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Court of Appeal No. B193386
Los Angeles County Superior Court No. TJ15419

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

HUMBERTO S.,

Real Party in Interest.

On review from the decision of the Court of Appeal, Second Appellate District.
Los Angeles County Superior Court, The Honorable Mark R. Frazin, Juvenile Court Referee.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of Petitioner, the People of the State of California, pursuant to rule 8.520(f) of the California Rules of Court.

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and

of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the recusal of the district attorney for opposing discovery of an eight-year-old sexual abuse victim's confidential psychotherapy records over the objection of both her mother and the therapist. A holding that the district attorney has no standing in this situation would leave victims who cannot afford private counsel defenseless against the professional, often state-paid, counsel for the defendant. Such an unfair imbalance is contrary to the interests CJLF was formed to protect.

Need for Further Argument

CJLF is familiar with the arguments presented on both sides of this issue and believes that further argument is necessary.

CJLF will argue that the district attorney did have standing to litigate the privilege and discovery issues in this case.

Our brief is submitted with this application and ready for immediate filing.

August 14, 2007

Respectfully Submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Crime victims and third parties to a criminal prosecution, including juvenile proceedings, are commonly subjected to the

forced production of their privileged records by means of defense-initiated subpoenas duces tecum. The California Legislature has enacted statutes that regulate the procedures by which such records are to be produced to the court, kept under seal, and disclosed if necessary to the parties to that proceeding. These procedures commonly do not require the presence of or notification to the victim or other third parties whose records are compelled to be produced pursuant to the court's process. Thus, crime victims are made to suffer invasion of their privileged records without a real opportunity to appear and contest that intrusion. Even when they are notified of efforts to override a privilege that would protect the confidentiality of those records, crime victims are commonly unable to afford the cost of counsel to represent them in protecting their legitimate interests in the privacy of their privileged records.

Crime victims and other third parties must ordinarily rely upon the good judgment and wise discretion of both trial courts and prosecuting attorneys to ensure that privileged records that have been subpoenaed to court are released to the parties only in accordance with the procedures and under the standards provided by law. It is the responsibility of both trial courts and the public prosecutor to see that every person involved in a criminal prosecution or juvenile proceeding is treated fairly and afforded due process of law.

Accordingly, when a defendant issues a subpoena duces tecum for privileged records of a victim or witness, and/or when a trial court fails to follow mandated procedures for receipt, handling, and release of such privileged records that are delivered to the court pursuant to a subpoena duces tecum, it is the lawful right and responsibility of the public prosecutor to advise the trial court and to litigate against unlawful subpoenas duces tecum and unlawful invasions of those privileged records.

Precluding the public prosecutor from carrying out his or her duty to ensure that crime victims and other third parties are treated fairly and afforded due process of law is contrary to the interests of justice and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On December 27, 2005, Humberto S., a minor, was charged in a juvenile court petition with the continuous sexual abuse of Samantha F., an eight-year-old girl. Humberto is Samantha's uncle; her father is Humberto's brother. Humberto's attorney issued subpoenas for Samantha's privileged medical and psychotherapy records. As described further in the argument section below, the procedures required by law for protection of the patient's privacy were not followed.

The People then filed a motion to quash both of the subpoenas, asserting deficiencies in the court's compliance with procedural requirements for the handling of records produced pursuant to a subpoena duces tecum, and arguing that the court's release of Samantha's privileged records violated the clear instructions which this Court gave trial courts in *People v. Hammon* (1997) 15 Cal.4th 1117, for the correct way to handle and disclose privileged records delivered to the court pursuant to a subpoena duces tecum.

The juvenile court then conducted a series of hearings at which Samantha's mother and father testified. Humberto's attorney repeatedly objected to the prosecutors' participation in these hearings regarding Samantha's privileged records, claiming that the People do not have standing to contest third-party discovery conducted by the defense. The juvenile court overruled Humberto's objection and allowed the People to participate in the litigation of the question

whether Samantha's records should be released to Humberto's attorney.

Because Samantha's parents did not agree on whether to give permission for the court to release Samantha's records to Humberto—the mother objected and the father, Humberto's brother, consented—and because the father appeared to the prosecutor to have a conflict of interest in consenting to the release of Samantha's records, the prosecutor requested that the juvenile court appoint a guardian ad litem to represent Samantha's interest in deciding whether to assert her patient-physician and patient-psychotherapist privileges or whether to waive those privileges.

The juvenile court denied the prosecution's motion for appointment of a guardian ad litem and ordered that the privileged records be released pre-trial to Humberto's attorney. The juvenile court ruled that the consent of Samantha's father was sufficient to waive Samantha's privilege against disclosure of her records. The juvenile court also ruled that because Samantha's father validly waived her privileges, this Court's ruling in *Hammon, supra*, did not apply. The People's writ petition challenging the disclosure order was summarily denied by the Court of Appeal without opinion.

Humberto then moved to disqualify the prosecutor, the District Attorney of Los Angeles County, pursuant to Penal Code section 1424. The juvenile court found that the district attorney had incurred a conflict of interest by seeking to represent the third-party interests of Samantha, Samantha's mother, and Samantha's psychotherapist, and the juvenile court recused all of the prosecutors in the Compton branch of the Los Angeles District Attorney's Office from participating in the prosecution of the case.

The district attorney, on behalf of the People, petitioned the Court of Appeal for writ of mandate to overturn the recusal order.

The Court of Appeal held that the prosecutors' actions "demonstrated a one-sided perspective on the role of the prosecution and an apparent attempt to represent the victim's interest in protecting her privacy that exceeded the exercise of balanced discretion necessary to ensure a just and fair trial." (*People* v. *Superior Court* (*Humberto S.*) (2006) 145 Cal.App.4th 32, 42, modified 145 Cal.App.4th 764a.) The Court of Appeal denied the People's writ petition, holding that the trial court did not abuse its discretion in its recusal order.

The People filed a petition for review in this Court. That petition stated two issues: the People's standing to object to the subpoena and the recusal sanction. On March 21, 2007, this Court granted the petition with an order stating simply, "Petition for review granted." The Court did not specify the issues to be briefed and argued in the order granting review or in any order issued since then. (Cf. Cal. Rules of Court, rule 8.516(a)(1).)

SUMMARY OF ARGUMENT

Real Party in Interest Humberto S., the minor in the Juvenile Court proceeding ("Real Party"), makes four arguments in support of his position that the standing issue is not properly before this Court: (1) that the issue has been "framed by this Court" to exclude that question; (2) that the courts below did not find it necessary to address the standing question, even though the People raised and briefed it; (3) that *People v. Hammon* is inapplicable, and (4) that the Court of Appeal's prior denial of a summary writ is the law of the case. (Real Party in Interest's Answer on the Merits ("Answer Brief") at pp. 15-16.)[1] The second is legally irrelevant. The third goes to the merits

1. All page cites to the Answer Brief are to the "corrected pagination" version served on June 20, 2007.

and not to whether the issue is properly before the Court. The fourth is contrary to the controlling precedents.

The actions of the District Attorney's Office in this case must be understood in the context of the serious violations of the statutory protections for confidential records committed by both defense counsel and the juvenile court. The procedures laid out in Penal Code section 1326 and Evidence Code section 1560 were violated in several important respects.

The district attorney has a duty to enforce the law and to see that justice is done. Further, as the representative of a party to the case, the district attorney has the right to participate in litigation affecting the proceeding. Litigation of a discovery issue related to the case and threatening an unlawful and unjust invasion of the privacy rights of the victim of the crime is a proper and lawful exercise of the district attorney's powers.

ARGUMENT

I. The prosecution's standing to contest the defense third party discovery efforts is properly an issue in this appellate review.

Real Party in Interest, Humberto S., has argued in his Answer Brief that the prosecution's standing to object to the trial court's release of documents subpoenaed by Real Party from a third party is not an issue in this case. In support of this argument, Real Party makes four arguments: (1) this Court has "framed" this issue as limited to the recusal sanction; (2) the Court of Appeal specifically declined to reach the question of the prosecution's standing; (3) the procedural timing issues of release of records addressed in *People v. Hammon* (1997) 15 Cal.4th 1117 are not applicable; and (4) the Court of Appeal's denial of the prosecution's writ petition challeng-

ing the order releasing the documents to the defense is "law of the case." These arguments are without merit.

A. The Issue Presented.

In accordance with California Rules of Court, rule 8.504(b)(1)[2], People's petition for review in this case presented two issues on review. The first issue was "Whether the People have standing under *People v. Hammon* (1997) 15 Cal.4th 1117, to object to the issuance of a subpoena duces tecum in a criminal case seeking pretrial release of an eight-year-old child victim's psychotherapy records, to move to quash the subpoena and to request the appointment of a guardian ad litem in order to preserve the victim's rights when her parents disagree about the release of such records?"

On March 21, 2007, this Court unanimously voted to grant review. In its grant of review, the Court did not limit the issues to be briefed, even though "[o]n or after ordering review, the Supreme Court may specify the issues to be briefed and argued." (Rule 8.516(a)(1).) Absent such a specification, the parties may brief and the Court "may decide any issues that are raised or fairly included in the petition or answer." (Rule 8.516(b)(1); *People v. Randle* (2005) 35 Cal.4th 987, 1001; *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1.)

B. Briefed and Argued.

Real Party contends without citation that "both the juvenile court and the Court of Appeal specifically stated that they did not reach the issue of standing, since it was neither necessary nor relevant to the decision." (Answer Brief at p. 16.) Even if that were true, the issues

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2. All subsequent rule citations are to the California Rules of Court.

properly before this Court do not depend on what the lower courts deemed necessary to decide. This Court's "power of decision, of course, extends to the entire case [citation], although as a matter of policy we ordinarily exercise that power only with respect to issues raised in the Court of Appeal [citation]." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6.) The latter policy is now in Rule 8.500(c)(1). The limitation is to issues the parties raised, regardless of whether the Court of Appeal decided them. If decision of the issue is "necessary for the proper resolution of the cases before" the Court, the Court should decide it, even when the Court of Appeal mistakenly believed it was not necessary. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1078, fn. 4.) As the People have explained, they properly preserved this issue in the lower courts. (Reply Brief at pp. 7-10.)

C. Basis of the Decisions Below.

The district attorney's standing was at issue before both courts below, and it is necessary to a proper resolution of this case. When the juvenile court granted Real Party's motion to recuse the district attorney, the juvenile court explicitly disavowed that the order recusing the district attorney was based on the prosecution's failure to provide discovery that Real Party had asked the prosecution to disclose. (Reporter's Transcript of Proceedings, August 21, 2006, page 3, line 26, to page 4, line 7.) However, rather than disavow its reliance upon any of these actions of the district attorney as a basis for the recusal, the juvenile court explicitly recounted those efforts. (Reporter's Transcript of Proceedings, August 21, 2006, page 4, line 8, to page 6, line 9.) The juvenile court then concluded that based upon the district attorney's actions the district attorney had a conflict of interest that arose when it sought to represent third party interests that was so great as to make a fair trial unlikely, and the juvenile

court granted the motion to recuse the district attorney. (Reporter's Transcript of Proceedings, August 21, 2006, page 6, lines 10-22.)

The Court of Appeal's opinion upholding the juvenile court's recusal order is a closer question. On one hand the Court of Appeal declined to hold as a matter of law that the district attorney's objections to the failures to follow procedural and statutory requirements for a subpoena duces tecum mandated a finding that the district attorney had a disabling conflict of interest. (*People v. Superior Court* (*Humberto S.*) (2006) 145 Cal.App.4th 32, 41-42.) The Court of Appeal further stated that the prosecutors "were not acting outside their role in the initial challenge to the procedures followed with respect to the subpoenaed documents." (*Id*. at p. 42.)

But the Court of Appeal concluded that the trial court's findings must be viewed "in the context of the proceedings that it observed in the courtroom" (*id*. at p. 38), and that there was "substantial evidence to support the trial court's findings." (*Ibid*.) The Court of Appeal considered, although it did not hold, that only one of the district attorney's actions—failure to produce Samantha's father at the court's request—would have supported the juvenile court's finding of a disabling conflict of interest. (*Id*. at p. 42, fn.10.)

The opinion of the Court of Appeal is not a model of clarity in an area of law in which prosecutors, defense attorneys, and trial courts need clarity: what actions may the prosecutor take toward defense third party discovery efforts? So while it is facially true that the Court of Appeal declined to hold as a matter of law that the prosecution does not have standing to litigate against defense-initiated third party discovery efforts, the Court of Appeal found substantial evidence and no abuse of discretion to support the juvenile court's recusal order in the context of the entire litigation over those discovery efforts—litigation that included prosecution

motions to quash the defense subpoenas duces tecum and other acts by the district attorney opposing Real Party's third party discovery efforts.

D. Importance of the Question.

Although the standing question is properly before the Court, amicus acknowledges that the Court has the discretion whether to decide it. (Rule 8.516(b)(3).) We submit that the importance of the question requires that this discretion be exercised in favor of deciding it.

In *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 859, the Court observed that under former Rule 29(a) "[o]ne of the principal grounds for granting review of Court of Appeal decisions is 'the settlement of important questions of law.' " It is an important fact that this Court granted review of the Court of Appeal decision by a unanimous vote of all seven justices of the Court. "When this court granted review, by a unanimous vote of its seven justices, we necessarily determined that the issues the Attorney General raised have sufficient statewide importance to warrant an opinion from this court, and that this case presents those issues. Even assuming the Attorney General did not timely raise in the Court of Appeal the two issues he has presented and briefed here, this court has authority under rule 29(b)(2) of the California Rules of Court to decide any issue that the case presents." (*People v. Braxton* (2004) 34 Cal.4th 798, 809.)

One cannot intelligently resolve the issue of whether a prosecutor has exceeded the proper scope of his or her authority without first resolving the scope of that authority. Thus, resolving the issue whether and how the prosecutor may litigate against defense-initiated third party discovery is at the core of determining whether the district attorney exceeded its authority in the case now before the Court.

This question is an issue of statewide importance to trial courts, litigants, and third parties who are dragged into criminal cases by virtue of third party discovery practices of the litigants. Trial courts, prosecutors, and defense attorneys need to know just what the prosecution may lawfully do when confronted with third party discovery efforts that the prosecution deems unlawful.

Recusal of the district attorney has significant consequences for the prosecution of a criminal case. Prosecutors should not be forced to risk the successful and timely prosecution of their case as the price of testing the scope of their lawful authority when they observe defense third party discovery efforts that they believe violate the procedural and substantive requirements for such discovery set by the California Legislature.

This issue is important to more than trial courts and parties to criminal cases. This issue impacts heavily on the rights of woefully underrepresented victims of crime and witnesses to crime. The prospect that crime victims and witnesses might be forced to hire counsel at their own expense to ensure that unlawful or improper defense-initiated third party discovery practices comply with the law, because the prosecutor, whose job it is to enforce the law and ensure fair and just trials for all, may not act to ensure fair and just trials for crime victims and witnesses, is a question of significant importance that this Court must address.

The question whether the prosecutor may lawfully intervene in defense-initiated third party discovery is a recurring issue faced by trial courts. Just within the past month another Court of Appeal published an opinion in which the Court determined that the prosecutor has no standing to participate in defense-initiated discovery efforts aimed at obtaining evidence from the courts, a form of third party discovery. (See *Smith v. Superior Court* (2007) 152

Cal.App.4th 205.) The prosecutor's standing to litigate against defense-initiated third party discovery efforts is fairly included within the issue presented and is an important question of law that is of statewide importance.

E. Law of the Case.

Real Party attempts to preclude litigation of the prosecutor's standing to litigate against defense-initiated third party discovery claiming that the Court of Appeal's summary denial of the district attorney's writ petition challenging the juvenile court's discovery ruling is "law of the case." Real party is mistaken.

In *Kowis v. Howard* (1992) 3 Cal.4th 888, 894, this Court stated:

> "When the appellate court issues an alternative writ, the matter is fully briefed, there is an opportunity for oral argument, and the cause is decided by a written opinion. The resultant holding establishes law of the case upon a later appeal from the final judgment. [Citations.] . . . .
>
> "By contrast, it is the rule, at least in general, that the doctrine does not extend to summary denials of writ petitions. In *People v. Medina*, *supra*, 6 Cal.3d at pages 488-493, we held that the summary denial of a pretrial writ after the trial court denied a motion to suppress evidence did not constitute law of the case for purposes of a later appeal from the final judgment."

This Court concluded that "[a] summary denial of a writ petition does not establish law of the case whether or not that denial is intended to be on the merits or is based on some other reason." (*Kowis*, *supra*, 3 Cal.4th at p. 899.) Real Party's reliance upon *Leone v. Medical Board* (2000) 22 Cal.4th 660, 669-670, to support a claimed exception to the general rule outlined above (Answer Brief at p. 19), is misplaced. *Leone* does not deal with an exception to the law of the case rule as outlined in *Kowis*. *Leone* holds that when a writ petition

is the only authorized mode of appellate review, a summary denial of the petition is necessarily on the merits, and an appellate court that summarily denies a writ petition for lack of substantive merit or for procedural defect thereby fulfills its duty to exercise the appellate jurisdiction vested in it by the state Constitution's appellate jurisdiction clause. But *Leone* does not hold that such a decision on the merits becomes "law of the case." Specifically, it does not contradict the passage of *Kowis* quoted above that denial on the merits does not give the summary denial "law of the case" status.

Although in the present case the Court of Appeal requested the parties to supply letter memoranda of authorities, the Court of Appeal never issued an alternative writ, the matter was not fully briefed, there was no oral argument, and the writ was not decided by a written opinion. None of the requirements for "law of the case" from the summary denial of the district attorney's writ petition on the discovery order have been met. Therefore, the standing of the prosecution to contest defense third party discovery efforts is properly an issue in this case.

II. Numerous errors attended the subpoena of Samantha's privileged records and their disclosure to the minor prior to trial.

The defense violation of standards for the subpoena of third party records took place prior to the events in controversy that are the subject of the litigation in this case. However, we discuss these defense violations of law in order to place the prosecutor's efforts to ensure correct handling of Samantha's privileged records into context. The prosecutor's actions did not occur in a vacuum, but in the context of multiple violations of statutory protections by both the defense and the juvenile court.

A. Violation of Procedural Standards by Attorney.

A defendant in a criminal proceeding or a minor in a juvenile proceeding has the lawful power to issue a subpoena duces tecum to third parties to require those persons to produce materials and evidence at court in that proceeding. This right is implicit in Penal Code sections 1326 and 1327 and "has been clearly recognized by the courts for at least two decades. [Citations.]" (*People v. Hammon* (1997) 15 Cal.4th 1117, 1128.)

However, since at least January 1, 2005, Penal Code section 1326 and Evidence Code section 1560 have set forth clear mandates on the procedures that are to be followed in the issuance of such subpoenas and in the handling of evidence and materials produced pursuant to these subpoenas. As amended in 2004, Penal Code section 1326 provides that a subpoena duces tecum issued in a criminal case shall direct that the subpoenaed records be delivered by the custodian of the records as specified in subdivision (b) of Evidence Code section 1560. Subdivision (b) of Section 1326 now also provides that deposition subpoenas are not available in criminal cases. As amended in 2004, subdivision (e) of Evidence Code section 1560 similarly provides that deposition subpoena procedures apply only "in a civil action."

The 2004 amendments to Penal Code section 1326 and Evidence Code section 1560 have explicitly codified the judicial interpretation of these statutes provided prior to 2004 that records subpoenaed in a criminal case must be subpoenaed to the court and not to the party issuing the subpoena. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1316; *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1296; *Carlson v. Superior Court* (1976) 58 Cal.App.3d 13, 22-23.) Subdivision (c) of Penal Code section 1326, as amended in 2004, provides that no party or attorney in a criminal action may

issue a subpoena duces tecum that requires the custodian to provide the originals or copies of books, papers, documents, or records that relate to a third party, in any manner other than the procedures specified in subdivision (b) of Evidence Code section 1560.

The amendments to these statutes were enacted by the Legislature in 2004 to remedy a pattern of subpoena practices that had developed in criminal prosecutions in California which some attorneys, including the undersigned, had denominated as "subpoenas duces grabbum." (See, e.g., Pipes & Gagen, California Criminal Discovery (3d ed. 2003) § 9:15, pp. 584-587.) The 2004 amendments eliminated deposition subpoenas in criminal cases, by requiring that all subpoenas duces tecum in criminal cases command the custodian to deliver subpoenaed records and documents directly to the court and not to a party or to a party's attorney.

The record does not establish whether the attorney for Humberto violated Penal Code section 1326 by issuing a subpoena duces tecum for the privileged medical records of Samantha that commanded the custodian of those records to deliver them directly to the defense instead of to the court. But it is clear that once the privileged medical records of Samantha were delivered directly to the defense, the defense acted unlawfully in (1) opening and in reading those records, (2) retaining Samantha's privileged medical records instead of delivering them to the court, (3) failing to inform the court of its receipt of those privileged records, (4) making duplicate copies of those records, and (5) providing those duplicate copies of the privileged records to a defense-retained expert and to the prosecutor. In each of these five ways, the attorney for Humberto violated her duty to handle privileged medical records delivered to her without court authorization in compliance with her duties under the law.

Subdivision (d) of Evidence Code section 1560 provides that "the copy of the records shall remain sealed and shall be *opened only* at the time of trial, deposition, or other hearing, *upon the direction of the judge*, officer, body, or tribunal conducting the proceeding, *in the presence of all parties* . . . ." (Italics added.) The attorney for Humberto opened and read Samantha's sealed, subpoenaed medical records outside the time of trial or other hearing, without the authorization or direction of the court, and in the absence of the People's attorney. The attorney for Humberto thereby violated Samantha's physician-patient privilege and subdivision (d) of Evidence Code section 1560.

Issuing a subpoena duces tecum for Samantha's privileged medical records did not entitle the attorney for Humberto to open and read those records. While a subpoena duces tecum may commonly be issued by a party to a criminal case without a showing of good cause supporting its issuance (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535-537), a party to a criminal action who seeks discovery from a third party is not entitled to require the third party to provide the discovery directly to that party, even with a subpoena duces tecum. "Third party records are required to be produced to the court rather than the attorney for the subpoenaing party . . . ." (*People v. Superior Court* (*Barrett*), *supra*, 80 Cal.App.4th at p. 1316.) "An accused [] is not entitled to inspect material as a matter of right without regard to the adverse effects of disclosure and without a prior showing of good cause." (*Hill v. Superior Court* (1974) 10 Cal.3d 812, 817.)

This Court has explained the good reason why records subpoenaed in criminal cases are to be delivered to the court instead of to the attorney for the subpoenaing party. "The issuance of a subpoena duces tecum . . . is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf

it is issued to obtain access to the records described therein until a judicial determination has been made that the person is legally entitled to receive them." (*People v. Blair* (1979) 25 Cal.3d 640, 651.)

The requirement that subpoenaed records be "*opened only* at the time of *trial, deposition*, or other *hearing, upon the direction of the judge*, officer, body, or tribunal conducting the proceeding, *in the presence of all parties* . . ." (Evid. Code, § 1560, subd. (d), italics added), is a statutory command that serves important interests and is not a meaningless formality. The requirement that the prosecutor be notified that documents and records in the possession of a third party have been delivered to the court pursuant to a defense-issued subpoena duces tecum gives the prosecutor an opportunity to (1) object to the opening of the sealed envelope containing the subpoenaed records, (2) advise the court on the requirement that subpoenaed records should not be released to the defendant absent a good cause showing by the defendant, (3) argue that subpoenaed privileged records should not be opened until the time of trial, and (4) move to quash the defense-issued subpoena duces tecum.

Even if the subpoena duces tecum issued by the attorney for Humberto did not command the custodian to deliver Samantha's medical records directly to the defense, and even if those privileged medical records were delivered to the defense attorney by mistake, the attorney had a duty to then correct that mistake by leaving the records sealed and delivering them to the court. In *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, the attorney for a man charged with a sexual battery served a subpoena duces tecum on a mental health treatment facility to obtain the mental health records of the woman who was the alleged victim of the charged sexual assault. The mental health facility sent the records by mistake directly to the attorney. The attorney opened the subpoenaed records, read them,

gave them to a defense-retained psychiatrist, and then used those records to cross-examine the victim in the criminal action. (*Id*. at p. 1294.)

The victim filed a civil action for abuse of process, infliction of emotional distress, and invasion of privacy against the attorney and the defendant. The trial court sustained a demurrer to the complaint and then dismissed it. The victim appealed the dismissal of the civil complaint. The Court of Appeal reversed the judgment of dismissal of the cause of action for invasion of privacy, holding that "a crime victim has a cause of action for invasion of her constitutional right to privacy against a defense attorney who, without authorization, reads and disseminates the victim's confidential mental health records." (*Susan S.*, *supra*, 55 Cal.App.4th at p. 1293.) In reaching this conclusion, the Court of Appeal held that the "subpoena duces tecum procedure itself implicitly recognizes an expectation of privacy on the part of the person whose records are subpoenaed." (*Id*. at p. 1296.) Therefore, the attorney for the minor violated clearly-established standards for the subpoena of third party records that are prescribed by Penal Code section 1326 and Evidence Code section 1560.

B. Violations of Standards by the Juvenile Court.

The juvenile court compounded the errors of the attorney for Humberto by failing to follow clearly-established standards governing the handling of third party records subpoenaed to court. Unlike Samantha's medical records, her privileged psychotherapy records were properly delivered by their custodian to the court. However, the juvenile court unlawfully opened those records and unlawfully delivered them to the attorney for Humberto. As noted *supra* at p. 16, subdivision (d) of Evidence Code section 1560 expressly forbids such ex parte opening and delivery.

The record in the juvenile court does not identify the person who opened Samantha's privileged psychotherapy records or whether those records were opened at the direction of the judge or juvenile court officer. The record further does not establish that the juvenile court judge or bench officer who released the records to the defense first read those records, conducted a balancing of the need of the defense for the records as weighed against Samantha's psychotherapist-patient privilege, and thereafter made a finding that the minor's need for the records outweighed Samantha's privacy interests in those records. If any such process occurred, the record of the juvenile court does not show it.

The record of the juvenile court also does not show that the juvenile court exercised any discretion to release to the defense only those portions of Samantha's psychotherapy records that were clearly relevant to the defense of the charges. It appears that the juvenile court simply turned over to the defense all of the subpoenaed records. Compare, for example, this Court's discussion of the propriety of a trial court's partial release of privileged records in *People v. Webb* (1993) 6 Cal.4th 494.

In *Webb*, this Court upheld a trial court's release to the defendant, following an in camera review, of only those portions of a witness's psychiatric records that indicated an impairment of her ability to perceive, recollect, or relate events that she had witnessed and those portions that contained her comments concerning the defendant's arrest in the pending capital case. This Court stated: "Any information having any arguable bearing on defendant, the capital crimes, and Sharon's ability to testify truthfully and accurately was disclosed." (6 Cal.4th at p. 518.) The Court held that the witness's psychotherapist-patient privilege overcame the defendant's request for any other disclosures, and there was no error in restricting the defendant's access to the remaining records.

It is, however, an apparently undisputed fact in the instant case that the opening, review, and release of Samantha's privileged records occurred without the presence and knowledge of the attorneys for the People, a party to the juvenile court proceeding. In fact, the People's attorneys did not even learn of the release to the defense of Samantha's psychotherapy records for more than one month. At the time these records were disclosed to the defense, there was no lawful basis to release them to anyone. Samantha did not consent to their release and neither of Samantha's parents had yet given consent to their release. Even though subpoenaed to court, Samantha's psychotherapy records remained privileged after they arrived at court.

Requests for discovery involving the right of privacy of third parties can run afoul of the protection of article I, section 1 of the California Constitution. That section provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." While the constitutional provision protecting the right of privacy is not absolute, intervention into an individual's privacy "must be justified by a compelling interest." (*White v. Davis* (1975) 13 Cal.3d 757, 775.)

When discovery would intrude upon a constitutionally protected area, the discovery request may not be justified solely on the basis that the request might lead to relevant information. The party requesting discovery must establish that the inquiry will likely be productive—an "affirmative showing that [the inquiry is] likely to turn up material information . . . ." (*Fults v. Superior Court of Sonoma County* (1979) 88 Cal.App.3d 899, 905.)

> "[D]isclosure is only justified, however, if the sought after disclosure would serve the compelling state interest of the facilitation of truth in legal proceedings. The party seeking court-ordered discovery must shoulder this heavy burden, and must establish more than 'merely . . . a rational relationship to some colorable state interest'; ' "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation" ' on the right of privacy. [Citations.]" (*Boler v. Superior Court* (1987) 201 Cal.App.3d 467, 473.)

Article I, section 1 of the California Constitution protects people not only from snooping by government, but also snooping by private parties, including the defense in a criminal action. "Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1136.)

This Court established a clear procedure for trial courts to follow when those courts come into possession of subpoenaed privileged records in *People v. Hammon*, *supra*. While this Court in *Hammon* sustained a trial court's grant of a motion to quash a defense-issued subpoena duces tecum for pre-trial disclosure of a victim's psychiatric records, *Hammon* means more than simply that a trial court is not required to conduct a pre-trial, in camera review of privileged records. It means that trial courts should normally not open, review, and disclose subpoenaed privileged records prior to trial. (See *People v. Gurule* (2002) 28 Cal.4th 557, 592.)

The reasons why trial courts should normally delay review and disclosure of subpoenaed privileged records until the time of trial were well explained by this Court in *Hammon*. (*People v. Hammon*, *supra*, 15 Cal.4th at p. 1127.) By opening and releasing Samantha's psychotherapy records to the minor's attorney well in advance of trial

and in a manner that did not comply with the procedures mandated for the handling and release of such records by Evidence Code section 1560, the juvenile court failed to follow clearly-established standards for the handling of privileged third party records that are prescribed by Evidence Code section 1560 and decisions of this Court.

C. Delayed Compliance.

The juvenile court officer whose erroneous decisions caused Samantha's psychotherapist-patient privilege to be unlawfully violated was apparently not the regularly presiding bench officer in the juvenile court. When the regularly presiding bench officer returned to preside over later proceedings in this case, that judicial officer attempted to correct the mistakes that had already been made in releasing Samantha's privileged psychotherapy and medical records to the minor's attorney. The parties were ordered to return their copies of those records to the court and the court thereafter conducted proceedings in accordance with Penal Code section 1326 and Evidence Code section 1560.

The damage, however, in violating Samantha's privileges had already been inflicted and the proverbial "bell" could never be unrung. There remained the question of whether the juvenile court would magnify the previous errors by again releasing to the defense Samantha's privileged records in a manner that might enable the defense to use those records to further damage an eight-year-old girl.

We have elucidated the numerous errors made by the attorney for Humberto and the juvenile court in invading Samantha's privileged records to demonstrate the legitimate concerns that caused the public prosecutors to play an active role in the proceedings in the juvenile court litigation over the question whether these records should be released to the defense. We come to the support of the

public prosecutor for his actions in this case for the reasons we will now discuss.

III. The public prosecutor lawfully and properly litigated against release of Samantha's privileged records.

While one of the issues presented by the petition for review to this Court is whether the juvenile court properly recused from this case a large number of the deputy prosecutors employed by the District Attorney of Los Angeles County, we submit that the Court need not reach the question whether recusal was an appropriate sanction in this case. Recusal of the public prosecutor in this case was a completely unjustified action by the juvenile court, because the public prosecutor's litigation against the release of the eight-year-old victim's privileged records was a lawful and proper exercise of the powers entrusted to the public prosecutor.

A. The Nature and Role of the Public Prosecutor.

The district attorney in each county in California is a public officer whose office is mandated by the California Constitution. Article XI, section 1(b) provides that "[t]he Legislature shall provide for . . . an elected district attorney . . . ." The California Legislature has by statute established the Office of the District Attorney as a county officer. (Gov. Code, § 24000, subd. (a).) The Legislature has designated the district attorney as the "public prosecutor," upon whom is imposed the duty to initiate and conduct all prosecutions of all public offenses on behalf of the People. (Gov. Code, § 26500.) The duty of the public prosecutor to prosecute public offenses includes the duty to investigate and gather evidence relating to those criminal offenses, since investigation of crimes is inseparable from prosecution. (See Gov. Code, § 25303; *Hicks v. Board of Supervi-*

sors (1977) 69 Cal.App.3d 228, 241; *Los Angeles City Ethics Com. v. Superior Court* (1992) 8 Cal.App.4th 1287, 1302.)

In carrying out his or her duties as the public prosecutor, the district attorney represents the People of the State of California in whose sovereign name the case is presented. (Gov. Code, § 100; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451.) In exercising the powers of the public prosecutor, the district attorney acts as a state officer. When the district attorney exercises discretion to initiate and conduct a prosecution, or when the district attorney declines to initiate a prosecution, a number of courts have described the district attorney as acting with quasi-judicial powers. (*Leo v. Superior Court* (1986) 179 Cal.App.3d 274, 288; *People v. Gephart* (1979) 93 Cal.App.3d 989, 999; *People v. Municipal Court* (*Pellegrino*) (1972) 27 Cal.App.3d 193, 207; *Pearson v. Reed* (1935) 6 Cal.App.2d 277, 286.)

1. District attorney's duty as the public prosecutor to enforce the law.

It is the duty of the district attorney and the Attorney General "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.) "California district attorneys 'are given complete authority to enforce the state criminal law in their counties.' " (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 358, quoting *McMillian v. Monroe County* (1997) 520 U.S. 781, 790.)

The Executive Branch, of which the district attorney is an integral part, carries out its mandate to enforce the laws of the State by prosecuting criminal offenses. (See *United States v. Armstrong* (1996) 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687.) The public prosecutor's duty to enforce the law is a principle that is recognized by the courts of many jurisdictions. (See, e.g., *State v.*

Leonardis (1977) 73 N.J. 360, 381, 375 A.2d 607, 617-618; *Anderson v. Manley* (1935) 181 Wash. 327, 331, 43 P.2d 39, 40.)

2. District attorney's duty as an officer of the court to conduct fair and just criminal prosecutions.

The public prosecutor is responsible to enforce the law in ways that are broader than simply prosecuting criminal offenses. In addition to being charged with the duty to prosecute criminal offenses, the district attorney is an officer of the court with a duty to state the law fairly and accurately, and to conduct criminal prosecutions that are fair and just to all parties and individuals involved in such prosecutions. "[T]he court and the prosecutor, as officers of the court, have a duty not to misstate the law, whether intentionally or not." (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 734-735.)

That the public prosecutor is an officer of the court with a unique duty to present only truthful evidence and information and to see that justice is done is recognized by numerous jurisdictions. (See, e.g., *United States v. Carmichael* (6th Cir. 2000) 232 F.3d 510, 517; *United States v. Block* (5th Cir. 1981) 660 F.2d 1086, 1091; *State v. Neuser* (1995) 191 Wis.2d 131, 139, 528 N.W.2d 49, 52; *State v. Glaze* (Minn. 1990) 452 N.W.2d 655, 662; *State v. Whitfield* (Fla. 1986) 487 So.2d 1045, 1047; *State v. Sledge* (1997) 133 Wn.2d 828, 840, 947 P.2d 1199; *Baker v. State* (Del. 2006) 906 A.2d 139, 152.)

The most well-known and quoted statement of the prosecutor's duty to afford fair and just trials is that of Justice Sutherland in *Berger v. United States* (1935) 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314: A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it

shall win a case, but that justice shall be done . . . ." In *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 839-840, this Court recognized the special role of the public prosecutor to act in an impartial manner to seek a just resolution of the case. The clearest example of the prosecutor's duty to provide a fair trial is the requirement to disclose to a defendant material, favorable evidence possessed by the police, whether or not known to the prosecutor. (*Strickler v. Greene* (1999) 527 U.S. 263, 280-281, 119 S.Ct. 1936, 144 L.Ed.2d 286.)

3. District attorney's right as the attorney for a party to litigate an issue affecting the proceeding.

In addition to his or her role as a public prosecutor whose duty is to enforce the law, and as an officer of the court whose duty is to assist the court in providing fair and just trials, the district attorney is the attorney for the People of the State of California, which is a party to every criminal prosecution. As described, *supra*, at 24, the district attorney represents the People of the State of California in whose collective name every criminal case is prosecuted. The prosecutor "is the representative of the public . . . ." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797, internal quotation marks omitted.) The district attorney as the public prosecutor is "vested with the power to conduct *on behalf of the People* all prosecutions for public offenses within the county." (*People v. Eubanks* (1996) 14 Cal.4th 580, 589, italics added.) Because the district attorney is the attorney who represents the People of the State of California, and the People are a party to every criminal action (*Dix*, *supra*, 53 Cal.3d at p. 451), the district attorney necessarily represents a party to every criminal prosecution.

As a party to every criminal prosecution, the People of the State of California have been given by the electorate the right to due

process of law. (Cal. Const., art. I, § 29.) At its core, this means that "[t]he People are entitled to the same judicial impartiality, fairness and due process rights as defendants [citations] so long as such equality of treatment does not otherwise trample on the special constitutional protections accorded criminal defendants." (*People v. Snyder* (1990) 218 Cal.App.3d 480, 492, disapproved on other grounds in *People v. DeLouize* (2004) 32 Cal.4th 1223, 1233, fn. 4.)

Although the People's right to due process is not identical to a defendant's right to due process (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 896), the People's right to due process of law guarantees the People the right to participate in the proceedings. ("[P]articularly in California cases, the prosecution's right to due process has been invoked to affirm its right to be heard in various preliminary or collateral proceedings and to oppose a defendant's claim of right to be heard ex parte and in camera. [Citations.]" (*Id*., at pp. 896-897; accord, *Walters v. Superior Court* (2000) 80 Cal.App.4th 1074, 1079-1080; *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, 1092-1093.) The United States Supreme Court has recognized the same principle that due process of law protects a party's right to participate. (See *Fuentes v. Shevin* (1972) 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556.)

Ultimately, the protection of the People's right to participate in proceedings that affect their prosecution of the case is intended to ensure the People's right to a fair trial. (*Walters*, *supra*, 80 Cal.App.4th at pp. 1079-1080.) When a criminal defendant's effort to obtain from a third party discovery relating to a prosecution witness causes a negative impact on the prosecution of the criminal case, the People's right to due process is abridged when the district attorney is precluded from litigating against that third party discovery.

In *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, the defendant served a subpoena duces tecum on the California Department of Corrections for records of an inmate who was a prosecution witness against him. The defendant then obtained a protective order precluding the Department of Corrections from notifying the district attorney of the subpoena, from discussing with the prosecutor the contents of the materials supplied in response to the subpoena, and from providing copies of the subpoenaed documents to the district attorney.

The Attorney General petitioned the Court of Appeal for writ of mandate and prohibition, which the Court of Appeal granted. The Court of Appeal held that "the People . . . 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." (199 Cal.App.3d at p. 1092.) The Court observed that "[d]iscovery proceedings involving third parties can potentially result in sanctions being applied against the People should the third party refuse to produce the documents requested" and concluded that "the ex parte proceedings violated the People's right to due process of law." (*Id*. at p. 1093.)

The concept that a party's right to participate in the proceedings is an essential ingredient of due process is not unique to California. This concept is integral to various kinds of cases in many different contexts. (See, e.g., *Ake v. Oklahoma* (1985) 470 U.S. 68, 76, 105 S.Ct. 1087, 84 L.Ed.2d 53; *State v. Strich* (2007) 99 Conn.App. 611, 622, 915 A.2d 891; *Conn v. Conn* (2005) 13 Neb.Ct.App. 472, 476, 695 N.W.2d 674, 677-678; *State ex rel. Children, Youth & Families Dep't v. Maria C.* (2004) 136 N.M. 53, 59, 94 P.3d 796, 805; *Warren v. State* (Tex. 2003) 93 S.W.3d 739, 743; *Child Support Enforcement Admin. v. Shehan* (2002) 148 Md.App. 550, 557, 813 A.2d 334, 339; *Lewek v. State* (Fla. 1997) 702 So.2d 527, 530.) The district attorney

therefore has the right as the attorney for the People of the State of California, a party to the proceeding, to participate in the litigation of an issue affecting the proceeding.

B. The District Attorney's Actions in this Case.

The district attorney took the following eight actions in participating in the litigation in the juvenile court involving the defense-issued third party subpoenas duces tecum for the medical and psychotherapy records of Samantha: (1) the district attorney objected to the possession of those records by the attorney for Humberto; (2) the district attorney advised the juvenile court of the unlawful nature of the defense-issued subpoenas and the unlawful release of Samantha's psychotherapy records to the defense; (3) the district attorney spoke to Samantha's mother regarding the defense subpoenas for her daughter's privileged records; (4) the district attorney complied with the request of the juvenile court to produce Samantha's mother as a witness in the juvenile court; (5) the district attorney filed a motion to quash the defense-issued subpoenas; (6) the district attorney participated in the juvenile court evidentiary hearing over the question whether Samantha's parents consented to the release of Samantha's privileged records; (7) the district attorney cited case and statutory authority to the court in arguing against the release of Samantha's records to the defense prior to trial; and (8) the district attorney moved the Court to appoint a guardian ad litem for Samantha to represent her interests in the privacy of her privileged records. In addition to his actions in the juvenile court, the district attorney petitioned the Court of Appeal for writ of mandate to overturn the juvenile court order releasing Samantha's records, and the district attorney petitioned the Court of Appeal to overturn the juvenile court's order recusing more than 100 of the attorneys of the district attorney's office from representing the People in the juvenile court proceeding.

In carrying out these actions the district attorney never purported to represent Samantha or her mother. The district attorney never stated that the Office of the District Attorney represented Samantha or her mother and never made any appearance or filed any pleading in which the district attorney claimed to represent either of them. All of the district attorney's appearances and pleadings were made on behalf of his corporate client, the People of the State of California. As far as we can determine, no one has claimed that the district attorney purported to represent any person or entity other than the People.

Nevertheless, the attorneys for Humberto argued, the juvenile court ultimately held, and the Court of Appeal affirmed, that the actions of the district attorney and his zealous advocacy in support of these actions, constituted the representation of a private party, with the result that the district attorney failed to exercise his duty to act in an impartial and fair manner, thus justifying recusal. In reaching this conclusion, the juvenile court and the Court of Appeal erred. Each of the actions of the district attorney were within the lawful scope of his duties and powers.

1. The unlawful nature of the defense subpoenas duces tecum.

The district attorney objected to the possession of Samantha's privileged records by the defense and explained to the juvenile court why the defense-issued subpoenas were unlawfully issued and why the acquisition of Samantha's privileged records by the defense was thereby unlawful. When the improprieties in the subpoena process were called to the attention of the juvenile court, the court immediately and correctly ordered that every party with a copy of those records return them to the court and that the records be sealed pending resolution of the right of the defense to receive them.

There were good and substantial reasons for the prosecutor's conduct—the issuance of the defense subpoenas and procedural handling of the records produced in compliance with those subpoenas were replete with violations of controlling statutes and decisional authority regarding those statutes. There were seven unlawful actions regarding these subpoenas:

(1) Samantha's medical records were unlawfully delivered directly to Humberto's attorney, the attorney who issued the subpoena;

(2) Humberto's attorney unlawfully opened those records;

(3) Humberto's attorney unlawfully read and copied those records;

(4) Humberto's attorney unlawfully delayed in notifying the court of the receipt by the defense of those records and unlawfully failed to deliver those records to the court until more than 30 days had transpired and the juvenile court had ordered the records to be lodged with the court under seal;

(5) Humberto's attorney unlawfully delivered copies of those records to a defense-retained expert and to the prosecutor;

(6) the juvenile court unlawfully opened Samantha's psychotherapy records in an unreported and ex parte proceeding without notifying the prosecutor and giving the People an opportunity to be present at the opening of the records; and

(7) the juvenile court unlawfully delivered Samantha's psychotherapy records in their entirety to Humberto's attorney in advance of trial and without a demonstrated and reported good cause showing that justified their release.

This series of unlawful conduct demonstrated all of the abuses of the subpoena duces tecum process in criminal prosecutions and the slipshod treatment of subpoenaed privileged and private records in those cases that the 2004 amendments to Penal Code section 1326 and Evidence Code section 1560 were intended to correct. To the credit of the juvenile court, once these abuses and unlawful actions were called to the attention of the regularly-assigned bench officer of that court, there were no further abuses in this case of the subpoena duces tecum process regarding these records.

Had the district attorney not called the numerous abuses and unlawful actions relating to the defense-issued subpoenas duces tecum to the attention of the juvenile court, there might not have been anyone else to do so. The regularly-assigned bench officer of the juvenile court did not even know of the defense-issued subpoenas for Samantha's records, and the attorney for Humberto was in no position to self-report the unlawful actions taken by the defense and the juvenile court regarding the defense-issued subpoenas for these records. That is precisely why the law charges the district attorney, as the public prosecutor and as an officer of the court, with the duty to see that criminal prosecutions and juvenile proceedings are conducted fairly and justly and with the duty to advise the court accordingly.

2. Motion to quash.

Once the numerous abuses of the subpoena duces tecum process regarding Samantha's privileged records had been brought to the attention of the juvenile court, the remaining actions of the district attorney were designed to ensure that the juvenile court did not release those privileged records except in compliance with the law. The district attorney, lawfully representing a party to the action,

properly moved to quash the defense-issued subpoenas. Such a motion is authorized by law. (Code Civ. Proc., § 1987.1.)

Unless the Code of Civil Procedure or the Penal Code provide otherwise, "[t]he rules of evidence in civil actions are applicable also to criminal actions . . . ." (Pen. Code, § 1102; *People v. Johnson* (2006) 38 Cal.4th 717, 730.) Because the Code of Civil Procedure and the Penal Code do not provide otherwise, "the provisions of the Code of Civil Procedure regarding the production of witnesses and evidence are deemed applicable" to a criminal case. (*People v. Avila* (1967) 253 Cal.App.2d 308, 330.) In addition, "[t]he courts have inherent power to control the issuance of their own process and to preclude an abuse of the right to subpoena witnesses." (*People v. Manson* (1976) 61 Cal.App.3d 102, 197.)

The procedural remedy for a subpoena for privileged documents is a motion to quash, vacate, recall, or modify the subpoena. (*City of Los Angeles v. Superior Court* (*Williamson*) (2003) 111 Cal.App.4th 883, 888.) "Third party intervention for the purpose of filing a motion to quash is generally permitted so that evidentiary privileges are not sacrificed merely because the subpoena recipient lacks sufficient self-interest to object." (*M. B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1392.) The district attorney as the attorney for a party to the criminal prosecution may move to quash an improperly issued or served subpoena duces tecum. (See, e.g., *People v. Kaurish* (1990) 52 Cal.3d 648, 686; *People v. Condley* (1977) 69 Cal.App.3d 999, 1017; *People v. Cohen* (1970) 12 Cal.App.3d 298, 324-325.)

In the face of a motion to quash a subpoena duces tecum, the party who has subpoenaed the records must demonstrate that the materials sought are relevant. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045; *People v. Superior Court* (*Barrett*) (2000) 80

Cal.App.4th 1305, 1320 & fn. 7.) The same standards apply when a motion is made to quash a subpoena for a witness. (See *In re Gary W.* (1971) 5 Cal.3d 296, 310; *People v. Hollander* (1961) 194 Cal.App.2d 386, 391.)

Accordingly, the district attorney lawfully and properly moved the juvenile court to quash the defense-issued subpoenas for Samantha's privileged medical and psychotherapy records.

3. Objections to release of privileged records.

In addition to moving to quash the defense-issued subpoenas duces tecum, the district attorney asserted objections and cited authorities in support of the objections to the release of Samantha's privileged records to the defense. The district attorney also participated in the evidentiary hearings concerning the defense request for release of Samantha's records. The district attorney's actions were lawful and proper. The prosecutor, as the attorney representing the People, may assert the privacy rights of third parties who are not present to assert those rights. (See *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 657 (acknowledging opposing party in litigation may assert rights of others); *Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1520; *Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 278.) The trial court has a similar responsibility to assert an objection to the requested discovery of third party records on the court's own motion on behalf of third parties who are not present at court. (See, e.g., *People v. Pack* (1988) 201 Cal.App.3d 679, 685, disapproved on other grounds, *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 (a trial court is "statutorily required to assert the psychotherapist-patient privilege, on its own motion, on behalf of" the victim and complaining witness); *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 158.)

Evidence Code section 916 provides, in pertinent part:

> "(a) The presiding officer, on his own motion or *on the motion of any party*, shall exclude information that is subject to a claim of privilege under this division if:
>
> "(1) The person from whom the information is sought is not a person authorized to claim the privilege; and
>
> "(2) There is no party to the proceeding who is a person authorized to claim the privilege." (Italics added.)

(See also *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 932-33 ("If the patient is not a party to the court proceedings, the appropriate court, in its discretion and on its own motion, may protect the absentee holder of the privilege who has not waived it").) Accordingly, the district attorney lawfully and properly objected to the release of Samantha's privileged records to the defense and lawfully and properly participated in the litigation over that subject.

4. No civil action.

It is an undisputed principle that the district attorney as the public prosecutor may not prosecute civil actions in the absence of specific legislative authorization. (See *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1251, fn.15.) The district attorney's actions in the case now before this Court did not constitute a violation of this principle. The restriction on a prosecutor's power to prosecute civil actions refers to the prosecutor's initiation or defense of or the prosecutor's intervention in an unquestionably civil action. It is the character of the underlying action itself (criminal prosecution or civil action) that determines the propriety of the prosecutor's involvement, not the label given to the action taken by the prosecutor in the legal proceedings. "[W]e denominate as 'civil' not the contempt proceedings themselves, but the unquestionably private litigation from which

they issued." (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 235, n. 8.)

The prohibition of district attorney involvement in civil actions without express statutory authorization is intended to prevent the district attorney from intruding into private litigation where there are conflicting private interests. (*Id*. at p. 238.) A prosecutor who makes a motion in a criminal case to quash a defense-issued subpoena in that case does not intrude into private litigation; the prosecutor acts within the scope of the litigation to which the district attorney as the prosecutor represents a party—the People of the State of California, plaintiff. The district attorney's making a motion to quash a defense subpoena duces tecum issued to a third party no more constitutes the prosecution of a civil action than a motion to quash a defense subpoena duces tecum that is directed to the office of the prosecutor.

The identity of the recipient of the subpoena does not determine the character of the motion to quash it. If the motion to quash is a civil action in one instance, it should be a civil action in the other. Yet we are unable to find any authority that suggests that the prosecutor lacks authority to move to quash a subpoena duces tecum directed at the office of the prosecutor. (See, e.g., *People v. Rhone* (1968) 267 Cal.App.2d 652, 656 (district attorney appeared on behalf of a subpoenaed police chief in a motion to quash the subpoena).)

Even if the making of a motion to quash a defense-issued subpoena duces tecum directed to a third party were to be viewed as the prosecution of a civil action, the district attorney's conduct would not violate the rule against public prosecutor prosecution of a civil action. The district attorney has the authority to participate in non-criminal actions or proceedings that are in aid of or auxiliary to the district attorney's usual duties. (*People v. Parmar* (2001) 86 Cal.App.4th 781, 798.) "While, as a general rule, district attorneys

may not use their funds and powers to intervene in purely private litigation, some functions, though civil in nature, are so closely related and in the furtherance of criminal law enforcement that the district attorney may properly perform them . . . ." (*Ibid*., citing *Rauber v. Herman* (1991) 229 Cal.App.3d 942, 947-948.) The district attorney's actions did not constitute the unlawful prosecution of a civil action.

5. No representation of a private party.

Prosecutors do not represent victims and witnesses as individuals and may not function as their attorneys. (*Bullen v. Superior Court* (1988) 204 Cal.App.3d 22, 25; *People v. Vasquez* (2006) 39 Cal.4th 47, 71 (Corrigan, J., concurring).) This principle means that a prosecutor may not file pleadings or motions on behalf of a crime victim or witness. However, prosecutors are not precluded from litigating against unlawful defense discovery practices involving third parties in criminal cases, simply because the target of those unlawful practices are third parties. As we have already discussed, *supra*, at 34, the prosecutor, as the attorney representing the People, may assert the privacy rights of third parties who are not present to assert those rights.

The district attorney may assert these third party privacy rights, because victims and other third party witnesses have as much right to due process and fair and just treatment in criminal cases as does the defendant. The district attorney has the duty and the right to see that these victims and other third party witnesses receive this fair and just treatment and that everyone participating in and affected by a criminal proceeding is afforded due process of law. As stated by the Eighth Circuit, "As an officer of the court a prosecutor carries a heavy responsibility to both the court and the accused to conduct a

fair trial." (*United States v. Woods* (8th Cir. 1973) 486 F.2d 172, 175.)

Twenty-five years ago a movement advocating a greater voice for crime victims in the criminal justice system began to gain strength. As part of this movement commentators articulated the concept that victims are entitled to fair treatment and due process of law. "The victim, no less than the defendant, comes to court seeking justice . . . . It is outrageous that the system should contend it is too busy to hear from the victim." (President's Task Force on Victims of Crime, Final Report 77 (Dec. 1982).) "[T]he victim deserves a voice in our criminal justice system . . . [and] should have a right to participate in hearings before the court on dismissals, guilty pleas, and sentences . . . ." (Goldstein, *Defining the Role of the Victim in Criminal Prosecution* (1982) 52 Miss. L.J. 515, 547.)

The California electorate responded to this movement, enacting two crime victims' initiatives, Proposition 8 and Proposition 115. Proposition 8, which was enacted in 1982 as "The Victims' Bill of Rights," added section 28 to article I of the state Constitution to read, in pertinent part:

> "SEC. 28. (a) The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.
>
> "The *rights of victims pervade the criminal justice system* . . . ." (Cal. Const., art. I, § 28, italics added.)

Eight years later, on June 5, 1990, the electorate enacted Proposition 115, the "Crime Victims' Justice Reform Act." "[T]he preamble to the initiative contained a clear finding of fact regarding the treatment of crime victims and stated reformatory goals. The

voters found 'that the rights of crime victims are too often ignored by our courts and by our State Legislature.' [Citation.] To remedy this in part, the initiative stated a goal of creating a criminal justice system 'in which crime victims and witnesses are treated with care and respect . . . .' " (*People v. Adams* (1993) 19 Cal.App.4th 412, 441-442, quoting Proposition 115, § 1(c), Stats. 1990, p. A-243.)

These enactments by the electorate were in accord with the principle contained in Penal Code section 4 that the Penal Code must be interpreted to promote justice. Penal Code section 4 provides: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

Individual justices of this Court have also articulated the important concept that the fundamental role of our criminal justice system is to promote justice. In *People v. Superior Court* (*Howard*) (1968) 69 Cal.2d 491, 506, Justice Mosk stated in a concurring opinion: "We must not overlook the fundamental purpose of our penal statutes: not to give defendant or the People an unconscionable advantage but 'to promote justice' (Pen. Code, sec. 4)."

In *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 34, Justice Kennard wrote in dissent,

> "Justice is a special obligation of the judiciary. Every court has the power and the duty to 'amend and control its process and orders so as to make them conform to law and justice.' [Citation.] When they construe statutes, courts are enjoined to do so in a way that will promote justice. [Citations.] And, because the very purpose of our legal system is to do justice between the parties [citation], the interests of justice are paramount in all legal proceedings [citation]. In short, justice is the 'sole justification of our law and courts.' (Gitelson & Gitelson, *A*

Trial Judge's Credo Must Include His Affirmative Duty to be an Instrumentality of Justice (1966) 7 Santa Clara Law. 7, 8.)"

The prosecutor's commitment to promoting justice does not require the prosecutor to be "disinterested" in the same way that the law expects of judges and jurors.

> "The 'disinterest' demanded of a prosecutor is not the type of true disinterest that is the domain of the judge and jury. (*Eubanks*, *supra*, 14 Cal.4th at p. 590.) A prosecutor has a duty of zealous advocacy and need not be disinterested on the issue of whether the prospective defendant has committed a crime. (*Ibid*.) If convinced of the defendant's guilt, the prosecutor is free, and indeed obligated, to be deeply interested in urging that view by any fair means. (*Ibid*.) In this respect, however, the prosecutor's interest should coincide with the interest of the public in bringing a criminal to justice and should not be under the influence of third parties who have a particular axe to grind against the defendant. (*Ibid*.)" (*People v. Parmar* (2001) 86 Cal.App.4th 781, 797.)

The district attorney acted within his lawful and proper role in seeking to ensure that Samantha was treated justly and fairly by the juvenile court in the handling and release of her privileged medical and psychotherapy records. Nothing in the actions taken by the district attorney gave any indication that the district attorney's litigation against unlawful subpoena duces tecum practices by the attorney for Humberto and by the juvenile court was controlled by Samantha or her mother. Nothing in the district attorney's litigation against the release of Samantha's records to the defense on the authority of this Court's opinion in *People v. Hammon* (1997) 15 Cal.4th 1117, the authority of Evidence Code section 1012, and the authority of Health and Safety Code section 1795.14, subdivision (a), gave any indication that the district attorney sought to ensure that Samantha receive the protection that the law affords a minor child in

her privileged psychotherapy records as against a violation of that privilege by the very person accused of sexually abusing her for any reason other than to ensure that the juvenile court applied the applicable law governing the release of privileged psychotherapy records of an abused minor child. (See *In re Kristine W.* (2001) 94 Cal.App.4th 521, 525-528 (discussion of the privilege); *In re Daniel C.* (1990) 220 Cal.App.3d 814, 825-827.)

By seeking to ensure that Samantha's psychotherapist was involved in the juvenile court determination whether to release Samantha's records, and by requesting that the juvenile court appoint a guardian ad litem to represent Samantha's interests, the district attorney affirmatively acted to ensure that Samantha's interests were represented only by people who had no bias to protect or axe to grind. The fact that the district attorney's actions sought to protect the rights of one person, Samantha, did not convert the district attorney's relationship with Samantha into that of an attorney-client. There is a substantial public interest in the protection of children against abuse and mistreatment inflicted by the judicial process. When a district attorney acts to ensure that a child enmeshed in the criminal justice system is treated fairly and in accordance with statutes enacted to protect children, the district attorney carries out public policy and represents his or her client, the People of the State of California.

In *Maryland v. Craig* (1990) 497 U.S. 836, 857, 110 S.Ct. 3157, 111 L.Ed.2d. 666, the United States Supreme Court held that the confrontation clause does not prohibit a child witness from testifying against a defendant at trial, outside the defendant's presence, by a one-way closed circuit television to protect the child from trauma that would impair the child's ability to communicate where the reliability of the evidence is ensured by subjecting it to rigorous adversarial testing. The Court recognized the state's interest in

protecting child witnesses from the trauma of testifying. (*Id*. at p. 852.) Further, "a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one." (*Ibid*.) As regards child witnesses, the State has a "traditional and ' "transcendent interest in protecting the welfare of children." ' " (*Id*. at p. 855, quoting *Ginsberg v. New York* (1968) 390 U.S. 629, 640, 88 S.Ct. 1274, 20 L.Ed.2d 195.)

The State of California has also recognized the important state interest in protecting children enmeshed in the criminal justice system from further harm. That public interest has been reflected in numerous statutes enacted by the California Legislature to protect and assist children who are required to participate in a legal system designed for adults. (See Pen. Code, §§ 868.5, 868.6, 868.7, 868.8; Evid. Code, §§ 1228, 1253, 1360.)

California's courts have clearly recognized the public interest in protecting children in the criminal justice system reflected by these statutes. "Balanced against appellant's interest in having a literal face-to-face meeting with Tammy were the *important interests of the state* in obtaining a complete and accurate account of the interactions between appellant and Tammy, *and in protecting Tammy from unnecessary emotional trauma*." (*People v. Sharp* (1994) 29 Cal.App.4th 1772, 1783, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452, 45 Cal.Rptr.2d 905, 903 P.2d 1037, italics added.) "When the victim witness is a young child, the risks of damage to both the witness and the truth-seeking function can be especially great." (*Id*. at p. 1786.)

Penal Code section 868.5 "is a compatible expression of legislative concern for the supportive treatment at the stand of young witnesses while testifying." (*People v. Adams* (1993) 19 Cal.App.4th 412, 441.)

> "California is one of a number of states which has implemented statutes or procedures that allow a person to be present to render support to particular witnesses during their testimony. These procedures normally are focused on the young witness or the victim of a sexual offense. The common reasons advanced for the procedure are to allow the witness to more easily come forward and to reduce the psychological harm and trauma the witness might experience. [Citation omitted.] The state's interest in safeguarding the physical and psychological well-being of a minor or victim of sexual abuse can be a compelling one." (*People v. Patten* (1992) 9 Cal.App.4th 1718, 1726.)

The fact that the district attorney's actions sought to protect the rights of one person, Samantha, did not convert the district attorney's relationship with Samantha into that of an attorney-client. This is further shown by an additional duty of the prosecutor to protect the rights of just one person. The district attorney as the public prosecutor has a due process duty to ensure that material, favorable evidence possessed by the prosecution team is disclosed to the defendant, in order to ensure that the defendant receives a fair trial. (*Strickler v. Greene* (1999) 527 U.S. 263, 280-281, 119 S.Ct. 1936, 144 L.Ed.2d 286.) Yet no one would argue that by carrying out this duty the district attorney becomes the attorney for the defendant.

A prosecutor who acts to protect a child witness or victim enmeshed in the criminal justice system acts to carry out the public policy of this state. That prosecutor does not thereby become the attorney for that child. The actions of the district attorney in this case did not constitute the unlawful representation of a private party.

6. Proper zealous advocacy.

The opinion of the Court of Appeal criticized the district attorney for zealous advocacy, characterizing the prosecutor's zealousness as evidence of a loss of impartiality and thus justification

for recusal of the district attorney. The Court of Appeal's criticism is misplaced. If the district attorney acted within his lawful and proper scope of his powers and responsibilities as described earlier in this brief, then he acted properly and lawfully in his zealous advocacy of those actions. Stated in the simplest terms, if the district attorney had the duty and right to litigate at all, he had the right to litigate properly and with zeal.

"In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 248, 100 S.Ct. 1610, 64 L.Ed.2d 182.) "So long as their zeal remains within legal limits—as petitioner concedes it has here—the lawful execution of their duty does not establish as a matter of law that they have surrendered their independence and impartiality." (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 843.) "That in the performance of their duties they have zealously pursued the defendants, as is their duty within ethical limits, does not make their involvement improper, in fact or in appearance." (*Commonwealth v. Ellis* (1999) 429 Mass. 362, 378, 708 N.E.2d 644.)

As this Court emphasized in *People v. Vasquez* (2006) 39 Cal.4th 47, 65, "Zealous advocacy in pursuit of convictions forms an essential part of the prosecutor's proper duties and does not show the prosecutor's participation was improper." The district attorney's zealous advocacy was a proper and lawful exercise of the public prosecutor's powers.

CONCLUSION

The decision of the Court of Appeal should be reversed and the case remanded to grant the writ of mandate.

August 14, 2007

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CALIFORNIA RULES OF COURT,
RULE 8.520, SUBD. (C)(1)

I, Kent S. Scheidegger, hereby certify that the attached brief amicus curiae of the Criminal Justice Legal Foundation contains 13,091 words, as indicated by the computer program used to prepare the brief.

Dated: August 14, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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