IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE V. STATE OF CALIFORNIA,	)	
	)	Crim. No. S166600
	)	(Court of Appeal No. B203034)
Plaintiff and Respondent,	)	(Sup. Ct. No. 2007015733)
v.	)	
GREGORY DIAZ,	)	
Defendant and Appellant.	)	

On Appeal from the Superior Court of Ventura County
Honorable Ronald Purnell, Judge
Honorable Kevin McGee, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I.

RESPONDENT'S DISCUSSION OF *ARIZONA V. GANT* IS TOO SELECTIVE.

Respondent acknowledges that *Arizona v. Gant* (2009) 556 U.S. __ [129 S.Ct. 1710, 173 L.Ed.2d 485] requires vehicle searches to remain "tethered" to the dual purpose of preserving evidence and protecting officer safety. (Respondent's Brief on the Merits, 25 "RB").) Relying on *United States v. Robinson* (1973) 414 U.S. 218, Respondent argues that a search of the arrestee's *person*, nevertheless, is not dependent on those same dual factors set forth in *Chimel v. California* (1969) 395 U.S. 75. (RB 25.)

Gant holds that *Chimel's* safety and evidentiary justifications for searching an area immediately within an arrestee's control define the scope of *United States v. Belton* (1981) 453 U.S. 454. If an arrestee is secure in police custody, and his

automobile or items in it are no longer within his reach, *Gant* would preclude search of the vehicle and its contents. (*Gant, supra,* 556 U.S. at __ [129 S.Ct. 1721, 173 L.Ed/2 485] ["Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest"].)

Gant does not directly resolve the question in this case: whether the text messages of a cell phone in police custody ever were, or remain, items "immediately associated" with appellant's person. *Gant* does underscores the broader Fourth Amendment principle that an arrestee's *actual and immediate control* over a particular item or area is fundamental to search and seizure of that item incident to arrest. (*Gant, supra,* 556 U.S. at __ [129 S.Ct. 1721-1722, 173 L.Ed/2 485.) In a sense, *Gant* refines the term "immediately within an arrestee's control" by removing any theoretical slack judicially introduced into that legal concept. When an automobile is in fact no longer accessible to the arrestee, its interior is not an area "immediately within" that arrestee's "control." (*Ibid.)*

The same *Chimel* justifications apply to the search of a person incident to arrest and search of an area within his immediate control. (See, e.g., *People v. Leal* (2009) 178 Cal.App.4th 1051.) In *Leal*, the Sixth District addressed the *Chimel* dual rationale in an opinion published subsequent to *Gant.* As *Leal* explained, "to effect the arrest in a safe manner, `it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.'" (*Leal, supra,* 178 Cal.App.4th at p. 1060, citing *Chimel, supra,* 395 U.S. at p. 763.) In carrying out this search, police may "1search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.'" (*Leal, supra,* 178 Cal.App.4th at p. 1060.) Additionally, "[f]or the foregoing purposes only, `the area into which an arrestee might reach in order to grab a weapon or evidentiary items'—i.e., `the area 'within his immediate control' —is `governed by a like rule.' " (*Ibid.*)

Leal then describes a variant of the *Gant* scenario, in which police have obtained *some* degree of control over the arrestee but not over "the entire situation." Police may then search the immediate area of the suspect's arrest. (*Leal, supra,* 178 Cal.App.4th at p. 1060.)

The third scenario, and the once present in *Leal* and *Gant*, was that in which police have gained control over a suspect and removed him from the area. Defendant in *Leal* was handcuffed inside a patrol car when police re-entered his residence, found no one else present, and returned to the area where defendant had been standing when he was arrested. Police lifted a sweatshirt and found a weapon underneath. (*Leal, supra,* 178 Cal.App.4th at p. 1057.)

In applying *Gant* to those circumstances, the Sixth District rejected the Fourth Amendment laxness permitted by in the prosecution's cited authority, including *United States v. Hudson* (9th Cir. 1996) 100 F.3d 1409, 1412-1413, *United States v. Nohara* (9th Cir. 1993) 3 F.3d 1239, 1243, *United States v. Turner* (9th Cir. 1991) 926 F.2d 883, and *People v. Rege* (2005) 130 Cal.App.4th 1584. Leal described those cases as "honor[ing] *Chimel* in the breach, paying homage to *Chimel* while going beyond what the Fourth Amendment permits under *Chimel*." (*Leal, supra,* 178 Cal.App.4th at p. 1061.)[1]

Leal appears to recognize no distinction between search of the person and search of the area immediately within the arrestee's control when applying the *Chimel* dual rationale, or when interpreting *Gant*'s "clarifi[ication of] the scope of the permissibility of police searches of vehicles following an arrest and the safe

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[1] *See, e.g., Hudson, supra,* 100 F.3d at p. 1419 [stating that a "search may be conducted shortly after the arrestee has been removed from the area" and announcing another constitutionally questionable rule, namely that a warrantless search of the entire room in which the person was arrested is valid]; *Nohara, supra,* 3 F.3d at p. 1243 [tautologically stating that "events between the time of the arrest and search must not render the search unreasonable" and questionably holding that a search is permissible two to three minutes after the arrest with the suspect removed from the room].)

confining of the arrestee to a nearby police car." In fact, *Leal* noted that the specifics of *Gant* had "little bearing" on the case before it, "except that *Gant*'s reaffirmation of *Chimel v. California*, *supra*, 395 U.S. 752, is congruent with our interpretation of *Chimel*."[2]

Respondent takes the position that *Chimel*, as reaffirmed in *Gant*, applies only when the search incident to arrest applies to an area that had previously been, but no longer is, within an arrestee's immediate area of control. Instead, as *Leal* demonstrates, the safety and evidentiary rationales of *Chimel* have always applied to limit the entire search incident to arrest exception to the warrant requirement. *Gant*'s emphasis on the arrestee's inability to access an *area* over which he previously had control should apply with the same force once an arrestee no longer has access to an *item* previously located in his possession.

II.

CASE LAW DISTINGUISHES CELL PHONE CONTENT FROM THE PHONE ITSELF.

Initially, appellant would like to point out that on December 14, 2009, the United States Supreme Court granted review in *Quon v. Arch Wireless Operating, Inc.* (9th Cir. 2008) 529 F.3d 892.) Appellant cited that case in his Opening Brief on the Merits supporting his distinction between a cell phone and the message content of a cell phone. (Appellant's Opening Brief on the Merits, 5.)

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[2] Gant stated: "In *Chimel*, we held that a search incident to arrest may only include 'the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' [Citation.] That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.... If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." (*Gant, supra*, 556 U.S. at p. __ [129 S.Ct. at p. 1716, 173 L.Ed.2d 485].)

Other cases have also recognized the difference between the item and its content. Generally, a search warrant is required to search the contents of a cell phone unless an exception to the warrant requirement exists. (*United States v. Flores* (S.D.N.Y. 2000) 122 F.Supp.2d 491, 494-95. [search of cell phone's contents not part of proper inventory search]; *see United States v. Zavala* (5th Cir. 2008) 541 F.3d 562, 577 [possession of cell phone gives rise to reasonable expectation of privacy regarding its contents, citing *United States v. Finley* (5th Cir. 2007) 477 F.3d 250, 258-259; *United States v. Quintana* (M.D. Fla. 2009) 594 F.Supp.2d 1291, 1299 [an owner of a cell phone has a reasonable expectation of privacy in the electronic data stored on the phone, citing *Quon,* supra, 529 F.3d at p. 905, rev. granted]); *see also, United States v. Jacobsen* (1984) 466 U.S. 109, 114.)

Here, what followed the seizure of appellant's cell phone was a general rummaging through the content of appellant's cell phone without a warrant and without the exigencies of officer safety or preservation of evidence described in *Chimel*. (*See Florida v. Wells* (1990) 495 U.S. at 1, 4.)

III.

THE SEARCH WAS NOT CONTEMPORANEOUS.

To be contemporaneous with an arrest, "the search must have been part of a `continuing series of events' flowing from the arrest. (*United States v. Hrasky* (8TH Cir, 2006) 453 F.3d 1099, 1102-03.) *Gant, supra, 556*, U.S. __ [129 S.Ct 1710, 1720-21, 173 L.Ed.2d 485] has addressed the issue of what constitutes contemporaneous: "Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton's* purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene." (*Id; see also*

Knowles v. Iowa (1998) 525 U.S. 113, 118 [the need to discover and preserve evidence disappeared after citation was issued].)

Consistent with these authorities, appellant urges this Court to find that the search here was not contemporaneous with arrest, and therefore was not a lawful search incident to arrest.

IV.

CONCLUSION.

For the reasons stated herein and in appellant's Opening Brief on the Merits, appellant requests that the search of his cell phone and the interrogation that followed be found unlawful, and that the evidence be ordered suppressed.

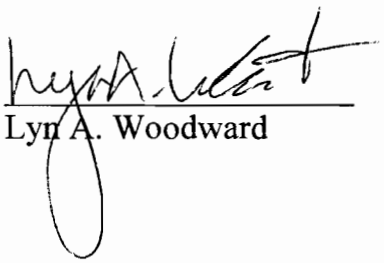
Dated: 12-14-09

Lyn A. Woodward
Attorney for Appellant,
Gregory Diaz

CERTIFICATE OF WORD COUNT

I certify that the attached Reply Brief on the Merits uses a 13 point Times New Roman font and contains 1,578 words.

Dated: December 14, 2009



Lyn A. Woodward

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF MONTEREY

I, Lyn A. Woodward, am employed in the County of Monterey, State of California. I am over the age 18 and not a party to the within action. My business address is 309 Prescott Lane, Pacific Grove, California 93950.

On December 14, 2009 I served the following document, known as **APPELLANT'S REPLY BRIEF ON THE MERITS (People v. Diaz)** in this action by placing a true copy thereof in a sealed envelope addressed as follows:

STATE ATTORNEY GENERAL
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(for delivery to the Honorable Kevin McGree, Judge Presiding)

Gregory Diaz
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Said envelopes were deposited in the mail at Pacific Grove, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with the practice of collection and processing for mailing of the firm by which I am employed. It is deposited with the United States Postal Service on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 14, 2009 at Pacific Grove, California.

Lyn A. Woodward