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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. _____
Plaintiff and RESPONDENT,	Court of Appeal Case No. B248316
v.	
PAUL MACABEO,	Los Angeles County Superior Court Case
Defendant and PETITIONER.	No. YA084963

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Paul Macabeo petitions this court for review following the decision of the Court of Appeal, Second Appellate District, Division Five, filed in that court on September 3, 2014 (see Exhibit A). Rehearing of the Court of Appeal decision was not requested.

QUESTIONS PRESENTED

1. When law enforcement officers detain for a traffic infraction, can a warrantless search of the driver's person and items found on his person be conducted prior to custodial arrest?
2. Given the United States Supreme Court's ruling that a warrantless cell phone search incident to arrest is unconstitutional absent certain exigencies (*Riley v. California* (2014) __U.S.__, 134 S.Ct. 2473 ("Riley").), does an unconstitutional cell phone search prior to the decision in *Riley* but after the California Supreme Court decision in *People v. Diaz* (2011) 51 Cal.4th 84 ("Diaz") require suppression of the evidence, or does the good-faith exception rule stated in *Davis v. United States* (2011) __ U.S. __, 131 S.Ct. 2419 ("Davis") foreclose the remedy of exclusion?

NECESSITY FOR REVIEW

Review is necessary to settle two important questions of law. First, is a person who is detained for violation of a traffic offense subject to a warrantless search incident to arrest prior to actually being arrested? Here, the Court of Appeal says yes. Petitioner was detained for rolling through a stop sign while on his bicycle, a traffic infraction. While he was detained for the offense, officers search through his cell phone and found illegal photographs. He was then arrested for possession of those photographs. Petitioner had not been arrested at the time of the search. The decision of the Court of Appeal is in opposition to both federal constitutional precedent and California precedent. Review is necessary to resolve the inconsistency in case law.

Second, according to the decision in the Court of Appeal below, between this court's ruling in *Diaz, supra,* 51 Cal.4th 84 in 2011 and the

United States Supreme Court ruling in *Riley, supra,* 134 S.Ct. 2473 in 2014, law enforcement officers could rely in good faith on *Diaz* to support the warrantless search of the cell phone seized from the person of an arrestee. [1] "Although the warrantless search of defendant's cell phone was unlawful under the recent decision in *Riley* [cite omitted], the search falls within the good faith exception to the exclusionary rule." (*People v. Macabeo* (2014) 229 Cal.App.4th 486, 177 Cal.Rptr.3d 311.) In reaching this conclusion the court relies on *Davis, supra,* 131 S.Ct. 2419.

According to *Davis*, a good faith exception to the exclusionary rule exists "when the police conduct a search in objectively reasonable reliance on binding appellate precedent." (*Davis, supra,* 131 S.Ct. at p. 2429.) Petitioner asks this court to consider this matter because any reliance on *Diaz, supra,* 51 Cal. 4th 84 by the searching officers was unreasonable. The holding in *Diaz* did not authorize the warrantless search of Petitioner's cell phone photograph file when he was detained for a traffic infraction. Further, *Diaz* should not be considered binding appellate authority since it was contrary to existing federal constitutional law.

STATEMENT OF THE CASE

On July 23, 2012, a felony complaint was filed against appellant. (1CT 18.) Defense counsel filed a motion pursuant to Penal Code section 1538.5 to be heard concurrently with the preliminary hearing. (1CT 20.)

An information was filed in the Superior Court alleging one count, a violation of Penal Code section 311.11(a). At a pretrial conference, petitioner pleaded no contest to the charges against him and was sentenced,

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[1] The opinion of the Second District of the Court of Appeal, Division Five is attached hereto as Exhibit A.

with the terms and conditions of probation stayed during the pendency of appeal. (1CT 129.) Notice of Appeal was filed December 3, 2012.

After the Court of Appeal notified counsel of a potential procedural error, the initial appeal (Case No. B245511) was dismissed by Appellant. (2CT 18) and Remittitur issued. (2CT 22.)

Defense counsel then moved to withdraw petitioner's previous no contest plea. (2CT 25.) The motion was granted. (2CT 33.) Defense counsel filed motions pursuant to Penal Code section 995 (2CT 35) and pursuant to Penal Code section 1538.5(m) (2CT 42.) Based on the evidence, arguments and rulings in the 1538.5 motion heard during the preliminary hearing by the same judge, the motions were again denied. (2CT 54.) Petitioner was then resentenced with the terms and conditions of probation stayed pending appeal of this matter. (2CT 56.)

Notice of Appeal was filed April 25 2013. (2CT 58.)

The Court of Appeal, Second District, Division Five filed its opinion, which was certified for publication, on September 3, 2014. A copy of that opinion is attached hereto as Exhibit A.

STATEMENT OF FACTS

On July 19, 2012, at 1:40 a.m., Officer Craig Hayes was working with a partner, Officer Raymond, patrolling the area of Gramercy and Artesia in a marked black and white vehicle. (1CT 51:12-17, 1CT 64:15.) He observed petitioner riding a bicycle approximately 20 feet in front of the officers' vehicle. (1CT 52:6, 64:25.) The officers' vehicle was traveling 5 – 10 mph and followed petitioner's bike for approximately 50 to 75 feet with the headlights turned off. (1CT 64:23-65:6, 1CT 65:28, 69:13.) The officer testified that he observed petitioner "roll right through" a stop sign at the intersection and turn left. (1CT 65:16.) Based on the purported observation of a violation of Vehicle Code section 22450, an infraction, the

officers detained petitioner. (1CT 53:1-5.) Officer Hayes testified that when he approached petitioner it was his intention to either just warn or to cite him for the traffic violation. (1CT 80:18-26.)

Although there was some discussion during the detention about petitioner's probation status, after the arrest of petitioner the officer learned, via the computer in his vehicle, that petitioner's probation had expired three months prior to this contact. (1CT 26:23-23:14, 87:5-8.)

When confronted with a tape recording of the contact with petitioner, Officer Hayes admitted that while his report stated that petitioner had told him he was on felony probation for narcotics (1CT 35:14-16), the truth was that petitioner never said that he was on felony probation for narcotics. (1CT 81:18-20.) Officer Hayes further admitted that while his report stated that petitioner gave consent to search his person (1CT 83:11-19) the truth was that petitioner said "yes" only to the officer's question, "Can I take items out of your pocket?" (1CT 83:17-19.)

After removing items from petitioner's pockets, Officer Hayes handed those items to his partner. (1CT 60:13-25.) Petitioner was ordered by the officers to sit on the ground. (1CT 61:18.) Officer Hayes testified that Officer Raymond stood out of the sight of petitioner and searched several databases in the contents of petitioner's phone, opening and looking through the phone for five to ten minutes while petitioner sat on the curb. (1CT 77:15-22, 1CT 117) Officer Raymond signaled to Officer Hayes and reported that he had searched the cell phone and had not found any narcotic evidence in the texts. (1CT 62:9-12.) However, Officer Raymond did find items in the photograph database which appeared to be sexually explicit images of girls under the age of 18. (1CT 62:11-21.) Petitioner was then arrested. (1CT 63:7-10.)

The trial court ruled that it agreed with the defense that this was not a lawful "probation search" (1CT 43:26-28) citing the absence of any

reasonable belief on the part of the officer that appellant was subject to search and seizure conditions. (1CT 90:2-7.) The court also agreed with the defense that this was not a "consent search." (1CT 103:2-4.) The court held that since petitioner committed a traffic infraction in the presence of the officers and since he could have been arrested for that offense pursuant to Penal Code section 836, the search of the database in the cell phone and the seizure of the images in the cell phone were proper under the Fourth Amendment of the United States Constitution as a search incident to arrest, relying on *People v. Diaz, supra,* 51 Cal.4th 84.

ARGUMENT

I. A SEARCH INCIDENT TO ARREST CANNOT LAWFULLY PRECEDE AN ARREST AND SERVE AS PART OF ITS JUSTIFICATION

In *Smith v. Ohio* (1990) 494 U.S. 541, the United States Supreme Court held:

> "[a]s we have had occasion in the past to observe, '[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968); see also *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134 (1959); *Rawlings v. Kentucky*, 448 U.S. 98, 111, n. 6, 100 S.Ct. 2556, 2564, n. 6, 65 L.Ed.2d 633 (1980). The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control. Contrary to the Ohio Supreme Court's reasoning, it does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows." (*Smith v. Ohio, supra,* 494 U.S. at 543.)

The Court of Appeal in *Macabeo, supra*, 229 Cal.App.4th 486 held:

> "a custodial arrest may be made for a traffic violation without violating the United States Constitution. *(Atwater v. Lago*

> *Vista* (2001) 532 U.S. 318, 354 *(Atwater)*; *People v. McKay* (2002) 27 Cal.4th 601, 607 *(McKay).*) An exception to the Fourth Amendment prohibition against unreasonable searches and seizures is a 'search incident to a lawful arrest." *(United States v. Robinson* (1973) 414 U.S. 218, 224 (Robinson).)

The Court of Appeal then held that *Diaz, supra*, 51 Cal.4th 84 authorized a search of the cell phone recovered from his person incident to lawful arrest. (*Macabeo, supra*, 229 Cal.App.4th at p. 318.) The court below found that the search of petitioner was a search incident to arrest even though the search occurred prior to the arrest.

But the search of petitioner's cell phone, found on his person at the time of detention for a traffic violation, occurred before petitioner had been arrested and the fruits of that search served as part of the justification for the arrest. (*Macabeo, supra*, 229 Cal.App.4th at 313.) No arrest had occurred until after the officers found the photographs on his cell phone and then the arrest was made for the felony Penal Code violation. (Id.)

The authorities cited by the Court of Appeal supporting its ruling are inapplicable to a searches prior to arrest. The Court of Appeal relies on *People v. McKay*, *supra,* 27 Cal.4th 601. In *McKay*, the defendant was observed riding a bicycle in the wrong direction on a residential street. (*McKay*, *supra,* at p. 606.) When the deputy stopped him with the intention of issuing a citation, defendant was not able to provide identification. Defendant was arrested and placed in custody for failing to present valid identification. Following arrest for that offense, a search was conducted and drugs were found in defendant's shoe.

The Court of Appeal in *Macabeo, supra*, 229 Cal.App.4th at p. 318, states that *McKay* follows the reasoning of *Atwater v. Lago Vista* (2001) 532 U.S. 318, one of the authorities also cited by the trial court below. In *Atwater*, the Court ruled 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, supra,* 532 US 318. However, in *Atwater,* the defendant was also arrested for a traffic offense prior to being searched.

The reasoning of the Court of Appeal is based upon cases which involve arrests as a result of a traffic infraction and searches done incident to that arrest. The present case involves a bicyclist being stopped for a traffic infraction and an unconstitutional search of his cell phone being conducted prior to custodial arrest. The Court of Appeal's decision in *Macabeo* is not consistent with United States Supreme Court authority in *Smith v. Ohio, supra.*

Not only does *Macabeo* ignore federal constitutional precedent in allowing a search as a result of a traffic infraction without custodial arrest, it ignores California precedent which requires that during a traffic stop the officer must have reasonable suspicion that a person is in possession of a weapon before even a pat-down search can be conducted. (*People v. Collier* (2008) 166 Cal.App.4th 1374 [during an ordinary traffic stop an officer may not pat down a driver and passenger absent reasonable suspicion they are armed and dangerous.]; *People v. Medina* (2003) 110 Cal.App. 4th 171 [during detention on traffic infraction an officer may not pat-down the driver even in a "high gang area"]) *People v. Superior Court* (1972) 7 Cal.3d 186 ["we conclude the search here conducted cannot be justified as an incident to defendant's arrest, and hence the trial court correctly granted the motion to suppress."]

Based on all of the above arguments, petitioner requests this Court grant review of the decision of the Court of Appeal because it is not consistent with federal constitutional case law or California precedent.

II. THE SEARCH OF PETITIONER WAS UNCONSTITUTIONAL UNDER *RILEY* AND THE *DAVIS* GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY.

A. *Davis* is distinguishable factually and does not support denial of the remedy of exclusion of evidence obtained through an unconstitutional search.

The Court of Appeal's opinion states that while *Riley, supra,* 134 S.Ct. 2473 makes the search in this case unconstitutional, the remedy for that unconstitutional search will not be exclusion because the officers relied in good faith upon California Supreme Court ruling which allowed such a search. (*Diaz, supra,* 51 Cal.4th 84.) The Court of Appeal relies on *Davis* to reach that conclusion. (*People v. Macabeo, supra,* 229 Cal.App.4th at p. 318.) However, *Davis, supra, 131 S.Ct. 2419* is inapplicable to this case.

In *Davis, supra,* 131 S.Ct. 2419, defendant was searched under the authority of *New York v. Belton* (1981) 453 U.S. 454. During the pendency of his appeal, a new ruling by the United States Supreme Court overruled *Belton* and made the search in his case unconstitutional. (*Arizona v. Gant* (2009) 556 U.S. 332.) Defendant argued that evidence in his case should be suppressed since the search was unconstitutional. However, the Court ruled that *Belton* had been the "bright line rule" regarding vehicle searches since 1981. (*Davis,* at p. 2424.) The United States Supreme Court in *Gant* changed the rules for searches of secured arrestees with a majority of four limiting the rule in *Belton* and a dissent of four supporting the rule of *Belton*. With one concurring opinion joining with the majority, there was hardly a resounding support for the changed rule and this was certainly not an anticipated change in the Court's precedent. In *Davis*, the court noted that *Belton* was a United States Supreme Court case. Since United States

Supreme Court cases are rarely overturned and since *Belton* had been the law for so many years at the time of the search of Mr. Davis, the results of the unlawful search in that case were not suppressed when a new rule was announced in *Gant*. The Court also noted that the search of Mr. Davis had occurred a full two years before the Court announced its new rule in *Gant*. (*Davis,* at p. 2425.) There, the officers were justified and had an objectively reasonable reliance upon *Belton*, a 26 year old United States Supreme Court case. The factual and legal background of *Davis* is substantially dissimilar to the present case. Here, the search of petitioner in this case took place on July 19, 2012 and *Diaz* was decided January 3, 2011. At the time of the search, *Diaz* was current California law but it was certainly not a "bright line rule" that had been litigated for 26 years such as was the case with *Belton*.

Further, in *Davis*, the facts surrounding the search were on all fours with the facts of *Belton*. Here, *Diaz, supra,* 51 Cal.4th 84 was factually different than the present case. (See discussion *ante*) [2]

In *Davis, supra,* 131 S.Ct. 2419, *Belton* and *Gant* were United States Supreme Court cases. *Diaz, supra,* 51 Cal.4th 84 is a California Supreme Court case which was overruled by the United States Supreme Court in a unanimous opinion. The court in *Diaz* specifically anticipated a ruling on the issue by the United States Supreme Court. [3] While the court in *Diaz*

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[2] A United States District Court case which analyzes the application of *Davis* in *Diaz/Riley* cases notes that a finding of reasonable reliance upon *Diaz* "might be a different question if Diaz were not so squarely on-point." (*United States v. Garcia* (2014, N.D. Cal.) ___F.Supp.3rd___.)

[3] The language of *Diaz* itself recognizes the clear need for the United States Supreme Court to make a rule in light of modern technology and acknowledges its inability to make such new law. The final sentence of the majority opinion in *Diaz* states "If, as the dissent asserts, the wisdom of the high court's decisions 'must be newly evaluated' in light of modern

did claim to be reaching its decision based upon current United States Supreme Court cases, the decision in *Riley, supra,* 134 S.Ct. 2473 shows how far afield of that Court's interpretation of those cases the California Supreme Court was. To reach its decision in *Riley*, the United States Supreme Court did not overrule any of the cases upon which the California Supreme Court relied in *Diaz*. It just analyzed those cases in a way which was reasonable in this new factual situation, i.e. the search of cell phone content. This Court in *Diaz*, according to the United States Supreme Court in *Riley*, misapplied existing federal constitutional law.

Therefore, petitioner urges this court to find that *Davis, supra,* 131 S.Ct. 2419 does not apply here. In *Davis*, an existing United States Supreme Court case which had been in effect for 26 years and was considered a "bright line rule" was relied upon in a search. The officers were justified in their reliance on the case when they conducted their search. Even though the Court overruled their own existing law in an unexpected and non-unanimous opinion, the officers were not unreasonable in their reliance on existing law and exclusion was denied based on the officers good-faith reliance. Here, *Diaz, supra,* 51 Cal.4th 84, an existing California Supreme Court case which had been in effect for only 19 months prior to the search of petitioner, was not a "bright line rule" and in fact was considered a rule which could likely be overruled. It was contrary to a decision of another state Supreme Court. The majority opinion in *Diaz* even anticipated a challenge to its ruling was likely. *Diaz* was also factually dissimilar. (See discussion *ante*.) Therefore, the *Davis* should not apply here and the evidence seized as a result of an unconstitutional search should be excluded.

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technology, then that reevaluation must be undertaken by the high court itself." (*Diaz, supra,* 51 Cal.4th at p. 117.)

B. Even If The Ruling In *Davis* Does Control, The Facts In This Case Do Not Meet The Requirements For Application Of The Good-Faith Exception Rule.

The Court states in *Davis* "[w]e hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." (*Davis, supra,* 131 S.Ct. at p. 2429.) So two questions are at issue if *Davis* is to be applied: first, did the officers' conduct a search in "objectively reasonable reliance" upon *Diaz, supra,* 51 Cal.4th 84; and, second, was *Diaz* "binding appellate precedent?" Petitioner urges this court to find the answers to both questions is no and that *Davis* does not apply.

1. There was no "objectively reasonable reliance" upon *Diaz* at the time of the search.

The officers could not reasonably rely on *Diaz, supra,* 51 Cal.4th 84 to justify a search of the photographs contained in the cell-phone during a traffic enforcement stop. *Diaz* does not authorize such a search. In response to this argument below, the Court of Appeal held that defendant's interpretation of the holding in *Diaz* is too restrictive." (*People v. Macabeo* (2014) 229 Cal.App.4th 486, 177 Cal.Rptr.3d 311.) Petitioner urges this Court to find otherwise. When a case is so thoroughly rejected by a unanimous United States Supreme Court, it does not make sense to read that rejected ruling broadly. Petitioner requests this court limit *Diaz* to the specific facts of that case and find that it does not apply here in that the search here was too far afield of the search approved in *Diaz.* Because *Diaz* does not apply factually to this case, petitioner requests this court find that the officers at the time of the search could not have reasonably believed their search was authorized by *Diaz.*

In *Diaz, supra,* 51 Cal.4th 84, defendant was arrested on drug charges and placed in custody. When defendant was booked, his cell

phone, which was on his person at the time of arrest, was placed into evidence. The investigating officers determined that part of their investigation should include the search of defendant's cell phone because, in their expert opinion, drug dealers often carry on their business through use of a cell phone, particular through texting. They expected to find evidence supporting the charges for which defendant was arrested on the cell phone. Ninety minutes after the arrest for drug related offenses, the officers searched defendant's cell phone text message folder. The search, after arrest for drug charges, was in further investigation of those charges and the officers had reasonable suspicion that a drug dealer would carry on his business through the use of text messages. Those facts are distinguishable from the arrest of Petitioner. Petitioner was stopped for failing to stop at a stop sign before making a left turn while on a bicycle, a traffic infraction. The officers searched his cell-phone at the scene of the detention for the traffic offense when the officers had no reasonable suspicion that petitioner's cell phone contained evidence of illegal activity or evidence of the crime for which he was detained. The officers, who had planned to either just warn petitioner or to write him a ticket, detained petitioner on the street while they looked through not only the text messages on the cell phone, but also through the photograph file.

There was no evidence that the officers relied upon, or even knew about, *Diaz, supra,* 51 Cal.4th 84. The officers never testified at trial that they had been told by their supervisors to search cell phones of traffic offenders. [4] In addition to not testifying to their reliance on *Diaz*, the

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[4] The court below notes that such absence of evidence makes no difference because an officer is presumed to know the law. (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 178-179.) But the court doesn't include the full quote from *Conway*. The case actually states "A public officer is presumed to know the law, provided it is clearly

officers went out of their way to misstate evidence supporting their claims that this was a probation search or consent search. Once the officers' claims were refuted by the playing of an actual tape of the arrest, the trial court found there was no lawful probation or consent search. The officers would not have needed to try to create a reason for the search if they reasonably believed that the California Supreme Court allowed it or if their supervisors had told them such searches were lawful.

Even if the officers can be presumed to know the law, they must be presumed to know the correct law. They cannot be allowed to rely on a head-note or sound bite version of the ruling in *Diaz, supra,* 51 Cal.4th 84. (i.e. "Cell phone Searches Legal in California!".) The exclusionary rule is in place to deter unconstitutional searches. (*Davis, supra*, 131 S.Ct. at p. ___.) It is important in today's sound bite society not to allow the law to be enforced based upon an overgeneralized summary of the rule of a case. *Diaz* does not say that all searches of cell phones are lawful. The Court explicitly limited the scope of its holding in *Diaz* by stating, "We granted review in this case to decide whether the Fourth Amendment to the United States Constitution permits a law enforcement officer . . . to conduct a warrantless search of the text message folder of a cell phone they take from [an arrestee's] person after the arrest." (*Diaz, supra,* 51 Cal.4th at p. 88.) Law enforcement should be held to the standard of actually knowing the law and expected to enforce it correctly, not just based upon the headline or twitter summary of the case law. The remedy of exclusion would

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established." (*Ibid.* at p. 179.) Here, petitioner argues that the law is not clearly established. Additionally, the language in *Conway* is mere dicta since there was evidence in that case that the officers had been specifically trained on the subject of search warrants and were aware of the law. (*Ibid.,* at footnote 18.)

effectively put law enforcement on notice that they must know the actual law, not just the law as described in head-notes or headlines.

It was objectively unreasonable for law enforcement to rely on *Diaz* to allow the unfettered search of a cell phone upon a traffic violation detention.

2. *Diaz* is not sufficient binding appellate authority

Diaz, supra, 51 Cal.4th 84 cannot be considered binding appellate precedent for purposes of the good-faith exception to the exclusionary rule because it was contrary to binding United States Supreme Court precedent. Three years after *Diaz* was decided, the United States Supreme Court unanimously rejected the *Diaz* ruling in *Riley, supra,* 134 S.Ct. 2473. The overwhelming rejection such a short amount of time after *Diaz* was decided shows the reasoning in *Diaz* was unsupportable by existing precedent. In overruling *Diaz*, the United States Supreme Court did not overrule any existing precedent; it just affirmed that the California Supreme Court had reached an incorrect decision in its analysis of that precedent.

The majority, concurring and dissenting opinions in *Diaz, supra,* 51 Cal.4th 84 all acknowledged and specifically anticipated a review by the United States Supreme Court on the issue of cell phone searches. The majority states "[i]f, as the dissent asserts, the wisdom of the high court's decisions 'must be newly evaluated' in light of modern technology, then that reevaluation must be undertaken by the high court itself." (*Id.* at p. 117.)

Immediately after the ruling in *Diaz, supra*, 51 Cal.4th 84 the California Legislature passed legislation making warrantless cell phone searches unlawful. The legislation was vetoed by Governor Brown on October 9, 2011, just months prior to the July 19, 2012 search of petitioner's cell phone, because Governor Brown believed the issue too complicated for the legislators and preferred to wait for the Court to rule.

(Letter from Edmund G. Brown Jr., Governor of Cal., to Members of the Cal. State Senate (October 9, 2011), available at http://gov.ca.gov/docs/SB_914_Veto_Message.pdf.) The state of the law was in flux and could not be reasonably relied upon by the officers.

Other jurisdictions rejected the reasoning in *Diaz, supra,* 51 Cal.4th 84 and found that unwarranted cell phone searches were a violation of the Fourth Amendment and a person's right to privacy. The Supreme Court of Ohio held that the warrantless search of a cell phone is unlawful, citing a high expectation of privacy in a cell phone's contents. (*State v. Smith* (2009) 124 Ohio St 3d 163.)

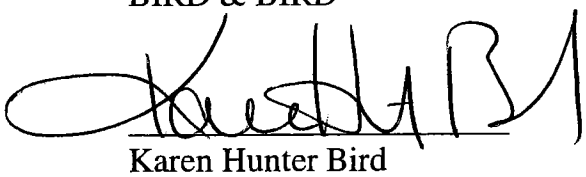
Petitioner urges this court to grant review because a state court opinion which is so clearly out of step with established federal constitutional law, as articulated by a unanimous United States Supreme Court, should not be considered binding authority and cannot be reasonably relied upon by law enforcement officers. The good faith exception to the exclusionary rule relied upon by the Court of Appeal below is inapplicable to this case. The warrantless search of Petitioner's cell phone was unconstitutional. It was not made lawful by *Diaz, supra,* 51 Cal.4th 84 because *Diaz* does not apply factually and *Diaz* was not based upon current federal constitutional law.

CONCLUSION

For the above reasons given, Petitioner requests this court to grant review to resolve these important issues of federal constitutional law.

Respectfully submitted,

BIRD & BIRD

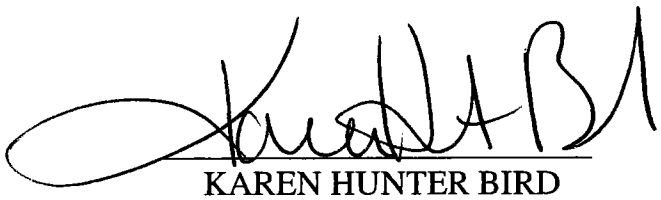


Dated: October 8, 2014

Karen Hunter Bird
Attorney for Petitioner
PAUL MACABEO

CERTIFICATE OF WORD COUNT

I certify that this document contains 5,491 words as counted by the Microsoft Word program on which it was created.



KAREN HUNTER BIRD

EXHIBIT A

PEOPLE v. MACABEO

(2014) 229 Cal.App.4th 486, 177 Cal.Rptr.3d 311

(not included on service copies)

229 Cal.App.4th 486
Court of Appeal,
Second District, Division 5, California.

The PEOPLE, Plaintiff and Respondent,
v.
Paul MACABEO, Defendant and Appellant.

B248316 | Filed September 3, 2014

Synopsis

Background: After denial of motion to suppress evidence, defendant pled pleaded nolo contendere in the Superior Court, Los Angeles County, No. YA084963, Mark Arnold, J., to possession of matter depicting a minor engaging in sexual conduct. Defendant appealed.

[Holding:] The Court of Appeal, Mosk, J., held that warrantless search of data on arrestee's telephone was within "good faith" exception to exclusionary rule.

Affirmed.

***312** APPEAL from an order of the Superior Court of the County of Los Angeles, Mark Arnold, Judge. Affirmed. (No. YA084963)

Attorneys and Law Firms

Karen Hunter Bird, Torrance, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, for Plaintiff and Respondent.

MOSK, J.

INTRODUCTION

Defendant and appellant Paul Macabeo (defendant) appeals from the trial court's order denying his motion to suppress evidence. He contends that the trial court erred when it found that the

search of his cell phone incident to a stop for a minor traffic violation did not violate the Fourth Amendment prohibition against unlawful searches and seizures. The United States Supreme Court, in overruling *People v. Diaz* (2011) 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501 (*Diaz*), and while this case was on appeal, held that absent an emergency, law enforcement must secure a warrant before searching the digital content of a cell phone incident to an arrest. (*Riley v. California* (2014) —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (*Riley*).) We hold that because *Diaz* was applicable ***313** at the time of the search, the officers' conduct in searching the cell phone was in good faith and therefore the failure to exclude the evidence from the cell phone was not reversible error.

FACTUAL BACKGROUND

On July 19, 2012, City of Torrance Police Detective Craig Hayes was patrolling in a police vehicle with his partner, Officer Raymond, near 17200 Gramercy Place and Artesia Boulevard in Torrance. At approximately 1:40 a.m., Detective Hayes observed defendant riding a bicycle directly in front of the police vehicle. At the intersection of Gramercy Place and Artesia Boulevard, defendant "rolled right through [a stop sign] without slowing down or making a full stop before making an eastbound [left] turn on Artesia" in violation of Vehicle Code section 22450, subdivision (a).

The police officers stopped defendant, and Detective Hayes exited his vehicle and approached defendant who was straddling his bicycle. The detective asked defendant from where he was coming, and defendant gave him an address. He next asked defendant if he was on probation or parole, and defendant told him that he was on probation for "methamphetamine." But defendant did not remember the identity of his probation officer. When Detective Hayes asked defendant whether his probation had been discharged, defendant initially stated, "I've already dismissed my case." Detective Hayes repeated the question, and defendant stated that he was "not sure." Defendant also told the detective that he had been on probation for "a couple of years."

After defendant told Detective Hayes that he did not have anything illegal in his possession, the detective initiated a pat down search and then asked defendant for consent to search his pockets. In response, defendant said "yeah, sure." Detective Hayes removed various items from defendant's pockets, including a cell phone, and handed the items to Officer Raymond.

When Detective Hayes finished searching defendant's pockets, he directed defendant to sit on the curb in front of his patrol vehicle and cross his ankles. The detective spoke to defendant "for a while" and then noticed Officer Raymond signaling to him. Detective Hayes told defendant to remain seated on the curb and walked over to his partner's location. Officer Raymond informed the detective that there were no text messages in defendant's phone concerning narcotics, but he had found a picture folder on the phone that contained pictures of young girls under the age of 18

engaged in sexual activity. Possession or control of such pictures was a violation of Penal Code section 311.11, subdivision (a).[1] Detective Hayes returned to defendant's location and placed him under arrest. The detective subsequently confirmed that defendant was not on felony probation at the time he was stopped because his felony probation ended in April 2012.

PROCEDURAL BACKGROUND

In a complaint, the District Attorney charged defendant in count 1 with possession of matter depicting a minor engaging in sexual conduct in violation of section 311.11, subdivision (a); and in count 2 with possession of a smoking device in violation of Health and Safety Code section 11364.1, subdivision (a)(1). Defendant pleaded not guilty.

Defendant filed a motion to suppress evidence pursuant to section 1538.5, contending the offending pictures on his cell phone had been obtained during an unlawful search and seizure. The hearing on ***314** the motion to suppress took place during the preliminary hearing. Following testimony and argument, the trial court denied the suppression motion, held defendant to answer, and granted the prosecution's motion to dismiss count 2.

Based on the result of the preliminary hearing, the District Attorney charged defendant in an information with possession of matter depicting a minor engaging in sexual conduct in violation of section 311.11, subdivision (a). Defendant pleaded not guilty but thereafter withdrew his plea and pleaded nolo contendere to the charge. The trial court found defendant guilty, suspended imposition of sentence, and placed him on formal probation for five years subject to various terms and conditions. The trial court, however, stayed most, but not all, of the terms and conditions of probation pending an appeal. Defendant timely appealed from the order denying his suppression motion.

On appeal, this court issued a briefing order directing the parties to address whether defendant could challenge the order denying his suppression motion if it was not litigated subsequent to the preliminary hearing. Defendant thereafter filed a notice of abandonment of appeal, and we dismissed the appeal.

Following remittitur, defendant moved to withdraw his plea, which motion the trial court granted. Defendant next moved to set aside the information pursuant to section 995 and renewed his motion to suppress the evidence from the cell phone, which motions the trial court denied. Defendant again pleaded nolo contendere, and the trial court accepted the plea. The trial court stayed imposition of sentence and placed defendant on formal probation for five years subject to various terms and conditions. The trial court, however, stayed most, but not all, of the terms and conditions of probation pending an appeal, which appeal defendant timely filed.

DISCUSSION

A. Background

Following the testimony of Detective Hayes at the preliminary hearing, the trial court informed the parties that it was "not looking at this as a probation search" and that "it would be an unlawful probation search." The trial court then heard argument and provided its reasoning for denying the suppression motion. "The Court: [Defendant's Counsel], what you have said has logic. But I'm going to cite some cases. The first case is *United States v. Scott* [*Scott v. United States*], which is [(1978)] 436 U.S. 128 [98 S.Ct. 1717, 56 L.Ed.2d 168]. The *Scott* case states that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances viewed objectively justify the action. [¶] ... [¶] So what this indicates to me is what was going through the officer's mind does not have any bearing on the legality of what the officer did. [¶] We then go to [*Virginia v.*] *Moore* [(2008) 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559], which is a 2008 case, 128 Supreme Court 1598. This case stands for the proposition that as long as the police have probable cause to believe that a person committed a crime in their presence, the person can be constitutionally arrested and searched even if the arrest violates state law. [¶] ... [¶] So what I gleaned from all of this is the defendant was subject to arrest. 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 ***315** could also have been subjected to a search incident to a lawful arrest. [¶] ... [¶] And as a search incident to a lawful arrest, we then get to the cell phone because since the cell phone was in his pockets, it was properly seizable. But the question then becomes, well, is it okay for the officers to search the contents of the cell phone? [¶] ... [¶] I think that [the search of the cell phone] could be incident to the arrest. It could be thoroughly searched. Just like his pockets could be thoroughly gone through. [¶] The police can seize his wallet. Following [defendant's] analysis, well, then they wouldn't be able to go through the contents of the wallet. They could go through the contents of the wallet, and I believe that they could go through the contents of the cell phone. [¶] Consequently, I do not find that the defendant's fourth amendment rights were violated."

B. General Legal Principles

[1] **[2]** A custodial arrest may be made for a traffic violation without violating the United States Constitution. (*Atwater v. Lago Vista* (2001) 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (*Atwater*); *People v. McKay* (2002) 27 Cal.4th 601, 607, 117 Cal.Rptr.2d 236, 41 P.3d 59 (*McKay*).) An exception to the Fourth Amendment prohibition against unreasonable searches and seizures is a "search incident to a lawful arrest." (*United States v. Robinson* (1973) 414 U.S. 218, 224, 94

S.Ct. 467, 38 L.Ed.2d 427 (*Robinson*).) In *Diaz, supra,* 51 Cal.4th at page 89, 119 Cal.Rptr.3d 105, 244 P.3d 501, the California Supreme Court held that a search of a defendant's cell phone recovered from his person incident to an arrest was valid without a warrant whether or not an emergency existed. While defendant's case was on appeal before this court, the United States Supreme Court in *Riley, supra,* 134 S.Ct. 2473 held that the search incident to an arrest exception to the requirement for a search warrant, absent exigent circumstances, does not apply to the contents of an arrestee's cell phone.

C. Search Not Incident to a Lawful Arrest

Defendant first contends that the search of his cell phone was not a valid search incident to a lawful arrest because, under state law, i.e., section 853.5,[2] he could not have been taken into custody for failing to stop at the stop sign in violation of Vehicle Code section 22450, subdivision (a). (See Veh.Code, § 40302, subd. (a); *People v. Superior Court* (1972) 7 Cal.3d 186, 199–200, 101 Cal.Rptr. 837, 496 P.2d 1205, superseded by statute on other grounds as stated in *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1229, 42 Cal.Rptr.2d 18; *People v. Monroe* (1993) 12 Cal.App.4th 1174, 1180–1182, 16 Cal.Rptr.2d 267.) According to defendant, if the police officers did not have a reasonable suspicion that defendant was involved in any crime other than the observed traffic infraction, but rather only probable cause to issue a citation under section 853.5, they had no right to search him, much less his cell phone. ***316** In his reply brief, however, defendant concedes that this contention is contrary to the California Supreme Court decision in *McKay, supra,* 27 Cal.4th 601, 117 Cal.Rptr.2d 236, 41 P.3d 59, which decision, in turn, is based on the United States Supreme Court decision in *Atwater, supra,* 532 U.S. 318, 121 S.Ct. 1536.

In *McKay, supra,* 27 Cal.4th 601, 117 Cal.Rptr.2d 236, 41 P.3d 59, a deputy sheriff observed the defendant riding a bicycle in the wrong direction on a residential street. (*Id.* at p. 606, 117 Cal.Rptr.2d 236, 41 P.3d 59.) The deputy stopped the defendant intending to cite him for violation of Vehicle Code section 21650.1. (*Ibid.*) But when the deputy asked the defendant for identification, the defendant said he did not have any identification and instead provided the deputy with his name and date of birth. (*Ibid.*) The deputy took the defendant into custody for failing to present valid identification in violation of Vehicle Code section 40302, subdivision (a).[3] (*Ibid.*) During a search incident to that arrest, the deputy found what appeared to be methamphetamine in the defendant's sock. (*Ibid.*) The defendant was charged with possession of methamphetamine, and, after the trial court denied his motion to suppress, he pleaded guilty and was sentenced to prison. (*Ibid.*) The Court of Appeal affirmed the defendant's conviction. (*McKay, supra,* 27 Cal.4th at p. 606, 117 Cal.Rptr.2d 236, 41 P.3d 59.)

On review before the California Supreme Court, the defendant argued, inter alia, that an arrest for such a minor offense violated the Fourth Amendment. (*McKay, supra,* 27 Cal.4th at p. 606, 117 Cal.Rptr.2d 236, 41 P.3d 59.) The court concluded that the defendant's contention was foreclosed

by the United States Supreme Court decision in *Atwater, supra,* 532 U.S. 318, 121 S.Ct. 1536. The court in *McKay* explained, "Appellant's first contention, he now concedes, is foreclosed by *Atwater v. Lago Vista* (2001) 532 U.S. 318 [121 S.Ct. 1536, 149 L.Ed.2d 549] ...), which upheld a custodial arrest for a violation of Texas's seatbelt law, an offense punishable by a fine of not less than $25 nor more than $50. (*Id.* at p. 323 [121 S.Ct. at p. 1541].) Under *Atwater,* all that is needed to justify a custodial arrest is a showing of probable cause. 'If 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.' (*Id.* at p. 354 [121 S.Ct. at p. 1557].) We therefore conclude that there is nothing inherently unconstitutional about effecting a custodial arrest for a fine-only offense. (*U.S. v. McFadden* (2d Cir.2001) 238 F.3d 198, 204 [upholding search incident to arrest for riding a bicycle on the sidewalk].)" (*McKay, supra,* 27 Cal.4th at p. 607, 117 Cal.Rptr.2d 236, 41 P.3d 59.)

On the issue of whether the officers were required to comply with state law limiting their right to arrest (see Vehicle Code section 40302, subd. (a)) before they could constitutionally arrest defendant, the court in *McKay, supra,* 27 Cal.4th at page 611, 117 Cal.Rptr.2d 236, 41 P.3d 59 concluded that "[o]ur determination of the validity of the search under the federal Constitution thus does not depend on ***317** whether 'it was authorized by state law' ([*Cooper v. California* (1967)] 386 U.S. [58,] 61, [87 S.Ct. 788 at p. 790, 17 L.Ed.2d 730]) or 'the law of the particular State in which the search occurs' ([*California v.*] *Greenwood* [(1988)] 486 U.S. [35,] 43, [108 S.Ct. 1625 at p. 1630, 100 L.Ed.2d 30]). According to [*Elkins v. United States* (1960)] 364 U.S. [206,] 224, [80 S.Ct. at page 1447], the test 'is one of federal law'—and, in this case, was disposed of by *Atwater*. Therefore, we need not consider whether defendant's arrest complied with [Vehicle Code] section 40302(a)."

[3] Given the holding in *McKay, supra,* 27 Cal.4th 601, 117 Cal.Rptr.2d 236, 41 P.3d 59—a decision that we are bound to follow [4]—we must reject defendant's contention that because under state law the officers could not lawfully search defendant based on the Vehicle Code violation in question, they therefore had no right under the federal constitution to search him. A court is not required to suppress evidence that is obtained in a manner consistent with the United States Constitution but in violation of a state law. (*Id.* at p. 610, 117 Cal.Rptr.2d 236, 41 P.3d 59.)

D. Search of Cell Phone During Search Incident to Arrest

Defendant next contends that even if the officers had probable cause to arrest him and conduct a search of his person incident to that arrest, they were not authorized to search his cell phone in view of *Riley, supra,* 134 S.Ct. 2473. The parties disagree over whether the United States Supreme Court decision in *Riley* applies retroactively to this case to require the exclusion of the evidence from the cell phone. The Attorney General argues that exclusion based on the newly announced rule in *Riley* is not warranted, for to do so would have no deterrent effect because the evidence

was obtained as a result of good faith police conduct consistent with the then binding authority of *Diaz, supra,* 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501. (See *Davis v. United States* (2011) —— U.S. ——, 131 S.Ct. 2419, 180 L.Ed.2d 285 (*Davis*); *United States v. Leon* (1984) 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677.) Subsequent to the decision in *Riley,* one federal district court has refused to apply *Riley* to require reversal of a conviction based on evidence not excluded under the rule announced in *Riley*. (*United States v. Spears* (S.D.Tex.2014) —— F.Supp.3d ——, 2014 U.S. Dist. Lexis 96812] [there was Fifth Circuit authority similar to *Diaz*].) In that case, the court noted that the rule announced in *Riley* applies retroactively to cases on direct review, but that does not mean that suppression of the evidence obtained in violation of the rule in *Riley* is required. (*Id.* at pp. *9–10.)

Defendant argues that decisions announcing new constitutional rules of criminal procedure are ordinarily retroactive to all cases on direct review or not yet final in which the new rule constitutes a "clear break" with the past. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 [retroactively applying *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Hoyos* (2007) 41 Cal.4th 872, 893, fn. 10, 63 Cal.Rptr.3d 1, 162 P.3d 528 [in upholding the actions of the police officers, the court said, "[a] high court decision construing the Fourth Amendment, however, applies retroactively to all convictions that were not yet final at the time the ***318** decision was rendered"], abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 641, 130 Cal.Rptr.3d 590, 259 P.3d 1186.) Defendant contends that there is no reason to distinguish between the rule and the remedy.

[4] In this case, the good faith exception to the exclusionary rule applies. In *Arizona v. Gant* (2009) 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (*Gant*), the United States Supreme Court held that "[n]either the possibility of access [to the defendant's vehicle] nor the likelihood of discovering offense-related evidence authorized the search in [that] case" because, at the time of the search of the defendant's vehicle, he was handcuffed in the back seat of a police car and the offense for which he was arrested—driving with a suspended license—could not have justified a search for evidence of that crime. (*Id.* at p. 344, 129 S.Ct. 1710.) Then, in *Davis, supra,* 131 S.Ct. 2419, the United States Supreme Court held that evidence seized from a car during a search incident to arrest contrary to the rule in *Gant* was not subject to the exclusionary rule because the officers conducted the search in "objectively reasonable reliance on [the] binding appellate precedent" of *New York v. Belton* (1981) 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768, which was restricted in *Gant,* and because "suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety...." (*Davis,* 131 S.Ct. at p. 2423.)

The court in *Davis, supra,* 131 S.Ct. at pages 2437 to 2438, said the exclusion of evidence to deter is proper when the law enforcement action in question constitutes " 'deliberate,' 'reckless,' or 'grossly negligent' " police conduct. Presumably this would include systematically negligent

police conduct. (See *id.* at p. 2438.) The court concluded that "[t]he harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.' [Citation.] Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." (*Id.* at p. 2429.) The court further held that although *Gant, supra,* 556 U.S. 332, 129 S.Ct. 1710 applied retroactively, "[i]t does not follow ... that reliance on binding precedent is irrelevant in applying the good-faith exception to the exclusionary rule." (*Id.* at p. 2432.) "We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." (*Id.* at p. 2434.)

Here, at the time Officer Raymond searched the cell phone, the search was authorized by the California Supreme Court decision in *Diaz, supra,* 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501, which was decided three years before the United States Supreme Court decision in *Riley, supra,* 134 S.Ct. 2473 and was the clearly established law in this state at the time of the search in question. Defendant attempts to distinguish *Diaz, supra,* 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501 by pointing out that the police searched the cell phone in that case to look for additional evidence of the crime for which defendant was arrested, whereas the search of defendant's cell phone in this case was conducted to look for evidence of crimes for which there was no preexisting probable cause to arrest. According to defendant, because *Diaz* did not authorize such an expansive search, the good faith exception does not apply here.

Defendant's interpretation of the holding in *Diaz, supra,* 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501 is too restrictive. The court in *Diaz, supra,* 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501, began its analysis of the issue with a discussion of ***319** three controlling United States Supreme Court decisions, *United States v. Robinson, supra,* 414 U.S. 218, 94 S.Ct. 467; *United States v. Edwards* (1974) 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (*Edwards*); and *United States v. Chadwick* (1977) 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538, overruled in part on other grounds in *California v. Acevedo* (1991) 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619. (*Diaz, supra,* 51 Cal.4th at pp. 90–93, 119 Cal.Rptr.3d 105, 244 P.3d 501.) The court in *Diaz* then explained that "[u]nder these decisions, the key question in this case is whether defendant's cell phone was 'personal property ... immediately associated with [his] person' (*Chadwick, supra,* 433 U.S. at p. 15 [97 S.Ct. 2476]) like the cigarette package in *Robinson* and the clothes in *Edwards.*[5] If it was, then the delayed warrantless search was a valid search incident to defendant's lawful custodial arrest." (*Diaz, supra,* 51 Cal.4th at p. 93, 119 Cal.Rptr.3d 105, 244 P.3d 501.)
The court in *Diaz, supra,* 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501 concluded as follows: "We hold that the cell phone was 'immediately associated with [defendant's] person' (*Chadwick, supra,* 433 U.S. at p. 15 [97 S.Ct. 2476]), and that the warrantless search of the cell phone therefore was valid." The court in *Diaz* did not state or imply that the cell phone search in that case was valid because the purpose of the search was related to the crime for which the defendant had been arrested. Indeed, in *Robinson, supra,* 414 U.S. 218, 94 S.Ct. 467, relied upon by the court in *Diaz,*

the search of the defendant that unearthed heroin in his cigarette package, as here, took place during an arrest for a vehicle code violation. Absent any language in *Diaz* supporting such a restriction, we conclude that the search of defendant's cell phone was consistent with the holding in *Diaz* and, therefore, undertaken in good faith reliance on the holding in *Diaz*.

Defendant also suggests that there is no evidence the officers relied upon *Diaz* and that any such reliance was unjustified. But, such reliance can be presumed (see *Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 178, 52 Cal.Rptr.2d 777 ["A public officer is presumed to know the law, provided it is clearly established"]), and reliance on such knowledge would have been justified because the California Supreme Court had pronounced the law of this state. Here, there is no showing that the officers deliberately, recklessly, or in a grossly negligently manner undertook the search of the cell phone.

[5] Although the warrantless search of defendant's cell phone was unlawful under the recent decision in *Riley, supra,* 134 S.Ct. 2473, the search falls within the good faith exception to the exclusionary rule. Thus, the failure of the trial court to suppress the evidence obtained from the search of the cell phone does not require a reversal of the trial court's order denying defendant's motion to suppress or his conviction.¿

DISPOSITION

The trial court's order denying defendant's motion to suppress evidence is affirmed.

We concur:

***320** TURNER, P.J.

KRIEGLER, J.

Parallel Citations

229 Cal.App.4th 486, 14 Cal. Daily Op. Serv. 10,439, 2014 Daily Journal D.A.R. 12,245

Footnotes

1 All further statutory references are to the Penal Code, unless otherwise indicated.

2 Section 853.5 provides: "Except as otherwise provided by law, in any case in which a person is arrested for an offense declared to be an infraction, the person may be released.... In all cases ... in which a person is arrested for an infraction, a peace officer shall only require the arrestee to present his or her driver's license or other satisfactory evidence of his or her identity for examination and to sign a written promise to appear contained in a notice to appear. If the arrestee does not have a driver's license or other satisfactory

evidence of identity in his or her possession, the officer may require the arrestee to place a right thumbprint, ... on the notice to appear.... Only if the arrestee refuses to sign a written promise, has no satisfactory identification, or refuses to provide a thumbprint or fingerprint may the arrestee be taken into custody."

3 Vehicle Code section 40302, subdivision (a) provides: "Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made in any of the following cases: [¶] (a) When the person arrested fails to present his driver's license or other satisfactory evidence of his identity for examination."

4 *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.

5 The cigarette package taken from the defendant's person in *Robinson* contained 14 heroin capsules. (*Diaz, supra*, 51 Cal.4th at p. 91, 119 Cal.Rptr.3d 105, 244 P.3d 501.) The clothes taken from the defendant's person in *Edwards* were found to have incriminating paint chips on them. (*Ibid.*)

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Proof of Service
People v. Paul Macabeo
Court of Appeal No.: B248316
Los Angeles Superior Court No.: YA084963

I, the undersigned, declare that I am over 18 years of age, residing or employed in the County of Los Angeles, and not a party to the instant action. My business address is listed above. I served the attached **PETITION FOR REVIEW** by placing true copies of in a sealed envelope, with the correct postage, and depositing them in the United States Postal Service, to each of the following persons at the following addresses on October 10, 2014:

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I additionally declare that I electronically submitted a copy of this document in compliance with the court's Terms of Use, as shown on the website.

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

Executed at Torrance, California, on October 10, 2014.

SANDRA R. CASTRO