SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RANDOLPH CLIFTON KLING,	)	
	)	COURT NO.
Petitioner,	)	S176171
	)	
vs.	)	
	)	(Court of Appeal
SUPERIOR COURT OF VENTURA COUNTY,	)	No. B208748)
	)	
Respondent;	)	(Superior Court
	)	No. 2005045185)
THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Real Party in Interest.	)	
	)	

OPENING BRIEF ON THE MERITS

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

COPY

GREGORY D. TOTTEN, District Attorney
County of Ventura, State of California
MICHAEL D. SCHWARTZ (SBN 091124)
Special Assistant District Attorney
800 South Victoria Avenue
Ventura, California 93009

Telephone: (805) 654-2719

Attorneys for Real Party in Interest

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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 submits this Brief on the Merits following the order of November 10, 2009, granting review.

ISSUES ON REVIEW

As stated in our Petition for Review, the issues on review are as follows (Cal. Rules of Court, rule 8.520 (b)(2)(B)):

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?

STATEMENT OF FACTS AND OF THE CASE

This case reviews a writ of prohibition regarding ex parte proceedings on defense subpoenas duces tecum (SDTs) in a criminal 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])

[1] Exhibits referred to herein were filed in the Court of Appeal as follows: exhibits with letter designations were attached to the Verified Petition for a Peremptory

Prior to trial, the defense issued subpoenas duces tecum to a number of third parties. As to some of the subpoenas, the prosecution learned at some point the identity of the entity 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] 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 notice of penalty phase evidence in aggravation filed by the prosecution 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. The superior court issued an order regarding a

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Writ of Prohibition, Exhibits 1-3 were attached to the Preliminary Opposition to Petition for Peremptory Writ of Prohibition, and Exhibits 4-17 were submitted in support of the Return to Petition for Peremptory Writ of Prohibition.

[2] The subpoenas and hearings of which the prosecution has knowledge are summarized below; 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 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.)

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.[3]

The defense also subpoenaed 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.)

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.) The People noted that the defense had filed four ex parte documents with the court, and one with an out-of-county court, on subjects unknown to the People. The People argued that only petitioner's *theories of relevance* as to certain

[3] 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 Ms. Kling-Hesse, including high school records, college records, mental health records, and Housing Authority records. Defendant denied those allegations in the Reply to Return, p. 5.

subpoenaed items should be heard ex parte; all other communications with and rulings by the court should be open to all parties and the public. After litigation on the above issue, the court continued to allow ex parte proceedings related to defendant's SDTs.

On February 20, 2008, according to the court docket, an in camera hearing with defense counsel only was held regarding "subpoena documents," not further described. The court described the hearing as pertaining to "defense subpoenas and in camera review of documents." (Exhibit 12, RT 1337, ll. 8-11.) The District Attorney and the public were excluded. (RT 1340, ll. 11-13; RT 1341, ll. 12-14.) The transcript of the ex parte hearing was originally ordered sealed. On June 18, 2008, the court ruled that the first portion (from page 1 through page 9, line 7) be unsealed because it contained "nothing but cursory discussions of subpoenaed records, nothing about defense strategy," but that the remainder was "replete with discussions of defense strategy" and would remain sealed. (Exhibit D, RT 1501, ll. 11-15; RT 1502, ll. 21-26.)

On March 6, 2008, according to the docket, the court held an "[i]n camera hearing on subpoenas requested by the defense." The subpoenas are not further described. The transcript was ordered sealed. The trial court did not later review the transcript to determine if it should be unsealed. (Exhibit D, RT 1503, ll. 11-14.)

On March 28, 2008, according to the docket, "Court and counsel go over subpoena records received." The subpoenas are not further described. The court later ordered the transcript unsealed, stating that it does not contain defense strategy. (Exhibit D, RT 1502, ll. 21-24.)

On April 8, 2008, the trial court and defense counsel discussed subpoenaed documents the court had received. The short format docket[4] (Exhibit B) did not further describe the documents. The long format docket printed later (Exhibit 4) and the Minute Order (Exhibit 13) state, "Subpoenaed records received from Case Records North." The reference to Case Records North suggests that these are prison records. It is unknown to the People whether these are the records the court discussed with defense counsel. The court later ordered the transcript unsealed, stating that it does not contain defense strategy. (Exhibit D, RT 1502, ll. 21-24.)

On April 28, 2008, after hearing apparently unrelated issues regarding some records from the Sheriff's Office and some records from the victim's company, Budco, the court and defense counsel went over SDTs received. The subpoenas are not further described in the docket. They are described in the transcript as two "subpoena matters." (Exhibit 14, RT 1413, ll. 21-28.) The prosecutor was unable to attend because she

[4] The superior court makes court dockets available in both "short" report format and "long" report format, with slightly more information contained in the "long" format. (Court of Appeal opinion, p. 3; Return to Petition for Peremptory Writ of Prohibition, p. 4, numbered paragraph 1.)

had to conduct oral argument in another courtroom. (RT 1400-1401.) She stated that the records appear to be from the Reno Housing Authority, and that she suspected they had to do with Beverly Kling (Beverly Kling-Hesse). (RT 1400, ll. 26-28.) She stated Ms. Kling objected to any of her information being released. (RT 1400-1401.) The court later ordered the transcript unsealed, stating that it does not contain defense strategy. (RT 1502, ll. 21-24.)

On May 1, 2008, the court apparently held an ex parte hearing on a topic unknown to the People. There is no reference to this hearing in the docket. The trial court described it as "a small transcript that was before the in camera hearing on the Pitchess material," and later ordered it unsealed. (Exhibit D, RT 1502, ll. 16-18.)

On May 12, 2008, the California Supreme Court issued its decision in *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737 ("*Humberto S.*"), which the People brought to the attention of the court and defense counsel 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 order 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.

Defendant filed the Verified Petition for a Peremptory Writ of Prohibition in the Court of Appeal, Second Appellate District, Division 6, on June 24, 2008. The People filed a preliminary opposition on July 1, 2008. Defendant filed a reply on July 21, 2008. On request of the court, supplemental letter briefs were filed on behalf of defendant on November 6, 2008, and on behalf of the People on November 21, 2008.

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 that some transcripts be unsealed. At that time the superior 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 unsealing 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.[5] 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. (*Kling v. Superior Court* (2009) 177 Cal.App.4th 223, opn. vacated by grant of review.) The court noted that although the conviction might render the matter moot, it is a matter of public interest likely to recur. (Court of Appeal opinion, p. 4, fn. 3.)

On September 1, 2009, pursuant to the opinion of the Court of Appeal, the Honorable Kevin J. McGee, Presiding Judge of the Superior Court, issued an order vacating the order of June 18, 2008. As reflected in a letter of September 11, 2009, in response to the Court of Appeal opinion in this case, the Clerk of the Superior Court directed courtroom staff that the docket in criminal cases should not identify the third party from whom subpoenaed records have been received. This practice was followed in a minute order of December 2, 2009. Sentencing and motion for new trial are set in superior court for December 28, 2009. These new developments

[5] 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. The jury hung on the financial gain special circumstances, and the court dismissed those allegations on May 12, 2009.

are reflected in our Motion for Judicial Notice, items 4 and 5, filed under separate cover. These developments also support the conclusion that the matter is not moot.

On September 10, 2009, the People filed a Petition for Review, which was granted November 10, 2009.[6]

ARGUMENT

This case raises an important recurring issue in criminal cases: whether the court may hold ex parte hearings and make ex parte orders regarding defense subpoenas duces tecum 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 precludes the People from receiving meaningful due process notice

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[6] The relief sought in, and granted by, the writ proceeding in the Court of Appeal pertained to the unsealing of transcripts of portions of ex parte hearings. It is our belief that the trial court properly exercised its discretion regarding the unsealing order, and that no action in excess of jurisdiction was shown to justify the issuance of the writ. (Code Civ. Proc., § 1102.) However, we sought review to address related issues that were discussed in the Court of Appeal opinion and are likely to recur: the right of the People and of victims to notice and to participate in court proceedings regarding defense SDTs.

of the subject matter of hearings regarding records subpoenaed by the defense.

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

Finally, as discussed below, the issue of notice regarding defense subpoenas should be viewed in light of Marsy's Law, which gives crime victims the right to notice and to be heard, and the right to prevent the disclosure of confidential records about them. Marsy's Law specifically 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.

I.

SUBPOENAED RECORDS IN CRIMINAL CASES MUST BE SUBJECTED TO JUDICIAL REVIEW

When records in a criminal case are produced in compliance with a subpoena duces tecum, the party who issued the subpoena is not entitled to

examine or receive the records "until a judicial determination is made that the person is legally entitled to receive them." (*People v. Blair* (1979) 25 Cal.3d 640, 651.) If the subject of the records would have a reasonable expectation of privacy in the records, the trial court "should review the records in camera, weigh the criminal defendant's constitutional rights of confrontation and cross-examination against the statutory privilege for such records, determine which privileged matters, if any, are essential to vindicate the defendant's constitutional rights and create a record adequate to review its ruling." (*Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1303.) "Whether the privilege is granted by statute or involves a constitutional right to privacy . . . the rule is the same: the trial court must hold an in camera hearing on its own motion if such a hearing is necessary to decide whether a request for discovery should be granted." (*Union Pacific R.R. Co. v. State Bd. of Equalization* (1989) 49 Cal.3d 138, 165, fn. 7.)

Prior to 2004, the law allowed a criminal defendant to either subpoena records to the court (Evid. Code, § 1560, subd. (b), (c) & (d)), or utilize an alternative procedure in which the witness makes the records available to defense counsel for inspection or copying. (Evid. Code, § 1560, subd. (e), as amended by Stats. 1986, ch. 603 (A.B. 3540), §6.) In 2004, the law was amended to limit the inspection and copying option of section 1560, subdivision (e) to only "a civil action," and to require that in

criminal cases, all subpoenaed documents be delivered to the court. (Stats. 2004, ch. 162 (A.B. 1249), § 1.)[7]

The purpose of this change was "to protect against the release of confidential consumer information in criminal cases" by requiring "that subpoenaed records be provided directly to the court under the seal, and opened by the court and reviewed by a judge before release" in order to "protect[] against the release of confidential consumer information such as financial, employment or privileged medical records." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1249 (2003-2004 Reg. Sess.) as amended June 9, 2004 [copy included in our Motion for Judicial Notice].)

The 2004 legislation also amended Penal Code section 1326, subdivision (c), to its current form:

> In a criminal action, no party, or attorney or representative of a party, may issue a subpoena commanding the custodian of records or other qualified witness of a business to provide books, papers, documents, or records, or copies thereof, relating to a person or entity other than the subpoenaed person or entity in any manner other than that specified in subdivision (b) of Section 1560 of the Evidence Code. When a

[7] Subdivision (e) of section 1560 reads the same today, except that the cross-referenced section numbers have been updated.

> defendant has issued a subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies thereof, the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents. The court may not order the documents disclosed to the prosecution except as required by Section 1054.3.

The provision for in-camera review was enacted in order to protect the defense's attorney-client privilege. As stated in the legislative history, "The Senate amendments require the court to allow the attorney for the defendant an ex parte opportunity to review the subpoenaed records if the court finds disclosure of the records would violate the attorney client privilege." (Assem. Floor Concurrence in Senate Amendments, Assem. Bill No. 1249 (2003-2004 Reg. Sess.) as amended June 9, 2004 [copy included in our Motion for Judicial Notice].)

These provisions for judicial review of subpoenaed documents are intended to protect the privileges and privacy rights of third parties. This procedure will be most effective if both the defense and the prosecution have an opportunity to participate in the proceedings, alert the court to potential issues, and provide input as to how the issues should be resolved.

II.

THERE IS A PRESUMPTION OF OPENNESS FOR COURT PROCEEDINGS AND RECORDS

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 submitted to 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 constitutional limitations on closed hearings are summarized in *NBC Subsidiary*: "[T]he United States Supreme Court and numerous unanimous lower courts have held that the First Amendment of the federal Constitution generally precludes closure of substantive courtroom proceedings in *criminal* cases unless a trial court provides notice to the public on the question of closure and after a hearing finds that (i) there exists an overriding interest supporting closure; (ii) there is a substantial probability that the interest will be prejudiced absent closure; (iii) the proposed closure is narrowly tailored to serve that overriding interest; and (iv) there is no less restrictive means of achieving that overriding interest." (20 Cal.4th at p. 1181, emphasis in original.) In the present case, the public interest does not require that matters pertaining to defense subpoenas be sealed, other than the few portions containing statements of strategy. The trial court here appropriately ordered those few sections remain sealed.

Allowing public access to documents, except those matters truly protected by privilege, is consistent with the courts' approach in other areas. For example, in *Pitchess* motions,[8] in order to protect the strategies of the defense, the court exercises its discretion as to whether to redact

[8] [8] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

portions of the affidavit in support of the motion. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63.) In the present case, as in *Garcia*, the court could have asked defense counsel in camera to justify its request to seal certain portions, but before that happened, "[o]pposing counsel should have an opportunity to propound questions for the trial court to ask in camera." (*Id.* at p. 73.)

In exercising its discretion, the court "should not be bound by defendant's naked claim of confidentiality but should, in light of all the facts and circumstances, make such orders as are appropriate to ensure that the maximum amount of information, consistent with protection of the defendant's constitutional rights, is made available to the party opposing the motion for discovery." (*City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1130, footnote deleted.)

Ex parte communications between the court and counsel for one party to a lawsuit are generally prohibited, except where "expressly authorized by law." (Cal. Code Jud. Ethics, canon 3 B (7)(e); Rules Prof. Conduct, rule 5-300 (B).)

As discussed below, Penal Code section 1326, subdivision (c) authorizes closed hearings only for as necessary to protect the strategies of defense counsel in explaining why particular records are sought. Because closed ex parte hearings are not permitted for other discussions regarding

subpoenas, the trial court properly ordered those portions unsealed. On review in the Supreme Court, in addressing the procedure for trial courts to follow in reviewing defense SDTs, the court should limit the authority to hold ex parte proceedings to the minimum necessary to protect defense strategies or other privileged matters.

III.

THE PEOPLE ARE ENTITLED TO MEANINGFUL NOTICE OF PROCEEDINGS AND THE OPPORTUNITY TO BE HEARD REGARDING DEFENSE SUBPOENAS

The People are guaranteed the right of due process in all criminal proceedings. (Cal. Const., art. I, § 29.) As recognized by the United States Supreme Court, "The people of the State are also entitled to due process of law." (*Stein v. New York* (1953) 346 U.S. 156, 197, overruled on other grounds in *Jackson v. Denno* (1964) 378 U.S. 368, 391.)

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 [trial court improperly issued ex parte order, without notice to the district attorney, allowing defense counsel to conduct ballistics test on firearm in custody of police department].)

In the present case, the Court of Appeal crafted a very restrictive interpretation of the right to be heard. The court stated that at section 1326

hearings, "the prosecution is often seen but **not** heard." (Court of Appeal opinion, p. 2, bold added.) Such a limitation on the prosecutor's role is at odds with the policy that both sides be permitted to participate.

"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.)

Ayala was a murder case with special circumstances. The defense issued a subpoena duces tecum to the California Department of Corrections (CDC) 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 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 held that the ex parte proceedings violated the People's right to due process of law. (*Id.* at p. 1093.) The court granted the writ, ordering the trial court to determine what portions of the supporting documents were privileged or constituted attorney work product, and to allow the district attorney to participate in further proceedings that did not involve sealed matters. (*Id.* at p. 1097.) The court stated:

> Even if, as Ayala argues, he is required to divulge privileged information to make a showing of good cause in support of the subpoena duces tecum, it is unnecessary to totally exclude the District Attorney's office from the proceedings. Rather, the court may review the supporting documents in camera on an ex parte basis to determine **if any specific information constitutes privileged information**. The court may then **seal those specific items**. In this manner the court will protect the defendant's constitutional rights and the attorneys' work product while, to the extent possible, still providing for open proceedings.

(*Ayala*, 199 Cal.App.4th at p. 1094, bold added.)

Ayala noted two procedural shortcomings inherent in ex parte proceedings. First, the absence of the adversary party results in a shortage of factual and legal contentions for the court to base its decision. Second, with only the moving party present to assist in drafting the court's order, it

may "sweep 'more broadly than necessary.'" (*Id.* at pp. 1092-1093, relying upon *United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 908-909.)

The participation of the prosecution in defense discovery matters was explained in *City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d at pages 1130-1131:

> [W]hile ex parte hearings may be necessary to protect a defendant's rights . . . it does not follow that the prosecutor (or interested third parties), must be precluded from effective participation in an important pretrial matter merely because the defendant asserts that the factual or legal showing made in support of a particular motion should remain confidential. If that were the rule, all defense discovery motions would soon be made and conducted in camera, to the detriment of our system of criminal justice in that those proceedings would not then be tested by the stringent and wholesome requirements of adversary litigation.
>
> The basic elements of due process are reasonable notice and an opportunity to be heard. The People (and interested third parties) are entitled to that process no less than the defendant.

In *Alford v. Superior Court* (2003) 29 Cal.4th 1033, the court addressed the prosecution's rights when the defense seeks peace officer personnel records through a *Pitchess* motion, which the court described as "essentially a third party discovery proceeding." (*Id.* at p. 1045.) 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.) The court held that "as a party to the underlying criminal proceeding, the district attorney under general due process privileges is entitled to notice of the date and place of the hearing on a defense *Pitchess* motion." (*Ibid.*) The court held that this would afford the trial court the opportunity to ask questions of both the defense and the prosecution. (*Ibid.*)[9]

Humberto S. 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.*

[9] This discussion 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.)

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 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 further stated, "the prosecutor is entitled to notice of the hearing and may there address any questions the trial court has." (*Id.* at p. 755.) The opportunity to address the court's questions appears to be an example, rather than a limitation, of the type of participation the trial court has discretion to permit.

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 subpoena duces tecum 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.)

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.

The general format of a *Pitchess* motion would be appropriate for a hearing on a defense SDT. Following notice to the prosecution of what is being sought, the matter should be discussed in the presence of all parties in open court. The trial court should have the discretion to permit argument by the prosecution. If a discussion of defense strategy is appropriate under Penal Code section 1326, subdivision (c), the prosecution and the public would be excluded from that portion of the proceedings, and an ex parte hearing held on that issue only.

IV.

MEANINGFUL NOTICE REQUIRES DISCLOSURE OF THE SUBPOENAS

In the present case, the Court of Appeal held, "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.) We respectfully disagree. The People's constitutional due process right to notice and an opportunity to be heard (Cal. Const., art. I, § 29) requires that the People receive sufficient information to participate in the proceedings.

In order to receive meaningful notice of the court proceedings regarding defense subpoenas duces tecum, the prosecution must be entitled to access the subpoenas, or comparable information disclosing the party from whom the records are received, the person who is the subject of the records, and the general nature of the records sought (psychiatric records, school records, records of previous arrests, etc.). Disclosure is also authorized by the provisions of Evidence Code section 1560, subdivision (c), and the prosecution's right to move to quash a subpoena, both of which are discussed below.

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 defendant 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, if the defense intends 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."])

The Court of Appeal states, "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." (Court of Appeal opinion, p. 10.) We disagree with both the premise and the conclusion. Penal Code section 1326, subdivision (c), precludes disclosure to the prosecution of "the documents" produced in response to a defense subpoena (except pursuant to the criminal discovery statute), but does not preclude disclosure of the subpoena itself. Inclusion on the court docket of the identity of the subpoenaed records the court will need to rule upon properly facilitates notice to the prosecution and the victims.

The Court of Appeal also states, "Section 1326, subdivision (c) does not require the defense to disclose to the prosecution the identities of the third parties upon it has served subpoenas or the nature of the documents sought." (Court of Appeal opinion, p. 5.) But it also does not prohibit the court from disclosing documents lodged with the court such as the writing on the outer and inner envelopes required by Evidence Code section 1560, subdivision (c).

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.

Disclosure is also appropriate to give the People the opportunity to move to quash the subpoena. Under California case law, the People have standing to file a motion to quash a subpoena duces tecum regarding third party records. (*People v. Hammon* (1997) 15 Cal.4th 1117, 1120 [Supreme Court upheld order quashing SDT made on motion of People]; see *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1320 [records

custodian Department of Corrections can move to quash SDT in criminal case].)[10] The opportunity for opposing counsel to move to quash an SDT helps ensure that the subpoena power of the court is not misused and acts as a check against potential violation of third parties' privileges and privacy rights. The opportunity of the prosecution and of victims to move to quash would be meaningless if they are prohibited from learning what has been subpoenaed, and from whom.

As discussed above, in *Ayala*, the superior court sealed a defense subpoena duces tecum, supporting declaration of counsel, and supporting points and authorities. (199 Cal.App.3d. at p. 1091.) The defense contended that revealing the subpoena duces tecum 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.

[10] As a party, the People may also have a statutory right to move to quash (Code Civ. Proc., § 1987.1, subd. (b)(1)), if such provision applies in criminal cases.

There is no basis in the law for interpreting attorneys' work product so broadly." (*Ibid.*) The Court of Appeal ordered 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.) Based on *Ayala*, defense subpoenas themselves, as opposed to supporting declarations, should not be assumed to be confidential.[11]

Humberto S. used *Pitchess* motions as an analogy for other defense third party discovery requests. In *Garcia v. Superior Court*, *supra*, 42 Cal.4th at pages 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. Using *Pitchess* as a model for other defense third

[11] 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.

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.

The fact that the prosecution may learn what evidence the defense is seeking does not violate the defendant's Sixth Amendment rights. In *Michigan v. Lucas* (1991) 500 U.S. 145, the court held that a Michigan statute requiring the defense to give notice of the intent to present evidence of an alleged rape victim's past sexual conduct did not per se violate the Sixth Amendment. The court held that the statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. The statute also protects against surprise to the prosecution." (*Id.* at pp. 149-150.) The court described such notice requirements as "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." (*Id.* at pp. 150-151.)

Similarly here, allowing the district attorney and the victim to know what records are being sought will protect victims against harassment and invasions of privacy, will protect the prosecution against surprise, and will enhance the fairness of the adversary system.

Although not binding on this court, two decisions of federal district courts are instructive. These cases construe Federal Rule of Criminal Procedure 17(c), which requires a party to make a motion to obtain a pre-

trial subpoena duces tecum. In *United States v. Beckford* (E.D. Va. 1997) 964 F. Supp. 1010, 1025-1032, the court held that in order to comply with the Sixth Amendment, the court could order the sealing of the application for an SDT in the "rare instance in which a defendant would be required to disclose trial strategy, witness identities or attorney work-product to the Government in his pre-issuance application." (*Id.* at p. 1027.) The court held that the determination as to whether to seal documents would be "determined based on the specific circumstances presented in a particular case" (*Id.* at p. 1029), but would be authorized "only in exceptional circumstances." (*Id.* at p. 1030.) The court did not hold that the subpoenas themselves must be sealed.

In *United States v. Tomison* (E.D. Cal. 1997) 969 F. Supp. 587, 595, the court authorized ex parte filing of an application for a subpoena duces tecum only in those cases in which the defendant "cannot make the required showing without revealing trial strategy." The court found a greater need for confidentiality of the application, which may reveal defense strategy, as opposed to examination of the subpoenaed documents themselves. (*Id.* at p. 591, fn. 8.) The court noted the lack of uniformity on the issue of whether an application can be made ex parte, citing cases which held that the rule contemplates notice to and inspection by the parties and their attorneys. (*Id.* at p. 91.)

In the present case, the Court of Appeal rejected the federal cases cited above as "inapposite because the federal rules require the defense to file a noticed motion before a third party subpoena may issue." (Court of Appeal opinion, p. 7.) But despite the procedural differences, the federal authority demonstrates the workability of a general rule of disclosure of defense subpoenas, with nondisclosure only in exceptional cases.

Because we do not fully know what records defendant subpoenaed, or from whom, we cannot address whether "exceptional circumstances" justified sealing here. But if the approach from federal cases is followed, the court should not require sealing of subpoenas or of hearings regarding subpoenas on a wholesale basis. Instead, the trial court should exercise its discretion as to which documents or transcripts should be sealed.

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.

V.

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

When records in a criminal case are produced in compliance with a subpoena duces tecum, the party who issued the subpoena is not entitled to examine or receive the records "until a judicial determination is made that the person is legally entitled to receive them." (*People v. Blair, supra.*) In

some cases, the court may need to determine if the records are privileged, or may need to balance conflicting rights such as a defendant's due process right to know against a third party's right to privacy. Such determinations are not ideally made in a vacuum, or with the input of defense counsel as the only party. The adversary system operates better and the decision-making process benefits when input is also permitted from opposing counsel representing the People.

The court's obligation to protect the rights of unrepresented third parties regarding document production is similar to the court's obligation to *exclude* evidence where "the person from whom the information is sought is not a person authorized to claim the privilege" and no party to the proceeding is authorized to claim the privilege. (Evid. Code, § 916.) Exclusion of privileged information under section 916 shall be made on the court's own motion, "or on the motion of any party." (Evid. Code, § 916, subd. (a).) This language contemplates that a party to a proceeding may raise the issue of a privilege held by a nonparty, and is consistent with a prosecutor moving to exclude evidence as to which a victim or witness has a privilege. "Section 916 is needed to protect the holder of a privilege when he is not available to protect his own interest." (Comment, Assem. Comm. on Judiciary, quoted in 29B (Pt. 3A) West's Ann. Evid. Code (2009 ed.) foll. § 916, p. 264 [copy included in our Motion for Judicial Notice].) The same policy should allow the prosecution to alert the court to the

privileged nature of documents that have been subpoenaed regarding an unrepresented third party, and to participate in the court's analysis of the third party's rights before the documents are turned over to defense counsel.

In the present case, the Court of Appeal stated that in hearings under Penal Code section 1326, "the prosecution is often seen but not heard." (Court of Appeal opinion, p. 2.) This saying describes an old attitude regarding children behaving in the presence of adults but is not an appropriate description of the role of an advocate in court. "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.)
>
> 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*, *supra*, 15 Cal.4th at pages 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.) Allowing the prosecution to know the nature of the records that have been sought reduces the chance of improper disclosure of the records.

The Court of Appeal concludes that the prosecutor's right to participate in a hearing regarding a defense subpoena duces tecum 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.

In ruling that the prosecution's role is, at most, answering questions formulated by the court, the Court of Appeal proposes a procedure that it admits "may be difficult, if not impossible" to accomplish without disclosing defense strategy. (Court of Appeal opinion, pp. 9-10.) The law need not impose such a difficult burden upon the trial courts. As discussed

above, disclosure of the nature of the records sought generally does not impermissibly disclose defense strategy. The prosecution should know before the hearing begins what records are being sought so that it can participate in a meaningful way in the proceedings.

VI.

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. Although the hearings here occurred before the enactment of Proposition 9, its provisions should be considered in providing guidance for future cases.

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 courts have not yet determined the scope of this protection, including whether it applies only when there are harassment concerns or whenever there are privileged or confidential materials, and whether it is an absolute right or is to be weighed against other rights such as the defendant's right to due process. But victims will have no opportunity to assert these rights if they do not know that their records have been sent to the court.

Proposition 9 also provides that the victim's rights may be enforced by the "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).) Again, if the victim is unaware that his or her records are being sought, the victim will not know to appear in court, to retain counsel, or to ask the prosecuting attorney for assistance. If

the prosecuting attorney is also prohibited from knowing what records are being sought, it will be difficult or impossible to render the assistance authorized by Proposition 9.

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.

At present, whether the victim or the prosecution learns that a subpoena has been issued is often a matter of chance. It appears that the consumer notice provisions of Code of Civil Procedure section 1985.3 do not apply to criminal cases.[12] Public access to subpoenas filed or lodged

[12] Code of Civil Procedure section 1985.3, subdivision (a)(2), defines "subpoenaing party" in terms of a "civil action or proceeding." *Michael B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1394-1396, holds that civil subpoena statutes do not apply to criminal cases. (See Pipes & Gagen, California Criminal Discovery (4th ed. 2008) §9.14, pp. 837-840, discussing consumer notices under section 1985.3, HIPAA, and the Information Practices Act for SDTs in criminal cases.) It is unclear whether an attorney employed by a county public defender would be bound by Government Code section 7476, which requires service of a subpoena duces tecum on the customer and compliance with Code of Civil Procedure section 1985 et seq. for certain financial records. (See Pipes &

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. It will also allow victims and other third parties to determine whether they need to take action to assert their rights. Learning that a subpoena has been issued for a victim's records should be a matter of right, not of happenstance.

CONCLUSION

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 participation than permitting answers to 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.

Gagen, *supra*, §9.29.1, p. 860, stating that the California Right to Financial Privacy Act does not apply to criminal defendants.)

We respectfully request that the Supreme Court issue an opinion that will provide victims and the prosecution with meaningful notice and an opportunity to be heard.

Respectfully submitted,

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

Dated: December 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 brief is 9382 words, exclusive of tables and this certificate.

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

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: Office of the District Attorney, 800 S. Victoria Avenue, Ventura, California 93009.

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

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Ventura, CA 93001

District Attorney, San Joaquin County
ATTN: Kevin A. Hicks
P.O. Box 990
Stockton, CA 95201

District Attorney, Orange County
ATTN: Kevin J. Haskins
P.O. Box 808
Santa Ana, CA 92701

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