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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RANDOLPH CLIFTON KLING, Petitioner, vs. SUPERIOR COURT OF VENTURA COUNTY, Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	COURT NO. (Court of Appeal No. B208748) (Superior Court No. 2005045185)

PETITION FOR REVIEW

Hon. Rebecca S. Riley
Judge of the Ventura County Superior Court

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PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Real Party in Interest, the People of the State of California, respectfully petitions for review following the decision of the Court of Appeal of California, Second Appellate District, Division 6, granting a petition for writ of prohibition. The Opinion and Order Granting Petition for Writ of Prohibition, certified for publication, was filed on August 31, 2009, and was made final immediately. A copy of the opinion is attached to this Petition.

ISSUES PRESENTED FOR REVIEW

1. When a defendant in a criminal case has issued a subpoena duces tecum for records from a third party, may the court hold ex parte hearings regarding the documents or make an order allowing the defense to receive the documents without allowing notice to the prosecution as to what types of records have been subpoenaed, and from whom?

2. Does the trial court have the discretion to entertain argument from the prosecution regarding a defense subpoena, or does the law prohibit prosecution participation beyond answering questions from the court?

3. In order to enforce victims' rights under Proposition 9 (Marsy's Law), when a defendant in a criminal case has issued a subpoena duces tecum for records pertaining to a crime victim, should the victim and the prosecution be informed of what types of records have been subpoenaed, and from whom?

NECESSITY FOR REVIEW

Review is necessary to secure uniformity of decision and to settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

This case raises an ongoing issue in criminal cases: whether the court may hold ex parte hearings and make ex parte orders regarding defense subpoenas without the prosecution knowing what hearings are being held or the subject matter of the subpoenas being litigated.

The opinion of the Court of Appeal holds, "No statutory or constitutional authority permits disclosure to the prosecution of the names of the third parties to whom defense subpoenas have been issued or the nature of the records produced." (Court of Appeal opinion, pp. 6-7.) The opinion limits the holding of *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 749 ("*Humberto S.*"), that the People are entitled to notice of hearings regarding records subpoenaed by the defense. If the People are not entitled to know the subject matter or source of the records, meaningful notice cannot be given.

The Court of Appeal opinion also limits the extent to which the prosecution may participate in a hearing regarding a defense subpoena. The court's conclusion that the prosecution must sit in "compelled silence" and may do no more than answer questions posed by the court, conflicts with the language in *Humberto S.*, 43 Cal.4th at page 750, that the prosecution may "participate if the trial court so desired" and that the court has the discretion to "entertain argument from the prosecution."

Marsy's Law gives crime victims the right to notice and a right to be heard, and to prevent the disclosure of confidential records about them. It also allows the prosecuting attorney to enforce the victim's rights. But if neither the victim nor the prosecutor knows that the defense has subpoenaed the victim's confidential records, they may not be able to enforce those rights.

Review is appropriate to settle these recurring issues and to define the rights of victims, the prosecution, and the defense in criminal cases.

STATEMENT OF THE CASE

Petitioner, Randolph Clifton Kling ("defendant") was charged by indictment with the murders of Michael P. Budfuloski and William J. Budfuloski, with special circumstances. Additional counts charged defendant with animal cruelty, possession of a silencer, possession of a forged driver's license, felon in possession of a firearm, and felon in possession of ammunition. (Court of Appeal opinion, p. 2; Exhibit A.[1])

In preparation for trial, the defense issued subpoenas duces tecum (SDTs) on a number of third parties. As to some of the subpoenas, the prosecution learned at some point from whom the records were sought. As to other subpoenas, the prosecution still has no knowledge as to what was sought, or from whom. The trial court had ex parte hearings with the defense on a number of occasions, some of which related to the subpoenas.[2]

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[1] Exhibits with letter designations were attached to the Verified Petition for a Peremptory Writ of Prohibition, filed in the Court of Appeal. Exhibits 1-3 were filed in the Court of Appeal, attached to the Preliminary Opposition to Petition for Peremptory Writ of Prohibition. Exhibits 4-17 were filed in the Court of Appeal in support of the Return to Petition for Peremptory Writ of Prohibition.

[2] The subpoenas and hearings of which the prosecution have knowledge are summarized in the Court of Appeal opinion, p. 3; in the Return to Petition for Peremptory Writ of Prohibition, pp. 5-6, 11-15; and in chart form in Exhibit 6. Some of the ex parte hearings did not relate to SDTs at all. Specifically, on November 28, 2007, the court closed the courtroom and excluded the prosecution

As acknowledged by the Court of Appeal, the People received no notice as to some of the hearings. (Court of Appeal opinion, pp. 2, 6.)

The statement of aggravation pursuant to Penal Code section 190.3 previously listed incidents by defendant against his sister, Beverly Kling-Hesse, including batteries, assault with a deadly weapon, and terrorist threats. (Exhibit 16; see Court of Appeal opinion, p. 8.) The Notice was subsequently amended to delete those incidents. In the Return to Petition for Peremptory Writ of Prohibition (p. 9), we alleged on information and belief that the defense subpoenaed personal records regarding her, including high school records, college records, mental health records, and Housing Authority records. The superior court issued an order regarding a subpoena for her mental health records from Northern Nevada Adult Mental Health Services. (Exhibit 10.) Counsel for California State University sent a letter to the court (Exhibit 17), stating that they received an objection from Ms. Kling-Hesse after they had complied with a subpoena for her records.

The defense also subpoenaed real estate finance records from Wells Fargo law department regarding Lori Budfuloski, who is the widow of

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so that the defense could call an undisclosed witness relating to a discovery motion regarding composition of the grand jury. (Exhibit 7, RT 1154-1158.) On December 27, 2007, the court held an ex parte hearing with the defense, apparently relating to a judge's voir dire of grand jurors. (Exhibit 4; Exhibit 11; Exhibit D, RT 1501, ll. 7-9; RT 1503, ll. 11-14.)

victim William Budfuloski and stepmother of victim Michael Budfuloski. (Court of Appeal opinion, p. 8; Exhibit D, RT 1507-1510.)

On January 18, 2008, defendant filed a brief urging the court to preclude the prosecution from receiving notice of third party subpoenas duces tecum and from being allowed to be present at or argue in favor of or against the release of information related to third parties. (Exhibit 1.) On January 30, 2008, the People filed an opposition to defendant's request to exclude the prosecution from the proceedings. (Exhibit 2.)

On May 12, 2008, the California Supreme Court issued its decision in *Humberto S.*, which the People brought to the court's and defense counsel's attention during a hearing on May 20, 2008. (Exhibit 3, RT 1436-1437.) In light of *Humberto S.*, the prosecution requested that the court examine the transcripts of all previously sealed ex parte hearings and unseal any transcripts that did not contain defense theories of relevance in support of releasing subpoenaed information. On June 18, 2008, the superior court ordered some of the transcripts unsealed (Exhibit D, RT 1500-1503), but stayed the unsealing orders so that the defense could file a writ. (RT 1515, ll. 2-7.) The stay was never lifted and to date, the People have not seen the transcripts in question.

The defense filed the Verified Petition for a Peremptory Writ of Prohibition in the Court of Appeal on June 24, 2008. The People filed a preliminary opposition on July 1, 2008. Petitioner filed a reply on July 21,

2008. On request of the court, supplemental letter briefs were filed on November 6, 2008, on behalf of petitioner, and on November 21, 2008, on behalf of the People.

The Court of Appeal issued an alternative writ and order to show cause on March 27, 2009. On April 6, 2009, respondent superior court heard argument on whether to vacate its earlier order. At that time the court stated that the docket entries had been amended to show the identity of the parties from whom records had been sought. (As shown in Exhibit 6, it appears that only two entries have possibly been changed: December 27, 2007, and April 8, 2008.) On April 8, 2009, respondent superior court issued an order declining to vacate its previous order.

The People filed in the Court of Appeal a return to the petition, and defendant filed a reply to the return. On May 7, 2009, the jury returned verdicts of guilty on all counts.[3] Oral argument on the order to show cause was heard in the Court of Appeal on May 14, 2009. On June 18, 2009, the jury set the punishment at death. On August 31, 2009, the Court of Appeal issued its Opinion and Order Granting Petition for Writ of Prohibition, certified for publication, the opinion final as to that court immediately. The court noted that although the conviction might render the matter moot, it is

[3] The jury found true the multiple murder special circumstance, and the lying in wait special circumstance as to count 1. The jury found not true the lying in wait special circumstance as to count 2, and hung on the financial gain special circumstances.

a matter of public interest likely to recur. (Court of Appeal opinion, p. 4, fn. 3.) Sentencing is set in superior court for October 19, 2009.

ARGUMENT

I.

THERE IS A PRESUMPTION OF OPENNESS FOR COURT RECORDS

We agree that the prosecution is not entitled to transcripts of those portions of ex parte hearings heard pursuant to Penal Code section 1326, subdivision (c), regarding defense theories of relevance and defense strategy for defense subpoenas. We conceded this point in the Court of Appeal. (Return to Petition, pp. 2-3, 13, 19-20.) But we respectfully disagree with the Court of Appeal's holding that "[n]o statutory or constitutional authority permits disclosure to the prosecution of the names of the third parties to whom defense subpoenas have been issued or the nature of the records produced." (Court of Appeal opinion, pp. 6-7.)

The Court of Appeal reasons that because Penal Code section 1326, subdivision (c), does not specifically require the defense to disclose the identities of the third parties from whom documents are sought or the nature of the documents, the court docket must not include this information. (Court of Appeal opinion, pp. 5, 10.) But we submit that disclosure is appropriate based on other provisions of law.

Evidence Code section 1560, subdivision (c), provides that records provided by the custodian of records be "enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon . . ." The envelope shall be opened upon direction of the judge "in the presence of all parties who have appeared in person or by counsel ..." (Evid. Code, § 1560, subd. (d).) This provision contemplates that the prosecution will learn at least some information regarding a defense subpoena, i.e., the information on the inner envelope.

California and federal law are clear that criminal proceedings and records are presumed to be open. "Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public." (Code Civ. Proc., § 124.)

"[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1200, quoting *Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 573.) The court noted that "'in general' the First Amendment provides 'broad access rights to judicial hearings and records . . . both in criminal and civil cases." (*Id.*, at p. 1208, fn. 25.) The court noted, however, that "decisions have held that the First Amendment does not compel public access to discovery materials that are neither used at trial nor submitted as a basis for adjudication." (*Ibid.*) "The

presumption of access does not apply until the documents or records of such proceedings are filed with the court or are used at a judicial proceeding." (*Ibid.*)

Where, as here, subpoenaed records are filed with the court, and the court holds proceedings to weigh the need for the records against privacy and privilege rights of third parties, public access should be required, not necessarily of the records produced in response to the subpoena, but of the subpoena itself.

The issue of whether the prosecution is entitled to know what records the defense is seeking via subpoena, or whether the court is prohibited from disclosing this information, is a recurring issue in criminal cases throughout the state. We request that the court grant review to resolve this issue.

II.

THE PEOPLE ARE ENTITLED TO MEANINGFUL NOTICE OF PROCEEDINGS REGARDING DEFENSE SUBPOENAS

The People are guaranteed the right of due process in all criminal proceedings. (Cal. Const., art. I, § 29.) The prosecution is entitled to fundamental due process of law, including notice and an opportunity to be heard; it is improper for the court to hold an ex parte hearing regarding discovery obtained by the defense without notice to the prosecution. (*Walters v. Superior Court* (2000) 80 Cal.App.4th 1074, 1079-1080.)

"The fundamental requisite of due process of law is the opportunity to be heard [citation], a right that has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest. . . . In the context of the opportunity to be heard, it is not just the defendant but also the People who are entitled to due process in a criminal proceeding. [¶] To assure due process, open proceedings involving the participation of both parties are the general rule in both criminal and civil cases." (*Department of Corrections v. Superior Court (Ayala)* (1988) 199 Cal.App.3d 1087, 1092 ("*Ayala*"), citations and internal quotation marks deleted; *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1130-1131.)

Ayala, supra, was a murder case with special circumstances. The defense issued an SDT seeking prison records regarding another inmate, and of the prison's investigation of a previous stabbing by Ayala. In ex parte proceedings, the trial court sealed the subpoena, supporting declaration of counsel, and supporting points and authorities. (*Id.* at p. 1091.) The trial court also issued a gag order prohibiting the California Department of Corrections (CDC) and its counsel, the Attorney General, from discussing the subpoena with the District Attorney. CDC and the Attorney General filed a petition for writ of mandate and prohibition. The Court of Appeal granted the writ, ordering the trial court to determine what portions of the supporting documents were privileged or constituted

attorneys' work product, and to allow the District Attorney to participate in further proceedings that did not involve sealed matters. (*Id.* at p. 1097.)

In *Ayala*, the defense contended that revealing the SDT and supporting documents would impermissibly lighten the prosecution's burden. (*Id.* at p. 1094.) The Court of Appeal agreed as to those portions containing privileged information or attorney work product. (*Id.* at p. 1096.) But the court found that the prosecution knowing what records the defense had subpoenaed did not impair defendant's rights. (*Id.* at p. 1097.) The court rejected defendant's argument that "the prosecution, by examining the records and knowing they have been subpoenaed by the defense, will have access to his attorneys' work product because the prosecutor will be able to 'glean' the attorneys' thought processes and determine defense strategy. There is no basis in the law for interpreting attorneys' work product so broadly." (*Ibid.*) Based on *Ayala*, the subpoenas themselves, as opposed to supporting declarations, are not confidential.[4]

In *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1044, the court held that the prosecution is entitled to notice of the date and time of a defense *Pitchess* motion,[5] which will afford the trial court the opportunity

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[4] Justice Wiener dissented in *Ayala*, without citation of authority on this point. We have located no cases that adopt Justice Wiener's opinion on this issue.

[5] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

to ask questions of both the defense and the prosecution.[6] The district attorney argued there, as we do here, that the People's right to due process (Cal. Const., art. I, § 29) includes a right to notice and presence. (*Id.* at p. 1044.)

Humberto S., supra, applied *Alford* to require notice to the prosecution and the right for the prosecution to appear at the hearing regarding records subpoenaed by the defense (medical and psychotherapy records of the alleged victim in a child abuse case). The court noted, "Evidence Code section 1560 thus suggests that, as with *Pitchess* hearings, and in accordance with the due process privileges we recognized in *Alford v. Superior Court, supra,* 29 Cal.4th at page 1044, opposing parties have a right to notice and presence. . ." (43 Cal.4th at p. 749.) The court further stated, "in *Alford* we concluded that in the *Pitchess* context prosecutors had no entitlement to participate, but were nevertheless entitled to notice, to be present, and to participate if the trial court so desired." (*Id.* at p. 750, emphasis deleted.) The court summarized, "the prosecutor is entitled to notice of the hearing and may there address any questions the trial court has." (*Id.* at p. 755.)

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[6] This language is contained in part C of the lead opinion of Justice Werdegar, concurred in by Chief Justice George and Justice Kennard. Justice Baxter, with Justices Chin and Brown concurring, agreed that the prosecution has a right to notice and to appear. (*Id.* at pp. 1047-1051.) Justice Moreno concurred in part C of the lead opinion. (*Id.* at p. 1057.)

Humberto S. rejected *Smith v. Superior Court* (2007) 152 Cal.App.4th 205, which had held that the prosecution is not entitled to participate in a proceeding regarding a defense SDT for records from a non-party. The Supreme Court held that *Smith* misread *Alford*; instead the prosecution is allowed "to participate if the trial court so desired." (43 Cal.4th at p. 750.)

Humberto S. used *Pitchess* motions as an analogy for other defense third party discovery requests. In *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72-73, the court held that the affidavit in support of a *Pitchess* motion generally does not reveal attorney-client or work-product material. *Pitchess* motions must include the identity of the officers whose records are sought and the agency that has custody of those records. (Evid. Code, § 1043, subd. (b)(1).) The court may allow portions of the affidavit to be sealed to protect attorney-client and work-product privileges, but a redacted version of the affidavit must be filed and served on opposing counsel (the district attorney). (*Garcia v. Superior Court, supra,* at p. 73.) Since this same redacted version is served on counsel for the employing agency (*id.* at pp. 76-77), it will necessarily include a description of what records are being sought. Following the *Pitchess* model for other defense third party discovery requests, when a third party's records are sent to the court in response to a defense subpoena, the identity of the subpoenaed party and the nature of the records sought should be public.

As discussed below, in *Humberto S.*, the prosecution provided useful input to the trial court that helped protect the rights of a minor regarding a defense subpoena seeking the minor's medical and psychiatric records. The prosecution would not have been able to provide this input if it did not know whose records were being sought, or what type of records they were. The notice of hearing required by *Humberto S.* will be inadequate if the nature of the records at issue is not disclosed. If the prosecution knows only that some sort of records have been received, without knowing what sort of records they are, from whom, and about whom, the opportunity to provide input will be almost meaningless.

We agree that the trial court is not required to provide the prosecution with copies of the documents produced in response to a defense subpoena. Respondent superior court in the present case did not rule otherwise, and petitioner did not claim that such an order had been made. Instead, under the criminal discovery statute, the defense would be obligated to provide the prosecution with those records produced in response to the subpoena, if the defense intended to use the evidence at trial. (Pen. Code, § 1054.3; *Smith v. Superior Court*, *supra*, 152 Cal.App.4th at p. 217.) The prosecution could also seek records directly from their custodian. (*Ayala, supra,* 199 Cal.App.3d at p. 1095.)

We disagree that the subpoena itself is "discovery" under Penal Code section 1054 et seq. (See Court of Appeal opinion, pp. 4-5.) The

exclusivity of the criminal discovery statute (Pen. Code, §§1054, subd. (e) and 1054.5, subd. (a)) does not abrogate the right of parties to know what matters are before the court that will require the court to make a ruling. Even though *Ayala* predated the enactment of the criminal discovery statute by Proposition 115 in 1990, the court rejected the argument that CDC's disclosure of information to the prosecution regarding the defense subpoena would violate cases which at that time "prohibit[ed] prosecutorial discovery." (*Id.* at p. 1095.) (See *People v. Superior Court (Broderick)* (1991) 231 Cal.App.3d 584, 594 ["Proposition 115 discovery procedures apply only to discovery between the People and the defendant. They are simply inapplicable to discovery from third parties."])

In summary, the requirement for notice under *Humberto S.* will be meaningless unless the prosecution knows what kind of records the court is considering, and to whom they pertain. Review is appropriate to resolve this issue.

III.

THE JUDICIAL PROCESS BENEFITS IF THE PROSECUTION HAS A MEANINGFUL OPPORTUNITY TO BE HEARD

The Court of Appeal concludes that the prosecutor's right to participate in a hearing regarding a defense SDT is limited to answering whatever questions the court may have. (Court of Appeal opinion, pp. 2, 9-10.) The court stated that the prosecution's "compelled silence" may be

broken only if the court calls upon the prosecution to "address any questions the trial court has." (Court of Appeal opinion, p. 2.) But the law does not necessarily relegate prosecutors to sitting passively at counsel table, waiting for the court to ask a question. An effective advocate for the prosecution may ask the court for leave to be heard, with the understanding that in the exercise of the court's discretion, the court may say no. (See *Humberto S., supra,* 43 Cal.4th at pp. 748-750, 755.) As the Supreme Court recognized, "trial courts regularly permit prosecutorial participation in third party discovery," and trial courts "are at least *permitted* to entertain argument from the prosecution on third party discovery issues." (*Id.* at p. 750, emphasis in original.) This language is inconsistent with the Court of Appeal's holding prohibiting the prosecution from participating beyond answering questions.

"Our system is grounded on the notion that truth will most likely be served if the decisionmaker – judge or jury – has the benefit of forceful argument by both sides. . . ." (*People v. Ayala* (2000) 24 Cal.4th 243, 263.) One of the "basic defects" of ex parte proceedings is "a shortage of factual and legal contentions"; such "contentions from diverse perspectives can be essential to the court's initial decision. . . ." (*Id.* at p. 262.)

As the Court of Appeal has stated regarding the analogous issue of allowing oral argument in civil cases:

> We do not subscribe to the obscurantist notion that justice, like wild mushrooms, thrives on manure in the dark. As Presiding Justice Gilbert observed, "Just as a theater critic must see the play before writing a review, judges must carefully consider the evidence before deciding a case. The lifeblood of our judicial institutions depends upon judges rendering decisions that are the product of a reasoned and objective view of the law and the facts." (Citation.)
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> Rulings should be "reasoned decisions, rather than decisions with reasons . . . ." (Citation.) Because of basic due process concerns, law and motion judges are always on shaky ground where they "entirely bar parties from having a say."

(*Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, 741-742.)

One scenario that commonly occurs (although not in the present case) is a defense subpoena for privileged psychotherapy records of a sexual assault victim. When the prosecution is aware that such records have been subpoenaed, the prosecution can alert the trial court to the requirements of *People v. Hammon* (1997) 15 Cal.4th 1117, 1127-1128, which holds that disclosure of the records should be deferred to the time of trial and should not be permitted pretrial. But if the prosecution is not permitted to know what has been subpoenaed, the trial court or the court clerk may allow the records to be given to the defense, either because the

court is unaware of *Hammon*, or through inadvertence. Erroneous disclosure of this kind occurred in *Humberto S.*, 43 Cal.4th at p. 743.

The Court of Appeal opinion unnecessarily restricts the trial court's discretion to allow the prosecution to be heard regarding defense subpoenas. Review should be granted to address this issue.

IV.

OPENNESS OF RECORDS IS NECESSARY TO IMPLEMENT PROPOSITION 9

On November 4, 2008, the voters approved Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law. The Act, which went into effect the following day, amends the California Constitution to guarantee crime victims a number of rights.

Proposition 9 expands the definition of "victim" to include "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime" as well as "the person's spouse, parents, children, siblings, or guardian" and "a lawful representative of a crime victim who is deceased." (Cal. Const., art. I, § 28, subd. (e).) Victims have "the right to notice and to be heard during critical stages of the justice system." (Prop. 9, § 2.) Victims have the right to "reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are

entitled to be present . . . and to be present at all such proceedings." (Cal. Const., art. I, § 28, subd. (b)(7).)

Under Proposition 9, victims have the right "[t]o prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law." (Cal. Const., art. I, § 28, subd. (b)(4).) The victims' rights may be enforced by a "victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim . . . in any trial or appellate court with jurisdiction over the case as a matter of right." (Cal. Const., art. I, § 28, subd. (c)(1).)

These new constitutional rights reinforce the need for both victims and the prosecution to know what records are sought, and when critical hearings will be held. If the prosecution does not know that the court will be holding proceedings as to release of a victim's records, and if the court refuses to disclose the nature of the records, the victim cannot receive the reasonable notice of the hearing required by Proposition 9. Nor will the victim or the district attorney have the opportunity to "prevent the disclosure of confidential information or records to the defendant." (Cal. Const., art. I, § 28, subd. (b)(4.)) Knowledge of what records the defense is

seeking is necessary for the victim and the prosecution to assert the victim's constitutional rights under Proposition 9.

Humberto S. serves as a good example of the benefits of participation by the prosecution. In that case, the defense sought medical and psychiatric records pertaining to the minor victim of sexual abuse. (*Humberto S., supra*, 43 Cal.4th at p. 750.) The prosecution argued the minor's statutory and constitutional rights (*id.* at p. 753), urged the court to appoint a guardian ad litem (*id.* at p. 752), and secured the appearance of the minor's parents so they could be questioned as to whether they consented to release of the records. (*Id.* at pp. 743-744.) The court noted that the interests of justice were served by the prosecution acting to protect the minor's rights. (*Id.* at p. 752.)

In the present case, the prosecution played a similar role regarding Housing Authority records relating to defendant's sister, Beverly Kling-Hesse, conveying to the court her objection to the release of these records. (Court of Appeal opinion, p. 8; Exhibit 14, RT 1400-1401.) Since the notice of aggravation (Exhibit 16) listed her as the victim of batteries, assault with a deadly weapon and terrorist threats, she may have come within the definition of "victim" for purposes of Proposition 9. (Cal. Const., art. I, § 28, subd. (e).) Ms. Kling-Hesse objected to the release of her college records, but not in time to prevent their release. (Court of Appeal opinion, p. 8; see Exhibit 17.) Had the prosecution received timely

notice of what had been subpoenaed, we may have been able to bring the issue to the court's attention.

Another example is the real estate finance records from Wells Fargo law department regarding Lori Budfuloski, who is the widow of victim William Budfuloski and stepmother of victim Michael Budfuloski. (Court of Appeal opinion, p. 8; Exhibit D, RT 1507-1510). As William Budfuloski's spouse, she would be a victim under Proposition 9. (Cal. Const., art. I, § 28, subd. (e).) The trial court initially stated that all the records appeared to be public records. (RT 1508, ll. 14-15.) After the district attorney raised the issue of consumer notice, the court looked at the documents further, noted that they contained financial information, and declined to release those portions without a showing of relevancy to overcome Ms. Budfuloski's privacy interest. (RT 1508-1510.)

In order to protect victims' rights under Proposition 9, the prosecution must know what records are being sought and are being reviewed by the court. In the present case, the Court of Appeal rejected the argument that notice of what records are sought are appropriate to enforce Proposition 9, stating that the prosecutor's right to participate in the hearing is limited to answering whatever questions the court may have. (Court of Appeal opinion, pp. 2, 9-10.) But, as discussed in the preceding section, the trial court has discretion to allow the prosecution to be heard, and such participation will often benefit the court's decision-making process.

Even aside from Proposition 9, as counsel for a party in a criminal case (The People of the State of California), the prosecution has standing to file a motion to quash a subpoena duces tecum. (Code Civ. Proc., § 1987.1, subd. (b)(1).) At present, whether the victim or the prosecution learns that a subpoena has been issued is often a matter of chance.[7] Public access to subpoenas filed or lodged with the court will allow the People to determine whether a response is appropriate such as filing a motion to quash or asking to address the court. Learning that a subpoena has been issued for a victim's records should be a matter of right, not of happenstance.

CONCLUSION

The present case raises issues of importance to prosecutors, defense attorneys and trial courts statewide. When the defense uses the subpoena power of the court to seek records regarding victims, witnesses, or other third parties, the trial court must review the records before providing them to the defense. The prosecution has a right to notice at these proceedings, but this right is almost meaningless without knowing what type of records the court is considering. The trial court has discretion to entertain argument by the prosecution, and the court should have the authority to allow more

[7] The law is unclear whether a consumer notice under Code of Civil Procedure section 1985.3 must be issued in a criminal case. See *Michael B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1394-1396, holding that the requirement of an affidavit of good cause does not apply to a criminal grand jury subpoena.

participation than answering questions. In order to effectuate the rights of victims embodied in our state constitution by Proposition 9, both victims and the prosecution need to know what sort of records about the victims are being sought. We respectfully request that the Supreme Court grant review to address these issues.

Respectfully submitted,

GREGORY D. TOTTEN, District Attorney
County of Ventura, State of California

Dated: September 8, 2009 By: _____
MICHAEL D. SCHWARTZ
Special Assistant District Attorney

CERTIFICATE OF WORD COUNT

I certify that according to the word count of the computer program used to prepare this document, this return is 5213 words, exclusive of tables, exhibits, and this certificate.

Dated: September 8, 2009 _____
MICHAEL D. SCHWARTZ
Special Assistant District Attorney

Filed 8/31/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RANDOLPH CLIFTON KLING, Petitioner, v. THE SUPERIOR COURT OF VENTURA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	2d Crim. No. B208748 (Super. Ct. No. 2005045185) (Ventura County) OPINION AND ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

Penal Code section 1326 requires that documents produced in response to a defendant's subpoena duces tecum in a criminal action be delivered to the clerk of the court.[1] The court may order an in camera hearings to determine whether the defendant is entitled to receive the documents subpoenaed. (§ 1326, subd. (c).)

In *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737 ("*Humberto S.*"), our Supreme Court held that the prosecution must receive notice of the hearing, but left unanswered the question to what extent the prosecution may participate in the hearing. Here we answer the question.

We conclude the prosecution has a limited role. Absent exceptional circumstances, the prosecution may not know who the defense has subpoenaed or what

[1] All statutory references are to the Penal Code unless otherwise stated.

documents were subpoenaed unless the defense decides to use them at trial. The prosecution is then entitled to discovery pursuant to the reciprocal discovery provisions of section 1054.3. At section 1326 hearings, the prosecution is often seen but not heard. The prosecution's compelled silence may be broken when the court calls upon it to "address any questions the trial court has." (*Humberto S., supra*, 43 Cal.4th 737, 755.) This is likely to occur when the subpoena concerns privacy rights of third parties.

Petitioner Randolph Kling seeks a writ of prohibition to compel respondent superior court to vacate its order granting the People's motion to unseal reporters' transcripts of in camera hearings conducted pursuant to section 1326, subdivision (c). We grant the petition.

Facts

A grand jury indicted Kling on seven felony counts, including two counts of first degree murder with special circumstances alleged for multiple murders, lying in wait, and financial gain. (§§ 187, subd. (a), 190.2, subd. (a)(1), (3) & (15).) During its investigation, the defense sought production of various records and served subpoenas on third parties. The subpoenaed records were delivered to the clerk of the trial court and examined by the court in camera, in the presence of defense counsel. (§ 1326, subd. (c).) Some of the in camera hearings occurred without notice to the People.

In January of 2008, Kling requested the trial court not to disclose to the prosecution information concerning the subpoenas. Kling contended that knowledge of the records subpoenaed would reveal defense strategies and work product. The prosecution argued the "People have a right to know the items subpoenaed . . . and what the court is contemplating releasing, to determine if the People have standing to object, to alert other persons who may have standing to object, or to join the defendant's attempt to obtain information therein." The prosecution did not object, however, to an in camera hearing for the court to hear defense arguments concerning the relevance of the subpoenaed items so it could determine whether to release the subpoenaed items.

On February 5, 2008, the trial court ordered that all documents received by the court pursuant to a defense subpoena were "to be logged in the docket, noting the date

received and the party supplying the documents."[2] The court stated that it found "no authority supporting the defense request to have no documentation in the file identifying the receipt of subpoenaed documents and the agency or person from whom they were received. The Court [found] that there is no privilege that applies to this information."

The Ventura County Superior Court clerk makes docket reports available to the public in both a "short" and "long" format, with slightly more information contained in the long format. In accordance with the trial court's order of February 5, 2008, the clerk began recording in the long docket report the names of the third parties from whom the defense had subpoenaed documents.

On February 20, March 6, March 28, April 8, April 28, and May 1, 2008, the trial court conducted in camera hearings with defense counsel to review subpoenaed documents. The court released documents to the defense and ordered transcripts of the in camera hearings sealed.

On May 20, 2008, relying on the recent case of *Humberto S.*, *supra*, 43 Cal.4th 737, the People requested that the trial court examine the transcripts of all previously closed hearings and unseal any transcripts that did not contain defense theories of relevance.

On June 18, 2008, the trial court issued an order unsealing the transcripts of in camera hearings held on November 28, 2007, and March 28, April 8, April 28, and May 1, 2008, and a portion of the February 20, 2008, transcript. The court stated that it would review the transcripts of December 27, 2007, and March 6, 2008, and issue a later ruling whether those transcripts would also be unsealed. The court stated the transcripts it had ordered unsealed contained "nothing but cursory discussions of subpoenaed records, nothing about defense strategy." The court stayed its order unsealing the transcripts to permit defense counsel to seek writ relief.

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[2] We have taken judicial notice of the trial court's order of February 5, 2008. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

Kling then filed the instant petition for a writ of prohibition. We issued an alternative writ directing the trial court to vacate its order granting the People's motion to unseal the transcripts of the in camera hearings, or show cause why a writ should not issue compelling it to do so. The trial court elected not to vacate its order and the People filed a return to the petition.[3]

Discussion

Much Ado About Knowing

Kling contends the trial court's order unsealing the transcripts of the in camera hearings amounts to discovery not authorized by the criminal discovery statutes. The court's order forces him to make "the Hobson's choice of going forth with his discovery efforts and revealing possible defense strategies and work product to the prosecution, or refraining from pursuing these discovery materials to protect his constitutional rights and prevent undesirable disclosures to his adversary."

The People contend the defense counsel's ex parte discussions with the court on matters unrelated to strategy are not authorized by section 1326, subdivision (c). Because the trial court narrowly tailored its order to seal only those transcripts that reveal defense theories of relevance, the People argue writ relief is not warranted.

"Prosecutorial discovery is a pure creature of statute, in the absence of which, there can be no discovery. . . . '[U]nder the reciprocal discovery provisions of section 1054 et seq., all court-ordered discovery is governed exclusively by--and *is barred except as provided by*--the discovery chapter. . . .'" (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1167, citations omitted; § 1054, subd. (e) ["no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States"].) "A trial court

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[3] Kling has since been found guilty of the charged murders, but not sentenced. Kling's conviction may render the matter moot. Because the issue here is a matter of public interest and may likely recur, we will resolve the issue. (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 868, fn. 8; *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 948-949.)

should not attempt to embroider the discovery statute to provide greater discovery rights for the prosecution." (*Hubbard*, at p. 1169.)

Section 1326, as amended in 2004, sets forth the methods for issuing and complying with a subpoena duces tecum issued by the defense in a criminal case requiring the production of documents from a third party. Section 1326, subdivision (b) provides: "A subpoena issued in a criminal action that commands the custodian of records or other qualified witness of a business to produce books, papers, documents, or records shall direct that those items be delivered by the custodian or qualified witness *in the manner specified in subdivision (b) of Section 1560 of the Evidence Code*." (Italics added.) Evidence Code section 1560, subdivisions (b) and (c) provide that the custodian of records or other qualified witness who was served with the subpoena shall deliver the records to the clerk of the trial court in a sealed envelope.

Section 1326, subdivision (c) provides that when the defendant issues a subpoena duces tecum in a criminal case, the court *may* order an in camera hearing to determine whether the defendant is entitled to receive the documents contained in the sealed envelope. Subdivision (c) precludes the trial court from ordering the records disclosed to the prosecution unless the defendant intends to introduce them as evidence in the trial.

Section 1326, subdivision (c) does not require the defense to disclose to the prosecution the identities of the third parties upon whom it has served subpoenas or the nature of the documents sought. Nor does the statute discuss the prosecution's role during the court's review of documents tendered in response to defense third-party subpoenas.

Evidence Code section 1560, subdivision (d) also applies to third-party discovery proceedings in criminal cases. (*Humberto S.*, *supra*, 43 Cal.4th 737, 749.) Subdivision (d) provides in part that, unless the parties to the proceeding otherwise agree, "the copy of the records shall remain sealed and shall be opened only at the time of trial . . . or other hearing, upon the direction of the judge, . . . *in the presence of all parties who have appeared in person or by counsel at the trial . . . or hearing*." (Italics added.)

Evidence Code section 1560 suggests that "opposing parties have a right to notice and presence, but it leaves unanswered the degree of any further participation, neither guaranteeing nor prohibiting it." (*Humberto S.*, at p. 749.)

In *Humberto S.*, the prosecution moved to quash a third-party subpoena issued by the defense for a victim's medical records. Our Supreme Court held that a prosecutor's argument at a third-party discovery hearing, whether permitted or solicited by the trial court, did not amount to the representation of third-party interests, and did not require recusal of the prosecutor. The court stated: "[A] prosecutor is not entitled to submit argument in certain types of third-party discovery proceedings. This does not mean the prosecution is prohibited from doing so; certainly with the trial court's consent, he or she is allowed to do so. Indeed . . . the prosecutor is entitled to notice of the hearing and may there address any questions the trial court has. . . . Having been allowed to participate in the hearing, the prosecutor is not for that reason then subject to recusal unless he or she has . . . formally assumed representation of a third party." (*Humberto S.*, *supra*, 43 Cal.4th 737, 755, citations omitted.)

Humberto S. instructs that the People are entitled to notice of a hearing relating to third-party subpoenas issued by the defense under section 1326. But *Humberto S.* does not sanction disclosure to the People of the identity of the third parties to whom the defense has issued subpoenas or the nature of the records sought. *Humberto S.* draws a parallel between the prosecution's participation in *Pitchess* procedures and section 1326 hearings.[4] In neither proceeding is the prosecution *entitled* to participate, but may participate if the court so desires. (*Humberto S.*, *supra*, 43 Cal.4th 737, 750, 755.)

Here, the prosecution did not receive notice of every in camera hearing. But that does not entitle it to knowledge of what took place at any of the in camera hearings. No statutory or constitutional authority permits disclosure to the prosecution of the names of the third parties to whom defense subpoenas have been issued or the nature

[4] The *Pitchess* decision allows the defense limited discovery of police personnel records where police misconduct is alleged. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

of the records produced. Unsealing transcripts of any in camera hearing could result in disclosure of information the defense may not use at trial and, in turn, inhibit defense counsel's investigation. This does not prejudice the People. Section 1054.3 requires disclosure of evidence the defense intends to offer at trial.

The cases relied upon by the People are not helpful. In *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, and *Department of Corrections v. Superior Court (Ayala)* (1988) 199 Cal.App.3d 1087, the appellate courts allowed the prosecution limited disclosure of information contained in defense subpoenas. But neither case has application here. They predate the enactment of the reciprocal discovery provisions in section 1054.3 and the recent amendments to section 1326.[5] Here the People will know what documents were subpoenaed if the defense decides to use them at trial. The People are not entitled to know what the defense subpoenaed but will not use at trial.

The federal authorities cited by the People are inapposite because the federal rules require the defense to file a noticed motion before a third-party subpoena may issue. (See *U.S. v. Beckford* (E.D. Va. 1997) 964 F.Supp. 1010, 1025-1032; *U.S. v. Tomison* (E.D. Cal. 1997) 969 F.Supp. 587, 595.)

Victims' Bill of Rights

We reject the People's contention that Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law," which amended the California Constitution to guarantee crime victims a number of rights, provides authority for the trial court's order. Proposition 9 expands the definition of "victim" to include "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime" as well as "the person's spouse, parents, children,

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[5] In 1990, the electorate passed an initiative measure designated on the ballot as Proposition 115 and entitled the "Crime Victims Justice Reform Act." Proposition 115 added constitutional and statutory language authorizing reciprocal discovery in criminal cases and a new chapter in the Penal Code on the subject (§ 1054, et seq.). As a result of Proposition 115, discovery in criminal cases is now governed primarily by statutory law. (*In re Littlefield* (1993) 5 Cal.4th 122, 129-130; 5 Witkin, Cal. Crim. Law (3d ed. 2000) Crim. Trial, § 30, pp. 76-77.)

siblings, or guardian" and "a lawful representative of a crime victim who is deceased." (Cal. Const., art. 1, § 28(e).)

Victims have the right "[t]o prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law." (Cal. Const., art. 1, § 28(b)(4).) This right to prevent disclosure may be enforced by a "victim, the retained attorney of a victim, a lawful representative of the victim, *or the prosecuting attorney upon request of the victim* . . . in any trial or appellate court with jurisdiction over the case as a matter of right." (*Id.*, § 28(c)(1), italics added.) Victims have the right to "be heard, upon request," at "any proceeding in which a right of the victim is at issue." (*Id.*, § 28(b)(8).)

The People contend these new constitutional rights allow for both victims and the prosecution to know what records are sought, and when critical hearings will be held. The People observe that the defense issued subpoenas for financial records of Lori Budfuloski (the widow of one of the victims in this case) and personal records regarding Kling's sister. In the penalty phase of the case, the People intend to present evidence of crimes committed by Kling against his sister, arguably also a "victim" for purposes of Proposition 9. Kling's sister objected to the release of her college records, but not in time to prevent their release. The People argue that had they received timely notice of what had been subpoenaed, they might have been able to bring the issue to the court's attention. They argue that, to protect victims' rights under Proposition 9, the prosecution must know what records are being sought by the defense and reviewed by the court.

The People concede the in camera hearings predated the enactment of Proposition 9. These new constitutional provisions do not allow the prosecution to see all defense third-party subpoenas. Proposition 9, like section 1326, empowers the trial court to ask questions pertinent to privacy rights of third parties without hindering defendant's ability to prepare a defense. If the trial court, in its discretion, determines that an in

camera hearing under section 1326 is warranted, the prosecution is entitled to notice of the hearing and may alert the court to the provisions of Proposition 9.

Conclusion

Section 1326 does not require the trial court to conduct an in camera hearing every time it receives documents produced in response to third-party subpoenas issued by the defense. If a trial court chooses to conduct such a hearing under section 1326, the prosecution is entitled to notice of the hearing and to be present. (*Humberto S.*, *supra*, 43 Cal.4th 737, 755.) The prosecution's role is limited. Unless the prosecutor has been requested by a victim to enforce rights guaranteed by Proposition 9, the prosecutor is not statutorily authorized to argue or otherwise participate in the in camera hearing, but may be available to answer any questions the trial court has.

Consistent with Evidence Code section 1560, subdivision (d), the trial court may open the sealed envelopes containing records produced in response to defense subpoenas without disclosing to the prosecution the identity of the third parties or the nature of the documents. If the court has questions concerning the relevance of the documents produced, the court should conduct an in camera hearing in the presence of defense counsel only. Before deciding whether the defense is entitled to receive the subpoenaed documents, the trial court may ask the prosecution questions it deems appropriate to protect the privacy rights of parties subpoenaed. We acknowledge this requires great care because it must do so in a manner that does not prejudice the defense.

If the trial court determines in camera that the documents the defense has subpoenaed are not relevant, the prosecution's participation is not necessary. If the court determines in camera that the documents are relevant, the prosecution will see them in due time if the defense uses them at trial. The court's in camera ruling on relevance, however, does not forestall the prosecution from objecting to the admission of the evidence on relevancy or other grounds at trial.

There may be cases in which the trial court determines it necessary to ask questions of the prosecution in addition to questions it has posed to the defense in camera to protect privacy rights of third parties. The court may solicit suggestions from the

defense on how best to ask these questions without disclosing defense strategies. In many cases this goal may be difficult, if not impossible, to achieve. In that event, the defense may be forced to choose either to disclose the subpoenaed document to the prosecution or to forego receiving the document.

The trial court's ruling on the question of the delivery of any documents to the defendant should be made in open court without identifying the third parties who produced the documents or the nature of the documents produced. Because section 1326 precludes the trial court from disclosing the records to the prosecution, the clerk's public (or long form) docket notes should not identify the names of the third parties from whom documents have been received. Needless to say, the prosecution may not receive copies of transcripts of in camera hearings held pursuant to section 1326. Those transcripts shall remain sealed as provided by section 1054.7.

Disposition

We grant the petition. Let a peremptory writ of prohibition issue directing the respondent superior court to vacate its order of June 18, 2008, granting the People's motion to unseal reporters' transcripts of in camera hearings conducted pursuant to section 1326, and to enter a new order denying the People's motion. The alternative writ is discharged and this opinion is made final immediately as to this court.

CERTIFIED FOR PUBLICATION.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Rebecca S. Riley, Judge

Superior Court County of Ventura

Duane Dammeyer, Public Defender, Michael C. McMahon, Chief Deputy, for Petitioner.

Gregory D. Totten, District Attorney, Michael D. Schwartz, Special Assistant District Attorney, Cheryl M. Temple, Senior Deputy District Attorney, for Real Party in Interest, the People.

No appearance for Respondent Superior Court.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 800 S. Victoria Avenue, Ventura, California 93009.

On September 9, 2009 I served true copies of the attached document, described as:

PETITION FOR REVIEW

by personal service on the following:

Receptionist, Public Defender
ATTN: Michael C. McMahon, Chief Deputy
800 South Victoria Avenue
Ventura, CA 93009

Clerk of the Superior Court
ATTN: Michael Planet, Executive Officer
800 South Victoria Avenue
Ventura, CA 93009

Clerk of the Superior Court
ATTN: Hon. Rebecca S. Riley, Judge
800 So. Victoria Avenue
Ventura, CA 93009

and by placing a true copy thereof enclosed in a sealed envelope addressed as follows, and causing such envelope with postage thereon fully prepaid to be placed in the United States Mail at Ventura, California:

Office of the Clerk
Court of Appeal
200 E. Santa Clara Street
Ventura, CA 93001

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.