IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GREGORY DIAZ, Defendant and Appellant,	**Crim. No. S166600** **(Court of Appeal No. B203034)** **(Sup. Ct. No. 2007015733)**

APPELLANT'S OPENING BRIEF ON THE MERITS

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	)	**(Court of Appeal No. B203034)**
	)	**(Sup. Ct. No. 2007015733)**
v.	)	
	)	
GREGORY DIAZ,	)	
	)	
Defendant and Appellant,	)	
	)	
	)	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<table>
<tr><td>PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

GREGORY DIAZ,

Defendant and Appellant,
______________________________</td><td>)
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Crim. No. S166600
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(Sup. Ct. No. 2007015733)</td></tr>
</table>

APPELLANT'S OPENING BRIEF ON THE MERITS

QUESTIONS PRESENTED

1. Was appellant's cell phone an item "immediately associated with the person of the arrestee" within the meaning of *United States v. Edwards* (1974) 415 U.S. 800, and thus subject to search incident to his arrest?

2. Was the warrantless search of the cell phone an hour and a half after the arrest, while defendant was being interrogated, invalid under *United States v. Chadwick* (1977) 433 U.S. 1?

STATEMENT OF THE CASE

Appellant, Gregory Diaz, was charged in 2007 with sale of Ecstacy (MDMA) and carrying a switch-blade knife. (Health & Saf. Code, §11379, subd. (a); Pen. Code, §653, subd. (k).) (1 CT 14-15.)

Prior to trial, Diaz moved to suppress evidence obtained when an officer searched and reviewed text messages stored on his cell phone at the police station. The court denied Diaz's motion, characterizing the cell phone search as a lawful search incident to arrest to locate evidence of a crime. (1 CT 24-29, 33; 1 RT 23.)

Diaz then pled guilty to transportation of a controlled substance and the remaining charge was dismissed. (1 CT 35-52; 1 RT 25-30.) He was granted probation. (1 CT 55-58; 1 RT 31-36.) He timely appealed, challenging the court's ruling on the suppression issue and its interpretation of federal constitutional law. (1 CT 59.)

In a published opinion, the Court of Appeal affirmed Diaz's conviction, following the reasoning of *United States v. Finley* (5th Cir.2007) 477 F.3d 250.

This Court granted review, holding the case for further briefing pending the United States Supreme Court's decision in *Arizona v. Gant* (2009) 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485. This Court subsequently ordered Diaz to file an opening brief on the merits.

STATEMENT OF FACTS[1]

On April 25, 2007 at about 2:50 p.m., Detective Fazio of the Ventura County Sheriff's Department was involved in a controlled Ecstasy buy near the intersection of Thousand Oaks and Westlake Boulevards. (1 RT 4-5.) Diaz was driving a car from which his passenger, Lorenzo Hampton, sold 6 Ecstasy pills to police. (1 RT 5.) Police searched Diaz at the scene and transported him to the

[1] The Statement of Facts is based upon the evidentiary hearing on Diaz's Motion to Suppress.

East County Sheriff's Station. There, at approximately 4:00 p.m., Detective Laubacher seized Diaz's cell phone and placed it with other evidence. At 4:18 p.m., Diaz waived his *Miranda*[2] rights and Detective Fazio interviewed him. (1 RT 6-7.) During the interrogation, between about 4:23 p.m. and 4:25 p.m., Detective Fazio retrieved Diaz's cell phone, searched the text messages folder stored on the phone memory, and reviewed a text message that read "6 4 80." (1 RT 6-8, 10-12, 14.) Believing this text message referred to the sale of 6 Ecstasy pills for $80, Detective Fazio confronted Diaz with the text message. Diaz then admitted participating in the drug sale. (1 RT 8, 12-13.)

SUMMARY OF THE ARGUMENT

Recently, a number of lower courts have relied upon *Finley, supra,* 477 F.3d at p. 250, to sanction warrantless cell phone searches incident to arrest, including the Court of Appeal here. (*See, e.g., United States v. Murphy* (4th Cir.2009) 552 F.3d 405, 411.) Diaz encourages this Court to reject the reasoning of *Finley* and follow a strict application of *Chimel v. California* (1969) 395 U.S. 752 and *Chadwick, supra,* 433 U.S. at p. 1.

Diaz contends that the content of data stored in a cell phone is not an item "immediately associated with the person of the arrestee" subject to the contemporaneous search exception of *United States v. Edwards* (1974) 415 U.S. 800. This result follows regardless of whether the cell phone itself is viewed merely as a traditional closed container or a wholly new form of intangible evidence. Returning to the constitutional basics, *Edwards* involved nothing more than the clothes worn by an arrestee. The delayed search in *Edwards* satisfied the Fourth Amendment because the item seized—the clothing—was by its fundamental nature implicitly associated with defendant's person, a conclusion requiring only the most basic assumption that people, including inmates, more or

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2 *Miranda v. Arizona* (1966) 384 U.S. 436.

less always wear clothing. (*Edwards, supra,* 415 U.S. at p. 801-803.)

Cell phones are not at all like clothing. Cells phones possess substantial storage capacity into which users often deposit detailed personal information about themselves, their friends, their family, and even minor acquaintances. A cell phone contains quantities of personal data unrivaled by any conventional item of evidence traditionally considered to be "immediately associated with the person of the arrestee," such as an article of clothing, a wallet, or a crumpled cigarette box found in an arrestee's pocket. (*See, e.g., United States v. Robinson* (1973) 414 U.S. 218, 235 [upholding warrantless search of cigarette package found in defendant's pocket].

Cells phones can operate as photo albums, video recorders and players, phone and address books, and even internet browsers. They contain not only records of incoming and outgoing telephone numbers, but the content of text messages, personal calendars, call histories including dates and times of numbers dialed and calls received, and sometimes email messages and browsing histories.

A cell phone's combined mobility and ability to store increasingly large quantities of personal data render the device an attractive tool for police investigation. Yet the justification for search incident to arrest defined in *Chimel v. California* (1969) 395 U.S. 752 should prohibit warrantless search of Diaz's cell phone's content incident to arrest. The search here was purely investigatory, and was not necessary to preserve evidence of the crime or prevent Diaz's access to a weapon. (*Chimel, supra,* 395 U.S. at p. 763.) A warrantless search of data stored in a cell phone confiscated by police should be permitted contemporaneous with arrest only when other exceptions to the warrant requirement are present, such as the immediate need to locate fleeing and dangerous suspects. (*See, e.g., United States v. Brooks* (9th Cir. 2004) 367 F.3d 1128, 1135.)

Diaz also contends that search of the cell phone's content was too remote in time to permit reliance by the government on the search incident to arrest exception of the Fourth Amendment. The cell phone itself was exclusively held in police custody well before the search of its text message folder. Diaz thus urges this court to apply the contemporaneous requirement of *Chadwick* to any search incident to arrest, and find inapplicable the exception to contemporaneous search of *Edwards*.

Specifically, Diaz urges this Court to find that the seizure of the cell phone pursuant to arrest, and the subsequent search of the phone's stored content once the evidence was securely in police custody, are separate issues under the Fourth Amendment. (*See, e.g., Qoun v. Arch Wireless Operating Company, Inc.* (9th Cir. 2008) 529 F.3d 892, 904; *United States v. Hernandez* (9th Cir. 2002) 313 F.3d 1206, 1209-1210) [expectation of privacy in content of container distinguished from exterior of the container itself].) The Court of Appeal characterized the search of Diaz's cell phone content as the mere confiscation of the cell phone itself, concluding that "[b]ecause he had the phone on his person at the time of his arrest, it was taken `out of the realm of protection from police interest' for a reasonable amount of time following the arrest." (Court of Appeal Opinion, 6.)

Diaz challenges such broad interpretation of *Edwards*, urging this Court to interpret more narrowly than did the Court of Appeal below the search incident to arrest exception to the warrant requirement. (*See, e.g., Gant, supra,* 556 U.S. at __, 129 S.Ct. 1710, 173 L.Ed.2d 485 [rejecting expansive interpretation of search of an automobile's passenger compartment incident to arrest].)

ARGUMENT

I.

THE INVESTIGATORY SEARCH OF DIAZ'S CELL PHONE AFTER ARREST AND WHILE THE PHONE WAS EXCLUSIVELY WITHIN POLICE CUSTODY WAS NOT A LAWFUL SEARCH INCIDENT TO ARREST.

Diaz moved to suppress evidence of the text message "6 4 80" retrieved by police during interrogation from a folder stored on his cell phone, and any statements made by him in connection with that text message. (1 CT 24-29.) The prosecution argued that the phone's text messages were lawfully searched as items located on Diaz's person or in his presence at the time of arrest. (1 RT 22.) The court denied Diaz's motion on the grounds that the cell phone search was included in a lawful search incident to arrest as evidence of a crime. (1 RT 23.) The Court of Appeal affirmed, citing among others *Robinson, supra,* 414 U.S. at p. 235, *New York v. Belton* (1981) 453 U.S. 454, 460-461, and *Edwards, supra,* 415 U.S. at pp. 801-803.)

Diaz urges this court to follow *Chadwick, supra,* 433 U.S. at p. 1 and its progeny rather than *Edwards, supra,* 415 U.S. at p. 800. He also challenges the reasoning and conclusions of the Fifth Circuit in *Finley, supra,*477 F.3d 250, and distinguishes that case both factually and philosophically as based on outdated legal principles derived from case law involving more rudimentary and limited data storage devices such as pagers.

A. Legal Principles.

The Fourth Amendment protects individuals from unreasonable search and seizure. (U.S. Const. Amend. IV.) A warrantless search is "per se unreasonable," subject to a few well-delineated exceptions. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.) A "search incident to arrest" is one such exception. (*Chimel, supra,* 395 U.S. 752; *United States v. Hudson* (9th

Cir. 1996) 100 F.3d 1409, 1419, overruled on other grounds in *Thornton v. United States* (2004) 541 U.S. 615.)

A search incident to arrest is one that occurs "at about the same time as the arrest." (*Hudson, supra,* 100 F.3d at p. 1419; *Chadwick, supra,* 433 U.S. at p. 1, overruled in part in *California v. Acevedo* (1982) 500 U.S. 565.) It is justified by law enforcement's need to retrieve weapons and seize evidence from an arrestee's person to prevent destruction or loss of that evidence. (*Chimel, supra,* 395 U.S. at p. 752; *Robinson, supra,* 414 U.S. at p. 218, 235.) A search incident to arrest of a suspect in an automobile may include search of items located on the arrestee's person as well as items reasonably believed to be within his reach. (*United States v. Belton* (1981) 453 U.S. 454, 460-461 [search incident to arrest applied to vehicle searches].)[3]

An arrestee's personal effects may also be searched after arrest and without warrant during a "booking search." (*Illinois v. Lafayette* (1983) 462 U.S. 640, 643-644.) A booking search is part of an administrative step of processing inventory after arrest. (*Lafayette, supra,* 462 U.S. at p. 646.) It must proceed according to standardized criteria. (*Florida v. Wells* (1990) 495 U.S. 1, 4.)[4]

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[3] As discussed more fully below, the United States Supreme Court recently rejected a broad interpretation of *Belton.* (*Gant, supra,* 556 U.S. at ___ ,129 S.Ct. 1710, 173 L.Ed.2d 485.)

[4] The Court of Appeal below did not reach the issue of whether the search was a valid inventory search. Respondent argued that the evidence did not indicate whether the search of the cell phone contents occurred as part of the booking process, and requested remand should the Court of Appeal's decision depend upon resolution of that issue. (Respondent's Brief, 13.) While Diaz addressed the issue below, it does not appear to be within the scope of issues accepted for review.

B. Text Messages Stored in a Cell Phone's Memory Are Not Items "Immediately Associated With the Person of the Arrestee" and Are Not Subject to Search Incident to Arrest.

Warrantless searches of property seized at the time of an arrest cannot be justified as incident to that arrest if the "search is remote in time or place from the arrest." (*Preston v. United States* (1964) 376 U.S. 364, 367.) The *Chimel* Court described a permissible search incident to arrest as follows:

> A similar analysis underlies the "search incident to arrest" principle, and marks its proper extent. 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. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. (*Chimel, supra,* 395 U.S. at 762-763.)

Chimel also emphasized that the general warrant requirement is not "lightly to be dispensed with," and that a search incident to arrest has clear limits:

> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less. (*Chimel, supra,* 395 U.S. 762-763.)

Despite this caution, in *Edwards,* the Court recognized an exception to the contemporaneous requirement of a search incident to arrest as expressed in *Chimel.* In *Edwards*, the Court found reasonable a search of an arrestee's clothing taken incidental to the booking process but not examined until ten hours later. (*Edwards, supra,* 415 U.S. at p. 805.) The Court explained:

> Surely, the clothes could have been brushed down and vacuumed while Edwards had them on in the cell, and it was similarly reasonable to take and examine them as the police did, particularly in view of the existence of probable cause linking the clothes to the crime. Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest. (*Id.* at p. 806.)

In substantial part, *Edwards* appears simply to have been addressing routine jailhouse procedure. (*See, e.g., United States v. Monclavo-Cruz* (9th Cir.1981) 662 F.2d 1285, 1291.)

Several years later in *Chadwick*, police seized a locked footlocker at the time of arrest and searched it an hour later. The United States Supreme Court held this search unlawful, finding the search too remote from the time of arrest, and otherwise lacking exigency:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. (*Chadwick, supra,* 433 U.S. at p. 15.)

Chadwick distinguished *Edwards* as involving a search of the person rather than a possession within the arrestee's immediate control: "Unlike searches of the person [citations], searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." (*Chadwick, supra,* 433 U.S. at p. 16, fn. 10.)

Chadwick was partially overruled in *Acevedo, supra,* 500 U.S. at p. 565, when the Court held that police may search a container located in an automobile without a warrant if they have probable cause to believe the container itself holds evidence or contraband. (*Acevedo, supra,* 500 U.S. at p. 565.)[5] Just the same, *Chadwick's* requirement that a search incident to arrest occur contemporaneous with the arrest remains good law. (*See, e.g., People v. Ingham* (1992) 5 Cal.App.4th 326, 331.) The question here, then, is whether a text message stored in Diaz's cell phone's memory is an item immediately associated with Diaz's person, or whether it is a possession that had been in his immediate control but was reduced to the exclusive control of the government before being searched. Lower courts have reached seemingly inconsistent conclusions in analyzing the *Chadwick/Edwards* distinction.

One of the relatively older cases decided by the Ninth Circuit is *Monclavo-Cruz, supra,* 662 F.2d at p. 1285. In that case, an Immigration Investigator arrested defendant and seized her purse that had been on her lap at the time of arrest. The officer did not search the purse until about an hour after the arrest, when defendant had been taken to the Immigration Office. The purse was searched in her presence. (*Monclavo-Cruz, supra,* 662 F.2d at p. 1286.) In light of those facts, the *Monclavo-Cruz* court explained its understanding of *Chadwick*:

> We understand [Chadwick] to mean that once a person is lawfully seized and placed under arrest, she has a reduced expectation of privacy in her person. Thus, a search of a cigarette case on the person is lawful once the person is under arrest without any reference to danger to police, United States v. Robinson 414 U.S. 218 (1973); and the search of a person's

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[5] *Acevedo* reconciled *Chadwick* with *United States v. Ross* (1982) 456 U.S. 798, in which the Court held that a warrantless search of an automobile could include a search of a container or package found inside the car when such a search was supported by probable cause. (*Acevedo, supra,* 500 U.S. at p. 570.) Quoting *Ross*, the Court in *Acevedo* explained: "The scope of a warrantless search of an automobile . . . is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." (*Acevedo, supra*, 500 U.S. at pp. 579-580.)

> clothes taken from his at the jail the day after his arrest is also lawful simply as reasonable jailhouse procedure. United States v. Edwards, supra. (*Monclavo-Cruz, supra,* 662 F.2d at p. 1291.)

Based on this understanding, the court clarified why it had earlier approved the warrantless search of a wallet incident to arrest in *United States v. Passaro* (9th Cir.1980) 624 F.2d 938, 943.) In *Passaro*, defendant was lawfully arrested. "On the day of that arrest, when defendant arrived at the initial place of detention," police seized his wallet from his person, searched it, and photocopied a document. This copy was admitted into evidence, the wallet containing the original document having been returned to the defendant.

The Ninth Circuit described the question facing it as follows:

> "[W]e face a choice of either applying the warrant requirement under United States v. Chadwick [citations omitted] and its progeny, such as United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978), or excepting the search from the warrant requirement under United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) and United States v. Edwards [citations omitted] and progeny such as United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978). (*Passaro, supra,* 624 F.2d at p. 943.)

The Court in *Passaro* followed *Edwards*, concluding that *Chadwick* and its progeny were not applicable to the facts before it: "Unlike a double-locked footlocker, which is clearly separate from the person of the arrestee, the wallet found in the pocket of Mr. Passaro was an element of his clothing, his person, which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest." (*Passaro, supra,* 624 F.2d at p. 944.)

Having reviewed its reasoning in *Passaro*, the Ninth Circuit in *Monclavo-Cruz* reached a different result by recognizing a subtle but significant distinction between certain "personal" items and others:

> Although we recognize that there is a fine line between a wallet on the person and a purse within an arrestee's immediate control, we hold that possessions within an arrestee's immediate control have fourth amendment protection at the station house unless the possession can be characterized as an element of the clothing, or another exception to the fourth amendment requirements applies. Monclavo-Cruz' purse, like a suitcase or briefcase in which a suspect has a fourth amendment interest at the station house, cannot be characterized as an element of her clothing or person, even if it were on her lap at the time of arrest. Although the officer had a right under Belton to search the purse taken from the car at the time of Monclavo-Cruz' arrest, we hold that the officer had no right to conduct a warrantless search of the purse at the station house. (*Monclavo-Cruz, supra,* 662 F.2d at p. 1291.)[6]

Thus, as the Ninth Circuit acknowledged in *Monclavo-Cruz*, whether an item is one sufficiently associated with one's person to warrant dispensing with the contemporaneous search requirement of *Chadwick* is a matter of examining the character of the item. If the seized item is not clothing, or an article or container typically kept on or inside of clothing, or otherwise by its very nature carried on the arrestee's person, that item ought to be governed by *Chadwick.*

The Fifth District addressed another station house purse search in *Ingham, supra,* 5 Cal.App.4[th] at p. 326. Noting that a delay in searching the purse would raise the contemporaneous search issue of *Chadwick* depending upon whether the purse was an item regarded as an extension of the arrestee's person, the court found that defendant's actions "disassociated" her from the purse. She removed what she needed from it, leaving it behind at her house, only to have police bring it to the station. While a purse search might be a proper booking search if guided by standardized criteria, police delivery of the purse to the station after defendant left it behind took the search outside the scope of a booking search or a search of items

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6 The recent narrow reading of *Belton* established in Gant might affect the accuracy of the *Monclavo-Cruz* dicta regarding a *Belton* search of the purse at the

in the arrestee's possession and intimately associated with the arrestee. (*Ingham, supra,* 5 Cal.App.4th at p. 332.)

Respondent relied in the Court of Appeal below on *United States v. Chan* (N.D.Cal. 1993) 830 F.Supp. 531, 536, for the position that a pager has historically been viewed as an item closely associated with defendant's person. (Respondent's Brief, 10.) In *Chan*, however, the court emphasized that *Chadwick* did not apply because the search there was not remote but rather occurred at the time of arrest. Therefore, law enforcement was not required to obtain a warrant to search the contents of the defendant's pager because the search was contemporaneous to the arrest. (*Chan, supra,* 830 F.Supp. at pp. 535-536.)

Additionally, in *Chan* the search of the pager was permissible not simply because the pager was an item obtained from defendant's person but because it was searched within minutes of the time of arrest. (*Ibid.)* Moreover, *Chan* is a 1993 case involving nothing more than the activation of a pager's memory to reveal telephone numbers received by that pager.

In *United States v. Parada* (D.Kan 2003) 289 F.Supp.2d 1291, 1303-04, the court found a warrantless search of a seized cell phone to be justified by exigent circumstances. (*Parada*, *supra,* 289 F.Supp.2d at p. 1291.) Seizure of the device itself was considered a proper inventory search. Police could make a record of incoming calls to that phone pursuant to the exigent circumstances exception to the warrant requirement. (*Parada, supra,* 289 F.Supp.2d at p. 1291 ["Because a cell phone has a limited memory to store numbers, the agent recorded the numbers in the event that subsequent incoming calls effected the deletion or overwriting of the earlier stored numbers. This can occur whether the phone is turned on or off, so it is irrelevant whether the defendant or the officers turned on the phone . . . under these circumstances, the agent had the authority to immediately search or retrieve, as a matter of exigency, the cell phone's memory of stored numbers of incoming

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time of arrest.

phone calls, in order to prevent the destruction of this evidence."]) As in *Chan*, however, the only information retrieved from the electronic device was the stored memory of incoming calls; that is to say, police reviewed the phone's incoming telephone numbers.

Although the storage devices of most cell phones are not yet as expansive as those contained in laptop computers, the electronic information contained in the memory of the average cell phone is quantitatively and qualitatively different from a pager, and from traditional, tangible containers. (*See, e.g.,* Kerr, Oris S., Digital Evidence and the New Criminal Procedure, 105 Colum. L. Rev. 279 (2005) [arguing that existing law is geared toward tangible evidence not well-suited to digital information]; *see also* Gershowitz, Adam M., The iPhone Meets the Fourth Amendment, 56 UCLA Law Review 27 (2008).)

Diaz contends that a cell phone, which is both a utilitarian communication device as well as a sophisticated data storage "container," is more like the purse in *Monclavo-Cruz* or the footlocker in *Chadwick* than the wallet in *Passaro*. The Court of Appeal characterized Diaz's argument on this point as follows: "[Diaz] argues that cell phones should be afforded greater constitutional protection than other items an arrestee might carry on his or her person, such as wallets, letters, or address books." (Court of Appeal Opinion, 4.)

This description is not entirely accurate. When analyzing cell phone content as a tradition tangible piece of evidence, Diaz contends that cell phone data is distinctly dissimilar from that which might fit into a wallet or address books, or worn as an article of clothing. Cell phones can be, but are not necessarily or routinely, worn, carried in a pocket, or attached to a person or his clothes. A cell phone is more often kept *near* its owner, within his reach, like a purse or more traditional container used for holding personal effects. The cell phone itself is no more likely to be inside a person's pocket than inside a briefcase, backpack, or purse, or on a car seat or table, or plugged into a power source, or stashed inside any manner of separate bags or carrying containers.

Furthermore, certainly a cell phone's stored *content*, and clothing worn by an arrestee during a crime, are exceedingly distinct. Clothing is genuinely an item of evidence immediately associated with the person of an arrestee. Rarely is a crime committed by an undressed suspect, and committing a crime in the nude might itself be another crime. The presence of clothing, or the state of one's being clothed, is a given, a fair and sensible assumption. On this basis, *Edwards* does not stray from a reasonable interpretation of a search incident to arrest.

If a cell phone must be compared to tangible evidence, it ought to be recognized that a cell phone's *content* cannot be worn or "carried" on one's person. The phone itself, which may or may not be carried in a pocket or kept immediately near one's person, is quickly distinguishable from the cell phone's content, which can only be carried about when contained within the cell phone by virtue of the cell phone's operating system. There is little about a cell phone's *content* that is conceptually linked to or inextricably associated with the physical body or the inherent attributes of the arrestee's person. A cell phone's data content is not at all like a pair of pants or even a piece of paper folded up inside a wallet that has been tucked inside the pocket of a pair of pants. Therefore, the reasoning of *Monclavo-Cruz*, and certainly *Chadwick*, are more compelling than that of *Passaro* and *Edwards* under the facts of this case.

There are other clear differences between a cell phone and clothing, wallets, and even purses. For example, access to a cell phone's content, or certain parts of the content, can be protected by a password, whereas the paint chips on defendant's clothes in *Edwards,* and the cigarette package in *Robinson*, could not have been. As well, it is reasonably likely that a cell phone might be storing confidential or privileged data, such as a text or voice message to or from a spouse or even an attorney, or treating doctor's names and telephone numbers or calendared medical appointments. Such privacy concerns simply don't arise with respect to articles of clothing as in *Edwards*. Although it is possible that some confidential information might be revealed from inspection of a wallet, the quantity of such information present in a cell phone is generally much greater, as is the likely presence of actual content of not merely one but many stored communications.

Upon evaluating the nature of a cell phone under case law involving more traditional items of physical evidence, Diaz also argued before the Court of Appeal that the inherent unique nature of cell phone storage capacity ought to be considered in deciding whether to characterize a cell phone as the equivalent of a wallet or crumpled cigarette case on the one hand, or a large, locked trunk on the other. It fits neatly into neither category, but the nature of the evidence that a cell phone may contain, and the fact that the cell phone "container" is readily differentiated from the cell phone "content," warrants treating the cell phone content differently from the seized cell phone itself. (*See, e.g., Hernandez, supra,* 313 F.3d at pp. 1209-1210.)

The Court of Appeal's approach essentially amounts to labeling the cell phone and its contents as immediately associated with Diaz's person simply because he had the phone with him at the police station. *Edwards*, however, did not suggest such a broad rule. That case was limited by its facts to the delayed search of an article of clothing. (*Edwards, supra,* 451 U.S. at pp. 801-805.)

Routinely permitting a cell phone search of the type that occurred here would have far-reaching consequences. The majority of cases relied upon in *Finley* involved search of physical containers, such as a cigarette package (*see, e.g., Robinson, supra,* 414 U.S. at pp. 223-224)[7], and older electronic devices with

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[7] Opening a crumpled cigarette package at the time of an arrestee's search as occurred in *Robinson* is reasonable under the Fourth Amendment because it would not necessarily be readily apparent what, if anything, was contained inside the package. It would be readily apparently, however, that whatever was inside was limited by the size of the package. (*See, e.g., Florida v. Wells* (1990) 45 U.S. 1, 4;

very limited storage capacity, such as pagers (*see, e.g., United States v. Ortiz* (7th Cir.1996) 84 F.3d 977, 984.) As mentioned above, contemporary cell phones have the capacity to store tremendous quantities of personal information. They are not comparable to tangible packages, letters, or address books that an arrestee might carry in his pocket. (*Compare Ortiz, supra,* 84 F.3d at p. 984 [finite nature of pager's memory might destroy currently stored telephone numbers].) Thus, the limited storage capacity of a pager's electronic memory supports the justification of search incident to arrest to prevent loss of data, whereas search of a cell phone with its extensive memory and data storage abilities is not similarly warranted. (*Id.* at p. 984-985.)

Diaz recognizes that subsequent courts have extended *Chimel* beyond its original rationale. (*See., e.g., Thornton, supra,* 541 U.S. at pp. 624-635.) More recently, however, the United States Supreme Court reaffirmed the limitations established in *Chimel*, and rejected a broad interpretation of *Beltron* and its authority to search an automobile incident to the arrest of the car's occupant. (*Gant, supra,* 556 U.S. ___129 S.Ct. 1710, 173 L.Ed.2d 485.)

This court should similarly decline to extend *Chimel* beyond its original justifications, and should prohibit investigatory evidence-gathering from complex electronic "containers" already secured in police custody. (*See, e.g., Thornton, supra,* 541 U.S. 632, Scalia, J., concurring [in the context of a general evidence-gathering search, the state interest is far less compelling than that of office safety or imminent evidence destruction].)

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see also United States v. Feldman (9th Cir.1986) 788 F.2d 544, 553 [addressing an inventory or booking procedure]; *United States v. Bowhay* (9th Cir.1993) 992 F.2d 229.) The same cannot be said when an officer begins reviewing the content of communications stored in cell phone folders.

C. The Search was Too Remote in Time to be a Search Incident To Arrest.

Most courts have approached the question of whether a search is too remote in time to meet Fourth Amendment requirements as an issue inextricably linked to characterization of the evidence as "immediately associated with the arrestee's person." (*Chadwick, supra,* 433 U.S. at p. 1.)

Several courts have also placed significant emphasis on whether the government has gained exclusive control over the item searched. In *United States v. Schleis* (1978) 582 F.2d 1166, for example, the Eight Circuit appears to have focused on the fundamental Fourth Amendment concern: Did police have exclusive control over an item of evidence prior to its search so as to render the search unreasonable?

In *Schleis*, police initially confronted defendant on the street. Once a crowd gathered, officers completed their search of his person and clothing at the police station. Police also took and forced open defendant's locked briefcase, an act the court found unlawful under *Chadwick.* (*Schleis, supra,* 582 F.2d at p. 1171.) The *Schleis* court explained its understanding of *Edwards* as follows: "However, a close reading indicates that the Supreme Court was only referring to searches of effects still in the defendant's possession at the place of detention, such as the defendant's clothing." (*Schleis, supra,* 582 F.2d at p. 1171.)

The *Schleis* court acknowledged that a briefcase is likely to be found within an arrestee's immediate control, thus permitting its search for officer safety or to prevent destruction of evidence. (*Schleis, supra,* 582 F.2d at pp. 1171-1172, citing *Chimel, supra,* 395 U.S. at p. 763. As the *Schleis* court understood *Chadwick*, however, that case establishes that "the justification for a search under Chimel evaporates once the officers seize the luggage or other personal property and reduce it to their exclusive control." (*Schleis,* *supra,* 582 F.2d at p. 1172.)

A search that occurs after police have seized an item and taken control over it exceeds the original rationale for searches incident to arrest: to ensure officer safety and to preserve evidence that could be concealed or destroyed. (*See. e.g., Chimel, supra,* 395 U.S. at p. 752.)

As *Gant* recognizes, an investigatory search for evidence may be admissible in the automobile context either under the probable cause standard of *United States v. Ross* (1982) 456 U.S. 798, 820-821 [warrantless search permitted for evidence of criminal activity], or the "reasonable to believe" standard of *Gant, supra,* 556 U.S. at p. __ , 129 S.Ct. 1710, 173 L.Ed.2d 485 [warrantless search permitted where reasonable to believe automobile contains evidence of the offense giving rise to arrest]. The search here, however, did not occur in the unique context of an automobile search. Instead, it occurred at the police station after officers had taken exclusive possession of the cell phone. (1 RT 13.)

The Court in *Gant* noted that the *Beltron* opinion "has been widely understood to allow a vehicle search incident to arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." (*Gant, supra,* 556 U.S. at ___, 129 S.Ct. 1710, 173 L.Ed.2d 485.) The Court expressly rejected such a sweeping interpretation of *Beltron*, acknowledging that "a vehicle search would be authorized incident to every arrest of a recent occupant" of a vehicle regardless of whether the passenger compartment was within the arrestee's reach at the time of the search. (*Ibid.*) *Gant* permits an automobile search incident to arrest where an arrestee is unsecured and within reaching distance of an automobile, and when—for reasons "unique to the vehicle context"—police have reason to believe evidence relevant to the crime of arrest might be found in the vehicle. (Other exceptions to the warrant requirement for an automobile search were unaltered by *Gant.*) (*Gant, supra,* 556 U.S. at __ , 129 S.Ct. 1710, 173 L.Ed.2d 485, citing *Ross, supra,* 456 U.S. at pp. 820-821.)

The implications of *Gant* to this case arise from the decision's focus on when justification for a search incident to arrest concludes: when the arrestee is secured and no longer within reaching distance of the vehicle's passenger compartment. (*Gant*, *supra,* 556 U.S. at __ , 129 S.Ct. 1710, 173 L.Ed.2d 485 .) Broadly stated, once access to evidence or weapons is foreclosed, the justification for the search incident to arrest ceases to exist. (*Ibid.)* *Gant* thus limited *Beltron* to the original justifications stated in *Chimel*, with the additional "reasonable to believe" exception unique to the automobile context. (*Gant, supra,* 556 U.S. at p. __ , 129 S.Ct. 1710, 173 L.Ed.2d 485.)

That said, the United States Supreme Court's reason for both permitting and limiting a search incident to arrest was clearly articulated in *Chimel*:

> The general point so forcefully made by Judge Learned Hand in *United States v. Kirschenblatt,* 16 F.2d 202, remains: "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis, the power would not exist if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. *Id.* at 203." (*Chimel*, *supra,* 395 U.S. 767-768.)

For the reasons originally recognized in *Chimel* and *Chadwick*, the cell phone search here impermissibly circumvented the "contemporaneous" requirement of a search incident to arrest solely for investigative purposes. Admittedly, the search here was purely investigatory, aimed at discovering evidence with which to interrogate Diaz during the police interview after his cell phone had been taken into police custody. (1 RT 13 ["Immediately after I examined the phone, I went and talked to [appellant]".) Police should not be permitted, at their discretion, to rummage through the electronic "papers" of an arrestee's cell phone during police interrogation "in search of whatever will convict him." The contemporaneous requirement of *Chadwick* should have been respected, and Diaz's cell phone should not have been searched for evidence during the station house interrogation.

In closing, a brief review of *Finley*'s facts is in order. In *Finley, supra,* 477 F.3d at p. 260, the Fifth Circuit declined to follow *Chadwick,* thereby validating a briefly delayed search of defendant's cell phone by characterizing the cell phone as an item found on defendant's person rather than "personal property not immediately associated with the person of the arrestee." (*Finley, supra,* 477 F.3d at p.260, fn. 7.) The Fifth Circuit also found that the search in that case was *substantially* contemporaneous with arrest, even though defendant had been moved to another location before police seized his cell phone. (*Ibid.*)

Here, unlike *Finley*, Diaz's cell phone was not searched contemporaneous with his arrest. Detective Laubacher took the cell phone from Diaz at the police station before he was taken into an interview room, nearly one and one-half hours after his arrest. (1 RT 6-7.) Diaz was then interviewed by Detective Fazio and denied involvement in the controlled buy. Detective Fazio left the interview, retrieved the phone, searched its folders, located a text message, and confronted Diaz with the message. (1 RT 11-13.) *Finley*, then, is factually different and should not be followed here.

II.

CONCLUSION.

For the reasons set forth herein, Diaz respectfully requests that the decision of the Court of Appeal be reversed, and that the trial court be instructed to enter a new order granting Diaz's motion to suppress motion, and that Diaz be permitted to withdraw his plea.

DATED: August 19, 2009

Respectfully submitted,

Lyn A. Woodward
Attorney for Appellant,
Gregory Diaz

CERTIFICATE OF WORD COUNT

I certify that this original Appellant's Opening Brief on the Merits is formatted using a 13 point Roman font, is proportionately spaced at 1.5 lines, and is 6,422 words, excluding Tables.

Dated: 8/19/09

Lyn A. Woodward

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MONTEREY

I, Lyn A. Woodward, am employed in the County of Monterey, State of California. I am over the age 18 and not a party to the within action. My business address is 309 Prescott Lane, Pacific Grove, California 93950.

On August 20, 2009, I served the following document, known as **APPELLANT'S OPENING BRIEF ON THE MERITS (People v. Diaz)** in this action by placing a true copy thereof in a sealed envelope addressed as follows:

STATE ATTORNEY GENERAL
5th Floor--North Tower
300 S. Spring St.
Los Angeles, California 90013

Court of Appeal, Second Dist., Div. Six
200 East Santa Clara Street
Ventura, California 93001

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, California 90071

CLERK OF THE SUPERIOR COURT
COUNTY OF VENTURA
800 South Victoria Avenue
Ventura, California 93009-0001
(for delivery to the Honorable Kevin McGee,)

OFFICE OF THE DISTRICT ATTORNEY
Ventura County
800 South Victoria Avenue
Ventura, California 93009

Gregory Diaz
9812 Vidor Dr., #301
Los Angeles, California 90025

_x_ Said envelopes were deposited directly in the mail at Pacific Grove, California. The envelopes were mailed with postage thereon fully prepaid.

__ I am readily familiar with the practice of collection and processing for mailing of the firm by which I am employed. It is deposited with the United States Postal Service on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

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

Executed on August 20, 2009 at Pacific Grove, California.

Lyn A. Woodward