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.	)	
	)	

REPLY BRIEF ON THE MERITS

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

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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REPLY BRIEF ON THE MERITS

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 Reply Brief on the Merits.

I.

REVIEW SHOULD NOT BE DISMISSED AS MOOT

On the same day petitioner's Answer Brief on the Merits was filed, the motion for new trial was denied by the superior court and a judgment of death was imposed. The automatic appeal is pending under case number

S180711. However, petitioner has not requested that the matter be dismissed as moot. Nor do the People.

The proceeding should not be dismissed as moot because it "present[s] important issues that are capable of repetition yet tend to evade review." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 524, fn. 1.) Writ proceedings to challenge the manner in which subpoenas are handled will be rendered technically moot if, as will often happen, the trial is completed before the writ proceedings are completed. The Court of Appeal properly concluded that the matter should be resolved, despite possible mootness, "[b]ecause the issue here is a matter of public interest and may likely recur." (Court of Appeal opinion, p. 4, fn. 3.)

The manner in which defense subpoenas duces tecum (SDTs) are handled in criminal cases is an important issue to prosecutors, victims, defense attorneys, and trial judges. Whether prosecutors, as well as victims and witnesses whose records are the subject of defense SDTs, are entitled to know what type of records have been subpoenaed is an issue that arises on a daily basis in our criminal courts. Based on the Court of Appeal decision in the present case, the Executive Officer and Clerk of the Ventura County Superior Court has directed courtroom clerks to not identify the third party from whom subpoenaed records have been received. (See item 5 of our Request for Judicial Notice, filed on December 10, 2009.)

The right of the defense, the prosecution and the public regarding confidentiality of subpoenaed records needs to be resolved. The present case presents a good vehicle for the court to resolve the issue, and we respectfully request that the court proceed to determine the merits.

II.

PENAL CODE § 1326 DOES NOT VIOLATE RECIPROCITY

Petitioner argues that Penal Code section 1326 is unconstitutionally "asymmetrical and non-reciprocal" in that it requires the defense, but not the prosecution, to make a showing of entitlement to receive documents it has subpoenaed. (Answer Brief on the Merits, pp. 3, 5.) That is not what section 1326 does.

Neither party in a criminal case can receive documents that it has subpoenaed "until a judicial determination is made that the person is legally entitled to receive them." (*People v. Blair* (1979) 25 Cal.3d 640, 651 [prosecution's receipt of records via SDT without court examination was improper].) Penal Code section 1326, subdivision (c), does not exempt the prosecution from making a showing of legal entitlement. It merely provides that when it is the defense that is seeking documents, the court has the option of holding the hearing in camera rather than in open court.

The purpose of this provision is to allow the defense to explain its justification without revealing its strategies to the prosecution. 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 violate the attorney client privilege." (Assem. Floor Concurrence in Senate Amendments, Assem. Bill No. 1249 (2003-2004 Reg. Sess.) as amended June 9, 2004, p. 1[1]). Rather than imposing a unique burden on the defense, this provision provides the defense a unique benefit.

Petitioner characterizes disclosure of the nature and identity of records subpoenaed by the defense as "discovery," and argues that it is not authorized by the criminal discovery statute, Penal Code section 1054.3. (Answer Brief on the Merits, p. 5.) We do not see it as an issue of discovery, but of openness of court proceedings and records, and as a due process right to notice of hearings that will be held. As discussed in our Opening Brief on the Merits, the prosecution and the public have a right to meaningful notice of court hearings. If the prosecution does not know the general nature of subpoenas that the court will examine, there can be no meaningful opportunity to be heard.

In the present case, we sometimes had no notice that a hearing was scheduled at all. (See Court of Appeal opinion, pp. 2, 6.) On May 1, 2008, the court apparently held an ex parte hearing on a topic still unknown to the People. There is no reference to this hearing in the docket, but the trial

[1] This report is included as item 2 in our previously-filed Motion for Judicial Notice.

judge later ordered the transcript unsealed. (Exhibit D, RT 1502, ll. 16-18.)[2] The prosecution has never actually received any of the sealed transcripts that are the subject of these proceedings because the unsealing order was stayed (Exhibit D, RT 1515), and was later vacated in light of the Court of Appeal's opinion. (Item 4 attached to Motion for Judicial Notice, docket entry of September 1, 2009).

If access to the nature of records lodged with the court and notice of matters to be heard by the court are characterized as "discovery," such disclosures are not prohibited by the criminal discovery statute. Penal Code section 1054, subdivision (e), states that a purpose of the statute is: "To provide that 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*." (Emphasis added.) As discussed in our Opening Brief on the Merits, openness of court records and proceedings is mandated by Code of Civil Procedure section 124, the First Amendment to the United States Constitution, and the Due Process clause (U.S. Const., 14th amendment). (Opening Brief on the Merits, pp. 15-16, 18-20.)

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[2] As noted in footnote 1 of our Opening Brief on the Merits, exhibits were filed in the Court of Appeal as follows: exhibits with letter designations were attached to the Verified Petition for a Peremptory 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 the Exhibits in Support of Return to Petition for Peremptory Writ of Prohibition.

III.

THE TRIAL COURT HAS THE DISCRETION TO PERMIT THE PROSECUTION TO PRESENT ARGUMENT, NOT JUST TO ANSWER QUESTIONS

Petitioner argues that there is no controversy between the parties on the issue of whether the prosecution can present argument or is limited to answering questions. (Answer Brief on the Merits, p. 4.) Petitioner somewhat inconsistently argues that the trial court is permitted to entertain argument from the prosecution, but that questions from the court must be "carefully crafted and narrowly tailored." (*Ibid.*)

Petitioner may be right that the issue of the scope of argument is not squarely presented by the record in this case. But the first page of the Court of Appeal opinion identified the issue in the case as "what extent the prosecution may participate in the hearing." The Court of Appeal then addressed and resolved the issue in a manner that unnecessarily limits the right of the prosecution to participate. This language was one of the issues we raised in our petition for review. Specifically, the Court of Appeal noted that "the prosecution is often seen but not heard" and must sit in "compelled silence," which may be broken only if "the court calls upon it to 'address any questions the trial court has.'" (Court of Appeal opinion, p. 2) This language is at odds with the Supreme Court's ruling in *Humberto S.* that trial courts are permitted to "entertain argument from the prosecution

on third party discovery issues." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal. 4th 737, 750.)

Petitioner argues that the prosecution never asked to be allowed to answer questions. In many instances, we did not have the opportunity. The trial court held in camera hearings on subpoenas with no notice to the prosecution. As we argued in the Court of Appeal, a better procedure would be similar to that utilized in *Pitchess*[3] motions: a general discussion of the issue in open court, followed if necessary by an in camera hearing with only the judge and the defense. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1227-1228.)

IV.

THE PROSECUTION DID NOT WAIVE ARGUMENT

Petitioner quotes from portions of the trial court transcript that create the erroneous impression that the prosecution has waived the request to he heard regarding defense subpoenas. (Answer Brief on the Merits, p. 7.) One portion cited by petitioner, RT 1332, does not appear to be part of the record in these writ proceedings and may not be considered by the court.[4] As to other language quoted by petitioner, when the full quote is read, it

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

[4] A party seeking writ relief must provide the reviewing court with a reporter's transcript and such other record necessary to review the ruling. (Cal. Rules of Court, rule 8.486(b)(1); *Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187.)

appears that the prosecution is discussing merely the dates on which the custodians are to submit the documents to the court, and is not waiving an opportunity to be heard before the court determines whether to provide these documents to the Public Defender.[5] We do not agree that the prosecutor's compliance with the court's directive that "the in camera hearing you won't be here for" (Exhibit 12, RT 1340) means the prosecutor "voluntarily left the hearing." (Answer Brief on the Merits, p. 12.) Moreover, the fact that some matters may have been properly heard in camera does not mean that the prosecution acquiesced in other confidential ex parte hearings that went beyond the permissible grounds of Penal Code section 1326, subdivision (c).

The prosecution had filed points and authorities that recognized the property of in camera hearings pursuant to section 1326, subdivision (c), to determine the defendant's theories of relevance, but had asserted the right to know what records were subpoenaed, and from whom. (Exhibit 2, pp. 6-

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[5] MS. TEMPLE: There have been some emails going on back and forth about requesting to put the case on calendar for purposes of subpoena compliance, and perhaps – I just wanted to make sure that we can have subpoena compliance dates without actual court appearances. That way both sides do not need to be available to be present in the event of any argument.

This is just for outside parties to know that they have to get their documents here by a said time, is that correct?

THE COURT: Yes, that's correct.

(RT 1339, included in Exhibit 12.)

7.) We also objected to ex parte communications to litigate other matters "on subject matter unknown to the People." (Exhibit 2, p. 1.) Matters such as a closed hearing to call and examine a witness regarding composition of the grand jury (Exhibit 7), and a hearing held without the presence of the prosecution regarding a judge's voir dire of grand jurors (Exhibit 11), are examples of the trial court's improper exclusion of the prosecution from participation in litigated issues in the case.

The hearing of February 20, 2008, discussed by petitioner (Answer Brief on the Merits, p. 7) is just one occasion on which ex parte hearings were held. As discussed in Section V below, there were a number of other dates in which ex parte hearings were held with the defense. Even today, the prosecution does not know the subject matter of what was discussed at some of these hearings.

V.

PORTIONS OF TRANSCRIPTS NOT DISCLOSING DEFENSE STRATEGY SHOULD HAVE BEEN UNSEALED

On November 28, 2007, the defense was permitted to close the courtroom and exclude the prosecution in order to call and examine a witness. The testimony related to a discovery motion regarding composition of the grand jury. (Exhibit 7, RT 1154-1158.) Defense counsel asserted that both the identity of the consultant and the information he provided was work product. (RT 1156, ll. 2-4.) The court agreed to

hear it ex parte but stated, "there is always a possibility that once I've heard it, I would be unsealing it, that I would feel it was inappropriate to keep it ex-parte." (RT 1157, ll. 4-7.) The court excluded everyone except the defense and their expert, and heard testimony ex parte. (RT 1157-1158.) This matter does not appear to have anything to do with defense SDTs, and sealing the transcript from the prosecution is not justified by Penal Code section 1326 or any other authority.

On December 27, 2007, the court held an ex parte hearing with the defense. From the court docket (Exhibit 4) and minute order (Exhibit 11), it appears that the subject matter relates, not to an SDT, but to a judge's voir dire of grand jurors. The transcript was ordered sealed, and the trial court has not reviewed that transcript to determine whether to reverse its sealing order. (Exhibit D, RT 1501, ll. 7-9; RT 1503, ll. 11-14.)[6] Again, the sealing of this transcript is not justified by Penal Code section 1326 or any other authority.

As to the in camera hearing of February 20, 2008, the court later ruled that the first portion 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

[6] An additional order on December 27, 2007, regarding records of Beverly Kling Hesse from Northern Nevada Adult Mental Health Services, does not appear to have involved a closed hearing. (Exhibit 10.)

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 docket states, "Subpoenaed records received from Case Records North," but 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 victims' company, Budco, the court and defense counsel went over SDTs received. The subpoenas are not further described in the docket (Exhibit

4.). 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 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 (defendant's sister). (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 ordered it unsealed. (Exhibit D, RT 1502, ll. 16-18.)

The trial court properly exercised its discretion to unseal portions of the transcripts that did not reveal defense strategy. This approach is consistent with *Department of Corrections v. Superior Court (Ayala)* (1988) 199 Cal.App.3d 1087, 1094, which is precedent by which respondent superior court was bound:

> 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.

(Bold added.)

The "Hobson's choice" claimed by petitioner (Answer Brief on the Merits, p. 6) is based on the false assumption that the defense has a constitutional right to keep secret that nature of records it has subpoenaed. This assumption was properly rejected in *Ayala*:

> In essence it is Ayala's position 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.

(199 Cal.App.3d at p. 1097.)

Citing sealed transcripts, petitioner argues that the hearings were properly held and that the transcripts were properly sealed. (Answer Brief on the Merits, pp. 7-9.) The People cannot evaluate these assertions because we have not been permitted access to the transcripts. Nor are these transcripts properly before the Supreme Court because they have not been made part of the record in these writ proceedings. (See footnote 4,

supra, and Cal. Rules of Court, rule 8.486(d).) Moreover, this argument does not address the issues raised and accepted in the Petition for Review, i.e., whether the prosecution and crime victims are entitled to notice of what type of records have been subpoenaed, and whether the prosecution should be permitted to present argument.

Finally, we disagree that the disclosure of unprivileged transcripts is properly characterized as "discovery." Instead, it is an issue of openness of court proceedings outside the scope of the criminal discovery statute.

VI.

NOTICE TO VICTIMS IS PROPER UNDER MARSY'S LAW

Petitioner states that "[f]or better or worse," the Victim's Bill of Rights Act of 2008: Marsy's Law" was passed by the voters in Proposition 9 and has amended the California Constitution. (Answer Brief on the Merits, p. 9.) The initiative's authors' frustration with the court system and the tenor of the changes they are demanding are clear. Petitioner takes issue with some aspects of the initiative process in California. (Answer Brief on the Merits, pp. 9-10.) The Attorney General recently raised similar issues regarding another initiative, but the court held "it is not a proper function of this court to curtail that process; we are constitutionally bound to uphold it." (*Strauss v. Horton* (2009) 46 Cal.4th 364, 391-392.)

Petitioner raises issues regarding the implementation of Marsy's Law that are not raised by the facts of the present case. As we noted

previously, the right of victims to "prevent the disclosure of confidential information" to the defense (Cal. Const., art. I, § 28, subd. (b)(4)) can be interpreted in more than one way. (Opening Brief on the Merits, p. 38.) This provision supplements the existing qualified right to privacy. (Cal. Const., art. I, § 1.) It is likely that future cases will confront the reciprocity issue regarding this provision. Future cases will also address the issue of whether a conflict of interest is created by the prosecuting attorney's enforcement of the victims' rights in Marsy's Law. (Cal. Const., art. I, § 28, subd. (c)(1).)

In the present proceedings, we make a more modest request regarding application of Marsy's Law. Neither the prosecution nor the victim can attempt to address the disclosure of records if they do not know what records are being sought. The victim's right to notice (Prop. 9, § 2; Cal. Const., art. I, § 28, subd. (b)(7)) is consistent with the First Amendment presumption of openness of court proceedings and the due process rights of the prosecution. (See Opening Brief on the Merits, pp. 15-24.) In resolving the present case, we ask that the court take the rights of victims into account.

CONCLUSION

In the present case, the trial court granted private hearings with the defense on a number of issues. The prosecution did not receive notice of some of these hearings, and to this day does not know what some of the

hearings were about. This procedure is at odds with our adversary system of justice and the People's right to due process.

Both petitioner and the Court of Appeal concede that the prosecution is entitled to notice of ex parte hearings. (Answer Brief on the Merits, p. 13; Court of Appeal opinion, p. 6.) The issues about which we disagree are: (1) whether the prosecution and the victim are entitled to know the nature and source of records the defense has subpoenaed, and (2) whether the trial court may permit the prosecution to present argument or may only allow the prosecution to answer questions.

Notice of the nature of defense subpoenas does not reveal defense strategies or violate the attorney-client privilege. The prosecution and the victim should be entitled to notice of this information so that they can seek to provide meaningful input to the court and so that the victim may attempt to protect whatever confidentiality rights he or she may have. The court may hold an in camera hearing to discuss the defense's theories of relevance (Pen. Code, § 1326, subd. (c)), but this provision should not be read so expansively as to justify sealing matters that have nothing to do with defense strategy.

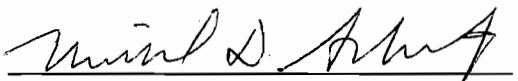
As to the "question versus argument" issue, petitioner (but not the Court of Appeal) agrees that the trial court may permit the prosecution to argue. (Answer Brief on the Merits, pp. 4, 13; Court of Appeal opinion, pp.

1-2, 9.) We respectfully request that the Supreme Court makes this clear as well.

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: March 15, 2010 By: 
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CERTIFICATE OF WORD COUNT

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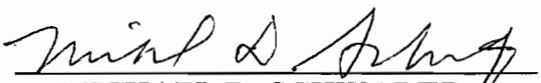
Dated: March 15, 2010 
MICHAEL D. SCHWARTZ
Special Assistant District Attorney

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 March 15, 2010, I served true copies of the attached document, described as:

REPLY BRIEF ON THE MERITS

by personal service on the following:

Receptionist, Public Defender
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ATTN: Michael Planet, Executive Officer
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Clerk of the Superior Court
ATTN: Hon. Rebecca S. Riley, Judge
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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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[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Cynthia M. Klante