APPENDIX

APPENDIX A

Filed: 2/13/2020

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FACEBOOK, INC. et al., Petitioners, v. THE SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; DERRICK D. HUNTER et al., Real Parties in Interest.	A157143 (San Francisco County Super. Ct. Nos. 13035658/13035657)

Real parties in interest Derrick D. Hunter and Lee Sullivan (defendants) were indicted on murder, weapons, and gang-related charges stemming from a drive-by shooting. Each defendant served a subpoena duces tecum on one or more of the petitioners, social media providers Facebook, Inc., Instagram, LLC, and Twitter, Inc. (collectively, providers), seeking

both public and private communications from the murder victim's and a prosecution witness's accounts. Providers, none of whom are parties to the underlying criminal case, repeatedly moved to quash the subpoenas on the ground that the federal Stored Communications Act (Act; 18 U.S.C. § 2701 et seq.) barred them from disclosing the communications without user consent. In the challenged order, the trial court concluded that the Act must yield to an accused's due process and confrontation rights, denied the motions to quash, and ordered providers to produce the victim's and witness's private communications for in camera review. Providers seek a writ of mandate directing respondent court to quash the subpoenas.

We conclude the trial court abused its discretion. The record does not support the requisite finding of good cause for production of the private communications for in camera review. Accordingly, we grant the petition and direct the trial court to quash the subpoenas.

BACKGROUND

A.

Subject to limited exceptions, the Act prohibits electronic communication service providers from "knowingly divulg[ing]" the contents of a user communication. (18 U.S.C. § 2702(a)(1)-(2), (b)-(c); accord, *Facebook, Inc. v. Superior Court* (*Hunter*) (2018) 4 Cal.5th 1245, 1262, 1264-1265 (*Hunter II*).) Disclosure is authorized if it is made "with the lawful consent of the originator or an addressee or intended recipient of such communication." (18 U.S.C. § 2702(b)(3); *Hunter II, supra*, at p. 1265.) Other ex-

ceptions are provided for disclosures made to government entities pursuant to a warrant, court order, or a subpoena. (18 U.S.C. § 2703(a)-(c).) It is undisputed that the Act prohibits the providers from producing private communications to a non-governmental entity without the user's consent. (*Hunter II, supra*, at pp. 1250, 1290; 18 U.S.C. § 2702(a)(1)-(2), (b)(3).) However, the Act allows a provider to divulge information about a subscriber, other than the contents of the communications, "to any person other than a governmental entity." (18 U.S.C. § 2702(c)(6).)

The Act "protects individuals' privacy and proprietary interests [and] reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility." (*Theofel v. Farey-Jones* (9th Cir. 2004) 359 F.3d 1066, 1072–1073.) Congress also sought to encourage the use and development of new technologies by "significantly limit[ing] the potential onus on providers by establishing a scheme under which a provider is effectively prohibited from complying with a subpoena issued by a nongovernmental entity—except in specified circumstances." (*Hunter II*, *supra*, 4 Cal.5th at p. 1290, italics omitted.)

B.

In June 2013, Jaquan Rice, Jr., was killed and B.K., a minor, was seriously injured in a drive-by shooting. The car used in the shooting was identified by surveillance video. The video shows the two shooters in the rear passenger seats. The driver of the vehicle was not visible on the video. Witnesses

provided inconsistent descriptions of the driver's gender.

Within minutes, police stopped prosecution witness Renesha Lee driving the car used during the shooting. She was its sole occupant. Lee and Sullivan had been dating at that time. When interviewed by police that day, Lee initially "just made up names and stuff." Eventually she told the police that Hunter and his younger brother were among those who had borrowed her car. Lee did not mention Sullivan's name until sometime later when she " 'told them the truth' "—that Sullivan had been involved along with Hunter and his brother. Although Lee told police she had not been in the car at the time of the shooting, one witness identified her as the driver.

The police obtained search warrants directed at Rice's Facebook and Instagram accounts.[1] The prosecution later shared with the defense information obtained from some (but possibly not all) of Rice's social media accounts. The police did not seek search warrants as to Lee.

When questioned by police, Hunter's 14-year-old brother confessed to the shooting. He told police he shot Rice because Rice had repeatedly threatened him, both in person and in social media postings on Facebook and Instagram. Rice also had "tagged" the boy in a video on Instagram that depicted guns.

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[1] Providers asked us to take judicial notice of the warrants. We deny the request because providers have not shown the warrants were before the trial court. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325 [reviewing courts need not take judicial notice of evidence not before trial court].)

Hunter's brother was ultimately tried in juvenile court.

In presenting the case against defendants to the grand jury, the prosecution contended defendants and Hunter's brother were members of Big Block, a criminal street gang, and that Rice was killed because he was a member of a rival gang, West Mob, and because Rice had publicly threatened Hunter's brother on social media. Defendants were charged with the murder of Rice and the attempted murder of B.K. (Pen. Code, §§ 187, 664.)[2]

C.

Before trial, in 2014, Sullivan's counsel served subpoenas duces tecum (§ 1326, subd. (b)) on Facebook, Instagram, and Twitter, seeking records from their social media accounts. As to Facebook and Instagram, the subpoenas sought "[a]ny and all public and private content," including user information, associated email addresses, photographs, videos, private messages, activity logs, posts, location data, comments, and deleted information for accounts belonging to Rice and to Lee. Defendants' subpoenas to Twitter sought similar information as to Lee only. To authenticate the requested records, Sullivan's subpoenas also sought the identity of each providers' custodian of records.

D.

Providers moved to quash defendants' subpoenas, asserting the Act (18 U.S.C. § 2702(a)(1)-(2))

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[2] Undesignated statutory references are to the Penal Code.

bars them from disclosing any communication (whether configured as public or private) and that no exceptions applied. Defendants implicitly accepted providers' conclusion that the Act barred providers from complying with the subpoenas but nonetheless argued compliance was required because the Act violated their rights under the Fifth and Sixth Amendments to the United States Constitution. Sullivan pointed out Lee was the only witness who implicated him in the shootings. The trial court (Honorable Bruce E. Chan) accepted the defendants' constitutional argument, denied providers' motions to quash, and ordered providers to produce the requested communications for in camera review.

Providers sought, and this Division issued, a stay of that order. A different panel of this court concluded the Act barred enforcement of defendants' subpoenas and rejected defendants' arguments that the Act, as applied *pretrial*, violated their rights under the Fifth and Sixth Amendments to the federal Constitution. (*Facebook, Inc. v. Superior Court* (*Hunter*) (2015) 240 Cal.App.4th 203, 215-221, judg. vacated and cause remanded by *Hunter II, supra,* 4 Cal.5th at p. 1291.)

Our Supreme Court granted defendants' petition for review. In *Hunter II, supra,* 4 Cal.5th 1245, the court concluded the Act's lawful consent exception (18 U.S.C. § 2702(b)(3)) allowed providers to disclose communications configured by a user to be public. subpoenas were unenforceable under the Act "with respect to communications addressed to specific persons, and other communications that were and have remained configured by the registered user to be restricted." (*Id*. at p. 1250.) Because production of

public communications could obviate the need for additional communications, and because the trial court did not develop an adequate record on alternative ways to obtain communications, the *Hunter II* court declined to address the parties' constitutional arguments and remanded the matter to the trial court. (*Id*. at pp. 1250-1251, 1275-1276.)

In particular, the *Hunter II* court observed: "[I]n the lower court proceedings the parties did not focus on the public/private configuration distinction. The trial court made no determination whether any communication sought by defendants was configured to be public (that is, with regard to the communications before us, one as to which the social media user placed no restriction on who might access it) or, if initially configured as public, was subsequently reconfigured as restricted or deleted. *Nor is it clear that the trial court made a sufficient effort 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*. *Consequently, at this point it is not apparent that the court had sufficient information by which to assess defendants' need for disclosure from providers when it denied the motions to quash and allowed discovery on a novel constitutional theory*. In any event, because the record is undeveloped, we do not know whether any sought communication falls into either the public or restricted category—or if any initially public post was thereafter reconfigured as restricted or deleted. [¶] In light of our interpretation of the Act, it is possible that the trial court on remand might find that providers are obligated to comply with the subpoenas at least in part. Accord-

ingly, although we cannot know how significant any sought communication might be in relation to the defense, it is possible that any resulting disclosure may be sufficient to satisfy defendants' interest in obtaining adequate pretrial access to additional electronic communications that are needed for their defense. For these reasons, we will not reach or resolve defendants' constitutional claims at this juncture." (*Hunter II, supra*, 4 Cal.5th at pp. 1275-1276, italics added, fn. omitted.)

E.

On remand, the trial court heard renewed motions to quash the pretrial subpoenas. Following *Hunter II*, the Honorable Tracie Brown ruled that the Act prohibited pretrial disclosure of private communications. Judge Brown also ordered Twitter to produce public content to the clerk under seal and scheduled an evidentiary hearing to address Facebook's and Instagram's argument that producing public content would be unduly burdensome.

In reaching these conclusions, Judge Brown rejected the providers' argument that defendants could not subpoena public content from third parties unless there was no other way to obtain it. She also rejected providers' argument that the court could order the prosecutor to issue a search warrant: "[A] warrant can only issue when there's probable cause that evidence of a crime can be found in the location to be searched which is plainly not the situation here." However, Judge Brown made clear that the viability of alternatives to the providers' production of *private* content was to be considered at trial.

F.

In 2019, after Judge Brown was elevated to the court of appeal, the case was assigned to the Honorable Charles Crompton for trial. Providers renewed their motions to quash the subpoenas to the extent defendants continued to seek disclosure of restricted or private content from Rice's or Lee's accounts. Sullivan opposed the motions, contending that, now that the case was in a trial posture, his federal due process rights prevailed over users' privacy rights. Sullivan also argued the safe harbor provision (18 U.S.C. § 2707(e)(1)) gave providers a complete defense to any liability under the Act.[3]

Sullivan filed a declaration under seal that provided further detail on the defense theory—that restricted communications were needed to demonstrate Lee's bias stemming from her jealousy over Sullivan's involvement with other women and/or a motive to protect herself from criminal liability for the shootings. Sullivan provided examples of postings on what he claimed to be Lee's Twitter account, such as a photograph of Lee holding a gun and making specific threats. Providers countered that defendants' constitutional arguments were not ripe because any restricted information from Lee's account could be obtained from Lee herself, either voluntarily or as compelled by the trial court, or from the recipients of her communications.

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[3] "[G]ood faith reliance on . . . [¶] a court warrant or order . . . [¶] is a complete defense to any civil or criminal action brought under this chapter." (18 U.S.C. § 2707(e)(1); accord, *McCready v. eBay, Inc.* (7th Cir. 2006) 453 F.3d 882, 892.)

G.

At hearings in March and May 2019, Judge Crompton indicated he was considering the matter as if it involved *trial* subpoenas (even though new subpoenas had not been served). By May 1, providers had produced all responsive public communications to the court, but they had not yet been reviewed by the trial court or by defense counsel. Providers withdrew their argument that producing private communications would be unduly burdensome.

Judge Crompton denied the providers' motions to quash and ordered them to produce responsive private communications to the court for in camera review (the May 1 order). He explained that defendants' Sixth Amendment and due process rights were "very important" and that he was unaware of any viable alternatives "for obtaining this information in the form and the manner, and [with] the authenticity guarantees that the defendants would need it." He added, "to the extent there's any weighing that can be done with the withdrawal of the burden argument, I think that these rights are important enough in this particular case, as I've said, given the relevance of electronic messages that's been raised in this particular case, with these particular charges and these particular defendants, it would certainly outweigh any . . . burden [incurred by providers]."

H.

Providers filed a petition for writ of mandate in this court and sought a stay of the production order. We initially stayed the production order pending consideration of the petition. After reviewing the briefs we requested, we dissolved the stay and issued

an order to show cause why the relief requested in the petition should not be granted. (See *Pugliese v. Superior Court* (2003) 146 Cal.App.4th 1444, 1448; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274.) Defendants filed a return to the order to show cause and providers filed a reply. Providers also stated they would not produce private communications, as ordered by the trial court, because they believed compliance would violate the Act.

DISCUSSION

Defendants argue the trial court's May 1 order is correct because the Act violates the federal Constitution to the extent it precludes a criminal defendant from obtaining impeachment evidence or other information material to the defense. We need not reach the constitutional arguments. We agree with providers that the May 1 order should be vacated "for the same reasons that the [*Hunter II* court] remanded this case in 2018." Defendants have not yet presented a ripe conflict between the federal Constitution and the Act. (See *Hunter II, supra*, 4 Cal.5th at p. 1275, fn. 31 [" '[W]e do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us' "].) Because it did not adequately consider the appropriate factors, including alternatives that would avoid a constitutional conflict, the trial court abused its discretion when it found good cause to issue the May 1 order. (See *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186 [abuse of discretion standard applies to discovery orders].)

A.

In *Hunter II,* our Supreme Court declined to address the same constitutional arguments at issue here (albeit raised pretrial) because the conflict potentially could be obviated by providers' production of public communications or by obtaining private communications through alternative means. (*Hunter II, supra*, 4 Cal.5th at pp. 1275-1276.)

In a footnote at the very end of the opinion, immediately after our Supreme Court concluded the providers' undue burden argument was best addressed on remand, *Hunter II* states, "The trial court on remand *might also consider* two additional and somewhat related legal issues . . . (1) whether a trial court may compel a witness to consent to disclosure by a provider, subject to in camera review and any appropriate protective or limiting conditions; and (2) whether a trial court may compel the prosecution to issue a search warrant under the Act, on behalf of a defendant." (*Hunter II, supra*, 4 Cal.5th at p. 1291, fn. 47, italics added.)

Defendants attempt to dismiss our Supreme Court's concerns altogether. Specifically, they argue consideration of alternative sources became a moot issue when providers waived their argument that production of private content would be unduly burdensome. Defendants are wrong. *Hunter II* and other authorities make clear that these factors are part of the defendants' good cause showing. (See, e.g., *Hunter II, supra*, 4 Cal.5th at pp. 1275, 1290, 1291, fn. 47.)

When a criminal defendant requests document discovery from a third party, the third party re-

sponds by delivering the materials to the clerk of the court. (Pen. Code, § 1326, subds. (b)-(c); Evid. Code § 1560, subd. (b); *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074.) "[T]he court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents." (Pen. Code, § 1326, subd. (c).) "Th[ese] restriction[s] maintain[] the court's control over the discovery process, for if the third party 'objects to disclosure of the information sought, the party seeking the information must make a plausible justification or a good cause showing of need therefor.' " (*Kling, supra,* 50 Cal.4th at pp. 1074-1075.) "Of course, any third party or entity—including a social media provider—may defend against a criminal subpoena by establishing that, for example, *the proponents can obtain the same information by other means, or* that the burden on the third party is not justified under the circumstances." (*Hunter II, supra,* 4 Cal.5th at p. 1290, italics added.)

To support the latter proposition, our high court cited *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1134 (*City of Alhambra*), which discusses factors a trial court must consider and balance when deciding whether a defendant may obtain discovery of police reports that might lead to third party culpability evidence. (*Id.* at p. 1134.) "Specifically, the court should review (1) whether the material requested is adequately described, (2) whether the requested material is reasonably available to the governmental entity from which it is sought (*and not readily available to the defendant from other sources*), (3) whether production of the records containing the requested information would violate (i) *third party confidentiality or privacy rights* or

(ii) any protected governmental interest, (4) whether the defendant has acted in a timely manner, (5) whether the time required to produce the requested information will necessitate an unreasonable delay of defendant's trial, (6) whether the production of the records containing the requested information would place an unreasonable burden on the governmental entity involved and (7) whether the defendant has shown a sufficient plausible justification for the information sought." (*Ibid*., italics added and internal citations omitted; cf. *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 809-814 [describing similar factors to be balanced when trial court determines whether accused's due process right overcomes immunity created by state newsperson's shield law].)

Accordingly, the trial court should have considered these factors, to the extent they are relevant, before finding good cause.

B.

Turning to the factors, we conclude that the trial court did not adequately explore them, particularly options for obtaining materials from other sources, prior to issuing its order. Thus, the trial court abused its discretion.

Judge Crompton was principally focused on defendants' justification for seeking the private communications. Defendants did make some attempt to respond to the *Hunter II* court's record development concerns—by filing a sealed declaration from Sullivan's counsel. The sealed declaration sufficiently identifies at least one possible direct message (purportedly originating from Lee) potentially relevant to show her bias. (See Evid. Code, § 780.) Thus, the

first (adequate description of material) and final (plausible justification for request) factors weigh in favor of the trial court's ruling.

With respect to the second factor (availability of material via alternative sources), Judge Crompton found, "for reasons that I think we've discussed before," defendants had no viable alternatives to obtain the private social media communications they sought. The record does not support this finding.

Preliminarily, providers maintain the "availability via alternative sources" factor is of elevated importance in this context—where the Act bars only one source of discovery in certain circumstances, rather than an entire category of evidence—under the principle of constitutional avoidance. They emphasize that if the documents an accused seeks are reasonably available elsewhere (or from the providers with user consent), the Act cannot possibly conflict with the accused's constitutional rights by prohibiting him from obtaining them. (See 18 U.S.C. § 2702(b)(3) [consent may be given by "an addressee or intended recipient of such communication"]; *Hunter II*, *supra*, 4 Cal.5th at pp. 1275, 1290; *Facebook, Inc. v. Superior Court* (2017) 15 Cal.App.5th 729, 745, fn. 6 (*Touchstone*), rev. granted Jan. 17, 2018, S245203 ["we fail to see how the [Act] impacts his right to present a complete defense where the evidence he seeks is available through the victim"].) We anticipate our high court will soon specify the precise role this factor plays in *Touchstone*. Here, however, we need not decide whether it serves as a threshold requirement or just one of several factors to be balanced because, even under a balancing test, we con-

clude the trial court gave this factor (and others) inadequate attention.

We are now concerned primarily with Lee's private communications, not Rice's. It was undisputed below that defendants already had access to at least some of Rice's private communications, which the People obtained via warrant. Yet, in these writ proceedings, defendants failed to address the need for further discovery (from providers) of Rice's private content, even after we sought supplemental briefing requesting support for the trial court's May 1 order. By failing to brief the issue, defendants concede providers' entitlement to relief as to Rice's accounts.

As to alternative ways to obtain private communications from Lee, we agree with the trial court that ordering the People to issue a search warrant was not a viable alternate route to obtain the identified private content. (See § 1525 ["A search warrant cannot be issued but upon probable cause, supported by affidavit"]; *Illinois v. Gates* (1983) 462 U.S. 213, 238 [probable cause means "a fair probability that contraband or evidence of a crime will be found in a particular place"].)

However, we reject Sullivan's assertion that it would be futile to try to obtain the communications from Lee because (Sullivan presumes) she will invoke the Fifth Amendment. This is speculation. When the trial court entered its May 1 order, Sullivan had shown no recent effort to subpoena Lee, and Lee had not taken the stand. Moreover, the trial court should have considered whether it could order Lee to consent to disclosure *by providers.* (See *Hunter II, supra,* 4 Cal.5th at p. 1291, fn. 47; *Touch-*

stone, supra, 15 Cal.App.5th at p. 746, rev. granted ["the trial court can order the account holder to consent to the disclosure by Facebook under section 2702(b)(3)"].)

Furthermore, Sullivan fails to explain why he cannot obtain either consent to the providers' production or the private communications themselves directly from the *recipient* of Lee's messages. In the sealed declaration, Sullivan's defense counsel identifies the recipient of a key communication by name. If a recipient consents to production of private content *by providers* (who have preserved the content of Lee's account), both the conflict with the Act and Sullivan's concerns regarding authentication and spoliation are avoided. (18 U.S.C. § 2702(b)(3); *Touchstone, supra,* 15 Cal.App.5th at p. 737, rev. granted ["under section 2702(b)(3), anyone can seek the contents of private electronic communications by obtaining the consent from the originator of the communication . . . , *or any addressee or intended recipient* of the communication" (italics added)].)

Finally, the trial court made no effort to evaluate Sullivan's continuing need for private content *after* the public content was produced. On May 1, neither the trial court, nor defense counsel, had reviewed the public in camera production. The sealed declaration from Sullivan's counsel was filed almost two months before the May 1 hearing. Thus, it was impossible for defense counsel to reassess Sullivan's need for Lee's private communications in light of what had already been produced. In other words, we do not know whether providers had already produced the key communication identified in the sealed declaration, or comparable communications, as part of their

public production. We question how the trial court could properly balance all the good cause factors, including Lee's privacy interests and the other policies served by the Act, without any review of what had already been produced.

In sum, the trial court did not follow our Supreme Court's instructions to consider all the relevant factors (*Hunter II, supra,* 4 Cal.5th at pp. 1275-1276, 1290) and, instead, appears to have focused solely on Sullivan's justification for discovery. The trial court abused its discretion in finding good cause to order providers to produce private content from Rice's and Lee's accounts for in camera review. We need not address the parties' additional arguments.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its May 1, 2019 order and to enter a new and different order granting providers' motion to quash.

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BURNS, J.

WE CONCUR:

_____
JONES, P. J.

_____
SIMONS, J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., and TWITTER, INC., Petitioners, v. **SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO,** Respondent; **DERRICK D. HUNTER and LEE SULLIVAN,** Real Parties in Interest.	**No.** California Court of Appeal, First Appellate District, Division 5 No. A157143 San Francisco Superior Court Nos. 13035657 and 13035658

PETITION FOR REVIEW[*]

Petition for Review After a Decision
By the Court of Appeal, First District, Division Five

Bicka Barlow
SBN 178723

[*] All typographical errors in the original filing are reprinted without alteration in this Appendix.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., and TWITTER, INC., Petitioners, v. **SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO,** Respondent; **DERRICK D. HUNTER and LEE SULLIVAN,** Real Parties in Interest.	**No.** California Court of Appeal, First Appellate District, Division 5 No. A157143 San Francisco Superior Court Nos. 13035657 and 13035658

PETITION FOR REVIEW

INTRODUCTION

Real Party, Lee Sullivan, petitions this Court to review the decision of the First District Court of Appeal, Division Five via an unpublished decision (Petition for Review, Exhibit A,[1] hereinafter Slip Opinion)

[1] The exhibit attached to this Petition shall be referred to as Petition Exhibit A. The exhibits submitted to the Court of Appeal will be referred to simply as Exhibit with the Court of Appeal exhibit letter and page number.

quashing Real Parties subpoena duces tecum served in this case on Petitioners Facebook and Twitter.

In this case, Real Party Sullivan served a subpoena duces tecum on Facebook[2] and Twitter (hereinafter, Service Providers) for the public and private posts of key prosecution witness Rensha Lee as well as the decedent Jaquan Rice. Service Providers moved to quash the subpoenas. That motion was denied in 2015, and production ordered by the trial court. The denial of the subpoena wound its way up to this Court, resulting in the opinion of *Facebook v Superior Court (Hunter)* (2018) 4 Cal. 5 th1245 (*Hunter II*), holding that Service Providers were covered by the Stored Communications Act (SCA 18 U.S.C § 2702 et seq.)

This Court in *Hunter II*, concluded that the SCA's lawful consent exception (18 U.S.C. § 2702(b)(3)), allowed Service Providers to produce communications that were configured as public by the user. (4 Cal.5th at 1274). This Court remanded the matter to the trial court. (*Id.* at 1250-51, 1275-76). In *Hunter II,* this Court suggested in a footnote that "the trial court *might* also consider two additional but somewhat unrelated legal issues that have been only generally alluded to in the court's order in *Facebook, Inc., v. Superior Court (Touchstone*) (2017) 15 Cal.App.5th 729, 223 Cal.Rptr.3d 660 (S245203)." (*Hunter II*, *supra*, 4 Cal.5th at 1291, n. 47 [emphasis

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[2] Three subpoenas were served in 2015 on Facebook, Instagram and Twitter. Facebook and Instagram are now a single entity and will be referred to simply as Facebook in this Petition.

added].) The two additional issues were "(1) whether a trial court may compel a witness to consent to disclosure by a provider, subject to in camera review and any appropriate protective or limiting conditions; and (2) whether a trial court may compel the prosecution to issue a search warrant under the Act, on behalf of a defendant." (*Id.*)

After voluminous briefing and argument, the Respondent Court denied Service Providers' motion to quash the subpoena duces tecum for and ordered production (May 1, 2019 Ex. 11.) Service Providers' filed a writ of mandate/prohibition in the Court of Appeal. The Court of Appeal stayed Respondent Court's production order. (May 9, 2019). Real Parties filed a return to the writ. After an additional round of briefing, the Court of Appeal dissolved the stay, denied the writ, and ordered the production of the subpoenaed records (July 1, 2019). Despite dissolving the stay, the Court of Appeal retained the matter for further consideration. Service Providers then filed a writ of mandate in this Court which issued a stay and requested informal briefing (Case No. S256686, July 3, 2019). On July 17, 2019, this Court denied the writ and dissolved the stay.[3]

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[3] Once the stay was dissolved by this Court, the Respondent Court ordered production of the private posts, the only remaining outstanding requests. Service Providers refused to comply, and Respondent Court issued an order of contempt against the Service Providers. Service Providers filed a writ of mandate in the Court of Appeal (Case No. A157902) which summarily denied the writ (July 30, 2019). Service Providers then filed a writ of mandate in this Court (Case No. S257385) which was summarily denied September 11, 2019.

On February 13, 2020, the Court of Appeal, issued a written, unpublished opinion (Pet. Ex A, Slip Opinion), granting Service Providers motion to quash holding that Respondent Court abused its discretion by not fully considering all alternative means of production and by not reviewing previously produced public posts of the key witness Renesha Lee, prior to order production of private posts.

ISSUES PRESENTD FOR REVIEW

1. Did Court of Appeal apply the wrong standard of review when it applied a de novo review and did not defer to the findings of fact in assessing whether the Respondent Court had substantial evidence that the alternative sources of a subpoena to Renesha Lee, forcing her consent or subpoenas to those who Lee shared private posts, were not viable?

2. Was the Respondent Court's denial of the motion to quash and subsequent order, arbitrary and capricious?

3 Did the Court of Appeal apply the wrong standard when it applied a strict alternative source analysis to the proceedings in the Respondent Court, contrary to the holding in *Delaney v Superior Court* (1990) 50 Cal. 3d 785, 811-12?

4. Did the Court of Appeal consider an argument that had been waived by Service Providers when they failed to object to the Respondent Court issuing its ruling on the motion to quash without having reviewed public content to assess if it satisfied the needs of Real Party?

WHY REVIEW SHOULD BE GRANTED

Real Party requests this Court review the matter to settle an important question of law (Cal. Rule of Court 8.500(b)(1)), concerning the proper regarding criminal defendants access to material evidence held by Service Providers based on an assertion of Constitutional due process rights and because the Court of Appeal, applied a strict alternative source analysis which this Court found improper in criminal proceedings. This is an important question that is likely to recur and directly impacts Real Party's access to relevant and material evidence in his criminal case.

STATEMENT OF FACTS

Real Party, Lee Sullivan was charged with Pen. Code, §§ 187, 664/187, 186.22(b)(1), 12022(a), 12022.53(d) & (e)(1). A grand jury heard evidence regarding these charges on December 10, 2013; December 12, 2013; December 13, 2013; December 17, 2013; and December 19, 2013.

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

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

Quincy H., who was 14 years-old, confessed to the shooting when detained by police after several eyewitnesses identified him as one of the shooters. Quincy H. told the officers that he shot Mr. Rice because Mr. Rice repeatedly threatened him at his job, at his home, and on social media including Facebook and Instagram. Mr. Rice tagged Quincy H. and others in a video with guns in it on Instagram which scared Quincy. He believed Mr. Rice would kill him if he did not act first. Quincy told police that Derrick Hunter was the getaway driver, but that Mr. Sullivan was not in the car when the shooting occurred. He identified the other shooter as "Johnson."

Renesha Lee is Mr. Sullivan's ex-girlfriend and the only witness that connects him to the shooting. Ms. Lee gave a multitude of disparate accounts about what transpired when she was interrogated by the police in the months following the June 24, 2013, shooting. She initially told police that a person she identified as "Man Man" and three male companions approached her shortly after shots were fired to get them away from the scene. However, on August 10, 2013, when the police threatened to charge her with murder if she did not implicate Mr. Sullivan, Ms. Lee said Mr. Sullivan was with Quincy and Derrick

Hunter when they borrowed her car and dropped her off at her home a few minutes before the shooting. Ms. Lee has at all times denied being in the car when the shooting occurred despite that she was in the only person in the car when it was stopped, and several percipient witnesses told the police a woman was driving the car when shots were fired.

None of the percipient witnesses at the bus stop placed Mr. Sullivan in the vehicle or near the crime scene when the shooting occurred. At the grand jury hearing, the prosecution's gang expert, Leonard Broberg, of San Francisco Police Department's Gang Task Force, relied heavily on social media records the police obtained from Facebook, Instagram, and Twitter in forming his opinion that the murder and attempted murder was committed for the benefit of Big Block, a criminal street gang in support of the gang allegations alleged pursuant to Penal Code section 186.22(b)(1). The prosecution's theory of the case was that Mr. Sullivan and the Hunter brothers were members of Big Block criminal gang and Mr. Rice was killed because he was a member of rival gang, West Mob, and because Mr. Rice publicly threatened Quincy Hunter on social media.

Real Party Sullivan issued subpoenas for social media posts of Renesha Lee as well as Jaquan Rice. The subpoenas were based on information in found by Real Party Sullivan in his investigation that Lee had engaged in threatening and abusive private posts on Facebook, Instagram and Twitter. Service Providers filed a motion to quash which was denied in 2015 and again in 2019 by Respondent Court after a finding of materiality:

> And as I think I said before, ***it's hard for me to imagine a case where there's greater relevance imposed in a post like this***. It's not to say that the Facebook account of a party or a defendant or a witness in every criminal case is going to be relevant or the like, but here, ***I think this is a special case*** and it seems to me that the Supreme Court would recognize that.

(Ex. 1 at 38:23-39:1 [emphasis added].)

The trial court considered voluminous briefing by both Service Providers and Real Parties and held extensive hearings on the questions posed by *Hunter II* prior to reaching its ultimate determination.

Specifically, Judge Tracie Brown issued specific rulings on a number of the open questions posed by this Court. Judge Brown issued a ruling on the need for Petitioners to obtain records through means other than a subpoena to Service Providers, finding Petitioners did not need to exhaust all alternative methods and that it was ***one factor to be weighed***. Judge Brown considered the legal question of alternative sources and stated:

> I also, I don't agree with the providers theory that essentially seems to point to an exhaustion of remedies type of argument. You seem to be saying essentially that there must be no other way for the defense to obtain the materials that they're seeking before they can go to you. That theme is throughout your briefs.
>
> I don't think that that is what the Hunter Court actually said. I don't think there's any

> case that says that if they can obtain the information by any other means, then ipso facto you're dead in the water. ***Whether they can or not is certainly a factor to be assessed in terms of the plain balancing test***. I don't think there's an absolute bar on them obtaining records from you or issuing a subpoena to the providers if they can perhaps get the materials in any other way. I don't think that your theory they basically have to have no other way of obtaining the materials is a valid reading of the phrase in the *Hunter* dictum on which the providers seem to rely.

(Ex. 19 at 497:21-498:9 [emphasis added]; *see generally* Ex. 16 at 421-427.)

The matter was transferred to Judge Charles Crompton when Judge Brown was elevated to the Court of Appeal. Judge Crompton indicated that he had reviewed all of the past briefings as well as Judge Brown's rulings which he considered binding. (Ex. 13 at 246:2-5; *see, In re Alberto* (2002)102 Cal.App.4th 421, 427).) In addition to the briefing before Judge Brown, the parties briefed the motion to quash in the context of trial, including the application of constitutional rationales for discovery of the subpoenaed documents of due process and confrontation (Ex. 5; Ex 2.) In addition, Real Party Sullivan filed a declaration under seal regarding the materiality the documents. (Ex A, filed under seal.) Judge Crompton found that the documentation sought was material (Ex. 1 at 38:13-39:4.)

Judge Crompton also considered, and ruled on, the issue of whether or not alternative means of ob-

taining the sought documents were required and ruled that these other options, including seeking a warrant, ***were not viable*** (Ex. 1 at 22:13-18).

The trial court's order was based on Petitioners' rights under the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause, as described in *Pennsylvania v. Ritchie* ((1973) 480 U.S. 39. (Ex. 1 at 20:4-11; 38:11-12; 40:26-41:12;[4] *see also* Ex. 5 at 71-73.) Nothing in the record indicates any reasonable possibility that the witness, Renesha Lee would cooperate and turn over her social media posts, nor is there any indication that Real Party knew who the individuals on the receiving end of Lee's private post other than the one individual named in Real Parties sealed declaration.

ARGUMENT

I. RESPONDENT COURT'S FINDINGS OF FACT ARE ENTITLED TO DEFFERENCE IS SUPPORTED BY SUSBSTANTAL EVIDENCE AND THE COURT DID NOT ABUSE ITS DISCRETION

"A discovery order is normally reviewed under the deferential abuse of discretion standard." (*Pirjada v Superior* Court (2011) 201 Cal.App.4th 1074, 1085, citing *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186; *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161].)

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[4] The transcript Ex 1 at 41:2 erroneously reads "Fourth" Amendment rather than "Fourteenth." Given that the reference is to *Pennsylvania v. Ritchie,* the transcript should read "Fourteenth Amendment."

> The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and ***its application of the law to the facts is reversible only if arbitrary and capricious***

(*Haraguchi v Superior Court* (2008) 43 Cal.4th 706, 711-12 [emphasis added].)

A reviewing court generally "will not substitute its opinion for that of the trial court and will not set aside the trial court's decision unless there was 'no legal justification' for the order." (*Pirjada*, *supra*, 201 Cal.App.4th at 1085, quoting *Krinskey, supra*, 159 Cal.App.4th at 1161.)

The Court of Appeal failed to apply the deferential standard for both substantial evidence and abuse of discretion.

1. Substantial Evidence

Under the substantial evidence standard of review, the record is examined through the eyes of the factfinder, most favorably to the judgment, with the presumptive goal of upholding whatever factual determinations the particular trier of fact was required to make. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "On appeal, we presume that a judgment or order of the trial court is correct, "'[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*People v Giordano* (2007) 42 Cal.4th 644, 665-66 (quoting *Denham v. Superior*

Court of Los Angeles County (1970) 2 Cal.3d 557, 564), in other words, everything that can be presumed will be presumed in favor of the trial court's favor.

"'On appeal all presumptions favor proper exercise'" of the trial court's power to " 'judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences' " and its " 'findings—whether express or implied—must be upheld if supported by substantial evidence.'" (*People v Alexander* (2010) 49 Cal.4th 846, 883 (quoting *People v James* (1977) 19 Cal.3d 99, 107.)

> By definition, "substantial evidence" requires ***evidence*** and not mere speculation. In any given case, one "may ***speculate*** about any number of scenarios that may have occurred.... A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence."

(*People v Cluff* (2001) 87 Cal. App.4th 991, 1002 [quoting *People v Morris* (1988) 46 Cal.3d 1, 21] [emphasis original].)

In reaching its conclusion, the Court of Appeal failed to apply the deferential standard for substantial evidence. Instead, it appears that the Court of Appeal applied a de novo review of the factual evidence before Respondent Court on the question of alternative sources, granting no deference to Respondent Court. The Court of Appeal failed to apply the

all presumptions in favor of the Respondent's factual determination of the viability of the alternative means for obtaining the records sought.

As noted in the slip opinion, Judge Crompton found that "for reasons that I think we've discussed before, I don't see any alternatives as viable for obtaining this information in the form and the manner, and the authenticity guarantees that the defendants would need it." (Ex. 1 at 22:14-17.)

A. Subpoena and Forced Consent

Judge Crompton made a determination that based on the facts before him including the past invocation of the Fifth Amendment by Renesha Lee in a prior proceeding, her prior testimony which could potentially subject her to criminal prosecution for perjury and her general uncooperativeness, that the alternative options of directly subpoenaing her, asking her to consent, or forcing her to consent, were not viable. This determination was supported by substantial evidence.

It is undisputed in the record before Respondent Court that Renesha Lee was not cooperative and had previously invoked her Fifth Amendment rights *directly relating to her social media accounts* (Ex. A, filed under seal.) It is also undisputed that if Lee were to admit ownership of the very accounts at issue here, that she could subject herself to charges of perjury. Respondent Court engaged in a lengthy discussion with the parties on the issues of compelled consent as well as Ms. Lee's Fifth Amendment rights. (Ex. 11 at 211-214, 20-23.) Respondent Court indicated that it had ***reviewed*** Real Parties' proffers (Ex. 11 at 207, 16:6-21), and Respondent Court was

informed that Ms. Lee asserted her Fifth Amendment rights in a separate proceeding when asked about social media. (Pet. Ex 11 at 212, 21:19-26; at 213, 22:1-7.) Counsel for Real Party Sullivan argued: "If Ms. Lee asserts her Fifth Amendment rights, I think any good counsel representing her would also tell her that she can't sign that consent." (Ex. 11:217:28-218:3.) Additionally, the prosecutor in the case noted that some of his witnesses were uncooperative in the context of possible sanctions on the government if the motion to quash were granted (Ex. 19 at 502, 43:14-20.) Under the deferential standard for substantial evidence, the appellate court must presume that Respondent Court considered not only evidence before it, but also the arguments of counsel.

There is no evidence in the record that there was any possibility that Lee would not act in accordance with her prior behavior relating to social media and her Fifth Amendment rights. The Court of Appeal's opinion that Lee would not invoke her Fifth Amendment right, is itself speculation (Pet. Ex A, Slip Opinion at 14.) There is no evidence in the record of any contrary evidence to base this conclusion. The Court of Appeal failed to grant Respondent Court the deference due when it made the determination based on the law and facts, that the alternatives of a subpoena to Lee or attempting to force her consent were not viable options.

Respondent Court rejected the alternative sources argument, including forcing the prosecution

to issue a search warrant,[5] subpoenaing the records directly from Lee and forcing her to consent. Because the record is silent as to Respondent Court's final rational for this rejection, the Court of Appeal as well as this Court, must infer that the order is correct and that "error must be affirmatively shown" rather than presumed. (*Giordano*, *supra*, 42 Cal. 4th at 665-66.) The Court of Appeal did exactly what this Court warned of in *Morris*, *supra*, when it speculated on other possible scenarios rather than deferring to the factual determination of Respondent Court. Based on these facts, the finder of fact found that these options were not viable. This conclusion by Respondent Court is supported by substantial evidence and it should be granted the deference that this Court has determined applies.

B. Recipients as Alternative Sources

The Court of Appeal also examined the issue of obtaining private post from the recipients of Lee's private messages. Respondent Court had before it a detailed deceleration filed under seal (Ex. A), laying out the materiality of the social media sought from Renesha Lee. This included descriptions of her conduct on social media and provided the name of one individual who had been subject to Lee's abusive, threatening conduct. The declaration contains further information that this type of conduct was directed at other unnamed individuals. Again, Respondent Court had before it the evidence, uncontradicted, that Real Party had identified one individual

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[5] The Court of Appeal agreed with this aspect of Respondent Court's decision (Slip Opinion at 14.)

who received threatening posts from Lee. It is not speculation based on this record, that Real Party did not have any further names. It is speculation based on the part of the Court of Appeal that Real Party knew the identity of these other individuals and thus could directly subpoena them or seek their consent. The Respondent Court in rejecting this option, again was silent, other than finding it not viable. Appellate courts should apply the deferential standard laid out in *Giordano* (*supra*, 42 Cal.4th at 665-66), and presume the correctness of the order.

2. Abuse of Discretion

If there is substantial evidence to support the Respondent Court's legal ruling, then under the abuse of discretion standard. "A trial court abuses its discretion when its ruling ' "fall [s] 'outside the bounds of reason.'"" (*People v Benavides* (2005) 35 Cal.4 th 69, 88 [quoting *People v Waidala* (2000) 22 Cal.4 th 690, 714, quoting *People v. DeSantis* (1992) 2 Cal.4 th 1198, 1226].) An appellate court "is not authorized to substitute its judgment for that of the trial judge." *(People v Stewart* (1985) 171 Cal.App.3d 59, 65.)

In this case, Respondent Court did not abuse its discretion. This case was extensively briefed and argued as shown by the record submitted to the Court of Appeal. In addition, this Court in *Hunter II*, gave clear guidance to the trial court regarding what factors to assess in determining whether private and public social media posts were subject to a defense subpoena. As noted in *Hunter II*, this Court stated in a footnote that "the trial court ***might*** also consider two additional but somewhat unrelated legal issues

that have been only generally alluded to in the court's order in *Facebook, Inc., v. Superior Court (Touchstone)* (2017) 15 Cal.App.5th 729, 223 Cal.Rptr.3d 660 (S245203)." (*Hunter II*, *supra*, 4 Cal.5th at 1291, n. 47 [emphasis added].) The two additional issues were "(1) whether a trial court may compel a witness to consent to disclosure by a provider, subject to in camera review and any appropriate protective or limiting conditions; and (2) whether a trial court may compel the prosecution to issue a search warrant under the Act, on behalf of a defendant." (*Id*.) Nothing in the *Hunter II* opinion suggests that the Respondent Court must force defendant's in criminal proceedings to ***exhaust all alternative options*** prior to the trial court engaging in a balancing analysis of a defendant's due process rights against the privacy rights of the social media user.

The Court of Appeal focused almost solely on the question of alternative sources for production (*see supra.*) As explained below, the Court of Appeal misapplied the holding of this Court in *Delaney v Superior Court* (§II, *infra*). Here the trial court record including briefs and transcripts, indicates that Respondent Court considered the vast majority of the areas delineated in *Hunter II* and reasonably applied the law to the facts of the case.[6]

Judge Brown in particular considered and ruled on many factors including the application of alternative sources. On October 5, 2018, Judge Brown, after

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[6] Many of the rulings of Respondent Court are not relevant to this petition but can be found in Real Parties Supplemental Brief in Response to the Court's June 21, 2019 Order

extensive discussion, indicated that she disagreed with the Service Providers argument that the Real Parties needed to exhaust all remedies (Ex 19 at 497, 38:21-26.) Judge Brown further indicated that Real Parties' efforts would be "a factor to be assessed in terms of the plain balancing test. I don't think there's an absolute bar on them obtaining records from you or issuing a subpoena to the providers if they can perhaps get material another way." (Ex. 19 at 498, 39:2-6.) Judge Brown further stated: "I don't think that your [Service Providers] theory they basically have to have no other way of obtaining the materials is a valid reading of the phrase in the *Hunter* dictum on which the providers seem to rely." (Ex.19 at 508, 49:6-9.) Judge Brown finalized this ruling on November 8, 2018 (Ex. 16 at 424, 52:11-17.) Judge Crompton explicitly stated that he had reviewed all of the past briefings as well as Judge Brown's rulings which he considered binding. (Ex. 13 at 246:2-5; *see, In re Alberto* (2002)102 Cal.App.4th 421, 427).) Given the record in this case and the extensive briefing and rulings, Respondent Court applied the law, determined that Real Party had exhausted all his viable options for obtaining the private posts and messages, had made a showing of good cause and materiality appropriately applied a balancing testing taking into all of the evidence and law before and determined that the need for the private material.

II. THE COURT OF APPEAL MISAPPLIED THE ALTERNATIVE SOURCE ANALYSIS IN THIS CASE TO CREATE A BAR TO ENFORCEMENT OF A SUPBOENA

The Court of Appeal's opinion is rooted in a misreading of applicable precedent from this Court,

namely the analysis forth in *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 809-814. The Court of Appeal applied a strict alternative source analysis, an analysis that is disfavored in criminal proceedings.

This Court held in the context of the California reporter shield law that "the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right." (*Delaney v Superior Court* (1990) 50 Cal. 3d 785, 793.) The California shield law, in its current form was enacted in 1980 with voter approval of Proposition 5, "a state constitutional amendment proposed by the Assembly." (*Id.* at 795.) The law protects a reporter from being held in contempt for a refusal to disclose unpublished information or the source of information. (*Id.*) At trial, the defendant asserted his federal constitutional right to a fair trial in seeking testimony of a reporter who had invoked the shield law. (*Id.* at 805.)

This Court set forth a balancing test to assess the competing interests of the reporter and the defendant's due process rights. A criminal "defendant must show a ***reasonable possibility*** the information will materially assist his defense. A criminal defendant is not required to show that the information goes to the heart of his case." (*Id.* at 808

[emphasis original].)[7] This Court laid out a road map for trial courts:

> First, the burden is on the criminal defendant to make the required showing. Second, the defendant's showing need not be detailed or specific, but it must rest on more than mere speculation. Third, the defendant need not show a reasonable possibility the information will lead ***to his exoneration***. He need show only a reasonable possibility the information will materially ***assist his defense***.

(*Id.* at 809 [citations omitted; emphasis original]). The next step is to balance the competing interests, which in the context of the shield law are: 1) whether the unpublished material is confidential or sensitive; 2) the interest sought to be protected by the law; 3) the importance of the information to the defendant; and 4) whether there is an alternative source. (*Id.* at 810-11.) This Court noted that

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[7] The means to vindicate this due process right is found in the right to compulsory process was "intended to permit [the defendant] to request governmental assistance in obtaining likely helpful evidence, not just evidence that he can show beforehand will go to the heart of his case. 'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.'" (*Id.* at 808 [quoting *United States v.* Nixon (1974) 418 U.S. 683, 709].)

> A defendant in a given case may be able not only to meet but to exceed the threshold "reasonable possibility" requirement. For example, he may be able to show that the evidence would be dispositive in his favor, i.e., to use the reporters' phrase, that it goes to "the heart of defendant's case." If so, ***the balance will weigh more heavily in favor of disclosure than if he could show only a reasonable possibility the evidence would assist his defense.***

(*Id.* at 811[emphasis added].) This Court also recognized that *Mitchell v. Superior Court* (1984) 37 Cal.3d 268, in which the "alternative-source" rule originated, "does not mandate a rigid alternative-source requirement in criminal proceedings." (*Id.*) This Court also acknowledged that in relationship to the alternative source rule, a "significant practical difference" between civil and criminal proceedings exists, namely that a criminal defendant is not afforded the ability to depose witnesses to seek information and "the economic reality of the criminal justice system is such that a criminal defendant will generally have less opportunity than a civil litigant to obtain information before trial." (*Id.* at 812.) This Court concluded that a "universal and inflexible alternative source requirement" in a criminal case is inappropriate. (*Id.*). Rather the trial court should consider 1) the type of information sought; 2) the quality of the alternative source and 3) the ***practicality of obtaining the information from the alternate source***. (*Id.* at 81-12-813 [emphasis added].) "In short, whether an alternative-source re-

quirement applies will depend on the facts of each case." (*Id.* at 813.)

Essentially, in its holdings in *Hunter II*, *supra*, this Court set forth a *Delaney* type of road map for the Respondent Court to follow. The Respondent Court followed the *Hunter II* decision when it applied a *Delaney* type of balancing test to the facts of this case.

The first two elements are easily understood: to protect the privacy rights of the users when they post online. The SCA creates an important safeguard against the dissemination of private material. The third element, the importance to the defendant, was also assessed by the Respondent Court. The witness, Renesha Lee, is a critical witness for the prosecution; the only witness to place Real Party Sullivan in the vehicle used in the shooting as well as a possible third-party suspect. Real Party submitted a declaration under seal to the Respondent Court laying out the defense theory as to why Lee's social media accounts are material to the defense in this case. (Ex. A.)

The Respondent Court in its final order made a finding of materiality:

> And as I think I said before, ***it's hard for me to imagine a case where there's greater relevance imposed in a post like this***. It's not to say that the Facebook account of a party or a defendant or a witness in every criminal case is going to be relevant or the like, but here, ***I think this is a special case*** and it seems to me that the Supreme Court would recognize that.

(Ex. 1 at 38:23-39:1[emphasis added].) Clearly Real Party not only met but exceeded the standard of reasonable possibility that the information will materially assist his defense.

As to the fourth and final prong of the *Delaney* test, the Respondent Court considered and rejected the alternative methods proposed by this Court based on the law as it relates to the issue of warrants, as well as the facts as they relate to Lee. Given the facts of this case, the application of these alternatives was not only impracticable but also would be ineffectual based on Lee's potential exposure to criminal charges should she take ownership of the named social media accounts (Ex. A.) Lee's constitutional rights under the Fifth Amendment are implicated should she be forced to consent or if she were issued a subpoena duces tecum for her accounts. Both avenues would require an acknowledgement by Lee that she was in fact the owner of the accounts. As set forth in *Delaney*, the Respondent Court considered the practicality of obtaining the information from the alternate source, namely Lee as well as the quality and nature of the material, and rejected that avenue of obtaining the information from alternative sources based on the facts of this case.

In its opinion, the Court of Appeal, applied a strict alternative source analysis in direct contradiction to this Court's precedent. The Court of Appeal opinion creates a new hurdle for criminal defendants in obtaining subpoenaed materials from any Service Provider, that is not applied in any other case: that they must exhaust all possible alternative sources prior to having the trial court even engage in balancing the competing interests of the parties. The Court

of Appeal established a new, inflexible and rigid rule of alternative source analysis which is not found in the case law. As this Court noted in *Hunter II*, a third party "may defend against a criminal subpoena by establishing that, for example, the proponents can obtain the same information by other means or, or that the burden on the third party is not justified under the circumstances." (4 Cal.5th 1245, 1290.) This Court did not impose a rigid requirement that Real Party ***exhaust all of other sources prior to seeking enforcement of a subpoenas*** on a Service Provider.

The precedent of *Delaney* is absolutely clear: the question of alternative sources is a factual one specific for each case; in the context of criminal proceedings, the test cannot be rigid and inflexible; and it is only one of a number of factors to be weighed, not a rigid bar that criminal defendants must overcome. As noted by this Court, there are practical considerations, namely that a criminal defendant is not afforded the ability to depose witnesses to seek information and "the economic reality of the criminal justice system is such that a criminal defendant will generally have less opportunity than a civil litigant to obtain information before trial." (*Id.* at 812.)

Based on the foregoing analysis, this Court should grant the petition for review and clarify the application of the alternative source rule in the context of subpoenas to Service Providers.

III. THE COURT OF APPEAL CONSIDERED A LEGAL RATIONALE PUT FORWARD BY SERVICE PROVIDERS THAT WAS NOT RAISED IN RESPONDENT COURT AND WAS WAIVED

1. The Court of Appeal erred when it considered the argument from Service Providers that Respondent Court abused its discretion when it failed to re-evaluate the need for private content after production of the public content.

In its opinion, the Court of Appeal concluded that Respondent Court could not "properly balance all the good cause factors" in determining whether to grant or deny the motion to quash because it did not re-evaluate the need by Real Party for private posts after the public posts were produced. (Pet. Ex A at 15.) Because Service Providers did not object to Respondent Court's failure to review the public content, this objection was waived and cannot be raised on appeal. (*People v. Green* (1980) 27 Cal.3d 1, 27, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 233-237 and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) The reasoning of this rule is to give the opportunity to the trial court to correct the error. (*Green, supra* 27 Cal.3d at 27.) In fact, during the May 1, 2019 hearing, Service Providers when asked directly by Respondent Court about conducting an *in camera* review, declined to take a position giving Respondent Court no opportunity to correct a perceived error.

At the time Respondent Court issued its order, it informed the parties that it had the public records

produced by Service Providers and specifically asked counsel for Service Providers if the court needed to conduct an *in camera* review of the materials (Ex. 1 at 8:12-17.) Rather than asking for such a review, Service Providers responded: "Your Honor, I think that's an issue for you to decide. We've complied with the Code in terms of how to get it to you and I think it's up to you to determine what to do with it." (Ex. 1 at 8:18-21.)

There was further discussion of how much private content existed in the named accounts (Ex. 1 at 15, 14-18.) Respondent Court again inquired of both the prosecution and Service Providers if an *in camera* review of the produced public content was necessary to screen for "sensitive" information (Ex. 1 at 35, 35:5-17.) Again, Service Providers stated position at that time was "the providers are agnostic on that point." (Ex. 1 at 35, 35:18-19.) Petitioners had multiple opportunities to request that the Respondent Court review the public content and factor that into its analysis and failed to do so. Petitioner cannot now raise this novel issue on review.

In fact, in their initial filing of their writ of mandate/prohibition in the Court of Appeal, Service Providers failed to raise this as an issue. It was not until the Court of Appeal requested additional briefing, that Service Providers for the first time raised an objection to Respondent Court's failure to conduct an *in camera* review to determine the necessity for the production of private material (Service Providers' Supplemental Brief in Response to the Court's June 21, 2019 Order at 11.)

Real Parties objected to this argument and requested the Court of Appeal strike this portion of Service Providers supplemental brief on the grounds that the argument was waived by failure to object in the Respondent Court and that it exceeded the scope of the Court of Appeal's June 21, 2019 order (Real Parties Supplemental Brief in Response to the Court's June 21, 2019 Order at 7-8.) It appears from the Slip Opinion that the Court of Appeal adopted the rationale put forward by Service Providers despite the fact that the issue had been waived in Respondent Court.

2. Assuming *arguendo* that the objection was properly made, there was substantial evidence in the record that the private posts were the heart of Real Parties subpoena

A review of the record before the Respondent Court shows that the proffer made to Respondent Court contained substantial evidence that ***private messages*** were at the heart of Lee's social media threats. As laid out in the sealed declaration of counsel and detailed, *supra* § I(1)(A), Real Party Sullivan had identified one named individual who had received ***private*** messages from Lee as well as other unnamed individuals who were the subject of her ***private abusive posts***. Furthermore, counsel for Real Party had accessed the public posts of Lee as

any other citizen could, and still sought these particular private posts.[8]

Finally, such a review would be fruitless. Without knowing the content of the private posts, how would the Respondent Court assess if the public posts were sufficient and contained the information sought? The normal course of review for trial court of confidential documents is laid out in *Kling v Superior Court* (2010) 50 Cal.4th 1068, 1071. The trial court upon receipt will engage in an *in camera* review of the materials. It is well understood that with confidential records the trial court will release only those records that are relevant and material and excise sensitive information that is not directly relevant to the matters at issue. From the record below, it appears that Respondent Court intended to engage in such a review prior to release of the public posts. What is different here is that Service Providers refused to even produce the private materials for *in camera* review, tying the hands of Respondent Court in assessing whether the public materials were sufficient for Real Parties purpose in seeking them. In light of the assertions of counsel for Real Party Sulli-

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[8] In addition, the production order for the private posts was stayed by Respondent Court for Service Providers to file a writ in the Court of Appeal (Ex. 1 at 43, 42:24-26.) The final stay in this Court was not dissolved until July 17, 2019, giving the Respondent Court ample time to conduct its in camera review. It is telling that once that review was completed, Respondent Court did not alter its order even when faced with holding Service Providers in contempt for failing to produce the subpoenaed private material on July 26, 2019. Service Providers had almost two months to request such a review and failed to do so.

van that the posts of abusive and threatening behavior were private, the review would have been futile.

This Court should reject this portion of the Slip Opinions reasoning because this objection was raised in Respondent Court and therefore was waived by Service Providers.

CONCLUSION

The Court of Appeal erred multiple times in its analysis of Respondent Court's denial of the motion to quash and the order of production based on the Sixth and Fourteenth Amendment guarantees of confrontation and due process. The Court of Appeal applied the wrong standard of review for an abuse of discretion analysis, applied a strict alternative source analysis specifically disfavored by this Court, and erred in finding that Respondent Court should have engaged in a futile *in camera* review of the public materials prior to ordering production of private material because that was not raised in the Respondent Court.

Respondent Court applied the correct legal analysis to the facts of this case and did not abuse its discretion in making this order. This Court should grant review to decide these important issues of law.

Dated:
February 24, 2020

Respectfully submitted,

/s/ Bicka Barlow

Bicka Barlow
Attorney for Real Party
in Interest
Lee Sullivan