In the Supreme Court of California

Facebook, Inc., Petitioner, v. **Superior Court of San Diego County,** Respondent.	No. S245203 Court of Appeal No. D072171 San Diego County Superior Court No. SCD268262
Lance Touchstone, Real Party in Interest.	

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

And Brief in Support of Real Party Lance Touchstone
(Rule 8.520(f))

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Issue presented

Does the trial court have authority to order the prosecution to issue a search warrant under 18 U.S.C. section 2703 regarding the communications sought from Facebook? How does the California Constitution, specifically Article 1, sections 15 and 24, affect these questions?

The San Francisco Public Defender urges this Court to hold that, to the extent the Stored Communications Act (SCA) bars a criminal defendant from subpoenaing necessary records from Facebook or other providers, it is unconstitutional.

But to avoid the constitutional issue, this Court has the power to fashion a procedural rule by which a trial court can direct the issuance *under seal* of a prosecution search warrant pursuant to 18 U.S.C. section 2703 for the sought-after records. So long as the prosecution gains no access to confidential defense information in the process, this solution is consistent with the SCA and the constitutional rights afforded criminal defendants.

Application to Appear as *Amicus Curiae*

The San Francisco Public Defender requests leave to file the attached *amicus curiae* brief supporting Real Party Lance Touchstone. (Cal. Rules of Court, Rule 8.520.)

This case raises an important statewide issue: how a defendant can access social media records that are necessary to mount an effective defense. As social media continues to dominate modern communications, it increasing becomes relevant evidence in criminal prosecutions, sought after by both the prosecution and the defense. But only the prosecution can access these records under the Stored Communication Act as the lower court interpreted it—an imbalance that must be righted. The decision here will affect scores of criminal cases in California, now and in growing numbers to come.

The issue is particularly important to San Francisco Public Defender, Jeff Adachi, whose office is charged with effectively representing thousands of criminal defendants per year. As part of that representation, public defenders are charged with ensuring that the accused are afforded due

process, including the right to compulsory process to get records and information necessary to defend against charges that threaten their right to liberty. The decision below leaves defendants at the mercy of law enforcement, in a way antithetical to our adversary system of justice.

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

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In the California Supreme Court

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Brief in Support of Real Party

Introduction

Amicus, the Public Defender of San Francisco, respectfully submits this brief in support of Real Party Lance Touchstone.

The decision under review, if allowed to stand, threatens to deprive criminal defendants of large swaths of relevant, often key evidence. The Court of Appeals recognizes the problem, but proposes unrealistic solutions. Like Petitioner Facebook, Inc., the lower court imagines that defendants can simply obtain the information from the account holders themselves, or, if not, through court orders to the account holders to

consent to the release of the information. As real party amply shows, these are not workable solutions in the real trial setting and will not produce full, complete and accurate records, if any at all.

This Court has the power and duty to rule on the constitutionality of that part of the Stored Communications Act that permits the prosecution to access this evidence, but denies the same access to criminal defendants. Alternatively, the Court may hold that trial courts have the authority to order prosecution-issued search warrants for the materials defendants seek, and fashion a rule under which criminal defendants' constitutional rights are protected in the process.

1. This Court should rule that the SCA, to the extent it bars defense access to necessary social media records, is unconstitutional as applied.

This Court 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." (*Hammarley v. Superior Court* (1979) 89 Cal.App.3d 388, 402.) The constitution prevails over legislative acts and "the constitution, and not such ordinary

act, must govern the case to which they both apply." (*Marbury v. Madison* (1803) 5 U.S. 137, 177.)

Due process means the right to a fair opportunity to defend against the State's criminal charges. The rights to confront and cross-examine the prosecution's witnesses and to call witnesses in one's own behalf are essential to due process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [35 L. Ed. 2d 297, 93 S. Ct. 1038].)

No United States Supreme Court decision squares the SCA with the paramount constitutional rights of criminal defendants. This Court has broad authority to interpret the SCA and rule on its constitutionality (see *California Assn. for Health Servs. at Home v. State Dep't of Health Care Servs.* (2012) 204 Cal.App.4th 676, 684 [absent controlling United States Supreme Court authority, state courts make independent determination of federal law]), allowing trial courts to conduct a proper in camera review of subpoenaed records and releasing with protective orders those materials deemed material and relevant.

In sum, a criminal defendant's constitutional rights to a fair trial, to effective counsel, to compulsory process, and to

confront witnesses require that the SCA yield to afford superior court judges the discretion to conduct a pretrial in camera review of social media records.

Amicus urges this Court to reach the constitutional issue. But the rule of constitutional avoidance—that courts, when faced with two plausible constructions of a statute, one constitutional and the other not, should choose the constitutional reading (*Voisine v. United States* (2016) 136 S. Ct. 2272; 195 L. Ed. 2d 736, 757)—would support finding other avenues to vindicate defendants' discovery and compulsory process rights, while not ruling on the constitutional question. Ordering the prosecution to issue a search warrant to ensure defendant a fair trial is one possible alternative.

2. Trial courts have authority to order prosecution-issued search warrants to obtain social media records for defendants.

Trial courts have inherent authority under the due process and compulsory process clauses of the state and federal constitutions to order the prosecution to issue a search warrant under 18 U.S.C. section 2703 to obtain social media records. Such an order is consistent with the SCA, and this

procedure is supported by the California Constitution (Article 1, sections 15 and 24).

A. Courts have the inherent and statutory power to make orders that guarantee the fair administration of justice.

Real party Touchstone has amply briefed the question whether trial courts have the power to make orders that will protect the efficacy and fairness of proceedings. It has shown that they have inherent equity, supervisory and administrative powers, and also the inherent power to control cases before them. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377; *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.) And regarding 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.)

For example, in *Juror No. One*, the Court of Appeal authorized a trail court order to a juror to give "consent" so his social media could be reviewed. (*Juror Number One v.*

Superior Court, supra, 206 Cal App.4th 854.) Here, the trial court would order the prosecution to issue a warrant. In both situations, the order requires a party to do something they do not voluntarily want to do.

Moreover, the California Supreme Court has the authority to implement rules of criminal procedure. (*People v. Burgener* (2003) 29 Cal.4th 833, 861.) In a proper case, this Court may adopt a new rule where it is necessary for the proper and fair administration of justice. (See *People v. Doyle* (2018) 19 Cal.App.5th 954, 966 (opn. of Liu, J., dissenting from dismissal of review [suggesting that the court might adopt a rule specifying the contents of the required colloquy to secure the defendant's waiver of the right to a jury trial.].)

Under these powers, this Court should recognize and direct that trial courts have the power to order a prosecution search warrant under the SCA when a defendant cannot otherwise obtain necessary social media information.

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B. The California Constitution provides independent grounds supporting trial court orders for prosecution search warrants to obtain social media records.

In addition to the inherent powers imbued to trial courts, the due process clause of the California Constitution provides a right to pretrial discovery when that discovery is necessary to vindicate the defendant's rights. (*Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444, 1463-1464.) "Due process 'is a flexible concept which depends upon the circumstances and a balancing of various factors.' [Citations.]" (*In re F.S.* (2016) 243 Cal.App.4th 799, 809.) And the rule of constitutional avoidance interprets statutes broadly. (See *People v. Chandler* (2014) 60 Cal.4th 508, 524-525.)

Here, the circumstances are a technical statutory roadblock to necessary, constitutionally-compelled discovery. The California due process clause support fashioning a rule of criminal procedure that will ensure defendants are not denied the rights to due process, fair trial, compulsory process, and other state and federal rights in the criminal process.

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C. The Separation of Powers Doctrine does not undermine a trial court's search warrant order.

A trial court order that the prosecution issue a search warrant on behalf of a defendant does not violate the separation of powers doctrine.

That doctrine became a part of California law through the adoption of article III, section 3, of the state Constitution, which provides that the "powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." *(Ibid.)* This Court has noted that its main purpose is "to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508-509, quoting *Parker v. Riley* (1941) 18 Cal.2d 83, 89.)

Here, even if issuing search warrants is traditionally an executive-branch prerogative, that does not justify interference with the judiciary's independent duty to control and insure fairness in the criminal process. (See *Romero, supra,* 13 Cal. 4th at 515; *People v. Tenorio* (1970) 3 Cal.3d 89, 90 [separation of powers provision could not abide statute

prohibiting trial court from dismissing defendant's prior conviction without prosecution approval, as it compromised judicial power of the trial court].)

Moreover, any prosecution objection to the court-ordered subpoena process would be contrary to the prosecution's duty to seek justice. (*People v. Arredondo* (2018) 21 Cal. App. 5th 493, 505.) And, the prosecution could refuse the order, understanding that dismissal would be the outcome. Compare the procedures used when the court finds an informer material and orders the state to reveal identification information. The state may comply or dismiss, without a separation of powers complaint. (See *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 365; Evid. Code, §§ 1041, 1042; *People v. Hobbs* (1994) 7 Cal.4th 948, 958, 959.) The failure to cooperate in the discovery of material social media information should draw the same choice.

D. Sealing the search warrant application is necessary and authorized.

Information may be sealed by the trial court to prevent disclosure of confidential facts and theories to the public or the prosecution. A trial court has inherent discretion to allow documents to be filed under seal in order to protect against

revealing privileged information. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71-72.)

The mere act of giving the prosecution a sufficiently detailed list of sought-after records would reveal defense strategy, attorney-client privileged information and work product. It would also be the equivalent of nonstatutory discovery, because if after review, a defendant does not intend to use it at trial, it would not be discoverable to the prosecution under Penal Code section 1054 et seq.

Thus, if trial courts are directed to order prosecution-issued search warrants, they must do so based on a sealed defense request, and ensure that the prosecution has no access to the request or the records produced. Amicus seeks a rule that would be the equivalent to a defense subpoena, in which disclosure is triggered only by the intent to use the material at trial. (Pen. Code, § 1054.3; *Teal v. Superior Court* (2004) 117 Cal.App.4th 488.) This falls within the trial court's inherent powers to control the proceedings and ensure fairness.

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E. The proper standard for materials sought under the proposed trial-court-ordered search warrant must not be greater than that applying to defense subpoenas.

Defendants have a state and federal due process right to compulsory process. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) Under that right, the standard to obtain by subpoena duces tecum third-party records is met if "the requested information will facilitate the ascertainment of the facts and a fair trial." (*Pitchess, supra,* 11 Cal.3d 531, 536.) The subpoenaing party must show the court "good cause" for the subpoenaed records. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1318; *Pacific Light Leasing Co.* (1976) 60 Cal.App.3d 552, 566.) That means it must be "more than a fishing expedition." (*Barrett, supra,* 80 Cal.App.4th at 1320 n.7.) Good cause is shown by a "plausible justification" for acquiring the documents from the third party by showing they a) are admissible or will lead to admissible evidence; and (b) will reasonably assist the party in preparing its case. (*Id.* at 1318.) This standard is much lower than probable cause.

So, while normally a search warrant requires a showing of probable cause, in the context of a court-ordered search warrant under 18 USC 2703 on behalf of the defense, the

applicable standard should be that of a defense subpoena. This approach does not conflict with 18 USC 2703, because that section does not state a particular standard. It only requires the search warrant is authorized by state law: "A governmental entity may require the disclosure by a provider .... pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, *issued using State warrant procedures*) by a court of competent jurisdiction." (18 USC 2703 (a).) Here, as shown above and in other briefs submitted to the Court on behalf of Real Party, state law does authorize this procedure—in fact the state constitution demands it.

Conclusion

An adversarial system of justice, and the constitutions that preserve it, demand protection of all a criminal defendant's rights. Defendants cannot be forced to give up one right to accomplish another. Real Party Touchstone has a *right* to this material—and to obtain it without revealing to the prosecution anything about his defense strategy, confidential

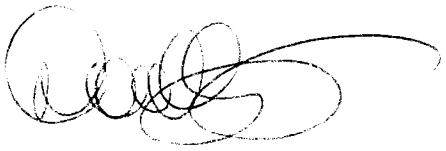
communications, or theory of relevance—and to the extent the SCA impedes this right, it is unconstitutional.

But if this Court must avoid the constitutional issue, it can and should authorize trial courts to order prosecution-issued search warrants under the Stored Communications Act (18 USC 2703). If defense information is properly shielded from the prosecution, this process represents a viable alternative that ensures that criminal defendants receive the materials due process requires.

Dated: May 11, 2018

Respectfully submitted,

Jeff Adachi
Public Defender

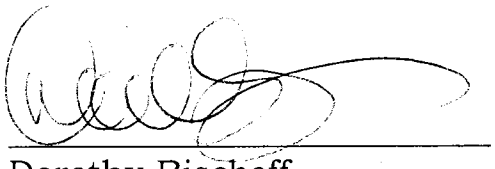


By: Dorothy Bischoff
Deputy Public Defender

Certificate of Word Count

I, Dorothy Bischoff, counsel for amicus curiae the San Francisco Public Defender, hereby certify that the word count of the attached application to file amicus brief and brief of amicus curiae in support of Real Party is 2,148 words as computed by the word-count function of Word, the word processing program used to prepare this brief.

Dated: May 11, 2018



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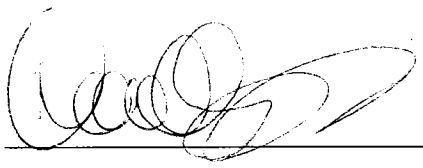

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