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September 6, 2016

The Honorable Tani Cantil-Sakauye, Chief Justice
The Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

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Re: *People v. Macabeo*, No. S221852
Appellant's Supplemental Letter Reply Brief pursuant to July 29, 2016 Order

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On July 29, 2016, this Court directed the parties to serve and file supplemental letter briefs addressing the effect on this case, if any, of the opinion in *People v. Robinson* (2010) 47 Cal.4th 1104, 1124-1126 [104 Cal.Rptr.3d 727, 224 P.3d 55]. Mr. Macabeo and the Respondent filed supplemental briefs, and Mr. Macabeo respectfully submits this supplemental reply.

1. *Neither "good faith exception" applies here.*

The parties' briefs have addressed two different "good faith exceptions," and it may help to separate them.

In the Respondent's Answer Brief on the Merits ("RB"), the prosecution claims that Mr. Macabeo was searched incident to his arrest, and that the search was saved by the "good faith exception" described in *Davis v. United States* (2011) 564 U.S. 229 [180 L.Ed.2d 285, 131 S.Ct. 2419]. (See RB 40-47.) *Davis* provides that "when binding appellate precedent specifically *authorizes* a particular police practice," evidence will not be excluded if an officer "conducts a search *in reliance*" on that binding precedent. (*Davis*, *supra*, 564 U.S. at p. 241, first italics original, second italics added.) Since Mr. Macabeo was not in fact searched incident to his arrest, this Court's ruling in *People v. Diaz* (2011) 51 Cal.4th 84, [119 Cal.Rptr.3d 105, 244 P.3d 501] — which relates only to searches incident to arrest — cannot supply the requisite "binding appellate precedent." (See Appellant's Opening Brief on the Merits ("AOB") 48-53; Appellant's Reply Brief on the Merits ("ARB") 31-32 & fn. 12; see also *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 612-614 [*Diaz* is not "binding appellate precedent" for a warrantless probation search]; *United States v. Martinez* (N.D. Cal. Aug. 12, 2014) 2014 WL 3956677, *4 ["This order need not decide whether *Davis* and *Diaz* apply . . . because on this record, the search of Martinez's iPhone was not incident to his arrest."]) Nor could officers be said to have relied upon *Diaz*, which the *Davis* exception requires.

This Court's order of July 29 directed the parties to address *Robinson*, which applies a more generalized "good faith exception," separate from the specific rule of *Davis*. In Respondent's

Supplemental Brief ("RSB"), the prosecution describes generic exclusionary rule principles. (See RSB 1-4.) This requires little by way of response, other than to note that evidence will be excluded when the officers' conduct was "deliberate, reckless, or grossly negligent . . .." (*Robinson*, *supra*, 47 Cal.4th at p. 1124, quoting *Herring v. United States* (2009) 555 U.S. 135, 144 [129 S.Ct. 695, 172 L.Ed.2d 496].) Contrary to Respondent's suggestion, the standard is not whether the officers were "doing anything nefarious." (See RSB 6, quoting the Superior Court judge.) And, just as with the *Davis* exception, the more generalized "good faith exception" cases also demand that officers act *in reliance* on some confusion or mistake about the law or the facts. (See Appellant's Supplemental Brief ("ASB") 2-3.) Since the officers did not purport to arrest Mr. Macabeo until they discovered the pictures on his phone, they could not have acted in reliance upon any confusion or misunderstanding of the law of searches incident to arrest.

As Mr. Macabeo has explained, to the extent the officers may have thought they were conducting a probation search, as the prosecution suggested at oral argument, they were reckless or grossly negligent with respect to whether Mr. Macabeo was on probation or whether he had a search condition, much less one that would allow the search of a cell phone. (See ASB 4-5.) Respondent does not even attempt to argue in its Supplemental Brief that the officers conducted a probation search in good faith. A fair reading of the record shows that the officers were determined to find a way to search Mr. Macabeo, and they recklessly persisted in the absence of any lawful basis for a search.

2. *People v. Gomez is not relevant to the search in this case.*

In its Supplemental Brief, the prosecution primarily relies upon *People v. Gomez* (2004) 117 Cal.App.4th 531 [12 Cal.Rptr.3d 398] to allege that the officers acted in "good faith." (See RSB 6-8.) However, *Gomez* is simply not relevant here. Gomez was stopped for a traffic infraction so that officers could investigate his involvement in a drug conspiracy. He challenged the length of time that officers detained him before he was actually arrested on drug charges. (*Gomez*, *supra*, 117 Cal.App.4th at pp. 534, 537-538.) *Gomez* contains two alternative holdings. The first relates to whether officers can detain a person for a prolonged period when they have probable cause that he is involved in a drug conspiracy. The second holding, on which the State appears to rely, also relates to the length of detention and, in any event, was overruled years before the officers searched Mr. Macabeo's cell phone. As set forth below, the case at bench is about a warrantless search, not the length of detention. Neither *Gomez* holding would give officers a good faith belief that they could search Mr. Macabeo's cell phone with probable cause for a traffic infraction and without a warrant.

In *Gomez*, detectives using wiretaps and visual surveillance learned of the planned transfer of a large amount of cocaine from a specific address in Pomona, using a specific vehicle. Officers followed this vehicle to a residence in Fountain Valley. The officers then established surveillance over the Fountain Valley residence and observed as another vehicle, a pickup truck, came to the Fountain Valley residence and left. Officers stopped the truck and found 14 kilogram-size packages of cocaine. An SUV later arrived at the Fountain Valley residence. The SUV backed up towards an unattached garage on the property. Investigators saw Gomez and another man load several large boxes into the SUV, and watched Gomez drove it away. The

officer conducting the surveillance asked another officer to stop the vehicle. The other officer effected a traffic stop — Gomez was not wearing a seatbelt. (*Gomez, supra*, 117 Cal.App.4th at pp. 535-536.)

After stopping Gomez's SUV and approaching the driver's window, the officer saw two large taped boxes in the rear of the vehicle, partially covered by a tarp and a ladder. "Based on his experience, training, and the seizure of 14 kilogram-sized packages of cocaine a few hours earlier, [the officer] was concerned the boxes contained illegal narcotics." (*Id.* at p. 536.) Gomez refused to consent to a search of his SUV. The officer advised Gomez that "he was being detained due to an ongoing narcotics investigation." (*Ibid.*) After a period of time, a K-9 unit was called to the scene. The drug detection dog alerted to the smell of narcotics. After the dog indicated that drugs were present, the officer searched the vehicle. He lowered a window in the SUV, opened a box, saw the narcotics, and arrested Gomez. Gomez later pleaded guilty to possessing 262 kilograms of cocaine. (*Ibid.*) Gomez argued that his investigative detention was unreasonably prolonged since he was detained for over an hour before the K-9 unit was even requested. (*Id.* at p. 537.)

The Court of Appeal rejected Gomez's claim. Courts occasionally use the phrase "de facto arrest" to signify the type of detention that requires probable cause, and not just reasonable suspicion. (See, e.g., *People v. Celis* (2004) 33 Cal.4th 667, 674-675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].) While Gomez's detention was sufficiently prolonged to amount to a "de facto arrest," which requires probable cause, there was probable cause to support the officer's actions. Through wiretaps and visual surveillance, investigators had good reason to believe large quantities of drugs were being distributed. The pickup truck that left the Fountain Valley residence just before Gomez arrived was stopped and had 14 kilograms of cocaine. Gomez was seen placing large boxes in his SUV. "Taken together, these facts constituted probable cause to believe defendant was engaged in drug trafficking." (*Gomez, supra*, 117 Cal.App.4th at p. 538.) This primary holding in *Gomez* is irrelevant to the case at bench. Mr. Macabeo has never claimed that he was under arrest at the time of his search; in fact, he has argued just the opposite. Nor has he alleged that the length of his detention led to a "de facto arrest." And, of course, in contrast with *Gomez*, the officers who searched Mr. Macabeo did not have probable cause or even reasonable suspicion that he was engaged in any criminal activity other than the traffic infraction.

The *Gomez* Court also provided an alternative holding, that "in light of *Atwater v. City of Lago Vista* (2001) 532 U.S. 318 [149 L.Ed.2d 549, 121 S.Ct. 1536], the seatbelt violation that led to the initial detention also supplied probable cause" for the prolonged detention, which was a "de facto arrest." (*Id.* at p. 538.) The Court wrote that "it is irrelevant that a seatbelt violation typically would result in a brief detention for purpose of issuing a citation." (*Id.* at p. 539.) This alternative holding in *Gomez*, which was dicta, also does not help the prosecution, as Mr. Macabeo is not making an argument about the length of his detention. But, in addition, this alternative holding is no longer good law.

In 2005, one year after *Gomez*, the U.S. Supreme Court decided *Illinois v. Caballes* (2005) 543 U.S. 405 [125 S.Ct. 834, 160 L.Ed.2d 842]. Caballes was stopped for speeding. A narcotics

detection dog was also brought to the scene. It alerted to the vehicle, officers found marijuana, and Caballes was arrested. (*Id.* at p. 406.) The high court accepted the state court's finding "that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." (*Id.* at p. 408.) It further held, directly contrary to the dictum in *Gomez*, that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." (*Id.* at p. 407.) In 2009, the Supreme Court reinforced this holding in *Arizona v. Johnson* (2009) 555 U.S. 323 [129 S.Ct. 781, 172 L.Ed.2d 694], where a passenger was subjected to a *Terry* frisk and questions about gang affiliation during the course of a lawful traffic stop. In upholding these actions, the high court emphasized that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, *so long as those inquiries do not measurably extend the duration of the stop*. [Citation.]" (*Id.* at p. 333, italics added.)[1]

When Mr. Macabeo's cell phone was searched in 2012, the law was clear: Officers who effected an actual arrest, even for a traffic infraction, could conduct a full search, which would be justified by the *fact* of the custodial arrest. (See *United States v. Robinson* (1973) 414 U.S. 218, 235 [94 S.Ct. 467, 38 L.Ed.2d 427] [fact of arrest justifies search]; *People v. McKay* (2002) 27 Cal.4th 601, 606-607 [117 Cal.Rptr.2d 236, 41 P.3d 59] [officers can arrest for an infraction].) Officers who cited but did not arrest a motorist could not search the individual or their vehicle pursuant to the citation. (See *Knowles v. Iowa* (1998) 525 U.S. 113 [119 S.Ct. 484, 142 L.Ed.2d 492].) Following *Caballes* and *Johnson*, which effectively overruled *Gomez*'s alternative holding, officers who neither cited nor arrested a motorist for a traffic infraction could not use probable cause for the infraction as a basis to extend the person's detention beyond the period of time necessary to complete the mission of the traffic stop. After *Caballes* and *Johnson*, what was left of *Gomez* was that case's primary holding: officers may detain a motorist and search his automobile when they have probable cause to believe the person is engaged in drug trafficking and has narcotics in the vehicle. Of course, the officers who detained and searched Mr. Macabeo had no reason to believe that he had done anything wrong other than ride a bicycle through a stop sign on a deserted street in the middle of the night. *Gomez* could not give these officers a good faith basis to search Mr. Macabeo's cell phone.

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[1] More recently, in *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609, 191 L.Ed.2d 492], an officer extended the period of a traffic stop so that he could conduct a dog sniff. The high court held that a dog sniff is not part of the officer's traffic mission, and a traffic stop cannot be extended so that one can be carried out. (*Id.*, 135 S.Ct. at p. 1616.) In so holding, the justices broke no new ground and emphasized that they were merely reiterating the rule in *Caballes*. (See *id.* at p. 1612 ["A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation. [Citation.] The Court so recognized in *Caballes*, and we adhere to the line drawn in that decision."]; *id.* at p. 1616 ["As we said in *Caballes* and reiterate today, a traffic stop 'prolonged beyond' that point is 'unlawful.' [Citation.]"])

* * *

In sum, neither *Davis*'s "good faith exception" nor the more general exception set forth in *Robinson* applies in this case. And Gomez – which relates to the length of a detention – is not relevant here.

Respectfully submitted,

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PROOF OF SERVICE BY EXPEDITED DELIVERY

Re: *People v. Macabeo*, No. S221852, Court of Appeal Case No. B248316, Los Angeles County Superior Court Case No. YA08496.

I declare that at the time of service I was at least 18 years old and not a party to this legal action. My business address is University of California, Berkeley School of Law (Boalt Hall), Clinical Program, 353 Boalt Hall, Berkeley, CA 94720-7200. On September 6, 2016, I sent copies of the above Appellant's Supplemental Letter Reply Brief pursuant to July 29, 2016 Order by enclosing them in sealed envelopes and depositing the sealed envelopes with Federal Express, fully prepaid for standard overnight delivery. The envelopes were addressed as follows:

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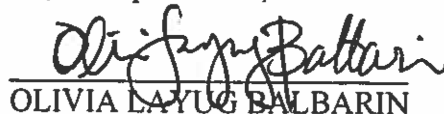
I am employed in the county where the delivery occurred. The document was sent from Berkeley, California.

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

Executed at Berkeley, California, on September 6, 2016.



OLIVIA LAYUG BALBARIN