IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent. LANCE TOUCHSTONE, Real Party in Interest.	No. S245203 Court of Appeal No. D072171 Superior Court No. SCD268262

REAL PARTY IN INTEREST TOUCHSTONE'S BRIEF REGARDING GOOD CAUSE OF THE UNDERLYING SUBPOENA AND REMAND TO TRIAL COURT

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A. Touchstone's Subpoena to Facebook, Seeking Renteria's Complete Social Media Account, is Supported by Good Cause.

A fundamental concern in criminal trials is that "an accused be provided with a maximum of information that may illumine his case." (*Bortin v. Superior Court* (1976) 64 Cal.App.3d 873, 878, quoting *Ballard v. Superior Court* (1966) 64 Cal.2d 159, 167.) Allowing an accused the right to discover such information "is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.)

When faced with an objection to the disclosure of sought information, a seeking defendant "must make a plausible justification or a good cause showing of need therefor." (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1075, quoting *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.) Often such a showing is readily apparent; when it is not, the defendant must make a prima facia showing of plausible justification. Such a showing "need not be strong." (*Bortin, supra,* 64 Cal.App.3d at 878-79.) He must simply demonstrate "that the requested information will facilitate the ascertainment of the facts and a fair trial." (*Id.* at 878; *Pitchess, supra,* 11 Cal.3d at 536.) This "may be satisfied by general allegations which establish some cause for discovery," other than a fishing expedition or vague desire to obtain all possible information available to the investigation. (*Pitchess, supra,* 11 Cal.3d at 537.)

Where the information sought "may have considerable significance to the preparation of his defense, and the documents have been requested with adequate specificity to preclude the possibility that defendant is engaging in a 'fishing expedition,'" good cause exists to warrant the discovery be

produced. (*Pitchess, supra,* 11 Cal.3d at 538.)

i. Plausible justification to acquire Renteria's private messages and restricted communications exists; it is revealed in his public Facebook record and preliminary hearing testimony.

1. Public Facebook records provide plausible justification.

Renteria led a public life through his social media page. After the shooting incident on August 8, 2016, he created significant content relating to the case and his growing propensity for, and fascination with, violence. This content is of the utmost importance and relevance to the defense and should be produced pursuant to defense subpoena in this case.

On August 30, 2016, Renteria posted that he would not have access to his private messages while in the hospital, asking people to instead contact him by public post on his Facebook page. (April 21, 2017, Defense Counsel Declaration "Def. Decl.," Exhibit E.) This was written nearly two weeks after the shooting incident. This post evidences that, during this timeframe, Renteria was using Facebook's private messaging feature as a means of communication; he would not notify friends to avoid private messaging if that was not a form of communication he was employing with sufficient regularity with them. Here, in this very post, Renteria provides evidence that he uses Facebook's private messaging feature to communicate – and that he wishes to communicate from the hospital after the shooting. Logically, since he is posting from and about the hospital where he is receiving treatment for his injuries sustained at the shooting, the communications will inevitably cover his medical status and aftermath of the shooting incident. This is not an illogical or vague assumption. This is not a fishing expedition. This is direct evidence that Renteria was using Facebook's private messaging feature to communicate with people in the days and weeks following the incident. These records should be produced as relevant, non-confidential

communications about the case.

On September 28, 2016, one day before the preliminary hearing in this case, Renteria posted to his Facebook page asking people to contact him to accompany him to the hearing. (Def. Decl. Ex. F.) Evidence of a response to this request exists in the preliminary hearing transcript: a man named "Danny" attended the hearing in support of Renteria. (Preliminary Examination "PE" Transcript at page 19 : line 4-5.) Did Danny respond to Renteria privately on Facebook messenger? Did he post to Renteria's page under restricted settings? Somehow Danny knew about the hearing and attended at the behest of Renteria. Yet that communication is not available on Renteria's public Facebook page. It is in the unproduced content sought through the instant defense subpoena.

Through September and October 2016, Renteria continued to post pictures of his injuries and discuss the shooting incident in detail. (Def. Decl. Ex. D.) He posted updates on the status of his recovery and fundraising efforts. (*Id.*) These posts garnered considerable interest on his page, spurring lengthy communications with friends. Statements Renteria made to others about the shooting incident, Touchstone himself, the procedural posture of the case, and the extent of his injuries, are fully relevant and entirely discoverable in this case. It is clear from the evidence on his public page that this discovery exists in his restricted and private Facebook records. There is every expectation that communications on these matters occurred in private messaging and restricted posts. Thus the inquiry for his private content during this timeframe is not a fishing expedition based on vague hopes for relevant content; this is a targeted inquiry for relevant content that reliable evidence shows to exist. Touchstone is entitled to these records and cannot obtain a fair trial without them.

Starting in February 2017, Renteria's public Facebooks posts begin to meaningfully reflect his propensity and character for violence. He references

financial struggle and threatens that "pretty soon I'll be forced to rob you at gun point to survive" and appears to joke abut "dumping" Rebecca Touchstone's body in Los Angeles. (Def. Decl. Exs. G, H.) He posts graphic and detailed fantasies of killing people and describes a daily struggle "fight[ing] the urge to kill" while reviewing his Facebook page for "people in need of dying slow painful deaths." (Def. Decl. Ex. I.) He describes being "on Facebook for three days" in a row, frustration with the government for prohibiting him from possessing a firearm, police seeking a psychological examination for him, and the persistent desire to commit robbery at gun point. (Def. Decl. Ex. J.)

These records reflect a mentally ill man spending considerable time on Facebook ruminating extensively on this case, firearm use, robbery, and killing Touchstone's sister. This is just what is seen on the public record. With public ruminations this revealing and relevant to the case at hand, Renteria's private and restricted content will only be more material, relevant, exculpatory, and reflective of his true character for violence. The inquiry is not *whether* there will be relevant, material, or exculpatory content contained in the private messages. The inquiry is *how much* there will be and *how* it can be delivered to the defense team in order to prepare for a fair trial.

2. Preliminary hearing testimony provides plausible justification.

At the preliminary hearing on September 29, 2016, Renteria gave the court the following curious narrative: he was in an argument with Rebecca Touchstone on the day of the shooting. Without her knowledge, he removed property from their shared bedroom and took possession of her firearms, hiding them in the attic. Renteria then left the house and ignored Rebecca's phone calls and text messages asking him where her firearms had gone. Renteria finally answered her calls and cryptically threatened her and

Touchstone, saying he "had measures in place to make sure that they both go to jail for a long time" if they "try to set [him] up." (PE 26:2-6.) Renteria unexpectedly returned to the house after making that threat, recording his entry into the house with his phone as he pushed past not one but two dog gates in order to enter the house. Renteria was within arm's length of Touchstone in the living room before Touchstone fired.

On cross examination, Renteria's story grew further convoluted as he repeatedly denied specific testimony he had just made on direct examination. He relayed that he'd been "threatened" by unknown people to stop his "research," and that Rebecca volunteered to arm herself as a result of these "threats," despite having no prior experience with guns. (PE 53:28-55:9.) He expressed "concerns that the implications of the research [he was conducting] were so profound that it might disturb portions of our society." (PE 41:15-17.) He boasted of life-long experience and knowledge with firearms. He stated that the medication he received at the hospital after the shooting "was thousands of times more powerful than morphine." (PE 42:5-6.)

The preliminary hearing revealed an unstable man prone to delusions and exaggerations, who had access, possession, knowledge, and experience with firearms. Read in conjunction with his public Facebook records, an alarming image emerges of a dangerous and unpredictable man. Renteria hid Rebecca's firearms on the day of the shooting and disappeared from the home without notice. When Rebecca tried calling him to find out where her guns went, he responded by threatening her. He then unexpectedly showed up at the house, coming through the doorway and two gates to advance within arm's reach of Touchstone before Touchstone responded with gunfire. He then posted about the incident at length on Facebook and solicited response from his friends in that forum. He joked about killing Rebecca and robbing others at gunpoint, revealing his close relationship and comfort with violent,

dangerous acts against those people closest to him. He described finding people on Facebook to kill and struggling with his own violent urges against others on a daily basis.

It is no secret that Touchstone is arguing self-defense in this case, as he was faced at arm's length with an unstable and violent man on August 8, 2016. In arguing self-defense, Renteria's character and propensity for violence is of utmost importance and relevance. Such evidence is inarguably admissible at trial and colorable to the defense asserted. (Cal. Evid. Code §1103; See *Pitchess, supra,* 11 Cal.3d at 537: "[D]efendant alleges that the disciplinary records are necessary as character evidence of the deputies' tendency to violence in support of his theory of self-defense. Such evidence is unquestionably relevant and admissible under Evidence Code section 1103.") Renteria's public Facebook records reveal the tip of an iceberg as to the universe of material and relevant contents in his complete social media record. A review of these public records provides plausible justification and constitutes prima facie showing "that the requested information will facilitate the ascertainment of the facts and a fair trial." (*Bortin, supra*, 64 Cal.App.3d at 878; *Pitchess, supra,* 11 Cal.3d at 536.) The information sought in the subpoena will "have considerable significance to the preparation of his defense," as Touchstone asserts self-defense against Renteria. (*Pitchess, supra,* 11 Cal.3d at 538.) Accordingly, the subpoena should stand, and Facebook should be again ordered to produce the records.

3. The trial court twice exercised their discretion to order the records produced, finding good cause on two separate occasions.

Discovery proceedings are to be "addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand." (*Pitchess, supra,* 11 Cal.3d at 535, citing *Hill v. Superior Court* (1974) 10 Cal.3d 812, 816, *People v. Terry*

(1962) 57 Cal.2d 538, 560-561, *Powell v. Superior Court* (1957) 48 Cal.2d 704, 708, *Vetter v. Superior Court* (1961) 189 Cal.App.2d 132, 134.) In this case, the trial court exercised discretion not once, but twice, in finding good cause for this subpoena to issue.

The trial court reviewed defense counsel's March 2016 declaration in support of the subpoena before signing and issuing the subpoena and supporting orders on March 16, 2016. That was an exercise of trial court discretion and a finding of good cause for the subpoena to issue. When Facebook filed a motion to quash the subpoena, the trial court reviewed the supporting declarations and exhibits, again finding good cause for the subpoena to issue. The trial court denied Facebook's motion to quash because the subpoena was grounded in good cause and issued with plausible justification. The trial court found that the sought records implicated Touchstone's constitutional rights to due process and a fair trial.

In issuing the subpoena in the first place, and denying the motion to quash, the trial court twice found "a strong justification for access to the sought information by real parties in interest." (July 17, 2019 Court Order, *Facebook, Inc. v. Superior Court (Hunter)* S256686.)

ii. The request for all of Renteria's Facebook communications from inception of his account to March 16, 2017, is overbroad; Touchstone seeks to narrow and modify the scope of the subpoena.

The subpoena currently requests all of Renteria's Facebook communications from inception of his account "to present date," or the date of the subpoena, March 16, 2017. This is overbroad. It would be appropriate to narrow this request to communications on Renteria's Facebook page from the date of the incident, August 8, 2016, to the date of the subpoena. Touchstone hereby proposes a modification of the subpoena request to that narrow timeframe: August 8, 2016 to March 16, 2017. This timeframe would

narrowly capture Renteria's most relevant, material, and exculpatory communications specifically addressing the parties in the case, court proceedings, his tendency for violence, and personal statements about the underlying incident.

iii. Touchstone has not-and should not, given the circumstances-attempt to subpoena Renteria (or others) to acquire the communications from him (or them) instead of Facebook.

Defense efforts to locate Renteria in March 2017 were for the purpose of interviewing him about the shooting incident, not to subpoena him for Facebook communications. That tactical decision was based on overwhelming evidence of Renteria's hostility towards the criminal justice process indicating that he would interfere with the evidence if alerted to its relevance. That tactical decision was acknowledged and reinforced by the trial court who issued an order on March 16, 2017 ordering parties to *not* disclose the subpoena to Renteria, "as such notification may lead to tampering with or destruction of evidence." (Def. Decl. Ex. B.) The trial court reviewed defense counsel's declaration and supporting exhibits demonstrating that "Renteria is likely to destroy or delete relevant evidence from his Facebook account, if he is personally served with a subpoena to produce his own records." (Def. Decl. para. 35.) The trial court was convinced by the evidence supporting that declaration and ordered the subpoena not to be disclosed. Thus, as a tactical decision, based on reliable evidence relating to this witness, Touchstone has not made efforts to directly subpoena the records from Renteria.

Renteria proved the trial court and defense counsel right when he removed all content from his Facebook page on or around February 16, 2018, within months of oral argument in front of the Court of Appeal and subsequent news publications about the case identifying Renteria by name.

(See Opening Brief on the Merits, § II. B., citing https://www.facebook.com/jeffrey.renteria, last viewed on February 16, 2018; https://www.sandiegouniontribune.com/news/courts/sd-me-facebook-appeal-20170927-story.html). Once Renteria was alerted to the request for his records, he responded by destroying that evidence – as predicted by defense counsel and the trial court. This highlights one of the many reasons why record retrieval via direct subpoena to the user is not a reliable option in this case.[1]

1. Direct production by Renteria or others is neither plausible nor possible.

The propriety of directly serving Renteria for these records has been briefed in this and lower courts. (See Petition for Review, § D; Reply in Support of Petition for Review, § III.; Opening Brief on the Merits, § II. B.; Reply Brief on Merits, § I.) It is Touchstone's steadfast position that such a method of retrieval is not only unreliable and risks spoliation, but the records obtained from users directly is not complete, comprehensive, or equivalent to those produced directly from Facebook.

Facebook suggests that a user can access their own account data using a downloading feature off their website directly, but Facebook does not show the court what that download yields or if it compares at all to a production from Facebook directly. Touchstone submits that the productions from Facebook directly, compared to a user-prompted download, are vastly different in content, format, and magnitude, and thus are an inequitable and inadequate means for production of the subpoenaed records in this case.

[1] Notably, The SCA itself acknowledges and accommodates this real concern for destruction of records in three separate portions of the Stored Communications Act: sections 2703(a) and 2703(b)(1)(A) both permit a search warrant to issue without notice to the user, and section 2703(b)(1)(B) permits a subpoena or court order to issue with delayed notice to the user. (18 U.S.C., §§ 2703, subd. (a), (b).) These important preventative measures are in place because the threat of destruction of records, if a user is notified of the production, is acute.

Moreover, this feature is patently unavailable to users such as Renteria who no longer have access to their account because it has been deleted. It is also unavailable to users like Renteria who are incarcerated without access to computers or the internet.[2]

Facebook suggests that Touchstone obtain the records by serving Renteria's "friends" from the social media site–yet Facebook refuses to release the data containing user names of Renteria's friends and does not justify how a list of user names would direct Touchstone to real people who can be identified by true name, located at a physical address, personally served a subpoena, or able to produce the complete records sought. Facebook fails to demonstrate that their proposed solutions of serving Renteria or his "friends" would work in reality—particularly when Renteria's page has been deleted and "friends" remain undisclosed.

2. Renteria will not comply with any subpoena, leaving Touchstone with no constitutional remedy for the loss of these material records at trial.

Let us suppose that Renteria is subpoenaed to produce his records and appears in court for a hearing on the matter. The evidence (most convincingly: the deletion of his account and objection to the release of medical records that establish the basic fact that he was injured) demonstrates that he will object to this production and refuse to consent to the release of the records. The court may respond by charging him with a misdemeanor, incarcerating him, fining him, or prohibiting his testimony at trial. (Cal. Pen. Code, §§ 166, subd. (a)(4), § 1054.5, subd. (b), (c); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816; Cal. Code Civ. Proc., §§ 1218, subd. (a), 1219, subd. (a).) A misdemeanor conviction, incarceration, and/or prohibition of

[2] As a matter of public record, Jeffrey Renteria has been in the custody of the San Diego County Sheriff's Department since June 27, 2018, with no projected release date at the time of this filing.

testimony may be penalties of no consequence to an incarcerated, convicted felon who has no incentive to testify. There is no punishment, levied against Renteria, that could realistically compel his compliance or remedy the error against Touchstone if the records are not produced.

Indeed the real punishment in this scenario will be Touchstone, since these records are not only relevant to impeach Renteria but are—more importantly—crucial to the assertion of the affirmative defense of self-defense. These records demonstrate Renteria's perspective on the shooting incident and his strong character for violence. These factors are highly relevant to Touchstone's assertion of self defense and must be included in a constitutionally sound trial on the merits of the case. There is no constitutionally sufficient sanction or remedy to Renteria's refusal to comply with the subpoena, short of an outright dismissal of the case. Any sanction that falls short of procuring the requested records results in a constitutional deprivation to Touchstone, who cannot achieve a fair trial without the complete and authenticated production of these records that unquestionably demonstrate the complaining witness' insights about the event and character for violence – regardless of whether or not Renteria testifies at trial. (See Opening Brief on the Merits, § III.; Reply on the Merits, § II.)

iv. Touchstone's constitutional rights to due process and a fair trial trump any privacy or constitutional rights claimed by Renteria in response to a subpoena for social media records.

The rights enjoyed by a complaining witness in a criminal case do not exceed or eclipse those of the criminally accused. Indeed, Renteria has protective rights related to his own records, including the right to object to their release or refuse to comply with a subpoena ordering their release. (Cal. Const., art. I, § 28(b)(4).) However, nothing contained in the laws protecting Renteria's rights ("Marcy's Law") alters or amends the demands of the

evidence code: "relevant evidence shall not be excluded in any criminal proceeding.... Nothing in this section shall affect... Evidence Code Sections 352... or 1103." (Cal. Const., art. I, § 28(f)(2).) Evidence Code Section 1103 permits Touchstone to admit evidence of Renteria's character for violence, which is demonstrated in the records of his Facebook account. (Cal. Evid. Code §1103(a).) Evidence Code Section 352 permits Touchstone to admit evidence of the statements Renteria has made about the case, criminal proceedings, and parties, including those made via Facebook. (Cal. Evid. Code §352.) Nothing in Marcy's Law affects Touchstone's rights to have all relevant evidence included in the proceedings and to obtain and present defensive evidence pursuant to Evidence Code Sections 352 and 1103. The sought records constitute such evidence and should be released to Touchstone in pursuit of a fair and constitutionally-sound trial on the merits of this case.

When Renteria objected to the release of his medical records, the court heard the objection and weighed it against Touchstone's constitutional right to a fair trial that includes the right to obtain and present relevant and material evidence. This same balance of interests should occur with the alleged victim's Facebook records. Such balancing is legally proper and consistent with the constitutional demands of Marcy's Law.

This same process occurs when sensitive records are sought from law enforcement, as outlined in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and its statutory progeny, Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. *Pitchess,* and the statutory scheme that followed it, "carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84; see also *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 403-404, *Alt v. Superior*

Court (1999) 74 Cal.App.4th 950, 955-956.) This is precisely what can and should occur in this case with respect to Renteria's records and the same process that took place before the court ordered his medical and psychiatric records released to the defense.

Just as Touchstone is entitled to Renteria's confidential medical and psychological records, he is entitled to complete social media records including restricted communications and private messaging. Federal law should not be interpreted to mean that the criminally accused can obtain medical and psychological records of complaining witnesses, but not social media records. This defies logic but appears to be the law under Facebook's proposed interpretation. In reality and practice, social media users are willing participants in a social forum designed specifically for outward expression and community engagement. As such, their content is not privileged. It is private *at best* and subject to judicial scrutiny if and when the trial court determines it necessary for the fair and constitutional administration of justice in a criminal proceeding.

B. This matter should not be remanded but heard fully on the merits, because no matter the outcome at trial court, Facebook will persist in its refusal to comply with any court order to produce the required records.

What is made plain in *Facebook v. Superior Court (Hunter)* and its numerous filings with this court (California Supreme Court Cases S230051, S256686, and S257385), is that Facebook has no intention to produce communications sought by defense subpoena regardless of any court order or sanction. Any resolution of this case that requires Facebook to produce user communications without a search warrant from the prosecution will result in an outright refusal to comply, as aptly demonstrated by the proceedings in *Facebook v. Superior Court (Hunter)*. Even if this court finds good cause for the underlying subpoena and a constitutional basis for the

enforcement of Touchstone's subpoena, Facebook simply will not comply.

Thus, what is practically served or promoted by a remand in this matter? The trial court already determined, when it issued the subpoena and denied the motion to quash, that the subpoena is supported by good cause and should issue. Renteria's inevitable and predicable refusal to produce the records or consent to their production, and his physical inability to now do so, bolsters the plausible justification for Touchstone to obtain the records from Facebook directly. Touchstone's constitutional rights will continue to be impinged without the production of the records. And the case will work its way back to this court, as it has in *Facebook v. Superior Court (Hunter)*, when Facebook again refuses to comply with lawful court order.

The issue is thus ripe for resolution: how do we reconcile a defendant's constitutional demand for social media records with a federal law that appears to prevent defense acquisition of the records, and given prosecutorial refusal to produce them through the discovery process?[3]

CONCLUSION

A solution to this issue of constitutional magnitude must be fashioned so that Touchstone can obtain Renteria's complete Facebook records in the same quality, manner, and format that is obtained by prosecution and law enforcement. This is the only way to achieve a fair trial for Touchstone, and it is what our constitution and justice system demands. It cannot be that defense counsel may readily and righteously obtain confidential medical and psychiatric records of a complaining witness, while their social media records are entirely unobtainable under the law. This is not the system of justice envisioned by Congress when they enacted

[3] Failing to make a constitutional determination regarding the federal law, the relevant questions remain: does Facebook qualify as an electronic service provider prohibited from disclosing content under the federal law? What are prosecutors' obligations with regard to social media records that cannot be acquired by defense subpoena? If this court adheres to the principle of constitutional avoidance in addressing the SCA, these alternative matters can be addressed.

the Stored Communications Act, and it is not the system of justice this Court should enforce.

Touchstone submits that the sought records must come from Facebook directly, either by (1) finding that Facebook does not fall under the purview of the SCA, (2) finding that users consent to record release based on the terms and policies of the social media platform, (3) ruling that the prosecution has an obligation to produce the records based on their fundamental discovery obligations, or (4) invalidating SCA based on its failure to accommodate the constitutional rights of the criminally accused.

Dated: September 4, 2019

Respectfully submitted,

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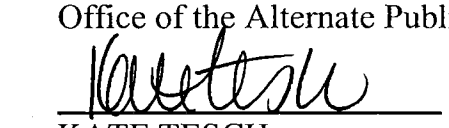

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, KATE TESCH, hereby certify that, based on the software in the Microsoft Word program used to prepare this document, the word count for this brief is 4,484 words. I swear under the penalty of perjury that the foregoing is true and correct.

Dated: September 4, 2019

Respectfully submitted,

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PROOF OF SERVICE

I, undersigned declarant, state that I am a citizen of the United States and a resident of the County of San Diego, State of California. I am over the age of 18 years and not a party to the action herein. My office address is 450 "B" Street, Suite 1200, San Diego, California 92101.

On September 4, 2019, I personally served the attached **BRIEF REGARDING GOOD CAUSE OF THE UNDERLYING SUBPOENA AND REMAND TO TRIAL COURT** to the following parties via U.S. Postal Service:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 4, 2019, in San Diego, California.

Signed: _____

Printed: _____
DECLARANT