

FEDERAL CRIMINAL DEFENSE TRAINING

*Sponsored by the Office of the Federal Public Defender and
the Charles F. Greevy, Jr., American Inn of Court*

Thursday, March 24, 2016

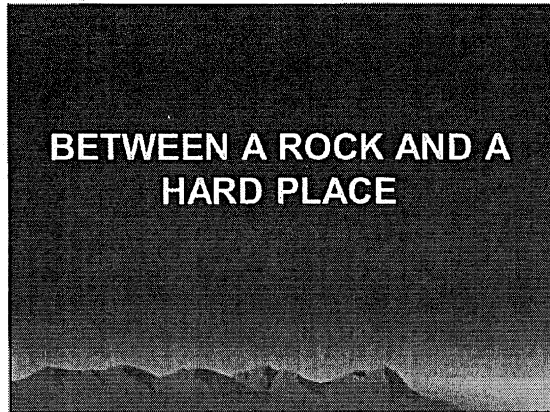
University of Scranton

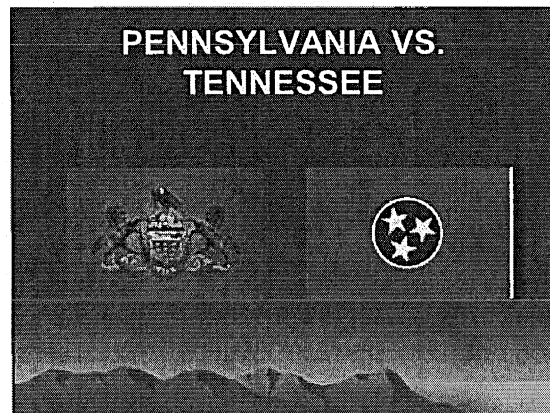
McIlhenny Ballroom, DeNaples Center

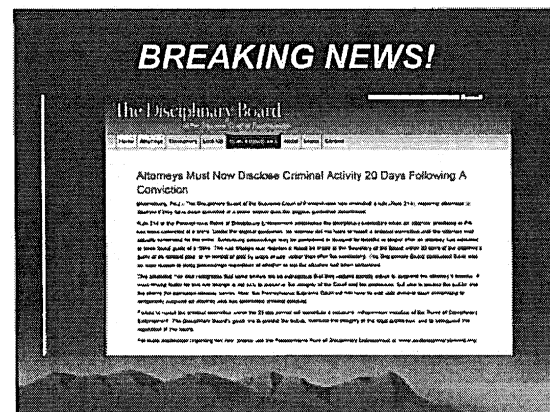
900 Mulberry Street

Scranton, PA 18510

8:00 A.M. - 8:45 A.M.	Registration and Continental Breakfast
8:45 A.M. - 9:00 A.M.	Welcome <i>James V. Wade, Federal Public Defender</i>
9:00 A.M. - 10:00 A.M.	Between a Rock & a Hard Place (Ethics) <i>Elizabeth B. Ford, Federal Community Defender, Eastern District of Tennessee</i>
10:00 A.M. - 11:00 A.M.	The Ins & Outs of Social Media Records <i>Tim Watkins, Assistant Federal Public Defender, District of Massachusetts</i>
11:00 A.M. - 11:15 A.M.	Break
11:15 A.M. - 12:15 P.M.	Sentencing Guidelines Update <i>Alan Dorhoffer, Deputy Director, Office of Education & Sentencing Practice, United States Sentencing Commission</i>
12:15 P.M. - 1:15 P.M.	LUNCH
1:15 P.M. - 2:15 P.M.	Sentencing Guidelines Update (Continued) <i>Alan Dorhoffer, Deputy Director, Office of Education & Sentencing Practice, United States Sentencing Commission</i>
2:15 P.M. - 2:45 P.M.	Case Budgeting and Excess Compensation Cases <i>Renee Hurtig Edelman, Case Budgeting Attorney, United States Court of Appeals for the Third Circuit</i>
2:45 P.M. – 3:15 P.M.	E-Voucher 101 <i>Holly Snell, Internal Control Analyst, United States District Court for the Middle District of Pennsylvania</i>
3:15 P.M. – 3:30 P.M.	Break
3:30 P.M. - 4:30 P.M.	Third Circuit Update & Practice Tips Update on Johnson Litigation <i>Ron Krauss, Assistant Federal Public Defender, Appeals</i> <i>Fritz Ulrich, Assistant Federal Public Defender, Appeals</i> <i>Tammy Taylor, Research & Writing Attorney</i>







THE FUGITIVE CLIENT

FACTS

- Client has fled the jurisdiction.
- Client calls you to discuss his/her case.

QUESTIONS

- Must you withdraw? Attempt to ascertain client's location so that you can tell the court?
- If the client volunteers the location, must you inform the court? What if relatives tell you his whereabouts?

- Rule 1.2 Scope of representation
 - (d) A lawyer shall not counsel...or assist a client in conduct that the lawyer knows is criminal or fraudulent...
- Rule 1.6 Confidentiality of information
 - (b) A lawyer **shall** reveal such information if necessary...
 - (c) A lawyer **may** reveal...

Rule 3.3 Candor toward the tribunal

- (a) A lawyer shall not knowingly;
- (1) make a false statement of material fact or law...or fail to correct...

ADVICE TO WITNESSES

FACTS

- One hour before trial is scheduled to begin, you learn that one of your witnesses will inculcate himself on the stand.

QUESTIONS

- Do you have an obligation to inform the witness of his peril?
- If it only becomes clear during the witness' testimony that she is about to inculcate herself, who, if anyone, should act and how?

- Rule 4.3 Dealing with unrepresented persons

– (a) ... lawyer shall not state or imply that the lawyer is disinterested.

Rule 4.4 Respect for rights of third persons

– ... a lawyer shall not ... embarrass, delay or burden a third person ... or violate the legal rights of such a person.

- Victim and Witness Protection Act, 18 U.S.C. §1512(e)

CANDOR TO THE COURT

FACTS

- At sentencing, the AUSA informs the court that the defendant has no prior record.
- Based on a client interview, you are aware that your client has a very lengthy criminal history.

QUESTIONS

- Must you inform the court?
- What if the judge asks you if the client has a record?
- If the client made a misrepresentation to the court, should you correct it?

- Rule 1.2(d) Scope of representation
 - ...shall not ...assist a client in conduct that the lawyer knows is...fraudulent
- Rule 3.3 Candor toward the tribunal
 - ...shall not knowingly...make a false statement...or fail to correct
- Rule 8.4 Misconduct
 - It is professional misconduct for a lawyer to...engage in conduct involving...fraud

CLIENT DANGEROUSNESS

FACTS

- Based on several client interviews, defense counsel is in possession of information which indicates that the defendant is a danger to himself and others.
- The court does not have the information and releases the client on an OR bond.

QUESTIONS

- Must defense counsel disclose the information? May he do so ethically?
- If the actual psychiatric report in counsel's possession states that the client is a danger to himself, but not society, is there an obligation to disclose to the court?

CROSS EXAMINATION

FACTS

- You are preparing to cross-examine a prosecution witness whose version of the events you know to be true.
- You have discovered that the witness has at least two convictions that may be used to impeach the witness.

QUESTIONS

- May you use this information to impeach the witness's credibility, despite the fact that you know her statement to be true?

MISREPRESENTATION

FACTS

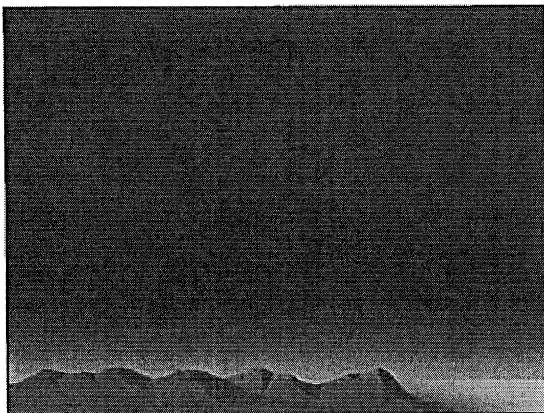
- Defendant fills out a financial affidavit that is filed with the court.
- Based on the affidavit, you are appointed to represent the defendant.

- You obtain information that your client is able to make payment, either in whole or in part, for legal services.
- The source of the information is not protected as a privileged communication.

QUESTIONS

- Should counsel inform the court?
- One month later your client tells you that she lied and that she does have assets that she did not list. She wants to pay you because you are doing such a good job. Should you tell the court?

- Should you tell the court that she may be able to make payments now?
- You learn from the sister that the client has \$10,000, should you inform the court?
- What if the grand jury subpoenas you regarding your client's financial status?



GUILTY PLEAS

FACTS

- Defendant is charged in an indictment alleging numerous counts of conspiracy, possession with intent to distribute and distribution of crack.

- Defendant insists upon accepting the offer to plead guilty to a single count of distribution despite defendant's denial of knowledge that the substance was cocaine.
- The plea offer is pursuant to Rule 11 of the FRCP.

QUESTION

- What is a defense attorney to do?

HOUSTON, WE HAVE A PROBLEM!

FACTS

- Larry Defense Lawyer is a social media whiz- Twitter, Blogs, Facebook, etc.- with a great idea.
- He knows who the snitch is and knows someone who will try to "friend" her to find out what is on her wall.

QUESTIONS

- Is there a problem with getting information about her that way?
- Would it make any difference if she is represented or not?

- Rule 5.3 Responsibilities regarding non-lawyer assistants.
 - ...a lawyer shall be responsible for conduct ...that would be a violation of the Rules...if engaged in by a lawyer...
- Rule 8.4(c) Misconduct.
 - ...engage in conduct involving dishonesty...or other misrepresentation.

TECHNOLOGY & ETHICS

Facts

- Even though Larry is a social media whiz, his clients are not always happy. His representation of Drug Dealer Donnie did not end so well for Donnie. Donnie posts a negative review of Larry on a legal referral website called AVVO.

Questions

- Can Larry post a response? Does filing a response violate any rules? What can he say if he does post a response?
- Is there another way to handle the negative review?

- Rule 1.6 (c) (4)
 - A lawyer may reveal such information to the extent the lawyer reasonably believes necessary in a controversy between the lawyer and the client, to establish ...a defense to a criminal charge or civil claim...

Facts

- Betty Barrister is reading restaurant reviews on Yelp when she decides that she will see if there are any reviews of her law firm on Yelp. She finds that the firm only has two stars. She calls together the staff and suggests that they open Yelp accounts and write reviews for the firm. She suggests ratings of 4 or 5 stars.

Questions

- Is there a problem with this? Would it make any difference if she had asked the members of her book group to post reviews?

Facts

- Polly Panel Lawyer was looking at her LinkedIn account and saw that there is a section called "Skills & Expertise." It showed that she had been "endorsed" by someone for the skill of "litigation."

Questions

- Does the endorsement feature of LinkedIn cause concern under professional conduct rules?

THE END

THE INS AND OUTS OF SOCIAL MEDIA RECORDS

*Tim Watkins, Assistant Federal Public
Defender, District of Massachusetts*

1 Kasie W. Lee, SBN No. 229168
2 One Sansome Street, ste. 3500
3 San Francisco, California 94104
4 Telephone: (415) 371-9786
5 Email: kasie@kasiewlee.com

6 Attorney for Defendant
7 LAUREN SMITH

8 SUPERIOR COURT OF CALIFORNIA
9 CITY AND COUNTY OF SAN FRANCISCO

10 PEOPLE OF THE STATE OF
11 CALIFORNIA,

12 Plaintiff,

13 v.

14 LAUREN SMITH,

15 Defendant.

No. [REDACTED]

NOTICE OF MOTION AND
MOTION TO QUASH THE
SUBPOENA DUCES TECUM
ISSUED BY THE PEOPLE TO
TWITTER, INC.

16 Date: [REDACTED] 1/4/13
Time: 1:30 pm
Dept. 16

17 TO THE ABOVE-ENTITLED COURT AND THE DISTRICT ATTORNEY FOR THE CITY
18 AND COUNTY OF SAN FRANCISCO:

19
20 PLEASE TAKE NOTICE that on the above date, time, and in the above-noted
21 department of the above-entitled court, the defendant LAUREN SMITH, will respectfully move
22 this Court to quash a subpoena duces tecum (hereinafter "the subpoena") issued by the San
23 Francisco District Attorney's Office to Twitter, Inc., for the records and content of Twitter
24 subscriber @laurenriot on the grounds that the subpoena fails to comply with 18 U.S.C. §2701-
25 2711 (the Stored Communications Act).

26 This motion is based on the attached declaration, points and authorities, and any
27 additional evidence and argument that may be presented at the time of the hearing.
28

1 I. DECLARATION OF COUNSEL

2 I, Kasie W. Lee, hereby declare:

- 3 1. I am the attorney of record for Lauren Smith in the above-entitled case.
- 4 2. On or about November 13, 2012, Assistant District Attorney Laura Caster served a
- 5 subpoena decus tecum on Twitter, Inc., for the production of records and content
- 6 information for subscriber @laurenriot, including:
- 7 a. Subscriber information for @laurenriot;
- 8 b. Photos tweeted by @laurenriot for the time period between January 1, 2012
- 9 through October 31, 2012;
- 10 c. Mentions of @laurenriot by any other Twitter user for the time period between
- 11 January 1, 2012 through October 31, 2012;
- 12 d. Tweets by @laurenriot the time period between January 1, 2012 through October
- 13 31, 2012;
- 14 e. The usernames of all followers of @laurenriot;
- 15 f. The usernames of all subscribers followed by @laurenriot.
- 16 *See Exhibit A, Subpoena Duces Tecum.*
- 17 3. The subpoena further asserts that there is good cause for the production for the
- 18 following reasons:
- 19 a. That the twitter account for @laurenriot belongs to Ms. Smith;
- 20 b. That Ms. Smith, along with the 18 other defendants are being charged with
- 21 rioting, routing, and unlawful assembly;
- 22 c. That Lauren Smith, Robert Donohoe and Daniel Bash are additionally charged
- 23 with wearing a disguise during the commission of a crime;
- 24 d. That the account may contain communications indicating that Ms. Smith and/or
- 25 the other defendants conspired to or agreed to stage a riot, unlawfully assemble
- 26 or wear a disguise during a commission of a crime.

27 *See id.*

- 28 4. No other statements supporting the existence of good cause were provided.

1 5. On or about November 24, 2012, Ms. Smith received an email from Twitter Legal
2 informing her of the subpoena. No other notice was provided to Ms. Smith.

3 6. Upon information and belief, the twitter account for @laurenriot was no longer
4 active at the time of the service of the subpoena and none of the tweets were
5 viewable by the public.

6 7. There is no information that this Twitter account was used immediately before,
7 during, or after the alleged incident.

8
9 Dated this 29th day of November, 2012.

10
11 Respectfully submitted.

12
13 
14 Kasie W. Lee

15 Attorney for Defendant
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II. POINTS AND AUTHORITIES

A. The Subpoena Should Be Quashed Because It Fails to Comply with the Stored Communications Act, 18 U.S.C. §2701-§2711

The Stored Communications Act, 18 U.S.C. §2701-2711, governs the privacy of stored Internet communications in the United States. Enacted in 1986, the statute prohibits providers of an electronic communication service, such as Twitter, Inc., from “knowingly divulging the contents of any communication while in electronic storage by that service to any person other than the addressee or intended recipient.” S.Rep. No. 99-541, 97th Cong. 2nd Sess. 37. Clearly, the legislative intent of the Stored Communications Act was to protect users whose communications are in electronic storage with an Internet Service Provider or other electronic communications facility.” *Theofel, v. Farey-Jones*, 341 F.3d 978, 982 (9th Cir. 2003).

§2703 sets forth an exception to the general rule of non-disclosure, laying out specific steps that must be taken before the government can compel disclosure of subscriber information (classified as “records”) and substantive electronic communication (classified as “contents”). None of those steps were complied with in this case.

1. §2703(a) Permits Disclosure of Contents Less Than 180 Days Old Only With a Valid Search Warrant

Pursuant to §2703, a governmental entity “may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction.” In this case, the San Francisco District Attorney’s Office seeks to compel disclosure of photos, tweets, mentions, names of followers and names of those followed from January 1, 2012 to October 31, 2012 for the account held by @laurenriot. However, any of the listed contents (photos, tweets, mentions, followers, those followed) from May 29, 2012 would be less than 180 days old. Absent a search warrant, compliance with the

1 subpoena would be in direct violation of this section.
2

3 2. §2703(b) Permits Disclosure of Contents Over 180 Days Old Only With
4 Either a Valid Search Warrant or Provides Notice to the Subscriber

5 With respect to the contents sought from January 1, 2012 to May 28, 2012, disclosure of
6 contents over 180 days old is only permitted under §2307(b) is only permitted with a valid
7 search warrant or, absent a warrant, prior notice to the subscriber. The notice requirement may
8 be bypassed with a court order, which may issue only when the governmental entity offers
9 specific and articulable facts showing that there are reasonable grounds to believe that the
10 contents of a wire or electronic communication, or the records or other information sought, are
11 relevant and material to an ongoing criminal investigation. Here, there is no search warrant,
12 prior notice or court order accompanying the subpoena.

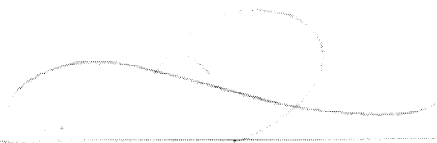
13 Even if a court order were to be sought in this matter, the People would not be able to
14 provide specific and articulable facts showing why contents dating as far back as nine to ten
15 months before the incident would be relevant and material to the incident on October 6, 2012.
16

17 III. CONCLUSION

18 Based on the foregoing, Ms. Smith and counsel respectfully request this court to quash
19 the subpoena.
20

21 Dated: November 29, 2012
22

23 Respectfully submitted.
24

25 
26 _____
27 KASIE W. LEE
28 Attorney for LAUREN SMITH

Proof of Service

I, the undersigned, declare:

On November 30, 2012 I electronically served a copy of the attached Notice of Motion and Motion to Quash on the following parties:

Honorable Andre Cheng, Acheng@sftc.org;
Laura Claster, Laura.Claster@sfgov.org;
Mark R. Vermeulen, vermeulen@mindspring.com;
Christopher Dove, dovelaw@gmail.com;
Michael Linscheid, linscheidlaw@hotmail.com;
Sam Lasser, samlasser@hotmail.com;
Stuart Hanlon, stuart@stuarthanlonlaw.com;
Wendy Lowinger, wendy@lowingerlaw.com;
Kate Chatfield, katechatfield@gmail.com;
Cherly Rich, cheryl_rich@crichlaw.com;
Josh Davis, jdavis@joshdavislaw.com;
Samantha Schwartz, schwartzbrownlaw@gmail.com;
Matt Sullivan, msullivan@mattsullivanlaw.com;
Christopher Shea, christopherjshea@comcast.net;
Jim Hardwood, jim@bayarea-criminallawyer.com;
Ryan King, ryan@ryanjking.com;
J.P. Visaya, johnpaul.visaya@sfgov.org;
Michelle Del Rosario, MDelRosario@sftc.org;
Ann Mendoza, amendoza@sftc.org;
David Harrison, defense@criminaldefend.com;
Patric Swillinger, patrickswillinger@gmail.com

I personally served copies of the attached on the following:

OFFICE OF THE DISTRICT ATTORNEY
City and County of San Francisco
850 Bryant Street, Room 300
San Francisco, CA 94103

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

Executed on November 30, 2012, at San Francisco, California.

KASIE W. LEE

EXHIBIT A

SUBPOENA

GEORGE GASCON District Attorney LAURA CLASTER Assistant District Attorney 850 Bryant Street San Francisco, CA 94103 (415) 734-3108 LAURA.CLASTER@SFGOV.ORG Attorneys for the People of the State of California	FOR COURT USE ONLY
SUPERIOR COURT OF THE STATE OF CALIFORNIA CITY AND COUNTY OF SAN FRANCISCO 850 Bryant Street San Francisco, CA 94103	

THE PEOPLE OF THE STATE OF CALIFORNIA vs. CICILY COOPER, ET AL.

CRIMINAL SUBPOENA DUCES TECUM	CASE NUMBER 12025923
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THE PEOPLE OF THE STATE OF CALIFORNIA, TO:

CUSTODIAN OF RECORDS

Twitter, Inc.

c/o Trust & Safety

1355 Market Street, Suite 900

San Francisco, CA 94103

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action as follows UNLESS you make a special agreement with the person named in item 3:

a. Date: 12-07-2012 Time: 1:30 PM Dept: 16
b. Address: 850 Bryant Street, San Francisco, CA 94103

PLEASE CALL THE ASSISTANT DISTRICT ATTORNEY TO CONFIRM APPEARANCE (415) 734-3108

2. And you are:

- a. ☐ ordered to appear in person
b. ☒ not required to appear in person if you produce the records described in the accompany affidavit in compliance with Evidence Code sections 1560, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and date, time, and place from item 1 (the above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party shown at top of this form; (5) Please also email a courtesy copy to Laura.Claster@sfgov.org
c. ☐ ordered to appear in person and to produce the records described in the accompanied affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of section 1560, and sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena.
d. ☐ ordered to make the original business records described in the accompanying affidavit available for inspection at your business address by the attorney's representative and to permit copying at your business address under reasonable conditions during normal business hours.

3. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR. PLEASE CALL BEFORE YOU COME TO COURT.

LAURA CLASTER, Assistant District Attorney Telephone number: (415) 734-3108

Witness Fees: You may be entitled witness fees, mileage, or both, in the discretion of the court. Contact the person named in item 3 after your appearance.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED BY A FINE, IMPRISONMENT, OR BOTH. A WARRANT MAY ISSUE FOR YOUR ARREST IF YOU FAIL TO APPEAR.

DATE 11/13/2012

25

LAURA CLASTER, Assistant District Attorney

DECLARATION FOR SUBPOENA DUCES TECUM

I, Laura Claster, an Assistant District Attorney for the City and County of San Francisco, declare, upon information and belief, that the witness whose name and address are described in the foregoing subpoena may have the following articles or records in his possession or control:

- 1) Subscriber information for ID @laurenriot
- 2) Photos tweeted by ID @laurenriot (between January 1, 2012 – October 31, 2012)
- 3) Mentions of ID @laurenriot (between January 1, 2012 – October 31, 2012)
- 4) Tweets by ID @laurenriot (between January 1, 2012 – October 31, 2012)
- 5) Followers of ID @laurenriot
- 6) Twitter accounts followed by ID @laurenriot.

and, that there is good cause for producing the records or articles before the Court. The records or articles described are relevant and material to the trial of this case for the following reasons:

THIS TWITTER ACCOUNT (@laurenriot) IS THE ACCOUNT OF LAUREN SMITH. CHARGES OF RIOTING (Cal. Pen. Code, § 404(a)), ROUTING (§ 406), AND UNLAWFUL ASSEMBLY (§ 407), ARE PENDING AGAINST LAUREN SMITH AS WELL AS AGAINST HER 18 CO-DEFENDANTS, CICIL COOPER, GABRIELLE SILVERMAN, JAMI WILLIAMS, EDWARD MEDINA, DANTE CANO, MAY YOUNG BENJAMIN MABIE, ROBERT DONOHUE, ANDREA ABI-KARAM, LAURA ZELKO, ARIEL GOLAN DANIEL BASH, ROHT UPADHYA, CAMMI MORGAN, MARIA LEWIS, PAUL MURUFAS, MICHAEL THURMAN, BRYAN MITCHELL. LAUREN SMITH, CAMMI MORGAN, ROBERT DONOHUE, AND DANIEL BASH ARE ALSO CHARGED WITH WEARING A DISGUISE DURING THE COMMISSION OF A CRIME (185).

THIS ACCOUNT MAY CONTAIN COMMUNICATIONS BETWEEN LAUREN SMITH AND THE ABOVE NAMED CO-DEFENDANTS THAT WOULD TEND TO SHOW THAT THERE WAS A CONSPIRACY OF AGREEMENT TO STAGE A RIOT, TO UNLAWFULLY ASSEMBLE, AND TO WEAR A DISGUISE WHILE PARTAKING IN CRIMINAL ACTIVITIES; THUS, THE RECORDS OR LACK THEREOF ARE MATERIAL TO THE CRIMES CHARGED.

Executed on 11/13/2012, at San Francisco, California. I declare under penalty of perjury that the foregoing is true and correct.


LAURA CLASTER

PROOF OF SERVICE OF SUBPOENA DUCES TECUM

I served this subpoena duces tecum and supporting declaration by delivering a copy personally to the person served as follows:

- a. Person served (name):
- b. Address where served:
- c. Date of service:
- d. Time of service:

Executed on _____ at San Francisco, California. I declare under penalty of perjury that the foregoing is true and correct.

Signature

Title



GEORGE GASCON
DISTRICT ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS TO CUSTODIAN OF RECORDS

Dear: Custodian of Records

In order to avoid personal appearance to comply with the Subpoena Duces Tecum you have received in this matter California Evidence Code section 1560 must be strictly followed.

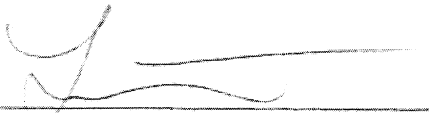
In order to comply with the Section 1560, the following steps must be followed within five days after the receipt of this Subpoena.

1. Make a true and correct copy of all records described in the Subpoena Duces Tecum. A photocopy is sufficient.
2. Complete and sign the enclosed Declaration. The enclosed Declaration should be completely filled out, with checkmark for either 3a or 3b. Sign and date the declaration and enclose it with the sealed records. It would be helpful to enclose a brief explanation of the records.
3. Put the Declaration and all copies of the records in a sealed envelope.
4. Write the following information on the outside of the sealed envelope:
 - a. Title of Action.
 - b. Court Number.
 - c. Date of Subpoena.
 - d. The name of the person signing the Declaration.
5. Enclose the sealed envelope in an outer envelope and seal the outer envelope.
6. Mail/deliver the package to:
**Clerk of the Superior Court
Hall of Justice
850 Bryant Street
San Francisco, CA 94103**
7. To comply with Section 1560 of the California Evidence Code, you must mail or deliver the above package within FIVE DAYS or receipt of the subpoena. If you do not comply with this requirement, you must appear in court on the date and time indicated on the subpoena and bring the records with you.
8. If there is an Waiver by the Patient, please send a copy to the District Attorney's Office, Hall of Justice, 850 Bryant Street, #322, SF, CA 94103.

Your cooperation is appreciated. If you have any questions, please call the undersigned Assistant District Attorney immediately.

Sincerely,

GEORGE GASCON
DISTRICT ATTORNEY



LAURA CLASTER
Assistant District Attorney
(415) 734-3108

DECLARATION OF CUSTODIAN OF RECORDS

Title of Action: _____

Number of Action: _____

Date of Subpoena: _____

Name of party
obtaining subpoena: _____

Name of Business _____

I, _____, the undersigned, say:

1. I am the duly authorized custodian of the records of the above-mentioned business.

2. I have the authority to certify copies of those records.

3. Check either a or b.

☐ a. the copies transmitted herewith are true and correct copies of all the original records described in the above named subpoena, insofar as the above named business has such records.

☐ b. No copies are transmitted herewith because the above named business has none of the records described in the above named subpoena.

4. The records referred to above were prepared by the personnel of the above named business, in the ordinary course of business, at or near the time of the act, condition, or event.

Executed on: _____
(date)

at _____
(city and state)

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

Signature of Declarant Custodian of Records

Client Social Media Checklist

- ☐ Does client have mobile device (i.e. Smartphone, tablet, music device with internet capability, etc.)
 - ☐ How many?
 - ☐ Where are they (in police custody, in client's property at the jail, at home, with someone)?
 - ☐ Who are the cellular provider/s?
 - ☐ Does he use it to send text messages, access the internet, and access any social media sites?
 - ☐ Does he use smartphone messaging apps such as WhatsApp, Snapchat, Kik, and Skype?
- ☐ Is client on Facebook or other social media services?
 - ☐ Which ones?
 - ☐ What are his user names?
 - ☐ What devices does client use to access accounts
 - ☐ What are his privacy settings?
 - ☐ Does client accept anyone as friend by default or are does he review requests?
 - ☐ Is client a "friend" or otherwise connected on social media with anybody involved in this case?
 - ☐ Has client, family or friends already posted or discussed anything related to the case on his page (i.e., messages, links, photos, etc.)
 - ☐ Has client posted or discussed anything the government will allege is related to criminal activity on his page (including things like large amounts of cash, expensive jewelry, fraudulent schemes, jihadist ideologies, street gang indicia, firearms, drugs, etc.)?
 - ☐ Has client corresponded with anyone about the case via direct/private messages
 - ☐ Does anyone else have access to the clients Facebook or social media accounts?
- ☐ Does client use Twitter?
 - ☐ What are client's privacy settings?
 - ☐ What are his user names and passwords?
 - ☐ Who does client follow?
 - ☐ Who follows client?
 - ☐ Has client tweeted about the case?
 - ☐ Has client, family or friends tweeted, retweeted, or posted photos about anything related to criminal activity (drugs, money, etc.)?
 - ☐ Has client corresponded with anyone about the case via direct/private messages
 - ☐ Has client seen any tweets about the case?
- ☐ Is client using any other social networking sites? Instagram, etc.?
- ☐ Does client have a blog? Tumblr?
- ☐ Does client go to any blogs regularly and have they left comments - if so, under what user name?
- ☐ Does client go to any chat rooms - what is their handle (user name)?
- ☐ For all of the above, have any of their discussions been related to the case
 - ☐ Get details and give warnings
- Warn client not to discuss case on social media and explain why
 - ☐ "Friends" (or their friends) may be confidential informants and give information to government)
- Warn client not to discuss case or "friend/follow" with any potential witness
 - ☐ May be violation of bond; potential obstruction of justice; potential threats
- Warn client not to discuss witnesses nor make reference to witnesses
- Advise client re: public nature of tweets and inability to control who sees them

FORENSIC RESOURCES

PAGEFREEZER

www.pagefreezer.com

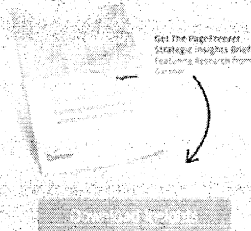
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Compliance is not optional. Don't let an audit, lawsuit or information request damage your organization.

- ✓ Know who said what, when on all your sites, blogs, and social accounts
- ✓ Authenticated, legally admissible, easy to produce digital evidence
- ✓ No hassle compliance: SEC, FINRA, FDA, FTC, Open Records
- ✓ One integrated platform, fully automatic, pain-free archiving

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[Web Archiving](#)

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X1 SOCIAL MEDIA SEARCHING

www.x1.com/products/x1_social_discovery

A screenshot of the X1 website. The header includes the X1 logo and the tagline 'Unified Search & eDiscovery for Virtual, Cloud & Hybrid Environments'. The navigation menu includes links for PRODUCTS, SOLUTIONS, PARTNERS, ABOUT, SUPPORT, CONTACT, and BLOG. The main content area is titled 'X1 Product Suite' and lists four products: X1 Search, X1 Search Virtual Edition, X1 Rapid Discovery, and X1 Social Discovery. Each product has links for Overview, Videos & Webinars, Whitepapers & Briefs, and FAQ.



Social media, webmail, website data and YouTube video are very common sources of evidence in criminal and civil litigation and must be properly addressed in discovery. However, legal and investigative professionals have lacked an effective means to cope with the vast amounts of data in their "on line" in the same manner as devices email and files until now.

X1 Social Discovery is designed to effectively address social media content from the leading social media networking sites such as Instagram, Facebook, Twitter and Tumblr. In addition, it can crawl, capture and instantly search content from websites, webmail and YouTube. Unlike archiving and image capture solutions, X1 Social Discovery provides for a variety of file workflows from search and collection through production in searchable native format, while preserving critical metadata not possible through image capture, printouts, or raw data archival or RSI reads. X1 Social Discovery saves investigators critical manpower and enables successful production of mountains of data with automated email alerts for social media, messaging and website monitoring.

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466
Lawyer Reviewing Jurors' Internet Presence

April 24, 2014

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'¹ presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.²

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;
2. active lawyer review where the lawyer requests access to the juror's ESM; and
3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached *ex parte* by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.³ In today's Internet-saturated world, the line is increasingly blurred.

2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.⁴ If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g., In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his “jury selection team” phone venire member’s home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer “cannot avoid the proscription of the rule by using agents to communicate improperly” with prospective jurors).

Passive review of a juror’s website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer’s behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer’s jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).⁵

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror’s electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).⁶ This would be akin to driving down the juror’s street, stopping the car, getting out, and asking the juror for permission to look inside the juror’s house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror’s ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

5. Or. State Bar Ass’n, Formal Op. 2013-189 (“Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website”); N.Y. Cnty. Lawyers Ass’n, Formal Op. 743 (2011) (lawyer may search juror’s “publicly available” webpages and ESM); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass’n, Op. E-434 (2012) (“If the site is ‘public,’ and accessible to all, then there does not appear to be any ethics issue.”). *See also* N.Y. State Bar Ass’n, Advisory Op. 843 (2010) (“A lawyer representing a client in pending litigation may access the public pages of another party’s social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation”); Or. State Bar Ass’n, Formal Op. 2005-164 (“Accessing an adversary’s public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary”); N.H. Bar Ass’n, *supra* note 3 (viewing a Facebook user’s page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party’s public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass’n, *supra* note 5, fn. 2, (a “lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so”); N.Y. Cnty. Lawyers Ass’n, *supra* note 5 (“Significant ethical concerns would be raised by sending a ‘friend request,’ attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror’s blog, or ‘following’ a juror’s Twitter account”); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Ethics, *supra* note 3 (lawyer may not chat, message or send a “friend request” to a juror); Conn. Bar Ass’n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass’n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass’n, *supra* note 3 (lawyer may request access to witness’s private ESM, but request must “correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer’s involvement” in the matter); Phila. Bar Ass’n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness’s private ESM, but may ask the witness “forthrightly” for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2⁷, concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."⁸

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.

8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions “that have no substantial purpose other than to embarrass, delay, or burden a third person . . .” Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.⁹

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.¹⁰ The recommended instruction states in part:

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror’s violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that “jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media.”¹¹ As a result, the authors recommend jury instruction on social media “early and often” and daily in lengthy trials.¹²

9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr>.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), <http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf>.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being “tempted” to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission’s proposal, to expand on a lawyer’s previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer’s client to also include such conduct by any person.¹³

Model Rule 3.3(b) reads:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000’s stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) (“A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal”) and DR 7-108(G) (“A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson’s or juror’s family, of which the lawyer has knowledge”). *Reporter’s Explanation of Changes, Model Rule 3.3.*¹⁴

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code’s DR 7-108(G), a lawyer knowing of “improper conduct” by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer’s obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal*.¹⁵ While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror’s conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee’s authority, applicable law might treat such juror activity as conduct that triggers a lawyer’s duty to take remedial action including, if necessary, reporting the juror’s conduct to the court under current Model Rule 3.3(b).¹⁶

14. Ethics 2000 Commission, *Model Rule 3.3 Reporter’s Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule3_3rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF’L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF’L CONDUCT, R. 3.5(d) (2013) (“a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror....”).

16. See, e.g., *U.S. v. Juror Number One*, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. *U.S. v. Rowe*, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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23 IN THE SUPERIOR COURT OF CALIFORNIA

24 COUNTY OF SAN FRANCISCO

25 PEOPLE OF THE STATE OF
26 CALIFORNIA,

27 Plaintiff,

28 v.

LAUREN SMITH,

Defendant.

Case No. 12025925

APPLICATION FOR LEAVE TO FILE
AMICI CURIAE BRIEF AND [PROPOSED]
BRIEF OF *AMICI CURIAE* OF AMERICAN
CIVIL LIBERTIES UNION, AMERICAN
CIVIL LIBERTIES UNION OF NORTHERN
CALIFORNIA AND ELECTRONIC
FRONTIER FOUNDATION IN SUPPORT OF
MOTIONS TO QUASH SUBPOENA DUCES
TECUM ISSUED BY THE PEOPLE TO
TWITTER, INC.

LEAVE TO PARTICIPATE IN ORAL
ARGUMENT REQUESTED

Date: January 4, 2013
Time: 1:30 p.m.
Dept: 16

1 APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

2 The American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of
3 Northern California ("ACLU-NC"), and the Electronic Frontier Foundation ("EFF") request
4 permission to file a brief as *amici curiae* in support of the motions to quash filed by Defendants
5 Lauren Smith and Robert Donohoe pending before this Court. A copy of the proposed brief is
6 attached to this Application and a proposed order granting leave to file is being lodged with the
7 Court.

8 *Interest of Amici*

9 The ACLU-NC is the regional affiliate of the ACLU, a nationwide, nonprofit,
10 nonpartisan membership organization with over 500,000 members, dedicated to the defense and
11 promotion of the guarantees of liberty and individual rights embodied in the federal and state
12 constitutions. The ACLU-NC, the largest state affiliate of the ACLU, is based in San Francisco,
13 California. The ACLU and its affiliates have been at the forefront of efforts to ensure that the
14 Internet remains a free and open forum for the exchange of information and ideas and to ensure
15 that the right to privacy remains robust in the face of new technologies.

16 EFF is a non-profit, member-supported organization based in San Francisco, California,
17 that works to protect free speech and privacy rights in an age of increasingly sophisticated
18 technology. As part of that mission, EFF has served as counsel or *amicus curiae* in many cases
19 addressing civil liberties issues raised by emerging technologies. *See, e.g., United States v.*
20 *Jones*, 132 S. Ct. 945 (2012); *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010); *United States v.*
21 *Warshak*, 631 F.3d 266 (6th Cir. 2010); *In re Application of U.S. for an Order Directing a*
22 *Provider of Elec. Comm'n Serv. to Disclose Records to Gov't*, 620 F.3d 304 (3d Cir. 2010).

23 *Grounds for Application*

24 The government in the above-captioned matters have served two subpoenas duces tecum
25 on Twitter, Inc., an online social network and micro-blogging service, seeking, among other
26 things, *all* communications over a *ten-month* period *by or about* Defendants Smith and Donohoe,
27 who have been charged with rioting, unlawful assembly, and other alleged crimes in connection
28

1 with a protest on a single day in October. Defendants Smith and Donohoe have moved to quash
2 the subpoenas because they violate the Stored Communications Act. *See* 18 U.S.C. § 2703.
3 *Amici* concur, but seek leave to make the additional argument that the motions to quash should
4 be granted because the subpoenas violate the First and Fourth Amendments, and parallel
5 provisions under the state constitution.

6 Our Supreme Court has made clear that orders compelling the disclosure of information
7 about individuals' communications or associations must be "narrowly circumscribed" to serve a
8 "'compelling' state interest." *Britt v. Superior Court*, 20 Cal.3d 844, 848-49 (1978). "Mere
9 relevance is not sufficient." *Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538, 1549
10 (1999). The California Supreme Court has held that government surveillance of what we say –
11 even when we say it in a public setting – can have a chilling effect on speech and can therefore
12 give rise to a violation of the First Amendment and the parallel state constitutional protection for
13 speech. *See White v. Davis*, 13 Cal.3d 757 (1975). The subpoenas at issue here are dramatically
14 overbroad. They seek information about the opinions and comments of defendants over a ten-
15 month period, on any and all subjects. Twitter can function like a virtual diary, reflecting a
16 user's thoughts and opinions on topics ranging from the personal to the political. Yet the
17 government seeks to capture all tweets by Defendants Smith and Donohoe, without any effort to
18 target only those communications that may have some connection to the charged crimes, or to
19 offer any basis for believing that the planning for a political protest on a single day in October
20 was likely to have commenced nine months earlier. Moreover, the subpoenas are also overbroad
21 because they seek tweets by third parties that simply mention Defendants, even if those other
22 speakers and their speech have no connection to the alleged crimes whatsoever.

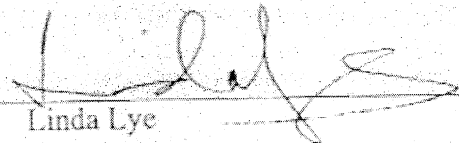
23 A district attorney's decision to prosecute is not an invitation for the government to
24 engage in intrusive fishing expeditions into a criminal defendant's opinions, beliefs, and
25 interests, let alone the opinions, beliefs, or interests of third parties unconnected to the charged
26 crime other than that they have once uttered the names of defendants or their Twitter accounts.
27 But that is precisely what the government seeks to do here. *Amici* respectfully believe that their
28 expertise on the constitutional issues will be of assistance to the Court.

1 *Amici* also request leave to participate at the oral argument at the hearing on the motions
2 to quash the subpoenas on Twitter, Inc.

3 Accordingly, the ACLU, ACLU-NC, and EFF respectfully request leave of this Court to
4 file the accompanying Brief of *Amici Curiae*.

5 Dated: December 21, 2012

Respectfully submitted,

6
7
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I. INTRODUCTION

Ostensibly in the name of finding evidence of a potential conspiracy, the government served Twitter, Inc., with subpoenas seeking, among other things, *all* communications over a *ten-month* period *by or about* two defendants charged with rioting and other alleged crimes in connection with a political protest. Defendants Smith and Donohoe have moved to quash the subpoenas because they violate the Stored Communications Act. See 18 U.S.C. § 2703. *Amici* American Civil Liberties Union, American Civil Liberties Union of Northern California, and Electronic Frontier Foundation concur, but seek leave to make the additional argument that the motions to quash should be granted because the subpoenas violate the First and Fourth Amendments and the parallel provisions of the California Constitution.

Our Supreme Court has made clear that orders compelling the disclosure of information about individuals' communications or associations must be "narrowly circumscribed" to serve a "compelling" state interest." *Britt v. Superior Court*, 20 Cal.3d 844, 848-49 (1978). "Mere relevance is not sufficient." *Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538, 1549 (1999). The subpoenas at issue here, however, are dramatically overbroad. They seek information about the opinions and comments of defendants over a ten-month period, on any and all subjects. Twitter can function like a virtual diary, reflecting a user's thoughts and opinions on topics ranging from the personal to the political. Yet the government seeks to capture all tweets by Defendants Smith and Donohoe, without any effort to target only those communications that may have some connection to the charged crimes, or to offer any basis for believing that the planning for a political protest on a single day in October was likely to have commenced nine months earlier. Moreover, the subpoenas are also overbroad because they seek tweets by third parties that simply mention Defendants, even if those other speakers and their speech have no connection to the alleged crimes whatsoever.

It is no answer to say that tweets are "public" statements and that they therefore lose all constitutional protection. The California Supreme Court has rejected that proposition, holding that government surveillance of what we say – even when we say it in a public setting – can have a chilling effect on speech and can therefore give rise to a violation of the First Amendment and the parallel state constitutional protection for speech. See *White v. Davis*, 13 Cal.3d 757 (1975).

In addition, the subpoenas are worded so broadly that on their face they encompass even

1 entirely *private* communications and other private account information, such as “Direct Messages”
2 and tweets from accounts that users have chosen to restrict from public view.

3 A district attorney’s decision to prosecute is not an invitation for the government to engage in
4 intrusive fishing expeditions into a criminal defendant’s opinions, beliefs, and interests, let alone the
5 opinions, beliefs, or interests of third parties unconnected to the charged crime other than that they
6 have once uttered the names of defendants or their Twitter accounts. But that is precisely what the
7 government seeks to do here. The motions to quash should be granted because they violate the First
8 Amendment. They should also be granted because they violate the Fourth Amendment insofar as they
9 seek private communications and other information that was never publicly available.

10 II. FACTUAL BACKGROUND

11 Twitter is an online social networking and micro-blogging service. Users can sign up for an
12 account which allows them to exchange messages, called “tweets,” of 140 characters or fewer.
13 Usernames begin with the symbol “@”. Messages are posted to the authoring user’s profile page, and
14 sent to the home page of any Twitter user who has chosen to “follow” that user. A user can “follow”
15 other Twitter users, *i.e.*, become a “follower,” meaning that she will receive the tweets they post.¹

16 As Twitter explains, Twitter “contains information you will find valuable” by allowing users to
17 follow users who tweet about topics of interest: “It’s like being delivered a newspaper whose
18 headlines you’ll always find interesting – you can discover news as it’s happening, learn more about
19 topics that are important to you, and get the inside scoop in real time.”² The list of users someone
20 follows thus provides at least as much information as a magazine or newspaper subscription list.

21 A list of a Twitter user’s followers provides such a rich trove of information that analytics
22 services dedicated to analyzing this information have sprung up. The website followerwonk.com, for
23 example, allows any Twitter user to “[s]lice [his or her] followers into actionable segments” and
24 “[f]ind most influential, dormant, old, and more.”³ Followerwonk can map “the approximate

25 ¹ See [https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-](https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/13920-get-to-know-twitter-new-user-faq#)
26 [support/articles/13920-get-to-know-twitter-new-user-faq#](https://support.twitter.com/articles/13920-get-to-know-twitter-new-user-faq#) and
<https://support.twitter.com/articles/14019-faqs-about-following#>

27 ² See [https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-](https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/215585-twitter-101-how-should-i-get-started-using-twitter#)
28 [support/articles/215585-twitter-101-how-should-i-get-started-using-twitter#](https://support.twitter.com/articles/215585-twitter-101-how-should-i-get-started-using-twitter#)

³ See <http://followerwonk.com/analyze>.

1 geographic location” and inferred gender, among other things, of a user’s followers.⁴

2 “Following” is not necessarily a mutual relationship. User A’s choice to follow User B is
3 independent of User B’s choice to follow User A. For example, as of December 20, 2012, Bill Gates
4 (“@BillGates”) follows (*i.e.*, subscribes to the tweets of) 147 other Twitter users, but has 9,123,656
5 followers (who subscribe to his tweets).⁵ Thus, following on Twitter is a one-way information stream,
6 unlike “friending” on other social networks like Facebook, where connections are mutual.

7 Twitter users can engage in conversations with each other. A user can reply to another user’s
8 tweet. A reply is known on Twitter as an “@ reply” because the body of an “@reply” begins with the
9 “@username” of the person to whom the reply is made. Similar to an “@ reply” is a “mention.” A
10 “mention” is any tweet “that contains ‘@username’ anywhere in the body of the Tweet”; “this means
11 that @ replies are also considered mentions.”⁶

12 Default account settings make tweets publicly available.⁷ But some communications through
13 Twitter are private. First, users have the ability to protect their accounts, which prevents strangers or
14 uninvited viewers from seeing their tweets. Where a user has chosen to protect her account, other
15 Twitter users can follow her only by requesting and obtaining her approval. Without that approval, the
16 users’ tweets and list of followers and followed users will remain hidden. In other words, a protected
17 account’s tweets are only visible to followers approved by the user. Protected tweets do not appear in
18 a Twitter or Google search.⁸ Second, all users, whether or not they have chosen to protect their
19 accounts, can communicate through a “Direct Message” or “DM.” A DM functions like normal email,
20 and is “private between the sender and recipient.”⁹

21 Twitter also retains information about each account that is not public, such as “Log Data”—
22 *e.g.*, the date, time, and duration of each session in which a user is logged into Twitter – and the

23
24 ⁴ For a sample analysis of Nancy Pelosi’s followers, see <http://followerwonk.com/NjXU>.

25 ⁵ See <https://twitter.com/BillGates>.

26 ⁶ See <https://support.twitter.com/articles/14023-what-are-replies-and-mentions#>.

27 ⁷ A follower subscribes to the tweets of the users they follow; a non-follower can view tweets of users
she does not follow, for example, by searching for tweets containing certain key words or visiting the
twitter profile page of the user, but would not receive them automatically.

28 ⁸ See <https://support.twitter.com/articles/20169886-how-to-protect-and-unprotect-your-tweets#>.

⁹ See <https://support.twitter.com/articles/166354-the-twitter-glossary#d>.

1 Internet Protocol ("IP") addresses for the computer or device used to access Twitter.¹⁰ An IP address
2 is a unique numerical address that can help to identify individual computers or other devices that are
3 connected to the Internet. *See Office Depot, Inc. v. Zuccarini*, 596 F.3d 696, 698 (9th Cir. 2010).

4 The subpoenas at issue here seek six broad categories of information from Twitter pertaining to
5 each of the two defendants, Lauren Smith and Robert Donohoe, who have each been charged with
6 rioting (Cal. Pen. Code § 404(a)), routing (§ 406), unlawful assembly (§ 407), and wearing a disguise
7 during the commission of a crime (§ 185).¹¹ The categories of information sought are:

- 8 1) Subscriber information for ID @laurenriot/@robbiedonohoe
- 9 2) Photos tweeted by ID @laurenriot/@robbiedonohoe (between January 1, 2012-October 31, 2012)
- 10 3) Mentions of ID @laurenriot/@robbiedonohoe (between January 1, 2012-October 31, 2012)
- 11 4) Tweets by ID @laurenriot/@robbiedonohoe (between January 1, 2012-October 31, 2012)
- 5) Followers of ID @laurenriot/@robbiedonohoe
- 6) Twitter accounts followed by ID @laurenriot/@robbiedonohoe

12 The declaration in support of each subpoena states that the Twitter "account may contain
13 communications between [Lauren Smith/Robert Donohoe] and the above-named co-defendants that
14 would tend to show that there was a conspiracy or agreement to" commit the charged crimes; "thus,
15 the records or lack thereof are material to the crimes charged." (Original in all capital letters.)¹²

16 III. ARGUMENT

17 A. THE SUBPOENAS VIOLATE THE FIRST AMENDMENT BECAUSE THEY 18 SEEK EXPRESSIVE AND ASSOCIATIONAL INFORMATION BUT ARE OVERBROAD

19 The subpoenas violate the First Amendment and parallel state constitutional protections¹³
20 because they compel the disclosure of protected expressive and associational information, but are not
21 "narrowly circumscribed" to serve a "'compelling' state interest." *Britt*, 20 Cal.3d at 848-49. These

22 ¹⁰ See <https://twitter.com/privacy>.

23 ¹¹ *Amici* do not take a position on whether the Twitter usernames @laurenriot and @robbiedonohoe
24 belong to Defendants Smith and Donohoe, but simply assume for the purposes of this motion that they
do, such that tweets by these IDs are speech by Ms. Smith and Mr. Donohoe and tweets about these IDs
are speech about Ms. Smith and Mr. Donohoe.

25 ¹² The subpoenas on Twitter for records pertaining to Ms. Smith and Mr. Donohoe are attached as an
26 Appendix to this brief, and also attached to the declaration filed by each defendant in support of the
parallel motions to quash. *See* Declaration of Counsel ISO Motion to Quash Prosecution Subpoena
27 Duces Tecum, filed Dec. 3, 2012, in *People v. Donohoe*, Case No. 12025934 & Declaration of Counsel
ISO Motion to Quash The Subpoena Duces Tecum Issued By the People, filed Nov. 30, 2012, in *People*
28 *v. Smith*, Case No. 12025925.

¹³ See Cal. Const. art. I, §2 (liberty of speech). 51

1 dragnet subpoenas seek ten months' of communications by Defendants Smith and Donohoe and by
2 unrelated third parties, potentially including private direct messages and protected tweets. The
3 overbroad subpoenas must be quashed to prevent an unconstitutional chill of First Amendment and
4 state constitutional freedoms.

5 **1. The First Amendment Provides a Qualified Privilege Against Compelled**
6 **Disclosure of Speech and Associational Activity**

7 The First Amendment protects the right of free speech and of association. See, e.g., *NAACP v.*
8 *Alabama*, 357 U.S. 449 (1958). Our Supreme Court has found a qualified First Amendment privilege
9 against inquiry into constitutionally protected activities. In *Britt*, the Court issued a writ of mandate
10 directing the trial court to vacate discovery orders compelling plaintiffs to disclose, *inter alia*,
11 membership lists of political organizations to which they belonged and all "communications [with]
12 any member of your family" or members of the political organizations. *Britt*, 20 Cal.3d at 851. The
13 Court recognized that "compelled disclosure will often deter ... constitutionally protected activities as
14 potently as direct prohibition." *Id.* at 857. Where an order compels disclosure of information
15 implicating First Amendment freedoms, the "disclosure [must] serve a 'compelling' state purpose"
16 and the order "must be drawn with narrow specificity." *Id.* at 855, 856 (internal quotation marks,
17 citations omitted); see also *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546
18 (1963) (state legislative subpoena could not be enforced: "essential prerequisite to the validity of an
19 investigation which intrudes into the area of constitutionally protected rights of speech [and]
20 association" is "substantial relation between the information sought and a subject of overriding and
21 compelling state interest"). As one court has subsequently explained, "[m]ere relevance is not
22 sufficient"; instead, "the party seeking discovery must make a higher showing of relevance and
23 materiality than otherwise would be required for less sensitive material." *Rancho Publications*, 68
24 Cal.App.4th at 1549.

25 The trial court discovery orders in *Britt* failed to satisfy this standard for two reasons. First,
26 they compelled disclosure of information pertaining not only to the plaintiffs in the case but also
27 "directly impinge[d] on the constitutional rights of numerous individuals" unrelated "to the underlying
28 lawsuit." *Britt*, 20 Cal.3d at 858. Second, "even as to the named plaintiffs, the challenged order is

1 likewise impermissibly overbroad.” *Id.* The suit was against an airport for diminution in plaintiffs’
2 property values and other damages caused by operation of the airport. *Id.* at 849. Yet “plaintiffs’
3 constitutionally protected associational activities, even those concerned with protesting airport
4 operations, appear quite unrelated to the matters placed at issue by plaintiffs’ complaints.” *Id.* at 859-
5 60. The Court therefore concluded that the discovery orders “go[] far beyond any limited disclosure
6 that defendant’s legitimate litigation interests may justify.” *Id.* at 852.

7 Disclosure orders must satisfy *Britt* whenever they implicate First Amendment freedoms, and
8 are not triggered solely by speech or associational activities that occur in private. The purpose of
9 *Britt*’s heightened scrutiny is to “safeguard” “constitutionally protected activity ... from governmental
10 interference.” *Id.* “First Amendment freedoms, such as the right of association,” the Court observed,
11 “are protected from attack not only against heavy-handed frontal attack, but also from being stifled by
12 more subtle governmental interference.” *Id.* (citation omitted).

13 Our Supreme Court has made clear that the government can violate free speech protections by
14 surveilling speech that occurs in public settings. In *White*, the plaintiff, a professor at UCLA,
15 challenged the Los Angeles Police Department’s practice of attending classes and preparing reports
16 about classroom discussions. *See White*, 13 Cal.3d at 762. The Court held that “police surveillance of
17 university classrooms and organizations meetings” can impermissibly chill speech, in violation of the
18 free speech protections in the state and federal constitutions, and reversed the trial court’s grant of a
19 demurrer. *Id.* at 767 & n.3. Notably, the Court rejected the defendant’s argument that the
20 “‘semipublic’ nature of a university classroom negates any claim of ‘First Amendment privacy.’” *Id.*
21 at 768 n.4. Although a teacher or student exposes her views to other class members whenever she
22 speaks in class, the Court explained that “such a risk is qualitatively different than that posed by a
23 governmental surveillance system involving the filing of reports in permanent police records.” *Id.*; *cf.*
24 *also Lo-Ji Sales v. New York*, 442 U.S. 319, 329 (1979) (“there is no basis for the notion that because a
25 retail store invites the public to enter, it consents to wholesale searches and seizures [by the
26 government] that do not conform to Fourth Amendment guarantees.”). Federal courts, similarly, have
27 recognized the infringement on First Amendment rights when the government records otherwise
28 public speech. *See, e.g., Community-Serv. Broadcasting of Mid-America, Inc. v. FCC* 593 F.2d 1102.

1 1122 (D.C. Cir. 1978) (requirement that government-funded non-commercial radio stations tape-
2 record public affairs programs for review by FCC unconstitutional because burdened more speech
3 than necessary to serve government's interests).

4 Courts have thus applied *Britt*'s qualified privilege even when the protected activity occurred
5 in public. For example, in *United Farm Workers of America v. Superior Court*, 170 Cal.App.3d 391
6 (1985), farmers filed suit against a union for damages stemming from a strike, and sought lists of
7 strikers and picketers. Strikers and picketers strike and picket in public, yet the court applied *Britt*,
8 and held that the information should not be released to the plaintiff farmers, absent a more
9 particularized showing of relevance. *Id.* at 395; *cf. also Tylo v. Superior Court*, 55 Cal.App.4th 1379,
10 1387-89 (1997) (applying *Britt*; rejecting claim that celebrity plaintiff waived her right to privacy).

11 **2. The Subpoenas Must Satisfy *Britt* Because They Implicate First**
12 **Amendment Interests.**

13 *Britt* governs the analysis because the subpoenas seek information that squarely implicates the
14 constitutional speech and associational rights of defendants and innumerable third parties.

15 The subpoenas seek information about the speech and associational activities of Defendants
16 Donohoe and Smith, and indeed even that of third parties unrelated to this criminal prosecution. In
17 particular, the subpoenas seek disclosure of all tweets by Defendants Smith and Donohoe (categories 2
18 and 4; photos and tweets by Smith and Donohoe) and all tweets about Defendants by *third parties*
19 (category 3; "mentions of" Smith and Donohoe). In this regard, they resemble the request in *Britt* for
20 all communications between plaintiffs and their family members or other members of the political
21 organizations. *See Britt*, 20 Cal.3d at 850. The subpoenas also seek disclosure of associational
22 information, *viz.*, the people with whom Defendants associate, that is, who they follow, or who follow
23 them (categories 5 and 6: followers of and Twitter accounts followed by). Similarly, category 1 (for
24 subscriber information) implicates associational information, as discussed further below. As such,
25 these requests are similar to the requests for associational information in *Britt* and *UFW*.

26 *Britt* applies even to the extent the information sought was at one time publicly viewable on
27 Twitter. This is so because exposing one's views and associations to other private citizens is
28 "qualitatively different [from] a governmental surveillance system involving the filing of reports in

1 permanent police records.” *White*, 13 Cal.3d at 768 n. 4. The constitutional interest in preserving the
2 free flow of ideas is at least as important in this context – the internet – as in *White* – the university.
3 See, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (recognizing importance
4 of internet as forum for speech); *Krinsky v. Doe*, 159 Cal.App.4th 1154, 1164 (2008) (same). But the
5 danger of chilling expressive activity through use of new technology is far greater than in *White*. By
6 stockpiling ten months’ worth of communications, the government can compile far more
7 comprehensive information about the views, associations, and habits of defendants and third parties
8 through the subpoenas here, than it could possibly have gleaned about the professors and students in
9 *White* by sending police officers into classrooms and meetings. See also *United States v. Garcia*, 474
10 F.3d 994, 998 (7th Cir. 2007) (“Technological progress poses a threat to privacy by enabling an extent
11 of surveillance that in earlier times would have been prohibitively expensive”). Indeed, it was
12 precisely to guard against the danger of “information-amassing practices” that the people of California
13 enacted the Privacy Initiative, now enshrined in Article I, Section 1 of the California Constitution. See
14 *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 16 (1994) (quoting official ballot pamphlet).

15 Moreover, the subpoena sweeps within its scope private communications. As discussed above,
16 Twitter users can communicate privately, either through protected tweets (which can be viewed only
17 through specifically approved followers) or Direct Messages (akin to private email between two
18 users). Category 3 seeks all “mentions” of Defendants, and thus encompasses communications about
19 Defendants by third parties, including not only public tweets, but also private Direct Messages and
20 protected tweets. Categories 2 and 4 similarly seek photos and tweets by Defendants Smith and
21 Donohoe, and thus could encompass tweets during periods they may have chosen to protect their
22 accounts, as well as private Direct Messages they sent.

23 3. The Subpoenas Are Not Narrowly Drawn

24 The subpoenas must be quashed because they are not narrowly tailored.

25 First, Categories 2 and 4 seek photos and tweets by Defendants over a ten-month period,
26 without limitation as to subject matter. Users tweet information on topics ranging from political
27 commentary to social updates. For some heavy Twitter users, their accumulated tweets amount to a
28 virtual diary. While “[m]ere relevance is not sufficient,” *Rancho Publications*, 68 Cal.App.4th at

1 1549, the government has failed to satisfy even the relevance standard. The declaration by the District
2 Attorney in support of the subpoena states only that the Twitter Accounts "may contain
3 communications" with co-defendants that would tend to show a conspiracy to commit the charged
4 crimes. (Emphasis added). "Mere speculation as to the possibility that some portion of the records
5 might be relevant to some substantive issue does not suffice." *Davis v. Superior Court*, 7 Cal.App.4th
6 1008, 1017 (1992) (issuing writ directing trial court to quash subpoena). Defendants are charged with
7 committing various crimes on Columbus Day, October 8, 2012. Yet the subpoenas seek every single
8 tweet, regardless of topic, commencing January 1, 2012, despite the absence in the supporting
9 declaration of any basis for believing that the planning of the alleged crimes in connection with a
10 political protest on a single day commenced nine months earlier. And they also seek every single
11 tweet, regardless of topic, through October 31, 2012, several weeks *after* the alleged crimes had been
12 completed. Like the overbroad subpoenas in *Britt*, the subpoenas here seek information "quite
13 unrelated to the matters placed at issue" in the underlying proceeding. *Britt*, 20 Cal.3d at 859-60.

14 Second, Category 3 seeks all "mentions" of @laurenriot or @robbiedonohoe, also over a ten-
15 month period, and also without limitation to the subject matter of the tweet. This category of
16 information is not narrowly drawn for the same reasons as Categories 2 and 4, but also for an
17 additional reason. It seeks communications by third parties who are not charged with any crime in this
18 matter, potentially including even protected tweets and Direct Messages that were never publicly
19 viewable on Twitter. The declaration in support of the subpoena states that the information sought
20 "may contain communications" between Defendants Smith or Donohoe and their 17 co-defendants.
21 But the subpoenas are not limited to seeking "mentions" of Smith or Donohoe *by the 17 named co-*
22 *defendants*. Instead, they seek "mentions" *by any Twitter user*. This plainly sweeps in far more
23 communication than would serve the government's stated interest in obtaining evidence of a
24 conspiracy between the co-defendants. By compelling disclosure of these communications by
25 unrelated third parties, the subpoenas are hopelessly overbroad. *See Britt*, 20 Cal.3d at 858 (order
26 "unquestionably overbroad" because compelled disclosure of information pertaining to "numerous
27 individuals who have taken no action whatsoever with respect to the underlying lawsuit").

28 Third, Category 5 seeks the followers of the Twitter accounts of Ms. Smith and Mr. Donohoe.

1 This category is overbroad for two reasons. First, followers are Twitter users who have chosen to
2 subscribe to another user's tweets. As a result, a list of followers sheds more light on the choices,
3 preferences, and interests of the followers than the user followed. But the subpoenas are not limited to
4 determining whether the co-defendants were followers of Ms. Smith or Mr. Donohoe; instead, they
5 seek *all* followers, even those who have nothing to do with this criminal prosecution. The
6 government's interest in obtaining evidence of a conspiracy between the 19 co-defendants does not
7 justify obtaining information about the reading preferences of unrelated third parties. *See Church of*
8 *Hakeem, Inc. v. Superior Court*, 110 Cal.App.3d 384, 390 (1980) (issuing writ directing trial court to
9 nullify order compelling disclosure of membership list "because innocent, non-litigant members are
10 entitled to First Amendment protection no matter what legitimate activities may have been engaged in
11 by the church, its founder, or some few of its member-ministers"). Second, and relatedly, following is
12 a one-way relationship. User A's choice to follow User B is totally independent of User B's choice to
13 follow, or not follow, User A. Thus, the "following" relationship lacks the inherent mutuality that is a
14 necessary component of a conspiracy. *See, e.g., People v. Vu*, 143 Cal.App.4th 1009, 1025 (2006) ("a
15 criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or
16 tacitly came to a *mutual* understanding to accomplish the act and unlawful design") (emphasis added,
17 citation omitted). As a result, this request cannot satisfy the "higher showing of relevance and
18 materiality" that is necessary here. *Rancho Publications*, 68 Cal.App.4th at 1549.

19 Fourth, Category 6 seeks "Twitter accounts followed by" Defendants Smith and Donohoe. As
20 a threshold matter, it is unclear whether this request seeks only the list of Twitter users followed by
21 Defendants Smith and Donohoe, or *all account information*, including the tweets, of every Twitter
22 user they followed. The latter would plainly be overbroad by sweeping in vast amounts of information
23 belonging to unrelated third parties. *See Britt*, 20 Cal.3d at 858; *Church of Hakeem*, 110 Cal.App.3d
24 at 390. But even if construed only to seek the list of Twitter users followed by Defendants Smith and
25 Donohoe, it would still be unconstitutional.¹⁴ The list of users that someone follows paints a highly
26 textured picture of that person's likes, interests, and political or religious leanings, among other

27 ¹⁴ The fact that a list of users followed may have been publicly viewable does not obviate the need to
28 satisfy *Britt*. In *United Farm Workers*, the court of appeal applied *Britt* to a discovery request to a union
for lists of strikers and picketers, *see id.* at 395. Even though striking and picketing occurs in public.

1 personal information. The Twitter users someone follows may be personal acquaintances, celebrities
2 (@ladygaga), newscasters (@andersoncooper), politicians (@senfeinstein), or political campaigns
3 (@YesOnProp30). Publications of all sorts, ranging from political blogs (@HuffingtonPost) to
4 newspapers (@latimes) and celebrity gossip magazines (@peoplemag), have Twitter accounts, as do a
5 slew of organizations ranging the political and issue spectrum (@NRA, @AFLCIO, @Scientology,
6 @TeaPartyExpress, @Sierra_Club). As Twitter itself boasts, it allows users to "learn more about
7 topics that are important to you."¹⁵ As a result, obtaining the list of Twitter's users a person follows
8 allows the government to learn about the topics that are important to that person. But "the First
9 Amendment protects the disclosure of an individual's "reading, listening, and viewing habits."
10 *Amazon.com LLC v. Lay*, 758 F. Supp.2d 1154, 1168 (W.D. Wash. 2010) (North Carolina Department
11 of Revenue's demand that Amazon.com disclose information about customers' purchases violated
12 First Amendment). First Amendment protections against compelled disclosure are particularly
13 important "where a group espouses dissident beliefs," *NAACP*, 357 U.S. at 462. The subpoenas do
14 not simply seek to ascertain whether Defendants Smith and Donohoe were "followers" of their co-
15 defendants. Instead, they seek detailed information about their reading preferences which far exceeds
16 any legitimate government interest in obtaining evidence of a conspiracy between the 19 co-
17 defendants. The government cannot make the particularized showing of relevance necessary to obtain
18 this constitutionally sensitive information.

19 Finally, Category 1 seeks "Subscriber information" for Defendants Smith and Donohoe. The
20 subpoenas do not delineate a time period for which the information is sought (other requests seek the
21 information for a ten month period), suggesting that the government seeks subscriber information
22 spanning the entire history of the Twitter accounts. Nor do they define the term "subscriber
23 information," but the term likely includes the "Log Data" retained by Twitter that reveals information
24 about the date, time, and duration of each session in which a user is logged into Twitter, and the IP
25 address(es) for the computers or devices used to access Twitter.¹⁶ This information could be used to

26 ¹⁵ [https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-](https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/215585-twitter-101-how-should-i-get-started-using-twitter#)
27 [support/articles/215585-twitter-101-how-should-i-get-started-using-twitter#](https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/215585-twitter-101-how-should-i-get-started-using-twitter#).

28 ¹⁶ The federal Stored Communications Act defines subscriber information to include, among other things, "local and long distance telephone communication records, or records of session times and durations," "length of service (including start date) and types of service utilized," "telephone or

map a person's behavior and associations. For instance, if a Twitter user logs in from her workplace in the morning, a union hall in the afternoon, and the gay and lesbian community center in the evening, she might present three different IP addresses over the course of a single day. The accumulation of such data over time could give the government a surprisingly detailed window into the associations and private habits of a frequent Twitter user. Accordingly, because the information that the District Attorney seeks with Category 1 would tend to reveal Defendants' "private association affiliations" over the entire time period that subject Twitter accounts were open, such data "are presumptively immune from inquisition." *See Britt*, 20 Cal.3d at 855. Because the government cannot show a compelling state interest in such a request, especially without temporal limitation, this category, too, fails *Britt*.¹⁷

B. THE SUBPOENAS VIOLATE THE FOURTH AMENDMENT BECAUSE TWITTER USERS HAVE A REASONABLE EXPECTATION OF PRIVACY IN PRIVATE COMMUNICATIONS AND ACCOUNT INFORMATION

The subpoenas also violate the Fourth Amendment and state constitutional privacy protections¹⁸ insofar as they seek private Twitter communications and other private account information. The government cannot obtain this information without a warrant.

Categories 2, 3, and 4 seek all photos and tweets by or about Defendants Smith and Donohoe over a ten-month period, without limitation as to topic. This broad request covers private forms of communication on Twitter, such as protected tweets or Direct Messages, by defendants and third

instrument number or other subscriber number or identity, including any temporarily assigned network address," and "means and source of payment for such service (including any credit card or bank account numbers)." 18 U.S.C. § 2703 (c)(2).

¹⁷ The government is likely to point to the New York County District Attorney's Office subpoena on Twitter for records pertaining to Malcolm Harris, a criminal defendant. In *People v. Harris*, 36 Misc.3d 613 (NY 2012), the court denied Harris' motion to quash the subpoena on Twitter on standing grounds, analogizing the case to "bank records cases" in which "New York law precludes an individual's motion to quash a subpoena seeking the production of the individual's bank records directly from the third-party bank." *Id.* at 616-17. The rule is directly to the contrary in California, in which our Supreme Court has rejected the so-called "third party doctrine" and held that individuals retain a privacy interest in their bank records. *See Valley Bank of Nevada v. Superior Court*, 15 Cal.3d 652 (1975) (bank records); *Burrows v. Superior Court*, 13 Cal. 3d 238 (1975) (bank records). After the New York court denied Mr. Harris' motion to quash on standing grounds, Twitter moved to quash and the court denied the motion on the merits. *See People v. Harris*, 36 Misc.3d 868 (NY 2012). The court did not address the First Amendment arguments presented here, and an appeal of that decision is pending.

¹⁸ *See* Cal. Const., art. I, §1 (privacy), §13 (search and seizure).

1 parties. But Twitter users have a legitimate expectation of privacy in protected tweets or Direct
2 Messages because the right to engage in private communications is "one that society is prepared to
3 recognize as 'reasonable.'" See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J.,
4 concurring). In *Katz*, the Supreme Court held that government eavesdropping on a defendant's
5 conversation conducted in a public telephone booth constituted a search within the meaning of the
6 Fourth Amendment. *Id.* at 353. As the Court explained:

7 No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person
8 in a telephone booth may rely upon the protection of the Fourth Amendment. One who
9 occupies it, shuts the door behind him, and pays the toll that permits him to place a call is
10 surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to
11 the world. To read the Constitution more narrowly is to ignore the vital role that the public
12 telephone has come to play in private communication.

13 *Id.* at 352 (footnotes omitted). Twitter users who take the affirmative step of protecting their tweets
14 (default account settings render tweets public) or who specifically choose to communicate with other
15 Twitter users through the Direct Messaging function are entitled to assume that their words "will not
16 be broadcast to the world." *Id.* Protected tweets and Direct Messages are no different from private
17 emails, which, like telephone calls and letters, are clearly entitled to Fourth Amendment protection.
18 See *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010) ("email requires strong protection
19 under the Fourth Amendment; otherwise, the Fourth Amendment would prove an ineffective guardian
20 of private communication, an essential purpose it has long been recognized to serve"). "As some
21 forms of communication begin to diminish, the Fourth Amendment must recognize and protect
22 nascent ones that arise." *Id.* "To construe the Constitution otherwise "is to ignore the vital role that"
23 Internet communications have come to play in this day and age. *Katz*, 389 U.S. at 352.¹⁹

24 In addition, Category 1 seeks "Subscriber information" which as noted above likely includes
25 "Log Data" retained by Twitter, such as date, time, and duration of each session when a user logs into
26 Twitter and the IP addresses for the computer or device used to access Twitter.²⁰ None of this account

26 ¹⁹ The New York court's denial of Twitter's motion to suppress in *Harris* is distinguishable because the
27 court there rejected the Fourth Amendment's applicability to *public* tweets. See *Harris*, 36 Misc. 3d at
28 874 (distinguishing public tweet from "a private direct message").

27 ²⁰ IP addresses can be matched with publicly available databases that "indicate the 'likely' locations of
28 the residences or other venues where defendants used their Internet-connected computers." See *Sony
Music Ent. Inc. v. Does 1-40*, 326 F. Supp.2d 666, 667 (S.D.N.Y. 2004).

1 information would have been broadcast by a user to the general public. But the user has every right to
2 expect that the details surrounding her internet reading habits, particularly those revealing intimate
3 associations, *see supra* at pages 11-12, should remain private.

4 The fact that the information sought is in the possession of Twitter, a third party, does not
5 mean that Twitter users lack a reasonable privacy expectation. *Cf. Smith v. Maryland*, 442 U.S. 735
6 (1979) (installation of pen register to collect telephone numbers dialed does not violate Fourth
7 Amendment rights of telephone customers); *United States v. Miller*, 425 U.S. 435 (1976) (account
8 holder lacked Fourth Amendment interest in bank records created and maintained by bank in course of
9 financial transactions). The federal "third-party" doctrine does not apply in these circumstances is
10 and, in any event, is not the law in California.

11 The doctrine does not apply to the portions of the subpoena that seek private communications
12 such as Direct Messages and protected tweets. This is so because the third-party doctrine has never
13 applied when the government seeks the content of communications. In *Katz*, the government attached
14 a listening device to a phone booth to intercept and record phone conversations; the Supreme Court
15 found a search, 389 U.S. at 353, even though callers used the telephone company to transmit their
16 conversations. "Letters and other sealed packages are in the general class of effects in which the
17 public at large has a legitimate expectation of privacy." *United States v. Jacobsen*, 466 U.S. 109, 114
18 (1984), even though senders use the post office or a delivery service to transmit them.

19 Nor does the third-party doctrine apply to private account information (such as "Log Data"),
20 which is transmitted passively and involuntarily by the user. *See United States v. Jones*, 132 S.Ct.
21 945, 957 (2012) (Sotomayor, J., concurring) (doctrine is "ill suited to the digital age, in which people
22 reveal a great deal of information about themselves to third parties in the course of carrying out
23 mundane tasks"). Twitter's Privacy Policy expressly contemplates that its users retain a privacy
24 interest in their account information and is not intended to interfere with users' ability to object to
25 government requests for information. *See* Twitter Privacy Policy ("nothing in this Privacy Policy is
26 intended to limit any legal defenses or objections that you may have to a third party's, including a
27 government's, request to disclose your information").²

28 ² <https://twitter.com/privacy> (last visited December 19, 2012).

The federal "third-party" doctrine cases are inapposite for a separate and independent reason: It is not the law under the California Constitution. The California Supreme Court has repeatedly held that people do not relinquish the privacy of personal information by revealing their affairs to institutions like banks, telephone companies, and credit card companies. *See Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652 (bank records); *Burrows v. Superior Court* (1975) 13 Cal. 3d 238 (bank records); *People v. Blair* (1979) 25 Cal. 3d 640 (credit card records and motel telephone calls); *People v. Chapman* (1984) 36 Cal. 3d 98 (unlisted telephone directory information);²² *see also* *People v. McKunes* (1975) 51 Cal. App. 3d 487 (telephone records). The Court held that because bank accounts, hotels, telephones and credit cards are a necessity of participating in modern life, opening accounts with the institutions that control those commodities is not truly volitional. Thus, customers reasonably expect that the personal information compiled will be used solely for account administration, and that the companies which hold records will not release information to law enforcement authorities unless they have obtained valid, judicially-supervised, legal process. Similarly, communicating through the Internet, including through platforms like Twitter, is a ubiquitous feature of modern life. Users reasonably expect that the personal information compiled by platforms like Twitter, to facilitate use of the Internet, will be used solely for that purpose and not disclosed wholesale to the police absent a warrant.

IV. CONCLUSION

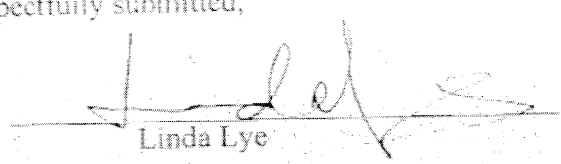
For the foregoing reasons, the court should grant the motions to quash the subpoenas issued by the government to Twitter, Inc.²³

²² *Disapproved on other grounds. People v. Palmer*, 24 Cal.4th 856, 861, 864 (2001).

²³ *Amici* respectfully request leave to participate at the hearing on the motions to quash to address the constitutional issues set forth in this brief.

1
2 Dated: December 21, 2012

Respectfully submitted,

3
4 By: 

Linda Lye

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APPENDIX A

SUBPOENA

GEORGE GASCON District Attorney LAURA CLASTER Assistant District Attorney 850 Bryant Street San Francisco, CA 94103 (415) 734-3108 LAURA.CLASTER@SFGOV.ORG Attorneys for the People of the State of California	FOR COURT USE ONLY
SUPERIOR COURT OF THE STATE OF CALIFORNIA CITY AND COUNTY OF SAN FRANCISCO 850 Bryant Street San Francisco, CA 94103	

THE PEOPLE OF THE STATE OF CALIFORNIA vs. CICYLY COOPER, ET AL.

CRIMINAL SUBPOENA DUCES TECUM	CASE NUMBER 12025923
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THE PEOPLE OF THE STATE OF CALIFORNIA, TO:

CUSTODIAN OF RECORDS

Twitter, Inc.
 c/o Trust & Safety
 1355 Market Street, Suite 900
 San Francisco, CA 94103

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action as follows UNLESS you make a special agreement with the person named in item 3:

a. Date: 12-07-2012	Time: 1:30 PM	Dept: 16
b. Address: 850 Bryant Street, San Francisco, CA 94103		

PLEASE CALL THE ASSISTANT DISTRICT ATTORNEY TO CONFIRM APPEARANCE (415) 734-3108

2. And you are:

- a. ☐ ordered to appear in person
- b. ☒ not required to appear in person if you produce the records described in the accompany affidavit in compliance with Evidence Code sections 1560, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and date, time, and place from item 1 (the above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party shown at top of this form; (5) Please also email a courtesy copy to Laura.Claster@sfgov.org

- c. ☐ ordered to appear in person and to produce the records described in the accompanied affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of section 1560, and sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena.

- d. ☐ ordered to make the original business records described in the accompanying affidavit available for inspection at your business address by the attorney's representative and to permit copying at your business address under reasonable conditions during normal business hours.

3. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR. PLEASE CALL BEFORE YOU COME TO COURT:

LAURA CLASTER, Assistant District Attorney Telephone number: (415) 734-3108

Witness Fees: You may be entitled witness fees, mileage, or both, in the discretion of the court. Contact the person named in item 3 after your appearance.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED BY A FINE, IMPRISONMENT, OR BOTH. A WARRANT MAY ISSUE FOR YOUR ARREST IF YOU FAIL TO APPEAR.

DATE 11/13/2012

 LAURA CLASTER, Assistant District Attorney

DECLARATION FOR SUBPOENA DUCES TECUM

I, Laura Claster, an Assistant District Attorney for the City and County of San Francisco, declare, upon information and belief, that the witness whose name and address are described in the foregoing subpoena may have the following articles or records in his possession or control:

- 1) Subscriber information for ID @robbiedonohoe
- 2) Photos tweeted by ID @robbiedonohoe (between January 1, 2012 – October 31, 2012)
- 3) Mentions of ID @robbiedonohoe (between January 1, 2012 – October 31, 2012)
- 4) Tweets by ID @robbiedonohoe (between January 1, 2012 – October 31, 2012)
- 5) Followers of ID @robbiedonohoe
- 6) Twitter accounts followed by ID @robbiedonohoe,

and, that there is good cause for producing the records or articles before the Court. The records or articles described are relevant and material to the trial of this case for the following reasons:

THIS TWITTER ACCOUNT (@robbiedonohoe) IS THE ACCOUNT OF ROBERT DONOHUE. CHARGES OF RIOTING (Cal. Pen. Code, § 404(a)), ROUTING (§ 406), AND UNLAWFUL ASSEMBLY (§ 407), ARE PENDING AGAINST ROBERT DONOHUE AS WELL AS AGAINST HIS 18 CO-DEFENDANTS, CICIY COOPER, GABRIELLE SILVERMAN, JAMI WILLIAMS, EDWARD MEDINA, DANTE CANO, MAY YOUNG, BENJAMIN MABIE, LAUREN SMITH, ANDREA ABI-KARAM, LAURA ZELKO, ARIEL GOLAN, DANIEL BASH, ROHT UPADHYA, CAMMI MORGAN, MARIA LEWIS, PAUL MURUFAS, MICHAEL THURMAN, BRYAN MITCHELL. ROBERT DONOHUE, LAUREN SMITH, CAMMI MORGAN, AND DANIEL BASH ARE ALSO CHARGED WITH WEARING A DISGUISE DURING THE COMMISSION OF A CRIME (§ 185).

THIS ACCOUNT MAY CONTAIN COMMUNICATIONS BETWEEN ROBERT DONOHUE AND THE ABOVE-NAMED CO-DEFENDANTS THAT WOULD TEND TO SHOW THAT THERE WAS A CONSPIRACY OR AGREEMENT TO STAGE A RIOT, TO UNLAWFULLY ASSEMBLE, AND TO WEAR A DISGUISE WHILE PARTAKING IN CRIMINAL ACTIVITIES; THUS, THE RECORDS OR LACK THEREOF ARE MATERIAL TO THE CRIMES CHARGED.

Executed on 11/13/2012, at San Francisco, California. I declare under penalty of perjury that the foregoing is true and correct.



LAURA CLASTER

SUBPOENA

GEORGE GASCON District Attorney LAURA CLASTER Assistant District Attorney 850 Bryant Street San Francisco, CA 94103 (415) 734-3108 LAURA.CLASTER@SFGOV.ORG Attorneys for the People of the State of California	FOR COURT USE ONLY
SUPERIOR COURT OF THE STATE OF CALIFORNIA CITY AND COUNTY OF SAN FRANCISCO 850 Bryant Street San Francisco, CA 94103	

THE PEOPLE OF THE STATE OF CALIFORNIA vs. CICYLY COOPER, ET AL.

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1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action as follows UNLESS you make a special agreement with the person named in item 3.

a.	Date: 12-07-2012	Time: 1:30 PM	Dept: 16
b.	Address: 850 Bryant Street, San Francisco, CA 94103		

PLEASE CALL THE ASSISTANT DISTRICT ATTORNEY TO CONFIRM APPEARANCE (415) 734-3108

2. And you are:
- a. ☐ ordered to appear in person
- b. ☒ not required to appear in person if you produce the records described in the accompany affidavit in compliance with Evidence Code sections 1560, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and date, time, and place from item 1 (the above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party shown at top of this form; (5) Please also email a courtesy copy to Laura.Claster@sfgov.org
- c. ☐ ordered to appear in person and to produce the records described in the accompanied affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of section 1560, and sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena.
- d. ☐ ordered to make the original business records described in the accompanying affidavit available for inspection at your business address by the attorney's representative and to permit copying at your business address under reasonable conditions during normal business hours.
3. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR. PLEASE CALL BEFORE YOU COME TO COURT

LAURA CLASTER, Assistant District Attorney Telephone number: (415) 734-3108

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DATE: 11/13/2012

DECLARATION FOR SUBPOENA DUCES TECUM

I, Laura Claster, an Assistant District Attorney for the City and County of San Francisco, declare, upon information and belief, that the witness whose name and address are described in the foregoing subpoena may have the following articles or records in his possession or control:

- 1) Subscriber information for ID @laurenriot
- 2) Photos tweeted by ID @laurenriot (between January 1, 2012 – October 31, 2012)
- 3) Mentions of ID @laurenriot (between January 1, 2012 – October 31, 2012)
- 4) Tweets by ID @laurenriot (between January 1, 2012 – October 31, 2012)
- 5) Followers of ID @laurenriot
- 6) Twitter accounts followed by ID @laurenriot,

and, that there is good cause for producing the records or articles before the Court. The records or articles described are relevant and material to the trial of this case for the following reasons:

THIS TWITTER ACCOUNT (@laurenriot) IS THE ACCOUNT OF LAUREN SMITH. CHARGES OF RIOTING (Cal. Pen. Code, § 404(a)), ROUTING (§ 406), AND UNLAWFUL ASSEMBLY (§ 407), ARE PENDING AGAINST LAUREN SMITH AS WELL AS AGAINST HER 18 CO-DEFENDANTS, CICIL COOPER, GABRIELLE SILVERMAN, JAMI WILLIAMS, EDWARD MEDINA, DANTE CANO, MAY YOUNG BENJAMIN MABIE, ROBERT DONOHUE, ANDREA ABI-KARAM, LAURA ZELKO, ARIEL GOLAN DANIEL BASH, ROHT UPADHYA, CAMMI MORGAN, MARIA LEWIS, PAUL MURUFAS, MICHAEL THURMAN, BRYAN MITCHELL. LAUREN SMITH, CAMMI MORGAN, ROBERT DONOHUE, AND DANIEL BASH ARE ALSO CHARGED WITH WEARING A DISGUISE DURING THE COMMISSION OF A CRIME (§ 185).

THIS ACCOUNT MAY CONTAIN COMMUNICATIONS BETWEEN LAUREN SMITH AND THE ABOVE NAMED CO-DEFENDANTS THAT WOULD TEND TO SHOW THAT THERE WAS A CONSPIRACY OR AGREEMENT TO STAGE A RIOT, TO UNLAWFULLY ASSEMBLE, AND TO WEAR A DISGUISE WHILE PARTAKING IN CRIMINAL ACTIVITIES; THUS, THE RECORDS OR LACK THEREOF ARE MATERIAL TO THE CRIMES CHARGED.

Executed on 11/13/2012, at San Francisco, California. I declare under penalty of perjury that the foregoing is true and correct.


LAURA CLASTER

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PROOF OF SERVICE

People v. Lauren Smith
San Francisco County Superior Court, Case No. 12025925

I am working in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made and whose business address is 39 Drumm Street, San Francisco, California 94111. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action.

On December 21, 2012, I caused to be served the following document(s):

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF MOTIONS TO QUASH SUBPOENA DUCES TECUM ISSUED BY THE PEOPLE TO TWITTER, INC.; LEAVE TO PARTICIPATE IN ORAL ARGUMENT REQUESTED

by the following means:

X U. S. MAIL: I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully paid.

X BY MESSENGER SERVICE: I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service for service.

X BY ELECTRONIC SERVICE: By agreement of the parties to accept electronic service, I caused the documents to be sent to the electronic service addresses listed above.

on each person listed below:

Via Email and U. S. Mail

Joshua B. Davis
Attorney at Law
3223 Webster Street
San Francisco, CA 94123
Tel.: 415-922-5454
Fax: 415-346-8987
Email: jdavis@joshdavislaw.com

Attorney for Defendant
ROBERT DONOHOE

Kasie W. Lee
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San Francisco, CA 94104
Tel.: 415-371-9786
Email: kasie@kasiewlee.com

Attorney for Defendant
LAUREN SMITH

1 Via Messenger Service

2 San Francisco District Attorney's Office
3 Attn: Laura Claster
4 350 Bryant Street, 3rd Floor
5 San Francisco, CA 94013

6 Custodian of Records
7 Twitter, Inc.
8 c/o Trust & Safety
9 1355 Market Street, Suite 900
10 San Francisco, CA 94103

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

12 Executed on December 21, 2011, at San Francisco, California.

13
14 
15 Elizabeth Bates

How do cases get budgeted?

- Referral to the CBA by counsel, judge or Clerk's Office staff
- Counsel confers with the CBA and prepares draft budget spreadsheet and memorandum
- Counsel and CBA finalize budget proposal
- CBA submits final budget proposal to the Court, with suggestions for a reasonable budget
- District Court reviews and approves the budget
- Circuit Chief Judge reviews and approves the budget

What happens after the budget is signed?

- Attach the budget to your vouchers and have your service providers do the same
- If the interim vouchers are under budget, no circuit level review is required for payment
- If your service provider has been named and approved in the budget, they are authorized to begin work
- You must keep track of your time relative to your budget
- If you or your service providers get close to (or over) budget, call the CBA to discuss a supplemental budget

Common Issues in Budgeted and Excess Compensation Cases

What is an excess compensation case?

- Any non-capital representation in which attorney compensation exceeds the statutory maximum of \$10,000
- Approximately 78 hours of attorney time
- The statutory maximum includes your compensation as well as any prior CJA attorney's compensation

Three rules of excess compensation cases

- Submit a CJA26 through e-Voucher
- The District Court must certify that the case involves extended or complex representation *and* the amount certified is necessary to provide fair compensation
- All payments must be approved by the Chief Judge of the Third Circuit or his designee

Common voucher pitfalls

If you are submitting vouchers that look like this:

1/1/16 Review discovery	8 hours
1/2/16 Review discovery	7 hours
1/3/16 Review discovery; phone conference with investigator re: witness interviews; draft & submit travel authorization request for witness interviews; write letter to AUSA re: missing discovery	4 hours
1/4/16 Open/read NEF (Doc. No. 30)	.5 hours

You may be getting a phone call or letter from a judge, wanting more information or giving notice of a proposed reduction.

Detail is important

1/1/16 Review discovery – Bates # 001-425 (302s re: Count 1)	8 hrs
1/2/16 Review discovery – Bates # 426-530 (302s re: Count 1), Audio disks #1-3, (wiretap re: Count 1)	7 hrs

Separate your work

1/3/16	Review discovery – Bates #531-640 (302s re: Count 2)	2.8 hours
	Phone conference with investigator re: witness interviews	.3 hours
	Draft and submit travel authorization request for witness interview	.3 hours
	Write letter to AUSA re: missing discovery	.6 hours

Describe all of your work

1/4/16 Open and read Notice of Electronic Filing .1 hrs
Read Gov't Response to Motion to Suppress .4 hrs
(Doc. No. 30)

Submit a descriptive CJA26 – part 1

The amount of hours devoted to interviews and conferences was necessary because my client was difficult.

BAD

I was the second attorney appointed to represent my client. This was my client's first experience with federal court, although he does have a state court record. It took extra consultation to build trust with my client and to explain to him the differences between state and federal court procedure, and the much greater sentences imposed in federal court. As a result, my client agreed to plead guilty after having refused to allow his prior counsel to engage in plea negotiations.

GOOD

Submit a descriptive CJA26 – part 2

There were 25,000 pages of discovery and it was necessary for me to read every page of discovery in order to provide effective representation of my client.

BAD

The Government provided 25,000 pages of discovery in this multi-defendant RICO and drug distribution conspiracy case. I had my paralegal do an initial review of the discovery to identify the approximately 2,000 pages that were directly relevant to the allegations against my client, and to organize the remaining materials so that I could briefly review them to determine their relevance.

GOOD

Associates and non-appointed co-counsel

- Associates and non-appointed co-counsel are a great cost-saving resource, in addition to enabling you to take on CJA cases and maintain your practice
- You must seek prior approval to use an associate or another attorney who is not appointed in the case
 - One exception - If the attorney is an associate or partner in your practice, you may seek compensation for up to 10 hours of their time without prior authorization.
- You may not charge more than 80% of the hourly CJA rate for your associate's work, unless that associate is a CJA panel member
 - With a CJA rate of \$129/hour, your associate's hourly rate is capped at \$103.20
 - If your associate is a panel member, they get the full panel rate

Service providers and expert witnesses

- Service providers include anyone not paid on a CJA20 or CJA30
- There are no official district or circuit-wide presumptive rates for any type of service providers
- If you have questions about what a reasonable rate for a particular type of expert or service provider would be, please contact me

Approval and payment of service providers

- Between \$800 and \$2500, you must get prior approval from the District Court
- Over \$2500, you must get prior approval from the District Court and the Circuit
- If a service provider's total compensation is over \$2500, their interim vouchers must be approved by the District Court and the Circuit unless it is a budgeted case

New Third Circuit service provider policies

- In limited situations, service providers must bill at 50% of their hourly rate for travel time
- You must provide your service providers with a retainer letter setting out the terms of their service

Computer-related litigation support services

When the expected combined cost of the services exceeds \$10,000, counsel **shall first consult the National Litigation Support Team** in the Defender Services Office of the Administrative Office of the United States Courts for guidance. Counsel shall also inform the Court in writing of the DSO's advice and recommendation regarding counsel's proposed expenditure.

National Litigation Support Team

- If you hear the words hard drive, gigabyte or terabyte, call me and then call the NLST
- Free or discounted software licenses – CaseMap, Adobe Acrobat Pro, dt Search
- Individualized training and direct case assistance
- Referrals to Coordinating Discovery Attorneys

NLST contact information

- Sean Broderick
(510) 637-1950 * sean_broderick@fd.org
- Kelly Scribner
(510) 637-1952 * kelly_scribner@fd.org
- Alex Roberts
(510) 637-1955 * alex_roberts@fd.org

Case budgeting is your way out of the maze of prior approval requirements

- All of your prior approvals in one document
- All of your service providers in one document
- Assistance of the CBA in getting through the process
- Approval in advance by the District Court and by Circuit Chief Judge McKee

If you have a case that may be appropriate
for budgeting, please contact me:

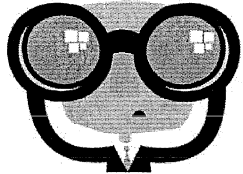
Renee Hurtig Edelman
renee_edelman@ca3.uscourts.gov
(267) 232-0210



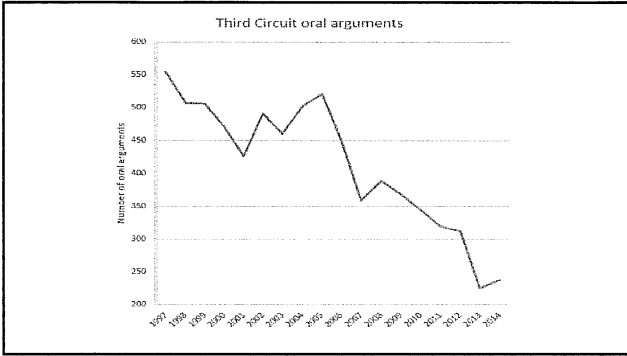
The 2015-16 Third Circuit
Update
&
A Primer on *Johnson* and its
Aftermath

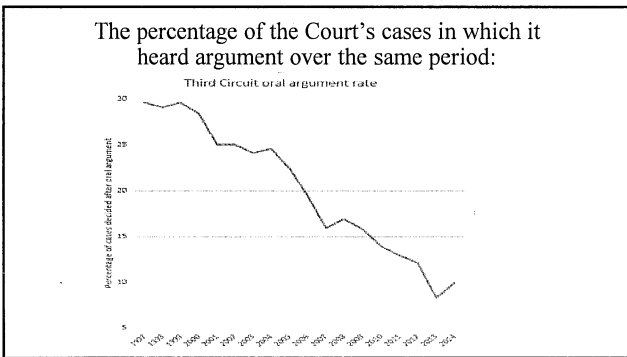
with
Ron, Tammy & Fritz

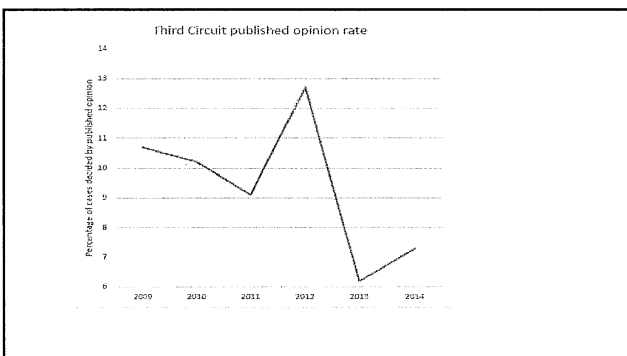
**Where Have All The Oral
Arguments and Opinions
Gone?**

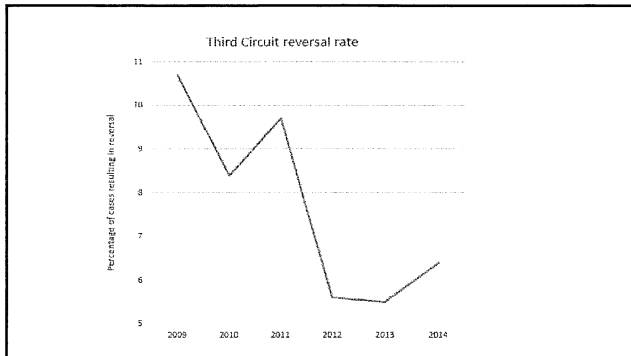


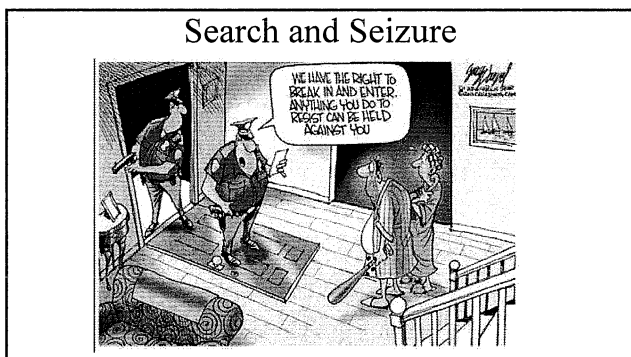
Guess which circuit holds the
fewest oral arguments? (Hint: it's
the same one that issues the fewest
published opinions.)











***United States v. Lowe*, 791 F.3d 424 (3d Cir. 2015)**

Facts: Philadelphia Police receive an anonymous tip of a black male wearing a grey hoodie with a gun in his waistband talking to a female at 914 N. Markoe St.

Issue: When was Mr. Lowe seized for purposes of the reasonable suspicion necessary under *Terry v. Ohio*.

Holding: Mr. Lowe was seized when he “froze” in response to the police show of authority, and the police did not have sufficient reasonable suspicion to conduct a stop and frisk.

United States v. Nagle, 803 F.3d 167 (3d Cir. 2015)

Facts: Messers. Nagle and Fink were co-owners and, respectively, the President/CEO and Chief Operating Officer and Board Chairman of a concrete manufacturing and construction corporations that defrauded the Government. The FBI executed two search warrants at the corporations' offices, seizing and imaging the computers and the file server.

Issue: Did the owners of these closely held corporations have the necessary "legitimate expectation of privacy" to challenge the search?

Holding: No, while the corporate entities could make a challenge, Nagle and Fink would have to show a personal connection to the places searched or the materials seized.

Trial Issues***United States v. Kolodesh, 787 F.3d 224 (3d Cir. 2015)***

- No issue of prosecutorial misconduct in the Government's use of translation of Russian recordings, which involved vulgar language, because the defendant had previously stipulated to the truth and accuracy of the recordings and the statements were relevant to the conspiracy.

United States v. Edwards, 792 F.3d 355 (3d Cir. 2015)

- Government comments during closing argument on a defendant's right to remain silent were not harmless. The Third Circuit found that the remarks violated the prohibition in *Doyle v. Ohio*, 426 U.S. 610 (1976).

United States v. Fountain, 792 F.3d 310 (3d Cir. 2015)

- In an extortion under color of right prosecution based upon fraudulent IRS refunds, the fact that the defendant could not have actually influenced the IRS is not determinative. Rather, the focus is on the victim's state of mind and what she believed.

United States v. Centeno, 793 F.3d 378 (3d Cir. 2015)

- Where the Government argues in closing based upon a theory not charged in the indictment, in this case, accessory after the fact, it amounts to a constructive amendment of the indictment and violates the Fifth Amendment.

Washington v. Sec'y Dep't of Corr., 801 F.3d 160 (3d Cir. 2015)

- Co-defendant's statement was insufficiently redacted under *Bruton* and its progeny that it was transparent to the jurors that it referred to the defendant.

***United States v. Steiner*, No.14-4628, 2016 WL 827989 (3d Cir. March 3, 2016)**

- Although the Court was deeply troubled by the Government's admission of evidence respecting an unrelated arrest of the defendant, the error was harmless. The discussion on the admissibility of evidence "to complete the story" under Rule 404(b) is informative and the Court points out the limited circumstances where such evidence may be admissible.
- The District Court, in a possession of ammunition charge under Section 922(g), was not required to instruct the jurors that they had to be unanimous as to each type of ammunition. The defense maintained that such an instruction was necessary because the indictment was duplicitous in charging, in one count, the possession of different types of ammunition.

***United States v. Merlino*, 785 F.3d 79 (3d Cir. 2015)**

- District Court lacks jurisdiction to revoke a term of supervised release unless a summons or an arrest warrant are issued before the term expires. The jurisdictional deadline is not subject to equitable tolling and an order by the court directing the issuance of a summons is insufficient.

Sentencing Issues

***United States v. Nagle*, 803 F.3d 167 (3d Cir. 2015)**

- Applying a "Government Benefit" calculation for loss and subtracting from the loss figure the value of the performance of the contracts

***United States v. Lewis*, 802 F.3d 449 (3d Cir. 2015) (*en banc*)**

- Finding a constitutional sentencing error where the defendant was subject to mandatory seven-year sentence for brandishing a firearm, when such fact had not been found by a jury as required by *Alleyne v. United States*, U.S. ___, 133 S. Ct. 2151 (2013). Although the defendant received an 84-month sentence, the Court declines to find the error harmless even though the same sentence would have been imposed under the Guidelines.

***United States v. Moreno*, 809 F.3d 766 (3d Cir. 2016)**

- Cross-examination of defendant as to factual issues of guilt or innocence during allocution when he had not contested such issues constituted plain error and required re-sentencing.

***United States v. Lopez-Esmurria*, No. 14-4166, 2015 WL 6468060 (3d Cir. Oct. 27, 2015)**

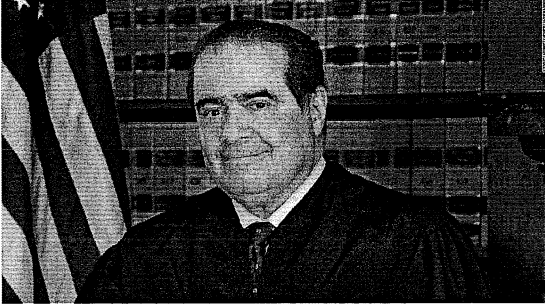
- The Court declined to find an *Apprendi* or *Alleyene* error in connection with drug quantity findings at sentencing when the jury specifically found otherwise for purposes of the mandatory minimums. However, the Court remanded for a re-sentencing because the District Court's findings were based upon those in the presentence report and Probation's findings were premised upon unstated assumptions of drug quantities that no witness testified to.

JOHNSON

What's the big deal?

***Johnson v. United States*, 135 S.Ct. 2551 (2015)**

- Residual clause of the Armed Career Criminal Act (ACCA) "denies fair notice to defendants and invites arbitrary enforcement by judges" and "produces more unpredictability and arbitrariness than the Due Process Clause tolerates."
- Residual clause is unconstitutionally vague because it ties the assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements and leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.
- Increasing a defendant's sentence under the residual clause denies due process of law.
- Overruled *James* and *Sykes*.



Justice Antonin Scalia
1936-2016

- *Johnson v. United States*, 559 U.S. 133 (2010) – force clause
- *Johnson v. United States*, 135 S.Ct. 2551 (2015) – residual clause

Armed Career Criminal Act
18 U.S.C. § 924(e)

15-year mandatory minimum term for felon-in-possession if defendant has 3 prior convictions for a “violent felony” or “serious drug offense”

“violent felony” means any crime **punishable** by imprisonment for a term exceeding one year:

- **Force Clause:** offense “has as an element the use, attempted use, or threatened use of physical force against the person of another”
- **Enumerated Offenses:** burglary, arson, extortion, use of explosives
- **Residual Clause:** offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

Pre-Johnson World

- *Taylor*, 495 U.S. 575 (1990): Adopts formal categorical approach (“generic” burglary)
- *Shepard*, 544 U.S. 13 (2005): documents for modified categorical approach
- *James*, 550 U.S. 192 (2007): examine language of a statute & application of state courts (FL attempted burglary of a dwelling)
- *Begay*, 553 U.S. 137 (2008): predicate offenses must be similar in kind to enumerated offenses – purposeful, violent, aggressive (DUI)
- *Chambers*, 555 U.S. 122 (2009): predicate offenses must be similar in kind and degree of risk to enumerated offenses (escape – failure to report)

Pre-Johnson World

- *Johnson*, 559 U.S. 133 (2010): violent physical force required under force clause (FL battery by touching)
- *Sykes*, 564 U.S. 1 (2011): similar in risk to closest analog among the enumerated offenses (Indiana flight from law enforcement by vehicle)
- *Descamps*, 133 S.Ct. 2276 (2013): modified categorical approach applies only if statute is divisible; does not apply if statute is overbroad and has single, indivisible set of elements (CA burglary)

Overbroad, Indivisible

... with liberty and justice for all!

Descamps v. United States, 133 S.Ct. 2276 (2013)

Divisible Statute:

- one or more **elements** in the alternative
- Prosecutor must select element and jury must be unanimous
- *e.g.*, burglary involves entry into a building *or* an automobile
- one crime corresponds to generic crime and other does not
- court may look to additional documents (*Shepard*) to determine which offense (generic or non-generic) formed the basis of the defendant's conviction

Descamps v. United States, 133 S.Ct. 2276 (2013)

Indivisible Statute:

- overbroad, sweeps more broadly than generic offense
- *e.g.*, an entry as opposed to an unlawful entry
- conviction under the statute is never a conviction of a generic offense
- not alternative elements but alternative means or methods
- US v. Brown*, 765 F.3d 185 (3d Cir. 2014)(Pa terroristic threats overbroad)
- US v. Fuentes*, 805 F.3d 485(4th Cir. 2015)(sex trafficking by force, fraud or coercion indivisible and not COV)
- factfinder is not unanimous on the means or methods

Descamps v. United States, 133 S.Ct. 2276 (2013)

- Modified Categorical Approach applies to divisible statutes only
- if at least one but not all divisible sections matches the generic version, courts may use approved documents to determine which section applied
- if the elements do not match the generic version, the inquiry is over

Mathis v. United States, No. 15-6092
(cert. granted Jan. 19, 2016; argument set for April 26, 2016)

Issue: whether the modified categorical approach may be used whenever there is an “or” between “methods” of committing the offense or may be used only when those methods are actually elements, *i.e.*, the factfinder must find one or the other to convict

* See footnote 2 in *Descamps*, 133 S.Ct. at 2285

Other Implications of *Johnson*

- Guideline Definition of Crime of Violence – U.S.S.G. § 4B1.2(a)
- Firearm Used, Carried or Possessed in Furtherance of a Crime of Violence – 18 U.S.C. § 924(c)
- Other firearms offenses – §§ 924(a)(6)(B), 929(a)(1)
- Statutory Definition of Crime of Violence – 18 U.S.C. § 16
- Illegal Reentry – 8 U.S.C. § 1326(b)(2)
- Three Strikes – 18 U.S.C. § 3559(c)(2)(F)(ii)
- Restitution – 18 U.S.C. § 3663A(c)(1)(A)(i)
- Release and detention – 18 U.S.C. § 3156(a)(4)

U.S.S.G. § 4B1.2(a)

The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or **otherwise involves conduct that presents a serious potential risk of physical injury to another.**

COMMENTARY – Application Note 1

Crime of Violence includes:

- “the offenses of aiding and abetting, conspiring, and attempting to commit such acts.”
- **Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.**
- Possession of a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun, sawed-off rifle, silencer, bomb or machine gun)

COMMENTARY AFTER JOHNSON

If the Commentary and the Guideline it interprets are inconsistent, the Guideline controls. *Stinson v. United States*, 508 U.S. 36 (1993).

The Commentary has no freestanding definitional power. *US v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015) (“the government skips past the text of § 4B1.2 to focus on its commentary,” but “it is the text, of course, that takes precedence.”)

US v. Soto-Rivera, 811 F.3d 53 (1st Cir. 2016) (“hopeless” to rely on Application Note)

References to Crime of Violence Definition in § 4B1.2

- Career Offender – U.S.S.G. § 4B1.1(a)(2)
- Firearms Offenses – U.S.S.G. § 2K2.1
- Supervised Release Violations – U.S.S.G. § 7B1.1(a)(1)

CAREER OFFENDER – U.S.S.G. § 4B1.1

Enhancement (assigns different Offense Level and Criminal History Category VI) applies if:

- (1) the defendant was at least 18 years old at the time of the instant offense;
- (2) the instant offense is a “crime of violence” or a “controlled substance offense;” and
- (3) the defendant has at least 2 prior felony convictions of either a “crime of violence” or a “controlled substance offense.”

* *Johnson* challenge to instant offense and predicate offenses

PROPOSED AMENDMENT

Effective August 1, 2016:

- deletes residual clause
- revises enumerated offenses – murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, extortion, or use or possession of firearm in 26 U.S.C. § 5845(a) or explosive material defined in 18 U.S.C. § 841(c)
- adds definitions in Commentary for forcible sex offense and extortion
- keeps language in Commentary about conspiracy and attempts

RETROACTIVITY

- FPD handling motions to correct sentence under 28 U.S.C. § 2255
- *Welch v. United States*, No. 15-6418 (cert. granted Jan. 8, 2016; argument set for March 30, 2016)
- DOJ Position: *Johnson* is retroactive for all ACCA cases (direct review and collateral review). *Johnson* applies to pipeline Guideline cases but not on collateral review.
US v. Gumfory, 4:14-CR-0228 (Doc. 35 – Govt Brf).

FIREARMS – 924(c)

Firearm Used, Carried or Possessed in Furtherance of a Crime of Violence

For purposes of this subsection, the term “crime of violence” means an offense that is a felony and –

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Note: No enumerated offenses & force is against person or property

Johnson Applied to § 924(c)

- *US v. Bell*, 2016 WL 344749 (N.D. Cal.)
- *US v. Edmundson*, 2015 WL 9582763 (D. Md.)
- *US v. Lattanaphom*, 2016 WL 393545 (E.D. Cal.)

Be Aware Of Other Firearms Offenses

References to 924(c):

- 924(g) – interstate acquires, transfers, or attempts to . . . a firearm
- 924(h) – knowingly transfers a firearm
- 924(j) – causes the death of a person through the use of a firearm
- 924(o) – conspiracy

18 U.S.C. § 924(a)(6)(B):

- 922(x) – transferring a gun or ammunition to a juvenile

18 U.S.C. § 929(a)(1) – armor piercing ammunition

18 U.S.C. § 16

The term “crime of violence” means –

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, **by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.**

Note: no enumerated offenses & force is against person or property

Illegal Reentry – 8 U.S.C. § 1326(b)

Increased statutory maximum for an alien who enters the United States after a previous removal which was subsequent to the commission of an “aggravated felony” as defined in 8 U.S.C. § 1101(a)(43)

Subsection (F) is a **crime of violence** as defined in **18 U.S.C. § 16** for which the **term** of imprisonment is at least one year

See also U.S.S.G. § 2L1.2(b)(1)(C) – 8 level increase to offense level if defendant was convicted of an aggravated felony

* Commentary of § 2L1.2 has own definition of “crime of violence” without residual clause

Johnson Applied to § 16

- *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015)
- *US v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015)
- *US v. Gonzalez-Longoria*, 2016 WL 537612 (5th Cir.), *reh'g en banc granted*, 2016 WL 766980 (5th Cir. 2016)

WHAT'S LEFT?

- **Enumerated Offenses**

ACCA: burglary, arson, extortion, involves explosives

Career Offender: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, sawed off shotgun or involves explosives (pending amendment)

(None in § 924(c) or § 16)

- **Force Clause**

"has as an element the use, attempted use, or threatened use of physical force against the person"

(ACCA & Career Offender: not property)

Fighting the Enumerated Offenses

- Focus is on Elements of the Generic Crime

- *e.g.*, Generic Burglary

(1) unlawful or unprivileged entry into or remaining in

(2) a building or structure

(3) with intent to commit a crime

(*Taylor*, 495 U.S. at 599)

Fighting the Enumerated Offense

Step 1: Find Generic Offense

Step 2: Compare the Elements

Step 3: Is Statute Indivisible or Divisible?

If statute is overbroad or indivisible, inquiry stops. If statute is divisible, make sure one of the alternative elements meets the generic offense. Then look to *Shepard* documents to determine if that particular offense was the basis for the conviction. (*Descamps*)

Burglary Wins

- *US v. Evans*, 2015 WL 9480007 (W.D. Pa.)(1992 PA burglary not COV following *Descamps*)
- *US v. Bayya*, 2015 WL 8751795 (D. Oregon)(first degree burglary in Oregon not ACCA predicate)
- *US v. Cornejo-Lopez*, 2015 WL 7274060 (D. Neb.)(attempted burglary in Nebraska not ACCA predicate)
- *US v. Welch*, 2016 WL 536656 (2d Cir. 2016)(NY attempted burglary in second degree not COV)
- *US v. Maldonado*, 2016 WL 229833 (2d Cir. 2016)(NY attempted burglary third degree not COV)

Fighting the Force Clause

Johnson v. United States, 599 U.S. 133 (2010)

- “physical force” not defined so give it ordinary meaning
- “*violent* force—that is, force capable of causing physical pain or injury to another person”
- connotes a substantial degree of force
- when the adjective “violent” is attached to the noun “felony,” its connotation of “strong physical force” is even clearer
- force strong enough to constitute “power”

Fighting the Force Clause

Step 1:

Does the Statute have as an element the use, attempted use or threatened use of physical force?

Step 2:

Is Statute Indivisible or Divisible?

If statute is overbroad or indivisible, inquiry stops. If statute is divisible, make sure one of the alternative elements meets the generic offense. Then look to *Shepard* documents to determine if that particular offense was the basis for the conviction

Key Issues to Remember

- Requires “violent force” not “unwanted touching”
- Force must be directed against a person, not property (ACCA & CO)
- Requires the use of force, not merely the causation of physical injury
- Force must be used intentionally, not recklessly or negligently
- Just because the word “force” is in the statute may not be “violent”
- “physical restraint” may not be enough
- offenses based on absence of legally valid consent don’t qualify

CHALLENGE AND PRESERVE!!

The Third Circuit gets it wrong and they admit it.

US v. Jones, 740 F.3d 127, 134 (3d Cir. 2014) (“While it may be tempting to examine the conduct underlying a given conviction, as the District Court did, the Supreme Court now says we cannot.”)

PA Statutes

- Resisting Arrest
US v. Stinson, 592 F.3d 460 (3d Cir. 2010)(COV under residual)
- Fleeing or Attempting to Elude
US v. Townsend, 2015 WL 9311394 (3d Cir. 2015)(not COV following *Johnson*)
US v. Jones, 740 F.3d 127 (3d Cir. 2014)(no element under force clause and not enumerated, COV under residual)

PA Statutes

• Aggravated Assault

Commonwealth v. Thomas, 867 A.2d 594, 597 (Pa. Super. 2005)(“evidence of the use of force or the threat of force is not an element of the crime of aggravated assault.”)

US v. Knight, 2016 WL 223701 (D.N.J. 2016)(NJ statute not COV)

PA Statutes

• Simple Assault

US v. Dorsey, 174 F.3d 331 (3d Cir. 1999)(COV under residual)

US v. Johnson, 587 F.3d 203 (3d Cir. 2009)(intentional or knowing violation of (a)(1) is COV under residual)

US v. Marrero, 743 F.3d 389 (3d Cir. 2014)(finds (a)(1) divisible)

But see Singh v. Gonzales, 432 F.3d 533 (3d Cir. 2006)(“physical menace” in subsection (a)(3) COV under force clause of §16)

PA Statutes

• Robbery

US v. Blair, 734 F.3d 218 (3d Cir. 2013)(divisible after *Descamps*)

US v. Hollins, 514 Fed. Appx. 264 (3d Cir. 2013)(robbery by force however slight not force clause but COV under residual)

US v. Dobbin, 2015 WL 7873596 (3d Cir. 2015)(threat immediate serious bodily injury satisfies force clause)

US v. Dixon, 805 F.3d 1193 (9th Cir. 2015)(CA robbery not ACCA violent felony)

PA Statutes

- Recklessly Endangering
US v. Lee, 612 F.3d 170 (3d Cir. 2010)(after *Begay* mere recklessness cannot constitute COV)
- Terroristic Threats
US v. Brown, 765 F.3d 185 (3d Cir. 2014)(after *Descamps* not COV)

Federal Offenses Commonly Paired With 924(c)

- Hobbs Act Robbery – 18 U.S.C. § 1951(a)
US v. Standberry, 2015 WL 5920008 (E.D. Va.)(is COV)
- Carjacking – 18 U.S.C. § 2119
US v. Sandoval, 2016 WL 632212 (D. Nev.)(is COV)
US v. Tsarnaev, 2016 WL 184389 (D. Mass.)(is COV)
- Bank Robbery – 18 U.S.C. § 2113
US v. Green, 2016 WL 277982 (D. Md.)(is COV)

Some Success

- *US v. Edmundson*, 2015 WL 9311983 (D. Md.)(conspiracy to commit Hobbs Act robbery not COV)
- *US v. Fuertes*, 805 F.3d 485 (4th Cir. 2015)(sex trafficking by fraud, force or coercion not COV)
- *US v. Litzy*, 2015 WL 5895199 (S.D.W. Va. 2015)(OH robbery third degree not COV)
- *US v. Jordan*, 2016 WL 556729 (8th Cir. 2016)(Arkansas aggravated assault not ACCA predicate)

More Success

- *US v. Madrid*, 805 F.3d 1204 (10th Cir. 2015)(TX aggravated sexual assault not COV)
- *US v. Maldonado*, 2016 WL 229833 (2d Cir. 2016)(NY attempted burglary third degree not COV; also federal phone count no longer qualifies)
- *US v. Bell*, 2016 WL 344749 (N.D. Ca. 2016)(robbery of govt property not COV but assault of federal officer is COV)
