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

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
EMILY R. HANKS
Deputy Attorney General
State Bar No. 230442
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3196
Fax: (619) 645-2191
Email: Emily.Hanks@doj.ca.gov
Attorneys for Plaintiff and Respondent

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ISSUE PRESENTED

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

As explained in respondent's opening brief, when determining the constitutionality of a warrantless parole search, this Court must consider the totality of the circumstances, weighing privacy expectations against the state's interest in performing the search. In this case, appellant's privacy expectations were significantly reduced. The deputy searched the passenger compartment of appellant's vehicle, which was located in public, and which was shared with a parolee subject to warrantless, suspicionless searches. In contrast to the diminished expectation of privacy, the state's interest in performing parole searches is overwhelming. The warrantless, suspicionless search condition is critical to the state's ability to effectively monitor parolees, ensure their reintegration into society, and protect the public. Balancing the diminished privacy expectations implicated by the search in this case with the state's powerful need to supervise those released from prison early, a search of the shared areas of the vehicle—the areas that reasonably appear subject to the parolee's joint access or control—was reasonable.

The Court of Appeal below failed to conduct this totality of the circumstances inquiry, instead focusing exclusively on the parolee passenger's legal ability to consent to a search of the nonparolee driver's car. Without any support in the record, the court found a nonowner passenger has no right to touch anything in a vehicle. Without any constitutional justification, the court crafted a bright-line rule limiting a

parole search of a shared passenger compartment to the actual seat occupied by the parolee and no further.

In his answer brief, appellant does not advocate the same bright-line rule announced by the Court of Appeal. Appellant acknowledges that this Court must balance the privacy rights of the individuals at stake with the state's interest in performing the search. However, appellant misapplies the totality of the circumstances test. He fails to account for the significantly reduced privacy expectations he held in a vehicle, located in public, and shared with a parolee subject to a search condition. His argument also fails to give due weight to the state's overwhelming interest in regulating parolees.

Appellant recognizes it is legitimate for the state to search areas of the passenger compartment of the car subject to the parolee's joint access or control, but asks this Court to adopt the immediacy requirement of the search incident to arrest doctrine. But appellant provides no legal justification for importing the limitations of the search incident to arrest doctrine into a *parole* search. Searches conducted pursuant to an exception to the warrant requirement are limited in scope by the constitutional justification for the exception at issue. Searches are not limited in scope, however, by the constitutional justification for entirely unrelated exceptions to the warrant requirement. Appellant provides no reason for incorporating the restrictions of the search incident to arrest doctrine into a search that did not fall under that exception.

Finally, appellant's application of the law to the facts of this case is erroneous. Appellant mischaracterizes the factual record below. He misrepresents the testimony regarding the areas of the vehicle searched. These unsupported factual arguments should not be considered by this Court.

ARGUMENT

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

Balancing appellant's reduced expectation of privacy with the state's overwhelming interest in monitoring and regulating parolees, a search of the passenger compartment that reasonably appeared subject to the parolee's joint access or control was proper under the Fourth Amendment. Although appellant purports to conduct this balancing test in his answer brief, he overvalues the privacy interests at stake and gives no weight to the state's interests. His argument relies on inapplicable legal doctrine and misstatements of the factual record.

A. This Court Must Balance the State's Overwhelming Interest in Conducting Parole Searches with Appellant's Reduced Privacy Expectations in a Vehicle He Shared with a Parolee

Appellant acknowledges that the United States Supreme Court has found parole and probation searches are constitutionally justified under a totality of the circumstances balancing test. (AABM[1] 18, 27, 29.) Pursuant to the United States Supreme Court's decisions in *United States v. Knights* (2001) 534 U.S. 112, [122 S.Ct. 587, 151 L.Ed.2d 497] (*Knights*), and *Samson v. California* (2006) 547 U.S. 843 [126 S.Ct. 2193, 165 L.Ed.2d 250] (*Samson*), in evaluating the constitutionality of a parole or probation search, 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 interest."

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[1] "AABM" refers to Appellant Answer Brief on the Merits.

(*Knights*, *supra*, 534 U.S. at pp. 118-119; *Samson*, *supra*, 547 U.S. at p. 848.) Although appellant recognizes the need to conduct such a balancing test, his application of the balancing test is erroneous. Appellant fails to reduce his own privacy expectations and fails to give due weight to the state's interests.

1. Appellant Had a Significantly Reduced Expectation of Privacy in the Passenger Compartment of His Car Shared with the Parolee

Appellant was subject to a reduced expectation of privacy because the area searched was in a vehicle located on a public street and was shared with Quenton Gordon, a parolee subject to suspicionless searches. Although appellant purports to acknowledge that cars are subject to reduced privacy expectations (AABM 24), his argument fails to take this reduced expectation into account. Appellant asks this Court to take into account the role of automobiles as an essential mode of transportation. (AABM 29.) But the fact that automobiles are used for travel is one of the precise reasons vehicles are subject to reduced privacy expectations. "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." (*South Dakota v. Opperman* (1976) 428 U.S. 364, 368 [96 S.Ct. 3092, 49 L.Ed.2d 1000].) Courts have traditionally found a lower expectation of privacy in vehicles because of, among other factors: (1) the inherent mobility of cars; (2) the "pervasive and continuing governmental regulation" of cars; and (3) the "obviously public nature of automobile travel." (*Id.* at pp. 367-369; *Wyoming v. Houghton* (1999) 526 U.S. 295, 303 [119 S.Ct. 1297, 143 L.Ed.2d 408] [finding passenger also have lessened expectation of privacy in car].) For that reason, Fourth Amendment jurisprudence recognizes exceptions to the warrant requirement that apply only to vehicles or apply differently to vehicles.

(See, e.g., *Arizona v. Gant* (2009) 556 U.S. 332 [129 S.Ct. 1710, 1719, 1721, 173 L.Ed.2d 485] (*Gant*) [collecting cases].)

Appellant also purports to acknowledge that the presence of a parolee in his vehicle subjected him to a reduced expectation of privacy. (AABM 18, 22.) But again, he fails to account for his reduction in privacy expectations when weighing his interests against those of the state. He asks this Court to find his privacy expectations in the passenger compartment of his shared vehicle were not diminished. This argument should be rejected. Courts have repeatedly held that one is subject to a reduced expectation of privacy in the areas shared with a parolee or probationer subject to search conditions. (*People v. Sanders* (2003) 31 Cal.4th 318, 330 (*Sanders*); *People v. Robles* (2000) 23 Cal.4th 789, 799 (*Robles*); *People v. Pleasant* (2004) 123 Cal.App.4th 194, 197; *People v. Boyd* (1990) 224 Cal.App.3d 736, 749; *People v. Triche* (1957) 148 Cal.App.2d 198, 203; *Russi v. Superior Court* (1973) 33 Cal.App.3d 160, 168.)

Appellant was subject to significantly diminished expectations of privacy in the passenger compartment of his vehicle that he shared with a parolee subject to a search condition.

2. The State Has an Overwhelming Interest in Performing Warrantless Parole Searches

In addition to failing to take account of his severely reduced privacy expectations, appellant's argument also fails to give due weight to the state's interest in performing the parole search conducted here. He contends that the state's interest in monitoring, regulating, and reintroducing those released from prison early should not be considered because appellant was not a parolee. Discounting the state's interest in monitoring parolees, he claims "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." (AABM 22.) This argument is erroneous. The law is clear that the scope of a search is confined in area and duration by the terms of a warrant or exception to the warrant requirement—here the parole search exception to the warrant requirement. (See *People v. Woods* (1999) 21 Cal.4th 668, 680 (*Woods*).) If, in the course of such a search, an officer discovers evidence implicating another individual, that discovery does not change the constitutionality of the search or the constitutional justification for the search. (*Id.* at pp. 680-681.)

For example, in *Woods*, officers searched a residence shared between a probationer subject to search terms and the defendant, a nonprobationer. The officers conducted the search in order to find evidence implicating the nonprobationer defendant. This Court found the search justified under the probation search exception despite the fact that the defendant was not the probationer whose status justified the search in the first instance and despite the fact that the purpose of the search was to discover evidence about the nonprobationer. (*Woods*, *supra*, 21 Cal.4th at pp. 681-682.) Similarly, the search in this case was conducted pursuant to the parole search exception to the warrant requirement and appellant's status as a nonparolee does not alter that fact or alter the state's interest in performing the search.

Appellant cannot avoid the state's "overwhelming interest" (*Samson*, *supra*, 547 U.S. at p. 853) in performing parolee searches simply because he was not on parole. As he concedes, Deputy Mihaela Mihai, the deputy performing the search, was aware that Gordon was on parole and searched the passenger compartment of the vehicle pursuant to Gordon's search conditions. (Supp. CT 9.) In balancing appellant's privacy expectations with the state's interest in performing the search in question here, this Court must consider the state's powerful interests in reducing recidivism,

promoting reintegration of former prisoners into society, and protecting the public from those who were and likely remain a threat. (See *Samson*, *supra*, at pp. 853-854.)

If this Court were required to set aside the state's interest in regulating parolees in determining the constitutionality of a parole search of a shared vehicle, a parolee would be permitted to end-run his or her search terms simply by riding as a passenger in a nonparolee's vehicle. Although the parolee would have the entire open passenger compartment available to hide contraband or dangerous weapons, officers would be unable to search this area, allowing parolees to stash their items within arm's reach without any repercussions. In effect, appellant's analysis would allow parolees to appropriate the normal privacy expectations of nonparolees. Contrary to appellant's argument, this Court must consider the state's powerful interest in monitoring and regulating parolees.

B. Based on the Totality of the Circumstances Balancing Test, a Parole Search of a Vehicle May Include Those Areas Reasonably Subject to the Parolee's Access or Control, Including the Passenger Compartment of the Vehicle

Balancing appellant's reduced expectations of privacy with the state's overwhelming interests in supervising parolees, the search of the areas of the passenger compartment reasonably subject to the parolee's joint access or control was proper. In his answer brief, appellant argues that a proper application of the above balancing test would allow a parole search of those areas of the car subject to the parolee's "immediate" access or control. (AABM 8, 15-16, 26.) This argument breaks with the decision of the Court of Appeal, which held that a passenger could not access or control objects located within someone else's car. Although respondent agrees that the area reasonably subject to the parolee's access or control is

properly included within a parole search of a shared vehicle, appellant's attempt to impose the immediacy requirement of the search incident to arrest doctrine here is unfounded.

Appellant's argument differs from that of the Court of Appeal. The Court of Appeal held that appellant "gave up none of his own expectation of privacy." (Slip opn. at p. 11.) The court found a parole search based on the passenger's status must be limited to the actual seat occupied by the parolee and no further. The court found that as a front seat passenger, the parolee in this case had no right to touch anything in the remainder of the car. Because the parolee was a nonowner and nondriver, the court concluded the parolee could not consent to the search and thus his parole status could not justify the search. (Slip opn. at pp. 10-11.) Respondent argued in its opening brief that this analysis was flawed because it failed to conduct the totality of the circumstances balancing test, broke with case law allowing a search of shared residential spaces, contradicted well-established law regarding joint possession, led to absurd results, and erroneously considered a parolee search to be constitutionally equal to a consent search.

Appellant does not ask this Court to create the same bright-line rule adopted by the Court of Appeal. Instead, he asks this Court to find a parole search based on a passenger's parole status is limited to the areas "immediately accessible to parolee" or "under his immediate access or control." He concedes that he did not have a reasonable expectation of privacy in these areas. (AABM 15, 16, 26.)

Appellant appears to adopt the term "immediate" from the United States Supreme Court's decision in *Chimel v. California* (1969) 395 U.S. 752, [89 S.Ct. 2034, 23 L.Ed.2d 685] (*Chimel*), regarding the scope of a search incident to arrest. (AABM 24.) A search incident to arrest is limited in scope to the area under the arrestee's "immediate control." (*Chimel*, *supra*, at p. 763.) In that context, "immediate control" is defined as "the

area from within which [the arrestee] might gain possession of a weapon or destructible evidence." (*Chimel*, *supra*, 395 U.S. at p. 763.) In *Gant*, the United States Supreme Court recently clarified that the area searched must fall within the arrestee's reachable space at the time the search is conducted. (*Gant*, *supra*, 129 S.Ct. at p. 1719.)

Appellant fails to provide a justification for adopting the search incident to arrest doctrine here. *Gant* held that the scope of a search based on an exception to the warrant requirement must be tethered to the constitutional justifications underlying that exception. (*Gant*, *supra*, 129 S.Ct. at p. 1719.) The search incident to arrest doctrine has a different constitutional justification than a parole search and thus different limitations and restrictions. (See *id.* at p. 1716 [search incident to arrest doctrine derives from interests in officer safety and preserving evidence of the offense of arrest that the arrestee might conceal or destroy].) Appellant does not explain why the immediacy requirement of a search incident to arrest should be adopted into the parole search context. In fact, courts have never required that the parolee or probationer be physically present when a parole or probation search is conducted. (See *People v. Byrd* (1974) 38 Cal.App.3d 941, 949; *People v. Veronica* (1980) 107 Cal.App.3d 906, 910.) Appellant's attempt to superimpose restrictions from unrelated constitutional doctrine should be rejected.

Rather than rely on disparate constitutional doctrine, this Court should look to the wealth of cases discussing the scope of parole search of shared spaces. In the context of a parole or probation search of a shared residence, courts have repeatedly allowed the parole or probation search to included common, shared areas. (See *Woods*, *supra*, 21 Cal.4th at p. 676 [single shared bedroom]; *Robles*, *supra*, 23 Cal.4th at p. 798 [attached garage].) Areas subject to the nonparolee/nonprobationer's "exclusive access or control" are excluded from the search, unless there is reason to

believe the parolee or probationer has authority over those areas. (*Robles*, *supra*, 23 Cal.4th at p. 798.) Courts use a reasonableness standard to determine which areas and which objects within those areas fall within that permissible zone. (See *Woods*, *supra*, 21 Cal.4th at p. 682; *People v. Smith* (2002) 95 Cal.App.4th 912, 918-919; *People v. Boyd*, *supra*, 224 Cal.App.3d at pp. 745-746.)

Appellant's and the Court of Appeal's attempt to limit the search of a shared vehicle to the seat occupied by the parolee ignores this reasonableness standard. In the context of a shared vehicle, it is reasonable to believe that the individuals jointly occupying the passenger compartment are jointly using that passenger compartment. Seats within a car are not like private bedrooms. They are not walled-off from the remainder of the car. They are not used exclusively or even primarily by one individual. They are not used to store private items. The passenger compartment of a car is open and its occupants are all free to access and store items in that open space. Indeed, it is for this reason courts have long found sufficient evidence to support convictions based on joint possession of contraband found throughout the passenger compartment. (See *People v. Evans* (1973) 34 Cal.App.3d 175, 182-183; *People v. Vermouth* (1971) 20 Cal.App.3d 746, 755.) Rather than a rule limiting a parole search to the actual seat occupied by the parolee, this Court should find the entire area that reasonably appears subject to the parolee's joint access or control within the proper scope of a parole search.

C. Appellant's Back Seat Area Was Reasonably Accessible to the Front Seat Parolee

Here, the open back passenger seat area appeared reasonably subject to the front passenger seat parolee's joint access or control. Appellant contends the search conducted in this case extended beyond the allowable

scope because the only area that could be accessible to Gordon was the front seat he occupied. (AABM 14-15.) However, the accessibility of the area searched to the parolee passenger was a factual issue impliedly determined by the trial court. The reviewing court must defer to the trial court's factual findings. Furthermore, appellant's analysis is based on a mischaracterization of the factual record below.

The determination of whether a parolee had access or control over a particular area is a question of fact for the trial court to resolve. (*Woods*, *supra*, 21 Cal.4th at p. 673.) As the fact finder in a motion to suppress evidence, the trial court "is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable." (*Ibid.*) This Court must defer to the superior court's express or implied factual findings that are supported by substantial evidence. (*Ibid.*) A reviewing court is required to 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." (*Ibid.*)

Appellant's argument not only fails to take into account the necessary deference to the trial court's implied factual findings, his argument affirmatively mischaracterizes the factual record below. Appellant asserts that the chip bag and shoes were "found beyond the area of parolee Gordon's immediate reach, access or control." (AABM 20.) This assertion is made without citation to any portion of the record. In fact, nothing in the record indicates that the chip bag and shoes were outside of the parolee's reach. The parolee was seated in the front passenger seat and the chip bag and shoes were found in the back seat area. (Supp. CT 9-10.) The vehicle was a normal older model Buick or Oldsmobile. (Supp. CT 8.) There is nothing supporting appellant's contention that the contraband was

found outside of the parolee's reach. Simply because the contraband was not directly next to Gordon's seat does not mean it was outside his access or control. Nothing prevented Gordon from reaching behind him.

Appellant also repeatedly contends, without citation to the record, that the trunk of the vehicle was searched. (AABM 5, 7-8, 14, 30.) Nowhere in the record does it state that officers searched the trunk of appellant's car. The purse, chip bag, and shoe were located in the back seat area of the car—not the trunk. (Supp. CT 9-10.) The Court of Appeal's decision did not once refer to a trunk search. Appellant's attempt to expand the scope of the search to include the trunk is unsupported by the record and should not be considered by this Court.

Appellant's argument focuses considerably on the fact that Deputy Mihai testified she searched a black purse also found in the back seat area of the car. (AABM 20-22.) Deputy Mihai stated the purse appeared feminine in character. (Supp. CT 10.) Appellant contends the deputy should not have searched the purse because Brenda Turner, one of the back seat passengers, was the only female in the car and thus the purse obviously belonged to her. But the propriety of the purse search is not before this Court. There was no fruit from the purse search. Deputy Mihai did not find any contraband in the purse. The only item recovered in the purse was a syringe *cap*. (Supp. CT 9.) Appellant did not list this item on the list of evidence he moved to suppress. (CT 43.)

Appellant attempts to liken the chip bag and shoes to the purse, claiming each of these items constituted "closed containers" that could only be associated with the back seat passengers, here Turner and her baby. (AABM 8, 19, 23.) But there is nothing in the record indicating the shoes or chip bag were associated with only Turner or the baby. Deputy Mihai testified she did not recall whether the shoes were women's or men's shoes. (Supp. CT 10.) And it is hard to image that a bag of chips could be

associated with only one gender. Unlike a purse, shoes and chip bags are not a common item for holding personal items. Also unlike a purse, a bag of chips and a shoe are not "closed containers." Nothing in the record indicates the passenger compartment of the car, including the back seat area containing the chip bag and shoe, was under the exclusive use of the nonparolee occupants of the car.

The record below shows the contraband was located in the open back seat area of the passenger compartment of appellant's car that he was sharing with a parolee. It was reasonable to believe the bag of chips and shoe were subject to the parolee's joint access or control. The trial court here properly concluded that the search of appellant's car was constitutional.

D. A Parole Search is Not the Constitutional Equivalent of a Consent Search

After acknowledging that a proper balancing test leads to the conclusion that the "immediately accessible" portions of the vehicle are subject to search, appellant then contradicts his own argument when attempting to defend the opinion of the Court of Appeal. (AABM 22-29.) Although appellant asks this Court to adopt a standard of immediate accessibility, in defending the Court of Appeal opinion he states that accessibility is not relevant and the court should apply the "common authority" consent doctrine. (AABM 27-28.) Not only does appellant's argument contradict itself, it repeats the error of the Court of Appeal. A parole search is constitutionally distinct from a consent search and a strict application of consent principles in this case is legally erroneous.

A parole search is not constitutionally justified based exclusively on advanced consent by the parolee. The United States Supreme Court has found parole searches constitutional under the Fourth Amendment totality

of the circumstances balancing test, without any need to consider consent principles. (*Samson*, *supra*, 547 U.S. at pp. 848; *Knights*, *supra*, 534 U.S. at pp. 118-119; see also *People v. Reyes* (1998) 19 Cal.4th 743, 752.) Parole 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* (2008) 164 Cal.App.4th 1152, 1158.) Unlike a simple consent search, society has an "overwhelming interest" at stake in a parole search—the need to regulate parolees, ensure parolees reintegration into the community, guard against recidivism, and protect the public. (*Samson*, *supra*, at p. 853.) And unlike a simple consent search, a party to a parole search is an individual who is technically still in the custody of the department of corrections and subject to pervasive government regulation. (*Id.* at pp. 851-852.) Applying consent law in this case ignores these significant factors in the balancing of privacy rights and government interests. Appellant's passenger's status as a parolee is central to the totality of the circumstances analysis and both the Court of Appeal and appellant err by casting aside this critical circumstance.

The scope of a search conducted pursuant to an exception to the warrant requirement must be tethered to the constitutional justification underlying that exception. (*Gant*, *supra*, 129 S.Ct. at p. 1719.) Because the constitutional justifications for a parole search are not the same as a consent search, appellant's attempt to adopt the law of consent is improper. Just as with his attempt to import law related to search incident to arrest, appellant ignores that consent is a constitutionally distinct exception to the warrant requirement, with different justifications and therefore different limitations.

Rather than merely adopt unrelated legal principals, this Court should look to the totality of the circumstances, including appellant's

reduced expectations of privacy in the areas of his vehicle he shared with a parolee and society's overwhelming interests in performing parole searches. Weighing all of these interests, the proper scope of a parole search of a shared vehicle includes those areas that reasonably appear subject to the parolee's joint access or control. Here, the open back seat area of appellant's passenger compartment was shared with a parolee and the deputy properly included this area within the scope of the parole search. The trial court properly denied appellant's motion to suppress.

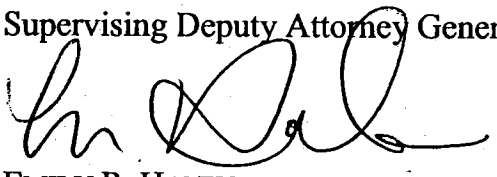
CONCLUSION

For the reasons stated in its opening brief on the merits, and in this reply, respondent respectfully requests this Court reverse the judgment of the Court of Appeal.

Dated: August 3, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



EMILY R. HANKS
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 4,369 words.

Dated: August 3, 2011

KAMALA D. HARRIS
Attorney General of California

EMILY R. HANKS
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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 August 3, 2011, I served the attached **RESPONDENT'S REPLY 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:

William D. Farber
Attorney at Law
369-B Third Street, #164
San Rafael, CA 94901
Attorney for Appellant Schmitz
2 Copies

Alan Carlson
Chief Executive Officer
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

For Delivery to: The Hon. John S. Adams

The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

Fourth Appellate District
Division Three
Court of Appeal of the State of California
Division Three
P.O. Box 22055
Santa Ana, CA 92702

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 August 3, 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 August 3, 2011, at San Diego, California.

N. Hernandez
Declarant

Signature

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