In the

Supreme Court of the United States

HENRY W. KERR et al.,

Petitioners

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA et al.,

No. 74-1023

Washington, D. C.
November 11, 1975

Pages 1 thru 68

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v.	:	No. 74-1023
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL	:	

Washington, D.C.

Tuesday, November 11, 1975

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KARL S. MAYER, ESQ., Deputy Attorney General of California San Francisco, California For Petitioners

B. E. BERGESEN, III, ESQ., San Francisco, California For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Kerr Against the District Court of the Northern District of California, Number 1023.

Mr. Mayer, you may proceed whenever you are ready.

ORAL ARGUMENT OF KARL S. MAYER, ESQ.

ON BEHALF OF PETITIONERS

MR. MAYER: Thank you, your Honor.

Mr. Chief Justice Burger, and may it please the Court:

I am Karl Mayer, Deputy Attorney General of the State of California. I represent Petitioners in this action, the Director of Corrections of the State of California and the chairman and members of the California Adult Authority, which is the state parole board.

QUESTION: Mr. Mayer, may I ask, did this case go to trial on September 25?

MR. MAYER: No, your Honor.

QUESTION: It did not.

MR. MAYER: There was a trial date. It was changed to November 10 and that has since been withdrawn and there is at present no trial date.

QUESTION: So this issue is still a live one? I had the impression, reading one of these briefs, that they weren't after this material any longer for the purposes of

the final hearing.

MR. MAYER: Yes, your Honor. Counsel for the Plaintiffs below had expressed to the Court, in a suggestion of mootness, their willingness to proceed with trial without the documents. At that time, there was a trial date of September 25.

Now, there have been proceedings in the District Court since then and on October 23, as I recall, there was a scheduled pretrial conference before the District Court.

Three days before that, on October 20, the district judge had sent a notice to the Ninth Circuit Court of Appeals, noticing the apparent necessity of a three-judge court.

At the formal pre-trial conference on the 23rd -- as I recall the date -- the topic of the three-judge court was again broached and there was some discussion and the way it was left was that the pending trial date of November 10 was withdrawn with further proceedings on the three-judge court question now scheduled for November 20.

QUESTION: The three-judge court question is what?

MR. MAYER: As to the necessity of the three-judge court for the trial below.

QUESTION: I see.

QUESTION: And that results from the amended

complaint that the Plaintiffs filed -- the claim of the three-judge court?

MR. MAYER: Yes, your Honor, the amended complaint was filed July 1 of this year, 1975. Our suggestion of the necessity of a three-judge court was filed some two or three weeks after that and that notice has been pending in the District Court since, but not disposed of.

And then on October 20, the District Judge did send the notice to the Ninth Circuit.

The three-judge court has not yet actually been convened. The notice of its necessity has gone to the Ninth Circuit.

QUESTION: If the three-judge court is convened to deal with these issues, then is there any case for decision here?

If the same district judge who tried it -- this was Judge Weigel, was it?

MR. MAYER: Yes, your Honor.

QUESTION: And he is the judge who, will you clarify that? Has he requested the designation of the three-judge court now?

MR. MAYER: This notice to the Ninth Circuit reads that this case appears to be a case requiring a three-judge court -- I am quoting it as best I can -- "And I hereby certify to you, the Chief Judge of the Ninth Circuit it

as a case requiring the convening of three judges."

QUESTION: If that three-judge court is designated, will it be reasonable to assume that he will or ought to vacate his judgment in this case?

MR. MAYER: I believe that if the three-judge court is actually convened and the three judges are appointed and sit, that we as Defendants in the action below could renew our motions before the three judges together for their consideration and I believe that consideration could be de novo and they could -- the three judges together could, in effect, overrule the single judge, his earlier rulings.

QUESTION: Would these rulings be outstanding until they were overruled? Or would they --

MR. MAYER: Yes, your Honor.

QUESTION: Or would they all be wiped out after a three-judge court were named?

MR. MAYER: I don't think the fact of convening a three-judge court would eradicate the existing single judge orders and certainly would not eradicate the Ninth Circuit opinion.

QUESTION: It would be the same case with the same number and everything except just now a three-judge?

MR. MAYER: Yes, your Honor, a three-judge court.

QUESTION: Is that it?

MR. MAYER: Yes.

QUESTION: Well, would all the issues be automatically referred to the three-judge district court or just those which required the convening of the court in the first instance?

MR. MAYER: I believe that the entire case would go to the three-judge court.

QUESTION: Under the Plaintiff's complaint before it was amended last summer, no one made any contention that there was a need for a three-judge district court.

MR. MAYER: That is correct, your Honor.

QUESTION: Mr. Mayer?

MR. MAYER: Yes, your Honor.

QUESTION: I wish you would clarify for me the status of the demand for these documents. You have said and the briefs state that Defendants below were willing to waive their demand for the documents. Has that waiver been withdrawn?

MR. MAYER: Your Honor, the topic first came up in proceedings in the District Court, I believe in July, and at that time there was an oral statement in open court by counself for Plaintiffs that they would -- they have not yet -- they would stipulate to withdrawal of their request for the documents.

They have not, in fact, withdrawn their request for documents and the District Court orders which compel

their production are outstanding, as is the published Ninth Circuit opinion.

QUESTION: They are stayed, Mr. Mayer, are they not, by Justice Douglas --

MR. MAYER: They are saved by the order of this Court, yes, your Honor.

QUESTION: Well, that being so, I gather they'll remain stayed until after this three-judge court issue is determined, will they not?

And they remain stayed even if there is a three-judge court convened, I take it. Is that so?

MR. MAYER: But for the order of this Court staying the District Court's orders, it is my understanding that the orders would become automatically effective. It is not my understanding --

QUESTION: You said earlier, or I thought I heard you say that if the three-judge court is convened, then you would be at liberty to renew the motions made before the single judge and denied by him. Is that right?

MR. MAYER: Yes, your Honor.

QUESTION: Well, now, what are those motions? Those are motions what -- to do what -- in respect to these documents.

MR. MAYER: Well, basically, these were our motions in opposition to the motions to compel discovery. I would

think until our motions are made, we would have to also ask the three judges to stay the single judge's order. We asked, we had to go to the Ninth Circuit to get stays on the judge's orders. He was not willing to stay them on his own and I wouldn't think there would be any different result if we were asking the three judges to review the single judge's order.

QUESTION: But we don't know that, of course.

MR. MAYER: No, I don't, your Honor.

QUESTION: I take it if -- it was the state that made the application to convene the three-judge court?

MR. MAYER: Yes, your Honor.

QUESTION: And if that were to be denied, I take it the state may appeal to the Court of Appeals from that denial. May it?

MR. MAYER: Your Honor, off the top of my head I am not sure whether it would be an appeal or a writ, a petition for mandamus.

QUESTION: Well, in any event, you'd have to go to the Ninth Circuit.

MR. MAYER: We'd have to go to the Ninth Circuit.

QUESTION: A denial would not be reviewable here.

MR. MAYER: Correct, your Honor.

QUESTION: But you indicated that Judge Weigel had already certified to the chief judge of the Ninth Circuit

as a three-judge case. Isn't that correct?

MR. MAYER: That is correct, your Honor, except that on November 20 there are further proceedings before Judge Weigel upon his -- where he will reconsider his notification and I believe he contemplates at that time either withdrawing or not withdrawing the notification.

The three judges, as I say, have not yet actually been appointed.

QUESTION: But the judge can still appoint it.

MR. MAYER: Yes, your Honor.

QUESTION: He can appoint it today.

MR. MAYER: Yes, your Honor.

QUESTION: And then you make a motion and the three judges agree with you and then what is before us?

You don't understand?

MR. MAYER: No, I understand, your Honor. I guess a problem in my head is this. If the question is before this Court as to whether the other two judges of the three-judge court would have jurisdiction to consider the orders in the first instance. In other words, this Court has stayed the single-judge District Court's order.

Now, as long as the case and those questions are before this Court, I would feel it would be improper for the other two judges and the single judge to also be considering them.

QUESTION: Or in any event, they might well feel that way.

MR. MAYER: They might feel that way, yes, your Honor.

QUESTION: Well, could we just maintain our stay until the three-judge court acts?

MR. MAYER: I would think if this Court --

QUESTION: We have already stayed it.

MR. MAYER: Yes, your Honor.

QUESTION: It is now stayed. Could we continue to stay until the three-judge court acts?

MR. MAYER: I would think if your Honors said this in a minute order or something, then the three-judges would feel, perhaps, more free to do that.

QUESTION: Well, I suspect that one of the things to be considered on the November 20th hearing is whether the district judge had any jurisdiction and has any jurisdiction over anything in this case, since it is pending here?

What authority has he got after this Court has granted the writ here, to deal with the case at all except in a purely ministerial way?

MR. MAYER: Yes, your Honor, that is a question that I am uncertain about. The distinction is this, is that the certiorari has been granted as to interlocutory discovery orders and we have searched but have not found express

authority that would state that such certiorari granted to a limited part of the case would also stay the entire proceedings below.

I think Judge Weigel believes that it is not improper for him to consider these other matters.

QUESTION: Well, I think perhaps you had better address yourself now to the main arguments now in light of this expiration unless there are further questions on this jurisdictional point.

MR. MAYER: Thank you, your Honor.

Petitioners come before the Court very basically because the District Court has granted indiscriminate demands for documents.

Indeed, the demands are for entire categories of documents. They are state government documents and the documents are of conceded confidentiality.

In doing this, the District Court did not look at a single document in question, although the Petitioners offered to present them to the Court for that purpose, prior to their disclosure directly to the adversary.

Also in doing this, the District Court's order of December 3, the order affecting the contents of inmate files was not only precipitated without the judge having seen the documents but is effectively a prospective order which requires the Petitioners to produce the entire contents

of any inmate's file that is designated by Plaintiffs in the future, up to a number of 200 files.

Some 20 to 30 files have been designated leaving approximately 170 inmates whose names can be picked at will by counsel for Plaintiffs. They have not yet been picked.

When picked, under the District Court's order, we must turn that entire inmate's file directly over to the adversary. We cannot withhold any document for any reason.

QUESTION: Now, what, briefly, does an inmate's file contain or consist of?

MR. MAYER: The inmate's file starts out with basically certain documents from the committing court, the trial court, the judgment of commitment, a probation report, statements by the judge and the district attorney and defense counsel as they exist.

QUESTION: Public statements or private statements made just for the purpose of that file?

MR. MAYER: They are private statements for the purpose of the file as to the judge and the district attorney. The statements of the defense counsel -- it is up to defense counsel if what he says is in the probation report. The statement may also appear in other documents which may or may not make it a public statement. But, basically, they are in the probation report which, itself, is not a public document.

Then the inmate goes to a reception and guidance center and there a mass of documents begins to accumulate. He is classified as -- he gets custody classification. He is examined by physicians. He is examined by -- he is given psychiatric work-ups. He is tested for his ability to read and some assessment is made of his mental standing.

As he proceeds through the system, assignments to other institutions are made and each of these steps is backed up by papers in the file.

There is a copy of his background, in effect, a rap sheet of his prior commitments and charges, the normal rap sheet with which we are all familiar.

There are statements which are characterized as pre-board reports, statements of a correctional counselor who knows and is familiar with the inmate and it is basically a report to the adult authority for consideration at the time of parole consideration.

There are these kinds of documents. Now, also, in there are disciplinary matters. If the inmate violates a rule of an institution there is a report on that. When he has his hearing, under the Wolff case, there is report of its disposition, the people who were at the hearing.

If the inmate -- if other inmates have informed on this inmate of one act or another that he has done which constitutes a violation of prison rules, that informant's

statement is in the record.

If relatives and friends from the outside write to the adult authority or to the Department of Corrections with comments on the inmate, those papers are all in the file.

Basically, everything concerning the inmate -- all information concerning the inmate goes into his -- into one file, into the central file, so-called.

QUESTION: Mr. Mayer?

MR. MAYER: Yes, your Honor.

QUESTION: Is that file available to anybody outside of the institution normally?

MR. MAYER: No. Well, by outside the institution, it is available to the Adult Authority, which is the Parole Board.

QUESTION: Sure, I understand that. But nobody else?

MR. MAYER: Not normally.

QUESTION: Is that a statute or custom? If you know.

MR. MAYER: It is by both. There are statutes referring to particular documents. There is custom referring to the entire -- and departmental regulations referring to the entire package. There are situations where other people can see it. The defense counsel can see it; if the inmate is involved in a crime and he has a defense

counsel, the defense counsel has access to his client's file and there are other circumstances.

QUESTION: And I gather this is the documentation before the Parole Board when they are considering whether he should be released on parole?

MR. MAYER: Yes, your Honor.

QUESTION: And at that juncture, at the Board's hearing, the prisoner has no attorney, does he?

MR. MAYER: That is correct, your Honor.

QUESTION: In other words, a determination would be made by the parole board whether or not to release -- in part, at least -- perhaps in some instances, entirely -- upon the contents of the prisoner's file.

MR. MAYER: That is correct, your Honor.

However, the --

QUESTION: Is the initial use of that file by the Adult Authority for the purpose of fixing the sentence?

MR. MAYER: Yes, first --

QUESTION: The judge does not sentence in California. Is that correct?

MR. MAYER: That is correct, your Honor.

QUESTION: Except in accordance with law and then the Adult Authority makes the decision from that point on.

MR. MAYER: Yes, your Honor.

QUESTION: Is the file then roughly comparable to the file before a United States District Judge, for example, in making a sentence after he has the presentence report?

MR. MAYER: It is -- that kind of thing is much more extensive because the information generated in a file has been generated over a longer period of time. Also, I am not sure of all that is in a presentence file for a district judge, but it would basically be that kind of file.

QUESTION: It wouldn't have all the documents. What is before the district judge would not have all the prison documentation --

MR. MAYER: Correct, your Honor.

QUESTION: -- would it?

MR. MAYER: That is correct.

Now, however, the inmate, before he goes into his parole consideration hearing may himself look at the file and there are extensive procedures for the inmate to, if he sees something in the file that he feels is incorrect, to take administrative procedures to correct it, there are procedures within the Department of Corrections as well as within the Adult Authority for the appointment of investigators.

QUESTION: When the Board is fixing the sentence, is this after a hearing at which the prisoner is present before the Board?

MR. MAYER: Yes, your Honor.

QUESTION: And so at that time do the Board and the prisoner together examine the contents of the file?

MR. MAYER: They don't together examine the contents. They talk about the contents.

QUESTION: So the prisoner is aware of everything that is in the file.

MR. MAYER: Except for the highly-confidential items, your Honor.

QUESTION: That is right, yes.

MR. MAYER: Yes.

QUESTION: And that would be what? Informant's -- confidential informant's statements?

MR. MAYER: It would be confidential informant's statements. The file often includes information on the crime partner of the particular inmate.

QUESTION: Oh, yes.

MR. MAYER: That information -- there is a strong policy of not letting one inmate see another inmate's information. That would be withheld. That kind of thing. Some psychiatric reports are not shown to the inmate because the psychiatrist feels that it would not be good for him to see his own psychiatric report.

Your Honor, I have wished to emphasize one very basic point, I think, which runs through our whole position

here and that is this: the state is not attempting to, in effect, lock up these documents for good, that no one can see them or that the court cannot see them. We are asking for a -- only a reasonable and informed evaluation of them before they must be turned over to the adversary. The --

QUESTION: I take it, Mr. Mayer, from part of your brief, pages 64, 65 and 66 that one of your contentions is that in weighing that type of an approach, the fact that the state owns these documents and the state itself could not be made a party to this action under the Eleventh Amendment, that itself is a factor which should be weighed against extensive discovery.

MR. MAYER: That is correct, your Honor.

If the documents are, in fact, important to the Plaintiff's case, they should be disclosed. If they are not important to the Plaintiff's case, in fact important to Plaintiff's case, they should not be disclosed. And I think that --

QUESTION: Well, all the Plaintiff wants is a sampling, isn't it, one in every 20 or something like that?

MR. MAYER: The Plaintiff's initially requested one of every 20 inmates filed.

QUESTION: Okay.

MR. MAYER: The court's order --

QUESTION: It is at random, I gather?

MR. MAYER: Yes, your Honor.

QUESTION: Yes.

MR. MAYER: Now, the court's order reads, "Any 200 files." However, of the -- any 200 inmates' files, but they get the entire file. There is a sampling as to the identity of the inmate, but as to the documents to be produced, there is no sampling. Everything goes.

Now, with the sense of probability as it is in my mind, a certainty that in an entire inmate's file there is something in some inmate of the 200 inmates' files that is highly confidential and that is not in any way relevant to the civil rights action before the District Court. That must be a certainty and yet, the prospective terms of this order require everything, without regard to the nature of its confidentiality, must be turned over directly -- directly to the adversary.

QUESTION: There is no provision for an in camera examination by the judge?

MR. MAYER: There is none whatsoever, your Honor.

QUESTION: Was that suggested?

MR. MAYER: It was suggested and refused and, indeed, with respect to the inmate files, the Petitioners attempted -- they couldn't look at any of the documents until the inmates' names were given. When they were given, certain documents were withdrawn from the files.

Everything else was given to counsel to look at. Counsel found this unacceptable and made a motion for enforcement clarification and sanctions before the District Court and when that was heard, the District Court made it very clear that by withholding any documents from production directly to counsel, it was viewed as bordering on contempt and when the December 3 order subsequently came out it was very clear in the court's explicit language in there as to what might be provided, that everything must go directly to counsel.

QUESTION: Mr. Mayer?

MR. MAYER: Yes, your Honor.

QUESTION: Did the state ever give any concrete reason why the documents should be regarded as confidential?

MR. MAYER: Yes, your Honor.

QUESTION: Other than generalities.

MR. MAYER: With respect to the documents in the inmates' files, these -- when the documents were withheld, as to each inmate's file there is a statement of confidentiality, I believe it is characterized as, and this appears -- there is a series of these appearing in the single Appendix at -- beginning at page 502.

They are called "Confidential Case Records." These are Department of Corrections documents and in these is listed the documents withheld from each particular inmate's

file that was, in fact, furnished and for example, if I may refer the Court to the confidential case records statment appearing on page 516 of the Appendix, it reads as characterizing or describing a document withheld, "Memo of June 6, 1972 identified name of informant concerning escape attempt. Disclosure would jeopardize safety and welfare of informant."

Of course, below that is another document to which I had made earlier reference, cumulative case summary of crime partner, identifying him by name.

I can think of no clearer statement that would put the court on notice that a document is of a confidential nature and such documents, we feel, at least deserve -- before their compelled production, deserve an examination by the Court. The other half of that coin, of course, of our position, is that the court can deny -- it can deny in this case a discovery without looking at the documents but could not grant it without looking at the documents and the reason for that is, is that the case in the District Court is not a case of a single inmate attacking his parole consideration procedure where he needs to know the documents considered at that procedure.

The litigation below is a general litigation. They are after these documents -- the plaintiffs are after the documents as examples, as something as a basis for

information for the Court that the Adult Authority, the Parole Board, relies on information which is not always reliable. They don't need every single document in 200 inmates files to advance that contention.

QUESTION: Mr. Mayer?

MR. MAYER: Yes, your Honor.

QUESTION: I have before me the opinion of the Ninth Circuit Court of Appeals in the petition for certiorari Appendix A at page 13. I'd like to read one sentence, have you follow me and then relate it to your argument.

The sentence is in the only full paragraph on page -- it is Roman XIII, beginning -- it is the last sentence in that paragraph, "Since there may be information--"

Do you have that?

MR. MAYER: Yes, your Honor.

QUESTION: "Since there may be information in the requested documents which should be protected, the Petitioners may assert a privilege to a particular document or class of documents and perhaps seek in camera inspection at the time the documents are discovered in the District Court."

I understood you to say that you were making no blanket objection to these documents, that the state would be satisfied if the District Court examined each one of them in camera before they were used in the trial.

Does that sentence meet your objection? And, if

not, why?

MR. MAYER: It does not, your Honor. I have responded to that in our reply brief.

QUESTION: Yes.

MR. MAYER: In footnote 8. And that response is this, that sentence in the District Court's opinion, as stated in the mandamus proceedings that relate to only the personnel files and other confidential writings of the Adult Authority; at the same time the Court was considering this opinion, it also had before it the mandamus petition, a separate petition covering the inmate files and that two of the judges that sat and decided summarily to reject the mandamus on the inmate files sat on this opinion that covered this opinion that covered the inmate files.

Now, in the inmate files case when we did take -- and we did attempt to withhold a few documents, to which I have just referred now, the confidential case records list of documents from inmate files.

We have attempted to withhold them as a preliminary matter as soon as those files were designated, our first chance to withhold them.

We did it as a preliminary matter. It precipitated a motion by Plaintiffs informing the court that we were violating the court's order. When the matter was heard, the District Court said, this is bordering on contempt and

the court's December 3 order makes very clear that what we did was a violation of the District Court's order, by withholding temporarily any documents from provision directly to counsel. That order was before this panel of the Ninth Circuit when it made this statement and yet resulted in a summary denial of mandamus.

It was a more aggravated situation, indeed, than the personnel file situation before the Court here.

The second problem is that it is not clear what the Ninth Circuit -- what the Court of Appeals envisions by the phrase, "At the time the documents are discovered in the District Court."

The District Court orders compel the furnishing of the documents directly to counsel. There is not a proceeding where documents are exchanged in open court. They are furnished directly to counsel and with the personnel files we did ask -- we did ask in the District Court for an in camera inspection of the contents of them and the District Court expressly said no, furnish them directly to counsel.

But we had already done that. And for that reason it is unclear to me what the Ninth Circuit envisions in that statement, but in any event, it certainly would not apply to the inmate files, and the contents of the inmate files.

QUESTION: Well, I must say, Mr. Mayer, that is a

strange business. This certainly would indicate, on the face of it, that the Court of Appeals thought that you had the advantage both of the privilege and, in any event, to seek in camera inspection.

MR. MAYER: Yes, your Honor.

QUESTION: And was this before the District Judge, after the decision of the Court of Appeals?

MR. MAYER: No, your Honor. The Court of Appeals decision is January, 1975 and the District Court's order on the personnel files was June, 1974 and the order covering the inmate files was August 12, '74 and December 3, '74.

QUESTION: Has he modified his order any since the Court of Appeals?

MR. MAYER: No, your Honor.

QUESTION: I don't understand that.

MR. MAYER: Indeed --

QUESTION: He would have retained jurisdiction to modify an order, wouldn't he? Do you think?

That's a question.

MR. MAYER: Well, your HOnor, there's a strange -- I don't say strange -- there is a -- I will say strange.

There is a strange situation going on in this case down there. The Court of Appeals order for the personnel files came out in June of '74 and we promptly petitioned for a mandamus in the Court of Appeals.

QUESTION: You mean the District Court's order.

MR. MAYER: The District Court's order is June '74.

QUESTION: In the summer of '74.

Then you went to the Ninth Circuit asking for mandamus.

MR. MAYER: We went to the Ninth Circuit for a mandamus. The Ninth Circuit ordered that an answer to our petition be filed and indicated there -- and stayed the District Court's order on the personnel files. That is September -- August and September, '74.

QUESTION: Well, I gather, Mr. Mayer, you could have gone back to the Court of Appeals but you weren't or back to the District Court, rather, satisfied with what the Court of Appeals gave you so you petitioned here. Is that it?

MR. MAYER: That is not correct, your Honor. We had already been to the District Court on that very question.

QUESTION: After this?

MR. MAYER: No, your Honor. If I might explain. There were two mandamus petitions going on at the same time before the same judges of the Ninth Circuit.

QUESTION: Is this the review of the mandamus denial?

MR. MAYER: Both are.

QUESTION: Both are. All right.

MR. MAYER: And both were denied, one with an

opinion, one without. One is a summary denial.

The summary denial is the more aggravated situation, inmate files -- the contents of inmate files was summarily denied in December.

QUESTION: And what appears here, you would suggest, would not have applied to the inmate files but only to the personnel files?

MR. MAYER: Well, that is the other mandamus case, the personnel file case.

QUESTION: That is where this opinion was written in that case, wasn't it?

MR. MAYER: Yes, your Honor. Now, at the same time the same court had before it the inmate file case.

QUESTION: Right.

MR. MAYER: And summarily denied it, the more aggravated case and for us to now go back and say -- our petition for mandamus on the inmate file thing weighed about five pounds, and everything was before the court and to then go back and say, well, look at it all again when they have just got done looking at it weeks before we thought would not be appropriate.

I am sure my time has --

MR. CHIEF JUSTICE BURGER: Well, we have not charged you the time when we interrogated you about the jurisdictional matters, Counsel.

MR. MAYER: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: You will get a white light at five minutes.

MR. MAYER: Thank you.

Your Honor, under Rule 26B, the scope of discovery in the District Court is limited to matters which are relevant and not privileged. In this case both factors arose. The relevance of the documents to the action is most tenuous, speculative or conjectural and the question of privilege could not have been resolved for the District Court without having looked at any single document which it ordered to be produced.

Now, the question of privilege under Rule 26B is difficult. The rule does not define what privilege is. There is no statute that defines what privilege is, the hope for it in the Evidence Code failed and precipitated a case-by-case analysis of it.

The Petitioner's position is that everything -- what privilege means is that it is not discoverable, nothing more and nothing less.

Some privileges are absolute. In other words, in every case the interest in preserving confidentiality will supercede any demand for its disclosure and as far as I can tell, this applies only to military or diplomatic secrets but with just about everything else in the world, the

privilege depends on who wants it and why and under what circumstances and it also depends on what it is and these factors beg of a balancing, an informed balancing of the competing interests involved.

And that is all that the Petitioners have sought below.

The documents -- the confidentiality of the documents is not contested, at least insofar as they are of the confidential nature.

The relevance and need for the documents is hotly contested and we ask that the, at the minimum, the matter be sent back to the District Court so that the judge may either deny the discovery altogether, which would please us immensely, or, at the minimum, look at the documents before compelling their disclosure to the adversary.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Bergesen.

ORAL ARGUMENT OF B. E. BERGESEN, III, ESQ.

ON BEHALF OF RESPONDENT

MR. BERGESEN: Mr. Chief Justice, and may it please the Court:

I would like to -- I think I ought to begin with these same jurisdictional matters but if your Honor would indulge me, I would like to respond only to one point of my

opponent because it was discussed so extensively here right at the end of his argument, and that is, we disagree entirely with his reading of the effect of the Ninth Circuit's opinion.

There were, indeed, two mandamus proceedings.

There was one which was summarily denied in December of 1974 without opinion which did have to do with the central files but then came January of 1975 and this Court's opinion, the full opinion, although it dealt with other types of documents, of the Ninth Circuit.

Now, our position, quite simply, is that that is the law of the circuit. That is the law that the district judge is now bound by with respect to whatever type of documents.

QUESTION: You mean that the outstanding orders now require modification to conform with this opinion?

MR. BERGESEN: Yes, your Honor, that if they went back to the District Court once the stays were vacated, then the District Court would have to proceed in conformance with --

QUESTION: And that you would not be entitled to anything as to which a privilege was determined.

MR. BERGESEN: The way I read the opinion, Mr. Justice Brennan, they would be permitted to make the type of showing -- and that is what really is at stake here -- the type of showing that they ought to have made but didn't make

initially and which is the basis of the Ninth Circuit's opinion.

QUESTION: And all of which involves also an in camera inspection of the documents.

MR. BERGESEN: It may and that would depend upon the showing that they have made.

QUESTION: I see.

MR. BERGESEN: In other words, the Ninth Circuit held that they didn't make the proper showing, either to, you know, have the privilege sustained or to get in camera that they had to make a proper showing and they didn't make it.

But we would say that the opinion binds because the other mandamus was prior.

QUESTION: Mr. Bergesen, do you think the District Court had a right to consider your amended complaint while the case was here?

MR. BERGESEN: Yes, your Honor, it is our position that what came here -- what was stayed, of course, was just the discovery orders and that only that part of the case which applies to these discovery orders and our right to these documents is here.

QUESTION: So that under your theory a three-judge court could have been convened, could have heard this case and decided it before now and then what would we be passing on?

MR. BERGESEN: Yes, Mr. Justice Marshall, that is my position and I wonder if I could address myself to two questions, the mootness and the three-judge court -- and I'll take them in that order if it is all right.

We did make a suggestion in late July after cert was granted here. We did file a suggestion of mootness because what happened, quite simply, was we were faced with a very difficult decision, either to postpone this trial for perhaps a year as it then appeared last summer and wait for what happened here and the documents that we might or might not get or go to trial and we opted for a number of reasons finally to go to trial and in order to not have this as a reason for delay below, as it has been used below, and not to have to litigate two cases in two courts with time and expense, especially when we saw that nothing could be gained here, we did file a suggestion of mootness which this Court, of course, put over until this hearing.

QUESTION: Well, why, when you filed it, Mr. Bergesen, didn't you go back to the District Court in those circumstances and perhaps ask first for lifting the stay for the purpose, to ask that the orders be rescinded, if you no longer wanted the benefit of them?

MR. BERGESEN: In retrospect, Justice Brennan, maybe we should have done that. We thought at the time -- we were foolish, I guess. We naively thought that the trial

MR. BERGESEN: In the District Court -- and this is the whole burden of our case -- they did not make, they did not --

QUESTION: Well, I understand that, but what does the state want?

MR. BERGESEN: They apparently want to go back to the District Court and not have to make the showing that the Court of Appeals says they have to make. That is the only thing I can figure out.

QUESTION: They want us to hold that, just based on whatever claim they made in the District Court, it initially was enough?

MR. BERGESEN: That the District Court was required without more to inspect all the documents in camera, that they could go in and say, "Here they are, Judge. We say they are confidential. You have got to inspect them in camera."

QUESTION: Well, you have been back and forth in the District Court ever since this case has been here. You at no time have told the District Court what you are now telling us about waiving this right.

MR. BERGESEN: Yes. And that is the second issue --

QUESTION: Brought here?

MR. BERGESEN: Yes, this is what I am going to say right now.

QUESTION: I, for one, am interested in allowing you to finish what you have to say about mootness.

MR. BERGESEN: Right. Here is what we have told the District Court. We have told them from time to time that we want to go to trial. We are willing to go to trial without the documents. We will not allege on appeal error by not having the documents and I believe it was on October 17th -- I was advised by telephone -- we filed a certificate of readiness when we thought -- when we did have a November 10 trial date, saying we relinquish our rights to the documents.

Now, if this Court were to hold that that were an irrevocable relinquishment, the certificate of readiness, then it seems to me the case would, indeed, be moot.

QUESTION: What is the paper the way you said you relinquish it? Where is that paper that you filed in the District Court?

MR. BERGESEN: I believe, Justice Marshall --

QUESTION: Well, it is not here.

MR. BERGESEN: No, sir, it was filed by my co-counsel and I am told by --

QUESTION: Well, how can we hold something moot on the basis of a piece of paper that is not here?

QUESTION: Especially if you have now disowned it.

MR. BERGESEN: Well, we are not asking you -- I am not asking you this morning to hold the case moot and I

don't think it is moot but I was trying to say, in all candor it seems to me that the two operative considerations are whether our statements in the district court, including the certificate of readiness, is an irrevocable relinquishment, which I don't think it is but which this Court might rationally hold it is.

QUESTION: Are you saying now that you withdraw that -- that you take the position you may withdraw it in the District Court?

MR. BERGESEN: I think so, Justice Powell, for this reason. Two things have happened since then. First of all, we were going to go to a pretrial conference at which the court would issue a pretrial order on October 23rd in which I think it would have incorporated that certificate into the order.

That never happened because a couple of days before the judge certified it as a three-judge court matter. So everything is up in limbo and although I don't know, I haven't researched the matter, I would suspect that that is not irrevocable.

QUESTION: In other words, you insist on the documents .

MR. BERGESEN: We would like to have the documents, yes, sir.

QUESTION: But not --

MR. BERGESEN: But not if it would delay --

QUESTION: But not at the risk of delay and now in addition to what you may or may not have ever filed in a district court and apart from the question of whether you may or may not withdraw that, you filed in this Court the following statement, "Respondents no longer seek any of the documents which are the subject of this appeal."

MR. BERGESEN: Is that in our suggestion of mootness?

QUESTION: I am reading from what you signed and filed in this Court.

MR. BERGESEN: Yes. And in our --

QUESTION: And if that is true even conditionally, shouldn't we set aside or remand this case to the Court of Appeals with directions to have it set aside the District Court's order and let everything start from scratch in the three-judge district court, which is now going to be convened?

MR. BERGESEN: Well, our --

QUESTION: And then you will know whether or not there is going to be delay or not going to be delay. It won't all be conditional.

MR. BERGESEN: Well, that is not our position. We --

QUESTION: I have read you what your position at least was on August 1st of this year. And you filed that and

you signed it.

QUESTION: Well, actually, Mr. Bergesen --

MR. BERGESEN: Yes.

QUESTION: -- your name is on this document.

MR. BERGESEN: Is this the -- this is the July suggestion of mootness.

QUESTION: August 1st it was filed here.

QUESTION: No, August 1. It was filed August 1.

MR. BERGESEN: It was filed -- I am just referring to the date. I believe there are two statements about relinquishment. The first one, as the other side pointed out in their opposition to mootness, says "We relinquish our right to these documents because we are going to trial."

Your Honor, I would say it is fair from the face of the document and it has always been our position -- because we have always wanted the documents and we have always been successful in every court below in our right to the documents. We have always made it clear that whatever relinquishment there was, was done because we thought we had an imminent trial date and --

QUESTION: Because or on condition that?

MR. BERGESEN: No, because. Because we thought we did, Justice Brennan, and it turned out time and again -- usually at the urging of the defendants, the trial date kept

getting put off and put off and put off and now we just don't have that.

QUESTION: Well, I must say it is rare when a Respondent makes a suggestion of mootness. I think it is rarer still when now he wants to disown it.

MR. BERGESEN: It certainly is, Justice Blackmun and it puts me, I feel, you know, in an unusual position and yet at the same time, this was an unusual situation below requiring, really, to have to go to trial then and we were ready and we are ready. Our evidence is getting staler by the day and the month and this type of case presents peculiar problems with stale evidence and witnesses and interviewing them and getting into their files.

We had to say last summer, we'll either wait a year and wait on this decision here, or we'll go to trial without the documents and I would submit that is an unusual --

QUESTION: But you made the choice and you told this Court you had made that choice.

MR. BERGESEN: That's right.

QUESTION: So isn't that the end of it?

MR. BERGESEN: I think if this Court had ruled at the time we filed our suggestion of mootness, when we urged it, I think that would have and should have been the end of it but I think the intervening events over which we -- you know, for which we have not been responsible -- have changed --

QUESTION: Well, what is that? The passage of time. Nobody is responsible for that.

MR. BERGESEN: Not only the passage of time but the vacation of a series of trial dates, the certification of the case as a three-judge case, what looked like a firm trial date when we filed that suggestion of mootness.

QUESTION: But the intervention of the three-judge court complicates and may delay this even further, unless the slate is wiped clean, you present this in order to know a vote of the three-judge court.

MR. BERGESEN: Well --

QUESTION: Isn't that fair to say?

MR. BERGESEN: No -- could I address myself to --

QUESTION: I hope you will.

MR. BERGESEN: -- the three-judge court thing.

Our position would be this. It might be that the judge will withdraw his certification because we think it is incorrect and not a three-judge court case.

QUESTION: He might.

MR. BERGESEN: Or the Ninth Circuit will not appoint it. But even if there is a three-judge court appointed, it would sit as a district court in the Ninth Circuit and it would be bound by Kerr versus United States District Court.

I think the question that hasn't come up yet is

whether -- or maybe it did -- whether if this three-judge court ruling is retroactive so the case is considered always to have been a three-judge court case, then was the petition for mandamus which resulted in the opinion of the court below properly taken to the Ninth Circuit or ought it to have been taken directly here?

And that, in turn, seems a little clouded by the recent case of M.T.M. versus Baxley, which indicates that perhaps it was correctly taken to the Ninth Circuit, although if this Court were to hold that it were not, perhaps a further question would arise as to whether it is here properly anyway because this Court could treat the cert petition as the petition we ought initially to have filed here.

I don't pretend to have the answers, but those seem to be some of the --

QUESTION: You don't, and neither does anyone else, Counsel.

QUESTION: If we accept your outstanding invitation, there won't be any Court of Appeals opinion to bind the three-judge court, will there?

MR. BERGESEN: I'm sorry, Mr. Chief Justice?

QUESTION: If we accept your outstanding invitation proper to declare this case moot, does that not vacate the Court of Appeals opinion and the three-judge court

would deal with this matter de novo.

MR. BERGESON: Well, our -- if that were correct, I feel that I --

QUESTION: Well, isn't that correct? When we vacate a federal case as moot, we wipe out everything below.

MR. BERGESEN: Oh, certainly, Mr. Justice Brennan.

QUESTION: That would get rid of the Court of Appeals' opinion.

MR. BERGESEN: Oh, yes, it would, but I don't feel --

QUESTION: And the District Court's order.

MR. BERGESEN: Oh, yes, that would get rid of everything and we would have a clean slate but with the intervening events, I don't think that I can -- I think with respect to my obligation to my client -- continue my request for mootness.

I think that I have to say that the intervening -- unless this Court holds that the previous events make it moot, I no longer, as I stand before you today, urge --

QUESTION: Well, if we don't hold you to it, to your August 1 submission, then are you here defending the judgment and supporting opinion of the Court of Appeals from which the state has appealed?

MR. BERGESEN: Yes, we are. We are --

QUESTION: If you are and we affirm, then, anyway, this whole business has to go back to allow the state to

prove privilege or that there ought to be in camera inspection.

MR. BERGESEN: If this Court affirms on the grounds given in the Court below's opinion, yes, that is precisely --

QUESTION: Well, that's what I said. That is why I asked you whether you were defending the judgment of the Court of Appeals and its opinion.

MR. BERGESEN: Yes, but in the alternative we are also arguing that this Court could properly affirm the discovery orders of the District Court as being proper in and of themselves, in which case --

QUESTION: Well, if they did, I should think we would have to set aside that sentence that Mr. Justice Powell directed your attention to in the Court of Appeals' opinion.

MR. BERGESEN: Oh, yes.

QUESTION: But you would then be asking for a judgment that gives you more than you obtained in the Court of Appeals.

MR. BERGESON: That is correct.

QUESTION: Without having cross-appealed.

MR. BERGESEN: But I think, Justice White, we would be entitled to it on the doctrine that this Court can affirm the Court below on any count.

QUESTION: You can affirm on any ground but you can't extend the rights of the Respondent that the Court of Appeals gave him. You can affirm what he got on any ground but I don't think you can extend it.

MR. BERGESEN: I see. Well, I stand corrected then.

QUESTION: But you can say, I suppose, that while the Ninth Circuit gave the state nothing, they denied the petition for mandamus and that you are entitled to argue in support of that denial on whatever basis you want to.

MR. BERGESEN: Precisely. Technically, we would be claiming that the affirmance here would be of the denial of the petition for mandamus and then the court could put that affirmance on any ground it wanted and since we fully briefed and argued in the Ninth Circuit the proposition that the District Court orders were correct --

QUESTION: Well, as I understand both you and your opponent -- as I understand you -- when the case went back to the District Court, the District Court would be bound by the Ninth Circuit's opinion to commit the state to claim the privilege.

MR. BERGESEN: Yes, sir and if this Court affirms on that ground, then they would. If this Court were to affirm the denial of mandamus on the ground the discovery orders were correct --

QUESTION: I know, but wouldn't you have more -- if we affirmed here instead and said that the discovery orders of the District Court were right initially, the state has no privilege and can't claim a privilege, you'd be getting more here than you got in the Court of Appeals.

MR. BERGESEN: But we didn't necessarily --

QUESTION: Wouldn't you?

MR. BERGESEN: Oh, yes.

QUESTION: All right.

QUESTION: Well, I don't see that you would.

QUESTION: No, the dicta in the Court of Appeals opinion -- so they denied mandamus but made a few observations.

QUESTION: What more can you ask? What more total vicotry could you have had in the Court of Appeals than a denial of mandamus?

MR. BERGESEN: Well, if it had been placed on the ground of discovery --

QUESTION: Whatever ground, that was the judgment of the court.

MR. BERGESEN: Then we would have had a lot more of the documents, your Honor.

QUESTION: Well, but you seem -- it may be dictum, but then I misunderstood what you said. You said that the District Court would be bound to permit the state to claim a privilege under the Court of Appeals opinion. Is that right

or not?

MR. BERGESEN: Correct, yes.

QUESTION: Mr. Bergesen, bring me back to one detail. A request had been made for a three-judge court. Now, normally, the chief judge acts promptly.

Do you and your opponent know whether Judge Chambers has acted on this?

MR. BERGESEN: No, I don't know, Mr. Justice Blackmun. The last I knew, he had not.

QUESTION: He had not.

MR. BERGESEN: Indeed, we have argued to the judge that that was not correctly certified and he is going to hear further -- this has been briefed and he is going to hear us on November 20th as to whether or not he ought to withdraw his certification.

QUESTION: Judge Weigel is going to hear it.

MR. BERGESEN: Yes.

QUESTION: But not -- you haven't heard from Chief Judge Chambers.

MR. BERGESEN: Not yet.

QUESTION: Can he do anything until he hears from the chief judge of the Ninth Circuit?

QUESTION: I raised that at the beginning. Once he asks for it, what can he do after that? I don't think the district judge can do anything.

MR. BERGESEN: Wouldn't he have the power, Mr. Justice Marshall, to withdraw his certification if he believed it was improvidently filed?

QUESTION: I doubt it. Not the way I read the statute because as soon as he files it, the Chief Justice moves on it.

MR. BERGESEN: Sometimes there is a long delay, though, your Honor, between the certification and the action and since it is jurisdictional I would think he would be required to withdraw it if he were convinced that it were filed in error.

QUESTION: Have you seen a case that did that?

QUESTION: When you make that statement, is this routine in the Ninth Circuit, a long delay? It isn't in some other circuits that I know about. It is overnight.

MR. BERGESEN: I don't know, Mr. Justice Blackmun. I don't think it is overnight in the Ninth Circuit but I don't know what generally is the case.

QUESTION: To the contrary, doesn't the statute say promptly?

MR. BERGESEN: Yes.

QUESTION: The chief judge shall promptly?

MR. BERGESEN: But you see -- right -- Justice Marshall, our position is that the Second Amendment --

QUESTION: Not with all deliberate speed but

promptly.

QUESTION: When we filed our second amended complaint, it is our position that nothing in that complaint that was not in the original complaint required a three-judge court and that defendants seized upon the filing of a second amended complaint to raise a three-judge court issue which has no merit, in our view and I will not speculate on motives, but certainly the effect of that has been further delay when we have continued to want to go to trial.

If it please the Court, perhaps I could make some of my remarks which go to the merits of the case.

MR. CHIEF JUSTICE BURGER: Yes, we have enlarged your time to cover this but you -- as was suggested before, needn't use all of it.

MR. BERGESEN: Thank you, Mr. Chief Justice.

Perhaps the best way to go most quickly to the heart of this case is to consider two somewhat separate but absolutely interrelated matters.

First, there is the obligation of the trial judge to make an informed determination in situations whereas here a government agency claims the qualified privilege for official information.

QUESTION: Well, apart from the privilege of the state, what about the privilege of these individual 200 prisoners not to have their files --

MR. BERGESEN: Judge Weigel's protective order expressly requires us to get their consent before we look at their files.

QUESTION: They are plaintiffs, I suppose, aren't they?

MR. BERGESEN: They are among the class.

QUESTION: Yes.

MR. BERGESEN: But even though they are among the class of plaintiffs, we still have to get their written consent.

QUESTION : Not all 200; 200 are in the class but they are not all main plaintiffs, are they?

MR. BERGESEN: Oh, no, your HOnor.

QUESTION: They are all plaintiffs in the class.

MR. BERGESEN: Well, they are all members of the plaintiff class.

QUESTION: That's what I mean.

MR. BERGESEN: Now here, of course, the defendant claims that the district judge abdicated that obligation by refusing to look at these documents in camera but secondly, that the obligation of an agency resisting discovery to submit a proper claim and to make a specific showing in the district court, that those documents do, in fact, come in within the governmental privilege.

Now, our position can be stated quite simply. Of

course the district judge has the obligation to make an informed determination but as a practical matter he can make that informed determination only if the party resisting discovery, the government agency which has complete custody of the documents, makes the type of detailed showing which the cases require and which they did not even attempt in the District Court.

And I'd like to note that the questions asked from the bench to my opponent this morning were what the files contained? What sort of documents are they? What sort of harm could come? Those are precisely the things that the district judge needed to know, precisely the facts that the resisting party was obligated to give him and exactly the detailed showing that the resisting parties here refused to make.

In other words, the requirement that a resisting party make a strong showing the documents are privileged is not a mere technical requirement.

Article

QUESTION: This is the argument on 26-B, is it?

MR. BERGESEN: Premised on, I believe all of the discovery rules, Justice Brennan, that put the burden on the resisting party to show that there is, for example, a privilege regardless of what device is used.

QUESTION: Yes.

MR. BERGESEN: And moreover, we put these defendants

on notice right at the beginning of this case in our Rule 37 papers that they had to make a proper claim by the agency head, that they had to make a specific showing, but this they never did throughout the entire litigation in the District Court.

For example, in the District Court, these defendants failed in the first instance to give the judge any idea of the dimension of the problem, how many documents were involved, failed to submit a formal claim by the agency heads after personal considerations setting forth agency policy, failed to even identify the specific documents involved for the discovering party, or for the court, failed to separate the documents into privileged and nonprivileged portions and then correlate their claim of privilege to both portions.

Fifth, failed to spell out the specific harm which would be caused if these documents were produced subject to the protective order which Judge Weigel carefully drew and failed to show why the protective orders recommended by the magistrate and adopted by the judge would not be affected and, indeed, at one point between the time when the magistrate recommended a protective order that would limit the inspection of the documents to anyone in our office, the other side suggested that it ought to be changed to be limited to two counsel and two investigators and Judge Weigel entered an

order,to one investigator, excuse me, limiting it to two counsel and two investigators.

Therefore, the obvious irony as well as the fundamental legal deficiency of defendant's claim here of judicial abdication is that it was their refusal to follow the law and provide the district judge with the information he needed which created the situation about which they now complain.

Now, at this point in the analysis, defendants would disagree. They would say -- they would point to their persistent request in the District Court that the judge inspect these documents in camera and their subsequent insistence in the Court of Appeals and in this Court that his refusal to do so constituted an abdication of his responsibility.

Now, to most people including some lawyers and perhaps even some judges, an in camera inspection sounds like a reasonable way to make an informed, equitable determination of this type of dispute.

However, a moment's reflection will show that there is at least three serious problems inherent in any in camera inspection, problems which the defendants in the District Court didn't even acknowledge, much less attempt to cure.

And they are, first, it is a serious burden, obviously,not only on the trial court but on the appellate

courts, to go through however many documents may be involved.

Secondly, by all but eliminating the adversary process, an in camera inspection greatly prejudices the discovering party and, third, and this is of crucial importance in our view, in a Rule 34 litigation situation, unlike a Freedom of Information Act, the judge cannot know, at the discovery stage, what documents or what portions of what documents are relevant to the plaintiff's case because he doesn't know such crucial things as what information plaintiffs have and of the depositions, who the witnesses are going to be, what they need to impeach the witnesses with and so forth.

So after you look at it for awhile, you see that it is a very difficult problem.

Now, it is for this reason that the lower federal courts -- especially the D. C. Circuit, which gets most of these requests, in the case of Vaughn versus Rosen which we cite in our brief and others is beginning to require, even in the FOIA case, a detailed breakdown of the documents, separating them out, showing which portions are privileged and which are not, cross-referencing the claims of privileged to those portions allegedly non-disclosable in the situation and setting forth an evidentiary basis for this.

Now, clearly, if this happens, this is necessary in order to decrease the burden on the court and in order to

give a maximumly fair chance to the discovering party.

And we would contend -- and what we ask is that if this Court reaches that issue -- because, after all, all the Court of Appeals said was, its limited, modest holding was that these defendants had not made the proper showing in the District Court and, indeed, upon remand they still have that opportunity.

If this Court affirms on that ground, it may or may not discuss the requisites for an in camera inspection and our request is that if this Court reaches that issue and discusses in its opinion that question, that it gives concern to the very real problems of in camera inspection, not just the general ones experienced by any Freedom of Information Act plaintiff, but the additional much more difficult knotty ones experienced by a litigant in a Rule 34 situation who is seeking these documents.

QUESTION: What about the privilege? In camera could protect the privilege, couldn't it?

MR. BERGESEN: It -- well, the problem there, Justice Marshall, is that the qualified governmental privilege requires the district judge to balance the harm that would come from disclosing these documents against the need for the plaintiffs of the documents in the litigation.

QUESTION: Well, suppose in the documents in inmate A's case it points out that he informed on inmate B.

I think somebody needs to protect inmate A.

QUESTION: Right.

MR. BERGESEN: I wouldn't disagree with that at all.

QUESTION: How could that be done, under your way?

MR. BERGESEN: Well, we would designate files. They would look through the file and say, here are these three documents. Document number one is privileged and needs to be protected from disclosure because it has in it the name of an inmate who informed on another inmate.

Now, if that were done, the plaintiffs, the discovery party, might very well say, we have no interest in that. We don't want to see that document. You see --

QUESTION: But if you do want to see it, you would see it.

MR. BERGESEN: No, then if -- then they would have made a proper showing. They would have carried their burden and the district judge either would uphold the privilege or look at the document in camera.

QUESTION: Well, I thought you said you didn't want him to look at it in camera. I misunderstood you.

MR. BERGESEN: No, our position, Justice Marshall, is that of course there is a place for in camera inspection.

QUESTION: All right.

MR. BERGESEN: But it is not for a resisting party

to say,"It is all privileged, we demand in camera inspection and here are the documents. We are not going to give you any more showing. We are not going to give you any more help. We are not going to give the discovering party any more of a chance to participate in the process."

And that is what we are objecting to, the failure of the resisting party to make the proper showing which would reduce the burden on the Court and make the adversary process work.

Now, let me give you an example of what they might have done because the other side makes much of it. They have this morning and they make much of it in their reply brief.

Their position is that with these central files, unlike other documents, they have no time -- they have no time to look through and make a submission to the court.

But this is the chronology of events that had to do with the central files and it is all in the record. We, in following the District Court's order saying that we had a right to see these inmates central files, on September 27th -- this is at Appendix page 529, we designated 28 files we wanted to see.

Not until October 9th did we actually show up to look at them. During that time the other side made no motion to go into court to say, here are the documents we think are privileged and why, to make any showing whatsoever. They

simply withheld from us. They said, despite the court's order, "You can't look at them."

So we had to go back to the District Court again. We filed a motion on October 21st at page 446 of the Appendix.

There were a whole series. They filed two submissions in opposition and at no time made the type of showing that they ought to have.

Indeed, as late as November 20th, they filed a countermotion -- this is Appendix at 590 -- trying to get the judge once again to reconsider and say that these documents were confidential and now this is almost two months after we first designated the files and still, in all this time, they haven't gone into the District Court and made the kind of submissions -- and made the kind of showing, even with respect to these inmate's central files that they say everything moved so rapidly on.

And, parenthetically, we wouldn't object to a procedure below of following the Ninth Circuit's opinion whereby even with respect to the central files we will designate them. There is a time interlude. They can come in and make the proper showing.

The one thing that we won't buy and the one thing that the Ninth Circuit wouldn't buy is just this blanket, conclusory claim of privilege with no showing to help the court and no showing that makes the adversary process work

and permits an informed decision to be made by the judge with respect to the qualified privilege for official information as to whether the discovering party's need for the documents in the litigation outweighs the harm that would come from their disclosure.

Now, I am so unaccustomed, your Honors, to terminating an argument before the time is up --

QUESTION: Is the question of relevance open here at all?

MR. BERGESEN: I do not believe -- I would have to look at the cert decision, I guess. Certainly, they haven't argued with any --

QUESTION: The Court of Appeals must have held that they were relevant.

MR. BERGESEN: The magistrate, the district judge and the Court of Appeals, each one of them after a hearing called these documents to be relevant to the subject matter of this litigation.

QUESTION: Why did you want the documents? Is there any one easy answer or are there lots of them?

MR. BERGESEN: There are lots and lots of them and I have even written them down just to --

QUESTION: Is that to pass upon the competence of the state officials?

MR. BERGESEN: It is not to pass upon their

competence, your Honor, so much as what you have is a very unique situation with the parole --

QUESTION: Well, is it to pass upon -- so the Court could make some judgment as to how they have performed their duties in the past?

MR. BERGESEN: Not so much as to determine what due process safeguards must surround these hearings.

In this regard, let me invite your Honors' attention to a very recent article by Justice --

QUESTION: Oh, yes, but can't you just tell me why you wanted these documents?

MR. BERGESEN: Which ones? There are three sets, your Honor.

QUESTION: All right, take the personnel file.

MR. BERGESEN: Yes. The personnel file -- the extreme, indeed, the unique power and discretion given to a parole board is usually premised upon the fact that these individuals have tremendous expertise not possessed by you and me and therefore due process safeguards really would be out of place in these parole hearings.

QUESTION: How about the Supreme Court of California? Would you think you were entitled to the biographical backgrounds of all the members in order to see whether they were qualified to make the more important judgments that they make?

MR. BERGESEN: No, your Honor and we distinguish in our brief the many, many distinctions between federal courts and federal judges bound by rules they do not make, bound by rules of evidence, required to proceed in open court on the record with all parties represented by counsel subject to judicial review.

QUESTION: Well, what did you want these records for?

MR. BERGESEN: We wanted to show two things.

First of all, as Judge Friendly suggests in a recent Law Review article, there may well be -- or there should be a connection between the impartiality of the hearing officer and the due process safeguards that are required.

We intend to show through these files, among other things, that many of these hearing representatives and members are former correctional officials -- are former police officials who even arrested some of the --

Mr. Chief Justice, may I leave the record for just a minute? I think my opposing counsel did that.

MR. CHIEF JUSTICE BURGER: Well, I can't tell until I know what you are going to go out of the record for. Ordinarily, you are confined to the record here.

MR. BERGESEN: Well, let me make a hypothetical. If we could show, Justice White, that a parole board member

as a Los Angeles Police Captain arrested an inmate, was punched in the nose by an inmate, later went on the Adult Authority and sat on that inmate's case and told him, "You ain't ever getting out of here as long as I am on the Board," I think this Court and any court would agree that maybe certain due process safeguards like, perhaps, a right to disqualify for bias -- which we ask in our complaint -- would be required.

Now, how do we make that kind of showing?

QUESTION: Your argument would be you might show from his personnel files that there is such a possibility or probability of bias on the part of these parole board or these authority members or hearing officers that there should be some due process procedures that don't now exist.

MR. BERGESEN: Precisely and our second amended complaint also alleges that the indeterminate sentence is unconstitutional, in part because we claim that the assumptions always made about parole board members that they can predict that based on the materials before them or the prison programs that the prisoners take part in, they can predict who will recidivate and who can't and we are going to prove that they can't at trial -- or we are going to try -- and we believe that we can show that the expertise which is often said to underlie --

QUESTION: You are going to have to go back and

go through -- you do a sampling job on their predictions and try to draw some conclusions that they can't predict?

MR. BERGESEN: We might have expert witnesses --

QUESTION: Well, isn't that what you are going to do?

MR. BERGESEN: I beg --

QUESTION: That is what you are going to try to do.

MR. BERGESEN: I am not sure I follow you, Justice White, on the sampling --

QUESTION: Well, how are you going to prove that they can't make predictions? Take individual cases?

MR. BERGESEN: In part, the files may well represent -- but let's take an example of a parole board member who writes a denial. Based upon X, Y or Z and based upon this, he says, I predict that there will be recidivism and let's say that our expert witness comes on, our psychiatric witness, and says, that is absolutely invalid. You cannot predict by X, Y or Z recidivism or dangerousness.

If you did enough of that sort of thing, you see -- our problem below, Justice White, we purposely structured this case so as that we would have to make a detailed, painstaking, evidentiary showing that, among other things, the assumption popularly and consistently held by many people including the judiciary about parole boards are, in fact, untrue and the only way we can do that is by making a

painstaking, day-by-day evidentiary showing in the teeth of a lot of popular wisdom which, in our opinion, is absolutely untrue, which invalidates the parole board and the indeterminate sentencing in California.

QUESTION: Mr. Bergesen, if you were the chairman of a committee or subcommittee of the California legislature and outlining a program of action of how you were going to proceed in order to persuade the legislature to abandon the Adult Authority system, I would think the argument you made would be entirely a valid one. But you are asking a court to undertake to evaluate the efficacy of the California Adult Authority system for sentencing offenders. That is what it amounts to, isn't it?

MR. BERGESEN: No, Mr. Chief Justice, I would take issue with the word "efficacy." Our intent is to show that the procedures are so defective and so lacking in evidentiary integrity that they must be surrounded by greater due process safeguards than are presently afforded, that the Fourteenth Amendment requires that because as this Court has said time and again, what due process is required in any situation depends on the situation and we want to make an evidentiary showing to show what this situation really is as opposed to what it is popularly assumed to be.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. Mayer? You have -- we can allow you about five minutes more.

REBUTTAL ARGUMENT OF KARL S. MAYER, ESQ.

MR. MAYER: Thank you, Mr. Chief Justice.

I'll be very brief.

Counsel spoke of the necessity, under the District Court's orders, for there to be consent of the inmates whose files are to be inspected and that is true.

However, as I have indicated, the files contain documents from persons other than that inmate. They contain crime partner information. They contain information from informants against the inmate whose file is to be inspected.

That inmate's consent is irrelevant as to those other documents. He cannot consent to the disclosure of other documents which he has not generated.

Now, Counsel has stated here that we would have no objection if, in the District Court, there was some showing made of the confidentiality of the contents of the inmates' files and if some particular document were withheld to be shown to the Court and upon a proper showing. We would have no objection to that.

That is precisely what we did and precisely what precipitated this Attorney's motion for enforcement clarification and sanctions. That is precisely what

precipitated Judge Weigel threatening me, in open court, with contempt if I tried it again and that is precisely what precipitated the strident language of the District Court in the December 3 order.

This was done and it was rejected. It was rejected by the Ninth Circuit in its denial of mandamus in that separate mandamus proceeding.

Now, if we go back to the District Court as the law presently stands, we are in the same relatively helpless position. The opinion in Kerr is not helpful.

It is a denial of mandamus and nothing more.

There is some dicta in the opinion but the dicta adds nothing to the state of the law as it was at the time these events began.

I feel, with respect to, particularly, the inmate documents and with respect to the contents of the personnel files, more must be required of the District Court.

The background and information in which Counsel has expressed an interest has been furnished in abundance to Plaintiffs, the complete work background, the complete educational backgrounds were furnished in response to interrogatories with statements and documents.

Each member of the Adult Authority has been deposed at length by Plaintiffs. The depositions focused on two things, their backgrounds and their attitudes and the

procedures each individual follows at parole consideration hearings -- how did they get into the file, what they look at, how they weigh this, how they weigh that.

They have this information to a fare-thee-well and there is no excuse to have demanded everything in every personnel file, everything in every inmate file and so on.

We submit that the District Court has not acted reasonably with respect to these documents, again, the confidential nature of which is conceded and has been continuously below.

I'll submit, your Honors.

Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:24 o'clock a.m., the case was submitted.]