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 REPLY BRIEF

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

ARGUMENT

Appellant argues that exclusion of the evidence is required in this case because the officers subjectively, but wrongly, believed they were conducting a lawful probation search, which alone resulted in culpable conduct. (Appellant's Supplemental Letter Brief (ASB) 1-5.) Appellant is incorrect.

First, appellant's argument is in direct conflict with *Herring v. United States* (2009) 555 U.S. 135 (*Herring*), under which the pertinent analysis of culpability is objective and not an inquiry into the subjective thought processes of arresting officers. *Herring* is consistent with bedrock principles of Fourth Amendment jurisprudence. Second, appellant's argument also appears to misapprehend the People's position and the record: this case solely concerns the search incident to arrest exception to the warrant requirement, and not the exception for probation searches.

A. *Herring* Requires an Objective Inquiry

As stated in respondent's Supplemental Brief: "To 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; accord, *Davis v. United States* (2011) 564 U.S. 229, 240 (*Davis*).) In other words, for the exclusionary rule to apply, there must be both (1) culpable conduct and (2) meaningful deterrence. And the United States Supreme Court has expressly and unequivocally stated that the test

for both of those factors is an objective one: "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.]" (*Herring, supra,* 555 U.S. at p. 145.) *Herring*'s objective culpability-deterrence test is practical, allowing courts to evaluate the applicability of the exclusionary rule "across a range of cases." (*Davis, supra,* 564 U.S. at p. 238.)

In arguing that the exclusionary rule should apply here, appellant wrongly focuses on a "mistake" made by police officers, rather than on the high court's particular culpability-deterrence test. He argues: "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." (ASB 2.) Appellant does not identify what he refers to as "every 'good faith exception' case from the United States Supreme Court." But the United States Supreme Court's cases make clear that the exclusionary-rule analysis is not necessarily premised on any mistake of fact or law by a police officer.

In *Davis*, the high court identified the following key cases addressing the exclusionary rule: *United States v. Leon* (1984) 468 U.S. 897 (*Leon*); *Illinois v. Krull* (1987) 480 U.S. 340 (*Krull*); *Arizona v. Evans* (1995) 514 U.S. 1 (*Evans*); and *Herring, supra,* 555 U.S. 135. *Leon* involved a mistake by a magistrate, not a police officer. (*Leon, supra,* 468 U.S. at pp. 902, 905.) *Krull* involved a mistake by a state legislature, not a police officer. (*Krull, supra,* 480 U.S. at pp. 349-350.) *Evans* involved a mistake by a judicial employee, not a police officer. (*Evans*, *supra,* 514 U.S. at p. 15.) *Herring* involved a mistake by a county warrant clerk, not a

police officer. (*Herring, supra,* 555 U.S. at pp. 137-138.) *Davis* involved an error by a court, not a police officer. (*Davis, supra,* 564 U.S. at p. 232.)

Moreover, in *Krull* and *Davis*, there was no mistake of fact or law at the time of the officers' challenged actions. In *Krull*, it was only after the officers conducted a warrantless administrative search pursuant to a state statute that a court determined the statute was unconstitutional. (*Krull, supra,* 480 U.S. at pp. 344-346.) And, in *Davis*, it was only after the officers conducted a lawful vehicle search pursuant to Eleventh Circuit precedent interpreting *New York v. Belton* (1981) 453 U.S. 454, that the United States Supreme Court narrowed the scope of lawful vehicle searches incident to arrest in *Arizona v. Gant* (2009) 556 U.S. 332. (*Davis, supra,* 564 U.S. at p. 236.)

In contrast, the facts in *Robinson* involved a mistake by law enforcement and then by a government employee: a correctional officer mistakenly believed Robinson had been convicted of a qualifying offense and collected a DNA blood sample from him (*Robinson, supra,* 47 Cal.4th at pp. 1116-1118); later, based on a different entry in Robinson's criminal history, a DNA data bank employee mistakenly deemed the blood sample qualified for inclusion in the state database (*id.* at pp. 1118-1119). *Robinson* analyzed those facts under *Herring*, which holds: "To 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; *Robinson, supra,* 47 Cal.4th at p. 1124.) This Court did not restrict, or purport to restrict, the holding of *Herring* to situations in which there is a mistake of fact or law by a police officer. Although *Robinson* involved, in part, such a mistake, that distinction rightly did not preclude this Court from applying the culpability-deterrence test. *Robinson* demonstrates that *Herring*'s culpability-deterrence test is a practical one in

which a court can evaluate, in objective terms, the applicability of the exclusionary rule on the facts of any given Fourth Amendment case.

Appellant's argument also goes astray insofar as he suggests that the culpability-deterrence test hinges on what the officers subjectively believed was the lawful basis of the search. (See ASB 2 ["While the high court in *Herring* noted that the 'analysis of deterrence and culpability is objective' [citation], it is clear that the sheriff's investigator actually searched Herring on account of the warrant clerk's error"]; see ASB 2 ["This Court's holding in *Robinson* . . . depended on the officers' actual confusion"].) The high court decisions addressing the applicability of the exclusionary rule unambiguously demonstrate that the pertinent analysis is objective—and for good reason. As the high court explained in *Leon*: "[W]e believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.' [Citation.]" (*Leon, supra,* 468 U.S. at p. 922, fn. 23; accord, *Davis, supra*, 564 U.S. at p. 241 ["An officer who conducts a search in reliance on binding appellate precedent does no more than '"ac[t] as a reasonable officer would and should act"' under the circumstances. [Citation.]" (original italics)]; *Herring, supra,* 555 U.S. at p. 145 [recognizing that both Herring and the dissent agreed that the standard for culpability and deterrence is an objective one, "not an 'inquiry into the subjective awareness of arresting officers'"][1]; *Evans, supra,* 514 U.S. at p. 15 ["There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record"]; *Krull, supra,* 480 U.S. at p. 355 ["As we emphasized in *Leon*, the standard

[1] In *Herring*, the court noted: "We (perhaps confusingly) called this objectively reasonable reliance 'good faith.' [Citation.]" (*Herring, supra,* 555 U.S. at p. 142.)

of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers"].)

An objective exclusionary-rule analysis is also consistent with well-established Fourth Amendment principles generally. The United States Supreme Court has repeatedly recognized that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" (*Brigham City v. Stuart* (2006) 547 U.S. 398, 403.) And "Fourth Amendment reasonableness 'is predominantly an objective inquiry.' We ask whether 'the circumstances, viewed objectively, justify [the challenged] action.' If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials. This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts; and it promotes evenhanded, uniform enforcement of the law." (*Ashcroft v. al-Kidd* (2011) 563 U.S. 731, 736, original italics, internal citations omitted.) There are only two "limited exceptions" to this rule: special needs and administrative search cases. (*Ibid*.) But apart from those cases, the high court has "almost uniformly rejected invitations to probe subjective intent." (*Id.* at p. 737; accord, *Graham v. Connor* (1989) 490 U.S. 386, 397 [recognizing that the court consistently uses an objective standard of inquiry in various Fourth Amendment contexts: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation"].)

This case illustrates the perils of adopting a subjective analysis and attempting to ascertain the subjective intent of arresting officers. For example, appellant states that the arresting officers here "intended to warn or cite him for the infraction." (ASB 1, fn. 1.) But the record reflects only that one of the two officers intended to cite or warn appellant when he *initially approached* him. (1CT 80.) The record is silent about whether that officer continued to intend to only cite or warn appellant for the

infraction after his exchange with appellant began. It is also silent about the second officer's intent. Thus, as *Leon* rightly recognized, requiring courts to delve into the subjective thought processes of all arresting officers "would produce a grave and fruitless misallocation of judicial resources." (*Leon, supra,* 468 U.S. at p. 922, fn. 23, internal quotation marks omitted.)

By contrast, application of the objective standard in this case is straightforward: it requires the Court simply to focus on whether a reasonably well-trained officer would have known that the search was illegal in light of all the circumstances. (*Herring, supra,* 555 U.S. at p. 145.) As explained in respondent's Answer Brief on the Merits at pages 45-46 and in its Supplemental Brief at pages 6-7, well-trained officers confronted with the circumstances of this case could reasonably believe that their conduct was constitutional in light of *People v. Gomez* (2004) 117 Cal.App.4th 531, because they had probable cause to arrest appellant for his traffic violation at the time of the search. There was also a vacuum of authority contrary to *Gomez*—there was no California case that a search incident to arrest would be unconstitutional under the circumstances of this case. Further, as explained in respondent's Answer Brief on the Merits at pages 8-29, the officers' search incident to arrest was consistent with high court authority, specifically, *Virginia v. Moore* (2008) 553 U.S. 164, and *Rawlings v. Kentucky* (1980) 448 U.S. 98. The trial court 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.) The officers' objective adherence to case law cannot be considered "culpable" conduct, and it certainly cannot be considered "flagrant" misconduct. (See *Utah v. Strieff* (2016) 136 S.Ct. 2056, 2064.)

Appellant relies on *People v. Sanders* (2003) 31 Cal.4th 318, a case that does not involve the applicability of the exclusionary rule, to argue that what an officer actually knows is relevant for purposes of the exclusionary

rule. (ASB 3.) In *Sanders*, this Court explained that an officer must have prior knowledge of a resident's parole status if the officer is relying on the mandatory search condition as authority for a warrantless search of a residence. (*Id.* at pp. 330-332.) The Court stated: "[T]his result flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search was conducted . . ." (*Id.* at p. 332.) But the Court went on to clarify that "[t]his is not to say that the validity of the search depends upon the officer's purpose." (*Id.* at p. 334.) "'[A]lmost without exception, in evaluating alleged violations of the Fourth Amendment the court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.' [Citations.]"[2] (*Ibid.*)

Sanders does not help appellant. First, this case does not involve, and the validity of the search does not depend on, the existence of a probation search condition that was unknown to the officers. Second, *Sanders* makes clear that it does not stand for the proposition that an officer's subjective thought process is relevant to a Fourth Amendment analysis. Rather, it explains that what is relevant are the facts and circumstances known to the officer. In this case, a fact known to the arresting officers at the time of the search was that appellant had committed a traffic infraction. (See 1CT 52.) Accordingly, well-trained officers confronted with that fact could reasonably believe that their conduct was constitutional in light of *Gomez*, because they had probable cause to arrest appellant for his traffic violation at the time of the search.

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[2] These principles are consistent with the high court's statement in *Devenpeck v. Alford* (2004) 543 U.S. 146: "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." (*Id*. at p. 153.) *Devenpeck* is discussed in respondent's Answering Brief on the Merits at pages 25-27.

In sum, the pertinent analysis of culpability and deterrence is objective. Under that controlling standard, a well-trained officer could have reasonably believed that the search of appellant was constitutional. An objective adherence to case law cannot be considered "culpable" conduct.

B. Appellant Misapprehends Respondent's Position and the Record

Appellant's emphasis on the officers' belief that they were conducting a probation search also appears to misapprehend respondent's position. (ASB 4-5.) The People do not rely on a probation search condition to validate the search in this case. Rather, this case solely concerns the search incident to arrest exception to the warrant requirement—whether there is a Fourth Amendment violation as a result of an invalid search incident to arrest and, if so, whether exclusion of evidence is required as a result of the invalid search incident to arrest.

Further, appellant makes several representations that call for clarification. Appellant states: "In the police report, an officer wrote that [appellant] stated he was on felony probation and that he consented to the search. On cross-examination, the testifying officer was forced to admit that [appellant] never said he was on felony probation and, further, that the officers never asked for consent to search [appellant] or his phone." (ASB 4, fn. 2.) This summary is not entirely accurate. On direct examination, the arresting officer testified that he asked appellant if he was on parole or probation, and appellant said that he was "on probation" for possession of methamphetamine. (1CT 54-55, 113-114.) On cross-examination, the officer testified that although he wrote in his report that appellant said he was on felony probation, appellant had not, in fact, used the word "felony." (1CT 81-82.) Similarly, on direct examination, the arresting officer testified that he asked appellant for consent to remove

things from appellant's pockets, and appellant consented. (1CT 59-60.) On cross-examination, the officer explained that he wrote in his report that appellant consented to the search of his person because "[w]hen he consented to going in his pockets . . . that's what I interpreted that as." (1CT 82.)

With regard to when the People first relied on the search incident to arrest exception, appellant states: "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." (ASB 4, fn. 2.) The record shows that the hearing on the motion to suppress was held in conjunction with the preliminary hearing. (See 1CT 49, 120; Pen. Code, § 1538.5, subd. (f)(1).) There was nothing untoward about the deputy district attorney filing a supplemental brief, before any testimony was adduced in court, identifying the People's legal arguments in opposition to appellant's motion to suppress.

Finally, contrary to appellant's suggestion (see ASB 2, 5), the People have never argued that the search of appellant's cell phone was justified as a probation search condition. Rather, as explained in respondent's Answer Brief on the Merits at pages 40-47, the People's position has been that the officers in this case acted in full accordance with binding precedent from this Court at the time of the search, i.e., *People v. Diaz* (2011) 51 Cal.4th 84, and that, accordingly, under *Davis, supra,* 564 U.S. 229, there is no basis for excluding from evidence the child pornography found in appellant's cell phone.

CONCLUSION

In sum, in determining whether to apply the exclusionary rule, a reviewing court should apply *Herring*'s practical test and evaluate, in objective terms, the culpability of officer conduct and the deterrent value of exclusion. The application of that test in this case shows that the exclusionary rule should not apply. Accordingly, respondent respectfully requests that this Court affirm the judgment.

Dated: September 6, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL REPLY BRIEF uses a 13 point Times New Roman font and contains 2,824 words.

Dated: September 6, 2016

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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 September 6, 2016, I caused one electronic copy of the **RESPONDENT'S SUPPLEMENTAL REPLY BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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On September 6, 2016, I caused one copy of the **RESPONDENT'S SUPPLEMENTAL REPLY BRIEF** in this case to be hand delivered/served on the California Court of Appeal, Second Appellate District, Division Five.

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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 September 6, 2016, at Los Angeles, California.

Irene Rangel
Declarant

Signature

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