IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ___

JOHN DOE,	) Court of Appeal
	) No. _____
Petitioner,	)
	) Sup. Court No.
SUPERIOR COURT OF CALIFORNIA,	)
COUNTY OF LOS ANGELES,	) **IMMEDIATE**
	) **STAY**
Respondent,	) **REQUESTED**
	) HON. JOHN
PEOPLE OF CALIFORNIA,	) JUDGE
	) Tel.: (310)
Real Party in Interest.	) _____
_____	)

LOS ANGELES COUNTY SUPERIOR COURT
HONORABLE JOHN JUDGE, JUDGE

PETITION FOR WRIT OF MANDATE

FAY ARFA, A LAW CORPORATION
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JOHN DOE

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IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ___

JOHN DOE,	)	Court of
	)	Appeal No.
Petitioner,	)	
	)	Superior Court
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES,	)	No.
	)	
Respondent,	)	
	)	
PEOPLE OF CALIFORNIA,	)	
	)	
Real Party in Interest.	)	
_____	)	

TO THE HONORABLE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT:

Petitioner JOHN DOE, through his attorney, Fay Arfa, petitions this Court to issue a writ of mandate to the Los Angeles Superior Court, commanding that the superior court vacate and set aside its order of October 2, 2008 denying Petitioner's request for Medi - Cal documents made pursuant to a court order.

By this verified petition the following facts and causes are set forth for the issuance of the writ:

I. Petitioner is the defendant named in a felony criminal action entitled "*People of the State of California, Plaintiff, v. John Doe*," (Case No. _____)

II. The prosecution filed an information alleging that, April 7, 2007, JOHN DOE committed the crimes of assault with a deadly weapon, spousal abuse and attempted murder against Jane Doe. (Pen. Code, §§ 245, 273.5, 664/187.) The prosecution also alleged a prior "strike" conviction. (Pen. Code, § 422; Pen. Code, §§ 1170.23 (a) - (d), 667(b) - (I).)

III. On August 4, 2008, Petitioner issued a subpoena duces tecum to Medi - Cal Custodian of Records requesting the accuser's Medi - Cal records. (Exh. A)

IV. On August 4, 2008, the Los Angeles Sheriff's Department personally served the subpoena duces tecum. (Exh. B)

V. On or about August 25, 2008, Petitioner's trial counsel received a telephone call from Ms. Debra Garrick, who represented the Medi-Cal records' department. (Declaration of Fay Arfa)

VI. Mr. Garrick stated that she could not comply with the subpoena and that she needed a court order in order to

comply with the subpoena. (Declaration of Fay Arfa)

VII. Petitioner's trial counsel agreed that she need not appear in court and that she would be notified when any appearance would be required. (Exh. C)

VIII. On August 28, 2008, respondent superior court issued an order releasing the Medi - Cal records to the Clerk of the Court. (Exh. D)

IX. On August 29, 2008, Petitioner, through counsel, faxed a copy of the Court's August 28, 2008 order to Ms. Garrick. (Exh. E)

X. On September 9, 2009, Petitioner's trial counsel spoke to Anthony Lewis, from the Medi - Cal's legal office in Sacramento and, pursuant to his request, faxed the August 28, 2008 court order to him. (Exh. F.)

XI. On or about September 25, 2008, the records arrived in the superior court. On that date, the prosecutor orally objected to the release of the records to Petitioner's counsel.

XII. The trial court continued the matter until October 2, 2008.

XIII. On October 2, 2008, the trial court conducted a brief hearing in open court and, without reviewing the records

themselves and instead reviewing a summary of the records, denied Petitioner's request for the Medi - Cal records. The trial court found the Medi - Cal billings to be "irrelevant." (See, Exh. G)

XIV. Respondent court acted beyond its jurisdiction and abused its lawful discretion in refusing to enforce the release of the Medi - Cal billing records to Petitioner's trial counsel.

XV. Appellate review before trial is appropriate because, otherwise, Petitioner would be compelled to endure the expense and time of a criminal trial without a reasonable opportunity to resolve the merits of his claims regarding pretrial discovery. (See, *Bravo v. Cabell* (1974) 11 Cal.3d 834, 837, n. 1 [writ relief appropriate when claims involved scope of pretrial discovery]; *Hill v. Superior Court* (1974) 10 Cal.3d 812 [Mandate is available to a criminal defendant to enforce a right to pre-trial discovery]; see also, *Joe Z. v. Superior Court* (1970) 3 Cal.3d 797.)

XVI. Petitioner is aggrieved by the denial of the release of the Medi - Cal billing records obtained through a lawful court order based on Petitioner's duly issued subpoena duces

tecum since the items requested are vital to his defense and will or may lead to admissible discovery.

XVII. No other petition for extraordinary relief has been filed by or on behalf of Petitioner relating to this action.

XVIII. On October 14, 2008, Petitioner ordered a copy of the reporter's transcript of the October 2, 2008 proceedings. (Exh. H.)

XIX. Petitioner seeks a stay by reason of the allegations described in paragraph numbers I through XVIII and the attached declaration of counsel.

XX. Unless immediately restrained by Order of this Court, the Respondent Superior Court will begin the trial in this case on October 27, 2008.

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/ / /

WHEREFORE Petitioner respectfully prays:

1. That this Court issue its writ of mandate directed to the Los Angeles Superior Court directing that court to vacate and set aside its order of October 2, 2008 denying Petitioner's request for the items ordered pursuant to the August 28, 2008 order enter a new and different order granting Petitioner's request.

2. This Court immediately stay all proceedings in Los Angeles Superior Court case number TA090164 until further order of this Court; and that

2. For such other and further relief as this court may deem just and proper.

DATED: October 15, 2008

Respectfully Submitted,
FAY ARFA, A LAW CORPORATION

/s/ Fay Arfa
By:_____
FAY ARFA, Attorney for Petitioner

VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, Fay Arfa, am the attorney for the Petitioner in the proceeding. I have read the petition and know the contents. The same is true of my knowledge, except as to those matters which are alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____ at Los Angeles, California.

/s/ Fay Arfa
_____
Fay Arfa, Attorney at Law

STATEMENT OF RELEVANT FACTS ELICITED AT THE PRELIMINARY HEARING

On April 7, 2007, at about 5:00 p.m., nine-year-old D.R. heard a woman screaming and saw her running down a storage aisle away from Mr. Doe, who had a knife in his hand. (PHT 6-7.) Ten minutes later, from a distance of 14 feet, D.R. saw Mr. Doe stab the woman in the back of her head with a knife "once or twice." A month earlier, D.R. had not been sure he saw a knife. (PHT 9-10, 13, 35, 38, 49, 51.)

Nine year old D.R.' mother heard, but could not see, a man and woman cussing at each other. Then she heard a woman scream, "Help. Somebody help me" and saw the woman running as fast as she could with "fear in her eyes." Within seconds, she saw the woman, face down, on the ground. D.R.' mother never saw a knife in Mr. Doe's hands. She had been talking to her son at the time. (PHT 57, 59, 67, 75.)

D.R.' mother approached the woman. Mr. Doe told the woman, "She's having a convulsion, She's having convutions [sic]." (PHT 75.) He bent over whispering and saying, "It's okay. It's okay. I got it." (PHT 80.)

Los Angeles Sheriff's Deputy_____arrived at the scene. At the preliminary hearing, she testified that she transported Mr. Doe to jail and secured his car. She also testified that she found a knife, containing a "red substance resembling blood" in the center console of his car. (PHT 84-85)

Jane Doe, who had been married to Mr. Doe for four years, testified that she got the laceration when she tripped, fell back and hit the corner of the steel building. She denied that her husband never stabbed her. (PHT 97, 98.)

ARGUMENT

I. THE TRIAL COURT DEPRIVED PETITIONER OF HIS RIGHT TO THE COURT'S SUBPOENA POWER, TO DUE PROCESS, TO EFFECTIVE COUNSEL, TO PREPARE A DEFENSE BY REFUSING TO ENFORCE ITS OWN ORDER

A. Introduction

Petitioner intends to show at trial that Ms. Jane Doe fell and injured her head on the ground. Petitioner intends to show that the nine-year-old witness never saw Petitioner ever strike his wife with a knife. Petitioner also intends to show that Ms. Jane Doe fell on the ground because of a pre-existing health condition that caused her to fall.

In order to prove Jane Doe's pre-existing condition, Petitioner needed her medical records. Jane Doe used the services of Medi-Cal. After Petitioner subpoenaed the Medi - Cal records, Petitioner learned that Medi-Cal only keeps billing records and not the medical records, themselves. However, Petitioner also learned that, by reviewing the Medi - Cal billings, Petitioned could get the names of Jane Doe's medical providers and then subpoena Jane Doe's medical records directly from the providers.

Without the information, Petitioner cannot prepare an

adequate defense to the charges because Petitioner would have no way of presenting Jane Doe's pre-existing condition. (U.S. Const., Amends. 5, 6.) Therefore, the trial court denied Petitioner his rights to counsel, to a defense, to due process and to a fair trial by refusing to enforce its own order issued subsequent to the defense subpoena.

B. A Defendant Has the Constitutional Right to Compel the Attendance of Witnesses under the Sixth Amendment, and to Due Process, Guaranteed by the Fourteenth Amendment

The state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690 [90 L. Ed. 2d 636, 644-645, 106 S. Ct. 2142]; *In re Martin* (1987) 44 Cal. 3d 1, 30) A defendant has the constitutional right to compel the attendance of witnesses under the Sixth Amendment, and to due process, guaranteed by the Fourteenth Amendment (*People* v. *Mincey* (1992) 2 Cal. 4th 408, 460; see also *Crane* v. *Kentucky, supra,* 476 U.S. at p. 690 [90 L. Ed. 2d at pp.644-645]; see also, Cal. Const., Art. I, § 15; Pen. Code, §§ 686 subd. (3), 1327.)

Penal Code sections 1326 and 1327 empower either party in a criminal case to serve a subpoena duces tecum requiring the

person or entity in possession of the materials sought to produce the information in court for the party's inspection. (*People v. Blair* (1979) 25 Cal.3d 640, 651; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315; *Pacific Lighting Leasing Co. v. Superior Court* (1976) 60 Cal.App.3d 552, 560.)

C. The Defendant Is Entitled to Discovery of All Relevant Information

The basis for pretrial discovery is the right of the defendant to a fair trial. (*Hill* v. *Superior Court* (1974) 10 Cal.3d 812, 816) The defendant is entitled to all relevant information which will facilitate a fair trial. (*Pitchess* v. *Superior Court* (1974) 11 Cal.3d 531, 535) The defendant is entitled to discovery of all information which is relevant or may lead to relevant evidence. (*Kelvin L.* v. *Superior Court* (1976) 62 Cal.App.3d 823, 828)

The defendant must be provided with the maximum information to illuminate the case, including any unprivileged evidence or information if it may reasonably assist in the preparation of the defense. The defendant need not state the defense or elect between available ones: all that is required is a showing of relevancy; necessity--that the defense cannot obtain the

material on its own; and specificity-- a list of items desired. (*State of California ex rel Dept. of Transportation* v. *Superior Court* (*Hall*) (1985) 37 Cal.3d 847, 855-6.)

D. The California Supreme Court Has Held that Criminal Proceedings Trump Any Privilege to Medical Records

Medical records are discoverable and not privileged. (Evid. Code, § 998.) The physician-patient privilege (Evid. Code, § 994) is inapplicable in criminal cases. (Evid. Code, § 998; see *Menendez* v. *Superior Court* (1992) 3 Cal.4th 435, 457, fn. 18; *People* v. *Lane* (1894) 101 Cal. 513, 516; *People* v. *Dutton* (1944) 62 Cal.App.2d 862, 863 [1]; *People* v. *West* (1894) 106 Cal. 89, 91.)

Any constitutional right to privacy may be outweighed by concerns for the truth. The State's interest in discovering the truth in legal proceedings may compel disclosure of confidential material. (*Brillantes* v. *Superior Court* (1996) 51 Cal.App.4th 323, 338.) '[A]n individual's medical records may be relevant and material in the furtherance of this legitimate state purpose. . . .' [Citation.]" (*Ibid.*)

E. The Defense Needs the Medi - Cal Billings in Order to Obtain the Accuser's Medical Records In order to Prepare a Defense

Based on communications with Medi - Cal, Petitioner believes

that the Medi - Cal records will lead to Jane Doe's medical records. The medical records contain critical information to show that Jane Doe fell and injured her head. The medical records would also show that Jane Doe suffered from a pre-existing condition that caused her to fall.

Jane Doe's Medi -Cal records are expected to lead to relevant information about Jane Doe's medical history. To deprive the defense of the opportunity to obtain Jane Doe's medical records would be to require it to defend a serious criminal case without any knowledge whether Jane Doe suffered from a pre-existing condition that created a propensity for her to fall.

Defendant has no other means by which to obtain this information. Therefore, under the facts of this case, when the accusers' privacy rights are weighed against Petitioner's legitimate interest in preparing their defense, the Petitioner's interest must prevail. (*Palay v. Superior Court* (1993) 18 Cal. App. 4th 919.)

F. This Court Should Grant Relief Because the Trial Court, by Improperly Finding the Documents "Irrelevant" Deprived Petitioner of His Constitutional Right to Compel the Production of Documents, Due Process, a Fair Trial and the Effective Assistance of Counsel under the Fifth, Sixth and Fourteen Amendments

The defense properly issued and served subpoenas duces tecum on Medi - Cal. (Exhs. A, B) The trial court subsequently issued an order requiring the Medi - Cal custodian of records to produce the requested documents. The prosecutor, in open court and without written notice to the defense, held a hearing in open court.

The law permitted the defense to argue such motions in an ex camera proceeding. (Cf. *People v. Superior Court (Barrett), supra,* 80 Cal.App.4th 1305 [party seeking discovery of materials in possession of third party by means of subpoena duces tecum not required to provide opposing party with notice of theories of relevancy of materials sought].)" (*Alford v. Superior Court* (2003) 29 Cal. 4th 1033, 1045, fn. 5.)

In the context of a subpoena duces tecum, "the defense is not required, on pain of revealing its possible strategies and work product, to provide the prosecution with notice of its theories of relevancy of the materials sought, but instead may make an offer of proof at an in camera hearing. (*People v. Superior Court (Barrett), supra,* at pp. 1320-1321; see *Smith v. Superior Court (San Diego)* (2007) 152 Cal.App.4th 205 [excluding People from participating in

proceedings on defendant's efforts to obtain third party discovery.)

During the October 2, 2008 hearing, the trial court summarily found the Medi - Cal documents "irrelevant" and refused to release the documents to the defense. The trial court applied the wrong standard. The law requires only a finding that the items would lead to admissible evidence, not whether or not the items themselves would be "relevant." (See, *Kelvin L., supra,* 62 Cal.App.3d at p. 828)

Therefore, this Court should grant relief prusuant to Petitioner's constitutional right to compel the production of documents, to due process, to a defense, to counsel and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

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PRAYER FOR RELIEF

WHEREFORE Petitioner respectfully prays:

1. That this court issue its writ of mandate directed to the Los Angeles Superior Court directing that court to vacate and set aside its order of October 2, 2008 denying Petitioner's request for the items obtained through respondent court's August 28, 2008 order and to enter a new and different order granting Petitioner's request.

2. That this Court immediately stay all proceedings in Los Angeles Superior Court case number TA090164 until further order of this Court; and that

2. For such other and further relief as this court may deem just and proper.

DATED: October 15, 2008

Respectfully Submitted,
FAY ARFA, A LAW CORPORATION

/s/ Fay Arfa
By:_____
FAY ARFA, Attorney for Petitioner

DECLARATION OF FAY ARFA

I, Fay Arfa, declare:

1. I represent Mr. JOHN DOE in the above case.

2. On August 4, 2008, I issued a subpoena duces tecum to Medi - Cal Custodian of Records requesting Jane Doe's Medi - Cal records. (Exh. A)

3. On August 4, 2008, the Los Angeles Sheriff's Department personally served the subpoena duces tecum. (Exh. B)

4. On or about August 25, 2008, I received a telephone call from Ms. Debra Garrick, who represented the Medi-Cal records' department.

5. Mr. Garrick stated that she could not comply with the subpoena and that she needed a court order in order to comply with the subpoena.

6. I spoke to Ms. Garrick and, pursuant to our conversation, sent her a letter in which I advised her that she need not appear in court and that she would be notified when any appearance would be required. (Exh. C)

7. On August 28, 2008, respondent superior court issued an order releasing the Medi - Cal records to the Clerk of the Court.

(Exh. D)

8. On August 29, 2008, I faxed a copy of the Court's August 28, 2008 order to Ms. Garrick. (Exh. E)

9. On September 9, 2009, I spoke to Anthony Lewis, from the Medi - Cal's legal office in Sacramento and, pursuant to his request, faxed the August 28, 2008 court order to him. (Exh. F.)

10. On or about September 25, 2008, the records arrived in the superior court. On that date, the prosecutor orally objected to the release of the records to Petitioner's counsel.

11. The trial court continued the matter until October 2, 2008.

12. On October 2, 2008, the trial court conducted a brief hearing in open court and, without reviewing the records themselves and instead reviewing a summary of the records, denied Petitioner's request for the Medi - Cal records. The trial court found the Medi - Cal billings to be "irrelevant."

13. I need the Medi - Cal billing records because the records are expected to reflect Jane Doe's medical providers. I can then subpoena Jane Doe's medical records and prepare and present a defense for Petitioner. The defense is expected to show that

Jane Doe suffered from a pre-existing medical condition where she had a propensity to fall and injure herself.

14. On October 14, 2008, I ordered a copy of the reporter's transcript of the October 2, 2008 proceedings.

15. In order to prepare and present a defense, I need the Medi - Cal information to prepare a proper defense and insure that Petitioner gets a fair trial.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Executed October 16, 2008 at Los Angeles, California.

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s/ Fay Arfa

_____
Fay Arfa, Attorney for Defendant

CERTIFICATE OF COMPLIANCE

Counsel certifies that the Petition for Writ of Mandate is proportionately spaced, in 13 point Century Schoolbook typeface, and contains _____ words.

Dated:

Respectfully Submitted,
FAY ARFA, A LAW CORPORATION

/s/ Fay Arfa
By_____
FAY ARFA, Attorney for Petitioner