

1 Name of Elected District Attorney
District Attorney
2 Name of DDA
Deputy District Attorney, State Bar # XXXXXX
3 _____ County District Attorney's Office
Street Address
4 City, California Zip
Telephone:
5

6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
IN AND FOR THE COUNTY OF _____

7 **THE PEOPLE OF THE STATE OF**
8 **CALIFORNIA**

Case No.

9 **v.**

10
11
12 Defendant

13 **BENCH MEMO ON WHETHER A DEFENSE SUBPOENA FOR SOCIAL**
14 **MEDIA OR OTHER THIRD-PARTY RECORDS SHOULD BE GRANTED**

15 This bench memo is provided to give this Court an overview of the factors
16 the California Supreme Court has mandated be considered by trial courts in
17 deciding whether to release third party records subpoenaed by a criminal
18 defendant – assuming disclosure is not barred by the federal Stored
Communications Act.

19 **I.**

20 **THE PEOPLE SHOULD BE HEARD ON WHETHER THE RECORDS**
SUBPOENAED BY THE DEFENSE ARE PROPERLY RELEASED

21 Although the requested records in the instant case are not in the possession
22 of the prosecution, the People are entitled to notice of (1) the identity of the
23 subpoenaed third party; (2) the nature of the documents subpoenaed; (3) the
24 identity of the person to whom the subpoenaed records pertain; and the (4) the

1 date and time of the subpoena's return. (*Kling v. Superior Court* (2010) 50
2 Cal.4th 1068, 1072, 1075, 1079; Hoffstadt, California Criminal Discovery (5th ed.
3 2015) Third Party Discovery Methods, § 13.03 at p. 387, 389.) And it is
4 appropriate for this Court to allow the People to be heard on the question of
5 whether the motion to quash should be granted. (See *Kling v. Superior Court*
6 (2010) 50 Cal.4th 1068, 1072 ["prosecutor may participate in and argue at the
7 hearing, if the trial court so desires"] accord *People v. Superior Court (Humberto*
8 *S.*) (2008) 43 Cal.4th 737, 750–752; Hoffstadt, California Criminal Discovery,
9 *supra*, at p. 389.) In addition, this holds true regardless of the fact that a court
10 may not order third-party documents subpoenaed by a defendant "disclosed to
11 the prosecution except as required by Section 1054.3." (Pen. Code, § 1326(c);
12 *Kling, supra*, at p. 1072; *Facebook, Inc. v. Superior Court of San Diego County*
13 *(Touchstone)* [hereafter "*Facebook (Touchstone)*"] (2020) 10 Cal.5th 329 [2020
14 WL 4691493, at pp. *8-*9].)

15 Participation by the People should be granted when the records are
16 privileged, private, or otherwise confidential. "The People, even if not the target
17 of the discovery, also generally have the right to file a motion to quash 'so that
18 evidentiary privileges are not sacrificed just because the subpoena recipient lacks
19 sufficient self-interest to object' [citation omitted] or is otherwise unable to do so
20 [citation omitted]. Even where the People do not seek to quash the subpoena, the
21 court may desire briefing and argument from the People about the scope of the
22 third party discovery." (*Kling, supra*, 50 Cal.4th at p. 1078; accord *Facebook*
23 *(Touchstone), supra*, at pp. *8, *15, *19] [cautioning trial courts against allowing
24 defense to proceed ex parte when trying to establish good cause for release of
subpoenaed third party records and remanding case for reconsideration of
motion to quash defense subpoena for records "with full participation" by the
prosecution and holder of records].) Especially when victim's rights of
confidentiality under the California Constitution are implicated. (See *Facebook*
(Touchstone), supra, at pp. *15, *19 [noting that a subpoena seeking private

1 communications on social media implicated subdivisions (b)(4) and (b)(5) of the
2 California Constitution, article I, section 28 and that “subdivision (c)(1) of section
3 28 allows the prosecution to enforce a victim's rights under subdivision (b).”].¹

4 **II.**
5 **BEFORE DOCUMENTS SUBPOENAED IN A CRIMINAL CASE MAY BE**
6 **RELEASED, A COURT MUST INITIALLY DECIDE WHETHER THE**
7 **REQUESTING PARTY HAS ESTABLISHED GOOD CAUSE FOR**
8 **THEIR RELEASE UNDER THE MULTI-FACTOR TEST LAID**
9 **OUT IN *FACEBOOK V. SUPERIOR COURT (TOUCHSTONE)***

10 “Under Penal Code section 1326, subdivision (a), various officials or
11 persons — including defense counsel, and any judge of the superior court — may
12 issue a criminal subpoena duces tecum, and, unlike civil subpoenas, there is no
13 statutory requirement of a “good cause” affidavit before such a subpoena may be
14 issued.” (*Facebook (Touchstone)*, *supra*, at p. *6.)

15 However, “such a criminal subpoena does not command, or even allow, the
16 recipient to provide materials directly to the requesting party. Instead, under
17 subdivision (c) of section 1326, the sought materials must be given to the superior
18 court for its in camera review so that it may ‘determine whether or not the
19 [requesting party] is entitled to receive the documents.’” (*Id.* at p *6 citing to Pen.

20 ¹ In *Kling v. Superior Court* (2010) 50 Cal.4th 1068, the California Supreme
21 Court observed that “disclosure of the identity of the subpoenaed party and the
22 nature of the records sought may, in many circumstances, effectuate the *People’s*
23 *right to due process* under the California Constitution.” (*Id.* at p. 1078, citing to
24 Cal. Const., art. I, § 29, emphasis added.) “Discovery proceedings involving third
parties can have significant consequences for a criminal prosecution,
consequences that may prejudice the People’s ability even to proceed to trial. For
example, a third party’s refusal to produce documents requested by the defense
can potentially result in sanctions being applied against the People.” (*Ibid.*)
Moreover, “[p]rotracted ex parte proceedings may result in delays, thereby
interfering with the *People’s right to a speedy trial.*” (*Ibid.*, citing to Cal. Const.,
art. I, § 29; Pen. Code, § 1050 emphasis added.)

1 Code, § 1326, subd. (c), emphasis added; see also *Kling, supra*, 50 Cal.4th at p.
2 1071.)

3 While “no substantial showing is required to **issue** a criminal subpoena
4 duces tecum, . . . in order to defend such a subpoena against a motion to quash,
5 the subpoenaing party must at that point establish good cause to **acquire** the
6 subpoenaed records. In other words, . . . at the motion to quash stage the
7 defendant must show “some cause for discovery other than ‘a mere desire for the
8 benefit of all information.” (*Facebook (Touchstone)*, *supra*, at p. *6, emphasis
9 added.)²

10 The California Supreme Court has identified seven factors *all of which* a
11 “trial court ... must consider and balance” when “deciding whether the defendant

12 ² In *Facebook (Touchstone)*, the California Supreme Court discussed good cause
13 in the context of a motion to quash. However, for several reasons, it is clear that
14 good cause for release of the records must be established even absent a motion to
15 quash being made. First, the California Supreme Court itself has repeatedly
16 recognized the purpose behind section 1326 is to allow a court to review the
17 subpoenaed records to determine if the party is lawfully entitled to the records
18 before allowing their release. (See *Facebook (Touchstone)*, *supra*, at p. *6; *Kling*,
19 *supra*, 50 Cal.4th at p. 1071.) Second, previous case law has never relieved a
20 party of making this showing of good cause for release (see *People v. Superior*
21 *Court* (2000) 80 Cal.App.4th 1305, 1316 [citing to *Pitchess v. Superior Court*
22 (1974) 11 Cal.3d 531, 536 and *People v. Blair* (1979) 25 Cal.3d 640, 651].) Third,
23 in Justice Hoffstadt’s treatise on California Criminal Discovery, it expressly states
24 that “[i]f a third party produces documents in response to a subpoena **without**
moving to quash or otherwise objecting, the subpoenaing party is still not
automatically entitled to those documents.” (*Id.* at p. 390, emphasis added.) The
treatise then notes that the “subpoenaing party must show ‘good cause’ for
acquiring the subpoenaed records” and identifies the factors a court must
consider in assessing good cause. (*Ibid.*) This is highly significant because in
Touchstone, the California Supreme Court repeatedly and approvingly cited to
this treatise as identifying the proper guidelines for assessing good cause *at the*
very pages in the treatise which discuss what showing is required when *no*
motion to quash is made. (See *Touchstone* at pp. *6, citing to Hoffstadt at pp.
390-391.) Fourth, courts have a sua sponte duty to protect third party privileges
on behalf of absent victims. (See *People v. Superior Court (Humberto S.)* (2008)
43 Cal.4th 737, 751 [and cases cited therein].) This duty could not be fulfilled if
the lack of a motion to quash obviated the need to make a good cause showing.

1 shall be permitted to obtain discovery of the requested material.” (*Ibid*, citing to
2 *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, emphasis
3 added.) We list these factors in brief and then expand upon some of them later
4 on in this memo under sub-headings. These are the seven factors:

5 First, “[h]as the defendant carried his burden of showing a “plausible
6 justification” for acquiring documents from a third party [citations omitted] by
7 presenting specific facts demonstrating that the subpoenaed documents are
8 admissible or might lead to admissible evidence that will reasonably “assist [the
9 defendant] in preparing his defense”? [Citations omitted.] Or does the
10 subpoena amount to an impermissible “fishing expedition”?” (*Id.* at p. *7.)

11 The California Supreme Court in *Facebook (Touchstone)* clarified that
12 “plausible justification” is **not** synonymous with “good cause.” “The plausible
13 justification consideration is but one (albeit the most significant) of multiple
14 factors that, together, reflect a global inquiry into whether there is good cause for
15 a criminal subpoena. ***It is included within the overall good-cause
16 inquiry and is not an alternative to that inquiry.***” (*Id.* at p. *7, fn. 6 [and
17 *rejecting* language in earlier decisions suggesting the test is either good cause or
18 plausible justification], emphasis added.)

19 Second, “[i]s the sought material adequately described and not overly
20 broad?” (*Id.* at p. *8.)

21 Third, “[i]s the material ‘reasonably available to the ... entity from which it
22 is sought (and not readily available to the defendant from other sources)’?”
23 (*Ibid.*) In cases involving social media posts and messages, for example, the
24 information can often be sought directly from the victim or witness.

Fourth, “[w]ould production of the requested materials violate a third
party’s ‘confidentiality or privacy rights’ or intrude upon ‘any protected
governmental interest’?” (*Ibid.*)

It is important to recognize that whether the materials are privileged or are
otherwise confidential is both a factor in assessing good cause **and** a primary

1 consideration in whether records should be released **even if** good cause for their
2 release is shown. (See *Facebook (Touchstone)*, *supra*, at p. *14; Hoffstadt,
3 California Criminal Discovery (5th Ed.) at p. 391; this bench memo at p. 13.)

4 Fifth, “[i]s defendant’s request timely? [Citations omitted.] Or,
5 alternatively, is the request premature?” (*Facebook (Touchstone)*, *supra*, at p.
6 *9.)³

7 Sixth, “[w]ould the “time required to produce the requested information ...
8 necessitate an unreasonable delay of defendant’s trial”? (*Id.* at p. *9.)

9 Seventh, “[w]ould ‘production of the records containing the requested
10 information ... place an unreasonable burden on the [third party]’?” (*Ibid.*)

11 **A. Courts May Consider Independent Evidence or Evidence Already**
12 **Available to the Defendant in Assessing Whether the Factor of**
13 **Plausible Justification Favors Disclosure**

14 “[E]ach legal claim that a defendant advances to justify acquiring and
15 inspecting sought information must be scrutinized and assessed regarding its
16 validity and strength.” (*Id.* at p. *12.)

17 In assessing the validity and strength of the justification for release,
18 ***courts can and should consider independent evidence*** aside from
19 merely what is stated in a defense declaration. For example, in *Facebook*
20 (*Touchstone*), the defendant subpoenaed records of the victim’s Facebook
21 communications, including restricted posts and private messages. (*Id.* at p. *5.)
22 The defendant made certain mischaracterizations in his declarations in support
23 of his request for information contained in a victim’s Facebook account. (*Id.* at
24 pp. *3-*4.) In finding that the trial court (which had relied on these
mischaracterizations) did not conduct a proper good cause analysis, the
California Supreme Court advised that “in assessing the present defendant’s

³ This factor implicates the continuing validity of *People v. Hammon* (1997) 15 Cal.4th 1117. (See this bench memo at pp. 11-12.)

1 primary basis for plausible justification to acquire and inspect the sought
2 restricted posts and private messages (to support a claim of self-defense), an
3 appropriate inquiry would focus on the facts as alleged in the briefs **and also as**
4 **reflected in the preliminary hearing transcript** in order to assess
5 whether a claim of self-defense is sufficiently viable to warrant that significant
6 intrusion.” (*Id.* at p. *12, emphasis added.)

7 A court should also consider **what evidence is already available** to
8 the defense that would diminish the need for disclosure of the records in
9 assessing whether a plausible justification has been shown. For example, in
10 *Facebook (Touchstone)*, the court seriously questioned whether there was a
11 plausible justification for a defense request for private social media posts and
12 messages of the victim in the hopes of locating statements impeaching the
13 character of the victim where the defendant had already acquired, “not only [the
14 victim’s] public posts (which, defendant assert[ed], contain[ed] substantial
15 relevant information) but also, and perhaps most importantly, [the victim’s]
16 probation reports . . . , which in turn detail[ed] his prior convictions and
17 contain[ed] other substantial related impeachment information.” (*Id.* at p. *12.)

18 **B. Speculative or Far-Fetched Theories of Relevance Should be**
19 **Viewed Skeptically – Especially When Private Posts and**
20 **Messages are Sought**

21 As illustrated in *Hill v. Superior Court* (1974) 10 Cal.3d 812, while “proof of
22 the existence of the item sought is not required,” (*id.* at p. 817), **speculative or**
23 **far-fetched theories of relevance should be viewed skeptically.** In *Hill*,
24 the court upheld the disclosure of any “public records of felony convictions that
might exist regarding the prosecution’s prospective key witness against him — in
order to impeach that witness.” (*Id.* at p. 819.) But the *Hill* court *also* upheld the
nondisclosure of any general arrest and detention records of the prosecution’s
prospective key witness (which were sought under the speculative theory that the

1 witness who reported the crime was the actual burglar) in “view of the minimal
2 showing of the worth of the information sought and the fact that requiring
3 discovery on the basis of such a showing could deter eyewitnesses from reporting
4 crimes.” (*Id.* at p. 22; see also *Facebook (Touchstone)*, *supra*, at pp. 10, 11, fn.
9.)⁴

5 A desire to peruse through private texts and posts in hopes of discovering
6 general impeachment evidence will not likely be viewed as establishing the
7 requisite “substantial connection between the victim’s social media posts and the
8 alleged crime” without the kind of case-specific showing present in *Facebook,*
9 *Inc. v. Superior Court (Hunter)* (2018) 4 Cal.5th 1245, but absent in *Facebook*
10 *(Touchstone)*, *supra*, 10 Cal.5th 329 [2020 WL 4691493].⁵

11 **C. Heightened Scrutiny is Required If the Defense is Seeking Items**
12 **Like Restricted Posts and Private Communications on Social**
13 **Media Which Implicate a Third Party’s Privacy Rights or Intrude**
14 **Upon a Protected Governmental Interest**

15 As noted above, the fourth factor in assessing whether “good cause” has
16 been shown is whether materials are privileged or are otherwise confidential.
17 (*Facebook (Touchstone)*, *supra*, at p. *8.) “[W]hen considering the enforceability
18 of a criminal defense subpoena duces tecum, ‘[t]he protection of [the subject of a

19 ⁴ The *Hill* court reasoned that even if the arrest and detention records might
20 conceivably lead “to the discovery of evidence of prior offenses by [the
21 prospective witness] having a distinctive modus operandi common to both the
22 prior offenses and the offense with which [the defendant] is charged” and even
23 assuming “such evidence would be admissible as tending to show that [the
24 prospective witness] committed the instant offense” by showing he had a motive
to lie, the request for these records was still properly denied. (*Hill* at pp. 822-
823; see also *Facebook (Touchstone)* at p. 11, fn. 9.)

⁵ In both cases, the defense sought social media communications. However,
unlike in *Facebook (Touchstone)*, in *Facebook, Inc. v. Superior Court (Hunter)*
(2018) 4 Cal.5th 1245, there was significant evidence that the underlying crime (a
homicide) may have *related to, and stemmed from,* social media posts.
(*Facebook (Touchstone)*, *supra*, at p. *13, fn. 11.)

1 subpoena's] right to be free from unreasonable search and seizure constitutes a
2 "legitimate governmental interest." Thus, . . . the protection of the witness's
3 constitutional rights requires that the "plausible justification" for inspection'
4 [citation] be so substantiated as to make the seizure constitutionally reasonable."
5 (*Touchstone* at p. *12 citing to *Pacific Lighting Leasing Co. v. Superior Court*
(1976) 60 Cal.App.3d 552, 566-567.)

6 When "a litigant seeks to effectuate a significant intrusion into privacy by
7 compelling production of a social media user's restricted posts and private
8 messages, the fourth *Alhambra* factor — concerning a third party's
9 confidentiality or constitutional rights and protected governmental interests —
10 becomes especially significant." (*Touchstone* at p. *12.) Extra scrutiny is
11 required when there is not an obvious relationship between the private
communications and the alleged crime. (See *Touchstone* at p. *13.)

12 In other words, the existence of privacy rights in the records sought not
13 only provides a reason weighing against disclosure, it *also* impacts how the *first*
14 factor (i.e., whether plausible justification exists) should be evaluated. If privacy
15 rights are implicated, the alleged plausible justification is subject to closer
16 scrutiny than when no privacy rights are involved. This is because when privacy
17 rights are implicated, such as when restricted social media posts and private
18 messages are sought, submitting the records "to a judge for ex parte review (see
19 Pen. Code, § 1326, subd. (c)), as a predicate to possible broader disclosure, itself
20 constitutes a significant impingement" on the privacy rights of the person to
21 whom the record pertains. (*Facebook (Touchstone)*, *supra*, at p. *13; *cf.*, *Hill v.*
National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 27, fn. 7 [state
22 constitutional right to privacy may be invaded by a less-than-public
23 dissemination of information].)

24 To effectuate this greater scrutiny, trial courts must review the *publicly*
available information that has been provided (e.g., *non-private* posts and
messages) in order to determine how substantial is the need for the private

1 content. (See *Facebook (Touchstone)*, *supra*, at p. *13, fn. 12 [quoting the
2 appellate court holding in *Facebook v. Superior Court (Hunter)* (2020) 46
3 Cal.App.5th 109 (review granted June 10, 2020, S260846].)

4 Moreover, in applying this heightened scrutiny, courts must recognize that
5 just because it “*possible* that material exists in a prior or subsequent social media
6 post [that] may be relevant to something that the defendant would like to rely
7 upon” (*Facebook (Touchstone)*, *supra*, at p. *13), this does not equate to a
8 plausible justification for in camera review of the materials.

9
10 **D. Courts Should Protect Victims’ Rights to Notice That Their
11 Records Have Been Subpoenaed**

12 Pursuant to constitutional provisions enacted by Marsy’s law, a victim has
13 a right to prevent disclosure of matters “otherwise privileged or confidential by
14 law” (Cal. Const., art. I, § 28, subd. (b)(4)) and to refuse a discovery request by a
15 defendant (*id.*, at subd. (b)(5)). (*Facebook (Touchstone)*, *supra*, at p. *14.)
16 “Moreover, subdivision (c)(1) of section 28 allows the prosecution to enforce a
17 victim's rights under subdivision (b).” (*Ibid.*) “These provisions contemplate
18 “that the victim and the prosecuting attorney would be aware that the defense
19 had subpoenaed confidential records regarding the victim from third parties.”
20 (*Ibid.*)

21 Accordingly, when a subpoena seeks private communications like
22 restricted posts and messages of a victim on social media, it implicates
23 constitutional provisions; and it is appropriate for a court “to inquire whether
24 such notice has been, or should be, provided.” (*Ibid.*) And where a trial court has
ordered an entity like Facebook to preserve the sought-after files and
information, and the entity has reported that it had done so, “an appropriate
assessment of a victim's rights under the constitutional provision would consider
whether, after such preservation has occurred (hence presumably addressing
concerns about possible spoliation by a social media user), notice to a

1 victim/social media user should be provided in order to facilitate the victim's
2 confidentiality and related rights.” (*Id.* at p. *13, fn. 13.)

3 **E. A Pretrial Request for Privileged or Confidential Documents**
4 **May be Summarily Denied: *People v. Hammon* (1997) 15 Cal.4th**
5 **1117**

6 As described above, one of the factors in deciding whether a good cause
7 showing for disclosure has been established is whether the request for the records
8 is premature. (*Facebook (Touchstone)*, *supra*, at p. *9.) This factor implicates
9 the continuing validity of *People v. Hammon* (1997) 15 Cal.4th 1117, a California
10 Supreme Court case upholding the refusal of a trial court to review or disclose
11 *pretrial* discovery of statutorily privileged psychotherapy information
12 subpoenaed by the defense - notwithstanding objections that the trial court's
13 refusal would violate defendant's federal Fifth Amendment due process rights
14 and his Sixth Amendment rights of confrontation, cross-examination, and
15 counsel. (See *Hammon* at p. 1128; *Facebook (Touchstone)*, *supra*, at p. *2.)

16 The *Hammon* court recognized there are inherent dangers in permitting
17 pretrial disclosure at a stage when the court does not have sufficient information
18 to conduct an inquiry and pointed out that under certain circumstances the
19 review and disclosure would be a serious and unnecessary invasion of the
20 statutory privilege. (*Id.* at p. 1127.) The rule in *Hammon* has been applied in
21 other contexts. (See e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 592-593;
22 *People v. Petronella* (2013) 218 Cal.App.4th 945, 960 [finding defendant did not
23 have right to pre-trial review of e-mails claimed to be covered by the attorney-
24 client privilege].) And its rationale (i.e., that disclosure at the pretrial stage of
privileged information is premature because a court will have insufficient
information to conduct an inquiry and there is a risk the privilege will be
unnecessarily breached) is applicable to *all* privileged or confidential documents.

1 The issue of the continuing validity of *Hammon* (insofar as it allowed trial
2 courts to decline to review privileged information in general at the pretrial stage)
3 has recently and repeatedly been raised, but not reached, by the California
4 Supreme Court. (See *Facebook (Touchstone)*, *supra*, at p. *2; *Facebook, Inc. v.*
5 *Superior Court (Hunter I)* (2018) 4 Cal.5th 1245 at p. 1261; see also *People v.*
6 *Caro* (2019) 7 Cal.5th 463, 501 [declining to reconsider *Hammon* in the context
7 of the case before it but recognizing that “the advent of digitized, voluminous
8 records may conceivably raise new and challenging issues” when it comes to
9 pretrial discovery in general].) For now, *Hammon* remains binding precedent.

10 However, it is important to recognize that just because *Hammon* held
11 there is no constitutional *right* to pre-trial review and discovery of privileged
12 information, this does not mean a trial court is absolutely *prohibited* from
13 reviewing or granting disclosure of privileged material pre-trial. It just means
14 that “courts should be especially reluctant to facilitate pretrial disclosure of
15 privileged or confidential information that, as it may turn out, is unnecessary to
16 use or introduce at trial.” (See *Facebook (Touchstone)*, *supra*, at p. *13, cf g
17 *Hammon* at p. 1127.)

18 **F. A Court Should Make a Record Facilitating Appellate Review**

19 Although a trial court is not required to issue a written decision concerning
20 its ruling, “a trial court ruling on a motion to quash — especially one that . . .
21 involves a request to access restricted social media posts and private messages
22 held by a third party — should bear in mind the need to make a record that will
23 facilitate appellate review.” (*Facebook (Touchstone)*, *supra*, at p. *16.) “[A] trial
24 court should, at a minimum, articulate orally, and have memorialized in the
reporter’s transcript, its consideration of the [seven factors that courts must
balance when ruling on a motion to quash].” (*Ibid.*)

1 upon . . . to balance the defendant’s need for cross-examination and the state
2 policies the privilege is intended to serve.”].)

3 A similar balancing test must take place not only when the records are
4 privileged but when the records are protected by a state constitutional right of
5 privacy – either the general state constitutional right of privacy ensconced in
6 article I, section 1 or the crime victim’s right of privacy ensconced in article I,
7 section 28(b)(4).⁶ (See *People v. Abel* (2012) 53 Cal.4th 891, 931; see also *J.E. v.*
8 *Superior Court* (2014) 223 Cal.App.4th 1329, 1338 [applying balancing test to
9 whether juvenile records sought be defense should be disclosed]; *Rubio v.*
10 *Superior Court* (1988) 202 Cal.App.3d 1343, 1350 [remanding case for trial court
11 to decide whether defendant’s right to due process outweighed the state and
12 federal constitutional rights of privacy and statutory privilege not to disclose
13 confidential marital communications of the victim’s parent in a videotape
14 subpoenaed by the defense].)

15 **A. The General California State Right of Privacy Embraces**
16 **Information that is Generally Viewed as Confidential, is**
17 **Privileged, or is Protected by Marsy’s Law**

18 The California state right of privacy is broad and California cases “establish
19 that, in many contexts, the scope and application of the state constitutional right
20 of privacy is broader and more protective of privacy than the federal

21 ⁶ Article 1, section 1 of the state Constitution provides: “All people are by nature
22 free and independent and have inalienable rights. Among these are enjoying and
23 defending life and liberty, acquiring, possessing, and protecting property, and
24 pursuing and obtaining safety, happiness, and **privacy**.” (Emphasis added.)

Article I, section 28(b)(4), enacted by Marsy’s Law, provides that a victim shall be
entitled “[t]o prevent the disclosure of confidential information or records to the
defendant, the defendant’s attorney, or any other person acting on behalf of the
defendant, which could be used to locate or harass the victim or the victim’s
family or which disclose confidential communications made in the course of
medical or counseling treatment, **or which are otherwise privileged or
confidential by law**.” (Emphasis added.)

1 constitutional right of privacy as interpreted by the federal courts.” (*American*
2 *Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 336.)⁷

3 Information is considered “private” under the state constitutional right of
4 privacy “when well-established social norms recognize the need to maximize
5 individual control over its dissemination and use to prevent unjustified
6 embarrassment or indignity.” (*International Federation of Professional and*
7 *Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319,
8 330; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 30.) Among
9 other information protected by the state constitutional right to privacy: arrest
10 records or information about arrests (see *International Federation of*
11 *Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*
12 (2007) 42 Cal.4th 319, 340; *People v. Jenkins* (2000) 22 Cal.4th 900, 957;
13 *Denari v. Superior Court* (1989) 215 Cal.App.3d 1488, 1498 [citing to numerous
14 cases]; *Reyes v. Municipal Court* (1981) 117 Cal.App.3d 771, 775; *Craig v.*
15 *Municipal Court* (1979) 100 Cal.App.3d 69, 72); home contact information
16 (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 554); records of personal
17 financial affairs (see *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259,
18 268); a patient’s medical records and psychiatric history (see *Manela v. Superior*
19 *Court* (2009) 177 Cal.App.4th 1139, 1150; *Pettus v. Cole* (1996) 49 Cal.App.4th
402, 440); personnel files (see *In re Clergy Cases I* (2010) 188 Cal.App.4th 1224,
1235); school records by virtue of Education Code section 49076 (see *BRV, Inc.*
20 *v. Superior Court* (2006) 143 Cal.App.4th 742, 751-754); and information
21 concerning a person’s sexual conduct (see *Roman Catholic Bishop v. Superior*

22 ⁷ “The Supreme Court has recognized that ‘one aspect of the “liberty” protected by
23 the Due Process Clause of the Fourteenth Amendment is “a right of personal
24 privacy, or a guarantee of certain areas or zones of privacy.”’ (*Marsh v. County*
of San Diego (9th Cir. 2012) 680 F.3d 1148, 1153 citing to *Carey v. Population*
Servs. Int’l (1977) 431 U.S. 678, 684.) “This right to privacy protects two kinds of
interests: ‘One is the **individual interest in avoiding disclosure of**
personal matters, and another is the interest in independence in making
certain kinds of important decisions.’” (*Ibid*, emphasis added.)

1 Court (1996) 42 Cal.App.4th 1556, 1567; *Barrenda L. v. Superior Court* (1998) 65
2 Cal.App.4th 794, 800).

3 Restricted posts and private messages on social media likely qualify for
4 protection under the California state right of privacy - even if they are not
5 necessarily protected by the Fourth Amendment. (See *Facebook (Touchstone)*,
6 *supra*, at p. *13 [noting even allowing a court to review such posts and messages
7 would constitute “a significant impingement on the social media user’s privacy”];
8 Pen. Code, § 1546 et seq. [limiting government access to electronic
9 communications]; cf., *People v. Pride* (2019) 31 Cal.App.5th 133, 140 [“Where
10 social media ‘privacy settings allow viewership of postings by “friends,” the
11 Government may access them through a cooperating witness who is a “friend”
12 without violating the *Fourth Amendment*.”].)

13 Information that is expressly privileged by statute will fall under the
14 general state constitutional right of privacy of article I, section 1. (See e.g.,
15 *Mansell v. Otto* (2003) 108 Cal.App.4th 265, 271 [holding the
16 psychotherapist/patient privilege is an aspect of the constitutional right to
17 privacy].)

18 And the general right to privacy also likely encompasses the crime victim’s
19 right of privacy in “confidential information or records to the defendant, the
20 defendant’s attorney, or any other person acting on behalf of the defendant,
21 which could be used to locate or harass the victim or the victim’s family or which
22 disclose confidential communications made in the course of medical or
23 counseling treatment, or which are otherwise privileged or confidential by law.”
24 (Cal. Const., art. I, § 28 (b)(4) [enacted by Marsy’s Law]; *Kling v. Superior Court*
(2010) 50 Cal.4th 1068, 1080.)

1 **B. When the Information Subject to the State Constitutional Right**
2 **of Privacy Constitutes Favorable and Material Evidence, the**
3 **Defendant’s Due Process Right to Third Party Records Will**
4 **Generally Require Disclosure**

5 When *privileged* or otherwise confidential information may potentially
6 constitute favorable material evidence under *Brady*, the decision of the United
7 States Supreme Court governing a trial court’s obligations is *Pennsylvania v.*
8 *Ritchie* (1987) 480 U.S. 39. In *Ritchie*, the High Court “considered the
9 circumstances under which the due process clause of the Fourteenth Amendment
10 entitled the defendant in a child molestation case to obtain pretrial discovery of
11 the files of Pennsylvania’s children and youth services agency to determine
12 whether they would assist in his defense at trial. The statutory scheme evidently
13 authorized the agency to investigate cases in which the child abuse had been
14 reported to the police; information compiled during the agency’s investigation
15 was made confidential, subject to numerous exceptions, including court-ordered
16 disclosure.” (*People v. Hammon* (1997) 15 Cal.4th 1117, 1124-1125 citing to
17 *Ritchie*.) The *Ritchie* court did not decide whether the records should have been
18 released but remanded the case to the trial court for it to determine “whether the
19 CYS file contains information that may have changed the outcome of his trial had
20 it been disclosed.” (*Id.* at p. 61; *Rubio v. Superior Court* (1988) 202 Cal.App.3d
21 1343, 1350 [remanding case for trial court to decide whether defendant’s right to
22 due process outweighed the state and federal constitutional rights of privacy and
23 statutory privilege not to disclose confidential marital communications of the
24 victim’s parent in a videotape subpoenaed by the defense].)

Ordinarily, if the information sought constitutes favorable *material*
evidence for the defense (i.e., *Brady* evidence), the privilege or state
constitutional right of privacy must give way. (See e.g., *J.E. v. Superior Court*
(2014) 223 Cal.App.4th 1329, 1335 [citing to *Ritchie* for the proposition that

1 “[d]isclosure may be required even when the evidence is subject to a state privacy
2 privilege, as is the case with confidential juvenile records.”].)

3 However, when a privilege is absolute, even a defendant’s federal due
4 process rights may not trump it. (See *People v. Bell* (2019) 7 Cal.5th 70, 96 [“a
5 criminal defendant’s right to due process does not entitle him to invade the
6 attorney-client privilege of another.”]; *People v. Gurule* (2002) 28 Cal.4th 557,
594 [same].)

7 **C. When the Information Protected by the State Constitutional
8 Right of Privacy Might Simply be Favorable But Not Material
9 Evidence, the Balancing Test is More Nuanced**

10 The state constitutional right of privacy in the records subpoenaed by the
11 defense is not absolute. (See *Hill v. National Collegiate Athletic Assn.* (1994) 7
12 Cal.4th 1, 37.) But before information subpoenaed by the defense can be
13 disclosed to the defense, the judge must determine (i) if there is a protected
14 privacy interest; (ii) whether there is a reasonable expectation of privacy in the
15 circumstances; (iii) how serious is the invasion of privacy, and (iv) whether the
16 invasion is outweighed by legitimate and competing interests. (*Hill v. National
17 Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.) “The key element in this
18 process is the weighing and balancing of the justification for the conduct in
19 question against the intrusion on privacy resulting from the conduct whenever a
20 genuine, nontrivial invasion of privacy is shown.” (*Alfaro v. Terhune* (2002) 98
21 Cal.App.4th 492, 509.) “[N]ot ‘every assertion of a privacy interest under article
22 I, section 1 must be overcome by a ‘compelling interest.’” (*Williams v. Superior
23 Court* (2017) 3 Cal.5th 531, 556.) But a “compelling interest” is still required to
24 justify “an obvious invasion of an interest fundamental to personal autonomy.”
(*Ibid.*) Most of the cases applying this balancing test are civil cases. But there is
no reason the principles discussed below should be inapplicable when third party
records are subpoenaed in a criminal case.

1 sought materials outside the presence of the prosecution, if necessary to protect
2 defense strategy and/or work product. (*Id.* at p. *15; see also *Kling v. Superior*
3 *Court* (2010) 50 Cal.4th 1068, 1075 [noting “the defense the defense is not
4 required, on pain of revealing its possible defense strategies and work product, to
5 provide the prosecution with notice of its theories of relevancy of the materials
6 sought, but instead may make an offer of proof at an in camera hearing”].)

7 However, in *Garcia v. Superior Court* (2007) 42 Cal.4th 63, the California
8 Supreme Court cautioned that, in deciding whether to allow the defense to file a
9 sealed affidavit, undue emphasis should not be placed on a defendant’s “state
10 constitutional privilege against self-incrimination as it relates to reciprocal
11 discovery.” (*Id.* at p. 76.) The *Garcia* court held, in light of the enactment of
12 Proposition 115 and its implementation of reciprocal discovery, a court deciding
13 whether to hold an in camera hearing may no longer weigh the need for
14 confidentiality as heavily as the courts did before the passage of Proposition 115
15 (i.e., the fact that the affidavit “conceivably might lighten the load the People
16 must shoulder in proving their case” is no longer a basis for preventing the
17 People from learning of the alleged need of the defense for the discovery sought).
18 (See *Garcia, supra*, 42 Cal.4th at pp. 75-76.)⁸

19 More importantly, the California Supreme Court has repeatedly stated
20 trial courts should not allow “sealing in this setting unless there is “a risk of
21 revealing privileged information” and a showing “that filing under seal is the
22 **only** feasible way to protect that required information.”” (*Facebook*
23 (*Touchstone*) at p. *15, emphasis added.) And the decision as to whether to allow
24 defendant to proceed ex parte and by way of sealed documents must take into
consideration the People’s “right to due process and a meaningful opportunity to

⁸ Like it did in the case of *Facebook (Touchstone), supra*, at pp. 6-7, the California Supreme Court in *Garcia* relied heavily on the decision in *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118 for guidance.

1 effectively challenge the discovery request.” (*Id.* at pp. *15 citing to *Kling v.*
2 *Superior Court* (2010) 50 Cal.4th 1068, 1079.)

3 Accordingly, a trial court should “balance the People’s right to due process
4 and a meaningful opportunity to effectively challenge the discovery request
5 against the defendant's constitutional rights and the need to protect defense
6 counsel’s work product.” (*Id.* at p. *15.) And “[a] trial court has discretion to
7 balance these ‘competing interests’ in determining how open proceedings
8 concerning the subpoena should be.” (*Ibid.*)

9 It is important to keep in mind that a trial court “is not ‘bound by
10 defendant’s naked claim of confidentiality’” but should, in light of all the facts
11 and circumstances, make such orders as are appropriate to ensure that the
12 maximum amount of information, consistent with protection of the defendant's
13 constitutional rights, is made available to the party opposing the motion for
14 discovery.” (*Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1079; accord
15 *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72; *City of Alhambra v. Superior*
16 *Court* (1988) 205 Cal.App.3d 1118, 1130; see also *People v. Sahagun* (1979) 89
17 Cal.App.3d 1, 26 [noting, in context of defense motion to dismiss for a speedy
18 trial violation, that trial court compounded its original error in granting an in
19 camera hearing “when, notwithstanding its realization during the hearing that
20 there was no legitimate need for preserving the confidentiality of the information
21 imparted to it, the court nevertheless proceeded to make its decision, based
22 expressly on the ‘offers of proof’ received in camera, without disclosing their
23 content to the People and affording the People an opportunity to challenge the
24 truth and accuracy of the statements made, present rebuttal evidence, and engage
in meaningful argument.”].)

How the determination of whether to allow the defense to file an affidavit
under seal and/or proceed ex parte should be made was discussed in *City of*
Alhambra v. Superior Court (1988) 205 Cal.App.3d 1118:

1 “The defendant who seeks to use in camera procedures in connection with
2 a motion for discovery should first give a proper and timely notice and claim his
3 fifth amendment or other privilege, and should support that claim by affidavit or
4 declaration, stating his reasons, all of which can be considered by the court in
camera.” (*Id.* at p. 1131.)

5 “The trial court should then make a clear finding, on the record, that it has
6 received and considered such papers and that it finds or does not find that the in
7 camera procedure is both necessary and justified by the need to protect a
8 constitutional or statutory privilege or immunity.” (*Ibid.*)

9 The court’s decision should be based upon an evaluation of all of the facts
10 in light of the need to answer two critical questions. Will disclosure to the
11 prosecutor ‘conceivably’ lighten the People’s burden or will it serve as a ‘link in a
12 chain of evidence tending to establish guilt’?⁹ Is the information which the
13 defendant seeks to protect subject to some constitutional or statutory privilege or
immunity? If the answer to either question is yes then disclosure should not be
made.” (*Ibid.*)

14 On the other hand, if the claim of confidentiality cannot be sustained as to
15 some or all of the material submitted by the defendant then such material should
16 be made available to the prosecutor (and, where appropriate, interested third
17 parties) so that all parties will have the fullest opportunity possible to participate
18 in those proceedings which will determine what, if any, discovery should be
ordered.” (*Ibid.*)

19 In *Garcia v. Superior Court* (2007) 42 Cal.4th 63, the California Supreme
20 Court discussed *City of Alhambra* with approval in the context of addressing the
21 issue of whether a sealed affidavit may be filed in support of a *Pitchess* motion.

22 ⁹ As noted earlier in this bench memo, the fact that the affidavit “conceivably
23 might lighten the load the People must shoulder in proving their case” is no
24 longer a basis for preventing the People from learning of the alleged need of the
defense for the discovery sought. (See *Garcia, supra*, 42 Cal.4th at pp. 75-76.)

1 The *Garcia* court largely approved the procedures that the *Alhambra* court
2 recommended be followed by the trial court and added a few of its own, including

3 (i) requiring the defense to provide “proper and timely notice” of the
4 privilege claim;

5 (ii) requiring the defense to provide the court with the affidavit the defense
6 seeks to file under seal, along with a proposed redacted version which should be
7 served on opposing counsel;

8 (iii) requiring an in camera hearing on the request to file under seal;

9 (iv) requiring that counsel explain how the information proposed for
10 redaction would risk disclosure of privileged material if revealed, and
11 demonstrate why that information is required to support the motion;

12 (v) requiring that opposing counsel be given an opportunity to propound
13 questions for the trial court to ask in camera; and

14 (vi) requiring that filing under seal be the only feasible way of protecting
15 the revelation of privileged information. (*Garcia*, at p. 73.)

16 In “*Facebook (Touchstone)*, *supra*, the California Supreme Court
17 admonished that if “a trial court *does* conclude, after carefully balancing the
18 respective considerations, that it is necessary and appropriate to proceed *ex parte*
19 and/or under seal, and hence to forego the benefit of normal adversarial testing,
20 ***the court assumes a heightened obligation to undertake critical and***
21 ***objective inquiry, keeping in mind the interests of others not privy to***
22 ***the sealed materials.*** (*Id.* at p. *16, emphasis added.)

23 Dated: _____

24 Respectfully submitted,
XXXX X. XXXXXXXXX
DISTRICT ATTORNEY

By: _____
Xxxxx Xxxxxx
Deputy District Attorney

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