

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

American Civil Liberties)
Union of Arizona and Sean)
Holstege,)

Plaintiffs,)

No. CV 2019-007636

vs.)

William Montgomery, in his)
official capacity as)
Maricopa County Attorney)
and Maricopa County)
Attorney's Office,)

Defendants.)

BEFORE: The Honorable Judge Barry C. Schneider
Special Master
REPORTER'S TRANSCRIPT OF HEARING AND ORAL ARGUMENT
PROCEEDINGS
Phoenix, Arizona
March 6, 2020
1:31 p.m.

REPORTED BY:
WILMA A. WEINREICH, CSR, RPR
Certified Stenographer
Certificate No. 50976
PREPARED FOR:
SPECIAL MASTER BARRY SCHNEIDER
(Original)

1 REPORTER'S TRANSCRIPT OF HEARING AND ORAL
2 ARGUMENT PROCEEDINGS was taken on March 6, 2020,
3 commencing at 1:31 p.m. at the law offices of Honorable
4 Barry C. Schneider, 1313 East Osborn Street, Suite 220,
5 Phoenix, Arizona, before WILMA A. WEINREICH, a Certified
6 Stenographer in the State of Arizona.

7
8 COUNSEL APPEARING:
9 For the Plaintiffs:

10 AMERICAN CIVIL LIBERTIES
11 UNION
12 Criminal Law Reform Project
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16 and
17 AMERICAN CIVIL LIBERTIES
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23 For the Defendants:

24 ALLISTER ADEL
25 MARICOPA COUNTY ATTORNEY
26 By: Ms. Ann Uglietta
27 and
28 Mr. Howard P. Levine
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31 Phoenix Arizona 85004-2206

1 SPECIAL MASTER SCHNEIDER: This is
2 CV 2019-007636, ACLU vs. Adel. May I have the appearances
3 for the record, please?

4 MS. UGLIETTA: Ann Uglietta and Howard
5 Levine on behalf of the County Attorney and MCAO.

6 MR. TRIVEDI: Somil Trivedi of the ACLU for
7 the Plaintiffs.

8 MR. KEENAN: Jared Keenan for the ACLU of
9 Arizona, also for the Plaintiffs.

10 SPECIAL MASTER SCHNEIDER: Mr. Trivedi is
11 admitted pro hoc, and the court reporter, Wilma Weinreich,
12 is present and recording the proceedings.

13 I have been doing a lot of reading -- it
14 will show up in my bill. I did spend a substantial amount
15 of time so far reading the memos, reading some cases, and
16 looking a little bit at the documents in question that the
17 Plaintiff has not yet seen.

18 And I have some kind of preliminary
19 questions. This is not going to be a traditional
20 appellate-formatted argument where you go first, reserve
21 your time for rebuttal and all that garbage, okay? This
22 is going to be a conversation hopefully that will be
23 enlightening and helpful to me, maybe to you as well, and
24 that's how it's going to proceed.

25 So I am going to be asking questions using a

1 little bit and wondering, so I will start with this: I am
2 confused as to what my role is as the special master
3 because I see that questions of law certainly initially
4 predominate what we are all about.

5 And I'm confused because although I think
6 Rule 53 and maybe the order appointing me empowers me to
7 decide questions or opine or give advisory rulings about
8 questions of law and questions of fact, in practicality
9 special masters are usually fact-driven. They look at
10 privileged documents. They resolve discovery dispute, can
11 we take this deposition, how many depositions do you want,
12 those kinds of things.

13 But to be sort of put in the position of
14 deciding whether or not something is a public record,
15 whether or not an exception applies, seems more law
16 related.

17 Now let me -- I have another question. Am I
18 correct in assuming that all of the documents in question
19 are conceded to be public records?

20 MS. UGLIETTA: Yes.

21 SPECIAL MASTER SCHNEIDER: Okay. Because in
22 the Carlson case it says you start with that question and
23 then do you your balancing act, right?

24 MS. UGLIETTA: Yes.

25 SPECIAL MASTER SCHNEIDER: I'm not sure that

1 was ever clear until I asked the question. Maybe it's
2 helpful to you to know that there is a concession that
3 everything we are talking about is in the domain of a
4 public record and governed by the appropriate statute and
5 case law, et cetera.

6 My confusion extends to this. What we are
7 -- there is a motion to compel response and reply in front
8 of me that's not been adjudicated by the court.

9 In fact, as I understand it, when it was
10 filed and fully briefed, the Court says let's appoint a
11 special master.

12 If I am trying to get inside the judge's
13 head, which I probably shouldn't do, one thing that I may
14 conclude from that is that the judge may have already
15 decided that these documents at the threshold as the
16 statute sort of indicates, or more than sort of, need to
17 be produced subject to whether there are any exceptions.

18 And I am assuming he was contemplating that
19 it was necessary to go through in-camera those documents
20 to see if they met -- if the exceptions excepted them out.

21 Otherwise, why appoint a special master. A
22 special master takes the time off the hands of the judge
23 of a time-consuming task and relieves the judge of that
24 task.

25 But having read this stuff, there could be

1 determinations of law that make it unnecessary to go
2 through an in-camera inspection.

3 For example, hypothetically if I agree with
4 the Defendant that capital murderer memos are indeed work
5 product, or whatever else is being offered as an
6 exception, then why would I spend your money and my time
7 reading the capital murder memos?

8 Another question that pops into my head.
9 Let's suppose I agree with the Plaintiff that general
10 policies are produceable. So, now do I look at them and
11 what am I looking for?

12 Because I'm not sure the Defendant is saying
13 to me that the general policies contain prohibited
14 content, confidential, privileged or whatever. So am I
15 looking for that or not? I will need some guidance if I
16 decide that guidelines are produceable.

17 So this is all a little confusing to me.
18 And there's another -- I have a lot of these little
19 questions.

20 Let's suppose I embark upon an in-camera
21 review of the group policies, and I'm not really sure --
22 maybe I will get more clarification what I am looking
23 for -- but I am now reading them in the comfort of my
24 office or wherever, and I'm not sure.

25 Am I allowed to pick up the phone and call

1 counsel for the Defendant and ask them, what is this, why
2 is this, et cetera, et cetera, ex parte?

3 Because they can't have that conversation
4 out in the open. That kind of defeats the whole purpose
5 of this, although that does me remind me there is
6 apparently an offer to do a protective order. I am
7 assuming that's been rejected?

8 MS. UGLIETTA: Correct.

9 SPECIAL MASTER SCHNEIDER: And that's been
10 formally rejected.

11 MS. UGLIETTA: There's not been an offer.
12 There's been a suggestion and we would not agree to do
13 that.

14 SPECIAL MASTER SCHNEIDER: If there were a
15 formal offer, you would formally reject it?

16 MS. UGLIETTA: Yes.

17 SPECIAL MASTER SCHNEIDER: And what just
18 happened, then, is it eliminates the opportunity for
19 adversary process of actually delving through the
20 documents.

21 And it could be, if we had that -- and I'm
22 not trying to convince you to change your mind. It's your
23 prerogative. If we had that adversary nature, you might
24 say, I don't really need this, it's garbage, it doesn't
25 really say anything, it's not important.

1 MR. TRIVEDI: Hence our suggestion.

2 SPECIAL MASTER SCHNEIDER: I understand.
3 Going back to my first little setup on this issue. What
4 if I needed to have an ex parte conversation to have me
5 understand what it is they are claiming because it's not
6 apparent to me? Would there be any objection to that?

7 MR. TRIVEDI: I think, Your Honor, the
8 process that we undertook right before getting here this
9 week where you proposed the contours of a question asked
10 us if we were okay with an ex parte communication and then
11 consented. I think that was an acceptable way to go about
12 it.

13 SPECIAL MASTER SCHNEIDER: That was more
14 process. The question I posed in that email -- and you
15 did not object and we actually sat down -- frankly, it was
16 not necessary.

17 I inconvenienced these nice folks because by
18 furnishing me with the last amended privilege log with the
19 citation to the public record report and where it's found
20 helped me tremendously, because I was kind of swimming.

21 And once I had that -- and then I also did
22 not understand in my fit of crisis peak, or whatever, when
23 I typed that email, I was only looking at the disk, and I
24 was looking at the redacted and unredacted policies.

25 And I am saying, How am I ever going to put

1 these side by side? And I didn't realize that they are
2 side by side for me for me in a notebook.

3 So those two issues that I saw evaporated,
4 and I really didn't need to speak to them. But I didn't
5 realize that.

6 I wasn't in my office -- I was playing golf.
7 But when the email with the new attachment came in, had I
8 seen it in the morning whenever it came in, I would have
9 said, hey, it's not necessary. And I apologize profusely,
10 I think, and this is my own mind, to them for the
11 inconvenience.

12 But I don't know if I could do that again
13 without spilling the beans.

14 So let's suppose I am looking at a policy on
15 Page 4 of whatever, how can I put in an email I don't
16 understand what these words mean? How could I do that in
17 a way that would really give you the opportunity to make
18 an informed decision on whether to object or not?

19 So you don't have to answer this right now.
20 If you want to think about it, by all means.

21 I would note that in-camera and ex parte --
22 in-camera means my eyes only, but it's also consistent
23 with that, and I think I have done this maybe with the
24 consent -- it's ex parte also. I am getting an ex parte
25 communication on a paper.

1 MR. TRIVEDI: By definition, right.

2 SPECIAL MASTER SCHNEIDER: And for the
3 process to maybe be more fully realized, that would
4 continue into an oral communication as well.

5 MR. TRIVEDI: Uh-huh.

6 SPECIAL MASTER SCHNEIDER: Don't tell me
7 now. Think about it. It may enure to your benefit and
8 you don't even know that. I may say this doesn't seem
9 like -- tell me why you think it. That may be the
10 conversation I have. So it can cut two ways.

11 But it would help me, that much I can tell
12 you, if I decided to do that. And it may not hurt you.
13 And it may help you. You don't have to tell me now, but
14 you can tell me by email or later on when you think about
15 it.

16 MR. TRIVEDI: Okay.

17 SPECIAL MASTER SCHNEIDER: I thought about
18 that issue when I got the assignment from the get-go when
19 I got the order when somebody contacted me. I can't
20 remember how it all came about. Am I going to be able to
21 have that kind of a conversation? And I did kind of
22 mention it in that first conference. I may have. I know
23 I was thinking about it.

24 MR. TRIVEDI: You did. I will say, Judge,
25 that that's a good question to think about over the course

1 of today. Those other questions that you had about
2 whether you can make conclusions of law and things of that
3 nature --

4 SPECIAL MASTER SCHNEIDER: It's not whether
5 I can. Only I can. But why. Why, if that's all I am
6 doing? It's more of a rhetorical question. There is
7 really not an answer to that. It' just explains at least
8 in my mind my confusion as to what my role is.

9 And what I am anticipating doing as a result
10 of this conversation that we are going to have today is I
11 am going to decide a number of things.

12 I may decide at the outset that capital case
13 memos are not discoverable, not produceable. I might
14 decide that general guidelines are.

15 And then if that's how it sets up, then I
16 don't know why I would have to look at the capital. I
17 mean I did glance at them. I didn't -- there were a lot.
18 About 80 pages of them, am I right?

19 MS. UGLIETTA: I'm not sure.

20 SPECIAL MASTER SCHNEIDER: There's a lot. I
21 got the flavor of them in reading -- and I didn't read
22 them to take notes on. I just -- I know these people and
23 that kind of a thing. I do know a lot of those people.

24 And the question is, What am I looking for?
25 But if I decide that they are not, then I think it's over.

1 But, then again, Judge Smith may disagree
2 with me on that threshold issue. He may say you're wrong,
3 I disagree, they are produceable. Then I would assume
4 he'd want me to go through them.

5 So maybe I should be going through them and
6 giving, in case he disagrees, this is what I think about
7 each of them. I don't know. I will have to think about
8 that myself. Okay. But my mind is going around about
9 this task that's set before me.

10 So, in the spirit of the conversation that I
11 propose we have, let me suggest that I kind of jump in
12 somewhere. I am looking at my notes. We could go down
13 the privilege log item by item. There's a number of them.
14 It might be more time consuming than it's worth.

15 MS. UGLIETTA: Your Honor, may I respond to
16 your general questions?

17 SPECIAL MASTER SCHNEIDER: Sure.

18 MS. UGLIETTA: In relation to why you are
19 appointed, I don't think the judge gave us a reason for
20 his decision to do that, but it was in connection with an
21 earlier hearing in August when he asked if there were any
22 documents that had not been produced yet and I indicated
23 to him that the County Attorney had objected on the basis
24 of privilege as to some documents and that there were a
25 couple of categories that we just hadn't yet produced

1 because we didn't have them yet from the client, and he
2 had asked me to go ahead --

3 SPECIAL MASTER SCHNEIDER: The client?
4 You're the client.

5 MS. UGLIETTA: Go ahead and produce a
6 privilege log for opposing counsel. And so that was done
7 on August the 30th.

8 In that same hearing I think he -- and
9 correct me if I'm wrong, Jared, but I think in that
10 hearing he said something along the lines of if there's
11 going to be a dispute about privilege and there's more
12 than a few documents, then I am going to want the parties
13 to talk about retaining a special master. And so I do
14 think that he at least initially was considering it for
15 you to resolve privilege claims.

16 SPECIAL MASTER SCHNEIDER: Sure, the
17 traditional role of a special master. Go through a box of
18 claimed privilege documents and say whether they are
19 privileged or not. Attorney/client privilege, whatever.
20 All that stuff.

21 MS. UGLIETTA: And the process that is
22 adopted by the Arizona Supreme Court in the Matthews case
23 and in the Carlson case, which are cited in our briefs and
24 I believe in the Plaintiffs' briefs, that process is that
25 when an official makes an objection on the basis of

1 confidentiality privacy in the best interest of the State
2 that at that point, if the requesting party objects and
3 disputes, then the government official needs to establish
4 that his objections are valid.

5 And to do that the Arizona Supreme Court has
6 informed litigants that we need to submit the records for
7 in-camera review, and then the judge at that point is
8 supposed to review those records and make a judicial
9 determination in relation to the privilege claims and best
10 interest of the State balancing test.

11 SPECIAL MASTER SCHNEIDER: Sure.

12 MS. UGLIETTA: What I am getting at is in
13 this particular case we filed that process, and where we
14 are today essentially is waiting for a neutral magistrate
15 to review the documents and then make judicial
16 determination.

17 Now, in relation to your question, are there
18 any categories of documents that just on the face of the
19 request it implicates work product or otherwise would not
20 be disclosable as a matter of law, I think in order for
21 you to reach a conclusion like that it would have to be a
22 category which could never include a document that would
23 be publically disclosable, so it would have to be a
24 category that in the four corners of the category all of
25 the documents are going to be work product.

1 Now, so for example our position is that the
2 cap review committee records are categorically
3 nondisclosable.

4 As far as the policies are concerned,
5 however, that's a category of documents that they have
6 requested in here under subsection (e), and each of the
7 policies stand on their own. There's 23 policies that we
8 withheld. So each of them --

9 SPECIAL MASTER SCHNEIDER: Withheld and
10 didn't give redacted copies?

11 MS. UGLIETTA: Nine of them we gave
12 redacted.

13 SPECIAL MASTER SCHNEIDER: So there's 23 and
14 9 redacted?

15 MS. UGLIETTA: Yeah. There's 51 that they
16 have, 23 that we retained, 9 that we gave redacted.

17 SPECIAL MASTER SCHNEIDER: Of those 23?

18 MS. UGLIETTA: Correct.

19 And my point is that for each of those
20 policies they cover particular prosecution policies for
21 individual charges or individual types of prosecutorial
22 activities in criminal court, whether it's bail or pleas
23 or it's witnesses or it's discovery or it's capital review
24 committee processes, sentencing, et cetera, juvenile
25 charging.

1 All of those policies stand on their own and
2 some of them we determined after review do not contain
3 work product information because it was simply like a
4 litany of statutory elements. That's not work product.
5 It's just, hey, prosecutors, when you charge identify
6 theft, these are the elements of the crime.

7 SPECIAL MASTER SCHNEIDER: And Plaintiff
8 would argue that guidelines are not work product because
9 they are not case specific.

10 MS. UGLIETTA: Yes.

11 SPECIAL MASTER SCHNEIDER: Deliberations
12 about a specific case, strategies, and whatever.

13 MS. UGLIETTA: Yeah, that's not -- that's
14 contrary to case law, but I can talk about that in a
15 minute.

16 MR. TRIVEDI: As can we.

17 MS. UGLIETTA: That's fine. I am just
18 trying to say that the individual policies from your
19 perspective need to be reviewed on an individualized
20 basis, and they can't be categorically found to be
21 disclosable because each of the policies pertains to an
22 individual activity in criminal litigation.

23 And some of them, as I said, have like a
24 CLE-type material for prosecutors. It just sets out
25 elements of a crime. We produced those.

1 Some of them have just procedural stuff like
2 when you file this, then take this to court and do that.
3 That's procedural. It's known in the defense bar
4 community. It's known to the judicial community.
5 Everyone knows about it. It's not truly confidential and
6 so we produced those.

7 On the other hand, there are some policies
8 that contain work product. These are the policies that
9 have, from the County Attorney's perspective, her guidance
10 and her advisements and her analyses and mental
11 impressions about how to respond to certain activities in
12 criminal litigation.

13 They are prepared in anticipation of
14 litigation. They cover particular aspects of criminal
15 litigation. Those are the policies that we withheld and
16 redacted.

17 And our position is that you are required to
18 review each of those policies and make a determination as
19 to whether or not they are work product and disclosure
20 would be contrary --

21 SPECIAL MASTER SCHNEIDER: This amended as
22 of yesterday privilege log?

23 MS. UGLIETTA: Yes.

24 SPECIAL MASTER SCHNEIDER: Will I know from
25 looking at that which policies you are withholding for

1 work product purposes?

2 MS. UGLIETTA: Yes. All of them are. All
3 of the policies.

4 SPECIAL MASTER SCHNEIDER: Give me an
5 example of one.

6 MS. UGLIETTA: Plea agreements.

7 SPECIAL MASTER SCHNEIDER: What page?

8 MS. UGLIETTA: Page 4, 7.1. So we have four
9 objections, work product, mental impressions, privilege,
10 prosecutorial, immunity privilege contrary to the best
11 interest of the State, and then we go on to discuss why.
12 That policy in particular, 7.1, is a policy that contains
13 information that's exempted from public disclosure.

14 SPECIAL MASTER SCHNEIDER: I can hear the
15 Plaintiff telling me that this is not specific enough.

16 MS. UGLIETTA: Yes, Your Honor, and that's
17 contrary to case law. And I can talk about the case law.
18 They didn't cite any case law.

19 SPECIAL MASTER SCHNEIDER: If you want to
20 speak now -- as far as I'm concerned, I want to ask some
21 more questions but it's up to you.

22 MR. TRIVEDI: There was a lot of argument
23 there. Let me say from the outset that I agree with
24 counsel's framing of why we are here and what your role
25 is. That's all -- Plaintiffs agree with that. And so --

1 and I realize you were sort of using policies as an
2 example to get into the discussion.

3 But as long as we are on the policy
4 question, the one thing that I sort of disagree with is
5 the notion that documents are categorically or not
6 categorically withhold-able because there is the
7 possibility of redaction, first of all, which they have
8 exercised on some documents.

9 They argue that capital review committee
10 memos are categorically withhold-able. We would have to
11 find some comfort that not a single word or sentence of
12 that is actually disclosable, meaning the burden would be
13 squarely on them under Arizona case law to justify
14 withholding that entire document rather than finding the
15 legitimate work product -- which we grant might exist.

16 These are memos by attorneys. We are not
17 pretending that there might not be legitimate work product
18 in there, but to withhold the entire document requires
19 them to make a stronger and more specific showing that the
20 entire document --

21 SPECIAL MASTER SCHNEIDER: Why am I
22 envisioning the Mueller report, all those black pages --
23 never mind.

24 MR. TRIVEDI: Possible. But then they'd
25 have to justify that as well.

1 So, on the policy point, Your Honor, I will
2 assert -- well, many points. So -- and you anticipated a
3 lot of them.

4 On the work product point, all of these
5 documents are generalized office policies and by
6 definition do not apply to a particular case.

7 Now, counsel is right that there could be
8 elements within those policies that are so obviously legal
9 analysis towards a particular question and apply law to
10 fact and do the kinds of things that lawyers do that there
11 is work product in there. So, again, we are not claiming
12 that there's no possibility that there is work product.

13 But I think an important point in this case
14 is that they have disclosed a lot of documents either in
15 whole --

16 SPECIAL MASTER SCHNEIDER: Of course, the
17 irony of what you just said about redacting out those
18 legal analyses and all that, that's the meat of what you
19 want and maybe you don't get. The rest of the stuff, I
20 really wonder if it's going to do you any good. But
21 that's your decision.

22 Unless it really contains something juicy,
23 of what benefit is it to you?

24 MR. TRIVEDI: Well, first of all, these are
25 all public documents presumptively, and there's Arizona

1 case law that says it's inappropriate to look into the
2 purpose for which anyone is asking for the documents. If
3 the documents are disclosable and requested in the proper
4 way they should be disclosed.

5 But, in any case, I will answer your
6 question which is that even the stuff that they have
7 produced contains extremely valuable information about,
8 say, factors to consider -- which ironically they claim as
9 a reason not to produce entire documents and yet there's
10 myriad examples in the documents they have produced with
11 factors for county attorneys to consider. So I will give
12 you an example.

13 17.4. Procedure 17.4 about diversion
14 programs. On the second page, even though in their
15 privilege log they intone over and over again tactics and
16 factors. Tactics and factors cannot possibly be produced.

17 They say in Section C, general
18 considerations for DCAs when granting diversion. And they
19 go through a whole bunch of these. These aren't statutory
20 factors. These are internal considerations that they have
21 decided to create.

22 So, by their own conduct they have admitted
23 that these types of tactics and factors unrelated to any
24 legal analysis are perfectly fine to disclose. We agree.
25 They obviously don't portend to the kind of parade of

1 horribles or harms to individual prosecutions. Otherwise
2 they wouldn't have produced it, but they did.

3 So, for example, they have withheld ever
4 plea bargaining procedure that they have, seemingly. They
5 haven't been produced, and we don't have any redacted or
6 unredacted plea bargaining related policies.

7 Just as they have produced general
8 considerations for diversion, and they think that's fine,
9 it makes little sense to us that they couldn't produce
10 general considerations for granting diversion. That's
11 what has us confused.

12 SPECIAL MASTER SCHNEIDER: Okay. I can see
13 why they would withhold guidelines on plea bargaining
14 strategies and whatever and give you that stuff because
15 the plea bargaining stuff is a lot more juicy, it's a lot
16 more really good information.

17 MR. TRIVEDI: So what's the juiciness test,
18 Your Honor?

19 SPECIAL MASTER SCHNEIDER: Well, I don't
20 know.

21 MR. TRIVEDI: I don't think they have made
22 it.

23 SPECIAL MASTER SCHNEIDER: If it's more
24 juicy, it may be more of a work product. That's the
25 thing.

1 It may be more in the realm of strategies
2 and legal analysis and -- the stuff that they gave you, I
3 am supposing that they're thinking you can have that.
4 Even though it may be work product, it's not that big a
5 deal. But the other stuff they are withholding because I
6 am assuming they think that's a big deal.

7 MR. TRIVEDI: I don't doubt that. But
8 whether it's a big deal or not is not the test. I am
9 assuming County counsel would not say they have produced
10 work product because they didn't think it was a big deal.
11 I think they withheld all the work product and not
12 withheld any, right?

13 Have you waived work product?

14 MS. UGLIETTA: I really don't think it's
15 appropriate for him to ask me questions but what I will
16 say --

17 SPECIAL MASTER SCHNEIDER: I will ask you
18 the question.

19 MS. UGLIETTA: I will say, reverting back to
20 before, the County Attorney had gone through all the
21 policies, made a determination of which ones are being
22 withheld on the basis of the objections that are set forth
23 in the privilege log, and for each of the ones that was
24 withheld, those are the bases.

25 With respect to the ones that were produced,

1 the review was that the information either did not fall
2 within the category of work product because it wasn't in
3 relation to criminal litigation, it was an office policy
4 having to do with, you know, investigators or something or
5 victims, or it was something that was procedural in
6 nature.

7 And then even so far as the diversion
8 program, I mean that's a program that is statutory. It's
9 been publicized. It's well known by the defense bar. We
10 want the community to be involved in diversion. The
11 judges are involved in diversion. Criminal Rule 38 is a
12 process that is well-established.

13 MR. TRIVEDI: All of that applies to plea
14 bargaining, no?

15 MS. UGLIETTA: No, because you are
16 forgetting the portion of the --

17 SPECIAL MASTER SCHNEIDER: Time out.

18 MS. UGLIETTA: Time --

19 SPECIAL MASTER SCHNEIDER: This is not
20 helpful at this point. I think what I am hearing about
21 the policy piece of all this, is there is a consensus that
22 I have heard -- maybe you didn't intend it to be a
23 consensus -- that I need to look at the withheld policies
24 and make a determination as to whether it's work product
25 that should be withheld or whatever else is being argued.

1 MR. TRIVEDI: Agreed.

2 SPECIAL MASTER SCHNEIDER: To belabor that
3 now I don't think is going to be productive. I am going
4 to have to get into the weeds on the policies, okay? So
5 that makes sense to everybody?

6 MS. UGLIETTA: Yes, Your Honor. May I
7 respond, though, to his statement about policies being
8 generalized office policies and not having to do with a
9 particular case?

10 That statement is not supported by case law,
11 and one of the cases that they do cite, which is a
12 district court case in California, Northern District of
13 California, was reversed by the Ninth Circuit.

14 And in that case the Ninth Circuit
15 specifically rejected that same argument made by the ACLU.
16 So I would like to refer Your Honor to that ACLU case that
17 was entered by the Ninth Circuit, and I can give you the
18 page citation for that.

19 SPECIAL MASTER SCHNEIDER: It's not in your
20 memo?

21 MS. UGLIETTA: It is in my memo, yes, but
22 also this particular argument is -- I was going to give
23 you the page citation now if you want it. It's at
24 Page 488 through -- at Page 488.

25 SPECIAL MASTER SCHNEIDER: Say that again?

1 880?

2 MS. UGLIETTA: 880 F 3d at 488.

3 SPECIAL MASTER SCHNEIDER: What's the first
4 page of that opinion?

5 MS. UGLIETTA: The first page is 473.

6 SPECIAL MASTER SCHNEIDER: And 488?

7 MS. UGLIETTA: Yes.

8 SPECIAL MASTER SCHNEIDER: As long as we are
9 talking about specific citations --

10 MR. TRIVEDI: Your Honor, could I quickly
11 respond to that?

12 SPECIAL MASTER SCHNEIDER: Sure.

13 MR. TRIVEDI: So that Ninth Circuit opinion,
14 I would actually point to you that as well because it
15 makes a clear distinction between -- here are the terms
16 they use -- instructions and guidance being different from
17 legal argument.

18 So when you go to that case, I would just
19 keep in mind --

20 SPECIAL MASTER SCHNEIDER: In the Ninth
21 Circuit?

22 MR. TRIVEDI: In the Ninth Circuit -- and
23 instructions and guidance are exactly what we believe are
24 contained in these policies because that's exactly what's
25 contained in a lot of the things that are already

1 produced.

2 MS. UGLIETTA: Can I say 487 to 488? I was
3 sort of talking quickly. It starts at 487. I'm sorry,
4 Your Honor.

5 SPECIAL MASTER SCHNEIDER: Just a note.
6 Right now I have --

7 MS. UGLIETTA: 486 to 488.

8 And I agree. That's the point of that case,
9 that there are policies that aren't withheld and policies
10 that are withheld depending upon what the language is.

11 SPECIAL MASTER SCHNEIDER: All right. I
12 don't need this. I appreciate the need to respond.

13 Just want to point out in the category, for
14 what it's worth, on Page 9 of the Plaintiffs' motion to
15 compel, there is a case Cox Arizona vs. Collins, and all
16 you gave me is the Pacific 2nd cite, not the Arizona site.
17 The Blue Book form, you have to give both. The next case
18 you cite is the Church of Scientology. You give only the
19 Arizona site and not the Pacific cite -- just saying.

20 MR. TRIVEDI: I appreciate that.

21 SPECIAL MASTER SCHNEIDER: And I think I had
22 some other observations along similar lines with the
23 Defendants' work product -- no pun intended.

24 Let's leave that. I am going to -- as far
25 as policies are concerned, what's going to come out of

1 this discussion so far is I am going to do my in-camera
2 review.

3 I am going to re-educate myself more
4 thoroughly on the issues, the case law and the memos, and
5 let them start to be my guidance. And you will let me
6 know, Plaintiffs, if I can have an ex parte communication
7 whenever you want to get around to that.

8 Let me leave that for the moment and let's
9 talk about the ongoing/pending cases that have been
10 highlighted in the amended privilege log.

11 I want to understand some basic things. Has
12 the County Attorney given to the ACLU, the Plaintiff, the
13 already closed or declined cases?

14 MS. UGLIETTA: Yes.

15 SPECIAL MASTER SCHNEIDER: Okay. And when
16 giving that to them, was it not in the form of an Excel
17 spreadsheet?

18 MS. UGLIETTA: Yes, it was part of that
19 900,000 rows of data that we gave them.

20 SPECIAL MASTER SCHNEIDER: And what's being
21 withheld are similar Excel spreadsheets but only with
22 respect to cases that are ongoing or pending?

23 MS. UGLIETTA: No. What they are are cases
24 that the prosecutors are still reviewing law
25 enforcement --

1 SPECIAL MASTER SCHNEIDER: They are still
2 open.

3 MS. UGLIETTA: So the charging decision is
4 still open.

5 SPECIAL MASTER SCHNEIDER: The case is still
6 open?

7 MS. UGLIETTA: Not the case, but the
8 submittal is still open.

9 SPECIAL MASTER SCHNEIDER: But it's an
10 ongoing -- I mean it could be -- there's different stages
11 of an ongoing case. It could still be in the police
12 department.

13 MS. UGLIETTA: It's in the pre-charging
14 status.

15 SPECIAL MASTER SCHNEIDER: And submit it to
16 the County Attorney for the County Attorney's decision
17 whether to charge or not. So that's an aspect of ongoing
18 or it could be charged but not resolved. That's an
19 ongoing case.

20 Any one of those is what you are
21 withholding?

22 MS. UGLIETTA: No. We are only withholding
23 the cases -- the information that would identify an
24 individually identifiable defendant and individually
25 identifiable charges where the prosecutor has yet to make

1 a charging decision. So it's pre-charging cases.

2 SPECIAL MASTER SCHNEIDER: So cases that
3 have been charged you gave them?

4 MS. UGLIETTA: Yes.

5 MR. TRIVEDI: Yes.

6 SPECIAL MASTER SCHNEIDER: Let me just make
7 a note. This helps me. There's a couple of categories in
8 the privilege log, ongoing cases.

9 MR. TRIVEDI: Then I think there is a
10 subcategory of information that we talked about on the
11 call that is mixed cases that have some pending charges
12 and some not, and we talked about whether the County would
13 have to extract the closed portions of that, understanding
14 that that's a difficult data-based process, so I just want
15 to remind everybody there's that category.

16 SPECIAL MASTER SCHNEIDER: So let me just
17 capture this for my notes. Defendant has produced closed,
18 declined, and cases -- and withheld cases where the
19 charging decision is not made. If charged, it has been
20 produced. We are talking about Excel spreadsheets is what
21 we are talking about as being produced.

22 I know you told me before case law confirms
23 that the purpose for which you are seeking these public
24 records is not relevant to the inquiry.

25 But, for the life of me, all you are getting

1 on these Excel sheets are names and what the crime is
2 alleged. I mean, what is their value other than the
3 total? You don't have to answer that. You can choose not
4 to.

5 MR. TRIVEDI: No, no. It's a fair question,
6 Your Honor. It's a fair question. And you hit the nail
7 on the head. Aggregated data about what pending charges
8 exist can tell a lot about investigatory practices of the
9 police and charging practices of the County Attorney.

10 SPECIAL MASTER SCHNEIDER: It's only this
11 one little portion that's being withheld.

12 MR. TRIVEDI: That's right. It's this
13 particular subset of cases that are not even yet cases.

14 SPECIAL MASTER SCHNEIDER: Which changes
15 every day, because I don't know if there is a -- is there
16 a recognition that there's an ongoing obligation, so if
17 one of these in that little category of being under review
18 before decision is made about charging the decision is
19 made today we are going to charge or decline, does that
20 then become produceable?

21 MS. UGLIETTA: No, because their public
22 records request was only until 2018.

23 MR. TRIVEDI: And we agree with that. This
24 was a static request.

25 SPECIAL MASTER SCHNEIDER: Right.

1 MR. TRIVEDI: But to your point, it is a
2 subset of information that's about a subset of cases, but
3 I think it yields a lot of important information about
4 what kind of cases are being investigated by the police
5 and being potentially turned down by the County Attorney.

6 And I would just point Your Honor to the Cox
7 Publications case which, as you know, was about law
8 enforcement trying to withhold police reports in ongoing
9 investigations.

10 SPECIAL MASTER SCHNEIDER: In one case or a
11 lot of cases?

12 MR. TRIVEDI: I believe that was about two
13 cases. But the data -- the volume of data --

14 SPECIAL MASTER SCHNEIDER: Those cases were
15 newsworthy.

16 MR. TRIVEDI: I think all cases are
17 newsworthy.

18 SPECIAL MASTER SCHNEIDER: This is not going
19 to be a book that's going to be on the best seller list.
20 But when you talk about the Winnie Ruth Judd murder, that
21 gets a lot of press.

22 MR. TRIVEDI: I hear you, but we think that
23 it's newsworthy in aggregate how the County Attorney does
24 their business.

25 And so I just want to point to the fact that

1 the court of appeals in that case credited the exact same
2 arguments that the County Attorney is making now, that no
3 one should be entitled to information about an ongoing
4 criminal case.

5 SPECIAL MASTER SCHNEIDER: This is Judge
6 Schroeder's opinion?

7 MR. TRIVEDI: I am not entirely sure.

8 SPECIAL MASTER SCHNEIDER: There was one she
9 wrote and there was one that came before that.

10 MS. UGLIETTA: Cox vs. Collins?

11 MR. TRIVEDI: Cox vs. Collins.

12 MS. UGLIETTA: That's the one, isn't it with
13 Zlaket?

14 SPECIAL MASTER SCHNEIDER: Then
15 Judge Schroeder wrote an opinion following that one in
16 which is she says that ongoing stuff is not produceable.
17 It wasn't a holding, but she said that. She later became
18 a Ninth Circuit judge.

19 MR. TRIVEDI: The holding in Cox
20 Publications v. Collins rejected that assertion by the
21 police in that case and said that those were global
22 generalities of the harm that could be caused by producing
23 documents in ongoing cases. This is no different.

24 SPECIAL MASTER SCHNEIDER: But they're not
25 produceable necessarily. I mean you have to do a

1 balancing test.

2 MR. TRIVEDI: Of course. We have to do a
3 balancing test. But the categorical statement --

4 SPECIAL MASTER SCHNEIDER: My next question
5 is, if I am doing a balancing test on this subcategory,
6 what am I looking at?

7 What is there I am going to see on these
8 Excel sheets that is, okay, a bulb is going off? This is
9 either really important to be produced or it should be
10 produced or -- it's just a bunch of names and information
11 that I can't -- it's too much to decipher.

12 MR. TRIVEDI: Well, I think you can decide
13 that the County Attorney has not made a sufficient showing
14 of how producing this information will harm the public.

15 And if you can't make that determination,
16 again, I agree with you. It's just a lot of data. And if
17 you don't believe that they made a showing that that can
18 harm the public, the presumption is that you do produce
19 it. Not that you don't.

20 SPECIAL MASTER SCHNEIDER: Another question
21 that comes to my mind, something you said before. Of all
22 these thousands, I don't know -- of all this bit of
23 information, what percentage of that grand total is this
24 subset? Do you have any idea?

25 MR. TRIVEDI: No idea. We haven't seen it.

1 SPECIAL MASTER SCHNEIDER: Do you have any
2 idea what percentage --

3 MS. UGLIETTA: No, I don't know. I am
4 hopeful that at some point I will be able to respond to
5 his argument.

6 SPECIAL MASTER SCHNEIDER: I am just sorting
7 through my mind the comment -- which counsel did not have
8 to answer -- about why do you need this.

9 The answer I think I understood receiving
10 was it is all the information -- it's additional
11 information that tells the story about charging policies,
12 police activity. And if this little piece, this little
13 subset, is one percent of that total, what are we
14 hollering about?

15 MS. UGLIETTA: Well, you know what, Your
16 Honor? I think that the problem with the data as it's
17 been requested is they are asking for the data as to
18 individual defendants.

19 SPECIAL MASTER SCHNEIDER: They are getting
20 a spreadsheet.

21 MS. UGLIETTA: With the individual
22 defendants' names and submitted charges listed on the
23 spreadsheets.

24 The problem with that is that the defendants
25 are individually identifiable with individually

1 identifiable charges.

2 SPECIAL MASTER SCHNEIDER: It could be
3 redacted.

4 MR. TRIVEDI: Exactly.

5 MS. UGLIETTA: Now, basically if the ACLU's
6 interest in the data is simply to find out how many cases
7 are pending in which there were, you know, felony murder
8 submittals or there were burglary submittals or sex abuse
9 submittals or something, then I can discuss that with the
10 County Attorney. That's not the information request that
11 was submitted to us. They are asking for individual
12 defendant information.

13 SPECIAL MASTER SCHNEIDER: Or you can redact
14 the names of the defendants.

15 MS. UGLIETTA: Yes, we could. And I could
16 find out whether that would be acceptable to the County
17 Attorney.

18 But that type of discussion was never had
19 from ACLU. They have always insisted upon having the data
20 as they requested it.

21 The problem with us producing the data with
22 individual defendants' names listed there with the
23 individual open submitted charges is then you get into the
24 risks to the integrity, to the charging decision, the
25 investigations, the criminal prosecution that we

1 identified in our briefing -- and by the way, the case law
2 does support the withholding of the data in those
3 instances --

4 SPECIAL MASTER SCHNEIDER: Let's assume I am
5 sympathetic to a defendant who has not formally been
6 charged having his or her name out there in the public and
7 subject the obloquy -- to use a word I learned in law
8 school -- that that would cause. Let's assume that I am
9 sympathetic to that.

10 What you are suggesting maybe makes sense to
11 maybe do a timeout right here and let the court reporter
12 rest and let you guys discuss if there is a compromise
13 that can be reached on this little subset.

14 I need to go to the bathroom anyway. So why
15 don't we call a timeout, go off the record and you guys
16 have that discussion, okay?

17 (Recess taken 2:24 p.m. - 2:30 p.m.)

18 MS. UGLIETTA: I was going to tell you
19 during our break we did talk about the open and pending
20 charging decision Excel spreadsheets, and I am going to go
21 back to the County Attorney and discuss with her whether
22 she would find it acceptable to redact personal
23 identifying information and possibly departmental reports
24 which are the police report numbers from the spreadsheet
25 and then provide the sheet to the ACLU, and the ACLU is

1 going to go back and talk amongst themselves about that
2 same issue, so we will come back to you. If it's
3 resolved, good for you and good for us.

4 SPECIAL MASTER SCHNEIDER: Sure. We will
5 table the issue of the open and ongoing cases by
6 stipulation, right?

7 MR. TRIVEDI: Yes, Your Honor.

8 SPECIAL MASTER SCHNEIDER: So you will keep
9 me advised?

10 MR. TRIVEDI: Yes. So Your Honor, unless
11 you have other questions, I would like to go back to the
12 policy question for a minute.

13 SPECIAL MASTER SCHNEIDER: Go ahead.

14 MR. TRIVEDI: So, I would just like to renew
15 --

16 SPECIAL MASTER SCHNEIDER: Let me stop you
17 for a second. From what I previously stated and what I
18 understand, I am going to review the policies and do my
19 balancing.

20 The position they are taking is that some
21 policies that are a little more reflective of
22 decision-making, strategy, the lawyering, as opposed to
23 just we have gun policy. If you have a gun, if you commit
24 a felony you are going to prison, which is a policy I
25 heard that the County Attorney had 20 years ago.

1 It was all over the courthouse. I'm a judge
2 and people are negotiating plea agreements, and I'm
3 sometimes doing settlement conferences and a defense
4 lawyer is telling me, I can't get around this policy.
5 Maybe Ron Reinstein can call the head of the department --
6 that's how it worked.

7 I didn't have the juice that Ron Reinstein
8 had because I didn't come from that environment. Ron had
9 a lot of juice, he was the presiding judge and a really
10 good friend of mine, and he was bailing out situations all
11 the time.

12 That was a policy that I was very familiar
13 with. I don't know if this is one of the policies that's
14 being withheld if it still exists.

15 Policy-wise, if you have a prior conviction
16 and you are using a weapon, firearm, you are going to
17 prison. You are not going to plead that away. It's not
18 going to be probation eligible.

19 That's the kind of -- does that fit into the
20 category of something that's produceable? I haven't
21 looked at the policies.

22 MS. UGLIETTA: You are asking me to
23 speculate on a policy -- any policy that we have been
24 requested to produce, we have withheld on the basis of --

25 SPECIAL MASTER SCHNEIDER: Is that one of

1 the policies that's included in this?

2 MS. UGLIETTA: I would have to look at the
3 privilege log.

4 SPECIAL MASTER SCHNEIDER: Is it one of the
5 policies?

6 MR. TRIVEDI: I don't know. We haven't seen
7 them.

8 SPECIAL MASTER SCHNEIDER: No, but was it
9 requested?

10 MR. TRIVEDI: Yes, that's exactly the kind
11 of thing we are requesting, and that is the kind of thing
12 that is a categorical set of guidance about a particular
13 factual circumstance that has no lawyering involved in it.
14 And, again, I would point out that that is the exact same
15 kind of policy --

16 SPECIAL MASTER SCHNEIDER: So let me just
17 ask you hypothetically. I know there's resistance to
18 answer the question.

19 Hypothetically, if a policy that you as the
20 County Attorney is considering whether or not to produce
21 articulated as to what I just described -- we have a
22 policy. Our gun policy is if you have committed a felony
23 and you now are charged with committing one while using a
24 weapon, the policy of the County Attorney's office is that
25 you are not going to be probation eligible. My question

1 hypothetically is, is that something that would be
2 produceable or withheld?

3 MS. UGLIETTA: Any plea policy that has not
4 previously been produced or made public in some form or
5 fashion we are withholding. They are strategic in terms
6 of criminal litigation.

7 SPECIAL MASTER SCHNEIDER: Is what I just
8 described strategic?

9 MS. UGLIETTA: I would argue that it could
10 be.

11 SPECIAL MASTER SCHNEIDER: Could be.

12 MS. UGLIETTA: Because, depending upon where
13 it fits within the plea policy that you are discussing, it
14 could be one of many factors that are considered by the
15 prosecutors in determining whether to get an aggravated
16 sentence or whatever it might be.

17 So, this is the prosecutor's roadmap to plea
18 bargaining. The defense lawyer's roadmap is not disclosed
19 to us. It is considered work product --

20 SPECIAL MASTER SCHNEIDER: I am narrowly
21 describe a hypothetical policy that I understood actually
22 existed and was modified more often than once. I never
23 knew why there was a policy. It was a hammer that was
24 being used by the prosecutor for whatever.

25 But the policy as I understood it -- I never

1 read it -- was what I described. If you have a conviction
2 of a felony and now you are accused of committing a crime
3 with a weapon, probation is not available. We will not
4 stipulate. Because as we all know sitting in this room
5 there are, I don't know, percentage-wise countless
6 defendants who have prior felony convictions who plead to
7 probation eligible offenses. They don't get stacked.
8 That happens every day down at the courthouse. That's
9 part of the negotiation process.

10 The statute says if you are convicted with a
11 prior felony conviction, other than maybe a drug offense,
12 you are going to prison. You are not probation eligible.
13 Am I right about that?

14 MS. UGLIETTA: I haven't memorized the
15 policies.

16 SPECIAL MASTER SCHNEIDER: If the conviction
17 by the jury is you are convicted of this offense and we
18 also find -- because there's always evidence presented --
19 that you were convicted of another felony, you are not
20 probation eligible. Am I right?

21 MS. UGLIETTA: Yes.

22 SPECIAL MASTER SCHNEIDER: Okay, that's
23 charged all the time every day. Dozens. And a large
24 percentage -- I have no idea what -- gets a plea that says
25 I will plead to this offense, not to the priors, and I am

1 going to probation. Happens every time -- all the time.

2 We all as judges understood -- and I don't
3 come from the criminal justice arena. I was a civil
4 practitioner before I was appointed as a judge. I handled
5 maybe a neighbor who had a DUI. I didn't even want to
6 touch that.

7 I had no idea what Rule 10 meant. I had no
8 idea what the lexicon -- I walked on that bench and I was
9 scared to death. I was already on the bench for three or
10 four years. But when I walked into criminal oh, my God,
11 what is this world? And I was probably -- I'll make this
12 comment. I would look out on my morning calendar and I
13 would see the prosecutors. I would see -- this is in the
14 old days -- the chain gang and all assembled at once, not
15 in a little room coming out one at a time in their little
16 uniforms.

17 I would see the defense bar on the other
18 side. And I would see the family, the victims, all
19 assembled in this courtroom. And I would look out and I
20 would say, of all the people in this courtroom, I know the
21 least about how this process works.

22 Six months down the road I was asked by
23 little, tiny baby lawyers, prosecutors, and defense
24 lawyers, Could I see you in chambers, Judge? And they
25 wanted advice from this wizened old man. It was a

1 learning curve for me.

2 Everybody knew -- even dummies like me knew
3 about the gun policy. And maybe some other policies.
4 They were out there. Maybe not the actual document, but
5 they were out there.

6 I still go back to my hypothetical -- I know
7 you're resisting it. But if the hypothetical was as
8 simple as we have a policy as I described, I am asking you
9 right now if you would tell me -- and you are obviously
10 declining and I keep pressing it -- is that something that
11 could be produced under your framework or not?

12 MS. UGLIETTA: The County Attorney's
13 position is that none of the plea policies are
14 discoverable under public records law because they set
15 forth her discretionary factors that the prosecutors are
16 to consider in evaluating defense plea offers.

17 SPECIAL MASTER SCHNEIDER: Let me stop you
18 for a second. The policy as I understood it, as
19 articulated, there was no discretion.

20 You didn't have Ron Reinstein call and ask
21 somebody who is a supervisor, hey, can we get a break in
22 this case? The policy as declared was nondiscretionary.

23 If that is the written policy that contains
24 no discretion, is it produceable?

25 MS. UGLIETTA: Our position is that our plea

1 policies are not discoverable regardless --

2 SPECIAL MASTER SCHNEIDER: You are a good
3 soldier.

4 MS. UGLIETTA: I don't believe the
5 discretionary versus mandatory is --

6 SPECIAL MASTER SCHNEIDER: You used that
7 word.

8 MS. UGLIETTA: I know, because many of our
9 plea policies do have discretionary factors. Even if it
10 was the County Attorney advising her attorneys that in
11 this particular type of instance this is what you shall
12 do, that is her work product and it's prepared in
13 anticipation of criminal litigation.

14 SPECIAL MASTER SCHNEIDER: That's not what
15 is being asked. They are asking you for the written
16 policy.

17 If the written policy only says what I
18 said -- I understood the policy to mean prior felony
19 conviction, alleged to have used a weapon in this one, no
20 probation. If that's all it said --

21 MS. UGLIETTA: It's the same answer. No, we
22 would not produce it voluntarily.

23 SPECIAL MASTER SCHNEIDER: It's not
24 discretionary.

25 MS. UGLIETTA: It is her --

1 SPECIAL MASTER SCHNEIDER: As written.

2 MS. UGLIETTA: -- plea policy that is
3 protected by work product. And the same is when the
4 defense bar sit together and say in these instances we are
5 always going to go -- the public defenders office can say
6 we are always going to ask for this plea offer.

7 I don't know what that policy is, and I
8 don't have the right to get it any more than they have the
9 right to get our plea policies.

10 SPECIAL MASTER SCHNEIDER: I'm not sure a
11 public defender's office's materials are public records.
12 There is a lot of constitutional issues.

13 MS. UGLIETTA: If they were, they would be
14 work product.

15 MR. TRIVEDI: In either case --

16 SPECIAL MASTER SCHNEIDER: That's not what's
17 before us now.

18 MS. UGLIETTA: Our plea policies, just like
19 their plea policies, whatever they might be, they are
20 prepared in anticipation of litigation and they contain
21 work product.

22 SPECIAL MASTER SCHNEIDER: Let me put a
23 ribbon on this issue, unless anybody wants to say
24 anything, but I don't think I need to hear anything.

25 On this particular issue, as I said before,

1 I am going to look at the policies. All I am seeing is
2 the writing on that piece of paper or on that disk.

3 I am not into the mind of the County
4 Attorney or the supervisor or the line attorney who is in
5 my courtroom. I am not getting into that.

6 If the policy says what I just described
7 that's nondiscretionary, doesn't contain any legal
8 analysis, doesn't contain any strategy, it just states
9 this is the County Attorney's policy, you are likely to be
10 ordered by me, advisory only, to produce that. That's
11 what I am saying. And I will look at those policies in
12 that -- through that prism.

13 MS. UGLIETTA: Yes, you would look at it
14 from the perspective of is it or is it not work product.
15 Does it or does it not set forth strategy,
16 recommendations, advisements.

17 SPECIAL MASTER SCHNEIDER: What I am trying
18 to get you to answer, and I understand and appreciate that
19 you don't and aren't, you are a good soldier and I
20 appreciate that, is whether that policy I described is
21 work product or not.

22 MS. UGLIETTA: And we would say that it is.

23 MR. LEVINE: Just in the way of background,
24 because maybe I know less about it right now, are you
25 saying this is a policy where it says you can't get

1 straight paper for this offense --

2 SPECIAL MASTER SCHNEIDER: You can't get
3 what?

4 MR. LEVINE: You can't get probation only.
5 Are you saying --

6 SPECIAL MASTER SCHNEIDER: You are going to
7 prison, is what I understood the policy --

8 MR. LEVINE: Are you saying that's the state
9 law that the --

10 SPECIAL MASTER SCHNEIDER: No, it was the
11 policy of the Maricopa County Attorney's office that when
12 they had any defendant either charged or about to be
13 charged -- charged, I guess, because now it's ripe.

14 If that defendant used the weapon in this
15 offense, new offense, and has a prior felony conviction
16 other than drug offenses, marijuana, that kind of stuff,
17 because that wasn't -- that's a whole other can of
18 worms -- but they had a prior for which they would then,
19 if tried and convicted of the prior, would have to go to
20 prison. The point is if you use a gun and you had a prior
21 you are going to prison. That was the policy.

22 MR. LEVINE: And that policy would be by the
23 County Attorney?

24 SPECIAL MASTER SCHNEIDER: The County
25 Attorney's office.

1 MR. LEVINE: That would be in her or his
2 discretion, so it would be discretionary --

3 SPECIAL MASTER SCHNEIDER: No, no, no, no.
4 There was a written policy that said that. This is the
5 policy of the Maricopa County Attorney's Office, what I
6 just described.

7 There's no discretion. The discretion is
8 whether to apply it in a particular case. And they are
9 not asking for that. They are asking for the written
10 policy.

11 MR. LEVINE: But isn't the policy
12 discretionary upon what the County Attorney determines --

13 SPECIAL MASTER SCHNEIDER: No. It's
14 written. It's a policy.

15 MR. LEVINE: Right, but before it becomes a
16 policy --

17 SPECIAL MASTER SCHNEIDER: No. It is a
18 policy. It's not before it becomes a policy.

19 MR. LEVINE: I guess what I'm trying to say
20 is before it becomes a policy someone has to consider it.

21 SPECIAL MASTER SCHNEIDER: Fine. But they
22 wrote a policy. It's black and white. No discretion.

23 MS. UGLIETTA: Your Honor, I would say that,
24 again, the case law does not support any kind of
25 distinction on the basis of a policy that is generally

1 applicable to an office of prosecutors versus a policy
2 somehow being implemented in a particular case.

3 The case law is that when you have a
4 recurring circumstance --

5 SPECIAL MASTER SCHNEIDER: They are not
6 asking for that. They are asking for the written policy,
7 period. Am I right?

8 MR. TRIVEDI: Yes, Your Honor.

9 MS. UGLIETTA: Yes, but my point is that the
10 written policy nonetheless can still be work product and
11 protected from disclosure. Even though it's policy,
12 there's no categorical exemption.

13 SPECIAL MASTER SCHNEIDER: All right, I
14 surrender, but I don't give up my position. I surrender.
15 I don't want to hear anymore. I disagree with that.

16 I think that's a clear case of no work
17 product, no legal analysis. It's an established policy of
18 the Maricopa County Attorney's Office.

19 This particular instance, everybody knew
20 about it. I don't know if it's still the policy or not,
21 but everybody knew about it. Every criminal defense
22 lawyer, every judge, every defendant sitting in a
23 courtroom knew about it.

24 MS. UGLIETTA: Your Honor, you have the
25 policies to review, and my understanding is you are going

1 to review them on their individualized basis?

2 SPECIAL MASTER SCHNEIDER: I am giving you a
3 head's up. If I see that particular policy or others like
4 it, that's going to be my result. And I will try to be as
5 consistent as possible on that.

6 Although, in the words of Ralph Waldo
7 Emerson, "a foolish consistency is the hobgoblin of little
8 minds."

9 MR. TRIVEDI: Multitudes.

10 SPECIAL MASTER SCHNEIDER: He also said
11 something about that? I am not aware of that one. You
12 have to be consistent. But the thing about what Emerson
13 is is it's a foolish consistency and they leave that
14 adjective.

15 All right. So where are we? We now have
16 under advisement the open cases. We now have kind of gone
17 through the policies as I will review them.

18 MR. TRIVEDI: I think, Your Honor, the last
19 question is about the capital review committee materials,
20 and we have already sort of discussed that there may be
21 legitimate work product in there but it's incumbent upon
22 Your Honor to review them to see if there are pieces that
23 are disclosable and which are not, in which case they
24 would be produced in redacted form. I think we all agree
25 on that principle and that you will review them with that

1 eye.

2 The last question is about capital review
3 committee members and votes which we have argued, and
4 there is case law to support the notion, that these sort
5 of binary pieces of information certainly are not work
6 product. They in and of themselves don't contain analysis
7 or anything like that.

8 SPECIAL MASTER SCHNEIDER: If you are going
9 to cite to me the ASU case, I don't think that's
10 applicable. I think it's so distinguishable from what you
11 are asking for.

12 MR. TRIVEDI: Okay.

13 SPECIAL MASTER SCHNEIDER: If you want, I
14 will try to articulate why.

15 MR. TRIVEDI: Please do.

16 SPECIAL MASTER SCHNEIDER: This was a public
17 search conducted for the appointment of the president of a
18 public university out in the open that the public has a
19 great interest in who that person is going to be and to
20 withhold the names of the applicants -- I didn't read the
21 whole decision, but to me it brings up, well, you are
22 stifling the public input on who should get this
23 appointment.

24 It should be open to the public. The public
25 should be able to participate. I don't see that as being

1 applicable to an in-house internal process to review
2 capital cases whether they are going to be capital cases
3 or not. I don't see the public having the same interest.

4 MR. TRIVEDI: Right. So I agree with your
5 characterization of the ASU case, and I agree that that
6 case was about -- had high public interest, and I believe
7 that whether or not the County Attorney is deciding to put
8 someone to death is of equal or more public interest, and
9 I respectfully disagree with the characterization that
10 it's somehow in-house.

11 They are a public agency. The documents
12 that they create are presumptively public. And their
13 deliberations, short of legitimate work product, right,
14 but the identities of the people who are doing that are
15 necessarily public if they are contained in a public
16 document.

17 Now, again, what their deliberations are,
18 and if they are conducting work product when they are
19 doing it, that's a reasonable discussion to have.

20 The members of the committee, just like the
21 County Attorney herself and line prosecutors within the
22 office, they don't retain any sort of protection from
23 being identified, nor do their decisions, final decisions,
24 have any protection from being identified.

25 They make important, final decisions every

1 day -- what we are going to recommend for a sentence,
2 whether we are going to seek bail, what charges we are
3 going to seek. Those all could be described as in-house
4 but are in fact --

5 SPECIAL MASTER SCHNEIDER: But they are
6 making those decisions on the record in a courtroom with a
7 court reporter present or in a memorandum filed as a
8 public document.

9 MR. TRIVEDI: Well, respectfully, not all
10 those are public. What to offer as a plea --

11 SPECIAL MASTER SCHNEIDER: Well, that's
12 different.

13 MR. TRIVEDI: Whether to offer diversion.

14 SPECIAL MASTER SCHNEIDER: You are
15 describing their decisions as to what to argue for in
16 front of a tribunal is public. That's what they are
17 saying out front that the public can hear and listen in
18 on.

19 Here's the reality of making this -- doing
20 this review of these materials. I think there's 80-plus
21 pages. I looked at like three or four pages. I didn't
22 look at them real closely. But you are going to get
23 nothing. Out of the three or four pages I looked at, it
24 was Prosecutor says that this case is okay for this
25 because of whatever. You are not going to get that.

1 MR. TRIVEDI: Understood.

2 SPECIAL MASTER SCHNEIDER: The stuff that's
3 left, as my grandmother would say, gornisht helfen. Okay?
4 That's Yiddish for there's nothing there, it's garbage.

5 MR. TRIVEDI: Your Honor, I am agreeing with
6 you as to the memos. The --

7 SPECIAL MASTER SCHNEIDER: Now we are
8 talking about the names.

9 MR. TRIVEDI: Individual identities and
10 votes. That's it.

11 SPECIAL MASTER SCHNEIDER: All right. You
12 said your piece. Let me hear from these guys why
13 individual identities should not be produced.

14 MS. UGLIETTA: Your Honor, first of all, the
15 case law --

16 SPECIAL MASTER SCHNEIDER: Excuse me, can
17 you translate gornisht helfen?

18 MS. UGLIETTA: The records that are at issue
19 in the capital review records in the public records
20 request are -- they asked for our capital review committee
21 memoranda to the County Attorney. They asked for --

22 SPECIAL MASTER SCHNEIDER: Which they
23 understand is almost entirely work product. Go ahead.

24 MS. UGLIETTA: The voting records and then
25 the capital review committee prosecution policies and

1 homicide policies which have --

2 SPECIAL MASTER SCHNEIDER: That's in the
3 policy camp.

4 MS. UGLIETTA: Right. That's in the policy
5 camp.

6 I will say that State vs. Appellate, which
7 is an Arizona Supreme Court decision, did explicitly say
8 that a criminal defendant, who I would imagine has the
9 most interest in understanding why capital sentencing
10 allegations were asserted, State vs. Appellate case, the
11 Arizona Supreme Court held that that capital defendant did
12 not have the right to either the capital review criteria
13 policies or the recommendation --

14 SPECIAL MASTER SCHNEIDER: I remember when
15 that case came down. I think I was on the bench and I
16 think Feldman wrote it, and I remember everybody around
17 the courthouse for a long time were scratching their heads
18 for a long time. I didn't read it exhaustively, but I
19 think the issue in that case was whether the defendant had
20 a constitutional right to see that memorandum.

21 MR. TRIVEDI: Correct.

22 MS. UGLIETTA: Yes.

23 SPECIAL MASTER SCHNEIDER: That's a
24 different animal from public records review.

25 MS. UGLIETTA: But you are going to be

1 looking at this information from the perspective of our
2 contention is contrary to the best interest of the state.

3 They claim the public has a great interest
4 in knowing this information. However, even in the context
5 of a defendant, an individual defendant, who was asserting
6 constitutional issues, the Arizona Supreme Court rejected
7 that argument.

8 Same thing in that McCleskey case at the
9 U.S. Supreme Court level. Again, you are not going to get
10 that information. Okay.

11 And then we have the Ninth Circuit cases,
12 U.S. vs. Fernandez, U.S. vs. Taylor, U.S. vs. Furrow.
13 Those are all cited in our brief.

14 In none of those cases was the defendant
15 permitted to have these types of records that the ACLU
16 contends they are permitted to have under public records
17 law.

18 SPECIAL MASTER SCHNEIDER: You are still now
19 talking about policies?

20 MS. UGLIETTA: I'm talking about the capital
21 review committee records. Like, for example, in all of
22 those cases in the Ninth Circuit, the defendant was
23 looking for the recommendation memorandum and all of the
24 records that underlie the district attorney's decision
25 whether or not to pursue death penalty sentencing in a

1 case.

2 And in all of those cases the courts have
3 found that, first of all, those records are work product
4 and then, secondly, they found that they cannot be
5 produced because of the chilling effect on the
6 deliberative process which led to the final
7 decision-making.

8 Finally, what they found was that when a
9 prosecutor such as the County Attorney exercises
10 prosecutorial discretion, makes her decision whether or
11 not to seek death penalty in a particular case, that that
12 in and of itself is not a sufficient reason for a
13 defendant to know the reasoning behind her decision.

14 There's no constitutional issue that drives
15 that. Therefore, the public also wouldn't have a
16 sufficient reason.

17 SPECIAL MASTER SCHNEIDER: Let me narrow
18 this down a little bit. We started talking about the
19 names of the committee members and how they voted. Now we
20 have broadened it into the policies and the memoranda.

21 MS. UGLIETTA: Uh-huh.

22 SPECIAL MASTER SCHNEIDER: I understand my
23 task will be to look at the capital committee memoranda
24 and determine whether that's produceable. And from where
25 I am sitting right now, likely that's heavily work product

1 and not to be produceable. And I am anticipating that the
2 Plaintiff expects that to happen.

3 What they are now started talking about was
4 something much more discreet. Can you be required to
5 produce the name of the members and how they voted?

6 MS. UGLIETTA: No. We cannot be required to
7 do that.

8 SPECIAL MASTER SCHNEIDER: These cases don't
9 apply to that?

10 MS. UGLIETTA: Those cases do not discuss
11 that, but they can be applied as an analogy to that
12 particular issue because the voting records and the names
13 of the individual committee members are all part of the
14 deliberative process.

15 And part of the deliberative process
16 privilege or the policies that underlie the deliberative
17 process privilege is that you don't want to chill the
18 frankness and thoroughness and thoughtfulness of the
19 committee members' discussions about these issues, their
20 recommendations to the County Attorney, and would include
21 their voting because the votes themselves reflect each
22 individual's reflection on what they have heard in
23 committee.

24 SPECIAL MASTER SCHNEIDER: What do you base
25 the conclusion that you are suggesting that there would be

1 a chilling effect if this were made public?

2 MS. UGLIETTA: Well, if I were a member of
3 that committee and I knew that my voting record on any
4 particular case was going to be made public, then I would
5 be certainly concerned about how I voted on a case,
6 because then if I felt that for whatever reason that's
7 discussed in the committee and I believed as a senior
8 prosecutor that that case should not go forward on death
9 penalty allegations and I vote no, then if the County
10 Attorney -- let me finish.

11 If the County Attorney then decides opposite
12 of what I said and that record is produced, then the
13 defense lawyer is going to use that record to try to
14 create some kind of issue at the jury trial to say, well,
15 the County Attorney was advised no by at least this one
16 person so I am going to call that person into trial and I
17 am going to, you know, cross-examine her on her vote.

18 SPECIAL MASTER SCHNEIDER: Cross-examine
19 who, the County Attorney?

20 MS. UGLIETTA: The committee member, that it
21 will chill --

22 SPECIAL MASTER SCHNEIDER: If that happens,
23 my understanding of evidence and trial procedure would
24 just blow up. But anyway, let me go back.

25 MS. UGLIETTA: That's our position on it

1 that --

2 SPECIAL MASTER SCHNEIDER: This horror that
3 you are going to see the County Attorney on the witness
4 stand being cross-examined --

5 MS. UGLIETTA: No, not the County Attorney.
6 The member of the committee.

7 SPECIAL MASTER SCHNEIDER: Well, that's a
8 county attorney, isn't it?

9 MS. UGLIETTA: Deputy county attorney.

10 SPECIAL MASTER SCHNEIDER: You have
11 nonmembers of the County Attorney's office --

12 MS. UGLIETTA: It's a deputy county
13 attorney.

14 SPECIAL MASTER SCHNEIDER: Are there
15 nonmembers of the County Attorney's office --

16 MS. UGLIETTA: They are members of the
17 office.

18 SPECIAL MASTER SCHNEIDER: I want to go
19 back. Does the public know who the members are right now?

20 MS. UGLIETTA: No.

21 SPECIAL MASTER SCHNEIDER: I just have -- I
22 don't think it would be a surprise to disclose who the
23 members are. I think everybody in the courthouse knows
24 that.

25 MS. UGLIETTA: No, they don't.

1 SPECIAL MASTER SCHNEIDER: Yeah, they do.
2 Those names I saw, they were not a surprise to me.

3 MS. UGLIETTA: There's no evidence of that.
4 They haven't produced any evidence of that, and as far as
5 I understand that is not public record.

6 SPECIAL MASTER SCHNEIDER: So you don't want
7 the names of these people, nor how they voted?

8 MS. UGLIETTA: Correct.

9 SPECIAL MASTER SCHNEIDER: And just the
10 public knowing their names, you see the same horror of a
11 chilling effect just by being on that committee?

12 MS. UGLIETTA: Every time that there is a
13 death penalty trial those people can expect to be called
14 or harassed in some way by the defense bar. They will be
15 harassed by members of the media. Their individual --

16 SPECIAL MASTER SCHNEIDER: So right now it's
17 sufficient that only the County Attorney is harassed?
18 Because the County Attorney everybody knows okayed --

19 MS. UGLIETTA: The County Attorney is
20 responsible as the final decisionmaker. Her decision as
21 the final decisionmaker is known to the public. It is
22 filed as a Notice of Intent by statute.

23 SPECIAL MASTER SCHNEIDER: And even though
24 she is going to be harassed, she wanted to have this
25 position?

1 MS. UGLIETTA: She is making her decision
2 known. That decision then is litigated in court, when the
3 public can attend court if they have any further interest
4 in the matter.

5 The Arizona Supreme Court found in State vs.
6 Scott that a Notice of Intent which identifies the County
7 Attorney's decision, the statutory aggravators, and --

8 SPECIAL MASTER SCHNEIDER: The County
9 Attorney's decision?

10 MS. UGLIETTA: Yes, the County Attorney's
11 decision, the statutory aggravators, and the bases --
12 evidentiary bases for that decision, that Notice of Intent
13 is sufficient to protect the defendant's due process
14 interest and his right to know what was the basis of the
15 County Attorney's decision.

16 The public don't have any more interest or
17 right than that defendant in State vs. Scott or the
18 defendant in McCleskey vs. United States.

19 In all of those cases, this process is
20 regarded to be work product and deliberative process
21 privilege. And that is the law.

22 SPECIAL MASTER SCHNEIDER: The case again
23 that says it's work product that have the names of the
24 committee members known, what case is that?

25 MS. UGLIETTA: That is not in the cases. No

1 one has ever asked for that in the cases I have read.

2 SPECIAL MASTER SCHNEIDER: I thought you
3 just said in your last sentence that the cases say that
4 the work product is whatever.

5 MS. UGLIETTA: That is true. The work
6 product privilege applies to this process and all the
7 records in relation to the process.

8 SPECIAL MASTER SCHNEIDER: You are candidly
9 admitting to me that there is no case on point that says
10 the names of the committee member, the capital membership
11 committee's situation that the names are work product.

12 MS. UGLIETTA: Our records which are
13 protected -- it is our position our records that are
14 protected under those cases do include voting records. My
15 assumption is these other cases under the DOJ's process
16 likewise have a voting record.

17 SPECIAL MASTER SCHNEIDER: Let me understand
18 what you just said. Your record meaning the Maricopa
19 County Attorney's Office records has these as being
20 confidential or privileged?

21 MS. UGLIETTA: Yes.

22 SPECIAL MASTER SCHNEIDER: Okay. Obviously.
23 But you are not the final arbiters of that. The Court is.

24 MS. UGLIETTA: Yes. But this is just our
25 position.

1 SPECIAL MASTER SCHNEIDER: Of course it's
2 your position.

3 MS. UGLIETTA: So you can analogize from
4 those cases in the same way that I just discussed, that if
5 you were to require or if the Court were to require the
6 publication of our voting records from members of the
7 capital review committee, then what would be the result is
8 the chilling effect that is the subject of the
9 deliberative process privilege.

10 Those members may not -- they may not be
11 feeling that they can be as frank and candid with the
12 County Attorney in making their recommendation and
13 providing their vote if they know that their names and
14 their votes will be made public and then that can be used
15 against the State in a prosecution case --

16 SPECIAL MASTER SCHNEIDER: How is it going
17 to be used against the State? This image of a County
18 Attorney being cross-examined, is that how it's going to
19 be used?

20 MS. UGLIETTA: It could be. They --

21 SPECIAL MASTER SCHNEIDER: It can't be.

22 MS. UGLIETTA: Defense lawyers make up
23 litigation all over the place.

24 SPECIAL MASTER SCHNEIDER: The judge
25 wouldn't hear of that.

1 MS. UGLIETTA: Well, that's the problem. We
2 don't know, and that's the risk. And the point is that
3 that is why the deliberative process privilege exists so
4 that you don't have that chilling effect in a deliberative
5 process like this one. The only person whose decision
6 matters is the County Attorney's decision.

7 SPECIAL MASTER SCHNEIDER: What would be
8 interesting for me is to have one of these people that I
9 know give me an affidavit to the effect that my name being
10 public as a member of this committee would have this
11 whatever effect on me.

12 I don't have that. I have your speculation
13 that these people think that. That's not part of any
14 record that's in front of me.

15 And I'm frankly skeptical that these people
16 that I know that are on that list would care one whit
17 about their name being made public as a member of this
18 committee. How they vote? Maybe I am skeptical that they
19 would actually care about that.

20 Now, maybe the County Attorney thinks
21 whatever she thinks and is directing you to articulate,
22 but I really wonder if these people would be chilled in
23 any way. Is there any thought of giving me an affidavit
24 or two under seal that I can see?

25 MS. UGLIETTA: I can discuss that with the

1 County Attorney.

2 SPECIAL MASTER SCHNEIDER: Okay.

3 If that's the case -- I just thought of that
4 this moment after hearing you articulate your reasons --
5 then I may not decide this issue until I know if I am
6 being furnished with that information or not. And if I am
7 I want to see what it says.

8 Go ahead. Anything you want to say in
9 response to all this?

10 MR. TRIVEDI: Not much, Your Honor. I think
11 you are there.

12 SPECIAL MASTER SCHNEIDER: Don't assume from
13 what I have been asking and whatever that I'm inclined to
14 give you the names of these people and how they vote.

15 MR. TRIVEDI: I meant that your questions
16 elicited your understanding of the issues.

17 I would point out that the deliberative
18 process privilege is not recognized in Arizona law.

19 Second, speculative harms are not sufficient
20 under *Star Publishing vs. Pima County Attorney's Office*
21 that's 891 P.2d 899.

22 I would reiterate that every case they cite
23 is not a public records case. And I think that's it.

24 SPECIAL MASTER SCHNEIDER: Just another
25 thought that popped into my head. Would it be an

1 acceptable compromise for the Plaintiff to know not the
2 names but whether it was a 5/4 or 6/3 or whatever vote?

3 MR. TRIVEDI: We'd consider it.

4 SPECIAL MASTER SCHNEIDER: Would that be
5 something that the County Attorney would consider doing or
6 something you obviously would get guidance from?

7 MS. UGLIETTA: I would have to ask her, but
8 my assumption is that she would not be willing to do that.
9 But I can ask her. Because, again, it's deliberative
10 process privilege as to what the voting was of the
11 individual committee members.

12 SPECIAL MASTER SCHNEIDER: If the public
13 doesn't know the names and doesn't know which way anybody
14 voted, what's the chilling effect?

15 MS. UGLIETTA: The chilling effect is that
16 this is information that is part of the deliberative
17 process.

18 What it shows -- the votes say it's 5/4, 5
19 in favor, 4 against. What that shows is that there was
20 some member of the committee that didn't believe that this
21 particular defendant should have a Notice of Intent filed.

22 And then it goes up to the County Attorney
23 and the County Attorney disagrees with the four and she
24 agrees with five and she issues her final determination
25 and they file a Notice of Intent.

1 Meanwhile this record of a vote is made
2 public and then the defense bar uses it in whatever form
3 or fashion they want to to create a dispute about the
4 validity of the County Attorney's decision, when in fact
5 the Arizona Supreme Court has already held that the Notice
6 of Intent, the statutory factors, and the bases for the
7 decision is sufficient to explain the legitimacy of the
8 County Attorney's decision.

9 SPECIAL MASTER SCHNEIDER: For a defendant's
10 constitutional rights it's sufficient.

11 MS. UGLIETTA: Yes. And that would then
12 mean that the public's right to know -- that doesn't trump
13 constitutional rights.

14 And if a defendant's constitutional rights
15 are satisfied by Notice of Intent, the public's right to
16 know is also satisfied.

17 They don't have the right to get into the
18 weeds of the County Attorney's deliberative process. And
19 there is not case law in Arizona that rejects the
20 deliberative process privilege. It's just not yet been
21 adopted.

22 MR. TRIVEDI: We will agree to that.

23 MS. UGLIETTA: Either way.

24 MR. TRIVEDI: Even if one day it's adopted,
25 it is about deliberations, not final decisions, and by

1 definition a vote is a final decision.

2 MS. UGLIETTA: No. The County Attorney
3 makes the final decision in relation to the Notice of
4 Intent.

5 MR. TRIVEDI: I thought we weren't
6 addressing each other.

7 MS. UGLIETTA: A member of a committee, all
8 they are doing is voting whether to make a recommendation.
9 They are not making a final decision of anything. They
10 are not the County Attorney. They don't have that
11 statutory ability.

12 SPECIAL MASTER SCHNEIDER: It's a
13 convenience to the Maricopa County Attorney to create this
14 committee because ultimately the County Attorney has the
15 prerogative to make the final decision.

16 And conceivably there could be however many
17 members all vote no and the County Attorney can still vote
18 yes as to whether we are going to pursue the death
19 penalty, am I correct?

20 MS. UGLIETTA: Yes.

21 SPECIAL MASTER SCHNEIDER: So this committee
22 process is not required by any law?

23 MS. UGLIETTA: Right.

24 SPECIAL MASTER SCHNEIDER: It's a pure
25 internal convenience to the County Attorney to get

1 feedback, in a somewhat more formal way than just picking
2 up the phone or emailing somebody and saying, hey, what do
3 you think about this. It's a formalized process, but it's
4 not required anywhere.

5 MS. UGLIETTA: That's true.

6 MR. KEENAN: If I may, assuming we came to
7 this compromise where we know the vote, the number, five
8 yes, four no, whatever, and nothing else, I have heard no
9 articulation of any harm that that would cause because,
10 one, it can't cause a chilling effect because the public
11 wouldn't know who's voting which way.

12 And the idea that the general defense
13 attorneys are going to do something shady with it? The
14 courts aren't going to overturn the County Attorney's
15 notice of filing for death because the vote is out there,
16 right? There's no basis in the law for a defense attorney
17 to be able to use this in any way to hinder a death
18 prosecution.

19 SPECIAL MASTER SCHNEIDER: In addition to
20 that, you are only asking about older cases. You are not
21 asking about open, current cases. You ended in 2018 or
22 whenever it was. So this information, if it were out
23 there, would have no applicability to any pending case.
24 Or am I wrong?

25 MS. UGLIETTA: The information you are

1 talking about is the voting record?

2 SPECIAL MASTER SCHNEIDER: If the public
3 knew that from this discrete period of time, 2013 to 2018,
4 what the numbers were, 5/4, 6/2, whatever, those cases are
5 not current. They are not around anymore.

6 MS. UGLIETTA: No, that's not accurate.
7 Most defendant penalty cases of course survive in the
8 court for years and years and they can come back. The
9 other thing that happens --

10 SPECIAL MASTER SCHNEIDER: But the danger
11 you see about the public knowing this and using it against
12 the County Attorney, I don't see how that part survives
13 the post-conviction process.

14 MS. UGLIETTA: It could, because the issue
15 is -- first of all, after a Notice of Intent is filed,
16 let's say, and then a case proceeds in the trial court, at
17 some point the defense lawyer may ask for a review of the
18 Notice of Intent or the County Attorney may ask for a
19 review of the Notice of Intent.

20 So that Notice of Intent decision can be
21 reviewed even as the case is in trial, okay, and then the
22 County Attorney may decide to withdraw the Notice of
23 Intent.

24 SPECIAL MASTER SCHNEIDER: But none of the
25 cases we are talking about are in trial.

1 MS. UGLIETTA: Yes, they probably are or
2 they will be.

3 SPECIAL MASTER SCHNEIDER: All right. Maybe
4 there is a carve-out to what I am suggesting as a
5 compromise as to any case that's still in the trial stage
6 you don't produce that information.

7 MS. UGLIETTA: And then you have the other
8 issue of, as you said, the appeal process. So let's say
9 it goes up and down to the courts of appeal and at some
10 point they say this needs to go back --

11 SPECIAL MASTER SCHNEIDER: Let me ask you
12 this. If that happens and it's remanded for a new trial,
13 does the -- maybe you don't want to answer this because
14 this may be divulging something internal.

15 My question is, if it is remanded, is there
16 a new capital committee process instigated?

17 MS. UGLIETTA: I think that it's known that
18 when a case is sent back on remand that the County
19 Attorney very often will have a review of the Notice of
20 Intent.

21 SPECIAL MASTER SCHNEIDER: Brand new.

22 MS. UGLIETTA: Well, it will be a review of
23 the Notice of Intent and all of the information known up
24 until then will be considered.

25 SPECIAL MASTER SCHNEIDER: It wouldn't be

1 this meeting --

2 MS. UGLIETTA: Yeah, there would be a new
3 meeting.

4 SPECIAL MASTER SCHNEIDER: So there would be
5 a new determination.

6 MS. UGLIETTA: Yes.

7 SPECIAL MASTER SCHNEIDER: And what I am
8 suggesting is that that new determination on a remand
9 would not be captured by a case that's no longer in the
10 trial category.

11 MS. UGLIETTA: Nonetheless, that information
12 if it's produced now and then later goes up on appeal and
13 comes back down, it's going to be out there in the world
14 and can be used in the next trial.

15 SPECIAL MASTER SCHNEIDER: Can't be
16 appealed. It can only be a post-conviction relief. You
17 don't have unlimited time to appeal, right? You have a
18 limited time to appeal.

19 MS. UGLIETTA: I am saying that whether you
20 are doing PCR or doing habeas corpus or whatever you are
21 doing --

22 SPECIAL MASTER SCHNEIDER: That's not an
23 appeal.

24 MS. UGLIETTA: It can still come back to
25 trial.

1 SPECIAL MASTER SCHNEIDER: A case that
2 was -- a death sentence was issued in 2015. This
3 defendant is sitting on death row, probably has filed a
4 bunch of PCRs that allege ineffective assistance of
5 counsel and the whole kitchen sink of all the different
6 things, and now this defendant hears about the fact that
7 there was a 5/4 vote by the committee that was convened in
8 his prosecution.

9 What does he do with that, anything? What
10 can he do? I mean they file these pro per things all the
11 time. Where do they go? Nowhere.

12 Where is this going to go? Post-conviction
13 relief because it was a 5/4 vote? It's a no-brainer.
14 Denied. So I don't know how it's going to be used.

15 MS. UGLIETTA: Isn't that the other point,
16 that they want information that they say the public has a
17 right to know? The public doesn't have a right to know
18 it.

19 And, secondly, there is no use of the
20 information for the public, okay?

21 But I do believe the defense bar could abuse
22 it. Regardless of whether they would be successful, they
23 could create a lot of havoc and there could be a lot of
24 time wasted and an attorney can be dragged into court and
25 questioned on their vote.

1 SPECIAL MASTER SCHNEIDER: Not to mention
2 this component that hasn't yet been mentioned. The County
3 Attorney is an elected official.

4 MS. UGLIETTA: Yes.

5 SPECIAL MASTER SCHNEIDER: Why shouldn't the
6 public be interested to know that the County Attorney
7 either went thumb's up like Nero or whoever did in the
8 Coliseum when everybody around him or her was saying no,
9 thumb's down -- thumb's down is to kill the person. Why
10 wouldn't the voting public be interested in that
11 information?

12 MS. UGLIETTA: They have it. The Notice of
13 Intent is exactly that information.

14 SPECIAL MASTER SCHNEIDER: No. The numbers.
15 Why wouldn't a voting public be interested to know that
16 this County Attorney has done thumb's down on a defendant
17 even though the committee said otherwise? Why wouldn't
18 that be of interest to the voting public?

19 MS. UGLIETTA: It's not relevant whatsoever
20 to anything.

21 SPECIAL MASTER SCHNEIDER: I am a voter.

22 I --

23 MS. UGLIETTA: It's only relevant to --

24 SPECIAL MASTER SCHNEIDER: I want to know if
25 the County Attorney I am voting for or against is likely

1 to go thumb's down or something else.

2 MS. UGLIETTA: That's the reason why the
3 deliberative process privilege applies because now this
4 information gets out to the public. The public is going
5 to use it to say this County Attorney is more likely to be
6 a defense-oriented County Attorney.

7 SPECIAL MASTER SCHNEIDER: You are not
8 responding to what I am saying.

9 MS. UGLIETTA: Maybe --

10 SPECIAL MASTER SCHNEIDER: My question is
11 Maricopa County Attorney's Office is an elected position.
12 Every four years one or two or three or more people run
13 for that position. I as a voter am charged with the
14 decision of whom to vote for.

15 Don't you think a voter would like to know
16 if the incumbent County Attorney that's running for
17 reelection on more occasions than others, and more than
18 predecessors or less than predecessors, voted to pursue a
19 death penalty even though the committee didn't support
20 that? Don't you think a voter would want to know that?

21 MS. UGLIETTA: It doesn't matter if the
22 voter would want to know that. It's still protected
23 information.

24 Her -- the recommendations provided to her
25 and an individual committee member's recommendations

1 provided to her by way of their votes is protected
2 information. The voters don't have the right to know it.

3 SPECIAL MASTER SCHNEIDER: Okay. I am
4 proposing that -- you don't have to obviously accept this
5 proposal.

6 I am proposing that you consider a
7 compromise in which -- let me write this down as I speak
8 -- the number tally of committee vote be disclosed without
9 mentioning names of committee members and only for those
10 cases in timeframe requested that are -- how do I define
11 that? What did I say about a carve-out before? When you
12 made a comment, I said we can carve out that little piece.

13 MR. TRIVEDI: I think you said
14 post-conviction.

15 SPECIAL MASTER SCHNEIDER: Carve out
16 post-conviction. But there is an issue of remand. But
17 there is a new process -- only for those in timeframe --
18 of the requested timeframe that are post-conviction.
19 That's my proposal that be considered.

20 So you don't give them the names. You don't
21 give them who voted for what. You just give the tally.
22 And it's only for cases that are not open for trial right
23 now. That's my proposal.

24 Obviously I am not real -- I am not
25 expecting that either side -- maybe Plaintiff would agree

1 with that. I am not expecting that the County Attorney
2 would agree with that. But I am proposing you consider
3 that.

4 It seems to make sense to me. I think it
5 answers the concerns that you are expressing. It answers
6 the chilling effect concern. It answers the concern that
7 these individual members will be harassed.

8 It does provide information, although not
9 articulated, it just popped into my head, about how it's
10 potentially of interest to the voting public in the
11 Maricopa County election.

12 So I think it answers the problems and
13 provides information that is useful and not harmful.
14 That's my proposal. Nobody has to say anything now.

15 MR. TRIVEDI: We are happy to take that back
16 and talk about it. I don't think we have anything more.

17 SPECIAL MASTER SCHNEIDER: I don't think I
18 have anything more either.

19 MS, UGLIETTA: We will get back to you on
20 our two sets of proposals.

21 SPECIAL MASTER SCHNEIDER: What was the
22 other one?

23 MS. UGLIETTA: The one on open and pending
24 charging decisions.

25 MR. TRIVEDI: That they would provide it

1 minus any personal identifying information and we can
2 decide amongst ourselves whether it could be an identifier
3 that could link it back to a police report.

4 SPECIAL MASTER SCHNEIDER: The ongoing
5 cases, we tabled that. I will add to my notes counsel are
6 to confer re compromise to providing spreadsheets for open
7 cases, redacted as to the names. Is that it?

8 MS. UGLIETTA: Identifiable information and
9 then police report numbers.

10 SPECIAL MASTER SCHNEIDER: All right.
11 Redacted as to the name of the defendant, ID information.

12 MS. UGLIETTA: Personal identifying
13 information like name, date of birth, social security
14 number.

15 SPECIAL MASTER SCHNEIDER: And police
16 report?

17 MS. UGLIETTA: And then we are going to
18 discuss about redacting the police report number because
19 that can be traced back to the individual.

20 SPECIAL MASTER SCHNEIDER: Sure. Redacted
21 as to police report number. That's what you guys --
22 because all of that was not mentioned before I left the
23 room. I never heard the word police report until you guys
24 had your discussion.

25 The open cases are tabled. Counsel are to

1 confer on the compromise of providing a spreadsheet for
2 open, redacted as to name, identifying information and
3 redacted as to police report number.

4 I don't have to wait on the policy issues.
5 That's ready for me to look at. What else is ready for
6 me? I can look at the memos of the -- okay to review --
7 you are also getting back to me on the ex parte thing.

8 MR. TRIVEDI: Yes.

9 SPECIAL MASTER SCHNEIDER: To review
10 in-camera policies, capital case memos, and Plaintiff will
11 get back to me on ex parte.

12 I am assuming that the County Attorney has
13 no objection to that?

14 MS. UGLIETTA: No.

15 SPECIAL MASTER SCHNEIDER: All right. I
16 think that wraps it up.

17 MS. UGLIETTA: Thank you.

18 (Matter concluded at 3:27 p.m.)
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C E R T I F I C A T E

I, WILMA A. WEINREICH, hereby certify that the foregoing pages, numbered 2 through 82, constitute a full, true and accurate transcript of all proceedings had in the above matter, all done to the best of my skill and ability.

/s/ Wilma A. Weinreich
WILMA A. WEINREICH
Certified Stenographer
Certificate No. 50976