

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF SAN DIEGO,

Respondent.

LANCE TOUCHSTONE,

Real Party in Interest.

No. S245203

SUPREME COURT
FILED

JUL 25 2019

Jorge Navarrete Clerk

Deputy

**INTERVENOR'S SUPPLEMENTAL BRIEF ADDRESSING
THE UNSEALING OF DEFENSE COUNSEL'S
DECLARATION AND EXHIBITS**

Fourth Appellate District, Division One, Case No. D072171
San Diego County Superior Court, Case No. SCD268262
The Honorable Kenneth K. So, Judge

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**UNSEALING DEFENSE COUNSEL’S DECLARATION AND
ATTACHED EXHIBITS IS NECESSARY FOR THE PARTIES TO
FAIRLY LITIGATE WHETHER GOOD CAUSE SUPPORTS THE
SUBPOENA FOR THE VICTIM’S PRIVATE FACEBOOK
COMMUNICATIONS**

This Court in *Kling v. Superior Court* (2010) 50 Cal.4th 1068 (*Kling*) explained that the People generally have the right to be heard regarding, or file a motion to quash, a third-party subpoena. This Court stated:

The People, even if not the target of the discovery, also generally have the right to file a motion to quash “so that evidentiary privileges are not sacrificed just because the subpoena recipient lacks sufficient self-interest to object” [citation] or is otherwise unable to do so. [Citation.] Even where the People do not seek to quash the subpoena, the court may desire briefing and argument from the People about the scope of the third party discovery. [Citation.] Indeed, “a canvass of the underlying proceedings in reported cases suggests trial courts regularly permit prosecutorial participation in third party discovery.” [Citation.]

(*Id.* at pp. 1077-1078.)

It cannot be fairly said that Intervenor San Diego County District Attorney (hereinafter “the People”) was able to adequately address the propriety of the defense subpoena to Facebook when counsel for Touchstone filed her April 21, 2017 declaration and exhibits under seal. In addition, it does not appear that the victim was timely notified of the subpoena: the victim did not object to disclosure via his Marsy’s law right to refuse discovery until February 13, 2018.¹

¹ On February 13, 2018, the victim in this case filed a motion with the Superior Court alleging victim’s rights violations, including the Superior Court order to produce his private messages. On April 18, 2018, the victim appeared before the Superior Court and asserted that the stay of

Because there is an objection to disclosure, Touchstone must establish good cause before he can obtain the sought records. “This restriction maintains the court’s control over the discovery process, for if the third party ‘objects to disclosure of the information sought, the party seeking the information must make a plausible justification or a good cause showing of the need therefor.’ [Citation.]” (*Kling, supra*, 50 Cal.4th at pp. 1074–1075, citing *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.)

Unsealing is necessary for the People to address the adequacy of the defense subpoena and evaluate any claim of good cause. This Court should also take judicial notice of the preliminary hearing transcript and any related exhibits, as they will add necessary context as to whether the defense declaration and exhibits supply good cause to obtain the victim’s private Facebook messages.

If this Court determines that portions of the April 21, 2017 declaration and exhibits should remain sealed, the People respectfully request that this Court err on the side of disclosure where possible. In explaining why *ex parte* review of a subpoena is disfavored, this Court stated, “The use of these extraordinary procedures, though, should be limited to that which is necessary to safeguard the rights of the defendant or of a third party, inasmuch as *ex parte* proceedings are generally disfavored because of their inherent deficiencies.” (*Kling, supra*, 50 Cal.4th at p. 1079.)

Any claim of attorney “work product” should be limited to “core” work product, that is, any writing reflecting “an attorney’s impressions, conclusions, opinions, or legal research or theories.”

this matter is in violation of his Marcy’s Law rights, as it relates to Touchstone’s attempt to obtain his private Facebook messages. (Intervenor’s Exh. F at p. 5.)

(Code Civ. Proc., § 2018.030, subd. (a); Pen. Code, § 1054.6; *People v. Zamudio* (2008) 43 Cal.4th 327, 355.) For example, statements of individuals obtained from Facebook does not constitute core work product, irrespective of whether reciprocal discovery compels disclosure. (Compare *Roland v. Superior Court* (2004) 124 Cal.App.4th 154 with *People v. Tillis* (1998) 18 Cal.4th 284.) In sum, core work product claims and reciprocal discovery limitations do not justify the sealing of collected statements used by Touchstone to support his subpoena for the victim's private Facebook content.

Additionally, any claim of attorney client privilege pursuant to Evidence Code section 954 should be limited to communications between Touchstone and his attorney at the time of the communication, as opposed to communications made to other third-persons or statements made in a public forum, such as open posts on Facebook. (Cf. *Facebook, Inc. v. Superior Court (Hunter)* (2018) 4 Cal.5th 1245.)

CONCLUSION

The People respectfully request this Court unseal most, if not all, of defense counsel's April 21, 2017 declaration and attached exhibits. Touchstone is asking this Court to balance his rights as a criminal defendant against the victim's state constitutional rights under Marsy's Law. Touchstone is also potentially asking this Court to hold that federal law, namely the Stored Communications Act, violates his constitutional rights as a criminal defendant. Full disclosure of any materials used to support Touchstone's subpoena is necessary to fully and fairly address these important questions of first impression.

Dated: July 24, 2019

Respectfully Submitted,

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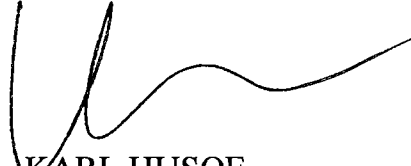
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CERTIFICATE OF WORD COUNT

I certify that this INTERVENOR'S SUPPLEMENTAL BRIEF ADDRESSING THE UNSEALING OF DEFENSE COUNSEL'S DECLARATION AND EXHIBITS including footnotes, and excluding tables and this certificate, contains 819 words according to the computer program used to prepare it.

A handwritten signature in black ink, appearing to read 'Karl Husoe', with a stylized, flowing script.

KARL HUSOE
Deputy District Attorney

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<p>FACEBOOK, INC,</p> <p style="text-align: right;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO,</p> <p style="text-align: right;">Respondent.</p>	<p style="text-align: center;">For Court Use Only</p>
<p>LANCE TOUCHSTONE,</p> <p style="text-align: right;">Real Party In Interest.</p>	<p>Supreme Court No.: S245203 Court of Appeal No.: D072171 Superior Court No.: SCD268262</p>

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On July 24, 2019, a member of our office served a copy of the within Letter of **INTERVENOR'S SUPPLEMENTAL BRIEF ADDRESSING THE UNSEALING OF DEFENSE COUNSEL'S DECLARATION AND EXHIBITS** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid in the United States Mail, addressed as follows:

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I electronically served the same referenced above document to the following entities via www.truefiling.com:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 24, 2019 at 330 West Broadway, San Diego, CA 92101.



Jerri C. Zara