S221852

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL MACABEO,

Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 5, CASE NO. B248316

APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICUS CURIAE PROFESSOR MYRON MOSKOVITZ

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APPLICATION TO FILE AMICUS BRIEF OF AMICUS CURIAE PROFESSOR MYRON MOSKOVITZ

Myron Moskovitz is Professor of Law Emeritus, Golden Gate University. He served as a law clerk for California Supreme Court Justice Ray Peters. He has taught and lectured on Criminal Law, Criminal Procedure, Comparative Criminal Procedure, and Constitutional Law at various law schools, including Boalt Hall, University of Paris Nanterre, Haifa University, Nanking University, Bahcesehir University (Istanbul), and summer programs at Oxford University

and the University of Bologna. He has authored the following books:

- *Cases & Problems in Criminal Procedure: The Police* (6th ed. 2014);
- *Cases & Problems in Criminal Procedure: The Courtroom* (6th ed. 2014); and
- *Cases & Problems in Criminal Law* (5th ed. 2004).

Professor Moskovitz has also written several law review articles on criminal procedure, including the following:

- *The Road to Reason: Arizona v. Gant and the Search Incident to Arrest Doctrine* (2009) 79 Mississippi Law Journal 181;
- *Advising the Pro Se Defendant: The Trial Court's Duties Under Faretta* (2004) 42 Brandeis L.J. 329;
- *A Rule In Search of A Reason: An Empirical Reexamination of* Chimel *and* Belton (2002) 2002 Wisconsin L. Rev. 657; and
- *The O.J. Inquisition: A United States Encounter With Continental Criminal Justice* (1995) 28 Vanderbilt Journal of Transnational Law 1121.

Professor Moskovitz is now in private practice as "of counsel" with the California Appellate Law Group. His complete bio appears at myronmoskovitz.com.

Professor Moskovitz is not aligned with either party to this case, and has no interest in the outcome. His only interest is in helping the Court to base its decision on neither blind adherence to unexamined doctrine nor erroneous factual assumptions. The U.S. Supreme Court made both mistakes in *New York v. Belton* (1981) 453 U.S. 454. Professor Moskovitz then played a small role in assisting the Court to correct those mistakes.

BRIEF OF AMICUS CURIAE PROFESSOR MYRON MOSKOVITZ

I. The Importance Of Reality-Based Decision-Making

"We need evidence-based law, just as we need evidence-based medicine. * * * * Judges need a better grasp of and grounding in empirical reality, and the methods of ascertaining that reality". (Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views* (2013) 51 Duquesne L.Rev. 3.[1])

In *Chimel v. California* (1969) 395 U.S. 752, the Court adopted the modern search-incident-to-arrest doctrine, limiting the searchable area to that which the arrestee could reach for a weapon or evidence.

In *Belton*, however, the Court ruled that after a police officer has validly arrested a "recent occupant" of a car, the search-incident-to-arrest doctrine always permits the officer to search the passenger compartment of the car – even though the arrestee in that case could not reach the car at the time of the search. The Court based this holding on the need to create a bright line easily understood by officers, and on a factual premise: "articles inside the relatively narrow compass of the passenger compartment of an

[1] http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5025&context=journal_articles

automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" (*Belton*, *supra*, 453 U.S. at pp. 459-460.)

I wondered: Is this premise accurate? The arrestee could reach into the car for a weapon or evidence only if the officer *failed to secure him* (by handcuffing him and/or locking him in the patrol car) before conducting the search. Is this what officers "generally, even if not inevitably", do? I wouldn't. It seems dangerous to stick your head into a car while an unsecured arrestee stands behind you. But I'm not a police officer, so I'm just guessing. To find out what officers actually do in this situation, I surveyed training materials used by law enforcement agencies throughout the country.

I reported my findings in a law review article: Moskovitz, *A Rule In Search of A Reason: An Empirical Reexamination of* Chimel *and* Belton (2002) 2002 Wisconsin L. Rev. 657 (hereafter, *A Rule In Search of A Reason*). I had sought "public records, writings, audiotapes, videotapes, and documents that are used to train law enforcement officers in how to perform a search incident to the arrest of a suspect." (*Id.* at p. 664.) I found no agency that told its officers to do what the Court in *Belton* assumed they do: leave the arrestee unsecured while the officer searches the car. Every

agency told its officers to lock the arrestee in the patrol car before conducting the search. I reported that "Not one regulation, training bulletin, or other piece of information indicated that officers were directed or advised to do, as a general practice, what the Court in *Chimel* assumed they would: allow the arrestee to stand unrestrained where he was when arrested while the officers conduct a search of the area around him." (*Id.* at p. 667.) Instead, the typical directive commanded the opposite course of conduct: "Safety issues shall be the first priority. A vehicle search shall not be done until all occupants of the vehicle have been secured." (*Id*. at p. 665.) (The same policy applied to arrests in a home: remove the arrestee from the premises and secure him before searching the home.)

In a concurring opinion in *Thornton v. U.S.* (2004) 541 U.S. 615, Justice Scalia (joined by Justice Ginsburg) criticized *Belton*, citing my article to show that *Belton's* factual premise was wrong. (*Id*. at pp. 665-666.) A few years later, in *Arizona v. Gant* (2009) 556 U.S. 332, the Court effectively overruled *Belton*.[2]

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[2] In his concurring opinion in *Gant*, Justice Alito cited my article (for a proposition I did not intend). (556 U.S. at p. 362.) I discussed the implications of *Gant* in a sequel article: *The Road to Reason: Arizona v. Gant and the Search Incident to Arrest Doctrine* (2009) 79 Mississippi Law Journal 181.

II. The Court Of Appeal Opinion Was Based On A Hypothetical, Not Reality.

According to the facts stated in the Court of Appeal opinion in this case, here is the sequence of relevant events.

Detective Hayes and Officer Raymond observed Defendant riding his bicycle through a stop sign. They stopped and warned Defendant about that offense. After their questioning uncovered no further evidence of crime, Hayes patted Defendant down – apparently feeling no hard object. Defendant consented to a search of his pockets, where Hayes found a cell phone. Hayes removed it and gave it to Officer Raymond. Hayes directed Defendant to sit on the curb in front of the patrol car and cross his ankles. Defendant apparently complied. Raymond then signaled Hayes to join him. Hayes told Defendant to remain seated, and apparently Defendant complied. Hayes walked to Raymond, who was presumably some distance away. Raymond told Hayes that he had found on the cell phone photos of young girls engaged in sexual activity. Hayes returned to Defendant and arrested him for possession of the photos.

The Court of Appeal upheld the search by the following reasoning: because the officers *could have* arrested Defendant before the search without violating the Fourth Amendment, the court would assume that

they *did* arrest him when they stopped him for riding his bike though a stop sign. If they *had* arrested him earlier, they *could have* searched his person incident to the arrest – including the contents of his pockets and all items found there. This would have included the cell phone, because the search occurred when *People v. Diaz* (2011) 51 Cal.4th 84, allowed cell phone searches incident to arrest, and before the U.S. Supreme Court invalidated these searches in *Riley v. California* (June 25, 2014, Nos. 13-132, 13-212) 573 U.S. ___.

In essence, the Court of Appeal held: "Because the officers *might have* arrested Defendant, we will assume they *did* – and thus allow them to visit all consequences of this hypothetical arrest on Defendant's right to privacy." One might equally say, "Because a defendant might have consented to a search, we will assume that he did." Or, "Because the police might have obtained a warrant, we will assume that they did." But this is not the law.

Belton too was based on a hypothetical. Because the Court allowed a search of the passenger compartment but not the trunk, the Court must have *assumed* that the arrestee was *in* the passenger compartment when the arrest occurred. The Court simply put the "recent occupant" back in the car and

asked how far he could reach from there.[3] *Gant* rejected this, holding in effect: "We deal with reality, not hypotheticals. If the arrestee was not in or within reach of the car when the search occurred, he posed no danger of reaching into the car." As the Seventh Circuit put it, "the reasonableness of a search depends on what the officers actually do, not what they might have done." (*U.S. v. Jackson* (7th Cir. 2004) 377 F.3d 715, 717.)

I am aware of only one Fourth Amendment doctrine that does in fact indulge in hypotheticals: the inevitable discovery doctrine. In the present case, if the officers had not handled this situation as they did, was it "inevitable" that they would have *arrested* the defendant (and then conducted a valid search under *Diaz*)? No, because the only crime they observed was running a stop sign, which is not an arrestable offense under California law. They *could not* legally arrest him before the search, they had *no intention* of doing so, and they *did not* do so. So the inevitable discovery doctrine does not justify what the police did here.

The Court of Appeal then ruled that even if *Riley* now bars a search of Defendant's cell phone, the resulting evidence is not excludable, because the officers reasonably relied on *Diaz*. But the defendant in *Diaz*

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[3] I discussed this point in my article, *A Rule In Search of A Reason*, *supra*, at p. 678.

had been *arrested*, so was subject to the search incident to arrest doctrine. The only issue in *Diaz* was the permissible *scope* of a search incident to arrest. In the present case, at the time of the search, Defendant had *not* been arrested. So how could Officer Raymond reasonably believe that *Diaz* allowed him to conduct that search? The good faith exception would apply here only if some case had held that the police may fully search the effects of someone they had stopped – but not arrested – for a traffic offense. I am aware of no such case.

III. The Proper Framework For Analyzing The Present Case

California's citation-and-release procedure for running a stop sign most closely resembles a *Terry* stop, because both are short and non-custodial. *Terry* and its progeny regulate the stop-and-frisk procedure step by step:

1. An officer may stop a suspect only with "reasonable suspicion."
2. He may then pat down the suspect's outer clothing only if the officer reasonably believes that the suspect is "armed and presently dangerous".
3. He may then reach into the suspect's pockets only if the pat down reveals a hard object that might be a weapon.
4. And once the officer removes the object and sees that it is not a weapon, he may not search *into* the object (unless he has somehow gained probable cause to believe the object contains evidence of a crime).[4]

[4] See *Terry v. Ohio* (1968) 392 U.S. 1; *Sibron v. New York* (1968) 392 U.S. 40.

A. The Stop Was Reasonable.

In the present case, the first Fourth Amendment intrusion – the stop – was reasonable. It was based on plenty of "reasonable suspicion", as the officers saw Defendant ride through the stop sign.

B. The Patdown Was Unreasonable, But Produced No Evidence.

To conduct the next intrusion – the patdown – the officers needed evidence that Defendant was "armed and presently dangerous". The nature of the crime (running a stop sign) did not show this. Detective Hayes did testify that he believed that Defendant "was really fidgety." (1CT 59:13-20.) But Hayes did not testify that "really fidgety" included any effort by Defendant to reach into his pockets. Therefore, it would seem that the patdown was not justified.

However, the patdown did not reveal any evidence or lead to the cell phone photos, so there are no "fruits" of this "poisonous tree" to be suppressed.

C. The Reach Into Defendant's Pockets Was Reasonable.

Because the patdown revealed no hard object, the reach into Defendant's pockets cannot be justified under *Terry's* protocol. But Defendant consented to this intrusion, so it is either no search (because there was no

intrusion on his expectation of privacy), or a search that was reasonable because he gave consent.[5]

Note that under the Court of Appeal's reasoning, no consent was necessary. Because Defendant *could have* been arrested, a full search of his person – including his pockets – was permitted under the search-incident-to-arrest doctrine. Looking forward, this was the Court's most important holding, because it will allow full searches of every person validly stopped for a citation – including millions of speeders, jaywalkers, and other people stopped for minor infractions. (The Court's holding regarding cell phone searches will have little effect in the future, because of *Riley*.)

D. The Opening Of The Cell Phone To View Its Contents Was Unreasonable.

The final search – Officer Raymond's opening the cell phone to view the photos – cannot be justified under *Terry*. The officer had no reason to believe that the cell phone contained either a weapon or evidence of a crime. The only doctrine that might conceivably justify it is consent, if one views the scope of Defendant's consent to search his pockets as including

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[5] A consent search might be based not on need, but on the notion that it might not be a "search" at all – as the suspect has voluntarily surrendered his expectation of privacy.

consent to search objects found within those pockets. (Cf. *Florida v. Jimeno* (1991) 500 U.S. 248.) The Court of Appeal did not consider this possibility. The alleged consent occurred when Officer Hayes asked Defendant, "[y]ou have no problem me taking stuff out of your pockets?" and Defendant replied, "[n]o, go ahead." (1CT 115.) Consent to "taking stuff out of your pockets" would not seem to include opening items that are found in the pockets. Also, because one's cell phone contains so much more private information than one's pockets (as the U.S Supreme Court recognized in *Riley*), it does not seem reasonable to infer that Defendant's consent to search his pockets encompassed his cell phone.

E. No Need Justifies Extending The Search-Incident-To-Arrest Doctrine To Cases Where The Suspect Is Not Arrested.

Chimel held, effectively, that the scope of a search is limited by the justification for the search.

A search of a person's pockets incident to arrest is justified by two facts.

First, "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." (*U.S. v. Robinson* (1973) 414 U.S. 218, 234-35.) During this "extended exposure", the arrestee might reach for a weapon or for evidence to

destroy. But no such "extended exposure" occurs when the suspect is not arrested and taken into custody.

Second, the arrestee has a diminished expectation of privacy, since he will probably be administratively searched anyway before he is placed in a jail cell. (See *Maryland v. King* (2013) 133 S.Ct. 1958, 1978.) No such administrative search will be performed on a suspect who is cited and released.

F. No Need Justifies The Creation Of A New Doctrine That Would Uphold The Search Of The Cell Phone.

As shown above, under the doctrine most closely applicable to the present facts – stop and frisk – the photos were the fruits of an unlawful search of the cell phone, and should be suppressed.

None of these doctrines, of course, is spelled out in the Fourth Amendment, which simply bars "unreasonable searches and seizures." Various doctrines – including *Terry's* – were adopted by courts seeking to give meaning to this vague term. This process will continue, and there is nothing inherently wrong with the Court of Appeal adopting a new Fourth Amendment doctrine – so long as that doctrine is based on a law enforcement *need* that outweighs the intrusion on a citizen's privacy.

But this one doesn't. There was no need to search Defendant's cell phone. The cell phone contained no weapon. There was no probable cause – indeed no evidence at all – that the cell phone contained evidence of any crime. And even if there were such evidence, because the officers had already seized the phone, they had plenty of time to seek a warrant to search the phone. Might Defendant have snatched the phone from the officers and destroyed the photos? Unlikely, if not impossible. Officer Raymond conducted the search when Defendant – unarrested – was at some unspecified distance from him, seated on the curb with his ankles crossed, with Detective Hayes in front of him. It appears highly unlikely that Defendant could uncross his ankles, stand up, run past Hayes, cover the distance to Raymond, grab the cell phone, and then somehow manipulate the cell phone to erase or destroy the photos – and do *all* of this before either Hayes or Raymond could stop him. Many people have trouble figuring out how to work complex functions on their cell phones – even when two police officers aren't trying to stop them. There is no evidence that Defendant was, as Justice Scalia put it in his *Thornton* concurrence, "possessed of the skill of Houdini and the strength of Hercules."[6]

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[6] "On occasion, the police might not restrain the arrestee simply because they do not fear him for some reason (e.g., reputation, age, or disability). If they do not

So there appears to be no reason to invent a new Fourth Amendment doctrine to find this intrusion on the privacy of Defendant's cell phone "reasonable".

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fear that he might reach into an area for a weapon or evidence, it makes little sense to allow them to search that area anyway." (*A Rule In Search of A Reason*, *supra*, at p. 688.)

IV. The Police Did Not "Earn" The Right To Search Defendant's Cell Phone.

The Fourth Amendment is not a game. Police officers do not "earn" the right to search by intruding less than the Constitution permits them to intrude. By stopping and citing or warning when they might have arrested, they do not "earn" the right to employ the search incident to arrest doctrine to go through the suspect's cell phone. Several cases that took that approach[7] were effectively overruled by *Gant*, which based its new approach on reality, not on hypotheticals or on treating the Fourth Amendment as a sporting event.

[7] In *A Rule In Search of A Reason*, *supra*, at pp. 682-683, I discussed some cases that seemed to treat the Fourth Amendment as a game. *Gant* implicitly overruled those cases.

Conclusion

The Fourth Amendment protects privacy. Without a valid search warrant, police should be permitted to invade this privacy only when they *need* to do so. They need to fully search an arrestee because he might grab a weapon or evidence. There is no similar need to search the pockets or effects of a person stopped for driving a few miles over the speed limit, for walking a few feet outside a crosswalk, for fishing with an expired license – for or rolling through a stop sign. No doctrine allowed this at the time Officer Raymond searched Defendant's cell phone, and there is no cause to create a new doctrine that does so.

The police should not be allowed to leverage a simple traffic stop into a full search of a person's pockets, texts, e-mails, photos, and other intensely private information.

Dated: April __, 2015

Respectfully submitted,

____/s/_____

Myron Moskovitz

Amicus Curiae

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