# In the Supreme Court of California

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| **Facebook Inc. et al.,**<br><br>Petitioners,<br><br>v.<br><br>**Superior Court of the City and County of San Francisco,**<br><br>Respondent.<br><br>**Derrick Hunter et al.,**<br><br>Real Parties in Interest. | No. S230051<br><br>(San Francisco Superior Court Nos. 13035657 & 13035658)<br><br>Hon. Bruce Chan, Judge |

## Application of the San Francisco Public Defender's Office to Appear as *Amicus Curiae*

And Brief in support of Respondent Superior Court and Real Parties Hunter et al. (Rule 8.200(c))

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## Issue presented

Should relevant social media records—widely used as evidence in criminal cases—be divulged in response to a criminal subpoena duces tecum before trial to allow effective representation and a fair trial? The Court of Appeal held that, while real parties may be constitutionally entitled to social media records despite the federal Stored Communications Act (18 U.S.C. §§ 2702, 2703, et seq.), this Court's decision in *Hammon* (*People v. Hammon* (1997) 15 Cal.4th 1117) vitiated the right to obtain them *pretrial*. (*Facebook, Inc. v. Superior Court* (2015) 240 Cal.App.4th 203.

The San Francisco Public Defender, as proposed amicus, urges this Court to: 1) hold that due process requires defense access to material social media records despite the Stored Communications Act; and 2) overrule or limit *Hammon* in light of the ubiquity of social media records as evidence, the practical problems with denying pretrial access, and the Legislature's subsequent revision of Penal Code section 1326—ensuring that all subpoenaed records in a criminal case are reviewed in camera for materiality, application of a privilege, and necessary protective orders before pretrial release to a party.

## Application to Appear as *Amicus Curiae*

The San Francisco Public Defender requests leave to file the attached *amicus curiae* brief supporting respondent court and real parties. (Cal. Rules of Court, Rule 8.200(c)).

This case raises an important statewide issue: whether, and when, a criminal defendant has the right to subpoena social media records, despite the Secure Communications Act's prohibition on disclosure except to law enforcement. Social media records are increasingly offered by the prosecution as evidence, particularly in gang cases, and defendants have a parallel need for these records to defend against charges. The decision here will directly affect the ability to obtain these records and prepare cases for trial.

The issue is particularly important to San Francisco Public Defender, Jeff Adachi, whose office is charged with effectively handling fifteen to twenty thousand criminal and juvenile delinquency cases per year. The office also represented the juvenile charged in connection with real parties and faced the same issue and objections involved here.

Thus, we request status as amicus to file the below brief.

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## Amicus Brief in Support of Respondent Court and Real Parties Hunter et al.

## Introduction

Amicus, the Public Defender of San Francisco, respectfully submits this brief in support of Respondent Court and Real Parties.

Currently, social media dominate as a means of communication in our society. And evidence derived from them is increasingly used, and often outcome-determinative, in criminal cases. (See, e.g., *People v. Valdez* (2011) 201 Cal.App.4th 1429 [evidence of gang involvement shown by his social-networking web page]; *People v. Beckley* (2010) 185 Cal. App. 4th 509 [erroneous admission of photo

downloaded from social networking website].) Its significance in criminal cases cannot be overstated, and as social media will only continue to grow, so too will their content increasingly constitute material evidence in criminal cases.

Real parties and other amici have fully explained why statutory privacy interests do not trump a criminal defendant's federal constitutional rights, and that no statute can validly limit the due process rights of criminal defendants. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.) We agree and will not repeat those arguments.

We write primarily about the timing of disclosure, and on that issue the Court of Appeal went too far in extending *Hammon* to unrelated materials and circumstances the Court had not contemplated at the time. Social media records, as opposed to psychiatric records, involve an enormous swath of evidence used by all parties to a criminal case, and are already protected from unfiltered pretrial disclosure under Penal Code section 1326. We urge this Court to revisit *Hammon* in light of the significant legal and social changes having occurred in the 20 years since it was decided; namely, the post-*Hammon* amendment of Penal Code section 1326 requiring all subpoenaed records in a criminal case go

to the court for review before disclosure; and the monumental shift in the nature of human communications—from the telephonic, spoken, written; to the texting, tweeting, posting—that define social communication today. To extend *Hammon*'s pretrial bar to social media evidence will hamstring trial courts, inconvenience jurors, and threaten the constitutional rights of the criminally accused to prepare a defense. The Court of Appeal's decision does just that.

## 1. The Court of Appeal erroneously applied *Hammon's* bar to pretrial disclosure of privileged psychiatric records to the social media records at issue here.

*Hammon*'s theory for delaying disclosure until trial was premised on a trial judge who has heard the victim's testimony and is thus in the best position to determine relevance: "Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (*People v. Hammon*, supra, 15 Cal. 4th at 1127.) But delaying the disclosure of voluminous social media records until trial creates an unworkable system, likely to impair the fair administration of justice, and is not necessary to the protection of any legitimate privacy interests.

### A. Trial courts must have discretion as to when to release material, relevant, subpoenaed documents to ensure effective representation, due process, and judicial efficiency.

The line between "pretrial" and "trial" in this context is vague. Does pretrial mean everything before the case is sent to a trial court, or before jury selection? Must a trial court wait to actually hear the witness's testimony before deciding if the requested materials are relevant?

The Court of Appeal here appeared to have drawn the line between "pretrial" and "trial" at the time the case gets assigned to a trial court. But drawing the line at this juncture does not serve *Hammon's* goal of having a well-informed judge. Here, respondent court's order issued one day before that was scheduled to occur, so it was deemed "pretrial." But how would a newly-assigned "trial judge" on Day One be in a better position to determine relevancy and need than a master calendar judge, like respondent court here, who had been managing the case since its arrival in Superior Court?

The problems with mid-trial disclosure in the context of social media records have been explained at length. Suffice it to say that, if promoting efficiency in the trial courts is the goal, the mid-trial disclosure of voluminous social media records, with the concomitant need for a delay in order to investigate, does not serve this goal.

### B. *Hammon* involved a weak showing (as opposed to the strong showing here) of materiality, justifying delayed disclosure until trial.

Moreover, *Hammon* does not represent a typical scenario. Unlike here, where respondent court was fully informed and understood the issues, the *Hammon* trial court was given little information about how the records would be relevant. So there, waiting until the victim testified was probably warranted. But this Court should entertain the prospect that diligent judges, even if they do not actually preside at the trial, will insist on an adequate showing before releasing anything, and that they are well-positioned to demand enough information to competently assess relevance and decide whether, and when, the materials should be released.

### C. *Hammon* is distinguishable, because it involved privileged materials; social media posting is not privileged and the SCA specifically limits providers' duties to maintain privacy.

Further, because *Hammon* involved a significantly different kind of evidence, it's holding as to the bar on pretrial disclosure does not control here. Specifically, *Hammon* distinguished between materials protected under "a statutory and constitutional privilege" and "unprivileged information in the hands of private parties" that the defense could obtain through a subpoena duces tecum. Here, the

social media records do not fall neatly into either category. Rather, they are records of communications designed to be shared, yet granted a privacy status under the Act that protects them from unfettered disclosure.

### D. Pretrial disclosure is also necessary for effective plea bargaining.

Finally, a comment on the notion that, because most cases are resolved through plea negotiations before trial, the records may not become necessary, so the pretrial bar on receiving this evidence does no harm to the defendant. This proposal is misplaced because defense counsel—in the absence of critical, relevant information—cannot fully assess the strength of potential defenses, and thus cannot competently advise a client in plea negotiations. Competent advice is required in plea bargaining. (*In re Alvernaz* (1992) 2 Cal.4th 924; *Lafler v. Cooper* (2012) 132 S.Ct.1376, 182 L.Ed.2d 398; *Missouri v. Frye* (2012) 132 S.Ct. 1399, 182 L.Ed.2d 379.)

*Hammon* should not be extended beyond its facts and the poor showing of relevance made there in the context of statutorily privileged records. The social media records fall outside the well-defined privilege involved in *Hammon,* and no good policy reason exists for shielding social media posts from disclosure, *subject to a*

*protective order*, when they are deemed by a well-informed jurist to be relevant and necessary to the defense.

Further, as discussed next, because there can be no unfettered disclosure in a criminal case after the 2004 amendment to Penal Code section 1326—where everything subpoenaed from a third party in a criminal case goes to the trial court and nothing is released to the parties until the court has determined need, relevance, and the scope of any privacy interests involved—no fear of defense abuse of process or privacy should exist.

## 2. The 2004 amendment to Penal Code section 1326—requiring in camera review of all subpoenaed materials before disclosure to the parties—makes *Hammon's* delayed review unnecessary.

In criminal cases, unlike civil cases, the protection of privileged, sensitive, or otherwise private information is integral to the subpoena duces tecum procedure, because the third party need only produce the materials *to the court*. (Pen. Code, § 1326; *Kling v. Superior Court of Ventura Cnty.* (2010) 50 Cal.4th 1068, 1074.) The parties get nothing from the third party, but only from the trial court after it has reviewed the materials, assessed the defendant's need for them, and considered any appropriate protective orders. (*Ibid.*)

This is what petitioners fail to grasp when they suggest that a

defendant may subpoena material "with no review at all." (Ans. Brief on the Merits, p. 7.) On the contrary, issuing 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." (*Kling, supra,* 50 Cal.4th at 1074, quoting *People v. Blair* (1979) 25 Cal.3d 640, 651.) Certainly, petitioners' objections has merit with regard to a *civil* deposition subpoena. (Evidence Code, § 1560 (b) and (e).) But no deposition subpoena can issue in a criminal case. (Penal Code, § 1326(c).)

Specifically, after *Hammon* was decided, the Legislature amended Penal Code section 1326 to restrict the way in which third-party subpoenas could be issued in criminal cases—legislatively mandating delivery of all subpoenaed records *to the court* so it could control access of the parties to those records.

Before the 2004 amendment, criminal practitioners could potentially issue "deposition subpoenas," which allowed them "to gain access to private records from third parties without judicial oversight." (See California Bill Analysis, A.B. 1249 Assem., 6/09/2004.) Citing this concern, the author of the 2004 amendment

argued, "This bill is needed to better protect the privacy rights of third-party citizens and litigants alike when subpoenas are issued and served in criminal cases, and to re-establish and strengthen judicial control over the release of privileged and confidential records to prosecutors and criminal defendants in criminal cases." (See California Bill Analysis, A.B. 1249 Assem., 6/09/2004.)

Now, the amended Penal Code section 1326 provides safeguards that apply in every case, whether the information is privileged, private, or otherwise sensitive. It effectively bars the parties from getting subpoenaed materials until the court determines relevancy and need. The social media records here fit neatly into this statutory framework, which implements the right to subpoena relevant evidence, while protecting the interests of third parties.

Importantly, the Legislature saw no need to build in timing restrictions, and after this Court's decision in *Kling*—permitting the prosecution to participate in the court's decision to disclosure subpoenaed materials—there is even less reason to worry about premature disclosure. (*Kling, supra,* 50 Cal.4th 1068.) The 1326 scheme supports *pretrial* discovery of relevant materials.

If this Court determines that *Hammon* remains necessary to protect the psychotherapist-patient privilege where insufficient

proffers are made (the proverbial fishing expedition) until mid-trial, even in light of these developments, so be it. But to extend *Hammon*'s timing restriction to other forms of less sensitive information, such as the social media posts involved here, is unnecessary and harmful to the efficient administration of justice. And to do so in the face of the uncontroverted materiality showing here, hampers a fair trial, with no concomitant harm to any legitimate privacy of the social media users.

Thus, criminal subpoenas are governed by a statute that already balances the right to relevant information with claimed privacy interests; with mandatory judicial oversight, information is released only when necessary, and then only with appropriate protective orders. Thus, privacy concerns are addressed at the same time a defendant's right to relevant materials is protected. Petitioners have not explained why their privacy concerns are not sufficiently protected by this procedure, especially when balanced against the 5th and 6th Amendment rights to due process and a fair trial.

In sum, to extend *Hammon* beyond the particularly private materials involved there will only bind the hands of litigants and judges attempting to efficiently prepare a criminal case for trial.

## Conclusion

Privacy interests under the Stored Communications Act do not trump a criminal defendant's federal constitutional rights, and no statute—state or federal—can validly limit the due process rights of criminal defendants. (*Pennsylvania v. Ritchie, supra,* 480 U.S. 39.) The drafters of the SCA could not have envisioned just how much material it would ultimately be invoked to protect, nor how much communication would shift from writing and talking, to texting, posting and tweeting. In any event, the conditional privacy it legislates cannot constitutionally deprive a criminal defendant of relevant, material evidence necessary to mount a defense.

Moreover, the 2004 legislative amendments to Penal Code section 1326—safeguarding all third-party material from unregulated disclosure—make *Hammon* superfluous, at least insofar as social media records are concerned. Respondent court properly ordered petitioners to comply with the subpoena on the ground that a federal statute cannot be invoked to deny a criminal defendant the right to relevant evidence in his defense.

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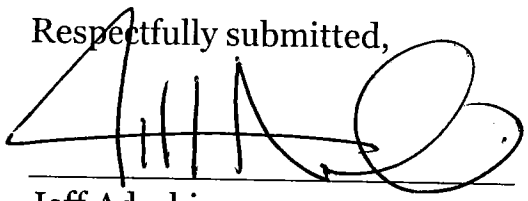
We respectfully urge the Court to overrule *Hammon*, or limit it to its facts, and to find the SCA unconstitutional if applied in a way that categorically denies an accused access to relevant social media records.

Dated: April 6, 2016

Respectfully submitted,



Jeff Adachi
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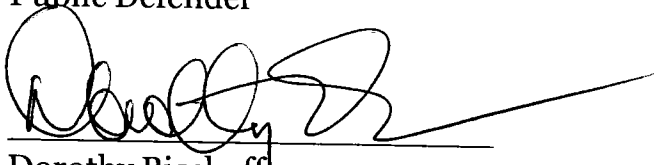

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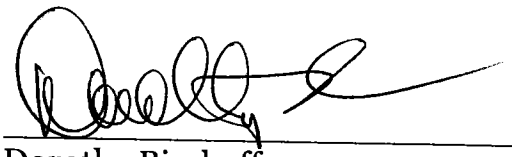
## Certificate of Word Count

I, Dorothy Bischoff, counsel for amicus curiae the San Francisco Public Defender, hereby certify that the word count of the attached application to file amicus brief and brief of amicus curiae in support of respondent court and real parties is 2,475 words as computed by the word count function of Word, the word processing program used to prepare this brief.

Dated: April 6, 2016



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## Proof of Service

I, the undersigned, say:

I am over 18 years old and not a party to the above action. My business address is 555 Seventh Street, San Francisco, California 94103. On April 6, 2016, I served the attached Application of the San Francisco Public Defender's Office to Appear as *Amicus Curiae* on the following parties by mailing a copy to the addresses listed, and placing the envelopes with postage affixed in the U.S. Mail:

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