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.	Supreme Court No. S245203 Court of Appeal No. D072171 Superior Court No. SCD268262

REAL PARTY IN INTEREST TOUCHSTONE'S OPENING BRIEF ON THE MERITS

After Published Opinion by the Court of Appeal, Fourth District, Division One, No. D072171 Filed September 26, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

CALIFORNIA CONSTITUTION

FEDERAL CASES

STATE CASES

PENAL CODE

UNITED STATES CODE

CODE OF CIVIL PROCEDURES

LEGISLATION

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

OTHER AUTHORITIES

CALIFORNIA RULES OF COURT

OTHER STATE CASES

ISSUES PRESENTED

(1) If, on remand and in conjunction with continuing pretrial proceedings, the prosecution lists the victim as a witness who will testify at trial (see Pen. Code, §§ 1054.1, subd. (a); 1054.7) and if the materiality of the sought communications is shown, does the trial court have authority, pursuant to statutory and/or inherent power to control litigation before it and to insure fair proceedings, to order the victim witness (or any other listed witness), on pain of sanctions, to either (a) comply with a subpoena served on him or her, seeking disclosure of the sought communications subject to in camera review and any appropriate protective or limiting conditions, or (b) consent to disclosure by provider Facebook subject to in camera review and any appropriate protective or limiting conditions?

(2) Would a court order under either (1)(a) or (1)(b) be valid under the Stored Communications Act, 18 U.S.C., section 2702(b)(3)?

(3) Assuming orders described in (1) cannot properly be issued and enforced in conjunction with continuing pretrial proceedings, does the trial court have authority, on an appropriate showing during trial, to issue and enforce such orders?

(4) Would a court order contemplated under (3) be proper under the Stored Communications Act, 18 U.S.C., section 2702(b)(3)?

(5) As an alternative to options (1) or (3) set forth above, may the trial court, acting pursuant to statutory and/or inherent authority to control the litigation before it and to insure fair proceedings, and consistently with 18 U.S.C. section 2702(b)(3), order the prosecution to issue a search warrant under 18 U.S.C. section 2703 regarding the sought communications? (Cf. *State v. Bray* (Or. Ct.App. 2016) 383 P.3d 883, pets. for rev. accepted June 15, 2017, 397 P.3d 30 [S064843, the state's pet.]; 397 P.3d 37 [S064846, the defendant's pet.].) In this regard, what is the effect, if any, of California Constitution, article I, sections 15 and 24?

FACTUAL AND PROCEDURAL BACKGROUND

In August 2016, Lance Touchstone drove to San Diego, California, to visit his sister Rebecca Touchstone. When he arrived, he discovered that Rebecca's boyfriend, Jeffrey Renteria, had moved into her home. Over the next several days, Touchstone observed odd behavior by Renteria.

Touchstone grew concerned for their safety on August 8, 2016, when he and Rebecca noticed that Rebecca's personal firearms were missing from the home. Renteria was also missing and appeared to have moved out of the house. When Touchstone and Rebecca attempted to contact Renteria over the phone about the missing firearms, Renteria threatened that he was coming to harm Touchstone and Rebecca. Hours later, while Touchstone and Rebecca were home alone, Renteria burst through the front door and lunged at them. Touchstone, armed with his personal handgun, immediately fired at Renteria, hitting him three times. None of the wounds were fatal.

Touchstone set aside his weapon, called 911, and was ultimately arrested for assault. He was compliant and cooperative with responding officers, giving a detailed explanation of the day's events and efforts to defend himself and his sister against Renteria. He was ultimately charged in San Diego County Superior Court with violating California Penal Code sections 664 and 187 for attempted murder, with allegations of personal use of a firearm and personal infliction of great bodily injury within the meaning of California Penal Code sections 12022.5(a) and 12022.7(a). Touchstone plead not guilty to the charge and allegations, which expose him to a maximum of twenty-two years in State Prison.

Since the shooting, Renteria has actively posted updates and messages on his personal Facebook account. He posted updates of his physical recovery from the hospital and requested private messages over the Facebook messaging system. He posted updates of court hearings in this case and sought community participation at the preliminary hearing. As he continued

a romantic relationship with Rebecca, Renteria posted comments about killing her. He posted about using drugs and the impact those drugs had on his mental health. He posted about his personal use of guns and described in detail his desire to rob and kill people. These posts were displayed on the public portion of his Facebook page, which are visible to all users.

On February 26, 2017, Touchstone requested that the prosecution produce Renteria's Facebook records. The prosecution declined to do so. Touchstone then filed a Motion to Compel, which was denied.

On March 16, 2017, Respondent Court signed a subpoena duces tecum ordering Facebook to produce Renteria's Facebook records. The subpoena was supported by a sealed declaration from defense counsel providing a basis of relevance and materiality for the records to be obtained. Facebook responded by filing a Motion to Quash.

On April 27, 2017, the Honorable Kenneth So issued a ruling denying the motion to quash and ordered that the records be produced by Facebook for an *in camera* review. The Court found that "Touchstone has a due process right to the information to defend himself on a very serious case that Facebook might have possession of... there is a due process right to the information...." (Facebook's Appendix of Exhibits to the Court of Appeal in D072171 ("AE") at p. 131-132.)

Facebook filed a petition to the Fourth Appellate District Court of Appeal requesting that the Superior Court's April 27, 2017, ruling be vacated and that Facebook's Motion to Quash be granted. After briefing and oral argument, the Court of Appeal issued a ruling on September 26, 2017, granting Facebook's petition and directing the trial court to vacate its April 27, 2017, order.

Touchstone filed a petition for review with the California Supreme Court on November 2, 2017. Touchstone submits this petition to California's highest court in order to address an important and novel issue of law

regarding a criminal defendant's constitutional right to discovery—specifically the right to obtain a witness' social media records—in light of the federal Stored Communications Act, 18 U.S.C., section 2701, *et seq.*, (hereinafter SCA or Act), which prohibits production of these records to any party other than the prosecutor, a government entity.

In granting Touchstone's petition for review, this Court requested briefing on the above issues presented. In this opening brief, Touchstone addresses these issues and incorporates by reference the arguments asserted in his original petition for review and at the Court of Appeal.

ARGUMENT

THE COURT OF APPEAL ERRED IN RULING THAT CRIMINAL DEFENDANTS DO NOT HAVE A CONSTITUTIONAL RIGHT TO PRETRIAL DISCOVERY OF SOCIAL MEDIA RECORDS DIRECTLY FROM SERVICE PROVIDERS UPON A SUFFICIENT SHOWING THAT THE REQUESTED RECORDS ARE NECESSARY FOR DUE PROCESS AND A FAIR TRIAL

Real Party in Interest Touchstone persists in his assertion that the right to pretrial discovery—such as the social media records sought in this case—is constitutional and that any law diminishing the criminal defendant's right to pretrial discovery should be limited or overruled to permit the fair exchange of relevant and exculpatory evidence in criminal cases. The records are necessary to ensure that Touchstone achieves a fair trial, which is guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution and Article I of the California Constitution. These records are necessary to ensure the full and fair expression of his rights to confrontation, cross examination, assistance of counsel, and compulsory process guaranteed by state and federal constitutions. These records should be available to Touchstone in the earliest stage of criminal proceedings once their relevance has been shown, because they are necessary to put forth an effective and intelligent affirmative defense to the charges against him.

To the extent that the SCA deprives Touchstone of his rights by prohibiting the production of necessary records during the pretrial stages of the case, it is unconstitutional. Otherwise viable alternatives to obtain these records are inadequate and insufficient as applied to this case, yet the records remain imperative and necessary to the case in order for Touchstone to assert his affirmative defense. Thus it is timely and appropriate for this Court to address the constitutionality of the SCA. The Act currently fails to accommodate the criminal defendant's constitutional rights to pretrial discovery, confrontation, cross examination, compulsory process, adequate defense counsel, and a fair trial. Therefore, it must be altered or amended to include a method by which a criminal defendant can obtain those records necessary for his defense.

Short of ruling the SCA unconstitutional, the trial court could order the records produced directly from the user or order the user to consent to the production by Facebook. However, this method comes with inherent and logistical obstacles that render it ineffective or inapplicable in numerous circumstances, including the circumstances presented in this case. Alternatively, the Court may rule that the records be obtained via discovery orders compelling the prosecutor's office to produce, since the prosecutor is a government entity with exclusive control over the records by function of the SCA. No matter the means, method, or procedural configuration, the United States and California Constitutions demand that Touchstone obtain these records for use at trial in support of his affirmative defense and in order to exercise his right to a fair trial. Depriving him of these records will result in a deprivation of due process and a degradation of the truth-seeking features that are deeply rooted in California's criminal justice system.

I. THE TRIAL COURT HAS AUTHORITY TO CONTROL LITIGATION AND ENSURE FAIR PROCEEDINGS BY ISSUING PRETRIAL DISCOVERY ORDERS DIRECTING WITNESSES TO PRODUCE RECORDS; HOWEVER, SUCH ORDERS WILL BE INEFFECTIVE IN CERTAIN FACTUAL CIRCUMSTANCES.

The trial court has authority, pursuant to statutory and inherent powers to control litigation and insure fair proceedings, to order Renteria to comply with a subpoena served on him or consent to disclosure of the records by Facebook. Such pretrial orders are consistent with judicial and legislative intent to provide efficient and effective judicial proceedings governed by trial court judges. Such pretrial orders do not violate or offend the SCA. However, as discussed below and in Section II, orders directed at witnesses themselves are rife with obstacles that, in some circumstances, render the order ineffective. For example, a witness may never avail themselves to the court process, or, if they do, the witness may have valid constitutional rights prohibiting compliance with the order. Finally, if compliance by the witness is achieved, the record provider may elect not to participate in the production. Although the trial court has ample authority to order consent or compliance from testifying witnesses, such a procedure is only appropriate and effective in circumstances when there are no impediments to such a production. Impediments to the production in this case exist that render the suggested methods of production inviable.

A. The exchange of pretrial discovery is an imperative and essential operation in criminal justice proceedings that is supported by statute and case law.

The importance of reciprocal discovery in the pretrial stages of a criminal case was reinforced by California voters in June 1990 by the adoption of Proposition 115, which gives effect to the following significant goals in criminal proceedings:

> (a) To *promote the ascertainment of truth* in trials by requiring *timely pretrial discovery.*

> (b) To *save court time* by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested.
>
> (c) To *save court time* in trial and *avoid the necessity for frequent interruptions and postponements.*
>
> (d) To protect victims and witnesses from danger, harassment, and *undue delay* of the proceedings.
>
> (e) To provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.

(Cal. Pen. Code, § 1054, subd. (a)-(e), emphasis added.) By enacting Proposition 115, California voters and the State Legislature illuminated the supreme importance of timely, efficient, and uninterrupted discovery as a key feature to "the ascertainment of truth" in criminal cases. (Cal. Pen. Code, § 1054, subd. (a).) Thus, "timely pretrial discovery" has been a specifically-stated goal in California criminal proceedings for nearly thirty years. (*Id.*)

To further promote these goals in the context of ongoing criminal cases, California Rule of Court 10.953 expressly provides that "[s]uperior courts...must, in cooperation with the district attorney and defense bar, adopt procedures to facilitate dispositions before the preliminary hearing and at all other stages of the proceedings," including "[e]arly, voluntary, informal discovery, consistent with part 2, title 6, chapter 10 of the Penal Code (commencing with section 1054)." (Cal. Rules of Court, rule 10.953; see Cal. Const., art. VI § 6, subd. (d).) Both the legislative and judicial branches of California agree that early discovery exchanges, explicitly occurring "before the preliminary hearing and at all other stages of the proceedings," is an invaluable component to a well-functioning and effective criminal justice system. (Cal. Rules of Court, rule 10.953.)

For those seeking to manipulate or depart from the firmly-stated intentions of the legislature and Judicial Council in promoting early and open pretrial discovery, the Penal Code itself reminds us that "[a]ll its provisions

are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." (Cal. Pen. Code, § 4; cf. *People v. Gohdes* (1997) 58 Cal.App.4th 1520, 1525-26 ["The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law"].) When the Penal Code itself introduces the rules governing discovery with the explicit intent "to promote the ascertainment of truth in trials by requiring timely pretrial discovery," one cannot disabuse the Court of this purpose. (Cal. Pen. Code, § 1054, subd. (a); cf. *Holman v. Superior Court* (1981) 29 Cal.3d 480, 486, (conc. opn. of Bird, C.J.) ["This court has recognized that the scope of permissible discovery must be enlarged to promote the orderly ascertainment of the truth"].) The clear intention of lawmakers, voters, and the Judicial Council is to promote truth-seeking in the justice system through pretrial discovery procedures that prevent delay, postponement, and waste of the courts' time. Efforts to deny or dissuade from this principle run afoul of the very notions of justice and truth-seeking that must govern every criminal proceeding in this state. The truth about a key witness or significant facts surrounding a criminal act should not be hidden from light when their relevance and materiality have been effectively demonstrated to the trial court, who in turn has determined that due process demands the records be produced.

Yet Facebook proposes such a conclusion in the instant case, asking the Court to enforce the SCA in spite of the Act's glaring oversight as it relates to the rights of the criminally accused. Facebook is only doing their job, by narrowly promoting the privacy rights of their users, who represent tremendous worth and value to their corporation, and thoroughly avoiding acknowledgement of the constitutional rights owed to Touchstone. However, this Court also has a job to do, and that job is to enforce the state and federal constitutions that protect Touchstone's right to due process and a fair trial. (*Hammarley v. Superior Court* (1979) 89 Cal.App.3d 388, 402, ["The

judiciary has a solemn obligation to insure that the constitutional right of an accused to a fair trial is realized. If that right would be thwarted by enforcement of a statute, the statute... must yield"]; see also *Marbury v. Madison* (1803) 5 U.S. 137, 177, ["an act of the legislature [that is] repugnant to the constitution, is void and does not bind the judiciary"].)

Touchstone needs these records to obtain a fair trial and due process. Every effort should be exhausted in getting the records to him within the law, with the goals and principles of due process and judicial fairness omnipresent in the minds of the Court and all parties. There is no constitutional reason for this production not to occur during the pretrial stages of the case, particularly when the need for the records has been clearly demonstrated to the court at an early stage of the proceedings.

B. The trial court's authority to control litigation and order witness compliance is supported by case law and consistent with federal law.

It is not disputed that "courts have inherent equity, supervisory and administrative powers as well as inherent power to control litigation before them." (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377, citation omitted; *Mowrer v. Superior Court* (1969) 3 Cal.App.3d 223, 230.) "A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice." (*Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, 866, quoting *People v. Cox* (1991) 53 Cal.3d 618, 700.) This power is reasonably rooted in the interest of "guard[ing] against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings." (*People v. Mattson* (1959) 51 Cal. 2d 777, 792.)

In terms of controlling discovery procedures, the trial court "has inherent power to order discovery when the interests of justice so demand." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.) In fact, "[a]

defendant's motion to discover is addressed solely to the sound discretion of the trial court...." (*Holman v. Super. Ct., supra*, 29 Cal.3d at p. 483, citations omitted.) However, "[t]he exercise of a judicial power over criminal discovery which inheres in courts when the Legislature is silent must be tempered and restrained when the Legislature has spoken... it would be inappropriate to exercise our inherent powers in conflict with existing legislation." (*Ibid.*, citing *People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 528.)

For this reason, Courts of Appeal have developed alternative methods to obtain discovery that is subject to the prohibitions of the SCA, such as the social media records sought in the instant case. Seeking alternative methods to obtain discovery is not inappropriate, as "courts have the power to fashion a new procedure... to manage and control the case before them." (*Cottle, supra,* 3 Cal.App.4th at p. 1380.) In *Juror Number One v. Superior Court*, the Third District Court of Appeal held that a juror in a criminal trial (referred to as "Juror Number One") could be compelled to produce his own Facebook records to the trial court for a juror misconduct hearing, and could similarly be compelled by the trial court to consent to disclosure of the records by Facebook. (*Juror Number One, supra,* 206 Cal.App.4th 854.) According to the Third Appellate District, "as part of its inherent power to control the proceedings before it and to assure real parties in interest a fair trial," the trial court "had the authority to order Juror Number One to disclose the messages he posted to Facebook during the criminal trial...." (*Id.* at pp. 865-66.) The Sixth Appellate District reinforced these methods, finding that, "insofar as the [Stored Communications] Act permits a given disclosure, it permits a court to compel that disclosure under state law." (*Negro v. Superior Court* (2014) 230 Cal.App.4th 879, 904.) The court in *Negro* noted that "courts in a variety of other settings have compelled parties to consent to a third party's disclosure of material where such consent was a prerequisite to its

production," specifically finding that court-ordered consent in this manner was effective in satisfying the SCA. (*Id.* at p. 897.)

Thus, the courts in *Juror Number One* and *Negro* provide two methods for obtaining Facebook records that are relevant and material to an ongoing case: (1) direct production from the user themselves in response to a subpoena; and (2) production from Facebook in response to user consent that has been compelled by the court. Those courts determined that the suggested methods were sufficient in excluding the SCA from bearing on the matter; by forcing consent or ordering the records directly produced by the user, the trial court takes the SCA, and any related Supremacy Clause concerns, out of the equation. Thus, the SCA is not implicated or offended and, in ideal circumstances, the records can be produced accordingly.

C. There are limitations to the effectiveness of court orders directing witness production of records.

It is important to note that the targeted Facebook user in *Juror Number One* failed to make any showing to the court that he had colorable constitutional rights implicated in the forced production of his records. Juror Number One argued that he had "a legitimate expectation of privacy in the records" under the Fourth Amendment, but the court found this argument lacking in both foundation and merit. (*Juror Number One, supra,* 206 Cal.App.4th at p. 865.) Juror Number One also argued that he had a Fifth Amendment right not to submit evidence against himself, but the court found that argument to be "at best, speculative." (*Ibid.*) As a very preliminary matter, Juror Number One appeared in court for scheduled hearings, participated intelligently in the litigation process, and gave no indication to the court that he would delete or destroy records as a result of the court's efforts to obtain them. (*Id.* at p. 873, (conc. opn. of Mauro, J.) ["There was no evidence that Juror Number One deleted Facebook posts in anticipation of the posttrial hearing"].) Similarly in *Negro*, the witness presented himself

in the proceedings and availed himself to the court process, ultimately consenting to the production of records. (*Negro, supra*, 230 Cal.App.4th 879.)

These circumstances distinguish Juror Number One and the witness in *Negro* from the Facebook user in the instant case. Renteria has colorable Fifth Amendment rights against self-incrimination that would support a refusal to produce the records, in the unlikely event that he were to avail himself to the criminal justice process. Renteria's public Facebook posts reflect indisputably criminal conduct: threats against Rebecca Touchstone's life, descriptions of real crimes presumably committed by Renteria, the handling of firearms which is unlawful for a convicted felon such as Renteria, and the use of controlled substances ostensibly without a valid prescription.[1] The Fifth Amendment provides Renteria with a constitutionally valid means to refuse consent or compliance to produce his Facebook records if ordered to do so by the trial court. (*Maness v. Meyers* (1975) 419 U.S. 449, 461; *In re Mark A.* (2007) 156 Cal.App.4th 1124, 1141.) While such an order from the court may be proper or valid under the SCA, taken to its logical conclusion, it is effectively unavailable in this case.

Moreover, for those who submit to a trial court order directing them to give consent for Facebook to release their records, disclosure by Facebook upon such consent appears to be discretionary under the SCA, not obligatory. Section 2702(b)(3) states that providers such as Facebook "may" produce communications with consent of the user; it does not read that providers *shall* produce the communications. (18 U.S.C., §2702, subd. (b)(3), ["A provider... *may* divulge the contents of a communication...with the lawful

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[1] Evidence supporting this statement is available in defense counsel's Declaration in Opposition to Facebook's Motion to Quash and Declaration in Support of the Subpoena Duces Tecum, produced under seal to the Court of Appeal in D072171 on June 13, 2017.

consent of the originator...or the subscriber"], emphasis added.) Facebook itself argued to the Court of Appeal that "disclosure of communications content by a provider based on a person's lawful consent is permissive, not mandatory," and that "section 2702(b)(3) vests discretion in a provider," rather than imposing an obligation on the provider. (Facebook Supplemental Letter Brief to the Court of Appeal in D072171 filed August 7, 2017, at p. 7.)

The court in *Negro*, ruled otherwise, holding that "when a user has expressly consented to disclosure, the [Stored Communications] Act does not prevent enforcement of a subpoena seeking materials in conformity with the consent given." (*Negro v. Super. Ct., supra,* 230 Cal.App.4th at p. 904.) Facebook disagrees with the *Negro* court, characterizing the ruling on this matter as "erred...flawed...[and] misplaced." (Facebook Supplemental Letter Brief at fn. 6). Facebook does not believe they have a mandatory obligation to respond to consent-based requests for production of records. If their interpretation of section 2702(b)(3) is lawful, and the *Negro* court is incorrect in their ruling on this matter, then Touchstone and Facebook are in agreement that a court order for a witness to consent to production of records by Facebook is not an effective method of retrieving the records.

II. ALTHOUGH VALID UNDER THE SCA, DISCOVERY ORDERS FOR FACEBOOK RECORDS DIRECTED AT INDIVIDUAL WITNESSES ARE INEFFECTIVE AND INADEQUATE MEANS TO OBTAIN SUCH DISCOVERY FROM CERTAIN WITNESSES.

The SCA provides windows through which a trial court may climb in attempt to avoid conflict with the federal law, including forced consent to Facebook production or direct production of the records from the user. These orders for consent or production can issue at any point during the trial process: from pretrial litigation to post-trial hearings. However, in factual scenarios like those in this case, there is no alternative that rightly reconciles constitutional rights of the criminally accused that demand production of the

records and a fair reading of the federal law that currently prohibits the production of the same.

A. Witness invocations under the Fifth Amendment and discrepancies in production value between Facebook and user-based productions present significant obstacles to achieving a comprehensive production of records.

Every person "has a privilege to refuse to disclose any matter that may tend to incriminate him." (Cal. Evid. Code, § 940; see also U.S. Const., 5th Amend. and Cal. Const., art. I, § 15.) The United States Supreme Court "has always broadly construed [Fifth Amendment] protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." (*Manessv. Meyers, supra,* 419 U.S. at p. 461.) The protection not only applies to "evidence which may lead to criminal conviction," but also that "evidence which an individual reasonably believes could be used against him in a criminal prosecution." (*Ibid.*, citing *Hoffman v. United States* (1951) 341 U.S. 479, 486.) Thus a witness protected by the Fifth Amendment may rightfully refuse to answer incriminating questions or inquiries. (*In re Mark A., supra,* 156 Cal.App.4th at p. 1141.) The Court of Appeal and Facebook recommend that Renteria could be ordered to consent to the release of his social media records as a workaround to the SCA, but this approach is only viable when a user does not have significant constitutional rights protecting him from the disclosure. As discussed above at Section I., C., Renteria has a valid claim under the Fifth Amendment to prohibit him from responding in compliance with a court order to consent to production of these records, as the records contain admissions of drug use, threats of violence, and descriptions of criminal conduct.

The Court of Appeal and Facebook also recommend that the user produce the records on his own volition in response to a subpoena served upon him directly. This is another workaround to the prohibitions of the SCA

that plausibly proves effective in some cases. Notwithstanding the above discussion on constitutional rights prohibiting such production in this instance, this avenue of production is neither complete, comprehensive, nor equivalent to those records received directly from Facebook. Facebook argues that a user can access their own account data using a downloading feature off the social media website directly, but does not show the court what that download yields. It has not been shown whether this method of record retrieval is comparable in any manner to the comprehensive production received by law enforcement or the prosecution when a search warrant is utilized to obtain the records. The instructions from the social media website itself reveal that the user-download feature does not include the entire record for that user, and that the user must utilize multiple avenues for a complete compilation of their Facebook records.[2] Touchstone submits that productions obtained from Facebook directly, compared to a user-prompted download, are vastly different in content, format, and magnitude. Thus user-based productions are an inequitable and inadequate means for production of the subpoenaed records in this case.

B. Righteous concerns regarding spoliation destroy any integrity in user-based production of Facebook records, as the user in this case readily demonstrates.

Both proposed options—ordering the user to consent to a release by Facebook and ordering the user to produce the records directly—implicate the real issue of spoliation. Both options presuppose that the user will submit himself to the will and order of the court, which is not a reasonable assumption to make in this particular case. Even if Renteria were not to object

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[2] See "Accessing Your Facebook Data / Facebook Help Center," at https://www.facebook.com/help/405183566203254 (last viewed on February 16, 2018), identifying four separate locations for a user to find their complete record: "Activity Log," "Downloaded Info," "Account Settings," and "Privacy Settings."

or invoke in response to a subpoena, there is no indication that he would act in good faith in providing full disclosure of the records. Rather, the record reflects that Renteria is an unreliable and unreasonable source for the requested records; he is hostile, has a history of refusing to cooperate with law enforcement, and consistently fails to comply with reasonable demands of the Court and prosecution.[3] After the Court of Appeal's opinion in this matter was filed and that ruling was publicized in local media, Renteria completely deactivated his personal account, which is the subject of the instant discovery dispute, destroying all information that was previously available. (See https://www.facebook.com/jeffrey.renteria, last viewed on February 16, 2018: "No permission to access this profile.") Thus, direct measures have already been taken by this user to deprive Touchstone, the trial court, and ultimately the jury, of knowing the contents of his Facebook communications.

Luckily, the trial court ordered Facebook to preserve Renteria's Facebook records upon issuance of the original subpoena in March 2016, and further ordered Facebook, the District Attorney, and law enforcement to not disclose the proceedings to Renteria "as such notification may lead to tampering with or destruction of evidence." (AE at p. 36.) This demonstrates the trial court's finding that Renteria is not a reliable or reasonable source for the requested records and should not be notified that the records are being sought. The SCA itself accommodates this real concern for destruction of records in three separate portions of the Act: section 2703(a), which permits a search warrant to issue without notice to the user; section 2703(b)(1)(A), which also permits a search warrant to issue without notice to the user; and

[3] The factual basis of this statement is provided in defense counsel's Declaration in Opposition to Facebook's Motion to Quash and Declaration in Support of the Subpoena Duces Tecum, produced under seal to the Court of Appeal in D072171, on June 13, 2017.

section 2703(b)(1)(B), which permits a subpoena or court order to issue with delayed notice to the user. (18 U.S.C., §§ 2703, subd. (a), (b).) These measures are available to government entities seeking communication records because the threat of destruction of records, if a user is notified of the production, is real. The concern is doubly relevant when the user is known to be uncooperative and hostile to the litigation process, who has already taken direct measures to conceal and destroy the records.

III. WITNESS SANCTIONS ARE NOT AN ADEQUATE REMEDY FOR NON-COMPLIANCE BECAUSE THIS DISCOVERY IS RELEVANT AND NECESSARY TO AN AFFIRMATIVE DEFENSE, NOT JUST WITNESS IMPEACHMENT.

The trial court has authority to hold witnesses in contempt and issue sanctions for noncompliance with court orders. However, sanctions don't have effect when a witness does not avail themselves to the court's authority, and sanctions are not appropriate when a witness has a constitutional justification to refuse compliance. In those scenarios, the defendant does not get the records he seeks. Even if orders issue and sanctions impose, they still may be ineffective in obtaining compliance from the contumacious witness. In that scenario as well, the defendant does not get the records he seeks. This would not present a quandary of constitutional magnitude if the sought records pertained only to the impeachment of that witness. However, a criminal defendant is uniquely deprived of constitutional rights when the sought records are also independently necessary for the presentation of an affirmative defense. In cases such as these, court orders and sanctions for non-compliance are no remedy to a criminal defendant seeking real evidence, rather than impeachment evidence. Sanctions are a token punishment to the hostile witness and a devastating punishment to the criminally accused, who can no longer achieve a fair trial with effective counsel or realize the plethora of trial rights afforded to him by the constitution.

A. Although the trial court has authority to hold witnesses in contempt and to issue sanctions for non-compliance with court orders, sanctions are not appropriate or applicable in certain factual scenarios.

"Disobedience to a subpoena...may be punished by the court or magistrate as a contempt." (Cal. Pen. Code, §1331.) The trial court has inherent power to punish any witness for contempt that disobeys their order or tends to obstruct or interfere with its proceedings. (*Raiden v. Superior Court of Los Angeles County* (1949) 34 Cal.2d 83, 86; *In re Burns* (1958) 161 Cal.App.2d 137, 141.) The witness who willfully disobeys the written terms of a court order or process, "including orders pending trial," is guilty of a misdemeanor crime and may be punished according to the Penal Code. (Cal. Pen. Code, §166, subd. (a)(4), emphasis added; *People v. Gonzalez* (1996) 12 Cal.4th 804, 816.) Criminal contempt may be shown by the unlawful refusal to be sworn as a witness or the refusal to answer any material question when so sworn. (*In re McKinney* (1968) 70 Cal.2d 8, 10.) "Disobedience of any lawful judgment, order, or process of the court" also constitutes civil contempt. (Cal. Code Civ. Proc., §1209, subd. (a)(5).) Upon a finding of such contempt, the disobedient witness may be punished with up to five days in jail and a $1,000 fine. (Cal. Code Civ. Proc., §1218, subd. (a); *Gonzalez, supra*, 12 Cal.4th at p. 816.) However, "if the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it...." (Cal. Code Civ. Proc., §1219, subd. (a).) As a final consequence for non-compliance, when other sanctions have been exhausted, the court may prohibit the testimony of the disobedient witness. (Cal. Pen. Code, § 1054.5, subd. (b), (c).)

It is the plain intent of the legislature in passing Code of Civil Procedure sections 1209 through 1222 and Penal Code sections 166 and 1331 to give a dual aspect to the acts of contempt described therein; in one aspect

they are regarded as offenses against the dignity and authority of the court, remediable in accordance with the rules prescribed in the Code of Civil Procedure; in another aspect they are regarded as offenses against the peace and dignity of the people, remediable in accordance with the rules prescribed in the Penal Code. (*In re Application of Morris* (1924) 194 Cal. 63, 69.) However, an essential element of the contempt in either forum is that the conduct of the accused be willful in the sense that it is inexcusable. (*In re Burns, supra*, 161 Cal.App.2d at p. 141.) Similarly, a witness who disobeys or ignores a subpoena issued by a criminal defendant is liable, "*unless he show good cause* for his nonattendance...." (Cal. Pen. Code, §1331, emphasis added.)

In the instant case, an invocation of the Fifth Amendment right against self-incrimination provides good cause for non-compliance and hinders the trial court's ability to find contempt or impose sanctions. The proposition that a court order, in conjunction with witness sanctions, may successfully inspire production of those records necessary for Touchstone to obtain a fair trial relies two presumptions: (1) on the witness availing themselves to the court; and (2) on the witness having no good cause to refuse the order. If either of these factors present themselves as an impediment to production, as they do in this case, then the records cannot be obtained from that witness. When Renteria refuses to avail himself to the court or invokes the Fifth Amendment in refusing to testify or answer material questions once sworn, he is precluded from testifying, and Touchstone is forced to proceed to trial without the sought records.

This is not acceptable. The Facebook records Touchstone seeks are relevant not only for impeachment purposes in the event that Renteria appears at trial; they are independently relevant and necessary at trial for the presentation of an affirmative defense, namely self-defense. As discussed below, the burden of presenting mitigation evidence in affirmative defense

rests on Touchstone, and Renteria's Facebook communication records are needed in order to do this, regardless of Renteria's physical presence or involvement at trial.

B. Touchstone requires these records in order to assert an affirmative defense, so sanctions against Renteria would not provide an adequate solution or remedy to obtain the records.

A person charged with homicide "must, upon his trial, be fully acquitted and discharged," if the homicide appears to be justified or excusable. (Cal. Pen. Code, §197; see also CALCRIM 505: Justifiable Homicide.) Attempted homicide, as charged in this case, is justifiable by any person who is resisting an attempted murder upon anyone, or resisting an attempted felony, or resisting an attempt to commit great bodily injury upon anyone. (Cal. Pen. Code, §197, subd. (1).) Attempted homicide is also justifiable by any person in any case:

> When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.

(Cal. Pen. Code, §197, subd. (2).) The defense in this case is that Touchstone was acting within the realm of conduct contemplated in Penal Code section 197 when he shot Renteria at his sister's home on August 8, 2016. Renteria's Facebook records bear directly on this defense.

Once the prosecution proves the homicide attempt itself, "the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that...the defendant was justifiable or excusable." (Cal. Pen. Code, §189.5; *People v. Searle* (1917) 33 Cal.App. 228, 232, ["it is incumbent upon [the defendant] to prove circumstances in mitigation, excuse, or justification unless they arise out of the evidence produced against him"]; *People v.*

Soules (1940) 41 Cal.App.2d 298, 314, ["The homicide having been conclusively established, the burden of showing that it was justifiable rested on the defendant"].) Thus Touchstone has the burden of showing justification or excuse for his actions on August 8, 2016, and must be able to "introduce evidence of such circumstances to raise a reasonable doubt of his guilt." (*People v. Cornett* (1948) 33 Cal. 2d 33, 42.) To do this, the Evidence Code permits him to admit evidence of Renteria's character or trait of character as it relates to violence. (Cal. Evid. Code, § 1103, subd. (a).)[4] This is precisely what Touchstone intends to do with the Facebook records of Renteria's communications, as those communications clearly reflect Renteria's malevolence towards Touchstone, violence toward Rebecca, unlawful handling of firearms, and regular use of illegal drugs.

The Penal Code rests the burden upon Touchstone to show justification for the actions that precipitated this case, and the Evidence Code provides him a clear means of doing so. (Cal. Pen. Code, §189.5; Cal. Evid. Code, § 1103, subd. (a).) Evidence of Renteria's violent character and nature is at the crux of Touchstone's defense, and that evidence exists in the sought Facebook records. These records cannot be obtained from Renteria himself, and court orders issued upon the pain of sanction will not be sufficient in compelling their production for the reasons discussed *supra*. Even if Renteria is precluded from testifying at trial as a sanction for noncompliance or as a consequence of invoking the Fifth Amendment, these records must still be produced for their independent value as evidence of an affirmative defense under the Evidence Code. These records cannot come from Renteria, yet they

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[4] Cal. Evid. Code § 1103(a)(1) states that, "[i]n a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

still must be produced; they are objectively relevant, material, and exculpatory in nature, and directly implicate Touchstone's ability to have a fair trial and due process.

IV. THE PROSECUTION HAS EXCLUSIVE ACCESS TO, AND CONSTRUCTIVE POSSESSION OF, THOSE RECORDS GOVERNED BY THE SCA; THUS A TRIAL COURT CAN ORDER THEM TO COMPLY WITH REASONABLE DISCOVERY REQUESTS FOR THE RECORDS.

Because the SCA authorizes the prosecution to compel the production of material and exculpatory records from providers, but prohibits a criminal defendant from gaining access to the same information, those records are under the prosecution's constructive possession and exclusive control. As such, the trial court can order the prosecution to produce the records pursuant to the court's authority in managing discovery litigation throughout the trial process. Such an order would be consistent with the prosecution's discovery obligations and duty to produce records under *Brady v. Maryland*, Penal Code section 1054, *et seq.*, and California Rule of Professional Conduct 5-110. (*Brady v. Maryland* (1963) 373 U.S. 83; Cal. Pen. Code, §1054, *et seq.*; Cal. Rule of Prof. Conduct, rule 5-110.)

A. The prosecution has an undisputed obligation to produce records that they know mitigate guilt or cast doubts on the testimony of their witnesses.

The constitutional right prohibiting deprivation of life or liberty without due process is a solemn call of duty to the prosecutor to ensure that the rights of criminal defendants are realized in the trial setting through the production of records and materials that have a direct bearing on the outcome of each case. The Due Process Clause of the United States Constitution requires the prosecution "to disclose to the defense evidence in its possession that is favorable to the accused and material to the issues of guilt or punishment." (*People v. Jenkins* (2000) 22 Cal.4th 900, 954.) In this case, the trial court found that Touchstone has a due process right to the sought

Facebook records. (AE at pp. 131-132, ["Touchstone has a due process right to the information to defend himself on a very serious case"].) This is because the records are exculpatory in nature and relevant to the affirmative defense asserted in the case.

The prosecutor's responsibilities in criminal cases are expanded in Rule of Professional Conduct 5-110 to include an obligation to "[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence" (Cal. Rule of Prof. Conduct, rule 5-110, subd. (D), Approved by the Supreme Court Nov. 2, 2017.) In discussion of that Rule, the comments state:

> The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by Brady v. Maryland (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely.

(Cal. Rule of Prof. Conduct, rule 5-110, Discussion at [3].) This rule establishes a standard for prosecutor production that is lower than the standard in *Brady,* which requires a subjective finding of materiality on the part of the prosecutor. (*Brady, supra,* 373 U.S. 83; *Turner v. United States* (2017) 137 S.Ct. 1885, 1893, ["[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different"], citations omitted.)

In light of Rule of Professional Conduct 5-110, materiality is an irrelevant inquiry at the pretrial discovery stage; the prosecutor's subjective belief regarding the ultimate impact of exculpatory evidence does not bear on their pretrial discovery obligations. Production is now required of "all

evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence," including but not limited to "information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely." (Cal. Rule of Prof. Conduct, rule 5-110, subd. (D), Discussion at [3].)

This obligation mirrors that which is imposed in Penal Code section 1054.1, which requires the prosecution to produce "[a]ny exculpatory evidence," not just material exculpatory evidence. (Cal. Pen. Code, § 1054.1, subd. (e); *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901, ["[defendants] do not have to make that [materiality] showing just to be entitled to receive the evidence before trial"].) For a defendant who shows "a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality." (*Barnett, supra,* 50 Cal.4th at p. 901.) This is consistent with federal law, which holds that "the 'materiality' standard usually associated with *Brady*... should not be applied to pretrial discovery of exculpatory materials." (*United States v. Price* (9th Cir. 2009) 566 F.3d 900, 913 n. 14, quoting *United States v. Acosta* (D. Nev. 2004) 357 F.Supp.2d 1228, 1239-40.)

It is without dispute that the prosecution has an obligation to produce records they know to mitigate guilt or cast doubts on the testimony of their witness. This obligation is of statutory and constitutional magnitude in the instant case. When the prosecution alone can access the complete, unadulterated record of Renteria's Facebook communications, the only meaningful application of their duty requires them to produce the records.

B. By virtue of their exclusive access to Facebook records under the SCA, the prosecution is in constructive possession of them with a concomitant duty to produce them when need is shown.

California courts have long interpreted the prosecutorial obligation to disclose relevant materials in their possession to include information "within the possession or control" of the prosecution. (*People v. Robinson* (1995) 31 Cal.App.4th 494, 499.) Materials discoverable to the defense also include information in the possession of agencies to which the prosecution has access, that are part of the criminal justice system, not just information actively "in the hands of the prosecutor." (*Ibid.*, quoting *Engstrom v. Superior Court* (1971) 20 Cal.App.3d 240, 244.) In *Pitchess,* this Court further defined the scope of the prosecutor's possession and control as encompassing information "reasonably accessible" to the prosecution. *(Pitchess v. Superior Court, supra,* 11 Cal.3d at p. 535.) "Possession includes information the prosecution possesses or controls, and encompasses information reasonably accessible to the prosecution." (*People v. Little* (1997) 59 Cal.App.4th 426, 431, emphasis added.)

The prosecution in *People v. Little* did not have actual knowledge of their key witness's prior conviction, and the defense *did* have alternative access to that information, yet the court still found that Penal Code section 1054.1 created a duty on the prosecution to inquire and disclose that information, since the prosecution had reasonable access to the record and thus had "possession" of it under the statute. (*Little, supra,* 59 Cal.App.4th at p. 431.) Note that *Little* addresses a factual scenario where the defense had other means to obtain the sought records, and the court *still* ordered the prosecution to produce the records, reinforcing the prosecution's statutory discovery obligations to produce records reasonably accessible to them.

The courts have similarly highlighted the prosecutor's duty to produce

records when the defense does *not* have reasonable access to the records. For example, in *People v. Kassim*, the court found that the prosecutor's duty to disclose encompasses not just exculpatory evidence in their possession, but also evidence possessed by investigative agencies to which the prosecutor—but not the defense—has reasonable access. (*People v. Kassim* (1997) 56 Cal.App.4th 1360, 1380, ["information subject to disclosure by the prosecution [is] 'readily available' to the prosecution and not accessible to the defense"].) The *Kassim* court cited *People v. Coyer* to distinguish and highlight the significance of the prosecutor's obligation when records are not available to the defense. (*Ibid.*, citing *People v. Coyer* (1983) 142 Cal.App.3d 839, 843.) In *Coyer*, "[a] list of any charges currently pending against prosecution witnesses could be compiled from information readily available to the district attorney," yet there was "no similarly expedient method by which defense counsel could obtain this information through his own efforts." (*Coyer, supra,* 142 Cal.App.3d at p. 843.) The court therefore concluded that the trial court "abused its discretion in refusing to order the prosecutor to furnish defense counsel with a list of all criminal charges pending against prosecution witnesses." (*Ibid.*)

The courts in *Kassim* and *Coyer* emphasize the prosecutor's duty to produce records available to them when the defense is unable to otherwise obtain the records on their own. While the prosecution has no general duty to seek out, obtain, or disclose all evidence that might be beneficial to the defense, it does have a duty, pursuant to the case law cited herein and Penal Code section 1054.1, to inquire of and disclose those records that are reasonably accessible to the prosecution and unavailable to the defense.[5]

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[5] Similarly, under Oregon law, if a third party entity is required to disclose records to the prosecution, the prosecution is deemed to have control over those records and must produce them to the defense. (*State v. Wixom* (2015) 275 Ore.App. 824, 831-32.) With this reasoning in mind, the Oregon

(*People v. Little, supra*, 59 Cal.App.4th at p. 431; *People v. Kassim, supra,* 56 Cal.App.4th 1360; *People v. Coyer, supra,* 142 Cal.App.3d 839.)

These exact circumstances are present in the instant case. The prosecution has reasonable and readily-available access to Facebook records that are currently known to the parties and the court to be relevant, exculpatory, and material to the case. The records are readily available to the prosecution via search warrant authority provided in section 2703(a), grand jury or trial subpoena authority provided by section 2703(b)(1)(B)(1), or court orders available under section 2703(d). (18 U.S.C., §§2703, subd. (a), (b)(1)(B)(1), and (d).) By function and fair reading of the SCA, the same federal statute that provides three distinct ways for the prosecution to obtain the records, the defense has no possible means to procure the same evidence. There is virtually no mention or reference to the criminal defendant anywhere in the SCA. As it stands today, the prosecution has independent, unilateral access to Renteria's Facebook records.

This presents an omission of constitutional magnitude. It compromises the very premise of justice system, which boasts of truth-seeking and the ability to secure evidence critical to proving guilt or innocence by either side. As the United States Supreme Court aptly stated in

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appellate court in *State v. Bray* found that the prosecution could not be compelled to produce Google records because Section 2702(b) of the SCA only states that the provider "may" produce records, which "under plain language" does not appear to require disclosure. (*State v. Bray*, *supra*, 281 Ore.App. at pp. 596-97.) However, a plain reading of the SCA at Sections 2703(a) and (b)(1) shows that the prosecution "may require" disclosure by the content provider, establishing a compulsory relationship between the prosecution and provider, not discretionary. (18 U.S.C., §2703, subd. (a) and (b)(1), emphasis added.) "Under plain language" of Section 2703, Google is in fact required to disclose records to the prosecution. (*Bray* at p. 597; 18 U.S.C., §§ 2703, subd. (a) and (b)(1).) Thus, under Oregon law, the prosecution has control over the Google records and should have been compelled to produce those records to the defense in *Bray.*

United States v. Nixon:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

(*United States v. Nixon* (1974) 418 U.S. 683, 709; see also *Brady, supra,* 373 U.S. at p. 87, ["Society wins not only when the guilty are convicted but when criminal trials are fair"].) The notions of judicial integrity and comprehensive fact-finding, set forth by the Supreme Court in *Nixon,* will be without effect if the SCA precludes the defense from obtaining exculpatory evidence necessary for the presentation of an affirmative defense at a fair trial, or if the prosecution is excused from their duty of producing the same records.

Case law and statutes provide a fair and reasonable basis to conclude that Facebook records are readily accessible to the prosecution under the SCA. The records are plainly unavailable to the defense pursuant to the same Act. Accordingly, a trial court can order the prosecution to comply with defense discovery requests for these records without offending the SCA. In this case, a court order instructing the prosecution to produce Renteria's Facebook records is the only reasonable or reliable means to realize the rights promised to Touchstone in the California Constitution providing for a fair trial and due process of the law. (Cal. Const., art. I, §§ 15, 24.)

V. CRIMINAL DEFENDANTS SHOULD BE AFFORDED THE SAME SUBPOENA POWER AND COURT-ORDER OPPORTUNITIES GRANTED TO GOVERNMENTAL ENTITIES IN SECTIONS 2703 (b)(1)(B) AND 2703(d).

The prosecution, acting as a "government entity," may obtain a court

order for the disclosure of records under section 2703(d) upon a "specific and articulable" factual showing of "reasonable grounds to believe" the records "are relevant and material to an ongoing investigation." (18 U.S.C., §2703, subd. (d).) The prosecution may also obtain the records by use of trial subpoena under section 2703(b)(1)(B)(i), with no factual showing or burden of proof whatsoever. (18 U.S.C., §2703, subd. (b)(1)(B)(i).)

In a similar manner, defense counsel has a statutory right to sign and issue subpoenas to compel attendance of witnesses and documents before the court, provided for in the Penal Code. (Cal. Pen. Code, § 1326, subd. (a)(4), (c).) This right is grounded in the federal and California constitutions, which explicitly protect a defendant's right to compel witnesses on their behalf in criminal cases. (Cal. Const., art. I §§ 15, 24; U.S. Const., 6th Amend.) When defense counsel issues a subpoena to non-parties compelling the production of documents or records, the court can order an *in camera* hearing to review the records and determine whether the defense is entitled to receive them. (Cal. Pen. Code, §1326, subd. (c).) This serves to protect any conflicting interests that reside in the records, aside from the defendant's constitutional rights to seek and obtain them.

Compulsory process by the defendant is fundamental in the search for justice and ascertainment of truth at trial. (*Taylor v. Illinois* (1988) 484 U.S. 683, 709; *Nixon, supra,* 418 U.S. at p. 709; *Pitchess, supra*, 11 Cal.3d at p. 536, ["[A]n accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial"].)

No case has addressed the question of whether a criminal defendant may obtain a court order under section 2703(d) by making the factual showing required under that statute, or whether a defendant may utilize a trial subpoena as contemplated and granted to the prosecution under section 2703(b)(1)(B)(i). The First Appellate District hinted at the possibility in

Facebook, Inc. v. Superior Court (Hunter/Sullivan):

> We find no case that has yet addressed whether a criminal defendant may ask the court to issue a "trial subpoena" under § 2703(b)(1)(B)(i) for production of information under the SCA. The statute, on its face, limits production to a subpoena issued by "a governmental entity," and at least one federal trial court has held that neither the court nor the federal public defender are governmental entities under the SCA. [citations omitted]. Although the issue is not now before us, we question whether such a limitation would be constitutional in light of the requirements of *Davis* and *Hammon.* Defendants may, in any event, directly subpoena the records they seek for production to the trial court pursuant to Penal Code section 1326.

(Facebook, Inc. v. Superior Court (Hunter/Sullivan) (2015) 240 Cal.App.4th 203, fn. 17; review granted and opinion superseded *sub nom. Facebook v. Superior Court* (2015) 195 Cal.Rptr.3d 789.)

Davis and *Hammon* both stand for the proposition that state policy interests and statutory or constitutional privileges relating to privacy and confidentiality cannot, in all circumstances, "require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 320; *People v. Hammon* (1997) 15 Cal.4th 1117, 1127.) If the effective cross examination of an adverse witness requires the production of records protected by the SCA, the defense seeking those records has a constitutional right to obtain them. Protecting the user's interests in confidentiality or privacy must yield to the vital constitutional rights of the criminally accused, both to cross examine that user *and* to present an affirmative defense that is based on the user's character.

There is no reason that a defendant such as Touchstone cannot make a showing as required of the prosecution in section 2703(d) or seek a trial subpoena pursuant to section 2703(b)(1)(B)(i) in order to obtain the same records as the prosecution. In fact, Touchstone did make such a showing to

the trial court in this case, and the trial court was sufficiently compelled to order the records produced by Facebook, in spite of Facebook's motion to quash. There is no constitutional reason that should preclude a defendant such as Touchstone from exercising his rights under Penal Code section 1326 to issue a trial subpoena, as the prosecution can do under section 2703(b)(1)(B)(i), or to seek a court order upon sufficient showing per section 2703(d). (18 U.S.C., §2703, subd. (b)(1)(B)(i), (d).) The interest in both instances is the ascertainment of truth and the execution of a fair trial, which can and should be achieved in this matter.

CONCLUSION

For the reasons stated herein, Real Party in Interest Touchstone respectfully requested that the Court of Appeal decision be reversed. Facebook or the prosecution should be ordered to produce the requested records to Respondent Court for an *in camera* pretrial review, as that court has determined the records are necessary for due process and a fair trial. Alternatively, the Court can grant defense counsel the authority to issue subpoenas or seek court orders that mirror those utilized by the prosecution in obtaining these records. This Court should exercise its broad authority to interpret the federal law and the constitution to afford the trial courts and/or defense counsel this ability, so that Touchstone can have a fair trial and due process of the law as guaranteed to him by the United States and California Constitutions.

Dated: February 16, 2018

Respectfully submitted,

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/s/ Kate Tesch
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LANCE TOUCHSTONE

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 9,623 words. I swear under the penalty of perjury that the foregoing is true and correct.

Dated: February 16, 2018

Respectfully submitted,

/s/ Kate Tesch
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Deputy Alternate Public Defender

Attorney for Real Party in Interest
LANCE TOUCHSTONE

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 February 16, 2018, I personally served the attached **REAL PARTY IN INTEREST TOUCHSTONE'S OPENING BRIEF ON THE MERITS** to the following parties:

San Diego Superior Court, *Respondent*
Hon. Kenneth So, Judge C/O Judicial Services
1100 Union Street, San Diego, CA 92101
Via U.S. Postal Service in sealed, stamped envelope and Truefiling Electronic Service

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Via U.S. Postal Service and Truefiling Electronic Service

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 16, 2018, in San Diego, California.

Signed: Ruby Shamsh

Printed: Ruby Shamsh
DECLARANT