IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **DOUGLAS GEORGE SCHMITZ,** Defendant and Appellant.	**Case No. S186707**

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

APPELLANT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

1. 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?

STATEMENT OF THE PROCEEDINGS

By information filed on May 7, 2007, in the Superior Court of California, Orange County, appellant was charged with possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a) (count 1), misdemeanor driving under the influence of alcohol or drugs with one prior driving

under the influence conviction in violation of Vehicle Code section 23152, subdivision (a) (count 2), misdemeanor under the influence of a controlled substance in violation of Health and Safety Code section 11550, subdivision (a) (count 3), misdemeanor unauthorized possession of a hypodermic needle or syringe in violation of Business and Professions Code section 4140 (count 4), and misdemeanor child abuse in violation of Penal Code section 273a, subdivision (b) (count 5). The information alleged one prior conviction in violation of Vehicle Code section 23152, subdivision (a), and one prior serious or violent felony conviction pursuant to Penal Code sections 667, subdivisions (d) and (e)(1), and 1170.12, subdivisions (b) and (c)(1). (1 CT 29-31.)

On December 3, 2007, on the People's motion, the trial court dismissed count 1, leaving only four alleged misdemeanors that were later renumbered counts 1 through 4. (1 CT 39.)

Appellant moved to suppress evidence on March 4, 2008, pursuant to Penal Code section 1538.5. (1 CT 43-46.) The trial court denied appellant's suppression motion on June 23, 2008. (1 CT 66; 1 RT 63-64.)[1]

On July 8, 2008, on the People's motion, count 4 of the information was amended to read misdemeanor "child endangerment." (1 CT 79.) Appellant pled guilty to counts 1 through 4 and admitted one prior misdemeanor conviction for

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[1]/ The first portion of the Penal Code section 1538.5 suppression hearing was not transcribed. On appeal and at appellant's request, a settled statement of the missing record was subsequently prepared and filed. (1 Supp CT 8-12.)

violation of Vehicle Code section 23152, subdivision (a). (1 CT 80.)

On July 8, 2008, the trial court suspended imposition of sentence on all counts and placed appellant on informal probation for three years under various terms and conditions. (1 CT 77-82.)

On appeal, the Court of Appeal, Fourth Appellate District, Division Three, in an opinion filed August 18, 2010, per Bedsworth, Acting Presiding Judge, with O'Leary and Moore, Associate Justices, concurring, reversed the judgment, ruled that the search of appellant's car violated the Fourth Amendment to the United States Constitution, and remanded the case to the trial court for further proceedings. The Court of Appeal's opinion was certified for publication. Respondent's petition for review was granted by the Court on December 1, 2010.

STATEMENT OF PROCEDURAL AND EVIDENTIARY FACTS

Appellant waived a preliminary hearing. (1 CT 24-26.) Consequently, an evidentiary record does not exist on which to base a detailed factual summary. The facts of this case have been set forth, generally, in the Court of Appeal's opinion. (See Slip Opinion at pp. 2-4.) Additional evidence admitted during the suppression hearing and set forth in the settled statement is outlined as follows.

Orange County Deputy Sheriff Mihaela Mihai testified that she was on patrol on November 24, 2006. At approximately 7:00 p.m. on that date, Mihai observed an older model Oldsmobile or Buick driving and then making a u-turn. Deputy Mihai approached the vehicle in her patrol car and stopped parallel to it. Mihai observed three adult passengers, including appellant who was identified as the owner and driver; Brenda Lynn Turner who was seated in the backseat (next to her child in a car seat); and Quentin Cary Gordon who was seated in the front passenger seat next to appellant. Deputy Mihai asked appellant if he was lost. Appellant told Mihai that he was not lost and that he had driven into the apartment complex to make a u-turn because he could not make a u-turn on the main street. (1 CT 8-9.)

Deputy Mihai asked appellant if he needed directions. Appellant said, "No." Mihai asked appellant if he minded showing her his driver's license. As he was getting the license, Mihai observed that appellant's arms were covered with abscesses which were indicative to her of possible drug use. (1 CT 9.)

After observing the abscesses, Deputy Mihai asked appellant if he was on

probation or parole. He replied, "No." She asked if anyone else in the car was on parole and learned that front seat passenger Gordon was on parole and that he had no identification. Mihai asked appellant for permission to search his vehicle. Appellant did not answer. Thereafter, Mihai ordered appellant and the other two occupants out of the car. While appellant and the other occupants were seated on a street curb under the watch of other officers who by then had arrived on scene, Deputy Mihai conducted a search of the entire vehicle, including the trunk and entire passenger compartment, based on front seat passenger Gordon's parole status. The search of the passenger compartment included a black, female purse belonging to Ms. Turner, in which Mihai found a syringe cap; a bag of chips in which Mihai found 2 syringes, one with no cap; and a pair of shoes in which Mihai found some methamphetamine. All of these items were located in the back seat or floor of the rear passenger area next to Ms. Turner. Appellant was arrested based on Deputy Mihai's observations, and the evidence she found in the back seat. (1 CT 9.)

During the suppression hearing, Deputy Mihai stressed that the incident did not commence as a traffic stop. (1 RT 3.) She acknowledged that before learning of the passenger's parole status, she had not observed any violation of law. (1 RT 9-10.)

Appellant testified that, after he pulled into the condominium complex in order to turn his car around, Deputy Mihai approached in her car and asked him whether he needed any help. After appellant said, "No," Deputy Mihai yelled for

him to stop. (1 RT 28.) After appellant stopped, Mihai got out of her patrol car, approached appellant, and asked him for his identification. (1 R 28, 32.) She also asked him if he was on probation or parole. Appellant said that he was not. (1 RT 30-32.) After Mihai looked at appellant's identification, she did not return it but asked him to get out of his car. (1 RT 30.) Mihai then asked appellant's passengers if they were on parole or probation. (1 RT 31.)

Turner testified that immediately after Deputy Mihai asked appellant if he needed help and requested his identification, she asked him and front passenger Gordon whether they were on probation or parole. Deputy Mihai was still in her patrol car when she asked about parole status. (1 RT 39-41.)

Passenger Gordon testified that after Deputy Mihai asked appellant whether he needed help and for his identification, she asked about his probation or parole status. (1 RT 54.) When appellant responded that he was not on probation or parole, the officer asked Gordon and Ms. Turner whether they were on probation or parole. (1 RT 54-55.)

In respect to witness credibility, the court stated at the conclusion of the suppression hearing, "I think there is a close-call here. There is [sic] issues that have been illuminated by the People's witness as well as by defense witnesses, but I am struck by the similarity in the testimony, the consistency of the testimony, in particular of both of the women who testified, as well as the defendant himself." (1 RT 61.)

I

THE SEARCH OF APPELLANT'S PASSENGER COMPARTMENT AND TRUNK COULD NOT BE JUSTIFIED ON THE GROUND THAT THE FRONT SEAT PASSENGER WAS SUBJECT TO A PAROLE SEARCH, WHERE APPELLANT RETAINED A REASONABLE EXPECTATION OF PRIVACY IN HIS PASSENGER COMPARTMENT AND TRUNK, AND WHERE THERE WAS NO EVIDENCE THAT THE PASSENGER HAD JOINT CONTROL OR COMMON AUTHORITY OVER ANY PORTION OF THE AUTOMOBILE BEYOND THE AREA OF HIS IMMEDIATE ACCESS AND CONTROL

A. Introduction

Appellant was the owner and driver of an automobile in which he had three occupants. Quentin Gordon was the front seat passenger. Brenda Turner and her child were back seat passengers. Mr. Gordon was on parole. There was no evidence that appellant knew or should have known of Mr. Gordon's parole status.

In the rear passenger area, next to Ms. Turner on the seat or floor were a female purse, shoes, and a chips bag. The officer conducted an overly expansive search of the entire passenger area of the car, including the inside of Turner's purse, the shoes, chips bag, and the trunk of appellant's car. Appellant did not consent to the search.

The search was conducted after the patrol officer learned of the front seat passenger Gordon's parole status. The officer found a syringe cap inside Ms. Turner's purse, two syringes inside the chips bag, and some methamphetamine inside one of the shoes. The issue before this Court involves whether the parole status of a vehicle passenger may justify an exhaustive and extensive search of the

entire passenger compartment and trunk of the vehicle. The answer to this question is found in the Fourth Amendment and its jurisprudence: The owner-driver of a vehicle retains an expectation of privacy in those areas of his vehicle not immediately accessible to or controlled by the passenger-parolee. Absent evidence, facts, or indicia that the passenger-parolee had joint control or common authority over the vehicle beyond the area of his immediate access and control, exterior compartments (e.g., trunk and engine compartment), interior compartments (e.g., glove compartment), or items and closed containers beyond the parolee's immediate access and control (e.g., a woman's purse, shoes, and closed chips bag in the back seat) are protected by the Fourth Amendment and not subject to search or inspection under the guise of a parole search.

B. Standard of Review

Federal constitutional standards govern review of a claim that evidence is inadmissible because it was obtained during an unlawful search. (Cal. Const., art. I, section 28, subd. (d); *People v. Willis* (2002) 28 Cal.4th 22, 29.) Thus, any challenge to the admissibility of a search or seizure must be evaluated solely under the Fourth Amendment. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171; *In re Lance W.* (1985) 37 Cal.3d 979; see also *California v. Greenwood* (1987) 486 U.S. 35, 38 [108 S.Ct. 1625, 100 L.Ed.2d 30].)

An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded [space] or the

seized thing. (*United States v. Salvucci* (1980) 448 U.S. 83, 91-92 [100 S.Ct. 2547, 65 L.Ed.2d 619].) The legitimate expectation of privacy must exist in the particular area searched or thing seized in order to bring a Fourth Amendment challenge. (*People v. McPeters, supra*, 2 Cal.4th at p. 1171.) The burden is on the defendant to establish that a legitimate expectation of privacy was violated by government conduct. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 104 [100 S.Ct. 2556, 65 L.Ed.2d 633]; *Kimmelman v. Morrison* (1986) 477 U.S. 365, 374 [106 S.Ct. 2574, 91 L.Ed.2d 305] [gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure; in order to prevail, a complainant need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue].)

In reviewing a trial ruling on a motion to suppress, the appellate court defers to the trial court's factual findings, express or implied, when supported by substantial evidence. (*People v. Hoyos* (2007) 41 Cal.4th 872, 891; *People v. Ayala* (2000) 23 Cal.4th 225, 255; *People v. James* (1977) 19 Cal.3d 99, 107.) The power to judge credibility, weigh evidence, and draw factual inferences is vested in the trial court. (*People v. James, supra*, 19 Cal.3d at p. 107.) However, in determining whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment, the appellate court exercises its independent judgment de novo. (*People v Hoyos, supra*, 41 Cal.4th at p. 891; *People v. Ramos* (2004) 34 Cal.4th 494, 505.) Here, the facts relevant to appellant's claimed expectation of privacy

are essentially undisputed. The determination of whether the facts show that appellant had a legitimate expectation of privacy is an issue of law to be reviewed de novo. (*People v. McPeters, supra,* 2 Cal.4th at p. 1172.)

In *Ornelas v. United States* (1996) 517 U.S. 690, 697 [116 S.Ct. 1657, 134 L.Ed.2d 911], the United States Supreme Court held that a trial court's application of the law to the facts in the context of a claimed violation of the Fourth Amendment to the United States Constitution, should be reviewed de novo, even though these legal principles cannot be reduced to simple rules; they involve "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." (*Ornelas v. United States, supra*, 517 U.S. at p. 696.) The high court concluded that independent review would clarify the applicable legal principles and provide guidance to law enforcement that would tend to assist officers in making a correct determination in advance as to whether an invasion of privacy is justified. (*Id.* at pp. 697-698.)

C. Respondent's Argument

In the present case, respondent does not contend that Deputy Mihai had reasonable suspicion to detain or arrest appellant before the search. (OBM 28-29.) Neither does respondent contend that Mihai had probable cause to arrest appellant at the time she decided to search his vehicle for contraband or evidence of crime. Respondent does not argue that any exception to the warrant requirement applies. Instead, respondent asserts that appellant lacked an exclusive expectation of

privacy in the entire compartment area of his vehicle merely because a parolee happened to be riding in the front passenger seat. (See OBM 22-24.)

Respondent repeatedly offers that appellant "assumed the risk" of a search "by inviting a parolee to share his vehicle" (OBM 26.) According to respondent, although appellant "maintained normal expectations of privacy in his person and areas of the vehicle he did not share in common with the parolee," nevertheless, by sharing the vehicle with the parolee, appellant subjected himself to a reduced expectation of privacy in the shared areas of the car." (OBM 23-24.) Respondent argues, in effect, that any subjective expectation of privacy appellant may have had immediately before the search was not exclusive -- i.e., one that society is prepared to recognize as reasonable, and thus there was no basis to suppress the evidence against appellant under the Fourth Amendment. According to respondent, a parolee's mere presence as a passenger in a vehicle establishes the requisite shared authority or common access to justify an expansive search. (See OBM 21-22.)

D. Fourth Amendment Principles

The Fourth Amendment guarantees individuals the "right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." (U.S. Const., 4th Amend.) Under the Fourth Amendment, a warrantless search is unreasonable per se unless it falls within one of the "specifically established and well-delineated exceptions." (*Katz v. United States* (1967) 389 U.S. 347, 357 [88 S.Ct. 507, 19 L.Ed.2d 576].)

Fourth Amendment rights are personal and may be asserted only by someone whose own rights have been violated. As explained in *Alderman v. United States* (1969) 394 U.S. 165, 171-172 [89 S.Ct. 961, 22 L.Ed.2d 176], "[t]he established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." (See also *People v. Rivera* (2007) 41 Cal.4th 304, 309, fn. 1 [the capacity to claim the protection of the Fourth Amendment depends upon whether the person has a legitimate expectation of privacy in the invaded place].)

Warrantless searches may be permitted without probable cause where an officer has legally obtained adequate consent. (See *People v. Woods* (1999) 21 Cal.4th 668, 674, citing *Schneckloth v. Bustamonte* (1973) 412 U.S. 218 [93 S.Ct. 2041, 36 L.Ed.2d 854].) "A consensual search may not legally exceed the scope of the consent supporting it. [Citation.] Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of circumstances. [Citation.]" (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408.)

In California, probationers and parolees, such as Mr. Gordon, may validly consent in advance to warrantless searches in exchange for the opportunity to remain on or obtain release from a state prison. (*People v. Woods, supra*, 21 Cal.4th at p. 674.) This Court has repeatedly said such searches are lawful. (*Id.* at p. 675.) These searches have repeatedly been evaluated under the rules governing consent

searches, albeit with the recognition that there is a strong governmental interest supporting the consent conditions -- the need to supervise probationers or parolees and to ensure compliance with the terms of their release. (*Id.* at p. 681; see also *People v. Bravo* (1987) 43 Cal.3d 600, 605.)

In the context of non-probationers or non-parolees, such as appellant, 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." (*People v. Robles* (2000) 23 Cal.4th 789, 794-795.) The United States Supreme Court has largely abandoned use of the word "standing" in its Fourth Amendment analysis. It did so without altering the nature of the inquiry: whether the defendant, rather than someone else, had a reasonable expectation of privacy in the place searched or the items seized." (*People v. Ayala, supra,* 23 Cal.4th at p. 254, fn. 3; see also *Smith v. Maryland* (1979) 442 U.S. 735, 740 [99 S.Ct. 2577, 61 L.Ed.2d 220] ["the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government].)

Although the Fourth Amendment protects people, not places, the extent to which the Fourth Amendment protects people may depend upon where those people are. (*Minnesota v. Carter* (1998) 525 U.S. 83, 88 [119 S.Ct. 469, 142 L.Ed.2d 373].) This inquiry is substantive in nature and consists of a subjective

and an objective component. In order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable -- i.e., one that has "a source outside the Fourth Amendment either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (*People v. Ayala, supra*, 23 Cal.4th at p. 255; see also *Minnesota v. Olson* (1990) 495 U.S. 91, 95-96 [110 S.Ct. 1684, 109 L.Ed.2d 85] ["A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable"].) The phrase "reasonable expectation of privacy" is properly understood as the ultimate determination, reflecting both the objective and subjective components of the analysis. Conversely, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." (*Hudson v. Palmer* (1984) 468 U.S. 517, 526-527 [104 S.Ct. 3194, 82 L.Ed.2d 393].)

Here, appellant had a legitimate expectation of privacy in the trunk of his car, his own seat and door, and back seat -- every part of his car except the front passenger seat area where parolee Gordon was sitting or over which he had immediate access and control. There was no evidence that appellant conferred any authority or control over the entire passenger compartment of his car to passenger-parolee Gordon merely by letting him ride in his car. The general search of both the trunk and back seat area were thus unlawful in violation of the Fourth Amendment because appellant retained a reasonable expectation of privacy in all

areas of his car not immediately accessible to parolee Gordon or under his immediate access or control. Because Deputy Mihai had no information or facts indicating that parolee Gordon had joint control or common authority over the vehicle, items and closed containers beyond Gordon's immediate access and control (e.g., Turner's purse, the shoes, and closed chips bag in the back seat) were protected by the Fourth Amendment.

E. The Court of Appeal's Opinion

The Court of Appeal held as follows. Appellant, as driver and owner, had at all relevant times possession and control of his vehicle. Under the facts of this case, therefore, parolee Gordon never gained or exercised any apparent authority over the vehicle beyond the area of his immediate access and control which might have given Deputy Mihai the reasonable impression he had the right to permit its inspection. Consequently, the officer could not search the interior of the vehicle or any part of the vehicle except the front passenger seat area where the parolee was sitting. Under the circumstances of this case, parolee Gordon had no expectation of privacy anywhere in appellant's car and no standing to contest his own search. Nothing appellant did could reasonably have been viewed as ceding authority over his back seat to Gordon. Gordon thus had no right to open packages, eat food, or even read magazines found in the back seat. Gordon 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" in the words of the Court of

Appeal. (Slip Opinion at pp. 11-12.)

The Court of Appeal's opinion fundamentally differs from respondent's proposed restriction of the protection afforded a vehicle owner-driver under the Fourth Amendment. Were respondent's argument to prevail, owners or drivers of vehicles would effectively be stripped of their privacy rights in their vehicles, without regard to any showing or evidence of common authority, joint access, control, or joint ownership, whenever a parolee happened to be riding as a mere passenger. (See Slip Opinion at p. 8.) Respondent's contention should be rejected for the reasons explained *post*.

F. A Search Authorized by an Automobile Passenger's Parole Condition is Limited to the Area Immediately Accessible to the Parolee in the Absence of Any Evidence or Indicia of Common Authority or Joint or Complete Control

Under the Fourth Amendment, a search occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." (*United States v. Jacobsen* (1984) 466 U. S. 109, 113 [104 S.Ct. 1652, 80 L.Ed.2d 85].)

In *United States v. Matlock* (1974) 415 U. S. 164, 171 [94 S.Ct. 988, 39 L.Ed.2d 242], the United States Supreme Court reaffirmed that a warrantless entry and search by law enforcement officers does not violate the Fourth Amendment's proscription of "unreasonable searches and seizures" if the officers have obtained the consent of a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be searched. The high court defined common authority as resting on mutual use of property by persons

generally having joint access or control for most purposes. (*Id.* at. p. 171, fn. 7; see also *Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [110 S.Ct. 2793, 111 L.Ed.2d 148].)

As with other factual determinations bearing upon search and seizure, the determination of consent to search must be judged against an objective standard: would the facts available to the officer at the moment warrant a person of reasonable caution in the belief that the consenting party had authority over the premises or property. (*Illinois v. Rodriguez, supra*, 497 U.S. at p. 188-189 [110 S.Ct. 2793, 111 L.Ed.2d 148]; see also *Terry v. Ohio* (1968) 392 U.S. 1, 21-22 [88 S.Ct. 1868, 20 L.Ed.2d 889].) If not, the warrantless search without further inquiry is unlawful unless authority actually exists. As further discussed by the high court in *Georgia v. Randolph* (2996) 547 U.S. 103, 110 [126 S.Ct. 1515, 164 L.Ed.2d 208], the constant element in assessing Fourth Amendment reasonableness is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules. (See, for example, *Rakas v. Illinois* (1978) 439 U.S. 128, 144, fn. 12 [99 S.Ct. 421, 58 L.Ed.2d 387 [an expectation of privacy is reasonable if it has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society"].)

Accordingly, the Court of Appeal here correctly discussed that, when conducting a parole search, an officer may look into closed containers or other areas that he or she reasonably believes are in the complete or joint control of the

parolee. (Slip Opinion at pp. 7-8, 11; see also *People v. Woods, supra*, 21 Cal.4th at p. 682; *People v. Boyd* (1990) 224 Cal.App.3d 736, 749.) This rule obtains because the need to supervise those who have consented to parolee searches must be balanced against the reasonable privacy expectations of those who reside with, ride with, or otherwise associate with parolees or probationers. (*People v. Baker* (2008) 164 Cal.App.4th 1152, 1159; see also *Wyoming v. Houghton* (1999) 526 U.S. 295, 300 [119 S.Ct. 1297, 143 L.Ed.2d 408] [balancing 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].)

Conversely, no common authority or control over appellant's entire vehicle or the entire passenger area could sensibly be suspected simply because parolee Gordon happened to be riding in the front passenger seat. Although appellant may have assumed some risk that, on permitting Gordon to ride with him as a passenger, his privacy rights in the area occupied by Gordon might be diminished, as in the case of every other passenger (parolee or otherwise), he nevertheless did not abdicate all expectations of privacy in other areas of his car not immediately accessible to his parolee-passenger.

Respondent contends that, by failing to acknowledge that a passenger may own or possess items in someone else's vehicle, the Court of Appeal contradicted well-established law regarding joint possession. (OBM 37-38.) In this regard, respondent erroneously conflates potential or hypothetical access with common authority or joint control to be determined by the facts or circumstances of each

case. Under the facts of the present case, there could be no reasonable suspicion that front seat passenger Gordon exercised common authority or joint control over the entire passenger compartment, including the items in the back seat of the vehicle -- the female purse, the shoes, and chips bag -- located beyond the immediate area where Gordon was sitting and as to which he had no apparent connection. Indeed, by virtue of their very nature and location, the items in the back seat (purse, shoes, and chips bag) were either obviously feminine or sufficiently associated with the female passenger to dispel any notion of common authority or joint control with front seat passenger Gordon. (See *People v. Boyd, supra,* 224 Cal.App.3d at p. 750 [reasonable-suspicion standard used to determine whether particular object within scope of parole search].)

In *Boyd*, police officers searched a one-room trailer of a parolee who was subject to a search condition. While searching the trailer, the officers noticed articles of female clothing on the floor. They then discovered a brown leather bag described as gender-neutral in appearance. The bag was found on the bed shared by the parolee and defendant Boyd, the parolee's girlfriend. A search of the bag revealed a quantity of drugs. The officers asked Boyd if the purse belonged to her, and she replied affirmatively. (*Id.* at pp. 739-740.)

On appeal, Boyd argued the search of her purse was outside the scope of the parole consent, as the purse was obviously a feminine object and, therefore, not reasonably under either the joint or exclusive control of the parolee. The *Boyd* court disagreed, concluding it was reasonable for the officers to assume the parolee

had either joint or exclusive control over the purse which was gender-neutral in appearance. The court also held the officers had no obligation to ask defendant if the purse was hers prior to searching it: "[T]he critical issue is whether the officers reasonably suspected the handbag was owned or controlled by a parolee. If so, it was within the scope of the parole search. The appearance of the object searched is but one of many factors to consider in assessing whether the reasonable suspicion standard was satisfied." (*People v. Boyd, supra*, 224 Cal.App.3d at pp. 745-746, 749-750.)

Here, there was no evidence that the passenger compartment of appellant's car in its entirety was jointly controlled by parolee Gordon or under common authority. Moreover, it was not reasonable for Deputy Mihai to believe that the personal items in the back seat were owned or controlled in any manner by parolee Gordon. A purse is not generally an object for which two or more persons share common use or authority. (See *People v. James* (1994, Ill.) 645 N.E.2d 195, 203].) The female purse in the back seat of appellant's car obviously belonged to the back seat, female passenger -- not Gordon -- and there was no reasonable basis for Deputy Mihai to believe otherwise. The other two items -- shoes and chips bag -- were also found beyond the area of parolee Gordon's immediate reach, access, or control and had no apparent connection to or with him. In light of the record in this case, those items lacked any indicia of common authority or joint control so as to justify otherwise their examination as a parole search. (See *Illinois v. Rodriguez, supra*, 497 U.S. at pp. 188-189 [facts available to officer must give rise to

reasonable belief that consenting party has authority over premises to be searched; if not, warrantless entry without further inquiry is unlawful unless authority actually exists; burden rests on state]; *People v. Alders* (1978) 87 Cal.App.3d 313, 317-318 [police exceeded permissible scope of valid probation search when they searched distinctly female coat with no reason to suppose that it was jointly shared by the male probationer and his female cotenant].)

In *People v. Veronica* (1980) 107 Cal.App.3d 906, a search was conducted of a male parolee's house while he was away. The parolee's wife admitted the parole agents into the home. Contraband was seized from a purse hanging on the rear of the bedroom door. The purse was a brown leather purse with designs on it. It appeared to be a purse that a female would wear.

On appeal from the husband's conviction, the court in *Veronica* held the evidence seized from the purse should have been suppressed because the purse "was clearly the property of Mrs. Veronica." (*People v. Veronica, supra,* 107 Cal.App.3d at p. 908) The purse was "distinctly female," and there was nothing to indicate it was jointly shared by the defendant and his wife. The court, however, left open the possible validity of a search of such an item if jointly controlled: "We do not, of course, suggest that simply because a garment or container is clearly designed for a person other than the parolee, it may never be searched . . . . The particular circumstances may indicate that the object is, in fact, one of the parolee's own effects or, at least, jointly possessed by him and another. In this case, however, there was simply nothing to overcome the obvious presumption that the

purse was hers, not his." (*Id.* at p. 909.)

Here, respondent contends that to effectuate the state's interest in monitoring and regulating parolees, law enforcement officers "must be able to search the parolee and his property." (OBM 22.) Respondent offers that the parolee should not be permitted "to frustrate the state's ability to regulate his reentrance into society by taking refuge in a nonparolee's car." (OBM 22.) The Court of Appeal correctly explained that the precise issue in this case is not whether the search violated parolee Gordon's expectation of privacy, but whether it violated appellant's, the owner and driver of the car. (Slip Opinion at p. 7.)

Respondent makes the illogical leap that a general search of appellant's vehicle was permissible because the back seat was accessible to parolee Gordon. Here, too, respondent misdirects the focus of the Fourth Amendment issue raised in this case. The Court of Appeal rejected respondent's categorical approach by properly examining the question of common authority and joint access, not simply accessibility. (See Slip Opinion at p. 10.)

While those who associate with parolees may assume the risk that when they share ownership or possession with a parolee their privacy might be violated, they do not abdicate all expectations of privacy over or in all property. The key question remains: whether there is joint ownership, control, or possession with the parolee over the area searched. (See *People v. Robles, supra,* 23 Cal.4th at p. 798; *People v. Woods, supra*, 21 Cal.4th at p. 682; *People v. Smith* (2002) 95 Cal.App.4th 912, 918; *People v. Veronica, supra,* 107 Cal.App.3d at p. 909.)

The conclusion that front seat passenger Gordon could not reasonably have had joint ownership, control, or possession over the passenger compartment, generally, or the back-seat area of appellant's car, or specific, closed items located in the back seat, is fully consistent with that reached in other California cases, (see *People v. Boyd, supra*, 224 Cal.App.3d at p. 750 [reasonable-suspicion standard used to determine whether particular object within scope of parole search]; *People v. Baker, supra*, 164 Cal.App.4th at 1159-1160 [there could be no reasonable suspicion that female purse in back seat belonged to male driver; that driver exercised control or possession of purse; or that the purse contained anything belonging to the driver; nothing to overcome obvious presumption that purse belonged to sole female occupant of vehicle who was not subject to a parole-condition search]; *People v. Alders, supra,* 87 Cal.App.3d 313), and those from other jurisdictions deciding the same or similar issue (see, e.g., *State v. Williams* (1980) 48 Ore.App. 293, 616 P.2d 1178, 1180 [vehicle owner's consent to search of vehicle held not reasonably construed as permission for search of closed and latched stereo cassette tape case belonging to passenger]; *State v. Zachodni* (S.D. 1991) 466 N.W.2d 624, 628-629 [driver's consent to search of vehicle not reasonably construed as permission to search wife's purse, who was passenger in vehicle]; *State v. Caniglia* (1993) 1 Neb.Ct.App. 730, 510 N.W.2d 372, 374 [evidence suppressed because passenger's makeup purse not item that police could reasonably believe belonged to male driver or which male driver would possess sufficient relationship to or common authority over]).

Officer Mihai's parole search was obviously limited in scope (*People v. Smith, supra,* 95 Cal.App.4th 912 [search of common areas "LIMITED IN SCOPE" (capitalization in original)] and limited by the terms of its authorization. (*Walter v. United States* (1980) 447 U.S. 649, 656 [100 S.Ct.2395, 65 L.Ed.2d 410].) Under other circumstances, the United States Supreme Court held in *Chimel v. California* (1969) 395 U.S. 752 [89 S.Ct. 2034, 23 L.Ed.2d 685], that police may search incident to an arrest only the space within an arrestee's "immediate control," meaning "the area from within which he might gain possession of a weapon or destructible evidence." (*Id.* at p. 763.)

Respondent further asserts that the search in this case was reasonable based on society's overwhelming interest in supervising individuals who were, and likely remain, a threat to society. (OBM 30.) Respondent's argument should be rejected for the following reasons.

Neither the United States Supreme Court nor this Court has ever sanctioned or approved a suspicionless search of a home or vehicle for a crime enforcement purpose. To do so here would represent a substantial incursion into previously inviolate constitutional territory. Respondent seriously undervalues appellant's privacy interest at stake. Although a motorist's privacy interest in his vehicle may be less substantial than in his home (see *New York v. Class* (1986) 475 U.S. 106, 112-113 [106 S.Ct. 960, 89 L.Ed.2d 81], the former interest is nevertheless important and deserving of constitutional protection. (See *Knowles v. Iowa* (1998) 525 U.S. 113, 117 [119 S.Ct. 484, 142 L.Ed.2d 492].)

Respondent contends that the Court of Appeal's decision erroneously focused on consent. (OBM 40-45.) Respondent ignores that parole searches have repeatedly been evaluated under the rules governing consent. (See *People v. Woods, supra,* 21 Cal.4th at p. 681; see also *People v. Bravo, supra.* 43 Cal.3d at p. 605.) "A consensual search may not legally exceed the scope of the consent supporting it. [Citation.] Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of circumstances." (*People v. Crenshaw, supra,* 9 Cal.App.4th at p. 1408.) Here, Officer Mihai's parole search was obviously limited both in scope (*People v. Smith, supra,* 95 Cal.App.4th 912) and by the terms of its authorization (*Walter v. United States, supra,* 447 U.S. at p. 656 [100 S.Ct.2395, 65 L.Ed.2d 410]).

Necessarily, questions of consent, scope of consent, and authority to consent arise in the context of parole searches where the Fourth Amendment rights of third parties, such as appellant in this case, are implicated. These issues necessarily develop in situations involving (1) the Fourth Amendment rights of third parties in conjunction with those of parolees, and (2) the intersection of the Fourth Amendment rights of third parties, such as appellant, who may not ordinarily be searched without probable cause, and those of parolees who are subject to search without similar constitutional constraints. In these cases, analytical concepts and tools -- including consent, scope of consent, and authority to consent -- become most pertinent, if not essential, in resolving the issues involved. (See, for example, *People v. Rivera, supra,* 41 Cal.4th at pp. 304, 311 & fn 1 [where Court evaluated

encounter between police and homeowner in terms of consent to search; discussing that warrantless search may be based on consent of a person, other than the accused, who may have control over the area searched]; *People v. Baker, supra,* 164 Cal.App.4th at pp. 1158-1159 [whether consent by parolee driver, given in advance as a condition of his parole, reached purse of passenger in parolee's car; no reasonable basis for officer to believe that purse of female passenger belonged to parolee driver, that driver exercised control or possession of purse in car, or that purse contained anything belonging to parolee]; *People v. Boyd, supra,* 224 Cal.App.3d 736, [reasonable-suspicion standard used to determine whether particular object within scope of parole search]; *People v. Gomez* (2005) 130 Cal.App.4th 1008, 1014 [whether officer's search exceeded scope of search waiver].)

Under the facts of this case, appellant at all relevant times was both in possession and control of his vehicle. There was no evidence that parolee Gordon gained or exercised any apparent authority or joint control over the vehicle which might have given Deputy Mihai the reasonable impression he had the right to permit its general inspection. Consequently, other than the area under Gordon's immediate access and control, Mihai could not search the entire passenger compartment based on Gordon's parole status.

Respondent contends that the Court of Appeal crafted an impermissible bright-line rule and ignored the totality of the circumstances, effecting giving greater protection to a vehicle than a home. (OBM 30-37.) Contrary to

respondent's assertions, the Court of Appeal's opinion in this case is entirely consistent with prior state and federal Fourth Amendment decisions on parolee-probationer searches discussed herein which invariably recognize, above-all, that the evidence and factual circumstances of each case must be examined to determine the propriety of the search and seizure at issue under the Fourth Amendment. (See Slip Opinion at pp. 10-12.)

Under the high court's general Fourth Amendment approach, courts must examine the totality of the circumstances to evaluate whether a particular warrantless search was reasonable. (*United States v. Knights* (2001) 534 U.S. 112, 118 [122 S.Ct. 587, 151 L.Ed.2d 497].) Here, the Court of Appeal in its opinion properly examined the totality of the circumstances in this case and carefully balanced the needs of law enforcement to supervise those who have consented to parole searches with the reasonable expectations of privacy expectations of vehicle owners or drivers, such as appellant. (See Slip Opinion at pp. 10-12.) No bright-line was intended or drawn by the Court of Appeal.

Nor does the Court of Appeal's opinion grant greater privacy expectations to a vehicle than a home as respondent asserts. (OBM 34.) Once again, respondent mischaracterizes the issue as one of accessibility. (OBM 34-35.) When conducting a search pursuant to a parole or probation search clause, police officers generally may only search those portions of the residence they reasonably believe the probationer has complete or joint control over. (*People v. Woods, supra*, 21 Cal.4th at p. 682.) Stated differently, a parole or probation search falls within permissible

bounds if the police reasonably suspect that an area to be searched is jointly controlled by the parolee or probationer. Officers wishing to search a room under the sole control of a nonparolee or nonprobationer must obtain a search warrant unless the circumstances justify a warrantless search (e.g., exigent circumstances). (*People v. Woods, supra*, 21 Cal.4th at p. 682; *People v. Boyd, supra*, 224 Cal.App.3d at p. 749 [addressing parole search]; *People v. Sanders* (2003) 31 Cal.4th 318, 330 [the expectation of privacy of cohabitants is the same whether the search condition is a condition of probation or parole].) Contrary to respondent's misinterpretations, the Court of Appeal here did not adopt a different rule as to vehicles or confer greater privacy expectations to a vehicle than a home. Rather, the Court of Appeal applied the same "common authority" standards involving the search of shared residential premises to the present situation involving the search of a car based on parolee status. (See Slip Opinion at pp. 9-10.)

A rule, as advocated by respondent, that gives police the power to conduct a general search of a vehicle, including closed containers and all personal items, whenever a parolee happens to be riding as a passenger, and when there is no basis for believing evidence of an offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment -- the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." (*Arizona v. Grant* (2009) 556 U.S. __ [129 S.Ct. 1710, 1720, 173 L.Ed.2d 485].)

Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio, supra,* 392 U.S. at p.19 [88 S. Ct. 1868, 20 L.Ed.2d 889] recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. (See also *Adams v. Williams* (1972) 407 U.S. 143, 146 [92 S.Ct. 1921, 32 L.Ed.2d 612]; *Delaware v. Prouse* (1979) 440 U.S. 648, 662-63 [99 S.Ct. 1391, 59 L.Ed.2d 660].)

"Whether a search is reasonable is determined 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." (*Samson v. California* (2006)547 U.S. 843, 848 [126 S.Ct. 2193, 165 L.Ed.2d 250,].) Here, since a parole search by definition is limited in scope, it is not unreasonable to limit the parole search to the same area, for example, defined by the United States Supreme Court in *Chimel.* (See *Chimel v. California, supra,* 395 U.S. at pp. 762-763 [89 S.Ct. 2034, 23 L.Ed.2d 685].) Under the circum-

stances of this case, the state had no legitimate interest in the warrantless search of appellant's vehicle beyond the area of parolee Gordon's immediate access and control. Considering the totality of the circumstances, Deputy Mihai had no reasonable basis for concluding that the parole search condition as to front seat parolee-passenger Gordon authorized and extended to the trunk of appellant's car, to the back seat area, or to the contents of the back seat passenger's purse or other items that were not under parolee Gordon's common authority or joint control. Considering the totality of the circumstances, the search of the trunk and entire back seat passenger compartment of appellant's car was not reasonable. Hence, the judgment of the Court of Appeal should be affirmed.

CONCLUSION

By reason of the foregoing, appellant Douglas G. Schmitz respectfully requests that the judgment of the Court of Appeal be affirmed.

DATED: June 10, 2011.

Respectfully submitted,

WILLIAM D. FARBER
Attorney at Law

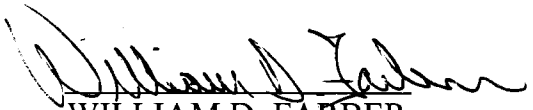
Attorney for Appellant Schmitz

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Answer Brief on the Merits uses a 13-point Times New Roman font and contains 7,911 words.

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

DATED: June 10, 2011.



WILLIAM D. FARBER

PROOF OF SERVICE

People v. Douglas G. Schmitz
Case No.: S186707

I, William D. Farber, declare under penalty of perjury under the laws of the State of California that I am counsel of record for defendant and appellant Douglas George Schmitz in this case, and further that my business address is William D. Farber, Attorney at Law, 369-B Third Street # 164, San Rafael, CA 94901. On June 10, 2011, I served the within **APPELLANT'S ANSWER BRIEF ON THE MERITS** by depositing copies each in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at Henderson, NV, addressed respectively as follows:

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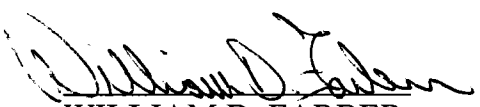

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