IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARIA ELENA LOPEZ, Defendant and Petitioner.	Case No. S238627 (Court of Appeal No. C078537)) (Yolo Co. Superior Court No. CRF143400)

OPENING BRIEF ON THE MERITS

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF YOLO HONORABLE SAMUEL T. MCADAM, JUDGE PRESIDING

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ISSUE PRESENTED

I. After the United States Supreme Court's decision in *Arizona v. Gant* (2009) 556 U.S. 332, which substantially narrowed the scope of the vehicle search doctrine, may a police officer still search inside a suspect's vehicle for identification when the suspect fails to provide it upon request?

SUMMARY OF ARGUMENT

On July 4, 2014, a Woodland police officer approached respondent Maria Elena Lopez just after she exited her car and asked if she had a driver's license. (RT 33-34.) Respondent said she did not, but that she had an identification card in the car. (RT 33-34, 39-40.) The officer immediately placed her in handcuffs, retrieved her purse from the car, and searched it, revealing methamphetamine. (RT 33-35.)

The Court of Appeal held that the police conducted a permissible search for identification, authorized by this Court's decision in *In re Arturo D.* (2002) 27 Cal.4th 60, 64-65. (Decision, p. 2.) The Court of Appeal's conclusion rested on two key premises. The first was that *Arturo D.*'s "documentation search" doctrine survives the United States Supreme Court's holding in *Arizona v. Gant* (2009) 556 U.S. 332, which narrowed the scope of the Fourth Amendment's vehicle search exception. (Decision, pp. 13-15.) The second was that *Gant* applied only to post-arrest vehicle searches; in the Court of Appeal's view, respondent, despite being handcuffed, was not yet under arrest. (Decision, p. 15.)

This Court need not address whether respondent was or was not under arrest when placed in handcuffs, for the search of her purse was

illegal either way. If she was under arrest, then the search violated *Gant*, whose holding overruled *Arturo D.* If she was not yet under arrest, then the search violated *Knowles v. Iowa* (1998) 525 U.S. 113, 114, and this Court's recent decision in *People v. Macabeo* (2016) 1 Cal.5th 1206. Finally, even if the Fourth Amendment's warrant requirement does include an exception for documentation searches, that exception did not apply here since there was no underlying traffic stop and respondent did not fail to provide identification.

The remedy for the violation is suppression. The good faith exception does not apply because: (1) the prosecutor forfeited the right to rely on it; (2) the state of the law was muddled and not the sort of "binding appellate precedent" on which a police officer may rely (*Davis v. United States* (2011) 564 U.S. 229, 232); and (3) the search was unlawful even under the documentation search doctrine. Because the search of respondent's purse violated the Fourth Amendment, this Court must reverse the Court of Appeal's decision.

STATEMENT OF THE CASE

On July 21, 2014, the Yolo County District Attorney filed a complaint charging respondent with felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and a

misdemeanor of driving on a suspended license (Veh. Code, § 14601.2, subd. (a)). (1 CT 3-4.)[1] At the close of the preliminary hearing, the magistrate reduced the felony charge to a misdemeanor. (RT 14-15.)

Respondent filed a motion to suppress evidence due to an unlawful search and seizure. (CT 11-14.) An evidentiary hearing took place on January 27, 2015. (CT 36.) In a written order, the trial court granted respondent's motion, finding that the arresting officer conducted an illegal vehicle search under *Arizona v. Gant, supra*, 556 U.S. 332. (CT 38-43.) On June 2, 2015, the trial court dismissed the charges under Penal Code section 1385. (Supp. CT [Jun. 8, 2015]: 2.) The prosecution filed a timely notice of appeal on July 1, 2015. (Supp. CT [Jul. 21, 2015]: 1.)

In a published decision of October 27, 2016, the Third District Court of Appeal reversed. The court found that the Woodland police lawfully detained respondent, and that the search of her vehicle was permissible as a search for identification which respondent had failed

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[1] The record contains one 49-page main volume of clerk's transcript, which respondent refers to as simply "CT." Supplemental volumes of clerk's transcript will be specified by the date on which the volumes were file stamped in the Yolo County Superior Court.

to provide. (COA's decision ["Decision" herein], pp. 11-15.) The court, therefore, reinstated the drug charges against respondent and remanded the case to Yolo County Superior Court. (Decision, p. 16.)

STATEMENT OF FACTS

Unless otherwise stated, the following facts are based on the evidence presented at the suppression hearing.

A. Respondent's July 4, 2014 detention

On July 4, 2014, around 10:24 a.m., Woodland police officer Jeff Moe received a dispatch regarding a report of erratic driving. (RT 26-28.) The dispatcher described the car as a dark Toyota and gave Moe the license plate number. (RT 28-29.)

When Moe could not find the car in the area described, he asked the dispatcher to run the license plate. (RT 29.) As a result, he learned that it was registered to someone at 116 Northwest Street. (RT 29.) Moe drove by that address but still did not see the car. (RT 30.)

At 1:35 p.m., Moe received a second dispatch about the same vehicle. (RT 30-31.) Moe additionally learned that a citizen had identified the driver as someone named Marlena, and said that she "had been drinking all day." (RT 30.) The citizen described Marlena's

location but, when Moe drove to the area, he again did not see the vehicle. (RT 30-31.)

Moe next drove to 116 Northwest Street, where he parked by the side of the road. (RT 31-32.) A few minutes later, the Toyota pulled up and parked next to the curb in front of the residence. (RT 32, 37.) Moe saw that the driver was a Hispanic female whom he believed to be Marlena. (RT 32.) He did not observe her commit any traffic violations. (RT 32, 37.) During the evidentiary hearing, Moe identified respondent as Marlena. (RT 41.)

As Moe approached, respondent got out of her car, looking "nervous." (RT 33.) Respondent began to walk away from Moe, but Moe "didn't give her a chance to go towards anywhere." (RT 33, 38.) Instead, he asked if she had a driver's license. (RT 33, 38.) Respondent said that she did not, but that she believed her identification was inside the vehicle. (RT 34, 39-40.) Moe immediately detained her by grabbing her wrist and placing her in a "control hold." (RT 34.) Respondent tried to pull away, but Moe was able to handcuff her. (RT 34.)

During direct examination, Moe testified that respondent mentioned the identification card only after he had detained her. (RT

34.) During cross, he reviewed his report and clarified that she mentioned the identification card when she revealed that she did not have her license. (RT 39-40.)

B. The search of respondent's car

While Moe was with respondent, his partner, Officer Barrera, retrieved a small purse from the car's front passenger seat. (RT 34-35.) Barrera handed the purse to Moe, who opened a side pocket looking for identification. (RT 35.) He found respondent's identification card and a plastic baggy containing methamphetamine. (RT 35.)

Moe could not recall if he asked respondent her name or date of birth before Officer Barrera entered the vehicle. (RT 42.) However, he testified that, even if he had, he would not have been satisfied with her answer "[b]ecause in the job that I'm in, 90 percent of the time, people lie to me." (RT 43.)

Respondent did not display any signs of alcohol intoxication during her interaction with Moe. (RT 40.) At the preliminary hearing, Moe testified that respondent's driver's license was suspended. (RT 10-11.)

ARGUMENT

I.

The Police Violated the Fourth Amendment's Prohibition on Unreasonable Searches and Seizures by Seizing Respondent's Purse from Inside Her Vehicle and Searching It.

A. Standard of review

Resolution of a Fourth Amendment suppression motion involves a mixed question of law and fact. (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.) A reviewing court must apply a substantial evidence standard for the judge's resolution of factual issues, but must exercise independent review in applying the governing law to the facts. (*People v. Saunders* (2006) 38 Cal.4th 1129, 1134.)

B. If respondent was under arrest, then the search of her purse constituted an unlawful vehicle search under the Supreme Court's decision in *Arizona v. Gant*.

1. The search violated *Gant*, as the police had no reason to believe that the vehicle or its contents contained evidence relevant to the underlying traffic infraction.

The Fourth Amendment to the United States Constitution ensures the right of all "people to be secure in their persons . . . against unreasonable searches and seizures." The California Constitution contains a similar guarantee, set forth in Article I, section 24. "In the

absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." (*Riley v. California* (2014) 573 U.S. ___, 134 S. Ct. 2473, 2482.) The burden is on the state to demonstrate that one of these exception applies. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.)

The United States Supreme Court has long recognized a vehicle exception to the Fourth Amendment's warrant requirement. (See *Carroll v. United States* (1925) 267 U.S. 132, 153-154.) This exception rests on two rationales. The first rationale is that vehicles are mobile and can be driven away if not seized. (*California v. Carney* (1985) 471 U.S. 386, 391.) Once seized, practical considerations justify an immediate search since a warrant requirement would force the police to either tow the car to the station or "post guard at the vehicle" while another officer obtains the warrant. (*United States v. Ross* (1982) 456 U.S. 798, 807, fn. 9; *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1232.) For these reasons, the police may conduct warrantless searches of any area of the vehicle which they have probable cause to believe will contain contraband or evidence. (*Ross*, at p. 824.)

The second reason for permitting warrantless searches of vehicles is that they are a necessary incident to arrest in order to ensure that the arrested driver does not reach for a weapon. (*Chimel v. California* (1969) 395 U.S. 752, 762-763.) The Supreme Court first endorsed this rationale in *New York v. Belton* (1981) 453 U.S. 454, 460. However, rather than limit the search's scope to only those areas within the arrestee's reach, *Belton* set forth a per se rule that the police may search the entire passenger compartment of a vehicle incident to the driver's arrest. (*Ibid.*)

In *Arizona v. Gant, supra,* 556 U.S. at pp. 350-351, the Supreme Court overruled *Belton,* insofar as it permitted suspicionless searches of the entire passenger area. Under *Gant,* the police may search a vehicle incident to arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Gant,* at p. 351.)

The arrest in *Gant* was for driving on a suspended license. (*Arizona v. Gant, supra,* 556 U.S. at p. 335.) Yet, under *Belton,* even an arrest for a traffic offense would permit a search of the entire passenger

area - though there would rarely be reason to believe it contained evidence of the underlying infraction. (*Gant*, at pp. 343-345.) The Court found such a result intolerable, as it posed "a serious and recurring threat to the privacy of countless individuals." (*Id.* at p. 345.)

As in *Gant*, the arrest here was for a traffic infraction - driving without physical possession of a license. (RT 33-34, 47.) The search of respondent's vehicle took place after Officer Moe had placed her in handcuffs. (RT 34-35.) Hence, she had no ability to reach inside the car for a weapon.

Moreover, as the Court of Appeal acknowledged, Officer Moe had no reasonable basis to believe that respondent's car contained additional evidence of the underlying traffic infraction. (COA's decision, p. 14.) Officer Moe saw respondent driving the car and she admitted she did not have physical possession of a driver's license. (RT 32-34.) Under such circumstances, the officer had all the information he needed to issue a citation. (*People v. Macabeo, supra*, 1 Cal.5th at p. 1217 [officer who observes a traffic infraction possesses "all the evidence necessary to prosecute that offense"]; see also *Arizona v. Gant, supra*, 556 U.S. at p. 344.) There was nothing the ensuing search was likely to turn

up which would have been relevant to the offense of citation. (*Macabeo*, at p. 1217.) The search of respondent's purse, therefore, constituted an unlawful vehicle search under *Gant*.

2. After *Gant*, the search of respondent's purse cannot be justified as a search for identification.

In upholding the July 4, 2014 search, the Court of Appeal did not rely on the vehicle search doctrine. Instead, it held that the search of respondent's purse, found inside her car, constituted a lawful search for identification. (Decision, pp. 12, 14-15.)

The concept of an identification search traces its roots to this Court's decision in *People v. Webster* (1991) 54 Cal.3d 411. There, the Court observed that, under Vehicle Code, sections 4462, subdivision (a) and 12951, subdivision (b), a driver of a vehicle must produce a license and vehicle registration upon a police officer's demand. (*Webster*, at p. 430.) To effectuate these laws, the Court concluded that the police may, "[w]ithin constitutional limits," enter the vehicle and search for a license or registration where the driver fails to produce them after a traffic stop. (*Webster*, at p. 430.)

The Court in *Webster* did not address what the "constitutional limits" on an identification search might be. Some 11 years later,

however, this Court held that the Fourth Amendment permits the type of documentation search described in *Webster*, provided it is limited to those areas of the vehicle where such documentation "reasonably may be expected to be found." (*In re Arturo D., supra*, 27 Cal.4th at pp. 64-65, 86.)

The decision in *Arturo D.* effectively created a documentation or identification exception to the Fourth Amendment's warrant requirement. In doing so, this Court relied primarily on *New York v. Class* (1986) 475 U.S. 106. (*In re Arturo D., supra*, 27 Cal.4th at pp. 71-74.) *Class*, however, did not countenance such an exception. It merely held that a police officer may reach inside a vehicle during a traffic stop and remove papers which are obscuring the Vehicle Identification Number ("VIN"). (*Class*, at p. 107.) The reason for this rule is that a driver has no reasonable expectation of privacy in his or her VIN – a number which must, by federal regulation, be readable from outside the car. (*Id.* at pp. 112-114.) The Court specifically contrasted this area of the car to other more private areas, like the trunk and glove compartment. (*Id.* at p. 114.)

That the police may make a suspicionless intrusion into an area of the vehicle which must be visible to the public does not mean they may make a similar intrusion into a container within the vehicle which is "a repository of personal effects." (*United States v. Chadwick* (1977) 433 U.S. 1, 13.) That is precisely what a purse is. (*People v. Baker* (2008) 164 Cal.App.4th 1152, 1159 ["a purse has been recognized as an inherently private repository for personal items"]; see also *Wyoming v. Houghton* (1999) 526 U.S. 295, 308 [conc. opn. of Breyer, J.].)

The *Arturo D.* majority conceded that a search of the area near the VIN was not the same as a search for identification; however, it concluded that the same policy considerations which justified the search in *Class* also justified a "limited warrantless search" for identification. (*In re Arturo D., supra,* 27 Cal.4th at p. 73.) Those considerations included the importance of the VIN regulatory system, the reduced expectation of privacy inside a vehicle, officer safety concerns, and the "limited nature of the search undertaken." (*Id.* at p. 72; *New York v. Class, supra,* 475 U.S. at pp. 113-115, 118.)

The Supreme Court's 2009 decision in *Gant* forecloses any argument that a warrantless search for documentation is permissible

under *Class*. After all, a central concern in *Gant* was the considerable privacy expectation which a motorist enjoys in her car. (*Arizona v. Gant, supra,* 556 U.S. at p. 345.) The reason *Gant* found fault with *Belton* was that it subjected those guilty of mere traffic infractions to intrusive searches of not only the passenger area of their vehicles, "but every purse, briefcase, or other container within that space." (*Gant,* at p. 345.) These are precisely the types of places where an officer would logically look for a driver's license. (See *In re Arturo D., supra,* 27 Cal.4th at p. 90 [conc. & dis. opn. of Werdegar, J.].) They are also precisely the types of places in which a driver's reasonable expectation of privacy is at its highest. (*United States v. Welch* (9th Cir. 1993) 4 F.3d 761, 764 ["a purse is a type of container in which a person possesses the highest expectations of privacy"].)

In finding that the identification search doctrine survives *Gant*, the Court of Appeal relied largely on *New York v. Class, supra,* 475 U.S. 106 – the same decision on which *Arturo D.* relied when it created the doctrine in the first place. (Decision, pp. 7, 14-15.) As previously discussed, *Class* was a limited holding which cannot be read to approve suspicionless searches inside private areas of a vehicle.

Nor did *Gant* cite *Class* "with approval" - as the Court of Appeal stated in its decision. (Decision, p. 15.) *Gant* mentioned *Class* only in passing - for the unremarkable proposition that "a motorist's privacy interest in his vehicle is less substantial than in his home." (*Arizona v. Gant, supra,* 556 U.S. at p. 345.) Yet, in the very same sentence, the high Court emphasized that a motorist still enjoys significant privacy expectations in his vehicle, and that expansive vehicle searches jeopardize these privacy interests. (*Ibid.*) The Court did not remotely suggest that it read *Class* to create or permit an entire new category of warrantless vehicle searches.

No matter what nomenclature a court attaches to it, a search for documentation inside a vehicle is still a vehicle search. "[T]he subjective intent of a police officer is irrelevant in evaluating the legality of a search or seizure." (*People v. Woods* (1999) 21 Cal.4th 668, 678-679; see also *Whren v. United States* (1996) 517 U.S. 806, 812-813.) A search inside a vehicle objectively constitutes a vehicle search regardless whether the officer hopes to find drugs or only a driver's license.

Since the Supreme Court's decision in *Gant*, at least four non-California tribunals have recognized that a suspicionless search inside a vehicle cannot be justified under the Fourth Amendment simply by relabeling it a search for documentation which the driver failed to provide. (*Newell v. County of San Diego* (S.D. Cal. 2014) 2014 U.S. Dist. LEXIS 72735, at *21-22; *Torrez v. Commonwealth* (Ky.Ct.App. 2011) 2011 Ky.App.Unpub.LEXIS 303, at *9-10; *Crock v. City/Town* (W.D.Pa. 2010) 2010 U.S.Dist.LEXIS 136442, at *25; *State v. Rider* (Ariz.Ct.App. 2008) 2008 Ariz.App.Unpub.LEXIS 86, at *9.)[2] As the Kentucky court stated in *Torrez*, "Allowing [the police] to use the justification of searching for Torrez's identification would lend to precisely the type of police entitlement the *Gant* court sought to dissuade." (*Torres*, at *9.)

If respondent was under arrest for the crime of driving without a license, then the search of her vehicle was subject to the requirements of *Arizona v. Gant, supra*, 556 U.S. 332. Neither the trial court nor Court of Appeal found that the search of respondent's purse met these requirements. Accordingly, the search violated the Fourth Amendment.

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[2] California Rules of Court, rule 8.1115 prohibits citations to unpublished California cases. However, the rule does not apply to unpublished non-California cases. (See *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077.)

C. If respondent was only detained, then the search of her purse constituted an unlawful pre-arrest search under *Knowles v. Iowa*.

Although the Court of Appeal found that the documentation search doctrine survives *Gant*, it also found *Gant* inapplicable because respondent was not yet under arrest. (Decision, p. 15.) Even if that is true - which respondent does not concede - the search was still illegal.

In *Knowles v. Iowa, supra*, 525 U.S. at p. 114, the Supreme Court held that the Fourth Amendment prohibits a "full search" of a driver's vehicle during a traffic stop. In so holding, the Court rejected the government's invitation to create a "search incident to citation" rule. (*Knowles*, at pp. 118-119.) Without such a rule, the government argued that drivers could hide or destroy their identification or registration during the traffic stop. (*Id.* at p. 118.) The Court found that such concerns could not justify suspicionless pre-arrest searches of all drivers. Rather, the remedy for failing to produce a satisfactory identification was to arrest the driver. (*Ibid.*)

Arturo D. distinguished *Knowles* on the ground that it prohibited only "full-scale warrantless search[es] for contraband *following* the issuance of a traffic citation," as opposed to more limited searches for identification documents "*prior* to issuing a traffic citation." (*In re*

Arturo D., supra, 27 Cal.4th at pp. 75-76, original emphasis.) In her dissenting opinion, Justice Kennard took issue with the majority's logic - pointing out that there was nothing limited about the searches which took place in that case. (*Id.* at p. 96 [dis. opn. of Kennard, J.].) Those searches extended to the glove compartment, the area underneath the passenger seat, and the areas behind and underneath the driver seat. (*Id.* at pp. 96-97 [dis. opn. of Kennard, J.].)

A search which may extend to all of these areas, and the personal effects within those areas, is effectively a search of the vehicle's entire passenger compartment. That is precisely the area which *Gant* said may no longer be subject to a suspicionless search. (*Arizona v. Gant, supra,* 556 U.S. at p. 343.) The search in *Gant* occurred incident to the driver's arrest, whereas the ones in *Arturo D.* occurred before any arrest had been made. (*In re Arturo D., supra,* 27 Cal.4th at pp. 65-67.) But, if anything, *Gant*'s policies should apply with even greater force in a pre-arrest setting. It would make little sense if a search that was prohibited even after the driver's arrest could nonetheless be carried out before her arrest, when no probable cause existed.

This Court's recent decision in *People v. Macabeo* (Dec. 5, 2016) 1 Cal.5th 1206, lends further support to Justice Kennard's dissenting position in *Arturo D.* In *Macabeo*, police stopped a bicyclist for running a stop sign. (*Macabeo*, at pp. 1210-1211.) During the ensuing detention, the officers did not issue a citation and made no mention of the traffic infraction. (*Id.* at p. 1211, 1224.) They did, however, remove a cellular phone from the suspect's pocket and search it – turning up images of underage girls. (*Id.* at pp. 1211-1212.)

At the time of the search, this Court's precedent specifically allowed the police to conduct warrantless searches of a cellular phone's data as an incident to a lawful arrest. (*People v. Macabeo, supra*, 1 Cal.5th at pp. 1210, 1212, citing *People v. Diaz* (2011) 51 Cal.4th 84, 88.) Some time later, the United States Supreme Court overruled *Diaz* in *Riley v. California, supra*, 134 S.Ct. at p. 2495. The issue in *Macabeo* was whether the evidence found on the phone was admissible under the good faith exception to the exclusionary rule. (*Macabeo*, at p. 1210; see generally *Davis v. United States, supra*, 564 U.S. at p. 232 [exclusionary rule does not apply where search is conducted in good faith "reliance on binding appellate precedent" that is later overruled].)

Relying on *Knowles*, this Court found that an officer who neither makes an arrest, nor intends to do so, has no good faith basis for believing he may conduct a search incident to arrest. (*People v. Macabeo*, *supra*, 1 Cal.5th at pp. 1216-1219, 1224.) If there was no permissible basis for conducting a search incident to arrest, there was no permissible basis for searching the contents of the suspect's phone under *Diaz*. (*Macabeo*, at pp. 1223-1224.)

The decision in *Macabeo* badly undercuts the central premise of *Arturo D.*: that *Knowles* prohibited only "full-scale" vehicle searches after a traffic citation has been issued. (*In re Arturo* D., *supra*, 27 Cal.4th at pp. 75-76.) *Macabeo* recognized that it makes no constitutional difference whether the search occurred before or after the citation, or whether it involved an extensive search or a more targeted one. Rather, the key is that there has been no arrest. With neither an arrest nor any particularized suspicion, there is no authority to search - regardless whether the suspect is on a bicycle or in a car, and regardless whether the officer is looking for drugs or an identification card. As stated earlier, the Fourth Amendment rules do not change based on the

officer's subjective intentions. (*Whren v. United States, supra*, 517 U.S. at pp. 812-813.)

If the Court of Appeal was correct in finding that respondent was not yet under arrest when police looked through her purse, then that search constituted an illegal pre-arrest search under *Knowles* and *Macabeo*. This Court should, therefore, reverse the Court of Appeal's decision.

D. Where a driver fails to produce a license after a traffic stop, the officer must use less invasive means of ascertaining the driver's identity before conducting a warrantless search inside her vehicle.

Appellant will no doubt ask this Court to reaffirm the documentation search doctrine on the ground that an officer cannot issue a traffic citation unless he first "ascertain[s] the true identity of the driver." (*In re Arturo D., supra*, 27 Cal.4th at p. 67; *Ingle v. Superior Court* (1982) 129 Cal.App.3d 188, 194.) While respondent acknowledges this legitimate policy objective, it does not follow that any time a driver fails to produce a license, the Fourth Amendment allows the police to rummage through her vehicle and personal effects to find it. There are other, less invasive methods of trying to find out a driver's name.

The most obvious starting point would be for the officer to simply ask the driver her name. Officer Moe either failed to take this step at all, or did take it but ignored respondent's answer. (RT 42-43.) At the evidentiary hearing, he explained that he would never rely on a person's word, "[b]ecause in the job that I'm in, 90 percent of the time, people lie to me." (RT 43.)

Besides being an obvious exaggeration, Officer Moe's presumption of criminality represents the very antithesis of what the Fourth Amendment demands. "[T]he constitutional proscription against unreasonable searches and seizures, and the judicial rules promulgated in support thereof, are designed to protect the innocent citizen, not the criminal." (*People v. Lara* (1980) 108 Cal.App.3d 237, 241.) "When an officer literally has no idea whether a presumptively law-abiding citizen has violated the law, the Fourth Amendment clearly commands that government let the individual be." (*McCurdy v. Montgomery County* (6th Cir. 2001) 240 F.3d 512, 519.)

When Officer Moe approached respondent and asked if she had a driver's license, he did not even have probable cause to believe she had committed a traffic infraction (See RT 32, 37) - let alone a more

serious crime. He acknowledged that he observed no unusual or erratic driving when respondent pulled up in her vehicle. (RT 32, 37.) He also detected no odor of alcohol and saw no obvious signs of intoxication as he approached her. (RT 40.) Respondent was, by all appearances, just an ordinary, law-abiding citizen exiting her car and going about her business. Yet, Officer Moe proceeded from the assumption that, if asked her name, respondent would commit the criminal act of lying to a police officer. (Veh. Code, § 31.)

Had Officer Moe asked respondent for her name, it is not as though he lacked the means to verify her answer. Indeed, the reason he found his way to respondent's house in the first place is because he had run her license plate earlier in the day. (RT 28-31.) If she was the registered owner of the vehicle (which is unclear from the record), then Officer Moe would have already known her name – and would have known if she was lying to him. Even if she was not the car's registered owner, Officer Moe could have checked her stated name and date of birth against Department of Motor Vehicle records – as happened in *Gant*. (*Arizona v. Gant, supra,* 556 U.S. at pp. 335-336.)

Yet another option would have been to ask respondent to go to the car and retrieve her identification card, which she had already told Officer Moe that she had. (RT 39-40.) To be sure, there might be situations in which officer safety concerns would weigh against this course of action. (See, e.g., *People v. Hart* (1999) 74 Cal.App.4th 479, 489.) But a traffic stop of a 57-year old woman, who stands no more than 5 feet, 4 inches tall and weighs between 130 and 145 pounds (CT 1-2), is not one of them. (See *People v. Faddler* (1982) 132 Cal.App.3d 607, 610 ["In the ordinary situation where the safety of the officer or the public is not endangered thereby, a driver may himself retrieve and present his license for examination by an investigating police officer"].)

If Officer Moe was still unable to learn respondent's true identity, despite these less intrusive efforts to do so, he ultimately had the authority to arrest her for failing to produce a valid license upon an officer's request. (*People v. Redd* (2010) 48 Cal.4th 691, 719; see also *Knowles v. Iowa, supra*, 525 U.S. at p. 118.) Once at the station, he could have obtained respondent's fingerprints and checked to see if they matched any other prints in the police database.

Simply put, if Officer Moe wanted to learn the name of this presumptively law-abiding citizen, he had several reasonable methods at his disposal for doing so. Moe chose none of these methods, but instead conducted the entire encounter in the most authoritarian way possible.

Though it was clear from the outset that respondent wanted nothing to do with him, Moe approached her as soon as she exited her car and, by his own admission, "didn't give her a chance to go towards anywhere." (RT 38.) Without saying hello or engaging in casual conversation, Moe then pressed respondent as to whether she had a driver's license. (RT 33.) When she replied that she had only an identification card, he did not offer her an opportunity to go get it. Instead, he immediately placed this diminutive 57-year old woman in a control hold and handcuffs for the infraction of driving without a license - an offense so trivial that the charge must be dismissed if the driver produces a valid license in court. (RT 33-34; Veh. Code, § 12951, subd. (a).) Afterward, Moe and his fellow officers retrieved and searched the single most private article in respondent's entire vehicle. (RT 34-35.)

One of the vices with the now-discarded *Belton* regime was that it created an incentive for police to "make custodial arrests which they otherwise would not make," in order to gain authority to search the vehicle's passenger area. (*Arizona v. Gant, supra,* 556 U.S. at p. 345, fn. 5.) The documentation search doctrine poses similar risks in that it gives police a motive to choose the most overbearing course even when a less invasive one would likely do just fine. The facts of this case vividly illustrate this phenomenon. Had Officer Moe just asked respondent her name or directed her to retrieve her identification from the car, he would likely never have had grounds to search inside her car. To prevent such a scenario, Moe used her admission of a petty infraction as a pretense to handcuff her and conduct a search which the law otherwise prohibited.

After *Gant*, *Knowles*, and *Macabeo*, the law demands that the police use other, less intrusive measures to learn a driver's identity before searching inside the vehicle. Because Officer Moe failed to do so, the search of respondent's purse violated the Fourth Amendment.

E. Even if documentation searches remain permissible, the search in this case did not constitute a valid search for identification.

Even if *Arturo D.* does survive cases like *Gant* and *Macabeo*, the search in this case did not meet the requirements of *Arturo D.*

The documentation search doctrine is a "narrow" one (*In re Arturo D., supra*, 27 Cal.4th at p. 75), which serves to effectuate the rule that a "driver of a motor vehicle" must comply with a police officer's request for identification or registration. (Veh. Code, §§ 4462, subd. (a), 12951, subd. (b); see *People v. Webster, supra*, 54 Cal.3d at p. 430.) The rationale behind the doctrine ceases to exist in situations where the citizen has no legal obligation to provide identification in the first place – like when she is simply walking down the street.

Likewise, the identification search doctrine presupposes the existence of a valid traffic stop. The Fourth Amendment prohibits the police from stopping a car just to check the driver's license or registration. (*Delaware v. Prouse* (1979) 440 U.S. 648, 663.) It follows that, if the police do stop a car solely for this improper purpose, they may not search that car for identification if the driver fails to provide it. *Arturo D.* made clear that the authority to search the vehicle for a driver's license arises only after a valid traffic stop – that is, "when a

driver . . . has been detained for citation for a Vehicle Code infraction," and fails to provide documentation upon the officer's request. (*In re Arturo D., supra*, 27 Cal.4th at pp. 64-65.)

In this case, Officer Moe did not observe any traffic infraction and respondent had already exited her vehicle when the officer approached her and asked for a driver's license. (RT 33, 37.) Therefore, the incident was not a traffic stop but a consensual encounter - as the trial court found in its ruling.[3] (CT 40.) The rationale of *Arturo D.* has no application to a consensual encounter, since the officer has no reason to believe that he will be issuing a traffic citation and, thus, no need to obtain the citizen's identification. There is, of course, nothing to stop a police officer from approaching a citizen on the street and asking for identification. (*Florida v. Bostick* (1991) 501 U.S. 429, 434-435.) But, if the citizen refuses or does not have a license to produce, the prerequisites for an *Arturo D.* search do not exist since there has been no traffic stop.

The search was also unlawful under *Arturo D.* for a second reason: because respondent did not fail to produce "personal

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[3] In the trial court and Court of Appeal, respondent argued that the encounter was an illegal detention. (RT 45-46; see RB, Argument (I)(C), pp. 15-19.) She is no longer pursuing that argument.

identification documentation." (*In re Arturo D., supra*, 27 Cal.4th at pp. 64-65.) Officer Moe did not ask respondent for identification; he asked "if she had a driver's license." (RT 33.) That question called for a yes or no answer, which is exactly what respondent provided. (RT 33-34, 38.)

Far from refusing to provide identification, respondent actually volunteered that she had it. On cross-examination, Officer Moe clarified that she volunteered this information at the same time that she indicated she did not have a license. (RT 39-40.) Since respondent did not refuse to provide identification, Officer Moe lacked the authority to conduct a search under *Arturo D.* (*In re Arturo D., supra*, 27 Cal.4th at pp. 64-65; see *In re Lisa G.* (2004) 125 Cal.App.4th 801, 808 [search for identification unlawful because suspect never refused to provide it].)

In short, Officer Moe did not observe any offense and was not conducting a traffic stop. Respondent answered the only question presented to her and stated that she had identification – though Officer Moe had never asked for it. Under such circumstances, Moe had no right to search respondent's vehicle for identification, even under *Arturo D.*

F. The good faith exception does not apply.

Respondent anticipates that appellant may cite the good faith exception to the exclusionary rule as a ground for admitting the drug evidence. As mentioned previously, the good faith exception applies where the officer conducts the search in "reliance on binding appellate precedent" that is later overruled. (*Davis v. United States, supra,* 564 U.S. at p. 232.) In this case, the good faith exception is inapplicable for multiple reasons.

1. The government has forfeited the right to rely on the good faith exception.

As an initial matter, the good faith exception is inapplicable because the government has forfeited the right to rely on it. (*Robey v. Superior Court, supra,* 56 Cal.4th at p. 1240.)

In their opposition to respondent's motion to suppress evidence, the government argued: (1) that Officer Moe lawfully detained respondent based on reasonable suspicion (CT 18-20); and (2) that the search of respondent's purse was a lawful search for identification. (CT 21-22.) The prosecutor made these same arguments at the evidentiary hearing. (RT 44-45.) Even after the trial court found *Gant* controlling (RB, pp. 40-43), the prosecution still failed to raise the good faith

exception on appeal. Instead, they again argued that the search of respondent's purse was a proper search for identification under *Arturo D.* (AOB, pp. 9-13.) At no point did the government contend that the exclusionary rule should not apply due to Officer Moe's good faith reliance on *Arturo D.* and similar cases.

An "appellate court[] should not consider a Fourth Amendment theory for the first time on appeal when the People's new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence." (*Robey v. Superior Court, supra,* 56 Cal.4th at p. 1242, internal quotations omitted.) Likewise, the forfeiture doctrine should bar a prosecutor's new theory on appeal when "the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition." (*Ibid.*)

The record at the evidentiary hearing does not support application of the good faith exception. Officer Moe did testify that he went through respondent's purse in search of identification. (RT 34-35.) But he did not testify about why he believed such a search was permitted. Had the prosecution raised the good faith argument at the suppression hearing, defense counsel could have explored the officer's

familiarity with cases like *Gant* and *Arturo D.* She could also have questioned the officer about the limits, if any, which he understood that *Gant* imposed on searching a suspect's vehicle for identification.

Through such cross-examination, respondent might have succeeded in showing that Officer Moe did not even know about the California case law which permitted a search for identification inside a vehicle. Alternatively, Moe might have testified that he did know about it, but also knew that these types of searches were questionable after *Gant*. Such testimony would have been inconsistent with a finding of good faith reliance on *Arturo D.* Yet, because the prosecution failed to raise the good faith argument, respondent never had an opportunity to delve into these themes at the suppression hearing. Accordingly, this Court should find that respondent has forfeited the argument.

2. The good faith exception does not apply because the documentation search doctrine was no longer good law at the time of the search.

The good faith doctrine is also inapplicable because, at the time of the search, the documentation search doctrine had already been overruled by the Supreme Court's decision in *Gant*. (See Argument (I)(B), *supra*, pp. 8-17.)

Davis v. United States, supra, 564 U.S. at p. 235, involved a vehicle search conducted under *Belton* and other binding precedent which found a "bright-line" rule permitting searches of a vehicle's passenger area. While *Davis* was pending on appeal, the Supreme Court decided *Gant,* thereby overruling, or significantly limiting, *Belton.* The high Court found the good faith exception applicable in *Davis* since the police "conduct[ed] [the] search in objectively reasonable reliance on binding judicial precedent." (*Davis,* at pp. 239-240.)

Unlike *Davis,* the search in this case occurred long after *Gant* became law. For reasons discussed in Argument (I)(B), *supra,* at pp. 8-17, the documentation search doctrine set forth in *Arturo B.* is no longer tenable after *Gant.* While *Arturo D.* arose in the pre-arrest context, and *Gant* arose in the post-arrest context, no reasonably trained police officer could believe that his right to conduct a vehicle search is greater before arrest than afterwards. Besides, it is not at all clear that the search here was pre-arrest.

Respondent appreciates that Officer Moe was not an attorney and that even reasonable attorneys (or, for that matter, judges) might disagree about whether *Arturo D.*'s rationale survives *Gant.* But a

murky state of the law is quite different than the bright-line rule which existed in *Davis*. A bright-line rule, set forth by the highest Court in the country, no doubt qualifies as "binding precedent" on which a well-trained officer may reasonably rely. (*Davis v. United States, supra,* 564 U.S. at pp. 240-241.)

The same cannot be said of a questionable state court precedent which has been arguably overruled by the United States Supreme Court. To apply the good faith exception in this situation would encourage police to remain ignorant about relevant changes in Fourth Amendment case law. It would also encourage them to err on the side of haste, rather than caution, when deciding how to proceed. Those are exactly the types of practices which the exclusionary rule seeks to deter. (*Davis v. United States, supra,* 564 U.S. at p. 240.) The good faith exception exists to absolve the conscientious officer, not to reward those who are careless or cavalier.

Ultimately, it is up to this Court to say whether *Arturo D.* remains good law. Should this Court decide that *Gant* overruled *Arturo D.*, then the latter case did not, in fact, constitute "binding precedent" on July 4, 2014. The good faith exception is, therefore inapplicable.

3. The good faith exception does not apply because the search was illegal even under *Arturo D.*

Finally, even if a reasonable officer could rely in good faith on *Arturo D.*, the search of respondent's purse was illegal under that precedent – for reasons set forth in Argument (I)(E), *supra*, at pp. 28-30. Accordingly, the good faith exception does not apply.

CONCLUSION

For the reasons expressed above, this Court should reverse the Court of Appeal's decision and dismiss the drug charges against respondent.

Dated: May 4, 2017

Respectfully submitted,

Solomon Wollack
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CERTIFICATE OF COUNSEL

I certify that this brief contains 7,001 words.

Dated: May 4, 2017

SOLOMON WOLLACK
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PROOF OF SERVICE

I, SOLOMON WOLLACK, declare that I am over the age of 18, an active member of the State Bar of California, and not a party to this action. My business address is P.O. Box 23933, Pleasant Hill, California 94523. On the date shown below, I served the within:

OPENING BRIEF ON THE MERITS

to the following parties hereinafter named by:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 4th day of May, 2017, at Pleasant Hill, California.

Solomon Wollack