No. S230051

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., et al.,
Petitioners,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA, SAN FRANCISCO

Respondent.

DERRICK D. HUNTER and LEE SULLIVAN,

Real Parties in Interest.

REAL PARTIES LEE SULLIVAN AND DERRICK HUNTER'S OPENING BRIEF ON THE MERITS

From the Published Opinion of the Court of Appeal,
First Appellate District, Division Five, No. A144315

San Francisco San Francisco Superior Court Nos. 13035657, 13035658.) The Honorable Bruce Chan, Judge, Dept. 22

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(San Francisco Superior Court Nos. 13035657, 13035658)

REAL PARTIES' OPENING BRIEF ON THE MERITS

TO: THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

ISSUES PRESENTED

1.) Are criminal defendants constitutionally entitled to *pretrial* access to social media records sought by subpoena that are necessary for a fair trial, to present a complete defense, to effective assistance of counsel, to compulsory process, and to confront and cross-examine witnesses as guaranteed by Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, or can social media records only be subpoenaed *during trial* as the Court of Appeal held below?

2.) Should this Court overrule *People v. Hammon* (1997) 15 Cal.4th 117, because it was wrongly decided on constitutional grounds and because delaying access to records necessary to defend a case until the middle of trial does not promote the orderly administration of justice? Alternatively, should this Court limit *Hammon* to records subject to the psychotherapist-patient privilege under Evidence Code section 1014?

STATEMENT OF THE CASE

Real parties in interest, Lee Sullivan and Derrick Hunter, are indicted and awaiting trial for the murder of Joaquan Rice (Pen. Code § 187) and the attempted murder (Pen Code § 664/187) of minor, B.K. The charges stem from a drive-by shooting that occurred on June 24, 2013, at a bus stop located in the Bayview District of San Francisco. The San Francisco District Attorney's theory of the case is that the crimes were committed for the benefit of "Big Block" an alleged criminal street gang.[1] Quincy H.,

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1 Gang allegations pursuant to Penal Code sections 12022.53(d), 120022.53(e)(1), and Penal Code section 186.22 (b)(1), as well as other

Derrick Hunter's 14-year old brother, confessed to the shooting to police inspectors shortly after it occurred, explaining that he shot Mr. Rice because he feared Mr Rice would kill him first if he did not act. According to Quincy, Mr. Rice repeatedly threatened and bullied him at his job, at his home, and on social media, including tagging him in violent posts on Facebook and Instagram. Quincy told police that Mr. Sullivan was not in the vehicle when the shooting occurred. Although the shooting occurred in front of a crowd, no eyewitnesses placed Mr. Sullivan at the scene. [2] (1 AE 124-128, 134-137.)

The sole witness who implicates Mr. Sullivan in the incident is Ms. Lee, Mr. Sullivan's jilted former girlfriend who had rented the vehicle used in the shooting and who was detained by police driving alone in the car seven minutes after the shooting occurred. Several eyewitnesses told police a woman was driving the vehicle when shots were fired. Importantly, Ms. Lee did not implicate Mr. Sullivan in the shooting until several months after the incident, when police threatened to charge Ms. Lee with murder if she did not implicate Mr. Sullivan. (1 AE 87-88.)

In preparation for jury trial, counsel for Mr. Sullivan served third-party subpoenas duces tecum (Pen. Code, §1326) on Facebook, Twitter, and Instagram seeking records from the social media accounts held by the

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enhancements were alleged.

[2] Quincy was tried in juvenile court for the murder of Mr. Rice and attempted murder of Benjanay K. The petition was sustained on all counts.

deceased alleged victim, Mr. Rice, as well as Ms. Lee. (1 AE 12-18, 53-56.) Mr. Sullivan simultaneously attempted to serve Ms. Lee with subpoena duces tecum seeking production of her social media records, but was unable to locate her for service either in person or through the San Francisco District Attorney despite diligent efforts. (1 AE 107.)

Facebook, Instagram, and Twitter, moved to quash the subpoenas on grounds that disclosure is prohibited under the Stored Communications Act (hereafter "SCA") set forth in 18 U.S.C. § 2701, et. seq. The social media providers argued that the SCA is an absolute bar to producing records to criminal defendants, and that petitioners need only respond to search warrants or court orders obtained by the police or prosecutorial agencies. (1 AE 1-8.) Real party, Sullivan, filed an Opposition to social media providers' Motions to Quash, asserting that the SCA must yield to a criminal defendant's constitutional right to compulsory process, to present a complete defense, and to due process guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Real party, Sullivan, made a detailed offer of proof as to the relevance of the records sought and requested that the records be produced for an *in camera* review by respondent court. Specifically, counsel for Sullivan asserted Ms. Lee's social media records were relevant to impeach her with prior acts of violence as well as to show bias, and to corroborate Sullivan's defense that she falsely implicated him in the murder because she was in a jealous rage. Counsel for Sullivan also made a good cause showing the Mr. Rice's records were relevant to impeach the prosecution's gang expert and because

the records are affirmative evidence demonstrating the shooting was not gang-related. (1 AE 84-105.)[3]

On January 7, 2015, respondent court, the Honorable Bruce Chan, issued a tentative ruling denying petitioners' Motions to Quash.

On January 22, 2015, the day before jury trial was to commence, respondent court affirmed the tentative ruling and denied petitioners' Motions to Quash ruling that notwithstanding the SCA, defendants, Sullivan and Hunter, have an independent constitutional right to access materials necessary to defend their case. Respondent court found that social media providers' argument that it should be excused from producing the information sought by the defendant on the grounds that the information was available from other sources was not compelling in light of the fact that Mr. Rice was dead and Ms. Lee could not be forced to authenticate her social media posts under the Fifth Amendment because they were incriminating in nature. Respondent court ordered the records produced for *in camera* review under Penal Code section 1326 on February 27, 2015. (1 AE 264-276; Supp. AE 286-287.)

On February 24, 2015, Facebook, Instagram, and Twitter filed a

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In support of his Opposition, Mr. Sullivan submitted a declaration from Quincy H.'s attorney, Rebecca Young, who stated that Quincy H. was denied his constitutional right to due process and to present a complete defense at his separate juvenile trial for the murder and attempted murder of Mr. Rice and Ms. K, respectively, because when Ms. Lee was called to testify as a witness, she refused to authenticate her social media posts that the defense had gathered in which Ms. Lee threatened others with violence. Counsel for Quincy H. was unable to lay a foundation to admit the records into evidence per the trial judge's ruling and the critical defense evidence was not admitted at trial. (1 AE 196-197.)

petition for writ of mandate and request for a stay of the production order in the Court of Appeal, First Appellate District, asserting that the respondent court abused its discretion in denying petitioners' Motion to Quash.

On February 26, 2015, the Court of Appeal issued a stay of respondent court's production order pending consideration of the petition. Sullivan submitted an answer which Hunter joined. An order to show cause to the respondent court was issued on March 30, 2015. Real party, Sullivan, filed a return to which Hunter joined. After briefing by the parties and amicus counsel, the Court of Appeal granted the petition for writ of mandate and issued a published opinion on September 8, 2015 (Exhibit A,) holding that although Hunter and Sullivan may be constitutionally entitled to social media records at trial notwithstanding the SCA, under *People v. Hammon* (1997) 15 Cal.4th 117, they had no constitutional right to pretrial access to social media records under the Compulsory Process Clause, the Due Process Clause, or the Sixth Amendment's Confrontation Clause.

On October 19, 2015, real party, Sullivan, filed a petition for review in this Court, which Hunter joined, seeking review of the Court of Appeal's published opinion that criminal defendants are not constitutionally entitled to subpoena social media records pretrial even upon a showing of good cause, even following an *in camera* review by respondent court, and requesting that *Hammon* be overruled or limited. Social media providers filed an answer to the petition for review on November 9, 2015. Real party, Sullivan, filed a reply on November 19, 2015. On December 16, 2015, this Court granted the petition for review.

STATEMENT OF FACTS

On June 24, 2013, at 12:55 pm, a green Ford Escape, rented by, Renesha Lee, passed by a bus stop located at the intersection of Westpoint and Middleburg Streets in San Francisco. Shots were fired from inside the vehicle by two shooters. Jaquan Rice, Jr., (aka "Pistol Poppin Dutch") was killed and his girlfriend, Ms. K, a minor, was seriously injured. Ms. K did not see who shot her. Ms. Lee's vehicle was identified by surveillance video and stopped by San Francisco police at 1:02 p.m, seven minutes after the shooting occurred at the intersection of George Court and Ingalls. Ms. Lee was alone in the car. (1 AE 87.)

Although the videos of the scene captured the shooting, no arrests were made because of the poor film quality. (1 AE 107.) The videos show one individual wearing a light colored hooded sweatshirt, shooting a hand gun from the rear window of the drivers side. A second individual wearing a black hat, jacket, and pants, exited the rear passenger side door and shot a hand gun with a large magazine attached, from behind the rear of the vehicle. The driver's was not visible because the window was rolled up. (1 AE 87-88.)

Quincy H., who was 14 years-old, confessed to the shooting when detained by police after several eyewitnesses identified him as one of the shooters. Quincy H. told the officers that he shot Mr. Rice because Mr. Rice repeatedly threatened him at his job, at his home, and on social media, including Facebook and Instagram. Mr. Rice tagged Quincy H. and others in a video with guns in it on Instagram which scared Quincy. He believed

Mr. Rice would kill him if he did not act first. Quincy told police that Mr. Sullivan was not in the car when the shooting occurred. He identified the other shooter as "Johnson." (1 AE 124-128, 134-137.)

Ms. Lee is Mr. Sullivan's ex-girlfriend and the only witness that connects him to the shooting. Ms. Lee gave multiple disparate accounts about what transpired when she was interrogated by the police in the months following the June 24, 2013, shooting. She initially told police that a person she identified as "Man Man" and three male companions approached her shortly after shots were fired to get them away from the scene. However, on August 10, 2013, when the police threatened to charge her with murder if she did not implicate Mr. Sullivan, Ms. Lee said Mr. Sullivan was with Quincy and Derrick Hunter when they borrowed her car and dropped her off at her home a few minutes before the shooting. Ms. Lee has at all times denied being in the car when the shooting occurred despite that she was in the only person in the car when it was stopped and several percipient witnesses told the police a woman was driving the car when shots were fired. (1 AE 88.)

None of the percipient witnesses at the bus stop placed Mr. Sullivan in the vehicle or near the crime scene when the shooting occurred. (1 AE 88.)

At the grand jury hearing, the prosecution's gang expert, Leonard Broberg, of San Francisco Police Department's Gang Task Force, relied heavily on social media records he obtained from Facebook, Instagram, and Twitter in forming his opinion that the murder and attempted murder was

committed for the benefit of Big Block, a criminal street gang in support of the gang allegations alleged pursuant to Penal Code section 186.22(b)(1). The prosecution's theory of the case was that Mr. Sullivan and the Hunter brothers were members of Big Block criminal gang and Mr. Rice was killed because he was a member of rival gang, West Mob, and because Mr. Rice publicly threatened Quincy H. on social media. (1 AE 88.).[4]

ARGUMENT

I. INTRODUCTION

This case presents an important question of law regarding whether criminal defendants have the constitutional right to pretrial access to social media records necessary for a fair trial and to present a complete defense under the Due Process Clause of Fifth Amendment, as well as under the Compulsory Process and Confrontation Clauses of the Sixth Amendment guaranteed to the states by the Fourteenth Amendment. Given the

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[4] At the grand jury, Broberg testified about the important role social media played in the present case:

> Well, as of all society, gangsters are now in the 21st century and they have taken on a new aspect of being gangbangers, and they do something they call cyber banging. They will actually be gangsters on the internet. They will issue challenges; will show signs of disrespect, whether it's via images or whether it's via the written word. . . Facebook, Instagram, Socialcam, Vine. . .
>
> There is any number of places they will post videos, they will post images, and of course, they will do the written word. They will disrespect each other in cyber space. (1 AE 93-94)

explosion of social media use in recent years, trial courts throughout California and nation are grappling with whether and when criminal defendants can subpoena social media records necessary to defend a case in light of the fact that social media records are increasingly offered by the prosecution as evidence without parallel access for criminal defendants under the SCA.

In this case, the Court of Appeal substantively addressed for the first time in the nation, a criminal defendant's right to access social media records under the SCA and ruled that a criminal defendant's constitutional right to a fair trial may require disclosure of social media records at trial notwithstanding the SCA's provision prohibiting disclosure of electronic records except to law enforcement. (18 U.S.C. §§ 2702, 2703, et seq.) Real parties agree that the SCA must yield to a criminal defendant's constitutional right to a fair trial. However, real parties challenge the Court of Appeal's ruling insofar as it held that criminal defendants do not have a constitutional right to *pretrial* access to this evidence and may only subpoena social media records *during* trial following an in camera review by the trial court.

Real party, Sullivan, respectfully asserts the Court of Appeal is wrong as a matter of constitutional law and also in practicality because denying pretrial access does not promote the fair administration or justice, nor the orderly ascertainment of the truth. Instead, the Court of Appeal's ruling ensures the opposite by delaying disclosure until after trial commences and then requiring continuances as they become necessary, as

indeed they will given that virtually all criminal cases use social media records as evidence and social media providers do not readily produce the records to the trial courts for review. Moreover, real parties assert that delaying access to social media records until trial without affording defense counsel reasonable pretrial investigation of the records, which are voluminous, impinges on defendants' ability to meaningfully challenge the state's evidence and, thus, runs afoul of defendants' constitutional rights to receive a fair trial, to defend a case, to effective assistance of counsel, to compulsory process, and to effectively confront and cross-examine witnesses.

Whether a criminal defendant has a constitutional right to pretrial access to social media records is an area that has not been squarely decided by the United States Supreme Court. Give that this Court is under a solemn obligation to interpret and implement the United States Constitution, it is incumbent on this Court to rule in areas of law where the United States Supreme Court has defaulted to protect the rights of the criminally accused given the important rights at stake when previous state and federal courts could not predict the ubiquitousness of social media evidence in criminal courts.

Finally, Sullivan and Hunter respectfully request that *People v. Hammon* (1997) 15 Cal.4th 1117, be overruled, or at a minimum, limited to records protected by the psycho-therapist patient privilege pursuant to Evidence Code section 1014. In ruling that criminal defendants do not have a constitutional right to pretrial access to social media records, the Court of

Appeal relied heavily upon *People v. Hammon* (1997) 15 Cal.4th 1117, which held that a child molest victim's confidential psychotherapy records could only be released to a criminal defendant *at trial*, not pretrial, upon a showing of good cause. Real parties contend *Hammon* was wrongly decided because it has created logistical problems in trial courts for the past 18 years, and also because criminal defendants do, in fact, have a constitutional right to pretrial access to evidence necessary to defend his or her case, as real parties argue here. The expansion of *Hammon* to include social media records will not only cause unnecessary chaos and backlog in criminal courts but will deny criminal defendants, the majority of whom are indigent, the ability to meaningfully challenge the state's evidence to demonstrate innocence at trial.

II. THE COURT OF APPEAL ERRED IN RULING THAT CRIMINAL DEFENDANTS DO NOT HAVE THE CONSTITUTIONAL RIGHT TO PRETRIAL, JUDICIAL REVIEW OF SOCIAL MEDIA RECORDS TO ENSURE THAT RECORDS NECESSARY FOR A FAIR TRIAL ARE PRODUCED TO THE DEFENSE

The Court of Appeal erred when it ruled that criminal defendants could not subpoena social media records until trial on grounds that the United States Supreme Court has never squarely addressed whether a defendant has a constitutional right to a pretrial access to evidence from third-parties. The Court of Appeal cites *Weatherford v. Bursey* (1977) 429 U.S. 545, for the proposition that there is no general constitutional right to discovery in criminal cases. However, *Weatherford* is inapposite because it concerned a prosecutor's obligation to disclose to the defense unfavorable

evidence under a claimed *Brady* violation. (*Id.* at 559.) Here, we are not concerned with discovery between the prosecution and the defense, but with a defendant's right to obtain relevant evidence from third-parties in order to obtain a fair trial and to meaningfully mount a defense. *Weatherford*, therefore, sheds no light on this issue.

A. **This Court is Authorized to Interpret the Federal Constitution on the Issue of Whether a Criminal Defendant's Has A Constitutional Right to Pretrial Access to Social Media Records.**

It is well-settled that in the absence of controlling United States Supreme Court opinion, state courts can and must make an independent determination of federal law and are not bound by decisions in the lower federal courts. (*People v. Bradley* (1969) 1 Cal.3d 80, 86; *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58; *California Assn. for Health Services at Home v. State Dep't of Health Care Servs* (2012) 204 Cal.App.4th 676, 684.) "Although the courts of California are bound by the decisions of the United States Supreme Court interpreting the federal Constitution, they are not bound by the decisions of lower federal courts, even on federal questions." (*People v. Superior Court* (*Moore*) (1996) 50 Cal. App. 4th 1202, 1211.) Given that the United States Supreme Court has yet to squarely address whether there is a constitutional right to access social media records necessary to defend a case prior to trial, this Court should not hesitate to decide the constitutional issues in light of the important issues at stake for criminal defendants who need social media records to prove innocence at trial. To that end, Justice Mosk eloquently stated the

following in his concurring opinion in *Hammon,* in which he argued that the this Court should hold that the Sixth Amendment right to confrontation includes the right to pretrial access to materials necessary to cross-examine witnesses, despite that the United States Supreme Court in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, had not reached a majority on that issue:

> It should hardly need mention that "[w]e are under a solemn obligation to interpret and implement the United States Constitution" (*People v. Harris* (1994) 9 Cal.4th 407, 449 fn.1 (conc. and dis. opn of Mosk J.)) - - especially when, as here, the United States Supreme Court has itself defaulted. "We are no less capable of discharging that duty than any other court. *We 'should disabuse [ourselves] of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court's Fred Astaire–always following and never leading.'* " (*Hammon, supra,* 15 Cal. 4th at 1130-1131 (conc. opn. of Mosk, J,) quoting *People v. Cahill* (1993) 5 Cal.4th 478, 557-558 (conc. and dis. opn. of Kennard, J.)

Justice Mosk went on to state that the California Supreme Court should have accepted its responsibility to address whether an evidentiary privilege should yield to a criminal defendant's right to confrontation in pretrial discovery and not "wait until it receives word from Washington" to do so. (*Hammon, supra,* 15 Cal. 4th at 1131 (conc. opn. of Mosk, J.)

Real party Sullivan respectfully urges this Court to take the lead in the nation and hold that, upon a showing of good cause, a criminal defendant has a constitutional right to access prior to trial, social media records that are necessary for a fair trial, to present a complete defense, and that such records must be released to the defense following the trial court's *in camera* review subject to any protective orders deemed necessary by the superior court.

B. Real Party Sullivan's Due Process Right to a Fair Trial and to Present a Meaningful Defense Requires Pretrial Access to Social Media Records

The United States Supreme Court has described the right of the defendant in a criminal trial to due process as "the right to a *fair opportunity* to defend against the state's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294, emphasis added.) A fair opportunity to defend is required to satisfy due process. Criminal defendants are denied basic fairness and stripped of the ability to meaningfully defend a case if they are forced to go to trial without first obtaining relevant social media records that are material to cross-examination or support the defense. Dumping thousands of social media records on defense counsel in the middle of trial with inadequate time to review or investigate the materials is deeply unfair to the defendant whose life and liberty is at stake, as well to as over-burdened public defenders and defense counsel who are unable to try the case competently while simultaneously reviewing and digesting voluminous records. Defendants must have pretrial access to social media records because they are ubiquitous and play an increasingly important role in modern life and in the criminal justice system. Especially for the younger generation, social media is not a separate domain in which few of life's functions are carried out. Rather, it is the hub of their world, the primary vehicle by which opinions are expressed, friends are made, and news is shared. Because of the central role these records play, they are voluminous on nature and important to both the prosecution and defense in criminal cases; thus, a defendant must have a parallel right pretrial access to social

media records, upon a showing of good cause, following an *in camera* judicial review, at which time the judge can withhold irrelevant information and issue any protective orders it deems necessary to protect privacy interests.

The Court of Appeal's position that criminal defendants do not have a constitutional right to pretrial access to evidence does not give appropriate weight to a criminal defendant's sacrosanct and overarching constitutional right to fundamental fairness at trial and the right to meaningfully defend a case which are inviolate under the Fifth Amendment and guaranteed to the states by the Fourteenth Amendment. It is axiomatic that a criminal defendant's right to fundamental fairness and to present a defense hinge on the ability to obtain, prior to trial, evidence in the possession of third-parties that is material to the defense, either because the records impeach a prosecution witness or because it demonstrates a defendant is actually innocent of the charges and/or allegations.

Whether rooted directly in the Due Process clause of the Fourteenth Amendment or in the Compulsory Process clause of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." (*Holmes v. South Carolina (2006) 547 U.S. 319, 324; Crane v. Kentucky* (1986) 476 U.S. 673, 690, (quoting *California v. Trombetta,* (1984) 467 U.S. 479, 485; citations omitted). The right of a criminal defendant to due process is "the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. at 294; see *Crane v. Kentucky*, *supra*, 476 U.S. at 690 ("Constitution

guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"). A defendant's right to present a complete defense is abridged by statutes and rules, such as the SCA, that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " (*Rock v. Arkansas* (1987) 483 U.S. 44, 58, 56.)

To meaningfully defend a case, a criminal defendant must usually seek out the truth immediately. He or she cannot wait until the case is called to trial. A defense lawyer cannot develop a cogent trial strategy, decide on what defense to pursue, how to conduct *voir dire*, do an opening statement, or even announce ready for trial, unless he or she can review the relevant evidence prior to trial and investigate leads that may exonerate the defendant or undermine the credibility of witnesses. Moreover, delaying disclosure of social media records until trial will lead to mistrial after mistrial if continuances are sought during trial so the parties can litigate subpoenas for social media records, to allow time for trial courts to conduct *in camera* reviews, and for defense counsel to investigate information gleaned from the social media records, because of juror attrition due to long mid-trial delays. Criminal defendants cannot mount an intelligent defense if voluminous social media records are received during trial the contents of which may change the defense entirely midway through the trial. Forcing defendants to wait until trial to access social media records is unworkable, does not promote the "orderly ascertainment of the truth" (*Jones v. Superior Court* (1962) 58 Cal.2d 56, 60,) which is best served by disclosure prior to