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.

REAL PARTIES LEE SULLIVAN AND DERRICK HUNTER'S OPENING BRIEF ON THE MERITS

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

JANELLE E. CAYWOOD
(CBN: 189980)
3223 Webster Street
San Francisco CA, 94123
Tel. (415) 370-2673
Fax. (888) 263-0456
Email: janelle@caywoodlaw.com
Attorney for Real Party
Lee Sullivan

SUSAN B. KAPLAN
(CBN: 57445)
214 Duboce Street
San Francisco, CA 94103
Tel. (415) 271-5944
Fax. (510) 524-1657
Email: sbkapl@yahoo.com
Attorney for Real Party
Lee Sullivan

JOSE PERICLES UMALI
(CBN: 118434)
507 Polk Street, Suite 340
San Francisco, CA 94102
Tel. (415) 398-5750
Fax. (415) 771-6734

Email: umali-law@att,net
Attorney for Real Party
Derrick Hunter

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

Cases **Page(s)**

Federal Statutes

California Statutes

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., et al.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

DERRICK D. HUNTER and LEE SULLIVAN,

Real Parties in Interest.

No. S230051

From the published opinion of the Court of Appeal, First Appellate District, Division Five

DCA No. A144315
(San Francisco Superior Court Nos. 13035657, 13035658)

REAL PARTIES' OPENING BRIEF ON THE MERITS

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

ISSUES PRESENTED

1.) Are criminal defendants constitutionally entitled to *pretrial* access to social media records sought by subpoena that are necessary for a fair trial, to present a complete defense, to effective assistance of counsel, to compulsory process, and to confront and cross-examine witnesses as guaranteed by Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, or can social media records only be subpoenaed *during trial* as the Court of Appeal held below?

2.) Should this Court overrule *People v. Hammon* (1997) 15 Cal.4th 117, because it was wrongly decided on constitutional grounds and because delaying access to records necessary to defend a case until the middle of trial does not promote the orderly administration of justice? Alternatively, should this Court limit *Hammon* to records subject to the psychotherapist-patient privilege under Evidence Code section 1014?

STATEMENT OF THE CASE

Real parties in interest, 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 San Francisco 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.,

---

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

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 Ms. 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 Instagram seeking records from the social media accounts held by the

---

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.

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 social media providers' 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. Real party, 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. Specifically, counsel for Sullivan asserted Ms. Lee's social media records were relevant to impeach her with prior acts of violence as well as to show bias, and to corroborate Sullivan's defense that she falsely implicated him in the murder because she was in a jealous rage. Counsel for Sullivan also made a good cause showing the Mr. Rice's records were relevant to impeach the prosecution's gang expert and because

the records are affirmative evidence demonstrating the shooting was not gang-related. (1 AE 84-105.)[3]

On January 7, 2015, respondent court, the Honorable 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 notwithstanding the SCA, defendants, Sullivan and Hunter, have an independent constitutional right to access materials necessary to defend their case. Respondent court found that social media providers' argument that it should be excused from producing the information sought by the defendant on the grounds that the information was available from other sources was not compelling in light of the fact that Mr. Rice was dead and Ms. Lee could not be forced to authenticate her social media posts under the Fifth Amendment because they were incriminating in nature. Respondent court ordered the records produced for *in camera* review under Penal Code section 1326 on February 27, 2015. (1 AE 264-276; Supp. AE 286-287.)

On February 24, 2015, Facebook, Instagram, and Twitter filed a

---

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

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

On October 19, 2015, real party, Sullivan, filed a petition for review in this Court, which Hunter joined, seeking review of the Court of Appeal's published opinion that criminal defendants are not constitutionally entitled to subpoena social media records pretrial even upon a showing of good cause, even following an *in camera* review by respondent court, and requesting that *Hammon* be overruled or limited. Social media providers filed an answer to the petition for review on November 9, 2015. Real party, Sullivan, filed a reply on November 19, 2015. On December 16, 2015, this Court granted the petition for review.

STATEMENT OF FACTS

On June 24, 2013, at 12:55 pm, a green Ford Escape, rented by, Renesha Lee, passed by a bus stop located at the intersection of Westpoint and Middleburg Streets in San Francisco. Shots were fired from inside the vehicle by two shooters. Jaquan Rice, Jr., (aka "Pistol Poppin Dutch") was killed and his girlfriend, Ms. K, a minor, was seriously injured. Ms. K did not see who shot her. Ms. Lee's vehicle was identified by surveillance video and stopped by San Francisco police at 1:02 p.m, seven minutes after the shooting occurred at the intersection of George Court and Ingalls. Ms. Lee was alone in the car. (1 AE 87.)

Although the videos of the scene captured the shooting, no arrests were made because of the poor film quality. (1 AE 107.) The videos show one individual wearing a light colored hooded sweatshirt, shooting a hand gun from the rear window of the drivers side. A second individual wearing a black hat, jacket, and pants, exited the rear passenger side door and shot a hand gun with a large magazine attached, from behind the rear of the vehicle. The driver's was not visible because the window was rolled up. (1 AE 87-88.)

Quincy H., who was 14 years-old, confessed to the shooting when detained by police after several eyewitnesses identified him as one of the shooters. Quincy H. told the officers that he shot Mr. Rice because Mr. Rice repeatedly threatened him at his job, at his home, and on social media, including Facebook and Instagram. Mr. Rice tagged Quincy H. and others in a video with guns in it on Instagram which scared Quincy. He believed

Mr. Rice would kill him if he did not act first. Quincy told police that Mr. Sullivan was not in the car when the shooting occurred. He identified the other shooter as "Johnson." (1 AE 124-128, 134-137.)

Ms. Lee is Mr. Sullivan's ex-girlfriend and the only witness that connects him to the shooting. Ms. Lee gave multiple disparate accounts about what transpired when she was interrogated by the police in the months following the June 24, 2013, shooting. She initially told police that a person she identified as "Man Man" and three male companions approached her shortly after shots were fired to get them away from the scene. However, on August 10, 2013, when the police threatened to charge her with murder if she did not implicate Mr. Sullivan, Ms. Lee said Mr. Sullivan was with Quincy and Derrick Hunter when they borrowed her car and dropped her off at her home a few minutes before the shooting. Ms. Lee has at all times denied being in the car when the shooting occurred despite that she was in the only person in the car when it was stopped and several percipient witnesses told the police a woman was driving the car when shots were fired. (1 AE 88.)

None of the percipient witnesses at the bus stop placed Mr. Sullivan in the vehicle or near the crime scene when the shooting occurred. (1 AE 88.)

At the grand jury hearing, the prosecution's gang expert, Leonard Broberg, of San Francisco Police Department's Gang Task Force, relied heavily on social media records he obtained from Facebook, Instagram, and Twitter in forming his opinion that the murder and attempted murder was

committed for the benefit of Big Block, a criminal street gang in support of the gang allegations alleged pursuant to Penal Code section 186.22(b)(1). The prosecution's theory of the case was that Mr. Sullivan and the Hunter brothers were members of Big Block criminal gang and Mr. Rice was killed because he was a member of rival gang, West Mob, and because Mr. Rice publicly threatened Quincy H. on social media. (1 AE 88.).[4]

ARGUMENT

I. INTRODUCTION

This case presents 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 and to present a complete defense under the Due Process Clause of Fifth Amendment, as well as under the Compulsory Process and Confrontation Clauses of the Sixth Amendment guaranteed to the states by the Fourteenth Amendment. Given the

---

[4] At the grand jury, Broberg testified about the important role social media played in the present case:

> Well, as of all society, gangsters are now in the 21st century and they have taken on a new aspect of being gangbangers, and they do something they call 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. . .
>
> There is any number of places they will post videos, they will post images, and of course, they will do the written word. They will disrespect each other in cyber space. (1 AE 93-94)

explosion of social media use in recent years, trial courts throughout California and nation 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 for 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 SCA's provision prohibiting disclosure of electronic records except to law enforcement. (18 U.S.C. §§ 2702, 2703, et seq.) Real parties 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 following an in camera review by the trial court.

Real party, Sullivan, respectfully asserts the Court of Appeal is wrong as a matter of constitutional law and also in practicality because denying pretrial access does not promote the fair administration or justice, nor the orderly ascertainment of the truth. Instead, 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 virtually all criminal cases use social media records as evidence and social media providers do not readily produce the records to the trial courts for review. Moreover, real parties assert that delaying access to social media records until trial without affording defense counsel reasonable pretrial investigation of the records, which are voluminous, impinges on defendants' ability to meaningfully challenge the state's evidence and, thus, runs afoul of defendants' constitutional rights to receive a fair trial, to defend a case, to effective assistance of counsel, to compulsory process, and to effectively confront and cross-examine witnesses.

Whether a criminal defendant has a constitutional right to pretrial access to social media records is an area that has not been squarely decided by the United States Supreme Court. Give that this Court is under a solemn obligation to interpret and implement the United States Constitution, it is incumbent on this Court to rule in areas of law where the United States Supreme Court has defaulted to protect the rights of the criminally accused given the important rights at stake when previous state and federal courts could not predict the ubiquitousness of social media evidence in criminal courts.

Finally, Sullivan and Hunter respectfully request that *People v. Hammon* (1997) 15 Cal.4th 1117, be overruled, or at a minimum, limited to records protected by the psycho-therapist patient privilege pursuant to Evidence Code section 1014. In ruling that criminal defendants 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 cause. Real parties contend *Hammon* was wrongly decided because it has created logistical problems in trial courts for the past 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. The expansion of *Hammon* to include social media records will not only cause unnecessary chaos and backlog in criminal courts but will deny criminal defendants, the majority of whom are indigent, the ability to meaningfully challenge the state's evidence to demonstrate innocence at trial.

II. THE COURT OF APPEAL ERRED IN RULING THAT CRIMINAL DEFENDANTS DO NOT HAVE THE CONSTITUTIONAL RIGHT TO PRETRIAL, JUDICIAL REVIEW OF SOCIAL MEDIA RECORDS TO ENSURE THAT RECORDS NECESSARY FOR A FAIR TRIAL ARE PRODUCED TO THE DEFENSE

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 and to meaningfully mount a defense. *Weatherford*, therefore, sheds no light on this issue.

A. **This Court is 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 social media records 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 this 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 in the nation 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 superior court.

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

The United States Supreme Court has described the right of the defendant in a criminal trial to due process as "the right to a *fair opportunity* to defend against the state's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294, emphasis added.) A fair opportunity to defend is required to satisfy due process. Criminal defendants are denied basic fairness and stripped of the ability to meaningfully defend a case 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. Dumping thousands of social media records on defense counsel in the middle of trial with inadequate time to review or investigate the materials is deeply unfair to the defendant whose life and liberty is at stake, as well to as over-burdened public defenders and defense counsel who are unable to try the case competently while simultaneously reviewing and digesting voluminous records. Defendants must have pretrial access to social media records because they 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 domain in which few of life's functions are carried out. Rather, it is the hub 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 voluminous on nature 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* judicial review, at which time the judge can withhold irrelevant information and issue any 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 appropriate 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. It is axiomatic that a criminal defendant's right to fundamental fairness and to present a defense hinge on the ability to obtain, prior to trial, evidence in the possession of third-parties that is material to the defense, either because the records impeach a prosecution witness or because it demonstrates a defendant is actually innocent of the charges and/or allegations.

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, such as the SCA, 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 or she 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*, do an opening statement, or even announce ready for trial, 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 to conduct *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. 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" (*Jones v. Superior Court* (1962) 58 Cal.2d 56, 60,) which is best served by disclosure prior to

trial. A defendant cannot receive fundamental fairness at trial when he or she does not have access to evidence that will shed light on the truth until after trial commences.

This Court should not hesitate to vindicate the demands of due process and require disclosure of relevant social media records prior to trial notwithstanding the SCA. The United States Supreme Court has held that a defendant's due process right to present a defense prevails over evidentiary rules and privileges. (*Chambers, supra,* 410 U.S. at 298; *Rovario v. United States* 353 U.S. 53, 60-61.) The United States Supreme Court's decision in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, established that a criminal defendant's right to due process and to receive a fair trial trumps a victim's statutory privacy rights in Child Protective Service records and that court's must conduct a *in camera* reviews of the confidential records and provide records material to the defense counsel. (*Ibid.*) Because *Ritchie* was a post-conviction case, it did not address whether the *in camera* review should be conducted prior to trial under the due process clause and this Court has yet had the occasion to resolve this issue.

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 in the wake of *Ritchie*, 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. For example, in *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 defendant's right to a fair trial trumped 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.

Similarly, 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 engaging in sexual activity. (*Id.* at 1346.) The defendant twice subpoenaed the tape prior to trial. The court granted the parents' Motion to Quash on grounds it was protected by the marital privilege. (*Ibid.*) The defendant sought extraordinary relief prior to trial in the Court of Appeal and the Supreme Court directed that an alternate writ be granted. The Court of Appeal complied. Relying upon *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.*)

Traditional notions of justice and fair play, the linchpin of the Due Process Clause, require that superior courts be given the authority to order social media providers to produce records for an *in camera* review prior to trial so that records can be used to mount an intelligent defense at a meaningful time. Any other conclusion violates a defendant's right to present a complete defense because delaying access to the records until the middle of trial, when the prosecution gets unfettered access prior to trial,

under the SCA would "infring[e] upon a weighty interest of the accused" and would be " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " (*Rock v. Arkansas* (1987) 483 U.S. 44, 58, 56.) This lack of reciprocity violates due process as addressed below.

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. The SCA, set forth in 18 U.S.C §§ 2701, et. seq, allows only account holders and government agencies, such as the police and district attorneys, to obtain the contents of electronic communications with a warrant or court order, but not criminal defendants. (18 USC 2702(d); 2703.) Real parties contend the SCA is unconstitutional as applied to criminal defendants.

In *Wardius*, the United 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 for lack of reciprocity which impinged on the defendant's ability to prepare a defense.

Similarly, in *Evans v. Superior Court* (1974) 11 Cal.3d 617, this Court held that the lack of reciprocity between the prosecution and the defense in pretrial discovery regarding access to line-ups violated the due process clause under *Wardius*. There, this Court held that a defendant has a right to a pretrial lineup in cases in which eyewitness identification is a material issue and there is a reasonable likelihood of a mistaken identification. (*Evans*, *supra*, 11 Cal.3d at p. 625.) Concerned about the ability of a defendant to receive a fair trial, this Court concluded that because prosecutors are able to compel a lineup and use any favorable evidence, fairness required that the defendant be given a reciprocal right to discover and use lineup evidence. (*Ibid.*)

Also persuasive is the Ninth Circuit's decision in *United States v. Bahamonde* (2006) 445 F.3d 1225. There, the Ninth Circuit reversed the defendants drug trafficking convictions for the importation of marijuana, because the district court excluded the trial testimony of the arresting

Customs and Border Protection agent on the ground that the defendant had failed to comply with 6 C.F.R. § 5.45(a) -- the Department of Homeland Security's regulation -- requiring a defendant to "set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought" from a proposed Department of Homeland Security witness. (*Id.* at 1228.) Relying primarily on *Wardius*, the Ninth Circuit ultimately reversed Bahamonde's conviction and remanded for a new trial, holding that "the regulation, as applied in this criminal prosecution, violates due process by failing to provide reciprocal discovery" from the prosecution. (*Id.* at 1229.)

Under *Wardius*, *Evans*, and *Bahamonde*, the latter as persuasive authority, it is clear the SCA is unconstitutional as applied to criminal defendants for lack of reciprocity insofar as access to social media records are concerned. Pursuant to the SCA, the prosecution can access to social media records with a court order or warrant, but bars criminal defendants the same right. Delaying access to social media records until the middle of trial when the police and prosecutor get unfettered access, does not cure the reciprocity error under *Wardius*. [5] Defense counsel cannot prepare an

---

5

The reciprocity problem is highlighted by a declaration submitted on behalf of Mr. Sullivan by Inspector Broberg, the prosecution's gang expert, who stated that he relies heavily on records from social media companies such as Facebook, Instagram and Twitter to prosecute alleged gang members for alleged gang crimes and in forming his opinion that crimes are committed for the benefit of a criminal street gang under Penal Code § 186.22. He also confirmed that San Francisco Police Department has ready access to both public and private content on social media accounts by search warrant. He said, "[i]n the instant case, I relied in part, on social media records to provide evidence that Jaquan Rice, Jr., and defendant Hunter, Hunter, and Sullivan

intelligent defense if preparations and investigation are not undertaken beforehand.

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*. In its opinion, 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 Appeal's position that there is no right to pretrial discovery fails.

With regard to the *Wardius* issue, the Court of Appeal stated 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

---

were members of rival gangs and that the shootings were gang-related." Broberg further stated he did not subpoena Reneesha Lee's social media records. (1 AE 262-263.) That the defense does not have parallel access prior to trial to fairly defendant against the state's evidence is unconstitutional as applied to criminal defendants under *Wardius*.

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. (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.

Finally, defendants cannot get the records they need from the state because the state chose to procure some, but not all, of Mr. Rice's social media records and none of Ms. Lee's social records, all of which the defense needs to impeach her at trial and to present a complete defense.[6] 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

---

[6] The prosecution's gang expert has averred he did not seek Ms. Lee's social media records. (1 AE 262-263.)

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 social media providers 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 generally

released wholesale to the state without an *in camera* review as to relevance 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 by law enforcement. Thus, the fear 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 control the process by limiting disclosure of irrelevant records and issuing 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, that the state, but not the defense, is granted access to social media records prior to trial without good reason for the distinction given that the superior court maintains strict control over the release of the relevant records. As such, the SCA is unconstitutional as applied to criminal defendants if interpreted to ban access entirely, or preclude access until trial is underway when the state is not subject to the same restriction.

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 issued 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. (*Ibid.)* 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 *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.)

In this case, the Court of Appeal correctly pointed out that the Supreme Court said in *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 examine the issue under the Due Process Clause, does not preclude this Court from also considering this issue under the federal Compulsory Process Clause as well. 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. This Court should

authorize the superior court to conduct an *in camera* review of social media records pursuant to the Compulsory Process Clause.

E. Social Media Records Should Be Produced Pretrial Because the Sixth Amendment Guarantees a Criminal Defendant the Right to Effective Assistance of Counsel in Plea Negotiations Which Will Not Occur if Exculpatory Social Media Records Are Inaccessible to the Defense Until Midway Through Trial

Real Party, Sullivan, asserts that the Sixth Amendment's guarantee of effective assistance of counsel requires that social media records be produced pretrial so counsel for the accused has access to all relevant evidence that will shed light on the truth in order to effectively represent a defendant during plea negotiations. The Sixth Amendment, applicable to the States by the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668.) It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." (*Montejo v. Louisiana* (2009) 556 U.S.778, 786.) The United States Supreme Court has affirmed that plea negotiations are a critical stage of the proceedings and constitutionally effective counsel is required under the Sixth Amendment. (*Padilla v. Kentucky* (2010) 559 U.S. 356; *Hill v. Lockhart* (1985) 474 U.S. 52; *Missouri v. Frye* (2012) 132 S.Ct. 1399.)

Real party, Sullivan asserts that criminal defendants cannot receive effective assistance of counsel at plea negotiations if they are precluded

from accessing exculpatory social media records unless and until they proceed to trial. Unless defense counsel has access to all evidence that will shed light on a case, including social media records that support an affirmative defense or impeach a prosecution witness, they will be unable to fairly negotiate with the prosecution to obtain a just outcome for their clients. A defense attorney cannot zealously defend his or her clients during plea negotiations if the search for the truth is hindered by a statute that blocks defense access to exculpatory social media records until midway through trial. The impact of delayed access to exculpatory social media records until trial would be disastrous given the majority of criminal cases do not go to trial, but are resolved by a negotiated disposition. This point is made by the United States Supreme Court in *Missouri v. Frye* (2012) 132 S.Ct. 1399 at 1407:

> Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. [Internal citations omitted.] The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," *Lafler, post,* at 1388, 132 S.Ct. 1376, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, Separation of Powers and the Criminal Law, 58 Stan. L.Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally

> culpable but take a chance and go to trial" (footnote omitted). *In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.*

(*Missouri v. Frye*, *supra*, 132 S.Ct. at 1407, emphasis added.)

Because plea negotiations are the critical point for the lion share of criminal cases, it is manifestly unfair to preclude criminal defendants from access to exculpatory social media records in 95% of the cases that settle rather than proceed to trial. Defense counsel cannot and will not be effective during plea negotiations unless armed with social media records that will discredit a prosecution witness and permit a plea to reduced charge or sentence following plea negotiations. The categoric denial of an entire genre of evidence until a defendant proceeds to trial is unfair and strips defendants of the effective assistance of counsel in the majority of criminal cases. Concerns about privacy interests can be dealt with by a careful *in camera* pretrial review as well as protective orders deemed necessary by the court. The over-emphasis on the timing of the disclosure is a red herring.

F. This Court Should Overrule *Hammon*, or in the Alternative, Limit *Hammon* to 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 social media records necessary to conduct an

effective cross-examination. The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This right is secured for defendants in state as well as in federal criminal proceedings. (*Pointer v. Texas* (1965) 380 U.S. 400.) The Court has emphasized that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination." (*Douglas v. Alabama (1965)* 380 U.S. 415, 418. The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis v. Alaska* (1974) 415 U.S. 308.) Indeed, the Court has recognized that cross-examination is the " 'greatest legal engine ever invented for the discovery of truth.' " (*California v. Green* (1970) 399 U.S. 149m 158, quoting 5 J. Wigmore, Evidence § 1367, p. 29 (3d ed. 1940).

In *Davis*, *supra*, 415 U.S. at 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 *Ritchie,* (1987) 480 U.S. 39, a plurality of the Court led, by Justice Powell, 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* 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. (*Id.* at 54.) However, Justice Powell failed to command a majority. For their part, Justice Blackmun and Justice Brennan, who was joined by Justice Marshall, 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.).)

In a later case, Justice Blackmun described his views on this issue as follows:

> The personal view of the author of this opinion as to the Confrontation Clause is somewhat broader than that of the *Ritchie*

> plurality. Although he believes that [t]here are cases, perhaps most of them, where simple questioning of a witness will satisfy the purposes of cross-examination (id., at 62, 107 S.Ct., at 1004 (BLACKMUN, J., concurring), he also believes that 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 83-65, 107 S.Ct., at 995-996.)
>
> (*Kentucky v. Stincer* (1987) 482 U.S. 730, at 738, emphasis added.)

Real parties respectfully request that this Court reconsider its ruling in *Hammon* because it gave undue weight to the plurality opinion in *Ritchie* that 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 when 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, *Ritchie* 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. (*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 *Ritchie*, *supra*, 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 hold that when it comes to social media records, a defendant has a constitutional right to pretrial access to evidence under the Sixth Amendment Confrontation Clause in order to conduct an effective cross-examination. Just having the opportunity to ask questions of Ms. Lee is of no import if counsel is not fully prepared to impeach her following a timely access and a complete review of the relevant records. Real parties assert

that Justice Blackmun's concurring opinion should be followed because this is a case in which simple questioning of witnesses at trial will not suffice for effective cross-examination under Confrontation Clause; pretrial access to social media records is, therefore, constitutionally compelled. Defendants urge this Court to hold that *Hammon* was wrongly decided on constitutional grounds insofar as it is being relied upon to deprive defendants of social media records necessary to cross-examine Ms. Lee and the gang expert at trial.[7]

Real parties agree with Justices Mosk, Blackmun, Brennan, and Marshall 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 overrule *Hammon* and

---

[7] 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 concerned trial courts' orders withholding the identity of witnesses in cases in which there was 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 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.

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 so defense counsel can effectively represent defendants at all critical stages of the proceedings, including plea negotiations. 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.

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 superior court judges who rule on pretrial motions and conduct settlement negotiations who are most familiar with the evidence in a particular case, and best able to regulate subpoena issues, not the trial courts who are assigned a case for trial depending on courtroom availability without prior information about the case. Moreover, even if access to social media records is technically a "trial right" a superior court judge still retains 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 social media's 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 was familiar with the evidence in this case, properly heard the Motions rather than sending the case to a trial court only to tie up a courtroom and jury while the losing party sought extraordinary relief in the Court of Appeal for the following 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, a ruling which will lead to absurd results and chaos if allowed to stand.

Alternatively, real parties request *Hammon* be limited to records subjected to the psychotherapist-patient privilege pursuant to Evidence Code section 1014. Real parties contend that this Court, in *Hammon,* intended to limit its holding to confidential mental health records by 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 arguably 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. [8] Accordingly, if this Court does not overrule *Hammon*, defendants request that it be limited to records protected by Evidence Code section 1014. Confidential communications between psychotherapist and patient are protected in order to encourage those who may pose a threat to themselves

---

[8]

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 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

or to others, because of some mental or emotional disturbance, to seek professional assistance. (*Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502, 507-508; *People v. Stritzinger* (1983) 34 Cal.3d 505, 511 [194 Cal.Rptr. 431, 668 P.2d 738].)

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. For example, section 1014 provides in part that "the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ." In contrast, the "holder" of social media records, such as one's "friends" on Facebook cannot refuse to testify regarding the contents of his or her social media posts, nor can the social media user prevent others who see the posts from testifying as to the contents. Rather, the social media companies are merely the bailee of communications between the account holder and whomever he or she communicates. 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* and its progeny prevented pretrial

access to social media records.

CONCLUSION

Real parties respectfully and urgently request that this Court do what is just and grant criminal defendants the right to subpoena social media records prior to the commencement of trial, upon a showing of good cause, subject to a judicial *in camera* review to protect privacy interest of the account holders. Real party Sullivan is facing a potential life sentence and he should not be deprived of pretrial access to records that will prove he is innocent of the charges for which he stands accused so counsel can reasonably prepare and mount proper defense. Ms. Lee and Mr. Rice's privacy interests can be adequately protected by a protective order.

For the reasons stated herein, it is respectfully requested that the Court of Appeal's decision be reversed and Facebook, Instagram, and Twitter be ordered to produce the subpoenaed records to respondent court for an *in camera* review forthwith.

Respectfully submitted this 15th day of January, 2016.

By: _____
JANELLE E. CAYWOOD
Associate Attorney for Real Party
LEE SULLIVAN

_____
SUSAN A. KAPLAN
Lead Counsel for Real Party
LEE SULLIVAN

_____
JOSE PERICLES UMALI
Attorney for Real Party
DERRICK HUNTER

CERTIFICATION

I hereby certify that Real Parties Opening Brief on the Merits consists of 12,100 words and that the font used was 13 point Times New Roman.

Dated: January 15, 2016

Respectfully Submitted,

JANELLE E. CAYWOOD
Attorney for Real Party
Lee Sullivan

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 January 15, 2016 I served a **REAL PARTIES, LEE SULLIVAN AND DERRICK HUNTER'S, OPENING BRIEF ON THE MERITS** 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 Bryant Street, Third Floor
San Francisco, CA 94103

Hon. Bruce Chan
San Francisco Superior Court, D-22
850 Bryant Street, Third Floor
San Francisco, CA 94103

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

Court of Appeal, First District
Division Five
350 McAllister Street
San Francisco, CA 94102

I declare under penalty that the foregoing is true and correct. Executed on January 15, 2016, at San Francisco, California.

JANELLE E. CAYWOOD