# WE DON'T DO THAT HERE

## A TRUE-CRIME WRITER'S REAL-LIFE STORY ABOUT BEING BAFFLED BY SAN BERNARDINO COUNTY CLERK BUREAUCRACY

By Carlton Smith • Illustration by Guy Billout

AS A WRITER OF SO-CALLED TRUE-CRIME BOOKS, I'VE MET plenty of court clerks. They usually are the guardians of arcane, frequently nonsensical rules that invariably seem to have the effect of limiting public access to information about the judicial system. There was, for example, the fellow in Chester County, Pennsylvania, who wanted four dollars a page for uncertified documents related to the brief, ill-fated college-wrestling-coach career of wealthy madman John du Pont, who had just shot and killed Olympic wrestling champion Dave Schultz. The clerk, a rotund political appointee, took one look at my face and apologetically claimed to be the victim of a vast conspiracy of budget cuts.

Faced with a three-week deadline to produce a book on the murder, I caved: The clerk (and presumably his pals) got the money, close to $600 for slightly fewer than 150 pages of interrogatories from a long-settled civil suit in which du Pont had been the defendant and that was in fact worth about five dollars in paper and toner. I did the copying myself.

To be sure, the majority of court clerks I've dealt with have been both fair and helpful, often patiently explaining to an itinerant journalist such as myself just how things work in their neck of the legal woods. A thorough review of the court file is the essential starting point for any attempt to write about a crime, and such a review should principally include the affidavit of probable cause—the law enforcement officer's sworn assertion as to the specific details that led to the arrest of the defendant, normally a five- or six-page summary of the facts. In California the law is clear: Such an affidavit must contain facts specific enough to lead an independent magistrate to believe that the crime was committed by the person charged. Pen C §817. Obviously, such details are the fundamental structural support for any true-crime book, since they guide all subsequent research. Also helpful are attorneys' briefs, declarations, search warrants and returns, transcripts, exhibits, and similar documents that together provide a fairly comprehensive framework for the book.

These documents are the normal contents of any criminal court file, and public access to them has been generally unquestioned, at least in my previous experience, in Fresno, Los Angeles, Orange, Alameda, Marin, San Francisco, San Joaquin, Sonoma, Santa Clara, and Sacramento Counties. Indeed, this has been the case anywhere in California where I have done research for my books, for the simple reason that the U.S. Supreme Court has consistently held that there is a common law right of access to judicial records, so that such documents are generally available to the public for inspection and copying. See *Nixon v Warner Communications, Inc.* (1978) 435 US 589, 607 and n18.

While I occasionally encounter a clerk who adopts a proprietary interest in the documents, expressing suspicion as to why anyone who isn't a party to the case might want to see them, nothing I had previously encountered in the ways of clerkdom's resistance to public access prepared me for the situation I encountered this past year in San Bernardino County. It appears that for years (decades, actually) court clerks there have routinely denied public access to all probable cause documents in support of warrants of arrest and searches, and of criminal complaints.

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I discovered this when I asked to see the file on San Bernardino County's prosecution of a man named Wayne Adam Ford, presently charged with four counts of murder in one of the first attempts to use the state's "serial murderer" law, a recent amendment of Penal Code section 790.

Ford, a long-haul truck driver, allegedly claimed to have killed at least four women in San Bernardino, Kern, and Humboldt Counties. To prove it, he had, in November 1998, proffered a female breast contained in a plastic bag to his interlocutors in Humboldt County. The section 790 amendment permits a county where a killing takes place to take jurisdiction over other homicides and joinable crimes, even if all the crimes are not committed within the venue, provided that the offenses are "connected together [sic] in their commission." Just what that phrase means is one of the major issues to be litigated in *People v Ford*. The San Bernardino district attorney had elected to take jurisdiction over Ford for all four alleged homicides.

Arriving in San Bernardino in November 1999, I had expected my inspection of the San Bernardino County court file to at least produce some litany of facts necessary to support Ford's arrest and incarceration. Usually, such a review of the file would show who he was alleged to have killed, when, where, and most important, why anyone in authority believed that he was the one who had done the deeds, along with facts necessary to support the notion that the four crimes were "connected together in their commission."

Initially, the San Bernardino clerks informed me that I couldn't inspect the file on Ford because it was in the possession of the court. I learned that the file was in the possession of the arraignment judge, although no hearing involving Ford was scheduled for that day. The arraignment judge was busy processing a stream of miscreants, as she apparently did daily.

"I want to see the court's file and these reports," I informed the court's bailiff.

"We don't do that here," the bailiff informed me.

After writing an on-the-spot letter to the court's presiding judge, I was given permission to inspect the court's file. But instead of finding the typical affidavit of probable cause enumerating the reasons for arresting Ford, all I found was a simple declaration, filed by a San Bernardino County Sheriff's Department detective, one LeRoy Sapp, asserting that he had "probable cause to believe" that Ford had committed the crimes and that the probable cause to believe same was encompassed in "the official law enforcement reports attached hereto and incorporated herein."

"Where are the reports?" I asked the clerk.

"What reports?" he responded.

Back to the bailiff in the arraignment judge's court. "I want to see these 'official law enforcement reports attached hereto and incorporated herein,'" I said.

"We don't do that here," replied the bailiff again.

Thus was revealed a yawning, almost Stygian gap in the public's access to the justice system, at least as practiced in San Bernardino County. The government could file charges against an individual and, by the simple expedient of not permitting public access to the alleged facts, keep its assertions veiled from any form of public scrutiny. All that was necessary was a willing and ignorant clerk, and a bailiff programmed to recite, "We don't do that here."

IN APRIL 2000 I FEDEXED A LETTER TO THE COURT CLERK'S office, this time formally demanding to be allowed to inspect and copy the "official law enforcement reports attached hereto and incorporated herein." I said I would be visiting San Bernardino within the week and invited the clerk's office to communicate with me regarding my request. I cited section 68150 of the California Government Code, which holds that court records are available to the public for inspection and copying, and a 1999 opinion of the Legislative Counsel, which supports the notion that court records are by that statute available to the public for inspection and copying. Not surprisingly, I heard nothing from the court clerk in response.

On April 27, the day I returned to San Bernardino, I went to the court clerk, brandishing a copy of my letter and demanding access. An assistant clerk disappeared into the inner sanctum of clerkdom, only to emerge half an hour later with a letter that advised me that my request had been submitted to "the office of the District Attorney," presumably for its review and approval. Exactly what power the San Bernardino County District Attorney's office held over the clerk of the superior court wasn't made clear.

Still, having anticipated being stonewalled, I had prepared a motion asking the judge now assigned to the case to compel the clerk to permit the inspection and copying of the documents "attached hereto and incorporated herein." I brought this motion to the judge, the Honorable Michael A. Smith, whose clerk informed me that the judge would not consider the motion unless the parties, i.e., the district attorney's office and the public defender, were properly notified, and that in any case the motion could not be heard before May 5. I raced around San Bernardino County and provided notice for each of the parties by serving their offices personally.

I returned to San Bernardino on May 5 and appeared in court, waiting patiently for the issue to work its way forward to the court's attention. After disposing of a variety of housekeeping issues related to scheduling the case against Ford, Judge Smith prepared to leave the bench, at which point his clerk alerted him to the fact that there was one more matter to be heard.

"Wait," Judge Smith said, as the lawyers were preparing to leave. He resumed his seat. "The court has received a request from an individual by the name of Carlton Smith, basically requesting permission to inspect and copy documents filed with the court in this case."

It was clear from the outset that Judge Smith was dubious about my request. "Obviously," he said, "there are lots of matters associated with a file that are not public documents."

Both the deputy district attorney prosecuting Ford and his public defender quickly asserted that what I was seeking was material that had been sealed. Not so, I informed the court; there was nothing in the record that indicated anything had been sealed. The judge invited me to be more specific.

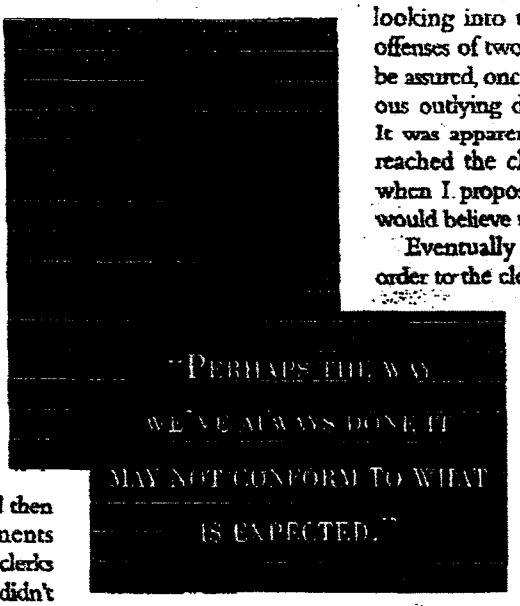
"Certainly, your honor," I said. "In Detective Sapp's declaration of June 29 [1999], he attaches and incorporates 'by reference the pertinent parts of the law enforcement reports attached hereto.' I consider that to be a part of the court's file, part of the public record. And I found nothing, no minute order that seems to indicate that those attachments to the declaration of probable cause in support of the arrest, filed by Detective Sapp, are sealed. There's nothing in there to indicate

that." Judge Smith now said he believed that the attachments referred to by the detective—"attached hereto and incorporated herein by reference"—were in fact discovery.

Not so, I said. "It is the item, the basis upon which the arrest warrant was issued." It was no different than an affidavit in support of a search, I argued. The judge said he didn't believe that affidavits in support of searches were public record either. I said the Penal Code seemed to indicate otherwise.

Having anticipated that one or both of the parties might now seek to have the documents sealed, I had prepared a memorandum in opposition to sealing. Judge Smith advised me to file it with the court and serve it on the parties. We agreed to take the issue up once again on June 1. After the hearing, the deputy public defender, Joe Canty, told me that in all of his years of practice in San Bernardino County, he had never known the sort of information I was seeking to be released to the public.

THREE WEEKS LATER WE WERE BACK IN COURT. BY THIS TIME Judge Smith had read my memorandum, which traced the whole history of public access to court documents, the First versus Sixth Amendment issue, and cases related to prejudicial publicity. In the meantime I had learned, when I sought to inspect similar probable cause documents related to the victims' minor arrest records, that for years San Bernardino County's law enforcement personnel had obtained probable cause by attaching "official law enforcement reports hereto and incorporating herein by reference," showing the reports to a magistrate, inducing the magistrate to sign the warrant, and then withholding the police documents from the file. This was why the clerks kept staring at me blankly. They didn't have the slightest idea of what a probable cause document was because they had never seen one. "We never give out police reports," they kept insisting. That was what the bailiff had been trying to tell me with "We don't do that here."




Judge Smith said he had been under the impression that probable cause documents were not part of the public record. But after reading Government Code section 68150 he said that he realized the documents were in fact a part of the court file, defined by Government Code section 68151 as "all filed papers and documents in the case folder," and as such were subject to public disclosure.

"Certainly the affidavit for the arrest warrant clearly qualifies as a paper or document filed in the case folder," Judge Smith said. "The reports that were attached to that affidavit and incorporated by reference clearly are papers and documents that are filed in the case folder. Therefore I think they are court records as defined by section 68150. There's a statutory presumption and policy that they be made accessible to the public."

"So," he concluded, "perhaps the way we've always done it may not be in conformity with what is expected."

It turned out that, in their ignorance of the law's requirements, the San Bernardino authorities had simply appended part of Ford's police file (in all about 1,500 pages of investigation reports) to the court file, never believing it would become public.

Judge Smith went on to order the documents be made public, but with statements made by Ford taken out.

IT TOOK THE SAN BERNARDINO COUNTY DISTRICT ATTORney's office about two weeks to eliminate Ford's statements from the file, a process that was made far more complex when Deputy District Attorney David Whitney and the defense attorney won the judge's approval of a modification of the disclosure order permitting the removal of virtually everything Ford had ever said to just about anyone—even insignificant, nonculpable statements he had made when in the U.S. Marines two decades before the crimes that led to his arrest.

In the meantime, I went about my research, including looking into the arrests for various misdemeanor offenses of two of Ford's alleged four victims, only to be assured, once again, by the court clerks in the various outlying districts that "We don't do that here." It was apparent that Judge Smith's finding hadn't reached the clerks in the outlying areas, and even when I proposed to acquaint them with it, no one would believe me.

Eventually I asked Judge Smith to approve an order to the clerk's office commanding it to turn over the documents on the victims, or if they never had them, as some deputy clerks had been asserting, to go and get them from the charging agency. It took another month, but eventually I recovered those documents as well.

You may be wondering why I went to all this trouble (and expense—by the time I collected the redacted documents, I had spent $6,500, almost as much as I had been advanced for the book). It is particularly galling when I realize that the documents I was seeking, or at least some fact-laden form thereof, are routinely available in every other court in the state and in the country, at least as far as I can tell.

My reason is simple: It's the principle of the thing. The courts are trustees for the public's faith in the essential fairness of the government. Without the capacity to observe, to check, to verify the actions of the state—our so-called right to know—we might as well live in a country without any civil liberties at all.

Despite Judge Smith's finding that such "attached hereto and incorporated herein" documents are part of the public court file as defined by both the statute and ratified by case law, I feel pretty certain that the next time I ask a clerk in San Bernardino County for a probable cause document, I'll get a blank look. And if I persist, I will surely be told, "We don't do that here." ❑