IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC.,	)	
	)	No. S245203
Petitioner,	)	
	)	Court of Appeal
vs.	)	4th Dist., 1st Div.
	)	No. D073171
SAN DIEGO COUNTY SUPERIOR COURT,	)	
	)	Superior Court
Respondent,	)	Dept. SD-55
	)	No. SCD268262
LANCE TOUCHSTONE,	)	
	)	Hon. Kenneth K. So
Real Party in Interest.	)	
	)	

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ON BEHALF OF REAL PARTY IN INTEREST LANCE TOUCHSTONE, SUBMITTED PURSUANT TO THE COURT'S ORDERS PERMITTING SUPPLEMENTAL BRIEFING

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SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ON BEHALF OF REAL PARTY IN INTEREST LANCE TOUCHSTONE, SUBMITTED PURSUANT TO THE COURT'S ORDERS PERMITTING SUPPLEMENTAL BRIEFING.

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

This Court granted California Attorneys for Criminal Justice, hereafter "CACJ" permission to appear as an *amicus curiae* on behalf of Real Party In Interest Lance Touchstone on May 17, 2018, after an application under California Rules of Court, Rule 8.520(f), filed on May 9, 2018. Pursuant to this Court's Orders filed on May 23, 2018, and on June 27, 2018, in this matter, permitting supplemental briefs that an *amicus curiae* may wish to file in view of the Court's decision in *Facebook v. Superior Court*

(Hunter) (2018) 4 Cal.5th 1245 (hereafter referenced as "*Facebook v. Superior Court (Hunter) S230051*"), CACJ respectfully tenders this supplemental brief.

I. **INTRODUCTION**.

In deciding *Facebook v. Superior Court (Hunter) (S235001)*, which now appears at (2018) 4 Cal.5th 1245, 417 P.3d 725 (hereafter "*Facebook v. Superior Court (Hunter)*"), this Court ruled on matters that pertain directly to the issues raised in this case, hereafter referred to as "*Touchstone*." In *Facebook v. Superior Court (Hunter)*, the Court set forth its interpretation of the Stored Communications Act (hereafter "SCA"). It addressed the reach of 18 U.S.C. § 2702 (hereafter "§ 2702") and the implications of that reach in a California criminal case litigation. The Court also reviewed the Court of Appeal's ruling in *Negro v. Superior Court* (2014) 230 Cal.App.4th 879, 904, and concluded that the Court of Appeal was correct in finding that the SCA "...permits a court to compel [...] disclosure...when a user has expressly consented to disclosure...." *Negro*, at 904. *Facebook v. Superior Court (Hunter)*, 4 Cal.5th, at 1285-86.

In *Hunter*, this Court clarified that California criminal court procedure permits subpoenas to compel "...disclosure by providers of communications that were configured by the registered user to be public and that remained so configured at the time the subpoenas were issued." *Facebook v. Superior Court (Hunter)*, at 1250-51. The Court also has explained that the question of "...whether any given communication sought by the subpoenas [...] falls within the lawful consent exception of section 2702(b)(3) and

must be disclosed by a provider pursuant to a subpoena..." is one that depends to some degree on the factual record before the court issuing the subpoena on "...the configuration of communications or accounts, along with related issues concerning the reconfiguration or deletion history of the communications at issue...." *Id.*, at 1250-51.

While there is a great deal of detailed analysis, both of the Federal legislation and of the procedural history of the litigation specific to *Facebook v. Superior Court (Hunter)* in this Court's 2018 *Hunter* ruling, the Court clearly limited the reach of its ruling in part by resolving that it "...[would] not reach or resolve defendants' constitutional claims at this juncture. Instead, we conclude that a remand to the trial court is appropriate." *Facebook v. Superior Court (Hunter)(S235001)*, at 1275.

In passing, the *Hunter* Court did address, in what will likely be referenced as informative *dicta*, the role and duties of a trial court to engage in fact-finding when SCA-related subpoenas are sought in California criminal cases. The Court noted the need for "...a sufficient effort [by the trial court] to require the parties to explore and create a full record concerning defendants' need for disclosure *from providers*–rather than from others who may have access to the communications." *Facebook v. Superior Court (Hunter)*, at 1275-76 [italics in original]. It is in part the examination of the granular aspects of SCA litigation that are at issue in the *Touchstone* litigation. This current *Touchstone* case permits this Court to consider highly specific procedures urged

upon it by Real Party Touchstone to enhance his ability to obtain information that he urges is essential to the preparation and litigation of his defense.

Real Party Touchstone's arguments also ask this Court to provide more specifics than it did in *Facebook v. Superior Court (Hunter)*, 4 Cal.5th, at 1254, fn.8, where the Court made general reference to the duty of a California prosecutor to provide exculpatory evidence: "Of course defendants are independently entitled to general criminal discovery, including exculpatory evidence, from the prosecution under Penal Code § 1054.1." The Court then continued by further explaining that "...the prosecution is obligated to share with the defense *any* material exculpatory evidence in its possession–including that which is potentially exculpatory [citation omitted]." *Ibid*. These observations and statements from the Court led to the explanation that in the above-referenced *Hunter* case "...consistent with its discovery obligations under state and federal law, the prosecution has apparently shared with defendants information relating to victim Rice's social media accounts. [citation omitted]" *Id.*, at fn.8.

Real Party Touchstone is seeking to prompt the logical next step in the discussion, from the criminal case defendant's viewpoint. Real Party Touchstone points out that the asymmetry left by the text of the SCA will, in given cases, leave the truth seeking process involved in criminal trials to the side unless the Court provides further guidance. A prosecutor may, for strategic and tactical reasons, limit his or her acquisition of public and private electronic communications related to a case. The defense, under *Facebook v.*

Superior Court (Hunter), arguably then either must contend that: (a) the prosecutor has a greater duty of investigation than he/she has undertaken; (b) subpoenas should issue to try to compel what may be a reluctant or uncooperative witness from providing electronic records; or (c) the trial court should provide the defense with a method to compel production of potentially exculpatory or impeaching material for dissemination, or at least *in camera* review, and dissemination to the defense. The ruling in *Facebook v. Superior Court (Hunter)(S235001)*, does not resolve the thorny questions asked by Touchstone. Nor does the Court address the question of the extent to which the asymmetry of access rights provided in the SCA can be remedied through a retooling of state law.

This litigation provides the platform for the discussion of these important issues which, given the pervasiveness of the use of electronic communications, are likely to arise again.

II. ARGUMENT AND AUTHORITIES

According to a March 2018 Pew Research Center report on social media use, 68% of individuals in the United States use Facebook, 73% use YouTube, 35% percent use Instagram, 27% Snapchat, 24% Twitter.[1] The same research report explains that this data analysis is different if one examines 'younger Americans,' those in the 18-24 year

[1] Smith and Andersan, "Social Media Use in 2018", Report of March 1, 2018, at www.pewinternet.org/2018/03/01/social-media-use-in-2018

range Snapchat [is there a percentage here], and around 80% of which visit Facebook. Pew reports that "...some 88% of 18-29 year olds indicate that they use any form of social media."[2]

At the same time, the increased pervasiveness of electronic communications of various kinds has resulted in a number of litigations at the federal and state level concerning criminal case investigations involving electronic communications, privacy issues, and the reach of state laws and procedures related to electronic communications covered in various ways by federal legislation. For an example of a local discussion, see "Electronic Communications: Obtaining E-mail, Voice Mail, and Text Messages," Alameda County District Attorney's Office, Point of View, Winter 2012 (available online). It has been pointed out that the Stored Communications Act is a statutory scheme that applies to a rapidly evolving area of endeavor that is essentially pervasive. More than once, it has been pointed out that when the Act was being contemplated in 1986, it had been contemplated, for example, that an e-mail provider might print an e-mail to deliver it via the post office. S.Rep. 99-541, at 8. This primitive view of the likely future of the internet was outdated even by the time the SCA was enacted. It makes sense then that more than a decade ago, one of the preeminent authorities on electronic media and the law, Professor Orin Kerr, wrote a law review article in 2004 entitled: "A User's Guide to the Stored Communications Act, and a Legislator's Guide to

[2] Smith and Andersan, *supra*.

Amending It." During the existence of the Act, a wide variety of decisions on aspects of the Act have been issued, several dealing with the reach of the Act–as in whether transmissions, such as e-mails, that had arrived at their destination and had been open are subject to the Act. See, for example, *Teofel v. Farey-Jones* (9th Cir., 2004) 359 F.3d 1066, addressing the legal issues raised in a federal lawsuit where a subpoena was issued to obtain production of all copies of e-mails sent or received by individuals at a company, discussing in passing what classes of e-mails are covered by the SCA, and whether the coverage applied to e-mails that received on an ISP's server after delivery, and whether even these stored backup communications are covered by the SCA.

At this point, it appears that the vast majority of cases that have interpreted and applied the SCA are Federal cases that have largely interpreted the reach of the Act under Federal law. This case presents this Court with an opportunity to join those courts that have attempted to provide clarity in the interpretation of the application of the SCA in California criminal cases. As the Ninth Circuit observed some time ago when addressing the intersection between the Federal Wiretap Act and the SCA, that intersection "...is a complex, often convoluted, area of the law." *U.S. v. Smith* (9th Cir., 1998) 155 F.3d 1051, at 1055-56. While this is not a wiretap case, it does involve the complexity and difficulty of juxtaposing a federal statutory scheme with rights provided under California law, as well as under both the State and Federal Constitutions.

This case represents another incremental step in this Court's involvement in setting forth clear procedures concerning accessing electronic communications.

While the issues and various interests, including claims of the predominance of one sovereign over others in the regulation of stored electronic communications, the reality is that in criminal cases, as demonstrated by the Facebook litigations that have come to the attention of this Court, including this one, there are legitimate interests in obtaining, for investigation and litigation purposes, electronic information.

What this Court ruled in *Facebook v. Superior Court (Hunter)(S235001)* paves the way, logically, for the consideration of Touchstone's arguments–including that: pretrial orders directing witnesses to produce records of electronic communications may or may not be effective, particularly if they are being directed to produce certain stored electronic communications that may have been dissipated or rendered inaccessible to a user by the witness-user. As Touchstone also suggests and argues in his briefing, discovery orders addressed to individual witnesses for Facebook or other e-business records may or may not be effective, depending on individual factual circumstances. The State does, as evidenced in the *Hunter* litigation, often have access to electronic records to which the defense will never have access, unless the Court finds merit to the argument offered by Touchstone that he and other litigants "...should be afforded the same subpoena power and court-order opportunities granted to governmental entities..." under the SCA. (Touchstone's brief on the merits, beginning at page 35.)

A. Real Party Touchstone Correctly Asks this Court to Address the Extent to Which Asymmetry in Access to Records Available to the Prosecution Through the SCA is Tolerable, Particularly Where the Available Information Will Affect the Accused's Right to Present a Defense, And/or Ability to Use Available Impeaching Evidence and Information.

As demonstration by the Court's extensive opinion in *Facebook v. Superior Court (Hunter)*, *supra*, thorny issues are presented to state courts by the existence of a Federal statutory scheme that could be read to truncate, and arguably to compromise, the accused's 'meaningful opportunity to present a complete defense' on the one hand, and due process right to obtain exculpatory and/or impeaching evidence otherwise potentially (or actually) available to the state on the other. In this *Touchstone* litigation, the Court is presented with a focused discussion of the dilemmas facing the accused in a criminal case in California where electronic communications covered by the SCA are at issue–and frames equally difficult questions that will be presented to California courts in the absence of guidance from this Court on how to address the issues.

There is little doubt that constitutional rights of several kinds are at issue here–though some of the discussion to date has focused mainly on the accused's due process right of access to impeaching or exculpatory evidence. There are, as further demonstrated by the extensive discussion in *Facebook v. Superior Court (Hunter) (S235001)* other interests to be considered. The Fourteenth Amendment right to due process and the Sixth Amendment right to a fair trial both protect the accused's right to a defined breadth of fairness in the process of the litigation of a criminal case. The

accused is given a constitutionally rooted opportunity to present what the United States Supreme Court has called 'a complete defense.'

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses 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, *relying in part on Crane v. Kentucky* (1986) 476 U.S. 683, 690. As the Court put it in *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, due process in a criminal case is "...in essence, the right to a fair opportunity to defend against the State's accusations." Elsewhere, the Supreme Court has explained that: "A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland v. Washington* (1984) 466 U.S. 668, 685.

In the aftermath of the enactment of Penal Code §§ 1054, et seq.–California's reciprocal discovery statutory scheme that applies in criminal cases–this Court reviewed the scheme against attacks on its constitutional validity. In upholding the requirement of reciprocal discovery, the Court explained that: "Comparing the obligations of the defense under section 1054.3 [citations omitted] with those of the prosecutor under section 1054.1 [citations omitted], it is clear that the two provisions closely track each other, with any imbalance favoring the defendant as required by reciprocity under the Due Process Clause." *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 373-74, *relying in*

part on Wardius v. Oregon (1973) 412 U.S. 470, 474-75. In the *Izazaga* case, among other things, the court explained: "[r]eciprocity requires a fair trade...." *Id.*, at 377-78. With respect to exculpatory evidence, the court explained that "...the new discovery chapter contemplates disclosure *outside* the statutory discovery scheme pursuant to constitutional requirements as enunciated in [*Brady v. Maryland* (1963) 373 U.S. 83] and its progeny." *Id.*, at 378-79.

The United States Supreme Court, when reviewing the results of a criminal prosecution that allegedly went askew because of failures to provide exculpatory, including impeaching, evidence explained that the inquiry when assessing the implications of withheld impeaching or exculpatory evidence by a prosecutor during the course of a criminal trial is a due process based inquiry centered on "whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley* (1995) 514 U.S. 419, 435.

The preservation of the "fundamental fairness of trials" requires that information that may be covered by an evidentiary privilege may nonetheless need to be provided–for example, sensitive information in a state agency's child abuse investigation file. *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56-57. The mechanistic application of an evidence rule–for example, a hearsay rule–that causes exclusion of evidence critical to a defendant's case can "defeat the ends of justice" and violate due process. *Chambers v. Mississippi* (1973) 410 U.S. 284, 302. See also, *Green v. Georgia* (1979) 442 U.S. 95,

97. As pointed out in *Holmes v. South Carolina, supra*, the imposition of asymmetrical evidentiary rules must give way to the right of due process. *Holmes, supra,* 547 U.S., at 331. Due process also protects the right to cross-examine. *Chambers v. Mississippi, supra*, 410 U.S., at 295.

It has already been argued in this case that in *United States v. Nixon* (1974) 418 U.S. 683, 709, the United States Supreme Court has explained that "the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts...to ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." *Accord. Taylor v. Illinois* (1988) 484 U.S. 400, 409. Compulsory process means that the accused in a criminal case must have "...the right to put before a jury evidence that might influence the determination of guilt." *Ritchie, supra*, 480 U.S., at 56.

The difficulty that arises in a situation in which the SCA is interpreted to provide the State with the prerogative to use the provisions of the SCA to investigate and evaluate its case, but then deprives the accused of the ability to prepare and present his defense by obtaining similar information, is that the defense is dependent on the prosecution's interpretation of its duty to timely provide exculpatory or impeaching evidence. The State may decide, for tactical reasons, to forgo obtaining stored private electronic communications that have not yet graduated to the *Facebook v. Superior*

Court (Hunter) 'public' category. Touchstone persuasively argues that much of the media information in a case like his obtained by a prosecutor would meet the 'actual or constructive possession' rule in effect and in use in California. *In re Steele* (2004) 32 Cal.3d 682, 697.

To depend on the notion that a prosecutor will feel compelled to investigate the case in a particular way and thus to obtain the kind of potentially impeaching or exculpatory information that would be subject to disclosure under California case law, or under the reciprocal discovery statute, is to use speculation to manage the fairness of a proceeding. Prosecutors may make tactical decisions about whether to use the SCA to seek witness-related communications and information, and this Court has already ruled that prosecutors do not have unlimited obligations to seek information that may be useable by the defense–rather, they have an obligation not to suppress evidence that is required to be provided under *Brady, supra*, and to provide exculpatory evidence unde the statutory mandate of Penal Code section 1654.1(e). See, generally, *People v. Mena* (2012) 54 Cal.4th 146, 160. Touchstone is correct that this Court is well situated to define a procedure to be followed in instances in which the trial court is concerned that the facts support the need for the acquisition and review of specific electronic evidence that fits under the SCA.

Admittedly, as has been argued in this case under *People v. Salazar* (2005) 35 Cal.3d 1031, 1042; and also under *In re Brown* (1998) 17 Cal.4th 873, 882, a California

prosecutor has duties to learn of evidence in the possession of investigating agencies, as well as to turn over favorable evidence that is either exculpatory or impeaching. As just pointed out, however, the obligation of disclosure is not an affirmative duty of acquisition in all instances. It is in light of this state of affairs that the Court may wish to consider that there is some analogy–albeit one that is not completely overlapping–with the way that Federal courts have, in a number of instances, dealt with the asymmetry created by the Federal use immunity statute, 18 U.S.C. § 6002.

That statute on its face grants a broad discretion to a Federal prosecutor to grant use of immunity to a witness–often to procure information or evidence for the Government. The same statute, however, does not provide the defense with the same opportunity to seek a grant of judicial immunity. Faced with repeated claims of the unfairness visited on proceedings in which the defense could make a showing that a witness was likely to have compelling defense evidence assuming that specific predicates were established, a minority of the Federal circuits have found that where the right to a fair trial is at issue, while recognizing the doctrine of separation of powers, it is appropriate to interpret the Fifth and Sixth Amendments as combining to provide a basis from a Federal District Court for an order commanding the Government to provide a given witness use immunity. And assuming the appropriate predicate, the government's refusal to grant immunity may amount, on review, to a violation of due process, and under some circumstances to prosecutorial misconduct warranting reversal. *U.S. v.*

Straub (9th Cir., 2008) 538 F.3d 1147, 1157-59. The State of New Mexico has also created a rule, judicially, permitting trial courts to grant use immunity. *State v. Bellanger* (N.M. 2009) 210 P.3d 783, 792-93. These are examples of courts proiding the means of avoiding unfair trials.

A greater structural infringement on what is 'traditionally' governmental prerogative is involved when courts rule that they can, under certain circumstances, force the Executive Branch to take action to foreclose a possible future prosecution than where a court directs a prosecutor to take action to seek information that a trial court would likely cause to be disseminated to both parties. Both do involved orders directed at the executive branch. What Toucstone proposes would not derail a prosecution. Rather, alowing, given compelling facts, a trial court to direct the issuance of a search warrant would tend to diminish the potential of an unfair trial.

There is some precedent for the creation, through court ruling, of a procedure to enhance the fairness of the trial process.

B. In Addressing the Issues in this Case, this Court Should Address a Factually Established and Untenable Asymmetry.

Little of the last case in which the Court was asked to consider issues involving the SCA–*Facebook v. Superior Court (Hunter)*–was devoted to an analysis of the extent of the asymmetry in the ability of the two parties in a criminal case–the prosecution and the defense–to obtain access to stored electronic data.

Facebook, as evidenced by the caption of this case, is a company that has responded to government requests for its stored data. Facebook maintains a publicly available description of its responses to government data requests–though CACJ, as is true of any defendant in a case, is hard pressed to attest to the reliability of the information that Facebook publishes.

According to Facebook's publicly available "transparency" page that is said to describe Facebook's responses to government requests in the United States, the company claims that between January and the end of June 2017, it was served with 32,716 requests for its records from law enforcement officers and in 85% of those events, it produced 'some data.'[3] The figure represents a nationwide figure applicable to the United States. It includes 7,632 subpoenas for 13,622 user accounts, and 19,393 search warrants focused on 30,786 users or accounts. Other categories of 'legal process' is accounted for by Facebook in its public statement.

For July through December of 2017, Facebook describes having been served with a total of 32,742 total requests involving 53,625 users or accounts, complying with 85% of the requests by producing at least some data.[4]

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[3] From https://transparency.facebook.com/government-data-requests/country/us/jan-jun2017.

[4] https://transparency.facebook.com/government-data-request/country/us/jul-dec-2017. CACJ notes that other media companies involved in *Touchstone* and *Hunter* do not report their compliance with law enforcement as publicly as does Facebook.

Unfortunately, other companies involved in this case and in the *Hunter* case do not purport to describe the extent of their interaction with law enforcement agencies in as fulsome a way as does Facebook. The point here is that electronic media companies resopnd to thousands of law enforcement efforts to obtain media information.

C. Touchstone Is Correct That in the Absence of Decisive Action from this Court, with the Exception of the Prosecution, None of the Potential Custodians or Proprietors of Stored Electronic Evidence Is in a Legally Defined Category That Requires Timely Compliance with Subpoenas or Court Orders for Production of Evidence.

While the Court's ruling in *Facebook v. Superior Court (Hunter)* illuminates and provides useful analysis of how the provisions of the SCA allows a way of categorizing which communications are subject to a subpoena, the *Hunter* ruling leaves a great deal of potentially informative and exculpatory (including impeaching) evidence beyond the access of the defendant in a criminal case. As demonstrated by the ruling of the First Appellate District in *IAR Systems Software, Inc. v. Superior Court* (2017) 12 Cal.App.5th 503, *modified at* (2017) 2017 Cal.App. LEXIS 600, it is difficult to find an entity other than a prosecutor or an investigating law enforcement officer or agency intertwined in the investigation of a criminal case that would be subject to California's interpretation of the reach of *Brady*.

In arguing this point, CACJ does not contend that the aforementioned *IAR Systems Software* necessarily recognizes recent changes in law that may have been affected by the retooling of prosecutorial ethical obligations of disclosure. But as the

First Appellate District mentions in *IAR Systems Software*, there is a fact specific inquiry that accompanies the analysis of the extent to which a particular person or entity is in the '*Brady* zone.' The *IAR Systems Software* ruling relies in part on *Kyles v. Whitley, supra*, 514 U.S., at 438, for the proposition that it is really the prosecutors who are on the hook to comply with *Brady* duties, and this Court's ruling in *In re Brown* (1998) 17 Cal.4th 873, at 881-82, does include the prosecutor's obligations to essentially be "...responsible for those persons who are directly assisting him in bringing an accused to justice...." In *IAR Systems Software*, after an extensive analysis, the Appellate Court concluded that a law firm could not, under the circumstances, be considered sufficiently within the '*Brady* zone' framework to be the subject of a *Brady* disclosure obligation, notwithstanding some level of cooperation between a law office, law enforcement investigators, and the Office of the District Attorney.

While it is admittedly not directly on point, the analysis in *IAR Systems Software* is sufficiently extensive to at least provide guidance on the point made by Touchstone–which is that few 'players' in a criminal case scenario, including the witnesses who might have reason to at least be in constructive possession, if not actual possession, of evidence of electronic communications pertinent to a case, have limited duties of disclosure or of preservation of evidence. And they can argue, like the law firm in *IAR Systems Software*, that their relationship with a prosecution is sufficiently

attenuated and devoid of common interests to consider them duty bound to seek to protect the due process rights of the accused–or to comply with due process, generally.

D. If the Court Is Not Inclined to Provide a Mechanism to Compel the Issuance of State Process or Warrants to Access Information Arguably Subject to the SCA, Due Process Based Limitations on the Presentation of Certain Categories of Evidence by the State under a Due Process Analysis May Avoid Miscarriages of Justice and Unfairness.

While the defense has, for some time now, sought to ensure greater clarity in criminal case discovery law, case authority continues to arguably provide means of escape for the prosecution from the contention that it must produce certain categories of evidence. In the aftermath of the enactment of the reciprocal discovery law in California, this Court explained, as it had in the past, that "...the prosecution has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense. [citations omitted]" *In re Littlefield* (1993) 5 Cal.4th 122, at 135-36, citing *In re Koehne* (1960) 50 Cal.2d 757, 759. At the same time, however, the Court has also followed in the wake of the United States Supreme Court in recognizing that the *Brady, supra*, obligation has widened since the decision in *Koehne*, and that today, in looking at what fit the definition of material exculpatory evidence, this Court has explained that: "...Materiality includes consideration of the effect of a non-disclosure on defense investigations and trial strategies...." *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132-33; *accord People v. Verdugo* (2010) 50 Cal.4th 263, 279-80.

What of the prosecutor who, for tactical and strategic reasons, understanding the effect and reach of a decision like *Facebook v. Superior Court (Hunter),* chooses to truncate or curtail the use of process or warrant to seek information that is arguably excised from the defense subpoena access rubric of *Facebook v. Superior Court (Hunter)*? Touchstone proposes that the effective remedy is for the defense to bring the matter to the attention of the trial court in such a way as to result in a court order directed at the State to seek a warrant, or a subpoena, commanding the production of material that the defense is unable to access.

As is demonstrated, however, by a series of cases in which questions about due process violations as a result of lack of access to evidence that either is or was in the state's possession at some point, no particular useful safe harbor or maintenance of the integrity of the process is gained by drawing some kind of a parallel between a prosecutor's failure to use good faith in seeking SCA media information as distinguished from linking some penalty to the prosecution's case for a show of bad faith in the prosecution's failure to seek to access potentially exculpatory evidence that later becomes inaccessible. The difficulty of seeking to enforce remedies under *Arizona v. Youngblood* (1988) 488 U.S. 51, and *California v. Trombetta* (1984) 467 U.S. 479, has amply been demonstrated in some of this Court's opinions. This has proven true even in capital cases. See, for example, *People v. Lucas* (2014) 60 Cal.4th 153, 222; also *People v. Carrasco* (2014) 59 Cal.4th 924, 890.

Clearly, the Court could, as encouraged by Touchstone, spell out concerns about the asymmetry created for a California criminal court defendant by the SCA, and rule that upon a suitable factual showing, a defendant should be able to obtain a due process based remedy where the State has neither taken steps to obtain potentially exculpatory (also potentially impeaching) evidence from an electronic storage business covered by the SCA, and there is a factual predicate demonstrating the likelihood that the issuance of a timely warrant or subpoena would have caused preservation and production of the useful information.

Touchstone's analysis, however, goes one step further by seeking a directive from this Court that would permit trial courts to order prosecutors, in factually appropriate situations, to seek a warrant commanding the production of pertinent material. Whether the Court dignifies Touchstone's arguments or suggested remedies, or otherwise recognizes the potential for due process violations where prosecutors fail to take reasonable action to seek preservation and production of potentially exculpatory or impeaching information, Touchstone has made a persuasive argument that the Court does need to move past its ruling in *Facebook v. Superior Court (Hunter)* at this point.

CONCLUSION

For all of the reasons urged on it by Real Party Touchstone, CACJ urges this Court to expand on its opinion in *People v. Facebook (Hunter)* and to provide a means to avoid the prejudicial impact of the asymmetry caused by the SCA by providing accuseds

in criminal cases a remedy where the prosecution has apparently failed to procure potentially exculpatory or impeaching stored electronic media information from an entity whose activities are covered by the SCA.

Dated: July 23, 2018

Respectfully submitted,

Stephen K Dunkle, Chair
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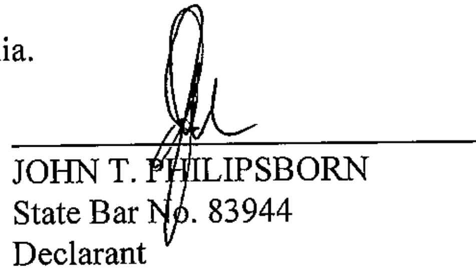
RULE 8.204 (c)(1) CERTIFICATION

I, John T. Philipsborn, declare as follows:

I represent *Amicus Curiae* CACJ on the matter pending in this court. This supplemental brief was prepared in WordPerfect X7, and according to that program's word count, it contains 5,251 words.

I declare under penalty of perjury the above is true and correct. Executed on July 23, 2018, in San Francisco, California.



JOHN T. PHILIPSBORN
State Bar No. 83944
Declarant

PROOF OF SERVICE

I, Melissa Stern, declare that:

I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within documents entitled:

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE ON BEHALF OF REAL PARTY IN INTEREST LANCE TOUCHSTONE, SUBMITTED PURSUANT TO THE COURT'S ORDERS PERMITTING SUPPLEMENTAL BRIEFING

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;

( ) By electronically transmitting a true copy thereof;

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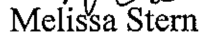
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 23rd day of July, 2018, at San Francisco, California.

Signed: 
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