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

INTERVENOR'S REPLY TO SUPPLEMENTAL BRIEFING ADDRESSING THE UNDERLYING SUBPOENA AND THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH

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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ARGUMENT

I.

TOUCHSTONE HAS FAILED TO EXPLAIN HOW THE CONTENTS OF THE UNSEALED DECLARATION AND ATTACHED EXHIBITS ESTABLISH PLAUSIBLE JUSTIFICATION THAT (1) PRIVATE CONTENT WOULD LEAD TO EXCULPATORY INFORMATION, OR (2) RELEVANT PRIVATE CONTENT EXISTS IN THE FIRST INSTANCE

Counsel for Touchstone (hereafter "Touchstone") argues in his supplemental brief that the content of the victim's public Facebook messages support plausible justification for the subpoena. As outlined in the People's supplemental brief, and reiterated below, there is no good cause that (1) there would be any private content which would contain exculpatory evidence, specifically propensity evidence for violence or dishonesty, or that (2) relevant private content exists at all, during a reasonable time frame related to the crime. Touchstone simply overstates his interpretation of the public Facebook content to support his good cause argument.

As an example of such an overstatement, Touchstone writes in the supplemental brief that the victim "threatens" to rob others at gunpoint to survive. (Touchstone, p. 7.) However, Touchstone later writes that the threat to rob others at gunpoint was a joke. (Touchstone, p. 8.) In either event, Touchstone continues, "[The victim] 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." (Touchstone, pp. 8-9.) In reviewing these posts in their entirety, along with the public response, these jokes do not reflect a "comfort" with violence against those "closest to him." As outlined in the People's supplemental brief, the tenor of the victim's posts, as well as the responses, make it self-evident that there was no expression of actual violence.

Next, Touchstone argues that the victim's public Facebook posts describe his daily struggle to fight the "urge to kill," and that the victim states he searches Facebook for "people in need of dying slow painful deaths." (Touchstone, p. 7.) Touchstone concludes that these posts "reflect a mentally ill man spending considerable time on Facebook ruminating extensively on this case, firearm use, robbery, and killing Touchstone's sister." (*Ibid.*)

Again, when these posts are read in their entirety, it is evident that the victim is describing a fictional scenario in which he references "The Rosicrucian Fellowship," a group who studies Christian mystic philosophy, and describes a series of events while travelling though the "astral plane." (Declaration, Exhibit I.) The entire context of the post does not reveal a character trait for violence. To hold that any abstract reference to violence constitutes propensity evidence, without more, would make great cases against most authors of fiction. It would also certainly be a stretch to conclude that such writings are conclusive evidence of "mental illness."

Next, Touchstone writes that the victim waited for two weeks after the shooting before indicating in a public post that he cannot access his private messages while in the hospital. Thus, Touchstone argues that, during this initial two-week period, the victim used Facebook's private messaging feature as a means of communication. (Touchstone, p. 5.) This defies logic, since the victim was immediately transported to the hospital by paramedics after Touchstone shot him. (P.E., pp. 24-25.) Counsel for Facebook correctly states in his supplemental brief (hereafter "Facebook") that the victim's post indicating that he cannot access private messages while in the hospital demonstrates a lack of good cause to believe *any* private content exists during the *most relevant* timeframe -- the period closest to the shooting in question. (Facebook, p. 4.)

Lastly, Touchstone references a public Facebook post in which the victim asked his friends to attend the preliminary hearing. (Declaration, Exhibit F.) A friend of the victim, Danny, appeared at the hearing in support of the victim. (P.E., p. 19.) Touchstone opines:

> 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.

(Touchstone, p. 6.)

However, the victim testified that he called his friend Danny on the day of the shooting. (P.E., p. 19.) Thus, it is more than likely that the victim communicated with Danny via telephone about the preliminary hearing, rather than through private Facebook messaging. There is simply nothing contained in the victim's public Facebook content to suggest he communicated with anyone about the case via private messaging, which could be favorable or exculpatory to the defense.

II.

TOUCHSTONE'S ANALOGY TO *PITCHESS* IS MISPLACED, AS IT DEALS WITH DIFFERENT COMPETING INTERESTS THAN THE ONES AT STAKE IN THIS MATTER

Touchstone relies heavily on *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) as an analogous justification to obtain, pretrial, the private Facebook content sought in this case. However, pretrial disclosure of peace officer personnel records cannot be analogized to a third party's objection to the release of private social media content. In a scenario involving a peace officer witness who is a member of the prosecution team, the government cannot commence criminal proceedings and then invoke a

governmental privilege to deprive a defendant of favorable evidence contained in that peace officer's personnel file. (*Pitchess*, *supra*, 11 Cal.3d at p. 540; Evid. Code, §§ 1040; 1042.)

In contrast, neither the victim nor Facebook in this matter are members of the prosecution team. The People do not possess, nor have control over, the sought communications, nor are the People in control over the victim's objection to their release or Facebook's claim of confidentiality under federal law (the Stored Communications Act (18 U.S.C. § 2701 et seq.) (hereafter "SCA")). Notwithstanding the inapplicability of the SCA to Facebook in this case, the People lack access to the sought communications under both state and federal law as outlined in the People's intervenor brief. Due Process does not grant the People extraordinary power to obtain the sought communications in order to provide Touchstone with pretrial discovery, or to vindicate a Sixth Amendment right to confront or cross-examine a witness, as held by *Kinsella v. U.S. ex rel. Singleton* (1960) 361 U.S. 234, 246.

Facebook has not established, with any competent evidence, that the SCA applies in this matter.[1] Thus, the competing interests at stake are the victim's constitutional right to refuse a defendant's discovery request pursuant to Marsy's Law, measured against any of Touchstone's constitutional rights as a criminal defendant which might be impacted by that refusal. At this stage, the only constitutional right which has been

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[1] Facebook assumes in its supplemental brief that the SCA applies in this instance. The People have previously briefed, at length, the inapplicability of the SCA to Facebook, as well as its failure to provide any competent or admissible evidence to meet their initial burden of proof that the SCA bars production of the sought communications. Rather than repeat what the People have already addressed at length, the People respectfully asks this Court to refer to those previously filed briefs in response to Facebook's continued assumption that it falls within the ambit of the SCA.

infringed upon is this victim's right under Marsy's Law when he was not provided timely notice or an opportunity to be heard regarding the Facebook subpoena pursuant to Code of Civil Procedure, section 187 (as outlined in the People's supplemental brief). Touchstone's rights have yet to be implicated because he has no constitutional or statutory right to pretrial discovery from a third party, which the People neither possess nor have reasonable access. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559; *Gray v. Netherland* (1996) 518 U.S. 152, 168; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1314; *People v. Hammon* (1997) 15 Cal.4th 1117; *Byrnes v. United States* (9th Cir. 1964) 327 F.2d 825, 832; Pen. Code, §1054.1 et seq.)

III.

REGARDLESS OF WHETHER TOUCHSTONE SUBPOENAS RECORDS DIRECTLY FROM FACEBOOK OR THE VICTIM, HE CANNOT AVOID THE DUE DILIGENCE REQUIREMENT OF PROVIDING NOTICE TO THE VICTIM

In response to this Court's question as to whether Touchstone made adequate efforts to locate and subpoena the victim directly, before resorting to Facebook, Touchstone argues that such efforts would be futile. Touchstone argues that the victim would be resistant to service of process and may make efforts to prevent disclosure of the private communications. However, Marsy's Law gives victims of crime the constitutional right to refuse a defendant's discovery request. Arguing that service of notice or process to an uncooperative victim is futile cannot serve as an excuse to erase that victim's right to notice and opportunity be heard in a proceeding which implicates his or her rights pursuant to Marsy's Law. (Cal. Const., art. I, § 28, subd. (b), par. (8).) It is the People's position that a victim's right to refuse a defendant's discovery request, by way of subpoena, can only be meaningfully enforced if a trial court requires notice and

opportunity to be heard to both the victim and the People prior to its issuance, pursuant to Code of Civil Procedure, section 187.

Marsy's Law gives victims of crime a constitutional right to refuse a discovery request from a defendant. Specifically, this provision of Marsy's Law gives victims of crime the following right:

> To refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents.

(Cal. Const., art. I, § 28, subd. (b), par. (5).)

Thus, this provision of Marsy's Law not only gives a victim the right to refuse a defense discovery request, it also contemplates that a victim might consent to such a request and set reasonable conditions. Requiring that victims be given notice and an opportunity to be heard prior to the issuance of a defense subpoena allows the trial court the opportunity to hear any objections the victim may have and the grounds for those objections. The trial court will also hear whether the victim consents to defense discovery and ultimately the scope of that consent. This must necessarily be done before the issuance of any subpoena, since the answers to these questions will determine whether: (1) there is plausible justification to issue a subpoena in the first instance; (2) the scope of the subpoena in light of: the plausible justification, the scope of the victim's consent (if any), and any duplicative discovery otherwise available via Penal Code section 1054.1; and (3) the likelihood that the subpoena will produce privileged or confidential materials which may ultimately be subject to a *Hammon* analysis.[2]

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[2] Marsy's Law provides that a victim has the right to refuse a "*discovery request by the defendant . . .*" (Cal. Const., art. I, § 28, subd. (b), par. (5), italics added.) This provision of Marsy's Law does not give a

A general complaint that providing notice or service of process to a victim may be difficult cannot justify avoiding enforcement of rights under Marsy's Law altogether. Indeed, notice to the People additionally ensures a victim will be notified and informed of his or her rights.

Marsy's Law also provides that, at the request of the victim, the prosecuting attorney may enforce a victim's right to refuse a defense discovery request. (Cal. Const., art. I, § 28, subd. (c), par. (1).) Thus, a victim of crime should not be required to retain counsel, or face litigating the above issues alone, in order to enforce a constitutional right. Notice to both the People and the victim prior to the issuance of the subpoena is necessary so the victim can have a meaningful opportunity to invoke their right to have the prosecuting attorney enforce their rights, and in turn, have a meaningful opportunity to be heard in a "proceeding in which a right of the victim is at issue." (Cal. Const., art. I, § 28, subd. (b), par. (8).) This is consistent with this Court's contemplation that both the People and the victim be given notice of such a subpoena in *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1080.

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victim the right to refuse service of process from a competent court, by way of subpoena. Further, the materials produced from such a subpoena are returnable to the court, not to the party seeking production. The issuance of a subpoena duces tecum pursuant to Penal Code section 1326 is purely a ministerial act and does not constitute legal process in the sense that it entitles the subpoenaing party access to the records. (*Kling v. Superior Court*, 50 Cal.4th 1068, 1074.) Thus, it is not the issuance of a defense subpoena to a victim that violates his or her rights under Marsy's Law *per se*, but rather, it is the issuance of a subpoena, ex parte, under seal, without any notice, opportunity to be heard, or opportunity to confer with the prosecutor, which violates rights guaranteed by Marsy's Law (all of which occurred here). Therefore, notice must be given *prior* to the issuance of the subpoena in order for this right to be meaningful.

Additionally, notice to both the victim and the People regarding a defense subpoena will avoid the "cat-and-mouse" game that Touchstone fears will occur if a defendant is forced to serve process on an uncooperative victim. Requiring notice and opportunity to be heard prior to the issuance of a subpoena will motivate an uncooperative victim to appear and object. Litigation of the above issues at the earliest opportunity also serves to limit the introduction of third parties to litigation over such a subpoena (such as Facebook) to only those occasions when it is necessary.

While Touchstone is correct that a trial court has already exercised discretion in both sealing and issuing the subpoena in question, that fact does not remedy the failure of the same trial court to provide notice or opportunity to be heard by the victim or the People. Further, the unsealing of the declaration in support of the subpoena demonstrates an *abuse of discretion* by the trial court, because the unsealed records revealed a lack of attorney work-product or privileged attorney-client communications that was necessary to support a sealing in the first place.

Lastly, it can hardly be said that Touchstone's subpoena survived any meaningful scrutiny, since it was obtained ex parte, under seal, and without any realistic way to challenge the invalidity of its issuance until this Court unsealed the declaration and requested briefing on the issue. The harm created by allowing trial courts and criminal defendants to continue with requests and issuances of ex parte subpoenas for victim records, under seal, is the exact harm that occurred here: 1) the stripping away of victims' constitutional rights to refuse discovery request by lack of notice and opportunity to be heard; 2) the waste of judicial resources due to lengthy appellate litigation where multiple parties do not have the necessary facts to meaningfully litigate the issue; 3) prematurely dragging third party record holders into litigation before it is necessary; and 4) the inability to challenge a trial court's good cause finding for abuse of discretion because

the process was conducted in secret, risking harassment of crime victims where the facts do not support the issuance or sealing of a subpoena.

CONCLUSION

As previously requested in the People's initial supplemental brief regarding the lack of good cause for the underlying subpoena, the People respectfully request that this court order this matter be remanded to the trial court, to both rescind the issuance of Touchstone's subpoena and vacate Facebook's motion to quash as moot. The People further request that this Court hold that the victim and the People must be given notice and an opportunity to be heard before a third-party subpoena of which the victim is the subject can be issued.

Additionally, should this Court rule that Touchstone be afforded an additional opportunity to provide evidence of good cause before the trial court, the People respectfully request that this court render a full opinion regarding the applicability of the Stored Communications Act to Facebook, as previously outlined by the People.

Dated: September 24, 2019

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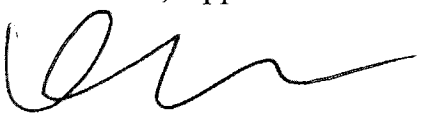

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CERTIFICATE OF WORD COUNT

I certify that this INTERVENOR'S REPLY TO SUPPLEMENTAL BRIEFING ADDRESSING THE UNDERLYING SUBPOENA AND THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH including footnotes, and excluding tables and this certificate, contains 2,667 words according to the computer program used to prepare it.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, Respondent.	For Court Use Only
LANCE TOUCHSTONE, Real Party In Interest.	Supreme Court No.: S245203 Court of Appeal No.: D072171 Superior Court No.: SCD268262

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 September 24, 2019, a member of our office served a copy of the within **INTERVENOR'S REPLY TO SUPPLEMENTAL BRIEFING ADDRESSING THE UNDERLYING SUBPOENA AND THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH** 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 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 September 24, 2019 at 330 West Broadway, San Diego, CA 92101.

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