No. _____

In The
Supreme Court of the United States

STEVEN MORRIS HURD,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
SAN MATEO COUNTY,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Riley v. California*, 134 S.Ct. 2473 (2014), this Court held that police may not, without a warrant, search digital information on a cellular phone seized incident to arrest. *Id.* at 2480, 2495. *Riley* has retroactive effect on petitioner's case which is not final. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The search incident to arrest of petitioner's cell phone took place on January 2 and 3, 2009. At that time, no binding appellate precedent specifically permitted California police officers to search an arrestee's cell phone incident to arrest. Petitioner sought to suppress the fruits of the digital search of his cell phone. The trial court denied his motion, finding that this Court's precedent from the seventies permitted police officers to conduct a warrantless search of a cell phone seized incident to arrest. This Court in *United States v. Robinson*, 414 U.S. 218 (1973) held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.* at 235. A year later, this Court upheld the warrantless search of clothing that was seized from an arrestee approximately 10 hours after his arrest. *United States v. Edwards*, 415 U.S. 800, 801-802 (1974). Of course, the older cases predated the advent of the cell phone. Moreover, this Court noted last year that the *Robinson* holding pertained to physical objects, not digital data. "[U]nknown physical objects may always pose risks, no matter how slight, during the tense

QUESTION PRESENTED – Continued

atmosphere of a custodial arrest. . . . No such unknowns exist with respect to digital data." *Riley,* 134 S.Ct. at 2485. The question presented is:

Whether this Court's 1970s search incident to arrest precedent involving physical objects applied to non-physical objects such as digital data prior to this Court's ruling in *Riley*.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven Morris Hurd respectfully petitions for a writ of certiorari to review the judgment of the California Superior Court, San Mateo County, in Case No. SC069090.

RULING AND ORDERS BELOW

The ruling of the California Superior Court, San Mateo County (App. 3-17) is unpublished. The order of the California Court of Appeal denying mandate (App. 2) is unpublished. The order of the California Supreme Court denying review (App. 1) is unpublished.

JURISDICTION

The California Supreme Court denied review on December 10, 2014. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a), as interpreted by this Court. Even though trial is yet to occur in state court, the outcome is preordained given that the sole life imprisonment counts are based on the digital cell phone evidence and its fruits, which should have been suppressed. The federal issue is conclusive with respect to the maintenance of the life imprisonment counts. Had the digital cell phone evidence been suppressed, petitioner would be released as he has served more time than he could be

sentenced to under the remaining non-life counts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."

STATEMENT OF THE CASE

1. In December 2008, petitioner became the focus of an investigation by San Mateo (California) police who suspected petitioner of providing massage services without having the necessary permit. On January 2, 2009, a female undercover officer received a massage from petitioner at his apartment. Some of her colleagues monitored the massage visit by way of a hidden microphone and transmitter. While the massage was still ongoing, the investigating officers showed up at petitioner's apartment and detained him. App. 30.

The undercover officer meanwhile told her colleagues that petitioner had inappropriately touched her. Petitioner was arrested for sexual battery and was searched incident to arrest. Police retrieved a

partial Viagra pill and a cell phone from petitioner's pants pocket. When officers viewed digital files stored on the cell phone, they came across a video of a small child orally copulating a male whose voice police identified as that of petitioner. App. 30.

Police then sought and obtained a search warrant for petitioner's apartment. The resulting search yielded a folder containing child pornography and hydrocodone pills. App. 31.

2. Petitioner was charged with three felony counts of oral copulation of a child age ten or below, based on the cell phone video; one felony count of using a minor to perform prohibited acts, also based on the cell phone video; one felony count of possession of child pornography, based on the images in a folder seized during the search warrant execution; one felony count of possession of hydrocodone (now a misdemeanor due to a change in the law); and five misdemeanor counts of sexual battery upon the undercover officer. The oral copulation offense carries a penalty of 15-years-to-life per count upon conviction. App. 31.

3. After this Court decided the cell phone search incident to arrest issue in *Riley v. California*, 134 S.Ct. 2473 (2014), petitioner filed a motion to suppress evidence based on the *Riley* decision, setting forth petitioner's argument that *Riley* rendered the search of the digital information on his cell phone unconstitutional, that the good faith exception to the exclusionary rule when police reasonably rely on binding appellate precedent had no application to this

case as there was no such precedent at the time of the search; and that the search warrant was no longer valid after removal of the illegally obtained information from the warrant affidavit. App. 32-33.

4. An evidentiary hearing was conducted on September 23, 2014, before Judge John L. Grandsaert of the California Superior Court, San Mateo County. Judge Grandsaert denied petitioner's motion, implicitly finding that the search incident to arrest violated petitioner's Fourth Amendment rights – otherwise the trial court would not have had to reach the good faith issue – but expressly finding that the good-faith exception established by this Court in *Davis v. United States*, 131 S.Ct. 2419 (2011) precluded application of the exclusionary rule because police reasonably relied on binding appellate precedent that allowed the search of the digital contents of a cell phone seized incident to arrest. App. 33.

5. Petitioner contested the denial of the suppression motion by petitioning the California Court of Appeal, First Appellate District, for a writ of mandate. The Court of Appeal denied the petition. App. 2.

6. Petitioner then sought review in the California Supreme Court. App. 18. The state Supreme Court requested the California Attorney General to answer the petition. App. 44. After briefing was completed, the petition for review was denied. App. 1.

REASONS FOR GRANTING THE WRIT

This case raises an important constitutional issue of whether binding appellate precedent existed prior to *Riley* that permitted police to search the digital contents of a cell phone incident to arrest. This Court held in *Davis* that the exclusionary remedy for Fourth Amendment violations does not apply when officers searched in objectively reasonable reliance on binding appellate precedent. *Davis*, 131 S.Ct. at 2434.

I. Search Incident To Arrest Exception To Warrant Requirement Applies To Physical Objects Only

The Fourth Amendment guarantees petitioner the right to be secure in his person, papers, and effects against unreasonable searches and seizures. This right is enforceable against the states as part of the due process guarantee of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). Evidence obtained in violation of the constitutional protections must be excluded. *Id.* at 655.

The Fourth Amendment requires the issuance of a warrant based on probable cause prior to a search or seizure, with limited exceptions. *Johnson v. United States*, 333 U.S. 10, 14-15 (1948). One such exception is a search incident to arrest when officers remove any weapons that a person might seek to use to resist arrest or to escape or when officers seize items of evidence in order to prevent the arrestee from

concealing or destroying them. *Chimel v. California*, 395 U.S. 752, 762-763 (1969).

In *United States v. Robinson*, 414 U.S. 218 (1973), this "Court applied the *Chimel* analysis in the context of a search of the arrestee's person." *Robinson,* 414 U.S. at 220. The police officer who had arrested Robinson for driving with a revoked license, felt an object in Robinson's coat pocket that the officer could not identify. The officer removed the object and observed that it was a crumpled cigarette package. When the officer opened it, he found 14 heroin capsules inside. *Id.* at 223.

This Court rejected the notion that "case-by-case adjudication" was required to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.* at 235. This Court explained its decision:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes

> the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

Ibid.

This Court in *Riley* stated that the *Robinson* rule "strikes the appropriate balance in the context of physical objects" but that "neither of its rationales has much force with respect to digital content on cell phones." *Riley,* 134 S.Ct. at 2484. Hence, the *Chimel*/*Robinson* precedent does not apply and never did apply to the digital contents of cell phones.

II. Retroactivity Principles Require That This Court's View Of The *Chimel*/*Robinson* Precedent Controls In Resolving Whether Binding Appellate Precedent Applied To The Digital Contents Of Cell Phones Searched Incident To Arrest

In *Riley*, this Court specifically "decline[d] to extend *Robinson* to searches of data on cell phones." *Riley,* 134 S.Ct. at 2485. The trial court below decided that *Robinson* did permit police officers to search the digital contents of a cell phone incident to arrest. In so deciding, the trial court ruled contrary to this Court's view of *Robinson* in *Riley*. But the principles of retroactivity established by this Court mandate that the *Riley* view of *Robinson*, not the trial court's view, governs the examination of whether any binding

appellate precedent existed that controlled searches incident to arrest of digital cell phone data. *See Griffith v. Kentucky*, 479 U.S. 314 (1987).

Thus, even if this Court were to hold that non-physical objects such as cell phone digital data were within the reach of the *Chimel/Robinson* search incident to arrest exception prior to *Riley*, then retro-activity principles require adoption of the *Riley* view to any case not yet final.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Court of Appeal, First Appellate District,
Division Three – No. A143312

S222249

IN THE SUPREME COURT OF CALIFORNIA

En Banc

STEVEN MORRIS HURD, Petitioner,

v.

SUPERIOR COURT OF SAN MATEO COUNTY,
Respondent;

THE PEOPLE, Real Party in Interest.

(Filed Dec. 10, 2014)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

STEVEN MORRIS HURD, Petitioner, v. THE SUPERIOR COURT OF SAN MATEO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	A143312 (San Mateo County Super. Ct. No. SC069090)

THE COURT:*

The petition for a writ of mandate is denied.

Dated: OCT 23 2014 McGuiness, P.J. P.J.

* McGuiness, P.J. & Siggins, J.

IN THE SUPERIOR COURT

STATE OF CALIFORNIA
COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. STEVEN MORRIS HURD, DEFENDANT.	)	NO. SC069090A

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE: HON. JOHN L. GRANDSAERT, JUDGE

DEPARTMENT 11, COURTROOM 2D

SEPTEMBER 23, 2014

APPEARANCES:

FOR THE PEOPLE:	STEPHEN WAGSTAFFE, DISTRICT ATTORNEY BY: AARON FITZGERALD, DEPUTY HALL OF JUSTICE AND RECORDS 400 COUNTY CENTER REDWOOD CITY, CA 94063
FOR THE DEFENDANT:	PAUL DEMEESTER 1227 ARGUELLO STREET REDWOOD CITY, CA 94063
REPORTED BY:	WENDY LOU CONDE, CSR #11668

* * *

[49] AND THEN FILED UNDER SEAL ARE TWO EXHIBITS, EXHIBIT P, INTERVIEW TRANSCRIPT BETWEEN DETECTIVE JOYCE AND MR. HURD.

AND THEN EXHIBIT Q ARE A SERIES OF PHOTOS, A TOTAL OF 11 PAGES OF PHOTOS. BOTH OF THOSE ARE FILED UNDER SEAL.

AND I ASK THAT THEY MAY BE ADMITTED BY STIPULATION INTO EVIDENCE.

THE COURT: AND THAT WAS THE STIPULATION BEFORE I STARTED CONSIDERING THE EXHIBITS. AND THAT STIPULATION WAS MADE BY BOTH COUNSEL AND ACCEPTED BY THE COURT.

MR. FITZGERALD: YES, YOUR HONOR.

THE COURT: THEY ARE ADMITTED.

(WHEREUPON COURT'S EXHIBITS A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, AND P, PREVIOUSLY MARKED FOR IDENTIFICATION, WERE ADMITTED INTO EVIDENCE.)

THE COURT: ALL RIGHT. 4:15 GENTLEMEN.

MR. FITZGERALD: THANK YOU, YOUR HONOR.

MR. DEMEESTER: THANK YOU.

(RECESS.)

THE COURT: ALL RIGHT. WE ARE BACK ON THE RECORD IN THE MOTION. ALL PARTIES ARE ONCE AGAIN PRESENT. ALL COUNSEL ARE PRESENT.

THERE ARE TWO SEARCHES THAT ARE CHALLENGED HERE, A SEIZURE PURSUANT TO ARREST OF A CELL PHONE AND A CONTEMPORANEOUS INITIAL INSPECTION OF THE CONTENTS OF THAT PHONE AND THEN A LATER SEIZURE OF THAT CELL PHONE PURSUANT TO SEARCH WARRANT OBTAINED THROUGH THE DISCLOSURE OF WHAT THE INITIAL [50] WARRANTLESS SEIZURE AND INITIAL INSPECTION OF THAT PHONE DISCLOSED.

WITH REFERENCE TO THE EXECUTION OF THE LATER SEARCH WARRANT, WHICH IS A SECONDARY ISSUE HERE, I FIND NOTHING INAPPROPRIATE WITH REFERENCE TO THE SERVICE OF THIS IN THE NIGHTTIME AND PURSUANT TO THE EXPLICIT AUTHORIZATION OF JUDGE PFEIFFER. I FIND THAT WITHIN THE FOUR CORNERS OF THE AFFIDAVIT, THERE WAS A MORE THAN SUFFICIENT BASIS TO AUTHORIZE NIGHT SERVICE. AND IN ALL OF MY RESEARCH, I CAN FIND NO CASE AUTHORITY FOR EXCLUDING EVIDENCE FOLLOWING THE PASSAGE OF PROPOSITION 8 UNDER THE FEDERAL LAW, EVEN IF THERE HAD BEEN A

VIOLATION OF THE NIGHT SERVICE RULE OF CALIFORNIA.

WITH REFERENCE TO THE FOURTH AMENDMENT ISSUE ON THE SECOND SEARCH ISSUE, THE SEIZURE PURSUANT TO THE SEARCH WARRANT AND THE EFFECT THAT THE INITIAL SEARCH AND INSPECTION OF THE CELL PHONE – WHAT THAT GAVE RISE TO IN DISCLOSING THAT TO THE MAGISTRATE AND MAKING THAT A PART OF THE AFFIDAVIT FOR PROBABLE CAUSE, I DON'T BELIEVE WE HAVE TO REACH THAT ISSUE. I THINK THERE MAY BE A GOOD ARGUMENT THAT THE – TO THE EXTENT THAT THE INITIAL SEIZURE OF THE CELL PHONE WAS ILLEGAL, EVEN UNDER RETROACTIVE APPLICATION OF U.S. SUPREME COURT DECISIONS, THAT COULD DOOM THE – DOOM A FINDING FOR THE PROSECUTION WERE IT REQUIRED TO DELETE AND RETEST THIS WARRANT.

BUT I SAY I'M NOT MAKING A DECISION ON THAT ISSUE. I DON'T THINK WE NEED TO GO THERE.

SO I'M CONCENTRATING ON THE LEGALITY OF THE FIRST SEIZURE [51] AND THAT CONTEMPORANEOUS INITIAL INSPECTION OF THAT SEIZURE OF THE CELL PHONE.

THE CHALLENGED SEARCHES AND SEIZURES IN THIS CASE TOOK PLACE BEFORE AND AFTER THERE WERE LEGAL RULINGS

UPHOLDING THE WARRANTLESS SEARCH PURSUANT TO ARREST OF A CELL PHONE FOUND ON THE PERSON OF THE DEFENDANT.

THE LEGAL RULING THAT PRECEDED THESE SEARCHES CANNOT BE CITED AS BINDING PRECEDENT SINCE BY OPERATION OF THE LAW THAT RULING WAS DEPUBLISHED WHEN THE CASE WAS ACCEPTED FOR REVIEW BY THE CALIFORNIA SUPREME COURT. BUT IT CANNOT BE DENIED AS A HISTORICAL FACT.

THE LEGAL RULING THAT WAS ISSUED SOON AFTER THE SEARCHES IN THIS CASE WAS BY THE CALIFORNIA SUPREME COURT IN THAT VERY CASE THAT WAS DEPUBLISHED WHEN REVIEW WAS GRANTED IN THE PEOPLE VERSUS DIAZ CASE.

AND IN THAT CASE, THE CALIFORNIA SUPREME COURT AGREED WITH THE LOWER COURT DECISION, THAT IT BY OPERATION OF LAW DEPUBLISHED BY ITS ACCEPTANCE OF REVIEW.

FIVE MEMBERS OF THE SUPREME COURT AND TWO DISSENTERS OR WITH TWO DISSENTERS FOUND THAT THE U.S. SUPREME COURT OPINION THAT HAD BEEN ISSUED IN THE SEVENTIES, THE 1970S, NOT ONLY AUTHORIZED A WARRANTLESS SEARCH OF THE CELL PHONE BUT FOUND THAT THAT U.S. SUPREME COURT PRECEDENT COMPELLED THEIR FINDING THAT A WARRANTLESS

SEARCH OF A CELL PHONE CARRIED BY THE PERSON ARRESTED WAS LAWFUL AND REASONABLE UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

[52] THE CONCURRING OPINION OF JUSTICE KENNARD, WHO CONCURRED WITH THE OPINION OF THE MAJORITY, ALONG WITH JUSTICES BAXTER, CORRIGAN, AND GEORGE CHARACTERIZED THE MAJORITY HOLDING IN DIAZ IN 2011 AS FOLLOWS:

THE MAJORITY HOLDS THAT THE POLICE MAY, WITHOUT OBTAINING A WARRANT, VIEW OR LISTEN TO INFORMATION ELECTRICALLY STORED ON A MOBILE PHONE THAT A SUSPECT WAS CARRYING WHEN LAWFULLY ARRESTED.

AS THE MAJORITY EXPLAINS, THREE DECISIONS OF THE UNITED STATES SUPREME COURT COMPELLED THE RESULT IN THIS CASE. THOSE DECISIONS ARE – AND I WON'T CITE THE COMPLETE CITATION OF THOSE CASES – BUT ROBINSON FROM 1973, EDWARDS FROM 1974, AND CHADWICK FROM 1977.

UNDER ROBINSON AND CHADWICK, A WARRANT IS NOT REQUIRED TO CONDUCT A FULL SEARCH OF THE PERSON INCIDENT TO A LAWFUL ARREST. AND THE POLICE MAY EXAMINE AN OBJECT FOUND DURING THE SEARCH TO DETERMINE WHETHER IT CONTAINS EVIDENCE OF CRIME, NOT JUST A WEAPON, SO

LONG AS THE OBJECT IS ONE THAT IS IMMEDIATELY ASSOCIATED WITH THE PERSON OF THE ARRESTEE.

UNDER EDWARDS, THIS SEARCH AND INSPECTION NEED NOT OCCUR AT THE TIME AND PLACE OF THE ARREST. IT MAY OCCUR EVEN AFTER A SUBSTANTIAL PERIOD OF TIME HAS ELAPSED.

WHEN CARRIED IN CLOTHING, RATHER THAN INSIDE LUGGAGE OR A SIMILAR CONTAINER, A MOBILE PHONE IS PERSONAL PROPERTY THAT IS IMMEDIATELY ASSOCIATED UNDER – ASSOCIATED WITH THE PERSON OF THE ARRESTEE.

[53] ACCORDINGLY, UNDER CONTROLLING HIGH COURT DECISIONS, POLICE MAY WITHOUT OBTAINING A WARRANT INSPECT A MOBILE PHONE CARRIED BY A SUSPECT AT THE TIME.

IN MY VIEW, THAT WAS THE STATE OF THE LAW AND THE STATE OF BINDING PRECEDENT AT THE TIME OF THE SEARCHES IN THIS CASE. ALTHOUGH IT IS NOT THE LAW AT THE PRESENT TIME BECAUSE OF THE PROMULGATION OF THE RILEY DECISION A FEW MONTHS AGO AND FIVE YEARS AFTER THE SEARCH IS CHALLENGED HERE, IN ORDER TO MAKE DETERMINATIONS OF WHETHER OR NOT LAW ENFORCEMENT AND SUPERIOR COURT JUDGE ROSEMARY PFEIFFER HAD A RIGHT TO RELY

ON THAT LAW AT THAT TIME, I MUST DETERMINE IF THAT LAW COULD FORM THE BASIS FOR GOOD-FAITH SEIZURE AND INSPECTION OF THE CONTENTS OF THE CELL PHONE WITHOUT A WARRANT AND THE SUBSEQUENT SEIZURE OF THAT PROPERTY AGAIN AFTER A WARRANT WAS ISSUED AUTHORIZING THEIR SEIZURE.

I FIND THAT IT COULD. IN SO FINDING, I WILL DENY THE MOTION TO SUPPRESS THE EVIDENCE FOUND ON THE CELL PHONE AND ANY EVIDENCE SEIZED THEREAFTER AS A RESULT OF THAT SEARCH.

I'M DOING SO ON THE BASIS OF WHAT WAS HISTORICAL FACT IN DIAZ IN 2011 BASED ON WHAT IT WAS READING IN THE INTERIM PERIOD GOING BACK TO THE 1970S.

AND PRIMARILY BASED ON THE DECISION OF THE U.S. SUPREME COURT IN DAVIS WHICH STATED IN VERY ARTFUL TERMS WHICH I WILL QUOTE:

THAT THE EXCLUSIONARY RULE MAY ONLY BE USED TO SUPPRESS EVIDENCE FOUND WHEN IT DETERS FUTURE FOURTH AMENDMENT [54] VIOLATIONS.

IN DAVIS, THE COURT STATED, AND I WILL AGAIN OMIT THE INTERVENING CITATIONS, THE EXCLUSIONARY RULE'S SOLE PURPOSE IS TO DETER FUTURE FOURTH AMENDMENT

VIOLATIONS. AND ITS OPERATION IS LIMITED TO SITUATIONS IN WHICH THIS PURPOSE IS THOUGHT MOST EFFICACIOUSLY SERVED. FOR EXCLUSION TO BE APPROPRIATE, THE DETERRENCE BENEFITS OF SUPPRESSION MUST OUTWEIGH THE RULE'S HEAVY COSTS.

UNDER A LINE OF CASES BEGINNING WITH U.S. V. LEON, THE RESULTS OF THIS COST-BENEFIT ANALYSIS TURNS ON THE FLAGRANCY OF THE POLICE MISCONDUCT AT ISSUE. WHEN THE POLICE EXHIBIT DELIBERATE, RECKLESS, OR GROSSLY NEGLIGENT DISREGARD FOR FOURTH AMENDMENT RIGHTS, THE BENEFITS OF EXCLUSION TEND TO OUTWEIGH THE COSTS.

BUT WHEN THE POLICE ACT WITH AN OBJECTIVELY REASONABLE GOOD-FAITH BELIEF THAT THEIR CONDUCT IS LAWFUL, OR WHEN THEIR CONDUCT INVOLVES ONLY SIMPLE, ISOLATED NEGLIGENCE, THE DETERRENT VALUE OF SUPPRESSION IS DIMINISHED AND EXCLUSION CANNOT PAY ITS WAY.

THE REMEDY OF EXCLUSION DOES NOT AUTOMATICALLY FOLLOW FROM A FOURTH AMENDMENT VIOLATION AND APPLIES ONLY WHERE ITS PURPOSE IS EFFECTIVELY ADVANCED.

EXCLUSION IS NOT A PERSONAL CONSTITUTIONAL RIGHT NOR IS IT DESIGNED TO

REDRESS THE INJURY OCCASIONED BY AN UNCONSTITUTIONAL SEARCH.

THE RULE'S SOLE PURPOSE, AS WE HAVE REPEATEDLY HELD, IS TO [55] DETER FUTURE FOURTH AMENDMENT VIOLATIONS. WHEN SUPPRESSION FAILS TO YIELD APPRECIABLE DETERRENCE, EXCLUSION IS CLEARLY UNWARRANTED.

REAL DETERRENT VALUE IS A NECESSARY CONDITION FOR EXCLUSION. EXCLUSION EXACTS A HEAVY TOLL ON BOTH THE JUDICIAL SYSTEM AND SOCIETY AT LARGE. IT ALMOST ALWAYS REQUIRES COURTS TO IGNORE RELIABLE, TRUSTWORTHY EVIDENCE BEARING ON GUILT OR INNOCENCE. AND ITS BOTTOM-LINE EFFECT IN MANY CASES IS TO SUPPRESS THE TRUTH AND SET THE CRIMINAL LOOSE IN THE COMMUNITY WITHOUT PUNISHMENT.

OUR CASES HOLD THAT SOCIETY MUST SWALLOW THIS BITTER PILL WHEN NECESSARY BUT ONLY AS A LAST RESORT. FOR EXCLUSION TO BE APPROPRIATE, THE DETERRENCE BENEFITS OF SUPPRESSION MUST OUTWEIGH ITS HEAVY COST.

AS IN DAVIS, IN THAT CASE IT WAS THE INTERVENING GANT DECISION THAT CHANGED WHAT WAS BELIEVED TO BE THE LAW AT THE TIME. AND AS THE DAVIS COURT STATED, ALTHOUGH THE SEARCH TURNED OUT TO BE UNCONSTITUTIONAL UNDER GANT, G-A-N-T,

ALL AGREE THAT THE OFFICERS' CONDUCT WAS IN STRICT COMPLIANCE WITH THEN-BINDING CIRCUIT LAW AND NOT CULPABLE IN ANY WAY.

UNDER OUR EXCLUSIONARY-RULE PRECEDENTS, THIS ACKNOWLEDGED ABSENCE OF POLICE CULPABILITY DOOMS DAVIS'S CLAIM. POLICE PRACTICES TRIGGER THE HARSH SANCTION OF EXCLUSION ONLY WHEN THEY ARE DELIBERATE ENOUGH TO YIELD MEANINGFUL DETERRENCE AND CULPABLE ENOUGH TO BE WORTH THE PRICE PAID BY THE JUSTICE SYSTEM.

[56] THE CONDUCT OF THE OFFICERS HERE WAS NEITHER OF THESE THINGS. THE OFFICERS WHO CONDUCTED THE SEARCH DID NOT VIOLATE DAVIS'S FOURTH AMENDMENT RIGHTS DELIBERATELY, RECKLESSLY, OR WITH GROSS NEGLIGENCE.

ABOUT ALL THAT EXCLUSION WOULD DETER IN THIS CASE IS CONSCIENTIOUS POLICE WORK.

I FEEL THE SAME WAY ABOUT THE SEARCH IN THIS CASE. IN THIS CASE, EXCLUSION WOULD NOT DETER FOURTH AMENDMENT VIOLATIONS. THE POLICE ACTED IN ACCORDANCE WITH WHAT JUDGE PFEIFFER IMPLICITLY FOUND WHEN SHE ISSUED THE SEARCH WARRANT AND WHAT THE CALIFORNIA SUPREME COURT EXPLICITLY FOUND WHEN IT

FOUND THAT THE WARRANTLESS SEARCH AND INSPECTION OF CELL PHONES WAS IN ACCORDANCE WITH BINDING JUDICIAL PRECEDENT.

UNDER THESE CIRCUMSTANCES AS FOUND BY OTHER COURTS, SUPPRESSION OF EVIDENCE PURSUANT TO THE EXCLUSIONARY RULE WOULD BE COUNTERPRODUCTIVE. IT WOULD NOT DETER POLICE MISCONDUCT BUT WOULD DETER OFFICERS FROM TRYING TO FOLLOW THEN EXISTING LAW. IT WOULD ENCOURAGE POLICE OFFICERS TO ENGAGE IN SPECULATIVE PREDICTIONS AS WHAT THE – AS TO WHAT THE LAW WILL BE ONCE THEIR CASE GETS THROUGH THE APPEAL PROCESS.

IN MY VIEW, THE LAW AT THE TIME OF THIS SEARCH, EVEN AS FAR AS THE U.S. SUPREME COURT WAS CONCERNED AT THE TIME, WAS EVIDENCED BY THE CONDUCT OF THE POLICE OFFICERS, THE DECISION OF JUDGE PFEIFFER, AND THE FIVE TO TWO OPINION OF THE CALIFORNIA SUPREME COURT. AND THAT LAW WAS THAT IT WAS [57] REASONABLE TO SEARCH THE PERSONAL EFFECTS OF AN ARRESTED SUSPECT WITHOUT A WARRANT.

THAT BEING SETTLED APPELLATE AUTHORITY INSOFAR AS EVERYONE KNEW AT THAT TIME, THE OFFICERS ACTED WITHIN THAT LAW IN SEIZING THE CELL PHONE IN THIS CASE.

THE MOTION TO SUPPRESS IS DENIED.

WHAT IS THE NEXT DATE IN THIS?

MR. DEMEESTER: YOUR HONOR, IT'S NOVEMBER 10 FOR TRIAL.

THE COURT: AND THAT WILL REMAIN THE DATE SET FOR TRIAL IN THE ABSENCE OF A 1050 MOTION.

MR. DEMEESTER: YES, YOUR HONOR.

AND JUST TO ENLIGHTEN ON THAT, I INTEND TO SEEK A WRIT BECAUSE OF THE NOVELTY OF THE ISSUE. BECAUSE THE TRIAL DATE IS A LITTLE BIT AWAY, I WILL AT THIS TIME NOT ASK FOR A CONTINUANCE AND NOT ASK FOR A STAY FROM THE COURT OF APPEAL. WERE WE TO GET CLOSER TO THE TRIAL DATE, DEPENDING UPON WHAT HAPPENS PROCEDURALLY, I MAY REVISIT AND OF COURSE I WOULD HAVE TO START IN THE TRIAL COURT WITH A REQUEST FOR CONTINUANCE BEFORE TURNING TO THE COURT OF APPEAL. BUT JUST TO EXPLAIN WHAT I MAY SEEK TO DO BETWEEN NOW AND NOVEMBER 10TH.

THE COURT: I UNDERSTAND THAT. AND THANK YOU.

MR. DEMEESTER: THANK YOU.

THE COURT: COURT'S IN RECESS.

MR. DEMEESTER: THANK YOU, YOUR HONOR.

MR. FITZGERALD: THANKS, YOUR HONOR.

(END OF PROCEEDINGS.)

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[58] IN THE SUPERIOR COURTS

STATE OF CALIFORNIA,
COUNTY OF SAN MATEO

DEPARTMENT NO. 11 — HON. JOHN L. GRANDSAERT, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. STEVEN MORRIS HURD, DEFENDANT.	NO. SC069090A

STATE OF CALIFORNIA)) SS
COUNTY OF SAN MATEO)

I, WENDY LOU CONDE, OFFICIAL COURT REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN MATEO, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 58, INCLUSIVE,

COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN IN THE MATTER OF THE ABOVE-ENTITLED CAUSE.

DATED: SEPTEMBER 26, 2014

/s/ Wendy Lou Conde
WENDY LOU CONDE, CSR #11668
OFFICIAL COURT REPORTER

IN THE SUPREME COURT OF CALIFORNIA

STEVEN MORRIS HURD, Petitioner, vs. THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO, Respondent. THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest. /	No. _____ Court of Appeal No. A143312 (First Dist. Division Three) San Mateo County Superior Court No. SC069090

PETITION FOR REVIEW

Following the October 23, 2014, Denial of Petitioner's Petition for Writ of Mandate

(Filed Oct. 29, 2014)

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ATTORNEY FOR PETITIONER
Under the Auspices of the San Mateo County Bar Association Private Defender Program

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner STEVEN MORRIS HURD petitions this Court for review following the denial of his petition for writ of mandate by the Court of Appeal, First Appellate District, Division Three, on October 23, 2014 (see appendix).

Issues Presented for Review

1) With respect to searches of digital cell phone data incident to arrest, was there an absence of binding appellate precedent at the time of the search in question, which took place after the depublication of a Court of Appeal on-point decision by virtue of this Court's grant of review but before this Court's eventual decision in that case?

2) Does the retroactivity principle require that established precedent extant in 2009 regarding searches of physical objects incident to arrest exclude digital cell phone data, as subsequently determined by the United States Supreme Court?

Necessity for Review

Review is necessary to settle important questions of law. (Cal. Rules of Ct., rule 8.500(b)(1).) The issues presented herein are of substantial constitutional

importance in the area of Fourth Amendment interpretation: whether any binding appellate precedent existed in January 2009 when a search incident to arrest was conducted of the digital contents of a cell phone even though at that time no published case dealt specifically with cell phone searches incident to arrest within the context of the good faith exception established by *Davis v. United States* (2011) 564 U.S. ___, 131 S.Ct. 2419 (*Davis*) [barring exclusion of evidence when officers searched in objectively reasonable reliance on binding appellate precedent] and in light of the fact that the United States Supreme Court recently refused to extend its *Robinson* holding to cell phone content searches, a decision that applies retroactively to petitioner's case. (See *Riley v. California* (2014) 573 U.S. ___, 134 S.Ct. 2473, 2485 (*Riley*) [declining to extend physical search incident to arrest authority established by *Robinson* to searches of cell phone data; citing *United States v. Robinson* (1973) 414 U.S. 218 (*Robinson*)].)

The Fourth Amendment to the United States Constitution guarantees petitioner the right to be secure in his person, papers, and effects against unreasonable searches and seizures. This right is enforceable against the states as part of the due process guarantee of the Fourteenth Amendment to the United States Constitution. (*Mapp v. Ohio* (1961) 367 U.S. 643.) Evidence obtained in violation of the constitutional protections must be excluded. (*Id.* at 655.)

The Fourth Amendment requires the issuance of a warrant based on probable cause prior to a search or seizure, with limited exceptions. (*Johnson v. United States* (1948) 333 U.S. 10, 14-15.) One such exception is a search incident to arrest, which is permitted to be conducted without a warrant when officers remove any weapons that a person might seek to use to resist arrest or to escape or when officers seize items of evidence in order to prevent the arrestee from concealing or destroying them. (*Riley,* at 2483; citing *Chimel v. California* (1969) 395 U.S. 752, 762-763 (*Chimel*).)

In *Robinson,* "the Court applied the *Chimel* analysis in the context of a search of the arrestee's person." (*Riley,* at 2483; citing *Robinson,* at 220.) The police officer who had arrested Robinson for driving with a revoked license, felt an object in Robinson's coat pocket that the officer could not identify. The officer removed the object and observed that it was a crumpled cigarette package. When the officer opened it, he found 14 heroin capsules inside. (*Riley,* at 2483, citing *Robinson,* at 223.)

The Court in *Robinson* rejected the notion that "case-by-case adjudication" was required to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." (*Robinson,* at 235.) As stated in *Riley, Robinson* promulgated a "categorical rule." (*Riley,* at 2484.) The *Robinson* Court explained its decision:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

(*Robinson,* at 235.)

In *Riley,* the Court held that the *Robinson* rule "strikes the appropriate balance in the context of physical objects" but that "neither of its rationales has much force with respect to digital content on cell phones." (*Riley,* at 2484.) The Court "therefore decline[d] to extend *Robinson* to searches of data on cell phones, and h[e]ld instead that officers must generally secure a warrant before conducting such a search." (*Riley,* at 2485.)

Even though *Riley* was decided in 2014, its holding applies to petitioner's case because of the retroactivity principle. (See *Griffith v. Kentucky* (1987)

479 U.S. 314, 328 ["We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."]). But this does not necessarily mean that unconstitutionally obtained evidence must therefore be excluded.

In *Davis,* the United States Supreme Court held "that when police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." (*Davis,* at 2434.)

The search incident to arrest of petitioner took place on January 2, 2009, well before the United States Supreme Court visited the issue of cell phone searches on June 25, 2014 in *Riley.* Hence, there was no binding precedent from the nation's highest court that would have validated the warrantless seizure of the data on petitioner's cell phone. The older cases of the U.S. Supreme Court did not permit digital cell phone searches, a point made clear by the *Riley* Court when it expressly stated: "We therefore *decline to extend Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search." (*Riley,* at 2485; italics added.)

Nor was there any California state court precedent in existence on January 2, 2009 that would have allowed such cell phone searches. Such precedent did

exist for a period of 91 days but the precedent was short-lived, with the Court of Appeal decision having been made on July 30, 2008, but with this Court ending the precedent when it granted review on October 28, 2008. (*People v. Diaz* (Court of Appeal, Second Appellate District, Division Six, No. B203034), formerly published at 165 Cal.App.4th 732 (2008), in which a warrantless search of an arrestee's cell phone text message folder was upheld; review was granted in *People v. Diaz,* California Supreme Court No. S166600; see Petn. App. 49-51; 94-101.)

The legal effect of the grant of review was that "an opinion is no longer considered published if the Supreme Court grants review. . . ." (Cal. Rules of Court, rule 8.1105(e)(1).) The only exception to that is when this Court orders otherwise but that did not happen in the *Diaz* case. (See Cal. Rules of Court, rule 8.1105(e)(2); see also *Diaz* Supreme Court docket, at Petn. App. 98-101.)

California law further provides that an unpublished opinion "must not be cited or relied upon by a court or a party in any other action." (Cal. Rules of Court, rule 8.115(a); see *People v. Kennedy* (2012) 209 Cal.App.4th 385, 400.) Hence, from October 28, 2008 onward, the *Diaz* Court of Appeal opinion ceased serving as binding appellate precedent.

From October 28, 2008, California was without any precedent on warrantless cell phone searches until this Court decided the *Diaz* case on January 3,

2011. "All opinions of the Supreme Court are published in the Official Reports." (Cal. Rules of Court, rule 8.1105(a).) The Court's *Diaz* decision is reported at 51 Cal.4th 84.

Therefore, between October 28, 2008, and January 3, 2011 (the *Diaz* time gap between the *Diaz* Court of Appeal decision being depublished by the grant of review, and the eventual filing of this Court's decision), there was no California appellate precedent, binding or otherwise, governing warrantless searches of data on cell phones seized incident to arrest.

Respondent Court differed on the existence of binding appellate precedent allowing the contested cell phone data search, finding that it did exist on January 2, 2009. Respondent Court relied on the same rationales as those expressed by the Court of Appeal and this Court in *Diaz*. (Petn. App. 201-204.)

The Court of Appeal in *Diaz* relied upon *Chimel* and *Robinson* (discussed above) as well as *Edwards* and *Chadwick*. (Petn. App. 95-96.) In *United States v. Edwards* (1974) 415 U.S. 800, 801-802, the Court upheld the warrantless search of clothing that was seized from an arrestee approximately 10 hours after his arrest. The Court reasoned that "once [an] accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has

elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use of evidence, on the other." (*Ibid.,* at 807.) In *United States v. Chadwick* (1977) 433 U.S. 1, 15, the Court invalidated the delayed search of a locked footlocker seized at the time of arrest. In so holding, the Court concluded that '[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." (*Ibid., at* 15.) The *Diaz* Court of Appeal noted that based on that authority, lower courts had upheld delayed searches of wallets, purses, address books and pagers. (See Petn. App. 96.)

This Court relied on three of the four cases that supported the appellate, depublished opinion: "Resolution of this issue depends principally on the high court's decisions in *Robinson, Edwards,* and *Chadwick*. (*People v. Diaz, supra,* 51 Cal.4th, at 91.) But this Court also pointed out that, "in analogous contexts, the high court has expressly rejected the view that the validity of a warrantless search depends on the character of the searched item." (*Ibid.,* at 95, citing *United States v. Ross* (1982) 456 U.S. 798 [upholding the warrantless search of any compartment or container in a lawfully stopped car that may conceal the object of the search]; and *New York v.*

Belton (1981) 453 U.S. 454 (*Belton*) [upholding the warrantless search of any containers found within the passenger compartment of the car whose occupant was lawfully arrested; this Court in *Diaz* did acknowledge that the *Belton* rule was limited by *Arizona v. Gant* (2009) 556 U.S. 332 [police may not search containers in a vehicle's passenger compartment incident to an occupant's arrest unless it is reasonable to believe that evidence of the arrest offense will be found in the car], see *Diaz, supra,* 51 Cal.4th, at 96, fn. 9.)

Respondent Court had two competing views before it, *Diaz* and *Riley,* neither one of which had been pronounced when the search of petitioner was conducted on January 2, 2009. Respondent Court opted to view the 2009 events through the *Diaz* lens. In doing so, respondent Court erred for two reasons: no binding precedential cases existed at that time upholding warrantless searches of cell phone data; and retroactivity principles require that we view the state of United States Supreme Court precedents on January 2, 2009 in the same way as *Riley* did, meaning that they applied to physical objects but not digital information stored on a cell phone. Without binding appellate precedent on which to rely, the exclusionary rule is implicated and the cell phone digital data and its fruits should have been suppressed.

Writ review is appropriate to address "questions of first impression that are of general importance to the trial courts and to the profession, and where

general guidelines can be laid down for future cases." (*Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186, fn. 4.)

The issues raised by this petition are of first impression. Fast-advancing cell phone technology has put privacy issues on the front burner. The recent *Riley* decision requires consideration of how to apply its holding to searches predating it, within the context of retroactivity principles and the *Davis* good-faith exception to the exclusionary rule. The suppression issues in this case have been fully developed in respondent Court. The underlying facts are undisputed. This petition raises legal issues only.

A recent appellate decision by the Court of Appeal for the Second Appellate District addressed *Riley* and *Davis* but involved a search that was conducted after this Court's decision in *Diaz* had been published in 2011. In *People v. Macabeo* (2014) 229 Cal.App.4th 486[1], a decision filed on September 3, 2014, the Court examined a search incident to arrest that had taken place on July 19, 2012. (*Id.,* at 488.) The *Macabeo* Court held that because *People v. Diaz, supra,* 51 Ca1.4th, was binding at the time of the search, the *Davis* good faith exception to the exclusionary rule applied.

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[1] A petition for review in *Macabeo,* filed on October 14, 2014, is pending in this Court. (See *People v. Macabeo,* California Supreme Court No. S221852.)

The *Macabeo* decision has no application to petitioner's case as the searches in the instant case took place on January 2 and 3, 2009, after the review-grant depublication of the *Diaz* Court of Appeal opinion but before the issuance of this Court's *Diaz* decision in 2011.

Mandamus is a proper remedy to correct an erroneous denial by a trial court of a criminal defendant's Fourth Amendment evidence suppression motion. (See *Lorenzana v. Superior Court* (1973) 9 Ca1.3d 626, 629, 641 [peremptory writs of mandate issued on separate petitions for writ of mandate brought by criminal defendants whose suppression motions had been denied in the trial court].)

Review is particularly appropriate in petitioner's case as he is now facing a jury trial wherein the sole life imprisonment counts (1 through 3) are based on cell phone evidence that should have been suppressed (one determinate sentence count with a maximum of three years imprisonment also depends on the inadmissible evidence – count 4). The remaining felony counts carry a maximum exposure of three years and eight months imprisonment; the misdemeanor counts carry a maximum exposure of two years and six months county jail. The aggregate total of the remaining counts (minus the cell phone life counts) is six years and two months incarceration but that is without taking any account of any good time/work time credits or Penal Code section 654 sentencing issues. Because petitioner has been in continuous custody since January 2, 2009, for an actual time

period of five years and 301 days as of the date of this writing, a denial of this petition would subject petitioner to a jury trial that may well end with petitioner being sentenced to life imprisonment (at age 63), even though he has served more time than legally available on the counts that are not based on inadmissible evidence.

Statement of Facts

In December 2008, petitioner became the focus of an investigation by San Mateo police who suspected petitioner of providing massage services without having the necessary permit. On January 2, 2009, a female undercover officer received a massage from petitioner at his apartment. Some of her colleagues monitored the massage visit by way of a hidden microphone and transmitter. While the massage was still ongoing, the investigating officers showed up at petitioner's apartment and detained him. (Petn. App. 7-9.)

The undercover officer meanwhile told her colleagues that petitioner had inappropriately touched her. Petitioner was arrested for sexual battery and was searched incident to arrest. Police retrieved a partial Viagra pill and a cell phone from petitioner's pants pocket. When officers viewed digital files stored on the cell phone, they came across a video of a small child orally copulating a male whose voice police identified as that of petitioner. (Petn. App. 9-11.)

Police then sought and obtained a search warrant for petitioner's apartment. The resulting search yielded a folder containing child pornography and hydrocodone pills. (Petn. App. 1-16.)

Statement of the Case

On July 24, 2009, the district attorney of San Mateo County filed an information charging petitioner with three felony counts of oral copulation of a child age ten or below (Pen.Code, § 288.7(b)) based on the cell phone video; one felony count of using a minor to perform prohibited acts (Pen.Code, § 311.4), also based on the cell phone video; one felony count of possession of child pornography (Pen.Code, § 311.11), based on the images in a folder seized during the search warrant execution; one felony count of possession of hydrocodone (Health & Safety Code, § 11350(a)); and five misdemeanor counts of sexual battery upon the undercover officer (Pen.Code, § 243.4(e)(1)). It was further alleged that the oral copulation counts constitute violent and serious felonies pursuant to, respectively, Penal Code sections 667.5(c)(6) and 1192.7(c)(6). The same three counts and the count of using a minor to perform prohibited acts were further enhanced with no-probation allegations. (Pen.Code, § 1203.065(a).) The offenses of oral copulation as charged each carry a 15-years-to-life sentence upon conviction. (Pen.Code, § 288.7(b).)

On July 28, 2009, petitioner was arraigned on the information. He pled not guilty and denied the

allegations. On November 3, 2009, petitioner's counsel expressed a doubt about petitioner's mental competency to stand trial within the meaning of Penal Code sections 1367 and 1368. Criminal proceedings were suspended and doctors appointed to examine petitioner. On May 21, 2010, petitioner was found not presently competent to stand trial. On July 2, 2010, he was committed to Napa State Hospital. Petitioner returned to respondent Court on December 20, 2011, and was deemed restored to competency on August 15, 2012. On October 24, 2012, petitioner added pleas of not guilty by reason of insanity to the not guilty pleas he had entered earlier. The case is pending trial, currently scheduled for November 10, 2014, prompting petitioner not to seek a continuance or stay of proceedings at this particular time. (See Petn. App. 208.)

On June 4, 2013, petitioner filed a motion to suppress evidence but withdrew it when the then-trial prosecutor's medical leave occasioned a continuance of the case. A second filing made on February 14, 2014 was withdrawn to allow Court and counsel to await the outcome of the *Riley* case in the United States Supreme Court, in which the high Court had granted certiorari on January 17, 2014. (Petn. App. 27; *Riley v. California,* U.S. Supreme Court Docket No. 13-132, 571 U.S. ___, 134 S.Ct. 999 (2014).)

The *Riley* case was decided by the Supreme Court on June 25, 2014. On July 29, 2014, petitioner filed a motion to suppress evidence based on the *Riley* decision, setting forth petitioner's argument that

Riley rendered the search of the digital information on his cell phone unconstitutional, that the good faith exception to the exclusionary rule when police reasonably rely on binding appellate precedent had no application to this case as there was no such precedent at the time of the search; and that the search warrant was no longer valid after removal of the illegally obtained information from the warrant affidavit. (Petn. App. 23-51.)

An evidentiary hearing was conducted on September 23, 2014, before the Honorable John L. Grandsaert, Judge of the San Mateo County Superior Court. Because the suppression issues did not require the resolution of any factual disputes, the parties stipulated that the evidence consisted of several police reports, the transcript of the preliminary examination and related materials. (Petn. App. 152, 156-160, 198-200.)

After in-depth argument, respondent Court denied petitioner's motion, implicitly finding that the search incident to arrest violated petitioner's Fourth Amendment rights – otherwise respondent Court would not have had to reach the *Davis* good faith issue – but expressly finding that the *Davis* good-faith exception precluded application of the exclusionary rule because police reasonably relied on binding appellate precedent that allowed the search of the digital contents of a cell phone seized incident to arrest. (Petn. App. 161-198, 200-208.)

On October 21, 2014, petitioner brought a petition for writ of mandate in the Court of Appeal, claiming that pretrial review of the denial of a Penal Code section 1538.5 motion is permitted "if the motion was made by the defendant in the trial court not later than . . . 60 days following defendant's arraignment on the information . . . unless within these time limits the defendant was unaware of the issue or had no opportunity to raise the issue." (Pen.Code, § 1510.)

"Section 1510 has two exceptions: Lack of awareness of an issue, or lack of opportunity to raise that issue." (*McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1513.) Petitioner asserted that both exceptions apply to his case. *Riley* was decided on June 25, 2014. It will be the seminal case not just on warrantless searches of cell phones incident to arrest but also on a host of privacy issues involving new technologies. It was a much anticipated decision. Petitioner could not be charged with awareness of what the decision would be. Petitioner had no opportunity to rely on the *Riley* decision prior to its issuance. Petitioner brought his motion to suppress in reliance on *Riley* 34 days after *Riley* was announced. Penal Code section 1510 permits pretrial review.

On October 23, 2014, the Court of Appeal denied the petition. (See appendix.)

ARGUMENT

I. No Binding Appellate Precedent Existed At The Time Of The Search Of Petitioner's Cell Phone That Would Have Permitted The Search Of Any Digital Information Stored On That Phone

A. Introduction

No binding appellate precedent existed at the time of the search incident to arrest of petitioner that allowed the search of digital information on a cell phone seized incident to arrest. Respondent Court, however, concluded that the doctrine governing search incident to arrest established by the *Chimel* and *Robinson* cases permitted such search. Respondent Court's decision conflicts with the United States Supreme Court's recent expression of that governing law in *Riley.* Principles of retroactivity demand that the *Riley* view of the governing principles set forth by *Chimel* and *Robinson* be applied to the searches in petitioner's case. In 2009, the authority to search incident to arrest was therefore limited to physical objects, rendering the *Davis* good-faith exception to the exclusionary rule inapplicable to petitioner's case. Even though police lawfully seized petitioner's cell phone when they arrested him, perusing the digital data stored on the phone required a warrant. In the absence of a warrant, the evidence stemming from the unlawful search should have been suppressed.

B. Standard of Review

Because the facts in this case are undisputed, this Court exercises its independent judgment in answering the question whether or not the search or seizure was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) This case presents strictly legal issues, as noted by respondent Court. (Petn. App. 156-157.)

C. Cell Phone Search Incident to Arrest Requires a Warrant

Police may not, without a warrant, search digital information on a cellular phone seized from a person incident to that person's arrest. (*Riley,* at 2480, 2495.) *Riley* applies to this case despite the fact that the decision was issued on June 25, 2014 and the case at bench dates back to 2009. *Riley* applies retroactively because its holding is applied to all cases pending on direct review. (*Griffith v. Kentucky, supra,* 479 U.S.) Of course, *Riley* is not a decision that breaks with the past but instead is a decision that did nothing more than apply settled precedent to modern technology – that a warrant is required unless an exception exists.

II. *Davis* Exception to Exclusionary Rule Did Not Apply

A. *Davis* Requires the Existence of Binding Appellate Precedent

The United States Supreme Court has established an exception to the application of the exclusionary rule based on police good faith. "[W]hen police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." (*Davis,* at 2434.) *Davis* does not apply to petitioner's case because when the search at issue was conducted on January 2, 2009, there was no "binding appellate precedent" on which an officer could rely to justify those searches.

This Court's decision upholding cell phone searches incident to arrest, *People v. Diaz, supra,* 51 Cal.4th, was not filed until January 3, 2011, and the Court of Appeal decision in the same case that also upheld the cell phone search incident to arrest, lost its publication status on October 28, 2008, when this Court granted review, as discussed above. Hence, the *Davis* exception to the exclusionary rule has no application to petitioner's case as there was no applicable precedent.

Precedent is

> An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis

> of principles established in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents. A rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.

(Black's Law Dictionary, abridged 5th ed. (West 1983).)

On January 2, 2009, no binding appellate precedent existed which held that the Fourth Amendment permitted police officers to conduct a warrantless search of the digital contents of an individual's cell phone seized from the person at the time of arrest.

Police could never reasonably rely on something that does not legally exist. Hence, the case at bench is the opposite from the *Davis* case. In *Davis,* the defendant was a passenger in a car that was pulled over in a traffic stop. Davis as well as the driver were handcuffed and placed in separate patrol cars. Police then searched the stopped car and found a revolver inside of Davis's jacket. (*Davis,* at 2425.)

The case against Davis was brought in a Miami federal court. Federal circuit law that had been on the books for eleven years interpreted a United States Supreme Court decision to hold that when an occupant of an automobile is searched incident to a lawful arrest, then the passenger compartment of that automobile, as well as any containers found within that compartment, may be searched. (*United*

States v. Gonzalez (11th Cir. 1996) 71 F.3d 819, 825 (*Gonzalez*), citing *Belton.*) After Davis was convicted in the trial court and while his appeal was pending, the United States Supreme Court revisited searches of automobiles in the context of the search incident to arrest exception and adopted a narrow reading of *Belton*: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Arizona v. Gant, supra,* 556 U.S, at 351.)

The *Davis* Court noted that at the time of the search therein, the Court had not yet decided *Arizona v. Gant* but that the Eleventh Circuit Court of Appeals in *Gonzalez* had interpreted *Belton* "to establish a bright-line rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest." (*Davis,* at 2428.) All parties in *Davis,* including the defendant, agreed "that the officers' conduct was in strict compliance with then-binding Circuit law." (*Ibid.*)

In *Davis,* on-point binding appellate precedent existed at the time of the search allowing it. The *Davis* ingredients are missing in the case at bench: on January 2, 2009, there was no binding, appellate, precedential, on-point published decision on the subject of whether digital information on a cell phone seized incident to arrest could be searched without a warrant. The *Davis* exception is not implicated here.

B. Respondent Court Erred in Finding that Binding Appellate Precedent Did Allow Cell Phone Searches Incident to Arrest as the Search Incident to Arrest Exception Was Limited to Physical Objects

"In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." (*Riley,* at 2482; citing *Kentucky v. King* (2011) 563 U.S. ___, 131 S.Ct. 1849, 1856-1857.) Respondent Court decided that the *Robinson* search incident to arrest exception permitted police to search the cell phone they had seized from petitioner upon his arrest. (See Petn. App. 203, referring to *Robinson*.)

Robinson does not support respondent Court's decision. In *Robinson*, "the Court applied the *Chimel* analysis in the context of a search of the arrestee's person." (*Riley,* at 2483; citing *Robinson,* at 220.) The *Riley* Court noted that the *Robinson* holding pertains to physical objects but that its rationale lacks force with respect to digital content on cell phones. (*Riley,* at 2484.) The *Robinson* ruling fits neatly within *Chimel*: "The officer in *Robinson* testified that he could not identify the objects in the cigarette pack but knew they were not cigarettes." (*Riley,* at 2485; citing *Robinson,* at 223, 236, fn. 7.) The *Riley* Court stated that "unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." (*Riley,* at 2485.) The *Riley* Court further commented that given the facts in

Robinson, "a further search was a reasonable protective measure" but that "[n]o such unknowns exist with respect to digital data." (*Riley,* at 2485.)

The *Riley* Court made clear why the search of petitioner's cell phone does not fit within the allowable search permitted in *Robinson*:

> Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon-say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.
>
> (*Riley,* at 2485.)

In other words, *Chimel* and *Robinson* did not permit San Mateo police officers to search petitioner's cell phone data on January 2, 2009. The *Robinson* rule applies only to physical objects and the *Riley* Court "decline[d] to extend *Robinson* to searches of data on cell phones, and h[e]ld instead that officers must generally secure a warrant before conducting such a search."

Respondent Court viewed the state of the law on January 2, 2009 through the retroactive lens of the 2011 *Diaz* decision. (See Petn. App. 202-203.) But that

view must give way to *Riley*'s view of *Robinson* and *Chimel, a* view that is given retroactive effect. Petitioner argued as much in respondent Court (see Petn. App. 168-171) but respondent Court disagreed (see Petn. App. 204.)

Respondent Court's portrayal of *Robinson* divests that case of its principal mooring, tethered to the search of the person in order to seize weapons and prevent the destruction of evidence. The extent of the permissible *Chimel*/*Robinson* search ended when police had seized and taken possession of petitioner's cell phone. Police were permitted to look for a razor blade hidden between the phone and its case but not search the digital data stored on the cell phone. (See *Riley,* at 2485.) The digital search was a separate search that could not be conducted without a warrant. No binding appellate precedent permitted such a digital search on January 2, 2009.

Respondent Court misinterpreted *Robinson* by asserting that "police may, without obtaining a warrant, inspect a mobile phone carried by a suspect at the time." (See Petn. App. 204.) Of course, *Robinson* was silent on cell phones given that they did not exist in 1973. *Yet, Riley* interprets *Robinson* correctly *and* "decline[d] to extend *Robinson* to searches of data on cell phones." (*Riley,* at 2485.) The *Riley* Court's interpretation of *Robinson* governs this case given that petitioner's case is not yet final and *Riley* therefore has retroactive effect. (See *Griffith v. Kentucky, supra,* 479 U.S., at 328.)

CONCLUSION

For the foregoing reasons, review should be granted.

DATED: October 29, 2014.

Respectfully submitted,

_____
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[SEAL]

Supreme Court of California

FRANK A. McGUIRE
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October 30, 2014

Office of the Attorney General – San Francisco
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Re: **S222249 – Hurd v. S.C. (People)**

Dear Counsel:

The court has directed that I request an answer to the above referenced matter. The petition was served on your office on October 29, 2014. The answer is to be served upon petitioner and filed in this court on or before November 18, 2014. Petitioner will then have ten (10) days in which to serve and file a reply to the answer.

The answer should address all issues raised in the petition for review.

Please be advised that the instant petition is a petition for review, and a ruling by the court is due on or before December 26, 2014. This request for an answer should be expedited by your office, and no request for extension of time is contemplated.

Very truly yours,

FRANK A. McGUIRE
Court Administrator and
Clerk of the Supreme Court

/s/ [Illegible]
By: Robert R. Toy, Deputy Clerk

cc: Paul F. DeMeester, Counsel for Petitioner
Rec.