In the Supreme Court of the State of California

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

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

RESPONDENT'S SUPPLEMENTAL BRIEF

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
State Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
VICTORIA B. WILSON
Supervising Deputy Attorney General
State Bar No. 167526
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2357
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Victoria.Wilson@doj.ca.gov
Attorneys for Respondent

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Pursuant to this Court's July 29, 2016, Order, respondent submits this Supplemental Brief addressing the effect of *People v. Robinson* (2010) 47 Cal.4th 1104, 1124-1126 (*Robinson*) on the issues presented in this case.

ARGUMENT

THE EXCLUSION OF EVIDENCE OF CHILD PORNOGRAPHY WOULD NOT BE AN APPROPRIATE SANCTION IN THIS CASE

This Court's decision in *Robinson*, relying on United States Supreme Court precedents, recognizes that exclusion of evidence for a Fourth Amendment violation is a sanction reserved for those cases in which the violation is deliberate, reckless, or grossly negligent and in which the deterrent effect of suppression outweighs the harm to the justice system. Here, the officers' conduct was supported by case law. And there was no United States Supreme Court precedent prohibiting their conduct. In other words, there was no reason for a well-trained officer to reasonably believe that the search of appellant was unconstitutional. Therefore, the officers' conduct was nonculpable. What is more, suppression of the evidence would not meaningfully deter police misconduct and would come at a high cost to both the truth and public safety.

A. The Exclusionary Rule Does Not Apply to Nonculpable Police Conduct Where There Is No Meaningful Deterrent Effect

The right to be free from "unreasonable searches and seizures" is a personal, constitutional right under the Fourth Amendment to the United States Constitution. But exclusion of evidence as a result of an unreasonable search and seizure is not. In other words, every case presenting a Fourth Amendment challenge presents two distinct legal questions: (1) was there a violation of the Fourth Amendment, i.e., was

there an unreasonable search or seizure; and, if so, (2) is exclusion of the evidence obtained as a result of the violation warranted.

The United States Supreme Court has made clear that "suppression [of evidence] is not an automatic consequence of a Fourth Amendment violation." (*Herring v. United States* (2009) 555 U.S. 135, 137 (*Herring*).) As explained in *Herring*: "The fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies." (*Id.* at p. 140.) This principle was more recently echoed in *Davis v. United States* (2011) 564 U.S. 229, 244 (*Davis*): "[E]xclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred." In fact, the United States Supreme Court has consistently stated: "[E]xclusion 'has always been our last resort, not our first impulse,' [citation], and our precedents establish important principles that constrain application of the exclusionary rule." (*Herring, supra,* 555 U.S. at p. 140; accord, *Davis, supra,* 564 U.S. at p. 237 ["Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.' [Citation.]"]; *Hudson v. Michigan* (2006) 547 U.S. 586, 591.)

More specifically, the exclusionary rule is not "designed to 'redress the injury' occasioned by an unconstitutional search. [Citations.]" (*Davis, supra,* 564 U.S. at p. 236, citing *United States v. Janis* (1976) 428 U.S. 433, 454, fn. 29 [exclusionary rule is "'unsupportable as reparation or compensatory dispensation to the injured criminal'"].) Rather, the exclusionary rule is a "sanction" created by the United States Supreme Court (*Davis, supra,* 564 U.S. at pp. 231-232) "to deter future Fourth Amendment violations" (*id.* at pp. 236-237). It "applies only where it '"result[s] in appreciable deterrence."' [Citation.]" (*Herring, supra,* 555 U.S. at p. 141; accord, *Davis, supra,* 564 U.S. at p. 237.)

Further, application of the exclusionary rule must take into account the costs to society. "Exclusion exacts a heavy toll on both the judicial system and society at large." (*Davis, supra,* 564 U.S. at p. 237.) Accordingly, in addition to achieving appreciable deterrence, for exclusion to be appropriate, "the benefits of deterrence must outweigh the costs." (*Herring, supra,* 555 U.S. at p. 141; *id.* at p. 147 ["the deterrent effect of suppression must be substantial and outweigh any harm to the justice system"]; accord, *Davis, supra,* 564 U.S. at p. 237.)

And those social costs are plain: "The principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.' [Citation.] '[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.' [Citations.]" (*Herring, supra,* 555 U.S. at pp. 141-142; accord, *Davis, supra,* 564 U.S. at p. 237 [applying the exclusionary rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. [Citation.] And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment."]; *United States v. Leon* (1984) 468 U.S. 897, 907 (*Leon*) ["'Our cases have consistently recognize that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.' [Citation.]"].) It is these costs that have made the United States Supreme Court "'cautio[us] against expanding'" the exclusionary rule. (*Hudson v. Michigan, supra,* 547 U.S. at p. 591, original brackets.)

With this balancing of deterrence benefits and social costs in mind, the United States Supreme Court, in a line of cases beginning with *Leon,* has focused its analysis of exclusion on the "'flagrancy of the police misconduct' at issue." (*Davis, supra,* 564 U.S. at p. 238; *Herring, supra,*

555 U.S. at p. 143.) The court has explained that "the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue. [Citation.]" (*Davis, supra,* 564 U.S. at p. 238.) Accordingly, "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. [Citation.] But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, [citation], . . . the '"deterrence rationale loses much of its force,"' and exclusion cannot 'pay its way.' [Citation.]" (*Ibid.*) In other words, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (*Herring, supra*, 555 U.S. at p. 144; *id.* at p. 143 ["'evidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."' [Citation.]"].) As the high court has noted: "Indeed, in 27 years of practice under *Leon*'s good-faith exception, we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. [Citation.]" (*Davis, supra,* 564 U.S. at p. 240.)

Thus, Supreme Court precedent now makes clear: "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.' [Citation.]" (*Davis, supra,* 564 U.S. at p. 240.) In other words, for the exclusionary rule to apply, there must be both (1) culpable conduct and (2) meaningful deterrence.

B. As in *Herring* and *Robinson*, the Exclusionary Rule Should Not Apply in This Case

In *Herring*, the court found the conduct "was not so objectively culpable as to require exclusion." (*Herring, supra,* 555 U.S. at p. 146.) There, police employees failed to update records in a warrants database, and an officer in a neighboring jurisdiction reasonably relied on the database to execute what he believed was an outstanding arrest warrant for Herring. (*Id.* at pp. 137-138, 145-146.) The court explained: "[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.' [Citation.] In such a case, the criminal should not 'go free because the constable has blundered.' [Citation.]" (*Id.* at pp. 147-148.)

Likewise, in *Robinson*, this Court found no culpable conduct regarding the mistaken collection of a DNA blood sample. The blood sample was collected under the DNA and Forensic Identification Database and Data Bank Act of 1998 (the Act), after a correctional officer mistakenly believed that Robinson had been convicted of a qualifying felony spousal-abuse offense under the Act. (*Robinson, supra,* 47 Cal.4th at pp. 1116-1118.) During the subsequent verification process, a DNA data bank employee noted that Robinson's conviction for *misdemeanor* spousal abuse was not qualifying under the Act but mistakenly determined that Robinson had a prior qualifying juvenile adjudication for assault with a deadly weapon. (*Id.* at pp. 1118-1119.) As a result, Robinson's blood sample was deemed qualified for inclusion in the state database, and, subsequently, there was a "cold hit" match between the DNA profile of an unidentified rapist and Robinson's profile in the state's DNA database. (*Id.* at pp. 1115, 1119.) This Court held that "even assuming that the nonconsensual extraction of defendant's blood . . . did violate the Fourth Amendment, the

law enforcement personnel errors that led to the mistaken collection of that . . . blood sample would not have triggered the federal exclusionary rule. Accordingly, exclusion of the evidence obtained from that sample is not an available remedy for defendant." (*Id.* at p. 1119.)

In determining culpability, this Court noted that the trial court had found that the mistakes that led to the collection of Robinson's blood were made "because correctional staff was under pressure to immediately implement a newly enacted law that was complex and confusing, that 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.'" (*Robinson, supra,* 47 Cal.4th at p. 1126.) This Court further noted that "[t]he trial court also found that, while the Department [of Justice] did not act in a 'perfect manner,' it acted in a 'responsible' and 'conscientious' manner in 'trying to keep [its] errors to a very low level.'" (*Ibid.*) The Court found the evidence "support[ed] the trial court's findings that the errors in this case were negligent rather than deliberate, reckless, or systemic." (*Ibid.*; see *id.* at pp. 1126-1129.) The Court thus found, "as in *Herring*, . . . the challenged errors do not, by themselves, 'require the "extreme sanction of exclusion."' [Citation.]" (*Id.* at p. 1129.)

The same is true in appellant's case. The trial court here considered the actions of the officers involved and found no culpability on their part. The trial court stated: "I don't think that they were doing anything nefarious." (1CT 94.) As explained in respondent's Answer Brief on the Merits at pages 45-46, at the time of the search, well-trained officers would have reasonably believed that their conduct was constitutional in light of

People v. Gomez (2004) 117 Cal.App.4th 531, a case that upheld a search conducted during a de facto arrest for a traffic infraction.[1]

In *Gomez*, officers conducted a traffic stop of Gomez for a seatbelt violation. (*People v. Gomez, supra,* 117 Cal.App.4th at p. 536.) They subsequently searched his car and found drugs. (*Ibid.*) The officers then arrested Gomez for the drug possession. (*Ibid.*) The Court of Appeal concluded that the seatbelt violation that led to the initial detention supplied probable cause for Gomez's de facto arrest. (*Id.* at pp. 538-540, citing *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, and *People v. McKay* (2002) 27 Cal.4th 601.)

In light of *Gomez*, officers confronted with the circumstances of this case could reasonably believe that their conduct was constitutional—even though they did not formally arrest appellant until after they discovered child pornography in his cell phone—because they had probable cause to arrest him for his traffic violation at the time of the search. (*Herring, supra,* 555 U.S. at p. 145 ["The pertinent analysis of deterrence and culpability is objective, not an 'inquiry into the subjective awareness of arresting officers[.]' [Citations.] We have already held that 'our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.' [Citation.]"].) The officers' objective adherence to case law cannot be considered "culpable" conduct, i.e., "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights . . . ." (*Davis, supra,* 564 U.S. at p. 238, quoting *Herring, supra,* 555 U.S. at p. 144.)

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[1] "When the detention exceeds the boundaries of a permissible investigative stop, the detention becomes a de facto arrest requiring probable cause." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 384.)

Moreover, at the time of the search, there was no case authority contrary to *Gomez*. There was no California authority informing officers that a search incident to arrest would be unconstitutional under the circumstances of this case.

The cases cited by appellant at oral argument did not overrule *Gomez*. *Illinois v. Caballes* (2005) 543 U.S. 405, and *Arizona v. Johnson* (2009) 555 U.S. 323, both concerned the propriety of prolonged traffic stops. And *Gomez* was not overruled in *People v. Redd* (2010) 48 Cal.4th 691, which stated in a footnote: "We note that even if the arrest were not proper *under state law*, the search of defendant incident to the arrest would not be a violation of the Fourth Amendment. [Citations.] Absent a federal constitutional violation, the exclusionary rule does not apply." (*Id.* at p. 720, fn. 11, original italics.)

Further, as explained in respondent's Answer Brief on the Merits at pages 8-29, the officers' search incident to arrest was consistent with United States Supreme Court authority, specifically, *Virginia v. Moore* (2008) 553 U.S. 164, and *Rawlings v. Kentucky* (1980) 448 U.S. 98.[2] And, again, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the

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[2] Both *Moore* and *Rawlings* addressed whether there was a Fourth Amendment violation and, finding none, had no occasion to apply the exclusionary rule. (*Virginia v. Moore, supra,* 553 U.S. at p. 171 [finding no Fourth Amendment violation where officers arrested Moore for driving with a suspended driver's license, even though state law provided that the offense was a misdemeanor subject to citation only]; *Rawlings v. Kentucky, supra,* 448 U.S. at p. 111 [finding no Fourth Amendment violation where the officers searched Rawlings before arresting him because the arrest was supported by probable cause and came "on the heels" of the search].)

justice system." (*Herring, supra,* 555 U.S. at p. 144.) Here, as in *Herring*, any error "d[id] not rise to that level." (*Ibid.*, fn. omitted.)

Because there was case law supporting the officers' conduct—and no case law prohibiting it—there was no reason for a well-trained officer to reasonably believe that the search of appellant was unconstitutional. Accordingly, in contrast to conduct that is a "deliberate, reckless, or grossly negligent" disregard of Fourth Amendment rights, the officers' conduct here was nonculpable. Additionally, as noted at pages 30-33 of respondent's Answer Brief on the Merits, appellant has not proffered any indication of "recurring or systemic negligence" requiring deterrence. (See, generally, *Herring, supra,* 555 U.S. at p. 144; *Robinson, supra,* 47 Cal.4th at p. 1124.) Indeed, suppression of the evidence in this case would not meaningfully deter unconstitutional police misconduct and would come at a high cost to both the truth and public safety—here, the safety of children.

In sum, if this Court were to hold or assume that the officers violated the Fourth Amendment, the "extreme sanction" of exclusion of the child pornography evidence would be unwarranted because well-trained officers would have reasonably believed that their conduct was constitutional.

CONCLUSION

Respondent respectfully requests that this Court affirm the judgment.

Dated: August 22, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
State Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General

Victoria B. Wilson

VICTORIA B. WILSON
Supervising Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 2,624 words.

Dated: August 22, 2016

KAMALA D. HARRIS
Attorney General of California

Victoria B. Wilson

VICTORIA B. WILSON
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

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

I declare:

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

On August 22, 2016, I caused one electronic copy of the **RESPONDENT'S SUPPLEMENTAL BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On August 22, 2016, I caused an original and eight (8) copies of the **RESPONDENT'S SUPPLEMENTAL BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102 by Federal Express, with a Tracking Number 8071-1579-4119.

On August 22, 2016, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by transmitting a true copy via electronic mail to:

Karen Hunter Bird, Esq.
Attorney At Law
hb@birdandbirdlaw.com

Catherine Crump
Attorney at Law
ccrump@law.berkeley.edu

Charles D. Weisselberg
Attorney at Law
cweisselberg@law.berkeley.edu

(Attorneys for Appellant)

Myron Moskovitz
myronmoskovitz@gmail.com
(Attorney for Amicus Curiae)

Peter Bibring, Esq.
pbibring@aclu-sc.org

Catherine Wagner
cwagner@aclusocal.org

Michael T. Risher
mrisher@aclunc.org

(ACLU Foundation)

On August 22, 2016, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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

David Blair-Loy
Attorney at Law
American Civil Liberties Union Foundation
of San Diego and Imperial Counties
P.O. Box 87131
San Diego, CA 92138

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

On August 22, 2016, I caused one electronic copy of the **RESPONDENT'S SUPPLEMENTAL BRIEF** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 22, 2016, at Los Angeles, California.

Elaine Marshall
Declarant

Signature

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