

SUPREME COURT COPY

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

AUG 10 2018

FACEBOOK INC.,)

Jorge Navarrete Clerk

Petitioner,)

Deputy

v.)

S245203

THE SUPERIOR COURT OF SAN)
DIEGO COUNTY,)

Ct.App. 4/1 D072171

Respondent;)

(San Diego County
Superior Court No.
SCD268262.)

LANCE TOUCHSTONE,)

Real Party in Interest.)

**SUPPLEMENTAL BRIEF OF THE CALIFORNIA PUBLIC
DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER
OF VENTURA COUNTY IN SUPPORT OF REAL PARTY IN
INTEREST LANCE TOUCHSTONE**

TODD W. HOWETH, Public Defender
Michael C. McMahon, Senior Deputy
SBN 71909

State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law

800 S. Victoria Avenue
Ventura, California 93009
(805) 477-7114

michael.mcmahon@ventura.org

Attorneys for amici curiae
CALIFORNIA PUBLIC DEFENDERS
ASSOCIATION and PUBLIC DEFENDER
OF VENTURA COUNTY

RECEIVED

AUG 10 2018

CLERK SUPREME COURT

IN THE SUPREME COURT OF CALIFORNIA

FACEBOOK INC.,)	
)	
Petitioner,)	
v.)	
	)	S245203
THE SUPERIOR COURT OF SAN)	
DIEGO COUNTY,	)	Ct.App. 4/1 D072171
)	
Respondent;	)	(San Diego County
	)	Superior Court No.
LANCE TOUCHSTONE,	)	SCD268262.)
)	
Real Party in Interest.)	
<hr/>		

SUPPLEMENTAL BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY IN SUPPORT OF REAL PARTY IN INTEREST LANCE TOUCHSTONE

TODD W. HOWETH, Public Defender
Michael C. McMahon, Senior Deputy
SBN 71909
State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law
800 S. Victoria Avenue
Ventura, California 93009
(805) 477-7114
michael.mcmahon@ventura.org
Attorneys for amici curiae
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION and PUBLIC DEFENDER OF VENTURA COUNTY

TABLE OF CONTENTS

	Page:
Table of Contents	2
Table of Authorities	4
Supplemental Brief of The California Public Defenders Association and the Public Defender of Ventura County	6
I. Footnote 1 is the most significant aspect of Facebook’s supplemental brief. Its post- <i>Hunter</i> assertion that its “current production tools” cannot sort communications by privacy settings suggests it is not truly compliant with the SCA because the SCA provides for different legal protections based upon those settings.	7
II. Facebook is a technological juggernaut that can easily alter its “production tools” to comply with the SCA and this court’s opinion in <i>Hunter</i>	9
III. Facebook indiscriminately conflates the jurisprudence of evidence admissibility and the jurisprudence of discovery.	10
IV. Your amici agree with Facebook that this court need not be concerned with privacy setting reconfigurations.	11
V. Law enforcement’s access to and widespread use of social media content has created a prejudicial lack of symmetry that is correctable only by enforcement of the constitutional rights of the criminally accused and the courts’ inherent power to control their proceedings.	12

VI. Article 1, section 30, of the California
Constitution provides an independent state ground
for rights of discovery in criminal prosecutions. 14

Conclusion 14

Certificate of Word Count 16

Declaration of Service End

TABLE OF AUTHORITIES

Page:

Constitutions

U.S. Const.	14
Due Process	14
Calif. Const., art. 1, § 30	14

Cases

<i>Brady v. Maryland</i> (1963) 373 U.S. 83	13
<i>Collins v. Virginia</i> (2018) ___U.S.___ [138 S.Ct. 1663]	12
<i>Elonis v. United States</i> (2015) ___U.S.___ [135 S.Ct. 2001]	13
<i>Facebook, Inc. v. Sup. Ct. (Hunter)</i> (2018) 4 Cal.5th 1245	passim
<i>In re Ferguson</i> (1971) 5 Cal.3d 525	13
<i>In re Winship</i> (1970) 397 U.S. 358	14
<i>John B. v. Superior Court</i> (2006) 38 Cal.4th 1177	11
<i>Marek v. Lane</i> (2013) 571 U.S. 1003.	8
<i>People v. Kassim</i> (1997) 56 Cal.App.4th 1360	13
<i>Pitchess v. Superior Court</i> (1974) 11 Cal.3d 531	13
<i>Schnabel v. Superior Court</i> (1993) 5 Cal.4th 704	11
<i>Wardius v. Oregon</i> (1973) 412 U.S. 470	14

Codes and Statutes

Code Civ. Proc., § 2017.010	11
Evid. Code, § 352	10
Pen. Code, § 1326, subd. (c)	13

Other

SCA (Safe Communications Act) passim

<https://developers.facebook.com/blog/post/2018/04/24/new-facebook-platform-product-changes-policy-updates/> 8

https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q2/Facebook-Reports-Second-Quarter-2018-Results.pdf 9

IN THE SUPREME COURT OF CALIFORNIA

FACEBOOK INC.,)	
)	
)	
Petitioner,	)	S245203
v.)	
	)	Ct.App. 4/1 D072171
THE SUPERIOR COURT OF SAN)	
DIEGO COUNTY,	)	(San Diego County
	)	Superior Court No.
Respondent;	)	SCD268262.)
)	
LANCE TOUCHSTONE,)	
)	
Real Party in Interest.)	
_____)	
_____)	

SUPPLEMENTAL BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY

The court has previously granted our application to participate as amici and invited this brief.

Your amici respectfully submit this joint, responsive supplemental brief after having carefully read the supplemental briefs of your petitioner Facebook Inc. (Facebook); real party in interest, Lance Touchstone (Touchstone); and the filings of the intervenor, the District Attorney of San Diego County.

Our brief primarily responds to the assertions of Facebook “addressing the effect of *Facebook, Inc. v. Superior Court (Hunter)*” in its supplemental brief. (*Facebook, Inc. v. Sup. Ct. (Hunter)* (2018) 4

Cal.5th 1245.) Therefore, as Facebook does in its supplemental brief, we will also refer to that case as *Hunter*.

I.

Footnote 1 is the most significant aspect of Facebook’s supplemental brief. Its post-*Hunter* assertion that its “current production tools” cannot sort communications by privacy settings suggests it is not truly compliant with the SCA because the SCA provides for different legal protections based upon those settings.

Apparently, Facebook will have to change its “current production tools” (Supp. Brief at p. 9, fn. 1) if it seeks to invoke the protections of the SCA. As this court explained in *Hunter*, the SCA provides for different rules of production depending upon the privacy settings of a communication.

Your amici have grave doubts that Facebook has ever conducted its business in full compliance with the privacy mandates of the SCA. For example, in November 2007, Facebook released a program called “Beacon.” It worked like this:

Whenever someone visited the Web site of a participating company and performed a “trigger” activity, such as posting a comment or buying a product, the Beacon program would automatically report the activity and the user’s personally identifiable information to Facebook – regardless of whether the user was a Facebook member.

If the user was a Facebook member, Facebook would publish the user’s activity on his or her member profile and broadcast it to everyone in the member’s “Friends” network. So, rent a movie from

Blockbuster.com, and all your Friends would know the title. Or plan a vacation on Hotwire.com, and all your Friends would know the destination. To prevent Facebook from posting a particular trigger activity, a member had to affirmatively opt out by clicking an icon in a pop-up window that appeared for about ten seconds after he performed the activity.

Beacon resulted in the dissemination of large amounts of information Facebook members allegedly did not intend to share, provoking a public outcry and litigation against Beacon and Facebook. (*Marek v. Lane* (2013) 571 U.S. 1003, 1004 [Roberts, C.J., den. cert.])

Assuming Facebook has violated or is currently violating the SCA, that, of course, does not abrogate the privacy interests of its members. It does, however, provide context to Facebook's recent assertion that it cannot sort public and private communications.

Would this court's opinion in *Hunter* have been different if Facebook had asserted this lack of "ability to produce only public content" during the litigation of that case? We think not.

Facebook declines to inform the court when the "current" tools were implemented, but Facebook made many significant changes to its platform effective April 24, 2018.

(<https://developers.facebook.com/blog/post/2018/04/24/new-facebook-platform-product-changes-policy-updates/> as viewed on August 8, 2018.)

/

/

II.

Facebook is a technological juggernaut that can easily alter its “production tools” to comply with the SCA and this court’s opinion in *Hunter*.

For the first quarter reported on July 25, 2018, by Facebook, it reported a 63% increase in quarterly profits, with the under-pressure social network giving no evidence that the *Cambridge Analytica* scandal has halted its breakneck growth.

(https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q2/Facebook-Reports-Second-Quarter-2018-Results.pdf as viewed on August 8, 2018.)

Mark Zuckerberg’s social network revealed that revenues in the first quarter of 2018 had risen to \$12 billion, a 49% increase over the same period a year ago. The number of people using Facebook each month hit 2.2 billion, surpassing analysts’ expectations and suggesting the *#deletefacebook* campaign that followed the company’s data privacy problems had done little to dent its user numbers. Profits reached \$5 billion, up from \$3.1 billion a year ago.¹

Every second, Facebook processes communications based upon their privacy settings and sorts them for broad distribution to the public or to a narrower distribution to a specified subset of Facebook users. It does so virtually instantaneously. Surely, Facebook can easily alter its “production tools” to comply with the SCA and this court’s opinion in *Hunter*. The SCA demands that it do so.

¹ The author of this brief owns an insignificant position in Facebook, Inc., and is an active user. No disparagement is intended.

Footnote 1 raises more questions than it answers, such as:

- When were the “current” production tools implemented?
- What is the alleged “burden” or cost of sorting public communication from private?
- Are Facebook’s current production tools in compliance with the SCA and this court’s opinion in *Hunter*?
- To the extent that the SCA provides benefits to those who store communications, if Facebook is non-compliant with portions of the SCA, does this create a legal estoppel?
- Is footnote 1 intended to be an argument that the electronic records ordered for the court’s in camera review are “not reasonably accessible” to Facebook? If so, has this issue been forfeited?

III.

Facebook indiscriminately conflates the jurisprudence of evidence admissibility and the jurisprudence of discovery.

Facebook blurs the difference between rules governing the admissibility of evidence and rules governing discovery in a manner which is unhelpful. In both civil and criminal contexts, discovery usually includes much evidence that may, for legitimate reasons, be inadmissible at trial. A legitimate reason for exclusion of evidence may not be a legitimate reason to preclude its discovery. (See, e.g., Evid. Code, § 352.) Those two bodies of jurisprudence should not be comingled in a way that obscures the different policy interests.

Under California’s discovery statutes, “information is discoverable if it is unprivileged and is either relevant to the subject matter of the action or reasonably calculated to reveal admissible evidence. [Additionally,] ‘[d]iscovery may relate to the claim or defense of the party seeking discovery or of any other party to the action.’ ” (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1187, citing *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 711.) (Code. Civ. Proc., § 2017.010.)

Cases such as those dealing with exclusion of evidence for public policy reasons are not helpful. (Supp. Brief, at pp. 1 and 5.)

IV.

Your amici agree with Facebook that this court need not be concerned with privacy setting reconfigurations.

Facebook argues that this court need not concern itself with what it describes as “account-history reconfigurations.” (Supp. Brief, at p. 9.)

Your amici agree, although based upon a different analysis. For starters, the phrase “account history reconfiguration” appears unhelpful and confusing.

For purposes of the SCA, the privacy setting for *individual* communications rather than the entire account are what is relevant. Facebook sometimes uses the term “audience selector tool” when referring to the privacy settings for an individual communication.

That said, a “public” setting impliedly consents to disclosure even if the communication is later deleted, hidden from the user’s Timeline, or reconfigured to belatedly limit it to “Friends” or

“Friends of Friends.” Indeed, Facebook warns users that once a “post” is shared, those with whom it was shared control who see it or who may make copies of it, going forward. Indeed, if persons are merely “tagged” in a post, those tagged persons also control who will subsequently see or redistribute that post. Even if a user hides their own photos and posts from their Timeline, these photos and posts remain visible to the original audience they were shared with in other places on Facebook, such as in News Feed and Search.

Controversies frequently arise, for example, when a user shares a post with another, and that person then shares that post with the originator’s employer. Generally, once that cat is out of the bag, that content is unprotected by any legitimate privacy rights.

Your amici disagree with Facebook’s assertion that a court may not examine *in camera* a public communication which was later reconfigured as private at the time of production.

V.

Law enforcement’s access to and widespread use of social media content has created a prejudicial lack of symmetry that is correctable only by enforcement of the constitutional rights of the criminally accused and the courts’ inherent power to control their proceedings.

The use of Facebook communications by law enforcement continues. Law enforcement continues to rely on information shared on Facebook in the form of both text and graphic images. Law enforcement may obtain Facebook content evidence with or without a search warrant. (See, e.g., *Collins v. Virginia* (2018) ___ U.S. ___ [138

S.Ct. 1663, 1668; 201 L.Ed.2d 9, 16] [Facebook photograph as a basis for search]; *Elonis v. United States* (2015) ___U.S.___ [135 S.Ct. 2001, 2005, 192 L.Ed.2d 1, 8] [use of both language and imagery from Facebook].)

The due process right articulated in *Brady v. Maryland* (1963) 373 U.S. 83 was not based upon a statute or code. The same was true of the due process right articulated in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. And although the prosecution has an affirmative duty to provide exculpatory and impeachment evidence with or without a defense request (*In re Ferguson* (1971) 5 Cal.3d 525, 532-533; *People v. Kassim* (1997) 56 Cal.App.4th 1360, 1379), there is no similar duty for the prosecution to seek out and obtain similar evidence from a third-party such as Facebook.

However, under Penal Code section 1326, subdivision (c), a person or entity responding to a third-party subpoena duces tecum in a criminal case must deliver the subject materials to the clerk of court so that the court can hold a hearing to determine whether the requesting party is entitled to receive them. When the defendant is the requesting party, the court may conduct that hearing *in camera*. (Pen. Code, § 1326, subd. (c).) Absent an obstacle such as the SCA, direct assistance from the prosecution is usually not needed.

Amici urge the court to harmonize the SCA with the constitutional rights of the accused. If this court is unable to do so, however, it is faced with Facebook's suggestion that, in an appropriate case, the prosecutor be ordered to assist the court through the execution of a search warrant.

VI.

Article 1, section 30, of the California Constitution provides an independent state ground for rights of discovery in criminal prosecutions.

Since 1990, the California Constitution has provided for reciprocal discovery in criminal cases. Although there is no explicit corollary in the Constitution of the United States, the Due Process Clause does speak to the *balance of forces* between the accused and his accuser. (Cf. *In re Winship* (1970) 397 U.S. 358, 361-364; *Wardius v. Oregon* (1973) 412 U.S. 470, 474.)

The SCA must be interpreted and applied to ensure the balance of forces between the accused and his accuser. Your amici believe this can only be done by resolving the constitutional issues unresolved in *Hunter*. It appears both Facebook and Mr. Touchstone concur. (Supp. Brief, at p. 1.)

Conclusion

This court should reverse the decision of the Court of Appeal and hold that the SCA does not trump the authority of a judge presiding over a criminal action to conduct an *in camera* review of

/

/

materials produced in accordance with this court's opinion in *Hunter*.

DATED: August 8, 2018

Respectfully submitted,

TODD W. HOWETH, Public Defender

A handwritten signature in black ink, reading "Michael C. McMahon". The signature is fluid and cursive, with a long horizontal flourish at the end.

Michael C. McMahon, Senior Deputy

SBN 71909

State Bar Certified Specialist - Criminal Law

State Bar Certified Specialist - Appellate Law

800 S. Victoria Avenue

Ventura, California 93009

(805) 477-7114

michael.mcmahon@ventura.org

Attorneys for amici curiae

CALIFORNIA PUBLIC DEFENDERS

ASSOCIATION and

PUBLIC DEFENDER OF VENTURA COUNTY

CERTIFICATE OF WORD COUNT

I do hereby certify that by utilizing the word count feature of MSWord, Century Schoolbook #13 font, there are 2,634 words in this document, excluding Declaration of Service.

August 8, 2018

A handwritten signature in cursive script, appearing to read "Jeane Renick", written in black ink. The signature is positioned above a horizontal line.

Jeane Renick
Legal Mgmt. Asst. III

DECLARATION OF SERVICE

Case Name: Facebook Inc., Petitioner, v. Superior Court of San Diego
County, Respondent; Lance Touchstone, RPI;
Case No. S245203 (from C. App. 4/5 SCD268262)

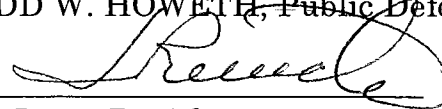
On August 8, 2018, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender at 800 South Victoria Avenue, Ventura, California 93009. On this date, I served the attached **Supplemental Brief of the California Public Defenders Association and the Public Defender of Ventura County in Support of Real Party in Interest Lance Touchtone, via TrueFiling and/or electronic service, as indicated:**

- 1) San Diego Sup. Ct., Hon. Kenneth So., Judge, @ appeals.central@sdcourt.ca.gov
- 2) Court of Appeal, 4th Appellate Dist., Div. 1 (via TrueFiling);
- 3) Atty. James Snell @ jsnell@perkinscoie.com, Petitioner counsel;
- 4) Atty. Christian Lee @ clee@perkinscoie.com, Petitioner counsel;
- 5) Atty. Marla Heap @ mheap@perkinscoie.com, Petitioner counsel;
- 6) Atty. Joshua Lipshutz @ jlipshutz@gibsondunn.com; Respondent counsel;
- 7) Atty. Michael Holecek @ mholecek@gibsondunn.com; Respondent counsel;
- 8) Dep. Alt. Pub. Def. Kate Tesch @ kate.tesch@sdcounty.ca.gov, RPI counsel;
- 9) Atty. Donald Landis, Jr., @ Don@donlandislaw.com, amici counsel;
- 10) Atty. Stephen Dunkle @ sdunkle@sangerswysen.com, amici counsel;
- 11) Atty. John Philipsborn @ jphilipsbor@aol.com, amici counsel;
- 12) Atty. Stanley Chen @ schen@horvitzlevy.com, amici counsel;
- 13) Atty. Gen. office @ AGSD.DAService@doj.ca.gov;
- 14) Appellate Defenders, Inc. @ eservice-criminal@adi-sandiego.com;
- 15) Karl Husoe, SD Dep. District Atty. @ karl.husoe@sdcca.org, Intervenor;
- 16) Summer Stephan, SD Dist. Atty. @ da.appellate@sdcca.org, Intervenor

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the above date at San Buenaventura, California.

TODD W. HOWETH, Public Defender

By



Jeane Renick
Legal Mgmt. Asst. III