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 REPLY 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

JANELLE E. CAYWOOD
(CBN: 189980)
3223 Webster Street
San Francisco CA, 94123
Tel. (415) 370-2673
Fax. (888) 263-0456
Email: janelle@caywoodlaw.com
Attorney for Real Party
Lee Sullivan

SUSAN B. KAPLAN
(CBN: 57445)
214 Duboce Street
San Francisco, CA 94103
Tel. (415) 271-5944
Fax. (510) 524-1657
Email: sbkapl@yahoo.com
Attorney for Real Party
Lee Sullivan

JOSE PERICLES UMALI (CBN: 118434)
507 Polk Street, Suite 340
San Francisco, CA 94102
Tel. (415) 398-5750, Fax (415) 771-6734
Email: umali-law@att,net
Attorney for Real Party Derrick Hunter

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

Federal Statutes

California Statutes

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., et al.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

DERRICK D. HUNTER and LEE SULLIVAN,

Real Parties in Interest.

No. S230051

From the published opinion of the Court of Appeal, First Appellate District, Division Five

DCA No. A144315
(San Francisco Superior Court Nos. 13035657, 13035658)

REAL PARTIES' REPLY 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

ARGUMENT

I. INTRODUCTION

Social media fails to appreciate the significance of California judiciary's solemn duty to stand as the protective bulwark between the power of Congress and the criminally accused when that person's right to remain free in society is hindered by a statute that prevents him from mounting an intelligent defense in a criminal case. Moreover, the majority of the authorities social media cite are inapt civil cases in which the litigants do not have the same constitutional rights, as do criminal defendants.[1] Notwithstanding the tenor of social media's opposition, this case is not a genteel Silicon Valley intellectual debate about internet privacy. Real lives are at stake and criminal defendants throughout the state face potential life

---

[1] For example, social media relies heavily on *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423 which is inapt. *O'Grady* held that the SCA preempted civil discovery subpoenas served on email service providers seeking email documents identifying persons who supplied content. However, *O'Grady* was decided almost ten years ago before the huge explosion of social media hit every facet of our everyday life, including criminal trials. Also, *O'Grady* is irrelevant because it involved only the civil discovery process where other means of discovery to the parties existed – interrogatories and depositions–that do not exist in criminal prosecutions. *O'Grady* did not address the federal constitutional issues raised by this case regarding pretrial access to social media records which are germane to all criminal prosecutions. "It has long been held that civil discovery procedure has no relevance to criminal prosecutions." (*Pacific Lighting Leasing Co. v. Superior Court* (1976) 60 Cal. App. 3d 552.)

and death sentences in cases that increasingly turn on access to social media records. The construction of the Stored Communication Act ("SCA") (18 U.S.C., § 2701, et seq.) advanced by social media providers increases the risk that innocent people will be convicted of crimes they did not commit if they cannot access exculpatory social media records at all, much less at meaningful time to prepare for plea negotiations and trial. As such,"[t]he search for truth is not served but hindered by the concealment of relevant and material evidence. A trial is not a game." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.) Thus, superior court judges should be afforded the discretion to review and disclose relevant social media records pretrial, on a case-by-case basis, if necessary to protect a criminal defendant's panoply of federal constitutional rights, which are paramount to the SCA.

Importantly, social media providers are not parties to the underlying criminal action, but merely the uninvolved third party holders of records sought by subpoena. As such, they should not be exempted from long established procedures set forth in Penal Code section 1326 governing subpoenaing confidential records from third parties. Private non-party witnesses are subject to a subpoena duces tecum in criminal cases. (*Pacific Lighting Leasing Co. v. Superior Court* (1976) 60 Cal.App.3d 552.) Social media providers should be treated the same as any other holder of

confidential records such as medical facilities, employers, and wireless providers whose records superior court judges routinely review and redact *in camera* upon a showing of good cause, subject to protective orders preventing further dissemination should the records be produced to the defense. (See generally *People v. Kling* (2010) 10 Cal.4th 1068.)

Moreover, as mere third party record holders, social media's opinions on the impact of *People v. Hammon* (1997) 15 Cal.4th 1117, in criminal courts for the past 18 years and how superior court judges, state prosecutors, and defense counsel should proceed in criminal cases are beyond the scope of social media's expertise and should be afforded little or no weight.

II. SUPERIOR COURT JUDGES SHOULD BE AFFORDED THE DISCRETION TO REVIEW AND RELEASE SOCIAL MEDIA RECORDS TO THE DEFENSE PRETRIAL TO ENSURE THAT RECORDS NECESSARY FOR A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, AND TO CONFRONT WITNESSES ARE PRODUCED TO THE DEFENSE

Real parties assert a criminal defendant's constitutional rights to a fair trial, to effective counsel, to compulsory process and to confront witnesses requires that the SCA yield to afford superior court judges the discretion to conduct a pretrial *in camera* review of social media records.

A. This is Not a Case About Conflict Between State and Federal Law, but About the SCA's Conflict with Defendants' Many Federal Constitutional Rights Rendering the SCA Unconstitutional as Applied in this Case

In opposition, social media providers invoke the Supremacy Clause and argue that the social media records can never be produced to the defense, even at trial, because the SCA, as a federal statute, prevails over a state law to the contrary. (Social Media Br. at pp. 6-10.) The Court of Appeal considered and rejected this argument when it opined that a complete ban on defense access to social media records would likely be unconstitutional at trial by stating as follows: "Although the issue is not now before us, we question whether such a limitation would be constitutional under *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 v. Superior Court* (2015) 240 Cal.App.4th 203, 226, fn 17.)

With regard to the Supremacy Clause, real parties assert that this is not an issue where state law conflicts with federal law, nor did Congress suggest when enacting the SCA, any intent to prevail over the panoply of constitutional rights guaranteed to a criminal defendant. Importantly, real parties do not invoke state law to defeat the SCA. Rather, they invoke the

federal constitution which can and does prevail over the SCA. "The Constitution is the supreme law of the land all legislation must conform to the principles it lays down." (*Rostker v. Goldberg* (1981) 453 U.S. 57, 112, dis. opn. J. Marshall with J. Brennan.) "The constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a State or from the United States." (*Cook v. Moffat & Curtis* (1847) 46 U.S. 295, 308.) Because the SCA does not comport with the federal constitution as it is applied in this case, the Supremacy Clause argument fails.

This Court has the authority to rule the SCA is unconstitutional as applied insofar as it prohibits a superior court judge from reviewing social media records *in camera* prior to trial for release to the defense if necessary to prepare for trial. In *Marbury v. Madison* (1803) 5 U.S. 137, the United States Supreme Court first ruled that its responsibility to overturn unconstitutional legislation was a necessary consequence of its sworn duty to uphold the federal Constitution. That oath could not be fulfilled any other way. "It is emphatically the province of the judicial department to say what the law is," Chief Justice Marshall declared. (*Ibid.*)

The United States Constitution also requires that the California judiciary take the same oath to uphold the United States Constitution. (US.

Const. art. VI, cl. 3 [requiring state officers to "be bound by Oath or Affirmation, to support this Constitution"].) In its first act in 1789, Congress carried into execution this obligation, commanding the state court judiciary to "solemnly swear that [they] will support the Constitution of the United States." (*An Act To Regulate the Time and Manner of Administering Certain Oaths* ch. 1, 1 Stat. 23 (1789) (codified as amended at 4 U.S.C. § 101 (2012).) The California Constitution also requires the state judiciary to interpret and enforce the United States Constitution. (Cal. Const. Art. XX, § 3.) The United States Supreme Court has made it crystal clear that "[u]pon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution. [Citation.]" (*Mooney v. Holohan* (1935) 294 U.S. 103, 113, emphasis added.)

Without question, California courts have the right and obligation to interpret and apply federal law and the federal Constitution in the absence of the United States Supreme Court decision on point. (*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; see also *Lockhart v. Fretwall* (1993) 506 U.S. 364, 376, conc. opn. J. Thomas [ruling that in the absence of a United States Supreme Court, or Arkansas Supreme Court or Arkansas Court of Appeal, decision on point, " a state trial court's interpretation" of a federal constitutional issue interpreting the Sixth Amendment's right to counsel "is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."]

Additionally, relying in part upon *Marbury v. Madison*, this Court has held that in enacting statutes where state court's have jurisdiction to enforce a federal statute, the United States Congress may not at the same time foreclose state courts from considering the federal constitutionality of a statute, because state court judges may not enforce federal statutes that are clearly unconstitutional. (*Miller v. Municipal Court of City of Los Angeles* (1943) 22 Cal.2d 818, 827-829.)

Since no United States Supreme Court decision reconciles the SCA with conflicting constitutional rights of criminal defendants, this Court has broad authority to interpret the SCA and rule it unconstitutional as applied in this case

Social media incorrectly asserts that defendants are seeking a state court ruling ordering them to violate a federal law in violation of the Supremacy Clause. (Social Media Br. at pp. 9-11.) Not so. We are asking to this Court to declare the SCA to be unconstitutional insofar as it deprives superior court judges of the discretion to conduct a pretrial *in camera* review of social media records upon a showing of good cause that the production of records is necessary for a defendant to prepare for trial. "An unconstitutional law will be treated by the courts null and void." (*Bd. of Liquidation v. McComb* (1875) 92 U.S. 531, *Chicago, Indianapolis, & Lousville Ry.* (1912) 227 U.S. 559l; *Stanton v. Baltic Mining Co* (1916) 240 U.S. 103. To paraphrase Chief Justice Marshall, an "act of the legislature" that is "repugnant to the constitution" is void and the judiciary is not bound by it in that case. (*Marbury v. Madison*, 1 Cranch 137, 177; *United States v. Booker* (2005) 543 U.S. 220, 283.) Thus, there is, in effect, no federal law for social media to violate because the SCA is void and unenforceable as applied to the defendants in this case.

Social media's curious argument that the SCA cannot be deemed unconstitutional as applied because Sullivan and Hunter's federal constitutional rights to a fair trial, to effective assistance of counsel, to compulsory process, and to cross-examine witnesses "govern the conduct of

the State not the Providers" is without merit. (Social Media's Br. at pp. 6, 9-10.) Social media providers aggrandize their role in this case given they are mere holders of subpoenaed records. The state action defendants challenge is Congress's enactment of the SCA in 1986, in granting police and prosecutors access to content-based electronic records, without affording criminal defendants parallel access to records necessary to defend their case.

Additionally, social media's argument likening social media records to state secrets necessary to national security under 18 U.S.C. 793(d) and statutes protecting informant's identities strains credulity. (Social Media's Br. at p. 12-13.) Specifically, providers argue that if social media records must be disclosed to protect a criminal defendant's right to a fair trial, the criminal action must be dismissed just as an indictment must be dismissed if the government refuses to disclose to the defendant national security classified secrets that are reasonably necessary for a fair trial. (Social Media Br., p. 12; *Jencks v. United States* (1957) 353 U.S. 657, 672.) While real parties do not quarrel with a dismissal, Reneesha Lee's *publicly shared* tweet threatening gun violence to a romantic rival, or someone's vacation photos posted on Facebook visible to 500 friends, can hardly be likened to national security secrets or the confidential data about informants which are

entitled to heightened statutory protection to prevent death or foreign invasion.

Moreover, social media misstates the holding of *People v. Farley* (2009) 46 Cal.4th 1053. (Social Media Br. at pp. 12-13.) In *Farley*, the issue of whether the criminal prosecution should be dismissed to enforce the fair trial rights of the defendant because the government failed to disclose national security interests the disclosure of which was necessary to defend the case, was never addressed. The sole issue on appeal on this point was whether the trial court properly sustained the prosecutor's relevancy objections under Evidence Code sections 210 and 352 to questions that may have disclosed classified information. The appellate court ruled there was no error. (*Id.* at 1126-1128.) *Farley* is not authority for propositions for which it does not stand. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

B. Fourth Amendment Jurisprudence is Irrelevant To Sullivan and Hunter Because They Are Private Citizens, Not a State Actors and Not Subject To the Warrant Requirement

Real parties contend they have a constitutional right to have a superior court judge review *in camera* social media records sought by subpoena duces tecum prior to trial notwithstanding the SCA. In response,

social media contends that a judicial *in camera* review is not allowed because federal appellate courts have held that the Fourth Amendment requires that the government to get search warrant to obtain electronic records covered by the SCA. (Social Media's Br. at p. 8; *United States v. Warshak* (2011) 631 F.3d 266; *United States v. Graham* (2015) 796 F.3d 332.) Moreover, social media contends defendants should not obtain social media records absent a warrant because *Riley v. California* (2014) 134 S.Ct. 2473, held that individuals have a reasonable expectation of privacy in their smart phones. (Social Media Br. at p. 29.) But Fourth Amendment jurisprudence is irrelevant because criminal defendants are private persons, not a state actors The fundamental purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." (*Camara v. Mun. Ct.* (1967) 387 U.S. 523, 528; see *Skinner v. Ry. Labor Execs.' Ass'n* (1989) 489 U.S. 602, 613-14 ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction.") The United States Supreme Court has consistently construed the Fourth Amendment as proscribing *only governmental action*; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not

acting as an agent of the Government or with the participation or knowledge of any governmental official." (*United States v. Jacobsen* (1984) 466 U.S. 109, 114, fn. 6; *Walter v. United States* (1980) 447 U.S. 649, 662 (BLACKMUN, J., dissenting), *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 487-490 ; *Burdeau v. McDowell*, 256 U.S. 465 (1921).

Accordingly, the fact that under the Fourth Amendment, a search warrant may be required for the police to procure social media records, does not mean that criminal defendants' access is barred. The Fourth Amendment is not a sword social media providers can wield to curtail a criminal defendant's access to evidence; rather, it is a safeguard applicable only to the government, to ensure the government does not overreach. Indeed, there are many types of searches for which the government much procure a warrant pursuant to Penal Code section 1524, whereas a criminal defendant issues subpoenas pursuant to Penal Code section 1326, subject to judicial scrutiny to ensure only relevant records are released. For example, a criminal defendant can subpoena documents from the home of a private party whereas the government would have to get a warrant. Also, criminal defendants regularly subpoena telephone, text, and cell cite records from wireless providers, whereas the government must obtain a search warrant. The trial court maintains strict control over the release of private records

and issues protective orders as appropriate. That the government may be required to procure a warrant does not compel the conclusion that a criminal defendant's access is barred if obtaining those records is necessary to prepare for trial.

Social media incorrectly states that the SCA requires a warrant based upon a judicial finding of probable cause, whereas a pretrial subpoena often "issues with no review at all." (Social Media Br. at p. 7.) As discussed in detail by this Court in *Kling*, "[i]it is undisputed that trial courts are authorized, indeed even obligated, to regulate the use of subpoenas to obtain privileged third party discovery." (*Kling, supra*, 50 Cal.4th at 1074, quoting *People v. Superior Court* (*Humberto S.*) 43 Cal.4th 747, 751.) "The issuance of a subpoena pursuant to Penal Code section 1326 is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein[,] *until a judicial determination has been made that the person is legally entitled to receive them.*" (*Kling, supra*,50 Cal.3d at 1074, emphasis added.) Unlike civil subpoenas in which the records can be produced for inspection and copying between the parties, records sought by criminal subpoenas must be produced directly to the clerk of superior court. (Evid. Code, § 1550(e); Pen. Code, § 1326 subd. c.) "This

restriction permits the court to maintain strict control over the discovery process." (*Kling, supra*, 50 Cal.4th 1074, 1075.) If the third party objects, defense counsel is required to make a good cause showing, as an officer of the court, that the requested information will facilitate the ascertainment of facts and a fair trial. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.) A good cause showing is established by a defense counsel's declaration detailing the records' relevancy, admissibility, and materiality to the defense case. (*People v. Superior Court (Barrett)*, *supra*, 80 Cal.App.4th at 1313.)

Even if the third party does not object to disclosure, superior court judges and district attorneys can and do protect the privacy of third parties. As this Court stated in *Kling*, the district attorney has standing to object and file motions to quash subpoenas for third party records even if the subpoena recipient does not appear in court to object:

> The People, even if not the target of the discovery, also generally have the right to file a motion to quash "so that evidentiary privileges are not sacrificed just because the subpoena recipient lacks sufficient self-interest to object" (*M.B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1392, 127 Cal.Rptr.2d 454) or is otherwise unable to do so. (See *People v. Superior Court (Humberto S.)*, supra, 43 Cal.4th at p. 743, 76 Cal.Rptr.3d 276, 182 P.3d 600.)

(*Kling, supra*, 50 Cal.4th at 1078.) Moreover, when it comes to private

records, even if the third party does not appear in court to object, a superior court judge reviews the records *in camera*, balances competing privacy interests with a criminal defendant's constitutional rights, redacts irrelevant information and discloses only relevant records to the defense subject to a strict protective order banning dissemination. (See generally *People v. Superior Court (Barrett)*, *supra*, 80 Cal.App.4th 1305; *Kling*, *supra*, 50 Cal.4th 1074.) Thus, there is no real danger of that private records will be inappropriately disseminated. The privacy interests of the social media account holders are vigorously protected by the superior court judge, the district attorney, and the provider all of whom can and will be in court at the time records are disclosed to defense counsel.

Moreover, defendants have no objection to this Court imposing an additional requirement that either the provider or defendant notify the social media account holder of a pending subpoena. However, lack of notice to the account holder is not fatal to defendants constitutional arguments given the other protections in place. By analogy, we note that under the federal Health Insurance and Portability and Accountability Act (HIPAA) of 1996, medical records can be compelled by subpoena so long as the party issuing the subpoena makes a good faith effort to notify the patient, or in the alternative, the court issues a protective order preventing dissemination

outside the court proceeding. (45 C.F.R. § 164.512(e).) Thus, if notice to the party is not strictly required for subpoenas seeking medical records which are much more private than social media posts, it makes sense that a protective order is sufficient to protect the privacy rights social media posts which at their heart where meant to be shared. Accordingly, real parties believe that a superior court judge's *in camera* review redacting irrelevant information in conjunction with protective orders banning dissemination are sufficient measures to protect the privacy interests of social media account holders particularly given that providers, prosecutors, and judges are present in court to advocate for them.

Moreover, real parties appreciate the important privacy interests at issue under the SCA, the CalECPA (Pen. Code, § 1546.1,) as well as the California Constitution. However, none of these privacy interests trump a criminal defendant's federal constitutional rights. This is precisely why this Court, for many decades, has authorized superior court judges to conduct *in camera* reviews of confidential records to balance the competing interests at stake, disclosing only those records relevant to enforce a defendant's constitutional right to prepare for trial. (*Kling*, *supra*, 50 Cal.4th 1074.)

C. Respondent Court Correctly Ruled That Social Media Records Sought By Subpoena are Not Reasonably Available Through Other Sources

Social media providers contend the SCA does not have to yield to afford defendants pre-trial access to evidence because the same evidence can be obtained from other sources. (Social Media Br. at pp. 25-27.) We disagree. Respondent court correctly ruled that it could not compel Mr. Rice to authenticate the records because he is dead and Ms. Lee is an adverse witness with a history of refusing to authenticate her own social media records as evidenced by her behavior in the juvenile co-defendant's separate trial during which asserted her Fifth Amendment privilege and refused to authenticate her social media posts. Notably, social media does not address how account holders with Fifth Amendment privileges can be compelled to authenticate their incriminating records. Because the social media records pertain to her threats of gun violence and other criminal acts, respondent court correctly ruled that it could not compel Ms. Lee to authenticate her social media records, or be compelled to assert ownership of social media accounts containing incriminating posts involuntarily because she has Fifth Amendment privileges. Indeed, even if there were not Fifth Amendment rights at play, a superior court judge has no way to force a person to consent to the release of records even under threat of jail

for contempt of court if the person refuses to comply with a court order.[2]

Even if Ms. Lee agreed to produce her social media records by downloading them herself, if a court ordered her to provide them, the defense has no way of ensuring that she, in fact, presented the records sought in their entirety given that she would be motivated to withhold records that implicate her in threatening others with gun violence and other bad acts. Also, Ms. Lee cannot provide her complete social media records because many of the accounts have been deleted, in particular, her Twitter account at issue in the instant case. Thus, if social media providers are not ordered to comply with the subpoenas, Mr. Sullivan and Mr. Hunter are deprived of the information they need to persuade a jury that the records in question originated from Ms. Lee by calling a custodian of records at trial to authenticate them.

Social media erroneously contend that they should not be required to comply with third party subpoenas because the social media records are

---

[2] For example, Susan McDougal served 18 months in jail for contempt of court for refusing to answer three questions before Kenneth Starr's grand jury regarding whether President Bill Clinton lied about in Whitewater scandal. The court could not force her to cooperate any more than superior court judges in criminal cases would be able to compel an uncooperative witness to "consent" to disclosure of social media records under threat of contempt of court. (Malinowski, W. Zachary (2005-05-07). "Hearing set on Cianci request to appear via video". Rhode Island news.)