Case No. S221852

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

PAUL MACABEO,
Defendant and Appellant.

After a Decision of the Court of Appeal, Second Appellate District, Division Five, Case No. B248316, from Superior Court of California, County of Los Angeles, Case No. YA084963, Hon. Mark Arnold

APPELLANT'S OPENING BRIEF ON THE MERITS

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STATEMENT OF APPEALABILITY

The trial court denied Appellant Paul Macabeo's motion pursuant to Penal Code section 1538.5 to exclude evidence from an illegal search. Mr. Macabeo then pled nolo contendere to a violation of Penal Code section 311.11, subdivision (a), and was placed on probation. Mr. Macabeo's Notice of Appeal specified that he was appealing the denial of his suppression motion and, pursuant to Rule of Court 8.304, subdivision (b)(4), the trial court's ruling is appealable without the necessity of a certificate of probable cause.

ISSUES PRESENTED

Officers saw Mr. Macabeo ride his bicycle through a stop sign late at night, and pulled him over for a possible traffic infraction. One officer questioned and frisked Mr. Macabeo. A second officer searched Mr. Macabeo's cell phone and found sexually explicit photographs of girls under the age of 18, for which Mr. Macabeo was then arrested. The lower courts upheld the cell phone search as incident to Mr. Macabeo's arrest.

The issues before this Court are:

(1) Does the "search incident to arrest" exception to the warrant requirement permit officers to conduct full custodial searches based solely on the fact that they have probable cause for a minor traffic infraction, or must an actual arrest have occurred or be underway?

(2) Does the good faith exception to the exclusionary rule, as articulated in *Davis v. United States* (2001) 564 U.S. ___ [131 S.Ct. 2419, 180 L.Ed.2d 285], permit the prosecution to rely on evidence it obtained through what it has conceded was an unconstitutional search of Mr. Macabeo's cell phone?

STATEMENT OF THE CASE

On July 19, 2012, the District Attorney filed a complaint, charging Mr. Macabeo with possession of matter depicting a minor engaging in sexual conduct in violation of Penal Code section 311.11, subdivision (a), and possession of a smoking device in violation of Health and Safety Code section 11364.1, subdivision (a)(1).[1] (1CT 18.[2]) Police officers discovered the evidence that led to the first charge by searching Mr. Macabeo's cell phone, which they took from him after he "rolled" through a stop sign late at night on his bicycle. (1CT 52:12-16, 60:13-25, 79:1-13.) Mr. Macabeo moved to suppress the evidence gathered through the search of his cell phone, pursuant to Penal Code section 1538.5. (1CT 20.)

During a preliminary hearing that served as a hearing on the suppression motion, the court heard the testimony of Torrance Police Department Detective Hayes. (1CT 50:1-88:18.) Detective Hayes was the

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[1] Health and Safety Code section 11364.1 was repealed effective January 1, 2015, although it was substantially re-codified at section 11364.

[2] The clerk's transcript and the reporter's transcript are in two volumes,

officer who made contact with Mr. Macabeo. (1CT 53:9-12.) His testimony, aided by a transcription of the recording of Mr. Macabeo's initial contact with officers, which was also entered into evidence, provided the factual basis for the suppression motion. (1CT 58:6-15; the transcription is included at 1CT 112-117, and is appended to this Brief.) The parties also stipulated that Detective Hayes' partner, Officer Raymond, activated and searched Mr. Macabeo's phone. (1CT 89:7-12.)

The court denied Mr. Macabeo's suppression motion. (1CT 104:23, 108:27-28.) The District Attorney did not pursue the smoking device charge and subsequently filed a one-count information alleging the violation of Penal Code section 311.11(a). (1CT 109:21-110:2, 122.) Mr. Macabeo pleaded nolo contendere, and received five years of probation. (1CT 127-130.) He appealed the denial of the suppression motion, which the Court of Appeal affirmed. (1CT 131, 2CT 58, *People v. Macabeo* (2014) 229 Cal.App.4th 486 [177 Cal.Rptr.3d 311].)[3]

[3] As set forth on pages 8-9, *infra*, the Court of Appeal at first remanded the case for procedural reasons. Mr. Macabeo's plea was set aside and he re-filed his suppression motion, which the Superior Court denied on the basis of the evidence introduced at the preliminary hearing. Afterwards, Mr. Macabeo re-entered his plea and filed a new notice of appeal. The Court of Appeal then decided the case on the merits.

STATEMENT OF FACTS

A. The Traffic Stop and *Terry* Frisk

In the early morning hours of Thursday, July 19, 2012, Detective Hayes and Officer Raymond of the Torrance Police Department were on patrol in a marked police car. (1CT 50:23-26, 51:6-21, 64:15-21.) At about 1:40 a.m., they saw Paul Macabeo riding a bicycle near the intersection of Artesia Boulevard and Gramercy Place in Torrance. (1CT 51:15-52:7.) As Detective Hayes testified at the preliminary hearing, Mr. Macabeo was riding at a normal speed, 5 to 10 miles per hour, and there were few—if any—other vehicles on the road. (1CT 65:1-22.) The officers followed him for about 50 to 75 feet with their headlights off. (1CT 64:22-25, 65:26-28, 69:2-13.) Detective Hayes said that they saw Mr. Macabeo ride through a stop sign without stopping. (1CT 52:12-16.) The officers then activated their lights and pulled Mr. Macabeo over for violating Vehicle Code section 22450 (failure to stop at a stop sign). (1CT 53:2-5, 67:28-68:1.) Detective Hayes testified that he intended to give Mr. Macabeo either a verbal warning or a citation requiring a promise to appear later in court. (1CT 80:27-81:13.)

During the traffic stop, Mr. Macabeo complied with all of the officers' commands and answered their questions. When the officers activated their lights, Mr. Macabeo pulled his bike to the curb. (1CT 68:17-19.) As the transcript of the encounter shows, Mr. Macabeo identified

himself, and explained that he was on his way to an AM/PM market. (1CT 113.) Detective Hayes asked Mr. Macabeo whether he was on probation. (1CT 113.) Mr. Macabeo first replied that he was, but then clarified that his case had already been dismissed, he did not have a probation officer, and his last arrest had taken place several years earlier. (1CT 113-114.) Detective Hayes said that he would check Mr. Macabeo's arrest history. (1CT 116.) As Detective Hayes later confirmed from the computer in the patrol car, Mr. Macabeo's felony probation had ended a few months earlier in April of 2012. (1CT 73:7-11, 86:28-87:8.)

While questioning Mr. Macabeo, Detective Hayes instructed him to keep his hands away from his waist and pockets, and thought that Mr. Macabeo "was really fidgety." (1CT 59:13-20.) As a result, Detective Hayes conducted a pat down of Mr. Macabeo, and asked him if he had anything illegal on him, including any weapons. (1CT 59:13-26.) Mr. Macabeo said that he did not. (1CT 59:13-26, 114-115.) Officer Hayes then asked, "[y]ou have no problem me taking stuff out of your pockets?" and Mr. Macabeo replied, "[n]o, go ahead." (1CT 115.) Detective Hayes took several items from Mr. Macabeo's pockets, including Mr. Macabeo's cell phone, which he then handed to his partner, Officer Raymond. (1CT 60:13-61:2.) Detective Hayes sat Mr. Macabeo on the curb and continued speaking with him for about 5 to 10 minutes while Officer Raymond searched the phone. (1CT 61:15-62:16, 77:15-22.)

B. The Cell Phone Search

Neither Detective Hayes nor Officer Raymond asked Mr. Macabeo for consent to search the contents of his phone. (1CT 76:19-77:13.) Nevertheless, while Detective Hayes questioned Mr. Macabeo, Officer Raymond searched the phone. (1CT 60:22-27, 77:14-22.)

Some time later, Detective Hayes looked up and saw Officer Raymond gesturing to him. (1CT 61:27-62:3.) Officer Raymond told Detective Hayes that the phone did not contain any drug-related text messages, but there was a folder with sexually explicit photographs of girls under the age of 18. (1CT 62:7-24.)

C. Mr. Macabeo's Arrest

Officer Hayes returned to Mr. Macabeo and told him to put both of his hands on his head. (1CT 117.) Mr. Macabeo asked, "[w]hy am I being arrested? Am I being arrested?" (1CT 117.) Officer Hayes replied, "I'll explain everything in a second. Do not stand up; you don't want to do that." (1CT 117.) The officers handcuffed Mr. Macabeo and read him his *Miranda* rights. (1CT 79:11-16.) It was only then that Detective Hayes used the computer in his patrol car and confirmed that Mr. Macabeo was no longer on felony probation. (1CT 86:20-87:8.)

D. Proceedings in the Superior Court

On July 19, 2012, the District Attorney charged Mr. Macabeo with possession of matter depicting a minor engaging in sexual conduct in

violation of Penal Code section 311.11(a), and possession of a smoking device in violation of Health and Safety Code section 11364.1(a)(1). (1CT 18.) Mr. Macabeo was neither arrested nor charged with failing to stop at a stop sign.

On August 17, 2012, Mr. Macabeo moved to suppress the evidence derived from the search of his cell phone, which the trial court denied. (1CT 104:23, 108:27-28.) The court stated that it was "not looking at this as a probation search" and that "if this is a probation search, it's an unlawful probation search." (1CT 89:20-21, 90:11-13.) As the judge pointed out, even if Mr. Macabeo had said he was on probation, "[a]ll persons who are on probation do not necessarily have a search and seizure condition. [¶] I haven't heard any testimony about whether the defendant had a search and seizure condition." (1CT 90:5-9.) "Correct," replied the Deputy District Attorney. (1CT 90:10.)[4] The court also declined to characterize the search as a consent search, stating that "[c]onsent is not relevant to my analysis." (1CT 103:2.)

Instead, the court concluded that the search was permissible because Mr. Macabeo could have been arrested, even though he was not arrested at the time of the search:

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[4] Penal Code section 1203.1, subdivision (a), provides a sentencing court with discretion to set the terms and conditions of probation.

> He could have been arrested for failing to stop at the stop sign. The fact that the officer didn't do that is irrelevant because it is the objective state of the case, not the subjective state of mind of the officer. Since the defendant could have been arrested, he could also have been subjected to a search incident to a lawful arrest. (1CT 102:18-24.)

Finally, the judge concluded that the California Supreme Court's decision in *People v. Diaz* (2011) 51 Cal.4th 84 [119 Cal.Rptr.3d 105, 244 P.3d 501] held that cell phones were among the items that could be searched incident to arrest.[5] (1CT 103:12-16, 104:8-18.)

On October 18, 2012, the District Attorney filed an information alleging only the count of possession of matter depicting a minor engaging in sexual conduct in violation of Penal Code section 311.11(a), to which Mr. Macabeo pleaded nolo contendere. (1CT 122, 127-130.) He was sentenced to 36 days in jail (which he had already served), and five years of formal probation. (1CT 127-130.) The court stayed most of the terms and conditions of probation during the pendency of appeal. (1CT 129.) Mr. Macabeo filed a notice of appeal. (1CT 131.)

E. First Trip to the Court of Appeal and Subsequent Superior Court Hearing

On January 3, 2013, the Court of Appeal entered an order requiring the parties to brief whether Mr. Macabeo was entitled to challenge the order denying suppression given that he had not litigated that issue beyond the

[5] The United States Supreme Court had not yet issued its contrary decision in *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 189 L.Ed.2d 430].

preliminary hearing.[6] (See Docket, *People v. Macabeo*, No. B245511.) Mr. Macabeo filed a notice of abandonment of appeal, and on December 3, 2012, the Court of Appeal dismissed the case. (2CT 18, 22-23.)

After remittitur, the court set aside Mr. Macabeo's plea and he re-filed his suppression motion, which the Superior Court denied on the basis of the evidence introduced at the preliminary hearing. (2CT 25, 33, 35, 42, 55.) Mr. Macabeo then re-entered his plea, and filed a second notice of appeal. (2CT 55-58.)

F. Second Trip to the Court of Appeal

While Mr. Macabeo's case was pending before the Court of Appeal, but after it had been fully briefed and argued, the Supreme Court issued its decision in *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 189 L.Ed.2d 430]. In *Riley*, the Supreme Court held that "the search incident to arrest exception does not apply to cell phones" (*id.*, 134 S.Ct. at p. 2494), and that "officers must generally secure a warrant before conducting such a search" (*id.* at p. 2485). As the prosecution conceded in a letter brief, "the warrantless search of [Mr. Macabeo]'s cell phone incident to arrest has turned out to be unlawful under *Riley*." (Victoria B. Wilson, Supervising

[6] The trial court, defense counsel, and prosecution were all under the erroneous impression that because the preliminary hearing had occurred before the same judge ultimately assigned to the case, and because that judge had already ruled on the suppression motion, there was no need to re-litigate suppression at a later stage of the proceeding. (2CT 31.)

Deputy Attorney General, Letter to California Court of Appeal, *People v. Macabeo*, No. B248316, July 7, 2014, p. 1.) The prosecution nonetheless argued that the search was permissible under the good faith exception to the exclusionary rule. (*Id.* at p. 2.)

On September 3, 2014, the Court of Appeal affirmed the trial court's denial of Mr. Macabeo's suppression motion in a published decision, *People v. Macabeo* (2014) 229 Cal.App.4th 486 [177 Cal.Rptr.3d 311].

The Court of Appeal recognized that Mr. Macabeo was not arrested until after officers searched his cell phone and found pictures. As the Court recounted, Detective Hayes "directed [Mr. Macabeo] to sit on the curb" while Officer Raymond searched his phone. (*Id.* at p. 489.) Officer Raymond called over Detective Hayes, and "informed the detective that there were no text messages on defendant's phone concerning narcotics, but he had found a picture folder" containing images that violated Penal Code section 311.11(a). (*Ibid.*) At that point, "Detective Hayes returned to defendant's location and placed him under arrest." (*Ibid.*) In upholding the cell phone search as incident to that arrest, the Court quoted extensively from the trial court's ruling at the preliminary hearing, including the judge's conclusion that Mr. Macabeo "could have been arrested for failing to stop at the stop sign." (*Id.* at p. 491.) "The fact that the officer didn't do that is irrelevant. . . ." (*Ibid.*)

The Court next rejected the argument that the officers violated Mr. Macabeo's Fourth Amendment rights because they searched him incident to an infraction for which he could not have been arrested under state law. (*Id.* at p. 494.) The Court said that this argument was foreclosed by the United States Supreme Court's decision in *Atwater v. Lago Vista* (2001) 532 U.S. 318, 354 [121 S.Ct. 1536, 149 L.Ed.2d 549], as well as this Court's decision in *People v. McKay* (2002) 27 Cal.4th 601, 607 [117 Cal. Rptr. 2d 236, 41 P.3d 59]. (*Macabeo, supra*, 229 Cal.App.4th at pp. 492-94.)

The Court of Appeal acknowledged that in *Riley* the United States Supreme Court had held that, absent an emergency, officers must obtain a warrant to search the digital content of a cell phone incident to arrest. (*Id.* at p. 488.) However, it concluded that the good faith exception to the exclusionary rule permitted admission of the evidence anyway because "at the time Officer Raymond searched the cell phone, the search was authorized by the California Supreme Court decision in *Diaz*." (*Id.* at p. 496.)

On October 14, 2014, Mr. Macabeo filed his petition for review, which was granted on November 25, 2015.

ARGUMENT

After stopping Mr. Macabeo for riding his bicycle through a stop sign on an empty street late at night, officers temporarily detained him and then searched his cell phone without a warrant. The lower courts incorrectly upheld the search as incident to arrest on the basis that the officers had probable cause to believe that Mr. Macabeo had committed a traffic infraction. But this expansive reading of the scope of the search incident to arrest exception is out of step with the United States Supreme Court's insistence that the exception be interpreted in keeping with its underlying justifications. The search incident to arrest exception is predicated on an arrestee's reduced expectation of privacy, and is justified to protect officer safety from the danger that "flows from the fact of the arrest" (*United States v. Robinson* (1973) 414 U.S. 218, 234 fn. 5 [94 S.Ct. 467, 38 L.Ed.2d 427]), as well as to prevent suspects from concealing or destroying evidence needed for prosecution.

The objective evidence shows that at the time of the search, Mr. Macabeo had not been arrested, nor was any arrest underway. Absent an arrest, Mr. Macabeo did not have the reduced expectation of privacy associated with being an arrestee, and the search of his cell phone cannot be justified as necessary to protect officer safety or preserve evidence. Instead, the officers detained him and conducted an exploratory search of his cell phone, which turned up evidence of an unrelated crime for which

Mr. Macabeo was then arrested. This was not a search incident to a lawful arrest; it was an arrest incident to an unlawful search.

Moreover, recasting the search incident to arrest exception into one that permits full custodial searches merely on probable cause to believe that any infraction has been committed would vastly expand the universe of police-citizen encounters that could trigger a full custodial search. Over 5 million infractions are recorded each year in California—4 times the number of felonies and misdemeanors combined—averaging more than 1 infraction for every 8 residents. (See *infra*, footnote 21, page 44.) The prosecution's proposed expansion would potentially infringe the privacy of millions of Californians and undermine efforts to build trust between law enforcement officers and the communities they serve.

Finally, contrary to the conclusion of the Court of Appeal, the good faith exception to the exclusionary rule as articulated in *Davis v. United States* (2001) 564 U.S. ___ [131 S.Ct. 2419, 180 L.Ed.2d 285] does not permit the prosecution to rely on the evidence it found on Mr. Macabeo's cell phone. (*Macabeo, supra*, 229 Cal.App.4th at p. 496.) In *Davis*, the United States Supreme Court held that the exclusionary rule does not apply to "searches conducted in objectively reasonable reliance on binding appellate precedent." (*Davis, supra*, 131 S.Ct. at pp. 2423-2424.) Although the Court of Appeal held that this Court's decision in *People v. Diaz* (2011) 51 Cal.4th 84 [119 Cal.Rptr.3d 105, 244 P.3d 501]] constituted binding

appellate precedent, this conclusion is incorrect because *Diaz* involved a valid search incident to arrest, but there was no valid search incident to arrest here. Moreover, even if this Court now expands the search incident to arrest doctrine to permit a search pursuant to a future or hypothetical arrest, *Diaz* would not have been binding judicial precedent prior to that expansion.

I. THE WARRANTLESS SEARCH OF MR. MACABEO'S CELL PHONE VIOLATED THE FOURTH AMENDMENT.

In concluding that the officers conducted a search incident to an arrest, the courts below incorrectly held that probable cause of a law violation is sufficient to trigger the search incident to arrest exception. Warrantless searches are presumptively unreasonable, and exceptions to the warrant requirement are to be narrowly drawn. The exception for searches incident to arrest comes into play when an individual is restrained to initiate a criminal prosecution, but it is inapplicable here because Mr. Macabeo was not under arrest for prosecution on the traffic offense when his phone was searched. In a trio of recent cases, the U.S. Supreme Court has emphasized that the contours of the search incident to arrest exception must be tethered to the justifications for it. (*Knowles v. Iowa* (1998) 525 U.S. 113 [119 S.Ct. 484, 142 L.Ed.2d 492]; *Arizona v. Gant* (2009) 556 U.S. 332 [129 S.Ct. 1710, 173 L.Ed.2d 485]; *Riley v. California* (2014) __ U.S. __ [134 S.Ct.

2473, 189 L.Ed.2d 430].) Extending this warrant exception to searches that lack arrests would sever the exception from its underlying rationales.

Further, contrary to the lower courts' suggestions, determining whether Mr. Macabeo was under custodial arrest at the time of the search is determined objectively. There is no reason to recast this warrant exception into one based upon a hypothetical and not an actual arrest. Accepting the prosecution's invitation to expand this warrant exception would greatly increase the number of full custodial searches, erode privacy, and damage relationships between officers and communities.

A. Warrantless Searches are Presumptively Unreasonable.

Searches conducted without warrants "are *per se* unreasonable under the Fourth Amendment." (*Katz v. United States* (1967) 389 U.S. 347, 357 [88 S.Ct. 507, 19 L.Ed.2d 576].) Warrants ensure that probable cause is evaluated with "the deliberate, impartial judgment of a judicial officer." (*Wong Sun v. United States* (1963) 371 U.S. 471, 481 [83 S.Ct. 407, 9 L.Ed.2d 441].) The privacy that the Amendment protects is "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." (*McDonald v. United States* (1948) 335 U.S. 451, 455-456 [69 S.Ct. 191, 93 L.Ed. 153].)

A search "undertaken by law enforcement officials to discover evidence of criminal wrongdoing" generally requires a warrant. (*Riley v. California, supra*, 134 S.Ct. at 2382 [quoting *Vernonia School Dist. 47J v.*

Acton (1995) 515 U.S. 646, 653 [115 S.Ct. 2386, 132 L.Ed.2d 564]].) A search is reasonable "only if it falls within a specific exception to the warrant requirement." (*Ibid.* [citing *Kentucky v. King* (2011) __ U.S. __ [131 S.Ct. 1849, 1856–1857, 179 L.Ed.2d 865]; see also *People v. Schmitz* (2012) 55 Cal.4th 909, 916 [149 Cal.Rptr.3d 640, 288 P.3d 1259] [a warrantless search is unreasonable "unless it is conducted pursuant to one of the few narrowly drawn exceptions"].) "The burden is on those seeking [an] exemption [from the requirement] to show the need for it." (*Chimel v. California* (1969) 395 U.S. 752, 762 [89 S.Ct. 2034, 23 L.Ed.2d 685] [quoting *United States v. Jeffers* (1951) 342 U.S. 48, 51 [72 S.Ct. 93, 96 L.Ed. 59]].)

B. The Warrantless Search of Mr. Macabeo's Cell Phone Was Not a Valid Search Incident to a Custodial Arrest Because No Arrest Had Occurred or Was Underway.

Mr. Macabeo was neither under arrest for the traffic infraction, nor was his arrest underway, when officers searched his phone for evidence of crime. After the search, officers arrested Mr. Macabeo based on what they discovered on his cell phone. But "justify[ing] the arrest by the search and at the same time . . . the search by the arrest . . . will not do." (*Johnson v. United States* (1948) 333 U.S. 10, 16-17 [68 S.Ct. 367, 92 L.Ed. 436]; see also *Smith v. Ohio* (1990) 494 U.S. 541, 543 [110 S.Ct. 1288, 108 L.Ed.2d 464], *per curiam* [the exception for incident searches "does not permit the

police to search any citizen without a warrant or probable cause so long as an arrest immediately follows"].)

1. Officers may only conduct a search incident to arrest where there has been an arrest or one is underway.

The ability of officers to conduct a search incident to arrest is "strictly limited." (*Chimel, supra*, 395 U.S. at p. 759 [quoting *Trupiano v. United States* (1948) 334 U.S. 699, 708 [68 S.Ct. 1229, 92 L.Ed. 1663].) Police may conduct a warrantless search of an individual pursuant to "a lawful custodial arrest." (*United States v. Robinson* (1973) 414 U.S. 218, 235 [94 S.Ct. 467, 38 L.Ed.2d 427].) The authority to search is categorical, and does not require an individualized basis to believe that a suspect is armed or possesses contraband: if a suspect is arrested, "a search incident to the arrest requires no additional justification." (*Id.* at p. 235.) Because an arrest categorically exempts the search from the warrant requirement, the U.S. Supreme Court has repeatedly emphasized that "[i]t is *the fact of the lawful arrest* which establishes the authority to search . . . ." (*Ibid.*, italics added; see also *Gustafson v. Florida* (1973) 414 U.S. 260, 266 [94 S.Ct. 488, 38 L.Ed.2d 456] ["it is *the fact* of custodial arrest which gives rise to the authority to search," italics added]; *United States v. Rabinowitz* (1950) 339 U.S. 56, 60 [70 S.Ct. 430, 94 L.Ed. 653][7] ["a search without warrant

[7] Overruled in part on another ground in *Chimel, supra*, 395 U.S. at p. 768.

incident to an arrest *is dependent initially on a valid arrest*," italics added]; *Knowles v. Iowa*, *supra*, 525 U.S. at pp. 118-119 [a traffic citation is not an arrest and may not support a search].)

There is a good reason why the search incident to arrest exception is tightly bound to the fact of an arrest itself. The essential feature of a custodial arrest is that it "is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement," including taking him or her to the police station. (*Robinson*, *supra*, 414 U.S. at p. 228 [quoting *Terry v. Ohio* (1968) 392 U.S. 1, 26 [88 S.Ct. 1868, 20 L.Ed.2d 889].) For centuries, an arrest has been understood as taking a person into custody to effect a prosecution.[8] The Court in *Robinson* drew upon Judge Cardozo's account of the historical basis for the authority to search upon arrest: a "[s]earch of the person becomes lawful when grounds for arrest and accusation have been

[8] See Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest* (2001) 19 Yale Law & Policy Rev. 381, 428-432 [historical understanding of arrest "presumed that the arresting official secured custody in order to effectuate prosecution"]; Perkins, *The Law of Arrest* (1940) 25 Iowa L.Rev. 201, 201 [An arrest "is the taking of another into custody for the actual or purported purpose of bringing the other before a court, body or official or of otherwise securing the administration of the law"]; 4 Blackstone, Commentaries (4th ed. 1770) p. 286 [an arrest "is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime"].

discovered, *and the law is in the act of subjecting the body of the accused to its physical dominion.*" (*Robinson*, *supra*, 414 U.S. at p. 232 [quoting *People v. Chiagles* (N.Y. 1923) 142 N.E. 583, 584, italics added]; see also *Riley*, *supra*, 134 S.Ct. at p. 2488 [quoting *Robinson* and *Chiagles*].)

Because a custodial arrest begins confinement to effect a criminal prosecution, decisions from the U.S. Supreme Court clearly establish that a seizure short of a full custodial arrest does not support a full search. In *Knowles v. Iowa*, the defendant was given a citation for speeding. (*Knowles*, *supra*, 525 U.S. at p. 114.) After issuing the citation, the officer conducted a full search of Knowles' car and found contraband, for which Knowles was arrested and charged. (*Ibid.*) The Court observed that officers who effect a traffic stop may conduct a "*Terry* patdown" if they reasonably suspect that a person may be armed and dangerous. (*Id.* at p. 118 [citing *Terry v. Ohio*, *supra*].) But if officers cite a motorist, and do not arrest him or her, they may not conduct a full search incident to arrest. (*Id.* at pp. 118-119; see also *Cupp v. Murphy* (1973) 412 U.S. 291, 296 [93 S.Ct. 2000, 36 L.Ed.2d 900] [holding that while a limited search (collecting fingernail scrapings) was justified to preserve fragile evidence, a full search incident to arrest was not permitted "without a formal arrest and without a warrant"].)

There is only one instance in which the U.S. Supreme Court has upheld a search incident to arrest where an actual search preceded a formal

arrest. In *Rawlings v. Kentucky*, the defendant was present in a residence where police executed a search warrant as part of a narcotics investigation. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 100 [100 S.Ct. 2556, 65 L.Ed.2d 633].) Rawlings' companion dumped thousands of dollars of narcotics—including 1800 tablets of LSD—onto a table, and Rawlings immediately admitted that the drugs were his. (*Id.* at p. 101.) Officers then searched Rawlings' person, found cash and a knife, and placed him under what the Court termed "formal arrest." (*Ibid.*) In upholding the search, the Court observed that officers had probable cause to arrest Rawlings when he admitted the drugs were his, and "[w]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." (*Id.* at p. 111.) Given the important limits on the ability of officers to claim a search incident to arrest where no actual arrest has occurred, this sentence in *Rawlings* should not be stretched too far. Moreover, under the objective circumstances of this case, it is clear that Rawlings' arrest on charges of narcotics trafficking was in fact underway, and so it did not matter that he was not considered to be under "formal arrest" until seconds later, after his person was searched.[9]

[9] Indeed, the major parts of *Rawlings* address other issues. (See *id.* at pp. 104-110.) Rawlings did not even raise the timing issue with respect to the search of his person. He contended only that the evidence on his person

Although this Court has not had occasion to consider this phrase in *Rawlings*, allowing a search where an arrest "followed quickly on [its] heels," *People v. Redd* addressed a claim that an officer had seized evidence from a defendant prior to his arrest. (See *People v. Redd* (2010) 48 Cal.4th 691, 720 [108 Cal.Rptr.3d 192, 229 P.3d 101].)[10] This Court unanimously upheld the search in *Redd* as incident to arrest based on the trial court's finding "that the search was conducted *during* or *after* the arrest." (*Id.*, 48 Cal.4th at p. 721, italics added.)[11] Put another way, Redd's arrest was at least "underway."[12] (*Commonwealth v. Craan* (Mass. 2014) 13

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was the product of a prior unlawful search. (See Brief for Petitioner, *Rawlings v. Kentucky*, 1980 U.S. S. Ct. Briefs LEXIS 2222,Briefs LEXIS 2222, at 122-125.)

[10] Sixty years ago, in *People v. Simon*, this Court observed that an officer with probable cause to arrest could search prior to the arrest, though the Court also found no probable cause to arrest the defendant in that case. (See *People v. Simon* (1955) 45 Cal.2d 645, 648-650 [290 P.2d 531].) *Simon* was decided without the benefit of *Chimel*, *Robinson*, *Rawlings*, *Riley* or—for that matter—*Mapp v. Ohio* (1961) 367 U.S. 643 [81 S.Ct. 1684, 6 L.Ed.2d 1081]. A majority of this Court last cited *Simon* for this proposition in *People v. Marshall* (1968) 69 Cal.2d 51, 61 [69 Cal.Rptr. 585, 442 P.2d 665].

[11] The Court also held that even if the officer had seized the evidence "before he began effecting the arrest," the evidence would inevitably have been discovered. (*Ibid.*) The Court's use of this alternative ground for admissibility also indicates that there is little reason to expand the search incident to arrest exception itself.

[12] A number of decisions from the California Courts of Appeal cite, *supra*, or this phrase in *Rawlings*. For the most part, these cases were decided prior to the U.S. Supreme Court's more recent holdings in *Knowles v. Iowa*, *Arizona v. Gant*, and *Riley v. California*. That aside, in several of these cases, one could characterize the search as occurring during an arrest.

N.E.3d 569, 575; see also *People v. Evans* (N.Y. 1977) 371 N.E.2d 528, 531-32 [the search and arrest must be "nearly simultaneous so as to constitute one event" and not "distinct occurrences"].)

Notably, in *all* of these decisions, the defendants were actually arrested and charged for the offenses for which officers had probable cause to arrest. (See *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 533, 535 [172 Cal.Rptr. 833] [officer had probable cause to arrest for auto theft, search turned up an ignition key, and defendant was arrested for auto theft]; *People v. Adams* (1985) 175 Cal.App.3d 855, 861-864 [221 Cal.Rptr. 298] [officer had probable cause to arrest for robbery, search uncovered evidence of a robbery, and defendant was arrested for robbery]; *People v. Fay* (1986) 184 Cal.App.3d 882, 891-893 [229 Cal.Rptr. 291] [police officers had probable cause to arrest for narcotics offense, search turned up narcotics, and defendant was arrested for narcotics offense]; *People v. Avila* (1997) 58 Cal.App.4th 1069, 1075-1077 [68 Cal.Rptr.2d 432] [same]; *People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189-1191 [265 Cal.Rptr. 507] [same]; *People v. Mims* (1992) 9 Cal.App.4th 1244, 1250-1251 [12 Cal.Rptr.2d 335] [same]; *People v. Limon* (1993) 17 Cal.App.4th 524, 538 [21 Cal.Rptr.2d 397] [same]; *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1239-1240 [25 Cal.Rptr.3d 13] [officers had probable cause to arrest for carjacking, search turned up ignition keys, suspect was arrested for carjacking].) These cases differ from Mr. Macabeo's in that he was never arrested or charged for the traffic offense for which there was allegedly probable cause to arrest.

For decisions in some federal jurisdictions, compare, e.g., *United States v. Powell* (D.C. Cir. 2007) 483 F.3d 836, 838-840 (en banc) [citing *Rawlings* and upholding search that preceded arrest, but observing that the defendant in *Rawlings* may have been under custodial arrest at the time of his search] with *United States v. Jackson* (7th Cir. 2004) 377 F.3d 715, 717 [asking whether defendant was arrested prior to the search]; *United States v. Benton* (9th Cir. 2011) 407 Fed. Appx. 218, 219 [finding no search incident to arrest where there was no arrest for the offense at the time of the search]; *United States v. King* (N.D. Cal. 2008) 560 F. Supp. 2d 906, 919 [search was not contemporaneous with an arrest where the discovery of a gun following a search was the impetus for the arrest].

2. The warrantless search of Mr. Macabeo's cell phone cannot be upheld as a search incident to arrest because he was neither arrested nor was an arrest underway.

A full search incident to an arrest must be predicated upon the *fact* of a full custodial arrest, meaning that officers have taken or are in the process of taking a person into their custody to face criminal charges; an investigative detention under *Terry* or a traffic stop leading to a citation will not suffice. Courts apply an objective test to distinguish an arrest from a consensual encounter or an investigative detention. (*Kaupp v. Texas* (2003) 538 U.S. 626, 632 [123 S.Ct. 1843, 155 L.Ed.2d 814], *per curiam* ["[t]he test is an objective one"].) "Important to this assessment . . . are the 'duration, scope and purpose' of the stop." (*People v. Celis* (2004) 33 Cal.4th 667, 675 [16 Cal. Rptr. 3d 85, 93 P.3d 1027] (quoting *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784 [195 Cal.Rptr. 671, 670 P.2d 325].) Viewed objectively, Mr. Macabeo was detained for investigation of a minor traffic infraction when his phone was searched. The Court of Appeal properly found that Mr. Macabeo was not arrested until after the search. (See *Macabeo*, *supra*, 229 Cal.App.4th at p. 489.) Moreover, there is no objective basis to conclude that a custodial arrest was "underway" at the time of the cell phone search.

Terry allows a warrantless forcible stop for a brief on-the-spot investigation upon reasonable articulable suspicion of contemporaneous

criminal activity, as well as a protective frisk for officer safety upon reasonable suspicion that the person may have a concealed weapon. (*Terry*, *supra*, 392 U.S. at pp. 21, 27; see also *People v. Souza* (1994) 9 Cal.4th 224, 229-230 [36 Cal.Rptr.2d 569, 885 P.2d 982] [reviewing *Terry* and later cases].) An ordinary traffic stop "is presumptively temporary and brief"; it is "more analogous to a so-called '*Terry* stop' . . . than to a formal arrest." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 437, 439 [104 S.Ct. 3138, 82 L.Ed.2d 317] [citing *Terry*, *supra*].) The officers stopped Mr. Macabeo for a minor traffic infraction and patted him down after his fidgeting made one officer suspect that he had a weapon. (1CT 59:13-25.) This was a quintessential traffic stop and *Terry* frisk, not a custodial arrest.

The objective circumstances show that prior to the search of his cell phone, Mr. Macabeo was not in custody to face prosecution on the traffic infraction. At that point, the officers had all of the facts they needed to establish probable cause for the traffic infraction, but the stop lacked any objective indicia of a custodial arrest. The officers did not tell Mr. Macabeo that he was under arrest. Had the officers arrested Mr. Macabeo before the search, they would presumably have so advised him, as they are trained to do. (See Penal Code section 841 [arresting officers in California "must inform the person to be arrested of the intention to arrest him, of the cause

of the arrest, and the authority to make it"].)[13] They did not bring Mr. Macabeo to their patrol car in order to transport him to the police station to face the traffic charge; "involuntary transport to a police station" is a hallmark of an arrest. (*Kaupp*, *supra*, 538 U.S. at p. 630.)[14] Nor did they handcuff Mr. Macabeo.[15] Instead, Mr. Macabeo was seated unsecured

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[13] Beginning at the police academy, officers are trained to tell a person when he or she is under arrest. (See California Commission on Peace Officer Standards and Training, Basic Course Instructor Unit Guide: Learning Domain 15, Laws of Arrest (June 1997), at p. 29 ["Officers must inform the person to be arrested" of the "cause (or reason) for the arrest," the "intention of the person making the arrest" and the "authority to make the arrest"] <http://libcat.post.ca.gov/dbtw-wpd/documents/post/173621265.pdf> [as of April 6, 2015]; see also California Department of Justice, California Peace Officers Legal Sourcebook (rev. Jan. 2014) at p. 2.24b ["Normally, you must tell the arrestee (1) you intend to arrest him or her, (2) the reason for the arrest, and (3) your authority . . ."]; Alameda County District Attorney's Office, *Point of View: Arrests* (Spring 2009), at p. 9 <http://le.alcoda.org/publications/point_of_view/files/ARRESTS.pdf> [as of Mar. 23, 2015] ["Officers must notify the person that he is under arrest," which can be accomplished through "words or conduct"].

[14] See also *Hayes v. Florida* (1985) 470 U.S. 811, 814-815 [105 S.Ct. 1643, 84 L.Ed.2d 705] [removing a suspect from his home and transporting him to a police station requires a warrant or probable cause]; *Atwater v. Lago Vista* (2001) 532 U.S. 318, 354-355 [121 S.Ct. 1536, 149 L.Ed.2d 549] [describing, as part of a "normal custodial arrest," that Atwater was handcuffed, placed in a squad car, and taken to the police station].

[15] In conducting searches incident to arrest, officers are generally trained to handcuff an arrestee prior to searching the area around him or her, including removing occupants from vehicles prior to searching. (See Moskovitz, *A Rule In Search of A Reason: An Empirical Reexamination of* Chimel *and* Belton (2002) 2002 Wisconsin L. Rev. 657, 665, 667, 677.) While the use of handcuffs or other physical restraints may not be determinative (see *Celis*, *supra*, 33 Cal.4th at p. 676), the *lack* of any restraints may—as here—indicate that a suspect is *not* under custodial arrest at the time of a search.

at the curb for 5-10 minutes while Detective Hayes talked with him, and Officer Raymond searched his phone. (1CT 61:15-23, 77:15-22.) His encounter was even *less* like an arrest than in *Celis, supra*, where this Court found the defendant was detained under *Terry* when officers stopped him at gunpoint, handcuffed him, and made him sit on the ground for a few minutes while they walked through his house. (*Celis, supra*, 33 Cal.4th at pp. 674-676.)

Under these circumstances, the Court of Appeal correctly stated that the arrest followed the cell phone search: after Officer Raymond showed Detective Hayes the photographs in the phone, "Detective Hayes returned to defendant's location and placed him under arrest." (*Macabeo, supra*, 229 Cal.App.4th at p. 489.) At that point, Detective Hayes told Mr. Macabeo to place his hands over his head, handcuffed him, and advised him of his *Miranda* rights. (1CT 63:2-10; 79:11-16.) It was only then that Mr. Macabeo was told he was under arrest, and the offense of arrest was possessing the photographs on the phone, not rolling through the stop sign.

Moreover, there can be no claim that Mr. Macabeo's arrest was "underway" when his phone was searched. Unlike *Rawlings* and *Redd*, where the searches and arrests were part of a single event and thus officers were fairly "in the act" of arresting the defendants at the time of their searches, the circumstances objectively show that Mr. Macabeo was not in custody to initiate prosecution for failing to stop at the stop sign. Rather, he

was seated on the curb for up to 10 minutes while Officer Raymond searched his phone. The transcript of the stop reports a "long silence" during the search. (1CT 117.) The search and arrest were not "so nearly simultaneous so as to constitute one event," but were instead "distinct occurrences." (*Evans*, *supra*, 371 N.E.2d at pp. 531-532.)

Finally, it is important to note that California law did not even authorize Mr. Macabeo's arrest for the offense of failing to stop at a stop sign.[16] While the officers could *in fact* have arrested Mr. Macabeo for that infraction without violating the Fourth Amendment (*Virginia v. Moore* (2008) 553 U.S. 164, 176 [128 S.Ct. 1598, 170 L.Ed.2d 559]; *People v. McKay* (2002) 27 Cal.4th 601, 618 [117 Cal. Rptr. 2d 236, 41 P.3d 59]), the officers' actions in *not* arresting Mr. Macabeo were consistent with California law. That California law did not authorize Mr. Macabeo's arrest

[16] Mr. Macabeo allegedly violated Vehicle Code section 22450, subdivision (a), which requires drivers approaching any stop sign to stop at a limit line. A violation of section 22450 is considered an infraction with a maximum fine of $100 (see Vehicle Code sections 40000.1 and 42001), which is a "public offense" (Penal Code section 16). Penal Code section 836, subdivision (a)(1), allows an officer to arrest without a warrant if the officer has probable cause to believe a person has committed a public offense in the officer's presence. However, this arrest authority is limited. Penal Code section 853.5, subdivision (a), provides that a person may be taken into custody for an infraction "[o]nly if the arrestee refuses to sign a written promise, has no satisfactory identification, or refuses to provide a thumbprint or fingerprint."

further supports the fair inference that he was not *in fact* under custodial arrest for the traffic offense at the time of the search.

The duration, scope and purpose of Mr. Macabeo's encounter with the officers shows that he was not under custodial arrest, nor was an arrest underway, at the time of the cell phone search. This Court may not uphold a search simply because "an arrest immediately follows." (*Smith, supra*, 494 U.S. at p. 543.) This was patently an arrest that followed an unlawful search, not a search incident to a lawful arrest.

C. This Court Should Not Extend the Search Incident to Arrest Warrant Exception to Searches Where No Arrest Has Occurred or Is Underway.

The trial court denied Mr. Macabeo's suppression motion because he "*could have* been arrested for failing to stop at the stop sign," a conclusion endorsed by the Court of Appeal. (*Macabeo, supra*, 229 Cal.App.4th at p. 491.) However, expanding the warrant exception to authorize full custodial searches whenever police "could" arrest someone would impermissibly "untether the rule" of searches incident to arrest from the justifications for the warrant exception. (*Riley, supra* at p. 2485 [quoting *Gant, supra*, 556 U.S. at p. 343].) Moreover, requiring courts to determine if a custodial arrest was complete or underway prior to a search is critical to assessing whether a search was objectively reasonable. And it would avoid the harms that the prosecution's proposed expansion of the warrant

exception would cause: erasing carefully established limits on the authority to search, and undermining the community's trust in police.

1. The scope of the search incident to arrest exception must be determined in light of the justifications for it.

In three successive cases in which it refused to expand the search incident to arrest exception to particular categories of searches, the high court has emphasized that the contours of the warrant exception must be established in light of the rationales for it. (*Knowles*, *supra*, 525 U.S. at pp. 115, 117 [declining to approve a "search incident to citation" because none of the "underlying rationales for the search incident to arrest exception is sufficient to justify [a] search in [that] case"]; *Gant*, *supra*, 556 U.S. at p. 343 [refusing to authorize a search of a vehicle incident to arrest where the arrestee was already secured, holding that this would "untether the rule from the justifications underlying the . . . exception"]; *Riley*, *supra*, 134 S.Ct. at pp. 2484, 2485 [declining to authorize a search of data on a cell phone incident to arrest would "untether the rule" from the justifications for it, even though "a mechanical application of *Robinson*" might well support the search"].)[17]

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[17] See also *Bailey v. United States* (2013) __ U.S. __ [133 S.Ct. 1031, 1038, 185 L.Ed.2d 19] [declining to expand the categorical rule allowing officers to detain occupants of a premises during a warrant search, stating that "[a]n exception to the Fourth Amendment rule . . . must not diverge from its purpose and rationale"]; *United States v. Myers* (3d Cir. 2002) 308 F.3d

As the U.S. Supreme Court explained in *Riley*, the search incident to arrest exception rests, on the one hand, upon "the heightened government interests at stake in a volatile arrest situation" and, on the other hand, "an arrestee's reduced privacy interests upon being taken into police custody." (*Riley*, *supra*, at p. 2488.) The government's affirmative interests for the warrant exception were summarized by the high court in *Chimel v. California*:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. (*Chimel*, *supra*, 395 U.S. at pp. 762-763; see also *Diaz*, *supra*, 51 Cal.4th at p. 90 [describing purposes].)

An arrestee's reduced expectation of privacy is also critical to the warrant exception, as Justice Werdegar has explained:

> The warrantless search of an arrestee's person . . . rests on a relatively simple, intuitively correct idea: the police, having lawful custody of the individual, necessarily have the authority to search the arrestee's body and seize anything of importance they find there. Having been lawfully arrested, with his or her person under the custody and control of the police, the individual can no longer claim in full the personal privacy he or she ordinarily enjoys. (*Diaz*, *supra*, 51 Cal.4th at p. 110 (dis. opn. of Werdegar, J.).)

251, 266 [a search incident to arrest is only reasonable "when it is confined to, and controlled by, the circumstances that warrant the intrusion"].

(See also *Riley*, *supra*, at p. 2488 [a search of an arrestee's person and effects "constitute[s] only minor additional intrusions compared to the substantial government authority exercised in taking [him] into custody"].)

The three recent Supreme Court decisions show how exacting courts must be in determining whether the justifications for the search incident to arrest doctrine support a proposed expansion of the warrant exception. In *Knowles*, the Court ruled that officers could not conduct a "search incident to citation" because police issuing traffic tickets are at risk "a good deal less than in the case of a custodial arrest." (*Knowles*, *supra*, 525 U.S. at p. 117-118.) Further, preservation of evidence was not at issue because "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained." (*Id.* at p. 118). In *Gant*, the Justices held that officers could not conduct a search of a vehicle where the occupant was already secured "[b]ecause Gant could not have accessed his car to retrieve weapons or evidence at the time of the search." (*Gant*, *supra*, 556 U.S. at p. 335.) And in *Riley*, the Supreme Court ruled that officers cannot search the content of cell phones incident to arrest because "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape," (*Riley, supra*, 134 S.Ct. at p. 2485), and destruction of evidence was not an issue because once the cell phone is secured, "there is no longer any risk

that the arrestee himself will be able to delete incriminating data from the phone" (*id.* at 2486).

2. The rationales for the warrant exception do not justify searches based upon probable cause where, as here, no arrest was completed or underway.

None of the rationales for the search incident to arrest exception justifies categorically extending the warrant exception to searches where no custodial arrest has been effected or is underway.

Expanding the search authority to all stops where there is probable cause to arrest is not justified for reasons of officer safety. A suspect who is taken into custody to answer charges is generally brought to a police station or other location. As the high court observed in *Knowles*, "a custodial arrest involves 'danger to an officer' because of 'the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.'" (*Knowles*, *supra*, 525 U.S. at p. 117 [quoting *Robinson*, *supra*, 414 U.S. at pp. 234-235].) Moreover, "the danger to the police officer *flows from the fact of the arrest*, and its attendant proximity, stress, and uncertainty, and *not from the grounds for arrest.*" (*Robinson*, *supra*, 414 U.S. at p. 234, fn. 5, italics added.) Unless a custodial arrest has been

effected or is underway, these dangers are present to no greater degree than during any traffic stop or investigative detention.[18]

Nor is a categorical extension of the warrant exception justified by the need to prevent suspects from concealing or destroying evidence. As the *Riley* Court also held with respect to this justification for a warrant exception for the proposed search of cell phones, "there remain more targeted ways to address those concerns" in individual cases, such as exigent circumstances. (*Id.* at p. 2487.) And of course there are many instances, such as in *Knowles*, where "all the evidence necessary to prosecute that offense ha[s] been obtained" and "the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote." (*Knowles, supra*, 525 U.S. at p. 118.) The Court in *Knowles* thus properly refused the invitation "to extend [*Robinson*'s] 'bright-line rule' to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all." (*Id.* at p. 119.)

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[18] Officers already have a variety of tools available to them to ensure their own safety during traffic stops and other encounters. With reasonable suspicion that an individual is armed, police may conduct a *Terry* frisk of a person or vehicle. (*Knowles, supra*, 525 U.S. at pp. 117-118.) To the extent that dangers to officers may arise in a particular case that are not ameliorated by a *Terry* frisk, "they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." (*Riley, supra*, 134 S.Ct. at p. 2486.)

In addition, and perhaps most significantly, the basic premise of the search incident to arrest exception—an arrestee's reduced expectation of privacy—is wholly absent when an individual is neither under arrest nor in the process of being arrested. It is the fact of arrest, the actual going-into-custody-to-answer-charges, that results in a diminished expectation of privacy. (See *Robinson*, *supra*, 414 U.S. at p. 237 (conc. opn. of Powell, J.) ["an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person"]; *Maryland v. King* (2013) __ U.S. __ [133 S.Ct. 1958, 1978, 186 L.Ed.2d 1] [an individual taken into police custody has a diminished expectation of privacy and may be intrusively searched].) As Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has noted, "*Knowles* limits *Robinson* and *Gustafson* to custodial arrests; it instantiates the principle that the reasonableness of a search depends on what the officers actually do, not what they might have done." (*United States v. Jackson* (7th Cir. 2004) 377 F.3d 715, 717.)

Although there is a split of authority, this Court would join others in refusing to authorize searches incident to probable cause. For example, the Maryland Court of Appeals has held,

> Where there is no custodial arrest, . . . the[] underlying rationales for a search incident to an arrest do not exist. An individual who does not believe that he has been arrested has no need to effect an escape or to harm the police officer that has detained him. Moreover, an individual who does not

> believe that he has been arrested has little or no need to destroy evidence and, thus, almost certainly will not destroy evidence that might be in his possession. (*Belote v. State* (Md. 2009) 981 A.2d 1247, 1252.)

Likewise, the Massachusetts Supreme Judicial Court has ruled that "[t]o permit a search incident to arrest where the suspect is not arrested until much later, or is never arrested, would sever this exception completely from its justifications. . . . It would, in effect, create a wholly new exception for a 'search incident to probable cause to arrest.' This we decline to do." (*Commonwealth v. Washington* (Mass. 2007) 869 N.E.2d 605, 611-612.) Noting that a search incident to arrest is authorized in part because an arrest may create a motivation to use a weapon or destroy evidence, the Arizona Court of Appeals has rejected the application of the search incident to arrest exception "when a person is not taken into custody to be booked for an offense." (*State v. Taylor* (Ariz. Ct. App. 1990) 808 P.2d 324, 324.) Moreover, "[w]e are cited no authority for the proposition that police are free to search anyone they choose to cite for a misdemeanor offense or that they could arrest although they do not intend to." (*Id.* at p. 325; see also *Commonwealth v. Shiflet* (Pa. 1995) 670 A.2d 128, 130 ["[a] lawful arrest is a precondition to the applicability of the exception"].)

The New York Court of Appeals has rejected the rule proposed by the prosecution here in perhaps the clearest language:

> To adopt the proposition that the search was valid because there was probable cause to arrest puts the cart before the horse. An arrest is an essential requisite to a search incident . . . Unless and until a person is arrested, a full body search without a warrant or exceptional circumstances is constitutionally unreasonable. (*Evans*, *supra*, 371 N.E.2d at p. 531.)

And as that court said just last year, re-affirming *Evans*, "[i]t is irrelevant that, because probable cause existed, there *could* have been an arrest without a search. A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not." (*People v. Reid* (2014) 24 N.Y.3d 615, 619 [26 N.E.3d 237].)

These decisions are consistent with the U.S. Supreme Court's demand that courts assessing the proper scope of the search incident to arrest exception carefully consider the contours of the warrant exception in light of the justifications for it; courts should not mechanically apply the exception. As shown here, allowing officers to search whenever there is probable cause to arrest, but neither an actual arrest nor one that is at least underway, would untether the exception from the justifications for it. Searches incident to arrest require actual and not hypothetical arrests. This Court should reject the prosecution's proposed expansion of the warrant exception and reverse the decision below.

3. Assessing whether a custodial arrest has occurred or is underway prior to a search is critical to determining the reasonableness of the search.

Rather than rest their decisions on the objective fact that, at the time of the search of Mr. Macabeo's cell phone, Mr. Macabeo had not been arrested to effect his prosecution on a criminal charge, the lower courts instead held that "[t]he fact that the officer didn't do that is irrelevant" because the officer's "subjective state of mind" does not determine the constitutionality of the search. (*Macabeo*, *supra*, 229 Cal.App.4th at p. 491; 1CT 102:18-24.) But the U.S. Supreme Court has held that the reasonableness of a search may turn on the purpose for it, and whether Mr. Macabeo was under custodial arrest at the time of the search turned on whether he was held to initiate prosecution on a criminal charge. Further, as Mr. Macabeo has already shown, the fact that he was not under arrest at the time of the search is established by the objective circumstances of the encounter.

The officers' purpose is central to the question of whether their search was reasonable. In *Florida v. Jardines*, the U.S. Supreme Court considered the Fourth Amendment implications of police officers' visit to the porch of a home with a drug-sniffing dog. (*Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 1413, 185 L.Ed.2d 495].) The Justices explained that "*whether* the officer's conduct was an objectively reasonable search . . . depends upon whether the officers had an implied license to

enter the porch, which in turn depends upon the purpose for which they entered." (*Id.* at p. 1417.) "Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." (*Ibid.*) The high court distinguished two prior cases, *Ashcroft v. al-Kidd* (2011) __ U.S. __ [131 S.Ct. 2074, 179 L.Ed.2d 1149] and *Whren v. United States* (1996) 517 U.S. 806 [116 S.Ct. 1769, 135 L.Ed.2d 89], which "merely hold that a stop or search that is objectively reasonable is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason." (*Jardines, supra,* 133 S.Ct. at p. 1416.)

As in *Jardines*, "*whether* the officer[s'] conduct was an objectively reasonable search" in the first place depends upon the officers' purpose. If no arrest for the purpose of initiating a criminal prosecution was complete or underway at the time of the cell phone search, then the officers' conduct was not an objectively reasonable search, since the search incident exception depends on the fact of an arrest. Had the officers *in fact* arrested Mr. Macabeo for the traffic infraction prior to the search of his phone—even if the officers' real motivation for the arrest was to investigate narcotics use—their real motivation would be irrelevant under both *Whren* and *al-Kidd*. Likewise, had the officers arrested Mr. Macabeo for a different offense prior to the search, he could not be heard to complain so long as there was probable cause to arrest him for a criminal offense. (See

Devenpeck v. Alford (2004) 543 U.S. 146, 153 [125 S.Ct. 588, 160 L.Ed.2d 537] [an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"].) But here there was no custodial arrest *at all* prior to or during the search.

Jardines reaffirms another basic principle as well: courts determine officers' purpose by what "their behavior objectively reveals . . .." (*Jardines*, *supra*, 133 S.Ct. at p. 1417.) In this way, the task of the courts is no different than applying objective standards to distinguish between detentions and arrests (see *Celis*, *supra*, 33 Cal.4th at pp. 674-676) or in a myriad of other contexts.[19] Mr. Macabeo has already shown, *supra* at pp. 23-28, that the objective facts of his encounter establish that he was not under custodial arrest, nor was his arrest underway, prior to the search of his cell phone.

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[19] Courts also apply an objective standard to decide whether an officer has seized an individual within the meaning of the Fourth Amendment. (See, e.g., *Brendlin v. California* (2007) 551 U.S. 249, 254 [127 S.Ct. 2400, 168 L.Ed.2d 132] [A person is seized when "the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement," citations omitted]; *People v. Zamudio* (2008) 43 Cal.4th 327, 344 [75 Cal.Rptr.3d 289, 181 P.3d 105] [finding no seizure where there was "no threat or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, and no command associated with the officers' request that defendant come to the police station"].)

4. Creating a new "search incident to probable cause" exception would erase established limits on the authority to search, and erode the privacy rights of millions of Californians.

The prosecution's proposed search incident to arrest rule "would sever this exception completely from its justifications" and "create a wholly new exception for a 'search incident to probable cause to arrest.'" (*Washington*, *supra*, 869 N.E.2d at pp. 611-612.) This recast warrant exception would have a remarkable impact: it would erase carefully-drawn limits on the power of police to conduct searches during traffic stops and other encounters, infringe the privacy of many ordinary Californians, and undermine efforts to build trust between law enforcement officers and the communities they serve.

If the Court of Appeal's disruptive holding is allowed to stand, this expanded warrant exception would far eclipse the more modest authority provided under *Terry*. During an investigative stop, officers may conduct a limited frisk for weapons when they have reasonable and articulable suspicion that a suspect may be "armed and dangerous." (*Terry*, *supra*, 392 U.S. at p. 27.) If officers who observe the most minor of infractions are automatically entitled to conduct a full body search, the carefully-delineated limits established by *Terry* will be erased. Officers could conduct full searches whenever there is probable cause to believe that a person has committed an offense such as jaywalking (Vehicle Code section

21955); driving while holding a cell phone (Vehicle Code section 23123, subdivision (a)); failing to ride a bicycle "as close as practicable" to the right-hand edge of a road (Vehicle Code 21202, subdivision (a)); or loitering or wandering on another's property "without visible or lawful business with the owner or occupant" (Penal Code section 647, subdivision (h)).

The expanded search incident to arrest exception would also overshadow the authority to search an automobile on probable cause that the vehicle contains evidence of a crime. (See *Acevedo v. California* (1991) 500 U.S. 565, 569, 579 [111 S.Ct. 1982, 114 L.Ed.2d 619] [automobiles and containers within them may be searched with probable cause]; *People v. Thompson* (2010) 49 Cal.4th 79, 112 [109 Cal.Rptr.3d 549, 231 P.3d 289] [same].) And, in *In re Arturo D.*, this Court upheld the authority to conduct a limited search of a vehicle for registration and identification documents. (*In re Arturo D.* (2002) 27 Cal.4th 60, 75-76 [115 Cal. Rptr. 2d 581, 38 P.3d 433].) These decisions will become superfluous if officers have authority to conduct a full search of the driver and the passenger compartment of every vehicle stopped for any traffic infraction. (See *Gant*, *supra*, 556 U.S. at p. 351 [officers may search passenger compartment if arrestee is within reaching distance at the time of the search].)

The requirement of a custodial arrest establishes a crucial limitation on the authority of police to search individuals whom they encounter, as

Atwater v. City of Lago Vista demonstrates. In *Atwater*, the U.S. Supreme Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*Atwater v. Lago Vista* (2001) 532 U.S. 318, 354 [121 S.Ct. 1536, 149 L.Ed.2d 549].) But as it announced that rule, the majority emphasized that officers have an interest in limiting petty-offense arrests, "which carry costs that are simply too great to incur without good reason." (*Id.* at p. 352.) This understanding was critical to overcoming the dissenting justices' point that "[a] custodial arrest exacts an obvious toll on an individual's liberty and privacy," listing—first and foremost—that "[t]he arrestee is subject to a full search of her person and confiscation of her possessions." (*Id.* at p. 364 (dis. opn. of O'Connor, J.).) By eliminating the fact of a custodial arrest as the predicate for a search, the prosecution's proposed rule would reduce the cost and administrative burdens of a search to zero, loosing officers to exact the "obvious toll" of a full custodial search upon millions of California residents.

The grave implications of expanding the search incident to arrest exception are even more apparent in light of *Whren v. United States*. *Whren* upheld an arrest and seizure of evidence following a pretextual traffic stop. (See *Whren*, *supra*, 517 U.S. at p. 813.) The prosecution's theory would open the door to pretextual searches with no review, and none of the

practical disincentives of arrest. If officers can conduct a full custodial search based only on probable cause to arrest, they will have no incentive to limit a search to situations that genuinely call for a custodial arrest prior to the search. Where a search turns up evidence of a serious crime, officers will be rewarded with the opportunity to make a custodial arrest for the greater charge, and the evidence will be admissible at trial. Where a search fails to turn up any evidence, a suspect will likely not be arrested, and the search will never be subject to scrutiny by a judicial officer as part of a criminal case.[20] These searches would generate no records, making it especially difficult for police departments or the public to recognize patterns of bias. This would place all of the costs and burdens of a warrantless search on the backs of Californians.

The proposed rule would adversely impact many unsuspecting Californians. California logs over five million infractions a year—four times the number of misdemeanors and felonies combined—averaging

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[20] In *Simon*, *supra*, this Court suggested that "if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested." (*Simon*, *supra*, 45 Cal.2d at p. 648.) This Court's half-century-old suggestion does not sufficiently account for the violation of the individual's liberty and privacy interests caused by the search, as reflected in *Riley* and many other more recent decisions. And the logic of the suggestion would seemingly indicate that we should have no Fourth Amendment protections at all.

more than one infraction for every eight residents of the State.[21] California does not collect data on arrests for infractions,[22] but a Bureau of Justice Statistics report indicates that, nationally, approximately 2.6% of drivers were arrested during a traffic stop in 2008, 55.4% were ticketed, 26.7% were given warnings, and 15.3% were allowed to proceed without any enforcement action. (See Eith and Durose, Contacts between Police and the Public, 2008 (Oct. 2011), at table 12, p. 9 <http://www.bjs.gov/content/pub/pdf/cpp08.pdf> [as of Mar. 21, 2014].) Five percent of all drivers or vehicles were searched (see *id.* at table 14, p. 10) and, of those searches, almost half were without consent.[23] Under a "search incident to probable cause" exception, the approximately 85% of drivers arrested, ticketed or warned would be subject to full custodial searches, as would many of their

[21] In Fiscal Year 2012-2013, the last year for which data are reported, there were 260,461 felony and 926,169 misdemeanor filings in the Superior Courts in California. (See Judicial Council of Cal., 2014 Court Statistics Report: Statewide Caseload Trends, table 7a, p. 112 ["Total Criminal Filings, by County and Case Type"] <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf> [as of Mar. 20, 2015].) There were 5,050,151 infractions filed (*ibid.*) for an estimated 2013 population of 38,431,393. (See U.S. Census Bureau, State & County QuickFacts, California <http://quickfacts.census.gov/qfd/states/06000.html> [as of Mar. 24, 2015].)

[22] The California Department of Justice only maintains data for felony and misdemeanor arrests. (See Cal. Dept. of Justice, Criminal Statistics Reporting Requirements (2014), at p. 8 <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/rptreq.pdf> [as of Mar. 21, 2015].)

[23] Searches without consent were conducted in 42.3% of driver-only searches, 40.0% of vehicle-only searches, and 49.2% of searches of both vehicle and driver. (See *id.* at table 15, p. 10.)

vehicles, far more than the 2.6% who now are arrested.

Justice Sotomayor has noted that traffic stops have "human consequences—including those for communities and for their relationships with the police" (*Heien v. North Carolina* (2014) __ U.S. __ [135 S.Ct. 530, 544, 190 L.Ed.2d 475] (dis. opn. of Sotomayor, J.)), and the data support her observations. Even though the majority of traffic stop searches in 2008 were with consent, as many as 79% of the searches were perceived as not legitimate by the individuals who were searched.[24] Perceptions of the legitimacy of the reasons for traffic stops varied by race and origin.[25]

Yet trust is essential to effective law enforcement. "The police depend heavily on people's cooperation in their efforts to control crime." (Tyler and Huo, Trust in the Law: Encouraging Public Cooperation with the Police and Courts (2002) p. 200.) California's top law enforcement official recently remarked that "[a]s a career prosecutor, I have always known one central truth: the public and law enforcement need each other to keep our communities safe." (Kamala Harris, Attorney General of California, Inaugural Address (Jan. 5, 2015) <http://oag.ca.gov/news/press-

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[24] See Eith and Durose, *supra*, at table 15, p. 10 [searches were perceived as not legitimate in 63.9% of driver-only searches, 79.3% of vehicle-only searches, and 78.3% of searches of both driver and vehicle].

[25] See *id.* at table 11, p. 8; see also Langton and Durose, Police Behavior during Traffic and Street Stops, 2011 (Sept. 2013) at table 2, p. 4 <http://www.bjs.gov/content/pub/pdf/pbtss11.pdf> [as of Mar. 20, 2015].

releases/attorney-general-kamala-d-harris-sworn-delivers-inaugural-address> [as of Mar. 21, 2015].) Surely building that trust will become much more difficult under a rule that permits officers to conduct highly-intrusive searches of so many Californians.

Finally, it is important to note what will *not* change by properly confining searches incident to arrest to their traditional and justifiable boundaries. In appropriate instances, the prosecution will still be able to rely upon other case-specific warrant exceptions such as consent (see, e.g., *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222 [93 S.Ct. 2041, 36 L.Ed.2d 854]) and exigent circumstances (see, e.g., *Riley*, *supra*, 134 S.Ct. at p. 2494), as well as the inevitable discovery rule (see, e.g., *Redd, supra*, 48 Cal.4th at 721; *Nix v. Williams* (1984) 467 U.S. 431, 444 [104 S.Ct. 2501, 81 L.Ed.2d 377]).

* * *

Warrantless searches are per se unreasonable, subject to a few narrow exceptions, of which the search incident exception is one. But the Supreme Court has consistently held that the search incident exception must be interpreted in light of its underlying justifications, which are predicated on the reduced expectation of privacy of arrestees as well as the need to keep officers safe and preserve evidence for prosecution. Not one of these justifications is served where, as here, the officers search someone who is not arrested. Mr. Macabeo was temporarily detained for a minor

traffic offense, and the officers took advantage of that fact to conduct an exploratory search of his cell phone, which turned up evidence of an unrelated crime for which he was then arrested. This Court should not endorse such an expansion of the search incident doctrine by holding that the mere fact that officers have probable cause of a law violation is sufficient to trigger a search incident to arrest. To do so would untether the warrant exception from its justifications, vastly expand the number of police-citizen interactions that can give rise to full custodial searches, and damage the privacy rights of Californians as well as their trust in law enforcement.

II. THE EVIDENCE OBTAINED THROUGH THE UNCONSTITUTIONAL SEARCH OF MR. MACABEO'S CELL PHONE IS NOT ADMISSIBLE UNDER THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

The Court of Appeal held that even though Officer Raymond conducted an unconstitutional search of Mr. Macabeo's cell phone, the evidence they found was admissible under the good faith exception to the exclusionary rule as articulated in *Davis v. United States* (2011) 564 U.S. ___ [131 S.Ct. 2419, 180 L.Ed.2d 285]. (*Macabeo, supra*, 229 Cal.App.4th at p. 496.) It reasoned that "at the time Officer Raymond searched the cell phone, the search was authorized by the California Supreme Court decision in *Diaz* . . . ." (*Ibid.*) The Court of Appeal's conclusion was grounded on a faulty premise: that the search of Mr. Macabeo's cell phone was incident to

arrest. Once it is apparent that there was no valid search incident to arrest, it follows that *Diaz* did not specifically authorize the search the officers conducted, and the good faith exception to the exclusionary rule does not apply. Moreover, even if this Court now expands the search incident to arrest doctrine to permit a search pursuant to a future or hypothetical arrest, *Diaz* would not have been binding judicial precedent prior to that expansion of the doctrine.

A. The *Davis* Good Faith Exception is Narrow and Applies Only When Officers Conduct a Search in Objectively Reasonable Reliance on Binding Appellate Precedent.

The exclusionary rule is an essential vehicle for effectuating the Fourth Amendment's guarantees. In *Weeks v. United States*, the U.S. Supreme Court explained that without it, the Fourth Amendment would be "of no value" and "might as well be stricken from the Constitution." ((1914) 232 U.S. 383, 393 [34 S.Ct. 341, 58 L.Ed. 652].) Nonetheless, the mere fact that the government violated the Fourth Amendment does not mean that evidence will be excluded. The rule must be applied with the understanding that its "sole purpose . . . is to deter future Fourth Amendment violations." (*Davis, supra*, 131 S.Ct. at p. 2426; accord *People v. Willis* (2002) 28 Cal.4th 22, 29-30 [120 Cal.Rptr.2d 105, 46 P.3d 898].)

In keeping with this purpose, the U.S. Supreme Court has recognized a good faith exception to the exclusionary rule, which permits the admission of evidence where outside authorities specifically authorized

officers' conduct. (See, e.g., *United States v. Leon* (1984) 468 U.S. 897, 926 [104 S.Ct. 3405, 82 L.Ed.2d 677] [exempting from exclusion searches based on judicially authorized warrants that were later invalidated]; *Illinois v. Krull* (1987) 480 U.S. 340, 349-350 [107 S.Ct. 1160, 94 L.Ed.2d 364] [same for searches conducted in reliance on statutes that were later overturned].)

The Court of Appeal relied heavily on *Davis*, and that case is particularly instructive here. In *Davis*, the police conducted a search that Davis himself conceded "fully complied with existing [circuit] precedent." (*Davis, supra*, 131 S.Ct. at p. 2426 [internal quotation marks omitted].) While his appeal was pending, the U.S. Supreme Court overruled that precedent. (*Ibid.*) The Court held that the good faith exception to the exclusionary rule permitted admission of the evidence gathered through the search. (*Id.* at pp. 2423-2424.) It reasoned that, "when binding appellate precedent specifically *authorizes* a particular police practice," the "deterrent effect of exclusion in such a case can only be to discourage the officer from do[ing] his duty." (*Id.* at p. 2429 [internal quotation marks omitted].) Because "suppression would do nothing to deter police misconduct," the Court held that the exclusionary rule does not apply to "searches conducted in objectively reasonable reliance on binding appellate precedent." (*Id.* at pp. 2423-2424.)

Davis therefore established a narrow exception to the exclusionary rule: where "binding appellate precedent specifically authorizes" a course of action, the good faith exception to the exclusionary rule allows the admission of evidence. As demonstrated below, the Court of Appeal erred in concluding that *Diaz* amounted to such precedent in this case.

B. Binding Appellate Precedent Did Not Authorize the Officers to Search Mr. Macabeo's Cell Phone.

The Court of Appeal held that the good faith exception to the exclusionary rule allowed admission of the evidence the officers found on Mr. Macabeo's cell phone because, in its view, the search was authorized by this Court's decision in *Diaz*. (*Macabeo*, *supra*, 229 Cal.App.4th at p. 496.) This conclusion is incorrect for two reasons. Most important, the officers did not conduct a valid search incident to an arrest, so *Diaz* did not authorize the conduct the officers engaged in here. Moreover, even if this Court now expands the search incident to arrest doctrine to permit a search pursuant to a future or hypothetical arrest, *Diaz* would not have been binding judicial precedent prior to that expansion of the doctrine.

In *Diaz*, this Court held that conducting a warrantless search of a suspect's cell phone "after lawfully arresting [him]" was valid under the search incident to arrest exception to the warrant requirement. (*Diaz, supra,* 51 Cal.4th at p. 88.) In *Diaz*, officers listened in as Diaz participated in a sale of Ecstasy to a police informant. (*Id.* at pp. 88-89.) The officers then

arrested him and transported him to a sheriff's station, where they seized his cell phone. (*Id.* at p. 89.) After an interview in which Diaz denied wrongdoing, the officers searched his phone and then used the text messages they found there to elicit a confession. (*Ibid.*) The search took place about 90 minutes after his arrest. (*Ibid.*) After reviewing a number of U.S. Supreme Court cases addressing searches incident to arrest, this Court concluded that "the key question in this case is whether defendant's cell phone was 'personal property . . . immediately associated with [his] person' . . . . If it was, then the delayed warrantless search was a valid search incident to defendant's lawful custodial arrest." (*Id.* at p. 93 [quoting *United States v. Chadwick* (1977) 433 U.S. 1, 15 [97 S.Ct. 2476, 53 L.Ed.2d 538]].)

As the passage quoted above illustrates, the linchpin of this Court's decision in *Diaz* was that the defendant had been subject to a "lawful custodial arrest." (*Ibid.*) But for the arrest, the Court would not have addressed whether the search incident exception allowed for the warrantless search of the defendant's cell phone. Since *Diaz* authorized the search of cell phone only incident to arrest, a police officer searching a cell phone outside of the context of an arrest could not be deemed to have been "specifically authorize[d]" to do so by that decision. (*Davis, supra*, 131 S.Ct. at p. 2429.) Thus, *Diaz* cannot serve as the basis for a holding that the good faith exception to the exclusionary rule applies in this case.

Even if this Court accepts the prosecution's invitation to extend the search incident to arrest exception to encompass searches incident to a future or hypothetical arrest, the good faith exception still does not apply because *Diaz* would not have been binding judicial precedent prior to that expansion of the doctrine. As described in Part I, *supra* at pages 16-28, currently the search incident to arrest exception to the warrant requirement only authorizes warrantless searches when a person has been arrested or an arrest is underway. It would take a decision by this Court to expand the doctrine to future or hypothetical arrests. But even if this Court makes that decision, it would be impermissible bootstrapping to then import that understanding of the search incident to arrest doctrine to *Diaz*, and to say that *Diaz* could have directly authorized the search in this case. That is a logical impossibility. Only under a drastically more expansive interpretation of the search incident doctrine could *Diaz* apply to future or hypothetical arrests. But it would then make no sense to say that *Diaz* directly authorized the search here, for *Diaz*'s very application would depend on a doctrinal change that had not yet been created.

In short, this Court should reject the prosecution's argument that the good faith exception to the exclusionary rule applies to the evidence the police unconstitutionally gathered from Mr. Macabeo's cell phone. *Diaz* is flatly inapplicable because it is a search incident to arrest case and there was no valid search incident to arrest of Mr. Macabeo. Furthermore,

because it would take an expansion of the search incident to arrest doctrine to include searches incident to a future or hypothetical arrest, *Diaz* could not have directly authorized the search here.

Finally, it is important to focus on how the prosecution is asking this Court to shoehorn this case within the *Davis* good faith exception. At the time of the search, the officers had not arrested Mr. Macabeo, nor was his arrest underway. The prosecution asks this Court to hypothesize an unauthorized arrest that the officers did not make, in order to presume reliance on a court decision upon which the officers demonstrably did not rely—all so it can use evidence from a search that the U.S. Supreme Court has held, and the prosecution concedes, violated the Fourth Amendment. Apart from the sheer gymnastics involved in this maneuver, this conception of good faith is at war with good public policy and common sense, and fails to deter the type of misconduct at which the exclusionary rule is aimed. *Davis* provides no basis for the prosecution to benefit from one last unconstitutional cell phone search.

CONCLUSION

For all of the foregoing reasons, Appellant Paul Macabeo respectfully asks this Court to reverse the Court of Appeal, to return this case to the trial court with instructions to grant his motion pursuant to Penal Code section 1538.5, and to afford him any additional relief that may be proper and just.

Dated: April 9, 2015

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), I hereby certify that, according to our word processing software, the word count for the attached APPELLANT'S OPENING BRIEF ON THE MERITS is 13,615 including footnotes.

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

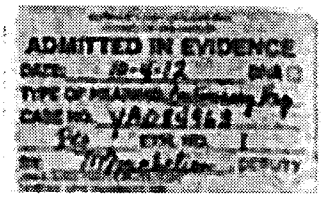
Dated: April 9, 2015 at Berkeley, California.

Catherine Crump
Attorney for Appellant

ADDENDUM

Transcript of the Recording of the Police Encounter (1CT 112-117)

[redacted] 000112



PEOPLE v. PAUL MACABEO
CASE NO.: YA084963

TRANSCRIPTION OF INITIAL CONTACT WITH OFFICERS

Officer: Where we headed?

Macabeo: [Inaudible].

Officer: AM/PM? Where are we coming from?

Macabeo: What's that?

Officer: Where are we coming from?

Macabeo: [Inaudible].

Officer: Where is that at?

Macabeo: Right there on 1 uh ... [unintelligible].

Officer #2: 17 double "0" 7?

Macabeo: Pardon?

Officer: No, just don't reach around in your pockets. 17 double "0" 7?

Macabeo: Wilton Place.

Officer: Wilton Place? What's your name?

Macabeo: Paul.

Officer: Paul what?

Macabeo: Macabeo.

Officer: Not on probation, parole nothing like that?

Macabeo: I'm on probation.

Officer: For what?

Macabeo: Uh ... possession.

Officer: Of what?

Macabeo: Uh controlled substance.

Officer: What controlled substance?

Macabeo: Huh?

Officer: What controlled substance?

Macabeo: Uh ... meth.

Officer: Alright. When do you discharge?

Macabeo: Uh, I've already dismissed my case. When did I discharge? Is that what you said?

Officer: When are you discharged off from probation?

Macabeo: Oh! Um ... I'm not sure.

Officer #2: How long have you been on?

Macabeo: Oh ... a couple of years?

Officer #2: When's your last arrest?

Macabeo: Uh ... a couple of years ago [inaudible].

Officer: Walk over to me. Turn and face my car. Put your hands up and spread your feet. Who's your PO?

Macabeo: Uh ... actually I don't have a PO.

Officer: Don't have one? You don't have anything illegal on you right now, right?

Macabeo: No.

Officer: No drugs, weapons, nothing like that?

Macabeo: No.

Officer: You have no problem me taking stuff out of your pockets?

Macabeo: No, go ahead.

Officer: When's the last time you used, in all honesty?

Macabeo: Uh ... last year.

Officer: Last year?

Macabeo: [inaudible].

Officer: How are you - how were you doing it?

Macabeo: How was I doing what?

Officer: The meth? Smoking, snorting what?

Macabeo: Oh. I was [inaudible].

Officer: Smoking? So you're not gonna have any needles on you – nothing stupid?

Macabeo: No.

Officer: You don't have any warrants or unpaid tickets or anything like that that you know of, right?

Macabeo: No.

Officer: No? Who do you live with?

Macabeo: Grandma.

Officer: Your grandmother? What are you doing for work right now?

Macabeo: I'm unemployed.

Officer: Unemployed? So what do you do for money?

Macabeo: I [inaudible] unemployment.

Officer: Unemployment? What else have you been arrested for?

Macabeo: Pretty much that ...

Officer: That doesn't answer my question at all, man. What's pretty much that? What else?

Macabeo: Mostly possession and uh ... probation violations.

Officer: How did you violate?

Macabeo: I had a couple [unintelligible].

Officer: Take a seat here for me. What's your name?

Macabeo: Paul Macabeo [unintelligible].

Officer: Cross your ankles in front of you. *[police code given in low tone.]* Alright, the only reason I was asking about your arrest history, -

Macabeo: Yeah.

Officer: Is because I'm gonna check it and I'm gonna find out what it is.

Macabeo: Oh, okay.

Officer: I just wanna know that you're being honest with me tonight. That's all.

Macabeo: Yeah [inaudible].

Officer: So, no other surprises anything like that?

Macabeo: I was arrested for possession, petty theft, [unintelligible] DUI, [inaudible] and that's it.

Officer: No burglaries, robberies, weapons charges, nothing like that? Have you done any state prison time?

Macabeo: No.

Officer: No? Just county?

Macabeo: Yeah.

Officer: Where did you get this bike?

Macabeo: It's my girlfriend's bike.

Officer: What's her name?

Macabeo: Eli.

Officer: Eli? Where does she stay?

Macabeo: [Inaudible].

Officer: You don't have anything stupid in your shoes, right?

Macabeo: I can take them off if you like.

Officer: Go ahead and take them off – start with your right one. Just hand it over to me. Don't shake it out or anything. Let me see the bottom of your foot. Same thing with the left.

Macabeo: Can I put this back on?

Officer: Yeah. When you put that back on just cross your ankles again.

Macabeo: Okay.

[long silence].

Officer: Okay, Paul. Put your hands on your head. Both of them.

Macabeo: Why am I being arrested? Am I being arrested?

Officer: I'll explain everything in a second. Do not stand up; you don't want to do that.

[END OF RECORDING].

PROOF OF SERVICE BY EXPEDITED DELIVERY

Re: *People v. Macabeo*, No. S221852, Court of Appeal Case No. B248316, Los Angeles County Superior Court Case No. YA08496.

I declare that at the time of service I was at least 18 years old and not a party to this legal action. My business address is University of California, Berkeley School of Law (Boalt Hall), Clinical Program, 353 Boalt Hall, Berkeley, CA 94720-7200. On April 10, 2015, I sent copies of the above APPELLANT'S OPENING BRIEF ON THE MERITS by enclosing them in sealed envelopes and depositing the sealed envelopes with Federal Express, fully prepaid for standard overnight delivery. The envelopes were addressed as follows:

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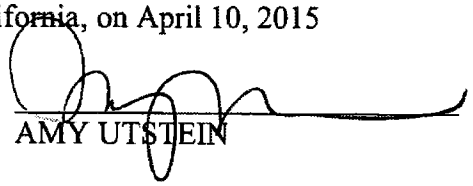
I am employed in the county where the delivery occurred. The document was sent from Berkeley, California.

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

Executed at Berkeley, California, on April 10, 2015



AMY UTSTEIN