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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SETTAWOOD MUANGTHONG, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	B266616 (Los Angeles County Super. Ct. No. BA418052)

ORIGINAL PROCEEDING; petition for writ of mandate. Laura F. Priver, Judge. Petition granted.

Lightfoot Steingard & Sadowsky, Richard M. Steingard and Stephen B. Sadowsky for Petitioner.

No appearance for Respondent.

Jackie Lacey, District Attorney, Phyllis C. Asayama, Leslie Meller and John Harlan II, Deputy District Attorneys, for Real Party in Interest.

INTRODUCTION

Settawood Muangthong filed this petition for a writ of mandate compelling the trial court to vacate its order denying in substantial part his motion for production of a laptop computer hard drive for inspection and to enter a new order granting the motion. For reasons we state below, we conclude the trial court erred in conducting its in camera review of the contents of the hard drive. We thus issue the peremptory writ of mandate directing the court to vacate its ruling and to reconsider the matter in accordance with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Offense, Search of the Hard Drive, and First Trial*

On October 29, 2012, Victoria Berenbau went to the Los Angeles Police Department (LAPD) and made a report that petitioner, her husband of 19 years, had been poisoning her by putting Brodifacoum, a type of rat poison,[1] in her food and drink. She stated to police that if she died, petitioner would inherit her multi-million dollar estate.

In a subsequent interview with police on November 12, 2012, Berenbau stated that while she and petitioner were in Thailand for New Year's eve 2011/2012, petitioner left her alone and went out with his friends. She was upset and emailed her business partner, stating that she was going to change her will to exclude petitioner from receiving any property or money upon her death. A few months later, petitioner told Berenbau he found her email and was very upset. Berenbau felt sympathy for petitioner and set up a living estate to provide a home and income for petitioner in the event of her death.

Berenbau also stated that, for the duration of her marriage, petitioner cooked the meals for her and himself, but in mid-2012, he began preparing separate meals for

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[1] According to Berenbau's hematologist, Brodifacoum is "a potent and highly lethal rodent[i]cide, one of the so-called 'superwarfarins.'"

Berenbau. Berenbau noticed thereafter that some of her food tasted bitter or tainted. Berenbau also began experiencing health problems, including bleeding gums and blood in her urine. Berenbau's blood was tested, and her hematologist diagnosed her with anticoagulant poisoning, caused by Brodifacoum in her blood. The hematologist opined the poison was likely hidden in her food or drink.

After learning Berenbau was in grave condition from poisoning, petitioner left the United States and traveled back to Thailand, changing his plane ticket to leave California two days earlier than he had originally planned. Berenbau received treatment for the poisoning and began to recover. Her doctor told her if she had not received treatment she would have died.

During the November 12, 2012, interview with police, Berenbau provided a laptop computer to a detective investigating the case. The detective sought and obtained a warrant to seize and search the laptop computer. The affidavit in support of the search warrant explained that the laptop computer was "owned by [Berenbau] but used by" petitioner and that police believed petitioner "may have used the computer to obtain information via the internet regarding the poison Brodifacoum." The search warrant authorized police to search the laptop computer for "photographic images, text files, or any data that shows the search for information on poisoning and specifically the chemical identified as Brodifacoum." It also authorized police to "peruse every file briefly to determine whether it falls within the scope of the warrant." The subsequent search of the laptop hard drive "revealed no information on 'rat poison' or 'brodifacoum'."

In September 2013, petitioner was arrested after police learned that petitioner had returned to California and was staying with his sister. On April 3, 2014, petitioner was charged by information with the attempted murder (Pen. Code, §§ 187, subd. (a), 664) and torture (*id*., § 206) of Berenbau. During the preliminary hearing, Berenbau testified that she gave the laptop computer to the police to "take it to the lab and see if there was any reference to any poison in the computer."

During the trial, Berenbau testified under oath that petitioner told her an email in which Berenbau wrote that she was changing her will had popped up in petitioner's

computer. She explained that she and petitioner shared an email account, but that petitioner had "his own" computer, which was a laptop. Berenbau testified that she turned the computer over to a detective for the detective to perform a search on the computer and that petitioner had left the computer in the house when he left the United States for Thailand. During the trial, the detective who conducted the investigation testified that Berenbau provided him with petitioner's laptop computer.

At the conclusion of trial, petitioner was acquitted on the torture count. The trial court declared a mistrial on the attempted murder count, finding that the jury was hopelessly deadlocked. The People informed the court of their intent to retry the case.

B. *The Motion To Compel Examination of the Hard Drive*

Prior to the scheduled retrial of the case, petitioner retained new counsel who requested to examine the laptop computer Berenbau had provided to the police on November 12, 2012. When the prosecution did not respond, on March 4, 2015, defense counsel filed a motion to compel discovery, including an examination of petitioner's "laptop which was searched pursuant to the execution of a search warrant."

The issue was not resolved, and counsel filed a second motion to compel discovery on May 18, 2015, seeking "an order compelling the People to copy real property seized during the course of its investigation, to wit, a laptop computer, pursuant to Penal Code section 1054.1[, subdivision] (c)." The motion explained that law enforcement had taken possession of the laptop computer during the investigation and that "[a] search warrant authorized the officers to search the laptop's hard drive for evidence of [petitioner's] efforts to implement his alleged plan to poison his then-wife. The search was conducted. Nothing relevant or inculpatory was found." The motion stated that the laptop computer continued to be in the possession of law enforcement and that the petitioner "has not had an opportunity to review the contents of the computer for exculpatory evidence." Petitioner was therefore requesting that the court order production of a copy of the laptop's hard drive.

The motion further stated, "[i]n discussions between the parties prior to the filing of this motion, the prosecution agreed to 'clone' the laptop's hard drive, but conditioned its willingness to do so on the [petitioner's] agreement that the prosecution could search any aspect of the laptop that the [petitioner] accessed." Petitioner informed the prosecutor that the defense could not agree to that proposal.

C. *Berenbau Claims the Hard Drive Contains Privileged and Confidential Information, Not Subject to Disclosure*

On May 21, 2015, the court heard argument on petitioner's motion to compel discovery. During the hearing, the prosecutor informed the court that she had received an email from Berenbau. Berenbau wrote that although the petitioner at times in 2012 would use the laptop for entertainment purposes, the laptop at issue was purchased and used by Berenbau and belonged to her. Berenbau also wrote that there were files on the laptop that contained Berenbau's confidential information concerning real estate transactions and client information, as well as emails subject to the attorney-client privilege. The People thus opposed turning over a copy of the entire hard drive to the defense. The prosecutor argued that the search conducted pursuant to the search warrant was limited in scope. Further, she argued it would be a violation of Berenbau's right to privacy to go beyond that search. Additionally, she argued that petitioner had no proprietary interest in the laptop because Berenbau purchased the laptop and used it for her personal business. The prosecutor also argued that, even if petitioner did have an interest in the property, he abandoned the laptop when he left the country in 2012 and remained outside the United States for nearly a year.

Defense counsel argued that the laptop belonged to the petitioner. He argued that Berenbau was asserting the hard drive contained privileged and confidential information for the first time at the hearing and that Berenbau had waived any argument regarding confidentiality or attorney-client privilege when she turned over the laptop to the police without seeking to limit the scope of the search. Defense counsel also argued that Penal Code section 1054.1, subdivision (c), required production of the hard drive.

The court concluded that both Berenbau and petitioner had used the laptop and that Berenbau had confidential information on the laptop in which she had a privacy interest. The court ordered the People to either separate Berenbau's private information and provide the remaining information to petitioner, or separate out petitioner's information and provide that information in discovery.

The prosecutor proposed that the police would duplicate the information being provided to petitioner, place it in a sealed envelope to be given to the court, and have the court decide what information should be disclosed. Petitioner's counsel objected that the procedure would allow the police to conduct a more expansive search than was permitted under the search warrant. The court discussed other possible proposals, but noted that it may have to review the contents of the laptop to determine if there is anything that should be turned over to the defense. The court added that it was unclear from the motion to compel what information counsel would be seeking on the laptop that would be relevant to the defense.

During a pretrial hearing on June 3, 2015, the prosecutor informed the court that the LAPD forensic unit could not separate the information on the laptop. She stated that the hard drive of the laptop would need to be imaged and a special master would need to be appointed to review the mirror image copy, which would take at least three months.

The court asked petitioner's counsel to make a proffer about the particular information the defense was seeking to obtain from the laptop and held an in camera hearing outside the presence of the prosecution for that purpose. During the in camera hearing, defense counsel identified three general categories of information the defense was seeking from the laptop: The first was "photographs that will depict [petitioner and Berenbau] during times that are relevant to the charges, photographs of them entertaining people, photographs of them traveling, photographs of them together . . . ." Counsel stated that the defense believed "to a certain extent those will reflect on [Berenbau's] medical state and physical condition as well as the nature of the relationship which is really at the key to this whole case." Counsel further explained, "the theory is that I

guess it's either a financial motive or a revenge thing and we believe the photographs will support our theory that neither of those is applicable."

Defense counsel requested photographs from the last 10 years. When the trial court suggested the relevant time period would be shorter, counsel suggested "2010 through 2012. I think that would probably be satisfactory for purposes of photographs."

For the second category of information sought, petitioner's counsel explained, "there is an allegation that our client was essentially a kept man, a man who didn't work at all, who freeloaded off his wife." Counsel stated the defense was seeking materials on the laptop that show the work that petitioner was performing as a real estate broker and tasks he performed working as a partner with his wife in listing, selling, fixing, and "flipping" houses. Counsel stated that he expected the laptop to have "email correspondence and hard copy documents as well as photographs of the work that [petitioner] was performing and [petitioner] maintained that [information] on his laptop."

Additionally, as a third category of information, petitioner's counsel requested "communications with others." Counsel stated that petitioner had gone through his email accounts through the service provider, but the emails for the time period of the investigation were no longer there. Counsel clarified that the defense was not seeking Berenbau's emails with her attorney, but petitioner's "emails, his dialogue, his conversations" and Berenbau's which "relate to [petitioner] . . . those of hers that have conversations about [petitioner]." Counsel expected the communications to show "[p]rimarily [petitioner and Berenbau's] relationship and/or his work." The court indicated its skepticism, stating hypothetically that a person who is secretly poisoning their spouse would attempt to carry on a regular relationship. In response, counsel stated, "In theory that's one approach . . . . We don't know. We just don't know, your Honor. You're asking us to speculate about what he was writing about." The court again asked if counsel could be more specific, stating that petitioner "knows what he was writing about. This is what kind of bugs me about some of this and it's not your fault. I appreciate you're doing your best job but he knows what he wrote." In response, counsel explained that counsel could not be more specific.

Petitioner's counsel proposed that a mirror image copy of the hard drive be made and that the court review the hard drive to determine the volume of material contained on the hard drive and to determine whether finding the three categories of information requested by the defense would be a time-consuming task or whether it could be completed in a relatively short period of time. The court responded, "I also have to decide whether or not I'm going to do it at all, based upon your representations. I know you want it done. I appreciate that. I'm not sure everything you want is appropriate. I haven't decided yet because I haven't heard everything."

Following the in camera proceedings, the court stated in open court that it was going to order the hard drive to be imaged, and that it would only order the LAPD to copy from January 2010 to November 12, 2012, the date the computer had been seized. The court stated that it would receive the copy and "decide based upon how much data it is what to do from there." The court issued an order directing the LAPD to copy the files on the hard drive "created, modified or accessed between January 1, 2010 and November 12, 2012" and to deliver the copy to the court.

During a hearing on July 10, 2015, the prosecutor informed the court that the LAPD could not create a mirror image copy of the laptop's hard drive limited to just the time period indicated in the trial court's order. The trial court thus issued an order directing the LAPD to copy the entire hard drive without searching its contents and to deliver the copy to the court.

D. *The Court's In Camera Review of the Hard Drive Copy and Challenged Orders*

On July 20, 2015, the court received a mirror image copy of the laptop's hard drive in court and informed the parties it would review the offer of proof from the defense, the prosecution's objections based on attorney-client privilege and confidentiality, and the court reporter's record before conducting its examination of the mirror image copy.

On July 24, 2015, the court issued a minute order stating that it undertook an examination of the copy of the hard drive, that it "limited its review to the dates between

1/1/12 and 10/22/12, the dates at issue in this litigation," and that "the information on the hard drive is voluminous." The court provided the defense with a total of 15 images from the laptop's hard drive. It stated, "[t]he court finds that there is no other relevant discoverable material on the hard drive to the best of the court's ability to determine and based upon the vague descriptions provided by counsel at the ex parte. Further examination would be extremely time consuming and arduous considering the number of items on the hard drive, the lack of specificity provided by counsel and the minimal relevance the information sought has to this litigation." The court orders sealed the hard drive and a copy of the materials provided by the court to the defense.

Petitioner's counsel then filed a motion to continue the trial, based in part on his objection to the trial court's ruling and in anticipation of filing a writ petition addressing this issue.

During a pretrial hearing held on August 7, 2015, the court provided additional information regarding its in camera review. It stated that from its review of the documents on the hard drive it was Berenbau's computer. It also stated that the information provided by defense counsel during the in camera was "quite vague. So the court did its best, given the vagueness of the information provided in camera and its minimal relevance to this litigation, to review . . . ." The court found, however, that most of the documents on the computer hard drive did not involve the dates of the litigation. It noted that the computer had been used for many years and that "there is very little on the computer in terms of documents involving the dates that the court, the parameter of the dates the court set." The court noted that "[t]he defendant is not involved in the documents that the court reviewed as it relates to the business." The court stated that it provided counsel with some images that fell within counsel's request during the in camera hearing.

As to other information requested, the court stated, "given the information provided by counsel it was impossible to find, and I don't actually think it really exists and I also believe it's really not relevant to this litigation upon further reflection . . . ." Based on its review of the material on the hard drive, the court concluded "given the

nature of what was requested, the lack of specificity of the request, . . . any additional discovery of this is not appropriate. So that's my finding. . . . I am not going to undertake any more discovery as relates to this hard drive . . . . We are wasting our time. There is nothing there."

Petitioner's counsel asked the court to confirm if it used the parameters of January 2012 to October 2012, as reflected in the court's minute orders. In response, the court stated, "I looked at everything . . . that I could look at but in terms of like a deep looking at the images, I looked at everything." The court discussed the volume of material the court had to review on the drive, stating it had to sort through all those comments, Facebook photos, hundreds of thousands. So there has to be some parameters. . . ." The court stated, "with regard to communications it was impossible based upon what [defense counsel] told [the court] . . . . It was not a fruitful search."

E. *Petition for Writ of Mandate and Issuance of Alternate Writ*

Petitioner filed the petition on September 4, 2015, for writ of mandate, requesting this court issue an order vacating the trial court's order and granting petitioner's request to inspect the laptop. On September 10, the trial court stated during a hearing, "[t]his court provided what this court thought was appropriate based upon the in-camera representations made by counsel and I will note that yes, I did shorten the time period but that was based upon number 1, what I viewed was on the laptop. I reviewed the real estate documents on the laptop. They didn't have anything to do with the [petitioner]. I reviewed the pictures, the pictures that fell within the review were provided to counsel." The court stated from its review that the laptop was primarily used by Berenbau. Further, it stated, "I didn't see anything from [petitioner] really of any note on the laptop and so also the dates were narrowed partially because of what is on the laptop and what communications were there based upon the dates of the communications." In addition, the court stated, "[t]he court was not arbitrary" and was "thoughtful" in its examination. The court stated that it examined the hard drive based upon the representations of petitioner's counsel regarding the information petitioner was seeking. The court further

stated that it did not "see anything that fell within those requests as it related to what [petitioner was] looking for on the hard drive except for the images that I sent [petitioner]."

On September 30, 2015, we issued an order and alternative writ of mandate ordering the trial court to vacate its orders of July 24, 2015 and August 7, 2015, denying petitioner's motion for the production of the imaged hard drive and enter a new order granting the motion or, alternatively, show cause why it should not be compelled to do so.

F. *Trial Court's Response to the Alternate Writ*

By order dated October 8, 2015, the trial court indicated that it was "considering complying with the alternative writ," but it required additional briefing and/or argument on the issue. On October 19, after hearing oral argument on the issue, the court again denied petitioner's request for production of the hard drive.

The court set forth its reasons for the denial in an order dated October 20, 2015. The court stated that it "spent several hours looking at the hard drive for [the] three categories of" evidence proffered by the defense counsel during the in camera hearing: "1. Photographs depicting [Berenbau] and . . . petitioner . . . . 2. Emails from . . . petitioner regarding his employment at [Berenbau's] real estate offices . . . . 3. Other emails from . . . petitioner regarding his relationship with [Berenbau]." The court noted that while in camera, the court had asked defense counsel to be more specific regarding the third category of information, including providing an email address or other information to assist the court in conducting the review, but defense counsel was not able to provide such information and did not know if such information existed.

The court also noted that it set the date parameters for January 1, 2012, through October 22, 2012, "based upon the in camera hearing, the dates of the material on the hard drive once it was opened and the dates set forth in the [i]nformation." The court provided the defense with 15 images after conducting its review and denied further discovery. It stated, "[t]he court did not find any documents regarding the [petitioner's]

employment within the time period. Based upon the information provided the court at the in camera hearing, it was not feasible to search for the emails . . . petitioner may or may not have written on that computer. The court did not have the email address of . . . petitioner (the defense claims he could not remember it), the court was not given any names/email addresses to whom . . . petitioner may have sent an email of the sort the defense was looking for (again [petitioner] did not have that information), the defense did not assert with certainty that such emails existed."

Further, the court stated that "[a]t the hearing held on October 19, 2015, the court inquired of the defense how the defense would examine the hard drive if it was provided and how much time that would take if it were possible. The defense did not have a clear answer to that question even though from the previous hearings they knew this was a concern of this court." Further, the court stated, the defense "felt they could 'gather information helpful to the defense.' They were unable to say what this information might be. They were unable to provide the court with any time table as to when they believed they would be ready for trial . . . ."

The court noted for the hearing that the People had renewed their objection to production of the hard drive, asserting privilege and other privacy reasons stated in past hearings. The court stated from its review of the contents of the hard drive, it was clear that the laptop belonged to Berenbau and not the petitioner. The court also noted, "there were in fact emails between [Berenbau] and her attorney and other emails regarding real estate transactions which contained confidential information of 3rd parties." The court found "the privilege was not waived nor vitiated" by the search conducted by law enforcement pursuant to the search warrant because the search was limited to "data indicating the computer had been used to research a particular poison. Law enforcement was not entitled to nor did they view emails or other documents on the hard drive."

The court explained it was "den[ying] the request for the hard drive for the following reasons: . . . The defense is unable to articulate with any specificity what it is they are seeking from the hard drive. They want to 'gather information helpful to the defense'." The court saw no such information in the course of its search of the hard

drive, other than the images it previously provided. "Given the lack of specificity at the in camera hearing, the court had no reasonable way of searching for this material. Any failure in that showing is the fault of the defense. This court believes the defense does not even know what they are looking for in regard to the personal emails or if such emails exist at all. A general belief that there may be such emails or a desire to search for something that may or may not exist is insufficient grounds to provide the hard drive."

In addition, the court stated it "searched for and did not locate any emails which indicated . . . petitioner was involved in the real estate transactions that were ongoing at the time. Therefore, nothing was provided. . . . The court did provide certain images that fell within the in camera showing. . . . A careful review of the contents of the hard drive revealed to this court that the computer belonged to [Berenbau]. There appears to this court to be confidential and/or privileged information on the laptop. Therefore, the court believes it is inappropriate to simply provide a copy of the hard drive to the defense. . . . The delay that would be created by further examination by the defense is not reasonable given the lack of showing that any information that would be beneficial to the defense exists on the hard drive."

The court also noted the defense's "request appears to be a fishing expedition and a delay tactic. It is not credible that . . . petitioner is unable to provide any email address that he has used in the past or any names or email addresses of individuals to whom these emails may have been addressed. This information, if those emails exist, would be known to . . . petitioner." The court recognized "that discovery is vital to the defense. That is the reason this court went to extraordinary lengths to accommodate the defense request. However, discovery is not unfettered. The defense must make some showing that what they are seeking exists and that it is relevant or could lead to information relevant to the litigation. The defense has failed to make any such showing."

DISCUSSION

A. *Standard of Review*

A defendant's pretrial discovery motion "is addressed to the sound discretion of the trial court and a writ of mandate will not issue unless it is demonstrated that the trial court abused its discretion. [Citations.]" (*Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 156; see also *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1013-1014.) Discretion is abused "if there is no substantial basis for the trial court's ruling or the court applied an incorrect legal standard. [Citation.]" (*Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695, 700.) We review the trial court's "ruling de novo to the extent that it involves statutory interpretation or any other legal question. [Citation.]" (*Ibid.*)

B. *Governing Principles*

The right of a criminal defendant to discovery is governed by the federal Constitution and California Penal Code section 1054 et seq. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 364, 377-378.) The due process clause of the Fourteenth Amendment requires the prosecution to disclose "to the defendant evidence in its possession that is favorable to the accused and material to the issues of guilt or punishment." (*People v. Jenkins* (2000) 22 Cal.4th 900, 954; accord, *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]; *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 709.) Penal Code section 1054.1 requires the prosecution to disclose to the defendant, among other materials and information: (1) "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged" (*id.*, subd. (c)); and (2) "[a]ny exculpatory evidence" (*id.*, subd. (e)), if such materials and information are in the prosecutor's possession or the prosecutor knows them to be in the possession of the investigating agency.

Among the primary purposes of criminal discovery, as expressly stated in section 1054, are "[t]o promote the ascertainment of truth in trials by requiring timely pretrial

discovery" and "[t]o save court time in trial and avoid the necessity for frequent interruptions and postponements." (Pen. Code, § 1054, subds. (a), (c).) As our Supreme Court has recognized, "[t]hese objectives reflect, and are consistent with, the judicially recognized principle that timely pretrial disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates 'the true purpose of a criminal trial, the ascertainment of the facts.'" (*In re Littlefield* (1993) 5 Cal.4th 122, 130.) Thus, a "defendant generally is entitled to discovery of information that will assist in his defense or be useful for impeachment or cross-examination of adverse witnesses." (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 953.)

"The right of discovery in criminal cases is, of course, not absolute." (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1316.) The prosecution "is [not] required to disclose any materials or information . . . which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States." (Pen. Code, § 1054.6.) Communications between a client and an attorney are privileged under Evidence Code section 954. Pursuant to that provision, a client may refuse to disclose and may prevent others from disclosing communications subject to the attorney-client privilege. (Evid. Code, § 954, subd. (a).) "[T]he privilege attaches to any legal advice given in the course of an attorney-client relationship" and covers "the entire communication, including its recitation or summary of factual material." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733, 736 (*Costco*).) The attorney-client "'privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.' [Citation.]" (*Id.* at p. 732.) As the California Supreme Court has recognized, "'[a]lthough exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. . . . [Citations.]' [Citation.]" (*Ibid*.)

However, where information or a communication is *not* subject to the attorney-client privilege, but may otherwise be subject to claims of privacy or confidentiality, a

trial court may review the material in camera to weigh such claims against the need for the materials' disclosure. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 955 [the trial court properly reviewed in camera a memoranda written by a Los Angeles Police chief and a lieutenant discussing an internal investigation of police officers to weigh the People's claim of privilege against the defendant's asserted need for the information]; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 814 ["The purpose of an in camera hearing is to protect against unnecessary disclosure of confidential or sensitive information"].)

C. *The Trial Court Erred in Failing To Use the Proper Procedure in Addressing Berenbau's Claims of Attorney-client Privilege and Confidentiality and in Limiting Disclosure of Non-privileged Information*

Petitioner contends the trial court abused its discretion when it failed to compel disclosure of the entire hard drive to the defense pursuant to Penal Code section 1054.1, subdivision (c), when it concluded the claims of privilege and confidentiality had not been waived, and when it applied an incorrect standard to its in camera review of the hard drive copy to limit disclosure. We conclude the trial court erred by not employing the proper procedure to address the attorney-client privilege and confidentiality claims and by limiting disclosure of non-privileged information on the hard drive copy.

1. *The Communications Claimed to be Subject to the Attorney-client Privilege*

A party claiming that a particular communication is subject to the attorney-client privilege has the burden of establishing the preliminary facts necessary to support the privilege—namely, that the communication was made in the course of an attorney-client relationship and in confidence. (*Costco*, *supra*, 47 Cal.4th at p. 733; see Evid. Code, § 952.) "Once [the] party establishes [the] facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Costco*, *supra*, at p. 733.)

Here, the record does not demonstrate that the trial court ever required Berenbau to establish a prima facie claim of privilege. Specifically, the trial court never asked Berenbau to identify (via a privilege log or by any other means) the specific communications on the hard drive claimed to be privileged. Nor did the trial court require Berenbau to set forth any preliminary facts establishing that an attorney-client relationship existed at the time the communications were made and that the communications were made in confidence. (See Evid. Code, § 952.)

In addition, the trial court did not give petitioner an opportunity to show the communications were not subject to the attorney-client privilege or that the privilege had been waived. (See *Costco*, *supra*, 47 Cal.4th at p. 733; see also Evid. Code, § 912 [the right of any person to claim a privilege as provided by statute "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone"].)

Accordingly, the trial court's determination that the hard drive copy contained communications subject to the attorney-client privilege was premature and, as discussed further below, was based on the use of an improper procedure.

2. *In Camera Review of Communications Claimed to be Subject to the Attorney-client Privilege*

In *Costco*, *supra*, 47 Cal.4th 725, the California Supreme Court held the trial court had erred by ordering, over Costco's objection, a discovery referee to review in camera the contents of an opinion letter prepared by Costco's retained counsel to enable the referee to determine the merits of Costco's attorney-client privilege claim. (*Id.* at p. 731.) The court reasoned that because the letter was a communication that gave Costco legal advice during its attorney-client relationship with the retained counsel, the attorney-client privilege attached to the entire letter, including its summary of facts the attorney obtained from Costco's employees. (*Id*. at pp. 733, 736.) Further, the court noted, with exceptions not applicable to that case, that Evidence Code section 915 prohibited the trial court from

compelling disclosure of the content of communications claimed to be privileged to determine whether they qualified as attorney-client privileged communications. (Evid. Code, § 915, subd. (a); *Costco*, *supra*, at pp. 736-737.)

The court emphasized "the critical distinction between holding a hearing to determine the validity of a claim of privilege and requiring disclosure at the hearing of the very communication claimed to be privileged." (*Costco*, *supra*, 47 Cal.4th at p. 737.) It explained that Evidence Code section 915, "while prohibiting examination of assertedly privileged information, does not prohibit disclosure or examination of *other* information to permit the court to evaluate the basis for the claim . . . ." (*Costco*, *supra*, at p. 737.) Further, it stated that "Evidence Code section 915 also does not prevent a court from reviewing the facts asserted as the basis for the privilege to determine, for example, whether the attorney-client relationship existed at the time the communication was made, whether the client intended the communication to be confidential, or whether the communication emanated from the client. (*Ibid.*)

The Supreme Court further clarified that the party seeking to prevent disclosure of privileged information, in response to an argument or tentative decision that the privilege does not apply, is free to *request* in camera review of the communication without running afoul of Evidence Code section 915, subdivision (a), but the trial court cannot *order* the disclosure over the claimant's objection. (*Costco*, *supra*, 47 Cal.4th at pp. 738-740.) Additionally, after the trial court, without reviewing the content of a communication, "has determined [that] the privilege is waived or an exception applies . . . , the court to protect the claimant's privacy may conduct or order an in camera review of the communication at issue to determine if some protection is warranted notwithstanding the waiver or exception." (*Id.* at p. 740.)

Here, although not specifically addressed by either party in the briefs, we note that the record demonstrates the trial court reviewed in camera the actual content of an unspecified number of attorney-client communications before deciding whether they were subject to the attorney-client privilege. However, the record does not reflect that Berenbau ever requested an in camera review of the content of such communications.

(See *Costco*, *supra*, 47 Cal.4th at pp. 738-740.) Although the prosecutor may have suggested to the trial court that in camera review of the privileged communications was permissible, this was not sufficient to authorize the trial court to conduct such a review. Under Evidence Code section 954, to the extent an attorney-client privilege exists, Berenbau is the holder of the privilege and, as such, has the right to refuse to disclose and prevent others, including the prosecution, from disclosing her attorney-client privileged communications. Although it would have been permissible for the trial court to examine information *other than* the communications asserted to be privileged to determine whether the privilege applied, absent a request from Berenbau, it was prohibited by Evidence Code section 915, subdivision (a), from conducting an in camera review of the allegedly privileged communications themselves for this purpose. (Evid. Code, § 915, subd. (a); *Costco*, *supra*, 47 Cal.4th at p. 737.) Thus, in addressing Berenbau's attorney-client privilege claims, the trial court used an improper procedure.

As stated previously, the proper procedure would have been for the trial court to require Berenbau to establish a prima facie case that the communications are subject to the attorney-client privilege; then, if she satisfies her burden, allow petitioner the opportunity to argue that the privilege does not apply or has been waived. The court then would have to decide, without reviewing the content of the communications (unless Berenbau requested it do so), whether the attorney-client privilege applied. Absent a request by Berenbau, the trial court could not review the content of the communictions to determine if some protection is warranted for the communications until after it had determined the attorney-client privilege did not apply or had been waived. (*Costco*, *supra*, 47 Cal.4th at p. 740.)

3. *The Information Claimed to be Private or Confidential, But not Subject to the Attorney-client Privilege*

In addition to asserting the hard drive copy contained communications subject to the attorney-client privilege, Berenbau also claimed that the hard drive contained other confidential information, which she sought to preclude from being disclosed in discovery.

From its in camera review of the hard drive copy, the trial court stated it observed that there were emails that contained confidential information of third parties in connection with real estate transactions. Although the court generally found that "the privilege was not waived nor vitiated" by the search conducted by law enforcement pursuant to the search warrant, the record does not contain any findings regarding the emails claimed to be confidential.

If the hard drive copy contained information claimed to be confidential, but not subject to the attorney-client privilege, Evidence Code section 915, subdivision (a), would not prohibit the trial court from requiring review of the contents of that information in camera, if necessary, to weigh such claims against the need for the materials' disclosure. (Evid. Code, § 915, subd. (a); *People v. Jenkins*, *supra*, 22 Cal.4th at p. 955 [holding "[t]he trial court properly reviewed the disputed [confidential] memoranda in camera to weigh the People's claim of privilege against [the] defendant's asserted need for the information"]; *Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 813; accord, *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 [107 S.Ct. 989, 94 L.Ed.2d 40] [remanding case on due process grounds for the trial court to conduct an in camera hearing to determine whether confidential files compiled by a state protective service agency contained information that was exculpatory and material to the defense and should be disclosed].)

In the present case, however, the trial court did not require Berenbau to identify specific information on the hard drive copy that was subject to confidentiality and did not give petitioner the opportunity to argue either that the information was not confidential or that his need for disclosure of the information outweighed claimed privacy interests. Additionally, the record does not demonstrate that the trial court ever weighed Berenbau's claims of confidentiality against petitioner's need for disclosure of the confidential information. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 955.) Thus, the record is not adequately developed for this court to determine whether confidential information on the hard drive copy should have been disclosed.

4. *The Remaining Material on the Hard Drive Copy*

The trial court indicated it reviewed a portion of non-privileged materials on the hard drive copy and determined that, because petitioner could not specify the particular information he was seeking, the court would only disclose to the defense 15 images.

However, the record demonstrates that the parties (and the trial court initially) contemplated that the court's in camera review would only be a preliminary step, consisting of the court determining the volume of material on the hard drive copy and the nature of the information and communications contained therein. Yet, during its in camera review, the trial court unilaterally changed the scope of its review of the hard drive copy contrary to what the parties contemplated. Further, the record demonstrates the trial court did not review all the information contained on the hard drive copy, concluding it was not feasible to search through the volumes of material, given what it determined to be petitioner's inability to specify the information it was seeking from the hard drive copy. Thus, the trial court may have unreasonably limited the pretrial disclosure of non-privileged information on the hard drive copy. (See Pen. Code, § 1054.1; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 953 [stating a "defendant generally is entitled to discovery of information that will assist in his defense or be useful for impeachment or cross-examination of adverse witnesses"].)

Accordingly, because we do not find a substantial basis in the record for the trial court's rulings on disclosure, we conclude the trial court's rulings were in error and remand the matter for reconsideration in light of this court's opinion.[2]

On remand, the trial court should require Berenbau to first identify in a privilege log each communication she claims is subject to the attorney-client privilege or is

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[2] In light of Berenbau's assertion of privilege and confidentiality, we do not conclude, as is urged by petitioner, that he is entitled under section 1054.1, subdivision (c), to unfettered access to the hard drive on remand. (See *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 59 [recognizing that "the eye of an advocate may be helpful to a defendant in ferreting out information" during discovery, but holding that this does not mean the a defendant is entitled to unfettered access to confidential files].)

otherwise confidential without revealing the content of the privileged communication or confidential information. She should also indicate the facts necessary to support her prima facie claim of privilege and confidentiality. If Berenbau satisfies her burden of establishing a prima face case of attorney-client privilege and/or confidentiality, the trial court should then give petitioner the opportunity to establish that the privilege and/or confidentiality does not apply or has been waived.

The trial court should hold a hearing to determine as to any communication claimed to be subject to the attorney-client privilege whether an attorney-client relationship between Berenbau and her attorney existed at the time the communication was made, whether Berenbau was seeking legal advice at the time, whether the communication was made in confidence or disclosed to a third party, or whether the privilege was otherwise waived. The trial court may require disclosure or examination of material or information *other than* the asserted attorney-client privileged communication to assist the court in evaluating the basis for the claimed privilege. The trial court should not review the content of the attorney-client communication, unless Berenbau specifically requests the court do so.

The trial court should also determine as to the information claimed to be confidential (but not subject to the attorney-client privilege) whether the information is in fact private and whether confidentiality has been waived. If necessary, the trial court *may* review in camera such confidential, non-attorney-client privileged information to weigh any claimed privacy interests against petitioner's need for disclosure.

If the trial court determines specific communications are subject to the attorney-client privilege, disclosure of that communication is not required.[3] If, however, the trial court, without examining an attorney-client communication, determines that an exception

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[3] Petitioner does not claim that the communications claimed to be subject to the attorney-client privilege fall within an exception authorizing disclosure under the Evidence Code. (See Evid. Code, §§ 956 [crime fraud exception], 956.5 [prevention of a criminal act likely to result in death or substantial bodily harm], or 958 [breach of a fiduciary duty].)

to the attorney-client privilege applies or that the attorney-client privilege has been waived, the trial court should give Berenbau the opportunity to request an in camera review of the attorney-client communications (if such a review has not already taken place pursuant to Berenbau's request) to determine whether the communications should be disclosed or may order an in camera review of the communication at issue to determine if some protection is warranted, notwithstanding the waiver or exception. Further, if, after determining information should be disclosed, the court decides any information should be redacted prior to the disclosure due to privacy or confidentiality concerns, the court should appoint a mutually agreed upon specialist to accomplish that purpose.

As to the remaining material on the hard drive that is not privileged or confidential, at this pre-trial stage of the proceedings, petitioner is entitled to disclosure of such information in accordance with the requirements of Penal Code section 1054.1.[4] Ultimately, the court will have to determine an appropriate mechanism for segregating such non-privileged information subject to disclosure from any communications and information deemed not subject to disclosure and should consider appointing an agreed upon specialist to undertake the separation task as well.

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[4] During oral argument, respondent argued that the Electronic Communications Privacy Act (Pen. Code, § 1546 et seq., Stats. 2015, ch. 651, § 1, eff. Jan. 1, 2016) applies to this case. The act circumscribes *the government's* access to electronic information. Here, the government has already accessed the laptop and made a copy of the hard drive, which is now in its possession. Thus, Penal Code section 1546.1 has no application.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent Los Angeles Superior Court to vacate its order of July 24, 2015, granting in part and denying in part petitioner Muangthong's motion for the production of the laptop computer hard drive and to reconsider the motion in accordance with the directions set forth in this opinion.

GARNETT, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.