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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO, Respondent. LANCE TOUCHSTONE, Real Party in Interest.	No. S245203

SUPREME COURT
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INTERVENOR'S SUPPLEMENTAL BRIEF ADDRESSING THE UNDERLYING SUBPOENA AND THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH

Fourth Appellate District, Division One, Case No. D072171
San Diego County Superior Court, Case No. SCD268262
The Honorable Kenneth K. So, Judge

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ARGUMENT

I.

THE SUBPOENA LACKS GOOD CAUSE: TOUCHSTONE HAS TAKEN THE VICTIM'S FACEBOOK POSTS OUT OF CONTEXT IN ORDER TO JUSTIFY THE PRODUCTION OF PRIVATE FACEBOOK CONTENT

The victim in this case has objected to the issuance of a subpoena to Facebook for his private content. Additionally, Facebook has filed a motion to quash the subpoena. Thus, Touchstone must establish good cause for the need to access the victim's private Facebook content. (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074–1075.) Having reviewed Touchstone's unsealed declaration and exhibits, it is evident that the subpoena is unsupported by good cause.

Key passages from the victim's public Facebook wall cited by defense counsel in her April 21, 2017 declaration (hereafter "declaration") are taken out of context. First, defense counsel states that, "While hospitalized with his injuries, on August 30, 2016, Mr. Renteria specifically implored his friends to contact him via his Facebook page in order to communicate with him while hospitalized." (Declaration, p. 2.) However, the Facebook post states, " . . . I do not have access to my private messages while in the hospital. You must call me or post on my wall if you want to communicate." (Declaration, Exhibit E.) Thus, this post suggests that the victim's private Facebook content would be *devoid* of any content during the victim's hospital stay, which began immediately after the shooting. In reviewing each exhibit, defense counsel has failed to show that there is a likelihood that Facebook possesses *any* relevant private content, or that the victim used private messaging to discuss matters relevant to this case, at all.

Indeed, the only showing that the victim communicates privately on Facebook is when defense counsel states, "Since the shooting incident on August 8, 2017, Mr. Renteria has sent at least one personal message to a

member of Mr. Touchstone's family via the Facebook messaging system." (Declaration, p. 3.) Defense counsel does not state which family member the victim messaged, the specific date the message was sent, or a description of the content. This is simply not enough to show that the production of private Facebook content would reveal any relevant or exculpatory information.

Next, defense counsel states "On February 9, 2017, Mr. Renteria posted to his Facebook page that his food stamps are cut off and he is not getting assistance from 'the state victims assistance program,' stating that 'pretty soon Ill [sp] be forced to rob you at gunpoint to survive.' " (Declaration, p. 3.) In reviewing the post in its entirety, this statement was made in jest and taken out of context by defense counsel. The full post reads:

> Hi Neighbors, I am the guy that got shot back in August. My food stamps are cut off and I wont be getting any assistance from the state victims assistance program or any program. pretty soon Ill be forced to rob you at gun point to survive, ..
>
> OR if you need some welding and fabrication work please let me know! My nerve damage is extensive and I cant lift more than ten pounds but if you have a project you need done I will find a way!
>
> thank you-!..

(Declaration, Exhibit G.) The post is then followed by a link to the victim's welding and fabrication business. This post is an obvious advertisement for the victim's business, and the reference to robbing others to survive was an attempt at humor. This post does not show any propensity for violence and does not justify the production of private Facebook content.

Citing another Facebook post, defense counsel writes, "On February 11, 2017, Mr. Renteria posted to his Facebook page, asking friends for a place for 'me and my gf' to stay in LA; someone asked if he was talking

about 'the girl that tried to have you killed,' and Mr. Renteria replied, 'no I was just there to dump her body.' " (Declaration, p. 3.) However, defense counsel failed to quote the entire post, in which the sentence ends with "lol," an acronym for "laugh out loud." (Declaration, Exhibit H.) This post is yet is another attempt at humor by the victim. Rather than expressing concern over the reference to "dumping the body," a Facebook "friend" of the victim replied, "Haha jealousy? Don't flatter yourself ',: I was just concerned. I can stand you enough to say I wouldn't want to hear that you got shot again lol." (Declaration, Exhibit H.) If the above-described posts can be considered character evidence at all, it is only for the propensity of the victim to engage in dark humor.

Defense counsel further states, "On February 23, 2017, Mr. Renteria posted a lengthy comment to his page, describing 'spend[ing] the whole day in cold sweats and periodic moments of absolute rage . . . periodically my consciousness drifts towards extremely violent thoughts of the people around me . . . I have to fight the urge to kill all day . . . Eventually the hitlist [sp] becomes a book, and that gives me even more anxiety because I might not be able to get them all!' " (Declaration, p. 3.) Defense counsel cites a similar, subsequent post: "On March 17, 201 7, Mr. Renteria posted another lengthy comment to his page, a narrative that includes the following: 'I find myself in interesting conversations with myself while I'm on drugs . . . I better rob someone to get my cash, good thing I am a criminal now and can have a gun, no laws holding me back!' " (Declaration, p. 3.)

While these passages come closer to actual descriptions of violence, when read in their entirety, are larger expressions of the victim's frustrations rather than direct threats. The victim expresses frustration regarding his doctor's inability to continue to prescribe opioids, his depression and post traumatic stress disorder (presumably as a result of

Touchstone shooting him), and other effects of his discontinued use of cannabis. (Declaration, Exhibit I.)

The most revealing statement in this passage is the victim's citation to www.rosicrucian.com, a website for "The Rosicrucian Fellowship," a group who studies Christian mystic philosophy. (Declaration, Exhibit I.) This link provides the context for the victim's stream-of-consciousness passages and negates the argument that these writings are direct threats or expressions of actual violence. While it is possible that these passages are evidence of the victim's character trait for grandiosity, they have no bearing on his character for violence or dishonesty and are otherwise irrelevant to this case.

Lastly, in reviewing the preliminary hearing transcript, there is no evidence contained in the victim's public Facebook posts which suggests any material inconsistencies that he could be impeached with. Neither do any of the public posts provide any exculpatory information which could exonerate Touchstone.

II.

WITHOUT GOOD CAUSE IN SUPPORT OF THE SUBPOENA, THERE IS NO PROPER SCOPE OR TIMEFRAME FOR THE REQUESTED FACEBOOK CONTENT

Because Touchstone does not have good cause to obtain any private Facebook content, there is no context to determine the appropriate scope or timeframe for such a request.

For example, if a Facebook account holder had made threats to others on Facebook to prevent their testimony in a criminal case, then the proper scope of a subpoena for Facebook content would encompass the duration of the criminal case in question. Since Touchstone has not provided any facts to establish good cause, there can be no way to

determine the proper scope of time for such a subpoena. At this stage, merely one day's worth of content would still be overbroad.

Defense counsel writes in her declaration, "It is unknown whether additional relevant posts have been made to Mr. Renteria's page that are not visible to the public, or whether additional messages have been sent through the Facebook messaging system that have not been disclosed to defense counsel; for this reason, a complete production by Facebook, Inc. is necessary and required." (Declaration, p. 3.) This is a bizarre statement, since it is tantamount to arguing that the lack of good cause to believe relevant private content exists justifies the greatest possible intrusion.

In sum, this subpoena amounts to the proverbial "fishing expedition," unsupported by any facts which would justify the production of private Facebook content or assist in defining the proper scope of such an intrusion.

III.

THIS COURT SHOULD HOLD THAT CODE OF CIVIL PROCEDURE SECTION 187 REQUIRES NOTICE TO, AND OPPORTUNITY TO BE HEARD BY, BOTH THE VICTIM AND THE PEOPLE BEFORE SUCH A SUBPOENA CAN ISSUE

This Court has also asked the parties to address whether Touchstone made adequate efforts to locate and subpoena the victim directly and attempt to acquire the communications from him and whether the victim's privacy or constitutional rights would be impaired or violated by enforcement of the underlying subpoena, or a subpoena served on him. It is the People's position that the victim's constitutional rights were violated when the trial court issued the subpoena without first giving the victim or the People prior notice and opportunity to be heard. Consistent with this Court's rationale in *People v. Superior Court* (*Morales*) (2017) 2 Cal.5th 523 (*Morales*) and *Kling v. Superior Court* (2010) 50 Cal.4th 1068 (*Kling*),

the People ask this Court to hold that a trial court must require notice and opportunity to be heard *prior to* the issuance of such a subpoena, via Code of Civil Procedure, section 187, for a victim's constitutional rights to be meaningful and enforceable.

As outlined in the People's intervenor brief, Marsy's Law gives victims of crime a constitutional right to refuse a discovery request. (Cal. Const., art. I, § 28, subd. (b), par. (5).) The People also have standing to represent the objections of a victim pursuant to Marsy's Law. (Cal. Const., art. I, § 28, subd. (b), par. (5).) This Court in *Kling* stated, "Marsy's Law evidently contemplates that the victim and the prosecuting attorney would be aware that the defense had subpoenaed confidential records regarding the victim from third parties." (*Kling*, *supra*, 50 Cal.4th at p. 1080.)

However, this Court has not yet had the opportunity to address the application of Marsy's Law to third-party subpoenas and whether the victim and the People should be afforded procedural safeguards to protect those rights, by way of notice and opportunity to be heard prior to issuance. While this Court in *Kling* held that a victim's right to notice of a third-party subpoena is consistent with the People's right to notice, this Court also stated, " . . . this proceeding does not present an opportunity for 'expansive proclamations regarding implementation of Marsy's Law.' " (*Id.* at p. 1080.) This Court also stated in *People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, " . . . we need not decide here whether prosecutorial participation in third party subpoena hearings is permitted or protected . . . " (*Id.* at p. 749.)

This case directly illustrates the need for notice and opportunity to be heard prior to the issuance of such a subpoena. The trial court issued the subpoena to Facebook on March 16, 2017. (See Declaration, Exhibit B.) On February 13, 2018, nearly 11 months later, the victim in this case filed his objection with the Superior Court. The victim was not given an opportunity

to be heard regarding his objections until April 18, 2018, more than a year after the trial court's issuance. (Intervenor's Exhibit F at p. 5.) This delay is untenable and could have been avoided if notice and opportunity to be heard was provided *prior to* the issuance of the subpoena.

Had notice and opportunity been given, the victim would have asserted his objections under Marsy's Law at the earliest opportunity and the People, with standing to assert those constitutional rights on behalf of the victim, would have objected to the improper sealing of defense counsel's declaration and exhibits. A court's review of the declaration would have revealed a lack of work-product or attorney-client privilege which would justify sealing. Litigation of these issues at the earliest opportunity would have avoided years of delay and unnecessary expenditure of appellate and trial court resources, as have occurred in this case.

The authority for this Court to hold that notice and opportunity to be heard are required before the issuance of such a subpoena lies within Code of Civil Procedure, section 187. That code section reads in part, "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given . . . " Since Marsy's Law confers constitutional rights to victims regarding third-party subpoenas and discovery, Code of Civil Procedure, section 187 must be invoked to require notice and opportunity to be heard prior to a court's issuance of such a subpoena for this constitutional right to be meaningful and enforceable.

In *Morales* this Court held that " . . . because the superior court has jurisdiction under Penal Code section 1054.9 to grant postconviction discovery to the extent consistent with the statute, the court has the inherent power under Code of Civil Procedure, section 187 to order preservation of evidence that would potentially be subject to such discovery." (*Morales*,

supra, 2 Cal.5th at p. 534.) This is because the "inability to timely appoint habeas corpus counsel in capital cases should not operate to deprive condemned inmates of a right otherwise available to them." (*Id.* at p. 533.) Similarly, if notice and opportunity to be heard is not provided to the victim and the People prior to the issuance of a third-party subpoena, of which the victim is the subject, it would operate to deprive crime victims of a constitutional right otherwise available to them.

IV.

SHOULD TOUCHSTONE BE GIVEN ADDITIONAL OPPORTUNITY TO SHOW GOOD CAUSE, THIS COURT SHOULD ISSUE AN OPINION ADDRESSING THE ISSUES RAISED IN THE INTERVENOR BRIEF

If this Court ultimately holds that, Code of Civil Procedure, section 187 required notice and opportunity to be heard prior to the issuance of the subpoena in this instance, then the trial court should be directed to rescind the issued subpoena as violative of the victim's constitutional rights. It would then necessarily follow that Facebook's motion to quash becomes moot and should be vacated.

Should proceedings be remanded to the trial court for additional opportunity to present evidence in support of, or opposition to, the subpoena, this Court should issue a full opinion addressing Facebook's claims that the Stored Communications Act prohibits disclosure. If Touchstone can now marshal evidence to meet his good cause burden, the trial court will need several questions of law addressed so that it may competently apply the appropriate legal standard to Facebook's motion to quash.

Specifically, as outlined in the People's intervenor brief, this court should hold that, (1) Facebook bears the initial burden of proving that they qualify as an electronic communication service provider who stores the

sought communications in "Electronic Storage," or that they are a qualifying remote computing service provider, (2) the issue of whether the Stored Communication Act applies to Facebook is a question of fact, (3) citations to prior court rulings or appellate decisions are not competent evidence to resolve such a question of fact, and (4) the evidence provided by the People in their motion to augment the record, including Facebook's terms of service and Congressional testimony, are judicially noticeable and properly admissible in the trial court to rebut Facebook's motion to quash. Only if these questions of law are resolved will a trial court be able to competently resolve Facebook's motion to quash.

CONCLUSION

The People respectfully request that this Court hold that the victim and the People must be given notice and an opportunity to be heard before a third-party subpoena of which the victim is the subject can be issued, and direct the trial court to rescind the subpoena in question.

Should this Court rule that Touchstone be afforded an additional opportunity to provide evidence of good cause before the trial court, the People respectfully request that this court render a full opinion regarding the applicability of the Stored Communications Act to Facebook, as outlined in the People's intervenor brief.

Dated: September 4, 2019

Respectfully Submitted,

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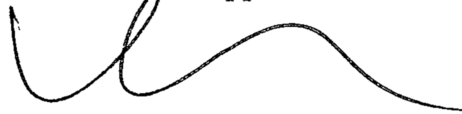

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CERTIFICATE OF WORD COUNT

I certify that this INTERVENOR'S SUPPLEMENTAL BRIEF ADDRESSING THE UNDERLYING SUBPOENA AND THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH including footnotes, and excluding tables and this certificate, contains 2,696 words according to the computer program used to prepare it.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, Respondent.	For Court Use Only
LANCE TOUCHSTONE, Real Party In Interest.	Supreme Court No.: S245203 Court of Appeal No.: D072171 Superior Court No.: SCD268262

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On September 4, 2019, a member of our office served a copy of the within **INTERVENOR'S SUPPLEMENTAL BRIEF ADDRESSING THE UNDERLYING SUBPOENA AND THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid in the United States Mail, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 4, 2019 at 330 West Broadway, San Diego, CA 92101.

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