No. S230051

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., et al.,
Petitioners,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
SAN FRANCISCO
Respondent.

DERRICK D. HUNTER and LEE SULLIVAN,

Real Parties in Interest.

SUPPLEMENTAL BRIEF BY REAL PARTIES SULLIVAN AND HUNTER REGARDING NEW AUTHORITIES PURSUANT TO CALIFORNIA RULE OF COURT 8.520(d)

From the Published Opinion of the Court of Appeal,
First Appellate District, Division Five, No. A144315

San Francisco San Francisco Superior Court Nos. 13035657,
13035658.) The Honorable Bruce Chan, Judge, Dept. 22

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ARGUMENT

Defendants Derrick Hunter and Lee Sullivan submit the within supplemental brief pursuant to California Rule of Court 8.520(d) based on the Fourth District's published opinion in, hereafter "*Touchstone*, "which was decided after briefing was complete in the instant case. Review was granted on January 18, 2018. (2018 Cal. LEXIS 268). This court has taken judicial notice of the opinion which the providers have cited for potential persuasive value under Cal. Rules of Court, rules 8.1105(e), 8.1115(e)(1).

I. Deceased persons and witnesses who assert their Fifth Amendment privilege against self-incrimination cannot respond to subpoenas duces tecum nor be compelled to consent to the release of their social media records

In *Touchstone,* Fourth District court stated that it need not reach the constitutional issues because victims and prosecution witnesses can be forced to comply with subpoenas duces tecum or the trial court can compel them to "consent" to Facebook releasing the social media records. *Touchstone's* analysis does not provide a solution in this instant case because courts have no authority to force a witness who asserts her Fifth Amendment privilege against self-incrimination to comply with a subpoena duces tecum or to "consent" to have providers produce the records under the SCA.

Specifically, here, witness Reneesha Lee cannot be forced to consent to the disclosure of her social media records pursuant to 18 U.S.C. 2702 because she is represented by counsel and has asserted her Fifth Amendment privilege at the trial of the juvenile codefendant, Q.H. Ms. Lee cannot be forced to identify social media accounts that contain inculpatory posts in order to authenticate the records because such a procedure would violate her Fifth Amendment privilege. (See, generally, *United States v. John Doe* (1984) 465 U.S. 605.) Ms. Lee also cannot be punished by contempt of court for exercising her constitutional privilege against self-incrimination. Even if she had not asserted her Fifth Amendment privilege and could access her own social media records, this is not a reasonable solution as a matter of statewide policy, because a witness can easily delete posts that cast them in an unfavorable light prior to responding to a subpoena and often do not have the technical skills to comply with a subpoena for social media records. Moreover, Ms. Lee's social media accounts have been deleted so she cannot access and produce them herself in response to a subpoena even if she had not asserted her Fifth Amendment privilege. The only solution with respect to Ms. Lee is to have providers produce her social media records to the court for an *in camera* review.

Also, *Touchstone's* suggestion that the court can sanction a witness for non-compliance with a subpoena duce tecum under Penal Code section 1054.5 is without merit because the California discovery statute set forth in Penal Code section 1054.1 applies strictly to the discovery between defense counsel and prosecutors, not subpoenaed materials in the possession of third-parties like Ms. Lee.

Moreover, courts cannot force a dead person, such as Joaquan Rice, to comply with a subpoena or otherwise give "consent" to permit providers to release records to the court. Even if a relative of the deceased person could theoretically give consent to comply with the subpoena, there is no assurances that such consent will, in fact, be given. And what possible sanction could a court impose on a dead person, or his or her relatives, who refuses to consent to let providers release the dead persons social media records to the court? Courts cannot hold a dead person in contempt of court nor jail the body. Jailing the family member of an alleged crime victim is morally repugnant and does not ensure subpoena compliance or that the family member will "consent" under threats of being held in contempt in the superior court. Family members, particularly when the deceased person is a gang member, can and will refuse to consent to production of records. No evidentiary remedy, such as excluding testimony, can be imposed because

Mr. Rice is dead. It would be absurd to suggest that the dead body, or the *corpus* of the crime, be excluded because Mr. Rice, or his family, would not consent to the release of the social media records once a subpoena was served. The only solution is for the provider to produce the social media records to the superior court for an *in camera* review and that evidence material to the defense be produced subject to a protective order.

Finally, even if a live prosecution witness did respond to the subpoena, the social media account holder can easily delete relevant evidence that is unfavorable to him or her prior to responding to the subpoena. The only way to ensure accurate and complete production of the social media records to effectuate a criminal defendant's right to a fair trial, to present a defense, and to cross-examine witnesses, is for the provider to produce the subpoenaed records to the court for an *in camera* review.

Finally, as a more general matter, we disagree with *Touchstone*'s proposal that courts can issue an order forcing a witness to "consent" to release their records under the Stored Communications Act, 18 U.S.C., section 2702(b)(3). True consent is done freely and voluntarily without threat of punishment or sanction. Judicially "compelled consent" is a non-sequitur. So called "consent" obtained by threatening to jail witnesses who refuse to give consent to providers to release information is not true consent

but submission to authority. Under the Fourth Amendment, obtaining consent to search a particular area is an exception to the search warrant requirement. A person's consent to search a particular area is invalid under the Fourth Amendment if the purported consent is obtained by law enforcement threats. (*People v. James* (1977) 19 Cal.3d 99, 106 [the prosecution must prove a person's "manifestation of consent was the product of his free will and not a mere submission to an express or implied assertion of authority."].) Under similar reasoning, so called "consent" obtained by judicial threats to hold that person in contempt of court, including jail, if the person does not allow providers to provide social media records to the court, is not the free and voluntary consent envisioned by the drafters of the SCA. In that regard, we disagree with *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, and other civil cases that state that courts can compel witnesses to consent to the release of his or her social media records.

II. <u>This Court must not construe the SCA to authorize the prosecution to issue search warrants for the defense</u>

This Court cannot construe the SCA to permit prosecutors to draft search warrants for the defense. Requiring defense counsel to work with law enforcement to draft an affidavit of probable cause to get the search warrant would require defense counsel to disclose privileged information, including theories of defense, trial strategy, and results of investigation. A

defendant's rights to compulsory process and a fair trial cannot be conditioned on giving up privileged work-product materials (see Pen. Code, § 1054.6)

Additionally, requiring the defense to provide confidential or privileged information to the prosecution to get a search warrant, violates the very cornerstone of our criminal justice system in United States, which requires that criminal cases be adversarial in nature. In our adversarial system of justice, a criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (*Herring v. New York* (1975) 422 U.S. 853, 862.) "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. [fn omitted] But if the process loses its character as a confrontation between adversaries, the constitutional guaranteed is violated." (*United States v. Chronic* (1984) 466 U.S. 648, 656., emphasis added.)

Because we have an adversarial system of justice, criminal defendants' Sixth Amendment right to effective assistance of counsel precludes defense counsel from disclosing to the prosecution defense work product, the results of investigation, defense theories, and other privileged material to the prosecution in order to explain the relevance of the social media records sought so that law enforcement can write search warrant affidavits on behalf of criminal defendants. Such a procedure is unprecedented in California and nationwide. Defendants should not be forced to choose between their right to effective assistance of counsel and their right to due process and to present a complete defense as they are entitled to all of their constitutional rights.

III. **Unlike in *Touchstone*, a foundation cannot be laid to admit Reneesha Lee's Twitter posts unless Twitter provides a custodian of records through the subpoena process**

In *Touchstone,* the court of appeal stated that Facebook need not comply with the defense subpoena duces tecum for the alleged victim's public social media posts because the information was publicly available to the defense. That rationale does not apply in the instant case regarding witness Reneesha Lee's posts on Twitter. Assuming *arguendo* the tweets were publicly posted at one time, the account and posts have since been deleted. Counsel for Mr. Sullivan obtained printout of some of Ms. Lee's

tweets in the courthouse hall from associates of the defendants. Other tweets were obtained from the attorney for the juvenile co-defendant. The defense does not know who initially downloaded these posts. Accordingly, Ms. Lee's Twitter posts cannot be properly authenticated for use at trial because she is represented by counsel and will likely assert her Fifth Amendment privilege against self-incrimination just as she did at the trial of the juvenile co-defendant when asked to identify her social media records. Clearly, the records are inadmissible unless Twitter provides a custodian of records to testify or authenticate the records.

Moreover, the issue is not simply whether Ms. Lee's posts on Twitter of which we are aware can be admitted at trial. Rather, the issue is whether the defense has access to all exculpatory social media records necessary to defend this case and that those records are obtained in time to allow for meaningful trial preparation. A criminal defendant has a right to obtain by subpoena duces tecum third-party records if "the requested information will facilitate the ascertainment of the facts and a fair trial" (*Pitchess v. Superior Court* (1974) 11 Ca1.3d 531, 536). The tweets that the defense attached to the subpoena pertaining to Mr. Lee constitute "good cause" to request that the court order that all her social media accounts for the relevant time period, containing both public and private posts, be

produced to the court for *in camera* review. It is only by this process that all exculpatory evidence the superior court deems material can be produced to the defense pursuant to the well-established procedures set forth in Penal Code section 1326.

In order to be constitutionally effective, defense counsel has an affirmative responsibility to conduct a pretrial investigation on behalf of criminal defendants. Ms. Lee's tweets, which defense counsel received by happenstance, require defense counsel to conduct a further investigation to locate other posts that are exculpatory. Her tweets constitute good cause for the production of all her public and private social media posts to the superior court for an *in camera* review so that all exculpatory posts, not just the posts third parties handed to defense counsel from an unknown source, can be located and introduced as evidence at jury trial.

IV. Defendants across the state must have access to exculpatory social media records from third parties who are not victims and are not on the prosecution witness lists because defense attorneys are required by the Sixth Amendment to investigate a case and present exonerating evidence to a jury

The Court should not limit its ruling in this case to social media records from victim or prosecution witnesses. Such a narrow ruling would ignore the reality that defense attorneys are obliged by the Sixth Amendment to investigate cases for their clients and present exculpatory

evidence uncovered during the investigation to the jury. Indeed, whether an accused receives the effective assistance of counsel guaranteed by the Sixth Amendment depends upon the pretrial investigation and preparation conducted by the attorney. (*Strickland v. Washington* (1984) 466 U.S. 668, 691 ["[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary."].) Thus, when defense counsel learns of potentially exculpatory evidence on social media from an individual not known to the prosecution, the defense must be able to subpoena those records directly from the provider particularly if the defense only knows the handle or name on a particular social media account but not the identity or whereabouts of that person.

For example, what if defense counsel learns that an eyewitness posts about a crime that describes a person different than the accused but then deletes the post? What should the superior court do if that eyewitness, who is not known to the prosecution, refuses to consent to have Facebook release the records? There is no evidentiary sanction the courts can impose, such as excluding that person's testimony, because the third-party eyewitness is not on the prosecution's witness list. If the superior court does not order the provider to produce the eye-witnesses accounts of the crime, the accused will be denied critical defense evidence of third party

culpability. There is no workable solution except to require social media providers to produce the records that tend to show a defendant is innocent at the earliest possible time. Criminal defendants throughout the state and nation are being denied the ability to obtain exculpatory evidence through defense investigation from persons who post on social media that are not crime victims or prosecution witnesses. This Court should not limit its holding to establishing procedures for obtaining only social media records for victims and prosecution witnesses but also for social media account holders who may possess exculpatory evidence that defense counsel discovers while investigating a case on behalf of the accused. This Court should provide an avenue for defendants to obtain exculpatory social media evidence from third parties who are not on the prosecution's witness list. Otherwise, countless defendants will be denied the right to access critical exculpatory evidence for many years to come because most criminal defendants cannot wait three and four years to go to trial as Mr. Hunter and Mr. Sullivan.

Waiting until trial, or even 30 days before trial, to procure exculpatory evidence deprives defendants of fundamental fairness. The truth should be sought immediately once a criminal case has been filed so that innocent persons may go free as soon as possible. Most criminal cases

take a year to go to trial. To wait until the eve of trial, or the day of trial, to procure exculpatory evidence could force defendants to stay in custody longer than they should be had the records been timely produced, and creates real risk that the exculpatory social media evidence will be destroyed. Court orders to preserve evidence do not protect against technical errors, human errors, or the bad faith destruction of evidence, which will cause spoilation of exculpatory social media evidence. If the prosecution team sometimes loses exculpatory evidence in its case file, no doubt Facebook will as well since they are not vested in the outcome of the case and will suffer no adverse consequences if the exculpatory social media records are lost or destroyed. Thus, superior courts should have the discretion, upon a good cause showing, to order social media records produced *in camera* pretrial, and released to the defense if material, on a case-by-case basis, in order to vindicate the panoply of constitutional rights to which a criminal defendant is entitled.

Contrary to Touchstone, no reasonable alternative exists in this case except to order providers to comply with the subpoenas. Given that California courts are required to enforce the federal constitutional rights of criminal defendants and there is no United States Supreme Court opinion addressing the issues presented in this case, the Court is well within its

authority to construe the SCA as containing an implied exception permitting superior courts to review subpoenaed social media records *in camera* so that evidence material to the defense be turned over at a meaningful time prior to trial.

CONCLUSION

For the reasons stated herein, it is respectfully requested that providers be ordered to produce the subpoenaed social media records for an in camera review by the superior court.

Respectfully submitted this 26TH day of February, 2018.

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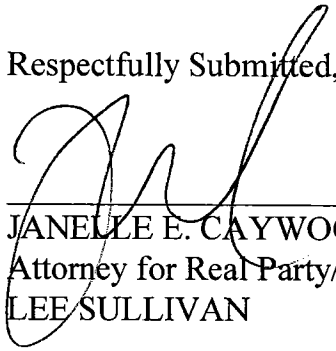
CERTIFICATION

I hereby certify that the within Supplemental Brief consists of 2781 words and that the font used was 13 point Times New Roman.

Dated: February 26, 2018

Respectfully Submitted,



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PROOF OF SERVICE BY U.S. MAIL

Re: Facebook v. Superior Court No. S230051

I, JANELLE E. CAYWOOD, declare that I am over 18 years of age and not a party to the within cause; my business address is 3223 Webster Street, San Francisco, California 94123. On February 26, 2018, I served a **SUPPLEMENTAL BRIEF** 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:

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