In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GREGORY DIAZ,

Defendant and Appellant.

Case No. S166600

Second Appellate District, Case No. B203034
Ventura County Superior Court, Case No. 2007015733
The Honorable Roland Purnell, Judge
The Honorable Kevin J. McGee, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

A cellular phone is seized from the person of an arrestee at the police station, about one hour after the arrest at another location. Approximately 30 minutes later, the arresting officer accesses the cellular phone's text message folder and retrieves an incriminating message. The question before this Court is whether the officer's actions were lawful under the search-incident-to-arrest exception to the search warrant requirement of the Fourth Amendment to the United States Constitution.

INTRODUCTION

Cases implicating the search-incident-to-arrest exception to the search warrant requirement of the Fourth Amendment have involved vehicles, rooms, homes, and offices. But this case is about, in particular, the search of the person of the arrestee at the police station, after a public arrest, and the search of a cellular phone found on the arrestee's person during the station-house search. So it concerns the extent to which a valid arrest removes from the Fourth Amendment's protective scope the privacy interest of an arrestee in such an item on his person at the time of his arrest. As will be argued below, a cellular phone on the person of the arrestee at the time of his arrest is properly subject to a warrantless search at the police station, during the administrative processing conducted there, as a search incident to arrest.

STATEMENT OF THE CASE

On April 25, 2007, at 2:50 p.m., appellant participated in the sale of six Ecstasy pills. Appellant drove Lorenzo Hampton to a location in Thousand Oaks and waited while Hampton and an informant conducted the hand-to-hand transaction in the back seat of appellant's car. (RT 4-5, 8, 14-15, 18.) Shortly after the transaction, Ventura County Sheriff's deputies arrested both appellant and Hampton. Appellant was searched at the scene,

and a small amount of marijuana was recovered from his pocket. (RT 5-6, 15.) Appellant also had a cellular phone in his possession, but it was not seized at that time. (RT 9.)

Appellant was transported to the sheriff's station. There, at around 4:00 p.m., appellant's cellular phone was seized from his person and placed with the other evidence that had been collected. (RT 6, 8-9.) At 4:18 p.m., Senior Deputy Victor Fazio interviewed appellant. Appellant waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694], and denied any involvement in the incident. (RT 4, 6-7, 14.) After this interview, at about 4:23 p.m., Senior Deputy Fazio retrieved appellant's cellular phone and searched its text message folder. (RT 7-8, 10-11, 14.) He found a text message addressed to Hampton, stating "6 4 80." (RT 8, 19-20.) Based on his training and experience, Senior Deputy Fazio believed that this text message referred to six Ecstasy pills for the price of $80. (RT 8.) Senior Deputy Fazio immediately returned to the interview room and confronted appellant about the text message. Appellant admitted participating in the sale of Ecstasy. (RT 8, 12-13.)

Appellant was charged with selling a controlled substance (Health & Saf. Code, § 11379, subd. (a); count 1) and carrying a switch-blade knife (Pen. Code, § 653k; count 2). He initially pleaded not guilty. (CT 14-17.) He moved to suppress, on grounds of alleged unlawful search and seizure (see Pen. Code, § 1538.5), evidence of the text message and the statements he made when questioned about that message. (CT 24-29, 33.) The trial court denied that motion, finding that the cellular phone was properly searched incident to appellant's arrest. The court explained:

> [A]lthough it's true that officers sometimes do get search warrants for the specific purpose of looking into computers and to get cell phone messages from wireless providers and so forth, in this situation it seems to me that incident to the arrest search of his person and everything that that turned up is really fair

> game in terms of being evidence of a crime or instrumentality of a crime or whatever the theory might be. And under these circumstances I don't believe there's authority that a warrant was required. So the motion is denied.

(RT 23.)

Appellant thereafter withdrew his not-guilty plea and pleaded guilty to transportation of a controlled substance. (CT 35-52.) The trial court accepted the plea and dismissed the switch-blade charge. The court suspended imposition of sentence and placed appellant on three years formal probation. (CT 55-58.)

Appellant appealed, challenging the trial court's ruling on the suppression motion. In a published opinion, the Court of Appeal held that Senior Deputy Fazio's actions in retrieving the incriminating text message were lawful under the Fourth Amendment to the United States Constitution as a valid search incident to arrest. (*People v. Diaz* (2008) 165 Cal.App.4th 732.) The Court of Appeal explained that, because appellant had the cellular phone on his person at the time of his arrest, the cellular phone was taken out of the realm of protection from police interest for a reasonable amount of time following arrest. (*Id.* at p. 738.)

This Court granted review, deferring further action pending the United States Supreme Court's decision in *Arizona v. Gant* (2009) __ U.S. __ [129 S.Ct. 1710, 173 L.Ed.2d 485]. Then, on June 10, 2009, this Court ordered the parties to file their briefs on the merits.

SUMMARY OF ARGUMENT

Under the search-incident-to-arrest exception to the search warrant requirement of the Fourth Amendment, a cellular phone seized from the person of an arrestee at the police station, following an arrest at another location, is properly subject to a warrantless search during the administrative processing conducted at the police station.

The path to this conclusion begins with the United States Supreme Court's decisions in *United States v. Edwards* (1974) 415 U.S. 800 [94 S.Ct. 1234, 39 L.Ed.2d 771], and *United States v. Chadwick* (1977) 433 U.S. 1 [97 S.Ct. 2476, 53 L.Ed.2d 538].[1] In *Edwards*, the Court upheld the station-house search of the arrestee's clothing (*United States v. Edwards, supra,* 415 U.S. at p. 802); in *Chadwick*, the Court invalidated the station-house search of the arrestee's 200-pound, double-locked footlocker (*United States v. Chadwick, supra,* 433 U.S. at p. 15). Together, these two cases stand for the proposition that, while the Fourth Amendment prohibits the warrantless delayed search of items that merely had been "within the arrestee's immediate control," the search-incident-to-arrest exception to the search warrant requirement permits the warrantless delayed search of the person of the arrestee and articles "immediately associated with the person of the arrestee."

These two precedents would embrace the warrantless station-house search of appellant's cellular phone. Appellant's cellular phone was an item on his person at the time of his arrest and during the administrative processing at the police station. Accordingly, like the clothing worn by the defendant in *Edwards*, appellant's cellular phone was an item "immediately associated with the person of the arrestee." Conversely, unlike the 200-pound, double-locked footlocker in *Chadwick*, appellant's cellular phone was not merely an item that had been "within the arrestee's immediate control." The cellular phone was not separate from appellant's person.

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[1] *Chadwick* was abrogated on other grounds by *California v. Acevedo* (1982) 500 U.S. 565 [111 S.Ct. 1982, 114 L.Ed.2d 619]. (See *United States v. Doe* (1st Cir. 1995) 61 F.3d 107, 111, fn. 6 ["*Chadwick* has been overruled only as to closed containers seized from inside an automobile"]; see, e.g., *People v. Ingram* (1992) 5 Cal.App.4th 326, 331.)

What is more, the warrantless search of the cellular phone was justified by the necessity to preserve evidence. Unlike the footlocker with its static contents, a cellular phone cannot safely be reduced to the exclusive control of law enforcement pending issuance of a search warrant. The phone's contents are dynamic in nature and subject to change without warning -- by the replacement of old data with new incoming calls or messages; by a mistaken push of a button; by the loss of power; by a person contacting the cellular phone provider; or by a person pre-selecting the "cleanup" function on the cellular phone, which limits the length of time messages are stored before they are automatically deleted. Thus, appellant's cellular phone was an item "immediately associated with the person of the arrestee" and properly subject to the station-house search.

This conclusion is further supported by the many court opinions interpreting *Edwards* and *Chadwick*. Applying these two precedents, courts routinely uphold the delayed searches of wallets and purses (and address books and papers found therein). These items are similar to cellular phones in the way they function, the likelihood that they might contain evidence of the arrest offense, and in their susceptibility to destruction before the police might secure them. Indeed, cellular phones store the very things often contained in wallets and purses, including photographs, personal correspondences, and names, addresses, and telephone numbers of acquaintances.

The United States Supreme Court's recent decision in *Arizona v. Gant, supra,* 129 S.Ct. 1710, further supports the conclusion that a cellular phone on the person of an arrestee is properly subject to a warrantless search at the police station. *Gant* recognized that a search of a vehicle incident to arrest is valid where there is reason to believe evidence relevant to the crime of arrest might be found. This reasoning should equally apply to the search of an arrestee and items found on his person at the time of his

arrest. For, just as there is a reduced expectation of privacy with regard to vehicles, the privacy interest of the arrestee in his own person and in the items on his person are greatly diminished by virtue of the arrest itself. And, here, the officer had reason to believe that evidence of the sale of Ecstasy could be found in appellant's text messages.

ARGUMENT

THE WARRANTLESS SEARCH OF THE TEXT MESSAGE FOLDER ON APPELLANT'S CELLULAR PHONE, SEIZED FROM HIS PERSON AT THE POLICE STATION FOLLOWING HIS ARREST, WAS A LAWFUL SEARCH INCIDENT TO ARREST

The question before this Court is whether the search-incident-to-arrest exception to the search warrant requirement of the Fourth Amendment allows a police officer to search through the text messages on an arrestee's cellular phone, when the phone is seized from the arrestee at the police station and then searched about 90 minutes after the arrest. The choice for this Court in resolving this question is whether this case is controlled by *United States v. Edwards, supra,* 415 U.S. 800, allowing warrantless delayed searches of the person of the arrestee and articles "immediately associated with the person of the arrestee," or by *United States v. Chadwick, supra,* 433 U.S. 1, requiring a warrant for the delayed searches of items "within the arrestee's immediate control." Respondent submits that a cellular phone on the person of an arrestee is an item "immediately associated with the person of the arrestee" and, accordingly, properly subject to a warrantless search at the police station during the administrative processing conducted there as a search incident to arrest. This conclusion is supported, moreover, by the United States Supreme Court's recent decision in *Arizona v. Gant, supra,* 129 S.Ct. 1710.

A. United States Supreme Court Precedent Establishes That a Warrantless Station-House Search of the Person of the Arrestee and Items "Immediately Associated with the Person of the Arrestee" Is a Lawful Search[2]

It is well settled that a search incident to arrest is an exception to the search warrant requirement of the Fourth Amendment to the United States Constitution. (*Arizona v. Gant, supra,* 129 S.Ct. at p. 1716; *United States v. Robinson* (1973) 414 U.S. 218, 224 [94 S.Ct. 467, 38 L.Ed.2d 427].) "[W]hen a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused" in order to seize weapons that might be used to assault an officer and to prevent the destruction of evidence. (*Preston v. United States* (1964) 376 U.S. 364, 367 [84 S.Ct. 881, 11 L.Ed.2d 777].)

In *United States v. Robinson, supra,* 414 U.S. 218, the United States Supreme Court recognized that the search-incident-to-arrest exception "has historically been formulated into two distinct propositions." (*Id.* at p. 224.) The first of these two propositions -- controlling in *Robinson*[3] and in this case -- is that "a search may be made of the person of the arrestee by virtue of the lawful arrest." (*Ibid.*) The second is that "a search may be made of the area within the control of the arrestee." (*Ibid.*) The *Robinson* Court recognized that, although the validity of the second proposition had been subject to differing interpretations as to the extent of the area of the search,

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[2] "When the admissibility of evidence is challenged as being the 'fruit' of an unlawful search and seizure, article I, section 28, subdivision (d) of the California Constitution requires us to follow the decisions of the United States Supreme Court." (*People v. Bennett* (1998) 17 Cal.4th 373, 390; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1291.)

[3] In *Robinson*, the defendant was lawfully arrested and, upon his arrest, the arresting officer searched the defendant's pocket and cigarette package therein and found heroin. (*United States v. Robinson, supra,* 414 U.S. at pp. 220-223.) The Court upheld the search as a valid search incident to arrest. (*Id.* at p. 236.)

"no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee." (*Id.* at p. 225.) The Court explained that authorization for a full body search is provided by virtue of the lawful arrest "not only [as] an exception to the warrant requirement of the Fourth Amendment, but . . . [also as] . . . a 'reasonable search' under that Amendment." (*Id.* at p. 235.) Thus, under *Robinson* and its survey of the history of the law on searches of arrestees, a full search of the person of the arrestee is justified by virtue of the lawful arrest.

In *United States v. Edwards, supra,* 415 U.S. 800, the United States Supreme Court once again addressed the lawful scope of the search of an arrestee and recognized an exception to the requirement that a search incident to arrest be contemporaneous with the arrest. In *Edwards*, the defendant was lawfully arrested on the streets of Ohio late one night and charged with attempting to break into a post office. (*Id.* at p. 801.) He was transported to jail and placed in a cell. (*Ibid.*) Soon after, the investigation at the post office revealed that the attempted entry had been made through a wooden window, leaving paint chips nearby. (*Id.* at pp. 801-802.) The next morning, the defendant's clothing was taken from him and held as evidence.[4] (*Id.* at p. 802.) Examination of the defendant's clothing revealed paint chips matching those found at the scene. (*Ibid.*) This evidence was admitted at trial over the defendant's objection. (*Ibid.*)

On appeal, the Court framed the question as "whether the Fourth Amendment *should be extended* to exclude from evidence certain clothing taken from [defendant] Edwards while he was in custody at the city jail approximately 10 hours after his arrest"; implicit in the question was the

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[4] Appellant is incorrect that the clothing of the defendant in *Edwards* was taken from him during the booking process and then examined 10 hours later. (See AOB 8; *United States v. Edwards, supra,* 415 U.S. at pp. 801-802.)

assumption that a lawful arrest justifies a warrantless search of an arrestee. (*United States v. Edwards, supra,* 415 U.S. at p. 801, emphasis added.) In answering the question, the Court declined to extend the Fourth Amendment to invalidate the search and seizure under the circumstances of the case. (*Id.* at p. 802.)

The Court explained that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." (*United States v. Edwards, supra,* 415 U.S. at p. 803.) It noted that this question had been settled by its prior decision in *Abel v. United States* (1960) 362 U.S. 217 [80 S.Ct. 683, 4 L.Ed.2d 668]. (*United States v. Edwards, supra,* 415 U.S. at p. 803.) There, the Court had sustained a search where the defendant was arrested at his hotel but his belongings (a birth certificate, an international certificate of vaccination, and a bank book) were searched at the place of detention. (*Abel v. United States, supra,* 362 U.S. at p. 239.) The *Edwards* Court also noted that the federal courts of appeals had followed the same rule and that those courts had held that both the person and property in his immediate possession may be searched at the station house after the arrest had occurred at another place.[5] (*United States v. Edwards, supra,* 415 U.S. at p. 803 & fn. 4.) The *Edwards* Court explained:

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[5] See, e.g., *United States v. Gonzalez-Perez* (5th Cir. 1970) 426 F.2d 1283, 1287 ["The arresting officers are not required to stand in a public place examining papers or other evidence on the person of the defendant in order for such evidence to be admissible"]; *United States v. DeLeo* (1st Cir. 1970) 422 F.2d 487, 493 ["[T]he fact that a suspect, arrested in a public place, has been subjected only to a hasty search for obvious weapons has a reasonable nexus with the necessity of conducting a more deliberate search for weapons or evidence just as soon as he is in a place where such a search can be performed with thoroughness and without public embarrassment to him. . . . Were this not to be so, every person arrested for a serious crime would be subjected to thorough and possibly humiliating search where and

(continued...)

> [O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.

(*Id.* p. 807.) The Court concluded its opinion by quoting a First Circuit case that "captured the essence" of the situation before it:

> "While the legal arrest of a person should not destroy the privacy of his premises, it does -- for at least a reasonable time and to a reasonable extent -- take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."

(*Id.* at pp. 808-809, quoting *United States v. DeLeo, supra,* 422 F.2d at p. 493.)

Thus, the *Edwards* decision did not simply address routine jailhouse procedure. (AOB 9.) Rather, it addressed the scope of the impact of a lawful arrest on the privacy interest of an arrestee in his person and in the effects in his possession at the place of detention. In addressing that issue, the Court held that the person of the arrestee and the effects in his possession at the place of detention are properly subject to a warrantless station-house search.

(...continued)
when apprehended"]; *United States v. Frankenberry* (2d Cir. 1967) 387 F.2d 337, 339 ["The diary was properly seized in a search incident to arrest [at the police station]. It is entirely proper and indeed good police practice to make a more careful and thorough search of a person who has been arrested once he is brought to the police station. There are obvious reasons why it is often advisable to conduct a more thorough search at a police station rather than on a public thoroughfare or in a public place and why such a search can be more safely and better conducted in surroundings which are completely under police control"].

Subsequently, in *United States v. Chadwick, supra,* 433 U.S. 1, the United States Supreme Court revisited the exception to the requirement that a search incident to arrest be contemporaneous with the arrest and specified that the exception applied to the person of the arrestee and personal property "immediately associated with the person of the arrestee." In *Chadwick*, the Court invalidated a search, where officers seized a 200-pound, double-locked footlocker during the defendant's arrest and searched the footlocker without a warrant an hour and a half later. (*Id.* at pp. 4-5.) The Court explained:

> By placing personal effects inside a doublelocked footlocker, [the defendant had] manifested an expectation of privacy that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.

(*Id.* at p. 11.)

The *Chadwick* Court went on to distinguish searches of the person and items "immediately associated with the person of the arrestee" from searches of possessions "within an arrestee's immediate control." Reaffirming but distinguishing *Edwards*, the Court explained: "Unlike searches of the person, *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Edwards*, 415 U.S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." (*United States v. Chadwick, supra,* 433 U.S. at p. 16, fn. 10.) As to the latter items, the Court held: "Once law enforcement officers have reduced *luggage or other personal property not immediately associated with the person of the arrestee* to their exclusive control . . . a search of that property is no longer an incident of the arrest." (*Id.* at p. 15, emphasis added.)

Thus, under *Edwards* and *Chadwick*, delayed searches incident to arrest at the police station during the administrative processing are lawful if they are searches of the person or personal property "immediately associated with the person of the arrestee," as opposed to searches of possessions merely "within the arrestee's immediate control."

B. Cellular Phones Are Items "Immediately Associated with the Person of the Arrestee" and Therefore Properly Subject to Delayed Warrantless Searches Incident to Arrest

Under the authority of *Edwards* and *Chadwick*, the station-house search of appellant's cellular phone was lawful.[6] Like the clothing worn by the defendant in *Edwards*, appellant's cellular phone was an item "immediately associated with the person of the arrestee," as appellant's cellular phone was on his person at the time of his lawful arrest and during the administrative processing at the police station.

Appellant argues that a cellular phone is not an item "immediately associated with the person of the arrestee" because a cellular phone "is no more likely to be inside a person's pocket than inside a briefcase, backpack, or purse, or on a car seat or table. . . ." (AOB 14.) Of course, a person's clothing can be worn by the person, as it was in *Edwards*, or it can be inside a locked suitcase, inside a closet that is miles away from the owner, or in the trunk of a car. Yet, these possibilities did not invalidate the search of the clothing worn by the defendant in *Edwards*. Nor should appellant's list of possibilities invalidate the search here.

Appellant also argues that the search here was invalid because there is little about a cellular phone's *contents* that are associated with the physical

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[6] Respondent does not concede that all cellular phone users invariably have a reasonable expectation of privacy in the content of their text messages.

body of the arrestee's person. (AOB 15.) If this reasoning was determinative in the Fourth Amendment analysis, then the search in *Edwards* would have been invalid because there is little about paint chips suspended on one's clothing that are associated with the physical body of the person of the arrestee. Appellant's argument is thus flawed.

On the flip side, unlike the 200-pound, double-locked footlocker in *Chadwick*, appellant's cellular phone was not merely an item that had been "within the arrestee's immediate control." A 200-pound footlocker is plainly separate from the person of the arrestee and is not an item carried on the person of the arrestee, whereas appellant's cellular phone was on his person at the time of his arrest. Also, unlike the double-locking mechanism protecting the contents of the footlocker in *Chadwick*, no evidence suggests that the contents of appellant's cellular phone were protected by a password.

Further, the warrantless search of appellant's cellular phone was justified by the necessity of preserving evidence. (See *United States v. Robinson, supra,* 414 U.S. at p. 234 ["The justification or reason for the authority to search incident to arrest rests quite as much on the need to disarm the suspect in order to take him into custody *as it does on the need to preserve evidence on his person for later use at trial"*], emphasis added.) Unlike the footlocker in *Chadwick*, a cellular phone cannot be reduced to the "exclusive control" of law enforcement. (*United States v. Chadwick, supra,* 433 U.S. at p. 15; see AOB 4-5, 18-19.) The tangible contents of a locked footlocker are static in nature. They can be safeguarded without risk or difficulty while a search warrant is obtained. But the intangible contents of a cellular phone are dynamic and vulnerable in nature. They are subject to change without warning and can be permanently lost or destroyed in multiple ways: by the replacement of old data with new incoming calls or messages; by a mistaken push of a button; by the loss of power; by a person

contacting the cellular phone provider; or by a person pre-selecting the "cleanup" function on the cellular phone, which limits the length of time messages are stored before they are automatically deleted. (See *United States v. Mercado-Nava* (D.Kan. 2007) 486 F.Supp.2d 1271, 1278 [upholding the contemporaneous search incident to arrest of a cellular phone and stating: "The need to preserve evidence is underscored where evidence may be lost due to the dynamic nature of the information stored on and deleted from cell phones or pagers"]; *United States v. Parada* (D.Kan. 2003) 289 F.Supp.2d 1291, 1304-1305; see also *People v. Bullock* (1990) 226 Cal.App.3d 380, 388 [upholding the search of a pager during booking based on the exigency of the vulnerability of data stored in a pager]; *United States v. Ortiz* (7th Cir. 1996) 84 F.3d 977, 984 [upholding the contemporaneous search of a pager incident to arrest, emphasizing an officer's need to preserve evidence and the vulnerability of data stored in pagers]; cf. *New York v. Belton* (1981) 453 U.S. 454, 461, fn. 5 [101 S.Ct. 2860, 69 L.Ed.2d 768] [the initial seizure at the time of arrest does not place the property within an officer's "exclusive control" because "under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid"].) There is no guarantee that a record of the electronic contents of a cellular phone would be available from any other source; nor has appellant suggested that there is. Thus, the warrantless search of the cellular phone was justified by the necessity of preventing the destruction of evidence.

Granted, as appellant argues, some cellular phones certainly have the capacity to store more information than do articles of clothing. (See AOB 4, 14, 16.) For example, some cellular phones -- like personal computers -- are capable of browsing the Internet and maintaining a record of visited websites. However, whether law enforcement should be permitted to access such records from a cellular phone carried on the person of the

arrestee is not a question before this Court. In the case before the Court, it is *undisputed* that Senior Deputy Fazio limited his search to appellant's text messages. The search here is analogous to the search of a personal letter or correspondence in a pocket,[7] not a personal computer. (See *United States v. Edwards, supra,* 415 U.S. at p. 803 & fn. 4 [citing with approval various federal circuit court cases upholding as valid searches incident to arrest the delayed searches of documents found on the person of the arrestee at the police station].)

Moreover, despite appellant's focus on the data-storage capacity of a cellular phone, the United States Supreme Court has not identified the storage capacity of an item as being determinative in the Fourth Amendment analysis. Likewise, appellant's focus on a cellular phone's data-storage capacity is not a compelling or workable standard in assessing the constitutional validity of a warrantless search, especially in the context of this case. (See AOB 17.) Like appellant in the instant case, the defendant in *United States v. Murphy* (4th Cir. 2009) 552 F.3d 405, argued that a cellular phone's data-storage capacity should dictate whether a warrant needs to be sought before the cellular phone is searched. (*Id.* at p. 411.) The Fourth Circuit Court of Appeals rejected this argument, finding it problematic for several reasons, all of which are applicable here: (1) the defendant did not provide the court with any standard by which to determine what would constitute "large" storage capacity; (2) the defendant introduced no evidence that his cellular phone had the requisite "large" storage capacity; (3) the defendant's argument was premised on the unwarranted assumption that information stored on a cellular phone with a

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[7] Arguably, text messages implicate lesser privacy interests than do personal letters or correspondences carried in a pocket, because text messages can be more readily "forwarded" or sent to multiple cellular phone users.

"large" storage capacity would, in fact, be less volatile than information stored on a cellular phone with a "small" storage capacity; and (4) requiring police officers to ascertain the storage capacity of a cellular phone before conducting a search would be unreasonable, because it is likely that, in the time it takes for officers to ascertain a cellular phone's particular storage capacity, the information stored therein could be permanently lost. (*Ibid.*)

Thus, for the foregoing reasons, a cellular phone seized from the person of an arrestee at the police station, following an arrest at another location, is an item "immediately associated with the person of the arrestee" and properly subject to a warrantless station-house search.

C. Many Court Opinions Interpreting *Edwards* and *Chadwick* Support the Conclusion That a Cellular Phone Seized from the Person of An Arrestee at the Police Station, after An Arrest at Another Location, Is Properly Subject to a Warrantless Station-House Search Incident to Arrest

After *Edwards* and *Chadwick*, lower federal courts and panels of the California Court of Appeal evaluating delayed searches incident to arrest have distinguished between searches of the person and articles "immediately associated with the person of the arrestee," on the one hand, and searches of possessions "within an arrestee's immediate control," on the other. The courts have applied this analysis to the delayed searches of various items incident to arrest -- most commonly, to wallets and purses (and address books and papers found therein), and, less commonly, to cellular phones. And the great weight of authority of these cases has been that these items are "immediately associated with the person of the arrestee."

Thus, courts have consistently found that a search of a wallet and its contents (e.g., papers, address books) qualifies as a search of the person and articles "immediately associated with the person of the arrestee." In *United*

States v. Passaro (9th Cir. 1980) 624 F.2d 938, for example, the defendant was lawfully arrested and taken into custody for assault and battery of a police officer. (*Id.* at p. 943.) When the defendant arrived at the initial place of detention, his wallet was seized from his person, its contents searched, and a document contained in the wallet photocopied. (*Ibid.*) Citing *Edwards* and distinguishing *Chadwick*, the Ninth Circuit Court of Appeals found the evidence was lawfully seized. (*Id.* at p. 944.) The court explained: "Unlike a double-locked footlocker, which is clearly separate from the person of the arrestee, the wallet found in the pocket of Mr. Passaro was an element of his clothing, his person, which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest." (*Ibid.*; *United States v. Ziller* (9th Cir. 1980) 623 F.2d 562, 563 [upholding the delayed search of the defendant's wallet (and the seizure of the slip of paper contained therein), stating: "In our view, a search of the person which produced the wallet being permissible under *Chadwick*, a search of the contents of the wallet is likewise permissible as being an incident to and a part of a personal search"].)

Like the Ninth Circuit, other federal circuit courts have relied upon *Edwards* and upheld the delayed searches of wallets and address books as valid searches incident to arrest. (See, e.g., *United States v. Rodriguez* (7th Cir. 1993) 995 F.2d 776, 778 [upholding the search of a wallet and a personal address book contained in the wallet, at the police station]; *United States v. McEachern* (4th Cir. 1982) 675 F.2d 618, 621-622 [upholding the search of a wallet at the police station about half an hour after the arrest]; *United States v. Phillips* (8th Cir. 1979) 607 F.2d 808, 809-810 [upholding the search of a wallet at the police station]; *United States v. Castro* (5th Cir. 1979) 596 F.2d 674, 677 [upholding the search of a wallet during a search at the jail].)

With respect to purses, California Court of Appeal panels have consistently found that a search of a purse qualifies as a search of an item "immediately associated with the person of the arrestee." In *People v. Harris* (1980) 105 Cal.App.3d 204, which involved a booking search of a purse, the court held that a purse could be lawfully searched without a warrant at the police station because a purse is regarded as an extension of the person for purposes of the search. (*Id.* at p. 216 ["*Chadwick* centered upon, and its holding was limited to, personal property not immediately associated with the person of the arrestee, rather than a woman's purse which under California law is considered a normal extension of a person subject to search. [Citations.] . . . [S]ince the purse carried by Ms. Devlin at the time of her arrest is to be regarded as an extension of her person for the purposes of search, and since the person of an arrestee can be searched without a warrant either on the place of the arrest or at the police station, it is immaterial whether the search of Ms. Devlin's purse was effected at the place of her arrest or shortly after at the police station"]; see *Miller v. Superior Court* (1981) 127 Cal.App.3d 494, 509 [recognizing that California case law has established that purses are items "immediately associated with the person of the arrestee"]; see also *People v. Decker* (1986) 176 Cal.App.3d 1247, 1252 ["[W]e note the conclusion reached in [*United States v. Monclavo-Cruz* (9th Cir. 1981) 662 F.2d 1285] that a purse cannot be searched as a normal extension of the person [citation] is also contrary to well-established California law"]; compare *People v. Ingram, supra,* 5 Cal.App.4th at pp. 331-333 [recognizing that "courts have held a purse could be lawfully searched without a warrant at the police station [as a part of a search incident to arrest] because a purse is regarded as an extension of the person," but finding that, in the case before the court, the search of the purse at the police station could not be justified as such because the defendant "disassociated" herself from the purse by

choosing not to take it to the police station -- the police officers picked up the purse from the defendant's home and took it to the station].)

Like the California Court of Appeal panels, federal circuit courts have found a purse to be an extension of the person for purposes of a Fourth Amendment analysis. (See, e.g., *Curd v. City Court* (8th Cir. 1998) 141 F.3d 839, 843 [in upholding the delayed search of the defendant's purse at the police station as a lawful search incident to arrest, the court stated: "[S]earches of the person and articles 'immediately associated with the person of the arrestee,' are measured with a different, more flexible constitutional time clock. . . . Unlike luggage, courts considering the question have generally concluded that a purse, like a wallet, is an object 'immediately associated' with the person"]; *United States v. Graham* (7th Cir. 1981) 638 F.2d 1111, 1114 [in holding that a purse was part of the defendant's person and that, accordingly, a search warrant authorizing a search of the person covers the officer's search of the purse, the court stated: "The human anatomy does not naturally contain external pockets, pouches, or other places in which personal objects can be conveniently carried. To remedy this anatomical deficiency clothing contains pockets. In addition, many individuals carry purses or shoulder bags. . . . Containers such as these, while appended to the body, are so closely associated with the person that they are identified with and included within the concept of one's person. To hold differently would be to narrow the scope of a search of one's person to a point at which it would have little meaning"]; but see *United States v. Monclavo-Cruz, supra,* 662 F.2d at p. 1290 ["[W]e confine the *Edwards* exception to the person and clothing of an arrestee"].)

Courts have also addressed pager searches at the time of the arrest. These cases, although not involving station-house searches, are relevant, because "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place

of detention." (*United States v. Edwards, supra,* 415 U.S. at p. 803.) In this context, courts have found that pagers are personal property "immediately associated with the person of the arrestee." (See, e.g., *United States v. Lynch* (D.V.I. 1995) 908 F.Supp. 284, 288-289 ["Since a search of the 'person' has been held to include a person's wallet or address book, we find that a search of Thomas' pager was a search of his 'person' and thus was valid. . . . [W]e find that the pager was personal property immediately associated with the person of arrestee Thomas, as distinguished from *Chadwick*'s footlocker, which was 'personal property not immediately associated with the person of the arrestee'"]; *United States v. Chan* (N.D.Cal. 1993) 830 F.Supp. 531, 536 ["[T]he pager was the product of a search of Chan's person, whereas the footlocker in *Chadwick* was obtained from the trunk of the defendant's car"].)

One federal circuit court upheld a warrantless search of a cellular phone incident to arrest, finding the cellular phone to be an item "immediately associated with the person of the arrestee." In *United States v. Finley* (5th Cir. 2007) 477 F.3d 250, officers arrested the defendant and a passenger in the defendant's car after making a traffic stop. (*Id.* at pp. 253-254.) Officers seized the defendant's cellular phone at the time of the arrest and transported the defendant to the passenger's residence. (*Id.* at p. 254.) While at the residence, officers searched the call records and text messages on the defendant's cellular phone and questioned him about those messages. (*Id.* at pp. 254-255.) The Fifth Circuit Court of Appeals upheld the search. The court stated that "as long as the administrative processes incident to arrest and custody have not been completed, a search of effects seized from the defendant's person is still incident to the defendant's arrest." (*Id.* at p. 260, fn. 7.) The court then found that, although the police had moved the defendant, the search was "still substantially contemporaneous with his arrest and was therefore permissible." (*Ibid.*)

The court also rejected the defendant's claim that his cellular phone was a possession within his immediate control as contemplated in *Chadwick*, reasoning as follows: "Finley's cell phone does not fit into the category of 'property not immediately associated with [his] person' because it was on his person at the time of his arrest." (*Ibid.*)

The result reached by the great weight of cases supports the conclusion that appellant's cellular phone was an item "immediately associated with the person of the arrestee" and properly subject to the station-house search. Wallets and purses (and address books and papers found therein), as well as pagers, are similar to cellular phones in the way they function, the likelihood that they might contain evidence of the arrest offense, and in their susceptibility to destruction before the police might secure them.

In fact, cellular phones contain the same type of personal information as these items do. Wallets and purses carry photographs, personal correspondences, and names, addresses, and telephone numbers of acquaintances. Cellular phones now also store those items.[8] Pagers once provided notice of incoming calls. Cellular phones now serve that function. Moreover, it would be anomalous to find that a cellular phone is not an item "immediately associated with the person of the arrestee," even though a purse -- where many women carry their cellular phone and in which there are special pockets to hold a cellular phone -- is considered an extension of the person under California law.

Thus, many court opinions interpreting *Edwards* and *Chadwick* further support the conclusion that appellant's cellular phone was an item

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[8] Just as a cellular phone might store confidential or privileged data, such as an attorney-client communication (see AOB 15-16), so too can a wallet or purse.

"immediately associated with the person of the arrestee" and properly subject to a station-house search.

D. The Principles Established in *Arizona v. Gant* Validate the Station-House Search of a Cellular Phone Seized from the Person of An Arrestee

The United States Supreme Court's recent decision in *Arizona v. Gant, supra,* 129 S.Ct. 1710 supports the conclusion that a cellular phone on the person of the arrestee at the time of his arrest is properly subject to a warrantless station-house search.

In *Arizona v. Gant, supra,* 129 S.Ct. 1710, the United States Supreme Court clarified its prior authority regarding searches incident to the lawful arrest of a recent occupant of a vehicle (i.e., *New York v. Belton, supra,* 453 U.S. 454). The Court in *Gant* first found that police are authorized to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. (*Arizona v. Gant, supra,* 129 S.Ct. at p. 1719.) The Court explained that to read its prior authority as authorizing a vehicle search incident to every recent occupant's arrest would "untether the rule from the justifications underlying the *Chimel* [*v. California* (1969) 395 U.S. 752 [89 S.Ct. 2034, 23 L.Ed.2d 685] exception." (*Arizona v. Gant, supra,* 129 S.Ct. at p. 1719.) In *Chimel,* the Court had 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 pp. 1714, 1716.) This limitation, which under *Gant* continues to define the boundaries of the exception, ensures that the scope of the search incident to arrest is commensurate with the dual purpose of the search warrant exception, namely, protecting arresting officers and safeguarding any destructible evidence. (*Id.* at p. 1716.)

Second, *Gant* went on to expand the search-incident-to-arrest exception in a way that the Court recognized "does not follow from *Chimel*." (*Arizona v. Gant, supra,* 129 S.Ct. at p. 1719.) Specifically, *Gant* adopted Justice Scalia's reasoning in his concurring opinion in *Thornton v. United States* (2004) 541 U.S. 615 [124 S.Ct. 2127, 158 L.Ed.2d 905], and held that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" (*Arizona v. Gant, supra,* 129 S.Ct. at p. 1719, quoting *Thornton v. United States, supra,* 541 U.S. at p. 632 (con. opn. of Scalia, J.).)

Gant supports the conclusion that a cellular phone on the person of an arrestee at the time of his arrest is properly subject to a warrantless search at the police station. *Gant* recognized that a search of a *vehicle* incident to arrest is valid where there is reason to believe evidence relevant to the crime of arrest might be found. This reasoning should equally apply to the search of *an arrestee* and items found on his person at the time of his arrest. Just as there is a reduced expectation of privacy in vehicles, which are mobile on the public thoroughfares (*United States v. Chadwick, supra,* 433 U.S. at pp. 12-13), the privacy interest of the *arrestee* in his own person and in the items on his person at the time of his arrest are greatly diminished by virtue of the arrest itself. (*Thornton v. United States, supra,* 541 U.S. at p. 630 (con. opn. of Scalia, J.) ["The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of his crime from general rummaging"].) Accordingly, *Gant*'s adoption of Justice Scalia's reasoning in *Thornton*, permitting a search incident to arrest of a vehicle where there is reason to believe evidence relevant to the crime of arrest might be found, should equally apply to the search of an arrestee

and items found on his person at the time of his arrest.[9] (*Id.* at p. 631 (con. opn. of Scalia, J.) [noting that some of the earlier authorities relying on the more general interest in gathering evidence relevant to the crime of arrest addressed searches of the arrestee's person].)

The application of Justice Scalia's reasoning to this case justifies the search of appellant's cellular phone. When appellant's cellular phone was searched, appellant was under arrest for drug-related activity -- the sale of Ecstasy. Courts have recognized that electronic devices, such as cellular phones, are used to communicate with others participating in drug-related activity. (See *United States v. Quintana* (M.D.Fla. 2008) 594 F.Supp.2d 1291, 1299.) Thus, Senior Deputy Fazio had reason to believe that evidence relevant to the sale of Ecstasy could be found in appellant's text messages. The officer's search of the cellular phone was limited to disclose only that information that he would have reasonably believed would lead to evidence of the crime for which appellant was arrested. (See *id.* at p. 1300 ["Where a defendant is arrested for drug-related activity, police may be

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[9] This analysis is consistent with this Court's decision in *People v. Sandoval* (1966) 65 Cal.2d 303. In *Sandoval*, police officers were lawfully searching a house for narcotics when the defendant telephoned the house and his call was intercepted by an officer. (*Id.* at p. 306.) As a result of a ruse used by the officer, the defendant implicated himself in a drug transaction and was arrested. (*Id.* at pp. 306-307.) Prior to the search, a deputy district attorney had informed the officers that at least one narcotics "connection" had contacted the resident of the house by telephone. (*Id.* at p. 306.) This Court found that the interception of the telephone call was justified, reasoning: "Because the officers were engaged in a lawful search, and because the information supplied by the deputy district attorney rendered incoming telephone calls *reasonably suspect*, the officers could justifiably answer the telephone and conceal their identity from the caller in order to learn of possible unlawful activities." (*Id.* at p. 308, emphasis added; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 704.)

justified in searching the content of a cell phone for evidence related to the crime of arrest, even if the presence of such evidence is improbable"].)

Appellant argues, unmeritoriously, that the search here should be invalidated because he had no access to evidence or weapons when the search was conducted and thus Senior Deputy Fazio's search was unrelated to *Chimel*'s dual rationale of preserving evidence and protecting officer safety. (AOB 19-21.) Although *Gant* emphasized the need to keep *vehicle* searches incident to arrest "tethered" to the dual purpose of preserving evidence and protecting officer safety, the United States Supreme Court in *Robinson* recognized that the authority to search *an arrestee's person* does not depend on the presence of *Chimel*'s dual rationale. (*United States v. Robinson, supra,* 414 U.S. at p. 235.) Rather, the fact of arrest alone justifies the search:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. 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. 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 arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

(*Ibid.*; see *Thornton v. United States, supra,* 541 U.S. at pp. 631-632 (con. opn. of Scalia, J.).)

Moreover, despite appellant's lack of access to his cellular phone when it was searched, the data stored in the cellular phone was still vulnerable and subject to permanent loss by both outside sources and appellant's own possible actions before the seizure (e.g., the loss of power, incoming calls deleting records of older calls, the pre-selection of the automatic "cleanup" option). (See *United States v. Mercado-Nava, supra,* 486 F.Supp.2d at p. 1278.) Thus, the search here conformed with *Chimel*'s rationale of preserving evidence.

In summary, under *Gant*, the search of appellant's cellular phone was lawful as a search incident to arrest. Therefore, the evidence of the text message and appellant's statements when confronted with the text message would have been admissible at appellant's trial.

CONCLUSION

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

Dated: November 17, 2009

Respectfully submitted,

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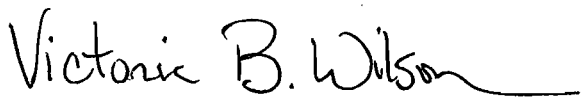

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,655 words.

Dated: November 17, 2009

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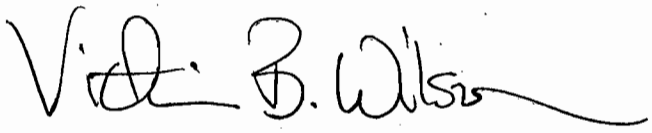

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DECLARATION OF SERVICE

Case Name: ***People v. Gregory Diaz***
No.: **S166600**

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; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 17, 2009, I served the attached **Answer Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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On November 17, 2009, I caused thirteen (13) copies of the **Answer Brief on the Merits** in this case to be delivered to the California Supreme Court at 300 South Spring Street, Second Floor, Los Angeles, CA 90013 by **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 November 17, 2009, at Los Angeles, California.

M. O. Legaspi
Declarant

Signature

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