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PERSPECTIVE

After high court ruling, defense bar is already sharpening their subpoenas for digital evidence

By Donald E. Landis Jr.

The California Supreme Court recently issued its second of two landmark decisions of first impression, addressing criminal defense subpoenas for social media content in *Facebook, Inc. v. Superior Court (Touchstone)*, 2020 DJDAR 8607 (Aug. 13, 2020), the first being *Facebook, Inc., et al., v. Superior Court (Hunter)*, 4 Cal. 5th 1245 (2018) (public posts may be compelled). While it looks like the social media companies have won the battle, they actually just lost the war from the death by a thousand future criminal subpoena cuts. "[R]eluctant to address significant substantive legal issues" due to underlying factual and procedural problems, Chief Justice Tani Cantil- Sakauye, writing for an unanimous Supreme Court, saved social media providers from answering big constitutional questions concerning the 1986 Stored Communications Act, 18 U.S.C. Section 2701's supposed prohibition on producing subpoenaed nonparty private digital content. Instead, the chief justice remanded the matter back to the trial court for further proceedings with a "clear roadmap" provided to determine whether criminal defendant Touchstone offered sufficient good cause in his supporting declaration to compel Facebook's production.

In all its arguments to the Supreme Court, social media providers clearly believe the SCA makes it sacrosanct that public/private social media content can never be turned over to anyone — save a few narrowly drawn law enforcement search warrant exceptions — or they will face untold civil liability, massive user distrust, and over-burdened resources to produce such subpoenaed material. But the chief justice rejected the social media providers' dogmatic arguments and wrote the future battle plans for the criminal defense bar to successfully compel this sacrosanct digital information in a march through Silicon Valley that would make General Sherman smile.

Make no mistake, the chief justice took Touchstone to task for filing an incomplete and possibly erroneous supporting declaration justifying the production of the subpoenaed digital information. And affirmatively citing the "more than three decades" old case of *City of Alhambra v. Superior Court*, 205 Cal. App. 3d 1118 (1988), the chief justice chided the trial court for not scrupulously reviewing and vigorously applying Albambra's handy seven-factors list when balancing whether Touchstone presented sufficient plausible justification to overcome the victim's privileged and constitutionally protected digital information under the Cal. Const., art. I, Section 28.

From now on, trial courts must analyze all criminal defense subpoenas — not just those for social media material — in light of *Alhambra*'s seven factors: (1) plausible justification; (2) adequacy of the description/over breadth; (3) availability of the sought material from other sources; (4) privacy/confidentiality and constitutional concerns; (5) timeliness; (6) potential for delay of trial; and (7) asserted undue burden on a producing nonparty. *Alhambra*, 205 Cal. App. 3d at 1134. With these factors, the trial court must then weigh whether the criminal defendant's plausible justification is sufficiently substantiated to constitutionally justify seizing the nonparty's private social media communications. Included in this analysis is whether there are other methods for the defense to obtain the digital information — like subpoenaing the social media user directly or obtaining the information from other users' accounts. The chief justice also calls on prosecutors to ensure a nonparty's privacy interests are being adequately protected consistent with *Kling v. Superior Court*, 50 Cal. 4th 1068 (2010). Finally, dissatisfied with the incomplete record below, the chief justice cautions trial courts against allowing ex parte evidence without good cause and calls for creating a better record that facilitates more meaningful appellate review. It is now abundantly clear that the Supreme Court wants the trial courts, the criminal defense bar, and the prosecution to tighten up loose litigation practices and provide much greater detail and analysis in determining whether nonparty social media users should be forced to divulge what we all know can be very embarrassing personal digital information.

Yet, if there is one thing that criminal defense attorneys like more than a symbolic victory that changes nothing, is a big loss that effectively diagrams future enda- rounds. That is exactly what the chief justice did in *Facebook (Touchstone)* by reaffirming *Alhambra*'s seven factors. Every future supporting declaration will have at least seven sections, one devoted to each factor, scripted for the trial judge to read directly into the record when ordering the production of this omnipresent digital media. Facing such detail, social media attorneys will need to possess equal and/or greater knowledge of criminal law and be quick studies of the case, all without access to underlying investigation reports to effectively combat the new onslaught of criminal

defense subpoenas surely to follow. Litigating social media subpoenas, in multiple jurisdictions, all on the same day, will at some point break the social media providers if they do not rethink their legal positions, retool their response teams, and/or re-engineer their sites to better contend with the onslaught.

Most ominous for social media providers, though, is the chief justice's rare sole concurring opinion acknowledging the possible validity of Touchstone and the prosecution's argument that social media providers like Facebook, who knowingly mine and sell their user's private data to third parties as stated in their user agreements, may not be protected under any statutory definition in the SCA. Prefacing that the argument was not germane to the majority decision, the chief justice urged Congress to finally modernize the SCA to avoid any confusion brought about by the act's arcane definitions. But given congressional inaction, the chief justice mused that with the right case, where the underlying record analyzes if the social media providers actually operate as "electronic communication services" and/or "remote computing services," then the sale of user information to third parties may negate the social media providers' protection under SCA.

Facebook (Hunter) and *(Touchstone)* are the first and only opinions addressing social media subpoenas served by criminal defendants, and the Supreme Court was very aware of the importance of these decisions not only in California, but also across the United States, where California's judiciary often leads the country in important jurisprudence, especially involving technology developed in the next valley over. However, such important decisions that have broad implications for criminal defendants, the prosecution, and its constituents require utilizing only the best possible record to make clear and indelible opinions that will properly balance a criminal defendant's constitutional rights to a fair and just trial with a nonparty user's constitutional right to confidentiality and privacy when using these ubiquitous social media platforms.

There is no question that the criminal defense bar has taken careful note and is already sharpening their subpoenas to compel this most important digital evidence. The question is whether the social media providers are ready — ready to build an army of lawyers to contest all these sharpened subpoenas across this state and across this country or come up with more effective legal, technical, and equitable solutions that strive for the same balance. Of course, all this could evolve once again when the Supreme Court renders its latest decision in *Facebook v. Superior Court (Hunter)*, 46 Cal. App. 5th 109 (2020) (review granted June 10, 2020, S260846; *Facebook (Hunter II)*. So, stay tuned on your most preferred social media platform. ■

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