In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DOUGLAS GEORGE SCHMITZ,

Defendant and Appellant.

Case No. S186707

Appellate District Division Three, Case No. G040641
Orange County Superior Court, Case No. 06HF2342
The Honorable John S. Adams, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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When conducting a search authorized by an automobile passenger's parole condition, can the police search those areas of the passenger compartment that reasonably appear subject to the parolee's access?

INTRODUCTION

Appellant was driving while under the influence of methamphetamine and opiates. His friend, a parolee, was seated in the front passenger seat. A woman and her three-year old child were seated in the back seat. During a consensual encounter, a police officer inquired whether anyone in the vehicle was on probation or parole and the front seat passenger admitted to being on parole. The officer then conducted a search of the passenger compartment of appellant's car based on the passenger's parole search condition. She discovered methamphetamine in a shoe and a hypodermic needle in a bag of chips located in the back seat area of the car. Appellant moved to suppress these items and the motion was denied. Appellant then pled guilty to driving under the influence, being under the influence, possession of a hypodermic needle, and child endangerment.

Appellant appealed the denial of his suppression motion and the Court of Appeal agreed, finding the search of appellant's car violated the Fourth Amendment. The court reasoned that a front seat passenger's parole

status could not authorize a parole search of the back seat area of a car. The Court of Appeal's decision was erroneous and must be reversed.

When conducting a search authorized by an automobile passenger's parole condition, police may search areas of the passenger compartment that reasonably appear accessible to the parolee. The United States Supreme Court has held that a parole search satisfies the Fourth Amendment if it is reasonable under the totality of the circumstances. Reasonableness is assessed by weighing the privacy expectations of the individuals involved against the state's interest in performing the search. Because appellant was in a vehicle on a public street and was sharing his vehicle's passenger compartment with a parolee subject to a suspicionless search condition, he was subject to a reduced expectation of privacy in the areas of the vehicle within the parolee's joint access or control.

The state has an overwhelming interest in conducting suspicionless searches of parolees to ensure the parolee's successful reintroduction into society and to protect the public. If those portions of the vehicle accessible to the parolee were excluded from a parole search, the parolee could end-run his search condition. The parolee could simply place his contraband or weapons in a nonparolee's car, within his reach and subject to his use, without fear of the property being discovered in a parole search, thereby frustrating the state's ability to supervise parolees and protect the public from those released from prison early. Balancing the third party's

diminished privacy expectations with society's vital interests in regulating parolees, a search of the property subject to the parolee's access or control is reasonable. In this case, the back seat area of appellant's car was subject to the parolee front seat passenger's access or control. Therefore, the back seat area was properly included within the parole search.

Rather than consider the totality of the circumstances, the Court of Appeal's decision below crafted a bright-line rule in which only the seat occupied by the parolee is subject to search. The Court of Appeal's rule marks a significant break with this Court's prior decisions in the context of parole searches of shared residences. Officers aware of the parolee's joint occupancy may search any area of the home that is subject to the parolee's joint access or control. The Court of Appeal refused to consider which areas of appellant's car constituted common or shared space, instead limiting the search to the actual seat used by the parolee and no further. This rule grants far more constitutional protection to a car than a home, directly contradicting the weight of constitutional authority holding the home is subject to the greatest Fourth Amendment protection.

The Court of Appeal's bright-line rule, untethered to the factual circumstances of the case, also leads to absurd results. The court's rule fails to acknowledge that a passenger can use more of a vehicle than the seat he or she is actually occupying and fails to acknowledge that a passenger can own, possess, or use items located in someone else's car.

Finally, the Court of Appeal's decision places dispositive weight on whether appellant's passenger was legally entitled to consent to the search of appellant's car. But the search at issue in this case was not a consent search. Although parole searches have a basis in consent, a parole search is constitutionally distinct from a consent search. Unlike a consent search, a parole search's reasonableness must be assessed with consideration of the reduced expectations of privacy held by parolees, and those who choose to live or ride with parolees, and society's vital interests in regulating parolees by way of the suspicionless search. A simple application of consent principles, employed by the Court of Appeal below, fails to appropriately assess the constitutionality of the parole search employed in this case.

STATEMENT OF THE CASE

On May 7, 2007, the Orange County District Attorney's Office filed an information charging appellant with possession of a controlled substance (count 1; Health & Saf. Code, § 11350, subd. (a)), driving under the influence (count 2; Veh. Code, § 23152, subd. (a)), being under the influence of heroin and methamphetamine (count 3; Health & Saf. Code, § 11550, subd. (a)), possession of a hypodermic needle (count 4; Bus. & Prof. Code, § 4140), and child endangerment (count 5; Pen. Code,[1] § 273a,

[1] All further statutory references are to the Penal Code unless otherwise indicated.

subd. (b)). (CT 29-30.) The information also alleged that appellant had previously been convicted of driving under the influence (Veh. Code, § 23540) and attempted robbery, a serious and violent felony (§ 667, subds. (d), (e)(1)). (CT 30-31.)

On December 3, 2007, the People dismissed count 1 pursuant to section 1100. (CT 39.) On March 4, 2008, appellant filed a motion to suppress evidence pursuant to section 1538.5, claiming both the stop and search of his vehicle violated the Fourth Amendment. (CT 43.) The hearing was held on May 21 and June 23, 2008. At the conclusion of the hearing, the trial court denied appellant's motion. (CT 62, 66.)

On July 8, 2008, appellant pled guilty to four misdemeanors: driving under the influence, being under the influence, possession of a hypodermic needle, and child endangerment. Appellant admitted his prior conviction for driving under the influence. The trial court sentenced appellant to 90 days in jail and 3 years' informal probation. (CT 80-81.)

Appellant appealed, contending his vehicle was stopped without reasonable suspicion and the search exceeded the proper scope of a parole search. On August 18, 2010, the Court of Appeal for the Fourth Appellate District, Division Three, issued a published decision reversing the judgment. The Court of Appeal held that appellant's initial encounter with the officer was consensual and did not implicate the Fourth Amendment. (Slip opn. at pp. 6-7.) However, the court concluded that the search of the

passenger compartment of appellant's vehicle was unconstitutional. The court found that appellant's front seat passenger's parole condition did not authorize the officer to search the back seat area of the car. (Slip opn. at pp. 7-12.)

Respondent petitioned this Court for review. On December 1, 2010, this Court granted the petition.

STATEMENT OF THE FACTS[2]

Appellant was driving an older model Oldsmobile or Buick in Aliso Viejo, Orange County, around 7:00 p.m. on November 24, 2006. There were three other occupants in the vehicle. The front seat passenger, Quentin Gordon, was appellant's friend of two or three years. Gordon was on parole. Gordon's girlfriend, Brenda Turner, and her three-year old son were seated in the back seat. (Supp. CT 8-9; Supp. RT 15, 33-35, 43, 45.)

Deputy Mihaela Mihai observed appellant turn off a larger street onto a smaller street and then make a U-turn. She followed him, without activating her lights or initiating a traffic stop. After appellant made a U-

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[2] The Statement of the Facts is derived from the section 1538.5 hearing held on May 21 and June 23, 2008. The arresting deputy's testimony began on May 21. There was no court reporter present and no tape recording of the testimony exists. A settled statement of the record regarding her testimony was filed before the Court of Appeal. (Supp. CT 8-11; RT 1-10.) Appellant presented multiple witnesses at the section 1538.5 hearing regarding whether the officer blocked his car during the encounter. These facts are omitted because the trial court's ruling that the encounter was consensual is not before this Court.

turn, his car was stopped parallel to Deputy Mihai's car, facing in the opposite direction. Deputy Mihai's car was stopped in such a way that it did not obstruct the movement of appellant's car. (Supp. CT 8-9; Supp. RT 3, 6.)

Deputy Mihai asked if appellant was lost or needed help. (Supp. CT 8-9; Supp. RT 39.) Appellant said that he was not lost and had driven into the condominium complex to make a U-turn because he could not do so on the main street. Deputy Mihai got out of her car and approached appellant's car. She asked where he was from and if he needed directions. Appellant replied that he was from Long Beach and did not need directions. Deputy Mihai asked if appellant minded showing her his driver's license. As he was retrieving the license, Deputy Mihai, who had expertise and training regarding street narcotics, observed that appellant's arms were covered in abscesses consistent with drug use. Deputy Mihai then asked appellant if he was on probation or parole. He said "no." She then asked if the other occupants of the car were on probation or parole. Gordon admitted that he was on parole and that he had no identification. Deputy Mihai asked appellant for permission to search the car and he did not respond. (Supp. CT 9; Supp. RT 39-41.) After she discovered that the passenger was on parole, Deputy Mihai advised dispatch of her location and requested another officer come to the scene. (Supp. RT 9.)

Deputy Mihai then conducted a search of the car based on the passenger's parole status. She found a woman's black purse containing a syringe cap in the back seat. She also found a bag of chips containing two syringes (one without a cap) and a pair of shoes containing methamphetamine in the back seat. (Supp. CT 9-10.) Deputy Mihai arrested appellant. (Supp. CT 9.) At the time, appellant was under the influence of methamphetamines and opiates. (CT 71.)

ARGUMENT

I. THE SEARCH OF THE AREAS OF THE VEHICLE'S PASSENGER COMPARTMENT THAT WERE ACCESSIBLE TO THE PAROLEE PASSENGER WAS REASONABLE UNDER THE FOURTH AMENDMENT

This Court must determine the reasonableness of a parole search under the totality of the circumstances, balancing the privacy interests of individuals with the state's interest in the search. In this case, appellant was subject to reduced privacy expectations because he was in a vehicle on a public street and was sharing the vehicle's interior with a parolee subject to a suspicionless search condition. Balancing this reduced privacy interest with the state's compelling need to regulate those released from prison early, a search of the areas of the vehicle accessible to the parolee was reasonable. The Court of Appeal failed to conduct this totality of the circumstances balancing test. Instead, the court erroneously created a

bright-line rule based on which seat the parolee occupied and focused on a passenger's legal right to consent to the search of another's car.

A. Standard of Review

When reviewing the denial of a suppression motion, the reviewing court views the evidence in the light most favorable to the trial court's ruling and adopts all express and implied factual findings that are supported by substantial evidence, but independently determines whether the challenged search or seizure was constitutionally reasonable as a matter of law. (*People v. Hughes* (2002) 27 Cal.4th 287, 327; *People v. Glaser* (1995) 11 Cal.4th 354, 362.) "[T]he power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court." (*People v. Munoz* (2008) 167 Cal.App.4th 126, 132, quoting *People v. Lawler* (1973) 9 Cal.3d 156, 160.) If factual findings are unclear, the reviewing court must infer "a finding of fact favorable to the prevailing party on each ground or theory underlying the motion." (*People v. Middleton* (2005) 131 Cal.App.4th 732, 737.)

B. General Principals Regarding the Fourth Amendment

Pursuant to California Constitution, article I, section 28, subdivision (d), issues relating to the suppression of evidence derived from police searches and seizures must be reviewed under federal constitutional

standards. (*People v. Ayala* (2000) 23 Cal.4th 225, 254-255; *People v. Bradford* (1997) 15 Cal.4th 1229, 1291.) The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" and provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., Amend. IV.)

"The touchstone of the Fourth Amendment is reasonableness." (*United States v. Knights* (2001) 534 U.S. 112, 118-119 [122 S.Ct. 587, 151 L.Ed.2d 497] (*Knights*).) The court determines the reasonableness of a search "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (*Ibid.*, quoting *Wyoming v. Houghton* (1999) 526 U.S. 295, 300 [119 S.Ct. 1297, 143 L.Ed.2d 408]; accord *Illinois v. McArthur* (2001) 531 U.S. 326, 331 [121 S.Ct. 946, 148 L.Ed.2d 838] ["we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable"].)

An individual has a constitutionally protected privacy interest where "he or she has manifested a subjective expectation of privacy in the object of the challenged search that society is willing to recognize as reasonable."

(*California v. Ciraolo* (1986) 476 U.S. 207, 211 [106 S.Ct. 1809, 90 L.Ed.2d 210]; *In re Tyrell J.* (1994) 8 Cal.4th 68, 83, overruled on other grounds in *In re Jamie P.* (2006) 40 Cal.4th 128, 139.) The Constitution recognizes a hierarchy of privacy interests. (*People v. Reyes* (1998) 19 Cal.4th 743, 751 (*Reyes*).) "Reasonable expectations of privacy that society is prepared to recognize as legitimate receive the greatest level of protection; diminished expectations of privacy are more easily invaded; and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection." (*Ibid.*)

1. The Parole Search Exception

A warrantless search must be justified under a recognized exception to the warrant requirement. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 79.) A search pursuant to a valid parole search condition constitutes such an exception. (*Knights*, *supra*, 534 U.S. at pp. 117-118, 121-122; *Griffin v. Wisconsin* (1987) 483 U.S. 868, 875 [107 S.Ct. 3164, 97 L.Ed.2d 709]; *People v. Smith* (2009) 172 Cal.App.4th 1354, 1360.)

In California, parolees may be subjected to a warrantless, suspicionless search by any member of law enforcement. The notice of parole in California dictates, "You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer."

(15 Cal. Admin. Code, § 2511, subd. (b)(4).) Furthermore, before being paroled, a California inmate must agree in writing "to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." (§ 3067, subd. (a).)

In *Reyes*, this Court held that the practice of conducting warrantless, suspicionless searches of parolees is constitutional under the Fourth Amendment. (*Reyes*, *supra*, 19 Cal.4th at p. 752.) Such a search is reasonable under the Fourth Amendment provided it is not "arbitrary, capricious or harassing." (*Ibid.*) This Court reached the conclusion that a properly conducted parole search does not intrude on any expectation of privacy "society is 'prepared to recognize as legitimate'" by weighing the privacy interests of the parolee with society's interest in conducting parole searches without any form of particularized suspicion. (*Id.* at p. 754.) "As a convicted felon still subject to the Department of Corrections, a parolee has conditional freedom-granted for the specific purpose of monitoring his transition from inmate to free citizen." (*Id.* at p. 752.) The parolee has a greatly reduced expectation of privacy because he "is on notice that his activities are being routinely and closely monitored." (*Id.* at p. 753.) Additionally, his parole status has been triggered by his own conduct, the crime which resulted in conviction, sentence, and ultimately parole.

(*Reyes*, *supra*, 19 Cal.4th at p. 752.) In contrast to the parolee's extremely diminished expectation of privacy, the state has a strong interest in conducting random searches of those released from prison early. "The state has a duty not only to assess the efficacy of its rehabilitative efforts but to protect the public, and the importance of the latter interest justifies the imposition of a warrantless search condition." (*Ibid.*)

In the years following *Reyes*, this Court has concluded that an officer's subjective reasons for undertaking a parole or probation search are irrelevant. (*People v. Woods* (1999) 21 Cal.4th 668, 680-681 (*Woods*).) However, an officer must be aware of the parole or probation condition prior to conducting the search. (*People v. Robles* (2000) 23 Cal.4th 789, 800 (*Robles*); *People v. Sanders* (2003) 31 Cal.4th 318, 330 (*Sanders*); *In re Jaime P.*, *supra*, 40 Cal.4th at pp. 138-139.)

In *Knights*, the United States Supreme Court upheld California's practice of allowing warrantless probation searches of a probationer's home by any member of law enforcement without involvement of the probation officer and for general criminal investigation. After examining the totality of the circumstances, "with the probation search condition being a salient circumstance," the Court found a warrantless search of a probationer's residence by a police officer constitutional. (*Knights*, *supra*, 534 U.S. at p. 119.)

The *Knights* Court noted that probationers have a "significantly diminished . . . reasonable expectation of privacy" and "do not enjoy 'the absolute liberty to which every citizen is entitled.'" (*Knights*, *supra*, 534 U.S. at pp. 119-120.) Society, on the other hand, has significant interests in performing probation searches, including "probation-rehabilitation and protecting society from future criminal violations." (*Id.* at p. 119.) The Court looked to the high recidivism rate of probationers and noted "'the very assumption of the institution of probation' is that the probationer 'is more likely than the ordinary citizen to violate the law.'" (*Id.* at p. 120.) Probationers also have more incentive to conceal their criminal activities and dispose of incriminating evidence. (*Ibid.*) The state's strong interest in "apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen." (*Id.* at p. 121.) Because the search before the Court in *Knights* was supported by reasonable suspicion, however, the Court declined to reach the issue of whether a suspicionless probation search comports with the Fourth Amendment. (*Id.* at p. 120, fn. 6.)

In *Samson v. California* (2006) 547 U.S. 843 [126 S.Ct. 2193, 165 L.Ed.2d 250] (*Samson*), the Court reached that unresolved question and affirmatively held that a parole search may be conducted without any form of particularized suspicion. In *Samson*, an officer performed a search of a

known parolee's person without any suspicion of wrongdoing. (*Samson, supra,* 547 U.S. at pp. 846-847.) The Court conducted the same totality of the circumstances balancing test that had been employed in *Knights*. (*Id.* at p. 848.) The Court found parolees have "severely diminished expectations of privacy by virtue of their status alone." (*Id.* at p. 852.) In fact, parolees have even fewer expectations of privacy than probationers "because parole is more akin to imprisonment than probation is to imprisonment." (*Id.* at p. 850.) "[A]n inmate-turned-parolee remains in the legal custody of the California Department of Corrections" and must comply with pervasive regulation, including mandatory drug tests, restrictions on association with felons or gang members, mandatory meetings with parole officers, approval for a change in residence or occupation, approval for travel, restriction from criminal conduct and possession of firearms, specified weapons, or knives unrelated to employment, possible psychiatric treatment programs, abstinence from alcohol, and "[a]ny other condition deemed necessary by the Board [of Parole Hearings] or the Department [of Corrections and Rehabilitation] due to unusual circumstances." (*Id.* at pp. 851-852.) Because of this pervasive regulation, which is clearly communicated to the parolee as a condition of his release, the *Samson* defendant did not have "an expectation of privacy that society would recognize as legitimate." (*Id.* at p. 852.)

In contrast, the state has "substantial" interests in performing suspicionless searches of parolees. (*Samson*, *supra*, 547 U.S. at p. 853.) Parolees are "more likely to commit future criminal offenses" and the state faces "grave safety concerns that attend recidivism." (*Id.* at p. 853.) Suspicionless searches serve to reduce recidivism, protect the public, and promote reintegration of the parolee into society. (*Id.* at pp. 853-854.) A reasonable suspicion standard would undermine these state interests by giving parolees the opportunity to anticipate a search and conceal criminal activity. (*Id.* at p. 854.) Balancing the parolee's severely reduced privacy expectations and the state's serious concerns regarding recidivism, public safety, and reintegration of parolees into productive society, the *Samson* Court held suspicionless searches of parolees are reasonable under the Fourth Amendment. (*Id.* at p. 857.)

2. Third Party Expectations of Privacy

This Court has repeatedly confronted the constitutionality of a parole/probation search of a residence shared between a parolee/probationer and nonparolee/nonprobationer. In *Woods*, the defendants shared a one-bedroom residence with a woman whose probation included a term allowing suspicionless searches of her residence. (*Woods*, *supra*, 21 Cal.4th at p. 672.) Officers believed one of the nonprobationer residents was selling drugs out of the home. The officers were also aware that a

probationer subject to a search condition was residing there. Based solely on the probationer's search condition, officers searched the home, including the shared bedroom, and recovered evidence implicating the defendants in drug sales. (*Woods*, *supra*, 21 Cal.4th at pp. 672-673.) In upholding the search, this Court indicated that probation searches are justified based on the theory of advanced consent; "In California, probationers may validly consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term." (*Id.* at p. 674.) The *Woods* Court therefore applied well-settled law regarding consent searches of shared residences and held that officers may search those portions of a shared residence "over which the probationer is believed to exercise complete or joint authority." (*Id.* at p. 681, citing *United States v. Matlock* (1974) 415 U.S. 164, 170-171 [94 S.Ct. 988, 39 L.Ed.2d 242] (*Matlock*).)

> The "common authority" theory of consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

(*Woods*, *supra*, 21 Cal.4th at p. 676, quoting *Matlock*, *supra*, 415 U.S. at p. 171, fn. 7.) The court found that officers "generally may only search those portions of the residence they reasonably believe the probationer has complete or joint control over." (*Woods*, *supra*, at p. 682.) Because the officers reasonably believed the probationer exercised common authority

over the single bedroom, the search was justified by her probation search condition. (*Woods*, *supra*, 21 Cal.4th at p. 676, fn 3.)

A year later in *Robles*, this Court again confronted a probation search of an area shared between a probationer and nonprobationer, in that case an attached garage in a home shared between the defendant and a probationer subject to a search condition. (*Robles*, *supra*, 23 Cal.4th at pp. 793-794.) This Court again stated that probation searches are justified under the theory of advanced consent. (*Id.* at p. 795.) The *Robles* Court also noted the important societal interest served by warrantless probation searches:

> Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation. By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.

(*Robles*, *supra*, 23 Cal.4th at p. 795 [citations omitted].) In accordance with *Woods*, this Court found the officers could search "common or shared areas" of the residence pursuant to the probationer's search condition. However, because the searching officers were not aware until much later that the garage was shared with a probationer, the search in *Robles* was illegal. (*Id.* at p. 798.)

The *Robles* opinion discussed the varying levels of expectations of privacy held by the different occupants of the searched residence. (*Robles*,

supra, 23 Cal.4th at p. 798.) An individual subject to a probation search condition "has a severely diminished expectation of privacy over his or her person and property." (*Ibid.*) Those who reside with such a person "enjoy measurably great privacy expectations in the eyes of society." (*Ibid.*) Those privacy expectations are affected, however, by sharing a residence with a probationer:

> For example, those who live with a probationer maintain normal expectations of privacy over their persons. In addition, they retain valid privacy expectations in residential areas subject to their exclusive access or control, so long as there is no basis for officers to reasonably believe the probationer has authority over those areas.

(*Robles, supra*, 23 Cal.4th at p. 798.) Cohabitants of a probationer "have no cause to complain of searches that are reasonably and objectively related to the purposes of probation-for example, when routine monitoring occurs or when facts known to the police indicate a possible probation violation that would justify action pursuant to a known search clause." (*Id.* at p. 799 [citations omitted].)

Finally, in *Sanders*, officers searched a residence belonging to a parolee and nonparolee and discovered drugs hidden in footwear. At the time of the search, however, the officers were unaware that one of the occupants was on parole. (*Sanders, supra*, 31 Cal.4th at pp. 323-324.) The *Sanders* Court noted that the nonparolee "had a reduced expectation of privacy because she was living with a parolee subject to a search condition." (*Id.* at p. 330.) However, the Court found the search violated

the nonparolee's expectations of privacy because she "need not anticipate that officers with no knowledge of the [parolee's] existence or search condition may freely invade their residence in the absence of a warrant or exigent circumstances." (*Sanders*, *supra*, 31 Cal.4th at p. 330.) The Court found that the cohabitant's status as a parolee, rather than a probationer, did not distinguish *Robles*; "the expectation of privacy of cohabitants is the same whether the search condition is a condition of probation or parole." (*Ibid.*)

This Court has not addressed the permissible scope of a parole or probation search of a shared vehicle. The Fifth District Court of Appeals confronted that issue in *People v. Baker* (2008) 164 Cal.App.4th 1152 (*Baker*). In *Baker*, a car driven by a male parolee was stopped for speeding. The front seat passenger was a female nonparolee. After the driver admitted to being on parole, officers ordered the individuals out of the car and searched the entire car, including a purse belonging to nonparolee that had been sitting at her feet beside the front passenger seat. (*Id.* at p. 1156.) Drugs were recovered inside the purse. The Fifth District found the search violated the Fourth Amendment. Considering the parole search one based on advanced consent, the *Baker* court looked to whether the parolee had "common authority" over the nonparolee's purse. (*Id.* at p. 1158.) The court noted, "[w]hile those who associate with parolees or probationers must assume the risk that when they share ownership or possession with a

parolee or probationer their privacy in these items might be violated, they do not abdicate all expectations of privacy in all personal property." (*Baker, supra*, 164 Cal.App.4th at p. 1159.) A purse is such a personal item, functioning as "an inherently private repository for personal items." (*Ibid.*) The *Baker* court concluded that there were no facts indicating a reasonable suspicion that the male parolee driver shared ownership, control, or use of the purse that was kept directly beside the only female occupant of the car. (*Id.* at pp. 1159-1160.)

No other court of appeal has addressed the scope of a parole or probation search in a vehicle shared by a third party. The lower court's decision in this case was the only to address the propriety of a search based on a passenger's parole status. (Slip opn. at 9.)

C. Considering the Totality of the Circumstances, a Search of the Areas of the Vehicle Accessible to the Parolee was Reasonable

In determining the reasonableness of the search conducted in this case, this Court must assess "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (*Knights, supra*, 534 U.S. at pp. 118-119; accord *Samson, supra*, 547 U.S. at p. 848.) Because appellant was sharing his vehicle's passenger compartment with a parolee subject to search terms, he was subject to a

diminished expectation of privacy in the shared areas of the vehicle. In contrast, the state has a strong interest in monitoring and regulating individuals released early from prison on parole. To effectuate that vital state interest, officers must be able to search the parolee and his property. If those portions of the vehicle accessible to the parolee were nonetheless off limits during the parole search, a parolee would be permitted to frustrate the state's ability to regulate his reentrance into society by taking refuge in a nonparolee's car. Balancing appellant's diminished expectations of privacy and society's vital interest in regulating parolees, a search of the back seat area which was accessible to the parolee was reasonable.

1. Appellant Was Subject to a Reduced Expectation of Privacy in the Areas of the Vehicle He Shared With the Parolee

"The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy, that is, whether he or she has manifested a subjective expectation of privacy in the object of the challenged search that society is willing to recognize as reasonable." (*Robles*, *supra*, 23 Cal.4th at pp. 794-795.) In this case, appellant was subject to reduced privacy expectations because the area searched was in a vehicle located on a public street and was shared with a parolee subject to search conditions.

An individual has far less privacy interests in his or her vehicle than in a home. (See *South Dakota v. Opperman* (1976) 428 U.S. 364, 368 [96 S.Ct. 3092, 49 L.Ed.2d 1000]; *Wyoming v. Houghton, supra,* 526 U.S. at pp. 304-305; *In re Arturo D.* (2002) 27 Cal.4th 60, 68 ["individuals generally have a reduced expectation of privacy while driving a vehicle on public thoroughfares"].)

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.

(*South Dakota v. Opperman*, *supra*, 428 U.S. at p. 368.) Because the area searched was a vehicle parked on a public street, appellant's expectation of privacy was reduced.

Additionally, by inviting a parolee to ride in the vehicle with him, appellant was subject to an even further reduced expectation of privacy. Gordon, the front-seat passenger, was on parole and subject to a suspicionless search condition. Consequently, Gordon had a severely diminished expectation of privacy. (*Samson*, *supra*, 547 U.S. at p. 852.) Appellant's expectation of privacy was not coextensive with Gordon's expectation. Because appellant was neither a probationer nor a parolee, he maintained normal expectations of privacy in his person and areas of the vehicle he did not share in common with the parolee. (*Robles*, *supra*, 23 Cal.4th at p. 798.) Nevertheless, by sharing the vehicle with the parolee,

appellant subjected himself to a reduced expectation of privacy in the shared areas of the car.

Had Deputy Mihai searched a residence shared between appellant and the parolee, the scope of the search would have been well defined. This Court has held that an individual has "a reduced expectation of privacy" in the areas of his or her home that are shared with a parolee/probationer cohabitant. (*Sanders*, *supra*, 31 Cal.4th at p. 330; see also *Robles*, *supra*, 23 Cal.4th at p. 799 [defendant subject to a reduced expectation of privacy in areas of residence shared with probationer]; *Woods*, *supra*, 21 Cal.4th at p. 684 (dis. opn. of Brown, J.) ["Those associating with a probationer assume the ongoing risk that their property and effects in common or shared areas of a residence may be subject to search"].) The California Court of Appeal has recognized that an individual diminishes his or her own expectations of privacy by sharing space with a parolee/probationer. (See, e.g., *People v. Pleasant* (2004) 123 Cal.App.4th 194, 197 ["Persons who live with probationers cannot reasonably expect privacy in areas of a residence that they share with probationers"]; *People v. Boyd* (1990) 224 Cal.App.3d 736, 749 [by spending the night with one parolee in another parolee's trailer, defendant (a nonparolee) had a lessened expectation of privacy]; *People v. Triche* (1957) 148 Cal.App.2d 198, 203 [by sharing a residence with "a parolee subject to special rules of supervision," a nonparolee's right to privacy

"must be to some extent restricted in the public interest"]; *Russi v. Superior Court* (1973) 33 Cal.App.3d 160, 168.) Indeed, multiple jurisdictions outside California recognize that co-habitants of parolees/probationers have a diminished expectation of privacy in the space they share with the parolee/probationer. (See, e.g., *State v. West* (Wis. 1994) 517 N.W.2d 482, 490-491; *State v. Johnson* (Utah 1987) 748 P.2d 1069, 1073; *State v. Hurt* (N.D. 2007) 743 N.W.2d 102, 108-109; *State v. Yule* (Fla. Ct. App. 2005) 905 So.2d 251, 264.)

In the context of a residential search, this Court has held that a parole/probation search may include areas of a home subject to the parolee/probationer's exclusive or joint access or control, including any "common or shared areas" of the residence. (*Robles*, *supra*, 23 Cal.4th at p. 798 [attached garage]; *Woods*, *supra*, 21 Cal.4th at p. 676 [shared bedroom].) Although areas subject to the parolee/probationer's joint access or control are subject to search, cohabitants maintain normal privacy expectations over their persons and residential areas subject to their exclusive access or control, provided there is no basis for officers to reasonably believe the parolee/probationer has authority over those residential areas. (*Robles*, *supra*, 23 Cal.4th at p. 798; see, e.g., *People v. Pleasant*, *supra*, 123 Cal.App.4th at pp. 197-198 [reasonable to believe probationer had joint access and authority over locked room occupied by her adult son because she had a key to the room]; *People v. Smith* (2002) 95

Cal.App.4th 912, 919-920 [reasonable to believe male probationer had joint access and was using a purse found in a shared bedroom because purse contained key to probationer's safe and room was being used for criminal enterprise].)

By sharing a residence with another, an individual assumes the risk that the cohabitant will consent to a search of areas over which he or she has "joint access or control for must purposes." (*Matlock*, *supra*, 415 U.S. at p. 171.) Similarly, in the context of a parole or probation search, one assumes a risk by sharing a residence with a parolee/probationer that common areas of the home will be subject to a parole/probation search. (*Robles*, *supra*, 23 Cal.4th at p. 799.) "[C]ohabitants have no cause to complain of searches that are reasonably and objectively related to the purposes of probation [or parole]." (*Ibid.*)

Here, appellant assumed a similar risk by inviting a parolee to share his vehicle. (See Caskey, Cal. Search and Seizure (2010 ed.) § 9:4, p. 550 ["A person who lives with, rides with or otherwise associates with a parolee or probationer *assumes the risk* law enforcement officers may search areas or items the officer reasonably believes are in complete or joint control (or access) of the parolee or probationer"].) It would be unreasonable for appellant to expect that those areas of the vehicle shared with the parolee—who is subject to warrantless, suspicionless searches at any time and by any member of law enforcement—would retain their full Fourth Amendment

protection. By allowing a parolee to use portions of his vehicle, appellant reduced his expectation of privacy in those shared spaces. (See *People v. Smith*, *supra*, 95 Cal.App.4th at pp. 919-920 [purse that appeared jointly used by probationer, even if not jointly owned, subject to probation search].) He has no cause to complain about a legitimate parole search of the shared space within the vehicle by an officer aware of the parolee's presence and search condition.

In this case, the common or shared areas of the vehicle included the passenger compartment of appellant's car. There is no evidence in the record that appellant's vehicle included separate compartments within the interior. There is nothing indicating that the front seat area was blocked in any way from the back seat area. There is no evidence indicating the back seat area was inaccessible from the front seat where Gordon was seated. By all accounts, appellant was driving an older model Oldsmobile or Buick with a normal passenger compartment. (Supp. CT 8.) By virtue of occupying the front passenger seat, the parolee had joint access and control over the passenger compartment accessible to him. This included the back seat area where the chip bag and shoe were discovered. Neither the chip bag nor the shoe constituted "an inherently private repository for personal items" and the facts did not indicate that either object was particularly associated with any one occupant in the car. (*Baker*, *supra*, 164 Cal.App.4th at p. 1159.) Deputy Mihai reasonably believed that the parolee

had access to or control over of these items and properly included them within the parole search.

Appellant did not retain full Fourth Amendment privacy protections in his vehicle. Given the reduced expectation of privacy in one's vehicle and that his passenger parolee was reasonably considered to be sharing the accessible areas of the passenger compartment, the search did not transgress on any reasonable privacy expectations.

2. Suspicionless Parole Searches Serve a Significant State Interest

Next, this Court must weight appellant's reduced privacy interests against the degree to which the search "is needed for the promotion of legitimate governmental interests." (*Knights*, *supra*, 534 U.S. at pp. 118-119.) California has an "overwhelming interest" in supervising parolees. (*Samson*, *supra*, 547 U.S. at p. 853, quoting *Pennsylvania Bd. of Prob. & Parole v. Scott* (1998) 524 U.S. 357, 365 [118 S.Ct. 2014, 141 L.Ed.2d 344].) The state's interests in reducing recidivism and promoting reintegration following incarceration "warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." (*Samson*, *supra*, at p. 853.) The warrantless, suspicionless search is a vital part of parole supervision. As the United States Supreme Court has recognized, "parolees . . . are more likely to commit future criminal offenses" and there are "grave safety concerns that attend recidivism." (*Id.* at pp. 853-854.) Additionally,

parolees and probationers "have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal." (*Knights*, *supra*, 534 U.S. at p. 120.)

The state's interest in regulating and monitoring parolees is even stronger than probationers because parole is "more akin to imprisonment." (*Samson*, *supra*, 547 U.S. at p. 850.)

> [A]s distinguished from those not convicted of anything, those convicted of mere misdemeanors and either jailed or not jailed, and those convicted of felonies but not imprisoned for lengthy periods, parolees are persons deemed to have acted more harmfully than anyone except those felons not released on parole.

(*United States v. Crawford* (9th Cir. 2004) 372 F.3d 1048, 1077 (concur. opn. of Kleinfeld, J.).)

If areas of the vehicle accessible to the parolee were nonetheless excluded from the parole search, the parolee would be permitted to end-run his or her search condition simply by riding as a passenger in a car driven by a nonparolee. Although the parolee would have the entire passenger compartment available to stash his or her contraband or weapons, officers would be restricted to searching only the seat occupied by the parolee. This would enable a parolee to flout his search condition by placing contraband or weapons within arm's reach while riding as a passenger without any repercussions. Parolees could effectively appropriate the normal expectations of privacy held by average citizens and undermine the state's interests in regulating parolee's reintroduction into society and protecting

the public. (See *Russi v. Superior Court*, *supra*, 33 Cal.App.3d at p. 169; *State v. Johnson*, *supra*, 748 P.2d at p. 1073 ["If the Fourth Amendment rights of nonparolees living with parolees were not reduced, a parolee could avoid all warrantless parole searches by living with a nonparolee and asserting the nonparolee's constitutional rights, and thus emasculate one significant feature of the parole system"]; *State v. West*, *supra*, 517 N.W.2d at p. 486.) "[T]he Fourth Amendment does not render the States powerless to address these concerns *effectively*." (*Samson*, *supra*, 547 U.S. at p. 854 [emphasis in original].)

The state's overwhelming interest in the effective functioning of its parole system requires that the parole search of a shared vehicle include those areas subject to the parolee's joint access or control.

3. Under the Totality of the Circumstances, the Search Was Reasonable

Balancing society's overwhelming interest in supervising individuals who were, and likely remain, a threat to society, with the parolee and nonparolee occupants' privacy expectations, the search of the back seat area accessible to the parolee was reasonable. The officer could not search the nonparolee's person or areas of the vehicle that it was not reasonable to believe were subject to the parolee's access or control. In this case, Deputy Mihai did not search appellant's person, which would clearly have been outside the permissible scope of the parole search. Additionally, the deputy

did not find the contraband in the trunk or some other compartment inaccessible to the parolee. The drugs were found in a shoe and the needle was found in a chip bag. Both items were located in the back seat area of the car. (Supp. CT 9-10.) As a passenger seated in the front passenger seat, the parolee had access to this area of the car and the back seat area was properly included within the scope of the parole search. As such, the trial court properly denied appellant's motion to suppress.

D. The Court of Appeal's Analysis is Erroneous

The Court of Appeal failed to conduct the above balancing test as required by the United States Supreme Court. The court ignored the totality of the circumstances and instead crafted a bright-line rule. The court broke with prior law regarding the scope of a residential parole search and effectively granted far greater protection to a vehicle than a home. By failing to acknowledge that passengers may jointly possess items in a vehicle, the court's decision also contradicts well-established law in the context of sufficiency of the evidence and will lead to absurd results. Finally, the court placed dispositive weight on the passenger's legal authority to consent, despite the fact that a parole search is constitutionally distinct from consent search.

1. The Court of Appeal Analysis Fails to Follow *Knights'* and *Samson's* Balancing Test

The Court of Appeal crafted a bright-line rule divorced from the facts of the case, thus ignoring the totality of the circumstances balancing test required by the United States Supreme Court in both *Knights* and *Samson*.

The Court of Appeal concluded that appellant "gave up none of his own expectation of privacy" by inviting a parolee to ride as a passenger in his vehicle. (Slip opn. at p. 11.) "Schmitz clearly had a reasonable expectation of privacy in his glove box, his console, his door pockets, his own seat, the back seat – *indeed every part of his car except the front passenger seat where the parolee was sitting*." (Slip opn. at p. 11 [emphasis added].) Because appellant was the owner and driver, the court concluded that he did not cede any authority over the back seat to the front seat passenger. "The parolee had no right to open packages, eat food, or even read magazines he found in the back seat." (Slip opn. at p. 11.) The court found that the parolee "could only obtain authority over the chip bag at issue here by claiming ownership, which – given his lack of search and seizure rights – would have been bootless." (Slip opn. at pp. 11-12.)

The determination regarding what area the parolee had access to or control over was a question of fact for the trial court to resolve. (*Woods*, *supra*, 21 Cal.4th at p. 673.) Rather than consider the record below in the

light most favorable to respondent and resolve all factual conflicts "in the manner most favorable to the [superior] court's disposition on the [suppression] motion" as required (*Woods*, *supra*, 21 Cal.4th at p. 673), the Court of Appeal refused to consider which portions of the vehicle constituted common, shared space with the parolee. The court's assertion that the front seat passenger lacks the "right" to touch things in the back seat was not based on anything the officer observed about the vehicle or its occupants. The court's absolute rule that appellant retained full privacy expectations everywhere except "the front passenger seat where the parolee was sitting" has no basis in the facts developed below.

The creation of a bright-line rule contradicts the United States Supreme Court's dictate that the reasonableness of a parole search should be determined from the totality of the factual circumstances. (*Knights*, *supra*, 534 U.S. at pp. 118-119; *Samson*, *supra*, 547 U.S. at p. 848; accord *Reyes*, *supra*, 19 Cal.4th at p. 750 ["What is reasonable depends upon all the circumstances surrounding the search and seizure"].) In fact, the United States Supreme Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." (*Ohio v. Robinette* (1996) 519 U.S. 33, 39 [117 S.Ct. 417, 136 L.Ed.2d 347].) The Court of Appeal's decision disregarded this firmly-rooted principle.

2. The Court Of Appeal's Rule Grants Greater Privacy Expectations to a Vehicle Than a Home

The effect of the Court of Appeal's rule is to afford far more privacy to individuals in a car than a home, thus contradicting the well-established Fourth Amendment hierarchy.

As explained above, in the context of a residential parole search, areas subject to the parolee's exclusive or joint access or control are properly included within the scope of the search. The rule pronounced by the Court of Appeal significantly deviates from this standard. The court limited the search to the area used exclusively by the parolee, the actual seat he was occupying. Thus, pursuant to the Court of Appeal's decision, a home search may include areas subject to exclusive or *joint* use by the parolee, but a vehicle search is limited to the areas subject to the parolee's *exclusive* use.

The Court of Appeals found that appellant "gave up none of his own expectation of privacy" by inviting a parolee to ride in his vehicle. (Slip opn. at p. 11.) But in the context of a parole search of a residence shared with a parolee, this Court has specially held that cohabitants of parolees have "a reduced expectation of privacy" in the common or shared areas of the home. (*Sanders*, *supra*, 31 Cal.4th at p. 330; see Part C.1. *supra*.) The Court of Appeal's decision in this case contradicts this Court's prior

decisions by concluding that appellant retained full Fourth Amendment privacy expectations despite the presence of a parolee in his vehicle.

In assessing appellant's expectations of privacy, the Court of Appeal noted, "there was no evidence Schmitz *knew* his passenger was a parolee." (Slip opn. at p. 11 [emphasis in original].) But in the context of a residential search, this Court has never applied a requirement that an individual know they are living with a parolee/probationer in order to be subjected to a reduced expectation of privacy in the common or shared areas of the residence. (See *Woods*, *supra*, 21 Cal.4th at p. 668; *Robles*, *supra*, 23 Cal.4th at p. 789; *Sanders*, *supra*, 31 Cal.4th at p. 318.)[3]

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[3] To the extent the court's decision seeks to create a requirement that the defendant know he or she is sharing space with a parolee, such a requirement is not supported by the law and is untenable. Even if appellant was unaware that his passenger was a parolee, his lack of knowledge does not transform otherwise lawful police activity into improper conduct. The purpose of the exclusionary rule is to "deter future unlawful police conduct." (*Sanders*, *supra*, 31 Cal.4th at p. 324.) If the searching officer is aware of the passenger's parole status and conducts a proper parole search, appellant's lack of prior knowledge about his passenger does not have any effect on the propriety of the *officer's* conduct. (*Russi v. Superior Court*, *supra*, 33 Cal.App.3d at p. 170.)

Furthermore, a knowledge requirement would be wholly unworkable. It would require the officer, once he or she has learned that they are dealing with a parolee, to inquire of all the other occupants of the car whether they knew that individual was on parole. Those individuals would have no reason to tell the truth. (See *Russi v. Superior Court*, *supra*, 33 Cal.App.3d at p. 167 [noting, in the context of a probation search of a shared residence, that a knowledge requirement "would be virtually impossible to prove"].)

The facts in the instant case underscore this concern. Appellant and Gordon were friends for two to three years prior to the offense and yet the

(continued...)

By limiting a parole search to the seat used by the parolee but not any shared space within the car and finding appellant did not in any way reduce his expectation of privacy by sharing his vehicle with a parolee, the Court of Appeal effectively granted far greater privacy protections to individuals in car than a home. Such a rule contradicts the weight of Fourth Amendment jurisprudence. The law is clear that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (*Sanders*, *supra*, 31 Cal.4th at p. 324, quoting *Payton v. New York* (1980) 445 U.S. 573, 585 [100 S.Ct. 1371, 63 L.Ed.2d 639].) The very core of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (*Silverman v. United States* (1961) 365 U.S. 505, 511 [81 S.Ct. 679, 5 L.Ed.2d 734].) "[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." (*Georgia v. Randolph* (2006) 547 U.S. 103, 115 [126 S.Ct. 1515, 164 L.Ed.2d 208].) In contrast to this "most stringent Fourth Amendment protection" afforded to private homes, an individual maintains far less privacy expectations in their vehicle. (*United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 561 [96

(...continued)
Court of Appeal found there was no evidence appellant knew Gordon was on parole.

S.Ct. 3074, 49 L.Ed.2d 1116].) The Court of Appeal's decision contradicts this well-established Fourth Amendment hierarchy.

3. The Court of Appeal's Decision Contradicts Well-Established Law Regarding Joint Possession

By failing to acknowledge that a passenger may own or possess items in someone else's vehicle, the Court of Appeal's decision contradicts well-established law regarding joint possession.

The Court of Appeal held that a passenger has no "right" to touch anything in a car that he does not own or has not be entrusted to him. On the contrary, the law is clear that an individual may possess items in a vehicle even when not in control of the vehicle as the driver. (See, e.g., *People v. Evans* (1973) 34 Cal.App.3d 175, 182-183 [sufficient evidence front seat passenger possessed drugs located in back of van]; *People v. Vermouth* (1971) 20 Cal.App.3d 746, 755 [probable cause to arrest passenger for unlawful possession of billy club located next to driver's side door]; *Rideout v. Superior Court* (1967) 67 Cal.2d 471, 475 [probable cause that back seat passengers were in possession of marijuana hidden behind back seat]; *People v. Mendoza* (1986) 183 Cal.App.3d 390, 395-396 [sufficient evidence front seat passenger was in possession of contraband found next to front passenger seat].) Items in a vehicle may be jointly possessed by all of its occupants. (*Vermouth, supra*, at p. 755.) Whether there is sufficient evidence that an occupant of a vehicle is in possession of

contraband found within it depends on the totality of the facts in a given case. (See, e.g., *People v. Tharp* (1969) 272 Cal.App.2d 268, 273-274 [considering totality of circumstances, including the character of the bag searched, to determine whether there was sufficient evidence defendant possessed a case of drugs found in a vehicle he co-occupied]; *People v. Vermouth*, *supra*, 20 Cal.App.3d at p. 755 ["Whether there is probable cause to arrest more than one occupant of a vehicle halted by the police on a public highway for a felony based upon possession of contraband observed in the car generally depends upon the facts in a given case"].)

The Court of Appeal's determination that a passenger has no right to touch anything in a car he does not own or has not been entrusted to drive contradicts this well-established law. It makes little sense that the front seat passenger could be properly convicted of possessing items in the back seat if the totality of the circumstances prove possession (see, e.g., *People v. Evans*, *supra*, 34 Cal.App.3d at pp. 178-179, 182-183), but those items could never be included, despite the factual circumstances, within the scope of his parole search.

4. The Court of Appeal's Decision Leads to Absurd Results

By failing to consider the totality of the circumstances, the Court of Appeal announced a rule that will lead to absurd results.

According to the Court of Appeal, the only way a front seat passenger's parolee status can authorize the search of an item in the back seat of someone else's car is if the parolee claims ownership of the item. (Slip opn. at pp. 11-12.) The court held that the parolee "could only obtain authority over the chip bag at issue here by claiming ownership, which – given his lack of search and seizure rights – would have been bootless." (Slip opn. at pp. 11-12.) Thus, the court's rule not only fails to take into account the totality of the factual circumstances, it actually requires the officer to ignore all factual circumstances indicating the parolee has access to or control over property in the car except a claim to ownership. And even the Court of Appeal acknowledges that such a claim is unlikely to be forthcoming given the parolee's knowledge that he is subject to a search condition.

Thus, the court's rule would require an officer with obvious reason to believe items in the back seat area belong to or are being used by the parolee front seat passenger to ignore those items during a parole search. For example, in a vehicle occupied by a male nonparolee driver and a female parolee front seat passenger, if an officer observed a woman's purse or clothing in the back seat, the officer would not be permitted to search those items despite the obvious reasonableness of the belief that the items belong to the female parolee. Even if the officer had reason to believe the parolee placed items in the car in an effort to end-run his parole search

terms, the officer would be required under the decision below to ignore that evidence absent a claim to ownership by the parolee.

The Court of Appeal's requirement that only a claim to ownership can establish a relationship between the parolee and the item sufficient to authorize a search would, in practice, create a requirement that officers ask who an item belongs to prior to including the item in the parole search. Several courts have explicitly rejected such a requirement, instead finding a reasonable suspicion under the totality of the circumstances standard appropriate. (See *People v. Baker*, *supra*, 164 Cal.App.4th at p. 1160; *People v. Smith*, *supra*, 95 Cal.App.4th at p. 918; *People v. Boyd*, *supra*, 224 Cal.App.3d at pp. 745-746, 749-750 ["Such a rigid rule would unnecessarily bind the officer to the answer given, regardless of its veracity"]); *People v. Britton* (1984) 156 Cal.App.3d 689, 701 ["An officer could hardly expect that a parolee would claim ownership of an item which he knew contained contraband"]; *United States v. Davis* (9th Cir. 1991) 932 F.2d 752, 760.) The Court of Appeal's rule, divorced from any consideration of the factual circumstances, is unworkable.

5. The Court of Appeal's Decision Erroneously Focuses on Consent Law

The Court of Appeal's analysis places dispositive weight on whether the parolee, as a nonowner and nondriver, was legally entitled to consent to

the search of appellant's car. This focus on consent law was erroneous because a parole search is constitutionally distinct from a consent search.

The court applied the test set forth in *Matlock* for determining the constitutionality of consent given by a third party:

> The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, [citations] but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

(*Matlock*, *supra*, 415 U.S. at p. 172, fn. 7.) The court found that Gordon did not have "common authority" over appellant's car because Gordon, as a nonowner passenger, did not have "the right to permit the inspection [of the vehicle's interior] in his own right." (Slip opn. at pp. 10-11.)

> In this case, there was no evidence that Schmitz, merely by allowing a parolee to ride as a passenger in his car, ceded to that parolee any authority over the car at all, let alone the authority to permit inspections of the vehicle's interior "*in his own right.*" Indeed there was no evidence Schmitz *knew* his passenger was a parolee. Had Schmitz left the vehicle in the parolee's possession, or allowed him to drive it, that would be different. [Citations]. But Schmitz did neither. Instead he simply allowed the parolee to visit the car temporarily as a passenger.

(Slip opn. at p. 11 [emphasis in original].) Because mere passenger status alone, absent other circumstances indicating ownership or another sufficient interest, does not grant an individual an expectation of privacy in

a vehicle[4] or the right to consent to a search of the vehicle,[5] the Court of Appeal concluded that Gordon could not consent to the search of appellant's car. (Slip opn. at p. 11.)

The Court of Appeal's analysis fails because the search of appellant's car was not based on consent. A strict application of the *Matlock* "common authority" doctrine was faulty here because a parole search is not simply a consent search. The constitutional basis for parole searches has been a moving target. (See 2 Ringel, Searches and Seizures, Arrests and Confessions (2d ed. 2010) § 17:8, pp. 17-27 [discussing multiple constitutional rationales for warrantless probation and parole searches]; 5 LaFave, Search and Seizure: A Treatise on the Fourth Amendment (4th ed. 2010) § 10:1, p. 434 [same].) The practice of conducting warrantless parole and probation searches has been upheld by this Court and the United States Supreme Court under various theories, including the "special needs" exception to the warrant requirement (see, e.g., *Griffin v. Wisconsin*, *supra*, 483 U.S. at p. 872), advanced consent

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[4] Pursuant to *Rakas v. Illinois* (1978) 439 U.S. 128 [99 S.Ct. 421, 58 L.Ed.2d 387], mere nonowner passengers do not have standing to contest the search of a vehicle.

[5] Whether a passenger has legal authority to consent to a search of the vehicle they are occupying depends on the factual circumstances presented. (See *U.S. v. Chavez Loya* (8th Cir. 2008) 528 F.3d 546, 554; *United States v. Morales* (3d Cir. 1988) 861 F.2d 396, 400 fn. 9; *United States v. Poulack* (8th Cir. 2001) 236 F.3d 932, 934-936 [passenger who rented the vehicle had authority to consent to search].)

(see, e.g., *Woods*, *supra*, 21 Cal.4th at p. 674; *Robles*, *supra*, 23 Cal.4th at p. 795; *People v. Bravo* (1987) 43 Cal.3d 600, 608), and the totality of the circumstances including the severely reduced expectations of privacy held by parolees and probationers (see, e.g., *Samson*, *supra*, 547 U.S. at pp. 850-853; *Knights*, *supra*, 534 U.S. at pp. 118-119; *Reyes*, *supra*, 19 Cal.4th at p. 752; *In re Tyrell J.*, *supra*, 8 Cal.4th at pp. 81-83).

Although this Court has at various times treated parole and probation searches differently under the theory that probation searches are consented to in advance while parole searches are mandatory (*Reyes*, *supra*, 19 Cal.4th at pp. 748-749), it is now clear that both probation and parole searches have an equal basis in consent. Since 1997, the Penal Code requires that in order to be released on parole, prisoners must consent in writing to warrantless, suspicionless searches. Section 3067[6] provides, "[a]ny inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." (§ 3067, subd. (a).) If the inmate refuses to consent to the above search terms, he or she is required to serve

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[6] Section 3067 only applies to parolees who committed their offenses after January 1, 1997. (§ 3067, subd. (c).) This provision did not apply to the parole search analyzed by this Court in *Reyes* and was not addressed in that case.

the remainder of his or her sentence, without worktime credits. (§ 3067, subd. (b).) Pursuant to section 3060.5, "the parole authority shall revoke the parole of any prisoner who refuses to sign a parole agreement setting forth the general and any special conditions applicable to the parole . . . and shall order the prisoner returned to prison." (§ 3060.5.) An inmate who refuses to consent to search terms is not paroled and must serve the entirety of his or her sentence. (*People v. Middletown*, *supra*, 131 Cal.App.4th at pp. 739-740; *People v. Smith*, *supra*, 172 Cal.App.4th at p. 1361, fn. 2.)

But parole and probation searches are not simply consent searches. (Caskey, Cal. Search and Seizure (2010 ed.) § 9:4, p. 550 [noting parole search is more than a consent search].) The United States Supreme Court's decisions in *Knights* and *Samson* make clear that parole searches are independently justified under the totality of the circumstances, including the severely diminished expectations of privacy held by parolees and the overwhelming state interest in regulating those released from prison early. (*Knights*, *supra*, 534 U.S. at pp. 118-119; *Samson*, *supra*, 547 U.S. at p. 848.) Parole and probation searches have a basis in consent, "albeit with the recognition that there is a strong governmental interest supporting the consent conditions-the need to supervise probationers and parolees and to ensure compliance with the terms of their release." (*People v. Baker*, *supra*, 164 Cal.App.4th at p. 1158.)

The parolee's severely reduced expectation of privacy and society's strong interest in regulating parolees by way of a warrantless search distinguish a parole search from a simple consent search. A normal search based on consent does not involve the added layer that a party to the search is subject to pervasive government regulation and limited Fourth Amendment rights. Nor does a regular consent search involve consideration of the state's powerful need to conduct the search in order to supervise and assimilate those released from prison early. Simply importing consent jurisprudence, as the Court of Appeal did in this case, ignores the constitutional distinction between a parole search and a consent search.

Thus, whether or not Gordon could consent to the search of appellant's car in the event Gordon was not a parolee is irrelevant. Gordon was a parolee and he and any property under his control were subject to warrantless, suspicionless searches. Gordon's status as a parolee is critical to the totality of the circumstances analysis, informing both appellant's reduced expectation of privacy in the shared portions of the vehicle and society's interest in conducting the search. (See *Knights*, *supra*, 534 U.S. at p. 119; *Samson*, *supra*, 547 U.S. at p. 848.) The Court of Appeals erred by dismissing this critical circumstance and analyzing the search in this case as if it was based solely on consent given by a passenger.

CONCLUSION

For the reasons stated above, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: January 26, 2010

Respectfully submitted,

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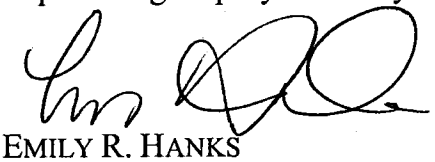

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,432 words.

Dated: January 26, 2010

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Douglas George Schmitz** Case No.: **S186707**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 26, 2011, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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For Delivery to:
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on January 26, 2011 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 26, 2011, at San Diego, California.

N. Hernandez
Declarant

Signature

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