IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

DANA WILLIAM STUBBLEFIELD, Petitioner on Mandamus, v. Superior Court of Santa Clara County. Respondent.	Case # _____ Related Case: Santa Clara County Superior Court No. F1660022
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	

PETITION FOR WRIT OF MANDATE
From the Order of the Honorable Vanessa A. Zecher

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TO THE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SIXTH DISTRICT COURT OF APPEAL;

Petitioner, DANA WILLIAM STUBBLEFIELD, alleges;

1. The Petitioner is the defendant in the underlying criminal case, *People v. Dana William Stubblefield*, Santa Clara County Superior Court Case No. F1660022. This petition concerns the Respondent court's erroneous Order to seal all documents relating to certain pretrial motions made by the Petitioner.

2. Petitioner was charged in the underlying case by Complaint filed May 2, 2016, as follows:

Count 1	Rape by Force	Pen. Code sec. 261(a)(2)
Count 2	Rape of Victim Incapable of Giving Consent	Pen. Code sec. 261(a)(1)
Count 3	Oral Copulation by Force	Pen. Code sec. 288a(c)(2)(a)
Count 4	Oral Copulation with Person Incapable of Consent	Pen. Code sec. 288a(a)(g)
Count 5	False Imprisonment	Pen. Code sec. 236-237

(Sealed Exhibit B, attached hereto and incorporated herein by reference)

3. The Respondent court ordered that pretrial motion papers presented by the defense would be "lodged but not filed" to avoid embarrassment to the complaining witness.

4. On April 30, 2018, the Defense presented to the Clerk of the Court for filing the following moving papers:

- Notice of Motion and Motion to Recuse the District Attorney (attached hereto and incorporated herein by reference as Sealed Exhibit C.)

- Notice of Motion and Motion for Nonstatutory Motion to Dismiss (attached hereto and incorporated herein as Sealed Exhibit D.)

- Notice of Motion for Admission of Declaration Testimony Under Evidence Code [- - -] (attached hereto and incorporated herein by reference as Sealed Exhibit E.)

- Declaration of Kenneth L. Rosenfeld in Support of Motion for Admission of Declaration Testimony Under Evidence Code [- - -] (attached hereto and incorporated herein by reference as Sealed Exhibit F.)

- Request for Judicial Notice in Support of Motion for Admission of Declaration Testimony (attached hereto and incorporated herein by

reference as Sealed Exhibit G.)

5. When those moving papers were presented, the Clerk of the Court filed stamped them as filed April 30, 2018 (see attached Sealed Exhibits C, D, E, F and G.). However, these papers were not made a part of the public record of the case.

6. Thereafter, Defense presented Supplemental Points and Authorities in Support of Defense Motion to Recuse the District Attorney and Motion for Admission of Declaration Testimony Under Evidence Code Section [- - -] (attached hereto and incorporated herein by reference as Sealed Exhibit H.)

7. The Supplemental Points and Authorities objected to the Respondent Court's refusal to file these Defense motions as part of the public records of the court, argued that the constitutional authority and California Rules of Court permit the court to withhold such moving papers from the public records of the court only by sealing the records after complying with the requirements of Rules of Court, rule 2.550. (Sealed Exhibit H.)

8. The Supplemental Points and Authorities pointed out that no motion to seal the records had been made, no hearing had been held and no sealing order with the express factual findings required by Rules of Court, rule 2.550 had been made. (Sealed Exhibit H.)

9. On August 28, 2018, the prosecution then presented the following moving papers:

- Application for Sealing of Documents (attached hereto and incorporated herein by reference as Sealed Exhibit I.)

- Motion to Seal (attached hereto and incorporated herein by reference as Sealed Exhibit J.)

- Declaration in Support of Application and Motion to Seal Defense Motions (attached hereto and incorporated herein by reference as Sealed Exhibit K.)

10. The prosecution's moving papers were filed "Conditionally Sealed." No notice was given to the public or the press of the hearing on the prosecutor's Motion to Seal. (Sealed Exhibit I, Seq. # 184.)

11. On September 19, 2018, the Respondent Court issued an Order on the Application for Sealing Documents. (attached hereto and incorporated herein by reference as Sealed Exhibit A.)

12. The Order stated the Application for Sealing Documents was granted, the court had reviewed all the documents and redacted them and that the redacted versions of the documents are incorporated into the Court's Order. (Sealed Exhibit A

13. The order further made factual findings required by Rules of Court, rule 2.551, subd. (d) to the effect that:

    - the overriding interest is the "the alleged victim's right to be treated with fairness and respect for the alleged victim's right to privacy and dignity;"

    - the overriding interest will be prejudiced if the record is not sealed;

    - "the redacted portions of the filings are of such a personal nature that the disclosure of that information will compromise the alleged victim's right to be treated with fairness and respect for the alleged victim's right to privacy and dignity;" and,

    - the proposed sealing is narrowly tailored." (Sealed Exhibit A

14. The Respondent Court's sealing order is illegal and an abuse of discretion in that it violates the First Amendment rights of the public and the press to access to court records and documents, and the

Petitioner's federal and state rights to a public trial. U.S. Constitution, Sixth Amendment; Cal. Constit. Art 1, sec. 15.)

15. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law because no procedure exists for review of the Respondent Court's erroneous ruling except this Petition for Extraordinary Writ.

16. If the relief requested herein is not granted Petitioner will be forced to continue with pretrial and trial proceedings while the public and press are kept in the dark about the true issues in his case.

17. Petitioner is beneficially interested in the issues herein raised because he is the Defendant accused in the underlying criminal case and his rights to a fair and public trial are being denied.

18. There has been no previous Petition for extraordinary relief filed by or on behalf of Petitioner raising these issues in any court.

19. Petitioner has been diligent in bringing these issues before this Court within a reasonable time after the erroneous order of the Respondent Court, as soon as practicable, and within the time the erroneous rulings can be corrected before the hearings on the subject defense motions are held.

THEREFORE PETITIONER PRAYS:

1. That this court issue a Writ of Mandate commanding the Respondent Court to reverse its order sealing the subject court records and order that the Clerk of the Court receive and file the un-redacted Defense Motions to be placed in the Court's file as normal parts of the records of the court open and available to the public, OR;

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IN THE ALTERNATIVE;

2. That this Court issue an ORDER TO SHOW CAUSE to the Real Party, the People, requiring that, within a reasonable time, they show cause why the relief sought herein should not be granted.

Dated: October 11, 2018 Respectfully submitted

Kenneth L. Rosenfeld
Kenneth L. Rosenfeld
Attorney for Petitioner

VERIFICATION

I, Kenneth L. Rosenfeld, declare,

1. I am an attorney at law admitted to the practice of law in all the courts of the State of California, and am attorney of record for the Petitioner, DANA WILLIAM STUBBLEFIELD in *People v. Stubblefield*, Santa Clara County Superior Court Case No. F1660022 and in the above Petition for Writ of Mandate.
2. I have read the above Petition and know the contents thereof and the same are true of my knowledge.
3. I declare the above to be true under penalty of perjury under the laws of the State of California.

Signed this 11th day of October, 2018

at Sacramento, California

Kenneth L. Rosenfeld
Kenneth L. Rosenfeld

DECLARATION OF KENNETH L. ROSENFELD IN SUPPORT OF PETITION FOR WRIT OF MANDATE.

I, Kenneth L. Rosenfeld, declare,

1. I am an attorney at law admitted to the practice of law in all the courts of the State of California, and am attorney of record for the Petitioner, DANA WILLIAM STUBBLEFIELD in *People v. Stubblefield*, Santa Clara County Superior Court Case No. F1660022 and in the above Petition for Writ of Mandate.

2. I have reviewed the Exhibits submitted under separate cover in support of the above Petition for Writ of Mandate and attest that they are true and correct copies of the records and documents on file with the Santa Clara County Superior Court in the underlying criminal case, including redacted versions of the defense and prosecution's moving papers (Exhibits A through J) and the un-redacted versions submitted under seal in a separate bundle. (Sealed Exhibits A through K.)

3. I maintain a law office in San Jose and practice criminal defense extensively in Santa Clara County. I attest that, since the public outcry about the lenient sentence in the sexual assault case of the "Stanford swimmer," and the judge in that matter being voted off the bench, it is common knowledge, and a matter of frequent discussion among the defense bar, that the prosecutors and judges in this county are taking an unusually hard line on sexual assault cases.

4. The instant case, involving sexual assault allegations against a professional athlete and a beloved San Francisco 49ers fan favorite, is the highest profile case of the sort in Santa Clara County since the "Stanford Swimmer" case. As a result there is a great deal of interest

in the case among the public and the press.

5. The legal interest and Constitutional rights of the public and the press in the proceedings and court records in this matter is exceptionally important.
6. In this case, without any request for sealing of records from anyone, the Respondent Court ordered that defense motions would be "lodged but not filed.
7. When the prosecution finally filed a Motion to Seal, the Motion was file under seal, never made a public record in the Court file, and no notice of the hearing on the Motion to Seal was ever given to the public or the press.
8. The defense could not and did not inform the public or press of the prosecutor's efforts to hide the court records because we are under a gag order.
9. I declare the above to be true under penalty of perjury under the laws of the State of California.

Signed this 11th day of October, 2018

at Sacramento, California

Kenneth L. Rosenfeld

Kenneth L. Rosenfeld

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

DANA WILLIAM STUBBLEFIELD, Petitioner on Mandate, v. Superior Court of Santa Clara County, Respondent.	Case # _____ Related Case: Santa Clara County Superior Court No. F1660022 POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	

Preface:

In the instant case, the un-redacted records and evidence relevant to the issues raised in this Petition are under seal. The trial court sealed those records to protect the privacy interests of Jane Doe, the complaining witness. Pursuant to Rules of Court, rule 2.551, subd. c, in a record filed publicly in the court, a party must not disclose material contained in a record which is sealed. Accordingly, we have filed with this court both redacted (Exhibits A through J) and unredacted (Sealed Exhibits A through

K) versions of the documents which the trial court placed under seal. Thus, in the following argument the Petitioner will not reveal, and will make no mention of, any specific derogatory information relating to the complaining witness nor any facts which might infringe on her privacy.

Therefore. the argument below will be significantly constrained. Begging the court's indulgence, where specific information, which cannot be stated here, is germane, we will, in the argument, refer the court to the un-redacted sealed records.

OVERVIEW AND STATEMENT OF FACTS:

It is common knowledge that a judge in Santa Clara County has been voted off the bench following an uproar in the public and press when that judge imposed a lenient sentence on a Stanford athlete in a sexual assault case. (See: Declaration of Kenneth L. Rosenfeld, above.) Even before the voters removed Judge Persky the story became a national political embarrassment to the justice system in Santa Clara County.

It is understandable that, in the current political climate, prosecutors and judges may be tempted to avoid any appearance of going too easy on men accused of sexual assault crimes. However, it does not excuse their abandoning their obligation to exercise their discretionary duties fairly and justly—to afford every defendant equal treatment under the law. (*People v. Dekraai* (2016) 5 Cal.App.5th 1110, 1116.) This Petition arises because, in fear of being perceived as too favorable to the accused, prosecutors have taken a win-at-all-cost approach and, as in the present case, will employ any tactic ethical or not, to gain convictions and the most severe sentences possible in sexual assault cases.

As will be shown below, that is particularly true in this case because this is the highest profile sexual assault case in Santa Clara County since the

"Stanford swimmer" case, the accused man is a celebrity and he is a well-known and beloved athlete, a former San Francisco 49ers football player who has been a fan favorite for many years. . (See: Declaration of Kenneth L. Rosenfeld, above.)

Now the court in Santa Clara County has joined the prosecutors in abandoning objectivity and closing the records of the court to hide from the public and press the unethical conduct of the prosecutors and the evidence which supports Dana Stubblefield's defense. They are even hiding from the public the fact that they are hiding the court records from the public.

Petitioner is charged with committing rape on April 9, 2015, using a gun. The prosecution filed charges a year and a month later (May 2, 2016). (See: Exhbit B, Complaint.) There are no percipient witnesses except the Petitioner and the complaining witness, Jane Doe. Thus, her credibility is the central issue in the case. Before charges were filed Petitioner's attorneys met with prosecutors and disclosed information from the complaining witness's Facebook page which called her credibility into question. (Sealed Exhibit C, p.2, Seq. # 14, Sealed Exhibit D, p. 2-3. Seq. # 46-47.)

Petitioner was also charged with Rape of a Victim Incapable of Giving Consent (Pen. Code sec. 261(a)(1).) The prosecutors hired an expert witness to attempt to support the claim that the complaining witness is incapable of consent. Their expert interviewed the complaining witness, did a medical assessment, prepared a thorough report and concluded she is perfectly capable of consent. Undaunted, the prosecution then hired a second expert who prepared another report which also does not actually support a conclusion that the complaining witness is incapable of consent. Then, at the preliminary hearing, the prosecution asked for and obtained a

holding order charging the Petitioner with Rape of a Victim Incapable of Giving Consent.(Sealed Exhibit C, p. 27, Seq. # 39.)

The prosecutors presented misleading testimony at the preliminary hearing, relying on government records, to support a claim that the Petitioner owned and possibly possessed certain guns. Prosecutors had either intentionally ignored, or negligently failed to discover, that the government records prove the Petitioner had long ago [1] turned over all guns he owned or possessed to law enforcement. (Sealed Exhibit C. Pp. 12-16, Seq. # 24-28.)

At the preliminary hearing, the complaining witness committed perjury nine times in responding to questions about her employment and commercial activities. Her perjured testimony was material to the allegations against the Petitioner and to her credibility. (Sealed Exhibit C, p. 4, Seq, # 16.; pp. 21-27, Seq. #33-39.)

Based on the misleading testimony about Petitioner owning guns, the prosecution added a gun-use enhancement to elevate the matter to a "no bail" case and convinced the court to remand the Petitioner to custody without bail. (Sealed Exhibit C, p.4, Seq. # 16.) [2]

After the preliminary hearing, further defense investigation revealed more evidence relating to the complaining witness's employment and commercial activities. That information was provided to the prosecutors, making them undeniably aware of their primary witness's earlier perjury at the preliminary hearing. (Sealed Exhibit C p. 7-9, Seq. # 19-21; Sealed

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[1] Long before the alleged crimes.

[2] When the defense later discovered and presented to the court the true facts concerning the government records showing Petitioner had surrendered all his guns before the alleged crime, bail was reinstated. (Sealed Exhibit C, p. 4-5, Seq. # 16-17.)

Exhibit D, p. 7-9, Seq. # 19-21.)

Prosecutors finally did investigate the derogatory information relating to the complaining witness's credibility and perjury. Their investigation confirmed the information provided by the defense. It also revealed new information concerning the complaining witness's commercial activities. However, prosecutors did nothing about their witness's perjury. (Sealed Exhibit C, p. 7-9, Seq. # 19-21.)

The defense then prepared and attempted to file good faith motions, i.e. a Motion to Recuse the D.A., a Common Law Motion to Dismiss and a Motion for Admission of Declaration Testimony under Evidence Code [—].[3]

The Respondent Court ordered that the defense motions would be "lodged but not filed," to avoid embarrassment to the complaining witness. (See Sealed Exhibit H, p. 1-2, Seq. # 174-175.) That order was patently illegal, as the defense pointed out to the Respondent Court in its Supplemental Points and Authorities in Support of [the Motions]. The only lawful order which could be made to prevent the Petitioner's moving papers from being filed and becoming a part of the public records of the court would be an order to seal the documents under Rules of Court, rules 2.550, and 2.551. (Sealed Exhibit H, p. 2-3, Seq. # 175-177.)

The prosecutor then belatedly filed a Motion to Seal and the Respondent Court granted it.

This conduct by the Respondent Court is beyond egregious; it is unconstitutional. The Court is now complicit in hiding truthful information from the Public. For some unknown reason, the Court has placed itself in

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[3] Petitioner is not permitted to reveal in public filings the number of the Evidence Code section pursuant to which this motion was filed. It has been redacted.

the position of maternal guardian for the Complaining Witness in direct contravention to its Constitutional role of being a fair and impartial arbitrator of justice. It is alarming that the Court is much more concerned about the privacy rights of a Complaining Witness than the Constitutional rights of a presumed innocent man to have a Public process. It is clear that the Constitutional presumption of innocense is given lip service at best by the Respondent Court. The entire reason we have a public proceeding is so that "star chamber" proceedings don't occur.

The Court's complicity in hiding information from the Public view under the pretext of protecting privacy rights of the Complaining Witness is tantamount to a Star Chamber. The decision of the trial Court grossly fails regarding the privacy of the Complaining Witness. Let us not forget, it was the Complaining Witness herself who put much of the "embarrassing" information out on the world wide web for the entire world to see. It is academically and legally disingenuous for the Court to pretend to be protecting the privacy of a Complaining Witness in matters she herself advertised to the world at large.

It is obvious this Court is embroiled and conflicted in her role. It is NOT her job to be the titular parent of the Complaining Witness. It is her job to be the fair and impartial arbitrator of justice. The fact that the Court is now complicit in an active fraud being perpetrated upon the justice system and the Public at large is cause for the highest alarm and reversal of the unconstitutional Order.

The Respondent Court has read the motions. It is uncontroverted there were several instances of perjury by the Complaining Witness. Instead of exposing the truth and upholding her duty to justice, this Court chose to attempt to hide and bury the information from the Public at large.

It certainly seems apparent that the Court is complicit with the desires of the District Attorney to shut out the public from the truth. It is clear that the recall of Judge Persky has a lingering effect on justice for anyone charged with a sex offense let alone a high profile defendant.

It was so important to the framers of the Bill of Rights and President Madison to have a Public and transparent process. Clearly it is not important to this Court and that is the reason we file this Writ.

Counsel believes the system should be fair and impartial. The evidence which the Respondent Court is attempting to hide exonerates the Defendant. It clearly shows that the criminal charges are false and that the conduct between the Complaining Witness and the Defendant, by her own statements, was a business transaction and not what has been charged. Counsel feels that the tenants of State Bar Rule of Professional Conduct 5-120 (c) would allow counsel to publicly protect the Defendant by correcting the damaging and false information which has been put forth by the District Attorney and is now shielded by the Respondent Court. However, Counsel has chosen the path of asking this higher Court to correct this injustice.

LAW AND ARGUMENT:

I.

THE APPELLATE COURT HAS AUTHORITY TO REVIEW A SEALING ORDER PRIOR TO JUDGMENT.

Where a trial court orders closure of hearings or sealing of court records, the Court of Appeal has authority to review such an order before final judgment. (*See: NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178 [where a media news outlet filed for extraordinary

relief in mid-trial when their Application to Vacate Closure Order was denied.) [4]

II.

THE RESPONDENT COURT'S SEALING ORDER
IS UNLAWFUL AND AN ABUSE OF DISCRETION.

A. The showing required to seal court records:

First, make no mistake, an order sealing the records of a California court is an order to hide something from the public and the press. And what the law says is that whatever it is that a party to the case, or the court wants to hide, there had better be a real good reason to hide it.

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra, 20 Cal. 4th 1178, (*NBC Subsidiary*), was a civil case in which the trial court ordered closure of certain proceedings during trial. The issue raised in the California Supreme Court was to what extent the First Amendment to the U.S. Constitution permits exclusion of the public and the press from court proceedings. In deciding the issue our Supreme Court undertook an exhaustive examination of the First Amendment issues involved with restricting or closing public access to trials. In the course of doing so the high court stated:

> As we shall explain, the United States Supreme Court and numerous unanimous lower courts have held that the First Amendment of the federal Constitution generally precludes closure of substantive courtroom proceedings in *criminal* cases unless a trial court provides notice to the public on the question of closure and after a hearing finds that (I) there exists an overriding interest supporting closure; (ii) there is a substantial probability that the interest will be prejudiced

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[4] In that case the matter was not decided until the trial was over, but the Court found the issues were "capable of repetition yet evading review." (*Id.* at p. 1190, fn 6.)

> absent closure; (iii) the proposed closure is narrowly tailored to serve that overriding interest; and (iv) there is no less restrictive means of achieving that overriding interest. (*Id*. at p. 1181, emphasis original.)

Ultimately, the *NBC Subsidiary* case became the basis of the rules which control the trial court's ability not only to close court proceedings, but also to seal or otherwise limit public access to court records and documents. In response to the *NBC Subsidiary* decision, California Rules of Court, rules 243.1 and 243.2 [now 2.550 and 2.551] were adopted to establish procedures for sealing court records. As explained in the Advisory Committee Comment to Rule 2.550:

> This rule and rule 2.551 provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. These rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication.

A further Constitutional consideration in sealing of court records is found in California Constitution, Art. 1, section 3 (b)(1), which provides:

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and <u>the writings of public officials and agencies</u> shall be open to public scrutiny. (Emphasis added.)

Among the court records being hidden from the public in this case are "the writings of" the District Attorney, a public official and agency, specifically Sealed Exhibits I, J, and K.

With the passage of Proposition 59, the People's right of access to information in public settings now has state constitutional stature, grounding the presumption of openness in court proceedings with state

constitutional roots. (Cal. Const., art. I, § 3, subd. (b)(1), (Prop. 59); *Savaglio v. Wal-Mart Stores, Inc.*, (2007)149 Cal.App.4th 588, 597.) Proposition 59 requires the courts to broadly construe a statute or court rule "if it furthers the people's right of access" and to narrowly construe the same "if it limits the right of access." (Cal. Const., art. I, § 3, subd. (b)(2).)

B. The Respondent Court's Order is illegal because no notice of the contemplated sealing of court records was given to the public:

There are two constitutional imperatives before a California trial court can order a hearing closed or seal records of the court. *(NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra*, at p. 1181.) The second of those imperatives is that the court must make the findings required by Rules of Court, rule 2.550 and *NBC Subsidiary*, discussed below. But the first requirement is that the court must give notice to the public.

As the court said in *H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 887-888:

> . . . after notice to the public of the contemplated closure, the trial court "expressly find[s] that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." [citing *NBC Subsidiary, supra*, at] pp. 1216–1218, fns. omitted.) (Emphasis added.)

(See also: *People v. Ayala* (2000) 24 Cal. 4th 243, at 294, fn 4.)

Here, the sealing order is illegal because the Respondent Court gave no notice to the public. The District Attorney's Application for Sealing of Documents and Motion to Seal were filed "Conditionally Sealed" and

"Subject to Application and Motion to be File Under Seal" (See: Sealed Exhibit I, p. 1, Seq. # 184.) Thus, there was no chance the public or the press would be given notice of the contemplated sealing. [5]

One of the Constitutional interests to be protected by these requirements is the First Amendment right of the public and the press to access to court records. The public and press have standing to intervene and address the court on closure of hearings and sealing of court records. A party or member of the public may move, apply, or petition the court to unseal a record. (Cal. Rules of Court, rule 2.551(h)(2); See: *Richmond Newspapers v. Va.* (1980) 448 U.S. 555 [where newspaper reporters filed a motion to vacate the closure order, which was denied, then filed writs of mandamus and prohibition.] [6] The evident purpose of the notice requirement is to permit the public and press to do exactly that.

Here, no notice or opportunity to be heard was given to the public or the press. Thus, in this case, the Respondent Court has become the prosecutor's accomplice in denying the First Amendment rights of the public and press. The Respondent Court even hid from the public and the press the very fact that the prosecutor was making an application to hide court records from the public.

"One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right." (*Maryland v. Baltimore Radio Show, Inc*., 338 U.S. 912,

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[5] The defense was not permitted to inform any member of the public or the press pursuant to a gag order. (Declaration of Kenneth L. Rosenfeld.)

[6] The right of the press and public to access was not ultimately vindicated until after the trial when the U.S. Supreme Court decided the case as one capable of repetition yet evading review. (*Richmond Newspapers v. Va., supra*, at p. 563.)

920 (1950) (Frankfurter, J., dissenting from denial of certiorari).) "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" (*Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) (Clark, J.).)

"It is true that the public has the right to be informed as to what occurs in its courts, . . . reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court. . . ." (*Estes v. Texas*, 381 U.S. 532, 541-542 (1965) (Clark, J.); see also *id*., at 583-584 (Warren, C. J., concurring). [7]

But, of course, that cannot happen when the court holds secret hearings to order wholesale sealing of court records which could inform the public as to what is going on in the case.

C. The Respondent Court's Order is illegal because there is no overriding interest that overcomes the right of public access to the court records:

These court records can be sealed only if the court finds there is an"overriding interest that overcomes the right of public access to the records." (Rules of Court, rule 2.550, subd. (d)(1).)

The sealing order cannot be, and is not, based on any interest of the District Attorney. The prosecutors and the court have no valid interest in hiding from the public or press the conduct of the prosecutors discussed in Petitioner's Motion to Recuse the District Attorney. That motion must demonstrate that "a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen. Code sec. 1424, subd. (a)(1).) Where such a claim is made, prosecutors have no valid interest in

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[7] The Court ruled, however, that the televising of the criminal trial over the defendant's objections violated his due process right to a fair trial.

hiding it.

The requirement of a public trial is for the benefit of the accused, that the public may see that he or she is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep the accused's triers keenly alive to a sense of their responsibility and the importance of their functions. In addition to ensuring that the judge and the prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. (*People v. Woodward* (1992) 4 Cal. 4th, 1992 Cal. LEXIS 6114, cert. denied, *(U.S. Apr. 26, 1993), 507 U.S. 1053, 113 S. Ct. 1950, 123 L. Ed. 2d 655, 1993 U.S. LEXIS 3057,* emphasis added.)

Nor did the Respondent Court base its order on any claim that the prosecutors have any overriding interest in hiding their conduct. Rather, the Order, including the sealing of the Motion to Recuse the District Attorney, is based solely on the clam that the complaining witness has a "right to be treated with fairness and respect for the alleged victim's right to privacy and dignity." The basis of that interest is the prosecution's argument that public disclosure of the derogatory information about the complaining witness would violate her privacy rights under "Marsy's Law." (See: Sealed Exhibit J, Motion to Seal, p. 9, Seq. # 197.) Marsy's Law is found in California Constitution, Art 1, sec. 28, subd. (b). The relevant portions cited by the prosecution state:

> (b)In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights:
> (1)To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.

However, the complaining witness has no privacy interest in her acts of perjury. Those acts are criminal and were done in open court in testimony at a preliminary examination. The transcript of that hearing is already a public record. Nor is it "unfair" to the complaining witness either to point the attention of the court to her perjury or to disclose it to the public. The rights of victims do not include a right to hide their public criminal conduct from the press and public. Exposing it is not intimidation, harassment or abuse.

Criminals have little or no privacy interest in their criminal conduct. One court held that, where a bank customer was attempting to defraud the bank, his right to privacy as a depositor was subordinated the bank's legitimate interest in self-protection from wrongdoing. (*People v. Johnson* (1975 53 Cal.App.3d 394; [defendant had no overriding expectation of privacy with respect to bank records relating to the status of his account.] In *People v. Luera* (2001) 86 Cal.App.4th 513, the court found that possession of Internet child pornography does not involve any "vital privacy interest." (*Luera, supra*, 86 Cal.App.4th at p. 522.) Luera claimed that his conviction for mere possession of child pornography violated his state constitutional right to privacy. (*Luera*, at pp. 518, 521.) The Court concluded that the privacy clause was not violated because possession of "child pornography [certainly does not involve [any] vital privacy interest,"

In *Matthews v. Beccera* (2017) 7 Cal. App. 5th 334, the court held the California Constitutional right to privacy (art. I, § 1.) is not violated by requiring therapists to disclose when patients communicate that they have developed, downloaded, streamed, or accessed child pornography. The court found the conduct is illegal and not a protected activity.

In *Matthews v. Becerra, supra,* the argument was made that the

statute violated the privacy rights of minors who send explicit "sexting" selfies to other minors. The court found the claim about "sexting" minors was unavailing because minors have no fundamental right to produce or possess child pornography, including sexually explicit images of other minors. (*Id*. at p. 342.) Simply put, criminals do not have the right to keep their crimes private.

Here, the complaining witness has no overriding privacy interest in her own commission of perjury, or the other crimes the sealed court filings show that she has committed. Nor does Marsy's Law give the complaining witness, as an alleged victim, any greater privacy interest in her own criminal conduct that of any other person. Rather, Marsy's Law simply acknowledges that crime victims possess collective rights "held in common with all of the People of the State of California." (Cal. Constit. Art. 1, sec. 28(a)(4).

Other information about the complaining witness which would be disclosed if not sealed is anything but private. Most of it is information the complaining witness herself put out to public view on her own Facebook page and other internet websites, and/or other criminal conduct.

It is difficult to imagine how public access to these facts could be seen as intruding on the complaining witness's privacy or being unfair to her.

D. There is no substantial probability that the overriding interest will be prejudiced if the records are not sealed;

The court cannot order its records sealed unless there is "[a] substantial probability . . . that the overriding interest will be prejudiced if the record is not sealed;" (Rules of Court, rule 2.550, subd. (d)(3).) Assuming, arguendo, there is some overriding interest to be prejudiced by

not sealing these records, the sealing order here does nothing to protect that interest. The derogatory information which is alleged to invade the complaining witness's privacy or offend her dignity has already been revealed to the public and the press, mostly by her own doing.

Her acts of perjury are public record. Her postings on the internet are available for public viewing and her conduct has already been extensively reported in the press. (See: Sealed Exhibit H, Supplemental Points and Authorities, p. 6, fn 1, Seq # 180 [noting only a few of the newspaper websites where the information is on line.]) (See: *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1286 "[I]t makes little sense to seal information after the fact" once it has already been disseminated to the public].)

It cannot be said that the complaining witness's interest will be prejudiced by not sealing these records because, whether the court records are sealed or not, the public and press already have access to all the information the Respondent Court redacted from the records.

E. The proposed sealing is not narrowly tailored:

The court cannot order its records sealed unless "[t]he proposed sealing is narrowly tailored." (Rules of Court, rule 2.550, subd. (d)(4).) Here, the Respondent Court reviewed all the documents subject to the Application to Seal.(See: Sealed Exhibit A, Order, p. 3, sec. 5(d).) The court then redacted every mention of any of the information relating to the complaining witness's improper conduct from the Defense motions and exhibits as well as the prosecution's motion and exhibits. (See Redacted Exhibits B through J.)

The Respondent Court indiscriminately redacted portions of the transcript of the complaining witness's preliminary hearing testimony

attached as exhibits to Defense motions and the portions of the defense argument relating to that testimony. But that transcript is already a matter of public record. The court redacted all mention of information culled from the complaining witness's Facebook page, although she had clearly waived any privacy interest she might have had in that information by posting it on the internet. The court redacted all mention of other websites to which the complaining witness had posted content, although, by posting it she had waived any privacy interest and redacting the court filings would not prevent public access to that information.

The court even redacted the caption of a defense motion by blacking out the number of the Evidence Code section pursuant to which the motion was brought and all other references to that number in the body of the argument. Public access to the number of a section of the Evidence Code does not invade the complaining witness's privacy or offend her dignity.

Rather than narrowly redacting only information as to which the complaining witness might have a legitimate privacy interest, the lower court here redacted everything remotely derogatory of the witness, including facts relating to her criminal conduct (which she has no right to conceal), her internet postings (as to which she waived any privacy rights) and extensive information which is already a matter of public record.

The redactions here are so extensive that, in attempting to read the redacted versions of the defense motions, the prosecutor's motion and some of the exhibits, it is not even possible to discern the reasons for the motions or for the prosecutor's request to seal them. This sealing of the court's records is not narrowly tailored.

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CONCLUSION

For the reasons stated, it is respectfully requested that the court issue the requested Writ of Mandate , or, in the alternative, issue an Order to Show Cause why the requested relief should not be granted.

Dated: October 11, 2018

Respectfully submitted,

Kenneth L. Rosenfeld

Kenneth L. Rosenfeld
Attorney for Petitioner

Stubblefield v. Superior Court. Case No. _____
Santa Clara County Superior Court No.F1660022

WORD COUNT CERTIFICATE

I, Kenneth L. Rosenfeld, declare,

1. That I am the attorney for the Petitioner in the above-entitled Mandate Petition.

2. That this Petition was prepared using WordPerfect software. I have reviewed the word count tool in the software, which indicates the word count for this document is 7,197 words with an average word length of 5 letters. Thus, the Brief complies with the requirements of the Rules of Court.

3. I declare the above to be true under penalty of perjury under the laws of the State of California.

Signed this 11th day of October, 2018

at Sacramento, California.

Kenneth L. Rosenfeld

Kenneth L. Rosenfeld

Stubblefield v. Superior Court. Case No. _____
Santa Clara County Superior Court No.F1660022

PROOF OF SERVICE BY MAIL

I, the undersigned, declare;

1. That I am over the age of eighteen years, am a resident of the State of California and am not a party to the above-entitled matter. My regular business address in Sacramento County is 1107 9th Street, Suite 850, Sacramento, CA 95814.

2. On this date I caused to be delivered by mail, by regular U.S. postal service in sealed envelopes with postage fully prepaid, true and correct copies of the attached, PETITION FOR WRIT OF MANDATE AND EXHIBITS A through J (redacted), to the following addresses:

Attorney General of the State of California
Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

Office of the District Attorney
County of Santa Clara
70 West Hedding Street, West Wing
San Jose, CA 95110

Clerk of the Court
Superior Court of Santa Clara County
190 West Hedding Street
San Jose, CA 95110
Attention: Appellate Clerk

3. I declare the above to be true under penalty of perjury under the laws of the State of California.

Signed this 11th day of October, 2018

at Valley Springs, California.

George Robertson
George R. Robertson