IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FACEBOOK, INC., et al,,
Petitioner,

Case No. S230051

(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.

REPLY TO ANSWER FOR PETITION FOR REVIEW

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

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (CONT.)

Statutes

ARGUMENT

I. REVIEW SHOULD BE GRANTED BECAUSE CRIMINAL DEFENDANTS' ACCESS TO SOCIAL MEDIA RECORDS PRE-TRIAL IS AN IMPORTANT ISSUE OF FIRST IMPRESSION THAT AFFECTS VIRTUALLY EVERY CRIMINAL CASE IN THIS STATE AND NATION

Social media's contention that this Court should not grant the instant petition because the question of law is settled is without merit. (Answer, p. 1-2, 7.) To our knowledge, the Court of Appeal's published opinion is the first in the nation regarding whether a criminal defendant has the constitutional right to obtain social media records pre-trial to preserve his or her right to a fair trial, to present a complete defense, to cross-examine witnesses, notwithstanding the federal Stored Communications Act ("SCA") which unfairly grants prosecutorial access to electronic records with a subpoena, court order, or search warrant, but bars criminal defendants from seeking the same records. (18 USC § 2701, et seq.) Thus, the issue is far from settled.

Although there are not split opinions in the Court of Appeal, the issue of whether a defendant can obtain pretrial access to social media records to mount a defense at trial, is such a pressing and important issue that truly reaches across California and the United States, affecting almost all criminal cases, that review should be granted to settle this important

issue that was wrongly decided in the court below insofar as it denied defendants' pretrial access to potentially voluminous records necessary to mount a defense. This Court should resolve the issue definitively so that countless criminal defendants across the state are not deprived of the right to a fair trial, by the inability to obtain relevant evidence until the middle of trial, for the sole purpose of waiting for other cases to work their way up through the appellate courts. Most indigent criminal defendants, particularly those in custody, do not have the time or resources to litigate with social media companies and proceed to trial without the social media records necessary to their defense. Thus, delaying review until there is a split of opinion could take years and result in manifest unfairness to a great number of defendants. This Court should grant review because the time to ensure criminal defendants receive a fair trial, when that right is in jeopardy, should always be right now.

Moreover, social media providers mislead the Court when they states that review should be denied because the law is settled given that "appellate courts in California and throughout the country have uniformly held that the SCA prohibits the use of a subpoena alone to compel Providers to disclose electronic communication content." (Answer, p.1.) The cases social media cites for this proposition [See e.g. *In re Facebook Inc.* (2012)

923 F.Supp. 2d 1204, *Optiver Australia Pty. & Anor V. Tibra Trading Pty. & Ors* (N.D. Cal.Jan. 23, 2013) 2013 WL 256771 at 2, *FTC v. Netscape* (N.D. Cal.2000) 196 F.R.D. 559, 560, *Negro v. Superior Court* (2015) 230 Cal. App.4th 879, 888-889,] are inapposite because they are *civil cases*, in which the litigants do not have the same constitutional rights to due process, to fundamental fairness, to present a complete defense, to effective counsel, and to cross-examine witnesses, as do criminal defendants. (Answer, p. 8-9.) These civil cases are inapposite and should be disregarded because they shed no light on whether a criminal defendant is entitled to pretrial access to social media records.

To that end, social media argues that *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, has already settled this issue in California. Not so. *O'Grady* held that the SCA preempted civil discovery subpoenas served on email service providers seeking email documents identifying persons who supplied content. However, *O'Grady* was decided almost ten years ago before the huge explosion of social media hit every facet of our everyday life, including criminal trials. Also, *O'Grady* is of marginal relevance because it involved only the civil discovery process where other means of discovery to the parties existed – interrogatories and depositions–that do not exist in criminal prosecutions. *O'Grady* did not

address the federal constitutional issues raised by this case regarding pretrial access to social media records which are germane to all criminal prosecutions. As such, *O'Grady* should be disregarded.

In reality, prior to the opinion in the court below, no court state or federal appellate court had issued a published opinion regarding whether a criminal defendant's constitutional rights to a fair trial and to present a complete defense trump the SCA and requires social media to produce the records for the local court to review *in camera* prior to trial upon in response to a defense subpoena. To create the false impression that this issue has been decided in criminal courts so review would be denied, social media companies cite *United States v. Pierce* (2nd Cir 2015) 785 F. 3d 832 and asserted that "(f)ederal courts have uniformly ... rejected any implied exception for subpoenas, and declined prior requests from criminal defendants to invalidate the SCA." (Answer, p. 8.) This misstates the holding of *Pierce*. In *Pierce* the court simply declined to rule on the constitutionality of the SCA, on appeal following jury trial, because the defendant's belief that Facebook had relevant records he did not possess was speculative and because the defendant failed to show how the records he sought would be helpful to his defense. Furthermore, the court found it problematic that he failed to subpoena the account holder who was

otherwise available. (Id. at 842.)

In contrast to *Pierce*, here, the superior court determined that Sullivan made a strong offer of proof as to the relevancy of the records sought and that production to the court for an *in camera* review was necessary to preserve Sullivan's right to due process and present a complete defense, which prevailed over the SCA. The instant case is also distinguishable from *Pierce* because subpoenaing the account holders is futile because one person is dead, and the other vanished, despite diligent efforts by the defense to locate her. Even if Ms. Lee could be located, respondent court correctly noted that she made incriminating statements in her social media posts and cannot be compelled to admit ownership of the account or posts because of her Fifth Amendment privilege against self-incrimination. (Transcript of January 7, 2015, hearing in respondent court.) Finally, respondent court was aware that Ms. Lee refused to authenticate her social media posts at the trial of the juvenile co-defendant and took that into consideration into deciding whether the records should be produced by the social media companies. Accordingly, *Pierce* is distinguishable and does not constitute controlling precedent on any issue because the constitutionality of the SCA was not addressed due to the defendant's failure to show why the records would have been helpful at trial.

This Court should grant review to decide this important issue of first impression regarding pre-trial access to social media records necessary for a fair trial, an issue that affects virtually all criminal cases in California.

II 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 CAUSE, WHEN THE MATERIALS ARE NECESSARY TO A FAIR TRIAL

A. The Court of Appeal's Opinion Recognized that Disparity of Access to Social Media Records At Trial, Between the Prosecution and Defense, Was Likely Unconsitutional

Social media providers contend that the SCA is an absolute bar to criminal defendants receiving social media records, both pretrial and at trial, regardless of whether the records are necessary and material to the defense despite that the SCA gives police and prosecutors access to the same records with a subpoena, court order, or search warrant. (18 U.S.C. § 2703.) Social media providers wrongly suggest that the Court of Appeal expressed no opinion on the constitutionality of the SCA insofar as it grants police and prosecutors access to social media records, but not the defense via a trial subpoena. (Answer, p. 5, fn. 1.) Although the Court of Appeal, ruled that defendants were not entitled to pretrial access to these records, it made clear that its ruling did not apply to a subpoena issued by the defense at trial by stating, "[n]othing in this opinion would preclude Defendants

from seeking at trial the production of records sought here. . ." (*Facebook v. Superior Court* (2015) 240 Cal.App.4th 203.) The Court of Appeal also noted that the lack of parity between the prosecution and defendants' ability to procure social media records under the SCA via a trial subpoena would likely be unconstitutional: "Although the issue is not now before us, we question whether such a limitation would be constitutional under *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." (*Id.* at 226, fn 17.) Thus, real parties correctly represented the holding of the appellate court and now turn to the issue of pretrial access.

B. Fourth Amendment Jurisprudence is Irrelevant To Sullivan Because He is A Private Citizen, Not a State Actor and Not Subject To the Warrant Requirement

Real party Sullivan contends he has a constitutional right to pretrial access to social media records via subpoena duces tecum, subject to an *in camera* review by the trial court. In response, social media providers contend that Sullivan is not entitled to social media records because some federal appellate courts have held that the Fourth Amendment requires that the government to get search warrant to obtain electronic records covered by the SCA. *(United States v. Warshak* (2011) 631 F.3d 266; *United States v. Graham* (2015) 796 F.3d 332.) The Fourth Amendment jurisprudence

cited on pages 9 and 10 of the Answer is irrelevant because Sullivan is a private person, not a state actor. The fundamental purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." (*Camara v. Mun. Ct.* (1967) 387 U.S. 523, 528; see *Skinner v. Ry. Labor Execs.' Ass'n* (1989) 489 U.S. 602, 613-14 ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction.") The United States Supreme Court has consistently construed the Fourth Amendment as proscribing *only governmental action*; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." (*United States v. Jacobsen* (1984) 466 U.S. 109, 114, fn. 6; *Walter v. United States* (1980) 447 U.S. 649, 662 (BLACKMUN, J., dissenting), *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 487-490 ; *Burdeau v. McDowell*, 256 U.S. 465 (1921).

Accordingly, the fact that under the Fourth Amendment, a search warrant may be required for the police to procure social media records, does not mean that criminal defendants' access is barred. The Fourth Amendment is not a sword social media providers can weild to curtail a

criminal defendant's access to evidence; rather, it is a safeguard applicable only to the government, to ensure the government does not overreach. Indeed, there are many types of searches for which the government much procure a warrant pursuant to Penal Code section 1524, whereas a criminal defendant need only issue a subpoena pursuant to Penal Code section 1326, subject to judicial scrutiny to ensure only relevant records are released. For example, a criminal defendant can subpoena documents from the home of a private party whereas the government would have to get a warrant. Also, criminal defendants regularly subpoena telephone, text, and cell cite records from wireless providers, whereas the government must obtain a search warrant. The trial court maintains strict control over the release of private records and issues protective orders as appropriate. That the government may be required to procure a warrant does not compel the conclusion that a criminal defendant's access is barred if obtaining those records is necessary to prepare for trial.

Social media providers' extensive reliance on the Sixth Circuit's opinion *United States v. Warshak* (2011) 631 F.3d 266 is misplaced. In that case, the issue was whether *the government* could obtain the criminal defendant's emails from his internet service provider without a warrant. The court said it could not given *Warshak* had a reasonable expectation of

privacy in the content of his own emails. In contrast, here, the issuance of a defense subpoena is not a search or seizure by a state actor; therefore, the Fourth Amendment protections do not apply. Also, *Warshak* did not involve a criminal defendant's constitutional right to gather evidence from third parties to defend a criminal case or to cross-examine adverse witnesses. As such, *Warshak* must be limited to its facts.

C. Respondent Court Correctly Ruled That Social Media Records Sought By Subpoena Duces Tecum Are Not Accessible to the Defense Through Mr. Rice, Ms. Lee, or Their Friends

Social media providers contend the SCA does not have to yield to afford defendants pre-trial access to evidence because the same evidence can be obtained from the account holders. (Answer, p. 19-20.) We disagree. Respondent court correctly ruled that it could not compel Mr. Rice to authenticate the records because he is dead and Ms. Lee is an adverse witness with a history of refusing to authenticate her own social media records as evidenced by her behavior in the juvenile co-defendant's separate trial during which she refused to authenticate her social media posts. Because the social media records pertain to her threats of gun violence and other criminal acts, respondent court correctly ruled that he cannot compel Ms. Lee to authenticate her social media records involuntarily because she has Fifth Amendment privileges.

Even if Ms. Lee agreed to produce her social media records by downloading them herself, or was ordered by this Court to provide them, the defense has no way of ensuring that she, in fact, presented the records sought in their entirety given that they implicate her in threatening others with gun violence and other threats of violence. Also, Ms. Lee cannot provide her social media records because many of the accounts have been deleted. She does not have access to the same subscriber information - such as email addresses, IP addresses, and location data - to which the social media providers have access as for Ms. Lee's inactive and active accounts social media accounts. Thus, if the social media providers are not ordered to comply with the subpoena, Mr. Sullivan is deprived of the information he needs to persuade a jury that the records in question originated from Ms. Lee's social media accounts.

Additionally, Mr. Rice's records cannot be accessed because he is dead. Even though Mr. Sullivan has access to some of Mr. Rice's social media records through the discovery process, Mr. Sullivan does not have access to the complete records he needs because the police only issued a search warrants for records from some of the providers. The defense has no authority to force the prosecution to investigate a case nor seek out evidence on his behalf. Thus, social media providers' argument that the court need

not produce the records pre-trial on grounds that the same evidence is available from other source is without merit, as discussed below.

D. The Prosecution Cannot be Compelled to Seek out Discovery on a Criminal Defendant's Behalf in Possession of Third Parties

Real party Sullivan contends that he is constitutionally entitled to pre-trial access to social media records he needs defend his case pursuant to the Fifth, Sixth, and Fourteenth Amendments. Social media providers argue in response, that instead of forcing them to comply with subpoenas, trial courts should simply order district attorneys to obtain relevant or exculpatory evidence for criminal defendants pursuant to *Brady v. Maryland* (1963) 373 U.S. 83. (Answer, p. 21-22.) This procedure is unauthorized. It is well-settled that the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense that is not in the hands of the prosecution team. (See *In re Koehne* (1960) 54 Cal.2d 757, 759 ["the law does not impose upon law enforcement agencies the requirement that they take the initiative, or even any affirmative action, in procuring the evidence deemed necessary to the defense of an accused"]; *People v. Hogan* (1982) 31 Cal.3d 815, 851 [There is no general duty on the part of the police or the prosecution to obtain evidence, conduct any tests, or " 'gather up everything which might

eventually prove useful to the defense.' "]; *In re Littlefield* (1993) 5 Cal.4th 122 [The prosecution has no general duty to seek out information from other agencies or sources that might be beneficial to the defense.].)

Federal law is in accord: A prosecutor does not have a duty to obtain evidence from third parties. (*United States v. Combs* (10th Cir. 2001) 267 F.3d 1167, 1173 [observing that *Brady v. Maryland* does not oblige the government to obtain evidence from third parties]; *United States v. Baker* (7th Cir. 1993) 1 F.3d 596, 598 [("Certainly, *Brady* does not require the government to conduct discovery on behalf of the defendant.");]; *United States v. Lujan,* 530 F. Supp. 2d at 1231 [stating there is no affirmative duty to discover information in possession of independent, cooperating witness and not in government's possession).] Thus, the District Attorney cannot be compelled to obtain evidence for criminal defendants that the prosecution team did not choose to seek out on its own.

Moreover, as respondent court correctly pointed out, search warrants **can only be** issued based upon statutorily enumerated grounds set forth in Penal Code sections1524 for property that was "stolen or embezzled", (Cal. Pen. Code, § 1524(a)(1),) that was "used as the means of committing a felony" (Cal Pen. Code § 1524(a)(2),) as well as "evidence that tends to show a felony was committed" (Cal. Pen. Code, § 1524(a)(4),) and other

exceptions not pertinent here. Penal Code section 1524 does not authorize law enforcement to issue search warrants issued to obtain evidence that supports a criminal defendant's defense or to impeach adverse witnesses. Thus, social media providers are plain wrong when they argue that social media providers can simply get what they need to defend a case from the prosecution. Certainly, the prosecution must disclose exculpatory evidence it obtains as a result of its own search warrants; however, it is under no obligation to seek out records a criminal defendant needs to impeach a witness or establish an affirmative defense.

Contrary to social media's assertions, 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 or *Brady*. 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 ascertain 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 subject to **judicial** scrutiny.

E. The Fifth, Sixth and Fourteenth Amendments Are Meaningless If Trial Courts Do Not Have the Authority to Permit Criminal Defendants to Subpoena Records Necessary to Mount a Defense Prior to Trial Upon A Showing of Good Cause, Subject to an In Camera Review

Social media providers contend that due process is not violated because police are entitled to use investigatory tools to which criminal defendants do not have access. (Answer, p. 11-12.) Criminal defendants are not seeking to investigate a case, but to obtain a fair trial and to present a complete defense. Once a defendant is charged with a crime and held to answer following a preliminary hearing, the only mechanism available for a criminal defendant to prepare for trial, is a subpoena. Not permitting defendants to issue subpoenas until the middle of trial when the police have access to social media records even before the person is charged, is unfair and unconstitutional. Criminal defendants do not seek the same investigatory tools as police, only the opportunity to reasonably prepare for trial, so the defense can be intelligent and well-prepared to meet the state's evidence and cross-examine witnesses.

With regard to the Sixth Amendment's Compulsory Process Clause,

we reject social media's contention that it applies only to the production of witnesses and not documentary evidence. As stated in the petition, *United States v. Nixon* (1974) 418 U.S. 683and *U.S. v. Burr* (C.C.D. Va 1807 25 F.Cas 30 both pertained to obtaining documentary evidence under the Compulsory Process Clause. Moreover, as the Supreme Court stated in *Ritchie*, 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.) The Compulsory Process Clause has never been limited to witnesses. Indeed, the distinction is irrelevant for purposes of social media records because Sullivan seek to compel the attendance of the custodian of records to testify to lay the foundation that the social media records came from the accounts of the Mr. Rice and Ms. Lee in addition to obtaining the social media records.

Finally, social media's contention that revisiting the issue regarding whether defendant's Sixth Amendment constitutional right to cross-examine witnesses can, in some cases in which the records are voluminous, require the records be produced pretrial, and whether *People v. Hammon* (1997) 15 Cal.4th 1117 should be revisited, disrupts a long line of

established Supreme Court precedent, overstates the matter. Social media records are much more ubiquitous and voluminous than psychiatric records at issue in *Hammon*, the rap sheets at issue in *People v. Clark* (2007) , or the juvenile records in *People v Martinez* (2009) 47 Cal.4th 399. Notably, those cases discussed *Hammon* and the Sixth Amendment issue in a footnote, as an aside.

Certainly, in some instances trial courts should have the authority to delay disclosure until trial if there are concerns the case will settle or if the records a defendant seeks are private, and involves a collateral matter. However, trial courts should also have the authority to permit pretrial production of social media records via subpoena when the records sought are voluminous, exculpatory, and necessary to review prior to trial for effective cross-examination and to mount an intelligent defense. This case presents an important opportunity for this Court to clarify, limit, or disapprove *Hammon.* to ensure that the constitutional right to cross-examine witnesses includes right to pretrial access to materials necessary to be effective and to obtain the truth from the witnesses.

Finally, real parties agree with social media providers that it is an issue of first impression whether the right to present a complete and meaningful defense under the Due Process Clause, includes the right to to obtain and review social media records prior to trial upon a showing of good cause that the records will

shed light on the disputed issues of fact. Petitioners contend that this Court should grant review to resolve this very important and unsettled question that impacts criminal defendants throughout the state on a daily basis.

CONCLUSION

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

Respectfully submitted this 19th day of November, 2015.

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CERTIFICATION

I hereby certify that the foregoing Reply to Answer to Petition for Review consists of 3,941 words and that the font used was 13 point Times New Roman.

Dated: November 19, 2015

Respectfully Submitted,

JANELLE E. CAYWOOD
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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 1660 Mason Street #6, San Francisco, California 94133. On November 19, 2015, I served the attached **REPLY TO ANSWER TO 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:

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

JANELLE E. CAYWOOD