IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Appellant,

v.

BOUHN MAIKHIO,

Respondent/Defendant.

S180289

Court of Appeal No. D055068

San Diego Sup. Ct. App. Div. No CA211304

Superior Court No. M031897

PETITION FOR REVIEW

Appeal From the Superior Court of California,
San Diego County, Case No. M031897
Honorable David Oberholtzer, Judge

JAN I. GOLDSMITH, City Attorney
ANDREW JONES, Assistant City Attorney
MONICA A. TIANA, Deputy City Attorney
California State Bar No. 176713

Office of the San Diego City Attorney
Appellate Unit
1200 Third Avenue, Suite 700
San Diego, California 92101-4103
Telephone: (619) 533-5500

Attorneys for Plaintiff/Appellant

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Appellant, v. BOUHN MAIKHIO, Respondent/Defendant.	Court of Appeal No. D055068 San Diego Sup. Ct. App. Div. No CA211304 Superior Court No. M031897

PETITION FOR REVIEW

Appeal From the Superior Court of California,
San Diego County, Case No. M031897
Honorable David Oberholtzer, Judge

JAN I. GOLDSMITH, City Attorney
ANDREW JONES, Assistant City Attorney
MONICA A. TIANA, Deputy City Attorney
California State Bar No. 176713

Office of the San Diego City Attorney
Appellate Unit
1200 Third Avenue, Suite 700
San Diego, California 92101-4103
Telephone: (619) 533-5500

Attorneys for Plaintiff/Appellant

TOPICAL INDEX

TABLE OF AUTHORITIES

California Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Appellant, v. BOUHN MAIKHIO, Respondent/Defendant.	Court of Appeal No. D055068 San Diego Sup. Ct. App. Div. No CA211304 Superior Court No. M031897

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The California Department of Fish and Game [DFG] is charged with the management and protection of California's fish and wildlife and their habitats, for the benefit of all of California's citizens, through enforcement of the relevant fish and game laws and regulations. One of the most important tools employed by DFG wardens has been their authority under Fish and Game Code sections 1006 and 2012 to stop vehicles and temporarily detain their occupants when those individuals are reasonably believed to be engaged in hunting or fishing. Such stops were conducted to inspect the fish and wildlife caught, examine fishing and hunting licenses, inspect firearms for compliance and conduct administrative inspections of the vehicle when warranted. The DFG has judiciously employed this tool in order to fulfill its important obligation to preserve and protect California's natural resources. However, in a published decision addressing the matter as an issue of first impression, the Fourth District Court of Appeal, Division

One, has determined that, in the absence of reasonable suspicion of criminal conduct, DFG wardens may not conduct vehicle stops, despite a reasonable belief that the occupants have been engaged in the highly-regulated activities of hunting and fishing. The People submit this petition for review because the court of appeal's decision will have a serious and adverse impact on the ability of the DFG to manage and protect California's fish and wildlife, and their habitats.

Therefore, the People of California respectfully petition this Court to grant review, pursuant to Rule 8.500 of the California Rules of Court, of the above-entitled matter, following the issuance of a published opinion on January 5, 2010, by the Court of Appeal, Fourth Appellate District, Division One, affirming the trial court's granting of Respondent's motion to suppress evidence. A copy of the court of appeal's opinion is attached.

ISSUES PRESENTED

1. Do California Fish and Game Code sections 1006[1] and 2012[2] authorize Department of Fish and Game [DFG] wardens to conduct vehicle stops based on a reasonable belief that the vehicle occupant(s) have recently been engaged in fishing or hunting, but without a reasonable suspicion of criminal activity?

2. Does a vehicle stop by a DFG warden, based on a reasonable belief that the occupant(s) have recently been fishing or hunting, but without reasonable suspicion of criminal activity, constitute a reasonable seizure under the Fourth Amendment?

---

[1] All future references are to the Fish and Game Code unless indicated otherwise.

> Section 1006 provides: The department may inspect the following:
> (a) All boats, markets, stores and other buildings, except dwellings, and all receptacles, except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, reptiles, or amphibia may be stored, placed or held for sale or storage.
> (b) All boxes and packages containing birds, mammals, fish, reptiles, or amphibia which are held for transportation by any common carrier.

[2] Section 2012 provides,

> All licenses, tags, and the birds, mammals, fish, reptiles, or amphibians taken or otherwise dealt with under this code, and any device or apparatus designed to be, and capable of being, used to take birds, mammals, fish, reptiles, or amphibians shall be exhibited upon demand to any person authorized by the department to enforce this code or any law relating to the protection and conservation of birds, mammals, fish, reptiles, or amphibians.

STATEMENT OF THE CASE

On the evening of August 19, 2007, DFG Warden Erik Fleet was on Narragansett Street watching the activities on the Ocean Beach Pier through a spotting scope. (Transcription of 1538.5 Motion [T.] at 19, line 9 to page 20, line 2.) The spotting scope was mounted to the window of Fleet's truck. (T. at 19, lines 22-23 and at 7, lines 4-13.)

At about 11:00 p.m., Fleet saw Defendant and Respondent Bouhn Maikhio fishing off the pier with a "hand-line." (T. at 19, line 12 to page 20, line 2.) Fleet knew that hand-lining is an illegal method of catching lobsters that is commonly used on the pier. (T. at 20, lines 1-2.) However, hand-lining is also a legal method of catching fish on the pier. (T. at 23, lines 9-15.) Fleet saw Respondent pull something up on the hand-line and place it in a black bag next to him. (T. at 20, line 17.) Fleet could not see what Respondent had caught nor what he put into the black bag. (T. at 20, lines 16-17.) Respondent then left the pier with his two companions, and drove out of the pier parking lot. (T. at 20, line 22.)

Warden Fleet stopped Respondent within the vicinity of the pier and asked him if he had any fish or lobsters in the car. (T. at 21, lines 15-25.) Respondent said, "no." (T. at 21, line 26.) After seeing a black bag on the rear floorboard of Respondent's car, Fleet searched the bag and found an illegally harvested California spiny lobster. (T. at 22, lines 1-6.) Respondent admitted the lobster was his and apologized, saying he was stupid for doing what he did. (T. at 22, lines 22-23.)

Fleet cited Respondent for possessing a lobster during closed lobster season and for failing to exhibit his catch, violations of California Code of Regulations Title 14, section 29.90(a), and Section 2012, respectively. Fleet released Respondent on his signed promise to appear and returned the lobster to the ocean. (T. at 22, lines 23-25.)

On November 1, 2007, Respondent pled not guilty to the charges. (Engrossed Settled Statement [ESS] at 1, lines 20-21.) On December 14, 2007, the trial court heard Respondent's motion to suppress evidence which was consolidated with two other suppression motions in similar fish and game cases. (ESS at 1, lines 23-25.)

Petitioner appealed the trial court's order granting the suppression motion and the Appellate Division of the Superior Court reversed the trial court's order. (Order, January 27, 2009.) The Appellate Division then granted Respondent's motion for rehearing and again reversed the trial court's order. (Order after Rehearing, April 7, 2009.) In both orders, the Appellate Division found (1) pursuant to Sections 1006 and 2012, Fleet conducted a lawful vehicle stop of Respondent based on a reasonable belief that Respondent was involved in fishing and, (2) that the stop was justified by reasonable suspicion of criminal activity.

Respondent filed an application with the Appellate Division for certification for transfer to the Court Of Appeal, Fourth Appellate District, Division One. On May 5, 2009, the Appellate Division granted the application.

On May 20, 2009, the court of appeal accepted transfer of the case for hearing and decision and requested briefing by the parties on the following issues: "(1) whether Fish and Game Code sections 1006 and 2012 authorize vehicle stops without reasonable suspicion of criminal conduct, and (2) whether the warden in this case had reasonable suspicion to believe Respondent was engaged in illegal lobster fishing."

On October 16, 2009, the court heard oral argument. On January 5, 2010, the court of appeal filed a published opinion with a majority of the court deciding that Sections 1006 and 2012 did not authorize Fleet's

vehicle stop. The majority also found that Fleet's vehicle stop was not a reasonable regulatory or other seizure under the Fourth Amendment and that, unless vehicle stops by DFG wardens are supported by a reasonable suspicion of criminal activity, they are illegal. Lastly, the majority held that Fleet did not have a reasonable suspicion to believe Respondent was engaged in illegal lobster fishing.

REASONS FOR REVIEW

Pursuant to Rule 8.500 of the California Rules of Court, a grant of review is necessary to settle an important issue of law with statewide impact. Review by this Court is required because, in a published decision, a majority of Division One of the Fourth Appellate District wrongly decided that DFG wardens' regulatory powers do not permit them to conduct vehicle stops to ensure that applicable hunting and fishing regulations have been met. Specifically, the majority decided that, even when a warden has a reasonable belief that occupants of a vehicle have recently been engaged in fishing or hunting, a vehicle stop and compliance check may not be conducted unless the warden has reasonable suspicion to believe the occupants have violated the law. The majority held that wardens have neither statutory, nor Constitutional, authority to conduct such vehicle stops. This erroneous decision by the court of appeal has seriously imperiled the state's vital interest in protecting fish and wildlife from depradation.

I

THE MAJORITY'S DECISION SERIOUSLY IMPERILS THE STATE'S ABILITY TO PROTECT FISH AND WILDLIFE IN CALIFORNIA

The DFG has the important job of protecting California's fish, wildlife, and their habitats. *People v. Harbor Hut Restaurant*, 147 Cal.

App. 3d 1151, 1154 (1983); Section 711.7(a). Although the people collectively own the state's wildlife, the DFG acts as trustee for California's citizens. Section 711.7(a); *People v. Perez*, 51 Cal. App. 4th 1168, 1175 (1996). The DFG's main objective is to exercise supervision over the trust in order "to prevent parties from using the trust in a harmful manner." *Harbor Hut Restaurant*, 147 Cal. App. 3d at 1154; *see also National Audubon Society v. Superior Court,* 33 Cal. 3d 419, 437 (1983). Specifically, the DFG's mission is to preserve, conserve, maintain, and protect California's diverse fish, wildlife and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment by the public. Section 1801. Yet another important objective of the DFG is to alleviate any public health or safety problems caused by wildlife. Section 1801.

To assist the DFG with their objective, there are numerous laws and regulations to prevent poaching[3] and other harmful uses of wildlife in California. For example, it is illegal to kill, capture, or possess game, fish or other wildlife except during open season and as provided by the Fish and Game Code and other regulations. Sections 2000, 2001, and 2002. Threatened and endangered species are the subject of even more stringent laws and regulations. Section 2080, *et. seq*.

DFG wardens are peace officers whose authority extends throughout the state. Penal Code section 830.2. However, the DFG, by necessity and in order to achieve their vital objective of protecting fish and wildlife, has also given broad inspection authority to wardens pursuant to Sections 1006 and 2012. Section 1006 gives wardens the authority to inspect designated sites

---

[3] To take game or fish illegally. www.dictionary.reference.com/browse/poaching

and containers where fish or game may be found and Section 2012 authorizes wardens to demand that fisherman or hunters exhibit their licenses, tags, and any fish or game they have caught. This inspection authority is crucial to the warden's ability to enforce the provisions of the Fish and Game Code and other regulations implemented under it. Yet, the erroneous decision by the majority[4] in this case has severely limited the wardens' ability to protect fish and wildlife from poaching in California.

In the present case, the majority found that Sections 1006 and 2012 and the Fourth Amendment allow for wardens to detain people *on foot* when wardens have a reasonable belief those people have recently been engaged in hunting or fishing. However, under identical circumstances, the majority found that wardens may not detain people driving *in vehicles* despite the identical reasonable belief that the occupant has recently been engaged in hunting or fishing. This decision creates a strange and disturbing dichotomy: namely, that poachers in California will soon learn that if they can make it to their vehicles before a warden can contact them, they do not have to obey California's fish and game laws and can completely avoid detection. Under the majority's decision, only when a warden has a reasonable suspicion to believe a fisherman or hunter has illegally taken fish or game or has violated some other law, can the warden conduct a vehicle stop.

Considering the size of California, this creates a disturbing picture and demonstrates that this case deserves review. As the third largest state, California has 163,707 square miles. Seven thousand seven hundred and thirty-four of those square miles are covered by water. California's general

---

[4] Justice Benke dissented.

coastline is 840 miles long.[5] The state contains coastal regions, mountains, rivers, deserts, forests, lakes, estuaries and state and national parks. In contrast to this vast expanse, there are only about 200[6] DFG wardens to enforce California's fish and wildlife regulations. In effect, the majority's decision now requires DFG wardens in California to actually catch fisherman or hunters in the act of poaching before they can conduct a vehicle stop and check their compliance. In the broad expanse that is California, this will make fish and game laws almost unenforceable, especially once poachers learn that their vehicles are a safe haven.

Poachers, by nature, actively work to conceal their actions. *People v. Maikhio,* 180 Cal. App. 4th 1178 (2010) (at 11:00 p.m., fisherman on pier used hand-lining—a legal method of catching fish—to catch a lobster out of season and hid lobster in black bag next to him); *People v. Tatman*, 20 Cal. App. 4th 1, 6 (1993) (warden on cliff using spotting scope saw two men in a boat, apparently harvesting abalone, cover their catch with burlap bags; wardens later found 196 shelled abalones in hidden compartment on boat); *People v. Nguyen*, 161 Cal. App. 3d 687, 690 (1984) (at 10:30 p.m., warden using scope saw two men illegally fishing with a gill net). In some cases, depending on the topography of the warden's surveillance location, such as the sea cliffs in northern California, it may not be possible for the warden to reach the suspected poacher before he leaves in a vehicle. *Tatman*, 20 Cal. App. 4th at 6 (possible abalone poachers stopped by

---

[5] Pursuant to Evidence Code sections 459(a) and 452(h), Petitioner asks the Court to take judicial notice of these facts found at: http://www.netstate.com/states/geography/ca_geography.htm

[6] Pursuant to Evidence Code sections 459(a) and 452(h), Petitioner asks this Court to take judicial notice of this fact. http://www.californiafishandgamewardens.com/index-5.html

wardens after pulling away from boat dock). Under *Maikhio*, when the warden cannot reach the possible poacher in time, the poacher is free to drive away and the warden is powerless to stop the vehicle.

It is important that California's DFG wardens have the authority to conduct vehicle stops, along with administrative inspections when warranted. Under the decision in this case, requiring reasonable suspicion before wardens may conduct such stops, enforcement of hundreds of fish and game laws and regulations has been undermined. One such law is the ban on the importation of certain portions of hunter-harvested deer and elk (skulls and spinal cords) into California. Cal. Code of Regs., tit. 14, section 712. The purpose of this ban is to protect California's deer and elk populations from chronic wasting disease [CWD]. This disease affects the brains of deer and elk and belongs to a group of diseases known as "transmissible spongiform encephalopathies." This group of diseases includes Creutzfeldt-Jakob disease in humans (mad cow disease). Currently, there is no evidence that California's deer and elk herds have chronic wasting disease, but the disease has been found in eight other states and one province of Canada.[7] Under the court of appeal's ruling in this case, unless there is a reasonable suspicion of criminal activity, wardens may no longer stop hunters returning from out of state during elk season. Hence, the ability of wardens to stop this potentially dangerous disease from entering California has been severely impaired.

Hundreds of fish and wildlife laws and regulations come into play during vehicle stops, but the decision below will render them largely

---

[7] Pursuant to Evidence Code sections 459(a) and 452(h), Petitioner asks the Court to take judicial notice of the DFG website containing information on CWD at: http://www.dfg.ca.gov/news/issues/cwd_faq.html

unenforceable. The DFG, in its amicus curiae brief [ACB], has cited numerous fish and game regulations that wardens are now hamstrung from enforcing. (ACB at 15-16.) The DFG states, "Considering that the department has only about 200 field wardens to police the entire state, California's fish and game laws [are] almost unenforceable without the ability of wardens to stop vehicles and temporarily detain the occupants in order to conduct brief administrative inspections." (ACB at 16.)

As Justice Benke aptly stated in her dissent, "By taking this regulatory power [vehicle stops] away from game wardens, the majority has seriously imperiled the state's vital interest in protecting fish and wildlife from depradation." *Maikhio*, 180 Cal. App. 4th at 1199 (dissenting opn. of Benke, J.).

II

THE MAJORITY ERRONEOUSLY CONCLUDED THAT VEHICLE STOPS FOR PURPOSES OF INSPECTIONS PURSUANT TO SECTIONS 1006 AND 2012 REQUIRE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY

The decision below, moreover, conflicts with a 1944 Attorney General Opinion that found Section 23, the predecessor to Section 1006, directly authorized vehicle stops in cases such as this one, where the warden had good reason to believe the occupant of the vehicle had recently been engaged in fishing. 4 Ops. Cal. Atty. Gen. 405, 409 (1944). Indeed, in 1959, the legislature enacted Section 1006 without substantial change from Section 23. In so doing, the legislature, by implication, adopted the Attorney General's construal of Section 23, in effect, that the statute authorizes vehicle stops in cases such as this one. It is well settled that when an Attorney General Opinion construes a statute and the legislature thereafter reenacts it without substantial change, "it must be presumed that

the Legislature is aware of the [Attorney General Opinion] and approves of it. *Orange County Employee's Assn., Inc. v. County of Orange*, 14 Cal. App. 4th 575, 582-83 (1993); *Henderson v. Board of Education*, 78 Cal. App. 3d 875, 883 (1978). Accordingly, contrary to the majority's decision, the Attorney General Opinion and, by implication, the legislature, have both concluded that Section 1006 authorizes vehicle stops such as occurred in this case.

Indeed, in her dissent, Justice Benke reasoned that the Attorney General Opinion's construction of Section 1006, and the Legislature's adoption of that construction authorized the vehicle stop here based on Fleet's reasonable belief that Respondent was recently engaged in fishing. Justice Benke stated, "[t]here can be no serious question Fleet was entitled to stop Maikhio's car under the authority provided to him by Fish and Game Code sections 1006 and 2012." *Maikhio*, 180 Cal. App. 4th at 1199 (dissenting opn. Benke, J.).

III

THE MAJORITY FAILED TO APPLY THE IMPLIED CONSENT DOCTRINE, RESULTING IN THEIR ERRONEOUS FINDING OF UNCONSTITUTIONALITY

Further, as Justice Benke persuasively explained, the majority erred in failing to consider this case under the implied-consent doctrine applicable in cases involving highly regulated activities. Had the majority applied this appropriate legal doctrine, the result would have been a finding of constitutionality. In her dissent, Justice Benke rejected the majority's conclusion that a reasonable suspicion was necessary for wardens' vehicle stops to be considered reasonable. As Justice Benke explained,

> While in other nonregulatory contexts such a suspicion is needed before citizens may be stopped, by voluntarily engaging in highly regulated hunting and fishing activities, citizens such as Maikhio have implicitly agreed game

> wardens may stop them at or near the time and place of such activities and take responsible steps to verify that the requirements of applicable hunting and fishing regulations have been met.

Maikhio, 180 Cal. App. 4th at 1199 (dissenting opn., Benke, J.).

Indeed, in *Perez*, 51 Cal. App. 4th at 1177-78, the court noted that due to the highly regulated nature of hunting and the reduced expectation of privacy of hunters, vehicle stops and administrative inspections of those returning from hunting are reasonable under the Fourth Amendment and reasonable suspicion of criminal activity is not required. *Id.* The *Perez* court further reasoned, "In analyzing the reasonableness of the search (inspection) and seizure (detention) of hunters, the special nature of hunting is significant. Indeed, the issue of the constitutionality of warrantless inspections by game wardens was anticipated by Justice Blackmun in *Delaware v. Prouse*, 440 U.S. 648 (1979) [Citations]. In *Prouse*, the Court found roving stops to check the licenses and registration of motorists were unconstitutional without reasonable suspicion of criminal activity. Justice Blackmun stated: 'I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily and somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties.'" *Id.* at 664 (conc. opn. Blackmun, J.); *Perez*, 51 Cal. App. 4th at 1177.

The *Perez* court concluded, "[g]iven the highly regulated nature of hunting and the corresponding reduced expectation of privacy of hunters in their gear and their take from hunting, we find it is reasonable to detain hunters briefly, near hunting areas during hunting season, to inspect their licenses, tags, equipment, and any wildlife taken . . . ." *Id.* at 1178.

As Justice Benke noted in her dissent, "One court has articulated this principle by stating that, in light of the highly regulated nature of hunting, hunters are deemed to have consented to certain intrusions on their privacy." *Maikhio*, 180 Cal. App. 4th at 1198, (dissenting opn., Benke, J.), *citing to People v. Layton*, 552 N.E. 2d 1280, 1287 (1990); *see also Betchart v. Department of Fish and Game*, 158 Cal. App. 3d 1104, 1110 (1984) (voluntarily participating in hunting gives rise to the "fundamental premise that there is an implied consent to effective supervision and inspection as directed by statute.").

On this issue, Justice Benke stated in her dissent,

> Plainly, where my colleagues have erred is in requiring that game wardens suspect a violation of law has occurred before they stop and question hunters and fisherman. [footnote omitted] While in other non-regulatory contexts such a suspicion is needed before citizens may be stopped, by voluntarily engaging in highly regulated hunting and fishing activities, citizens such as Maikhio have implicitly agreed game wardens may stop them at or near the time and place of such activities and take reasonable steps to verify that the requirements of applicable hunting and fishing regulations have been met.

Maikhio, 180 Cal. App. 4th at 1199 (dissenting opn., Benke, J.).

Based on the highly regulatory nature of fishing and hunting in California and on the reduced expectation of hunters and fisherman, under the implied consent doctrine, a warden's vehicle stop, based on a reasonable belief that the vehicle occupant(s) have recently been hunting or fishing, for the purpose of conducting a lawful compliance check, is reasonable under the Constitution. The majority's failure to apply this legal doctrine demonstrates that this case deserves review.

IV

THE MAJORITY'S ANALYSIS OF THE SPECIAL NEEDS TEST WAS ERRONEOUS AND RESULTED IN AN IMPROPER FINDING OF UNCONSTITUTIONALITY

The majority conducted a special needs balancing test and reached the conclusion that wardens' vehicle stops—based on a reasonable belief that the occupant(s) have recently been engaged in hunting or fishing—are unconstitutional without a reasonable suspicion of criminal activity. However, the majority's analysis under the special needs test was erroneous and resulted in the improper finding that vehicle stops, such as the one in this case, are unconstitutional.

The Fourth Amendment requires that searches or seizures be reasonable. *Prouse*, 440 U.S. at 648, 654. "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). However, the United States Supreme Court has carved out several exceptions to this requirement of individualized suspicion. For example, in the context of regulatory searches, several courts have approved of searches without individualized suspicion when they have determined the state has a "special need," beyond the normal need for law enforcement, which outweighs the intrusion on the individual. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search by school official of student's purse); *Treasury Employees v. Von Raab*, 489 U.S. 646 (1989) (drug tests for customs employees seeking promotion to certain positions); *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes).

The Supreme Court has also allowed searches for various administrative purposes without a requirement of an individualized suspicion of wrongdoing, provided those searches are limited. *New York v.*

Burger, 482 U.S. 691 (1987) (inspection of "closely regulated" business); *Michigan v. Tyler*, 436 U.S. 499 (1978) (administrative search of fire damaged premises to determine cause).

In addition, the United States Supreme Court has upheld several vehicle checkpoint stops after finding that the state's interest outweighed the intrusion on the motorist. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (fixed checkpoint designed to intercept illegal aliens); *Michigan v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoint designed to remove drunk drivers from the road).

Subsequent to these checkpoint cases, the Supreme Court decided *Edmond*, 531 U.S. at 32. In *Edmond*, the Court invalidated a vehicle checkpoint program whose primary purpose was interdicting illegal narcotics trafficking. Id. at 44. The program allowed officers to randomly stop motorists on public highways without a warrant and without reasonable suspicion, and, while checking the motorists for compliance with license and registration requirements, a drug-sniffing dog checked for narcotics possession. *Id.* at 35. The Court held that the checkpoint stop was set up primarily for "general crime control purposes," and therefore, the Fourth Amendment required an individualized suspicion of criminal activity to support the stops. *Id.* at 44.

In the present case, the majority first erred under its special needs analysis, when it improperly concluded that an "Edmond-type presumptive rule of unconstitutionality" applied. *Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004). The majority found that Fleet's primary purpose in conducting the stop was to uncover evidence of general crime and, likening this case to the checkpoint stop in *Edmond*, 531 U.S. at 44, in which officers set up a checkpoint to uncover drug offenses, found Fleet's vehicle stop was unlawful under the Fourth Amendment. But, this case is clearly regulatory

in nature and, as such, is completely distinguishable from the *Edmond* case, in which a police department conducted a checkpoint for the admitted and sole purpose of "interdicting drugs in Indianapolis." *Id.*at 35. The holding in *Edmond* is distinguishable and does not invalidate Fleet's vehicle stop in this case. As the Supreme Court clarified in *Lidster*, 540 U.S. at 419, *Edmond* "refers to the subject matter of its holding as 'stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.'" The *Lidster* Court went on to state, "We concede that Edmond describes the law enforcement objective there in question as a `general interest in crime control,' but it specifies that the phrase `general interest in crime control' does not refer to every `law enforcement' objective." *Id.* at 424. *Edmond* therefore impacts only those isolated cases with facts similar to those presented in *Edmond*, because *Edmond* was "referring in context to circumstances . . . then before the Court and not referring to quite different circumstances that the Court was not then considering." *Id.*

Despite the majority's contrary conclusion, the facts in the present case are distinguishable from the facts in *Edmond*. Here, a DFG warden had good reason to believe Respondent had recently engaged in fishing. Unlike in *Edmond*, Fleet was not stopping any car just to see if the occupant may have committed a crime, rather, Fleet's discretion was limited by his reasonable belief Respondent was involved in fishing.

Additionally, the majority makes much of Fleet's testimony that his purpose in conducting the vehicle stop was to "make sure that [Respondent] was in compliance with the California fishing laws and regulations." (T. at 21, lines 15-20.) The majority argues Fleet's testimony shows that his primary purpose for stopping Respondent was for "normal law enforcement needs," and "for the general purpose of crime control" as the Court found in

Edmond. *Maikhio*, 180 Cal. App. 4th at 1190. However, contrary to the majority's reasoning, the *Edmond* Court emphasized that the primary purpose inquiry "is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Edmond*, 531 U.S. at 48.

Further, the *Edmond* Court took great pains to limit its holding to the specific facts of the case before it. The Court explained,

> Our holding also does not affect the validity of border searches or searches of places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute. Nor does our opinion speak to other intrusions aimed primarily at purposes beyond the general interest in crime control."

Edmond, 531 U.S. at 47-48.

Petitioner submits that, in this case, Fleet's stop is an example of an "other intrusion[ ] aimed primarily at purposes beyond the general interest in crime control." *Id*. Specifically, the vehicle stop was aimed at accomplishing the DFGs primary objective of protecting the fish, wildlife and other natural resources in this state. *Harbor Hut Restaurant*, 147 Cal. App. 3d at 1154; Betchart, 158 Cal. App. 3d at 1106-07; Section 1800. Indeed, because of Fleet's vehicle stop, he was able to return the illegally harvested lobster to the ocean. The primary purpose of Fleet's vehicle stop was not to uncover general crime as in *Edmond*, it was to protect California's fish and wildlife. Hence, Petitioner submits that *Edmond* is not applicable to this case and therefore, the vehicle stop must be evaluated for its reasonableness under the balancing test developed in *Brown v. Texas*, 443 U.S. 47, 50-51 (1979). As the Supreme Court stated in *Lidster*, 540 U.S. at 426-27, even if "an Edmond-type presumptive rule of unconstitutionality does not apply here . . . we must judge [the stop's]

reasonableness, hence, its constitutionality, on the basis of the individual circumstances . . . ." pursuant to the *Brown* three-prong test.

The *Brown* test involves balancing three concerns: (1) the public [or state's] interest served by the seizure; (2) the degree to which the seizure advances the particular public [state's] interest; and (3) the severity of the interference with individual liberty that the seizure engenders. *Brown*, 443 U.S. at 50-51; *Sitz*, 496 U.S. at 451. With regard to the "state's interest" prong of the balancing test, there can be no doubt that the state has a compelling interest in preserving wilderness areas and the fish and wildlife that thrive there. *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371, 392 (1978) (Burger, C.J., concurring). *See also Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *Betchart*, 158 Cal. App. 3d at 1106-07. Wildlife habitats are under an ever increasing threat. W. Ringel, *Searches & Seizures, Arrests and Confessions*, § 14.3(b) at 14-16 (2d ed. 1984). Further, much of the damage to natural resources is caused by those who violate fish and game laws. *State v. Howard*, 411 So. 2d 372, 375 (1982). Here, the state has a compelling interest to protect the fish, wildlife and other natural resources in California.

Moreover, with regard to the second prong of the *Brown* test, the "degree to which the seizure advances the public interest," the vehicle stop in this case was a highly effective and productive means of furthering the state's interests. Fleet's use of a spotting scope to observe the fishing activity on the pier and then conducting vehicle stops to check compliance with fish and game laws is an especially effective means of promoting the state's interest in protecting fish and wildlife resources. Conducting such vehicle stops in close proximity to the pier and close in time to the fisherman's fishing activities, yet far enough from the pier not to alert other possible violators of fish and game laws that wardens are present, is an

effective and productive means of deterring those who violate fish and game laws.

However, with regard to this prong, the majority reasoned that because Fleet did not stop Respondent on foot on the pier or in the parking lot, the fact that he did not use this "less intrusive means" must be weighed against the state's interest under the balancing test from *Brown*. *Maikhio*, 180 Cal. App. 4th at 1192. However, in *Sitz*, 496 U.S. at 453, the high Court rejected such an analysis, ("the degree to which the seizure advances the public interest prong . . . was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger [with the state's vital interest in protecting fish and wildlife]."). Further, *United States v. Munoz*, 701 F. 2d 1293, 1300 (1983), the case the majority cites to for the proposition that the less intrusive means analysis must be applied under *Brown*, erroneously adopted that test after misreading the Supreme Court's decision in *Prouse*, 440 U.S. at 659; *Maikhio*, 180 Cal. App. 4th at 1192.

In *Prouse*, the Court did not find that a lesser intrusive alternatives analysis must be applied in determining the strength of the government's interests. Prouse, 440 U.S. at 658-59. The *Prouse* Court only looked to "alternative mechanisms," or, other types of possible intrusions, in order to determine whether the random spot checks being utilized were a "sufficiently productive" method that advanced the state's interest and therefore justified the intrusion. *Id*. Here, unlike in *Prouse*, where the chance of finding an unlicensed driver through spot checks was found to be "incremental," vehicle stops to conduct compliance checks are a highly productive means of advancing the state's interest in protecting fish and

wildlife and, when weighed against the minimal intrusion on the fisherman or hunter, are reasonable.

In weighing the state's vital interest in protecting fish and wildlife, and taking into account the high degree to which vehicle stops further that interest, the degree of the intrusion on the fisherman is minimal. The fisherman at the pier already have a reduced expectation of privacy due to the highly regulated nature of fishing. Moreover, the vehicle stop was based on the reasonable belief that Respondent had recently engaged in fishing and occurred close in time to Respondent's fishing activity and within the vicinity of the pier. These factors minimized the intrusion even further.

A weighing of the concerns under the balancing test in *Brown* demonstrates that vehicle stops by wardens who have a reasonable belief that the occupants have recently been engaged in fishing or hunting, are reasonable under the Fourth Amendment. Because the majority's decision erroneously found these stops unreasonable and because this decision seriously imperils the state's ability to protect fish and wildlife in California, this case presents important issues that deserve review.

CONCLUSION

Accordingly, for the reasons stated above, Appellant respectfully requests that this Court grant review in the present case.

Dated: February 11, 2010

JAN I. GOLDSMITH, City Attorney

By Monica A. Tiana
Monica A. Tiana
Deputy City Attorney

Attorneys for Plaintiff/Appellant

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Appellant,

v.

BOUHN MAIKHIO,

Defendant and Respondent.

D055068

(Super. Ct. Appellate No. CA211304)
(Super. Ct. No. M031897)

APPEAL from an order of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Jan I. Goldsmith, City Attorney, David P. Greenberg, Assistant City Attorney, and Monica A. Tiana, Deputy City Attorney, for Plaintiff and Appellant.

Edmund G. Brown Jr., Attorney General, Mary E. Hackenbracht, Senior Assistant Attorney General, Carol A Squire and Deborah Fletcher, Deputy Attorneys General, for California Department of Fish and Game as Amicus Curiae on behalf of Plaintiff and Appellant.

Steven J. Carroll, Public Defender, Randy Mize, Chief Deputy Public Defender, Gary R. Nichols and Matthew Braner, Deputy Public Defenders, for Defendant and Respondent.

On transfer to this court from the Appellate Division of the San Diego County Superior Court, the People of the State of California appeal an order of the trial court granting defendant Bounh Maikhio's Penal Code section 1538.5 motion to suppress evidence in its case against him for two misdemeanor fishing offenses. On appeal, the People contend the trial court erred by granting the motion to suppress because: (1) Fish and Game Code[1] sections 1006 and 2012 authorized the State of California Department of Fish and Game (DFG) warden to stop Maikhio's vehicle to conduct an inspection and that stop was reasonable under the Fourth Amendment to the United States Constitution even if he had no reasonable suspicion Maikhio was involved in criminal activity; and, alternatively, (2) the warden had reasonable suspicion under the Fourth Amendment that Maikhio was involved in criminal activity and therefore could lawfully stop Maikhio's vehicle. We conclude the DFG warden did not have either the statutory or constitutional authority to stop Maikhio's vehicle in the circumstances of this case.

FACTUAL AND PROCEDURAL BACKGROUND

At about 11:10 p.m. on August 19, 2007, DFG warden Erik Fleet issued a citation to Maikhio for possession of a California spiny lobster during closed season in violation

---

1 All further statutory references are to the Fish and Game Code unless otherwise specified.

of California Code of Regulations, title 14, section 29.90, subdivision (a), and for failure to exhibit his catch on demand in violation of section 2012. After the People filed a misdemeanor complaint (Case No. M031897) against Maikhio, he was arraigned and pleaded not guilty. Maikhio subsequently moved to suppress evidence pursuant to Penal Code section 1538.5.

On December 14, the trial court heard Maikhio's motion to suppress, together with motions to suppress made by two other defendants in similar cases.[2] At the hearing, Fleet testified that at about 11:00 p.m. on August 19, 2007, he was on duty and observed activities on the Ocean Beach pier by using a spotting telescope mounted on his truck, which was parked on Narragansett Street. Fleet saw Maikhio fishing on the pier, using a method called hand-lining. Maikhio was accompanied by a woman and an infant. Fleet saw Maikhio catch something and place it in a black bag next to him. Fleet could not see what Maikhio had caught and placed in the bag. Fleet watched as Maikhio and the other two persons left the pier, entered the parking lot, and drove away from the parking lot in Maikhio's vehicle. Fleet then stopped Maikhio's vehicle because he "wanted to make sure . . . that he [Maikhio] was in compliance with the California fishing laws and regulations." Fleet testified that he did "[n]ot necessarily" suspect at the time of the stop that Maikhio had broken the law.

---

2 Those other cases were *People v. Nguyen* (Case No. M031902) and *People v. Herrera* (Case No. M031898).

After stopping Maikhio's vehicle, Fleet, who was in uniform, approached Maikhio and introduced himself as a DFG warden. Fleet asked Maikhio if he had any fish or lobsters in his vehicle. Maikhio answered, "no." Fleet then searched the vehicle pursuant to section 1006 and found the black bag in the rear passenger area under the woman's feet. He looked inside the bag and found a California spiny lobster. Fleet placed Maikhio in handcuffs for his (Fleet's) safety, sat Maikhio on the curb, and continued his search of the vehicle (which revealed nothing more). Maikhio eventually admitted the lobster was his.

Fleet issued a citation to Maikhio for possessing a lobster during closed season (Cal. Code Regs., tit. 14, § 29.90, subd. (a)) and for failing to exhibit his catch on demand (§ 2012). Fleet testified that, pursuant to his training as a DFG warden, he waited to stop Maikhio's vehicle until after Maikhio left the pier and parking lot so that Fleet would not "blow [his] cover" at the pier and therefore could continue to effectively "work" the pier and catch other possible law violators that night. On direct examination by the prosecutor, Fleet described the method of "hand-line" fishing:

> "They were fishing on the pier in a method we call hand lining, which is commonly used to catch lobsters. It's an illegal method of catching lobsters, but it's very productive and it's basically a person holds a fishing line in their hand, either the fishing line goes back to their fishing rod and reel or they hold it in their hand and they jerk the fishing line which generally has a treble hook on the bottom of it with the weight on it and squid is usually used for bait. And it gives them a better feel of the bottom because a lobster doesn't strike the bait, it will actually climb onto the bait and they lift the line up when they feel weight on it, they jerk it which causes the hook to penetrate the lobster and they bring it up. It's very common and that's what drew my attention to [Maikhio]."

However, on cross-examination, Fleet admitted that hand-lining can also be used for regular fishing. Following arguments of counsel, the trial court granted Maikhio's motion to suppress evidence.

On appeal, the Appellate Division of the San Diego County Superior Court initially reversed the trial court's order granting Maikhio's motion to suppress and, after a rehearing, again reversed trial court's order. The appellate division concluded Fleet lawfully stopped Maikhio under sections 1006 and 2012 to conduct a compliance inspection. In addition, it concluded Fleet had reasonable suspicion to believe Maikhio was in possession of an illegally caught lobster, based on his observation of Maikhio using the hand-lining method to catch something, because that method of fishing is commonly used to catch lobsters.

Maikhio filed an application for certification for transfer of the case to this court pursuant to California Rules of Court, rule 8.1005. On May 5, 2009, the appellate division issued an order granting Maikhio's application for certification for transfer, stating "[t]ransfer is necessary to settle the following important question of law: Whether Fish and Game Code sections 1006 and 2012 authorize vehicle stops without reasonable suspicion of criminal conduct."

On May 20, 2009, we issued an order transferring the case to this court for hearing and decision. We requested briefing by the parties on the following issues: "(1) whether Fish and Game Code sections 1006 and 2012 authorize vehicle stops without reasonable suspicion of criminal conduct; and (2) whether the warden in this case had reasonable

suspicion to believe Maikhio was engaged in illegal lobster fishing." The parties have submitted, and we have considered, briefs on those issues.

DISCUSSION

I

Vehicle Stops Pursuant to Sections 1006 and 2012 Without Reasonable Suspicion of Criminal Activity

The People contend Fleet lawfully stopped Maikhio's vehicle pursuant to sections 1006 and 2012 without reasonable suspicion that he committed any crime. They argue Fleet's authority to stop Maikhio's vehicle must be implied as necessary to carry out express powers granted to the DFG by sections 1006 and 2012, and the stop was reasonable under the Fourth Amendment. The parties do not cite, and we are unaware of, any case addressing this question, which we believe is one of first impression.

A

In interpreting a statute, we first examine the actual language of the statute and give the statute's words their ordinary, everyday meaning unless the statute gives them a special meaning. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239.) If the meaning of a statute's language is certain and unambiguous, then its language controls. (*Id.* at p. 1239.) However, if the meaning of a statute's words is not clear, we review the statute's legislative history. (*Ibid.*) In the event a statute's language and legislative history do not reveal a clear meaning, we then apply reason, practicality, and common sense to its language to, if possible, interpret the statute's words to make them workable and reasonable. (*Id.* at pp. 1239-1240.) Finally, "[i]f a statute is

susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.)

Section 1006 provides:

> "The department [the DFG] may inspect the following:
>
> "(a) All boats, markets, stores and other buildings, except dwellings, and all receptacles, except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, reptiles, or amphibia may be stored, placed, or held for sale or storage. . . ."

Section 2012 provides:

> "All licenses, tags, and the birds, mammals, fish, reptiles, or amphibians taken or otherwise dealt with under this code, and any device or apparatus designed to be, and capable of being, used to take birds, mammals, fish, reptiles, or amphibians shall be exhibited upon demand to any person authorized by the department to enforce this code or any law relating to the protection and conservation of birds, mammals, fish, reptiles, or amphibians."

We conclude, as Maikhio asserts and the People apparently concede, the language of section 1006 does *not* provide for the inspection of *vehicles* by the DFG. The words used in section 1006 do not include the word "vehicle," and its other words cannot be reasonably construed to include inspection of vehicles. We conclude the ordinary,

everyday meaning of the word "receptacles" does not include vehicles. In interpreting virtually identical language contained in section 1006's predecessor (i.e., former section 23),[3] the California Attorney General in 1944 addressed this precise question and concluded:

> "[T]here is nothing in [former] Section 23 which commands the search or inspection of automobiles. As used in that section *the word 'receptacles' cannot be extended to connote motor vehicles.* The sentence in which the word is contained was added to Section 642 of the Political Code by Stats. 1915, page 727, and *a reading of the whole indicates that the legislature did not intend to include automobiles by implication in the enumeration of places and things that shall be inspected.* Moreover, it must be borne in mind that in 1915 automobiles were not as extensively used as they are today and the probability of transporting contraband game in cars was not as likely then as it is now. [Former] [s]ection 23, therefore, *confers no authority on the Commission or its officers to inspect or search automobiles.*" (4 Ops.Cal.Atty.Gen. 405, 407, *supra,* italics added.)

In 1957, the Legislature repealed former section 23 and reenacted it as section 1006 without substantial modification to the DFG's inspection authority. (Stats. 1957, ch. 456, § 1006, p. 1330.) In 1972, the Legislature amended section 1006, but only added reptiles to the list of animals. (Stats. 1972, ch. 974, § 4, p. 1766.) Because we presume the Legislature was aware of the Attorney General's 1944 opinion when it enacted and subsequently amended section 1006, we presume the Legislature approved of the Attorney General's construction of section 1006 as not including vehicles within the

---

3 In 1944, former section 23 provided: " 'The commission shall inspect regularly (1) all boats, markets, stores and other buildings, except dwellings, and all receptacles except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, mollusks, or crustaceans may be stored, placed or held for sale or storage . . . ." (4 Ops.Cal.Atty.Gen. 405, 406-407 (1944).)

DFG's inspection authority. (*Orange County Employees Assn. v. County of Orange* (1993) 14 Cal.App.4th 575, 582-583; *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875, 883.) Had the Legislature disagreed with the Attorney General's 1944 interpretation of former section 23, it presumably would have expressly included the word "vehicles" on enacting or subsequently amending section 1006. Had the Legislature intended to authorize the DFG and its wardens to inspect vehicles, it could have expressly so provided by simply adding the word "vehicles" to section 1006's list of items that may be inspected. We therefore conclude the Legislature intended the DFG's section 1006 inspection authority to *not* extend or apply to vehicles. Because the plain meaning of the words of section 1006 and its legislative history show section 1006's inspection authority does not include inspection of vehicles, we need not address the remaining rules of statutory construction. In any event, we conclude reason, practicality, and common sense support our interpretation of section 1006. Our interpretation also avoids any potential constitutionality issues were section 1006 interpreted as granting the DFG and its wardens broad authority to inspect vehicles. (*Miller v. Municipal Court*, *supra*, 22 Cal.2d at p. 828.)

Apparently conceding section 1006 does not expressly authorize the DFG or its wardens to inspect vehicles, the People assert the DFG's authority to stop and inspect vehicles must be *implied* as necessary to carry out express powers granted it under sections 1006 and 2012. In *People v. Perez* (1996) 51 Cal.App.4th 1168, the court noted the general rule that "[g]overnment officials may exercise such powers as are necessary

to carry out the powers granted by statute or that may be fairly implied from the statute. [Citation.]" (*Id.* at p. 1178; see also *Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 810; *Betchart v. Department of Fish & Game* (1984) 158 Cal.App.3d 1104,1109.) Pursuant to the powers expressly granted to the DFG by section 1006 to inspect boats and receptacles in which fish may be stored and by section 2012 to demand that a person exhibit his or her catch, we agree with the People's assertion that there are certain additional powers that may be fairly implied as necessary to carry out those express powers. For example, it may be fairly implied from sections 1006 and 2012 that a DFG warden generally has the implied power to stop people who are fishing on a pier to demand they exhibit their catch and to inspect their receptacles (e.g., tackle boxes, pails, etc.) in which fish may be stored. However, contrary to the People's conclusory assertion, it *cannot* be fairly implied from the DFG's express statutory powers that its wardens have the power to stop a specific vehicle on a public street and detain its occupants to make a section 2012 demand and conduct a section 1006 inspection. Unlike the DFG hunting checkpoint held constitutionally reasonable in *Perez*, the circumstances in this case involve a traffic stop of a specific vehicle (i.e., Maikhio's vehicle) by a DFG warden. (Cf. *People v. Perez*, *supra*, at pp. 1171-1173, 1179.) Neither *Perez* nor any of the other cases cited by the People persuade us that it may be fairly implied from sections 1006 and 2012 that it is necessary for the DFG to conduct traffic stops and inspections of specific vehicles on public streets to accomplish the express powers granted to it by to those statutes.

B

We further conclude, contrary to the People's assertion, that Fleet's stop of Maikhio's vehicle was *not* a reasonable regulatory or other seizure under the Fourth Amendment and therefore required reasonable suspicion Maikhio was involved in criminal activity. The Fourth Amendment prohibits "unreasonable searches and seizures." Maikhio's vehicle was subjected to a "seizure" within the meaning of the Fourth Amendment when Fleet stopped it on a public street and detained its occupants. (*Delaware v. Prouse* (1979) 440 U.S. 648, 653.) "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. [Citation.]" (*Indianapolis v. Edmond* (2000) 531 U.S. 32, 37 (*Edmond*).) However, in certain limited or exceptional circumstances, reasonable suspicion of criminal activity is not required for a seizure to be reasonable under the Fourth Amendment. (*Ibid.*) *Edmond* stated: "[W]e have upheld certain regimes of suspicionless searches [or seizures] where the program was designed to serve 'special needs, beyond the normal need for law enforcement.' [Citations.] We have also allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited. [Citations.]" (*Ibid.*) The United States Supreme Court has "also upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens [citation] and at a sobriety checkpoint aimed at removing drunk drivers from the road [citation]." (*Ibid.*, citing *U.S. v. Martinez-Fuerte* (1976) 428 U.S. 543; *Michigan Dept. of State Police v. Sitz* (1990) 496 U.S. 444.) "In none of these cases,

however, did [the United States Supreme Court] indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." (*Edmond*, at p. 38.) In the circumstances of *Edmond*, the court held: "Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment." (*Id.* at pp. 41-42.) *Edmond* stated: "When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, . . . stops can only be justified by some quantum of individualized suspicion." (*Id.* at p. 47.)

However, if the primary purpose of a stop or seizure is to promote a "special need" of government beyond the normal need for law enforcement and is not to uncover evidence of ordinary criminal wrongdoing, the "special needs" exception to the usual requirement for individualized, reasonable suspicion for a stop or seizure may apply if, on balancing the government's "special need" against its intrusion on the individual's Fourth Amendment privacy right, a court determines the stop or seizure was reasonable under the Fourth Amendment.[4] (*Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 665-666; *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 619; *Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 652-653; *Delaware v. Prouse*, *supra*, 440 U.S. at pp. 654, 657-661; *Edmond*, *supra*, 531 U.S. at p. 37; *U.S. v. Munoz* (9th Cir.

---

4 The "special needs" balancing test for Fourth Amendment reasonableness has been alternatively described as requiring the balancing of "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." (*Brown v. Texas* (1979) 443 U.S. 47, 51.)

1983) 701 F.2d 1293, 1297.) One court has also stated: "In assessing the strength of the government's interests, courts must ascertain whether the government could employ less intrusive alternatives. [Citations.]"[5] (*U.S. v. Munoz*, *supra*, 701 F.2d at p. 1300.)

Accordingly, "[t]here is a two-step analysis applicable to Fourth Amendment checkpoint cases. First, the court must 'determine whether the primary purpose of the [checkpoint] was to advance "the general interest in crime control." ' [Citation.] 'If so, then the stop . . . is per se invalid under the Fourth Amendment.' [Citations.] [¶] If the checkpoint is not per se invalid as a crime control device, then the court must 'judge [the checkpoint's] reasonableness, hence, its constitutionality, on the basis of the individual circumstances.' [Citation.] This requires consideration of 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.' [Citations.]" (*U.S. v. Fraire* (9th Cir. 2009) 575 F.3d 929, 932.) Although *Fraire*'s two-step analysis specifically addressed vehicle checkpoints, there is no reason why the same analysis should not apply to other traffic stops of vehicles, including the stop of Maikhio's vehicle in this case.

In the circumstances of this case, we conclude Fleet's stop of Maikhio's vehicle was indisputably made for normal law enforcement needs and to uncover evidence of

---

5 This factor may, however, have little or no weight considering the United States Supreme Court's subsequent language in *U.S. v. Sokolow* (1989) 490 U.S. 1, involving the related concept of reasonable suspicion: "The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." (*Id.* at p. 11.)

ordinary criminal wrongdoing (i.e., a misdemeanor fishing offense) by a specific individual (i.e., Maikhio). As described in the factual and procedural section above, Fleet saw Maikhio hand-line fishing. He saw Maikhio catch something and place it in a black bag, but he could not see what Maikhio had caught. Fleet watched as Maikhio left the pier and drove away from the parking lot in his vehicle. Fleet then conducted a traffic stop of Maikhio's vehicle on a public street because he "wanted to make sure . . . that [Maikhio] was in compliance with the California fishing laws and regulations." Accordingly, the primary, if not sole, purpose of Fleet's stop of Maikhio's vehicle was to determine whether Maikhio had violated a fishing law (i.e., committed a misdemeanor fishing offense) and presumably to cite Maikhio if Fleet determined he had done so. That purpose was clearly to detect or uncover evidence of ordinary criminal wrongdoing and therefore promote the general purpose of crime control. Because Fleet's stop of Maikhio's vehicle did not serve a "special need" of government, it was per se unreasonable under the Fourth Amendment (absent the existence of reasonable suspicion that Maikhio was involved in criminal activity).[6] (*Edmond*, *supra*, 531 U.S. at pp. 37-38, 41-42, 47; *U.S. v. Fraire*, *supra*, 575 F.3d at pp. 931-932.) "Because the primary purpose

---

6 To the extent the 1944 opinion of the California Attorney General concluded a DFG warden may stop a vehicle to inquire if any game had been taken without any reasonable suspicion under the Fourth Amendment that the vehicle contained illegal game, we note it preceded the United States Supreme Court's decision in *Terry v. Ohio* (1968) 392 U.S. 1 and its progeny regarding investigatory stops and therefore does not reflect consideration of current Fourth Amendment principles. (4 Ops.Cal.Atty.Gen. 405, 407-410, *supra*.) In any event, we are unpersuaded by the 1944 opinion's reasoning and instead decide this Fourth Amendment question of law based on our reasoning set forth in this opinion.

of [Fleet's stop of Maikhio's vehicle was to uncover evidence of ordinary criminal wrongdoing, the [stop] contravene[d] the Fourth Amendment [if Fleet had no reasonable suspicion that Maikhio was involved in criminal activity]." (*Edmond,* at pp. 41-42.) Like the court in *Edmond*, "[w]e decline to suspend the usual requirement of individualized suspicion where [a DFG warden] seek[s] to employ a [traffic stop of a specific vehicle] primarily for the ordinary enterprise of investigating crimes." (*Id.* at p. 44.)

Contrary to the People's assertion, the stop of Maikhio's vehicle was not done primarily for the "special need" purpose of educating Maikhio or another purpose beyond the normal need for law enforcement. Although we agree the DFG and its wardens have a governmental interest in protecting California's fish and wildlife, we disagree with the People's assertion that the DFG's *enforcement* of fish and wildlife laws and regulations (e.g., stopping of vehicles to cite criminal offenders) serves a "special need" beyond the normal need for law enforcement. The People's suggestion that Fleet was only promoting "compliance" with, and not "enforcing," California's fishing laws and regulations is disingenuous and a distinction without a difference in the circumstances of this case. Likewise, the primary purpose of Fleet's stop of Maikhio's vehicle was *not* to protect fish and wildlife. Although criminal citations may have the effect of deterring and educating violators of California's fishing laws and regulations, that effect does *not* make the primary purpose of Fleet's stop of Maikhio's vehicle the protection of fish and/or educational, rather than criminal enforcement of those laws and regulations. *People v. Perez*, *supra*, 51 Cal.App.4th 1168, cited by the People, is factually inapposite and does

not persuade us to conclude otherwise. That case involved a vehicle checkpoint primarily regulatory in purpose. (*Id.* at p. 1175.)

Even were we to conclude the primary purpose of Fleet's stop of Maikhio's vehicle was not for normal law enforcement needs or to uncover evidence of ordinary criminal wrongdoing, it is likely that on applying the "special needs" balancing test we would conclude the suspicionless stop was unreasonable under the Fourth Amendment. We note that Maikhio had a substantial privacy interest in driving his vehicle on a public street at night. In *Prouse*, the United States Supreme Court stated: "We cannot agree that stopping or detaining a vehicle on an ordinary city street is less intrusive than a roving-patrol stop on a major highway [as held unconstitutional in *U.S. v. Brignoni-Ponce* (1975) 422 U.S. 873] . . . . We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community." (*Delaware v. Prouse*, *supra*, 440 U.S. at p. 657.)

Traffic stops of vehicles also may have no preventive purpose or effect. "Because a motorist could not actively [violate fishing laws and regulations] while driving lawfully on [public] roads, vehicle stops can have no preventive purpose, other than a possible deterrent effect." (*U.S. v. Munoz*, *supra*, 701 F.2d at p. 1301.) Furthermore, although we assume the DFG has a significant interest in the protection of fish and other wildlife, that purported "special need" could be promoted through less intrusive means. "In assessing the strength of the government's interests, courts must ascertain whether the government could employ less intrusive alternatives. [Citations.]" (*Id.* at p. 1300.) In the circumstances in this case, Fleet could have stopped Maikhio and inquired about his catch while Maikhio was on the pier or as he was walking to his car in the parking lot. That less intrusive means of protecting fish and wildlife presumably would have been reasonable under the Fourth Amendment. Likewise, a DFG checkpoint could have been established at the end of the pier or in the parking lot to educate the public regarding fish and wildlife laws and regulations. (Cf. *People v. Perez*, *supra*, 51 Cal.App.4th at pp. 1175-1179.)

Although the People argue Fleet's method of using a spotting scope to observe fishing activity and then stop vehicles on public streets to check compliance with fishing laws and regulations is the most effective means of promoting the government's interest in protecting fish, the fact that a certain method of promoting a government interest is the most effective does not necessarily make it reasonable under Fourth Amendment, particularly if a less intrusive method exists. Were we to balance Maikhio's privacy

interest as an occupant of a vehicle traveling on a public street against the DFG's interest in educating the public and protecting fish, it is very likely we would conclude Fleet's presumed suspicionless traffic stop of Maikhio's vehicle was unreasonable under the Fourth Amendment. (Cf. *People v. Levens* (Ill.App. 1999) 713 N.E.2d 1275, 1277 ["[A] conservation officer may not stop a motorist if the officer merely believes that the motorist is currently or was very recently engaged in lawful hunting. Because a traffic stop is a greater intrusion than a brief detention in the field, we require that an officer must reasonably believe that a motorist's hunting is illegal before the officer may make a valid stop."]; *State v. Larsen* (Minn. 2002) 650 N.W.2d 144, 153-154 ["While the state clearly has a strong interest in regulating and protecting its wildlife, . . . the warrantless search of a fish house by a conservation officer is *per se* unreasonable in the absence of express consent or other circumstance justifying entry and therefore is unconstitutional under the Fourth Amendment . . . ."].)

II

Reasonable Suspicion under the Fourth Amendment

The People alternatively contend the trial court erred by granting Maikhio's motion to suppress evidence because Fleet had reasonable suspicion under the Fourth Amendment that Maikhio was involved in criminal activity and therefore could lawfully stop Maikhio's vehicle.

A

In certain circumstances, a police officer may stop and briefly detain a person for questioning or other limited investigation. (*In re Tony C.* (1978) 21 Cal.3d 888, 892.) "[T]o justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]" (*Id.* at p. 893, fn. omitted.)

In determining the reasonableness of a stop or detention, we must consider the totality of the circumstances.[7] (*People v. Loewen* (1983) 35 Cal.3d 117, 128-129.) "[A]n assessment of the whole picture must yield a particularized suspicion . . . that the particular individual being stopped is engaged in wrongdoing." (*U.S. v. Cortez* (1981) 449 U.S. 411, 418.) "The possibility of an innocent explanation does not deprive the

---

7 "The concept of reasonable suspicion . . . is not 'readily, or even usefully, reduced to a neat set of legal rules.' [Citation.]" (*U.S. v. Sokolow*, *supra*, 490 U.S. at p. 7.)

officer of the capacity to entertain a reasonable suspicion of criminal conduct." (*In re Tony C.*, *supra*, 21 Cal.3d at p. 894.) However, "no stop or detention is permissible when the circumstances are not reasonably 'consistent with criminal activity' and the investigation is therefore based on mere curiosity, rumor, or hunch." (*Ibid.*) "The process [of determining the existence of reasonable suspicion] does not deal with hard certainties, but with probabilities." (*Cortez*, at p. 418.)

"On review of a motion to suppress, we defer to the trial court's factual findings, where supported by substantial evidence, but must independently assess, as a question of law, whether under the facts as found the challenged search and seizure conforms to the constitutional standards of reasonableness." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 939.) In opposing a Penal Code section 1538.5 motion to suppress, the prosecution has the burden to prove "that the warrantless search or seizure was reasonable under the circumstances. [Citations.]" (*People v. Williams* (1999) 20 Cal.4th 119, 130.)

B

Based on our review of the totality of the circumstances in this case, we conclude Fleet did not have, at the time of the traffic stop, specific and articulable facts causing him (or a reasonable DFG warden) to suspect some activity relating to crime had taken place and Maikhio was involved in that activity. (*In re Tony C.*, *supra*, 21 Cal.3d at p. 893.) At the hearing on Maikhio's motion to suppress evidence, Fleet testified that, using a spotting scope, he saw Maikhio fishing by using the hand-lining method. He saw Maikhio catch something, but could not see what he caught and placed in the black bag.

Fleet testified the hand-lining method can be used to catch fish, but also is commonly used to catch lobsters. While catching fish with that method is lawful, catching lobsters out-of-season with that method is not. After Maikhio left the pier and drove his vehicle out of the parking lot and onto public streets, Fleet stopped Maikhio's vehicle. Fleet testified that although he did "[n]ot necessarily" suspect at the time of the stop that Maikhio had broken the law, he stopped Maikhio's vehicle because he "wanted to make sure . . . that he [Maikhio] was in compliance with the California fishing laws and regulations."

The People argue specific and articulable facts existed for Fleet's stop of Maikhio's vehicle. They rely on the fact that Fleet saw Maikhio catch something using the hand-lining method of fishing. However, based on the record in this case, we conclude the People did not carry their burden to prove Fleet had a reasonable suspicion Maikhio was involved in criminal activity based on his use of the hand-lining method of fishing. That method could lawfully be used to catch fish. Although that method could also be used to catch lobsters, neither Fleet nor any other prosecution witness testified at the hearing that the hand-lining method of fishing was, in his experience and/or training, generally used more often to illegally catch lobsters than to lawfully catch fish. Absent any testimony or other evidence showing there was a substantial possibility, much less a likelihood, that an angler (e.g., Maikhio) would use the hand-lining method to illegally catch lobsters, Fleet lacked a reasonable suspicion that Maikhio was involved in criminal activity (i.e., had illegally caught a lobster out-of-season). Although it is true, as the People assert,

reasonable suspicion may exist even if a suspect's activity is consistent with innocent or lawful activity, Maikhio's hand-lining method of fishing, based on the record in this case, does not support a conclusion that Fleet had reasonable suspicion Maikhio illegally caught a lobster out-of-season using that method.

In circumstances involving ambiguous conduct that could be either legal or illegal activity, an officer may not make an investigative stop or detention unless that conduct, in the context of the totality of the circumstances, gives rise to reasonable suspicion that the suspect is involved in criminal activity. Although, based on the totality of the circumstances at the time of the stop, it was *possible* Maikhio had used the hand-lining method to illegally catch a lobster, the record was devoid of any evidence showing there was a *substantial* possibility he had done so. Absent that substantial possibility, Fleet in effect acted on a mere hunch or speculation that Maikhio had illegally caught a lobster out-of-season.

An investigative stop or detention based on a mere hunch of criminal activity is unreasonable under the Fourth Amendment. (*In re Tony C.*, *supra*, 21 Cal.3d at p. 894; *People v. Loewen*, *supra*, 35 Cal.3d at p. 123; *People v. Hernandez* (2008) 45 Cal.4th 295, 299.) In *Hernandez*, the California Supreme Court recently concluded that although "some people driving with a [displayed] temporary [vehicle] permit may be violating the law [e.g., that permit may be forged or issued for a different vehicle], [the officer] could point to no articulable facts supporting a reasonable suspicion that [defendant], in particular, may have been acting illegally." (*Hernandez*, at p. 299.) Likewise, although

in this case some people fishing with the hand-lining method may be violating the law [e.g., by catching an out-of-season lobster], Fleet "could point to no articulable facts supporting a reasonable suspicion that [Maikhio], in particular, may have been acting illegally." (*Ibid.*; see also *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 233-234 [no reasonable suspicion where officer saw defendant park his idling car in a convenience store's parking lot near a street exit, heard something thud on car's floorboard, and observed defendant attempt to avoid contact with officers]; *People v. Krohn* (2007) 149 Cal.App.4th 1294, 1299; *People v. Jones* (1991) 228 Cal.App.3d 519, 524 [no reasonable suspicion where officer saw man receiving money from another in a high crime neighborhood]; *People v. Roth* (1990) 219 Cal.App.3d 211, 215 [no reasonable suspicion where officer saw man walking in early morning hours in deserted parking lot of closed shopping center]; *People v. Butler* (1988) 202 Cal.App.3d 602, 606-607 [no reasonable suspicion where officer saw car with tinted windows near a liquor store]; *U.S. v. Kerr* (9th Cir. 1987) 817 F.2d 1384, 1387 [no reasonable suspicion where officer saw man loading boxes into vehicle in residential area in mid-afternoon]; *People v. Levens*, *supra*, 713 N.E.2d at p. 1277 ["[A] conservation officer may not stop a motorist if the officer merely believes that the motorist is currently or was very recently engaged in lawful hunting. Because a traffic stop is a greater intrusion than a brief detention in the field, we require that an officer must reasonably believe that a motorist's hunting is illegal before the officer may make a valid stop."].) We conclude, based on the totality of the circumstances shown in the record, Fleet did not have reasonable suspicion to stop

Maikhio's vehicle.[8] Therefore, the trial court correctly granted Maikhio's motion to suppress evidence.

DISPOSITION

The order is affirmed.

CERTIFIED FOR PUBLICATION

McDONALD, J.

I CONCUR:

HUFFMAN, J.

---

8 We did not request, and the parties did not provide, briefing on the issue of whether, assuming Fleet had reasonable suspicion to stop Maikhio's vehicle, Fleet had probable cause to conduct a warrantless search of Maikhio's vehicle and the contents of the black bag in the vehicle. Although we need not decide that question considering our conclusion that Fleet lacked reasonable suspicion to stop Maikhio's vehicle, we nevertheless doubt Fleet had the requisite probable cause to search the vehicle and the black bag. (Cf. *Commonwealth v. Palm* (Pa.Super.Ct. 1983) 462 A.2d 243, 247-248 ["While we conclude that the initial stop of the vehicle was valid, the game protectors did not have probable cause at that moment to search [the vehicle]. It is well settled that probable cause to justify a search without a warrant exists only where the facts and circumstances within the knowledge of the arresting or searching officer, or of which the officer had reasonable trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. [Citations.]"].) "[P]robable cause means 'a fair probability that contraband or evidence of a crime will be found' [citation] . . . ." (*U.S. v. Sokolow*, *supra*, 490 U.S. at p. 7.)

BENKE, J.

With due respect I dissent.

There is no dispute in this record that on the evening of August 19, 2007, Department of Fish and Game warden Erik Fleet saw defendant and appellant Bouhn Maikhio fishing off the Ocean Beach pier with a hand line. There is also no dispute that Fleet saw Maikhio pull something up on the line and put it in black bag next to him. Finally, there is no dispute Fleet saw Maikhio leave the pier in his car with two companions and that very shortly thereafter, within the vicinity of the pier, Fleet stopped Maikhio's car.

On these facts there can be no serious question Fleet was entitled to stop Maikhio's car under the authority provided to him by Fish and Game Code[1] sections 1006 and 2012. It is true section1006 does not permit game wardens to make random stops for the purpose of determining whether citizens have engaged in regulated hunting or fishing activity. (See 4 Ops.Cal.Atty.Gen 405, 407-409 (1944).) However, in interpreting the predecessor to section 1006, the Attorney General was careful to distinguish the unfettered right to stop any vehicle, which the Attorney General rejected, from the situation which arises here, where a game warden has good reason to believe that the occupants of a vehicle have been recently engaged in regulated hunting or fishing. Under the Attorney General's interpretation of the statute, a warden's observation of a vehicle emerging from a duck club during the open season would give the warden the "right to

---

1 All further statutory references are to the Fish and Game Code.

stop the car and inquire if any game had been taken. If possession of game was denied, the warden would not have the right to search the car in the absence of probable cause for believing that such a denial was untrue. If possession was admitted, he would have the right to demand an exhibition of the game under Section 403 of the Fish and Game Code. A refusal to exhibit the game would rise to probable cause for searching the car without a warrant [citation.]." (4 Ops.Cal.Atty.Gen. *supra*, at p. 409.)

Contrary to the majority's conclusion, Fleet did precisely what the Attorney General's opinion expressly permitted and, by implication, what the Legislature intended to permit by later enactment of section 1006 without substantial change from its statutory predecessor. (See *Orange County Employees Assn., Inc. v. County of Orange* (1993) 14 Cal.App.4th 575, 582-583.) Fleet not only observed Maikhio leaving a fishing area, he actually saw Maikhio engaged in the act of fishing. Under the Attorney General's opinion and the presumptive intent of the Legislature, that fact alone gave Fleet the authority to stop Maikhio's car and inquire about any fish Maikhio had taken. (See 4 Ops.Cal.Atty.Gen. *supra*, at p. 409.) Thus, having lawfully stopped Maikhio's car, Fleet was authorized by section 2012 to inquire of Maikhio whether he had any fish or lobsters in the car. (See *ibid.*) When Fleet received a negative response, which he had probable cause to believe was false, Fleet was then authorized to search the car. (See *ibid.*)

The Attorney General's conclusion is based on the broad authority game wardens have in regulating the capture of fish and game. Because of the highly regulated nature of hunting and fishing and the consequent diminished expectation of privacy of hunters and fisherman, there is no requirement in our statutes or under the Constitution that a

game warden believe that any crimes have been committed or that any game regulations have been violated before exercising his or her powers of inspection. (See *People v. Perez* (1996) 51 Cal.App.4th 1168, 1177-1178; see also *Elzey v. State* (Ga.App. 1999) 519 S.E.2d 751; *People v. Layton* (Ill.App. 1990) 52 N.E. 2d 1280, 1286-1287.)

In finding that evidence of hunting alone, without any suggestion that any hunting regulations had been violated, was sufficient under the Constitution to support the detention of hunters, the court in *People v. Perez* stated: "In analyzing the reasonableness of the search (inspection) and seizure (detention) of hunters, the special nature of hunting is significant. Indeed, the issue of the constitutionality of warrantless inspections by game wardens was anticipated by Justice Blackmun in his concurring opinion in *Delaware v. Prouse* (1979) 440 U.S. 648. In *Prouse*, the court found roving patrols to check the licenses and registration of motorists were unconstitutional. Justice Blackmun stated: 'I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties.' (*Id.* at p. 664, (conc. opn. of Blackmun, J.).)

"As explained above, hunting is a highly regulated activity. 'The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.' [Citation.] The

high degree of regulation over the privilege of hunting, in turn, reduces a hunter's reasonable expectation of privacy. [Citation.]

"Under Fish and Game Code section 2006, officers have authority to check a hunter's rifles and shotguns to determine if they are loaded. [Citation.] Game wardens may inspect receptacles, except the hunter's clothing, where wildlife may be stored. (Fish & G. Code, § 1006.) Fish and Game Code section 2012 requires hunters to exhibit on demand licenses, tags, and the wildlife taken. Government officials may exercise such powers as are necessary to carry out the powers granted by statute or that may be fairly implied from the statute. [Citation.] To this end, wardens may, without a warrant, enter and patrol private open lands where hunting occurs to enforce fish and game laws [citation]; search a restaurant to inspect commercially caught fish [citation]; board a vessel to inspect the fishing haul [citation]; and inspect containers known to be used to hold game [citation].

"Given the highly regulated nature of hunting and the corresponding reduced expectation of privacy of hunters in their gear and their take from hunting, we find it is reasonable to detain hunters briefly, near hunting areas during hunting season, to inspect their licenses, tags, equipment, and any wildlife taken." (*People v. Perez, supra*, 51 Cal.App.4th at pp. 1177-1178.) One court has articulated this principle by stating that in light of the highly regulated nature of hunting, hunters are deemed to have consented to certain intrusions on their privacy. (*People v. Layton, supra*, 552 N.E.2d at p. 1287.)

Admittedly, in *People v. Perez* the defendant was stopped at a checkpoint, rather than, as here, as a result of a warden's roving patrol. However, that distinction was

rejected by the courts in *People v. Layton, supra*, 552 N.E.2d at page 1286, and *Elzey v. State*, *supra*, 519 S.E.2d at pages 754-755, where hunters were stopped by wardens on roving patrols of hunting areas and their convictions for possession of drugs were upheld. In expressly rejecting the defendant's contention that hunters may properly be stopped and searched only at designated roadblocks, the court in *People v. Layton* stated: "The fact that such roadblock and checkpoint stops have been upheld cannot be equated to a rule that these are the only methods of enforcing game laws which do not violate the fourth amendment." (*People v. Layton, supra*, 552 N.E.2d at p. 1286.) Thus the court held: "It is elemental that wildlife licensing and regulatory provisions must be enforceable during the hunt and immediately following it. The roving conservation officer patrol stopping hunters encountered in the field, as here, does not violate the fourth amendment." (*Id.* at p. 1287.)

The court in *Elzey v. State* agreed with the reasoning of the courts in *People v. Perez* and *People v. Layton*: "We believe [*People v. Layton* and *People v. Perez*] correctly recognize that actions by wildlife law enforcement officers in questioning hunters and checking their licenses and identification may be reasonable, even though such actions might be unreasonable outside the hunting context. Clearly, a [Department of Natural Resources] officer may approach a hunter in a state-operated wildlife management area to determine whether the hunter has the necessary license and permits and to ask him questions about his hunt, *regardless of whether the officer has reason to suspect that the hunter has broken any laws*." (*Elzey v. State, supra*, 519 S.E.2d at p. 755, italics added.)

Plainly, where my colleagues have erred is in requiring that game wardens suspect a violation of law has occurred before they stop and question hunters and fisherman.[2] While in other nonregulatory contexts such a suspicion is needed before citizens may be stopped, by voluntarily engaging in highly regulated hunting and fishing activities, citizens such as Maikhio have implicitly agreed game wardens may stop them at or near the time and place of such activities and take reasonable steps to verify that the requirements of applicable hunting and fishing regulations have been met. By taking this regulatory power away from game wardens, the majority has seriously imperiled the state's vital interest in protecting fish and wildlife from depredation.

Here, under the authority provided by section 1006, Maikhio was detained immediately after and very near the area where Fleet had witnessed Maikhio fishing with a hand line. In detaining Maikhio under those circumstances, Fleet acted in conformance with sections 1006 and 2012 and the Constitution.

Benke

BENKE, Acting P. J.

---

2 There is no dispute that the hand line method employed by Maikhio is commonly used to catch lobster and the lobster catch season was closed. However, I do not find this fact necessary to the implied consent doctrine I believe is applicable in this case.

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)(1)]

Pursuant to California Rule of Court, Rule 8.204(c)(1), I certify that this Petition for Review contains 5,527 words and is printed in a 13-point typeface.

Dated: February 11, 2010

JAN I. GOLDSMITH, City Attorney

By Monica A. Tiana
Monica A. Tiana
Deputy City Attorney

Attorneys for Plaintiff/Appellant

JAN I. GOLDSMITH, City Attorney
ANDREW JONES, Assistant City Attorney
MONICA A. TIANA, Deputy City Attorney

Office of the City Attorney
Criminal Division
1200 Third Avenue, Suite 700
San Diego, California 92101-4103
Telephone (619) 533-5500

IN THE SUPREME COURT OF CALIFORNIA

DECLARATION OF
SERVICE BY MAIL

Court of Appeal No. D055068
San Diego Sup. Ct. App. No. CA211304
Court No. M031897
Respondent: Bouhn Maikhio

I, Janette A. Myers, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 1200 Third Avenue, Suite 700, San Diego, California, 92101-4103. I served the following document(s): **PETITION FOR REVIEW,** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Gary R. Nichols
Office of the Public Defender
233 "A" Street, Suite 1010
San Diego, CA 92101

The Honorable David Oberholtzer
Judge of the Superior Court
220 West Broadway
San Diego, CA 92101

San Diego Superior Court
Clerk of the Appellate Division
220 West Broadway
San Diego, CA 92101

Court of Appeal State of California
Fourth Appellate District
Division One
750 "B" Street, Suite 300
San Diego, CA 92101-8196

Office of the Attorney General
110 West "A" Street, Suite 1100
San Diego, CA 92101

I then sealed each envelope, and with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California, on February 16, 2010.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 16, 2010, at San Diego, California.

Janette A. Myers
Janette A. Myers

PROOF OF SERVICE BY MAIL
C.C.P. §§ 1013(a); 2015.5