

# Daily Journal

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## Social media companies win discovery fight

*Court rules defendants cannot subpoena social media content from murder victim's account*

By L.J. Williamson

Criminal defendants awaiting trial have no right to the social media content of victims' Facebook, Instagram and Twitter accounts, the 1st District Court of Appeal ruled Tuesday, reversing a San Francisco County Superior Court ruling.

The defendants, accused of committing a drive-by shooting, sought to subpoena both public and private content from social media user accounts of the murder victim and a witness as part of pretrial discovery while they awaited charges, citing criminal defendants' right to due process. San Francisco County Superior Court Judge Bruce E. Chan ruled in favor of the defense and ordered petitioners to produce responsive material for in camera review.

The petitioners - Facebook, Instagram, and Twitter - then moved to quash the subpoenas, citing the federal Stored Communications Act, part of the Electronic Communications Privacy Act, which "creates a zone of privacy to protect Internet subscribers from having their personal information wrongfully used and publicly disclosed by 'unauthorized private parties.'"

The 1st District appellate panel ruled Tuesday that a criminal defendant's right to pretrial discovery is limited, but left open the possibility that defendants might again seek the materials during trial.

Despite the case being overturned on appeal, defense attorneys are excited by the 1st District's ruling.

"This is the first time in the nation a court has acknowledged that a criminal defendant may have the constitutional right to social media records that will help exonerate him or her at trial," said Janelle E. Caywood, counsel for defendant Lee Sullivan.

The question was one of timing, Caywood said. "It opens the door for us to access evidence that we need to help our clients. It's important because all of these years, Facebook, Instagram and Twitter have turned over these records to police and prosecutors who request them, but never to criminal defense. This is the first time the court has said that has constitutional implications, so we're thrilled."

Caywood said she would be petitioning the Supreme Court for review on the issue of pretrial access.

James G. Snell and Sunita Bali, counsel for petitioners, did not return calls requesting comment.

Donald E. Landis, Jr., a Monterey County assistant public defender and author of an amicus brief on behalf of the defendants, said the case was an intersection between a criminal defendant's federal constitutional rights, which are being affected in a state court prosecution.

A state court judge had to rule on the federal constitutionality of the Electronic Communications Privacy Act, which was written in 1986 when "no one even knew what the Internet was."

Though the panel could have been more proactive, they also could have also closed more doors, Landis said. "They didn't say no, they just said not now. It's not the full monty, but it's better than what we had before."

The decision's distinction between trial and pretrial proceedings "has real logistical problems," that will cause "all kinds of delays the trial courts don't want to engage in," said Michael McMahon, counsel for amici Ventura County Public Defender and California Public Defenders Association. "I think that is a real nightmare for trial courts because in important felony cases there usually are hearings, and objections and things like that before jury selection."

"If I walked into trial courts up and down the state a day before trial and took the position that this didn't have a sufficient nexus to the trial, I think judges would want to chop my head off."

Alex Simpson, adjunct professor at California Western School of Law, said that the court was being "very smart," however, by "not closing to the concept of having access to social media for the victims or witnesses at some later date."

"It's just that it's specific to one's rights before anything like a preliminary hearing."

That will inevitably change, Simpson said. "With the ubiquity of social media, the amount of information that you can get about witnesses, motivations, intentions - it does seem as though social media as a whole is going to be a much larger part of any criminal proceeding."

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