POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Surveillance of Criminal Law Approved for Credit Toward California Criminal Law Specialization: C437 -- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	General 30
Sept. 21 2015	Subpoena duces tecum by criminal defendants seeking confidential content from Facebook and other social media providers is quashed (*Facebook et al. v. San Francisco Superior Court*)	[redacted]	

Facebook, Inc. v. The Superior Court of San Francisco City and County, Derrick Hunter **(Sept. 8, 2015, A144315) __Cal.App.4th __ 2015 WL 5244640]**

- **Two defendants charged with murder and other crimes served pretrial subpoenas duces tecum on Internet social network operators. The social network operators (petitioners) moved to quash the subpoenas because disclosure is barred by the Stored Communications Act. The trial court denied petitioners' motions to quash. But the Court of Appeal granted petitioners' writ of mandate, ordering the subpoenas quashed.**

- **The Court of Appeal concludes there is little, if any, support for the defendants' claims that their requested disclosures are constitutionally mandated, and discusses why a subpoena duces tecum at the pretrial stage is ill-suited for adjudicating contested issues of privilege.**

- **Following a discussion of this case, this P&A makes observations about the wider application of this opinion to issuance of subpoenas duces tecum for *any* privileged records at the pretrial stage.**

Proceedings in Trial Court

A. General Factual Background

1. The defendants Derrick Hunter and Lee Sullivan were involved in a drive-by shooting, in which one person (Jaquan Rice) was killed and a minor was seriously injured. Hunter's 14-year old brother was identified by witnesses as one of the shooters. He was tried in juvenile court and

found guilty of murder and attempted murder. The car used in the shooting belonged to prosecution witness Renesha Lee. (*1)

2. Hunter's brother told police that he shot Rice because Rice had repeatedly threatened him in person and in social media postings on Facebook and Instagram. Rice also had "tagged" the boy in a video clip posted on Instagram that depicted guns. (*2)

3. In presenting the case to the grand jury, the prosecution contended that defendants and Hunter's brother were members of a criminal street gang, and that Rice was killed because he was a member of a rival gang, and because Rice had publicly threatened Hunter's brother. (*2)

4. A gang expert with the San Francisco Police Department testified before the grand jury that "gangsters are now in the 21st century and they have taken on a new aspect of being gangbangers, and they do something called cyber banging. They will actually be gangsters on the internet. They will issue challenges; will show signs of disrespect, whether it's via images or whether it's via the written word, Facebook, Instagram, Socialcam. . . . They will disrespect each other in cyberspace." (*2)

5. The inspector described for the grand jury a video posted by Rice on Facebook in which he rapped while giving a tour of his gang neighborhood and pointed out areas where he could be found if rival gang members wanted to find him, including the location where Rice was shot. (*2)

6. In a subsequent declaration, the inspector stated that he relies "heavily on records from social media providers such as Facebook, Instagram, and Twitter to investigate and prosecute alleged gang members for gang crime." The inspector said that he regularly relied on social media records in forming an opinion whether a particular crime is gang related. The inspector also said he relied, in part, on social media records as evidence that Rice and the defendants were members of rival gangs and that the drive-by shooting was gang related. (*2)

7. The defendants were indicted and stand charged with the murder of Rice and the attempted murder of the minor, and firearms enhancements. (*2)

B. <u>The Subpoenas Duces Tecum</u>

1. Counsel for defendant Sullivan served subpoenas duces tecum on Facebook, Instagram, and Twitter, seeking records from the social media accounts of murder victim Rice and prosecution witness Lee. (*2)

2. As to Facebook and Instagram, the subpoena sought "any and all public and private content," including, but "not limited to user information, associated email addresses, photographs, videos, private messages, activity logs, posts, status updates, location data, and comments including information deleted by the account holder" for accounts belonging to Rice and to Lee. Defendant Sullivan's subpoena to Twitter sought similar information as to Lee only.

(*3)

3. The petitioners (Facebook, Instagram and Twitter) moved to quash the subpoenas, arguing that the disclosure of the information sought was barred by the Stored Communications Act (SCA). (*3)

4. Defendants opposed, contending that their constitutional rights to present a complete defense, cross-examine witnesses, and a fair trial prevailed over the privacy rights of account holders under the SCA. (*3)

5. In an offer of proof as to Lee's social media records, Sullivan alleged that Lee was the only witness who implicated him in the shootings, that the records would demonstrate, among other things, that Lee was motivated by jealous rage over Sullivan's involvement with other women. In his offer of proof as to Rice's social media records, Sullivan said review of the records was required to " 'locate exculpatory evidence' " and to confront and cross-examine the inspector gang expert. Sullivan cited the inspector's grand jury testimony and attached examples to his opposition of what he alleged were screen shots of violent video postings by Rice, asserting that the subpoenaed records would show that Rice was " 'a violent criminal who routinely posted rap videos and other posts threatening [Hunter's brother] and other individuals.' " (*3)

6. The trial court denied the petitioners Facebook, Instagram and Twitter's motions to quash the subpoenas, and ordered them to produce the requested material for an in camera hearing. (*3)

7. As a result, the petitioners filed a petition for writ of mandate in the California Court of Appeal and asked for a stay of the order to produce the materials. (*3)

8. The Court of Appeal granted the stay. After requesting and receiving a response from defendants, the Court of Appeal issued an order to show cause why the relief should not be granted. (*3)

9. The Court of Appeal then granted the petition for writ of mandate and directed the trial court to issue an order quashing the subpoenas. (*1)

10. [In the California Court of Appeal, the following parties appeared as amicus curiae on behalf of the defendants and the San Francisco Superior Court: the San Francisco Public Defender's Office; the Ventura County Public Defender's Office; California Attorneys for Criminal Justice; and the Calfornia Public Defenders Association. (*3, fn. 6)]

California Court of Appeal Analysis

I. The Stored Communications Act (SCA)

A. *Purpose*

1. The SCA is a part of the Electronic Communications Privacy Act, which creates a zone of privacy to protect Internet subscribers from having their personal information wrongfully used and publicly disclosed by unauthorized private parties. (*4)

2. "The SCA 'protects individuals' privacy and proprietary interests. The Act reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility. Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents, the Act protects users whose electronic communications are in electronic storage with an Internet Service Provider or other electronic communications facility.' [Citation omitted.]" (*4)

3. The SCA declares that, subject to certain conditions and exceptions, "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service. . . ." (Stored Communications Act, § 18 U.S.C. 2701 (a)(1).) (*4)

Similarly, but subject to certain additional conditions, "a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service. . . ." (§ 2702(a)(2).) (*4)

4. The SCA enumerates several exceptions to the rule that service providers may not disclose the contents of stored messages. In the criminal context, there are several applicable provisions in the statute including disclosure of the content of an electronic communication to a governmental agency, without notice to the subscriber or customer, "only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction." (§ 2703(a),(b)(1)(A).) Here, for example, the People obtained and served search warrants for several of Rice's social media communications. (*5, and fn. 7.)

B. *Provisions for Criminal Defendants in the SCA*

1. As to criminal defendants, the Court of Appeal here noted that the SCA provides no direct mechanism for access by a *criminal defendant* to private communication content, and " 'California's discovery laws cannot be enforced in a way that compels . . . disclosures violating the Act.' " (*5, citing *Negro v. Superior Court* (2014) 230 Cal.App.4th 879. 889.) (*5)

2. Defendants insist that, notwithstanding constraints of the SCA, the subpoenaed materials were necessary to ensure their right to present a complete defense to the charges against them. They relied on the Sixth Amendment right to confrontation and compulsory process and the Fifth Amendment guarantee of due process. (*5)

3. The Court of Appeal's responses to these arguments was "we think that defendants overstate the extent of constitutional support for their claims." (*5)

II. Criminal Defense Discovery

The California Court of Appeal then looked at each of the grounds for which the defendants asserted they had constitutional basis for *pretrial* discovery of this material.

The Court of Appeal began by quoting from the United States Supreme Court that " '[t]here is no general constitutional right to discovery in a criminal case, and . . . [t]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.' " (*5, quoting *Weatherford v. Bursey* (1977) 429 U.S. 545, 559.)

In California, at least as to *nonprivileged* information, "[t]he 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* (2000) 22 Cal.4th 900, 953.) (*5.)

A. The Sixth Amendment Right of Confrontation

- The Confrontation clause of the Sixth Amendment protects the defendant's right to be confronted with the witnesses who testify against him, and the right to cross examination.

- The Court of Appeal here reviewed United States Supreme Court authority and California Supreme Court cases and found the Sixth Amendment confrontation clause does not require disclosure of privileged information to defendant's at pretrial. See below.

- Specifically, the Court of Appeal concluded: "[T]here is little if any support for defendants' claim that the confrontation clause of the Sixth Amendment mandates disclosure or otherwise privileged information for purposes of a defendant's pretrial investigation of the prosecution's case." (*6).

1. *United States Supreme Court*

a. In *Davis v. Alaska* (1974) 415 U.S. 308, a trial court refused to allow the defendant to impeach the credibility of a prosecution witness with his status as a juvenile probationer, because the witness's juvenile record was confidential under state law. The United States Supreme Court, however, said the primary interest secured by the right of confrontation is the

right of cross examination. The Supreme Court said the state's interest in protecting the confidentiality of the juvenile record "cannot require yielding of so vital a constitutional right as effective cross-examination for bias of an adverse witness." (*Id*. at p. 320.) (*6.)

b. In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, the Supreme Court considered the application of the confrontation clause to *pretrial* discovery. While no majority consensus emerged, four justices expressed the view that the right to confrontation is a *trial* right. (*6.)

c. The defendant in *Ritchie* was convicted of various sexual offenses with his minor daughter. Before trial, he had attempted to subpoena confidential records from a state protective services agency which had investigated abuse allegations. The agency refused to comply, claiming the records were privileged under state law. The trial court declined to order production. The Pennsylvania Supreme concluded that by denying access to the file, the trial court order had violated both the Sixth Amendment's Confrontation Clause and the Compulsory Process Clause. (*Id*. at pp. 43-46, 59.) (*6.)

d. A plurality of the United States Supreme Court, four justices, concluded the high court of Pennsylvania got it wrong: "The Pennsylvania Supreme Court apparently interpreted our decision in *Davis* to mean that a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony." (*Id*. at p. 53.) (*6.)

e. The plurality stated further: "If we were to accept this broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is *a trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." (*Id*. at p. 53, emphasis added.) (*6.)

f. Additionally, the plurality found that the defendant's due process rights to a fair trial were sufficiently protected by in camera review *at trial* of the confidential files to determine if they contained information material to his defense. (*Id*. at pp. 59-60.) (*6.)

2. *California Supreme Court*

a. The California Court of Appeal here stated: "Our own Supreme Court has repeatedly declined to recognize a Sixth Amendment right to defense pretrial discovery of otherwise privileged or confidential information." (*7.)

b. The Court of Appeal first noted *People v. Webb* (1993) 6 Cal.4th 494, in which the court at the pretrial stage conducted an in camera review of the subpoenaed psychiatric records of a prosecution witness. The court provided limited disclosure to the defendant, about which he complained. The Supreme Court questioned whether the defendant had any constitutional right

to examine the records *at all* at the pretrial stage, in light of the strong policy of protecting a patient's criminal history. (*7.)

c. The Supreme Court in *Webb* said, "[I]t is not clear whether or to what extent the confrontation or compulsory process of clauses of the Sixth Amendment grant pretrial discovery rights to the accused." (*Webb*, at pp. 517-518.) (*7.)

d. The Court of Appeal here then looked at *People v. Hammon* (1997) 15 Cal.4th 1117, the next California Supreme Court case to consider the extent of pretrial defense discovery of otherwise privileged information in. (*7.)

e. In *Hammon*, the defense served subpoena duces tecum on psychotherapists who had treated the complaining witness in a sexual molestation case, claiming the records would be necessary to challenge the witness's credibility. The trial court granted the People's motion to quash the subpoena. (*Hammon*, at pp. 1119-1121.) (*7.)

f. The *Hammon* court noted the lack of majority consensus in the United States Supreme Court on whether the Sixth Amendment grants pretrial discovery right to the accused. Nevertheless, *Hammon* declined to hold that the Sixth Amendment confers a right to discover privileged psychiatric information before trial. (*Hammon*. at p. 1127.) (*7.)

g. The California Supreme Court in *Hammon* said it did not see an adequate justification "for taking such a long step in a direction the United States Supreme Court has not gone. Indeed, a persuasive reason exists not to do so." The Court in *Hammon* said that when a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon to balance the defendant's need for cross examination and the state policies for the privilege. (*Hammon*, at p. 1127.) (*7.)

h. The *Hammon* court said the trial court will typically not have sufficient information to conduct this inquiry at the pretrial stage, and, thus, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily. (*Hammon*, at p. 1127.) (*7.)

[***Note***: Jeff Rubin, in his "*Basic Brady and Statutory Discovery Obligations,*" at p.164, says: "The holding in *Hammon* means more than simply that a trial court is not required to conduct a pre-trial, in camera review of privileged records. It means that trial courts should normally not open, review and disclose subpoenaed privileged records prior to trial."]

i. The Court of Appeal here also looked at *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, in which the Supreme Court found valid a protective order permitting *pretrial* nondisclosure of the names of prosecution witnesses, rejecting the argument that nondisclosure violated defendants' constitutional rights to confront witnesses against them, and due process. In *People v. Valdez* (2012), the Supreme Court rejected the argument that Penal Code section 1054.7, insofar as it authorizes denial of pretrial disclosure by delaying and limiting the identity of

prosecution witnesses, is unconstitutional under the Sixth Amendment right to confrontation or due process. (*7.)

B. The Sixth Amendment Right of Compulsory Process

1. The California Court of Appeal said it found even less support for the defendants' contention that the compulsory process clause of the Sixth Amendment separately authorizes pretrial discovery of the protected SCA information. (*7.)

2. The United States Supreme Court said it "has had little to occasion to discuss the contours of the Compulsory Process Clause," and said its cases "establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses *at trial* and the right to put before *a jury* evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie*, *supra*, 480 U.S. at pp. 55, 56, emphasis added.) (*8)

3. The Supreme Court in Ritchie said that compulsory process provides no greater protections in this area than those afforded by due process, and so these kinds of claims are better evaluated "under the broader protections of the Due Process Clause of the Fourteenth Amendment" addressing fundamental fairness of *trials*." (*Ritchie*, at p. 56.) (*8)

4. Our California Supreme Court said in *People v. Prince* (2007) 40 Ca.4th 1179, 1234, fn. 10, that it is not at all clear to what extent the compulsory process clause of the Sixth Amendment grants pretrial discovery rights to the accused. (*8)

5. Bottom line on Sixth Amendment compulsory process: As the California Supreme Court sees it, the Sixth Amendment right of confrontation does not mandate pretrial discovery of privileged information, and the right of compulsory process is an even weaker leg to stand on.

C. Fifth Amendment and Due Process

1. The defendants next argued that the failure to provide pretrial discovery would deny them their due process rights to prepare and present a defense to the charges against them. The Court of Appeal states: "They more broadly assert that the SCA is unconstitutional to the extent that it denies them access to information available to the prosecution through search warrant, subpoena, or court order." (*8)

2. The Court of Appeal said a defendant must meet a heavy burden to prevail on a claim that a statute is unconstitutional. In the due process context, the statute must offend some fundamental principle of justice. Such fundamental principles define the community's sense of fair play and decency and form the base of civil and political institutions. (*9.)

3. However, far from a fundamental principle of justice, our Supreme Court has said that "[t]here is no general constitutional right to discovery in a criminal case," and the "Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559.) (*9.)

4. For example, the California Supreme Court rejected a due process challenge to Evidence Code section 1045, subdivision (5), limiting defense discovery of complaints of police officer misconduct to a five-year window. The defendant claimed the information unduly infringed his right to a fair trial and that this information might fall under *Brady*. The Supreme Court found no "fundamental principle of justice' implicated and, further, *Brady* merely serves to restrict the prosecutor's ability to suppress evidence rather than to provide the accused a right to criminal discovery. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 12, citing *People v. Morison* (2004) 34 Cal.4th 698, 715.) (*9.)

D. Other Access to Information and Reciprocity

1. The petitioners Facebook, Instagram and Twitter pointed out the defendants are not precluded from access to the information they want. The prosecution had obtained some of the victim's Facebook and Instagram communications pursuant to a search warrant authorized by the SCA. (*9.)

2. The Court of Appeal noted that the defendant would be entitled to receive copies of those communications, either as general discovery under Penal Code section 1054.1, or perhaps as potentially exculpatory *Brady* material. (*9.)

3. But the defendants argued that access only to records that tend to support the prosecution's theory of the case does not provide them with the complete materials necessary to present a full defense. They argue that the SCA establishes " 'a one-sided, arbitrary, and unconstitutional preference that the government, but not the defense, is entitled to access to relevant information.' " (*10.)

4. The defendants here rely on *Wardius v. Oregon* (1973) 412 U.S. 470, in which the United States Supreme Court struck down a statute that required the defendant to disclose the names of his alibi witnesses, but did not require the prosecution to disclose the names of its witnesses. The Supreme Court struck down the statute, concluding that discovery must be a two-way street. (*Id*. at p. 475.) (*10.)

5. But the Court of Appeal here said the discovery in *Wardius* did not involve disclosure of privileged or confidential information, and the Court of Appeal pointed out that a variety of investigative and evidence collection procedures are routinely available to governmental agencies that are not provided to a criminal defendant. For example, the prosecution can obtain search warrants and compel the attendance of witnesses at trial. (*10.)

6. The Court of Appeal noted that our Supreme Court has said that because due process provides the defendant the right to a fair trial, the question is whether any lack of reciprocity interferes with the defendant's right to a fair trial. The "mere mechanical repetition of the word 'reciprocity' is not enough to show that a defendant's right to a fair hearing has been violated." (*People v. Hansel* (1992) 1 Cal.4th 1211, 1221. (*10.)

E. Subpoena Duces Tecum

● Penal Code section 1326 provides in relevant part: "In a criminal action, no party, or attorney or representative of a party, may issue a subpoena commanding the custodian of records or other qualified witness of a business to provide books, papers, documents, or records, or copies thereof, relating to a person or entity other than the subpoenaed person or entity in any manner other than that specified in subdivision (b) of Section 1560 of the Evidence Code. When a defendant has issued a subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies thereof, the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents. The court may not order the documents disclosed to the prosecution except as required by Section 1054.3."

● Penal Code section 1054.3 only requires disclosure of documents that "the defendant intends to offer in evidence at trial." (Pen. Code, § 1054.3(a).)

● Evidence Code section 1560 provides that a third party may send a sealed envelope containing documents to the court in response to a subpoena duces tecum issued by the prosecution or the defense.

1. The defendants here asserted that the SCA must yield to their statutory right to obtain records necessary to investigate a case and present a complete defense through the use of a criminal subpoena duces tecum. (Pen. Code, § 1326.) (*10.)

2. The defendants argued that the confidential nature of the information obtained is adequately protected by the requirement that the records of a nonparty be delivered to the court, and by the ability of the court to hold an in camera hearing to determine the relevance of the material sought. (*10.)

3. The Court of Appeal said the defendants are correct that issuance of the subpoena would not entitle them to receive the subpoenaed records " 'until a judicial determination has been made' " that they are legally entitled to receive them. (*10.)

4. But the Court of Appeal noted the difficulties presented by the subpoena duces tecum in the pretrial setting. No prior notice is required to be given to the person whose records are subpoenaed, and the responsive documents may not even be disclosed to the prosecution at the pretrial stage. (See Penal Code section 1326, subdivision (c) above.) (*10.)

5. Significantly, the Court of Appeal stated the following: "Such a nonadversarial ex parte process is ill-suited to adjudication of contested issues of privilege. While the court *may* order an in camera hearing to determine whether or not the defense is entitled to receive the documents (§ 1326(c)) and *may* elect to invite the prosecution to participate in and argue at a hearing on a defense subpoena duces tecum (see *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1072, *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 750), the court would still be unlikely to have any context to make a meaningful evaluation pretrial, and in most instances would not have the benefit of an adversarial response. Absent response by the service provider, as here, the court may not even be cognizant of objections to production, and of the level of in camera scrutiny required." (*10.)

6. The Court of Appeal went back to the California Supreme Court's decision in *Hammon*, and reiterated that the Supreme Court found "persuasive reasons" not to permit pretrial disclosure of privileged or confidential information, and noted the "risk inherent in entertaining such pretrial requests." (*Hammon*, *supra*, 15 Cal.4th at p. 1127.) (*10.)

7. The Court of Appeal further quoted the California Supreme Court in *Hammon*: "When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in *Davis v. Alaska*, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (*Hammon*, at p. 1127.) A defendant's general right to issue subpoenas duces tecum to private persons 'provides no basis for overriding a statutory and constitutional privilege.'" (*Id*. at p 1128.) (*10.)

8. The Court of Appeal also pointed the anomalous result flowing from defendants' argument. In order to obtain third party confidential information protected by the SCA, a governmental entity [e.g. the prosecution here] would have to obtain a search warrant, authorized in advance by a magistrate on a sufficient showing of probable cause. However, a criminal defendant could procure the same confidential information "simply by serving an ex parte subpoena duces tecum with no required notice to the subscriber or prosecuting authority – and which may nor may not be subject to meaningful judicial review." (*11.)

9. In a footnote, the Court of Appeal noted the severe administrative burdens imposed on Internet service providers if they were regularly required to respond to (and object to) routine pretrial subpoenas on criminal matters, when the overwhelming majority of those matters will never result in a trial at all. The Court of Appeal said also "[t]he burdens imposed on our courts already struggling with constrained resources in, in conducting hearings that would ultimately be unnecessary, would be equally severe." (*11, fn. 15.)

F. Court of Appeal's Conclusion

● The Court of Appeal said, in sum, it found *no* support for the trial court's order for pretrial production of information otherwise subject to the protections of the Stored Communications Act (SCA). (* 11.)

● The Court of Appeal said: "The consistent and clear teaching of both United States Supreme Court and California Supreme Court jurisprudence is that a criminal defendant's right to pretrial discovery is limited, and lacks any solid constitutional foundation. Simply alleging that the material they seek might be helpful to their defense does not meet defendants' burden to show that the SCA is unconstitutional in denying them access to protected information at this stage of the proceedings." (*11.)

● Therefore, the Court of Appeal granted the writ of mandate and directed that the trial court vacate its order, requiring the petitioners to produce responsive material for an in camera review, and enter a new order granting the motion to quash the subpoena. (*11.)

● The Court of Appeal emphasizes that its ruling is limited to the pretrial context in which the trial court's order was made. The Court of Appeal said nothing in its opinion would preclude the defendants from seeking at trial the production of the materials they sought pretrial (or petitioners again seeking to quash subpoenas), where the trial court would be far better equipped to balance the defendants need for effective cross-examination and the policies the SCA is intended to serve. (*11.)

[In a footnote, the Court of Appeal noted an argument made by one of the defense attorneys that the proposed in camera hearing to review the petitioners' documents would have occurred only day before trial. Therefore, defense counsel argued that the hearing should not be considered a "pretrial proceeding." But the Court of Appeal had this to say: "Counsel did not suggest what temporal proximity would make a hearing part of the trial. Nor did counsel suggest how this would cure the basic difficulty of having someone other than the trial judge weigh the confidentiality interests against a defendant's need for the information, in the context of the evidence. Whether the balance weighs in favor of disclosure may ultimately depend on developments at trial, including for example, whether and how a witness testifies, or what other evidence the prosecution seeks to introduce. In *Hammon*, for example, the defendant sought disclosure of the victim's psychotherapy records on the theory that the records would provide evidence of the victim's lack of credibility and her propensity to fantasize. At trial, the defendant admitted engaging in sexual conduct with the victim 'thus largely invalidating the theory on which he had attempted to justify pretrial disclosure of privileged information.' (*Hammon*, *supra*, 15 Cal.4th at p. 1127.) " (*11.)]