

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

KRISTIN M. PERRY, ET AL.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. CV 09-02292-JW
)	
ARNOLD SCHWARZENEGGER, ET AL.,)	
)	
Defendants.)	
_____)	

San Francisco, California
Wednesday, June 28, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Movant KQED:

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Reported By:

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
Official Reporter

1 Wednesday - June 28, 2017

2:23 p.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling CV 09-2292, Perry, et al., vs.
5 Schwarzenegger, et al.

6 Counsel, please come forward and state your appearance.

7 **MR. BURKE:** Good afternoon, Your Honor. Thomas Burke
8 of Davis Wright Tremaine on behalf of KQED.

9 **MR. PATTERSON:** Peter A. Patterson on behalf of the
10 defendants intervenors.

11 **THE COURT:** All right. So let me give you my sense of
12 this and then hear your argument because I think it's a very
13 interesting issue.

14 So starting with *Perry vs. Brown*, the beginning part of
15 the opinion references the narrow consideration of whether the
16 public's entitled to view the recordings some two years after
17 the trial given the unique circumstances of the case. And it
18 references in the next paragraph publications shortly
19 thereafter. And so I don't read the opinion as saying that the
20 Ninth Circuit has forever decided this question.

21 It also refers to Judge Walker's several unequivocal
22 promises and solemn commitments in light of the Supreme Court's
23 intervention, and the heart of the opinion is about the
24 importance of the integrity of the judicial system and the
25 proponent's reasonable reliance on those solemn commitments,

1 and it references the local rule, which would open -- have a
2 presumption of opening sealed documents to public inspection
3 ten years from the date the case is closed.

4 So in analyzing the interests of the parties, I think the
5 intervenors do have a strong public interest in having those
6 recordings published, and I also think the defendants have a
7 strong basis for relying on judicial integrity, and they may
8 have, although there wasn't really an attempt to show it, good
9 cause to hold the recordings sealed in light of witness safety
10 and harassment sorts of issues.

11 So my inclination at the moment is in light of the unique
12 circumstances of the case, that I wouldn't unseal the
13 recordings now; that I would think that the local rule is sort
14 of the way to look at this case; and that at the -- shortly
15 before the ten-year mark, if the -- I'm never sure quite how to
16 refer to Mr. Patterson's --

17 **MR. PATTERSON:** Defendants intervenors, I believe.

18 **THE COURT:** The defendants intervenors. Is that who
19 they are?

20 That if they, at that point, think that the recordings
21 should still be sealed, then they should be. Then they should
22 file a motion, and we would deal with it at that point down the
23 road.

24 And I would also say that I think that point is not the
25 date of the administrative closing of the case, but at the time

1 that the case went up to the Court of Appeals, whenever that
2 was. So that's sort of my sense of everything.

3 Mr. Burke, I'll let you take that on and anything else
4 that you want to say.

5 **MR. BURKE:** Your Honor, I appreciate and I'm sure my
6 colleague here also appreciates the Court's insight.

7 I don't understand and I think the pivotal question for
8 the Court is what does waiting ten years accomplish? I do not
9 believe that the local rule will trump a common law right of
10 access.

11 And so in this context, what you're asked to approve
12 essentially by this motion is a continuing sealing. And I
13 think any time there is a -- essentially a continuing ceiling
14 situation, you have to ask whether or not there is a compelling
15 need to maintain the seal.

16 And so from the abstract to the specific, the question of
17 whether or not in ten years, on the first day after the tenth
18 year has passed, do you suddenly have a concern about judicial
19 integrity?

20 And I think the question can be asked and appropriately
21 under the common law has to be asked now as to whether or not
22 there is a compelling need for this or it's even less than
23 compelling, honestly, under the standard, whether it's
24 justified under the common law.

25 **THE COURT:** But don't you think Judge Reinhardt was

1 very clear about the importance of the integrity of the
2 judicial commitments that were made at the trial? I thought --
3 I mean, that part reads compellingly clearly, and it's hard for
4 me to -- I balance -- I have to balance that, which is almost
5 an absolute, against the common law right, and that's why I
6 think Judge Reinhardt referred to this as the unique
7 circumstances of the case, and he did also in that opinion
8 reference the local rule, which has some relevance to the
9 issue.

10 So to me that's the -- that's sort of the *kick it down the*
11 *road a little bit* solution that I'm leaning towards.

12 **MR. BURKE:** We've been kicking for quite a while.
13 It's now seven years, Your Honor, and I don't belittle -- you
14 know, I saw physically during oral argument Judge Reinhardt's
15 position with respect to some of these issues, and I look, as
16 the Court has, at his language, and the language that he uses
17 is very much in the context of the unique circumstances of this
18 case where at the time that the Ninth Circuit was hearing this,
19 there was no merits ruling. There was no decision by the U.S.
20 Supreme Court, and the Court specifically refers to the
21 language of, you know, within a period after the trial. It was
22 less than two years afterwards.

23 I think that's of great significance. In fact, I think
24 that's more significant than anything else because what the
25 Court is now asking is what's a concrete way to get your arms

1 around damage to judicial integrity, and with the benefit of
2 knowing of seven years passage, knowing that there is no
3 showing of the very danger that was of the concern to the
4 Court.

5 If there had been a showing, KQED would not be here making
6 that. There has been no showing, despite an enormous amount of
7 attention to this case. That's what also makes it very unique.

8 **THE COURT:** And it does -- in some ways doesn't it --
9 I've been trying to think about this. In some ways, it lessens
10 each parties' interest that's been expressed because the
11 transcript is out there. There have been plays and recordings
12 using that information, and so while the actual recording
13 itself -- I understand why the witnesses would like that to
14 be -- your witnesses would like -- the plaintiffs' witnesses
15 would like that to be out there, and I appreciate that and I
16 think that's a concern, and it's a historic document, and I
17 think that's a concern --

18 **MR. BURKE:** It is.

19 **THE COURT:** But I do think the interest on both sides
20 is lessened a little bit by the fact that all of this
21 information is very public.

22 **MR. BURKE:** I don't think there can be a lessening of
23 the fact that it was the only federal trial in U.S. history on
24 this topic. And I think it's a unique historical -- again, the
25 unique facts of this case, it was a tremendous historical

1 value. It has that.

2 And it's not a situation where there is any threat. If
3 there was, I'm sure the Court would have seen it in
4 declarations.

5 So the question is whether or not you have a proceeding,
6 recording of a proceeding of such historic value, sealed out of
7 the concern for *let's set judicial integrity*, but that's now
8 been tested seven years later. It's been tested as to whether
9 or not there is a concern that should appropriately let the
10 three years run out.

11 And again in the context of a continuing sealing order, I
12 think the Court has to consider exactly what was the impetus
13 before and ask has that been addressed, has that been erased,
14 and I believe that it has. I don't think there is any showing
15 to the contrary.

16 **THE COURT:** All right.

17 Mr. Patterson?

18 **MR. PATTERSON:** Yes.

19 First of all, we would be happy with your proposed
20 resolution of this, but to respond to a few points my colleague
21 here made -- first of all, the local rule absolutely can trump
22 the common law, just as, you know, any -- the Supreme Court
23 said this local rule had the force of law. We cited cases in
24 our brief where statutes and regulations had trumped the common
25 law. The *Nixon vs. Warner Communications* case itself involved

1 a situation in which a statute essentially trumped the common
2 law in that case.

3 Second of all, we don't concede that the common law
4 applies at all to this judicial recording -- to these
5 recordings of the proceedings. A recording of a trial is not a
6 document that historically has been considered a document that
7 the public has access to.

8 Just a few years ago in the Apple *iTunes* litigation, this
9 Court held that a videotaped deposition of Steve Jobs that was
10 played at trial did not -- was not subject to the common law
11 right of access, following the Eighth Circuit's decision in
12 *McDougal* because this is just not the type of thing that is
13 historically considered a judicial record.

14 And even if the common law right of access did apply, the
15 compelling reasons that the Ninth Circuit referenced, nothing
16 has changed. They did not talk about the case being on appeal,
17 they didn't talk about these issues being, you know, contested
18 issues. They focused specifically on Judge Walker's
19 assurances, and they were not -- Judge Reinhardt, I believe,
20 was clear that the assurances were not time barred.

21 He wrote in one place that "Judge Walker promised the
22 litigants that the conditions under which the recording was
23 maintained would not change. That there was no possibility
24 that the recording would be broadcast to the public in the
25 future." So it's hard to get much more unequivocal than that.

1 And finally the last thing I would say is that we don't --
2 we also don't concede that Rule 79-5 even applies to
3 judge-created as opposed to party-submitted materials, but it
4 may be that the appropriate time to brief that would be, you
5 know, on the eve of when that ten-year period otherwise would
6 expire. You can decide it all at that time.

7 **THE COURT:** And I don't know whether you want to take
8 my -- whatever order I come up with up and have this resolved
9 because I do think a central issue in the opinion is whether
10 this is a forever order or whether it's limited.

11 And I think it's limited because Judge Reinhardt says at
12 the beginning when he's talking about it -- he puts those
13 limitations on it.

14 So I don't think he was thinking that the record would be
15 forever sealed.

16 So, Mr. Burke, do you want to add anything at this point?

17 **MR. BURKE:** I didn't hear any essentially argument in
18 counter to the idea of all right, if this is a continuing
19 sealing order, setting aside the local rule issue -- if this is
20 a continuing sealing order, what is the evidence that justifies
21 the sealing? That is the test I believe the Court has to
22 follow.

23 I do not believe that there is anything in the local rule
24 that says there's no way that it can be checked under the
25 constitutional common law right of access which the Ninth

1 Circuit did apply in this case.

2 It simply, as the Court indicated on these unique facts --
3 there was no question that the common law was applied by the
4 Ninth Circuit. It just said that there was a compelling reason
5 at the time.

6 Where is the compelling reason today? We are not going to
7 be any better off, and yet the public will not allow -- will
8 not have access to this information for three-plus more years.

9 That doesn't serve anything when the public benefit is
10 very clear in this record from having this be out. The public,
11 unless you attended those court proceedings, cannot see the
12 individuals testifying.

13 If the Court is concerned about the evidence with respect
14 to the witnesses for my colleagues, the Court can certainly
15 keep those portions of the trial recordings under seal and
16 release the rest.

17 **THE COURT:** My real concern is that Judge Walker made
18 some promises to the parties about that -- those tapes, how
19 they were going to be used, and the defendants, in light of
20 those promises, forewent what was a favorable appellate --
21 potential appellate review, or potentially did, of that
22 decision because they had gotten those assurances.

23 And so that's what -- that's what I'm balancing against
24 the common law right that you have. And I'm also looking at
25 the order that we already had from the Ninth Circuit and trying

1 to -- which is unclear about this, and trying to figure out
2 well, so what is the fairest and best result in light of these
3 competing interests, which are unique, as the Court of Appeals
4 said.

5 **MR. BURKE:** But if I might, when the Ninth Circuit was
6 concerned about that, they looked at the evidence and there
7 was -- there was a -- there are a variety things offered to the
8 Court at the time, and it was temporal at the time. It was
9 concerns about physical threats.

10 If there is any manifestation of that today, that would be
11 before you now, and it is not. It has not been offered. We
12 are not arguing about it. It's not been presented.

13 So how does that change three years from now? It is a
14 continuing sealing order until --

15 **THE COURT:** One would think that it would continue to
16 dissipate as hopefully radically as it has over the last five
17 years.

18 **MR. BURKE:** But I would submit that for purposes of
19 upholding a sealing order, it's already dissipated, and that
20 makes, at least on this record, the continued sealing not
21 appropriate.

22 **THE COURT:** I understand that argument.

23 Mr. Patterson, do you have anything further?

24 **MR. PATTERSON:** Just two quick things.

25 One, the Ninth Circuit did not hold that the common law

1 right of access applied to these recordings. It assumed for
2 purposes of the decision. So it was, you know, not a premise
3 of this decision that it applied. It was just an assumption
4 that the Court made for purposes of the opinion.

5 And second, the basis of the Ninth Circuit's ruling was
6 not threat to witnesses. It was a need to uphold judicial
7 integrity, and nothing has changed with respect to that.

8 The promises, as the Ninth Circuit said, were unequivocal
9 that the recording would not be broadcast in the future, that
10 the right -- that the potential for broadcast had been
11 eliminated; you know, not time bound but eliminated.

12 So I grant Your Honor's observation that there is some
13 limiting language at the beginning part of the opinion, but
14 then when you read the reasoning of the opinion, you know, it
15 is that the judge's assurances were unequivocal.

16 So that's all I would offer.

17 **THE COURT:** All right. I will look at this one more
18 time. I am inclined to think that the local rule strikes the
19 appropriate balance when parties disagree about whether
20 documents should be -- documents that have been sealed should
21 remain sealed, and so I'm inclined to go in that direction, but
22 I will look one more time.

23 Thank you both for your argument and your papers, which
24 were great. They were very interesting.

25 (Proceedings adjourned at 2:41 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, July 6, 2017

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter