IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY BRIEF ON THE MERITS

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

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Plaintiff and Appellant,	]
	] **(Court of Appeal No.**
v.	] **C078537))**
	]
MARIA ELENA LOPEZ,	] **(Yolo Co. Superior**
	] **Court No. CRF143400)**
Defendant and Respondent.	]
	]

INTRODUCTION

As respondent Maria Elena Lopez was walking away from her vehicle on July 4, 2014, Woodland police officer Jeff Moe approached and asked if she had a driver's license. (RT 33-34.) Lopez said she did not but that she might have an identification card in the car. (RT 33-34, 39-40.) The police immediately arrested her then entered her car, searched her purse, and found both the identification card and methamphetamine. (RT 34-35.)

The primary issue in this case is whether the Woodland police conducted a permissible search for identification under *In re Arturo D.* (2002) 27 Cal.4th 60, or an illegal vehicle search under *Arizona v. Gant* (2009) 556 U.S. 332. Lopez submits that *Arturo D.*'s documentation search doctrine is no longer tenable in light of *Gant* and this Court's recent decision in *People v. Macabeo* (2016) 1 Cal.5th 1206. Appellant counters that neither *Gant* nor *Macabeo* addressed the type of "limited" search for identification approved in *Arturo D.* In appellant's view, the documentation search doctrine remains both good law and sound policy. Under that doctrine, they argue that the search of Lopez's purse was permissible. For the reasons herein set forth, this Court should reject appellant's contentions.

ARGUMENT

I.

The Police Violated Lopez's Fourth Amendment Rights by Entering the Passenger Area of Her Vehicle, Removing Her Purse, and Searching it for Identification.

A. A search for identification inside a vehicle is no more limited in scope than the types of suspicionless vehicle searches which the United States Supreme Court has expressly prohibited.

Lopez begins by addressing a core contention which appellant makes throughout their brief: that a search for identification is "limited" in scope. This was a foundational premise behind the decision in *Arturo D.* There, the Court held that, because of their limited nature, documentation searches differ from the full-scale pre-arrest vehicle searches prohibited by *Knowles v. Iowa* (1998) 525 U.S. 113, 118-119. (*In re Arturo D., supra,* 27 Cal.4th at pp. 74-75.)

Appellant now uses this same "limited search" rationale to distinguish documentation searches from the vehicle searches prohibited in *Gant.* (AB, pp. 24-25, 27, 30-32.) Yet, the facts of *Arturo D.*, itself, reveal that its core premise was a legal fiction even at the time. In light of more recent cases like *Gant* and *Macabeo*, it is time to dispense with that legal fiction.

There were two searches at issue in *Arturo D.* In one search, the officer blindly reached underneath the driver seat of a pickup truck. (*In re Arturo D., supra,* 27 Cal. 4th at p. 65.) Afterward, he positioned himself behind that same seat and looked under it, finding methamphetamine. (*Id.* at pp. 65-66.) In the second search, the officer looked inside the glove compartment and underneath both the driver and passenger seats. (*Id.* at pp. 66-67.) In both instances, this Court found that the sought-after documentation was reasonably likely to be found in the locations searched. (*Id.* at pp. 84-87.)

In actuality, the two searches in *Arturo D.* were every bit as invasive as the one held invalid in *Knowles.* As Justice Kennard pointed out in her dissent, the drugs in *Arturo D.* were found in the exact same location as the drugs in *Knowles*: underneath the driver's seat. (*In re Arturo D., supra,* 27 Cal.4th at pp. 96-97 [dis. opn. of Kennard, J.].)

Nonetheless, at the time of *Arturo D.*, the controlling Supreme Court authority permitted full-scale searches of a vehicle's passenger area incident to the driver's arrest. (*New York v. Belton* (1981) 453 U.S. 454, 460.) A series of other high Court cases had emphasized the diminished expectation of privacy that a driver enjoys in his vehicle.

(See, e.g., *California v. Carney* (1985) 471 U.S. 386, 393; *United States v. Knotts* (1983) 460 U.S. 276, 281; *Rakas v. Illinois* (1978) 439 U.S. 128, 153, 154 [conc. opn. of Powell, J.].) In this legal environment, it perhaps made sense for this Court to view a search for identification as limited in scope. After all, the searches conducted in *Arturo D.* would also have been permissible incident to arrest under *Belton*.

In *Gant*, however, the Supreme Court substantially narrowed *Belton*. (*Arizona v. Gant, supra*, 556 U.S. at pp. 350-351.) In so doing, it recognized that, while a driver's expectation of privacy in her vehicle is not as great as in her home, it is nonetheless substantial "and deserving of constitutional protection." (*Id.* at p. 345.) Of particular concern to the Court was the prospect of a driver forfeiting those privacy rights merely by committing a minor traffic violation. (*Ibid.*)

After *Gant*, it is no longer possible to dismiss a search for identification as "limited" in scope. A documentation search generally occurs after a traffic stop and may extend, at a minimum, to the glove box, behind the driver seat, underneath both front seats, and within any purse found in those areas. (*In re Arturo D., supra*, 27 Cal.4th at pp. 84-87.) In some cases, it may even go beyond these locations and into

the vehicle's trunk. (*Id.* at p. 86, fn. 25.) There is nothing limited about a search which covers the very areas which the Supreme Court has said may not be searched.

Rebranding a search inside a vehicle's passenger area as a search for documentation does not make it any more limited than other types of vehicle searches within that same area. "Courts must examine the lawfulness of a search under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." (*People v. Carrington* (2009) 47 Cal.4th 145, 168.) Just as an objectively reasonable traffic stop does not turn illegal because the officers hope to find contraband (*Whren v. United States* (1996) 517 U.S. 806, 812-813), an objectively unreasonable vehicle search does not turn lawful because the officers hope to find an identification card.

Appellant points out that the July 4, 2014 search did not extend beyond Lopez's purse, which was sitting in plain view inside her car. (AB, pp. 16, 20, 27; see RT 34-35.) That is true, but not because of any inherent limitation in what *Arturo D.* permits. Under *Arturo D.*, Officer Moe did not even have to ask Lopez where, within the car, he would find the identification card. Instead, the officers just grabbed the purse

and searched it. (RT 34-35.) Had it turned up empty, *Arturo D.* would permit the officers to continue rummaging through at least the passenger area of Lopez's car until and unless they eventually found an identification card. That scenario is exactly what *Gant* prohibits.

B. Regardless whether the suspect is under arrest or merely detained, California's documentation search doctrine cannot be reconciled with the Supreme Court's decision in *Gant*.

Appellant argues that *Gant* involved a vehicle search incident to arrest and did not speak to the legality of searches following a traffic stop, when the driver is merely detained. (AB, pp. 12, 20, 24-25.) This distinction does not help appellant's argument.

An officer's authority to search incident to detention is less than, not greater than, his authority to search incident to arrest. "[A]n arrest is a greater infringement than a detention." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 330.) The only search permitted during an investigative detention is a patdown for weapons. (*Terry v. Ohio* (1968) 392 U.S. 1, 30-31.) A search inside a vehicle for identification is manifestly not a patdown.

Moreover, the decision in *Gant* did not turn on the academic distinction between an arrest and a detention. Rather, *Gant* was more broadly concerned with the "serious and recurring threat to . . .

privacy" which occurs when a driver is subject to invasive searches of her personal effects after being "caught committing a traffic offense." (*Arizona v. Gant, supra,* 556 U.S. at p. 345.) The search in this case occurred moments after Lopez had been "caught committing a traffic offense." (*Ibid.*) Regardless whether she was detained or arrested, this was exactly the scenario addressed in *Gant.*

Appellant characterizes the documentation search exception as one which pre-dated *Gant* and was "supported by decades of case law across the country." (AB, p. 25, citing *In re Arturo D., supra,* 27 Cal.4th at pp. 68-71.) They argue that *Gant* left that doctrine in place by affirming the continuing validity of other recognized exceptions to the warrant requirement. (AB, pp. 25-26, citing *Arizona v. Gant, supra,* 556 U.S. at p. 346.)

Appellant overstates the universality of the documentation search doctrine. The "decades of case law" which this Court cited in *Arturo D.* consisted solely of California cases. (See *In re Arturo D., supra,* 27 Cal.4th at pp. 68-71.) This Court did not cite any cases from "across the country" which had endorsed a documentation search exception to the warrant requirement. (AB, p. 25.)

When *Gant* acknowledged the existence of "other established exceptions," it meant "other established exceptions" recognized by the Supreme Court's own case law. (See *Arizona v. Gant, supra,* 556 U.S. at pp. 346-347.) It did not mean it was endorsing a California-created exception whose validity the United States Supreme Court had never considered - and which was, in substance, little different than the search it had just struck down.

C. If this Court finds *Gant* inapplicable because Lopez was merely detained, then the search of her vehicle was an unlawful search incident to citation.

Even if this Court finds that *Gant* applies only after arrest, the search of Lopez's vehicle was still illegal under *Knowles v. Iowa, supra,* 525 U.S. 113, and *People v. Macabeo, supra,* 1 Cal.5th 1206.

Knowles rejected the argument that an officer who has issued a traffic citation may search the vehicle incident to that citation. (*Knowles v. Iowa, supra,* 525 U.S. at pp. 118-119.) *Arturo D.* found that this rule did not apply to documentation searches, in part, because of their limited nature. (*In re Arturo D., supra,* 27 Cal.4th at pp. 75-76.) Lopez has already addressed this aspect of *Arturo D.* in Argument (I)(A), *supra,* at pp. 11-15.

Arturo D. also observed that the search in *Knowles* occurred after the citation had issued, whereas a documentation search occurs beforehand. (*In re Arturo D., supra,* 27 Cal.4th at pp. 75-76.) In *Macabeo,* however, this Court applied *Knowles* in a pre-citation setting, finding that it prohibited the search of a bicyclist following a stop for a violation. (*People v. Macabeo, supra,* 1 Cal.5th at pp. 1210-1211, 1216-1219.) According to appellant, *Macabeo* merely held "that, regardless of timing, a search incident to arrest cannot take place once it becomes 'clear that an arrest [i]s not going to take place.'" (AB, p. 32, citing *Macabeo,* at p. 1219.) In *Macabeo,* it was clear that an arrest would not take place since state law prohibited it. (*Ibid.*; AB, p. 32.) Appellant contrasts this situation with the one here, in which Lopez may or may not have been subject to arrest. (AB, p. 32.)

Macabeo is significant because it reaffirms *Knowles*'s holding that the warrant requirement includes no search incident to citation exception. More importantly, *Macabeo* reaffirms that holding in the very type of pre-citation context which was at issue in *Arturo D.* If *Knowles* did not apply to pre-citation searches – as *Arturo D.* found – then there is no reason why the search in *Macabeo* should have been held invalid.

Appellant's argument, at bottom, is that *Macabeo* and *Knowles* are inapposite for the same reason that *Gant* was inapposite: because those cases do not govern searches for documentation. This argument is fundamentally circular. It says: documentation searches are not subject to the normal Fourth Amendment rules because those rules do not govern documentation searches. But outside the realm of documentation searches - the very doctrine under challenge - appellant can cite only one case which has ever upheld a suspicionless search in a pre-arrest context. That case is *New York v. Class* (1986) 475 U.S. 106. (See AB, pp. 18-19, 27-28.)

Unlike a search for identification, the search permitted in *Class* was truly de minimis. The officer in *Class* merely reached inside the car and moved some papers which were obscuring the vehicle identification number ("VIN") on the vehicle's front dashboard. (*New York v. Class, supra,* 475 U.S. at p. 108.) The high Court found that a driver has no reasonable expectation of privacy in his VIN since, by federal regulation, that number must be located in a place visible from outside the car. (*Id.* at pp. 112-114.)

Appellant likens a VIN to a driver's license, since the driver must have that document with her when she drives and must present it to a police officer upon request. (AB, p. 28, fn. 8; Veh. Code, § 12951.) The analogy fails. While state law requires that a driver have physical possession of a driver's license, it does not require that she keep it in a place visible from outside the vehicle. Quite conversely, most people keep their license and registration documents in purses and glove compartments, where the expectation of privacy is at its highest. There is a big difference between permitting officers to move a few papers in an area which must be visible to the public and permitting officers to search through areas which are inherently private.

If appellant is correct that Lopez was merely detained, then the only search permitted was a pat search for weapons. A search inside the vehicle – no matter what the purpose – constituted the very type of search incident to citation which both *Knowles* and *Macabeo* prohibited.

D. The post-*Gant* cases relied on by appellant are inapposite.

Appellant points to a series of post-*Gant* cases which have "directly addressed the propriety of warrantless document searches of automobiles under the Fourth Amendment, upholding their validity." (AB, p. 38; see also AB, pp. 28-29, citing *State v. Keaton* (N.J. 2015) 222

N.J. 438, 448; *People v. Pryor* (N.Y.S.Ct. 2009) 896 N.Y.S.2d 575, 581-582; *United States v. Samuels* (6th Cir. 2011) 443 Fed.Appx. 156, 157, 160-161; *United States v. Ramos* (D.N.M. 2016) 194 F.Supp.3d 1134, 1163-1164.) Appellant overstates the significance of these cases.

None of the cases cited by appellant so much as mentioned *Gant* – let alone addressed its impact on the legality of a documentation search. Two of the cases did not involve documentation searches at all. They involved VIN searches, which the Supreme Court has specifically permitted in *New York v. Class, supra,* 475 U.S. at p. 114. (*United States v. Samuels, supra,* 443 Fed.Appx. at pp. 160-161; *United States v. Ramos, supra,* 194 F.Supp.3d at pp. 1163-1164.)

A third case, *State v. Keaton* (N.J. 2015) 222 N.J. 438, 442, arose after the police entered an overturned car to search for registration. The New Jersey Supreme Court found a Fourth Amendment violation because the officer never gave the driver an opportunity to provide that document on his own. (*Keaton,* at pp. 450-451.) Far from helping appellant, *Keaton* supports the argument made by Lopez. Under the facts of *Keaton,* affording the driver a chance to provide registration meant affording him a chance to return to his overturned vehicle and

retrieve that document. (*Id.* at pp. 443-444.) By that logic, the search in this case was unlawful since Officer Moe never gave Lopez a chance to retrieve her own identification card.

Of the four cases relied on by appellant, only *Pryor* actually upheld a search for documentation inside a vehicle. (*People v. Pryor, supra,* 896 N.Y.S.2d at pp. 581-582.) However, it did so because of the cases's "unique circumstances." (*Id.* at p. 582.) The police in *Pryor* ordered the driver out of the car and searched it only after he became agitated and potentially combative. (*Id.* at p. 579.) Before that, they gave him an extensive opportunity to search for the documents himself. (*Id.* at pp. 578-579.) Lopez did not receive a similar opportunity. Instead, Officer Moe immediately placed her in handcuffs after she revealed that she had no license.

In her opening brief, Lopez cited a series of cases from the last decade which have found that *Gant* prohibits a search inside a vehicle for documentation. (OBM, p. 17, citing *Newell v. County of San Diego* (S.D. Cal. 2014) 2014 U.S. Dist. LEXIS 72735, at *21-22; *Torrez v. Commonwealth* (Ky.Ct.App. 2011) 2011 Ky.App.Unpub.LEXIS 303, at *9-10; *Crock v. City/Town or Boro of Mt. Lebanon* (W.D.Pa. 2010) 2010

U.S.Dist.LEXIS 136442, at *25; *State v. Rider* (Ariz.Ct.App. 2008) 2008 Ariz.App.Unpub.LEXIS 86, at *9.) Appellant goes to some length to distinguish each of these cases from the present one. (AB, pp. 37-38.) Their purported distinctions are unconvincing.

Appellant distinguishes *Torrez* and *Rider* on the ground that they both involved post-arrest searches for identification, as opposed to pre-citation searches. (AB, p. 38.) That purported distinction is meaningless – for reasons already discussed. (See Argument (I)(B), *supra*, pp. 15-16.)

In *Newell*, the plaintiff alleged a violation of his civil rights due to a police officer's search of his vehicle. (*Newell v. County of San Diego*, 2014 U.S. Dist. LEXIS at *1, 6-7.) The defendant moved for summary judgment, arguing that it was a lawful search for identification. (*Id.* at *20-21.) The district court refused to grant summary judgment on this ground. (*Id.* at *22.) Appellant nonetheless reads *Newell* as "affirm[ing] the existence of authority permitting 'non-consensual vehicle searches to ascertain vehicle ownership.'" (AB, p. 38.) In fact, *Newell* cited exactly one case which upheld a search for documentation, and that case arose 37 years before *Gant*. (*Newell*, at *21-22, citing *United States v. Brown* (9th Cir. 1972) 470 F.2d 1120.)

In a similar vein, appellant construes *Crock* as a case which "assumed the vitality" of the documentation search doctrine but found it inapplicable on the facts before it. (AB, p. 38.) Quite to the contrary, *Crock* acknowledged past cases which had allowed documentation searches in certain circumstances. (*Crock v. City/Town or Boro of Mt. Lebanon, supra,* 2010 U.S.Dist.LEXIS at *19-22.) It then went on to state that *Knowles* and *Gant* "appear[] to foreclose any justification of Defendants' search on the basis of Plaintiff's failure to provide an unexpired form of identification." (*Crock*, at *22-24.)

The authorities relied on by Lopez are far more analogous to this case than the authorities cited by appellant. This Court should follow the former.

E. While important policy objectives underlie the documentation search doctrine, the doctrine is not narrowly tailored to achieve those objectives.

Appellant makes an extensive policy-based argument for reaffirming the documentation search doctrine. (AB, pp. 21-24.) They argue that a police officer must have a way to learn a traffic offender's identity even when she cannot produce a license. Such information is necessary so that the officer may issue a notice to appear, determine

which offense the driver committed, and decide whether it is appropriate to make an arrest. (AB, pp. 21-23.)

Here, for instance, appellant states that Officer Moe knew Lopez had committed a Vehicle Code violation but did not know which one. (AB, p. 23.) Appellant argues that Moe needed to obtain identification so that he could complete his investigation and determine whether to arrest Lopez or just issue a citation. (AB, pp. 21, 23, fn. 3.)

Lopez agrees that an officer conducting a traffic stop must have a way of learning and verifying the driver's identity. But, in the vast majority of instances, the police can accomplish these objectives without searching the car. Other available tools are not only less invasive than a vehicle search, but also more likely to lead to the desired information than a search for a license which the driver has already said she does not have.

1. A police officer is more likely to learn a driver's identity by asking her name and date of birth, and verifying the information through dispatch, than by searching the car for identification.

The simplest, and most obvious, step that an officer may take to learn the driver's identity is to ask for her name and date of birth. (*Berkemer v. McCarty* (1984) 468 US 420, 439 [officers "may ask the

detainee a moderate number of questions to determine his identity"].) Afterwards, the officer may try to verify the driver's license status by calling in the information provided or calling in the license plate number of her vehicle.

In most cases, the driver will provide truthful information and the officer will be able to determine whether she has a valid license that has not been suspended. If so, the officer will have all the information needed to determine what offense was committed and to either write a citation or make an arrest. Conversely, if the officer is unable to confirm the driver's identity or whether she has a valid license, he may either arrest the driver or issue a citation and require her to provide a thumbprint on the notice to appear. (See Veh. Code, 40500, subd. (a); Pen. Code, § 853.5.)

Citing multiple cases in which the defendant lied about his or her identity or personal details, appellant argues that an officer should not have to accept the suspect's word about her identity. (AB, pp. 34-35; see also AB, p. 21, fn. 3.) Lopez does not contend that the officer must accept the driver's word. She does contend that an officer must take reasonable steps, short of a search, to learn the driver's identity. Asking

the driver her name need not be the end of the officer's investigation, but it is a far more reasonable starting point than entering the vehicle and searching through the driver's personal effects.

The very facts of *Arturo D.* help illustrate why searching the vehicle for documentation is often ineffective as compared to other, less invasive measures. When stopped by the police, Arturo D. could not provide a licence but volunteered his name, address, and date of birth. (*In re Arturo D., supra,* 27 Cal.4th at p. 65.) The Court's factual summary does not say if the officer called dispatch to confirm the driver's information. However, it does say that the officer did not plan to make an arrest – an indication that he was satisfied with the information. (*Id.* at p. 100 [dis. opn. of Kennard, J.].) The ensuing search for documentation was not only pretextual but useless, as the Court's discussion does not indicate that it yielded any documentation.

Mr. Hinger, the second driver in *Arturo D.*, did not have a license with him but did tell the officer his name. (*In re Arturo D., supra,* 27 Cal.4th at p. 66.) As a result, the officer was able to verify Hinger's identity through dispatch. (*Id.* at p. 100 [dis. opn. of Kennard, J.].) Again, the ensuing search did not lead to the discovery of any driver's

license. (*Id.* at pp. 66-67.) Police did, however, find a check-cashing card with Hinger's photograph, which merely confirmed what they already knew about his identity. (*Id.* at p. 67.)

Similarly, in *People v. Webster* (1991) 54 Cal.3d 411, 429 – the primary case on which *Arturo D.* relied – the driver had no license but truthfully gave his name by providing a birth certificate. Using this information, the officer contacted dispatch and determined that the driver had an outstanding warrant. (*Ibid.*) Likewise, in *Gant*, the police managed to confirm Mr. Gant's identity and license status just by asking his name. (*Arizona v. Gant, supra*, 556 U.S. at pp. 335-336.)

Appellant argues that a defendant who gives false information to police may do harm to innocent third parties by using their identities. (AB, p. 35.) Perhaps so but, for every traffic offender who uses another's identity, there are a great many who do not. The mere possibility that a driver might lie is no reason to dispense with the Fourth Amendment's warrant requirement. (See *United States v. Salgado* (7th Cir. 1986) 807 F.2d 603, 609 ["mere possibility that evidence will be destroyed" exists in every drug case and cannot justify a finding of exigent circumstances].)

In any event, a search for identification seems ill-suited to uncover a driver who has given a false identity to the police. A person who provides false information likely does so because he has no valid license or is concerned about outstanding warrants. A documentation search would rarely reveal his deceit because such a person would have little reason to carry identification in the first place.

In short, the policies behind *Arturo D.* are important ones, but the rule set forth in that case is not narrowly tailored to achieve those policies. Where the officer fails to take reasonable, less intrusive steps to ascertain the driver's identity, policy considerations cannot justify this state's continued recognition of the documentation search doctrine as an exception to the normal limits on vehicle searches.

2. Officer Moe did not ask Lopez her name, did not permit her to retrieve her identification card on her own, and did not seek her consent to enter the car and retrieve the identification.

The prosecution presented no evidence that Officer Moe ever asked Lopez her name – let alone followed up on that information – before searching her vehicle for documentation. At the hearing, Moe could not specifically recall if he asked Lopez her name. (RT 42.) However, he would have had almost no chance to do so, given how

little time passed between his initial request for a driver's license and the ensuing search of Lopez's vehicle. (See RT 32-35.) Moreover, Moe essentially admitted that he believed it a waste of time to ask a suspect her name (RT 43) – which strongly suggests that he did not do so.

Unlike the usual case, Officer Moe knew that Lopez had identification inside the car for she had just gotten done volunteering this information. (RT 39-40.) Thus, in lieu of asking Lopez her name, he could have allowed her to retrieve the identification card from the car. Appellant, however, contends that this course of action would have been "unacceptably risky" given Lopez's previous resistance when Officer Moe tried to arrest her. (AB, p. 20.) In fact, a careful reading of the record shows that Moe learned the identification card was inside the car **before** Lopez ever resisted.

On direct examination, Officer Moe testified that he approached Lopez and asked if she had a driver's license. (RT 33.) When Lopez said she did not, he grabbed her wrist to apply handcuffs and Lopez immediately tried to pull away. (RT 33-34.) After having his recollection refreshed, Moe clarified that, when he asked for her license,

Lopez replied that she did not have one but that there might be identification in the car. (RT 39-40.)

Moe's testimony on cross-examination refutes appellant's contention that she had already resisted arrest. To the contrary, the arrest - and resulting resistance - occurred only after she had volunteered that she might have an identification card. Therefore, neither Lopez's resistance, nor the fact of her arrest, made it necessary for the officers to search inside her car in order to obtain identification. Once Lopez revealed that the identification was in the car, Moe could have just asked her to go retrieve it. Had he done so, there may never have been any need to arrest her.

Yet another option at Officer Moe's disposal was to request Lopez's consent to enter the car and retrieve her identification. If Lopez agreed, the search would have been valid as a consent search. If she declined, leaving the officer unable to confirm her identity, he would no doubt have had grounds to make an arrest.

Appellant argues that allowing a "limited" search for documentation is a lesser intrusion on liberty than arresting a driver for failing to produce a driver's license. (AB, pp. 19, 37.) They also note that

most arrests of a driver would necessarily include a search of the vehicle anyhow, since the car would be impounded and an inventory search conducted. (AB, pp. 19, 37.)

As Lopez has already demonstrated, an officer has other middle-ground options between an arrest and a search. Besides, if the driver has identification in the car, then it would be wholly within her power to prevent an imminent arrest simply by consenting to a search of her vehicle. (See *Chambers v. Maroney* (1970) 399 U.S. 42, 64 [dis. opn. of Harlan, J.].)

It is true that, in many instances, a driver's arrest will lead to impoundment of the vehicle and a resulting inventory search. In this case, however, Lopez's vehicle was already parked on the curb in front of her own house. There was no reason to believe the car was stolen and it was not "impeding traffic or threatening public safety and convenience." (*United States v. Cervantes* (9th Cir. 2012) 678 F.3d 798, 805, quoting *South Dakota v. Opperman* (1976) 428 U.S. 364, 369.) Under such circumstances, there was no community caretaking interest in towing the vehicle. (*People v. Williams* (2006) 145 Cal.App.4th 756, 762-763; *United States v. Caseres* (9th Cir. 2008) 533 F.3d 1064, 1074-1075.)

By searching Lopez's vehicle for identification, without ever asking her name, or allowing her to retrieve the identification from her car, Officer Moe violated Lopez's Fourth Amendment right to be free of unreasonable searches of her personal effects.

F. The search of Lopez's car was impermissible under *Gant*.

Appellant argues that the search of Lopez's purse would have been permissible even under *Gant*. They reason that Officer Moe "had reasonable suspicion . . . to believe that Lopez had committed one of four offenses:" driving without physical possession of a license (Veh. Code, § 12951, subd. (a)); failure to turn a license over to a police officer (Veh. Code, § 12951, subd. (b)); driving while unlicensed (Veh. Code, § 12500); or driving on a suspended license (Veh. Code, § 14601, subd. (a)). (AB, pp. 19, 26.) Appellant argues that the information gleaned from Lopez's identification card was relevant evidence in assessing which of these offenses she had committed. (AB, p. 26.)

Lopez's identification card was not relevant evidence to any of the charges under investigation. The relevant evidence was the information which Officer Moe would be able to learn about Lopez's license status by calling in the name and date of birth on her

identification card. But Moe did not need her identification card to obtain her name and date of birth.

Furthermore, *Gant* does not permit the type of investigative search which appellant proposes. It only permits a search where it is "reasonable to believe the vehicle contains evidence of the offense of arrest." (*Arizona v. Gant, supra,* 556 U.S. at p. 351.) At the time he placed Lopez in handcuffs, Officer Moe had probable cause to believe that she had committed exactly one infraction: driving without physical possession of a license. All the evidence needed to prove that crime was that the officer saw her driving and she admitted she did not have a license. Moe was certainly within his rights to investigate the possibility of other, more serious license-related offenses. But *Gant* did not permit him to conduct that investigation by searching the vehicle.

Lopez acknowledges that there might well come a point where a search for identification is appropriate under *Gant*. The legality of a search ultimately comes down to "balancing the need to search against the invasion which the search entails." (*Camara v. Municipal Court of San Francisco* (1967) 387 U.S. 523, 536-537.) Where a police officer asks the driver her name but cannot confirm her identity through dispatch, the

need to learn her true identity might, arguably, justify a search inside the vehicle for identification. The same might be true if the officer has received conflicting information about the driver's identity - as happened in *Ingle v. Superior Court* (1982) 129 Cal.App.3d 188, 191-192. But neither of these scenarios was present in this case. Consequently, this Court need not decide whether *Gant* would permit a search for identification in this situation.

G. Even if documentation searches remain permissible in this state, the search of Lopez's car did not satisfy *Arturo D.*'s requirements.

1. Lopez has not forfeited the right to argue that the search was an impermissible documentation search.

At the Court of Appeal and in her opening brief on the merits, Lopez argued that, even if this Court upholds *Arturo D.*, the search of her purse did not meet its requirements. (OBM, Argument (I)(E), pp. 28-30.) Appellant contends that Lopez has forfeited this argument by failing to raise it in her petition for review. (AB, pp. 33-34, citing Cal. Rules of Court, rule 8.516(a)(1); *People v. Estrada* (1995) 11 Cal.4th 568, 580.) Their argument lacks merit.

Rule 8.516(a)(1) states: "On or after ordering review, the Supreme Court may specify the issues to be briefed and argued. Unless

the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them." This Court's order granting review did not specify any particular issue to be briefed or argued. As such, rule 8.516(a)(1), by its very terms, does not limit the arguments which Lopez may make.

In a similar vein, *People v. Estrada, supra,* 11 Cal.4th at p. 580, does not bar Lopez's argument. In *Estrada,* this Court refused to consider a sub-argument because the defendant did not make it in the Court of Appeal and did not try to explain why it was fairly included in the primary issue. (*Ibid.*) Lopez is making a sub-argument which she did make at the Court of Appeal: that the search of her purse was improper even under *Arturo D.* (See Respondent's Brief at Court of Appeal, Argument (I)(E), pp. 26-28.) That sub-issue is "fairly included" in the question of whether *Arturo D.* remains good law. (Cal. Rules of Court, rule 8.516(a)(1).)

Lopez did not seek review to obtain an advisory opinion on whether *Arturo D.* survives the decision in *Gant.* She sought review so that this Court could decide if the search of her vehicle was legal - an issue on which appellant bears the burden of proof. (*People v. Redd*

(2010) 48 Cal.4th 691, 719.) If this Court concludes that *Arturo D.* remains good law, it cannot evaluate whether appellant has met its burden without evaluating the search's legality under *Arturo D.*

It was appellant who injected the identification search issue into this case by using it to justify the search of Lopez's vehicle in the trial court, the Court of Appeal and, now, this Court. (See CT 21; AOB in Court of Appeal, pp. 9-13; AB, pp. 17-24.) In addition, appellant is now arguing that, even if *Arturo D.* is no longer good law, Officer Moe conducted the search in good faith reliance on that authority. It is impossible to consider the merits of this good faith argument without considering whether the search was or was not proper under *Arturo D.* Having injected these issues into the case, appellant may not argue forfeiture when Lopez tries to respond. (See *People v. Brenn* (2007) 152 Cal.App.4th 166, 174 [forfeiture doctrine inapplicable where prosecution "put the . . . issue on the table"].)

2. Because Lopez was not a driver of a motor vehicle, and did not refuse to provide identification, the search of her vehicle was improper.

In her opening brief, Lopez argued that the authority to conduct a search for documentation arises only after a traffic stop, based on an observed Vehicle Code violation. (OBM, pp. 28-30.) Officer Moe did not

observe any traffic infraction and he did not conduct a traffic stop, as Lopez was already on foot when he approached her. (RT 32-33, 37.)

Appellant argues that these distinctions are immaterial since, moments after the encounter began, Lopez admitted to the offense of driving without a license. (AB, p. 33.) The documentation search exception, however, is a creature of statute. When this Court created the exception, it did so because it believed the right to search for identification flowed directly from Vehicle Code sections 4462, subdivision (a), and 12951, subdivision (b). (*People v. Webster, supra*, 54 Cal.3d at p. 430.) If those statutes created the exception, then the statutes' language defines the exception's scope. Vehicle Code sections 4462, subdivision (a), and 12951, subdivision (b) both apply only to a "driver of a motor vehicle."

If Officer Moe had pulled Lopez over while she was still behind the wheel, she would have been in position to reach into her purse and hand over her identification card when the officer asked for a license. But Moe could not pull her over, as she committed no offense and an officer may not make a traffic stop just to demand that the driver produce a license. (*Delaware v. Prouse* (1979) 440 U.S. 648, 663.)

Therefore, Moe waited until she was a pedestrian before instituting what the trial court found to be a consensual encounter. (CT 40.) If Lopez was not a "driver of a motor vehicle," then there was no statutory authority for Moe to demand that she produce a license - and no statutory authority to search her car when she did not.

Lopez accepts that, once she admitted to the offense of driving without a license, Moe had the right to issue a traffic citation. But the development of probable cause to issue a traffic citation does not transform a pedestrian into a "driver of a motor vehicle," thereby triggering a right to search her nearby vehicle.

Finally, the search was also improper under *Arturo D.* because, far from failing to produce identification, Lopez volunteered that she had it. Appellant argues that her statement was equivocal and came only after she had resisted arrest. (AB, p. 34; RT 39-40.) The record refutes the latter claim - for reasons already discussed. (See Argument (I)(E)(2), *supra*, pp. 30-31.) While Lopez could not definitively say that her identification was in the car, she said that it might be and that she believed it was. (RT 34, 39-40.) That is not a failure to provide identification.

Because Lopez was not a driver, and did not fail to produce identification in response to Officer Moe's request, the prerequisites for a documentation search were not present.

H. The good faith exception does not apply.

1. Appellant has waived the right to rely on the good faith exception.

Appellant argues that, even if *Arturo D.* is no longer good law in light of cases like *Gant*, the good faith exception should prevent Lopez from obtaining the remedy of suppression. (AB, pp. 39-40.)

Appellant did not advance the good faith theory in the trial court and has, therefore, forfeited the argument. (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1232.) Appellant, however, points out that Lopez brought only a generic suppression motion. (AB, p. 41; CT 11-14.) Though she mentioned *Gant* at the evidentiary hearing (RT 48-49), defense counsel never specifically argued that it had overruled *Arturo D.* (AB, pp. 41-42.) Appellant, therefore, contends that the prosecutor had no reason to advance a good faith argument in the trial court. (AB, pp. 41-42.) Appellant is wrong.

During the evidentiary hearing, the trial court specifically asked the prosecutor if *Gant* had superseded the California case law cited in

his opposition papers. (RT 50-51.) The prosecutor responded by distinguishing *Gant* from this state's documentation search cases. (RT 51-52.) He did not even mention the good faith exception.

In a footnote, appellant concedes that the court questioned the prosecutor about the continued viability of California's documentation search cases. (AB, p. 42, fn. 11.) However, they argue that Lopez suffered no unfair disadvantage by the prosecutor's decision to distinguish *Gant* instead of relying on the good faith doctrine. (AB, p. 42, fn. 11.)

Lopez did suffer disadvantage from the prosecutor's failure to raise good faith in the trial court. It will be recalled that, before he even approached Lopez, Officer Moe had already run a license plate check on her car. (RT 29.) As a result, he learned that the car was registered to "116 Northwest Street" (RT 29), which other court records identified as Lopez's residence. (CT 1.) Moe did not say whether he learned that Lopez was the registered owner. Had the prosecutor raised the good faith issue in the trial court, defense counsel might have inquired into this area. This was a potentially key point since even *Arturo D.* said that, "an officer may not search for [documentation] on pretext." (*In re*

Arturo D., supra, 27 Cal.4th at p. 86.) If Moe already knew Lopez's identity, and was searching inside her vehicle on the pretext of looking for identification, then the search did not comport with *Arturo D.* Hence, the good faith exception would not apply.

Good faith reliance on *Arturo D.* also means giving the driver an adequate opportunity to provide identification before concluding that she has failed to do so. (*In re Lisa G.* (2004) 125 Cal.App.4th 801, 808.) Even now, appellant argues that Moe could not feasibly have allowed Lopez to retrieve the identification card on her own, since she had already resisted arrest. (AB, p. 20.) Had defense counsel known of the good faith argument, she might have tried to more clearly establish that Lopez resisted arrest only after she mentioned the identification card. Such a showing would have substantially weakened the prosecutor's good faith argument.

Not only did appellant fail to raise the good faith argument in the trial court. They also failed to raise it in their opening brief at the Court of Appeal. By that point, appellant cannot plausibly claim that they were not on notice of the good faith doctrine's potential application. On several occasions, this Court has found arguments

forfeited when not made in the Court of Appeal. (*People v. Murphy* (2001) 25 Cal.4th 136, 156; *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458, fn. 3; *People v. Standish* (2006) 38 Cal.4th 858, 888, fn. 9.)

Because appellant did not raise the good faith exception in either the trial court or Court of Appeal, they should not be permitted to raise it for the first time now. The argument has been forfeited.

2. The facts do not warrant application of the good faith exception.

If this Court permits appellant to raise the good faith exception, it should reject that argument on its merits.

For reasons argued in subsection (I)(G)(2), *supra*, at pp. 37-40, the search of Lopez's purse was improper even under *Arturo D.* That, alone, defeats appellant's good faith argument.

Furthermore, *Arturo D.*'s continuing viability was, at best, unclear after the 2009 decision in *Gant.* It is one thing for an officer to rely on a "bright-line" rule of law that is overturned only after the officer's actions. (*Davis v. United States* (2011) 564 U.S. 229, 232-233.) It is quite another to rely on a California decision whose continued validity is questionable in light of a more recent United States Supreme Court case which came down years before the officer's actions.

Appellant argues that Officer Moe cannot be faulted for reaching the same conclusion that even the Court of Appeal reached about *Arturo D.*'s continuing validity. (AB, p. 13.) It is not a question of fault. It is that the good faith exception only applies to "binding precedent." (*Davis v. United States, supra,* 564 U.S. at p. 241.) A case that has been overruled by a court of higher authority does not constitute binding precedent. If this Court concludes that *Gant* overruled *Arturo D.*, then the the latter was not binding precedent and the good faith exception does not apply.

CONCLUSION

For the reasons expressed above, and those set forth in Lopez's opening brief on the merits, this Court should reverse the Court of Appeal's decision and dismiss the drug charges against Lopez.

Dated: September 15, 2017

Respectfully submitted,

Solomon Wollack
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Maria Elena Lopez

CERTIFICATE OF COUNSEL

I certify that this brief contains 7,183 words.

Dated: September 15, 2017

SOLOMON WOLLACK
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PROOF OF SERVICE

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

REPLY BRIEF ON THE MERITS

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I declare under penalty of perjury the foregoing is true and correct. Executed this 15th day of September, 2017, at Pleasant Hill, California.

Solomon Wollack