IN THE SUPREME COURT OF CALIFORNIA

FACEBOOK INC., et al., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; THE PEOPLE, DERRICK HUNTER, and LEE SULLIVAN, Real Parties in Interest.	S230051 Ct.App. 1/5 A144315 (San Francisco County Superior Court Nos. 13035657 & 13035658.)

JOINT APPLICATION TO APPEAR AS AMICI CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST HUNTER AND SULLIVAN, AND BRIEF OF *THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION* AND *THE PUBLIC DEFENDER OF VENTURA COUNTY*

STEPHEN P. LIPSON, Public Defender
Michael C. McMahon, Chief Deputy
SBN 71909
State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law
800 S. Victoria Avenue
Ventura, California 93009
(805) 477-7114 *michael.mcmahon@ventura.org*
Attorneys for amici curiae
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION and PUBLIC DEFENDER OF VENTURA COUNTY

IN THE SUPREME COURT OF CALIFORNIA

FACEBOOK INC., et al., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; THE PEOPLE, DERRICK HUNTER, and LEE SULLIVAN, Real Parties in Interest.	S230051 Ct.App. 1/5 A144315 (San Francisco County Superior Court Nos. 13035657 & 13035658.)

JOINT APPLICATION TO APPEAR AS AMICI CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST HUNTER AND SULLIVAN, AND BRIEF OF *THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION* AND *THE PUBLIC DEFENDER OF VENTURA COUNTY*

STEPHEN P. LIPSON, Public Defender
Michael C. McMahon, Chief Deputy
SBN 71909
State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law
800 S. Victoria Avenue
Ventura, California 93009
(805) 477-7114 *michael.mcmahon@ventura.org*
Attorneys for amici curiae
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION and PUBLIC DEFENDER OF VENTURA COUNTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES
FOR APPLICATION TO APPEAR AS AMICI CURIAE

Page:

Cases

Codes and Statutes

TABLE OF AUTHORITIES
FOR BRIEF IN SUPPORT OF RPI

Page:

Constitutions:

Cases:

Codes & Statutes:

Other:

IN THE SUPREME COURT OF CALIFORNIA

FACEBOOK INC., et al., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; THE PEOPLE, DERRICK HUNTER, and LEE SULLIVAN, Real Parties in Interest.	S230051 Ct.App. 1/5 A144315 (San Francisco County Superior Court Nos. 13035657 & 13035658.)

JOINT APPLICATION TO APPEAR AS AMICI CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST HUNTER AND SULLIVAN, AND BRIEF OF *THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION* AND *THE PUBLIC DEFENDER OF VENTURA COUNTY*

The CALIFORNIA PUBLIC DEFENDERS ASSOCIATION (CPDA) and the PUBLIC DEFENDER OF VENTURA COUNTY (Stephen P. Lipson) apply for permission to file the accompanying succinct amici curiae brief in support of Real Parties in Interest, DERRICK D. HUNTER and LEE SULLIVAN. Because the constitutional claims and rights of Hunter and Sullivan arise from their status as criminal defendants, this brief will refer to them as "defendants." (Although our brief is not lengthy, our courts have repeatedly reminded us that "brevity and eloquence are not necessarily inconsistent." (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 469.)

This application summarizes the nature and history of your amici, and our interest in the issues presented in this case. It also demonstrates that our proposed brief will assist the court in the analysis and consideration of the issues presented.

A. The California Public Defenders Association is the largest and most influential association of criminal defense attorneys and public defenders in the State of California. Our collective experience regarding the law and our appellate advocacy on criminal justice issues puts us in a unique position to assist the court in this case.

CPDA's membership of some 4,000 public defenders and attorneys in private practice exceeds that of our comparable sister association, California Attorneys for Criminal Justice. We are an important voice of the criminal defense bar.

CPDA has been a leader in continuing legal education for defense attorneys for almost 40 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education, Criminal Law Specialization Education, and Appellate Law Specialization Education. The CPDA is one of only two organizations deemed by the Legislature to be an "automatically" approved legal education provider. (Bus. & Prof. Code, §6070, subd. (b).)

The courts have granted CPDA leave to appear as amicus curiae in many California cases which culminated in published opinions. We believe that our participation has been helpful in many important cases. (See, e.g., *People v. Sasser* (2015) 61 Cal.4th 1 [limitation on status-based enhancements]; *People v. Robey* (2013) 56 Cal.4th 1218 [warrant requirement for seized shipment]; *People v. Beltran* (2013) 56 Cal.4th 935 [heat of passion analysis]; *People v. Albillar*

(2010) 51 Cal.4th 47 [sufficiency of the evidence in a gang-related prosecution]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [pre-prelim discovery]; *People v. Lenix* (2008) 44 Cal.4th 602 [comparative juror analysis for first time on appeal], *People v. Nelson* (2008) 43 Cal.4th 1242 [DNA evidence in a cold-hit case]; *Chambers v. Superior Court* (2007) 42 Cal.4th 673 [*Pitchess* procedures]; *People v. Sanders* (2003) 31 Cal.4th 318 [search could not be a reasonable "parole search" without knowledge of the suspect's parole status]; *Manduley v. Superior Court* (2002) 27 Cal.4th 537 [no separation of powers violation by the direct filing of juvenile cases in the criminal court]; *Morse v. Municipal Court* (1974) 13 Cal.3d 149 [mandate issued to compel consideration of diversion].)

CPDA has also served as amicus curiae in the United State Supreme Court in numerous cases resulting in a decision on the merits. (See, e.g., *Gonzales v. Duenas-Alvarez* (2006) 549 U.S. 1076 [generic "theft offenses" under the Immigration and Nationality Act]; *California v. Trombetta* (1984) 467 U.S. 479 [the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense]; *Monge v. California* (1998) 524 U.S. 721 [double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency]; *United States v. Knights* (2001) 534 U.S. 112 [parole searches]; *Lockyer v. Andrade* (2003) 538 U.S. 63 [recidivist sentencing and the Eighth Amendment].)

The author of this amici brief is a California State Bar Certified Specialist in both Appellate Law and Criminal Law, a past-president of CPDA, and Co-Chair of the CPDA Amicus Committee. I have authored briefs and argued cases in the California courts (see, e.g., *Packer v. Superior Court* (2014) 60 Cal.4th 695 [recusal procedures]; *Kling v. Superior Court* (2010) 50 Cal.4th 1068 [criminal SDT procedures]; *People v. Salazar* (2005) 35 Cal.4th 1031 [*Brady* duties re expert witnesses]; *People v. Loyd* (2002) 27 Cal.4th 997 [jail privacy];

Albertson v. Superior Court (2001) 25 Cal.4th 796 [SVP procedures]; *People v. Douglas* (1999) 20 Cal.4th 85 [appealability].) and in the United States Supreme Court. (See, *Samson v. California* (2006) 547 U.S. 843; *United States v. Knights* (2001) 534 U.S. 112.) As an adjunct professor of law at two schools, I have taught classes on Advanced Evidence, Trial Practice, Moot Court, and Criminal Law.

CPDA is also involved in legislative solutions, as noted by the court in *People v. Wagner* (2009) 45 Cal.4th 1039 [1971 amendments to sentencing scheme]. Members of the CPDA Legislative Committee and our paid lobbyists attend key state Senate and Assembly committee meetings on a weekly basis and take positions on hundreds of bills relating to the topics of constitutional rights, criminal discovery, evidence, criminal procedure, and the fair administration of justice.

In summary, CPDA and its legal representatives have the necessary experience, collective wisdom, and interest in matters of constitutional rights, discovery, evidence law and appellate/writ review to serve this court as amici curiae in this case. Our statewide perspective can be helpful when the court is confronted by a controversy that arises out of the fact-bound background of a single trial.

B. The Ventura County Public Defender's office is established pursuant to Government Code sections 27700-27712 to provide quality legal representation to indigent persons in the courts of Ventura County. Historically, the Public Defender is well-versed on all issues relating to California's criminal justice system and often provides amicus services to the California courts on issues of statewide significance.

Stephen P. Lipson is the Public Defender of Ventura County. Each year, the Public Defender provides a defense in nearly 16,000 new misdemeanor

cases and over 3,500 new felonies. All of these cases involve discovery issues. Our collective trial and appellate experience well equips us to assist this court on the issues presented in this case.

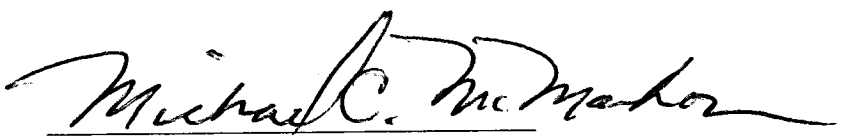
The Public Defender of Ventura has been permitted to appear as amicus in our state Supreme Court since 1969. In 2005, that court also allowed the public defender to present oral argument as an amicus in *People v. Salazar* (2005) 35 Cal.4th 1031.

The Public Defender takes an active presence in our courts of review as a party, an attorney for a party, or in the role of amicus. (See, e.g., *Erwin v. Appellate Dept.* (1983) 146 Cal.App.3d 715 [Public Defender as petitioner].) The author of this brief has worked for the Ventura County Public Defender for 16 years and is the Chief Deputy responsible for our appellate practice and training. I was counsel on some of the cases cited by the parties in this writ proceeding.

The Prayer

Based upon this application and the accompanying brief, the California Public Defenders Association and the Public Defender of Ventura apply for an order granting permission to file our amici curiae brief in support of the real parties in interest (the defendants). The brief is combined and bound with this application.

Dated: April 1, 2016



Michael C. McMahon
Attorney for the
The California Public Defenders Association and
The Public Defender of Ventura County,
Applicants for amici curiae status
in support of real parties in interest.

Our Discussion and Observations

Introduction

This case involves a potential conflict between certain provisions of the federal Stored Communications Act (SCA or the Act) (18 U.S.C., § 2701, et seq.) and criminal defendants' federal and state constitutional rights in a state prosecution. If those laws are harmonized, the conflict is resolved and avoided.

Your amici have carefully read the briefing of the parties. For purposes of brevity and judicial economy, we will try to avoid repetition of any lengthy discussion of the scope of the various constitutional rights implicated by the petition or the record. (Most of these rights are both state and federal. For example, both the United States and California Constitutions grant a defendant the right "to have compulsory process for obtaining witnesses in his favor." (U.S. Const., 6th Amend.; see Cal. Const., art. I, § 15 [affording "the right ... to compel attendance of witnesses in the defendant's behalf"].) Here, the resistive witnesses are custodians of certain records sought by the defendants.

We write to share our observations about how this controversy should be viewed by this court. In short, it appears the superior court did a very good job balancing the competing equities and legal interests, and *beginning* to resolve any potential tension between the SCA and the constitutional rights of the defendants. Importantly, review ensued before any final balancing by the trial court.

At the risk of oversimplification, the Court of Appeal purports to resolve the issue by categorizing the record as involving *pretrial discovery*, rather than the production of evidence for trial. Based upon that dubious conclusion, the doctrine of stare decisis dictates the result under the majority opinion in *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*). Amici urge this court to carefully scrutinize and revisit the basis of that opinion.

Your amici also ask this court to affirm the order of the superior court on the narrowest grounds possible and to avoid any sweeping proclamations regarding the constitutionality of the SCA. Your opinion should simply hold that the SCA does not *categorically* preclude a trial court from ordering an in camera judicial inspection of records to determine if the defendants' entitlement to due process, compulsory process, and confrontation, warrant redacted disclosures with appropriate protective orders. The petition should then be denied on that basis.

I.

Because the order denying the motion to quash was made one day before the commencement of trial, it should be viewed as a *trial* order, rather than an order for *pretrial* discovery.

The order denying the motion to quash was made on January 22, 2015, and the trial was scheduled to commence the next day, January 23, 2015. (Ex. U, R.T., 1/22/2015 at p. 16.) Because the movants requested time to get transcripts, to seek a stay of the order, and to file a petition for review of the order, the trial had to be continued. (*Id.*, at pp. 13, 16.) Nevertheless, the January 22 hearing and order are best viewed as trial-related, rather than as an order involving pretrial discovery.

In cases involving multiple defendants facing sentences of Life Imprisonment, it is very common for trial courts to conduct trial-related hearings before selecting a jury. Such hearings are commonly referred to as "*in limine*," a phrase derived from the Latin word for "threshold," signifying a motion made *at the start of a trial*. Because such hearings are invariably conducted outside the presence of the trial jury, judicial economy is promoted by resolving as many of these issues as possible prior to jury selection.

Here, the trial court did not exceed its jurisdiction nor abuse its discretion in delaying the order denying the motion to quash until the day before the formal commencement of trial. Had the order been made after jeopardy attached, writ review would have been impossible or effectively have forced a mistrial.

Nevertheless, the Court of Appeal appears to have concluded that a trial judge may inspect social media records, but that the in camera hearing in the instant case was a form of prohibited *pretrial* discovery.

"We emphasize that our ruling is limited to the *pretrial* context in which the trial court's order was made. (Fn. 16.) Nothing in this opinion would preclude Defendants from seeking *at trial* the production of the materials sought here (or petitioners again seeking to quash subpoenas), where the trial court would be far better equipped to balance the Defendants' need for effective cross-examination and the policies the SCA is intended to serve. (Fn. 17.)" (Emphasis added.) But that balancing can only occur *after* judicial inspection.

A trial court should be allowed to begin trial discovery proceedings before commencing jury selection. The trial court acted within its discretion in scheduling a discovery hearing the day before the formal commencement of the rest of the trial. The trial court may have correctly concluded that the SCA might have to yield to the defendants' Sixth Amendment right of confrontation at trial. Allowing *the court* to examine the records the day before jury selection to identify any potentially relevant and material content would reduce the risk of mid-trial delay.

The subsequent delay of the trial was caused by petitioners' resistance to the SDT and to the court's order denying their motion to quash. According, the in camera inspection should properly be viewed as one occurring on the eve of trial.

/

II.

The order on review made no records available to the defendants; it was merely designed to prepare the trial court to rule expeditiously on such discovery issues and to make additional orders at some later date without unnecessary mid-trial delays.

Amici remind the court that the trial court's order did not involve any disclosure of social media records to the parties. The Court of Appeal does not contend that the constitutional rights to ensure a fair trial will never outweigh the public policy interests sought to be furthered by the SCA. The order at issue here merely compelled that records be lodged with the clerk for potential in camera review by the trial court at some unspecified date and time. The issuance of a subpoena duces tecum is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein until a judicial determination has been made that the person is legally entitled to receive them. Review is difficult (or premature) on the instant record because the important judicial determination has yet to be made.

The actual in camera review may well have occurred during trial. Trial courts should have the discretion to avoid unnecessary delay by ordering non-parties to locate and to lodge relevant records at the threshold of the trial. Importantly, a ruling on the threshold of trial does not preclude the court from changing its ruling based on other developments during trial.

The Court of Appeal erred by attempting to micromanage the trial court's calendar. The power to conduct judicial proceedings involves the power inherent in every court to control the disposition of the causes on its docket with an economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing

interests and maintain an even balance. The record in this case supports the conclusion that the trial court was doing just that.

III.

The trial court's factual finding that the records were not available to the defendants by alternative means is entitled to great deference.

A large component of the petitioners' motions to quash, and oral argument at the January, 2015, hearings on those motions, is that the defendants were able to get the necessary records from other sources. This factual contention was *repeatedly* rejected by the trial court in both hearings.

When reviewing factual findings, the reviewing court does not reweigh the evidence in the record because a trial court "generally [is] in a better position to evaluate and weigh the evidence." (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385.) Instead, the reviewing court should consider the record in the light most favorable to the trial court's factual findings and "defer to the superior court's express and implied factual findings if they are supported by substantial evidence." (*People v. Woods* (1999) 21 Cal.4th 668, 673.)

IV.

Due Process will sometimes require the disclosure of private, personal information, regardless of the format in which it is stored. A literal reading of the SCA as prohibiting Due Process rights would present a serious question regarding its constitutionality, which this court should avoid.

Due Process often requires the disclosure of private, personal information. It appears the Petitioners concede the point.

If private, personal information is directly relevant to, and essential to, a fair criminal trial, privacy rights give way if there is a compelling and countervailing state interest related to the rights of the parties. (Cf., *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853-1854 [disclosures of sexual harassment civil suit].) The format in which the information is stored should be irrelevant to that balancing of those competing interests.

When enacting the SCA, Congress was well-aware of the operation of the judicial branch, the separation of powers, and constitutional exceptions read into legislation. "In determining a statute's constitutionality, we start from the premise that it is valid, we resolve all doubts in favor of its constitutionality, and we uphold it unless it is in clear and unquestionable conflict with the state or federal Constitutions." (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 122); accord, *California Housing Finance Agency v. Elliott* (1976) 17 Cal. 3d 575, 594.)

V.

Petitioners disavowed any claim that the SCA creates any form of privilege and moved to quash to avoid some fictive criminal liability.

At the final trial court hearing on the motion to quash (January 22, 2015), the petitioners disavowed any claim that the SCA creates some form of privilege and moved to quash to avoid their own federal criminal liability. (Ex. U, R.T., at 271.)

However, the petitioners would be shielded from such liability because their acts were compelled by a court order. "Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.' *United States v. Balint*, 258 U.S. 250, 251, 42 S.Ct. 301, 66 L.Ed. 604, T.D. 3375 (1922). We therefore generally 'interpret[ ] criminal statutes to include broadly applicable scienter requirements, even where

the statute by its terms does not contain them.') *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)." (*Elonis v. United States* (2015) __ U.S.__, 135 S.Ct. 2001, 2009 [rejecting the government's argument that negligence may be the mental state for making a criminal threat].)

It is far-fetched to conclude that the petitioners would be criminally or civilly responsible under the SCA for providing records to a judge pursuant to an order to do so.

VI.

The Confrontation Clause of the Sixth Amendment may afford criminal defendants a right to discovery on the eve of trial of privately held documents when such discovery is necessary to a fair trial. Due Process and the Confrontation Clause will sometimes require that rights historically viewed as "trial rights" attach shortly *before jeopardy* to be meaningful.

Amici contend that the record here is distinguishable from the record in *Hammon* in a manner which dictates a different result. We further contend the dissenting opinions in *Hammon* are better reasoned than the majority opinion, which overruled previous precedents. Although the result in *Hammon* may have been correct, the majority opinion goes too far, and is generally read to resolve important constitutional issues that should have been avoided.

In *Hammon*, the trial court failed to identify the documents it reviewed in camera to facilitate meaningful appellate review. This court concluded that Hammon had forfeited such a claim by not asking the trial court to make such a record. (15 Cal.4th, at p. 1124.) This court also described the trial court's characterization of the records it had examined as merely a "cryptic statement." This flawed and inadequate appellate record provides a shaky foundation for an important component of our state's constitutional jurisprudence.

Importantly, in the instant case, it seems highly likely that trial court would have made an adequate record to ensure meaningful appellate review and that nothing would have been provided to the defendants unless such production was demonstrably necessary for the conduct of a fair trial.

VII.

This is not a case about a conflict between state and federal law. The SCA must be applied to this state prosecution in a manner that comports with the many federal constitutional rights made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

"[When] it appears that an Act of Congress conflicts with [a constitutional] [provision], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation." *Trop v. Dulles* (1958) 356 U.S. 86, 104 (plurality opinion). "[T]he Constitution is the supreme law of the land, and all legislation must conform to the principles it lays down." (*Rostker v. Goldberg* (1981) 453 U.S. 57, 112, dis. opn. J. Marshall with J. Brennan.)

Every reasonable jurist is aware that Congress passes a fair amount of questionable and ill-advised legislation. Some of these Acts of Congress facially conflict with the federal constitution, and others could be unconstitutional if literally applied to a particular case or controversy. (Compare *Citizens United v. FEC* (2010) 558 U.S. 310 [federal ban on corporate-funded independent expenditures under 2 USC § 441b *facially* violated the First Amendment] with *United States v. Raines* (1960) 362 U.S. 17 [upholding the constitutionality of the Civil Rights Act of 1957 *as applied* to the parties to the litigation].)

On other occasions, federal regulations conflict with an Act of Congress and are unenforceable, but only as applied to the status of the parties. (See, e.g. *Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. __, 134 S.Ct. 2751 [closely-held, for-profit corporations are not required to provide certain forms of birth control seemingly mandated by the Affordable Care Act].)

When such conflicts arise, as in the instant case, it is the duty and province of the courts to resolve them. Over the years, our courts have invalidated hundreds of provisions in Acts of Congress or, more commonly, construed the statute in a manner that avoids a question regarding their constitutionality. A statute should be interpreted in a way that avoids placing its constitutionality in doubt. The "constitutional-doubt canon" of statutory construction militates against not only those interpretations that would render the statute unconstitutional, but also those applications which would even raise serious questions of constitutionality. It is essential in this proceeding for the court to follow its "duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality." (*Richmond Co. v. United States* (1928) 275 U.S. 331, 346.) This constitutional-doubt canon is sometimes referred to as the "doctrine of constitutional avoidance."

Again, this is not a case about a conflict between state and federal law. The SCA must simply be applied to this prosecution in a manner that comports with the federal and state rights to due process, including its compulsory process and confrontation components.

Criminal prosecutions constitute "ongoing" criminal investigations, at least until the entry of a judgment. It is left to the court to determine if there are reasonable grounds to believe that the records sought are "relevant and material" to the investigation of the case. Consistent with the Compulsory Process Clause, California and other jurisdictions provide both parties with the means to participate in the pretrial investigation of the crime and the identity of the

perpetrators. (See, e.g., Pen. Code, § 1326 [providing for in camera review of records produced under a defense's subpoena duces tecum (SDT)].) Section 1326 was analyzed extensively in *Kling v. Superior Court* (2010) 50 Cal.4th 1068, and the author of this brief argued and briefed that case in the California Supreme Court.

California also requires a criminal defendant to share some of the fruits of his or her criminal investigation with the prosecution at least thirty days before trial. (See Pen. Code, § 1054.3.) California's criminal investigation and disclosure scheme is ongoing and reciprocal. For example, the People's obligations under *Brady* are ongoing, even postjudgment. (*People v. Davis* (2014) 226 Cal.App.4th 1353, 1366.)

In *Mapp v. Ohio* (1961) 367 U.S. 643, 655, the High Court held "all evidence obtained by searches and seizures in violation of the [federal] Constitution is, *by that same authority*, inadmissible in a state court." (Emphasis added.) Mapp's federal constitutional rights were viewed as self-effectuating in her Ohio prosecution, without the need of further codification by Congress or by the state government. The applicable federal constitutional rights must enforced by the state court. "To hold otherwise is to grant the [constitutional] right but in reality to withhold its privilege and enjoyment." (*Id.*, at p. 656.)

VIII.

The order for an in camera inspection in this case is consistent with the due process requirement that criminal prosecutions "comport with prevailing notions of fundamental fairness" and that "criminal defendants be afforded a meaningful opportunity to present a complete defense."

In the first instance, we need to trust and afford some deference to our trial court judges, who are generally far better informed about the specific

facts and circumstances of their cases than we will ever be. Those judges attempt to harmonize and apply seemingly inconsistent statutory and constitutional mandates to a particular case.

In the instant case, the defendants' showing of a necessity, good cause, and legal entitlement to the documents was quite strong and compelling. In a different case, it may not be as strong. Here, the order for an in camera inspection was fair and appropriate to protect the due process rights of the defendants.

A defendant's due process rights include the right to present material evidence in his or her defense. Rules excluding evidence from criminal trials do not necessarily "abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve." (*United States v. Scheffer* (1998) 523 U.S. 303, 308; quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 56.) *Rock v. Arkansas* guides us here. The High Court did not invalidate the legislation, it merely ruled there must be a constitutionally-compelled exception in Rock's particular case. As here, the text of the legislation was not the source of the exception.

On the record presented here, the trial court may have concluded that to interpret the SCA to categorically prohibit any judicial inspection of records in this particular case would be "disproportionate" to the purposes intended for the SCA. That conclusion is not unreasonable.

IX.

The petition should be denied without prejudice because this court has an inadequate record for meaningful review and the exculpatory value of the subpoenaed records is unknown at this time.

Because petitioners have not yet produced the records for judicial

inspection, it impossible to assess, at this time, whether the prejudice to the defendants is of constitutional magnitude.

Such an assessment could be made if the records were examined at in camera hearing with the trial court making an adequate record for meaningful review.

After the in camera hearing, the entire controversy may be moot if the trial court determines that the defendants have no entitlement to see the records. If the trial court concludes that some records or redacted records should be released to the defendants subject to appropriate protective orders, petitioners should be afforded an adequate window of time to file a successor petition. Writ review can then be conducted, aided by the sealed transcript of the in camera hearing and review of the sealed records sought to be disclosed.

California procedure facilitates this process. Under Penal Code, § 1326, subdivision (c), an entity responding to a third party SDT in a criminal case must deliver the subject materials to the clerk of court so that the court can hold a hearing to determine whether the requesting party is entitled to receive them. When the defendant is the requesting party, the court may conduct that hearing in camera. In light of the SCA, it seems appropriate that the defendants should be excluded from a portion of that in camera hearing. The issuance of an SDT pursuant to section 1326 is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described in the SDT until a judicial determination has been made that the party is legally entitled to receive them. Again, this is yet to occur.

Part of the trial court's role when presented with materials produced under a defense SDT to a third party is to assess the defendant's constitutional rights regarding the records sought. To the extent the trial court has not completed that assessment, the petition is premature. (Cf., *Kling v. Superior Court* (2010) 50 Cal.4th 1068 [remand required because the Court of Appeal had not reviewed the

transcript of the in camera proceedings].)

Our Supreme Court's guidance in *People v. Mooc* (2001) 26 Cal.4th 1216, supports the conclusion that meaningful review cannot occur in a vacuum. "The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential [sealed] file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision of whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with the requirements of Evidence Code, section 915, and the transcript of the in camera hearing and all copies of the documents should be sealed. [Citation omitted.]" (*Id.*, at p. 1229.)

X.

As applied to this prosecution, the SCA violates the defendants' right to due process if it is interpreted to prohibit any judicial assessment of the exculpatory significance of the subpoenaed records.

In construing and applying the words of a statute to a particular controversy, common sense should be a guide.

Petitioners' threshold premise that a court conducting an in camera examination of records is a "person or entity" within the meaning of the SCA is just wrong. (Petition, at p. 22.) By analogy, James G. Snell, who authored the petition, is clearly a person, and his law firm, Perkins Coie LLP, is clearly an

entity, yet it would be absurd to suggest that the SCA prohibits disclosure to them. Construction that leads to an absurd result should be avoided.

When Congress enacted the SCA, it was presumed to have done so with full knowledge of then-existing law, including the federal constitution and its amendments. Each Act of Congress need not enumerate any constitutionally-compelled deviations from its text, because those exceptions are read into the Act by the Judicial Branch, when and if the need arises. (*Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137 ["The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it."].) Congress also knows that the courts are the forum where controversies such as the one here will be resolved and that the courts will determine their own procedures.

XI.

Social media evidence has become outcome-determinative in many criminal prosecutions.

"It seems as if every week there's a news story about someone committing a crime and confessing to it on Facebook, bragging about it on Twitter or sharing photos of it via Instagram. In many ways, social media has been a boon for law enforcement, handing the police ready admissions of guilt, equipping criminal investigators with new types of evidence and empowering prosecutors to better dispel reasonable doubt of guilt." (The New York Times, February 16, 2014, on page SR5 of the New York edition with the headline: Social Media, a Trove of Clues and Confessions. See also: http://www.nytimes.com/2014/02/16/sunday-review/social-media-a-trove-of-

clues-and-confessions.html?ref=todayspaper)

This court recently acknowledged that social media records can be "particularly significant" to pretrial motions which have nothing to do with the guilt or innocence of a defendant. The evidence the unanimous court labeled as "particularly significant" were records stored by a petitioner in this case, Twitter, Inc. (*Packer v. Superior Court* (2014) 60 Cal.4th 695 [court erred in denying a recusal motion without an evidentiary hearing].) In *Packer*, the defense was forced to make its case, in large part, with social media records because, as here, the witnesses were uncooperative or unavailable. This court's unanimous opinion is rife with reliance upon the social media records. (E.g., *Id.*, at p. 704 (MySpace record), and pp. 706, 708, 709, 711 (Twitter, Inc. records).]

Contrary to petitioners' assertion, the actual business records are often necessary to overcome an authentication objection when an uncooperative witness will not do so. (See, *id.*, at p. 709 ["the prosecutor objected to the introduction of the [Twitter, Inc.] message, "really over not being able to tweet my whereabouts" that had appeared on Elizabeth's Twitter account, arguing that "there has been no showing that the 'tweet' can be attributed to Elizabeth Frawley."].)

Again, the significance of social media records, such as those sought here, cannot be over-stated.

Conclusion

This court should affirm the order of the superior court on the narrowest grounds possible and avoid any sweeping proclamations regarding the constitutionality of the SCA. Your opinion should simply hold that the SCA does not *categorically* preclude a trial court from ordering an in camera inspection of records on the eve of trial to determine if the defendant's entitlement to due

process warrants redacted disclosures with appropriate protective orders. The petition should be denied on that basis.

DATED: April 1, 2016

Respectfully submitted,

STEPHEN P. LIPSON, Public Defender

Michael C. McMahon, Chief Deputy

SBN 71909
State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law
800 S. Victoria Avenue
Ventura, California 93009
(805) 477-7114
michael.mcmahon@ventura.org
Attorneys for amici curiae
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION and PUBLIC DEFENDER OF VENTURA COUNTY

CERTIFICATE OF WORD COUNT

I do hereby certify that by utilizing the word count feature of MSWord, Times New Roman #13 font, there are 7587 words in this document, excluding Declaration of Service.

April 1, 2016

Jeane Renick
Legal Mgmt. Asst. III

DECLARATION OF SERVICE

Case Name: **Facebook Inc., et al., Petitioner, v. Superior Court of the County of San Francisco, Respondent; The People, Derrick Hunter, and Lee Sullivan, Real Parties in Interest;**

Case No. **S230051 (from C. App. 1/5 A144315)**

On April 1, 2016, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender at 800 South Victoria Avenue, Ventura, California 93009.

I am "readily familiar" with the County of Ventura's practice of collection and management of correspondence for mailing. Under that practice outgoing correspondence would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Ventura, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one business day after date of deposit for mailing affidavit. On this date, I served the attached **Joint Application to Appeal as Amici Curiae in Support of Real Parties In Interest Hunter and Sullivan, and Brief of the California Public Defenders Association and the Public Defender of Ventura County** by placing in the U. S. Mail, a full, true, and correct copy thereof in an envelope addressed to the persons named below at the addresses set out below, by sealing and depositing said envelope in the Ventura County U.S. Mail collection center in the ordinary course of business.

1) James G. Snell, Esq., 3150 Porter Drive, Palo Alto, CA 94304-1212 (Counsel for Petitioners);
2) Superior Court of City/County of San Francisco, 400 McAllister St. San Francisco, CA 94102-4515;
3) Susan B. Kaplan, Esq., 214 Duboce St., San Francisco, CA 94102 (Counsel for RPI Sullivan);
4) Janelle E. Caywood, Esq., 3223 Webster St., San Francisco, CA 94123 (Counsel for RPI Sullivan);
5) Heather Trevisan, Office of District Attorney, 850 Bryant St., Rm 322, San Francisco, CA 94103 (Counsel for The People);
6) Jose Pericles Umali, Esq., 507 Polk St., Ste. 340, San Francisco, CA 94012 (Counsel for RPI Hunter);

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the above date at San Buenaventura, California.

STEPHEN P. LIPSON, Public Defender
By
Jeane Renick