SUPREME COURT CASE NO. S166600
(Court of Appeal Case No. B203034)

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GREGORY DIAZ,

Defendant and Appellant,

FROM A DECISION OF APPEAL BY THE COURT OF APPEAL, SECOND DISTRICT, DIVISION SIX

PETITION FOR REVIEW

LYN A. WOODWARD, SBN 149860
Attorney at Law
P.O. Box 51545
Pacific Grove, California 93950
(831) 375-1191

Attorney for Petitioner,
GREGORY DIAZ

ISSUES PRESENTED

1. Does a station house search of an arrestee's cell phone's text messages that occurred during interrogation, 90 minutes after arrest and 23 minutes after the cell phone was seized at the station house, constitute a lawful search incident to arrest?

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PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
v.	)
GREGORY DIAZ,	)
Defendant and Appellant,	)

TO: THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Gregory Diaz, defendant and appellant, hereby petitions this Honorable Court for review in the above-entitled matter after decision rendered by the Court of Appeal of the State of California, Second Appellate District, on July 30, 2008, affirming his conviction. That opinion was certified for publication. A copy of the opinion of the Court of Appeal is attached hereafter as Exhibit A. Review is sought pursuant to California Rules of Court rule 8.500 (b)(1) to settle an important question of law and to preserve federal remedies.

DATED: September 7, 2008

Respectfully submitted,

By: _____
LYN A. WOODWARD
Attorney for Petitioner,
Gregory Diaz

INTRODUCTION

Shortly after 2:50 p.m. on April 25, 2007, police arrested Diaz in connection with a controlled ecstasy sale involving Diaz's passenger and a police informant. Diaz was searched at the scene and transported to Ventura County's East County Sheriff's Station.

At about 4:00 p.m. police seized Diaz's cell phone and placed it with other evidence. Diaz waived his *Miranda* rights and at 4:18 p.m. Detective Frazio began interrogating him. Five minutes into the interrogation, Detective Frazio took a break, retrieved the cell phone, and searched the phone's folders containing stored data. After locating a potentially incriminating text message, Detective Frazio confronted Diaz with the message. According to police, Diaz then admitted his involvement in the sale. (1 RT 6-8, 10-12, 14.)

Before pleading guilty, Diaz moved to suppress evidence of a text message located in a folder stored on his cell phone, and evidence of the statement he made to police in connection with that message. (1 CT 33-52.)

On appeal, Diaz argued that the station house cell phone search was not lawful. The search of his phone's message folders was too remote in time to permit reliance by the government on the search incident to arrest exception of the Fourth Amendment. Diaz urged the court to apply the contemporaneous requirement of *United States v. Chadwick* (1977) 433 U.S. 1 to any search incident to arrest, and to find inapplicable the exception to contemporaneous search of *United States v. Edwards* (1974) 415 U.S. 800.

Diaz also argued that the search was not an inventory or booking search, because it was not undertaken pursuant to established police procedures. Finally, Diaz contended that the justifications for permitting a search incident to arrest exception to the Fourth Amendment do not apply to a cell phone search for evidence undertaken at the police station during interrogation. *(United States v. Finley* (5th Cir. 2007) 477 F.3d 250; *Chadwick,*

supra, 433 U.S. at p. 1.)

STATEMENT OF THE CASE

Diaz was charged in 2007 with sale of MDMA, a controlled substance, and carrying a switch-blade knife. (Health & Saf. Code, §11379, subd. (a); Pen. Code §653, subd. (k).) (1 CT 14-15.)

He requested the trial court to suppress evidence obtained from an officer's search of his cell phone text messages at the police station. The court denied that motion. (1 CT 24-29, 33.) Diaz then pled guilty to transportation of a controlled substance and the remaining charge was dismissed. (1 CT 35-52; 1 RT 25-30.) He was granted probation. (1 CT 55-58; 1 RT 31-36.) He timely appealed, challenging the court's ruling on the suppression issue and its interpretation of federal constitutional law. (1 CT 59.)

STATEMENT OF FACTS

For the purpose of this Petition for Review, Diaz adopts the facts set forth in the Court of Appeal's opinion.

ARGUMENT

I.

NECESSITY FOR REVIEW

Review is necessary to resolve important issues of state and federal constitutional law:

1) Does a station house cell phone search and seizure, more than an hour after arrest, constitutes a lawful search incident to arrest search, and is such a search subject to the contemporaneous rule of *Chadwick* or the exception to *Chadwick* set forth in *Edwards*?

Diaz also seeks to preserve his right to pursue federal remedies by exhausting his state appellate remedies. (28 U.S.C. Section 2254(b)(1); *Picard v. Conner* (1971) 404 U.S. 270, 275-276.)

II.

TEXT MESSAGES REVIEWED AT THE POLICE STATION DURING INTERROGATION, AND STATEMENTS MADE BY DIAZ ABOUT THE TEXT MESSASES WHEN CONFRONTED, SHOULD HAVE BEEN SUPPRESSED UNDER *CHADWICK*.

Diaz moved to suppress evidence of the text message "6 4 80" retrieved by police during interrogation from a folder stored on his cell phone, and any statements made by him in connection with that text message. (1 CT 24-29.) The prosecution argued that the phone's text messages were lawfully searched as items located on Diaz's person or in his presence at the time of arrest. (1 RT 22.) The court denied Diaz's motion on the grounds that the cell phone search was included in a lawful search incident to arrest as evidence of a crime. (1 RT 23.)

Diaz contends that the cell phone search here was unreasonable under the Fourth Amendment. He urges this court to follow *Chadwick, supra,* 433 U.S. at p. 1 and its progeny rather than *Edwards, supra,* 415 U.S. at p. 800. In that regard, Diaz challenges the reasoning and conclusions of the Fifth Circuit in *United States v. Finley* (5th Cir.2007) 477 F.3d 250, which was relied upon by the appellate court below, and distinguishes that case both factually and philosophically, as based on outdated legal principles derived from case law involving more rudimentary and limited data storage devices such as pagers.

A. Legal Principles.

A warrantless search is "per se unreasonable," subject to a few well-delineated exceptions. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.) A "search incident to arrest" is one such exception. (*Chimel v. California* (1969) 395 U.S. 752; *United States v. Hudson* (9th Cir. 1996) 100 F.3d 1409, 1419, overruled on other grounds in *Thornton v. United States* (2004) 541 U.S. 615.) A search incident to

arrest is one that occurs "at about the same time as the arrest." (*Hudson, supra,* 100 F.3d at p. 1419; *Chadwick, supra,* 433 U.S. at p. 1, overruled in part in *California v. Acevedo* (1982) 500 U.S. 565.) It is justified by law enforcement's need to retrieve weapons and seize evidence from an arrestee's person to prevent destruction or loss of that evidence. (*Chimel, supra,* 395 U.S. 752; *United States v. Robinson* (1973) 414 U.S. 218, 235.) A search incident to arrest includes search of items located on the arrestee's person as well as items within his reach. (*United States v. Belton* (1981) 453 U.S. 454, 460-461.)

An arrestee's personal effects may also be searched after arrest and without warrant during a "booking search." (*Illinois v. Lafayette* (1983) 462 U.S. 640, 643-644.) A booking search is part of an administrative step of processing inventory after arrest. (*Lafayette, supra,* 462 U.S. at p. 646.) It must proceed according to standardized criteria. (*Florida v. Wells* (1990) 495 U.S. 1, 4.)

Here, Diaz's cell phone search was unreasonable because it was not "incident" to arrest, but rather occurred as part of a police investigation during an interview of Diaz more than one and one-quarter hours after he was arrested. The search also was not carried out pursuant to standardized criteria at booking. Finally, in light of the expansive data storage capability of current cell phones, permitting a warrantless cell phone search under circumstances such as occurred here would reach far beyond the original rationale for searches incident to arrest.

B. The Cell Phone Search was Unlawful.

1. The Search was Too Remote in Time to be a Search Incident to Arrest.

Warrantless searches of property seized at the time of an arrest cannot be justified as incident to that arrest if the "search is remote in time or place from the arrest." (*Preston v. United States* (1964) 376 U.S. 364, 367.) The

Chimel Court described a permissible search incident to arrest as follows:

> A similar analysis underlies the "search incident to arrest" principle, and marks its proper extent. When an arrest is made, 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. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. (*Chimel, supra,* 395 U.S. at 762-763.)

Chimel also emphasized that the general warrant requirement is not "lightly to be dispensed with," and that a search incident to arrest has clear limits:

> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less. (*Chimel, supra,* 395 U.S. 762-763.)

Despite this caution, in *Edwards, supra,* 415 U.S. at p. 800 the Court recognized an exception to the contemporaneous requirement of a search incident to arrest as expressed in *Chimel.* In *Edwards*, the Court found reasonable a search of an arrestee's clothing taken incidental to the booking process but not examined until ten hours later. (*Edwards, supra,* 415 U.S. at p. 805.) The Court explained:

> Surely, the clothes could have been brushed down and vacuumed while Edwards had them on in the cell, and it was similarly reasonable to take and examine them as the police did, particularly in view of the existence of probable cause

> linking the clothes to the crime. Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest. (*Id.* at 806.)

In substantial part, *Edwards* appears simply to have been addressing routine jailhouse procedure. (*See, e.g., Monclavo-Cruz* (9th Cir.1981) 662 F.2d 1285, 1291.)

Several years later in *Chadwick, supra,* 433 U.S. at p. 1, police seized a locked footlocker at the time of arrest and searched it an hour later. The United States Supreme Court held this search unlawful, finding the search too remote from the time of arrest, and otherwise lacking exigency:

> Once 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. (*Chadwick, supra,* 433 U.S. at p. 15.)

Chadwick distinguished *Edwards* as involving a search of the person rather than a possession within the arrestee's immediate control: "Unlike searches of the person [citations], searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." (*Chadwick, supra,* 433 U.S. at p. 16, fn. 10.)

Chadwick was partially overruled in *Acevedo, supra,* 500 U.S. at p. 565, when the Court held that police may search a container located in an automobile without a warrant if they have probable cause to believe the container itself holds evidence or contraband. (*Acevedo, supra,* 500 U.S. at p. 565.)[1] Just the same, *Chadwick's* requirement that a search incident to arrest

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[1] *Acevedo* reconciled *Chadwick* with *United States v. Ross* (1982) 456 U.S. 798, in which the Court held that a warrantless search of an automobile could include a search of a container or package found inside the car when

occur contemporaneous with the arrest remains good law. (*See, e.g., People v. Ingham* (1992) 5 Cal.App.4th 326, 331; *People v. Leal* (2008) --- Cal.App.4th ---, 2008 WL 518365, 08 Cal. Daily Op. Serv. 2468, 2008 Daily Journal D.A.R. 3021.)

In *Monclavo-Cruz*, an Immigration Investigator arrested defendant and seized her purse that had been on her lap at the time of arrest. The officer did not search the purse until about an hour after the arrest, when defendant had been taken to the Immigration Office. The purse was searched in her presence. (*Monclavo-Cruz, supra,* 662 F.2d at p. 1286.) In light of those facts, the *Monclavo-Cruz* court explained its understanding of *Chadwick*:

> We understand [Chadwick] to mean that once a person is lawfully seized and placed under arrest, she has a reduced expectation of privacy in her person. Thus, a search of a cigarette case on the person is lawful once the person is under arrest without any reference to danger to police, United States v. Robinson 414 U.S. 218 (1973); and the search of a person's clothes taken from his at the jail the day after his arrest is also lawful simply as reasonable jailhouse procedure. United States v. Edwards, supra. (*Monclavo-Cruz, supra,* 662 F.2d at p. 1291.)

Based on this understanding, the court clarified why it had earlier approved the warrantless search of an arrested person's wallet in *United States v. Passaro* (9th Cir.1980) 624 F.2d 938, 943.) In *Passaro*, defendant was

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such a search was supported by probable cause. (*Acevedo, supra,* 500 U.S. at p. 570.) Quoting *Ross*, the *Acevedo* court explained: "The scope of a warrantless search of an automobile
. . . is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." (*Acevedo, supra*, 500 U.S. at pp. 579-580.)

lawfully arrested. "On the day of that arrest, when defendant arrived at the initial place of detention," police seized his wallet from his person, searched it, and photocopied a document. This copy was admitted into evidence, the wallet containing the original document having been returned to the defendant.

The Ninth Circuit described the question facing it as follows:

> "[W]e face a choice of either applying the warrant requirement under United States v. Chadwick [citations omitted] and its progeny, such as United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978), or excepting the search from the warrant requirement under United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) and United States v. Edwards [citations omitted] and progeny such as United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978). (*Passaro, supra,* 624 F.2d at p. 943.)

The Court in *Passaro* followed *Edwards*, concluding that *Chadwick* and its progeny were not applicable to the facts before it: "Unlike a double-locked footlocker, which is clearly separate from the person of the arrestee, the wallet found in the pocket of Mr. Passaro was an element of his clothing, his person, which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest." (*Passaro, supra,* 624 F.2d at p. 944.)

Having reviewed its reasoning in *Passaro*, the Ninth Circuit in *Monclavo-Cruz* court reached a different result by recognizing a subtle but significant distinction between certain "personal" items and others:

> Although we recognize that there is a fine line between a wallet on the person and a purse within an arrestee's immediate control, we hold that possessions within an arrestee's immediate control have fourth amendment protection at the station house unless the possession can be characterized as an element of the clothing, or another exception to the fourth amendment requirements applies. Monclavo-Cruz' purse, like a suitcase or briefcase in which a suspect has a fourth amendment interest at the station house, cannot be characterized as an element of her clothing or person, even if it were on her lap at the time of arrest. Although the officer had a right under Belton to search the

> purse taken from the car at the time of Monclavo-Cruz' arrest, we hold that the officer had no right to conduct a warrantless search of the purse at the station house. (*Monclavo-Cruz, supra,* 662 F.2d at p. 1291.)

Thus, as the Ninth Circuit acknowledged in *Monclavo-Cruz*, whether an item is one sufficiently associated with one's person to warrant dispensing with the contemporaneous search requirement of *Chadwick* is a matter of examining the character of the item. If the seized item is not clothing, or an article or container typically kept on or inside of clothing, or otherwise by its very nature carried on the arrestee's person, that item ought to be governed by *Chadwick.* Diaz contends that a cell phone, which is a utilitarian communication device as well as a sophisticated data storage "container," is more like the purse in *Monclavo-Cruz* than the wallet in *Passaro.* Cell phones can be, but are not necessarily or routinely, worn, carried in a pocket, or attached to a person or his clothes. A cell phone is more often kept *near* its owner, within his reach, like a purse or more traditional container used for holding personal effects. A cell phone is no more likely to be inside a person's pocket than inside a briefcase, backpack, or purse, or on a car seat or table, or plugged into a power source, or stashed inside any manner of separate bags or carrying containers. Therefore, the reasoning of *Moncalvo-Cruz* is more compelling than that of *Passaro* under the facts of this case.

The Fifth District also addressed a similar station house purse search in *Ingham, supra,* 5 Cal.App.4th at p. 326. Noting that a delay in searching the purse would raise the contemporaneous search issue of *Chadwick* depending on whether the purse was an item regarded as an extension of the arrestee's person, the court noted that defendant's actions "disassociated" her from the purse. She removed what she needed from it, leaving it behind at her house, only to have police bring it to the station. While a purse search might be a proper booking search if guided by standardized criteria, police delivery of the purse to the station after defendant left it behind took the search outside the

scope of a booking search or a search of items in the arrestee's possession and intimately associated with the arrestee. (*Ingham*, *supra,* 5 Cal.App.4th at p. 332.)

Recently, in *Finley, supra,* 477 F.3d at p. 260, the Fifth Circuit declined to follow *Chadwick,* thereby validating a briefly-delayed search of defendant's cell phone by characterizing the cell phone as an item found on defendant's person rather than "personal property not immediately associated with the person of the arrestee." (*Finley, supra,* 477 F.3d at p.260, fn. 7.) The Fifth Circuit also found that the search in that case was *substantially* contemporaneous with arrest, even though defendant had been moved to another location before police seized his cell phone. (*Ibid.*)

Here, unlike *Finley*, Diaz's cell phone was not searched contemporaneous with his arrest. Detective Laubacher took the cell phone from Diaz at the police station before he was taken into an interview room, at least an hour after his arrest. (1 RT 6-7.) Diaz was then interviewed by Detective Fazio and denied involvement in the controlled buy. Detective Fazio left the interview, retrieved the phone, searched its folders, located a text message, and confronted Diaz with the message. (1 RT 11-13.) *Finley*, then, is factually different and should not be followed here.

The United States Supreme Court's justification for a search incident to arrest has been clear from the outset:

> The general point so forcefully made by Judge Learned Hand in *United States v. Kirschenblatt,* 16 F.2d 202, remains: "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis, the power would not exist if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. *Id.* at 203." (*Chimel*, *supra,* 395 U.S. 767-768.)

For the reasons originally recognized in *Chimel* and *Chadwick*, the cell phone search here impermissibly circumvented the "contemporaneous" requirement of a search incident to arrest solely for investigative purposes. Police should not be permitted, at their discretion, to rummage through the electronic "papers" of an arrestee's cell phone during police interrogation "in search of whatever will convict him." Therefore, the contemporaneous requirement of *Chadwick* should have been honored, and Diaz's cell phone should not have been searched for evidence during the station house interrogation.

2. Search of Cell Phone Text Messages Implicates Far Greater Privacy Interests than a Pager Search or Similar Electronic Device Searches Addressed in Prior Case Law.

Permitting a cell phone search of the type that occurred here would have far-reaching consequences. The majority of cases relied upon in *Finley* involved search of physical containers, such as a cigarette package (*see, e.g., Robinson, supra,* 414 U.S. at pp. 223-224), and older electronic devices with very limited storage capacity, such as pagers (*see, e.g., United States v. Ortiz* (7th Cir.1996) 84 F.3d 977, 984.) Contemporary cell phones have the capacity to store tremendous quantities of personal information. They are not comparable to tangible packages, letters, or address books that an arrestee might carry in his pocket. (*Compare Ortiz, supra,* 84 F.3d at p. 984 [finite nature of pager's memory might destroy currently stored telephone numbers].) Thus, the limited storage capacity of a pager's electronic memory supports the justification of search incident to arrest to prevent loss of data, whereas search of a cell phone with its extensive memory and data storage abilities is not similarly warranted. (*Id.* at p. 984-985.)

A cell phone's storage capacity is more like that of a computer than a pager. As one California federal district court has recently articulated, advances in technology permit vast amounts of data to be electronically stored

on laptop computers. *(See, e.g., United States v. Arnold* (C.D. Cal.2006) 454 F.Supp.2d 999, 1004 [border search].) In *Arnold*, the Court explained:

> [T]he information contained in a laptop and its electronic storage devices renders a search of their contents substantially more intrusive than a search of a lunchbox or other tangible object. A laptop and its storage devices have the potential to contain vast amounts of information. People keep all types of personal information on computers, including diaries, personal letters medical information, photos, and financial records. (*Arnold, supra,* 454 F.Supp.2d at p. 1004.)

Although the storage devices of most cell phones are not yet as expansive as those contained in laptop computers, the electronic information contained in the memory of the average cell phone is quantitatively and qualitatively different from traditional, tangible containers. (*See, e.g.,* Oris S. Kerr, Digital Evidence and the New Criminal Procedure, 105 Colum. L. Rev. 279 (2005) [arguing that existing law is geared toward tangible evidence not well-suited to digital information].)

Furthermore, a cell phone text message search exceeds the original rationale for searches incident to arrest: to ensure officer safety and to preserve evidence that could be concealed or destroyed. (*See. e.g., Chimel, supra,* 395 U.S. at p. 752.) The search here was purely investigatory, aimed at discovering evidence with which to interrogate Diaz during the police interview. (1 RT 13 ["Immediately after I examined the phone, I went and talked to [Diaz]".)

Diaz recognizes that subsequent courts have extended *Chimel* beyond its original rationale. (*See., e.g., Thornton, supra,* 541 U.S. at pp. 624-635.) This court should decline to extend *Chimel* further, however, without express guidance from this state's Supreme Court or from the United States Supreme Court, in the context of evidence gathering from complex electronic "containers." (*See, e.g., Thornton, supra,* 541 U.S. 632, Scalia, J., concurring

[in the context of a general evidence-gathering search, the state interest in far less compelling than that of office safety or imminent evidence destruction].)

3. The Text Message Search was not a Proper Booking Search.

Items carried into the police station by an arrestee may be searched and accounted for without warrant as part of the booking or inventory process. (*South Dakota v. Opperman* (1976) 428 U.S. 364 [seized vehicles]; *Illinois v. Lafayette, supra,* 462 U.S. at p. 646 ["At the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed."] A booking or inventory search ***must*** be governed by standardized criteria as part of an established routine, administered in good faith, to ensure that the search is not a "ruse for a general rummaging in order to discover incriminating evidence." (*Florida v. Wells* (1990) 45 U.S. 1, 4; *see also United States v. Feldman* (9th Cir.1986) 788 F.2d 544, 553; *see also Colorado v. Bertine* (1987) 479 U.S. 367, 372, 374-375.) The procedure need not permit or prohibit opening or searching all categories of a particular items or container. A standard policy may, for example, permit officer discretion to open a container to determine its contents where he cannot ascertain the contents from the outside. (*Florida v. Wells, supra,* 45 U.S. at p. 4; *see also United States v. Bowhay* (9th Cir.1993) 992 F.2d 229.)

An inventory search is an administrative procedure designed to produce an inventory. (*United States v. Blaze (10th Cir.1998)* 143 F.3d 585, 592.) An inventory search undertaken in bad faith or for the sole purpose of investigation cannot be sustained. (*See, e.g., Bertine, supra,* 479 U.S. at pp. 372, 374-375 [inventory search must be undertaken pursuant to reasonable police procedures undertaken in good faith.])

The government bears the burden of proving that a warrantless search is reasonable and did not violate the Fourth Amendment. *(United States v.*

Carbajal (9th Cir.1992) 956 F.2d 924, 930.) Here, during cross-examination Detective Fazio denied the existence of any written procedures of the Sheriff's Department governing inventory searches of cell phone data. (1 RT 13.) The prosecution offered no evidence of a standardized procedure, written or otherwise, pursuant to which Detective Fazio examined the files stored in the cell phone's memory. Instead, the prosecution argued that the cell phone was properly confiscated as an item located on Diaz's person prior to police questioning, just as "if [he] had been carrying a letter in his hip pocket or he'd been carrying an address book at the time that he was arrested." (1 RT 22.) There was simply no established procedure or administrative need to separately inventory each of Diaz's text messages from his cell phone. (*See, e.g., Monclavo-Cruz, supra,* 662 F.2d at p.1289.)

III.

CONCLUSION.

Diaz respectfully requests that this court grant review to decide whether the trial and appellate courts correctly relied upon *Finley* and correctly interpreted *Chadwick* and *Edwards* in applying those cases to Diaz's suppression motion.

Respectfully submitted.

Dated: September 7, 2008

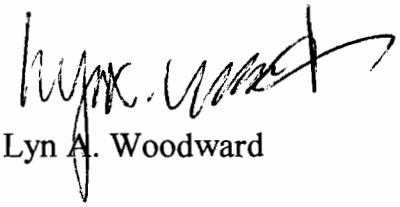
LYN A. WOODWARD
Attorney for Petitioner,
Gregory Diaz

CERTIFICATE OF WORD COUNT

This original Petition for Review is printed in 12.5 point Roman font, with spacing of 1.5, and is 4,845 words.

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

Executed this 7th day of September 2008 at Pacific Grove, California.



Lyn A. Woodward

EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY DIAZ,

Defendant and Appellant.

2d Crim. No. B203034
(Super. Ct. No. 2007015733)
(Ventura County)

A cell phone is seized from the person of an arrestee approximately one hour after he is transported to the police station. About 30 minutes later, while the arrestee is being interrogated, the arresting officer accesses the phone's text message folder and retrieves an incriminating message. We hold the officer's actions are lawful under the Fourth Amendment of the United States Constitution as a valid search incident to arrest.

Gregory Diaz appeals the judgment entered after he pled guilty to transportation of a controlled substance, Ecstacy (Health & Saf. Code, § 11379, subd. (a).) The trial court suspended imposition of sentence and placed him on three years formal probation. Diaz entered his plea after the court denied his motion to suppress evidence of a text message retrieved from his cell phone, which was searched approximately 90 minutes after his arrest, and his ensuing statements made when questioned about that message. He contends that the delayed warrantless search of his cell phone violated the Fourth Amendment because the phone was a "possession[] within

an arrestee's immediate control," instead of an item "spacially limited to the person of the arrestee," as those terms are defined by *United States v. Chadwick* (1977) 433 U.S. 1, 16, footnote 10, and *United States v. Edwards* (1974) 415 U.S. 800, 810. We conclude that the cell phone was immediately associated with Diaz's person at the time of his arrest, and was therefore properly subjected to a delayed warrantless search. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

At 2:50 p.m. on April 25, 2007, Diaz participated in a controlled buy of six Ecstacy pills. Diaz drove Lorenzo Hampton to the location in Thousand Oaks, and waited while Hampton and a confidential informant conducted the transaction in the back seat of his car. Diaz and Hampton were arrested shortly thereafter. When Diaz was searched at the scene, a small amount of marijuana was recovered from his back pocket. Diaz also had a cell phone in his possession, but it was not seized at that time.

Diaz was transported to the East County Sheriff's Station. At approximately 4:00 p.m., Diaz's cell phone was seized from his person and placed with the other evidence that had been collected. At 4:18 p.m., Diaz was interviewed by Detective Victor Fazio of the Ventura County Sheriff's Department. Diaz waived his *Miranda*[1] rights and denied any involvement in the incident. At about 4:23 p.m., and while Diaz was still being interrogated, Detective Fazio retrieved Diaz's cell phone, searched the text message folder, and found a recent message addressed to Hampton stating "6 4 80." Based on his training and experience, the detective believed that this message referred to 6 Ecstacy pills for the price of $80. Diaz admitted his participation in the crime when confronted with this information.

Diaz pled not guilty to the charge of selling a controlled substance and moved to suppress the text message and his statements in response thereto pursuant to Penal Code section 1538.5. The trial court found that the cell phone was properly

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1 *Miranda* v. *Arizona* (1966) 384 U.S. 436.

searched incident to Diaz's arrest, and denied the motion. In rejecting Diaz's argument that cell phones are akin to computers and should be excluded from the search-incident-to-arrest exception to the warrant requirement, the trial court reasoned as follows: "[A]lthough it's true that officers sometimes do get search warrants for the specific purpose of looking into computers and to get cell phone messages from wireless providers and so forth, in this situation it seems to me that incident to the arrest search of his person and everything that that turned up is really fair game in terms of being evidence of a crime or instrumentality of a crime or whatever the theory might be. And under these circumstances I don't believe there's authority that a warrant was required. So the motion is denied."

DISCUSSION

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. Searches conducted without a warrant are "'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.) One such exception applies to searches incident to an arrest. The exception provides that "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." (*Chimel v. California* (1969) 395 U.S. 752, 762-763.) The police may also search "the arrestee's person" and the area "'within his immediate control'" to remove weapons and secure evidence. (*Ibid.*)

Diaz does not dispute that his cell phone was properly seized incident to his arrest and that the police could have searched it contemporaneous with the arrest. (See *United States v. Robinson* (1973) 414 U.S. 218, 235 [upholding warrantless search of cigarette package found in defendant's pocket as a search incident to arrest]; *New York v. Belton* (1981) 453 U.S. 454, 460-461 [closed containers in the passenger compartment of a vehicle can be searched incident to passenger's arrest].) He contends, however, that the search of his cell phone approximately 90 minutes after his arrest violated the Fourth

Amendment's requirement that a warrant be obtained for delayed searches of "possessions within an arrestee's immediate control." (*United States v. Chadwick, supra*, 433 U.S. at p. 16, fn. 10.) While he acknowledges that items "immediately associated with the person of the arrestee" are properly subject to delayed warrantless searches (*id.*, at p. 15; see also *United States v. Edwards, supra*, 415 U.S. at pp. 801-803), he argues that cell phones should be afforded greater constitutional protection than other items an arrestee might carry on his or her person, such as wallets, letters, or address books, because they "have the capacity to store tremendous quantities of personal information." He also asserts that cell phones should be characterized differently from other items associated with the person of an arrestee because they are "no more likely to be inside a person's pocket than inside a briefcase, backpack, or purse, or on a car seat or table, or plugged into a power source, or stashed inside any manner of separate bags or carrying containers." We are not persuaded.

In *United States v. Edwards*, the court upheld the warrantless search of clothing that was seized from an arrestee approximately 10 hours after his arrest. (415 U.S. at pp. 801-802.) 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 as evidence, on the other." (*Id.*, at p. 807.) Subsequently, in *United States v. Chadwick*, 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." (*Chadwick, supra,* 433 U.S. at p. 15, fn. omitted.)

In reliance upon this authority, courts have upheld delayed warrantless searches of wallets (see, e.g., *United States v. Passaro* (9th Cir. 1980) 624 F.2d 938, 944), purses (*People v. Decker* (1986) 176 Cal.App.3d 1247, 1252), address books (*United States v. Rodriguez* (7th Cir. 1993) 995 F.2d 776, 777-778) and pagers (*United States v. Chan* (N.D.Cal. 1993) 830 F.Supp. 531, 536). Recently, one federal court applied the same rationale in upholding the warrantless search of a cell phone seized from the defendant incident to his arrest. In rejecting the defendant's claim that the search was not substantially contemporaneous with his arrest, the court stated: "In general, as long as the administrative processes incident to the arrest and custody have not been completed, a search of effects seized from the defendant's person is still incident to the defendant's arrest. [Citations.] Although the police had moved Finley, the search was still substantially contemporaneous with his arrest and was therefore permissible." (*United States v. Finley* (5th Cir. 2007) 477 F.3d 250, 260, fn. 7.) The court also rejected the defendant's claim that his cell phone was a possession within his immediate control as contemplated by *Chadwick*, reasoning as follows: "*Chadwick* held 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. [Citation.] Finley's cell phone does not fit into the category of 'property not immediately associated with [his] person' because it was on his person at the time of his arrest." (*Ibid.*)

We reach the same result here. Cell phones may contain personal information, but so do wallets, purses and the like. The fact that electronic devices are capable of storing vast amounts of private information does not give rise to a legitimate heightened expectation of privacy where, as here, the defendant is subject to a lawful

arrest while carrying the device on his person.[2] Whether Diaz *could* have kept his cell phone in a briefcase or backpack is of no moment. Because he had the phone on his person at the time of his arrest, it was taken "out of the realm of protection from police interest" for a reasonable amount of time following the arrest. (*United States v. Passaro, supra*, 624 F.2d at p. 944; see also *United States v. Edwards, supra*, 415 U.S. at pp. 808-809 ["'While the legal arrest of a person should not destroy the privacy of his premises, it does-for at least a reasonable time and to a reasonable extent-take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence'"].)

Diaz also contends that "a cell phone text message search exceeds the original rationale for searches incident to arrest: to ensure officer safety and to preserve evidence that could be concealed or destroyed." The United States Supreme Court has recognized, however, that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. 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

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[2] The record does not disclose whether Diaz's phone was in his hand, a pocket of his clothing, or elsewhere on his person at the time it was seized. It is undisputed, however, that the phone was "on his person" as contemplated by *United States v. Finley*.

Amendment." (*United States v. Robinson, supra*, 414 U.S. at p. 235.) In any event, "[t]he need to preserve evidence is underscored where evidence may be lost due to the dynamic nature of the information stored on and deleted from cell phones or pagers." (*United States v. Mercado-Nava* (D. Kan. 2007) 486 F.Supp.2d 1271, 1278.)

Because the warrantless search of Diaz's cell phone was a valid search incident to arrest, his motion to suppress the fruits of the search was properly denied. In light of our conclusion, we need not address Diaz's alternative claim that the booking or inventory search exception to the warrant requirement does not apply.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Kevin J. McGee, Judge

Superior Court County of Ventura

Lyn A. Woodward, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Victoria B. Wilson, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

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 September 8, 2008, I served the following document, known as PETITION FOR REVIEW (People v. Diaz) in this action by placing a true copy thereof in a sealed envelope addressed as follows:

STATE ATTORNEY GENERAL
5th Floor--North Tower
300 S. Spring St.
Los Angeles, California 90013

OFFICE OF THE DISTRICT ATTORNEY
Ventura County
800 South Victoria Avenue
Ventura, California 93009

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, California 90071

Court of Appeal, Second District
200 E. Santa Clara Street
Ventura, CA 93001

CLERK OF THE SUPERIOR COURT
COUNTY OF VENTURA
800 South Victoria Avenue
Ventura, California 93009-0001
(for delivery to the Honorable Kevin McGee,)

Gregory Diaz
9812 Vidor Dr., #301
Los Angeles, California 90025

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 that the foregoing is true and correct to the best of my knowledge.

Executed on September 8, 2008 at Pacific Grove, California.

Lyn A. Woodward