

COPY
SUPREME COURT COPY

IN THE SUPREME COURT OF CALIFORNIA

RANDOLPH CLIFTON KING,
Petitioner,

v.

THE SUPERIOR COURT OF VENTURA
COUNTY,
Respondent,

THE PEOPLE,
Real Party in Interest.

S176171

Ct. App. 2/6 B208748

Ventura County
Super. Ct. No. ~~90888~~
**SUPREME COURT
FILED**

FEB 26 2010

Frederick K. Ohlrich Clerk

Deputy

ANSWER BRIEF ON THE MERITS

**(Regarding the "in camera hearing" provision
of Penal Code section 1326)**

Duane Dammeyer, Public Defender
By Michael C. McMahon, Chief Deputy
State Bar Certified Specialist – Appellate Law
State Bar Certified Specialist – Criminal Law
SBN 71909
800 S. Victoria Avenue, HOJ-207
Ventura, California 93009
(805) 477 - 7114
michael.mcmahon@ventura.org
Attorney for Petitioner

IN THE SUPREME COURT OF CALIFORNIA

RANDOLPH CLIFTON KING,
Petitioner,

v.

THE SUPERIOR COURT OF VENTURA
COUNTY,
Respondent,

THE PEOPLE,
Real Party in Interest.

S176171

Ct. App. 2/6 B208748

Ventura County
Super. Ct. No. 2005045185

ANSWER BRIEF ON THE MERITS

**(Regarding the “in camera hearing” provision
of Penal Code section 1326)**

Duane Dammeyer, Public Defender
By Michael C. McMahon, Chief Deputy
State Bar Certified Specialist – Appellate Law
State Bar Certified Specialist – Criminal Law
SBN 71909
800 S. Victoria Avenue, HOJ-207
Ventura, California 93009
(805) 477 - 7114
michael.mcmahon@ventura.org
Attorney for Petitioner

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Answer Brief on the Merits.	1
Discussion	3
I. The third-party discovery procedures imposed by section 1326 are facially asymmetrical and non-reciprocal in that they require a showing of entitlement by the defense, but not by the prosecution. This lack of reciprocity violates federal due process unless this court construes the statute in a manner favorable to the defense.	3
II. Disclosure of a reporter’s transcript of an in camera hearing ordered pursuant to section 1326, subdivision (c) of the Penal Code, is a form of discovery subject to the criminal discovery statutes.	6
• The context in which the in camera hearing was conducted.	6
• The content of the transcripts.	7
III. To the extent the “Victims’ Bill of Rights Act of 2008: Marsy’s Law” imposes discovery impediments on the defense that are not imposed on the prosecution, it violates the reciprocity requirements of Due Process.	9
Conclusion.	12
The Disposition	14
Certificate of Word Count	15
Declaration of Service	End

TABLE OF AUTHORITIES

Page

Constitutions

Due Process	2, 9, 10
Calif. Const., Art I, § 28	9
Calif. Const., Art. I, § 28 (b)(4)	10
Calif. Const., Art. I, § 28 (c)(1)	10
Cal. Const., Art. I, § 28, subd. (e)	10

Cases

<i>Alford v. Superior Court</i> (2003) 29 Cal.4th 1033	4, 5
<i>Bullen v. Superior Court</i> (1988) 204 Cal.App.3d 22	11
<i>Department of Corrections v. Superior Court (Ayala)</i> (1988) 199 Cal.App.3d 1087	2
<i>Garcia v. Superior Court</i> (2007) 42 Cal.4th 63	4
<i>Hubbard v. Superior Court</i> (1997) 66 Cal.App.4th 1163	9
<i>Izazaga v. Superior Court</i> (1991) 54 Cal.3d 356	5
<i>People v. Mooc</i> (2001) 26 Cal.4th 1216	8
<i>People v. Samayoa</i> (1997) 15 Cal.4th 795	8
<i>People v. Superior Court (Romero)</i> (1996) 13 Cal.4th 497	3
<i>People v. Superior Court (Humberto S.)</i> (2008) 43 Cal.4th 737	passim
<i>Pitchess v. Superior Court</i> (1974) 11 Cal.3d 531	5
<i>Wardius v. Oregon</i> (1973) 412 U.S. 470	3

Codes and Statutes

Evid. Code, § 916	5
Evid. Code, § 1560	5
Pen. Code, § 187, subd. (a)	6
Pen. Code, § 190.2, subd. (a)(1)	6
Pen. Code, § 190.2, subd. (a)(3)	6
Pen. Code, § 190.2, subd. (a)(15)	6
Pen. Code, §1054. 3	3, 5
Pen. Code, § 1326	passim
Pen. Code, § 1326, subd. (c)	2

Victims' Bill of Rights Act of 2008: Marsy's Law	. . .	9, 10
Proposition 115	5

IN THE SUPREME COURT OF CALIFORNIA

RANDOLPH CLIFTON KING,

Petitioner,

v.

THE SUPERIOR COURT OF VENTURA
COUNTY,

Respondent,

THE PEOPLE,

Real Party in Interest.

S176171

Ct. App. 2/6 B208748

Ventura County

Super. Ct. No. 2005045185

**ANSWER BRIEF ON
THE MERITS**

TO CHIEF JUSTICE RONALD M. GEORGE AND TO THE HONORABLE
ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

In the still-pending capital case from which this proceeding arises, petitioner RANDOLPH CLIFTON KING is preparing to present his motion for new trial of both the guilt and penalty phases.

Here, he submits his Answer Brief on the Merits in support of the judgment of the Court of Appeal. Since the Court of Appeal filed its opinion, there appear to be no significant legal developments affecting the questions presented for review.

As they did in the Court of Appeal, the People continue to rely extensively upon excerpts from judicial opinions that predate the now-controlling statutes. For example, nothing in *Department of Corrections v. Superior Court (Ayala)* (1988) 199 Cal.App.3d 1087, authorizes disclosure of transcripts of section 1326 hearings.¹

Each of the in camera hearings at issue here was specifically authorized by Penal Code section 1326, subdivision (c). The relevant provisions of that statute were amended in 2004, 16 years *after* the decision in *Ayala*. By providing that such hearings are to be conducted in camera, the Legislature effectively removed discretion for the reporter's transcript of those hearings to be unsealed and released to the public. Nothing in *Ayala* suggests a different conclusion. The People's reliance on that case is misplaced. (Petitioner agrees with the holding in *Ayala* that the trial court erred in issuing a gag order, which prohibited the Department of Corrections and the Attorney General from discussing a defense subpoena with the district attorney. However, no similar issue is presented in the instant case.) The People's call to resurrect *Ayala* should go unanswered.

Rather than reply in sequence to the points raised in the Opening Brief, this Answer brief proposes that the questions presented for review are best resolved by using the Due Process requirement for reciprocity and the controlling statutes as our point of departure.

/

¹ All references herein to code sections refer to the Penal Code unless otherwise identified.

Discussion

I.

The third-party discovery procedures imposed by section 1326 are facially asymmetrical and non-reciprocal in that they require a showing of entitlement by the defense, but not by the prosecution. This lack of reciprocity violates federal due process unless this court construes the statute in a manner favorable to the defense.

It appears that the 2004 amendment to section 1326 was intended to deter “subpoena abuse,” primarily abuse by criminal defense attorneys. To that end, the statute was amended to authorize the court to require a showing of entitlement to discovery from the defense, but not the prosecution. “When a *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.” (*Id.*, at subd. (c), emphasis added.) The wording is unambiguous. The meaning is plain. The statute appears facially invalid because it violates the federal due process requirement of “two-way street” reciprocity in matters of discovery and discovery procedures. (*Wardius v. Oregon* (1973) 412 U.S. 470.)

Presumably, the Legislature intended the 2004 amendments to pass constitutional muster. The requirement that such hearings be conducted in camera supports that conclusion, as does the mandate that: “The court may not order the documents disclosed to the prosecution except as required by Section 1054.3.” (*Ibid.*) When a statute is susceptible to two constructions, one of which raises serious constitutional questions, courts construe the law to avoid such questions. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509.)

Kling contends that the in camera hearing authorized by the section is intended to be an *ex parte* proceeding, closed to both the public and the prosecutor,

unless the court elects to pose carefully-crafted questions to the prosecution or to request argument on a point of law.

In the instant case, the court had no questions and requested no argument from the People. *Kling agrees with the People that the answer to a question from the court will often take the form of an "argument."* The recording of the oral argument in the Court of Appeal reveals that there was no disagreement on this point and it was not an issue presented, heard, and determined by that court. Anything said by the court on that subject would be dictum because the trial court never invited or solicited any input from the prosecution. To the extent that the court may have granted review to resolve the "question vs. argument" controversy, no such controversy exists. "A trial court is permitted to entertain argument from the opposing party relating to third party discovery." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 750, fn. 9.)

Here, the prosecution never suggested to the court that it be allowed to answer any specific questions. "Opposing counsel should have an opportunity to propound questions for the trial court to ask in camera." (Cf., *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 73.) If the People have a *right* to make an unsolicited argument, this case fails to present that issue. It appears, however, that no such right exists. "[T]he district attorney, *in asserting entitlement to argue the prosecutorial point of view* and to receive any information the court orders disclosed, overstates the extent of his legitimate interest in what is essentially a third party discovery proceeding." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.)

If the court has questions for the prosecutor, they must be carefully crafted and narrowly tailored. If the questions reveal more than is necessary, those revelations may violate the constitutional rights of the accused. The defense can assist the court in artfully framing such questions.

If the defense strongly objects to a proposed question and is unable to dissuade the court from using its overly-broad wording, *the defense must have the option to make an adequate record for review and then withdraw the subpoena to prevent the objectionable revelation.*

It is implicit in the opinion of the Court of Appeal that the court construed section 1326 as conferring a benefit, rather than a burden, on the defense. To do otherwise would render the statute facially invalid. “Proposition 115 creates a nearly symmetrical scheme of discovery in criminal cases, *with any imbalance favoring the defendant as required by reciprocity under the due process clause.*” (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 377 (emphasis added).)

Apart from existing evidentiary privileges and statute-based entitlements to confidentiality, section 1326 creates its own independent statutory basis for confidentiality of the oral proceedings at the in camera hearing. It does not, however, create a statutory authorization for discovery to the prosecution that operates independently of section 1054.3. California’s reciprocal discovery scheme and section 1054.3 simply do not provide for discovery of the nature and identity of records subpoenaed by the defense.

Similarly, Evidence Code section 1560 does not expressly provide for discovery of subpoenas or the identity of records subpoenaed by the defense. “Evidence Code section 1560 thus suggests that, as with *Pitchess* hearings, and in accordance with the due process principles we recognized in *Alford v. Superior Court*, opposing parties have *a right to notice and presence*, but it leaves unanswered the degree of any further participation, neither guaranteeing nor prohibiting it.” (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 749.)

Lastly, Evidence Code section 916 does not expressly provide for discovery of subpoenas or the identity of records subpoenaed by the defense.

After June 6, 1990, California courts may not create criminal discovery rules that are untethered to a statutory or constitutional base. The court should decline the invitation to do so here.

/

II.

Disclosure of a reporter's transcript of an in camera hearing ordered pursuant to section 1326, subdivision (c) of the Penal Code, is a form of discovery subject to the criminal discovery statutes.

The defense contends that release of transcripts of an in camera hearing conducted pursuant to Penal Code 1326 section, subdivision (c), is a form of discovery subject to the criminal discovery statutes. In determining whether this is true, it is illuminating to consider the context in which these in camera hearings are conducted, and the content of such transcripts. The record in this case provides an excellent vehicle for this analysis.

- **The context in which the in camera hearing was conducted:**

A grand jury indicted Randolph 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).) The offenses are punishable by death.

The defense sought to investigate the strengths and weaknesses of the People's case, the credibility of the prosecution's witnesses, and to seek out evidence that the defense might want to introduce at trial. At the same time, the defense did not want to become an agent of the prosecution by drawing their attention to information which might assist them in meeting their burden of proof of guilt or creating a compelling case for death.

The defense contends that state law should not be interpreted to force a defendant to make the Hobson's choice of going forth with his discovery efforts and prematurely revealing defense investigation theories and trial strategies to the prosecution, or refraining from pursuing these discovery materials to protect his constitutional rights and prevent undesirable disclosures to his adversary.

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. The court may order an in camera hearing to determine whether the defendant is entitled to receive the documents subpoenaed. (§ 1326, subd. (c).)

On February 4, 2008, the court announced in open court that she had “blocked out the entire morning” of February 20, 2008, to review documents subpoenaed by the defense. The prosecutor asked: “This is an in camera hearing for the rationale to release them?” And the court replied, “Well, to review the documents to see whether or not they, in fact, even can be released.” (RT 1332.) The prosecution had notice of the date, time, and location of the in camera hearing. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737 [the prosecution must receive notice of the in camera hearing].)

The proceedings on February 20, 2008, provide a good example of the implementation of Penal Code section 1326, subdivision (c). The case was called in open court and the parties publicly discussed a number of discovery issues affecting their readiness for trial including stipulations and agreements regarding DNA and ballistics evidence. (RT 1333-1339.)

The prosecutor then said “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.” (RT 1339.) Prior to conducting the in camera hearing, the court stated: “I believe that’s everything the, that the People are required to be here for.” The prosecutor replied, “That’s correct.”

The court again sought clarification stating, “The in camera you won’t be here for.” And, again, the prosecutor replied, “I guess not.”

Both before and during the in camera hearing, the defense was led to believe that its revelations to the court about the subpoenaed records and their possible use by the defense at trial would not be shared with the public or the prosecution.

- **The content of the transcripts:**

Contrary to the theory of the People that was accepted by the Court of Appeal, the sealed transcript reveals that the court and the defense had received and considered letters of objection from third parties prior to the release of any documents to the defense. (SEALED RT, 2/20/08, at pp.3-5) At the in camera hearing, the defense

explained its theory that business records from a school and the absence of other business records from the school might be used to impeach a specific witness for the prosecution. (SEALED RT, 2/20/08, at p. 4.) The defense also explained its theory regarding a film of the defendant that it wanted to privately review as potential evidence in mitigation. (*Id.*, at p. 7.) The defense went on to discuss its investigation regarding third-party guilt. (*Id.*, at pp. 10-17.) The hearing continued with a discussion of state licensing records that might be useful in the impeachment of a specific prosecution witness. (*Id.*, at pp. 17-24.) At one point, it was mentioned that counsel and this court had discussed theories regarding 13 of 51 subpoena responses and that a few more mornings might be needed to complete the task. (*Id.*, at pp. 27-28.) Before the in camera hearing concluded, there was further discussion about how phone records might suggest third-party guilt. (*Id.*, at pp. 28-29.) Throughout the in camera hearing there was discussion of the investigation of the social history of the defendant. At the conclusion, the court appropriately ordered the reporter's transcript to be prepared and sealed. (*Id.*, at p. 34.)

The defense submits that the in camera hearing conducted on February 20, 2008, is precisely the type of hearing contemplated by the Legislature in section 1326. The court protected the privacy of non-parties by releasing copies of documents only when it appeared that the defendant's right to a fair trial warranted the release to the defendant of documents relevant to the subject matter involved in the pending litigation. The locus of decision-making was, as it should be, the trial court. To protect the rights of the defendant and the privacy rights of third-parties, the oral proceedings at the in camera hearing were memorialized in a sealed transcript and the original documents lodged with the clerk were sealed. (Cf. *People v. Samayoa* (1997) 15 Cal.4th 795, 825 [after ruling on a Pitchess motion, "[t]he magistrate ordered that all remaining materials be copied and sealed."]; *People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1230 [defendant's ability to gain review of the court's ruling is compromised absent an adequate sealed record].)

There is no need for this court to make a decision in a vacuum. A careful review of the proceedings that occurred in camera on February 20, 2008, as well as similar proceedings on June 18, 2008, June 26, 2008, August 11, 2008, and September

11, 2008, support the conclusion that a release of the transcripts is an unauthorized form of discovery.

Pretrial discovery of the defense theories is barred whether the court orders the defense to give the information directly to the prosecution or the court orders the defense to provide the court with the information so that the court can provide it to the prosecution (as was attempted in the instant case.) Having the court serve as an intermediary in the process does not change the fact that such disclosures from the defense to the prosecution (and public) is a form of discovery governed by the criminal discovery statutes. The courts must “not attempt to embroider the discovery statute to provide greater discovery rights” than are circumscribed. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.)

III.

To the extent the “Victims’ Bill of Rights Act of 2008: Marsy’s Law” imposes discovery impediments on the defense that are not imposed on the prosecution, it violates the reciprocity requirements of Due Process.

The “Victims’ Bill of Rights Act of 2008: Marsy’s Law” became effective on November 5, 2008. Currently, there is a dearth of case law regarding its scope and application. The defense believes Marsy’s Law will provoke decades of litigation regarding the competing due process interests of parties and non-parties, and conflicts of interest for prosecutors who may now attempt to formally represent the interests of the People *and* third parties. For better or worse, California’s criminal justice “playing field” has been permanently altered by passage of this proposition by the electorate. The law’s underlying premise was that California had an “arcane criminal justice system.” (Calif. Const., Art I, § 28.)

Arguably, many constitutional amendments by voters (like Marsy’s Law) make for bad public policy. Because initiative backers are allowed to pay for the gathering of signatures, a proposal with sufficient funding is likely to qualify for the

ballot and then, with money available for advertising, it may have a good chance of passing. Votes may be cast based upon an attractive title of a proposition without reflection upon its text or on the proposition's intended and unintended consequences. The true "will of the electorate" in passing such amendments is largely fictive.

Marsy's Law appears to violate the Due Process requirement of reciprocity regarding third-party discovery. (See the discussion of these Due Process reciprocity requirements in the first section of this brief.) Marsy's Law prevents disclosure of information and records to the defendant, but not to the prosecution. (Calif. Const., Art. I, § 28 (b)(4).) Upon a formal request of the victim, this law authorizes the prosecuting attorney to formally represent the victim in discovery proceedings. (Calif. Const., Art. I, § 28 (c)(1).)

Absent extraordinary circumstances, all subpoenas issued by a criminal defendant are served on a person or entity that is not a party, because discovery between the parties rarely necessitates the use of a subpoena. Sometimes such third parties will be "victims" within the meaning of Marsy's Law, which expands the definition 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).) Marsy's Law will not apply when the defense serves the subpoena on a person or entity that is not a victim.

Often, as occurred in this case, the service of a subpoena on a Marsy's Law victim, or a custodian of records that relate to a Marsy's Law victim, will provide actual notice of the potential release of the records and provoke a letter of objection. (See, e.g. SEALED RT, 1/20/2008.) If the victim or the custodian of records wishes to discuss the subpoena with the prosecution, they are free to do so. Such a discussion does not create an impermissible conflict of interest.

Importantly, in *Humberto, supra*, at p. 748, the People "did not represent third party interests." "[T]here was no formal representation of any third party, no corresponding duty of loyalty, and no divided loyalty or structural incentive potentially at

odds with these prosecutors' duty to handle the prosecution of Humberto S. fairly." (*Id.*, at p. 754.) *Humberto S.* was an unusual record because the defense had voluntarily provided the documents to the prosecution before the controversy ensued. No issue was presented regarding the right, vel non, of the prosecution to disclosure of information about the documents.

But Marsy's Law authorizes the prosecution to formally represent the interest of a third party victim following a formal request. The conflict of interest which did not exist in *Humberto S.* is very likely to exist under Marsy's Law. This may necessitate the participation of the Attorney General in many superior court proceedings at a time when the ability of the state to pay for such additional representation does not exist.

"In true third party representation cases, a material risk exists that a prosecutor will continue to represent the third party interests even when those interests diverge from the People's interest in the evenhanded pursuit of justice. [Citation.] A prosecutor who has undertaken an attorney-client representation of the victim in a case might in the future feel pressure from the loyalty owed his or her client to pursue the case more vigorously than the merits might otherwise dictate." (*Humberto S.*, *supra*, 43 Cal.4th at p. 754.)

Under Marsy's Law, we are more likely to see real conflicts of interest like those presented in *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22, where the prosecution had a formal relationship as the legal representative of a third party. After recusal of the prosecutor from further representation of the victim in *Bullen*, the victim was given the option of retaining counsel or appearing in propria persona. (*Id.*, at p. 25.) The formal representation of victims authorized by Marsy's Law will give the prosecution a structural incentive (its duty of loyalty to its victim-client), which, as in *Bullen*, will often be at odds with the prosecution's duty to seek justice in a fair and evenhanded manner.

For this reason, recusal may be required. Upon receiving a request for legal representation, the prosecutor should immediately notify the court and opposing counsel.

Notification should also be given if the prosecutor elects to represent the victim.

Representation by the prosecutor will present problems best resolved in future cases.

It may be that an indigent victim may now be entitled to appointed counsel. It is unclear whether the cost of such appointed counsel should be borne by the state or county, but most court costs are borne by the state.

This case does not provide an appropriate basis for expansive proclamations regarding the implementation of Marsy's Law. Marsy's Law was not the authority cited by the prosecution when it moved the trial court for an order releasing the transcripts of the in camera hearings. Instead, the prosecution argued that release of the transcript was mandated by the court's decision in *Humberto S.*, although a close reading of the opinion reveals no such mandate.

Nothing in Marsy's Law would justify the release of transcripts of the in camera hearing at issue here.

Conclusion

The Court of Appeal has construed the statutory scheme in a manner that avoids doubts as to its constitutionality. It also reads the in camera hearing provision of section 1326, subdivision (c), as protecting the rights of the defendant and barring release of the transcripts of such hearings to the prosecution and the public. Put differently, in this context, the in camera hearing is an ex parte proceeding. Both the trial court and the parties concluded this was what the statute contemplated and the prosecutor voluntarily left the hearing without a demand to participate.

Documents lodged with the clerk in response to a defense subpoena are not part of the court file open to inspection by the public. There is no reason or authorization for the clerk to describe, identify, or disclose the documents in the minutes. If the defense seeks judicial action regarding the documents, those discussions can be memorialized in a reporter's transcript of the oral proceedings which can be sealed if that seems appropriate. The oral proceedings of the in camera hearing must, however, be

sealed to effectuate the legislative intent to protect the privacy of third-parties and to avoid a chilling effect on the investigation and preparation of the defense.

Generally, the defense will not know if the court elects to conduct an in camera hearing regarding any given subpoena. In the first instance, it should be the responsibility of the court and clerk to give the parties notice of the time and place of an in camera hearing conducted pursuant to section 1326. The prosecutor may appear, suggest questions to be asked at the hearing, and remain available to answer questions or to argue if the court invites the prosecution to provide information or input. If appropriate, this input may also be given in camera to protect the privacy rights of third parties.

The court should not unnecessarily reveal information about the defense investigation merely because it is unsure about a question of law. The court should initially conduct its own research on the legal issue to avoid an improvident disclosure of information concerning the preparation of the defense for trial.

The lack of reciprocity in Marsy's law is troubling, but not surprising. Courts should be cautioned regarding its implementation or they will open the floodgates to a wave of litigation regarding Due Process reciprocity and conflict of interest recusal motions.

Here, the in camera hearings were properly conducted. They appear to be a model of statutory implementation. However, when the prosecutor later brandished a copy of the slip opinion in *Humberto S.*, the court read into the opinion a mandate that she unseal the transcripts. This was error, and the court was inappropriately deferential to a demanding and experienced prosecutor.

The defense had been lured into frank and candid disclosures to the court based upon what eventually proved to be a broken promise of confidentiality. The defense correctly concluded it had been "sand-bagged" and promptly sought writ relief to interpret section 1326 as ensuring such confidentiality. The Court of Appeal got it right and provided us with much needed guidance in a thoughtful and well-written opinion.

The Disposition

This court should affirm the judgment of the Court of Appeal.

Dated: February 25, 2010.

Respectfully Submitted,
Duane A. Dammeyer, Public Defender

A handwritten signature in black ink, appearing to read "Michael C. McMahon", written over the typed name of the attorney.

By Michael C. McMahon, Chief Deputy
State Bar Certified Specialist Appellate Law
State Bar Certified Specialist Criminal Law
SBN 71909
Attorney for Petitioner.

CERTIFICATE OF WORD COUNT

The undersigned does hereby certify that by utilization of the Word Count Feature of MSWord software, in Times New Roman 13 pt font, there are 4,978 words in this document, excluding Declaration of Service.

Dated February 25, 2010



Jeane Renick
Legal Mgmt. Asst. III
Public Defenders Office
(805) 654 2203

DECLARATION OF SERVICE

Case Name: **The People, Plaintiff, v. Randolph Clifton Kling, Defendant.**
Case No. **S176171 (from B208748 and Superior Court No. 2005045185)**

On February 25, 2010, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender. My business address is 800 South Victoria Avenue, Ventura, California 93009. On this date, I personally served the following named person at the place indicated herein, with a full, true and correct copy of the attached **Answer Brief on the Merits**:

Gregory Totten, District Attorney
Attn: Cheryl Temple, DDA
800 South Victoria Avenue
3rd Floor
Ventura, CA 93009
(Counsel for People, Real Party in Interest)

Hon. Rebecca S. Riley, Judge AND
Michael Planet, Exec. Officer
Superior Court, County of Ventura
800 South Victoria Avenue
Ventura, CA 93009
(Respondent)

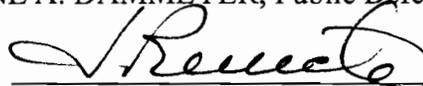
I am "readily familiar" with the County of Ventura's practice of collection and processing correspondence for mailing. Under that practice outgoing correspondence would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Ventura, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one business day after date of deposit for mailing affidavit. On this date, I served the attached **Answer Brief on the Merits** by placing in the U. S. Mail, a full, true, and correct copy thereof in an envelope addressed to the persons named below at the addresses set out below, by sealing and depositing said envelope in the Ventura County U.S. Mail collection center in the ordinary course of business:

Hon. Edmund G. Brown, Jr.
Office of the Attorney General
300 S. Spring Street
5th Floor – North Tower
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the above date at San Buenaventura, California.

DUANE A. DAMMEYER, Public Defender

By



Jeane Renick
Legal Mgmt. Asst. III