CENTER FOR JUVENILE LAW AND POLICY LOYOLA LAW SCHOOL

Michael Shultz, Attorney for Minor California State Bar Number 154836 919 Albany Street

Los Angeles, CA 90015 (213) 736-8314

## SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, ) Case Number

)

Plaintiff, ) **EX PARTE MOTION TO**

## ) COMPEL COMPLIANCE

vs. ) **WITH SUBPOENA FOR**

## ) RECORDS; DECLARATION

MINOR ) **OF COUNSEL IN SUPPORT**

## ) OF MOTION

)

) **FILED UNDER SEAL**

MYSPACE.COM., )

)

Real Party In Interest. )

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**PLEASE TAKE NOTICE** that on June 3, 2008, at 9:00 a.m., in Department

of the above entitled court, the minor will move this court ex parte and in camera for an order compelling MySpace.com to comply with the defense’s attached subpoena duces tecum. Minor’s motion is based on the subpoena duces tecum originally served on MySpace.com, all papers in the court file, these moving papers, points, authorities, declaration or counsel, exhibits, and any argument of counsel at the hearing herein.

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STATEMENT OF THE CASE

On November 13, 2007, the Minor, Minor , was arrested and charged with criminal threats in violation of Cal. Penal Code §422. On January 14, 2008, Minor was arraigned where she entered a denial of the charge.

On February 29, 2008, the defense issued a subpoena duces tecum on MySpace.com, requesting lP Logs (recorded at time of login) for Friend ID XXXXXXXX from *4/1/06* — present, dates and times of login (PST) for Friend ID XXXXXXXX from 4/1/06 — present, subscriber information for Friend TD YYYYYYYYY from 4/1/06 — present, private 11 messages in the user’s inbox, trash and sent mail for Friend ID XXXXXXXXX include the 13 words “Minor,” “Minor ,” or “horse” from 4/1/06 — present, private blogs for Friend ID XXXXXXXXX that include the words “Minor,” “Minor ,” or “horse” from 4/1/06 — present, and all data and images for Friend ID XXXXXXXXX depicting or referring to user Minor .1 The subpoena was re-served on March 14, 2008 with a new compliance date of March 27, 2008 in order to provide MySpace.com an opportunity to contest the Minor’s Subpoena.

On March 26, 2008, one day prior to the compliance date, MySpace.com’s Compliance Center informed defense counsel that it would be producing “basic subscriber information and lP logs,” but refusing to provide any information regarding

1 A true and correct defense subpoena duces tecum on MySpace.com dated February 29, 2008, is attached as Exhibit A, and is incorporated by reference here in the motion.

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photographs, because they were “stored content” prohibited from being reproduced pursuant to the Stored Communications Act (SCA) 18 U.S.C. §§ 2702-2703, 18 U.S.C.

§ 2510 (17), *Theofle v. Farey-Jones* 359 F. 3d 1066 (2004), and *O’Grady v. Superior*

*Court* (2006) Cal.App. Lexis 802.)

The matter is currently set for pre-trial hearing on June 3, 2008.

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POINTS AND AUTHORITIES IN SUPPORT OF MINOR’S MOTION TO COMPEL THIRD PARTY TO PRODUCE RECORDS

I.

THE MINOR HAS A RIGHT TO SUBPOENA MATERIAL INFORMATION FROM A

THIRD PARTY

In an effort to secure evidence for the current juvenile proceedings, the defense served real party with a subpoena duces tecum to Penal Code § 1326 et.

seq., on February 29, 2008, to produce:

1. IP Logs (recorded at time of login) for Friend ID 12345678 from 4/1/6 to the present.
2. Dates and time of login (PST) for Friend ID 12345678 from 4/1/6 to the present.
3. Subscriber information for Friend ID 12345678 from 4/1/6 to the present.
4. Private messages in the user’s inbox, trash and sent mail for Friend ID 12345678 that include the words “Minor,” “Minor ,” or “horse” from 4/1/6

–present

1. Private blogs for Friend ID 12345678 that include the words “Minor,” “Minor ,” or “horse” from 4/1/6 to the present.
2. All data and images for Friend ID 12345678 depicting or referring to user Minor

While complying with some of the requests regarding the profile of the complaining witness, MySpace.com has refused to provide any content material on its web portal/site of the identified user, who is the complaining witness in the juvenile

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proceeding.

The minor, Minor, has been charged with making criminal threats against the complaining witness, C.W.. The defense is informed and believes that the complaining witness had harassed the minor for more than fifteen months leading up to the incident, with some substantial harassment conducted through the complaining witness’ MySpace profile. These profile records are and will be material and exculpatory evidence impeaching the complaining witness’ credibility and supporting possible defenses at adjudication. Nonetheless, real party continues to refuse to produce such information, prompting this motion to compel.

A juvenile is entitled to invoke pretrial discovery in a delinquency proceeding, and juvenile courts “should have the same degree of discretion as a court in an ordinary criminal case to permit, upon a proper showing, a discovery between the parties.” (*Joe Z.*

*v. Superior Court* (1980) 3 Cal. 3d 797.) The authority for such discovery in the juvenile context “derives not from statute but from the inherent power of every court to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of the truth. (*I*d. At p. 801.)

A subpoena duces tecum does not require the subpoenaed party to provide the defendant with a copy of the materials sought, but does require that a person or entity to produce the information in trial court for the defendant’s inspection. (*Pacific Lighting Leasing Co. v. Superior Court* (1976) 60 Cal.App. 3d 552, 560.) the records are

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required to be produced to the trial court –rather than the attorney for the subpoenaing party, because: “[t]he issuance of a subpoena duces tecum. . . is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein until a judicial determination has been made that the person is legally entitled to receive them.” (*People v. Blair* (1979) 25 Cal. 3d 640, 651; Evidence Code § 1560.)

Penal Code §§ 1326 and 1327 sets forth the procedure to compel such witnesses or obtain such evidence. A defendant’s right to evidence from third party witnesses and/or their records requires a showing of “good cause’-that is, specific facts justifying evidence-that “the requested information will facilitate the ascertainment of the facts and a fair trial.” (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536; *Millaud v. Superior Court* (1986) 182 Cal.App.3d 471, 475; *Pacific Lighting Leasing Co. v. Superior Court, supra,* 60 Cal.App.3d at p. 560.) “Good cause” for requesting third party discovery may be shown by a declaration filed on the day of the Motion to Compel, detailing the records’ relevancy, admissibility, and materiality to the defense’s case. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313; code of Civil Procedure § 2009; code of Civil

Procedure 1204.5.)

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II.

THE MINOR HAS A CONSTITUTIONAL RIGHT TO COMPEL THE DISCLOSURE OF “STORED CONTENT” FROM MYSPACE.COM.

MySpace.com suggest that the requested records are “stored content” which are prohibited from being reproduced pursuant to the Stored Communications Act (SCA) 18 U.S.C. §§ 2702-2703, 18 U.S.C. § 2510 (17), *Theofel v. Farey-Jones* (9th Cir. 2004) 359

F.3d 1066, and *O’Grady v. Superior Court* (2006) 2006 Cal.App.Lexis 802. MySpace.comMedia/MySpace.com contends that the SCA contains no exception for criminal defense subpoenas because only the government cans use the compelled disclosure provisions of 18 U.S.C. § 2703 to obtain the contents of material in electronic storage or material stores by a remote computing service.

MySpace.com is incorrect. The discovery requested in Minor’s Subpoena Duces Tecum is compelled pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article 1, § 15 of the California Constitution and Penal code § 1326 et. seq.

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# A.

THE LEGISLATIVE HISTORY OF THE STORED COMMUNICATIONS ACT DOES NOT DEMONSTRATE AN INTENT TO DENY CRIMINAL DEFENDANTS A MEANS TO COMPEL DISCOVERY RELEVANT TO PROSECUTION

The legislative history of the Stored Communications Act in H.R. Rep. No. 99- 647 (1986) indicates that the SCA was enacted to extend Fourth Amendment

protections to email service providers and establish a framework for government searches of emails held by third parties. (See 132 CONG. REC. H4039-01(Oct.2, 1986); 0. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending it* (2003) 72 Geo. Wash. L. Rev. 1208, 1214; *Sherman & Co. V.*

*Salton Maxim Housewares, Inc.* (2000) 94 F. Supp. 2d 817, 820, [intent of Congress in 17 enacting this legislation was to create a cause of action against computer hackers and electronic trespassers].) Indeed, there is nothing to suggest that Congress sought to deny criminal defendants a means to compel disclosure of electronic communications relevant to his or her prosecution.

Before the SCA was enacted, courts had held that citizens could not rely on Fourth Amendment protection for information revealed to third parties, including

26 information sent over the Internet or stored by an Internet service provider. *(Id.* at 1210- 11.) Thus, unlike information stored in an individual’s home, the government could obtain electronic information stored by a service provider without a showing of probable

cause. *(Id.* at 1212.) Even in situations where the Fourth Amendment barred the

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government from obtaining communications held by a service provider, nothing prevented that provider from disclosing stored communications to the government on its own accord. *(Id.)* Congress enacted the SCA to address this imbalance by extending

‘ Fourth Amendment protections applicable to information stored in the home to information stored by a third party service provider. *(Id.* at 1212-1 3.) **2**

The SCA did not bar a criminal defendant’s right to obtain third party discovery of emails or stored content held by service providers for a simple reason: there was no corresponding disparity between the methods for and restrictions on discovery of stored content from individuals or their service providers. The federal and state discovery rules applied whether the email was located at the service provider, the individual’s home, the individual’s workplace, or elsewhere. This was fundamentally different from the pre 1 SCA gaps in Fourth Amendment protections for email or other stored content. Nor can MySpace.com explain why, as they would have it, Congress created an impenetrable bar to third party discovery from service providers but placed no new restriction on third party discovery of stored content or emails from individuals or their employers. In short, nothing in the legislative history of the SCA suggests the creation of an absolute prohibition on third party discovery - discovery that is under the ultimate supervision of the courts. Such a reading would imply a profound change to criminal litigation and constitutionally based discovery.

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2. Congress also enacted the SCA to punish and deter unauthorized access to email service

providers’ facilities by so-called “hackers.” *See* A. Carter, *Computer Crimes,* 41 Am. Crim. L. Rev. 313, 337 (2004) *see also* S. REP. No. 99-541, at 3 (1986) (the SCA is intended to prevent

“wrongful use and disclosure by law enforcement authorities as well as *unauthorized*

private parties”) (emphasis added).

Myspace.com can not cite a single case holding that the SCA bars third party discovery in a criminal case. In fact, MySpace.com acknowledges that *Theofel v. Fare y-Jones* (2004) 359 F,3d 1066, is a civil case, yet argues that *Theofel* is nonetheless applicable because the “SCA contains no exceptions for criminal defense subpoenas.” (MySpace.Com’s Motion to Quash.) MySpace.com’s position, that a federal statute designed to protect against government intrusion, could thwart one’s constitutional rights is simply untenable.

B.

COURTS HISTORICALLY HAVE RECOGNIZED A CONSTITUTIONAL RIGHT TO DISCOVERY EVEN IN THE ABSENCE OF STATUTORY AUTHORITY

The defense concedes that ECPA and the SCA do not provide an explicit exception for criminal subpoenas, however these federal statutes can not thwart Minor’s Federal Constitutional rights as a criminal defendant to Due Process of Law under the Fifth Amendment, her right of Compulsion also under the Fifth Amendment, nor her right

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to receive adequate, prepared counsel under the Sixth Amendment. Likewise, the case authority cited by MySpace.com imposes no restriction on Minor’s constitutional right to subpoena this digital information, because the cases involve civil litigation only, which is not imbued with the same constitutional protections afforded a defendant during an ongoing criminal prosecution.

# In discussing *Brady v, Maryland (1963)* 373 U.S. 83 obligations in *Izazaga* V. *Superior Court* (1991) 54 Cal. 3d 356, Chief Justice Lucas wrote: “Due process rights are self-executing and need no statutory support to be effective [and] if a statutory scheme exists, these due process requirements operate outside such a scheme. No statute can limit the foregoing due process rights of criminal

defendants.” *(Id.* at p. 378.) Law and logic suggest the same must be said of the broader constitutional underpinnings of the defendant’s right to utilize subpoena duces tecum. (Right to due process compulsory process, confrontation, and adequate assistance of counsel).

1. Quashing the subpoena will Deny the Minor the Right to Confront Witnesses

# The Sixth Amendment to the U.S. Constitution guarantees criminal

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defendants the right “to be confronted with the witnesses against him.” (U.S. Const. amend. VI.) Pretrial discovery is an integral aspect of preparing for cross- examination and other elements of a criminal defense. The basis for granting pretrial discovery to criminal defendants “is the fundamental principle that an accused is entitled to a fair trial.” *(Cash v. Superior Court of Santa Clara County* (1959) 53 Cal. 2d 72.) Even when there has been no statutory avenue for a criminal defendant’s discovery, courts have relied upon the constitutional protections of an accused to justify the disclosure. The Supreme Court has held that the confrontation clause goes beyond the right to confront witnesses physically, and that a primary interest secured by it is to “secure for the opponent the opportunity of cross-examination.” *(Davis v. Alaska* (1974) 415 U.S. 308.)

In light of the weighty constitutional implications of criminal discovery, California courts have routinely viewed discovery as part of the defendant’s constitutional rights. In *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531, the Supreme Court of California found that ‘the right of an accused to seek discovery in the course of preparing his defense to a criminal prosecution is a judicially created doctrine evolving in the absence of guiding litigation.” *(Id.* at p. 536;See also *Murgia v. Municipal Court*,(1975) 15 Cal. 3d 286, 293 [the constitutional implications in a criminal trial necessitate a broader avenue for defense discovery].)

Here, the minor has requested information that is material to the defense.

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Quashing the subpoena will serve to preclude the minor from effectively cross examining the complaining witness and successfully impeaching her.

1. Quashing the Subpoena Will Deny the Minor Compulsory Process

The Sixth Amendment provides, in part: “In all criminal prosecutions, the accused shall enjoy the right .to have compulsory process for obtaining witnesses in his favor “

This right is applicable in state as well as federal prosecutions through the Due Process Clause of the Fourteenth Amendment. *(Washinton v. Texas (1967) 388 U.S. 14, 17- 19.)* Compulsory process of the courts is available for the production of evidence needed either by the prosecution or by the defense. *(United States v. Noble* (1975) 422 U.S.

225, 231.) Use of subpoena duces tecum is based upon federal constitutional rights to due process of law *(Pennslyvania v. Ritohie* (1980) 480 U.S. 39.) and confrontation *(Davis v. Alaska* (1974) 415 U.S. 308.) (see People v. Love (1977) 75 Cal.App.3d 928,929, [an accused’s right to compulsory process is “one of his most fundamental rights”], citing Chambers v. Mississippi (1972) 410 U.S. 284; See also United States v. Nixon (1974) 418 U.S. 693. 699, [right to compulsory process overcomes even claim of executive privilege of president]; United States v. Burr (1807) 25 Fed.Cas. 30, 33-34,

[compulsory process clause contemplates “no exceptions whatsoever’].)

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An accused is also entitled to any “pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense. ” *(Vela* v.

*Superior Court* (1989) 208 Cal.App.3d 141, 148.) The Fourteenth Amendment due process clause incorporates the sixth Amendment compulsory process clause and makes it binding on the states. *(Washington v. Texas* (1967) 388 U.S. 14.)

Third Party subpoenas are an appropriate vehicle for obtaining discovery even in the absence of statutory authority. *(People v. Superior Court (Barrett), supra,* 80 CaI.App.4th at p. 1313, [the statutory reciprocal discovery scheme “expressly permits discovery outside its terms” through express statutory provisions or as discovery mandated by the Constitution].)

C.

COURTS HISTORICALLY HAVE RECOGNIZED A CONSTITUTIONAL RIGHT TO DISCOVERY WHEN A STATUTE SEEMINGLY PRECLUDED SUCH DISCOVERY

MySpace.com claims that the records requested by the defense cannot be turned over by subpoena because the SCA prohibits the discovery. When a statute precludes discovery by an accused based on the privacy interests of a third party, the defendant’s constitutional rights often supersede the statutory protections. *(United*

*States v. Lindstrom* (1983) 698 F.2d 1154; *Rublo v. Superior Court* (1 988) 202

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Cal.App. 3d 1343; *Riderv. Superior Court (1988)199* Cal. App. 3d 278.)

In *United States v. Lindstrom* (1983) 698 F.2d 1154 ,the court held that doctor- patient privilege was not an absolute bar to discovery in a criminal trial, and the statute must “yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case.” *(Id.* at p. *1167.)* By denying the discovery because of statutory restrictions, the trial court deprived the criminal defendant of her “fundamental rights of confrontation and cross-examination,” and the Eleventh Circuit reversed the lower court decision denying discovery based on these constitutional considerations. *(Id. at* p. 1163.)

Similarly, in *Rubio v. Superior Court* (1988) 202 Cal. App. 3d 1343, the court of appeal held that a third party’s right to privacy could not thwart a criminal defendant’s right to subpoena potentially relevant information. *(Id.* at p. 1351.) The defendant in *Rublo,* charged with child molestation, sought production of a video tape (pursuant to a subpoena duces tecum) in the possession of the child-victim’s father and step-mother. The tape depicted the real parties in interest engaging in sex acts supposedly similar to the acts defendant allegedly performed on the minor. The trial court quashed the defendant’s subpoena holding that the tape was protected by the marital privilege.

Initially, the court of appeal agreed, summarily denying the Petition for Writ of Mandate filed by the defendant. *(Id. atp. 1346-1347.)* The Supreme Court granted review, transferred the matter back to the court of appeal. The court of appeal eventually

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directed the superior court to reverse its order quashing the subpoenas duces tecum and ordered the real parties in interest to produce the tape for an *in camera* review. *(Id.* at p. 1350.) Balancing the competing privacy interests of the real parties and discovery interests of the accused, the *Rubio* court held the defendant’s “right to due process outweighs the real parties in interest’s constitutional rights of privacy and their statutory privilege not to disclose confidential marital communications.” *(Id.* at p. 1350; See *Rider*

*v. Superior Court (1988)199* Cal. App. 3d 278, [courts must balance rights of civil litigants to relevant discovery and the privacy rights of those subject to the discovery].)

# Here, the minor subpoenaed relevant and material information in the hands of MySpace.com. Proof of C.W.’s constant emotional abuse, her physical challenge to Minor and her attitude up to and after Minor’s alleged threat to her are relevant to this case. Her behavior underscored the fact that she was not fearful of Minor that she provoked Minor and that C.W. shares responsibility in their ongoing dispute. While the minor acknowledges that C.W. may have a legitimate privacy interest to protect, MySpace.com does not. Even if MySpace.com., did entertain a legitimate privacy interest, this interest is not more important than Minor’s constitutional rights to confrontation, due process of law and compulsory process.

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**CONCLUSION**

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Michael Shultz, Attorney for Minor California State Bar Number 154836 919 Albany St.

Los Angeles, California 90015 Telephone: (213) 736-8314

## SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

v.

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**No. YJ31079**

Plaintiff,

**EX PARTE DECLARATION IN SUPPORT OF**

**MINOR’S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA FOR RECORDS**

MINOR )

Minor.

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**FILED UNDER SEAL**

TO THE HONORABLE JUDGE OF THE LOS ANGELES

COUNTY SUPERIOR COURT: Attached herein is a declaration in support of the minor’s motion to compel compliance with the subpoena duces tecum issued to My.Space.com.

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## DECLARATION IN SUPPORT OF MINOR’S MOTION TO COMPEL COMPLIANCE WITH THE SUBPOENA FOR RECORDS

**County of Los Angeles, State of California**

The following declaration is based on information and belief:

I, the undersigned, Michael Shultz am an attorney licensed to practice law

in the state of California. In that capacity, I am the attorney of record for the above entitle action; that said action has been set for pre trial conference on June 3, 2008 in Dept. of Los Angeles Superior Court, Inglewood Branch. The Minor is indigent and cannot afford the services of an attorney. Minor is represented by the Center for Juvenile Law and Policy.

This declaration in support of the minor’s motion to compel compliance with the subpoena for records contains much of the same information as the declaration in support of the subpoena itself, however the defense has included additional information relevant to the materiality of the requested records.

The objects and information requested are necessary to assist in preparation of the defense. The prosecution alleged that the minor, Minor , is guilty of making criminal threats in violation of Penal Code section 422. The prosecution has alleged that Minor made threats against the complaining witness, C.W., via a telephone and text message exchange that occurred on .

REDACTED - Explain Materiality…

C.W., the complaining witness, is a MySpace.com user, has a MySpace.com profile and posts images, statements and other content o 63 n her MySpace.com page. C.W.’s MySpace.com account number or Friend ID # is XXXXXXXXXX. C.W. has used

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her MySpace.com profile, account number and/or Myspace.com page to post racist messages about Minor, referring to her as a “dirty XXXX.” C.W. has also made cruel remarks about Minor’s appearance, referring to her in MySpace messages as “fat,” as a “pig,” and as a “horse.” C.W. conducted a campaign of harassment using MySpace to broadcast both real and defamatory information about Minor.

The defense obtained a copy of one such blog from C.W.’s MySpace profile. On May 21, 2006 C.W. posted a blog on her MySpace page that said Minor should “just kill yourself.” In the same blog, C.W. directed threats at Minor writing: “I have true facts about you/I know everything about you/I could ruin you.” C.W. also referenced the family’s attempts to stop the

harassment, writing “ur mom coming to my house trying to get me to stop saying shit to you/isnt gonna work/im going to keep running my mouth/lsuck it up/deal with it/ur life is fucked as far as im concerned.” C.W. also challenged Minor to a

fight writing, “if you wanna throw down/bring it bitch.”

In other blogs, posted after May of 2006, C.W. continued her harassment

of Minor. Although the harassment included name calling, bullying and threats to disclose personal information; C.W. also challenged Minor to fight and threatened her with violence.

On October 17, 2007, C.W.’s continued her harassment of Minor. angry and inflammatory messages, but Minor sought to end the conflict at the conclusion of the altercation, and apologized the same afternoon.

About a month after Minor allegedly threatened C.W. via a text message, C.W. complained to the police. She told the police that she was afraid of Minor. C.W., however, provided very little context to the police

and neglected to inform the police that she had been continuously harassing Minor. Because “sustained fear” is defined as a period of time that extends beyond what is momentary, fleeting, or transitory, the omitted information was critically relevant to assessing and determining whether C.W. was in “sustained

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fear,” within the meaning of Penal Code section 422. *(People v. Allen* (1995) 33 Cal. App. 4th 1149, 1156; *People v. Ricky* T.,(2001) 87 Cal. App. 4th 1132; see *People v. Toledo* (2001) 26 Cal.4th 221, 228-229.)

In short, the defense avers that C.W., who informed the police one month after the text-sent threats were allegedly made, was not in “sustained fear,” and her MySpace postings will assist the defense in directly establishing that C.W. was not in “sustained fear.” Information tending to confirm the history of harassment and ill will towards Minor will aid the minor’s preparation of a

defense in that it will show C.W. instigated the events and contributed to the iii feelings between the two girls. C.W.’s MySpace postings that contain evidence she bullied or harassed Minor, that she threatened Minor, that she

challenged Minor to a fight and/or that she engaged in prior immoral conduct would be directly relevant to C.W.’s credibility and potentially admissible at trial.

# Evidence of C.W.’s prior misconduct, however, need not be limited to misconduct committed against Minor in order to be discoverable via Subpoena Duces Tecum. Indeed, any evidence of prior aggression against any one, not just Minor, via MySpace.com would assist the defense in showing that C.W. was the instigator in this phone altercation. In fact, such evidence would be admissible pursuant to Evidence Code §1103. Evidence Code §1103, subdivision (a) (1) states “evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim is not made inadmissible if offered by the defendant to prove conduct of the victim.” (Evidence Code § 1103, subdivision (a)(1).)

The defendant needs not state a defense or elect between available ones: all that is required is a showing of relevancy; necessity—that the defense cannot obtain the material on its own; and specificity—a list of items desired. State of

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California ex reL Dept. of Transportation v. Superior Court (Hall*)* (1985) 37 CaL 3d 847, 855-6.)

# In addition, since C.W.’s credibility is critical to the prosecution’s case, any prior bad acts of moral turpitude may be used to impeach C.W.. The MySpace.com postings contain evidence of prior immoral (moral turpitude) conduct. Since C.W. is the complaining witness against the minor, her credibility is vital to the prosecution. “Misconduct involving moral turpitude may suggest a willingness to lie.” *(People v. Wheeler* (1992) Cal. 4th 284, 295.) Any MySpace evidence that tends to show a propensity to lie is relevant to impeach C.W.’ credibility.

We are informed and believe that the complaining witness, C.W.

is currently a user of My.Space.com and currently maintains a MySpace webpage.

We are informed and believe that the records sought are in the possession

and control of My.Space.com and that My.Space.com is refusing to disclose the records and refusing to comply with a lawfully issued subpoena duces tecum. The items requested are in the exclusive possession of My.Space.com and would not

be turned over other than by court order or subpoena. DATED: May 14, 2008

Respectfully submitted,

MICHAEL SHULTZ

Attorney for Minor

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