S230051
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN FRANCISCO CITY AND COUNTY,

Respondent;

DERRICK D. HUNTER, et al.

Real Parties in Interest;

REAL PARTIES' BRIEF ON THE MERITS

After Published Opinion by the Court of Appeal
First Appellate District, Division Five

Superior Court of the State of California
County of San Francisco
The Honorable Bruce Chan, Judge Presiding

Round: 3, 7:45pm
Date: November 9, 2016

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QUESTIONS PRESENTED

I. Does the Stored Communication Act ("SCA") violate Real Parties' Fifth Amendment rights to Due Process by denying Real Parties means of discovery available to the prosecution?

II. Does the SCA's withholding of access to potentially exculpatory evidence violate Real Parties' Sixth Amendment rights to present a meaningful defense?

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FALL TERM 2016

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OPINION BELOW

The opinion of the California Court of Appeal for the First District is reported at *Facebook, Inc. v. Superior Court*, 240 Cal. App. 4th 203 (2015).

STANDARD OF REVIEW

This Court applies "de novo review of constitutional legal questions in light of the factual record made below." *In re Taylor*, 60 Cal. 4th 1019, 1035 (2015). The questions as to whether the SCA infringes Real Parties' Fifth and Sixth Amendment is a question of law and thus *de novo* review is proper.

STATEMENT OF THE CASE

Statement of Facts

On June 24, 2013, Jaquan Rice, Jr. and his minor girlfriend, Ms. K, sat waiting at a bus stop at the intersection of Westpoint and Middleburg streets in San Francisco. (R.A. 128.) A green Ford Escape, rented by the prosecution's star witness Renesha Lee, drove by the intersection and shots were fired from the vehicle. (R.A. 128.) Mr. Rice was killed, and Ms. K was seriously injured. (R.A. 128.) When the vehicle was pulled over seven minutes after the shooting, Ms. Lee was its sole occupant. (R.A. 128.) Ms. Lee is the estranged ex-girlfriend of Real Party Lee Sullivan. (R.A. 129.)

Although video surveillance of the shooting was obtained by police, no arrests were made due to poor video quality. (R.A. 128.) The video shows at least three individuals in the car: one shooter from inside the vehicle, one shooter who exits the vehicle, and an unidentified person driving the vehicle. (R.A. 128.) Eyewitnesses identified Quincy Hunter, the minor brother of Real Party Derrick Hunter, as one of the shooters. (R.A. 128.) Witnesses also identified a woman as driving the vehicle. (R.A. 128.)

Quincy Hunter was taken into custody, interviewed, and confessed to shooting Mr. Rice because of repeated personal threats Mr. Rice made against him. (R.A. 128-29.)

Among these were threats made on the electronic platforms owned by Providers Twitter, Facebook, and Instagram, including photos of guns and hostile messages.[1] (R.A. 128-29.) Quincy Hunter named Real Party Hunter as the driver of the vehicle, but stated that Real Party Sullivan was not in the car. (R.A. 129.)

For her part, Ms. Lee gave investigators varied and sporadic accounts of the events in question. (R.A. 129.) She first identified someone named "Man Man" and three companions as the shooters. (R.A. 129.) She identified Real Parties Sullivan and Hunter after police threatened to charge her with the murder. (R.A. 129.)

Other than Ms. Lee, *no one* has identified Real Party Sullivan as an occupant of the vehicle or as a shooter during the incident. (R.A. 129.) In spite of the fact that witnesses recounted a woman driver at the scene of the crime, and the fact that Ms. Lee was the sole occupant when the vehicle was pulled over moments later, Ms. Lee has denied being in the car at the time of the shooting. (R.A. 129.) To date, Real Parties have been unable to serve Ms. Lee with *subpoenas duces tecum* seeking access to the social media records at bar. (R.A. 128.)

[1] Twitter is a social media platform that allows users to communicate between individuals or publish messages containing 140 html characters or fewer to the World Wide Web. *See Company - About*, Twitter, Inc. (last visited Oct. 25, 2016), available at http://about.twitter.com/company; Facebook is a social media website that allows users to create, manage, and view profiles that contain desired content including biographical information, photographic images and generated content shared individually or between users. *See About Facebook*, Facebook, Inc. (last visited Oct. 25, 2016), available at https://www.facebook.com/about/; Instagram is a social media platform, designed solely for mobile devices, that allows users to share and caption images, and comment on images posted by others. *See About Us*, Instagram, LLC (2016), available at https://www.instagram.com/about/us/.

Procedural History

In December 2013, a grand jury convened to hear evidence against Real Parties Sullivan and Hunter, and Quincy Hunter. (R.A. 126.) Quincy Hunter was later removed from consideration by the grand jury and tried in juvenile proceedings, where he was found guilty of Mr. Rice's murder and the attempted murder of Ms. K. (R.A. 122.) Arguing before the grand jury, the district attorney posited that Real Parties were members of the Big Block street gang and that the murder was a result of gang violence between Big Block and Mr. Rice's gang, West Mob. (R.A. 122.) Testifying in support of this position, Inspector Leonard Broberg, a gang expert from the San Francisco Police Department's Gang Task Force, explained that street violence increasingly is instigated or committed online. (R.A. 132.) In a subsequent declaration, Inspector Broberg emphasized the growing importance of social media content—including Facebook, Instagram, and Twitter—to government investigations and prosecutions of street violence. (R.A. 138-40.) The grand jury indicted Real Parties and charged them with Rice's murder and the attempted murder of Ms. K. (R.A. 126-27.)

During pretrial discovery, Real Parties served *subpoenas duces tecum* on Facebook, Instagram, and Twitter ("Providers"), seeking content and account information for social media accounts belonging to Mr. Rice and Ms. Lee. (R.A. 15-22, 30-34.) Real Parties argued that the social media records were essential to protect their constitutional rights to due process and to present a complete defense. (R.A. 130.) Real Parties believe that social media content from the accounts of Ms. Lee would reveal a history of violence and threats that would undermine the credibility of her testimony placing Real Party Sullivan at the crime scene. (R.A. 130-31.) Additionally, Real Parties believe that Mr.

Rice's social media content would reveal a history of violence and personal threats against Real Parties, undermining Inspector Broberg's "gang activity" theory of the case. (R.A. 131-33.) However, Providers refused to comply with the subpoenas, claiming that disclosure would violate the SCA. (R.A. 23-27, 35-37.)

The trial court denied Providers' motion to quash the subpoena and required Providers to submit the records for *in camera* review. (R.A. 157-58.) The trial judge agreed with Real Parties that quashing the subpoenas would disregard Real Parties' constitutional rights to due process and to prepare for defense at trial. (R.A. 286.) He reasoned that the Providers' privacy concerns could be allayed through *in camera* review of the subpoenaed content. (R.A. 147.) He also rejected Providers' protests that the cost of producing the information was prohibitive, reasoning that "it is not uncommon for both sides to commit some resources to do relevant searches." (R.A. 159-60.) The trial judge concluded that the harm to Real Parties outweighed the potential liability faced by Providers. (R.A. 164.)

Providers filed a petition for a writ of mandate from the California Court of Appeal. (R.A. 14.) The Court of Appeal vacated the trial court's order and directed it to issue a new order granting the motion to quash. (R.A. 2.) The Court of Appeal held that Real Parties' constitutional rights under the Sixth Amendment's Confrontation Clause did not extend to pretrial discovery, and that Fifth Amendment Due Process rights did not extend to disclosure of documents privileged by the SCA. (O.B. 15-17, 22-23.) This Court granted Real Parties' petition for review. (R.A. 197.)

SUMMARY OF ARGUMENT

This Court must ensure that Real Parties receive access to social media content that is essential to their criminal defense. By prohibiting disclosure of essential content, the SCA violates Real Parties' Fifth and Sixth Amendment rights and is unconstitutional as applied. This Court has jurisdiction over many of the service providers likely to face requests for electronic content related to criminal proceedings. Therefore, it is uniquely qualified to decide the open federal question of whether the SCA may restrict defense discovery of electronic content. Although Providers present legitimate privacy concerns, these are outweighed by the threat to Real Parties' constitutional rights. As a result, this Court should require Providers to submit the subpoenaed content for *in camera* review and ensure fair and equitable proceeding for Real Parties and other criminal defendants in the state of California.

The Fifth Amendment's Due Process clause requires that a "balance of forces" exist between the prosecution and the defense. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Although legislatures are not required to provide criminal defendants with discovery rights, where a statute grants a discovery right to one party, Due Process requires the right be given to both. *Id.* at 475. The SCA creates a fundamentally unfair imbalance by providing discovery rights to the prosecution that are not available to Real Parties. As a result, the SCA is unconstitutional as applied and void. *See Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1875). Providers are thus subject to Real Parties' subpoenas under California Penal Code § 1326. *Negro v. Superior Court*, 230 Cal. App. 4th 879, 900 (2014). If this Court does not require Providers to disclose the

requested social media content, Real Parties will have no alternative means of obtaining information necessary to call into question the credibility of adverse witnesses at trial.

Further, this Court's holding in *People v. Hammon* created a dangerous precedent that extinguishes Real Parties' Sixth Amendment rights to confrontation. 15 Cal. 4th 1117 (1997). Because the U.S. Supreme Court has offered no binding precedent on this critical question, this Court has a duty to criminal defendants to revise its broad holding in *Hammon* and safeguard their constitutional rights. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (plurality opinion). Denying Real Parties access to the requested social media content would inhibit effective cross-examination of the prosecution's key witnesses. Thus, this court should overturn *Hammon*, or in the alternative limit its holding to the facts of that case. Moreover, Real Parties' Sixth Amendment rights to compulsory process and the effective assistance of counsel are hamstrung by the SCA's restrictions on discovery. Without pretrial access to the subpoenaed content, Real Parties are denied access to information that is vital to their defense.

For these reasons, Real Parties respectfully request that this Court reverse the opinion of the Court of Appeal below.

ARGUMENT

I. THE SCA VIOLATES REAL PARTIES' FIFTH AMENDMENT RIGHTS BY GIVING DISCOVERY RIGHTS TO THE PROSECUTION THAT ARE NOT AVAILABLE TO REAL PARTIES.

The SCA was enacted by the U.S. Congress to bring the privacy protections given to electronic communication up to par with those given to traditional modes of communication. *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1444 (2006) (citing Sen. Rep. No. 33, 2d Sess. (1986) reprinted in 1986 U.S. Code Cong. & Admin.

News, p. 3557). The SCA prohibits electronic service providers from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702. However, the SCA permits disclosure under several enumerated exceptions, including disclosure to law enforcement where the communication pertains to commission of crime. *Id*. California courts have held that the language of the SCA is unambiguous and that the only exceptions to its prohibitions are those enumerated in the statute itself. *O'Grady*, 139 Cal. App. 4th at 1447. Quite apart from these exceptions *permitting* disclosure, however, section 2703 *requires* providers to disclose customer communications or records to a governmental entity, such as a criminal prosecutor, where the government has obtained a warrant. 18 U.S.C § 2703(a). The Act provides no such discovery rights to criminal defendants.

A. The SCA Upsets the "Balance of Forces" Between Real Parties and the Prosecution.

The Due Process Clause of the Fifth Amendment requires that a "balance of forces" exist between the prosecution and the defense. *Wardius*, 412 U.S. at 474. Accordingly, for example, the prosecution may not withhold exculpatory evidence that would aid a defendant's case; nor may a court exclude evidence that may undermine the prosecution's case simply because the court has pre-determined the relative strength of the parties' cases; nor may a court mechanistically apply an evidentiary rule to exclude evidence where it is material to determining a defendant's innocence or guilt. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (stating that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) ("[B]y evaluating

the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."); *Chambers v. Mississippi*, 410 U.S. 284, 313 (1973) ("Although perhaps no rule of evidence has been more respected . . . than that applicable to the exclusion of hearsay, . . . where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

A statute that creates a fundamentally unfair imbalance of procedural forces available to the parties is unconstitutional. In *Wardius*, the U.S Supreme Court emphasized that, where a statute grants criminal discovery rights, the Due Process Clause requires that a "balance of forces" exist between the rights given to the prosecution and those given to the defense. *Wardius,* 412 U.S. at 474. There, the defendant was indicted and charged with unlawful sale of narcotics. *Id.* at 472. At trial, the judge refused to allow the defendant to testify to an alibi, or to call a witness who would testify to that alibi, because the defendant had not filed notice of the alibi in contravention of an Oregon statute. *Id.* at 472-73. The defendant argued that the statute violated due process because it provided discovery rights to the prosecution without providing reciprocal rights to the defendant. *Id.* at 473. The Court agreed. *Id.* at 475-76. The Court acknowledged that Oregon was not required to provide pretrial discovery rights to parties, and that certain state interests might preclude the grant of defense discovery rights. *Id.* at 474 (citing *Williams v. Florida*, 399 U.S. 78, 81 (1970) (upholding the constitutionality of a Florida notice-of-alibi rule where Florida law provided defendants liberal discovery rights and required reciprocal state disclosure)). However, where a statute did provide discovery

rights to one party, Due Process required those discovery rights be provided to both parties. *Wardius*, 412 U.S. at 474-75.

By selectively quoting *Wardius*, the Court of Appeal mischaracterized the Supreme Court's holding, focusing on its declaration that "[t]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded," but ignoring the second-half of that very sentence: "*but* [the Due Process Clause] does speak to the balance of forces between the accused and his accuser." *Wardius*, 412 U.S. at 474 (1973) (emphasis added). The primary California case cited by the Court of Appeal does not even speak to the balance of forces. (O.B. 17.) *City of Los Angeles v. Superior Court* turned upon an evidentiary rule limiting discovery of citizen complaints to those filed within five years of litigation, but said nothing about whether such complaints were discoverable by both parties. 29 Cal. 4th 1, 6 (2002).

The Court of Appeal also attempted to distinguish this case from *Wardius* by noting that, here, the information sought by Real Parties is protected by state privacy interests. (O.B. 20-22.) While it is true that the SCA exists in part to protect the privacy of electronic communications, the SCA recognizes a number of exceptions to those privacy rights and even requires disclosure from providers where the government has obtained a warrant. 18 U.S.C. § 2703. *Wardius* does not distinguish between objects of discovery that differ in kind: it clearly states that where discovery of an object is provided to one party, it must be provided to the other. *Wardius*, 412 U.S. at 475. Such statutory privacy protections, beholden to conditions and exceptions, fall far short of the constitutional protections of Due Process. Additionally, the SCA's privacy interests can be maintained by *in camera* review, restricting Real Parties' access solely to evidence

that is material while simultaneously ensuring that Real Parties have access to all relevant content.

In the case at bar, the prosecution has enjoyed the benefits of pretrial discovery that is not available to Real Parties, creating a fundamental unfairness. (R.A. 139-40.) Inspector Broberg developed his "gang activity" theory of the case as a direct result of accessing the social media accounts of Jaquan Rice pursuant to § 2703 of the SCA. (R.A. 139.) Yet the SCA prohibits Real Parties from accessing those accounts in order to refute "gang activity" charges that could result in significant additional mandatory sentencing. Cal. Penal Code § 186.22(b)(5). Nor can Real Parties access the social media accounts of Ms. Lee, star witness for the prosecution and the only person to place Real Party Sullivan near the crime scene at the time of the shooting, to call into question her credibility. (R.A. 129.) Without access to the accounts, Real Parties face a fundamentally unfair imbalance of forces that violates their Due Process rights.

B. Because the SCA is Unconstitutional as Applied, it is Null and Void, and Providers Must Produce the Subpoenaed Content Subject to California Penal Code Section 1326.

A statute that is unconstitutional as applied to an individual is null and void. *McComb*, 92 U.S. at 541. Additionally, California courts have held that where the SCA does not apply, parties are still subject to state discovery rules. *Negro*, 230 Cal. App. 4th at 900. Here, because the SCA creates a fundamentally unfair imbalance of forces between Real Parties and the prosecution, it is unconstitutional as applied and null and void. Providers argue that as private actors they cannot be coerced by Due Process to violate a federal statute, and that the remedy must come from the state. (R.A. 145.)

However, Providers ignore the fact that nullification of the SCA *is* the state's remedy. If the SCA and California Penal Code section 1326 were both applied, there would be a Supremacy Clause issue. However, because the SCA does not apply here, Providers are subject only to California discovery rules and thus must disclose the subpoenaed social media content pursuant to section 1326. *See Negro*, 230 Cal. App. 4th at 900.

C. If Providers Fail to Disclose the Subpoenaed Content, Real Parties Will Have No Alternative Means of Accessing Social Media Content That is Essential to Their Defense.

First, Real Parties will be unable to access the social media accounts of Jaquan Rice in order to refute Inspector Broberg's "gang activity" theory of the case. (R.A. 129.) Even if Real Parties subpoena Mr. Rice's Estate, the Estate itself may not have access to the accounts.[2] In accordance with the SCA, Providers' policies currently prohibit disclosure of account login information of deceased users, regardless of the requesting party's relationship to the user.[3] Attempting to address the legal issues created by "digital life after death," the California Legislature recently passed and Governor Brown signed into California law the Revised Uniform Fiduciary Access to Digital

[2] The problems created by the unsettled nature of the law in this area are so widespread they have recently made news. *See* Nilson, Anton, *Widow who wanted her dead husband's Apple ID so she could play games on their iPad is refused and told to get a COURT order instead*. DailyMail.com. (Jan. 20, 2016) available at http://www.dailymail.co.uk/news/article-3407830/Widow-wanted-dead-husband-s-Apple-ID-play-games-iPad-refused-told-COURT-order-instead.html (last visited Oct. 24, 2016).

[3] *See Special Request for Deceased Person's Account*, Facebook, Inc., available at https://www.facebook.com/help/contact/228813257197480 (last visited Oct. 24, 2016); *How do I report a deceased person's account on Instagram?*, Instagram, LLC, available at https://help.instagram.com/264154560391256/ (last visited Oct. 24, 2016); *Contacting Twitter about a deceased user or media concerning a deceased family member*, Twitter, Inc., available at https://support.twitter.com/articles/87894 (last visited Oct. 24, 2016).

Assets Act to work in conjunction with SCA. A.B. 691, 2015-16 Reg. Sess. (Ca. 2016). However, because it is not known whether Mr. Rice did expressly authorized disclosure to his estate, the law may not apply to his accounts, and Real Parties will be unable to refute Inspector Broberg's claims of "gang activity." *Id*.

Second, Real Parties will be unable to access the Twitter account of the prosecution's star-witness Ms. Lee to undermine the credibility of her claims that Real Party Sullivan was at the scene of the crime. (R.A. 129-131.) The limited social media content already available to Real Parties reveal a spurned and jealous lover. (R.A. 87-101.) Ms. Lee's Twitter posts exhibit violent and profane threats against women whom Real Party Sullivan pursued after their relationship ended. (R.A. 87-101.) Real Parties must have access to her account to refute the prosecution's portrayal of Ms. Lee as a relatively upstanding citizen. (R.A. 131.) Further, even where account information is made public, without Provider disclosure Real Parties will be unable to authenticate the evidence at trial. (R.A. 122-23.) At the trial of Quincy Hunter, counsel for the defendant could not authenticate social media posts from Ms. Lee and was precluded from entering the posts into evidence, seriously hampering Quincy Hunter's ability to effectively cross-examine Ms. Lee. (R.A. 122-23.) To date Ms. Lee is missing, leaving Real Parties unable to serve her with *subpoenas duces tecum*. (R.A. 128.) Therefore, only Provider disclosure will enable Real Parties to access the accounts necessary to effective cross-examination and defense at trial.

II. THE SCA INFRINGES REAL PARTIES' RIGHTS TO FUNDAMENTALLY FAIR AND EQUITABLE PROCEEDINGS UNDER THE SIXTH AMENDMENT.

Real Parties' Sixth Amendment guarantees are violated by the SCA's wholesale bar on access to evidence necessary to their defense. The Sixth Amendment provides that "[i]n all criminal prosecutions" a defendant has the right "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend. VI. Sixth Amendment rights apply in federal and state courts. *Bullcoming v. New Mexico*, 564 U.S. 647, 674 (2011). The California State Constitution holds a similar provision.[4]

This Court's holding in *People v. Hammon* created a flawed precedent that violates Real Parties' Sixth Amendment rights to confrontation through effective cross-examination. 15 Cal. 4th at 1128 ("we decline to extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information."). Because *Hammon*'s overbroad ruling allows providers to withhold social media content under the SCA, it unconstitutionally denies Real Parties their right to meaningfully cross-examine adverse witnesses at trial. Additionally, denying access to the subpoenaed social media content obstructs Real Parties' Sixth Amendment rights to compulsory process and assistance of counsel by precluding access to evidence that may be critical pretrial.

[4] "The defendant in a criminal cause has the right to...compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel . . . ." Cal. Const. Art. I, § 15.

A. Because This Court's Broad Holding in *Hammon* Violates Real Parties' Confrontation Clause Rights, This Court Must Overturn *Hammon* or Alternatively Limit the Holding to its Facts.

This Court has recognized that "the right of cross-examination is the primary interest secured by the confrontation guarantee and an essential safeguard of a fair trial." *People v. Brock*, 38 Cal. 3d 180, 189 (1985) (citing *Pointer v. Texas*, 380 U.S. 400, 405-407 (1965)). However, a splintered U.S. Supreme Court in *Pennsylvania v. Ritchie* offered no binding precedent as to whether that confrontation guarantee extends to pretrial access to evidence necessary for effective cross-examination. 480 U.S. 39 (1987) (plurality opinion). Real Parties respectfully assert that this Court has a duty to ensure criminal defendants are given pretrial access to evidence necessary to fulfill their constitutional right to cross-examination.

1) Absent binding precedent, this Court should recognize that social media has drastically altered the dynamic of criminal discovery and overturn its ruling in *Hammon*.

In holding that the Confrontation Clause does not entitle Real Parties to pretrial access to the subpoenaed content, the Court of Appeal was bound by this Court's flawed holding in *Hammon*. (O.B. 12-13.) *Hammon* unduly relied on the U.S. Supreme Court's fragmented opinion in *Ritchie*, which provides no controlling precedent as to a defendant's pretrial rights under the Confrontation Clause. 15 Cal. 4th at 1130 (Mosk, J., concurring) ("[The majority] rely on *Pennsylvania v. Ritchie* . . . . Which means they rely on nothing.") The *Ritchie* court obtained a majority only in determining that Due Process requires *in camera* review for subpoenaed privileged materials, and a mere plurality as to whether the Confrontation Clause provides for pretrial disclosure. *Ritchie*, 480 U.S. at 52.

As the U.S. Supreme Court held in *Marks v. United States*, when "no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977). This Court has applied the *Marks* rule previously. *See People v. Dungo*, 55 Cal. 4th 608, 628 (2012). In accordance with this Court's previous application of the *Marks* rule, Justice Blackmun's narrow concurrence can and should be recognized as the only binding authority established by the *Ritchie* court.

In *Ritchie*, Justice Blackmun rejected "the plurality's conclusion that . . . the Confrontation Clause protects only a defendant's trial rights and has no relevance to pretrial discovery." 480 U.S. at 61. (Blackmun, J., concurring). Indeed, the "plurality's effort to divorce confrontation analysis from any examination into the effectiveness of cross-examination" would render a defendant's cross-examination right "an empty formality." *Id.* at 62. As Justice Blackmun notes, the *Ritchie* plurality failed to recognize the importance of cross-examination in determining the credibility of adverse witnesses at trial, a factor the U.S. Supreme Court has held integral to a defendant's right under the Confrontation Clause. *See Davis v. Alaska*, 415 U.S. 308, 320 (1974) (finding state law barring use of privileged records in cross-examining a witness at trial violated sixth amendment); *People v. Rangel*, 62 Cal. 4th 1192, 1217 (2016) ("the Clause's ultimate goal is to ensure reliability of evidence" as tested through "the crucible of cross-examination") (internal quotation omitted).

Other federal and state courts have considered the issue of pretrial disclosure in the wake of *Ritchie* and have held that the confrontation clause does provide some

pretrial rights to criminal defendants. *See, e.g.*, *United States v. Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994); *Curry v. State*, 228 S.W.3d 292, 298 (Tex. App. 2007); *Village of Granville v. Graziano*, 858 N.E.2d 879, 883 (Ohio Mun. Ct. 2006). These courts reasoned that denying defendants access to potentially relevant material until trial would fundamentally infringe criminal defendants' rights during critical pretrial stages of proceedings. *See Hodge*, 19 F.3d at 53 (recognizing the confrontation right extends to all "critical stage[s] of the prosecution"); *Granville*, 858 N.E.2d at 883 (holding Confrontation Clause applies during pretrial suppression hearings). In 2015 alone, more than 97% of California's 246,374 felony cases were disposed of before trial, suggesting that if Real Parties do not obtain this evidence now, it is highly likely they will never receive it.[5]

The ubiquity of social media makes discovery of content necessary for effective and complete cross-examination even more burdensome.[6] If the content were delivered at trial, counsel would be unable to sift through thousands of pages of social media posts to effectively cross-examine prosecution witnesses. The logistical impossibility of reviewing all relevant content at trial would restrict counsel to "simple questioning," which "will not be able to undermine a witness' credibility and in fact may do actual

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[5] 2015 Court Statistics Report, Judicial Council of California, available at http://www.courts.ca.gov/13421.htm (last visited Oct. 24, 2016).

[6] Various studies show that the average users spend from one hour up to 8 hours, depending on the targeted demographic, accessing social media sites every day. *See* Stewart, James, *Facebook Has 50 Minutes Of Your Time. It Wants More.* N.Y. TIMES. (May 5, 2016) available at http://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html?_r=0 (last visited Oct. 24, 2016); Wallace, Kelly. *Teens spend a 'ming-boggling' 9 hours a day using media, report says*. CNN Health. (Nov. 3, 2011) available at http://www.cnn.com/2015/11/03/health/teens-tweens-media-screen-use-report/ (last visited Oct. 24, 2016).

injury to a defendant's position." *Ritchie*, 480 U.S. at 63 (Blackmun, J., concurring) (citing *Davis*, 415 U.S. at 308). Likewise, *Hammon* irreparably hinders Real Parties' ability to cross-examine the prosecution's witnesses at trial. Without adequate review of these social media accounts, Real Party Sullivan will be unable to call into question the credibility of the *only* witness implicating him, and Real Party Hunter will be unable to rebut the government's cherry-picked theory connecting the crimes to "gang activity". (R.A. 128-30.)

Because the U.S. Supreme Court has left a void on this critical issue, this Court can and must realign its position in *Hammon* to ensure criminal defendants in the state of California are afforded their constitutional rights to confrontation through cross-examination. The landscape of criminal trials has drastically altered since this Court last considered whether the Confrontation Clause affords criminal defendants pretrial rights. *Hammon*, broadly applied, creates a dangerous and unconstitutional precedent that denies criminal defendants the ability to effectively confront adverse witnesses. Thus, *in camera* review of the subpoenaed content is appropriate.

2) Alternatively, Real Parties respectfully request this Court limit its holding to the facts of *Hammon*.

Even if this Court does not agree with Real Parties' argument for overturning *Hammon*, Real Parties urge them to limit its holding to its facts. In *Hammon*, this Court considered only whether the statutory protections offered by California Evidence Code § 1014 were required to give way to the defendant's *subpoenas duces tecum* seeking pretrial access to privileged mental health records. *Hammon*, 15 Cal. 4th at 1120. There, the defendant sought a large swath of otherwise private records, including "high school and juvenile court records" which "the trial court did review . . . and disclose some of [ ]

to the defense." *Hammon*, 15 Cal. 4th at 1122. Educational and juvenile court records are protected by federal and California statutes.[7] However, the *Hammon* court emphasized that its analysis was limited "exclusively [to] the records requested from the psychologists." *Id.* Therefore, limiting the scope of *Hammon* to pretrial disclosure of psychotherapist-patient records is appropriate.

The Court's jurisprudence adhering to statutory protection of mental health records records follows the same reasoning offered by the U.S. Supreme Court in *Jaffee v. Redmond*, recognizing that certain privileged relationships *depend* on an expectation of confidentiality. 518 U.S. 1, 18 n. 19 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.") While the statutory protections of social media content and psychotherapist-patient records are similar, the content itself is inherently different. Unlike the psychotherapist-patient relationship, social media content is not wrought on any expectation of confidentiality. In fact, other state courts have found that the evidentiary value offered criminal defendants in social media content outweighs the asserted privacy concerns. (R.A. 109-116.)

It is understandable that in *Hammon*, this Court sought to ensure statutory protections of confidential materials in light of the broad fishing expedition sought by the defendant and his subsequent trial admission to heinous crimes. 15 Cal. 4th. at 1127 ("In fact, defendant at trial admitted engaging in sexual conduct with his foster daughter, thus

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[7] *See* Family Education Rights and Privacy Act, 20 U.S.C. § 1232(g); Cal. Welf. & Inst. Code §§ 826-27; California Rules of Court, Rule 5.552 ("Juvenile case files may not be obtained or inspected by criminal or civil subpoena.").

largely invalidating the theory on which he had attempted to justify pretrial disclosure of privileged information."). However, here Real Parties have made an offer of proof as to the relevance of the subpoenaed content. (R.A. 130-32.) In fact, the content already accessible to Real Parties offers a glimpse into the type of exculpatory or material evidence that may be revealed. (R.A. 99-107.) In contract with police or medical records, which are highly curated, social media content is voluminous and unorganized. An expectation that defense counsel could wade through this content and find relevant evidence in the minutes afforded during trial is impractical.

The *Hammon* restriction on of discovery of psychotherapist-patient records was never intended to apply to communications of such a public and unfiltered nature as the subpoenaed social media content. In asking this Court to limit its holding in *Hammon*, Real Parties seek to ensure defendants receive their full Sixth Amendment rights to fair and just criminal proceedings.

B. The SCA Violates Real Parties' Sixth Amendment Rights to Compulsory Process and the Effective Assistance of Counsel Because it Bars Access to Information Necessary for Real Parties to Present a Meaningful Defense.

Notwithstanding this Court's holding in *Hammon*, Real Parties are entitled to other safeguards under the Sixth Amendment. The Sixth Amendment "provides that [i]n all criminal prosecutions," the defendant first has the rights: 1) "to have compulsory process for obtaining witnesses in his favor," and 2) to be "represented by counsel" during all "critical stages" of criminal proceedings. *People v. Bryant*, 60 Cal. 4th 335, 368 (2014) (quoting U.S. Const. amend. VI) (internal quotations omitted). For the reasons discussed below, the SCA's prohibition against disclosure of the subpoenaed social media content infringe Real Parties' rights.

1) The Compulsory Process Clause grants Real Parties the rights to discover relevant evidence, including the subpoenaed social media content.

Parties have a constitutional right to compel production of relevant evidence. *See United States v. Nixon*, 418 U.S. 683, 709 (1974) (holding "it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution *or by the defense*.") (emphasis added). In California, a criminal defendant may compel discovery with a just showing that the "requested information will facilitate ascertainment of the facts and a fair trial." *Pitchess v. Superior Court*, 11 Cal. 3d 531, 536 (1974) (citing *Cash v. Superior Court*, 53 Cal. 2d 72, 75 (1959)).

Even where information is privileged as confidential, those protections must yield if the information sought is necessary to a criminal defense. *See Nixon*, 418 U.S. at 713 (rejecting the President's assertion of privilege reasoning that "privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."); *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (holding "there is no exception whatever" to a criminal defendant's right to compulsory process).

Real Parties have made an offer of proof as to the relevance of the subpoenaed content. (R.A. 130-33.) In fact, Real Parties' offer of proof led the trial court to deny Providers' motion to quash and require disclosure. (R.A. 157-58.) Only *in camera* review of the subpoenaed materials will "facilitate ascertainment of the facts." *Pitchess*, 11 Cal. 3d at 536. The SCA's blanket restriction on Real Parties' discovery extinguishes their constitutional right to compulsory process.

Nevertheless, Providers advance several theories against Real Parties' assertion of their constitutional rights. (R.A. 163-66.) First, Providers claim that production of the

subpoenaed content would be unduly burdensome. (R.A. 163-66.) However, this burden is profoundly outweighed by the threat to Real Parties' liberty if they are unable to access this relevant evidence. In fact, the trial court soundly rejected Providers' claim that they should not have some burden during the exchange of electronic discovery. (R.A. 160.) As previously discussed, Real Parties have no alternative means of obtaining the sought social media content. With Real Parties unable to serve Ms. Lee, only Providers may guarantee the provenance of any content obtained. (R.A. 128.)

Providers also assert that deleted content cannot be recovered, but courts routinely find "deleted electronic records to be discoverable, under the facts and circumstances presented." Discovery of Deleted E-mail and Other Deleted Electronic Records, 27 A.L.R. 6th 565, 567. In fact, when pressed by the trial court, Providers refused to say definitively that they cannot produce deleted materials, but rather suggested they are unwilling to do so unless compelled by court order. (R.A. 163-166.)

None of these objections overcome Real Parties' compulsory process rights to relevant evidence. Real Parties have demonstrated a need for the subpoenaed content. The content is necessary for Real Parties to question the credibility of the only witness implicating Real Party Sullivan and to debunk the prosecution's "gang activity" theory. The Sixth Amendment therefore compels production of the subpoenaed content, and thus the trial court did not err in enforcing Real Parties' *subpoenas duces tecum*.

2) Denying Real Parties access to the subpoenaed social media content violates their rights to effective assistance of counsel.

Criminal defendants are entitled "to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *see also*, *People v. Clark*, 52 Cal. 4th 856, 1006 (2011) (holding that the Sixth Amendment

requires assistance of counsel that is effective and meaningful). Further, criminal defendants are entitled to representation that does not fall "fall below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Because a vast majority of felony cases in California are disposed of before trial, the lion's share of assistance provided by defense counsel will occur pretrial.[8] The current reality of the criminal justice system is such that "defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in criminal process at critical stages." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

However, in addition to plea bargaining, counsel for Real Parties must provide assistance during pretrial hearings, preparation for cross-examination, and other critical pretrial stages of proceedings. If this Court allows the SCA to withhold access to the subpoenaed content, counsel for Real Parties will be unable to provide effective and meaningful assistance. Therefore, this Court must hold unconstitutional as applied the provisions of the SCA that restrict Real Parties' discovery of the subpoenaed content.

CONCLUSION

The Fifth and Sixth Amendments require that Real Parties have access to the subpoenaed social media content. Because the SCA unconstitutionally restricts Real Parties' discovery rights as applied, it is null and void, and Providers must produce the evidence under California Penal Code § 1326. Any burdens Providers would incur are outweighed by the threats to Real Parties' liberty. For the foregoing reasons, this Court

[8] 2015 Court Statistics Report, Judicial Council of California, available at http://www.courts.ca.gov/13421.htm.

should REVERSE the decision of the Court of Appeal, and direct the trial court to order Providers to disclose the subpoenaed content for *in camera* review.

Dated: November 9, 2016

Respectfully submitted,

_____
John Darin

_____
Jonathan Klaren

Counsels for Real Parties

No. S230051

CERTIFICATE OF SERVICE

I, John Darin, attorney for Real Parties, do swear and declare that on the 28th day of September, 2016, as required by California Rule of Court 8.25(a), I have served the enclosed BRIEF FOR REAL PARTIES on each party to the above proceeding or that party's counsel, and on every other person required to be served, by personally serving a copy to each of them.

The names and addresses of those served are as follows:

John Darin
200 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 9, 2016

John Darin
Counsel for Real Parties

No. S230051

CERTIFICATE OF SERVICE

I, Jonathan Klaren, attorney for Real Parties, do swear and declare that on the 28th day of September, 2016, as required by California Rule of Court 8.25(a), I have served the enclosed BRIEF FOR REAL PARTIES on each party to the above proceeding or that party's counsel, and on every other person required to be served, by personally serving a copy to each of them.

The names and addresses of those served are as follows:

Jonathan Klaren
200 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 9, 2016

Jonathan Klaren
Counsel for Real Parties