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August 22, 2016

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

Re: *People v. Macabeo*, No. S221852
Appellant's Supplemental Letter 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]. As Mr. Macabeo explains below, this case does not fall within the "good faith exception" to the exclusionary rule described in *Robinson*.

In *Robinson*, an employee of a correctional center mistakenly thought that one of the defendant's prior convictions was a "qualifying offense" under California's DNA and Forensic Identification Database and Data Bank Act of 1998 ("the Act"), and so Robinson's blood was drawn. (*Id.*, 47 Cal.4th at pp. 1113, 1118.) This Court found that the blood draw violated the Act but not the Fourth Amendment. (*Id.* at pp. 1122-1124.)[1] In the alternative, assuming that the state statutory violation also constituted a Fourth Amendment violation, this Court concluded that the evidence was admissible under the "good faith exception" to the exclusionary rule, since the Act was a newly-passed law that proved difficult for officers to apply. (*Id.* at pp. 1124-1126.)

Robinson does not help the prosecution here. First, should this Court rule that there was no valid search incident to Mr. Macabeo's arrest—since no arrest was complete or underway at the time of the search—the record shows that the cell phone search was not conducted due to any confusion or misunderstanding about *Knowles v. Iowa* (1998) 525 U.S. 113 [119 S.Ct. 484, 142 L.Ed.2d 492], *Rawlings v. Kentucky* (1980) 448 U.S. 98 [100 S.Ct. 2556, 65 L.Ed.2d 633], or the timing of arrests and searches. The prosecution conceded this point at oral argument, stating that the officers believed they were conducting a probation search, not a search incident to arrest. (See Webcast Recording of May 4, 2016 Oral Arguments at 5:04 to 5:05 ["[W]e [the Attorney

[1] Mr. Macabeo does not contend that his Fourth Amendment rights were violated solely because state law did not permit officers to arrest him for the infraction of riding his bicycle through a stop sign. Rather, in not arresting Mr. Macabeo for that infraction, the officers complied with state law. They intended to warn or cite him for the infraction. (1CT 80:27-81:7.) The search of Mr. Macabeo was unconstitutional because no arrest was in fact complete or underway at the time of the search, and the search was therefore not incident to his arrest. (See Appellant's Opening Brief ("AOB") 23-28.)

General's Office] are advancing the search incident to arrest exception. The officers thought they were conducting a lawful probation search."]) In *Robinson*, as well as in every "good faith exception" case from the United States Supreme Court, the Courts examined the officers' actual mistakes of fact or of law, not mistakes that they hypothetically could have made. Here, the officers could not have relied on any interpretation of the law of searches incident to arrest when they searched Mr. Macabeo's phone since they were not conducting a search incident to an arrest.

Second, even if the officers believed that they were conducting a probation search, their conduct was reckless or grossly negligent. They searched Mr. Macabeo after he expressly told them that he had no probation officer and his case had already been dismissed. The officers never tried to determine if any condition of probation permitted a search of Mr. Macabeo, much less a search of his cell phone. The officers could easily have made this determination had they cared to do so. Shortly after the search, the officers confirmed from the computer in their patrol car that Mr. Macabeo was not on felony probation at all.

1. *The officers did not search Mr. Macabeo because of any confusion or misunderstanding of the law relating to searches incident to arrest.*

In *Robinson*, a blood sample was taken from the defendant while he was serving a sentence for two misdemeanor convictions and was awaiting transfer to state prison for a parole violation from a prior felony offense. (*Robinson*, *supra*, 47 Cal.4th at p. 1118.) The trial court found, based upon the testimony of experts and officers, "that the mistakes that led to the unlawful collection of defendant's blood were made *because* correctional staff was under pressure to immediately implement a newly enacted law that was complex and confusing." (*Id.* at p. 1126, italics added.) Further, "the motivation for the collection of the . . . blood sample 'was a good faith belief, possibly based on a negligent analysis by someone, that the defendant was a qualified offender and that the law directed his sample to be obtained.' " (*Ibid.*) This Court reviewed the extensive testimony and upheld the trial court's denial of the defendant's suppression motion. (*Id.* at pp. 1113, 1119.) Applying the rule of *Herring v. United States* (2009) 555 U.S. 135 [129 S.Ct. 695, 172 L.Ed.2d 496], the Court concluded that the law enforcement errors "*were the result* of negligence," and were "not 'sufficiently deliberate that exclusion can meaningfully deter it. . ..' " (*Robinson*, *supra*, 47 Cal.4th at p. 1129, italics added, quoting *Herring*, *supra*, 555 U.S. at p. 144.) This Court's holding in *Robinson*, and its application of the "good faith exception," depended on the officers' actual confusion about the meaning of the law they sought to apply.

This connection was also critical in *Herring*, the primary authority cited in *Robinson*. In *Herring*, a sheriff's investigator was told that an arrest warrant was outstanding for Herring's arrest. (*Herring*, *supra*, 555 U.S. at p. 137.) The investigator arrested Herring, conducted a search incident to that arrest, and found methamphetamine and a weapon. (*Ibid.*) A warrant clerk turned out to be mistaken about the existence of the warrant, which had in fact been recalled. (*Id.* at p. 138.) While the high court in *Herring* noted that the "analysis of deterrence and culpability is objective" (*id.* at p. 146), it is clear that the sheriff's investigator actually searched Herring on account of the warrant clerk's error. That is, whatever the investigator may have subjectively intended, the record—viewed objectively—established an actual connection

between the warrant clerk's mistake and the warrantless search of the defendant. Exclusion is not required "when police mistakes *are the result* of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements . . .." (*Id.* at p. 147, italics added.)

Other high court cases finding a "good faith exception" also depend upon an actual connection between the confusion or mistake and the Fourth Amendment violation. In *Davis v. United States* (2011) 564 U.S. 229, 234-236 [131 S.Ct. 2419, 180 L.Ed.2d 285], officers conducted an automobile search incident to arrest prior to the decision in *Arizona v. Gant* (2009) 556 U.S. 332 [129 S.Ct. 1710, 173 L.Ed.2d 485], which later prohibited most such searches. The high court held that "when the police conduct a search *in* objectively reasonable *reliance* on binding appellate precedent, the exclusionary rule does not apply." (*Davis*, *supra*, 564 U.S. at pp. 249-250, italics added.) In finding the search to fall within the "good faith exception," the justices emphasized the actual connection between the pre-existing law and the search, stating that "we have 'never applied' the exclusionary rule to suppress evidence obtained *as a result* of nonculpable, innocent police conduct." (*Id.* at p. 240, italics added, quoting *Herring*, *supra*, 555 U.S. at p. 144.) Further, "[i]f the police in this case *had reasonably relied on* a warrant in conducting their search, . . . *or on* an erroneous warrant record in a government database, . . . the exclusionary rule would not apply." (*Davis*, *supra*, 564 U.S. at p. 240, italics added, citing *United States v. Leon* (1984) 468 U.S. 897, 909 [104 S.Ct. 3405, 82 L.Ed.2d 677] and *Herring*, *supra*, 555 U.S. at p. 144; see also *Illinois v. Krull* (1987) 480 U.S. 340, 349, 356-357 [107 S.Ct. 1160, 94 L.Ed.2d 364] ["The application of the exclusionary rule to suppress evidence obtained by an officer acting *in* objectively reasonable *reliance* on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts *in* objectively reasonable *reliance* on a warrant" and "Detective McNally's *reliance* on the Illinois statute was objectively reasonable." Italics added.])

A "good faith exception" to the exclusionary rule only makes sense if there is a connection between the source of the mistake or confusion and the officer's actual conduct. In none of the high court's cases has it hypothesized a ground for a search that was not relied upon by the officer, just to excuse the officer's conduct based on possible ambiguities under some other doctrine. The Court did not establish the "good faith exception" as a free-floating basis to avoid exclusion, disconnected from an officer's actual conduct. Thus, if the sheriff's investigator in *Herring* had found contraband during a search that exceeded the lawful bounds of a *Terry* frisk, the high court would not have upheld the admission of the evidence simply because a mistake about a warrant existed somewhere in a computer database, unbeknownst to the investigator. Instead, the evidence would have been kept out because its exclusion could meaningfully deter future *Terry* violations. Although it is not a "good faith exception" case, this Court made a similar point in *People v. Sanders* (2003) 31 Cal.4th 318 [2 Cal.Rptr.3d 630, 73 P.3d 496]. In *Sanders*, this Court declined to admit "evidence obtained during a search of a residence that the officer had no reason to believe was lawful merely because it was later discovered that the suspect was subject to a search condition." (*Sanders*, *supra*, 31 Cal.4th at p. 335.) It explained that admitting evidence based not on what officers actually knew, but rather based on what they could have known, would be inconsistent with the "primary purpose of the exclusionary rule—to deter police misconduct." (*Id.* at p. 334.)

Mr. Macabeo submits that the rule of *Knowles v. Iowa*, *supra*, is clear, and the facts in *Rawlings v. Kentucky*, *supra*, plainly show that an arrest was underway at the time Rawlings was searched, in contrast to Mr. Macabeo's case. But even if the Court concludes that the law on the timing of arrests and searches was uncertain when Mr. Macabeo was searched, the officers in no way relied upon any such confusion, as the prosecution admitted at oral argument and as the record objectively shows.[2]

2. *The officers' belief that they were conducting a probation search was grossly negligent or reckless.*

At oral argument, the State suggested that the officers thought that they were conducting a probation search because they heard the word "probation." (See Webcast Recording of May 4, 2016 Oral Arguments at 5:04 to 5:05 ["I think a fair reading of this record shows that the officers heard the word probation, heard the word methamphetamine, and they thought they were conducting a lawful probation search."]; see also *id.* at 5:25.) Yet not even the State contends that the officers conducted a valid probation search, and the prosecution made the strategic decision not to advance this argument on appeal.[3] As Mr. Macabeo explains, because any belief that the officers were conducting a valid probation search was reckless or grossly negligent, this Court also cannot apply the "good faith exception" to this basis for a search.

Herring does not permit application of the "good faith exception" where officers act in a reckless or grossly negligent manner. (*Herring*, *supra*, 555 U.S. at p. 144.) "[A] reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing. . .." (*Global-Tech Appliances, Inc. v. SEB S.A.* (2011) 563 U.S. 754, 770 [131 S.Ct. 2060, 179 L.Ed.2d 1167], citing Model Penal Code § 2.02(2)(c), which provides that "[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists . . .".) This Court has applied the Model Penal Code definition of "reckless" to construe our Penal Code. (See *People v. Clark* (2016) 63 Cal.4th 522, 617 & fn. 73 [203 Cal.Rptr.3d 407, 372 P.3d 811], citing *In re Steven S.* (1994) 25 Cal.App.4th 598, 615 [31 Cal.Rptr.2d 644] (Opn. of Chin, J.).) " 'Gross negligence' long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an

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[2] The record fully supports the Attorney General's concession. The officers never claimed that they searched Mr. Macabeo's phone incident to his arrest. In the police report, an officer wrote that Mr. Macabeo stated he was on felony probation and that he consented to the search. On cross-examination, the testifying officer was forced to admit that Mr. Macabeo never said he was on felony probation and, further, that the officers never asked for consent to search Mr. Macabeo or his phone. (1CT 76:13-77:8, 81:14-82:17.) The District Attorney originally opposed the motion to suppress on grounds other than a search incident to arrest. (1CT 38-41.) The theory that the search could be justified as incident to arrest did not surface until the District Attorney filed a supplemental brief on the eve of the suppression hearing. (See Appellant's Reply Brief ("ARB") 24-25.)

[3] See Webcast Recording of May 4, 2016 Oral Arguments at 5:25 [explaining that a search incident to arrest is "the theory that the State is offering, and it is the theory that the trial court and the court of appeal relied on, because what [the officers] actually relied on, the probation search exception, or the probation search, doesn't work."]

extreme departure from the ordinary standard of conduct. [Citations.]' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754 [62 Cal.Rptr. 527, 161 P.3d 1095].)

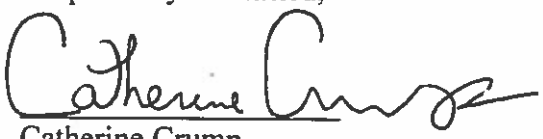
Under well-established law, a valid probation search requires officers to have advance knowledge of the search condition. (See *In re Jaime P.* (2006) 40 Cal.4th 128, 136-139 [51 Cal.Rptr.3d 430, 146 P.3d 965]; see also *People v. Romeo* (2015) 240 Cal.App.4th 931, 939-940 [193 Cal.Rptr.3d 96] [collecting cases, and explaining that "[b]ecause the terms of probation define the allowable scope of the search . . ., a searching officer must have 'advance knowledge of the search condition before conducting a search' [citations]."])

In this case, the officers did not ask Mr. Macabeo if he was on felony probation or if he had a search condition. Mr. Macabeo told them said he didn't have a probation officer and his case had been dismissed. (1CT 72:8-73:25; 114.) To search Mr. Macabeo on these facts was to consciously disregard the substantial and unjustifiable risk that Mr. Macabeo was not on felony probation, that there was no search condition, and that any search condition (if one existed) would not include a search of his cell phone. The risk was substantial given what Mr. Macabeo told the officers. It was unjustifiable given how easy it was for the officers to check Mr. Macabeo's status. After they searched Mr. Macabeo's phone, the officers used the computer in their patrol car and learned that Mr. Macabeo's felony probation had expired in April 2012, several months earlier. (1CT 73:2-11, 86:20-87:8.) There was no search condition. (1CT 90:2-10.) If Robinson's "good faith" exception allows the evidence in on these facts, it would overrule this Court's holding that advance knowledge of a search condition is critical. Just hearing a suspect say the word "probation" is insufficient grounds to establish a good faith belief in the existence and terms of a search condition, much less a condition that would allow the search of a cell phone.[4]

* * *

For the foregoing reasons, nothing in *Robinson* alters the outcome in this case. This Court should reverse the Court of Appeal and remand this case to the trial court with the instruction that Mr. Macabeo's motion to suppress evidence gathered through the search of his cell phone be granted.

Respectfully submitted,



Catherine Crump

[4] See *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 612-614 [finding that a general probation search condition did not extend to the search of a cell phone, and that *People v. Diaz* (2011) 51 Cal.4th 84 [119 Cal.Rptr.3d 105, 244 P.3d 501] was not "binding appellate precedent" on which officers could reasonably rely to search the phone, since *Diaz* was not a probation search case.]

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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 August 22, 2016, I sent copies of the above Appellant's Supplemental Letter 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 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 August 22, 2016.

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