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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FACEBOOK, INC., et al,,
Petitioner,

Case No. A144315

(San Francisco Superior
Court Nos. 13035657, 13035658)

v.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA,

Respondent.

DERRICK D. HUNTER and LEE
SULLIVAN,

Real Parties in Interest.

PETITION FOR REVIEW

After Published Opinion by the Court of Appeal,
First Appellate District, Division Five
Filed September 8, 2015

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TO: THE HONORABLE TANIA CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Real party in interest, Lee Sullivan, respectfully petitions for review of the published decision of the Court of Appeal, First Appellate District, filed on September 8, 2015, granting Facebook, Instagram, and Twitter's petition for writ of mandate directing the trial court to vacate its January 22, 2015, order denying petitioners' motion to quash the *subpoenas duces tecum* for the social media records of a witness and alleged victim in a homicide trial. (Exhibit A.) Real parties did not seek rehearing. The review petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUES PRESENTED FOR REVIEW

1.) This case presents an issue of first impression of statewide importance regarding whether criminal defendants are constitutionally entitled to *pretrial* access to social media records sought by *subpoena duces tecum* that are necessary for a fair trial, to present a complete defense, and to confront and cross-examine witnesses at jury trial, as guaranteed by Fifth, Sixth and Fourteenth Amendments of the United States Constitution, or whether social media records can only be subpoenaed *during trial* as the Court of Appeal held below?

2.) In light of the confusion and logistical problems created in the wake of *People v. Hammon* (1997) 15 Cal.4th 117, should this Court consider whether *Hammon* was wrongly decided on constitutional grounds and also on practical grounds because it does not promote the orderly administration of justice. Alternatively, this Court should clarify whether *Hammon's* ruling denying pretrial access to evidence is limited to records subject to the psychotherapist-patient privilege or applies to social media records.

FACTUAL CONTEXT AND PROCEDURAL HISTORY

Real parties, Lee Sullivan and Derrick Hunter, are indicted and awaiting trial for the murder of Joaquan Rice (Pen. Code § 187) and the attempted murder (Pen Code § 664/187) of minor, B.K. The charges stem from a drive-by shooting that occurred on June 24, 2013, at a bus stop located in the Bayview District of San Francisco. The District Attorney's theory of the case is that the crimes were committed for the benefit of "Big

Block" an alleged criminal street gang.[1] Quincy H., Derrick Hunter's 14-year old brother, confessed to the shooting to police inspectors shortly after it occurred, explaining that he shot Mr. Rice because he feared Mr Rice would kill him first if he did not act. According to Quincy, Mr. Rice repeatedly threatened and bullied him at his job, at his home, and on social media, including tagging him in violent posts on Facebook and Instagram. Quincy told police that Mr. Sullivan was not in the vehicle when the shooting occurred. Although the shooting occurred in front of a crowd, no eyewitnesses placed Mr. Sullivan at the scene. [2] (1 AE 124-128, 134-137.)

The sole witness who implicates Mr. Sullivan in the incident is Reneesha Lee, Mr. Sullivan's jilted former girlfriend who had rented the vehicle used in the shooting and who was detained by police driving alone in the car seven minutes after the shooting occurred. Several eyewitnesses told police a woman was driving the vehicle when shots were fired. Importantly, Ms. Lee did not implicate Mr. Sullivan in the shooting until several months after the incident, when police threatened to charge Ms. Lee with murder if she did not implicate Mr. Sullivan. (1 AE 87-88.)

In preparation for jury trial, counsel for Mr. Sullivan served third-party subpoenas duces tecum (Pen. Code, §1326) on Facebook, Twitter, and

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[1]Gang allegations pursuant to Penal Code sections 12022.53(d), 120022.53(e)(1), and Penal Code section 186.22 (b)(1), as well as other enhancements were alleged.

[2] Quincy was tried in juvenile court for the murder of Mr. Rice and attempted murder of Benjanay K. The petition was sustained on all counts.

Instagram seeking records from the social media accounts held by the deceased alleged victim, Mr. Rice, as well as Ms. Lee. (1 AE 12-18, 53-56.) Mr. Sullivan simultaneously attempted to serve Ms. Lee with subpoena duces tecum seeking production of her social media records, but was unable to locate her for service either in person or through the San Francisco District Attorney despite diligent efforts. (1 AE 107.)

Facebook, Instagram, and Twitter, moved to quash the subpoenas on grounds that disclosure is prohibited under the Stored Communications Act (hereafter "SCA") set forth in 18 U.S.C. § 2701, et. seq. The social media providers argued that the SCA is an absolute bar to producing records to criminal defendants, and that petitioners need only respond to search warrants or court orders obtained by the police or prosecutorial agencies. (1 AE 1-8.) Real party, Sullivan, filed an Opposition to petitioners' Motions to Quash, asserting that the SCA must yield to a criminal defendant's constitutional right to compulsory process, to present a complete defense, and to due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Mr. Sullivan made a detailed offer of proof as to the relevance of the records sought and requested that the records be produced for an *in camera* review by respondent court. (1 AE 84-105.)[3]

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[3] In support of his Opposition, Mr. Sullivan submitted a declaration from Quincy H.'s attorney, Rebecca Young, who stated that Quincy H. was denied his constitutional right to due process and to present a complete defense at his separate juvenile trial for the murder and attempted murder of Mr. Rice and Ms. K, respectively, because when Ms. Lee was called to testify as a witness, she refused to authenticate her social media posts that the defense had gathered in which Ms. Lee threatened others with violence. Counsel for Quincy H. was unable to lay a foundation to admit the records into evidence per the

On January 7, 2015, respondent court, the Hon. Bruce Chan issued a tentative ruling denying petitioners' Motions to Quash.

On January 22, 2015, the day before jury trial was to commence, respondent court affirmed the tentative ruling and denied petitioners' Motions to Quash ruling that Mr. Sullivan and Mr. Hunter have an independent constitutional right to access materials necessary to defend their case, and ordered the records produced for *in camera* review under Penal Code section 1326 on February 27, 2015. (1 AE 264-276.)

On February 24, 2015, petitioners filed a petition for writ of mandate and request for a stay of the production order in the Court of Appeal, First Appellate District, asserting that the respondent court abused its discretion in denying petitioners' Motion to Quash.

On February 26, 2015, the Court of Appeal issued a stay of respondent court's production order pending consideration of the petition. Sullivan submitted an answer which Hunter joined. An order to show cause to the respondent court was issued on March 30, 2015. Real party, Sullivan, filed a return to which Hunter joined. After briefing by the parties and amicus counsel, the Court of Appeal granted the petition for writ of mandate and issued a published opinion on September 8, 2015(Exhibit A) holding that although Hunter and Sullivan may be constitutionally entitled to social media records at trial notwithstanding the SCA, under *People v. Hammon* (1997) 15 Cal.4th 117, they had no constitutional right to pretrial

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trial judge's ruling and the critical defense evidence was not admitted at trial. (1 AE 196-197.)

access to social media records under the Compulsory Process Clause, the Due Process Clause, or the Sixth Amendment's Confrontation Clause.

Petitioners now seek review of the Court of Appeal's ruling that criminal defendant's are not constitutionally entitled to subpoena social media records pretrial even upon a showing of good cause.

WHY REVIEW SHOULD BE GRANTED

Review should be granted to settle an important question of law regarding whether criminal defendants have the constitutional right to pretrial access to social media records necessary for a fair trial. Given the explosion of social media use in recent years, trial courts throughout the state are grappling with whether and when criminal defendants can subpoena social media records necessary to defend a case in light of the fact that social media records are increasingly offered by the prosecution as evidence without parallel access to criminal defendants under the SCA.

In this case, the Court of Appeal substantively addressed for the first time in the nation, a criminal defendant's right to access social media records under the SCA and ruled that a criminal defendant's constitutional right to a fair trial may require disclosure of social media records at trial notwithstanding the federal Stored Communication Act's provision prohibiting disclosure of electronic records except to law enforcement. (18 U.S.C. 2701, et seq.) We agree that the SCA must yield to a criminal defendant's constitutional right to a fair trial. However, real parties challenge the Court of Appeal's ruling insofar as it held that criminal defendants do not have a constitutional right to *pretrial* access to this

evidence and may only subpoena social media records *during* trial.

Real parties respectfully assert the Court of Appeal is wrong as a matter of constitutional law and also in practicality because denying pretrial access does not promote the orderly ascertainment of the truth. The Court of Appeal's ruling ensures the opposite by delaying disclosure until after trial commences and then requiring continuances as they become necessary, as indeed they will given that an increasing number of criminal cases that use of social media records as evidence. Moreover, real parties assert that delaying access until trial without affording defense counsel reasonable pretrial investigation of the social media records impinges on defendants' ability to meaningfully challenge the state's evidence and, thus, runs afoul of a defendant's constitutional right to a due process, to receive a fair trial, to defend a case, to effective assistance of counsel, and to effectively confront and cross-examine witnesses.

Whether a criminal defendant has a constitutional right to pretrial access to social media records, or evidence in general, is an area that has not been resolved by the United States Supreme Court. Give that this Court is under a solemn obligation to interpret and implement the United States Constitution, this Court should grant review to settle this important question of law.

Finally, in ruling that criminal defendant's do not have a constitutional right to pretrial access to social media records, the Court of Appeal relied heavily upon *People v. Hammon* (1997) 15 Cal.4th 1117, which held that a child molest victim's confidential psychotherapy records

could only be released to a criminal defendant *at trial*, not pretrial, upon a showing of good case. This Court should grant review to determine if *Hammon* was wrongly decided because it has created logistical problems in trial courts for 18 years, and also because criminal defendants do, in fact, have a constitutional right to pretrial access to evidence necessary to defend his or her case, as real parties argue here. Alternatively, review should be granted to clarify whether *Hammon* is limited to records subject to the psychotherapist-patient privilege or whether it applies to social media records.

ARGUMENT

I. THE COURT OF APPEAL ERRED IN RULING THAT CRIMINAL DEFENDANTS DO NOT HAVE A CONSTITUTIONAL RIGHT TO PRETRIAL ACCESS TO DISCOVERY OF PRIVATELY HELD, CONFIDENTIAL RECORDS UPON A SHOWING OF GOOD CASE, WHEN THE MATERIALS ARE NECESSARY TO A FAIR TRIAL

The Court of Appeal erred when it ruled that criminal defendants could not subpoena social media records until trial on grounds that the United States Supreme Court has never squarely addressed whether a defendant has a constitutional right to a pretrial access to evidence from third-parties. The Court of Appeal cites *Weatherford v. Bursey* (1977) 429 U.S. 545 for the proposition that there is no general constitutional right to discovery in criminal cases. However, *Weatherford* is inapposite because it concerned a prosecutor's obligation to disclose to the defense unfavorable evidence under a claimed *Brady* violation. (*Id.* at 559.) Here, we are not concerned with discovery between the prosecution and the defense, but with

a defendant's right to obtain relevant evidence from third-parties in order to obtain a fair trial. *Weatherford* is, therefore, unhelpful.

A. California Courts Are Authorized to Interpret the Federal Constitution on the Issue of Whether a Criminal Defendant's Has A Constitutional Right to Pretrial Access to Social Media Records.

It is well-settled that in the absence of controlling United States Supreme Court opinion, state courts can and must make an independent determination of federal law and are not bound by decisions in the lower federal courts. (*People v. Bradley* (1969) 1 Cal.3d 80, 86; *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58; *California Assn. for Health Services at Home v. State Dep't of Health Care Servs* (2012) 204 Cal.App.4th 676, 684.) "Although the courts of California are bound by the decisions of the United States Supreme Court interpreting the federal Constitution, they are not bound by the decisions of lower federal courts, even on federal questions." (*People v. Superior Court* (*Moore*) (1996) 50 Cal. App. 4th 1202, 1211.) Given that the United States Supreme Court has yet to squarely address whether there is a constitutional right to access materials necessary to defend a case prior to trial, this Court should not hesitate to decide the constitutional issues in light of the important issues at stake for criminal defendants who need social media records to prove innocence at trial. To that end, Justice Mosk eloquently stated the following in his concurring opinion in *Hammon,* in which he argued that the California Supreme Court should hold that the Sixth Amendment right to confrontation includes the right to pretrial access to materials necessary to

cross-examine witnesses, despite that the United States Supreme Court in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, had not reached a majority on that issue:

> It should hardly need mention that "[w]e are under a solemn obligation to interpret and implement the United States Constitution" (*People v. Harris* (1994) 9 Cal.4th 407, 449 fn.1 (conc. and dis. opn of Mosk J.)) - - especially when, as here, the United States Supreme Court has itself defaulted. "We are no less capable of discharging that duty than any other court. *We 'should disabuse [ourselves] of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court's Fred Astaire–always following and never leading.'* " (*Hammon, supra*, 15 Cal. 4th at 1130-1131 (conc. opn. of Mosk, J,) quoting *People v. Cahill* (1993) 5 Cal.4th 478, 557-558 (conc. and dis. opn. of Kennard, J.)

Justice Mosk went on to state that the California Supreme Court should have accepted its responsibility to address whether an evidentiary privilege should yield to a criminal defendant's right to confrontation in pretrial discovery and not "wait until it receives word from Washington" to do so. (*Hammon, supra*, 15 Cal. 4th at 1131 (conc. opn. of Mosk, J.)

Real party Sullivan respectfully urges this Court to take the lead and hold that, upon a showing of good cause, a criminal defendant has a constitutional right to access prior to trial, social media records that are necessary for a fair trial, to present a complete defense, and that such records must be released to the defense following the trial court's *in camera* review subject to any protective orders deemed necessary by the trial court.

B. Real Party Sullivan's Due Process Right to a Fair Trial and to Present a Meaningful Defense Requires Access to Social Media Records Before Trial

Criminal defendants are unable to meaningfully defend a criminal case within the meaning of the Due Process Clause if they are forced to go to trial without first obtaining relevant social media records that are material to cross-examination or support the defense. Social media records are ubiquitous and play an increasingly important role in modern life and in the criminal justice system. Especially for the younger generation, social media is not a separate, stand-alone domain in which few of life's functions are carried out. Rather, it is the epicenter of their world, the primary vehicle by which opinions are expressed, friends are made, and news is shared. Because of the central role these records play, they are likely voluminous and important to both the prosecution and defense in criminal cases; thus, a defendant must have a parallel right pretrial access to social media records, upon a showing of good cause, following an *in camera* review at which time superior courts can withhold irrelevant information and issue whatever protective orders it deems necessary to protect privacy interests.

The Court of Appeal's position that criminal defendants do not have a constitutional right to pretrial access to evidence does not give due weight to a criminal defendant's sacrosanct and overarching constitutional right to fundamental fairness at trial and the right to meaningfully defend a case which are inviolate under the Fifth Amendment and guaranteed to the states by the Fourteenth Amendment. The reason there is not an abundance of case law regarding a criminal defendant's pretrial access to evidence is

because it is axiomatic that a criminal defendant's right to fundamental fairness, to present a defense, and to effective assistance of counsel at trial, hinge on the ability to obtain prior to trial, evidence in the possession of third-parties and the government that is material to the defense, either because the records impeaches a prosecution witness or because it demonstrates a defendant is actually innocent of the charges and/or allegations. Indeed, even without controlling precedent from the United States Supreme Court or this Court on the issues of the constitutional right to pretrial access to evidence, lower California courts have routinely granted pretrial access to evidence to criminal defendants under the due process clause even in the face of conflicting statutes and constitutional provisions involving privacy issues.[4]

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[4] See e.g., the *Department of Motor Vehicles v. Superior Court of Los Angeles County* (2002) 100 Cal.App. 4th 363, the DMV refused to disclose to the prosecutor or criminal defendant, both of whom jointly sought the records, confidential medical records in DMV's possession which were relevant to a vehicular manslaughter prosecution. DMV claimed the records were deemed confidential and not to be disclosed to the public pursuant to Vehicle Code section 1808.5. DMV asserted it was prohibited by statute from disclosing records of a mental and physical condition. (*Id* at. 367.) The DMV filed a writ of mandate in the Court of Appeal contending the trial court abused its discretion in ordering it to disclose the entirety of the records sought because the records were statutorily deemed confidential. The Court of Appeal denied the writ holding, "The People and [the defendant] have an interest in a document that is relevant to [the defendant's] defense to the vehicular manslaughter charge. 'A criminal defendant's right to discovery . . . is based upon the fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.'" [citations ommitted.] *DMV v. Superior Court, supra*, 100 Cal.App.4th at 377. The Court held on balance, the DMV's interest is outweighed by the prosecution and defendant's interest in a fair trial in a criminal case. (*Ibid.*) As such, a criminal defendants right to a fair trial trumps a state statute declaring certain medical records held by the DMV to be exempt from disclosure despite public policy interests in promoting truthful exchanges between medical professionals and the DMV.

Also, California courts have long held that the right of a criminal defendant to a fair trial, guaranteed by the Fifth Amendment, prevails over a third party's constitutional right privacy. For example, in *Rubio v. Superior Court* (1988) 202 Cal.App.3d 1342, the defendant was charged with felony sex offenses against a minor. The defendant denied molesting the minor and claimed that she had made up the incident after watching a video tape of her parents

Whether rooted directly in the Due Process clause of the Fourteenth Amendment or in the Compulsory Process Clause of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." (*Holmes v. South Carolina (2006) 547 U.S. 319, 324; Crane v. Kentucky* (1986) 476 U.S. 673, 690, (quoting *California v. Trombetta,* (1984) 467 U.S. 479, 485; citations omitted). The right of a criminal defendant to due process is "the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. at 294; see *Crane v. Kentucky*, *supra*, 476 U.S. at 690 ("Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"). A defendant's right to present a complete defense is abridged by statutes and rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " (*Rock v. Arkansas* (1987) 483 U.S. 44, 58, 56.)

To meaningfully defend a case, a criminal defendant must usually seek out the truth immediately. He cannot wait until the case is called to trial. A defense lawyer cannot develop a cogent trial strategy, decide on what defense to pursue, how to conduct *voir dire*, or do an opening

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engaging in sexual activity. (*Id.* at 1346.) The trial court granted the parents' motion to quash the defendant's *subpoena duces tecum* seeking the video on grounds it was protected by the marital privilege. (*Ibid.*) The defendant sought extraordinary relief in the Court of Appeal and then the Supreme Court, who directed that an alternate writ be granted. The Court of Appeal complied. Relying upon *Pennsylvania v. Ritchie*, the appellate court granted the writ and remanded the case back down to the trial court for the court to review the tape *in camera* to determine of the evidence was necessary to disclose to the defendant to ensure his right to due process when weighed against the parent's federal constitutional right to privacy in the marital relationship as well as the marital privilege set forth in Evidence Code section 980. (*Id.* at 1350.) The Court of Appeal also stated that if disclosure is required, the trial court "should recognize its concomitant power to issue whatever protective orders are necessary should any further disclosure be compelled to preserve petitioner's right to a fair trial." (*Ibid.*)

statement unless he or she can review the relevant evidence prior to trial and investigate leads that may exonerate the defendant or undermine the credibility of witnesses. Moreover, delaying disclosure of social media records until trial will lead to mistrial after mistrial if continuances are sought during trial so the parties can litigate subpoenas for social media records, to allow time for trial courts *in camera* reviews, and for defense counsel to investigate information gleaned from the social media records, because of juror attrition due to long mid-trial delays. Moreover, criminal defendants cannot mount an intelligent defense if voluminous social media records are received during trial the contents of which may change the defense entirely midway through the trial. Forcing defendants to wait until trial to access social media records is unworkable, does not promote the "orderly ascertainment of the truth" which is best served disclosure prior to trial. (*Jones v. Superior Court* (1962) 58 Cal.2d 56, 60.) A defendant cannot receive fundamental fairness at trial when he does not receive relevant evidence until trial commences. Thus, this Court should not hesitate to vindicate the demands of due process and require disclosure of relevant social media records prior to trial.

C. Denying Pretrial Access to Social Media Records to the Defense, but not Prosecution, Violates the Due Process Clause under *Wardius v. Oregon*

The Court of Appeal's ruling interpreting the SCA to grant the prosecution, but not the defense, pretrial access to social media records is arbitrary, unconstitutional, and cannot be squared with Sullivan's right to present a defense, let alone with the due process argument that such a

disparity in treatment is prohibited by *Wardius v. Oregon* (1973) 412 U.S. 470, 474. In *Wardius*, the Unites States Supreme Court struck down a state 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 Court held that such inequitable discovery rules violated due process guarantees:

> The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

(*Wardius v. Oregon, supra*, 412 U.S. at 476.) Further, the Court ruled that [a]lthough the due process clause has little to say regarding the amount of discovery which the parties must be afforded [ ] it does speak to the balance of forces between the accused and his accuser." *(Wardius v. Oregon*, supra, 412 U.S. at 475-76, emphasis added.) Thus, the discovery statute in which defendants and prosecutors were treated differently was ruled unconstitutional.

The Court of Appeal is correct that law enforcement agencies are afforded access to means of investigation that are denied to others, including criminal defendants. But once a defendant is charged with a crime and held to answer following a preliminary hearing, the right to prepare for trial is indisputable and the access to evidence between the prosecution and the defense cannot be arbitrary, one-sided or unfair without running afoul of the due process clause under *Wardius*. The Court of Appeal does not address the problem of how a defendant is to prepare for

trial without access to relevant evidence: with no pretrial ability to subpoena records, significant pretrial preparation would be impossible. Because a fair trial depends on counsel well-prepared to meet the state's case with all evidence that will shed light on the truth, the Court of Appeals position that there is no right to pretrial discovery fails.

With regard to the *Wardius* issue, the Court of Appeal states that "[d]efendants do not suggest why they would not be entitled to receive copies of [social media records.] either as general criminal discovery required under Penal Code section 1054.1, [fn omitted] or as potentially exculpatory *Brady* material." (Exhibit A, p. 18.) Not so. Defendants have extensively explained that Penal Code section 1054.1 controls discovery between the prosecution and defense counsel only, and does not address a criminal defendants right to compel third parties such as Facebook to produce materials the defense needs for trial. Moreover, the state cannot compel third parties such a Facebook to produce exculpatory evidence to the defense because third parties are not part of the prosecution team and the state is not required to seek out evidence and investigate a case on behalf of the defendant under *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny.

Finally, defendants cannot get the records they need from the state because the state chose to subpoena some, but not all of Joaquan Rice's social media records and none of Reneesha Lee's social records, all of which the defense needs to impeach her at trial and to present a complete defense. Criminal defendants cannot fully and fairly defend a criminal case

based solely upon social media records obtained by police and prosecutors by utilizing the statutory discovery scheme set forth in Penal Code section 1054.1. The prosecution team and defense attorneys seek very different records in support of their respective adversarial roles. Law enforcement issue search warrants to obtain evidence of criminal activity or contraband based upon a peace officers sworn affidavits establishing probable cause of criminal activity. (Cal. Pen. Code, § 1523-1524.) In contrast, the mechanism criminal defendants use to obtain evidence that is likely to facilitate the ascertainment of truth and a fair trial, such as evidence relevant to impeach a prosecution witness or establish an affirmative defense, is a third-party subpoena pursuant to Evidence Code section 1326. If contested, defense counsel is required to make a good cause showing, as an officer of the court, that the requested information will facilitate the ascertainment of facts and a fair trial. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.) A good cause showing can be established by a defense counsel's declaration detailing the records' relevancy, admissibility, and materiality to the defense case. (*People v. Superior Court (Barrett)*, *supra*, 80 Cal.App.4th at 1313.) The issuance of a third-party subpoena is a ministerial act, and the trial court has wide authority to review the records *in camera,* issue protective orders, redact irrelevant information, and engage in whatever balancing of interests that needs to occur to ensure a criminal defendant has access to records needed to present a complete defense as guaranteed by the

constitution. (See generally, *Kling v. Superior Court* (2010) 50 Cal.4th 1068.) In light of the foregoing, it is abundantly clear that respondent court rightly decided that petitioners should produce the records sought to the court for an *in camera* review prior to trial and the Court of Appeal erred in reversing that decision.

Defense pretrial subpoenas of confidential records are subject to even stricter judicial control than search warrants because two levels of judicial review are required before confidential records can be disclosed to the defendant: first, defense counsel must make an initial good cause showing as to relevance before the records can be released. If good cause is shown, then the court conducts an *in camera* review and only releases relevant records to the defense, subject to a protective order. In contrast, for law enforcement, once a judge signs a search warrant, the records are released wholesale to the state without an *in camera* hearing as to relevance review regardless of the privacy rights at stake. Thus, the procedures in place pursuant to Penal Code section 1326 for defense pretrial subpoenas of confidential records provide more privacy protections for the citizenry, than the search warrant process used law enforcement.[5] Thus, the Court of Appeal's fears that real parties will have unfettered access to irrelevant records, disclose private records to the general public, and will engage in "fishing expeditions" is unfounded particularly given that trial courts can

[5] Moreover, if the police are not required to give notice to a social media account holder prior to obtaining a search warrant, there is no reason the Court of Appeal should be concerned that the defense is not required to do so given that the trial court has strict control over the release of relevant social media records to the defense.

control the process and issue protective orders.

In light of the foregoing, Sullivan asserts that his right to due process is violated under *Wardius* because under the interpretation of the SCA enunciated by the Court of Appeal, the state, but not the defense, is granted access to social media records prior to trial without good reason for the distinction given superior court's strict control over the release of the relevant social media records to defense counsel.

D. The Compulsory Process Clause Compels Pretrial Production of Social Media Records Sought By Third-Party Subpoena

Criminal defendants have the right to pretrial access to social media records held by electronic service providers under the Compulsory Process Clause. As a general matter, a California criminal defendant has the right to obtain by *subpoena duces tecum* third-party records "if the requested information will facilitate ascertainment of the facts and a fair trial." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 556.) Under the federal Compulsory Process Clause one of the most fundamental of rights in our adversary system of justice is the right of a criminal defendant to compel the attendance of witnesses at trial and to present to the jury evidence that might influence the determination of guilt. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39; *accord; Washington v. Texas* (1967) 388 U.S. 14.) The Supreme Court has long held that compulsory process is fundamental for the search for justice. (*Taylor v. Illinois* (1988) 484 U.S. 683, 709; *United States v. Nixon* (1974) 418 U.S. 683, 709.)

Over 200 years ago, the high court in *United States v. Burr*, 25 F.

Cas.30 (C.C.D. Va.1807) held that a defendant has the right, as soon as his case is in court to compel the production of evidence: "any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses." (*U.S. v. Burr* (C.C.D. Va 1807) 25 F.Cas 30, 33.

Like here, the *Burr* court addressed privacy objections, because the subpoena there was directed to the President of the United States in the Aaron Burr trial. Then, as now, a privacy objection would not overcome the defendant's right to compulsory process of relevant material: "In the provisions of the constitution, and of the statute which give to the accused a right to the compulsory process of the court, *there is no exception whatsoever.* (*U.S. v. Burr, supra,* 25 F. Cas. at 34, emphasis added.) Issuing the subpoena, the *Burr* court observed what is still the heart of the compulsory process clause today: "General principles, then, and general practice are in favor of the right of every accused person, so soon as his case is in court, to prepare for his defence, and to receive aid of the process of the court to compel the attendance of his witnesses." (U.S. v. *Burr*, supra, 25 F. Cas. at 33.)

In United States v. Nixon, (1974) 418 U.S. 683, 716, the President of the United States invoked executive privilege to avoid compliance with a third-party subpoena duces tecum issues by criminal defendants in the Watergate scandal that sought the production of tape recordings and documents *five months prior to trial.* (*Id* at 689.) A special prosecutor sought to obtain information concerning meetings between the President

and certain individuals charged with obstruction of justice, conspiracy, and other offenses. The President's motion to quash the subpoena was denied. Holding that the President's general privilege of confidentiality did not extend to an absolute privilege of immunity from all judicial process, the U.S. Supreme Court affirmed the denial of the motion to quash. The Court ruled that because the special prosecutor had demonstrated a specific need for the evidence sought by way of subpoena it was proper to compel production based, in part, on the Compulsory Process Clause, and to examine the material in camera. In so ruling, the Supreme Court stated:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. *To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.*

(*United States v. Nixon*, supra, 418 U.S. at p. 709, emphasis added.)

Relying on *Nixon, Burr* and its progeny, in *Pennsylvania v. Ritchie*, the Supreme Court held that, "[O]ur cases establish, at a minimum, that [under the Compulsory Process Clause of the Sixth Amendment] 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 at 55-56, fn. omitted, emphasis added.)

The Court of Appeal correctly pointed out that the Supreme Court said in *Pennsylvania v. Ritchie*, 480 U.S. at 55, that the High Court has yet had "little occasion to discuss the contours of the Compulsory Process Clause" and chose to analyze the issues presented therein under a *Brady* due process clause analyses presumably because the records the defendant sought were in possession of the government, not third parties. However, just because the *Ritchie* majority chose to analyze the issue under the Fourteenth Amendment, does not preclude this Court from also considering this issue under the federal Compulsory Process Clause. Sullivan contends that the Compulsory Process Clause alone, or in conjunction with the due process clause, requires pretrial production of social media records and the Court of Appeal erred in failing to so hold.

E. This Court Should Overrule *Hammon*, or in the Alternative, Limit *Hammon* to the Psychotherapy-Patient Records, and Hold that a Criminal Defendant's Right to Confrontation Under the Sixth Amendment Includes The Right to Pretrial Access to Evidence Necessary to Cross-Examine Witnesses Given the United States Supreme Court Has Not Reached This Issue

In the absence of United States Supreme Court authority to the contrary, this Court has the authority to decide that a criminal defendant's Sixth Amendment's right to confront and cross-examine witnesses, includes the right to pretrial access to evidence necessary to conduct an effective cross-examination. In *Davis v. Alaska* (1974) 415 U.S. 308, the United States Supreme Court held a criminal defendant's constitutional right to cross-examine witnesses trumped a state law declaring juvenile records to be confidential and not to be disclosed to the public. Specifically, the trial

judge prohibited defense counsel from questioning a witness about the latter's juvenile criminal record, because a state statute made this information presumptively confidential. The United States Supreme Court found that this restriction on cross-examination violated the Confrontation Clause, despite Alaska's legitimate interest in protecting the identity of juvenile offenders. (*Id.* at 318–320.)

The Court of Appeal's opinion that defendants are not entitled to pretrial access to social media records under the Sixth Amendment's Confrontation Clause is based largely on *People v. Hammon* (1997) 15 Cal.4th 1177, a case in which this Court held that child molest victim's confidential psychotherapy records could not be subpoenaed prior to trial. The basis for the *Hammon* opinion was that in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, the a plurality of the Court led by Justice White interpreted the Confrontation Clause to mean that the right of confrontation is designed simply "to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination" and does not create pretrial access to evidence. (Id., at 52.) Thus, the plurality in *Ritchie* concluded that the constitutional error in *Davis v. Alaska*, 415 U.S. 308 (1974), was not that state law made certain juvenile criminal records confidential, but rather that the defense attorney had been precluded from asking questions about that criminal record at trial. (480 U.S., at 54.) However, Justice White failed to command a majority. For their part, Justice Blackmun and Justice Brennan each expressed a view to the contrary, namely, that the Confrontation Clause gave criminal defendants

the constitutional right to pretrial access to evidence necessary for cross-examination. (Id; at pp. 61-65 (conc. opn. of Blackmun, J.); id at 66-72. (dis. opn. of Brennan, J.).) Justice Blackmun said "there are cases, perhaps most of them, where simple questioning of a witness will satisfy the purposes of cross-examination," (id., at 62, BLACKMUN, J. concurring), I also believe there are cases in which a state rule that precludes a defendant from access to information before trial may hinder that defendant's opportunity for effective cross-examination at trial, and thus that such a rule equally may violate the Confrontation Clause." (*Id.*, at 63-65, Blackmun, J concurring.)

Real party Sullivan respectfully requests that this Court reconsider its ruling in *Hammon* because it gave undue weight to the plurality opinion in *Pennyslvania v. Ritchie* that the the Sixth Amendment does not grant pretrial right to access materials necessary for cross-examination. Plurality opinions are not controlling precedent because they do not command a majority. In *Marks v. United States* (1977) 430 U.S. 188 the Supreme Court of the United States explained how the holding of a case should be viewed where there is no majority supporting the rationale of any opinion: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (*Marks*, 430 U.S. at 193.) Thus, *Pennsylvania v. Richie* is only controlling precedent for the proposition upon which the majority agreed: that the due process clause required the

trial court to conduct an in camera review of a confidential child protective services file to determine if it contained material evidence helpful to the accused. (*Pennsylvania v. Ritchie*, *supra*, 480 U.S. 39.) It is not authority for the proposition that the Sixth Amendment's Confrontation Clause does not grant pretrial access to discovery necessary to cross-examine witnesses.

Defendants agree with Justice Mosk's concurring opinion in *Hammon* in which he said that the majority wrongly relied upon the *Ritchie* plurality in concluding there is no pretrial right to access evidence under the Sixth Amendment's Confrontation Clause. He said, that in reaching their opinion, the *Hammon* majority relied on *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 "[w]hich means that they rely on nothing" because no majority was reached in that case. Justice Mosk further stated: "It should hardly need mention that [w]e are under a solemn obligation to interpret and implement the United States Constitution [internal citations omitted] especially when, as here, the United States Supreme Court has itself defaulted." (*Hammon*, *supra*, 15 Cal.4th at 1130-31.) He concluded his opinion as follows:

> And so, the majority, in effect, leave to another day the question whether a state law evidentiary privilege may have to yield to a defendant's Sixth Amendment right of confrontation in pretrial discovery. That day may not come until the United States Supreme Court happens to give an answer. Unless, that is, this court should accept its responsibility to address the matter even in the absence of word from Washington.

(People v. Hammon (1997) 15 Cal.4th at 1130-31, conc. opn of Mosk, J.) Defendants respectfully urge this Court to answer Justice Mosk's call and squarely address the issue of whether a criminal defendant's has a constitutional right to pretrial access to evidence under the Sixth

Amendment Confrontation Clause since the United States Supreme Court has not reached this issue. Defendants urge this Court to hold that *Hammon* was wrongly decided on constitutional grounds.[6]

Defendants agree with Justices Mosk, Blackmun, and Brennan that although a defendant may happen to cross-examine an adverse witness only in the course of trial, to do so effectively he may have to undertake preparations long before. "More generally, to defend himself meaningfully, he must usually seek out the truth immediately: He cannot wait until the cause is called to trial." (*Hammon*, 15 Cal.4th at 1130-31, conc. opn of Mosk, J.)

Defendants respectfully urge this Court to reconsider *Hammon* and conclude it was wrongly decided on practical, as well as constitutional, grounds. Courts are obliged to seek the "orderly ascertainment of the truth" (*Jones*, *supra*, 58 Cal.2d at 60) which would be served by timely pretrial disclosure. Instead, *Hammon* is not followed in trial courts because delaying disclosure until after trial commences results in mid-trial continuances and strains an already over-burdened criminal justice system.

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[6] The Court of Appeal gave great weight to gang cases such as *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, *People v. Valdez* (2012) 55 Cal.4th 82 and *People v. Maciel* (2013) 57 Cal.4th 482, in support of its ruling that defendants are not entitled to pretrial access to social media records under the Sixth Amendment's Confrontation Clause. These cases are not germane to the issues presented herein because the gang cases concern the trial court's order withholding the identity of witnesses in cases in which there has been an actual threat on a witnesses life, which is not a consideration here. Indeed, if the release of social media records would endanger the life of a witness, a trial court conducting the in camera review certainly has the authority to limit or delay disclosure if a witnesses was threatened. Moreover, in Alvarado, Valdez, and Maciel, the defendants were not deprived of pretrial access to materials necessary to defend their case at trial. Only the identity of the witness was delayed or withheld. In contrast, here, defendants are being wholly deprived of their right to pretrial access to evidence needed to mount a defense and cross-examine adverse witnesses.

Moreover, defendants disagree with the Court of Appeal's assertion that trial courts are in the best position to rule on the disclosure of confidential records. In counties which use a master calendar system, it is the pretrial judges who rule on pretrial motions and conduct settlement negotiations who are most familiar with the case evidence, not the trial courts who are assigned cases without prior knowledge of the case depending on courtroom availability. Moreover, even if access to social media records is technically a "trial right" a superior court judge still retain the inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice." (*People v. Cox* (1991) 53 Cal.3d 618, 700, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn.22.) Indeed, superior courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them. [Citation.] *(Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967; *People v. Olsen* (2014) 229 Cal.App.4th 981, 997-98; Const., art.VI, § 1.) Thus, respondent court, as master calendar judge, had the inherent authority to rule on petitioners motions to quash a one day before the case was to be sent out of trial in order to promote the efficacious administration of justice. Respondent court, who was familiar with the evidence in this case, had the inherent authority to hear the motions to quash rather than tying up a courtroom and jury while the losing party sought extraordinary relief in the Court of Appeal for the next seven months. The Court of Appeal promoted form over substance when it granted the petition based on the fact that

respondent court ruled on the motion one day before trial was to commence. Real parties respectfully urge this Court to conclude *Hammon* was wrongly decided.

Alternatively, real parties request that this Court clarify whether *People v. Hammon*, supra, 15 Cal. 4th 1117, is limited to records subjected to the psychotherapist-patient privilege. Real parties contend *Hammon* limited its holding to confidential mental health records be stating as follows:

> The only records the trial court declined to review in camera were those defendant sought from Jacqueline's psychologists. While defendant also sought access to Jacqueline's high school and juvenile court records, the trial court did review those records and disclose some of them to the defense. *Thus, in asking whether the trial court had a duty to review confidential or privileged records in camera, we are concerned exclusively with the records requested from the psychologists.*

(Hammon, supra, 15 Cal.4th at 1122. The foregoing indicates, that this Court intended its ruling to apply to privileged mental health records only protected by Evidence Code section 1014, not to all confidential records. This interpretation makes the most sense given that the psychotherapist-patient privilege is entitled to heightened protections due to the vulnerability of the patients and research that has showed the patients will not seek mental health treatment unless assured of confidentiality. [7]

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[7] The Legislative Comment to Evidence Code section 1014 makes this point: This article creates a psychotherapist-patient privilege that provides much broader protection than the physician-patient privilege.

. . . .

A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or

Accordingly, if this Court does not conclude Hammon was wrongly decided, defendants request that it be limited to records protected by Evidence Code section 1014.

Real parties assert that *Hammon* does not apply to the disclosure of social media records at issue here. Although the SCA is an statutory bar to the production of electronic records by social media companies, it does not create a traditional evidentiary privilege that was at issue in *Hammon.* (*See* Evidence Code section 910, et seq.) In traditional privileges, a holder may refuse to testify as to the substance of a confidential communication, or prevent the recipient of the communication, such as an attorney or doctor, from testifying to its substance. (*Ibid.*) In contrast, under the SCA, the "holder" of social media records cannot refuse to testify regarding the contents of his or her social media posts, nor can the social media user

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emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends.

The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.

The Commission has also been informed that adequate research cannot be carried on in this field unless persons examined in connection therewith can be guaranteed that their disclosures will be kept confidential.

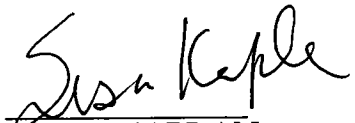
Evid. Code, § 1014

prevent others who see the posts from testifying as to the contents. Accordingly, social media posts do not fall within the ambit of *Hammon* because the contents of the posts are not protected from disclosure like the traditional evidentiary privileges. Thus, the Court of Appeal erred when it ruled *Hammon* prevented pretrial access to social media records.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the petition for review be granted.

Respectfully submitted this 19th day of October, 2015.



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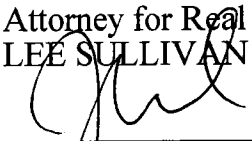

JANELLE E. CAYWOOD
Attorney for Real Party in Interest
LEE SULLIVAN

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 8385words.

Dated: October 19, 2015

JANELLE CAYWOOD
Attorney for Real Party in Interest
LEE SULLIVAN

PROOF OF SERVICE BY U.S. MAIL

Re: Facebook v. Superior Court No. A144315

I, JANELLE CAYWOOD, declare that I am over 18 years of age and not a party to the within cause; my business address is 1660 Mason Street #6, San Francisco, California 94133. On October 19, 2015, I served the attached **PETITION FOR REVIEW** on each of the following by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid and deposited in United States mail addressed as follows:

Heather Trevisan
Office of the San Francisco District Attorney
850 Bryan Street
San Francisco, CA 94103

Jose Umali
507 Polk Street
San Francisco, CA 94104

Court of Appeal, First District, Div. 5
350 McAllister Street
San Francisco, CA 94102

The Hon. Bruce Chan
San Francisco Superior Court
Dept. 22
850 Bryant Street
San Francisco, CA 94103

James Snell
Perkins Coie, Llp.
3150 Porter Drive
Palo Alto, CA 94304

I declare under penalty that the foregoing is true and correct. Executed on October 19, 2015 at San Francisco, California.

JANELLE CAYWOOD

EXHIBIT A

192 Cal.Rptr.3d 443
Court of Appeal,
First District, Division 5, California.

FACEBOOK, INC., et al., Petitioners,
v.
The SUPERIOR COURT of San Francisco City and County, Respondent;
Derrick D. Hunter et al., Real Parties in Interest.

A144315 | Filed September 8, 2015

Synopsis

Background: Two defendants were charged with offenses including murder. Defendants served subpoena duces tecum on Internet social network operators. The Superior Court, City and County of San Francisco, Nos. 13035657 and 13035658, Bruce E. Chan, J., denied operators' motion to quash the subpoena. Operators petitioned for writ of mandate.

Holdings: The Court of Appeal, Bruiniers, J., held that:

[1] Stored Communications Act (SCA) did not violate Confrontation Clause in prohibiting pretrial disclosure of victim's social network account contents;

[2] SCA did not violate Compulsory Process Clause in prohibiting pretrial disclosure of victim's social network account contents; and

[3] SCA did not violate due process in prohibiting pretrial disclosure of victim's social network account contents.

Petition granted.

West Headnotes (13)

[1] **Telecommunications**
Computer communications

The Stored Communications Act (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 SCA. 18 U.S.C.A. § 2701 et seq.

Cases that cite this headnote

[2] **Constitutional Law**
Disclosure and Discovery

Criminal Law
In general; examination of victim or witness

There 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. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

[3] **Criminal Law**
Information or Things, Disclosure of

In California, at least as to nonprivileged information, the 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.

Cases that cite this headnote

[4] **Constitutional Law**
Sixth Amendment

Both the Confrontation Clause and the Compulsory Process clause of the Sixth Amendment are binding on the States under the Fourteenth Amendment. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[5] **Criminal Law**
Right of Accused to Confront Witnesses

Criminal Law
Cross-examination and impeachment

The Confrontation clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. U.S. Const. Amend. 6.

Cases that cite this headnote

[6] **Criminal Law**
Use of documentary evidence
Telecommunications
Validity

The Stored Communications Act (SCA) did not violate the Sixth Amendment Confrontation Clause in prohibiting pretrial disclosure of murder victim's Internet social network account contents for purposes of defendants' investigation of the prosecution's case, even though the prosecution had obtained access to at least some of the contents of the account pursuant to a search warrant. U.S. Const. Amend. 6; 18 U.S.C.A. § 2701 et seq.

Cases that cite this headnote

[7] **Telecommunications**
Validity
Witnesses
Constitutional and statutory provisions

The Stored Communications Act (SCA) did not violate the Sixth Amendment Compulsory Process Clause in prohibiting pretrial disclosure of murder victim's Internet social network account contents for purposes of defendants' investigation of the prosecution's case, even though the prosecution had obtained access to at least some of the contents of the account pursuant to a search warrant. U.S. Const. Amend. 6; 18 U.S.C.A. § 2701 et seq.

Cases that cite this headnote

[8] **Constitutional Law**
Particular Items or Information, Disclosure of
Telecommunications
Validity

The Stored Communications Act (SCA) did not violate defendants' due process rights to meaningfully prepare and present a defense to the charges against them, in prohibiting pretrial disclosure of murder victim's Internet social network account contents for purposes of defendants' investigation of the prosecution's case, even though the prosecution had obtained access to at least some of the contents of the account pursuant to a search warrant. U.S. Const. Amend. 5; 18 U.S.C.A. § 2701 et seq.

Cases that cite this headnote

[9] **Constitutional Law**
Presumptions and Construction as to Constitutionality
Constitutional Law
Clearly, positively, or unmistakably unconstitutional

The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.

Cases that cite this headnote

[10] **Constitutional Law**
Creation and Definition of Offense

In the due process context, a defendant challenging the constitutionality of a statute must show that the statute offends some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental, where "fundamental" principles of justice are those which lie at the base of the people's civil and political institutions and which define the community's sense of fair play and decency. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

[11] **Constitutional Law**
Evidence

The due process clause of the federal Constitution requires the prosecution to disclose to the defense evidence in its possession that is favorable to the accused and material to the issues of guilt or punishment. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

[12] **Constitutional Law**
Disclosure and Discovery

Because the concern of the due process clause is the right of the defendant to a fair trial, the focus of the due process reciprocity inquiry into "the balance of forces" between the accuseds and their accuser in discovery is whether any lack of reciprocity interferes with the defendant's ability to secure a fair trial, and thus mere mechanical repetition of the word "reciprocity" is not enough to show that a defendant's right to a fair hearing has been violated. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

[13] **Witnesses**
Subpoena duces tecum

A criminal defendant's issuance of a subpoena duces tecum under the Penal Code does not entitle the defendant on whose behalf the subpoena is issued to obtain access to the subpoenaed records until a judicial determination has been made that the person is legally entitled to receive them. Cal. Penal Code § 1326.

See 4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Illegally Obtained Evidence, § 419.

Cases that cite this headnote

West Codenotes

Limitation Recognized
18 U.S.C.A. § 2703(b), (d).

Superior Court of the City and County of San Francisco, Nos. 13035657 and ***445** 13035658, Bruce E. Chan, Judge. (Super. Ct. Nos. 13035657, 13035658)

Attorneys and Law Firms

Perkins Coie, James G. Snell, Palo Alto and Sunita Bali, San Francisco, for Petitioners.

No appearance for Respondent.

Jose Pericles Umali, San Francisco, for Real Party in Interest Derrick D. Hunter.

Susan Kaplan and Janelle E. Caywood, San Francisco, for Real Party in Interest Lee Sullivan.

Jeff Adachi, Public Defender (San Francisco), Matt Gonzalez, Chief Attorney, and Dorothy Bischoff, Deputy Public Defender, as Amicus Curiae on behalf of Respondent and Real Parties in Interest.

Stephen P. Lipson, Public Defender (Ventura), and Michael C. McMahon, Chief Deputy Public Defender, for California Public Defenders Association and Public Defender of Ventura County as Amici Curiae on behalf of Real Parties in Interest.

Donald E. Landis, Jr., Assistant Public Defender (Monterey); Law Offices of J.T. Philipsborn and John T. Philipsborn, San Francisco, for California Attorneys for Criminal Justice as Amicus Curiae on behalf of Real Parties in Interest.

Opinion

BRUINIERS, J.

Use of social media, in its myriad of forms, has become ubiquitous in our society. Petitioners Facebook, Inc. (Facebook), Instagram, LLC (Instagram), and Twitter, Inc. (Twitter) each provide digital platforms on which users may post communications, commentary, photographs, video clips, or other items the user may wish to share within a social network. Evidence gathered from social media is becoming equally ubiquitous in our courtrooms. Real parties in interest Derrick Hunter and Lee Sullivan (Defendants) were indicted, and await trial, on murder, weapons, and gang-related charges stemming from a drive-by shooting. Each of the Defendants served a subpoena duces tecum on one or more of the petitioners seeking both public and private content from user accounts of the murder victim and a witness.

Petitioners moved to quash the subpoenas, objecting under the federal Stored Communications Act (SCA or Act) (§ 18 U.S.C. § 2701 et seq.)[1] to the compelled disclosure of the content of their users' electronic communications. Section 2702(a) provides that electronic communication services "shall not knowingly divulge" the contents of a user communication to anyone, with limited exceptions (§ 2702(b)). Defendants responded that the requested information is necessary to properly defend against the

pending charges, and that any statutory privacy protections afforded a social media user must yield to a criminal defendant's constitutional rights to due process, presentation of a complete defense, and effective assistance of counsel. [2]

The trial court denied petitioners' motions to quash and ordered petitioners to produce responsive material for in camera review. Petitioners filed the instant petition for writ of mandate and/or prohibition in this court. We issued an order staying the production order and requested opposition. After consideration of Defendants' answer, and petitioners' reply thereto, we denied Defendants' request to dissolve the ***446** temporary stay and issued an order requiring the respondent superior court to show cause why the relief requested by petitioners should not be granted. We now grant the petition and direct the trial court to issue an order quashing the subpoenas.

I. F ACTUAL CONTEXT AND PROCEDURAL HISTORY [3]

On June 24, 2013, Jaquan Rice, Jr., was killed and B.K., a minor, was seriously injured in a drive-by shooting in the Bayview District of San Francisco. The vehicle used in the shooting was identified by surveillance video. While of poor quality, the video depicts one individual shooting a handgun from the rear passenger window on the driver's side. A second individual is seen exiting the rear passenger-side door and shooting from behind the rear of the vehicle with a handgun with a large attached magazine. The driver of the vehicle was not visible, but witnesses indicated that a woman was driving. Within minutes of the shooting, prosecution witness Renesha Lee was stopped driving the vehicle. She was the sole occupant.

Hunter's 14–year–old brother was identified by several eyewitness as one of the shooters, and he confessed to the shooting when questioned by police. [4] 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.

Lee is Sullivan's former girlfriend. Lee gave varying accounts of the events of June 24, 2013, but ultimately told police that Defendants and Hunter's brother borrowed her car and took her home prior to the shooting.

In presenting the case to the grand jury, the prosecution contended that Defendants and Hunter's brother were members of Big Block, a criminal street gang, and that Rice was killed because he was a member of West Mob, a rival gang, and because Rice had publicly threatened Hunter's brother. In testimony before the grand jury, Inspector Leonard Broberg, a gang expert from the San Francisco Police Department Gang Task Force, opined that the murder and attempted murder were committed for the benefit of Big Block. Broberg testified 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, Vine ... [.] [¶] ... They will disrespect each other in cyberspace." Broberg 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. In a subsequent declaration, Broberg averred that he "rel[ies] heavily on records from social media providers such as Facebook, Instagram, and Twitter to investigate and prosecute alleged gang members for gang crime." Broberg said that he regularly relied on social media records in forming an opinion whether a particular ***447** crime is gang related. Broberg 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.

Defendants were indicted and stand charged with, inter alia, the murder of Rice and the attempted murder of B.K. (Pen.Code, §§ 187, 664). Gang and firearm enhancements are alleged as to both Defendants in the indictment. (*Id.*, §§ 186.22, subd. (b)(1), 12022, subd. (a), 12022.53, subds. (d) & (e)(1).)

Sullivan's counsel served subpoenas duces tecum (Pen.Code, § 1326, subd. (b)) on Facebook, Instagram, and Twitter, seeking records from the social media accounts of Rice and Lee. As to Facebook, the subpoena seeks "[a]ny 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. As to Instagram, the subpoena seeks "[a]ny and all public and private content," including, but "not limited to user information, associated email addresses, photographs, videos, private messages, activity logs, posts, location data, and comments," as well as "data deleted by the account holder" associated with accounts belonging to Rice and Lee. Sullivan's subpoena to Twitter seeks similar information as to Lee only. Hunter's subpoena to Twitter seeks a subset of that information for "all accounts" registered to Lee. Sullivan's subpoenas also seek the identity of the custodian of records for petitioners who could authenticate the requested records.

Petitioners moved to quash the subpoenas, arguing that disclosure of the information sought was barred by the SCA. 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. 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 Lee was motivated by jealous rage over Sullivan's involvement with other women, and that Lee had repeatedly threatened others with violence. Sullivan cited examples of postings on what he said was Lee's Twitter account that included a photograph of Lee holding a gun and making specific threats. 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 Broberg. Sullivan cited Broberg'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."

Hearings on the motions to quash were held on January 7 and 22, 2015. The trial court denied petitioners' motions to quash, and ordered petitioners to produce responsive material for an in camera review by February 27. [5] Petitioners filed a petition for writ of mandate in this court contending that the trial court abused its discretion in denying the motion to quash, and ***448** seeking a stay of the order to produce the requested materials. On February 26, we stayed the production order pending consideration of the petition and requested opposition. Sullivan submitted an answer, in which Hunter joined. On March 30, we issued an order to show cause to the respondent superior court why the relief requested in the petition should not be granted, and we declined Defendants' request to dissolve the stay. Sullivan filed a return to the order to show cause, in which Hunter joined, and to which petitioners filed a reply. [6]

II. DISCUSSION

The issues of statutory interpretation and constitutional challenges presented are purely ones of law. We therefore exercise de novo review and accord no deference to the trial court's ruling. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 632, 92 Cal.Rptr.2d 115.)

A. *Petitioners*

Petitioners operate social networking sites. Social network sites are Web-based services that allow individuals to create a public profile, create a list of users with whom to share connections, and view their list of connections and those made by others within the system. (Boyd & Ellison, *Social Network Sites: Definition, History, and Scholarship* (2008) 13 J. of Computer–Mediated Comm. 210, 211.)

Facebook was founded in 2004 and is an online social networking service. After registering to use the site, users can create a user profile, add other users as "friends," exchange messages, post status updates and photos, share videos and receive notifications when others update their profiles. As of June 2015, it claimed 968 million daily active users, and 1.49 billion monthly active users. (Facebook, *Company Info* < https://newsroom.fb.com/company-info/> [as of Sept. 8, 2015].) Instagram was launched in 2010, and is an online mobile photo-sharing, video-sharing and social networking service that enables its users to take pictures and videos, and share them on other social networking platforms. It reports 300 million monthly active users, posting an average of 70 million photographs per day, and over 30 billion photographs shared on its site. (Instagram, *Our Story* < https://instagram.com/press/> [as of Sept. 8, 2015].) Twitter was created in 2006 and is a public social networking website where users can write and respond to short messages called "tweets." Registered users can read and post tweets, but unregistered users can only read them. Twitter has its own integrated photo-sharing service that enables users to upload a photo and attach it to a tweet. Twitter messages are public, but users can also send private messages. Twitter reports that, as of June 2015, it had more than 500 million tweets sent per day and more than 316 million monthly active users. (Twitter,

Company < https://about.twitter.com/company> [as of Sept. 8, 2015].)

B. *The SCA*

The SCA is a part of the Electronic Communications Privacy Act (Pub.L. No. 99–508 (Oct. 21, 1986) 100 Stat. 1860). (See Stuckey & Ellis, Internet and Online Law (2015) § 5.02[4], p. 5–18.1 (rel.# 37).) "The [Electronic Communications] Privacy Act creates a zone of privacy to protect ***449** internet subscribers from having their personal information wrongfully used and publicly disclosed by 'unauthorized private parties.' " (*In re Subpoena Duces Tecum to AOL, LLC* (E.D.Va.2008) 550 F.Supp.2d 606, 610.) Congress's intention in enacting the SCA was to protect from disclosure private, personal information that happens to be stored electronically. (*AOL,* at p. 610, citing Sen.Rep. No. 99–541, p. 3 (1986), reprinted in 1986 U.S.Code Cong. & Admin. News, pp. 3555, 3557.)

"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....' (... § 2702(a)(1).) 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).)" (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1440, 44 Cal.Rptr.3d 72 (*O'Grady*).) 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, [citation], the Act protects users whose electronic communications are in electronic storage with an [Internet Service Provider] or other electronic communications facility." (*Theofel v. Farey–Jones* (9th Cir. 2004) 359 F.3d 1066, 1072–1073.) It is undisputed that the materials Defendants seek here are subject to the SCA's protections.

"The SCA enumerates several exceptions to the rule that service providers may not disclose the contents of stored messages. Among the disclosures authorized are those that are incidental to the provision of the intended service (see ... § 2702(b)(1), (4), (5)); incidental to the protection of the rights or property of the service provider (... § 2702(b)(5)); made with the consent of a party to the communication or, in some cases, the consent of the subscriber (see ... § 2702(b)(3)); related to child abuse (... § 2702(b)(6)); made to public agents or entities under certain conditions (... § 2702(b)(7), (8)); related to authorized wiretaps (... §§ 2702(b)(2), 2517, 2511(2)(a)(ii)); or made in compliance with certain criminal or administrative subpoenas issued in compliance with federal procedures (... §§ 2702(b)(2), 2703)." (*O'Grady, supra,* 139 Cal.App.4th at p. 1441, 44 Cal.Rptr.3d 72.) " 'All other disclosures—including disclosures of content pursuant to a third party subpoena in civil litigation—are prohibited.' " (*Id.* at p. 1443, fn. 10, 44 Cal.Rptr.3d 72; Stuckey & Ellis, Internet and Online Law, *supra,* § 5.02[4] [b], p. 5–19 (rel.# 37).)

In *O'Grady,* Apple Computer sought and obtained authority from the trial court, inter alia, to subpoena information from an e-mail service provider for a Web site publisher in order to identify the source of unauthorized publication of Apple's confidential product information. The trial court denied the provider's request for a protective order. (*O'Grady, supra,* 139 Cal.App.4th at p. 1431, 44 Cal.Rptr.3d 72.) Construing the absence of any exception for civil discovery subpoenas in the text of the statute as intentional, the Sixth District reversed and held that the subpoena to the e-mail service provider "cannot be enforced consistent with the plain terms of the [SCA]." (*O'Grady,* at pp. 1432, 1447, 44 Cal.Rptr.3d 72.) Federal decisions are ***450** in accord. (See *Mintz v. Mark Bartelstein & Associates, Inc.* (C.D.Cal.2012) 885 F.Supp.2d 987, 991–992 ["[t]he SCA does not contain an exception for civil discovery subpoenas"]; *Crispin v. Christian Audigier, Inc.* (C.D.Cal.2010) 717 F.Supp.2d 965, 976 [same]; *In re Subpoena Duces Tecum to AOL, LLC, supra,* 550 F.Supp.2d at p. 611 ["the clear and unambiguous language of § 2702 ... does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas"]; *Flagg v. City of Detroit* (E.D.Mich.2008) 252 F.R.D. 346, 350 ["§ 2702 ... lacks any language that explicitly authorizes a service provider to divulge the contents of a communication pursuant to a subpoena or court order"]; *Viacom Intern. Inc. v. Youtube Inc.* (S.D.N.Y.2008) 253 F.R.D. 256, 264 ["§ 2702 contains no exception for disclosure of [private videos and data revealing their contents] pursuant to civil discovery requests"].)

In the criminal context, the SCA provides for 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).)[7] Disclosure of the communication content may also be compelled by a "governmental entity," with notice to the subscriber by (1) "administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena" (§ 2703(b)(1)(B)(i)); or (2) a court order for disclosure "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation" (§ 2703(d), (b)(1)(B)(ii)). Several courts have recognized that users have a Fourth Amendment reasonable expectation of privacy in electronic communications " 'that are stored with, or sent or received through, a commercial [Internet Service Provider]' " and that a warrant, based on probable cause, may be required to obtain communication content. (*U.S. v. Warshak* (6th Cir. 2010) 631 F.3d 266, 288 [holding the SCA unconstitutional to the extent that it would permit the government to obtain the content of the defendant's e-mails without a warrant]; see *U.S. v. Hanna* (6th Cir. 2011) 661 F.3d 271, 287 & fn. 4; *U.S. v. Lucas* (6th Cir. 2011) 640 F.3d 168, 178.) "As some forms of communication begin to diminish, the Fourth Amendment must recognize and protect nascent ones that arise." (*Warshak,* at p. 286.)

[1] 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." (*Negro v. Superior Court* (2014) 230 Cal.App.4th 879, 889, 179 Cal.Rptr.3d 215; *id.* at p. 888, 179 Cal.Rptr.3d 215; see *O'Grady, supra,* 139 Cal.App.4th at p. 1451, 44 Cal.Rptr.3d 72 [enforcing civil subpoenas to obtain identities of sources of published content from e-mail service providers would violate SCA and offend the principle of federal supremacy].)

Defendants insist that, notwithstanding constraints of the SCA, the subpoenaed materials are necessary to ensure their ***451** right to present a complete defense to the charges against them, and that their Fifth Amendment guarantee of due process and Sixth Amendment right to compulsory process are implicated. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 [federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense].) Moreover, they argue that their Sixth Amendment rights to effective assistance of counsel and confrontation of the witnesses against them require that they be given the opportunity to conduct reasonable pretrial investigation of the prosecution's case. Defendants, and amici curiae, assert that the SCA is unconstitutional to the extent that it precludes access by a criminal defendant to information potentially material to his or her defense. We think that Defendants overstate the extent of constitutional support for their claims.

C. *Criminal Defense Discovery*

[2] **[3]** "There 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....' " (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30; see *United States v. Ruiz* (2002) 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586; *Wardius v. Oregon* (1973) 412 U.S. 470, 474, 93 S.Ct. 2208, 37 L.Ed.2d 82.) 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, 95 Cal.Rptr.2d 377, 997 P.2d 1044.)

1. *Sixth Amendment*

[4] The Sixth Amendment to the United States Constitution protects both the right of confrontation and the right of compulsory process: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." Both clauses are binding on the States under the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 403–406, 85 S.Ct. 1065, 13 L.Ed.2d 923 [confrontation clause]; *Washington v. Texas* (1967) 388 U.S. 14, 17–19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 [compulsory process clause].)

a. *Confrontation/Cross–Examination*

[5] "The Confrontation clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51, 107 S.Ct. 989, 94 L.Ed.2d 40 (plur. opn. Powell, J.) (*Ritchie*), citing *Delaware v. Fensterer* (1985) 474 U.S. 15, 18–19, 106 S.Ct. 292, 88 L.Ed.2d 15.)

In *Davis v. Alaska* (1974) 415 U.S. 308, 320–321, 94 S.Ct. 1105, 39 L.Ed.2d 347 (*Davis*), the Supreme Court found a violation of the confrontation clause in a trial court's refusal to allow the defendant to impeach at trial the credibility of a key prosecution witness with the witness's probationary status resulting from a juvenile delinquency adjudication. The trial court granted a prosecution protective order, precluding cross-examination concerning the witness's juvenile record, on the basis that the records were confidential under Alaska law. (*Id.* at p. 311 & fns. 1, 2, 94 S.Ct. 1105 .) Noting that the "primary interest" secured by the right of confrontation is the right of cross-examination (*id.* at p. 315, 94 S.Ct. 1105), the Supreme Court found that the state's policy interest ***452** in protecting the confidentiality of a juvenile offender's record "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." (*Id.* at p. 320, 94 S.Ct. 1105.)

Subsequently, in *Ritchie,* the Supreme Court considered the application of *Davis* to *pretrial* discovery. While no majority consensus emerged concerning the proper application of the confrontation clause to the pretrial discovery issue presented, four justices expressed the view that "the right to confrontation is a *trial* right...." (*Ritchie, supra,* 480 U.S. at p. 52, 107 S.Ct. 989 (plur. opn. of Powell, J.); *People v. Hammon* (1997) 15 Cal.4th 1117, 1126, 65 Cal.Rptr.2d 1, 938 P.2d 986 (*Hammon*).) The defendant, Ritchie, was convicted of various sexual offenses with his minor daughter. Prior to trial, Ritchie attempted to subpoena confidential records from a state protective services agency which had investigated the abuse allegations. The agency refused to comply with the subpoena, claiming that the records were privileged under Pennsylvania law. Ritchie argued that he was entitled to information in the agency file because it might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. The trial judge declined to order production. (*Ritchie,* at pp. 43–45, 107 S.Ct. 989.) The high court of Pennsylvania concluded that "Ritchie, through his lawyer, [was] entitled to review the entire file to search for any useful evidence." (*Id.* at p. 46, 107 S.Ct. 989, fn.omitted.) Applying a due process analysis, the Supreme Court majority rejected the idea that a defendant's right to discover exculpatory evidence would include "unsupervised authority to search through the [agency] files." (*Ritchie, supra,* 480 U.S. at p. 59, 107 S.Ct. 989; see *id.* at pp. 58–61, 107 S.Ct. 989 [concluding in camera review of agency file sufficient to protect Ritchie's interests].)

A plurality of the Supreme Court also rejected the view that the trial court interfered with Ritchie's confrontation clause right of cross-examination by denying him pretrial access to information he contended was necessary to prepare his defense. (*Id.* at p. 51, 107 S.Ct. 989 (plur. opn. Powell, J.).) "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" and "[n]othing in the case law" supports the view that the confrontation clause creates "a constitutionally compelled rule of pretrial discovery." (*Id.* at p. 52, 107 S.Ct. 989.) The plurality found that Ritchie's due process rights were sufficiently protected by in camera review *at trial* of the confidential files to determine if they contained information material to his defense. [8] (*Id.* at pp. 53–54, 107 S.Ct. 989; see *Weatherford v. Bursey, supra,* 429 U.S. at pp. 547, 559, 97 S.Ct. 837 [no due process violation in prosecution's pretrial failure to reveal identity of undercover informant whose trial testimony was unfavorable to the defendant].)

Our own Supreme Court has repeatedly declined to recognize a Sixth Amendment right to defense pretrial discovery of otherwise privileged or confidential information. ***453** In *People v. Webb* (1993) 6 Cal.4th 494, 24 Cal.Rptr.2d 779, 862 P.2d 779, the defense subpoenaed psychiatric records of a witness in a capital murder case, arguing entitlement to any information in the records affecting the competence or credibility of the witness in order to " 'fairly cross-examine' " her. (*Id.* at p. 516, 24 Cal.Rptr.2d 779, 862 P.2d 779.) The trial court conducted in camera review of the records and provided limited disclosure. The defendant, citing *Ritchie,* contended that limited pretrial disclosure of the psychiatric records prejudicially undermined his right to cross-examine the witness effectively at trial. (*Webb,* at p. 517, 24 Cal.Rptr.2d 779, 862 P.2d 779.) The court refused to read *Ritchie* as broadly as defendant urged, and questioned whether the defendant had any constitutional right to examine the records at all, even if material, in light of the strong policy protecting a patient's treatment history. "Simply stated, it is not clear whether or to what extent the confrontation or compulsory process clauses of the Sixth Amendment grant pretrial discovery rights to the accused." (*Webb,* at pp. 517–518, 24 Cal.Rptr.2d 779, 862 P.2d 779.)

Our high court again considered the extent of pretrial defense discovery of otherwise privileged information in *Hammon, supra,* 15 Cal.4th 1117, 65 Cal.Rptr.2d 1, 938 P.2d 986. In that case, the defense served subpoenas 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 subpoenas. (*Id.* at pp. 1119–1121, 65 Cal.Rptr.2d 1, 938 P.2d 986.) Noting the lack of a majority consensus in *Ritchie* on the proper application of the confrontation clause, the *Hammon* court observed that "it is not at all clear 'whether or to what extent the confrontation or compulsory process clauses of the Sixth Amendment grant pretrial discovery rights to the accused.' " (*Hammon,* at p. 1126, 65 Cal.Rptr.2d 1, 938 P.2d 986.)

In declining to extend a defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information, our Supreme Court expressly overruled a series of intermediate appellate cases interpreting *Davis, supra,* 415 U.S. 308, 94 S.Ct. 1105, to require pretrial disclosure of privileged information when a defendant's need for the information outweighed the confidentiality interest. (*Hammon, supra,* 15 Cal.4th at p. 1123, 65 Cal.Rptr.2d 1, 938 P.2d 986.) The *Hammon* court found that *People v. Reber* (1986) 177 Cal.App.3d 523, 223 Cal.Rptr. 139 (permitting pretrial discovery of a complaining witness's psychotherapy records) and cases following that decision were "not correct." (*Hammon,* at p. 1123, 65 Cal.Rptr.2d 1, 938 P.2d 986.) "In authorizing disclosure before trial ... *Reber* went farther than *Davis* required, with insufficient justification." (*Hammon,* at p. 1123, 65 Cal.Rptr.2d 1, 938 P.2d 986.) "We do not ... see an adequate justification for taking such a long step in a direction the United States Supreme Court has not gone." (*Id.* at p. 1127, 65 Cal.Rptr.2d 1, 938 P.2d 986.) The high court recognized that *at trial,* a trial court might be called upon to balance a defendant's need for cross-examination and the policies supporting a statutory or constitutional privilege, but also noted that entertaining such requests pretrial—when the trial court would not typically have sufficient information to conduct the inquiry—presented a serious risk of unnecessary invasion of statutory privilege. (*Ibid.*)

In *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 99 Cal.Rptr.2d 149, 5 P.3d 203, the trial court issued protective orders in a jail homicide case, permitting the ***454** prosecution to withhold the names of witnesses, both pretrial and during testimony at trial. (*Id.* at pp. 1128–1130, 99 Cal.Rptr.2d 149, 5 P.3d 203.) The Supreme Court found the order valid to the extent it permitted *pretrial* nondisclosure of the witnesses' identities, rejecting the argument that nondisclosure violated the defendants' constitutional rights to due process of law and to confront the witnesses against them.[9] (*Id.* at pp. 1132, 1134–1136, 99 Cal.Rptr.2d 149, 5 P.3d 203; see *Weatherford v. Bursey, supra,* 429 U.S. at pp. 559–561, 97 S.Ct. 837 [no constitutional violation where prosecution surprised the defendant at trial by calling to the stand a previously undisclosed witness].) In *People v. Valdez* (2012) 55 Cal.4th 82, 144 Cal.Rptr.3d 865, 281 P.3d 924, our high court again approved a trial court order, issued pursuant to Penal Code section 1054.7,[10] delaying and limiting disclosure of the identities of prosecution witnesses to protect the safety of those witnesses. (*Valdez,* at pp. 101–105, 144 Cal.Rptr.3d 865, 281 P.3d 924.) The court again found no authority for any contention that "section 1054.7, insofar as it authorizes 'the denial of pretrial disclosure' based on concerns for witness safety, is 'unconstitutional under either the confrontation or the due process clause.' " (*Valdez,* at p. 106, 144 Cal.Rptr.3d 865, 281 P.3d 924; see *People v. Maciel* (2013) 57 Cal.4th 482, 506–510, 160 Cal.Rptr.3d 305, 304 P.3d 983 [rejecting similar claims by a different defendant regarding the same protective orders].)

[6] In sum, there is little, if any, support for Defendants' claim that the confrontation clause of the Sixth Amendment mandates disclosure of otherwise privileged information for purposes of a defendant's pretrial investigation of the prosecution's case.

b. *Compulsory Process*

[7] We find even less support for Defendants' contention that the compulsory process clause of the Sixth Amendment separately authorizes the trial court's order here. The Supreme Court "has had little occasion to discuss the contours of the Compulsory Process Clause." (*Ritchie, supra,* 480 U.S. at p. 55, 107 S.Ct. 989.) The cases provide that "at a minimum ... 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." (*Id.* at p. 56, 107 S.Ct. 989, italics added, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, *Cool v. United States* (1972) 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335, and *Washington v. Texas, supra,* 388 U.S. 14, 87 S.Ct. 1920.) The *Ritchie* majority concluded that "compulsory process provides no *greater* protections in this area than those afforded by due process," and that claims such as this are better evaluated "under the broader protections of the Due Process Clause of the Fourteenth Amendment"

addressing the fundamental fairness of trials. (*Ritchie,* at p. 56, 107 S.Ct. 989.)

***455** Our own Supreme Court has rejected a claim that a defendant was denied his Sixth Amendment right to effective counsel when he was denied access to an FBI database for use in cross-examination of a prosecution expert, allegedly thereby compromising his right to present a meaningful defense, a fair opportunity to be heard, and the constitutional right to reliable factfinding. (*People v. Prince* (2007) 40 Cal.4th 1179, 1233–1234, 57 Cal.Rptr.3d 543, 156 P.3d 1015.) Similar to Defendants' contentions here, Prince argued that lack of access to the database " 'depriv[ed] [him] of evidence clearly bearing on the credibility of key prosecution witnesses.' " (*Id.* at p. 1234, 57 Cal.Rptr.3d 543, 156 P.3d 1015.) Finding it unnecessary to address the claim on evidence in the record, the court nevertheless noted that "[t]o the extent defendant's claim concerns pretrial discovery and is based upon the confrontation or compulsory process clauses of the Sixth Amendment, it is on a weak footing. 'As we have previously observed, in light of the divided views of the justices of the Supreme Court ... it is not at all clear "whether or to what extent the confrontation or compulsory process clauses of the Sixth Amendment grant pretrial discovery rights to the accused." ' " (*Prince,* at p. 1234 & fn. 10, 57 Cal.Rptr.3d 543, 156 P.3d 1015; see *People v. Clark* (2011) 52 Cal.4th 856, 982–983, 131 Cal.Rptr.3d 225, 261 P.3d 243 [rejecting a claim that failure to disclose witness's misdemeanor conviction prior to guilt phase of capital trial deprived defendant of compulsory process and confrontation rights, and declining to "recognize a Sixth Amendment violation when a defendant is denied discovery that results in a significant impairment of his ability to investigate and cross-examine a witness"].)

2. Fifth Amendment and Due Process

[8] Defendants and amici curiae argue that failure to provide pretrial discovery would deny Defendants their due process rights to meaningfully prepare and present a defense to the charges against them. 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.

[9] **[10]** To prevail on a claim that a statute violates due process, a defendant "must carry a heavy burden. The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity. [Citations.] In the due process context, defendant must show that [the statute] offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*People v. Falsetta* (1999) 21 Cal.4th 903, 912–913, 89 Cal.Rptr.2d 847, 986 P.2d 182; see *Patterson v. New York* (1977) 432 U.S. 197, 201–202, 97 S.Ct. 2319, 53 L.Ed.2d 281.) Fundamental principles of justice are those " ' " 'which lie at the base of our civil and political institutions' [citation] and which define 'the community's sense of fair play and decency.' " ' " (*Falsetta,* at p. 913, 89 Cal.Rptr.2d 847, 986 P.2d 182, quoting *Dowling v. United States* (1990) 493 U.S. 342, 353, 110 S.Ct. 668, 107 L.Ed.2d 708.)

The observation of the United States Supreme Court that " '[t]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded....' " (*Wardius v. Oregon, supra,* 412 U.S. at p. 474, 93 S.Ct. 2208; *Weatherford v. Bursey, supra,* 429 U.S. at p. 559, 97 S.Ct. 837) has been repeated often by our own high court. (*People v. Williams* (2013) 58 Cal.4th 197, 259, 165 Cal.Rptr.3d 717, 315 P.3d 1; ***456** *People v. Maciel, supra,* 57 Cal.4th at p. 508, 160 Cal.Rptr.3d 305, 304 P.3d 983; *People v. Valdez, supra,* 55 Cal.4th at pp. 109–110, 144 Cal.Rptr.3d 865, 281 P.3d 924.) In *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 124 Cal.Rptr.2d 202, 52 P.3d 129, our Supreme Court rejected a due process challenge to Evidence Code section 1045, subdivision (b), limiting defense discovery of complaints of police officer misconduct to a five year window. The defendant argued that enforcement of the limitation would unduly infringe his right to a fair trial, and that information older than five years old might qualify as evidence favorable to the accused that is material to guilt or punishment under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (*Brady*). (*City of Los Angeles,* at p. 7, 124 Cal.Rptr.2d 202, 52 P.3d 129.) The court found no due process "fundamental principle of justice" implicated. (*Id.* at p. 12, 124 Cal.Rptr.2d 202, 52 P.3d 129.) The court has separately observed that *Brady* merely serves " 'to restrict the prosecution's ability to *suppress* evidence rather than to provide the accused a right to criminal discovery.' " (*People v. Morrison* (2004) 34 Cal.4th 698, 715, 21 Cal.Rptr.3d 682, 101 P.3d 568, italics added.)

D. Other Access to Information and Reciprocity

[11] As petitioners correctly note, Defendants are not wholly precluded from access to much of the information that they now seek by subpoena. The prosecution has obtained at least some of Rice's Facebook and Instagram

communications pursuant to search warrant, as authorized by the SCA.[11] Defendants do not suggest why they would not be entitled to receive copies of those communications, either as general criminal discovery required under Penal Code section 1054.1,[12] or as potentially ***457** exculpatory *Brady* material. (See *U.S. v. Pierce* (2d Cir. 2015) 785 F.3d 832, 841–842 [declining to address constitutional challenge to the SCA for failure to provide reciprocal discovery rights where defendant otherwise obtained material from witness's Facebook account, and dismissing as speculative the suggestion that additional relevant exculpatory material might have been in the account].) The due process clause of the federal Constitution requires the prosecution "to disclose to the defense evidence in its possession that is favorable to the accused and material to the issues of guilt or punishment." (*People v. Jenkins, supra,* 22 Cal.4th at p. 954, 95 Cal.Rptr.2d 377, 997 P.2d 1044.)

[12] Defendants respond 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 the SCA establishes "a one-sided, arbitrary, and unconstitutional preference that the government, but not the defense, is entitled to access to relevant electronic evidence." They assert that such a disparity in treatment is prohibited by *Wardius v. Oregon, supra,* 412 U.S. 470, 93 S.Ct. 2208. In *Wardius,* the Unites States Supreme Court struck down a state 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. (*Id.* at pp. 471–472 & fn. 3, 93 S.Ct. 2208 .) "[A]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded [citation], it does speak to the balance of forces between the accused and his accuser." (*Id.* at p. 474, 93 S.Ct. 2208.) The court held that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." (*Id.* at p. 475, 93 S.Ct. 2208.) The discovery in *Wardius,* however, did not involve disclosure of privileged or confidential information, and a variety of investigative and evidence collection procedures are routinely available to governmental agencies that are not provided to a criminal defendant. The prosecution, for example, can obtain search warrants and compel attendance of witnesses before a grand jury. Because the concern of the due process clause is "the right of the defendant to a fair trial," the focus of the reciprocity inquiry under the due process clause is whether any lack of reciprocity " 'interferes with the defendant's ability to secure a fair trial.' " (*People v. Hansel* (1992) 1 Cal.4th 1211, 1221, 4 Cal.Rptr.2d 888, 824 P.2d 694.) Thus, "mere mechanical repetition of the word 'reciprocity' is not enough to show that [a defendant's] right to a fair hearing [has been] violated." (*Ibid.* fn. omitted.)

In *People v. Valdez, supra,* 55 Cal.4th 82, 144 Cal.Rptr.3d 865, 281 P.3d 924, our Supreme Court rejected a defendant's challenge to protective orders entered in a gang-related homicide case, delaying disclosure of the identity of prosecution witnesses and permitting the prosecution to attend and transcribe defense interviews of prosecution witnesses. (*Id.* at pp. 93–94, 119–120, 144 Cal.Rptr.3d 865, 281 P.3d 924.) Valdez challenged the order authorizing prosecution attendance at witness interviews on due process grounds, alleging that, by granting this discovery to the prosecution " 'but not providing [him] with a reciprocal right, the trial court upset the "balance of forces between the accused and [the] accuser," in violation of [his] right to due process under the Fourteenth Amendment.' " (*Id.* at p. 120, 144 Cal.Rptr.3d 865, 281 P.3d 924.) The Supreme ***458** Court disagreed. "The inquiry is not whether 'the procedures available to the defendant ... precisely mirror[ed] those available to the prosecution,' but whether the defendant received 'a full and fair opportunity to present' a defense and whether the rules at issue 'tilt[ed] the balance toward the state to any significant degree.' [Citation.] ... [T]o the extent there was any nonreciprocity, the prosecution made 'a strong showing of state interests' to justify the trial court's order." (*Id.* at pp. 120–121, 144 Cal.Rptr.3d 865, 281 P.3d 924.)

Defendants insist the SCA must yield to their statutory right to obtain records necessary to investigate a case and present a compete defense through use of a criminal subpoena duces tecum. (Pen.Code, § 1326.) They urge 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.

[13] Defendants are correct that issuance of a subpoena duces tecum pursuant to Penal Code section 1326 does not "entitle" the person on whose behalf it is issued to obtain access to the subpoenaed records "until a judicial determination has been made that the person is legally entitled to receive them." (*People v. Blair* (1979) 25 Cal.3d 640, 651, 159 Cal.Rptr. 818, 602 P.2d 738.) The difficulty presented in the pretrial setting, however, is that no prior notice is required to the individual whose records are subpoenaed (cf. Code Civ. Proc., § 1985.3, subd. (b)), and the existence of

the responsive documents may not even be disclosed to the prosecution (see Pen.Code, § 1326, subd. (c)).[13] 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" (*ibid.*) 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, 116 Cal.Rptr.3d 217, 239 P.3d 670; *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 750, 76 Cal.Rptr.3d 276, 182 P.3d 600), 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. As noted *ante,* our Supreme Court has previously found "persuasive reason[s]" not to permit pretrial disclosure of privileged or confidential information, and observed that there was "risk inherent in entertaining such pretrial requests." (*Hammon, supra,* 15 Cal.4th at p. 1127, 65 Cal.Rptr.2d 1, 938 P.2d 986.) "When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial ***459** court may be called upon, as in [*Davis, supra,* 415 U.S. 308, 94 S.Ct. 1105] to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. [Citation.] 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, 65 Cal.Rptr.2d 1, 938 P.2d 986.) 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, 65 Cal.Rptr.2d 1, 938 P.2d 986.)

Moreover, accepting Defendants' argument would lead to an anomalous result. In order to obtain third party confidential information protected by the SCA, a governmental entity would have to obtain a search warrant, authorized in advance by a magistrate on a sufficient showing of probable cause (§ 2703(a), (b)(1)(A)),[14] or provide notice to the subscriber in order for an administrative or trial subpoena to issue (§ 2703(b)(1)(B)(i)). However, a criminal defendant could procure such confidential information simply by serving an ex parte subpoena duces tecum with no required notice to the subscriber or prosecuting authority—and which may, or may not, be subject to meaningful judicial review.[15]

In sum, we find no support for the trial court's order for pretrial production of information otherwise subject to the SCA's protections. 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*. Accordingly we grant the writ and direct that the trial court vacate its order.

We emphasize that our ruling is limited to the pretrial context in which the trial court's order was made.[16] Nothing in this ***460** opinion would preclude Defendants from seeking at trial the production of the materials sought here (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.[17]

III. DISPOSITION

Let a peremptory writ of mandate issue directing the trial court to vacate its January 22, 2015 order denying petitioners' motion to quash the subpoenas for the social media records of Jaquan Rice, Jr., and Renesha Lee, and to thereafter enter a new and different order granting petitioners' motion to quash. The previously issued stay shall dissolve upon issuance of the remittitur. (Cal. Rules of Court, rule 8.490(d).)

WE CONCUR:

JONES, P.J.

MARGULIES, J.*

All Citations

192 Cal.Rptr.3d 443, 15 Cal. Daily Op. Serv. 10,127, 2015 Daily Journal D.A.R. 10,405

Footnotes

1 Undesignated statutory references are to title 18 of the United States Code.

2 As noted *post,* the record before us is not clear that Hunter joined in opposition to the motions to quash below, but he has formally joined in Sullivan's arguments in this court. For simplicity's sake, we refer to opposition below as that of the Defendants' collectively.

3 We recite the facts as set forth by Defendants' opposition in the trial court, and we accept those facts as true for purposes of the petition unless specifically controverted by petitioners.

4 Hunter's brother was tried in juvenile court and found guilty of Rice's murder and the attempted murder of B.K.

5 Hunter apparently did not oppose Twitter's motion to quash his subpoena, but the trial court nonetheless denied that motion on the same basis as its denial of the motions to quash Sullivan's subpoenas.

6 We subsequently granted application of the Public Defender of the City and County of San Francisco to appear as amicus curiae on behalf of the respondent trial court and Defendants. We also granted the applications of California Attorneys for Criminal Justice, the California Public Defenders Association, and the Public Defender of Ventura County to appear as amici curiae on behalf of Defendants.

7 In the instant case, the People obtained and served search warrants for several of Rice's social media communications.

8 Three justices indicated that, in some circumstances, denial of a defendant's *pretrial* access to information that is needed for effective cross-examination could violate the confrontation clause. (*Ritchie, supra,* 480 U.S. at pp. 61–66, 107 S.Ct. 989 (conc. opn. of Blackmun, J.); *id.* at pp. 66–72, 107 S.Ct. 989 (dis. opn. of Brennan, J.).) The two remaining justices expressed no view on this issue. (See *id.* at pp. 72–78, 107 S.Ct. 989 (dis. opn. of Stevens, J. [concluding that the writ of certiorari should have been dismissed for want of a final judgment].).)

9 As we discuss *post,* the court in *Hammon, supra,* 15 Cal.4th 1117, 65 Cal.Rptr.2d 1, 938 P.2d 986, suggested a different result regarding nondisclosure at trial.

10 Penal Code section 1054.7 permits disclosure of discovery information otherwise required to be provided to a criminal defendant at least 30 days before trial to be "denied, restricted, or deferred" for "good cause," limited to "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement."

11 Defendants argued in the trial court, and contend here, that production of subscriber information, including complete social media profiles for Lee and Rice, is necessary to permit authentication of relevant postings already in their possession. Petitioners assert that the subscriber data is unnecessary for this purpose since actual postings may be self-authenticating. (See *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435, 135 Cal.Rptr.3d 628 [printouts of MySpace Web pages sufficiently authenticated by personal photographs, communications, and other details confirming that the pages belonged to defendant]; see also Evid.Code, §§ 1410 [no restriction on "the means by which a writing may be authenticated"], 1421 [authenticity may be established by the contents of the writing]; Joseph, *Authentication: What Every Judge and Lawyer Needs to Know About Electronic Evidence* (Autumn 2015) 99 Judicature 49, 51–53.) Petitioners further disclaim any ability to actually confirm the identity of the person or persons making a posting on a user account. Defendants and amici curiae point to the difficulties encountered at the juvenile court trial of Hunter's brother when Lee refused to acknowledge what Defendants believe to be postings on her Twitter account that included a photograph of Lee holding a gun and making threats of violence to others. This conflict merely serves to bolster our conclusion that the necessity of disclosure is best determined by a trial judge in the context of the evidence presented at trial.

12 Penal Code section 1054.1 provides, "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. (b) Statements of all defendants. (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. (e) Any exculpatory evidence. (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

13 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."

14 A very recent federal decision of the Fourth Circuit has held that a law enforcement agency may obtain at least some data protected by the SCA (in that instance, cell site location information) only by a search warrant, supported by a showing of probable cause, and may not obtain the information under the lesser reasonable suspicion standard required for a court order under section 2703(d). (*United States v. Graham* (4th Cir.2015) 796 F.3d 332[" 'specific and articulable facts showing that there are reasonable grounds to believe that ... the records or other information sought ... are relevant and material to an ongoing criminal investigation' "].)

15 At least one court has also noted the severe administrative burdens on service providers that compliance with routine subpoenas would impose, "interfering with the manifest congressional intent to encourage development and use of digital communications." (*O'Grady, supra,* 139 Cal.App.4th at p. 1446, 44 Cal.Rptr.3d 72.) The burdens imposed would be substantially greater if service providers 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. (See Judicial Council of Cal., Rep. on Court Statistics: Statewide Caseload Trends 2003–2004 Through 2012–2013 (2014) pp. 47–48 < http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf> [as of Sept. 8, 2015].) The burdens imposed on our courts, already struggling with constrained resources, in conducting hearings that would ultimately be unnecessary would be equally severe.

16 At oral argument, Sullivan's counsel represented that the proposed in camera hearing contemplated in the trial court's order would have occurred only one day before trial, and so should not be considered a "pretrial" proceeding. 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, 65 Cal.Rptr.2d 1, 938 P.2d 986.)

17 We find no case that has yet addressed whether a criminal defendant may ask the court to issue a "trial subpoena" under § 2703(b)(1)(B)(i) for production of information under the SCA. The statute, on its face, limits production to a subpoena issued by "a governmental entity," and at least one federal trial court has held that neither the court nor the federal public defender are governmental entities under the SCA. (*U.S. v. Amawi* (N.D.Ohio 2008) 552 F.Supp.2d 679, 680 ["court order" for disclosure sought under section 2703(d)]; see *F.T.C. v. Netscape Communications Corp.* (N.D.Cal.2000) 196 F.R.D. 559, 561 [pretrial subpoena duces tecum not a "trial subpoena" under § 2703(c)(1)(C) and Federal Rules of Civil Procedure].) Although the issue is not now before us, we question whether such a limitation would be constitutional in light of the requirements of *Davis* and *Hammon.* Defendants may, in any event, directly subpoena the records they seek for production to the trial court pursuant to Penal Code section 1326.

* Associate Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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