IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Appellant, v. BOUHN MAIKHIO, Respondent/Defendant.	Case No. S180289 Court of Appeal No. D055068 San Diego Sup. Ct. App. Div. No CA211304 Superior Court No. M031897

REPLY TO ANSWER TO PETITION FOR REVIEW

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

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REPLY TO ANSWER TO PETITION FOR REVIEW

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

The People respectfully submit this reply to Respondent's answer to the petition for review.

WHY REVIEW SHOULD BE GRANTED

The issues presented in this case—issues that affect the California Department of Fish and Game's [DFG] ability to protect fish and wildlife throughout California—are important legal questions deserving this Court's review. The People submit the following reply to the arguments in Respondent's answer, in the same order the arguments were presented.

ARGUMENT

I

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

Respondent argues "the People['s] claim that the Court of Appeal's decision 'seriously imperils the state's ability to protect fish and wildlife'" is a "scare tactic." (Answer to Petition For Review [Answer] at 2.) Respondent asserts that the majority's decision will not have a serious impact on the ability of DFG wardens because they can "figure out effective ways to accomplish [their] mission [in spite of it]. . . ." (Answer at 2.)

Contrary to Respondent's arguments, there can be no doubt that the majority's decision in *People v. Maikhio*, 180 Cal. App. 4th 1178 (2010), will seriously imperil the ability of DFG wardens to effectively protect fish and wildlife in this state. Under *Maikhio*, wardens may no longer conduct vehicle stops of those they reasonably believe have recently been engaged in hunting or fishing. The DFG will obviously look to the *Maikhio* case as a guide to determine the circumstances under which wardens in California can conduct vehicle stops. Under a review of *Maikhio*, the serious impact of this case on the ability of wardens to conduct vehicle stops is evident from the majority's reasoning under their special needs balancing test.

Under the majority's special needs analysis, conducted pursuant to *Brown v. Texas*, 443 U.S. 47 (1979), the majority was required to weigh three concerns: (1) the state's interest, (2) the degree to which the vehicle stop furthered the state's interest, and (3) the intrusion on Maikhio. *Brown,* 443 U.S. at 50-51. However, the majority erred by replacing the second concern with a wholly different one. Slip Opn. at 17-18; *Maikhio*, 180 Cal.

App. 4th at 1192. Rather than focusing on the degree to which the vehicle stop in this case furthered the state's interest, the majority improperly considered whether a "lesser intrusive means" could have been used by Warden Fleet to stop Respondent. Slip Opn. at 17; *Maikhio*, 180 Cal. 4th at 1192. The majority concluded that because Fleet could have stopped Respondent on foot or by conducting a checkpoint stop at the end of the pier, the vehicle stop based on a reasonable belief he had recently engaged in fishing, was unconstitutional. *Id.*

Under *Maikhio*, hunters and fisherman now have the ability to successfully raise this "lesser intrusive means" argument to defeat vehicle stops conducted by wardens in California. Under such an argument, the "state's interest" concern and the "intrusion" concern, will likely garner the same weight for every vehicle stop case. The only fluctuating factor in the majority's special needs analysis is the "lesser intrusive means" factor that the majority applied. If a fisherman or hunter can tip this concern in his or her favor, the individual can defeat a warden's vehicle stop. Tipping this "lesser intrusive means" concern in the hunter's favor, to obtain a finding of unconstitutionality, will not be difficult to accomplish.

For example, a finding of constitutionality would be difficult to obtain in the case of a warden who conducts a vehicle stop based on a reasonable belief that the occupants are returning from out of state hunting expeditions during elk season (whereby the warden is seeking to prevent chronic wasting disease from entering California). Under *Maikhio*, a hunter who takes his case to court could obtain a finding of unconstitutionality merely by arguing that the warden could have conducted a checkpoint stop to check for evidence of chronic wasting disease, rather than conducting the individual stop of the hunter's vehicle. Thus, a warden's stop of a vehicle to check for chronic wasting disease, based on a reasonable belief the

occupants are returning from out of state hunting during elk season, is now unconstitutional under *Maikhio*. This is but one example of how the majority's decision will detrimentally impact the ability of wardens to conduct vehicle stops, inevitably leading to the depradation of fish and wildlife in this state.

Moreover, California is a large state and there are a limited number of DFG wardens to enforce the relevant fish and game laws. The DFG likely does not have the resources to conduct multiple checkpoints across the state on a daily or even weekly basis. Yet wardens are now essentially required to conduct checkpoint stops in order to combat chronic wasting disease. Thus, under *Maikhio*, the ability of DFG wardens to stop chronic wasting disease from entering California has been seriously compromised.

Additionally, under the same "lesser intrusive means" analysis, vehicle stops of abalone poachers can be defeated in court, even when the warden was unable to reach the poacher before the individual drove off in a vehicle. A poacher could make the successful argument that the warden could have used the lesser intrusive means of walking the beach to dissuade poachers, similar to Respondent's argument that Warden Fleet could have walked the pier to prevent poaching. (Answer at 3.)

Once again, the DFG likely does not have the resources to assign numerous wardens to walk the beaches or piers in California. Rather, case law shows that the DFG furthers its primary objective of protecting fish and wildlife by providing individual wardens with spotting scopes which allow them to monitor large areas and groups of people who are fishing on piers or diving for abalone. *People v. Tatman*, 20 Cal. App. 4th 1 (1993); *People v. Nguyen*, 161 Cal. App. 3d 687 (1984); *Maikhio*, 180 Cal. App. 4th at 1178. Case law and common sense dictate that wardens can then attempt to contact possible poachers and deter them from future poaching through the

use of citations or criminal charges. *Id.* Under the "lesser intrusive means" prong in *Maikhio*, the DFG is now seriously hampered from using the reasonable and Constitutional tool of vehicle stops to protect fish and wildlife at beaches and piers in this state.

The majority's cite to *People v. Levens*, 713 N.E. 2d 1275, 1277 (Ill. App. 1999),[1] and *State v. Larsen*, 650 N.W. 2d 144, 153-154 (Minn. 2002), clearly evinces the majority's intent that a reasonable suspicion of criminal activity must be present before a vehicle stop by a warden, based on a reasonable belief of recent hunting or fishing, can be deemed Constitutional.

Justice Benke accurately recognized the serious impact of the majority's decision and stated in her dissenting opinion, "[b]y 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." Slip Opn. at 6; *Maikhio*, 180 Cal. App. 4th at 1199; *dissenting opn.*, Benke J.

Finally, if the majority had applied the implied consent doctrine to the vehicle stop in this case, such application would have led to a finding that the vehicle stop was Constitutional. The serious and detrimental impact that the majority's erroneous decision has on fish and wildlife in California demonstrates that this case deserves review.

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[1] The finding of the *Levens* court that reasonable suspicion is required for a warden to conduct a vehicle stop appears to be dictum.

II

THE MAJORITY ERRONEOUSLY CONCLUDED THAT FISH AND GAME CODE SECTIONS 1006 AND 2012[2] DO NOT AUTHORIZE VEHICLE STOPS WITHOUT A REASONABLE SUSPICION OF CRIMINAL ACTIVITY

Respondent essentially argues that the majority properly found that Sections 1006 and 2012 did not authorize the vehicle stop in this case. (Answer at 4.) Specifically, Respondent claims that the 1944 Attorney General Opinion (4 Ops. Cal. Atty. Gen. 405, 409) which directly permitted the vehicle stop made by Warden Fleet in this case, has no persuasive authority. (Answer at 4-5.) However, in this case, aside from the Attorney General Opinion permitting the identical vehicle stop that occurred here, the legislature, by implication, adopted the Attorney Generals construal of Section 1006 by reenacting it without substantial change.

It is well settled that,

> "[w]here a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." [Citations.] "There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." [Citation.]

Orange County Employees Association v. County of Orange, 14 Cal. App. 4th 575, 582 (1993), *citing Wilkoff v. Superior Court*, 38 Cal. 3d 345, 353 (1985). Similar presumptions apply in the case of Attorney General opinions. *Henderson v. Board of Education*, 78 Cal. App. 3d 875, 883 (1978). Further, "[t]he Attorney General['s] . . . statement on this question

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[2] All future references are to the Fish and Game Code unless otherwise specified.

is entitled to great weight in the absence of controlling state statutes and court decisions." *Phyle v. Duffy*, 334 U.S. 431, 441 (1948); *see also Smith v. Municipal Court of Glendale Judicial District*, 167 Cal. App. 2d 534, 539 (1959).

Here, as succinctly discussed by Justice Benke in her dissenting opinion, the 1944 Attorney General Opinion expressly permitted the vehicle stop conducted by Warden Fleet, and by implication, was what the Legislature intended to permit by subsequent enactment of the statute without substantial change. Slip Opn. at 2; *Maikhio*, 180 Cal. App. 4th at 1196-1197; *dissenting opn.*, Benke J., *citing to Orange County Employees Association*, 14 Cal. App. 4th at 582.

The majority's comment in footnote 6 of its opinion—that the Attorney General's Opinion does not reflect a current consideration of Fourth Amendment law regarding investigatory stops, since it predated *Terry v. Ohio*, 392 U.S. 1 (1968)—does not change this analysis. The Attorney General's Opinion reflects a finding of reasonableness in the context of an administrative seizure and apparently, there are no controlling statutes or cases evincing a different construal.

As Justice Benke stated in her dissent, "[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." Slip Opn. at 1; *Maikhio*, 180 Cal. App. 4th at 1196; *dissenting opn.*, Benke J. In light of the Attorney General's Opinion and the legislature's reenactment of Section 1006 without substantial change, the majority's holding that Sections 1006 and 2012 do not authorize vehicle stops by wardens based on a reasonable belief the occupants have recently engaged in fishing, is erroneous.

III

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

Respondent's Answer fails to substantively address the applicability of the implied consent doctrine to this case. The majority in *Maikhio* also failed to apply the implied consent legal doctrine to the vehicle stop in this case. However, as persuasively argued by Justice Benke, had the majority applied this appropriate legal doctrine, the result would have been a finding of constitutionality.

There is no dispute that fishing in California is a highly regulated activity, and, consistent with other highly regulated activities, should be included within the appropriate application of the implied consent doctrine. In the context of hunting, the court of appeal in *People v. Perez*, 51 Cal. App. 4th 1168, 1177-78 (1996), found that the implied consent doctrine applied to justify a warden's vehicle stop without reasonable suspicion and based only on evidence of recent hunting. The *Perez* court stated, "[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.*

In finding the implied consent doctrine applicable to this case, Justice Benke aptly concluded,

> 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. . . . 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.

Slip Opn. at 6; *Maikhio*, 180 Cal. App. 4th at 1199*; dissenting opn.*, Benke J.

In short, application of the implied consent doctrine demonstrates that the vehicle stop in this case was reasonable under the Constitution. The majority's failure to apply this appropriate legal doctrine to the determination of Constitutionality further 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 analysis and reached the conclusion that wardens' vehicle stops, based on a reasonable belief that the occupants have recently been engaged in fishing, are unconstitutional unless supported by a reasonable suspicion of criminal activity. Despite Respondent's arguments to the contrary, 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. (Answer at 5-10.)

A. THE MAJORITY ERRONEOUSLY FOUND THAT THE *EDMOND* RULE OF PER SE UNCONSTITUTIONALITY APPLIES TO THIS CASE

The majority first erred by concluding that an "Edmond-type presumptive rule of unconstitutionality" applied to Warden Fleet's vehicle stop. *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Illinois v. Lidster*, 540 U.S. 419, 426-427 (2004). Based solely on Fleet's statement that he stopped Respondent to "make sure that [he] was in compliance with the California fishing laws and regulations," the majority found that Fleet's primary "if not, sole" purpose was to catch those committing misdemeanor crimes and was not to protect fish and sea life at the pier. Slip Opn. at 14-15; *Maikhio*, 180 Cal. App. 4th at 1190-91.

The majority wrongly concluded that *Edmond* applies to this case. In *Edmond,* a police department set up a checkpoint and conceded that the primary and sole purpose of the checkpoint operation was to stop cars in order to interdict drug crimes. *Edmond,* 531 U.S. at 44. The high Court found that because the primary purpose of the checkpoint stop was general crime enforcement, the stop was per se unconstitutional and therefore, required that the stops be supported by a reasonable suspicion of criminal activity. *Edmond*, 531 U.S. at 44. However, the high Court in *Edmond* made it clear that the case has a very narrow application. *Id.* at 47-48; *Lidster*, 540 U.S. at 424. The Court stated,

> 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.

In *Lidster*, the Court narrowed the application of *Edmond* even farther. The Court explained that *Edmond* applies only to those facts in isolated cases that are "similar to those presented in *Edmond.*" *Lidster*, 540 U.S. at 424. The People submit that the facts of this case are not similar to those in *Edmond*. Contrary to the majority's reasoning in *Maikhio* and to the arguments in Respondent's answer, Warden Fleet was not acting pursuant to an ulterior and improper motive. On the contrary, Warden Fleet saw Respondent catch something while hand-line fishing—a method commonly used to illegally catch lobsters at the pier—and saw him place the catch in a black bag. Fleet stopped Respondent to "make sure that [he] was in compliance with the California fishing laws and regulations." (Transcript at 21, lines 15-20.) A reasonable inference from this statement is that Fleet stopped Respondent to make sure he was not poaching. This is a primary function of DFG wardens. *See Tatman*, 20 Cal. App. 4th at 1; *Nguyen*, 161 Cal. App. 3d at 687.

The People submit that, contrary to the majority's finding of a general crime control purpose, the facts of this case demonstrate that the DFG has a special need, beyond the normal need for law enforcement to conduct vehicle stops of occupants they reasonably believe have recently been engaged in fishing or hunting. The majority's finding of unconstitutionality under *Edmond* was erroneous.

B. THE MAJORITY IMPROPERLY CONDUCTED THE SPECIAL NEEDS BALANCING TEST UNDER *BROWN*

The majority also erred when it conducted the special needs balancing test pursuant to *Brown,* 443 U.S. at 50-51. The majority first erred by ignoring the third prong in *Brown*: the degree to which the vehicle stop furthered the state's interests. The majority failed to consider the reduced expectation of privacy that fisherman have based on the highly

regulated nature of fishing. Slip Opn. at 16; *Maikhio*, 180 Cal. App. 4th at 1191). However, as discussed earlier, the most serious error in the majority's balancing test was their application of a "least intrusive means" prong to the weighing under *Brown*. Slip Opn. at 17; *Maikhio*, 180 Cal. App. 4th at 1192. The majority engaged in this analysis, despite the fact there is no authority for applying this test, and after improperly relying on *United States v. Munoz*, 701 F.2d 1293, 1300 (9th Cir. 1983), a case that misinterpreted the balancing test conducted in *Delaware v. Prouse*, 440 U.S. 648 (1979).[3] Simply put, based on the majority's failure to properly gauge the weight of the interests at issue, the majority erroneously found that the intrusion on the motorist outweighed the state's interest in protecting fish and wildlife in California.

In his answer, Respondent does not argue in favor of the least intrusive means analysis. (Answer at 7-10.) Rather, he asserts that because Warden Fleet could have conducted a "more effective" stop, the vehicle stop was unlawful. (Answer at 7.) However, this analysis was clearly rejected by the United States Supreme Court in *Michigan v. Sitz*, 496 U.S. 444, 453 (1990), "(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 [the state's vital interest in protecting fish and wildlife].)."

Additionally, the majority's erroneous balancing test resulted in an inconsistency which highlights the flaw in the majority's reasoning.[4]

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[3] *See* petition for review at 20.

[4] The majority failed to consider the degree to which the vehicle stop furthered the state's interests. Slip Opn. at 17; *Maikhio*, 180 Cal. App. 3d at 1192.

Specifically, the majority found that wardens may stop hunters and fisherman who are *on foot* when they reasonably believe the individuals have recently been engaged in hunting or fishing yet under the same balancing test, found that wardens may not conduct *vehicle stops* of individuals under identical circumstances. A proper special needs analysis under *Brown* would have resulted in a finding of Constitutionality for both vehicle stops and for stops of individuals on foot. For example, under the first concern under *Brown*, the state has a vital interest in conducting both types of stops in order to protect fish and wildlife. Additionally, both stops have an equally high degree of furthering the state's interest and the intrusion for both stops is minimal because whether on foot or in a car, the stops are of an individual engaged in the highly regulated activity of fishing. Hence, that individual clearly has a reduced expectation of privacy. Furthermore, the stops must occur close in time to the fishing or hunting and close to the area of the hunt.

In short, the majority erred by conducting a faulty balancing test under *Brown*. The erroneous decision of the majority, coupled with the detrimental impact on the state's ability to protect fish and wildlife, demonstrates that this case deserves review.

CONCLUSION

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

Dated: March 19, 2010

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

Pursuant to California Rule of Court, Rule 8.204(c)(1), I certify that this Reply to Answer to Petition for Review contains 3,349 words and is printed in a 13-point typeface.

Dated: March 19, 2010

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IN THE SUPREME COURT OF CALIFORNIA

DECLARATION OF
SERVICE BY MAIL

Supreme Court No. S180289
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): **REPLY TO ANSWER TO 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:

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233 "A" Street, Suite 1010
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The Honorable David Oberholtzer
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San Diego, CA 92101

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Clerk of the Appellate Division
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Court of Appeal State of California
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I then sealed each envelope, and with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California, on March 22, 2010.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 22, 2010, at San Diego, California.

Janette A. Myers
Janette A. Myers

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