# In the Supreme Court of the State of California

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff and Respondent,<br>**v.**<br>**PAUL MACABEO,**<br>Defendant and Appellant. | Case No. S221852 |

SUPREME COURT
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Second Appellate District, Division Five, Case No. B248316
Los Angeles County Superior Court, Case No. YA084963
The Honorable Mark S. Arnold, Judge

## ANSWER BRIEF ON THE MERITS

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**CONSTITUTIONAL PROVISIONS**

## ISSUES PRESENTED

Police officers on routine patrol observed appellant commit a traffic infraction. The officers stopped appellant and, prior to issuing any citation, searched him and the cell phone inside his pocket, and retrieved images of child pornography from the cell phone. The officers arrested appellant for possessing child pornography, but not for the traffic infraction. The questions before this Court are:

(1) May police officers conduct a search incident to arrest for a minor traffic infraction, as long as a custodial arrest follows, even solely for an unrelated, more serious crime?

(2) Does *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 189 L.Ed.2d 430], require the exclusion of the evidence of the child pornography as an unlawful search incident to arrest? Or does the search of the cell phone fall within the good faith exception to the exclusionary rule (pursuant to *Davis v. United States* (2011) 564 U.S. __ [131 S.Ct. 2419, 180 L.Ed.2d 285]) in light of this Court's controlling decision in *People v. Diaz* (2011) 51 Cal.4th 84, which upheld the warrantless search of a cell phone incident to arrest?

## STATEMENT OF THE CASE

On July 19, 2012, City of Torrance Police Detective Craig Hayes was driving in a patrol car with his partner, Officer Raymond, in the area of Gramercy Place and Artesia Boulevard in Torrance. (1CT 50-52, 64.)[1] Around 1:40 a.m., Detective Hayes saw appellant riding a bicycle directly

[1] Except as otherwise indicated, all further references to the clerk's transcript and the reporter's transcript are to the record in Court of Appeal case number B245511, the initial appeal filed by appellant. On June 17, 2013, the Court of Appeal granted appellant's motion to augment the record in his second appeal (case number B248316—the lower court proceedings from which this case arises) to include the record in his initial appeal.

in front of the patrol car. (1CT 51-52.) There was a stop sign at the intersection of Gramercy Place and Artesia Boulevard, which appellant "rolled right through without slowing down or making a full stop," in violation of Vehicle Code section 22450.[2] (1CT 52-53, 67.)

The officers activated their overhead lights, and appellant pulled over to the curb. (1CT 53, 67-68.) Detective Hayes approached appellant, intending to give him either a citation or a warning. (1CT 53, 68, 80-81.) He asked appellant where he was coming from, and appellant gave an address. (1CT 53, 113.) Detective Hayes then asked appellant if he was on parole or probation, and appellant said that he was "on probation" for possession of methamphetamine. (1CT 54-55, 113-114.) When Detective Hayes asked appellant when he would be discharged from probation, appellant initially responded, "I've already dismissed my case," but later said he was "not sure" when he would be discharged from probation and that he had been on probation for "a couple of years." (1CT 114.) Appellant also said that he did not have a probation officer. (1CT 55, 73-74, 114.)

Detective Hayes asked appellant to walk over to him, and appellant complied. Appellant was fidgety and nervous. Detective Hayes told appellant to keep his hands away from his waist and pockets and asked if he had anything illegal in his possession, such as a weapon or a needle. Appellant said he did not. (1CT 59, 68-69, 71, 114-115.) For his own safety, Detective Hayes patted appellant down. (1CT 78.) He then asked appellant for consent to remove things from appellant's pockets, and appellant gave his consent. (1CT 59-60.) Detective Hayes removed a cell

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[2] Vehicle Code section 22450, subdivision (a), provides, in relevant part: "The driver of any vehicle approaching a stop sign at the entrance to, or within, an intersection shall stop at a limit line . . . ." A violation of the statute is an infraction. (See Veh. Code, § 40000.1.)

phone and a few other items from appellant's pockets and handed the items to Officer Raymond. (1CT 60-61.)

After Detective Hayes finished searching appellant's pockets, he asked appellant to sit on the curb in front of the patrol car and to cross his ankles. (1CT 61, 116.) Detective Hayes spoke to appellant for about five to ten minutes and then noticed Officer Raymond signaling to him. (1CT 61-62, 77; see 1CT 116-117.) Officer Raymond told Detective Hayes that he had found a photo folder on the phone that contained photos of girls under the age of 18 engaged in sexual activity (the possession of which violates Penal Code section 311.11, subdivision (a)). (1CT 62-63.) Detective Hayes arrested appellant. (1CT 63, 117.)

Detective Hayes subsequently confirmed that appellant was not on felony probation when he was stopped; appellant's felony probation had ended three months earlier. He also learned that appellant was on summary probation for other crimes, e.g., petty theft and driving under the influence. (1CT 86-87.)

The Los Angeles County District Attorney charged appellant with possession of matter depicting a minor engaging in sexual conduct (count 1; Pen. Code, § 311.11, subd. (a)) and possession of a smoking device (count 2; Health & Saf. Code, § 11364.1, subd. (a)(1)). (See 1CT 18.) Appellant pleaded not guilty (1CT 18) and moved to suppress, on grounds of alleged unlawful search and seizure (see Pen. Code, § 1538.5), all evidence resulting "from the initial stop, detention, and subsequent arrest," including all physical evidence seized from appellant's person. (1CT 20-26.) A hearing on the motion was held during the preliminary hearing. (See 1CT 49, 120.)

After Detective Hayes testified, the trial court observed that the search could not be justified as a probation search because, at a minimum, the officers did not know whether appellant was subject to search and

seizure conditions. (1CT 89-90.) The court then heard argument by the parties and explained its reasons for denying the suppression motion. (See 1CT 91-104.)

The trial court found that the officers could search appellant incident to arrest because appellant was subject to arrest for the traffic infraction and the fact that the officers did not arrest appellant for the infraction was immaterial because the officers' subjective state of mind was irrelevant to the constitutional analysis. (1CT 100-102.) The court reasoned as follows:

> . . . I'm going to cite some cases. The first case is *United States versus Scott* [*sic*], which is 436 U.S. 128. 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 *Moore v. Virginia* [*sic*], 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 could also have been subjected to a search incident to a lawful arrest.

(1CT 100-102.)

The trial court went on to conclude that, as a part of a search incident to a lawful arrest, the cell phone was properly searched under *People v. Diaz, supra,* 51 Cal.4th 84:

> 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? [¶] . . . Well, the *Diaz* case is from last year, 2011. [¶] . . . [¶] . . . I think that [the search of the cell phone] could be incident to arrest. It could be thoroughly searched. Just like his pockets could be thoroughly gone through. [¶] The police can seize his 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 Amendments [*sic*] rights were violated.

(1CT 103-104.)

Appellant later moved to set aside the information, pursuant to Penal Code section 995, and also renewed his motion to suppress. The trial court denied both motions. (B248316 CT 35-52, 55; RT B1-B2.)[3] Appellant then entered a no-contest plea to possession of matter depicting a minor engaging in sexual conduct, and the court placed him on formal probation for five years subject to various terms and conditions. The court, however, stayed most of the terms and conditions pending the result of appellant's appeal. (B248316 CT 54-57; RT B3-B11.)

In a published opinion, the Court of Appeal affirmed the denial of the suppression motion. The court held that appellant was properly subject to arrest for the Vehicle Code violation of failing to stop at the stop sign in light of *Atwater v. City of Lago Vista* (2001) 532 U.S. 318 [121 S.Ct. 1536, 149 L.Ed.2d 549]. (*People v. Macabeo* (2014) 229 Cal.App.4th 486, 491-494.) The court reasoned that, because appellant was subject to arrest for the Vehicle Code violation, he could lawfully be searched incident to arrest. (*Id.* at p. 493.) And although the warrantless search of appellant's cell phone incident to his arrest turned out to be unlawful under *Riley v.*

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[3] Following the denial of his suppression motion, appellant had initially entered a no-contest plea, from which he appealed, but that appeal was dismissed and appellant returned to the superior court to withdraw the plea and renew his suppression motion. (1CT 122-123, 125, 127-130; 1RT 11; B248316 CT 18, 23, 25-34; RT A1.)

*California, supra,* 134 S.Ct. 2473, the pre-*Riley* search of appellant's cell phone fell within the good faith exception to the exclusionary rule (see *Davis v. United States, supra,* 131 S.Ct. 2419) and therefore suppression of the evidence obtained from the search of the cell phone (i.e., the child pornography) was unwarranted. (*People v. Macabeo, supra,* 229 Cal.App.4th at pp. 494-497.)

This Court granted review.

## SUMMARY OF ARGUMENT

This case is controlled by a combination of principles that have been firmly established by the United States Supreme Court.

Three high court decisions govern the constitutionality of appellant's arrest and search: *Virginia v. Moore* (2008) 553 U.S. 164 [128 S.Ct. 1598, 170 L.Ed.2d 559]; *Rawlings v. Kentucky* (1980) 448 U.S. 98 [100 S.Ct. 2556, 65 L.Ed.2d 633]; and *Devenpeck v. Alford* (2004) 543 U.S. 146 [125 S.Ct. 588, 160 L.Ed.2d 537]. Under these decisions, the constitutionality of an arrest or search incident to arrest depends on the existence of probable cause to arrest.

*Moore* makes plain—as this Court had already rightly recognized in *People v. McKay* (2002) 27 Cal.4th 601—that a custodial arrest is valid under the Fourth Amendment so long as there is probable cause to believe that an individual has committed a criminal offense. It does not matter to the constitutional analysis if the probable cause is for an infraction; it does not matter to the constitutional analysis if the arrest violates state statutory law. What matters is probable cause to believe that an offense has occurred. If there is probable cause, an officer may constitutionally arrest the likely offender.

*Rawlings*, too, hinges on a finding of probable cause. *Rawlings* holds that, as long as an officer has probable cause to arrest before the search, and the search and the arrest are substantially contemporaneous, a

search incident to arrest may take place *before* the formal pronouncement of arrest. Stated more simply, the critical point of *Rawlings* is that probable cause to arrest must exist before the search.

Finally, *Devenpeck* explains what is *not* relevant to the existence of probable cause: the arresting officer's state of mind. In other words, the officer's subjective reason for making an arrest does not control as long as the known facts provide probable cause to arrest for the commission of a criminal offense.

These precedents confirm the constitutionality of the search and arrest of appellant. Police officers in this case had probable cause to believe that appellant committed a traffic infraction. Accordingly, under *Moore*, they were constitutionally permitted to arrest appellant for that offense. The search of appellant that followed was valid under *Rawlings*, even though the officers had not yet effected the arrest at the time of the search, because they had probable cause to arrest appellant for the traffic infraction at the time of the search. The fact that the officers ultimately arrested appellant for possession of child pornography is irrelevant to the Fourth Amendment analysis under *Devenpeck*. Although the officers arrested appellant for the more serious offense (possession of child pornography) and exercised their discretion not to pursue the infraction any further after they discovered the more serious offense, the circumstances, viewed objectively, showed that the officers had probable cause to arrest appellant for the traffic infraction at the time of the search. Nothing more was required.

The question whether the evidence obtained as a result of the search of the cell phone is subject to exclusion is also governed by United States Supreme Court authority. *Davis v. United States, supra,* 131 S.Ct. 2419, confirms a long line of precedent establishing the good faith exception to the exclusionary rule. After the search in this case, *Riley v. California,*

*supra,* 134 S.Ct. 2473, held that the warrantless search of digital data in cell phones incident to arrest is unlawful unless justified by some other exception to the warrant requirement, such as exigent circumstances. But a pre-*Riley* search incident to arrest of a cell phone in California falls squarely within the good faith exception to the exclusionary rule under *Davis* because, at the time of the search, binding precedent from this Court, *People v. Diaz, supra,* 51 Cal.4th 84, authorized warrantless searches of cell phones incident to arrest. Because the officers here reasonably relied on this Court's then-controlling authority, and their conduct was not culpable, the child pornography found in appellant's phone was not subject to exclusion.

## ARGUMENT

### I. APPELLANT WAS LAWFULLY SEARCHED INCIDENT TO ARREST BECAUSE THE TRAFFIC INFRACTION PROVIDED PROBABLE CAUSE TO ARREST HIM AND THE SEARCH OF HIS PERSON WAS SUBSTANTIALLY CONTEMPORANEOUS WITH THE ARREST

The search of appellant was lawful as a search incident to arrest. First, the officers were constitutionally permitted to arrest appellant for the traffic infraction because they had probable cause to believe that he had committed that offense. Second, although the search incident to appellant's arrest occurred before his actual arrest, probable cause to arrest pre-existed the search, which was substantially contemporaneous with the arrest; therefore the order in which the search and arrest were performed is not constitutionally significant. Third, it is irrelevant that the officers' subjective reason for arresting appellant (possession of child pornography) was not the same one that justified the officers' initial search (the traffic infraction) because an officer's subjective intent is not part of the Fourth Amendment calculus. Fourth, upholding the search in this case will not increase the number of searches for minor offenses and will instead allow

officers to avoid escalation of police-citizen encounters. Finally, the lawfulness of appellant's search and arrest is consistent with the dual rationale of the search-incident-to-arrest exception as applied to the search of a person in *United States v. Robinson* (1973) 414 U.S. 218 [94 S.Ct. 467, 38 L.Ed.2d 427].

### A. The police officers were constitutionally permitted to arrest appellant because they had probable cause to believe that he had committed a traffic infraction

First, the Constitution permitted the officers to arrest appellant for the traffic infraction, based on probable cause. In *Atwater v. City of Lago Vista, supra,* 532 U.S. 318, the high court considered the question of "whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine."[4] (*Id.* at p. 323.) The Court held that all that is needed for 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.)

In reaching that holding, the Court recognized the need for a bright-line constitutional standard: the purpose in "implementing [the Fourth Amendment's] command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." (*Atwater v. City of Lago Vista, supra,* 532 U.S. at p. 347; *ibid.*

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[4] Atwater was arrested and then jailed for failing to wear her own seat belt and for failing to fasten her children's seat belts, a misdemeanor punishable in Texas by a fine of not less than $25 and not more than $50. (*Atwater v. City of Lago Vista, supra,* 532 U.S. at p. 323.) Texas, by statute, authorized an officer to either conduct a custodial arrest for a seat-belt violation or issue a citation in lieu of arrest. (*Ibid.*)

[citing *New York v. Belton* (1981) 453 U.S. 454, 458 [101 S.Ct. 2860, 69 L.Ed.2d 768] for the proposition that "Fourth Amendment rules ought to be expressed in terms that are readily applicable by the police . . . and not qualified by all sorts of ifs, ands, and buts" (internal quotation marks & fn. omitted)]; see *Atwater v. City of Lago Vista, supra,* 532 U.S. at p. 366 (dis. opn. of O'Connor, J.) [describing the rule in *Atwater* as a "bright-line rule focused on probable cause"].) The Court also relied in its holding on "a dearth of horribles demanding redress," noting, "[w]e are sure that . . . the country is not confronting anything like an epidemic of unnecessary minor-offense arrests." (*Atwater v. City of Lago Vista, supra,* 532 U.S. at p. 353, fns. omitted.)

One year later, this Court had the opportunity to apply *Atwater* in a situation where the arrest potentially violated state law. In *People v. McKay, supra,* 27 Cal.4th 601, this Court preserved *Atwater*'s bright-line rule focusing on probable cause. In *McKay*, a deputy sheriff saw McKay riding a bicycle in the wrong direction on a residential street, a violation of Vehicle Code section 21650.1, which is an infraction punishable by a fine of not more than $100. (*Id.* at p. 606.) The deputy stopped McKay, intending to cite him for the Vehicle Code violation. (*Ibid.*) But when the deputy asked McKay for identification, McKay said that he did not have any identification and, instead, told the deputy his name and birth date. (*Ibid.*) The deputy arrested McKay for the Vehicle Code violation, i.e., riding a bicycle in the wrong direction on a residential street. (*Ibid.*) The deputy made the arrest pursuant to Vehicle Code section 40302, subdivision (a), based on McKay's "failure 'to present his driver's license or other satisfactory evidence of his identity for examination.'" (*Ibid.*, quoting Veh. Code, § 40302, subd. (a).) During the search incident to the arrest for the bicycle violation, the deputy found what he believed to be

methamphetamine in McKay's sock. (*People v. McKay, supra,* 27 Cal.4th at p. 606.)

McKay was charged with possession of methamphetamine. (*People v. McKay, supra,* 27 Cal.4th at pp. 605-606.) He moved to suppress that evidence, but his motion was denied and he was convicted of the charge. (*Id.* at p. 606.) On appeal, McKay first argued that a custodial arrest for a fine-only offense, such as his traffic infraction, violated the Fourth Amendment and, second, that his custodial arrest violated the Fourth Amendment because of the deputy's failure to comply with Vehicle Code section 40302, subdivision (a), the statute governing the arrest procedure for the infraction. (*Id.* at p. 605.)

This Court rejected the first of those arguments in a single paragraph, citing *Atwater* and its holding that custodial arrests for fine-only offenses do not violate the Fourth Amendment. (*People v. McKay, supra,* 27 Cal.4th at p. 607.) As for McKay's second argument—which had not been an issue in *Atwater*—this Court found that "compliance with state arrest procedures is not a component of the federal constitutional inquiry." (*Id.* at p. 605.) The Court reviewed a series of United States Supreme Court cases and explained: "[W]here state officials have been derelict under state law, . . . the illegality of such conduct 'under the state statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. . . .' [Citation.]" (*Id.* at p. 609.) This Court noted that the United States Supreme Court had never ordered a state court to suppress evidence that had been seized consistent with the federal Constitution but in violation of some state law or local ordinance.[5] (*Id.* at p. 610.) "To the contrary," this

[5] The Court recognized, however, that violations of state arrest procedures expose peace officers and their departments to civil actions and (continued...)

Court stated, "the high court has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law." (*Ibid.*) Accordingly, this Court concluded that it need not even consider whether McKay's custodial arrest complied with Vehicle Code section 40302, subdivision (a).[6] (*Id.* at p. 611.) At bottom, the Court maintained the bright-line rule of probable cause articulated in *Atwater* and concluded that "so long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment." (*Id.* at p. 618.)

This Court's decision in *McKay* foreshadowed the United States Supreme Court's subsequent decision in *Virginia v. Moore, supra,* 553 U.S. 164. In *Moore,* two police officers conducted a traffic stop of Moore because they believed that his driver's license was suspended. (*Id.* at p. 166.) During the traffic stop, the officers confirmed that Moore's license was, in fact, suspended. (*Id.* at pp. 166-167.) The officers then arrested Moore, even though Virginia law provided that the offense was a misdemeanor subject to citation only. (*Id.* at p. 167.) A subsequent search of Moore turned up crack cocaine. (*Ibid.*) The Virginia Supreme Court found that, because the officers should have issued a citation and because

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(...continued)
may subject the officers to internal investigation, additional training, and departmental discipline. (*People v. McKay, supra,* 27 Cal.4th at pp. 618-619.)

[6] Nonetheless, the Court went on to hold that, even if compliance with state arrest procedures were a predicate to the constitutionality of McKay's arrest, McKay still would not be entitled to relief because the arrest did not violate state law, i.e., Vehicle Code section 40302, subdivision (a). (*People v. McKay, supra,* 27 Cal.4th at pp. 619-625.)

the Fourth Amendment does not permit a "search incident to citation," the search was unlawful. (*Id.* at pp. 167-168.)

The United States Supreme Court reversed the decision of the Virginia Supreme Court. (*Virginia v. Moore, supra,* 553 U.S. at p. 178.) The high court once again emphasized the "'essential interest in readily administrable rules'" and "the need for a bright-line constitutional standard." (*Id.* at p. 175.) And, the Court reasoned, "linking Fourth Amendment protections to state law would cause [those Fourth Amendment protections] to 'vary from place to place and from time to time[.]'" (*Id.* at p. 176, quoting *Whren v. United States* (1996) 517 U.S. 806, 815 [116 S.Ct. 1769, 135 L.Ed.2d 89].) Accordingly, the Court returned to the bright-line rule that focused on probable cause. (*Virginia v. Moore, supra,* 553 U.S. at pp. 174-175 ["Even if we thought that state law changed the nature of the Commonwealth's interests for purposes of the Fourth Amendment, we would adhere to the probable-cause standard."].) The Court stated that it had long recognized that, when an officer has probable cause to believe that a person has committed even a minor crime in the officer's presence, the balancing of private and public interests left no doubt that an arrest was constitutionally reasonable. (*Id.* at p. 171.) The Court concluded that the bright line does not move when a state chooses to protect privacy beyond the level the Fourth Amendment requires. (*Ibid.*)

This Court reaffirmed those principles more recently in *People v. Redd* (2010) 48 Cal.4th 691. In *Redd*, an officer learned that the registration of Redd's car was expired. (*Id.* at p. 712.) The officer arrested Redd for having an expired registration, providing a false name, and having no driver's license. (*Id.* at pp. 712-713.) As this Court noted, the officer had authority to arrest Redd under state law. (*Id.* at p. 719, citing Pen. Code, § 148.9 & Veh. Code, § 4000.) The Court, however, also cited *McKay* and *Moore* and stated: "We note that even if the arrest were not

proper *under state law*, the search of defendant incident to the arrest would not be a violation of the Fourth Amendment. [Citations.] Absent a federal constitutional violation, the exclusionary rule does not apply. [Citations.]" (*People v. Redd, supra,* 48 Cal.4th at p. 720, fn. 11, original italics.)

The foregoing precedents establish that a custodial arrest for a fine-only offense is valid under the Fourth Amendment when an officer has probable cause to believe that an individual has committed a criminal offense. Here, Detective Hayes had probable cause to believe that appellant committed a violation of Vehicle Code section 22450, i.e., failing to stop at a stop sign. Detective Hayes observed appellant "roll[] right through" a stop sign. (1CT 52.) And the trial court found Detective Hayes's testimony about his observation credible. (1CT 103.) The trial court's factual finding is entitled to deference because it is supported by substantial evidence. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597.) Accordingly, Detective Hayes was constitutionally permitted to arrest appellant for that offense.

Nor does California law provide any basis for suppression. Whether the arrest and search of appellant violated Vehicle Code section 853.5[7] (see AOB 27, fn. 16) is irrelevant to the constitutionality of the search and arrest

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[7] Penal Code section 853.5, subdivision (a), provides, in relevant part: "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, except as specified in Sections 40302, 40303, 40305, and 40305.5 of the Vehicle Code, 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 . . . 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 . . . 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."

under the Fourth Amendment. (*People v. Redd, supra,* 48 Cal.4th at p. 720, fn. 11; *People v. McKay, supra,* 27 Cal.4th at p. 618 ["it is of no moment that defendant's arrest assertedly violated the procedures set forth in [Vehicle Code] section 40302(a) since (as defendant concedes) [the deputy] had probable cause to believe defendant had violated a provision of the Vehicle Code"]; *id.* at p. 605 ["California has, in various statutes, limited the circumstances in which a peace officer may effect a custodial arrest for minor offenses. . . . [¶] We conclude, in accordance with United States Supreme Court precedent, that custodial arrests for fine-only offenses do not violate the Fourth Amendment and that compliance with state arrest procedures is not a component of the federal constitutional inquiry."]; see also *In re Lance W.* (1985) 37 Cal.3d 873, 886-887 [Proposition 8 requires California courts to follow United States Supreme Court decisions in applying the exclusionary rule].) Thus, California's statutory "cite and release" laws do not bear on the constitutionality of the arrest under the Fourth Amendment.

The recent case of *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609, 191 L.Ed.2d 492], which involved the post-citation conduct of an officer, is inapposite. (See Supp. AOB 1-3.) In *Rodriguez*, an officer issued a warning ticket to Rodriguez after the officer observed Rodriguez driving his vehicle on a highway shoulder, in violation of Nebraska law. (*Id.* at pp. 496-497.) After handing Rodriguez the ticket and returning to Rodriguez and his passenger their driver's licenses, the officer—instead of releasing Rodriguez—asked him for permission to walk his drug-detection dog around Rodriguez's car. (*Id.* at p. 497; see *ibid.* [officer later testified that, at this juncture, he had "'[taken] care of all the business'"].) Rodriguez said no. (*Ibid.*) Nonetheless, the officer walked his dog around Rodriguez's vehicle about seven or eight minutes after he gave Rodriguez the ticket. (*Ibid.*) The dog alerted to the presence of drugs

in Rodriguez's vehicle. (*Ibid.*) The United States Supreme Court found that the dog-sniff evidence was unlawfully obtained, holding that an "otherwise-completed" traffic stop could not be extended in order to conduct a dog sniff (absent reasonable suspicion). (*Id.* at pp. 498-499.)

In reaching that conclusion, the Court cited with approval two of its prior decisions—*Illinois v. Caballes* (2005) 543 U.S. 405 [125 S.Ct. 834, 160 L.Ed.2d 842] and *Arizona v. Johnson* (2009) 555 U.S. 323 [129 S.Ct. 781, 172 L.Ed.2d 694]. (See *Rodriguez v. United States, supra,* 191 L.Ed.2d at p. 499.) In *Caballes*, the Court found the use of a drug-detention dog *during* a traffic stop (i.e., *while* the driver was still lawfully seized for the traffic violation) lawful. (*Illinois v. Caballes, supra,* 543 U.S. at p. 409.) In *Johnson*, the Court held that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. [Citation.]" (*Arizona v. Johnson, supra,* 555 U.S. at p. 333.)

Unlike *Rodriguez*, this case does not involve a traffic stop that was *otherwise complete*. Here, Detective Hayes had not issued appellant a citation when he searched him. As in *Caballes*, the traffic stop was ongoing when appellant was searched. And, as in *Johnson*, Detective Hayes's inquiries did not convert the encounter into something other than a lawful seizure, nor does appellant claim that they did; in fact, the inquiries did not "measurably extend the duration of the stop," and they were arguably *related* to the justification for the traffic stop (e.g., whether appellant was on probation or parole, his arrest history) because appellant's responses informed Detective Hayes about the possible level of dangerousness of his encounter with appellant.

Likewise, *Knowles v. Iowa* (1998) 525 U.S. 113 [119 S.Ct. 484, 142 L.Ed.2d 492], another case involving the post-citation conduct of an officer,

is inapplicable. (See AOB 19.) In *Knowles*, an officer conducted a traffic stop of Knowles for speeding. (*Knowles v. Iowa*, *supra*, at p. 114.) Although it was lawful under Iowa law for the officer to arrest Knowles, the officer issued him a citation. (*Id.* at pp. 114-115.) However, instead of releasing Knowles after issuing the citation, the officer conducted a full search of Knowles's car and found a bag of marijuana and a marijuana pipe. (*Id.* at p. 114.) The officer then arrested Knowles for possession of a controlled substance. (*Ibid.*) Knowles moved to suppress the evidence, arguing that the search-incident-to-arrest exception did not apply to him because he had been issued a citation and had not been arrested. (*Ibid.*) The United States Supreme Court agreed with Knowles and "refused to extend the search incident [to] arrest exception to the warrant requirement to include situations where an officer had probable cause to arrest, but instead only issued a traffic citation. [Citation.] The issue [in *Knowles*] was whether a search was permissible based on the issuance of citation rather than a formal arrest . . . ." (*In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1239, fn. 3; see *In re Arturo D.* (2002) 27 Cal.4th 60, 75-76 ["[I]n *Knowles*—as the high court itself emphasized—the officer in that case already had issued the driver a citation . . . and *thereafter* had conducted an unrelated *full-scale* warrantless search for contraband. . . . [T]he court in *Knowles* addressed itself only to the question of allowing a full-scale warrantless search for contraband *following* the issuance of a traffic citation . . . ." (original italics)].) In contrast, this case does not involve a search incident to a citation because the search did not follow the issuance of a citation. Rather, the search was incident to an *arrest* justified by the traffic violation.

In sum, probable cause for the traffic violation supported appellant's arrest and, accordingly, Detective Hayes could search appellant incident to that arrest, consistent with the Fourth Amendment.

### B. The search of appellant was lawful because the officers had probable cause to arrest appellant for the traffic infraction before the search and the search was substantially contemporaneous with the arrest

Next, the officers could lawfully search appellant before the arrest because they had probable cause to arrest him for the traffic infraction at the time of the search, and the search was substantially contemporaneous with the arrest. It is well settled that police officers may search an individual incident to a custodial arrest. (*United States v. Robinson, supra,* 414 U.S. at p. 235.) And it is not constitutionally significant that the search precedes the formal arrest, so long as probable cause to arrest exists before the search and the arrest follows "quickly on the heels" of the search. (*Rawlings v. Kentucky, supra,* 448 U.S. at p. 111.) That is the case here.

In *Rawlings*, police officers detained Rawlings and his friends inside the home of one of the friends as other officers sought a search warrant to search the home for drugs. (*Rawlings v. Kentucky, supra,* 448 U.S. at pp. 100-101, 106.) Once the search warrant was obtained, officers searched the purse of one of Rawlings's friends and found a sizable amount of controlled substances in the purse. (*Id.* at p. 101.) Rawlings immediately claimed ownership of the drugs. (*Ibid.*) The officers searched Rawlings and found $4,500 in cash in his pocket, as well as a knife in a sheath. (*Ibid.*) The officers then arrested Rawlings. (*Ibid.*)

The United States Supreme Court stated that it had "no difficulty upholding this search [of Rawlings] as incident to [Rawlings's] formal arrest," even though the search preceded the arrest. (*Rawlings v. Kentucky, supra,* 448 U.S. at p. 111.) The Court's recognition of the applicability of the search-incident-to-arrest exception hinged on the finding of probable cause. (*Ibid.*) As the Court explained: "Once [Rawlings] admitted ownership of the sizable quantity of drugs found in [his friend's] purse, the police clearly had probable cause to place [Rawlings] under arrest." (*Ibid.*)

And because the officers had probable cause to believe that Rawlings possessed the drugs before they searched him, the officers could legally search Rawlings incident to arrest before the formal pronouncement of arrest. "Where the formal arrest followed quickly on the heels of the challenged search of [Rawlings's] person, we do not believe it particularly important that the search preceded the arrest rather than vice versa. [Citations.]"[8] (*Ibid.*, fn. omitted.)

This Court has similarly recognized that a search incident to arrest may precede the arrest where the search is "substantially contemporaneous" with the arrest. (See *People v. Terry* (1969) 70 Cal.2d 410, 429 ["When probable cause to arrest exists at the outset, a search preceding the formality of a substantially contemporaneous arrest may be incident thereto [citation] . . ."]; *People v. Ingle* (1960) 53 Cal.2d 407, 413 ["Where an arrest is lawful the search thereto is not unlawful merely because it precedes rather than follows the arrest."].)

And the California Court of Appeal has adhered to the same rule. For example, in *People v. Gomez* (2004) 117 Cal.App.4th 531, a traffic-stop case, the fact that the officers did not formally arrest Gomez until they discovered drugs in his car was irrelevant to the Fourth Amendment analysis because the officers had probable cause to arrest Gomez for both the traffic violation and drug possession at the time of the search. (*Id.* at pp. 534-536, 538-540; see *In re Lennies H., supra,* 126 Cal.App.4th at pp. 1239-1240 ["An officer with probable cause to arrest can search incident to the arrest before making the arrest. The fact that a defendant is not formally arrested until after the search does not invalidate the search if

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[8] Although appellant asserts that Rawlings was under arrest "seconds" after the search (AOB 20), there is no support for this assertion in the *Rawlings* opinion. (See *Rawlings v. Kentucky, supra,* 448 U.S. at p. 101.)

probable cause to arrest existed prior to the search and the search was substantially contemporaneous with the arrest." (citations, fn., & internal quotation marks omitted)]; *People v. Avila* (1997) 58 Cal.App.4th 1069, 1076-1077 ["it is unimportant whether a search incident to an arrest precedes the arrest or vice versa"]; *People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189 ["If [the officer] had probable cause to believe [the defendant] possessed illegal drugs, the search and seizure are justifiable as incident to a lawful arrest. It matters not that they occurred before a formal arrest."]; *People v. Fay* (1986) 184 Cal.App.3d 882, 891-892 ["A search incident to an arrest may in fact precede the arrest. . . . The crucial point is whether probable cause to arrest existed prior to the search notwithstanding 'the fact that the officer does not have the state of mind [i.e., to make an arrest] which is hypothecated by the reasons which provide the legal justification for the officer's action.' [Citations.]"]; *People v. Adams* (1985) 175 Cal.App.3d 855, 861 [search made 10 minutes before arrest was substantially contemporaneous].)

The limit to this rule is "bootstrapping": when the search *itself* provides the only probable cause for the arrest. In *Smith v. Ohio* (1990) 494 U.S. 541 [110 S.Ct. 1288, 108 L.Ed.2d 464] (per curiam), the officers had no probable cause to arrest Smith. (*Id.* at p. 542.) Yet they searched a bag that he had been carrying, found drug paraphernalia inside, and arrested him. (*Ibid.*) The Ohio Supreme Court upheld the search as a search incident to arrest. (*Id.* at pp. 542-543.) The United States Supreme Court reversed and explained: "That reasoning . . . 'justify[ing] the arrest by the search and at the same time . . . the search by the arrest,' just 'will not do.' [Citation.]" (*Id.* at p. 543.) The Court made plain that the search incident to arrest exception "does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows." (*Ibid.*; see *People v. Ingle, supra,* 53 Cal.2d at p. 413 ["The arrest is not

sought to be justified by what the search produced."].) Instead, probable cause to arrest must exist beforehand.

It did in this case. Detective Hayes and his partner had probable cause to arrest appellant for the traffic infraction. Because appellant was subject to arrest, he could be lawfully searched. (*United States v. Robinson, supra,* 414 U.S. at p. 235.) The fact that appellant was searched before he was formally arrested is irrelevant. (*Rawlings v. Kentucky, supra,* 448 U.S. at p. 111.) What is relevant is that probable cause to arrest existed before the search, and the search and arrest were substantially contemporaneous. (*Ibid.*)

Appellant asserts that, for his search to be lawful, he must have been "under arrest" or an arrest must have been "underway" when the search occurred. (AOB 16-22.) He argues that his search and arrest were unlawful under this rule because he, for example, was not told that he was under arrest, was not handcuffed, and/or was not transported to the patrol car before or during the search. (AOB 24-25.) Appellant's "under arrest or arrest underway" rule finds no support in *Rawlings* or any other United States Supreme Court jurisprudence. Appellant reads contingencies into *Rawlings* that are simply not in that opinion. *Rawlings* does not require that an individual be told that he is under arrest, be handcuffed, or be transported to the patrol car before or during the search for the rule in *Rawlings* to apply. Instead, *Rawlings* establishes that, where there is probable cause to arrest, a search can precede an arrest where the formal arrest follows "quickly on the heels of the challenged search."[9] (*Rawlings v. Kentucky, supra,* 448 U.S. at p. 111.)

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[9] Appellant also quotes the high court's decision in *Robinson*, where the Court stated: "It is the fact of the lawful arrest which establishes the authority to search." (*United States v. Robinson, supra,* 414 U.S. at p. 235;

(continued...)

The cases that appellant relies on to support his "under arrest or arrest underway" rule are easily distinguishable. In *Commonwealth v. Washington* (2007) 449 Mass. 476 [869 N.E.2d 605, 610], the officers *released* the defendant after the traffic stop and the search. (See AOB 35, 40.) There was no contemporaneous search and arrest at all. In fact, there is no indication in the opinion whether the arrest even occurred on the same day or in the same month as the search. Similarly, in *Commonwealth v. Craan* (2014) 469 Mass. 24 [13 N.E.3d 569, 572], the officers *released* the defendant after the search, which produced evidence of drugs and ammunition.[10] (See AOB 21-22.) In *New York v. Evans* (1977) 43 N.Y.2d 160 [371 N.E.2d 528, 529], the issue was "whether or not the existence of probable cause to arrest justifies a full search where the arrest was not made until *one month* after the search." (Italics added; see AOB 22.) Likewise, in *Belote v. Maryland* (2009) 411 Md. 104 [981 A.2d 1247, 1249, 1257], after the officer's contact with the defendant, the officer *released* the defendant and arrested him *two months* after their encounter. (See AOB 34-35.) In contrast, the search and arrest in this case took place within a 10-minute period of time (and appellant was not released before being searched).

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(...continued)
see also *Gustafson v. Florida* (1973) 414 U.S. 260, 266 [94 S.Ct. 488, 38 L.Ed.2d 456] [argued and decided with *Robinson*].) Appellant appears to suggest that the quotation stands for the proposition that there must be a formal arrest before there can be a search incident to arrest. (AOB 17.) If so, he reads too much into the quotation and, in any event, *Rawlings* subsequently made clear that a search incident to arrest may precede the formal custodial arrest.

[10] In *Arizona v. Taylor* (1990) 167 Ariz. 439 [808 P.2d 324] (AOB 34) there does not appear to be any indication in the opinion that the defendant was subject to a full custodial arrest even after he was searched.

Citing the California Court of Appeal cases applying the rule in *Rawlings*, appellant states: "These cases differ from [appellant's] in that he was never arrested or charged for the traffic offense for which there was allegedly probable cause to arrest." (See AOB 22, fn. 12.) The implication of appellant's argument is that *Rawlings* would apply had he been arrested and charged for the traffic infraction, in addition to the possession of child pornography. But that would unreasonably elevate form over substance. The officers reasonably exercised their discretion not to pursue the infraction any further after they discovered the more serious offense. The officers' exercise of discretion to arrest appellant for the greater offense does not invalidate the search.

Moreover, appellant's search and arrest were substantially contemporaneous. (Cf. AOB 27 ["The transcript of the stop reports a 'long silence' during the search. The search and arrest were not 'so nearly simultaneous so as to constitute one event,' but were instead 'distinct occurrences.'" (citations omitted)].) Plainly, a search may precede an arrest, as long as the formal arrest follows "quickly on the heels of the challenged search." (*Rawlings v. Kentucky, supra,* 448 U.S. at p. 111.) Or, as California courts have said, a search may precede an arrest, as long as the search and arrest are "substantially contemporaneous." (*People v. Terry, supra,* 70 Cal.2d at p. 429 ["a search preceding the formality of a *substantially contemporaneous* arrest may be incident thereto. . . " (italics added)]; *In re Lennies H., supra,* 126 Cal.App.4th at pp. 1239-1240 ["The fact that a defendant is not formally arrested until after the search does not invalidate the search if probable cause to arrest existed prior to the search and the search was *substantially contemporaneous* with the arrest." (citations, fn., & internal quotation marks omitted, italics added)].)

To the extent appellant is now claiming that the search and arrest were not "substantially contemporaneous," the argument is forfeited by

appellant's failure to present it in the trial court. (*People v. Williams* (1999) 20 Cal.4th 119, 136.) If appellant wanted to know the precise number of minutes between the search and the arrest, he was obligated to place the prosecution on notice so that the People would have the opportunity to make that showing.[11] (*Ibid.*) In any event, even the limited record available here shows that the search and arrest of appellant were substantially contemporaneous because they were, at most, 10 minutes apart. (1CT 61-62, 77; see *People v. Adams, supra,* 175 Cal.App.3d at p. 861 [search made 10 minutes before arrest was substantially contemporaneous].)

### C. The officers' subjective assessment of probable cause is not relevant to the validity of the search as incident to an arrest

Next, the officers' subjective assessment of probable cause is not relevant under the Fourth Amendment: so long as probable cause *objectively* supports the arrest, it is constitutional. The United States Supreme Court has repeatedly recognized that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" (*Brigham City v. Stuart* (2006) 547 U.S. 398, 403 [126 S.Ct. 1943, 164 L.Ed.2d 650].) Most recently, in *Ashcroft v. al-Kidd* (2011) __ U.S. __ [131 S.Ct. 2074, 179 L.Ed.2d 1149], the Court explained that reasonableness is an objective inquiry. "Fourth Amendment reasonableness 'is predominantly an objective inquiry.' We ask whether 'the circumstances, viewed objectively, justify [the challenged] action.' If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials. This approach

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[11] The encounter between appellant and the officers was tape recorded by a device on Detective Hayes's person. (See 1CT 56.) A transcript of the tape recording was admitted into evidence at the suppression hearing (see 1CT 90; see also 1CT 57), but the tape recording itself was not.

recognizes that the Fourth Amendment regulates conduct rather than thoughts; and it promotes evenhanded, uniform enforcement of the law."[12] (*Id.* at p. 2080, original italics, internal citations omitted.)

These principles are best illustrated by *Devenpeck v. Alford, supra,* 543 U.S. 146. In *Devenpeck*, police officers arrested Alford for violating the Washington Privacy Act by tape-recording his conversations with the officers during a traffic stop. (*Id.* at p. 150.) The arrest came after much contemplation and discussion by the officers about whether there was probable cause to arrest Alford for a series of various offenses. During the conversation, the officers decided not to arrest Alford for other crimes, including impersonating a law enforcement officer and obstructing a law enforcement officer. (*Id.* at pp. 149-150.) Subsequently, however, the state trial court dismissed the Privacy-Act charge. (*Id.* at p. 151.) Alford then brought a civil rights suit, arguing that the officers arrested him without probable cause. (*Ibid.*) The Ninth Circuit Court of Appeals agreed with Alford and further rejected the officers' argument that probable cause existed to arrest Alford for the other offenses. (*Id.* at p. 152.) The Ninth Circuit found that those offenses were legally irrelevant because they were not "closely related" to the offense the officers actually relied on when they took Alford into custody. (*Ibid.*; see also *id.* at p. 156.)

The United States Supreme Court rejected the Ninth Circuit's reasoning and remanded the case for further proceedings to determine

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[12] There are only two "limited exceptions" to this rule: special needs and administrative search cases, neither of which is at issue here. (*Ashcroft v. al-Kidd, supra,* 131 S.Ct. at pp. 2080-2081; see *id.* at p. 2081 [discussing checkpoint stops for general crime control purposes].) The United States Supreme Court has also stated, albeit in dicta, that the programmatic purpose, not the officer's individual subjective motivation, is the correct inquiry with regard to vehicle inventories. (See *Brigham City v. Stuart, supra,* 547 U.S. at p. 405.)

whether there was probable cause to arrest Alford for the other offenses (impersonating a law enforcement officer and obstructing a law enforcement officer). (*Devenpeck v. Alford, supra,* 543 U.S. at p. 156.) The Court began by explaining how probable cause is determined: "[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. [Citation.]" (*Id.* at p. 152.) The Court then made clear what is *not* relevant to that determination: "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. [Citations.]" (*Id.* at p. 153.) More specifically, the Court explained that *"[an officer's] subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.* As we have repeatedly explained, '"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 that action."' [Citation.]" (*Ibid.*, italics added.) Returning to the touchstone of reasonableness, the Court summarized: "'[T]he Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.' [Citation.]" (*Ibid.*, original italics.)

Thus, *Devenpeck* expressly validates what appellant refers to as "hypothetical" arrests. (See, e.g., AOB 14, 15.) This defeats appellant's suggestion that the lawfulness of an arrest is contingent upon the officers' announced charge selection. (See AOB 26-28, 38.) In *Devenpeck*, there was no probable cause to support Alford's arrest for violating the state Privacy Act, the only offense for which Alford was, in fact, arrested. But *Devenpeck* held that Alford's arrest could still be upheld if, objectively, the officers had probable cause to arrest Alford for impersonating a law

enforcement officer or obstructing a law enforcement officer—offenses that the officers had subjectively rejected as a basis for Alford's arrest.

Appellant's case is even simpler. The circumstances, viewed objectively, justified appellant's arrest for the traffic infraction. In other words, the officers had probable cause to arrest appellant for the traffic infraction at the time of the search. Therefore, they could search incident to the authority to arrest for that offense.

The fact that Detective Hayes initially intended to issue appellant a citation when he saw appellant commit the infraction is irrelevant. (See *Ashcroft v. al-Kidd, supra,* 131 S.Ct. at p. 2080 ["We ask whether the circumstances, viewed objectively, justify [the challenged] action. If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials." (internal quotation marks and citations omitted, original italics)]; *Devenpeck v. Alford, supra,* 543 U.S. at pp. 154-155 ["Subjective intent of the arresting officer . . . is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."]; but see *People v. Reid* (2014) 24 N.Y.3d 615 [26 N.E.3d 237, 239] [finding officer's stated intent (that he would not have arrested the defendant but for the switchblade found during the search) controlling and granting suppression motion].)[13]

Likewise, because the officers' subjective reason for making the arrest need not be the same one that justifies their actions under the Fourth Amendment, it makes no constitutional difference that the officers did not also arrest appellant for the traffic infraction after discovering evidence of

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[13] The *Reid* court's dismissal of *Devenpeck* essentially forces courts not only to *require* but to *rely* on an officer's subjective intent. That analysis is inconsistent with United States Supreme Court authority and with the goal of maintaining bright-line, administrable rules under the Fourth Amendment.

the more serious offense of possessing child pornography. (*Devenpeck v. Alford, supra,* 543 U.S. at p. 153 ["[an officer's] subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"]; see *Schmidlin v. Palo Alto* (2008) 157 Cal.App.4th 728, 779 ["the probable cause inquiry is *not* confined to the charge invoked by the officer at the time of the arrest . . ." (citing *Devenpeck*, original italics)]; *United States v. Willis* (9th Cir. 2005) 431 F.3d 709, 717 ["We think it was reasonable for the officers to view any traffic violations as inconsequential in light of Willis's arrest [on more serious charges]"].)

Appellant relies on *Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 185 L.Ed.2d 495] for the proposition that an officer's purpose is central to the question of whether the search was reasonable. (See AOB 37-39.) In *Jardines*, the question before the Court was whether the use of a drug-sniff dog on a homeowner's porch to investigate the contents of the home was a "search" within the meaning of the Fourth Amendment. (*Florida v. Jardines*, *supra*, 133 S.Ct. at p. 1413.) The Court identified the issue as "precisely *whether* the officer's conduct was an objectively reasonable search. . . . [And] that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do." (*Id.* at pp. 1416-1417, original italics.) As the Court explained, this question was different than the one resolved in *al-Kidd* and other cases, which "merely hold that a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason." (*Id.* at p. 1416, original italics.)

Appellant's reliance on *Jardines* is misplaced. *Jardines* did not delve into the subjective intent of an officer or hold that an officer's intent (or purpose) is central to the question of whether a search is reasonable. (See AOB 37.) Rather, *Jardines* expressly looked to the behavior of the officer to determine the lawfulness of the officer's conduct. (*Florida v. Jardines, supra,* 133 S.Ct. at p. 1417 ["Here, [the officers'] *behavior objectively reveals* a purpose to conduct a search, which is not what anyone would think he had license to do" (italics added)].) Also, unlike in *Jardines*, where the constitutionality of the officers' conduct was at issue, this case does not present the question whether the initial stop of appellant was lawful: it was lawful because the officers had reasonable suspicion for the traffic offense, as well as probable cause to arrest for that offense. Rather, as in *Devenpeck*, the question here is whether the lawfulness of the search and arrest that followed were vitiated by the officers' subjective reason for making the arrest.

Finally, appellant's "under arrest or arrest underway" rule, which does not withstand scrutiny under *Rawlings*, also does not withstand scrutiny under *Devenpeck* and *al-Kidd*. Appellant's "under arrest or arrest underway" rule requires an analysis of the officer's state of mind. The inquiry asks: immediately before the search, did the officer intend to arrest appellant and to do so regardless of the outcome of the search? Appellant's inquiry is inconsistent with the objective-circumstances test adopted by the United States Supreme Court.

### D. Validation of the search in this case does not require any expansion of police authority and, in fact, this type of search allows officers to avoid escalation of police-citizen encounters

For the reasons set forth above, the search in this case falls within the clear rules established by the United States Supreme Court in *Moore*, *Rawlings*, and *Devenpeck*. Stated differently, upholding the search in this

case does not require this Court to alter the bright lines established by the United States Supreme Court (and applied by this Court) or to "expand" (see AOB 15) the search-incident-to-arrest exception to the warrant requirement.

Appellant expresses concern that validating the search would "vastly expand the universe of police-citizen encounters that could trigger a full custodial search," "infringe the privacy of millions of Californians," and undermine trust in law enforcement officers. (AOB 13; see AOB 40-46.) But this case is not much different from *Moore*, in which the officers conducted a traffic stop, arrested Moore, searched him, and found crack cocaine. (*Virginia v. Moore, supra,* 553 U.S. at pp. 166-167.) The only noteworthy difference is that the search of appellant came just before the arrest, which was proper under *Rawlings*. Thus, this case does not involve an expansion, much less any "vast expansion," of police power.

Appellant's real concern seems to be the constitutionality of custodial arrests for minor offenses—in other words, the rule articulated in *Atwater*, *McKay*, and *Moore*. (See AOB 40 [arguing that, if the Court of Appeal's opinion "is allowed to stand," then "[o]fficers could conduct full searches whenever there is probable cause to believe that a person has committed an offense such as jaywalking [or] driving while holding a cell phone . . ."].) This concern is not novel; in fact, the United States Supreme Court has already considered and rejected it. In her dissenting opinion in *Atwater*, Justice O'Connor summarized what she thought the Court's ruling there implied, in combination with other Fourth Amendment precedent: "Under today's holding, when a police officer has probable cause to believe that . . . a traffic violation [has occurred], the officer may stop the car, arrest the driver, [citation], search the driver, [citation], search the entire compartment of the car including any purse or package inside, [citation],

and impound the car and inventory all of its contents, [citations]." (*Atwater v. City of Lago Vista, supra,* 532 U.S. at p. 372 (dis. opn. of O'Connor, J.).)

But the majority in *Atwater* observed that no empirical data supported Justice O'Connor's concern, and it reasoned that the incentives facing officers, in fact, cut the other way. The Court explained: "[I]t is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason. . . . [¶] The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horribles demanding redress. . . . [T]he country is not confronting anything like an epidemic of unnecessary minor-offense arrests." (*Atwater v. City of Lago Vista, supra,* 532 U.S. at pp. 352-353, fn. omitted; see *id.* at p. 353, fn. 25 [stating, in response to Justice O'Connor's dissent, "Noticeably absent from the parade of horribles is any indication that the 'potential for abuse' has ever ripened into a reality. In fact, . . . there simply is no evidence of widespread abuse of minor-offense arrest authority."].)

Appellant conjures a "parade of horribles" similar to Justice O'Connor's. At one point, he suggests that 85 percent of Californians who commit infractions will be subject to a full custodial search if this Court were to affirm. (See AOB 44-46.) Specifically, appellant argues that validation of the search in this case would mean that officers would have "no incentive to limit a search to situations that genuinely call for a custodial arrest prior to the search. Where a search turns up evidence of a serious crime, officers will be rewarded with the opportunity to make a custodial arrest for the greater charge, and the evidence will be admissible at trial. Where a search fails to turn up any evidence, a suspect will likely

not be arrested, and the search will never be subject to scrutiny by a judicial officer as part of a criminal case."[14] (AOB 43.) That argument, however, ignores the countervailing incentives to limit such searches, such as judicial review in civil cases and internal investigations at police departments.

As this Court recognized in *McKay*, arrest procedures in California are governed by statute. (*People v. McKay, supra,* 27 Cal.4th at p. 605 ["California has, in various statutes, limited the circumstances in which a peace officer may effect a custodial arrest for minor offenses. (E.g., Pen. Code, §§ 818, 827.1, 853.5 . . . )"].) Conducting a full custodial arrest for a cite-and-release offense—whether or not the accompanying search results in finding any incriminating evidence—would be contrary to state statutory law. And as this Court also recognized in *McKay*, violations of state arrest procedures expose peace officers and their departments to civil actions seeking injunctive or other relief, and expose officers to internal investigation and departmental discipline. (*Id.* at pp. 618-619.)

The United States Supreme Court has similarly recognized that civil rights suits and internal police discipline are the appropriate deterrents for an officer's violation of the knock-and-announce rule under the Fourth Amendment.[15] (*Hudson v. Michigan* (2006) 547 U.S. 586, 594-599 [126 S.Ct. 2159, 165 L.Ed.2d 56].) In finding the potential of civil liability an effective deterrent, the Court noted that Congress had authorized attorney's

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[14] Although appellant, who is a white male (see 1CT 1), does not claim that racial bias was a factor in his case, he also argues that, if his arrest is upheld, it will be "especially difficult . . . to recognize patterns of bias." (AOB 43.)

[15] The knock-and-announce rule is the principle that law enforcement officers must announce their presence and provide residents of a home an opportunity to open the door before the officers enter the home. (*Hudson v. Michigan, supra,* 547 U.S. at p. 589; see Pen. Code, §§ 844, 1531.)

fees for civil-rights plaintiffs and that the number of public-interest law firms and lawyers who specialized in civil-rights grievances had greatly increased. (*Id.* at pp. 597-598.) The Court explained: "Even if we thought that only large damages would deter police misconduct (and [not] . . . large . . . attorney's fees), we do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury. It is clear, at least, that lower courts are allowing colorable knock-and-announce suits to go forward . . . . [Citations.]" (*Id.* at p. 598.) The Court further found the potential of internal police discipline to be an effective deterrent. (*Id.* at p. 599 ["[I]t is not credible to assert that internal [police] discipline, which can limit successful careers, will not have a deterrent effect"].) So, police officers have significant incentives to limit searches and arrests for minor offenses that violate state statutory law.[16]

Next, appellant suggests that validating the search here would mean that "officers have authority to conduct a full search of a driver *and the passenger compartment of every vehicle stopped for any traffic infraction,*" rendering cases that limit an officer's authority to search a vehicle "superfluous." (AOB 41, italics added.) But finding the search of appellant lawful would have no impact on the law governing vehicle searches. The issue in this case is the initial propriety of a search as incident to arrest, not the scope of that search (except as discussed in Argument II, *post*). The United States Supreme Court's decisions limiting

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[16] Notably, both *Devenpeck* and *Atwater* were civil rights cases under 42 U.S.C. § 1983 where the challenges were to the lawfulness of the arrests. (*Devenpeck v. Alford, supra,* 543 U.S. at p. 151; *Atwater v. City of Lago Vista, supra,* 532 U.S. at p. 325; see also *Macias v. County of Los Angeles* (2006) 144 Cal.App.4th 313, 317, 319-321 [finding plaintiff's civil rights suit viable where there was evidence that officers unreasonably detained plaintiff during the execution of a lawful search warrant].)

the scope of a vehicle-search incident to arrest would still apply, e.g., *Arizona v. Gant* (2009) 556 U.S. 332 [129 S.Ct. 1710, 173 L.Ed.2d 485] [search of car for evidence of offense arrest]; *California v. Acevedo* (1991) 500 U.S. 565 [111 S.Ct. 1982, 114 L.Ed.2d 619] [probable cause search of vehicle and containers within]; *United States v. Ross* (1982) 456 U.S. 798 [102 S.Ct. 2157, 72 L.Ed.2d 572] [probable cause search of vehicle and containers within], just as other constitutional limitations on searches incident to arrest would apply (see Argument II, *post* [discussing further search of contents of cell phone incident to arrest]).

Similarly, appellant argues that finding his search constitutional would mean that the limits established by *Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868, 20 L.Ed.2d 889], which permits a patdown search of a detainee for weapons, "will be erased." (AOB 40.) But a *Terry* investigative detention is distinguishable from a detention supported by probable cause. When an individual is detained based on reasonable suspicion of criminal activity, he is not subject to arrest for a criminal offense. He will not be subject to search incident to arrest, but he would be subject to a patdown for weapons "'when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others[.]'" (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373 [113 S.Ct. 2130, 214 L.Ed.2d 334], quoting *Terry v. Ohio, supra,* 392 U.S. at p. 24.) Here, appellant's detention was supported by probable cause.

Appellant also argues that "[b]y eliminating the fact of a custodial arrest as the predicate for a search, the prosecution's proposed rule would reduce the cost and administrative burdens of a search to zero . . . ." (AOB 42.) It is not clear what appellant means by "the cost and administrative burdens of a search." The putative "cost and administrative burdens" of conducting a search would appear to be no different whether the search

precedes or follows arrest. Any in any event, the People do not propose any new rule. The People's position is that this case involves application of established United States Supreme Court precedent. As explained, *Rawlings* permits a search-incident before formal arrest, so long as the search and arrest are substantially contemporaneous.

Finally, there is something appellant *does not* include in his parade of horribles. Absent from appellant's argument is any empirical showing that an "epidemic of unnecessary minor-offense arrests" or searches has emerged since *Atwater* and *McKay*. (*Atwater v. City of Lago Vista, supra,* 532 U.S. at p. 353.) The absence of such data confirms that statutory restrictions, civil remedies, and internal police discipline are effective deterrents in this context. (*People v. McKay, supra,* 27 Cal.4th at pp. 618-619 [violations of state arrest procedures expose peace officers and their departments to civil actions seeking injunctive or other relief, and expose officers to internal investigation and departmental discipline]; see *Hudson v. Michigan, supra,* 547 U.S. at p. 598 ["As far as we know, civil liability is an effective deterrent here . . ."]; *id.* at p. 599 ["it is not credible to assert that internal [police] discipline, which can limit successful careers, will not have a deterrent effect"].) Notably, since *McKay*, only one published case in California, *People v. Gomez, supra,* 117 Cal.App.4th 531, has upheld a search incident to arrest for a traffic infraction, and only as an alternative basis for justifying the search. So what was true at the time *Atwater* and *McKay* were decided holds true now, and an affirmance here will not encourage a search incident to arrest any time an officer observes the commission of an infraction.

Moreover, appellant's new rule would impose its own risks and costs. As this Court recognized in *McKay*, foreclosing the exercise of discretion by the officer in the field can result in absurd consequences. (*People v. McKay, supra,* 27 Cal.4th at p. 622 [addressing the importance

of giving officers in the field the discretion to determine whether an individual who is stopped for a cite-and-release offense has presented proper identification under Vehicle Code section 40302, subdivision (a)]; see *ibid.* ["Inasmuch as California could, consistent with the federal Constitution, authorize a custodial arrest for *all* Vehicle Code violations, the fact that it has delegated *some* discretion to police officers to evaluate the sufficiency of the proffered evidence of identity is . . . of no constitutional concern." (original italics)].) Even in cases not involving infractions, an officer need not always effect a custodial arrest when probable cause to do so exists. A rule, such as appellant's, that searches incident to arrest are permissible *only* if the police first advise an individual that he is under arrest for a minor offense[17] (see AOB 24), or if the police first handcuff the individual for the minor offense, would encourage officers to do exactly that. That is, appellant's rule would create an incentive for officers to make custodial arrests routinely for all offenses where arrest is permitted under state statutory law, the very outcome appellant claims he wants to avoid.

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[17] No such announcement of arrest is constitutionally required. (*Devenpeck v. Alford, supra,* 543 U.S. at p. 155 ["While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required"], fn. omitted; cf. Pen. Code, § 841 ["The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested in actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, or after an escape. [¶] The person making the arrest must, on request of the person he is arresting, inform the latter of the offense for which he is being arrested."]

### E. The lawfulness of appellant's search and arrest is consistent with the principles articulated in *United States v. Robinson*

Appellant argues that upholding the search of his person—where a custodial arrest did not precede the search—would untether the search from the dual rationale underlying the search-incident-to-arrest exception: preserving evidence and protecting officer safety. (AOB 29-36.) He is wrong. The validity of a search incident to arrest does not depend on the existence in every particular case of the dual rationale that generally makes such searches reasonable. But in any event, a search like the one in this case is closely tied to the search-incident-to-arrest rationale.

In *Chimel v. California* (1969) 395 U.S. 752 [89 S.Ct. 2034, 23 L.Ed.2d 685], the United States Supreme Court limited the scope of a search incident to arrest to the person of the arrestee and the area within his immediate control, defined as the area into which the arrestee might reach to grab a weapon or destructible evidence. (*Id.* at p. 763.) "That limitation . . . ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. [Citation.]" (*Arizona v. Gant, supra,* 556 U.S. at p. 339.)

A few years later, in *United States v. Robinson, supra,* 414 U.S. 218, the high court considered the extent to which police may search "the person" of an arrestee. There, an officer lawfully arrested Robinson for driving with a revoked license and, upon Robinson's arrest, the officer searched Robinson's pocket, where he found heroin inside a cigarette package. (*Id.* at pp. 220-223.) The Supreme Court approved the search as constitutionally reasonable, recognizing that the authority to search *an arrestee's person* incident to arrest does not depend on the presence of

*Chimel*'s dual rationale in any given case. (*United States v. Robinson, supra,* 414 U.S. at pp. 235-236.) The Court explained: "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." (*Id.* at p. 235.) Instead, "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." (*Ibid.*)[18] As the Court recently summarized in *Riley:* "The Court [in *Robinson*] thus concluded that the search of Robinson was reasonable even though there was no concern about the loss of evidence, and the arresting officer had no specific concern that Robinson might be armed. [Citation.]" (*Riley v. California, supra,* 134 S.Ct. at p. 2483.) And while *Riley* adopted a new rule to govern any further search of the digital content of a cell phone found on an arrestee's person, it did not disturb *Robinson*'s holding as to searches for and of physical objects incident to an arrest. (See, e.g., *id.* at p. 2484 ["*Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects"].)

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[18] In *Gustafson v. Florida, supra,* 414 U.S. 260, the companion case to *Robinson*, an officer lawfully arrested Gustafson for failing to have his driver's license in his possession and, upon Gustafson's arrest, the officer searched Gustafson's pocket, where he found marijuana cigarettes inside a cigarette box. (*Gustafson v. Florida, supra,* 414 U.S. at pp. 261-262.) The Supreme Court upheld the search and explained: "It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody. . . . [T]he arguable absence of 'evidentiary' purpose for a search incident to a lawful arrest is not controlling" (*id.* at p. 265) and "it is of no moment that [the officer] did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed" (*id.* at p. 266).

There is no reason to distinguish this case from *Robinson* in this regard. As the Court noted in *Robinson*, the "'[s]earch of a person becomes lawful *when grounds for arrest and accusation have been discovered*, and the law is in the act of subjecting the body of the accused to its physical dominion.'" (*United States v. Robinson, supra,* 414 U.S. at p. 232, quoting *People v. Chiagles* (1923) 237 N.Y. 193 [142 N.E. 583, 584] [authored by then Associate Judge Cardozo of the New York Court of Appeals], italics added; see also *Virginia v. Moore, supra,* 553 U.S. at p. 177 ["[W]e have equated a lawful arrest with an arrest based on probable cause"].) And here, the search of appellant was lawful because there was probable cause to arrest appellant (or "grounds for arrest and accusation" were discovered) when the officers observed appellant commit the traffic infraction. The search incident to appellant's arrest required no additional justification. (*United States v. Robinson, supra,* 414 U.S. at p. 232 ["A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."].) The search was, therefore, lawful.

But in any event, the rationale supporting the reasonableness of searches incident to arrest does support the search here. As *Robinson* recognized, a search incident to arrest is permitted because of the dangers inherent in arrests. (*United States v. Robinson, supra,* 414 U.S. at pp. 234-235 ["It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop."].) Here, officer safety is promoted by permitting a search incident to arrest to precede a custodial arrest, before any danger is created by the escalation of the police-citizen encounter from a detention to an arrest.

## II. THE WARRANTLESS SEARCH OF APPELLANT'S CELL PHONE CONDUCTED INCIDENT TO ARREST PRE-*RILEY* DOES NOT REQUIRE THE SUPPRESSION OF THE CHILD PORNOGRAPHY FOUND IN THE PHONE IN LIGHT OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

The trial court in this case found that the warrantless search of appellant's cell phone was lawful as part of the search incident to arrest in light of this Court's decision in *People v. Diaz, supra*, 51 Cal.4th 84. (1CT 102-104.) At the time of its ruling, the trial court was correct.

However, while this case was pending in the Court of Appeal, the United States Supreme Court held that the search-incident-to-arrest exception to the warrant requirement does not apply to searches of data on cell phones. (*Riley v. California, supra,* 134 S.Ct. 2473.) The high court reasoned that the government interests that would support such a warrantless search—the need to protect officers and prevent the destruction of evidence—are not normally at risk when the search is of digital data, while the privacy interests at stake are high given the vast amount of personal information contained in cell phones. (*Id.* at pp. 2484-2485.) Accordingly, the warrantless search of appellant's cell phone incident to arrest has turned out to be unlawful under *Riley*. But the exclusionary rule should not apply here because, as the Court of Appeal held, the police conducted the search of appellant's cell phone in objectively reasonable reliance on binding precedent from this Court. (See *Davis v. United States, supra,* 131 S.Ct. 2419.)

"[E]xclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred. [Citation.]" (*Davis v. United States, supra,* 131 S.Ct. at p. 2431; *Herring v. United States* (2009) 555 U.S. 135, 140 [129 S.Ct. 695, 172 L.Ed.2d 496] ["The fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule

applies. [Citation.] Indeed, exclusion 'has always been our last resort, not our first impulse,' [citation], and our precedents establish important principles that constrain application of the exclusionary rule."].) "The [Fourth] Amendment says nothing about suppressing evidence obtained in violation of" the right to be free of unreasonable searches and seizures. (*Davis v. United States, supra,* 131 S.Ct. at p. 2426.) In other words, "[e]xclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search.' [Citations.]" (*Ibid.*) Rather, the "exclusionary rule" is a "sanction" created by the United States Supreme Court (*id.* at p. 2423) "to deter future Fourth Amendment violations. [Citations.]" (*Id.* at p. 2426; see *id.* at p. 2427 [the exclusionary rule is a "'judicially created remedy' of this Court's own making"]; *id.* at p. 2434 [the exclusionary rule is "specifically designed as a 'windfall' remedy to deter future Fourth Amendment violations"].) "Where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted.' [Citation.]" (*Id.* at pp. 2426-2427.)

In a line of cases beginning with *United States v. Leon* (1984) 468 U.S. 897 [104 S.Ct. 3405, 82 L.Ed.2d 496], the United States Supreme Court has indicated that the deterrent effect of exclusion is related to the culpability of law enforcement conduct. (*Davis v. United States, supra,* 131 S.Ct. at p. 2427, citing *Herring v. United States, supra,* 555 U.S. at p. 143.) "When the police exhibit 'deliberate,' 'reckless,' 'or grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. [Citation.] But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful . . . the '"deterrence rationale loses much of its force,"' and exclusion cannot 'pay its way.' [Citation.]" (*Davis v. United States, supra,* 131 S.Ct. at pp. 2427-2428.) As the high court explained: "Indeed, in 27 years of practice under *Leon*'s good-faith exception, we have

'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct.' [Citation.]" (*Id.* at p. 2429; *id.* at p. 2432 ["we have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement" (original italics)].)

The United States Supreme Court has applied this "good faith" exception to the exclusionary rule in a range of cases. (*Davis v. United States, supra,* 131 S.Ct. at p. 2428; *id.* at p. 2434 ["The good-faith exception is a judicially created exception to this judicially created [exclusionary] rule"].) They include searches conducted in objectively reasonable reliance on: a warrant that is later held invalid (*United States v. Leon, supra,* 468 U.S. 897); a statute that is subsequently invalidated (*Illinois v. Krull* (1987) 480 U.S. 340 [107 S.Ct. 1160, 94 L.Ed.2d 364]); erroneous information in a warrant database that is maintained by judicial employees (*Arizona v. Evans* (1995) 514 U.S. 1 [115 S.Ct. 1185, 131 L.Ed.2d 34]); and erroneous information in a warrant database that is maintained by police (*Herring v. United States, supra,* 555 U.S. 135).

Most recently, in *Davis v. United States*, the Court held that "when the police conduct a search in compliance with binding precedent that is later overruled," suppression of evidence "would do nothing to deter police misconduct" and "would come at a high cost to both the truth and the public safety[.]" (*Davis v. United States, supra,* 131 S.Ct. at p. 2423.) Accordingly, "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." (*Id.* at pp. 2423-2424.)

In *Davis*, after a routine traffic stop, police arrested Davis for giving a false name. (*Davis v. United States, supra,* 131 S.Ct. at p. 2425.) After handcuffing him, police searched the vehicle and found Davis's gun. (*Ibid.*) Davis was indicted on charges of being a felon in possession of a

firearm. (*Id.* at pp. 2425-2426.) In a suppression motion, Davis conceded that the search of the vehicle was lawful because it complied with existing Eleventh Circuit precedent interpreting *New York v. Belton, supra,* 453 U.S. 454, but he raised the Fourth Amendment challenge "to preserve 'the issue for review' on appeal." (*Davis v. United States, supra,* 131 S.Ct. at p. 2426.) The district court denied the suppression motion, and Davis was convicted of the charge. (*Ibid.*) While his appeal was pending, the United States Supreme Court decided *Arizona v. Gant, supra,* 556 U.S. 332, which announced a new rule governing vehicle searches incident to arrests of recent occupants. (*Davis v. United States, supra,* 131 S.Ct. at pp. 2425-2426.) The Eleventh Circuit held that the vehicle search at issue in Davis's case violated the Fourth Amendment under *Gant*, but the court declined to suppress the evidence and affirmed Davis's conviction. (*Id.* at p. 2426.)

The United States Supreme Court affirmed the judgment of the Eleventh Circuit. (*Davis v. United States, supra,* 131 S.Ct. at p. 2434.) The Court explained that, at the time of the search, *Gant* had not yet been decided, but the Eleventh Circuit, in *United States v. Gonzalez* (11th Cir. 1996) 71 F.3d 819, had interpreted *Belton* "to establish a bright-line rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest. [Citation.]" (*Davis v. United States, supra,* 131 S.Ct. at p. 2428.) The Court explained: "The search incident to Davis's arrest in this case followed the Eleventh Circuit's *Gonzalez* precedent to the letter. Although the search turned out to be unconstitutional under *Gant*, all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way. [Citation.] [¶] Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis's claim." (*Ibid.*) Notably, the High Court also recognized: "In most instances, as in this case, the precedent sought to be

challenged will be a decision of a Federal Court of Appeals or State Supreme Court." (*Id.* at p. 2433.)

Here, Officer Raymond searched appellant's cell phone without a warrant, incident to appellant's arrest in 2012. (See 1CT 51, 62-63.) *Riley*—a 2014 case—was not decided at that time. Instead, this Court's *Diaz* decision—a 2011 case—was binding precedent and it *authorized* the search. *Diaz* held that the search-incident-to-arrest exception to the search warrant requirement allowed a police officer to review data on an arrestee's cell phone found on the person of the arrestee. (*People v. Diaz, supra,* 51 Cal.4th at p. 93.) So, binding precedent from this Court specifically authorized the officers' actions in conducting the warrantless search of appellant's cell phone incident to his arrest. (*Davis v. United States, supra,* 131 S.Ct. at p. 2429 ["when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities" (original italics)]; see *United States v. Garcia* (N.D. Cal. Sept. 12, 2014) [2014 U.S. Dist. LEXIS 128207, *17-18] [evidence obtained by search of defendant's cell phone before *Riley* not subject to exclusionary rule based on good faith reliance upon *Diaz*]; *United States v. Peel* (E.D. Cal. Aug. 25, 2014) 2014 U.S. Dist. LEXIS 118264, *17 [same].)

And because the officers' actions were in compliance with the binding precedent of *Diaz*—and not culpable in any way—no "'appreciable deterrence'" would result from the application of the exclusionary rule in this case. (*Davis v. United States, supra,* 131 S.Ct. at pp. 2426-2427; *id.* at pp. 2428-2429 ["The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case."]; *Herring v. United States, supra*, 555 U.S. at p. 141; see *People v.*

*Youn* (2014) 229 Cal.App.4th 571, 579 [*Davis* applies to warrantless blood draws conducted under state appellate precedent before *Missouri v. McNeely* (2013) 569 U.S. __ [133 S.Ct. 1552, 185 L.Ed.2d 696]; see also *Heien v. North Carolina* (2014) __ U.S. __ [135 S.Ct. 530, 539, 190 L.Ed.2d 475 [holding that the Fourth Amendment tolerates only objectively reasonable mistakes of law, and recognizing that, in *Davis*, "[a]ny consideration of the reasonableness of an officer's mistake was [] limited to the separate matter of remedy"].) To the contrary, exclusion "would come at a high cost to both the truth and the public safety." (*Davis v. United States, supra,* 131 S.Ct. at p. 2423.) Thus, the evidence resulting from the search should not be subject to the extraordinary remedy of exclusion. As the United States Supreme Court concluded in *Davis*:

> It is one thing for the criminal "to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.). It is quite another to set the criminal free because the constable has scrupulously adhered to governing law.

(*Id.* at p. 2434.)

Appellant disputes the application of *Davis* and the application of the exclusionary rule. He first argues that "[o]nce it is apparent that there was no valid search incident to arrest, it follows that *Diaz* did not specifically authorize the search the officers conducted, and the good faith exception . . . does not apply." (AOB 48; see AOB 50-51.) He is mistaken. Even if this Court were to find that there was no valid search incident to arrest, the application of the exclusionary rule does not automatically follow. The United States Supreme Court has explained that "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." (*Herring v. United States, supra,* 555 U.S. at p. 143, internal quotation marks and

citations omitted.) Here, at the time of the search, the officers had reason to believe that their conduct was lawful under *People v. Gomez, supra,* 117 Cal.App.4th 531, 538-540, which upheld a search conducted during a de facto arrest for a traffic infraction. And there was no contrary California authority informing the officers that a search incident to arrest was unlawful under the circumstances of this case. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (*Herring v. United States, supra,* 555 U.S. at p. 144.) Here, as in *Herring*, any error "does not rise to that level." (*Ibid.*, fn. omitted.) Because there was case law supporting the officers' conduct—and no case law prohibiting it—there was no reason for a reasonably well-trained officer to believe that the search of appellant was illegal, and the conduct of the officers was not so objectively culpable as to require exclusion.

Appellant further argues that, "even if this Court now expands the search incident to arrest doctrine to permit a search pursuant to a future or hypothetical arrest, *Diaz* would not have been binding judicial precedent prior to that expansion of the doctrine." (AOB 48; see AOB 52-53.) But respondent does not advocate an *expansion* of the search-incident-to-arrest exception to the warrant requirement. All this case calls for is an application of the principles articulated by the United States Supreme Court over the past several decades—in *Atwater*, *Moore*, *Rawlings*, and *Devenpeck.* Those cases have taught police officers, time and again, when a search incident to arrest is lawful. *Diaz*, in turn, informed police officers that a cell phone was an item that officers could search incident to arrest. In other words, *Diaz* was a cell-phone case, not a case that described the circumstances that can constitute a lawful search incident to arrest.

The officers in this case acted in full accordance with binding precedent. And their conduct was blameless. It follows that there is no basis for excluding from evidence the child pornography found in appellant's cell phone.

## CONCLUSION

Respondent respectfully requests that this Court affirm the Court of Appeal's decision affirming the judgment of conviction.

Dated: August 3, 2015

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 15,125 words.

Dated: August 3, 2015

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## DECLARATION OF SERVICE

Case Name: **People v. Paul Macabeo** No.: **S221852**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On August 5, 2015, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On August 5, 2015, I served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via electronic mail to:

Karen Hunter Bird
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On August 5, 2015, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Sherri R. Carter, Clerk of the Court
Los Angeles County Superior Court
for delivery to: Hon. Mark S. Arnold, Judge
111 N. Hill Street
Los Angeles, CA 90012

On August 5, 2015, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

Two copies for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 5, 2015, at Los Angeles, California.

Irene Rangel
Declarant

Signature

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