you wish to have it marked and received as an item in evidence?

MR. NEGUS: Move -- it makes no difference to me.

I wanted to have it considered. If you wished -- if you wanted to consider it as evidence or as an exhibit.

THE COURT: No. It may remain then just as an exhibit to your moving papers.

MR. NEGUS: There will be a supplement to that exhibit filed.

THE COURT: It will be considered.

Okay. Now, the question is that if we do continue the matter over until the 7th for the completion of this 868 hearing, and there are going to be items presented which will take some time for me to view or to read, it will be helpful to have those ahead of time so that I may have viewed them or read them. I would like very much to make a ruling on October the 7th on your motion and not put it off to another hearing for me to consider evidence, additional evidence, that I haven't been able to.

MR. NEGUS: In my talking with people who are furnishing the information to me, I have told them that, and hopefully all the material will be in my hands in sufficient time so I can get it in your hands before the hearing.

THE COURT: Okay. Only a procedural question, and that is that obviously it would be inappropriate, unless there were stipulations otherwise, for the court to be considering items as evidence before they've been admitted into evidence. Can we receive a stipulation between yourself and the District Attorney's Office that Mr. Negus may submit proposed items of evidence to the court prior to the next hearing, that the court may have them marked for identification and that the court may view them and, contingent upon a motion to have them admitted into evidence on October 7th, either consider them or not consider them depending on the

court's ruling there?

MR. NEGUS: I would so stipulate.

MR. KOCHIS: So would I.

THE COURT: The court receives that stipulation.

Counsel, I would like for you to have any such items to the court clerk no later than --

MR. NEGUS: I can have the bulk, Your Honor, by next Friday. If I could have a little bit longer for some of the transcripts of the tapes, but you have the tapes so you can view the tapes without the transcripts.

THE COURT: But are they in the form that I can look at them?

MR. NEGUS: No, but I would be willing to stipulate that with respect to the professional quality video cassettes which were submitted by some of the television stations, that Mr. Kottmeier and I both have copies of those tapes which were made on cassettes which can be played in normal video machine players and that you could borrow either mine or Mr. Kottmeier's to view.

THE COURT: Well, I think you'd better submit with them, along with them. They'll be marked as an item for identification. We can release them to you afterwards.

There's no problem in that regard. But I'd rather have them to have a designation so that I can tell you what I've looked at and I haven't looked at.

MR. NEGUS: The ones that you have have been marked.

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All have exhibit numbers on them.
1
2
             THE COURT: Yes.
3
                        And I will put those --
             MR. NEGUS:
             THE COURT:
                        No. no.
5
                         -- transfer those --
             MR. NEGUS:
                                  They should remain with those
6
             THE COURT: No, no.
7
     present exhibit numbers --
             MR. NEGUS: No. If you get them from me, for example,
8
     I will label mine with the appropriate exhibit numbers.
9
     Mr. Kottmeier and I are both fearful of having the tapes
10
     somehow get into the system. That's why we had the copies
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     made. So I think Mr. Kottmeier or Mr. Kochis would agree to
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     the procedure that I am suggesting that I just give you the
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     tapes with them appropriately marked, rather than having
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15
     them made as exhibits.
             THE COURT: As long as it's marked so that I know
16
17
     which ones I'm viewing.
             MR. NEGUS:
18
                         I'm afraid to ask you, how long are these
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             THE COURT:
     tapes going to be?
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             MR. NEGUS: It took me seven hours to look at the
21
22
     television.
             THE COURT: Thank you.
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             MR. NEGUS: Your Honor?
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             (Discussion off the record.)
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             THE COURT: Yes. Let's give a date. They should all
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be to me no later than October the 3rd.

MR. MENDEZ: Your Honor, one last point.

THE COURT: Yes.

MR. MENDEZ: If counsel has P's and A's in support of the motion, can we get a copy of those?

THE COURT: In support of the --

MR. MENDEZ: 868 motion.

THE COURT: Yes, the 868 --

MR. NEGUS: My objection to that is that the Points and Authorities contain allegations about facts which I expect to come out at the preliminary hearing and argument along that grounds. If those Points and Authorities are released to the general public, then obviously part of the point of having a closed preliminary hearing is thwarted. So I would object to that.

THE COURT: Okay. The court will take your request under submission and will rule on it, and it may be a qualified ruling, and that is there may be certain restrictions placed on aspects of it. I'll have to review those Points and Authorities.

MR. MENDEZ: Thank you, Your Honor.

THE COURT: Mr. Bierschbach, any other matter?

MR. BIERSCHBACH: Only that it would be very difficult for us to respond if we can't see his Points and Authorities. I don't think that would be fair at all.

THE COURT: All right.

What else do we have in terms of any motions to quash or in terms of an anticipation of the next hearing date --

MR. NEGUS: I believe --

THE COURT: -- to cover?

MR. NEGUS: Well, I would -- I was going to make a request for the transcript of today's proceedings to be prepared.

THE COURT: Okay. The court will so order.

MR. NEGUS: And I believe that leaves us only with the discovery motion matters.

THE COURT: Okay.

MR. KOTTMEIER: There was one other indicated area of concern, Your Honor, which was relative to the location of the prelim for November.

THE COURT: Right. I think I had indicated previously that I would rule on it at this time. I think it's appropriate that I rule on that after I've made a ruling on the 868, because I think that's pertinent. So the court will defer ruling as to the -- any change of location until I've ruled on the 868 motion. But I thank you for bringing that up. I had indicated that I would make that determination today.

MR. KOCHIS: Your Honor, that presents one problem in that we're putting into the system subpoenas for a large number of witnesses and that some of those witnesses are located outside of this geographical area, and we need to know -- at least I need to know the location to put on the

subpoenas to notify people where to appear, whether it's Department 11 or here.

MR. NEGUS: My request would be to have the matter in Department 11, no matter which way you rule on the motion.

THE COURT: Well, as of this time it's the court's intention to hold the preliminary hearing in this courtroom. And so you can subpoen accordingly --

MR. KOCHIS: Thank you.

THE COURT: If the court becomes convinced otherwise, I'm open to a reconsideration of that ruling, but that's the tentative ruling of the court at this time. And you may have to alter your subpoenas or redirect people once they come here.

Okay. You wish to be heard. You have a request now as regards to the continuance of the -- of this hearing until another date?

MR. NEGUS: Yes. I would request that the 868 hearing be continued until October 7th.

THE COURT: Okay.

Counsel?

MR. KOCHIS: As long as that doesn't affect the preliminary hearing date, I have no objection.

THE COURT: The preliminary hearing date is presently set for November the 9th. I'd expect that, as I indicated I think in our first hearing, that preliminary hearings aren't set in concrete. This one is getting increasingly

set in concrete. I would expect that it will start
November 9th. The continuance of this hearing until
October the 7th will not affect that.

MR. NEGUS: That's -- I have no reason to think it will.

THE COURT: So the court will grant your request to continue the balance of the proceedings on your motion under Penal Code Section 868 until October the 7th at the hour of 8:30 in this department.

The one remaining matter we have to cover is some specific discovery motion. The court is going to take a recess until 11:30, after which time the courtroom will be closed to the public because of the particular nature and the representations that may have to be made in this discovery motion.

Court will be in recess until 11:30. (Recess.)

THE COURT: The record may reflect we're back in court. At this point the hearing has been closed. However, Mr. Bierschbach has requested an opportunity to address the court on the ruling that it's made closing the hearing and the ruling on the discovery.

You may be heard, Counsel.

MR. BIERSCHBACH: Thank you, Your Honor, for allowing me to be heard.

THE COURT: Surely.

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MR. BIERSCHBACH: At this time, Your Honor, I would request the court rescind its order closing this particular hearing until some adequate showing has been made that there will be a strong prejudicial effect on the defendant's right to a fair trial if the hearing is open. I think it's been clearly set forth by the United States Supreme Court and the Ninth Circuit Court in the case of U.S. versus Brook Lier that without some hearing to determine the closing of any portion of a trial, it is a violation of the First Amendment. And I'd request the court to hold such a hearing before it makes such a determination.

THE COURT: Okay. What I'm concerned about, Counsel, is I have in front of me the written request for discovery that requests a number of things. Incumbent in the court's consideration of that discovery motion and those items are going to have to be representations made to the court as to what those items may or may not contain. Those are only representations, and I can't at this point, without obviously having those matters in front of me, determine whether or not they are in fact — those representations in fact reflect what the document is that's asking to be discovered. Therefore I am concerned in having information be disseminated to the public at this time only as a representation of what the discovery might be without having it itself, and it's that principal concern that leads me to believe that it may be detrimental to a fair trial at a later time, and if certain

representations and certain statements are made here in court and given the imprimatur or the stamp of the court when they may not in fact be true at all, that's my concern.

I appreciate your presentation of the constitutional assertion of the right of your client, but the court at this time will decline to reconsider. Thank you, Counsel.

MR. BIERSCHBACH: Thank you, Your Honor.

THE COURT: Counsel, I'm referring now to a document declared Motion for Discovery which gives a notice of it and then contains specific numbered paragraphs at which discovery is requested. And absent a suggestion otherwise from counsel we'll, I guess, just simply proceed down those, and I'll hear argument and representations by counsel as to whether it shall be granted or denied.

They start out with requested records from C.I.M.

Mr. Hanoian, can we get you at the counsel table
somewhere?

MR. HANOIAN: Certainly, Your Honor. Thank you. THE COURT: Okay.

I assume that at this time, for purposes of the arguing presentation that none of these have been submitted; is that right, Mr. Negus?

MR. NEGUS: With respect to the C.I.M. materials, that's true. When we get to some of the stuff that's been requested from the District Attorney's Office, we'll have different representations.

THE COURT: Let's address Request No. 1.

Mr. Hanoian?

MR. HANOIAN: We would not object to providing the defense with Mr. Cooper's Central file, his property records or records of clothing, with this proviso: There are waiver forms that are provided for inmates looking at the specific pieces of property and copying them or releasing them to their attorney. We would ask the court to order that the defendant sign those forms and that the attorney sign those forms in exchange for us providing that information. And on that basis we would submit the request.

THE COURT: Any objection?

MR. NEGUS: No, assuming you mean the standard form we always submit to --

MR. HANOIAN: We have the forms.

MR. NEGUS: Okay. He'll provide the form.

MR. HANOIAN: Sure. I've got them in my briefcase.
Also the records would be made available for counsel
to copy at a time and place convenient to him and to the
C.I.M. personnel.

THE COURT: Yes, that's understood. Okay.

Number 1 will be granted with the only modification that defense will be required to submit waiver forms.

Number 2?

MR. HANOIAN: We would object to this, Your Honor.

I believe that the justification for this specific item

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relates to an examination which took place on the 3rd of May of 1983. To the extent that such an examination did take place, it would be in the inmate's Central file, and then he would have knowledge of who it was that examined him. I'm not sure of the nature of the examination involved or any of the specific material in the file, but I believe that it's over broad as requested, "all staff on duty on May 3rd, 1983."

MR. NEGUS: We were looking for the person that examined him. If we had his name, we wouldn't have asked for it.

There's other witnesses we need to locate. I don't wish to have to reveal what we're trying to find, because that would be having to give up Mr. Cooper's rights to --

THE COURT: Okay. I'm going to at this time deny 2 on the basis that it's over broad.

I would expect, Counsel, that once you get the discovery under 1, that you'll be in a better position to --

MR. NEGUS: I don't think so. I already have the -what I believe is in Central's file with respect to 1. We've
gotten a few documents. The problem is that there are some
people that did specific acts who were staff who were on that
one date in that one place. So I'm not asking for everybody
he's ever come in contact with. There's only going to be
probably 10 or 15 people.

MR. HANOIAN: Maybe if he would designate what specific

acts he was talking about, we could narrow it down.

MR. NEGUS: The thing is I don't wish to have to give up crucial facts of Mr. Cooper's defense in order to do it. There is a specific individual we are looking for who was present on that date, and I know of no other way of obtaining his identity other than showing photographs of the people there to Mr. Cooper and having him designate who he was to me.

THE COURT: At this point I don't know what relevance May the 3rd is.

MR. NEGUS: Well, if I tell you what relevance it is -- I'll be glad to tell you what relevance it is outside the presence of the prosecution.

MR. HANOIAN: Well, Your Honor, we are not the prosecution. I think that's one of the things that needs to be made clear. We're representing the California Department of Corrections and not the People in this matter.

MR. NEGUS: The California Department of Corrections throughout the Complaint, and the Attorney General I think is --

THE COURT: Okay. The court is going to not order that.

MR. NEGUS: Can I be heard in-camera then in order to justify it?

THE COURT: Not at this time, no.

Okay. Number 3?

MR. HANOIAN: Number 3 is incredibly over broad. He is asking for photographs, inmate numbers, cells, bunk numbers of everybody that the defendant came in contact with over what appears to be a six-week period of time, and the task involved in gathering that material, if it is possible to gather the material, is monumental, and without a showing of how that would specifically be relevant to an escape charge, I don't think that he would be entitled to that material as well.

It's the Pitchess situation, the fishing expedition incarnate.

MR. NEGUS: The problem is that we're not dealing only with the escape charge in our material from C.D.C.

The prosecution intends to introduce witnesses at trial that and at the preliminary hearing, specifically, that will detail certain actions that Mr. Cooper supposedly underwent at the California Department of Corrections. I'm aware at the present time, from a witness list which has been provided to me, of a James Taylor who is an inmate at the California Institution for Men.

In order to locate witnesses -- Mr. Cooper does not know the names of the different people that he came in contact with, other than street names in some instances. This is the only way that I can locate those witnesses who have information about his contacts with Mr. Taylor and other things relevant to that testimony which we expect to have at

the preliminary hearing.

I have heard time and time again from the Department of Corrections how onerous it is on them to find these photographs. The courts have ordered them over and over again, and they usually come up with them within a couple of days.

I have had situations where it was to their advantage to produce the photographs, and they come up with them within a couple of hours.

I find it very difficult to believe that it's all that hard for them to do it, because they always manage to do it when it's to their advantage, and it always manages to be tremendously onerous when it's to the advantage of the defense.

There's no other way we can locate those witnesses, other than having all those people brought into court, other than showing the photographs to Mr. Cooper and having him tell me who they are.

THE COURT: Counsel?

MR. HANOIAN: The fact that counsel has some experience where he has been provided with photographs in the past is no indication as to the request that we have in front of the court right now where there are between three and five hundred different persons involved. Not only do we have to locate photographs of the individuals, but we have to find out who they are in the first place. And there is no log that is kept, a permanent record of who is where on a specific date.

There are movement chronos, is my understanding from talking with my clients, and they are, you know, within the C File at C.I.M.

So we would have to examine all of the records at C.I.M. to find who was where on what specific dates. I think that that's an incredible task, and we still haven't heard the justification for looking at everybody.

I mean, how does this relate -- certainly doesn't relate to the escape, because the escape can be -- all you have to prove for the escape is presence in the institution, and then he's no longer there. And they haven't provided any kind of a justification as to how this would relate to a plausible defense for the homicide as well.

THE COURT: Counsel?

MR. NEGUS: I've heard time and time again that they don't have any list of who is where on a particular date.

I have seen such lists provided on innumerable occasions after such protests. I find -- I don't believe it, and I believe it's inherently incredible if they wouldn't know where people are on a given date within an institution. I know they keep the photographs there in Rolodexes at the institution.

They have been provided to me in the past in very short order, and I just find that that is unbelievable.

If I had any way of limiting the number of inmates that I needed to look at, if we could -- if we could identify the people who are witnesses in any other way, I would do it.

I know of no other way to limit it, because we're dealing with both -- the only way I could think of doing it offhand would be race, but we're dealing with witnesses of both races, and so I can't even do that.

THE COURT: The court is going to deny the request as over broad and also on the basis of relevancy.

Number 4?

MR. HANOIAN: Your Honor, we would object to A through H here. If Mr. Taylor wishes to give the defense access to his Central file, then he can fill out the paperwork and allow access. But I believe that he is entitled to the same privacy as any other individual in the State of California under the privacy act.

Further, this again is a request to examine the totality of Mr. Taylor's Central file, and a search for credibility evidence.

The prosecution will provide the defense with any evidence that they're aware of with regard to credibility. They are required by law to do that, and so this -- anything that would be in his C File would be duplicative of that particular fact.

I don't believe that it's necessary to infringe on Mr. Taylor's privacy rights without some compelling justification.

Further, if in fact the court rules that these are necessary and relevant, we would assert the privilege

pursuant to 1040, because all the information in the Central file was taken in confidence. It is not generally disseminated to the public, and it is meant to stay confidential.

THE COURT: Do you have that file with you?

MR. HANOIAN: Yes, I do, and I have a records

officer with it as well.

THE COURT: Counsel?

MR. NEGUS: It is not the entire Central file. I've specified the exact documents that I want within the file. There are many documents in the file that are not covered by the thing.

Mr. Taylor is going to be -- is going to be a witness at the preliminary hearing. He's going to testify as to contacts that he's had with Mr. Cooper.

I believe that -- I have set forth in the declaration the problems one has of proving directly the rewards and promises and things that have to do with the credibility, inmate witnesses from the -- from the institution. There's been no counter declarations filed on that.

Mr. Hanoian argued on the last item that he wasn't part of the prosecution. To my knowledge, the prosecution does not -- is not the -- the District Attorney's Office is not in possession of Mr. Taylor's file. Therefore, it doesn't do any good to rely upon their duty to disclose to me something that they personally don't have. That's why I asked

the C.D.C. to come forward with it.

All the -- all the documents are documents which are relative to credibility and are relative to the rewards that Mr. Taylor may receive.

THE COURT: As to credibility and also as to reliability or bias or what have you; is that right?

MR. NEGUS: Right, as set forth in the declaration.

MR. HANOIAN: If I might invite the court's attention to People versus Gaulden, 36 Cal.App.3d at 961, they have specifically rejected claims to go throughout a file just in search of evidence of credibility.

Moreover, this request also asks for any psychological test results which I think are particularly subject to the person -- the personal privacy rights of any individual as well as -- and the courts of appeal have in fact dealt with that issue specifically in Arcelona versus Municipal Court, 113 Cal.App.3d at 531 through 532.

That case was not an inmate case. It was a case where a law enforcement officer's psychiatric records were in question, but I think the reasoning is as applicable to this specific case.

MR. NEGUS: The psychological testing which is done of inmates at the California Department of Corrections is not subject to the psychotherapist-patient privilege. That information is widely disseminated throughout the institution. People who are not in a privileged position with the inmate

have access to it as it's usually included in their cum files, and those things are slopped around the institution with utter abandon. People -- anybody -- any staff member of the institution who comes in contact with the inmate will have access to that information.

THE COURT: Okay.

I'm going to take No. 4 under submission and probably will review it under your exercise of privilege in an incamera matter.

Number 5.

MR. HANOIAN: Number 5, Your Honor, the complete records of all tennis shoes on hand and issued to the inmates in the month of May, 1983.

My clients have represented to me that they don't have such records. Again, we're talking about 3,000 inmates or 6,000 shoes.

If the records don't exist, they don't exist.

It seems as if it's over broad. I don't have an offer as to the relevancy of --

THE COURT: I wouldn't go beyond that. If you say they don't exist, it seems to me that's your response.

MR. HANOIAN: Okay.

MR. NEGUS: Usually when the C.D.C. says they don't exist, Your Honor, we find out they do exist next week when the court orders that they produce them. I find it unbelievable that they have tennis shoes which they issue to

inmates, and nobody has any records of that. Somebody had to pay for the tennis shoes.

THE COURT: What kind of records are you talking about?

MR. NEGUS: I'm looking for the records of what tennis shoes they issued to inmates.

One of the pieces of physical evidence which the prosecution is going to try to use in this particular case is a footprint, and they have gotten a bunch of sample tennis shoes from the California Institution for Men. And Mr. Stockwell, I believe, is going to say that a pattern of an impression found somewhere around one of the various crime scenes is of the same class of shoes as the -- as the kind of shoes which were available at the California Institution for Men.

Mr. Taylor is going to come in and say that somehow he snuck a pair of tennis shoes out of the stock that they had and gave them to Mr. Cooper, and that's how come they are going to try and connect this tennis shoe print at the scene with Mr. Cooper, is through this long chain of evidence. So if they are going to claim that that sort of -- if they're going to introduce that kind of evidence, which I believe that they are based upon their witness list, then I think that I'm entitled to inspect the records of the tennis shoes to see whether or not there's any evidence which supports Mr. Taylor's testimony or denies it.

THE COURT: Counsel?

MR. HANOIAN: I don't think that justifies looking at 6,000 shoes or the records for 6,000 shoes. It certainly justifies perhaps the defense examining the same sample that the prosecution has had an opportunity to examine, and indeed if the defense would like additional shoes, particular shoes to examine, I think we could produce that, as well as providing the types of tennis shoes which are available. That doesn't require the inspection of every pair of shoes —

THE COURT: That's not what he's asking. He's asking for records of them.

MR. HANOIAN: Of all the shoes?

THE COURT: Suppose he wants to know what kind of shoes C.I.M. bought or had there to hand out.

MR. HANOIAN: Well, if that's what he wants, the type of shoes bought, perhaps they do have those, and I'd be willing to hand that over.

THE COURT: You want the kinds of shoes?

MR. NEGUS: I want the records of the shoes bought and their distribution. I assume that they have -- somebody I can't believe a state agency -- we've got 10,000 tennis shoes or 6,000, whatever figure that they supposedly have. I don't believe it's that high for the month of May, but maybe I'm wrong. However many tennis shoes they issued in the month of May, I would think they were probably more in the low hundreds or even below that, and some indication of

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to whom. That is to say, if Mr. Taylor claims that he got a certain kind of tennis shoe, and those tennis shoes weren't issued in the month of May, I think that bears heavily upon this chain of evidence that they're trying to establish.

THE COURT: Do you think any record exists as to who was issued what kind of tennis shoe?

MR. HANOIAN: My understanding with talking with my client -- and, in fact, Your Honor, I do have one of the investigators from C.I.M. here who is familiar with the procedures. We can put him on the stand if that need be --

THE COURT: I just want representations without taking evidence.

MR. HANOIAN: My understanding is that the clothing that is distributed to the inmates at C.I.M. is not accounted for item by item. They account for the property that is brought into the institution by each inmate, and then they supplement clothing with that particular property, and they don't keep a record as to who gets which pair of shorts or who gets which pair of socks or which pair of shoes.

MR. NEGUS: Tennis shoes are somewhat different in that only special persons are allowed to have them. not something which is generally issued, and you have to get special permission in the institution to get tennis shoes, which leads one to believe that if there's special permission, they have records of the special permission. In fact, I'm reasonably sure that they do.

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But also if it just -- I can't believe that they
don't keep some kind of track of, for example, whether tennis
shoes are going to R.C. West or C.I.M. Minimum or the
East Facility. And if they're all going to the East Facility
and not to West, where this supposedly happened, that's
important to know.

THE COURT: I think to resolve that, we're going to have to have some representations by your people as to what the practice is on tennis shoes so I can form some conclusion as to how relevant it is to get a record of all the tennis shoes or what have you.

So let's take our noon recess at this time. We'll be in recess until 1:30.

And if you could have your person available to come in to make some representation to us as to that.

MR. HANOIAN: Certainly.

THE COURT: If you envision on any of these other ones those same particular problems, we can do that, or have your --

MR. HANOIAN: There are only three more.

THE COURT: Right. There are very few more.

Okay? We'll be in recess until 1:30.

(Lunch recess.)

THE COURT: We're back in session, in a closed session, considering defendant's written request for discovery.

The second

Mr. Hanoian, we were discussing No. 5, and you were going to perhaps have someone here or be able to make some representations to me as to the significance of tennis shoes, whether they're --

MR. HANOIAN: I have talked to my client who is outside the courtroom, if the court would --

THE COURT: If you can just give me what you know about it after that conversation.

MR. HANOIAN: Certainly.

My understanding is that there are purchasing records that would be available, records regarding the brands of tennis shoes and the types of tennis shoes that were available at that time.

With regard to distribution of tennis shoes, it happens one of two ways:

An individual inmate may get a pair of tennis shoes through a physician's request. Those records are kept in the individual inmate's chronology file. There is no master file that suggests who gets tennis shoes.

The second way an inmate can get tennis shoes is by going to a booth at the gym and obtaining a pair of tennis shoes for that particular day's activities by presenting an identification card, and at the end of the time in the gym, they bring the tennis shoes back. They get their identification card back.

Of course, there is the potential for any individual

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to rip off a pair of tennis shoes, but they are not entitled to get them any way but medical -- medical reasons, other than in reception areas where they may have their own tennis shoes. So there are no records with regard to distribution of tennis shoes.

THE COURT: Okay. Counsel?

MR. NEGUS: Could I inquire what records exist of these -- for example, for our Reception Center West, what tennis shoes were there for passing out on a day-by-day basis? Do we have records of that?

MR. HANOIAN: Only the purchasing records as to what was purchased.

THE COURT: He's concerned about the athletic activities when they hand out a pair of tennis shoes. Do they keep any records?

MR. HANOIAN: No, they don't. They hand an I.D., the tennis shoe is given, and when the tennis shoe is given back, the I.D. is returned, much like a towel concession at a swimming pool.

THE COURT: Okay.

The court, in Term No. 5, will modify the order, and that is that it will order that you turn over, in essence, business records of the kinds of tennis shoes that you had ordered, and if you have records of those that you had in stock --

MR. HANOIAN: Certainly.

THE COURT: -- that nature.

MR. HANOIAN: And I would also represent to the court that the sheriff's department has been provided with an example of the tennis shoes that were available, the different brands of shoes that were available, and we would be --

THE COURT: I'm only concerned here with the requested order. That covers No. 5.

Number 6?

MR. HANOIAN: We do not have any property of Mr. Cooper's in the institution.

THE COURT: Okay. The court will leave that as ordered, and you merely indicate that there is none existent.

Number 7?

MR. HANOIAN: We would object to this, Your Honor, for a number of reasons:

First and foremost, security reasons. I don't think that it would be appropriate to allow someone who has been charged with escape to go out and photograph the entire institution. If there's any specific reason why these particular places are relevant and photographs are necessary, I'd be interested in hearing them. They certainly aren't justified by the rationale presented in the motion.

"Material as to route of the alleged escape."

I don't know that there is a route to the escape.

I mean, I'm sure he -- he escaped by --

THE COURT: I don't think it says that, does it?

MR. HANOIAN: "Material as to the route of the alleged escape."

THE COURT: Oh, I see.

Mr. Negus?

MR. NEGUS: Well, if there's not a route, I wonder how he got out.

I think that the security reasons, if they're worried about Mr. Cooper escaping from C.I.M. Minimum again, I would suggest that that's probably fanciful in the extreme. I can't imagine the C.D.C. ever putting Mr. Cooper back in C.I.M. Minimum given all the flak they had for the last time they did it.

It's -- what I'm asking for is photographs of the crime scene.

The problem we have in all these requests is that in the prison cases, the crime scene is in fact a prison. But that doesn't -- so you have to get a special order to get access to what normally you'd just be able to walk up and take pictures of.

I've taken pictures of other crime scenes, other escapes in the past, and I've never heard any of those photographs caused any breaches in their security.

I would note that they allow the news media in to take pictures of their institution with surprising frequency. At least, I saw an awful lot of pictures of their institution on the news when I was watching the television program in

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this instance.
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MR. HANOIAN: With regard to the pictures that the news media take, they're generally outside shots or specific areas with specific requests, and they're very narrow.

Again, the escape charge is a very simplistic charge. It is he is there, and then he is not there. The route that he took is not relevant unless it somehow reflects on a defense, and I haven't heard how there is any plausible justification and how the escape route affects the defense.

THE COURT: Okay.

The court at this time will deny No. 7 as over broad and/or not relevant.

Mr. Negus, my bailiff brings to my attention that there is a Mr. Ken Lee present, mayor pro tem of Chino.

MR. NEGUS: Mr. Kenealy.

THE COURT: Must be Kenealy.

MR. NEGUS: Tell him I thought he was on call, and he is excused.

THE COURT: Thank you.

MR. NEGUS: I apologize. Didn't know he was going to be in.

THE COURT: Number 8 is essentially the same thing, same arguments, or is it --

MR. NEGUS: Well, it's different.

THE COURT: Okay.

MR. NEGUS: It's -- No. 8, there can be no claim of

security on that. They published similar-type diagrams in the Chino Champion, and if you'll look at Exhibit C-21 in the stuff I gave you, you'll see an outline of the -- of the whole thing showing the location of the buildings. The only thing it doesn't do is it doesn't give the specific names of the buildings and that sort of stuff.

Basically the -- we're talking again about the crime scene, and how the escape, if it was, was effected, and that certainly is relative to some of the charges that we're going to be facing.

THE COURT: Do you want any more than that?

MR. NEGUS: Well, they have these -- they have diagrams which -- which they release in lots of cases. They're blueprint outlines of the relationships of the various buildings, and they are available to the prosecution. And in order to try and figure out certain facts about the escape, I need those diagrams to show to Mr. Cooper and to show to the witnesses. That particular diagram doesn't give me the names of the buildings and what have you. They have another one that has the names of the buildings.

THE COURT: Counsel?

MR. HANOIAN: Well, if it's available in the press, I don't see how we need to provide it to him.

As far as the names of the buildings --

THE COURT: This is just sort of a -- apparently a popularized version, as opposed to a more specific one.

Is that right, Mr. Negus?

MR. NEGUS: Yes, that's true.

MR. HANOIAN: Well, I mean, what is the reason for being more specific, other than having the names of the buildings? That's one of the things I don't understand. I think that giving detailed blueprint diagrams are certainly -- there is certainly a security risk involved in that.

MR. NEGUS: They certainly float around rather freely, if there is a security risk. I can provide counsel with lots of them. I just den't happen to have this particular facility. If I did, I wouldn't have asked for it.

MR. HANOIAN: Again, the same relevance arguments would apply.

THE COURT: I suppose some knowledge of the location of the -- where the defendant was alleged to have been incarcerated and the exit, way one exits is --

MR. HANOIAN: Well, again, the defendant can provide counsel with that information.

THE COURT: Well, that -- we're not asking the defendant for discovery here. We're asking your office.

MR. HANOIAN: Certainly. And if there is a reason why the defendant can or can't provide himself with discovery we do not need to serve as his investigator.

THE COURT: Okay.

I'm going to order No. 8. I think that probably that doesn't breach the security very much. As ordered.

MR. NEGUS: With respect to No. 7, Your Honor, you struck it down as over broad. There are -- you have listed -- there are photographs -- I don't know how to describe it with any greater specificity, but I would like to have certain photographs of certain parts of the facility to facilitate testimony as to the escape.

How would you like it to be less broad? I mean, specific shots that I want? This hole and that fence or -THE COURT: I suppose that's one way.

MR. NEGUS: It's hard to do that unless I can have an order -- the only alternative that I can think of to get it more specific is that I be given an order to allow Mr. Cooper to accompany me to C.I.M. Minimum to point out what I should take pictures of. And it would seem like the way I'm asking for it is an easier way to do that.

THE COURT: I think with the diagram you're going to be able to confer with your client. Then perhaps you can achieve greater specificity at that point.

I'm going to leave it as ordered.

Okay. Number 9. Let's see who we're dealing with.

No one here -- is here for the Federal Bureau of Investigation; is that right?

So we disregard discussion on that.

United States Immigration and Naturalization Service.

Anyone here for that?

The State Police of Baja?

No one here on that.

MR. NEGUS: The last two were not served.

THE COURT: Oh, okay.

I'm not sure I would have any jurisdiction there anyway.

MR. NEGUS: That's why I didn't serve them.

THE COURT: Because it becomes moot.

Well, then there's no question.

Number 9 doesn't relate to any of your clients, does it, Mr. Hanoian?

MR. HANOIAN: No, it doesn't.

Of course, the Department of Justice, I'm an arm of the Justice Department, but I am not involved in their investigation.

THE COURT: Okay.

What we'll do is we'll complete 10, 11, 12 and 13, and then get the District Attorney out, and then I will hear the 1040 hearing as to No. 4.

MR. NEGUS: With respect to No. 9, Your Honor, what I'm requesting is that the District Attorney get the information I'm requesting from those agencies. The case I cited --

THE COURT: Is that what it is --

MR. NEGUS: The case I cited indicates --

THE COURT: Excuse me. You have it listed under the California Institute for Men Section. Then from just after

that you make reference to the D.A.

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MR. NEGUS: Right. What I'm requesting is the District Attorney be ordered to make efforts, diligent efforts, to -- excuse me -- diligent, good faith efforts to obtain and make available the information requested from those agencies.

THE COURT: Do you wish to comment?

MR. KOTTMEIER: We have no anticipation of being able to get the cooperation of any of the agencies listed.

Furthermore, nothing in our investigation indicates that there's relevant material to the prosecution or the defense from those particular agencies, and I object to being directed, in effect, to carry forth an investigative exercise when there is no foundation, as far as relevance that I have heard, that has been laid before this court.

MR. NEGUS: The various agencies, as I indicated, have, according to the police reports furnished by the prosecution and information I've gained from other witnesses with respect to the FBI, conducted an investigation into Mr. Cooper's background and his whereabouts on the dates suggested.

There is indication in the police reports that the gentlemen that are listed in the -- in Mexico were cooperating with the sheriff's department in looking for Mr. Cooper in There is indication that the border patrol was Mexico. likewise cooperating. There are lots of reports of the various FBI people doing both background checks and investigations.

In some of the reports with respect to the FBI people, there are sheriff's officers who say, "We were looking through the following buildings for information. For the rest of the information please see the report of Officer" -"FBI Officer Keneans," I believe it was.

So you have even sheriff's officers' reports that specifically refer to the FBI reports.

None of the FBI reports are furnished, and I'm requesting that good faith be directed as the case law -- as the case law requires to make those good faith efforts to obtain that information.

MR. KOTTMEIER: We have no objection to attempting to attain from any agency a copy of a report that is referred to by any officer engaged in the investigation of this case which hasn't heretofore been furnished to the defense. What I am objecting to is the listing of certain governmental agencies and in effect directing my office to go in the abstract and ask them in regard to everything that they may have in the Kevin Cooper case or any case that may have any relevance to the Kevin Cooper case. And the illustration given relative to FBI Agent Keneans or the officer that quoted him as having further information, if we're given that kind of specifics to work with, we have no objection to getting the reports.

THE COURT: Is there any objection to you just simply

making -- I mean, you're aware that the FBI played some role greater or smaller in the investigation of at least the escape, perhaps the alleged murders. Do you think it's incumbent for you at least to ask them whether or not they have any reports that they haven't submitted to you?

MR. KOTTMEIER: The difficulty, Your Honor, is that there is a very clear delineation of activity. One involves investigation of an escape, another involves an investigation of the murder, and then the third area is attempted apprehension of a fugitive, and this is where the FBI and all these other agencies come in. And I would suggest to the court that potentially there are very voluminous reports, as far as the operation of the fugitive detail to try and apprehend Mr. Cooper, the same as there are voluminous reports from the sheriff's office. But they do not provide any relevant information, other than a whole series of false leads and people going everywhere to try and pick up Mr. Cooper.

The difficulty is to put the burden on us to try and bring the Federal Bureau of Investigation into line. To cooperate with the very time-consuming preparation of reports in a fugitive felony area is not the same as saying, well, Kottmeier, go out and get the reports that directly relate to evidentiary considerations in this case. And I get the impression from the way in which this material is worded that it is the fugitive investigation that we are being requested to offer, especially with the information listed

from the U.S. Immigration and Naturalization, as well as the Department of Justice.

THE COURT: Counsel?

MR. NEGUS: In carrying out those fugitive investigations, there are numerous reports about some of the same subject matter that if you look at the -- if you look at the that the reports of the sheriff's investigation of the crime they're covering the same area.

For example, in the investigation of the crime there is a tremendous amount of stuff about Mr. Cooper's contacts in Los Angeles, and trying to connect in certain phone calls, certain actions with respect to people in Los Angeles with proving that he was the person that committed the crime.

Those same areas are investigated by -- were investigated by the FBI perhaps for different purposes, but the information they're gathering applies in both situations.

Another example, they did -- there's apparently going to be some effort at some point in time to prove some sort of modus operandi, that Mr. Cooper commits crimes in certain ways, using certain distinctive mannerisms. The same sort of stuff that was involved in that investigation is also involved in the investigation of -- in the attempts to apprehend him.

There are certain things -- there are certain people that will be testifying against him as witnesses. Those people were contacted, background checks were done on them, and they

were put under surveillance, I believe, at certain points in time with respect to attempts to apprehend him. So the attempts to apprehend are not isolated from the investigation of the crime.

They're not -- it's not, as the prosecutor says, in neat little boxes, and people didn't label their reports, escape, attempting to apprehend or investigation of the murder. They were doing all of them, from the reports that I have received, simultaneously.

THE COURT: Okay.

Anything further, Mr. Kottmeier.

MR. KOTTMEIER: Only the suggestion, Your Honor, that I have found in the past, and I need this on the record as far as an evaluation of our efforts, that even in cases where we have worked with the Federal Bureau of Investigation, we have not been able to get full compliance from their agency, because they believe in a strong separation of powers idea, as far as the furnishing of reports and information of the activities of their agents.

A recent case in point is People versus Gwaltney, and we've had other contacts of that nature where literally they do their investigation and then refuse to give us any indication of the activities or the reports of their particular agents.

THE COURT: Okay.

The court will modify Term No. 9, and that is make it

relative to Cooper's escape from C.I.M. on June 2, 1983, the killing of the Ryen family, Christopher Hughes, in Chino Hills on June 4th and 5th, 1983, deleting from the word "including" down into the next-to-last line reading "of Deborah Englehart on June 29th or 30th, 1983," leaving in that portion of the arrest of Kevin Cooper on July 30th, 1983.

The court will order that the District Attorney's Office make a good faith effort to attempt to inquire of the first three agencies as to whether they have any such reports relative to those subject matters, and if those reports are provided to the D.A.'s Office, that they be made available to the defense.

Okay. Number 10.

MR. KOCHIS: Your Honor, as to that request, we've provided Mr. Negus with a list of the persons we were able to determine were in the crime scene. So we've complied with 10, Lines 3, 4 and 5 up until the comma after the date.

As I've explained to Mr. Negus, we were having difficulty and may not be able to recreate the times, specific times at which each officer entered the residence and left to make a radio call or lunch or any other purpose. So we will attempt to comply with 10 to the best of our ability.

THE COURT: Okay.

Court will order that to the ability -- to the extent that you have such records.

Number 11?

MR. KOCHIS: We've provided your court reporter and Mr. Negus with such a list.

THE COURT: Okay. That's fine.

MR. NEGUS: Is there --

You provided the clerk?

MR. KOCHIS: I have not provided the clerk with one.

MR. NEGUS: Could I have that -- a copy of that

marked?

THE COURT: Okay. Marked as Defendant's next in order.

Any objection to it being received?

MR. KOCHIS: Is it a witness list? If I could glance at what's being marked.

THE COURT: After it's marked, would you let Mr. Kochis take a look at it?

MR. KOCHIS: No, I have no objection.

THE COURT: It may be received.

MR. KOTTMEIER: We do reserve the right, Your Honor, obviously, to add to or detract from that list. That is not necessarily a batting order which we guarantee that all nine, or however many, will bat.

THE COURT: That's understood.

MR. NEGUS: I understand that as well, but what I -reason I'm requesting is that by indicating that I'll be
ready on November 9th, I'm indicating that I'll be ready with

respect to these witnesses. If there's other witnesses of significance, then that could change.

THE COURT: It would be expected that if, as you develop your case or as the time approaches, you change your list, that you keep counsel informed of those that you'd expect not to call so that he will not be under the misapprehension of not subpoening them if he wishes to call them, and if there are additional ones, that you'll make those available to counsel.

THE CLERK: This is simply marked for identification?

THE COURT: No, it's received as well.

MR. KOCHIS: Your Honor, is that going to be sealed or in any fashion --

THE COURT: As of this point we have the entire file sealed.

MR. KOCHIS: Thank you.

THE COURT: Not available for public inspection.

Number 12?

MR. KOCHIS: We have no objection to providing that type of information.

THE COURT: That will be ordered.

Number 13?

MR. KOCHIS: We have provided already, to the best of our ability this morning, a written list that complies with 13. If I receive additional information that necessitates the listing augmented, I will do that immediately.

THE COURT: Okay. The court will order that, then.

I've run out of numbers. Is that it?

MR. NEGUS: I would like at some point the opportunity to be heard in-camera as to Number 2 as to why I need that so I don't have to reveal to the prosecution the theory under which I am operating.

MR. KOCHIS: Could we have Sergeant Arthur in Chambers when that offer of proof is made?

THE COURT: Number 2? You wish to be heard --

MR. NEGUS: Yes.

THE COURT: -- in regard to the staff?

MR. NEGUS: Yes.

THE COURT: No. The court will deny that request.

Okay. Do we have any others?

Okay. All we have left, as far as I can see, is that I'm going to meet in-camera with Mr. Hanoian, come back out and announce my ruling on that. Otherwise, everything is put over until the 7th of October at 8:30, and you are aware of the deadline date of October 3rd to get all of those other physical items to me so that I can be prepared on that date. So on the 7th we'll be deciding -- hearing the rest of the testimony and the argument on the 868 guestion.

Any other matters that we're going to handling on that date?

MR. NEGUS: I would like to reserve the right to present witnesses with respect to the inconvenience and

physical discomfort and what I think will make it impossible for Mr. Cooper to cooperate with me --

THE COURT: You wish to address the location of the preliminary hearing issue?

MR. NEGUS: Yes.

THE COURT: Okay. You'll be allowed to do that.

MR. KOCHIS: Your Honor, so there's no confusion as there apparently was before this last proceeding, could the court inform the custody officers that Mr. Cooper is ordered to be back in court with us on the 7th of October?

THE COURT: Certainly. If we overlooked that, we shouldn't have.

Okay. We'll be in brief recess, and I'll see
Mr. Hanoian in chambers, and then we'll come back out and
wrap up this proceeding.

(Whereupon proceedings were held in chambers which were reported but are not transcribed herein.)

THE COURT: The court has reviewed the file on James
Taylor referred to as the Central file, and the court will
order that the following portions of that file be made
available to the defense:

The documents known as classification chronos, which, my understanding as I was able to understand them, relate the movement of the -- or the documentation of the movement of Mr. Turner within the prison. He went from one location to

another location. That is ordered revealed.

And also the investigation reports regarding an allegation against Mr. Turner of suspected possession of marijuana. Those reports may be made available to the defense.

MR. HANOIAN: Your Honor, may I be heard on the first one --

THE COURT: Yes.

MR. HANOIAN: -- the classification chronos?

THE COURT: Yes.

MR. HANOIAN: Could I inquire of the court as to what relevance the classification chronos have to the issue of credibility?

THE COURT: They go beyond the issue of credibility in this instance.

MR. NEGUS: Could I request that a copy of the file be preserved in a sealed condition so in case we ever got to an appellate review of this, there would be some way of figuring out what happened?

THE COURT: Well, I'll have to inquire of Mrs. King.

Is it -- would there be any reason why the file in its present condition as regards to Mr. Turner would not remain in its present condition?

MRS. KING: No. It would be added to, but it would stay in its present condition.

THE COURT: I'm not sure we can suspend Mr. Turner -

MR. NEGUS: Taylor.

MR. KOCHIS: It's Taylor, Your Honor.

THE COURT: Excuse me. I used the wrong word.

-- in action.

MR. NEGUS: That's why I was requesting a copy.

That would seem like they could keep what they need, and then we could keep a copy for review.

THE COURT: I'm going to deny the request at this time.

Okay. Do we have any other matters?

All right. Before you think of another motion, Mr. Negus, we'll be in recess until October the 7th at 8:30 in the morning.

Thank you, Counsel.

Oh, just a minute. I didn't do what you all asked me to do.

The court will order that the sheriff return Mr. Cooper to this court on October the 7th at 8:30.

(Whereupon the proceedings were concluded.)

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

ss.

I, NOEMI LUCCHESI, Official Reporter of the aboveentitled court, do hereby certify:

That I am a Certified Shorthand Reporter of the State of California, duly licensed to practice; that I did report in stenotype the oral proceedings had upon hearing of the aforementioned cause at the time and place hereinbefore set forth; that the foregoing pages numbered 1 through 118, inclusive, constitutes to the best of my knowledge and belief a full, true and correct transcription from my said stenotype notes so taken.

DATED This 21st day of June, 1985, at Ontario, California.

Official Reporter C.S.R. No. 3136