SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE FOR THE STATE OF CALIFORNIA, Petitioner/Appellant, v. BOUHN MAIKHIO, Respondent/Defendant.	S180289 Court of Appeal No. D055068 (Super. Ct. No: CA 211304)

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This case involves the stop of a vehicle on a well trafficked street in the city of San Diego. The prosecution has put forth a number of theories to justify the stop, including that it was implicitly authorized under sections 1006 and 2012 of the California Fish and Game Code[1]; that it is a permissible suspicionless seizure and search under both -- or perhaps a combination of -- the administrative search and special needs doctrines; and that, in light of the broad array of rules and regulations governing those who hunt and fish on California's wildlife areas, Mr. Maikhio impliedly consented to the stop and search. This last theory the prosecution first advances before this Court, whereas the prosecution has now discarded the

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

argument the stop was supported by reasonable suspicion, a theory they advanced before the trial court, appellate department and court of appeal.

Mr. Maikhio respectfully submits that while theories obviously abound, there was no legal justification to stop his vehicle. The prosecution contends this stop was for "compliance" not law enforcement. But it is important to stress at the outset this officer declined to patrol the relatively narrow confines of the Ocean Beach pier in favor of surreptitious telescope surveillance and traffic stops on city streets, so that he would not "blow his cover." And it is important to note this was not merely a stop or "compliance check." This Fish and Game warden handcuffed Mr. Maikhio, because he had lied about having a lobster, and then, after he recovered the single crustacean, this warden still thoroughly searched the car while a handcuffed Mr. Maikhio waited, along with his wife and infant child even though it was close to midnight.

In short, even though in this instance this Fish and Game employee behaved entirely like a very aggressive police officer, the prosecution nevertheless characterizes his actions as administrative. In portraying this stop and search as administrative, the prosecution adduces a broad array of case authority, much of it from other jurisdictions. What is crucial about these cases is not merely their legal and factual inapplicability. It is also that

while they demonstrate a perhaps surprising variety in the kinds of searches and seizures affected within game preserves, the cases reveal that even when rules such as those embodied in sections 1006 and 2012 confer broad authority on game wardens to inspect the effects of hunters and anglers in a game preserve, that authority is limited in at least two respects: by the terms of the authorizing statutes and the attendant notice they provide; and by the parameters of the preserve and any lawful extension of the preserve, such as a properly established checkpoint. Otherwise, the constraints of the Fourth Amendment apply with full effect to game wardens, particularly when as here they are acting solely in their enforcement capacity.

STATEMENT OF THE FACTS AND CASE

The Incident

On the evening of August 19, 2007, California Department of Fish and Game (DFG) Officer Erik Fleet sat in his vehicle, parked on Narragansett street watching activity on the Ocean Beach Pier through a high powered scope, from about 300 yards away. (Transcript of Hearing [T], 7, 19.) The pier is approximately a half mile long and 12 feet wide. (T, 23, 34.) People enter the pier through a parking lot that Officer Fleet has the authority to patrol. (T, 8.)

By his own admission Officer Fleet was "hiding" from those who were fishing off the pier. (T, 8.) Officer Fleet explained that he customarily used this covert technique, rather than station himself on the pier itself because he did not want to "blow his cover" for fear people on the pier would notice him and discard "all the evidence" of their illegal fishing activities back into the sea: "I can't blow my cover on the pier when I'm working the pier. If I go out there, then everybody else on the pier knows that Fish and Game is present." (T, 8.) Officer Fleet elaborated on this: "When I'm working the pier, I work more than one group of people. I can see multiple groups of people violating the law. So, if I go check on a group, then the other groups, all the evidence gets thrown or, or my cover gets blown. For new people coming on the pier or the people that are on the pier." (T, 8, 20-21.) Officer Fleet explained that by "thrown," he meant, "you can throw evidence off the pier all the time . . . fish, lobsters[.]" (T, 8.) Officer Fleet explained that he was "taught all the way through the Academy," to "wait for a vehicle to depart or suspects to depart in their vehicles before making [his] search for violations[.]" (T, 18, 34.)

To catch violators, Officer Fleet hides in his car, some distance away, watching and waiting until people return from fishing, load up their cars and drive away. Then, he conducts traffic stops and demands to inspect any

containers which might contain captured fish or other sea creatures. (T. 8-9, 18, 33-34.) He saw Respondent, Bounh Maikhio, accompanied by a woman holding an infant. (T, 20.) Mr. Maikhio was fishing from the pier, using a hand-held line. A hand-held fishing line is legal to use. It is considered to be an effective tool for capturing certain creatures that dwell on the ocean floor, like lobsters and other crustaceans. (T., 20, 23.) Then Officer Fleet saw Mr. Maikhio catch something and place it in a black bag. He could not tell what it was. Officer Fleet continued to observe Mr. Maikhio. (T, 20.) He saw him take up the bag and, accompanied by the woman and infant, leave the pier, enter the parking lot and drive out of the pier. (*Id.*) Officer Fleet reiterated he waited to stop Mr. Maikhio because he did not want to blow his cover. (T, 20-21.) Officer Fleet stopped Mr. Maikhio's car approximately three blocks from the pier. (T, 21.)

Officer Fleet did not have a warrant and did not "necessarily" suspect Mr. Maikhio of any law violations. Instead, he relied exclusively on the inspection statute of the California Fish and Game Code section 1006, to detain the vehicle and its occupants and then to search Mr. Maikhio's car and containers found therein. (T, 21-22.) Inside a black bag, beneath the left rear passenger seat "under the female's feet," Officer Fleet found a lobster. (T, 22.) Mr. Maikhio admitted the lobster was his. (T, 24.) But at this time,

Officer Fleet had Mr. Maikhio get out of his car. (*Id.*) "I was working by myself that evening and since he had the propensity to lie to me, I placed the Defendant in handcuffs for my safety and I sat him on the curb and continued a more detailed search of the vehicle." (T, 22.) (There was no discussion of what Officer Fleet did with Mr. Maikhio's wife and infant child at this point, but presumably they were not in the car when he conducted this more detailed search.) Nothing was found during this more thorough search. (T, 22.)

The Motion to Suppress and Review of that Motion

Mr. Maikhio was prosecuted for possessing an out-of-season lobster and refusing to permit inspection of his vehicle. He moved to suppress the evidence found as a result of the warrantless search and seizure. The trial court granted his motion. Although the trial court had "no problem with the officer walking up to the vehicle and asking to look inside, asking to look in the container," in this case, Officer Fleet conducted "a traffic stop, he lit him up." (T, 43.) The trial court found that notwithstanding the Fish and Game inspection statutes, a vehicle stop still requires a reasonable suspicion of illegal activity under the Fourth Amendment. (T. 44, 46-47.)

The prosecution appealed to the appellate division of the superior court, which reversed, holding that sections 1006 and 2012 authorized a vehicle stop and search based on a reasonable belief the person to be stopped and searched has been involved in fishing. (Order After Rehearing, 4/7/09, p. 2.) The appellate division also held that the observation that a person caught something using a hand line established a reasonable suspicion that the person had illegally caught a lobster. (*Id.*, at p. 2.)

The Court of Appeal Decision

The Court of Appeal granted transfer of this case and requested briefing on two 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 Majority Ruling

The Court of Appeal majority found the stop to be unlawful. The Court rejected the prosecution's argument sections 1006 and 2012 *impliedly* authorized the vehicle stop.

In addition to relying on the plain language in Section 1006 which does not mention vehicles, the Court of Appeal majority quoted extensively from a 1944 Attorney General Opinion, which the People also extensively

discuss in their brief. (AOB, 7, 9-12.) This advisory opinion, discussing a predecessor statute, addresses the precise question of whether the predecessor statute to section 1006 allowed Fish and Game to inspect vehicles, and concludes it does not:

> "As used in that [precursor] 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...[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 (1944), italics added.)

The Court of Appeal carried forward the legislative history of Section 1006, noting it was twice amended after this advisory opinion, once in 1957 and again in 1972 and in neither instance did the Legislature include vehicles among the items wardens could inspect. The Court found that by failing to include vehicles, the Legislature expressed its intent they be excluded from the scope of section 1006. The majority found this interpretation avoided the instant issues regarding the constitutionality of section 1006 if that section was interpreted as granting the DFG and its wardens broad authority to inspect vehicles.

The majority also rejected the prosecution's argument section 1006

impliedly allowed for the inspection of vehicles. The Court acknowledged there were "certain additional powers that may be fairly implied as necessary to carry out" the express powers under section 1006. For example, the Court found, "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." But the Court concluded that nothing in sections 1006 or 2012 made it *necessary* for the DFG to "conduct traffic stops and inspections of specific vehicles on public streets to accomplish the express powers."

The Court of Appeal also rejected the People's argument this was a suspicion-less stop justified under the "special needs" doctrine. The Court found the stop was primarily for law enforcement purposes. But the Court also found it would "likely" resolve the special needs balancing test in favor of Mr. Maikhio given the severity of the intrusion as recognized by the United States Supreme Court in a *Delaware v. Prouse* (1979) 440 U.S. 648 [99 S.Ct. 1391, 59 L.Ed.2d 660] and *U.S. v. Brignoni-Ponce* (1975) 422 U.S. 873 [95 S.Ct. 2574, 45 L.Ed.2d 607]. The Court found that DFG had less intrusive alternatives available here such as patrolling the pier or setting up a checkpoint at the entrance.

Finally, although the prosecution is no longer making this argument, the Court of Appeal concluded Officer Fleet lacked reasonable suspicion to stop Mr. Maikhio's car because the handlining technique was perfectly legal and Fleet admitted he was not sure what Mr. Maikhio had caught. Significantly, the Court concluded with *People v. Levens* (1999) 713 N.E.2d 1275, 1277, where the Illinois Court of Appeal found that "[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."

The Dissent

The Honorable Patricia Benke dissented. The dissent first concluded that a hypothetical in the aforementioned Attorney General's advisory opinion supported allowing vehicle stops under sections 1006 and 2012. Under this hypothetical, wardens may stop a motorist emerging from a duck club and inquire if they have "right to 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 []. 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*, 405, p. 409.) The dissent argued this hypothetical was adopted by the Legislature along with the rest of the advisory opinion and the instant facts mirror that the scenario authorized under this hypothetical.

The dissent found that this authority did not violate the fourth amendment because of the "broad authority game wardens have in regulating the capture of fish and game," which consequently diminished hunters and anglers' expectation of privacy and allowed wardens to "inspect" them without reasonable suspicion. The dissent observed that in one case the court found 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* (1999) 142 Ill.Dec. 539..) The dissent also cited and another out of state case, *Elzey v. State* (Ga. Ct. 1999) 239 Ga.App. 47, 51, that allowed for "roving patrols" within hunting areas.

ARGUMENT

I.

FISH AND GAME CODE SECTIONS 1006 AND 2012 DO NOT AUTHORIZE VEHICLE STOPS WITHOUT REASONABLE SUSPICION OF CRIMINAL CONDUCT AND EVEN IF THESE SECTIONS DID AUTHORIZE SUCH STOPS, IT WOULD VIOLATE THE FOURTH AMENDMENT.

Although vigorously arguing in the lower court that "receptacle" in section 1006 included vehicles (Trans. 9, 41, AOB in the Court of Appeal, 8-11, Reply Brief, 2-3), the prosecution has now seemingly focused entirely on the dissent's conclusion the Legislature adopted not only the statutory construction, but also the illustration in the 1944 advisory opinion. (AOB, 9-12.) As discussed in Section I.D, below, words in a statute and what they mean can be imputed to motorists like Mr. Maikhio but no authority allows imputing an outdated constitutional illustration. And although neither the dissent nor the prosecution now seemingly contend that "receptacle" in section 1006 applies to vehicles, Officer Fleet believes it does (T, 9) and it is ostensibly what he was taught at the academy (T, 18, 34). It is important to confirm that the actual language of section 1006 offers no purchase for police to stop motorists.

"Well-established rules of statutory construction require [courts] to ascertain the intent of the enacting legislative body so that [they] may adopt

the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) Statutory interpretation involves a three-step analysis. First, a court should examine the actual language of the statute. "In examining the language, the courts should give to the words of the statute their ordinary, everyday meaning unless, of course, the statute itself specifically defines those words to give them a special meaning." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-1239 [*Halbert's Lumber*], internal citations omitted.) "If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. " (*Id.* p. 1239.) "[I]f the meaning of the words is not clear, courts must take the second step and refer to the legislative history. [Citations.]" (*Id.* at p. 1239.) "The final step--and one which we believe should only be taken when the first two steps have failed to reveal clear meaning--is to apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable." (*Id.* at pp. 1239-1240.)

"'If 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. [Citations.]'" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509.)

A. The Plain Language of the Statutes

Since 1915 section 1006, subdivision (a) and its predecessors have provided for the inspection of "[a]ll 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." (See 4 Ops.Cal.Atty.Gen., *supra*, 405, 406-407.)

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."

Nowhere does either statute mention the inspection of vehicles. Section 1006 does authorize the inspection of boats, but not cars or trucks or motorcycles or wagons, or carts, or any other form of conveyance or kind of vehicle. If the Legislature had intended to permit the inspection of vehicles it would have said "vehicles." It certainly would not have expressed its intention to authorize the inspection of vehicles by referring to them as "receptacles." Nor would any reasonable person reading the statute think of vehicles when reading the word "receptacles." In fact, no California statute can be found which has used the word "receptacles" when the Legislature meant "vehicles."

Because when given its "ordinary, everyday meaning," the word "receptacles" does not mean vehicle, the prosecution's former theory that a car was a species of vehicle fails.

B. The Historical Interpretation of the Statute and its Predecessors.

Section 1006 was enacted in 1957. It has been amended once since then, in 1972, when the word "reptiles" was added to the statute. Section 1006 superseded Fish & Game Code section 23 which contained the identical language of the current statute, permitting inspection of "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, ..."

(See 4 Ops.Cal.Atty.Gen., *supra*, 406-407.) The quoted sentence was added to the predecessor of section 23 in 1915. (*Ibid.*)

In 1944, the Attorney General was asked by the Department (then Division) of Fish and Game to render an opinion on "'how far law enforcement officers of the Division of Fish and Game may proceed under the provisions of sections 23 and 24 of the Fish and Game Code in searching automobiles and seizing illegal game which may be found in such vehicles. (See 4 Ops.Cal.Atty.Gen., *supra*, at p. 405.) In concluding that either a warrant or something more than mere suspicion, was required (*Id.* at p. 410), the Attorney directly addressed and rejected the suggestion that an automobile could be searched under the statutory authorization to inspect "receptacles." "As used in that section [former § 23] 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." (*Id.* at p. 407.)

The Attorney General's opinion that "receptacles" did not include automobiles has not been challenged since it was rendered until the prosecution made this argument in the lower courts. But, more significantly,

in 1957, when the Legislature repealed and reenacted the statute in slightly modified form, it did not add automobiles to the list of things and places subject to inspection. The Legislature amended the statute again in 1972, well after the Supreme Court applied the Fourth Amendment to the States in *Mapp v. Ohio* (1961) 367 U.S. 643 [81 S.Ct 733, 6 L.Ed.2d 1081], and four years after the Court established the reasonable suspicion standard for investigative detentions in *Terry v. Ohio* (1968) 392 U.S. 1, [88 S.Ct. 1868, 20 L.Ed.2d 889], but this 1972 amendment merely added reptiles to the kinds of animals subject to the law, it again did not add automobiles to the list of things and places to be inspected.

The Legislature is deemed to be aware of prior official interpretations of statutes. When the Legislature then reenacts or amends a statute without changing the language previously construed, it may be deemed to have adopted the construction. For almost three-quarters of a century the Fish and Game Code has remained unchanged in the specification of things and places subject to inspections, although in that time it has been repealed and reenacted in identical language, and amended as to the kinds of animals which may be seized, but not as to the things and places which may be inspected. For that entire time, the official, published, opinion of the California Attorney General has been that automobiles are not "receptacles"

subject to inspection within the meaning of the statute.

Although the Attorney General's interpretation of *statutory law* is not controlling, courts accord it great respect. (See *State Bd. of Educ. v. Honig* (1993) 13 Cal.App.4th 720, 735; *Sonoma County Bd. of Education v. Public Employment Relations Bd.* (1980) 102 Cal.App.3d 689, 699.) ""Where 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.]' (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353 [211 Cal.Rptr. 742, 696 P.2d 134].) [¶] "So it is here. Similar presumptions apply in the case of Attorney General opinions (*Henderson v. Board of Education* (1978) 78 Cal.App.3d 875, 883) . . . . We must assume the Legislature knew what it was doing when it employed the language of the statute[] at issue in this case." (*Orange County Employees Ass'n v. County of Orange* (1993) 14 Cal.App.4th 575, 582-583.)

Because the Legislature is presumed to be aware that the Attorney General has construed the language of section 1006 to not permit inspection of automobiles, and the Legislature has had two opportunities to amend the

statute and reject the Attorney General's interpretation but did not, it is now presumed that the Legislature has adopted and endorsed the interpretation of the Attorney General. Therefore, it is the intent of the Legislature that section 1006 does not authorize the inspection of vehicles.

C. Application of Reason, Practicality, and Common Sense

Reason, practicality, and common sense dictate that if a statute means to refer to vehicles, is says "vehicles," not "receptacles." Additionally, the language of the statute, consistent with its administrative character and the protections of the Constitution, is careful to limit the scope of the inspection authorization to avoid invading areas of personal privacy. Boats, markets, stores and other buildings are subject to inspection, but not dwellings. All receptacles are subject to inspection, but not the clothing worn by an individual. The obvious concern shown by the Legislature for the privacy of personal space would be seriously diminished by construing "receptacles" to extend to personal automobiles, but would be furthered by recognizing that the Legislature did not intend for "receptacles" to mean vehicles.

This is also the conclusion reached in the only published appellate opinion to consider the statute, *People v. Maxwell* (1969) 275 Cal.App.2d Supp. 1026. There, the court noted "that the Legislature itself is not insensitive to the invasion of privacy which a search may involve since it

prohibits search of 'the clothing actually worn by a person at the time of inspection' and of 'dwellings.'"(*Id.*, at p. 1029.) This conclusion also coincides nicely with the second step of statutory interpretation, the legislative history. As the Attorney General pointed out in 1944, the sentence in question was first codified in 1915 when automobiles were not as extensively used and the probability of transporting contraband game in them was lower. (See 4 Ops.Cal.Atty.Gen., *supra*, 407.) The relative rarity of automobiles may help explain why the Legislature did not authorize their inspection initially. But as the automobile became more and more commonplace, the best explanation for their continued exclusion from the inspection statute is that the Legislature did not intend to authorize the inspection of vehicles. And, as discussed in section B., *ante*, that conclusion has been inescapable for the last half century when the Legislature reenacted and amended the statute, informed by the Attorney General's opinion, and continued to exclude vehicles from the statute.

D. The Legislature Cannot Adopt an Outdated Constitutional Illustration.

The prosecution has now recast their statutory argument to make it indistinguishable from the lower court dissent. (AOB, 9-12.) Justice Benke relied on the hypothetical in the Attorney General's advisory opinion that would allow a fish and game warden to stop and search a vehicle "emerging"

from a the duck club, the warden reasonably believed the driver lied about having game in the car.

The majority rejected this portion of the Attorney General's advisory opinion as being inconsistent with current bedrock Fourth Amendment principles: "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* [*supra*,] 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*.)." A section 1006 vehicle stop advisory opinion from the Attorney General informed by post *Terry* fourth amendment jurisprudence would not mirror its 1944 counterpart.

But it is difficult to accept the dissent's finding that the Legislature incorporated not only the Attorney General's statutory construction that "receptacles cannot be extended to connote motor vehicles," but also gave the force of law to one of the "illustrations" addressing the constitutional question "of reasonableness or the existence of probable cause to justify a search." (4 Ops.Cal.Atty.Gen. 405, 407.) First, such an interpretation would

invite rather than defeat a constitutional attack, and violate the rule of construction this Court reiterated in *Romero*, *supra*, 13 Cal.4th at p. 509.

Second, the cases that apply to attorney general advisory opinions the rule of construction that the legislature by leaving a statute unchanged implicitly adopts that construction all concern particular statutory interpretations. (e.g. *Wilkoff v. Superior Court*, *supra*, 38 Cal.3d 345, 353 [DUI with injury charge applies to one incident regardless of number of injuries]; *Henderson v. Board of Education*, *supra*, 78 Cal.App.3d 875, 883 [interpreting application of "less than quorum exception" to Brown Act]; *Orange County Employees Ass'n v. County of Orange*, *supra*, 14 Cal.App.4th 575, 582-583 [interpretation of phrase "may carry firearms only if authorized and under terms and conditions specified by their employing agency."].) This has to be so since the Legislature controls the words used in a statute and thus how these words should be interpreted, but the Legislature does not control future court decisions assessing whether or not this interpretation satisfies constitutional standards. Thus the Legislature cannot by inaction adopt that portion of an advisory opinion illustrating what might and might not be constitutional when and if a reviewing court takes up that issue.

Thus, section 1006 does not include vehicles within those areas the warden may inspect.

II.

VEHICLE STOPS WITHOUT A WARRANT OR REASONABLE SUSPICION OF CRIMINAL ACTIVITY VIOLATE THE FOURTH AMENDMENT

The prosecution argues that because Mr. Maikhio voluntarily engaged in the heavily regulated activity of fishing, he impliedly consented to the stop and search of his vehicle. (AOB, 13-18; 29-31.) The prosecution relies on an amalgam of administrative cases concerning closely regulated businesses, and a few cases that analogize to this concept in the context of game preserves. These cases are inapposite. Game preserves are heavily regulated but they are not businesses. A hallmark of administrative inspections is the explicit notice they provide to those affected. Such notice is lacking here. And contrary to the prosecution's assertions, even those few cases that impliedly authorize on site game preserve inspections, recognize the limitations set out in decisions from the United States Supreme Court and do not allow vehicle stops nor authorize such inspections off site.

A. The Closely Regulated Business Exception Requires Clear Guidelines and Express Notice and is Otherwise Inapplicable to Wildlife Areas.

"Implied consent" is part of a lawful administrative scheme that applies almost exclusively to closely regulated businesses. Under this scheme, the state may search areas that would otherwise be protected under

the fourth amendment. (See *United States v. Biswell* (1972) 406 U.S. 311, 315-316 [92 S.Ct. 1593, 32 L.Ed.2d 87]; *Almeida-Sanchez v. U.S.* (1973) 413 U.S. 266, 270-271 [93 S.Ct. 2535, 2538, 37 L.Ed.2d 596].) The authority for these kinds of administrative searches does not derive solely from the fact "an individual [has] voluntarily engaged in certain types of [heavily regulated] activity" such as hunting and fishing. (AOB, 13.) Instead, these administrative searches are expressly authorized and *circumscribed* by the applicable statutes and regulations; and the person subject to a search impliedly consents because he has *notice* of these rules.

The prosecution cites *Biswell, supra*, 406 U.S. 311, a case in which federal agents forced open a gun dealer's storage locker. The agents did so not because generally gun dealing is a closely regulated industry which inherently reduces privacy, but rather because a federal statute, 18 U.S.C. § 923(g), authorized state officials to enter during business hours into 'the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining" records, documents, and firearms. (*Biswell, supra*, 406 U.S. at pp. 311-312.) In *Biswell*, the Supreme Court explained that dealers impliedly agreed to the search because of this express authorization and the notice it conveyed to those choosing to sell arms:

> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's *justifiable* expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, *he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection*. Each licensee is annually furnished with a revised compilation of ordinances which describe his obligations and define the inspector's authority...The dealer is *not left to wonder about the purposes of the inspector or the limits of his task*.'

(*Biswell*, *supra*, 406 U.S. at p. 406, emphasis added; see also *New York v. Burger* (1987) 482 U.S. 699 [107 S.Ct. 2636, 96 L.Ed.2d 601] [used auto parts business]; *People v. Harbor Hut Restaurant* (1983) 147 Cal.App.3d 1151, 1155 [citing *Biswell* as authority to subject the commercial food industry to fully noticed inspections.]; *People v. Di Bernardo* (1978) 79 Cal.App.3d Supp. 5, 6 [permitting inspections of commercial fishing boats under Fish and Game Code section 7702].)

Significantly, the mere fact the Government could authorize intrusive inspections within a closely regulated industry does not justify such inspections in the absence of a specific regulation authorizing the intrusion. (*Colonnade Catering Corp. v. United States* (1970) 397 U.S. 72, [90 S.Ct. 774, 25 L.Ed.2d 60].) In *Colonnade*, federal inspectors, without a warrant and without the owner's permission, forcibly entered a locked storeroom and seized illegal liquor. Acknowledging the

historically broad authority of the Government to regulate the liquor industry, the Supreme Court found that Congress had ample power 'to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." (*Colonnade*, *supra*, 397 U.S., at 76.) The Court found, however, that Congress had not expressly provided for forcible entry in the absence of a warrant. "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. (citation.)" (*Id.*)

In this case anglers lacked notice their vehicles could be stopped even assuming the state had the power to enact such a provision.[2] Moreover, despite the similarity of pervasive regulation, it is a misnomer to equate a game preserve and the recreational activity therein to a closely regulated

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[2] It is of course true that many DFG powers are implied from express powers. (See *People v. Perez* (1996) 51 Cal.App.4th 1168, 1177-1178, which observed that Fish and Game 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]." The majority readily agreed that there are powers implied by the express authority granted to DFG under section 1006, and other statutes. But the power to stop vehicles may not be implied from the word receptacles or any other provision of section 1006. Anglers do not impliedly give up their express constitutional rights and consent to unwritten rules that would otherwise advance the goals of wildlife conservation and protection.

industry and the attendant administrative scheme – particularly in the context of roving vehicle stops. *Almeida-Sanchez*, *supra*, 413 U.S. 266, 271 rejected the government's reliance on *Colonnade* and *Biswell* as justification for an automobile search, finding that, "a central difference between [Colonnade and Biswell] and this [case] is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business."

In *State v. Larsen* (2002) 650 N.W.2d 144, 150, the Minnesota Supreme Court rejected the specific argument wildlife areas were closely regulated industries such that wardens -- who had express statutory authority to conduct inspections of tents and other structures -- were entitled to inspect anglers' ice houses during ice fishing season: "We do not perceive recreational ice fishing in a private fish house comparable to running an automobile junkyard business, operating a licensed gun dealership, or engaging in the sale of alcoholic beverages for purposes of the closely regulated industry exception. [] Each of these industries is a narrow field of commercial activity where, absent regulations and readily ascertainable compliance, serious personal safety concerns or felony level criminal conduct could reasonably be expected. That is not the case here as no

personal safety concern is at stake, and under our statutory scheme a violation of fishing regulations is a misdemeanor only." It should be remembered this case involves the taking of a lobster out of season.

The Ninth Circuit has similarly rejected the closely regulated business analogy to wildlife areas. (*U.S. v. Munoz* (9th Cir. 1983) 701 F.2d 1293, 1295.) *Munoz* found that the Government's "analogy to the pervasively-regulated industry exception to the usual Fourth Amendment requirements is inapt, and its reliance on *Biswell* and *Colonnade Catering Corp.* misplaced. The Supreme Court has described these [administrative] cases as 'responses to relatively unique circumstances...Certain industries have such a history of government oversight that no reasonable expectation of privacy, [ ], could exist for a proprietor over the stock of such an enterprise'" (*Id.* at p. 1298.) *Munoz* found that it violated the fourth amendment for a roving patrol within a National Park to stop all vehicles, to, among other reasons, "check for possible game violations in the heavy game wintering area." (*Id.* at p. 1295.)

B. Checkpoint Cases do not Support the Instant Stop.

Notwithstanding the inapplicability of the closely regulated business cases to game preserves, it is undoubtedly true that by availing themselves of land and resources the public has set aside, hunters and fishermen do subject themselves to the *Constitutional* rules and regulations the Department of Fish

and Game employs to protect and preserve these resources. (See AOB, 26-27.) But as with administrative searches of closely regulated businesses this theory depends at its core on the fact that hunters and fishermen have actual or constructive notice of the rules, and their consent to them can be thus be inferred by their use of the resources within a wildlife preserve.

The prosecution nevertheless baldly and mistakenly asserts that "based on the highly regulated nature of fishing and hunting, fisherman have impliedly agreed that fish and game wardens may stop them at or near the time and place of fishing and hunting activity to conduct reasonable compliance checks." (AOB, 15.) For this proposition the prosecution first cites *People v. Perez*, *supra*, 51 Cal.App.4th 1168, 1178.) (AOB, 15-16.) The court in *Perez* authorized a "waterfowl inspection stop" some three miles from a hunting area. (*Id.* at 1171.) The site was chosen because it was safe, there was already an agricultural inspection checkpoint at the site and the hunting area itself was in a remote inaccessible area, "where control is difficult." (*Id.* at 1172, 1178.)

Perez is of course readily distinguishable. It involves a "functional equivalent" checkpoint stop, which the *Perez* court described as "primarily regulatory in purpose." It utilized a neutral formula under which about "325 to 340 vehicles were stopped that day." (*Perez*, *supra*, 51 Cal.App.4th at pp.

1172, 1175.) And it provided notice and limited the discretion of the inspecting officers.

Unlike the prosecution's implied consent rationale as applied to 'roving stops,' checkpoint stops are a well established lawful means of regulating wildlife areas. As the *Perez Court* noted, the United States Supreme Court has approved border equivalent checkpoint inspections (*Id.* at 1174, citing *United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 556 [49 L.Ed.2d 1116, 1127, 96 S.Ct. 3074); both the United States Supreme Court and this Court have authorized sobriety checkpoints (*Michigan Dept. of State Police v. Sitz* (1990) 496 U.S. 444, 454 [110 S.Ct. 2481, 110 L.Ed.2d 412]; *Ingersoll v. Palmer* (1987) 43 Cal.3d 1321), and California courts have sanctioned similar primarily regulatory random checkpoint inspections for agricultural inspections; mechanical inspections of vehicles and the like. (*Perez, supra*, 51 Cal.App.4th at p. 1177.) *Perez* further noted that the many other jurisdictions addressing this question that found checkpoints to be a lawful means of patrolling wildlife areas. (e.g. *State v. Sherburne* (Maine 1990) 571 A.2d 1181; *State v. Tourtillott* (1980) 289 Or. 845; *State v. Halverson* (S.D. 1979) 277 N.W.2d 723; See also *U.S. v. Fraire* (2009) 575 F.3d 929, 932.)

Perez certainly found "the special nature of hunting [to be]

significant," but the prosecution errs in asserting that this factor alone justified either this checkpoint stop or its placement. Unlike the instant stop, checkpoint inspections include notice and a uniform procedure that serves to check a particular officer's discretion. In *Martinez-Fuerte*, *supra*, 428 U.S. 543, the United States Supreme Court noted two virtues of fixed checkpoint stops, first that "Motorists using these highways are not taken by surprise *as they know, or may obtain knowledge of,* the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest ." (*Martinez-Fuerte*, *supra*, 428 U.S. 543, 559.)

Consistent with these dictates, the checkpoint in *Perez* was authorized by regulation and hunters were given notice: "The checkpoint was established in accordance with the statewide operating policy which sets parameters and requires four levels of supervision. The supervisor proposing the checkpoint files an operational plan with his captain. The plan is then routed to the regional patrol chief for approval. *The stated purpose of the checkpoint is to educate* and to implement regulations for monitoring the

harvest and transportation of waterfowl. The wardens would answer questions about hunting regulations, but they did not pass out any written material. *Notice of the checkpoint was given to the local press, television, and radio.*" (*Perez, supra*, 51 Cal.App.4th 1168, 1172.; see also *State v. Sherburne, supra*, 571 A2d 1181 [detailed policy statement existed as to how such checkpoints were to be conducted,]; *State v. Albaugh* (N.D. 1997) 571 N.W.2d 345 [checkpoint was conducted under a comprehensive policy formally adopted by the department].)

In this case by contrast, there is a patent and quite deliberate lack of both authorization and notice. Mr. Maikhio lacked any notice Fish and Game believed his car could be stopped and searched on a public road *after* he left the pier. Indeed, Officer Fleet expended great effort insuring that anglers like Mr. Maikhio remain *unaware* of what Fleet claimed was a systematic policy that he was taught "at the academy."

This secrecy is curiously uncharacteristic of the DFG. The prosecution describes the "hundreds of regulations that govern fishing and hunting in California." (AOB, 14.) In addition to sections 1006 and 1012, the regulations "contain licensing requirements that place fishermen and hunters on further notice that they are subject to fish and game regulations." (*Id.*) The prosecution boasts of the many publications DG makes available

on line, all "setting forth a plethora of regulations' governing fishermen. (AOB, 15.) And the prosecution asserts these "available booklets inform fishermen of the inspection authority of the DFG wardens pursuant to sections 1006 and 2012." (AOB, 15.)

But this last statement is both misleading and wrong. The prosecution cites to one page of a single DFG publication on Ocean wildlife. This page is entitled "IT IS UNLAWFUL TO DO THE FOLLOWING" and there follows a laundry list of proscribed activities, one of which states: "Not to allow the inspection, by a warden, of any boat, market, or receptacle, where fish or wildlife may be found. (FGC, Section 1006.)" (OAB, fn. 12 citing a website publication www.dfg.ca.gov/marine/pdfs/oceanfish2010.pdfwww.df at p. 76.) In contrast to the Department's gloss on other statutes, (see AOB, fns 19 and 20), this publication says nothing about vehicles, or about how DFG interprets this statute or even that the statute needs to be interpreted. (And the prosecution at least is now conceding that receptacles do not include vehicles.) Not one of the myriad DFG publications informs the public that DFG believes it may, and does, stop vehicles off site. And there is no DFG publication that alerts the public to the Department's attendant telescope and off-site detention policy. Accordingly, no publication tells the public whether this policy proceeded through various levels of DFG

command as the checkpoint policy did in *Perez*, *supra*, 51 Cal.App.4th at p. 1172. In short, even assuming DFG had authorization to make off-site stops of vehicles leaving the pier, it notably fails to give potential fishermen notice such that their consent to these stops might be implied.

DFG's reticence is hardly surprising: Assuming this practice could be called a policy, it is quite deliberately surreptitious -- *because it is primarily a law enforcement policy*. And it reposes enormous discretion in the Fish and Game peace officers who employ it. (See La Fave, Search and Seizure, (4th Ed. 2004) Section 10.8(e), pp. 381-382 [discussing the abuse of discretion in empowering game wardens to stop vehicles in the absence of reasonable suspicion].) In this case, Officer Fleet provided no systematic or verifiable method for why he focused on Mr. Maikhio; when he recovered the lobster, Officer Fleet decided to handcuff Mr. Maikhio, and he decided to continue to search the car – seemingly for evidence of other contraband since he knew Mr. Maikhio took nothing but the single bag to his car; and he decided to do this late at night while Mr. Maikhio, his wife and infant child waited.

As the lower court found, *Perez* and other wildlife checkpoint cases might support establishing a similar checkpoint at the Ocean Beach pier. But regardless of language describing hunters' reduced expectation of privacy, *Perez* is a checkpoint case, it does not advance a more generalized rule

allowing DFG to detain specific hunters and fishermen outside the borders of a wildlife area.

C. The U.S. Supreme Court has Allowed Flexible Checkpoints but Proscribed Roving Stops.

The prosecution argues that the remote location of the checkpoint in *Perez* supports the off site stop in this case. (AOB, 15-16, 29.) Indeed, the prosecution relies solely on *Perez* for the "at or near" portion of the rule they conjure from an implied consent rationale. (*Id.*) But the United States Supreme Court has more generally approved fixed checkpoints at a remove from the target area. (*U.S. v. Martinez-Fuerte*, *supra*, 428 U.S. 543, 566.) In *Martinez-Fuerte*, the Court found that fixed checkpoints more than 25 miles from the border but "maintained at or near intersections of important roads leading away from the border" were the functional equivalent of the border itself. (428 U.S. at pp. 552, 566.) In *Martinez-Fuerte*, the Border Patrol determined such checkpoints must be (i) distant enough from the border to avoid interference with traffic in populated areas near the border, (ii) close to the confluence of two or more significant roads leading away from the border, (iii) situated in terrain that restricts vehicle passage around the checkpoint, (iv) on a stretch of highway compatible with safe operation, and (v) beyond the 25-mile zone in which "border passes are issued." (*Id.* at p. 552.)

The checkpoint at a remove from the wilderness area in *Perez* seems patterned after these considerations, not only in the assessment of the location but also in the careful consideration of factors regarding placement. And in contrast to the pier in this case, the checkpoint in *Perez* was positioned at some distance from the hunting area because that area was very large, remote and hard to patrol. Obviously the checkpoint targeted not particular hunters but all hunters leaving this remote area, but eventually funneling onto the common road that lead to the checkpoint. The off-site location in *Perez* solved the specific problem of accessibility.

By contrast, based on the severity of the intrusion the U.S. Supreme Court rejected roving patrol stops within this same geographical territory unless the stopping officer was "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that a vehicle contains illegal aliens." (*U.S. v. Brignoni-Ponce*, *supra*, 422 U.S. 873, 884.) Checkpoints at some remove from the target area are a constitutionally permissible way of achieving an important state purpose; roving patrol stops are not.

D. No Out of State Case Supports the Instant Stop.

The prosecution anticipates that Mr. Maikhio will distinguish the checkpoint stop in *Perez* from "an individual roving stop, as occurred here."

The prosecution contends that such roving stops were authorized in an Illinois case, *People v. Layton* (1990) 552 N.E. 2d 1280, 1287 where the court similarly found hunters may be deemed to have consented to certain intrusions on their privacy. (AOB, 16, 29-31.) The prosecution cites *Layton* as rejecting checkpoints and roadblock stops "as the only methods of enforcing game laws that do not violate the fourth amendment." (AOB, p. 29, citing *Layton*, *supra*, 552 N.E.2d at p. 1286.)

But *Layton* is not a roving vehicle stop case, by the prosecution's own admission. (AOB, 29, fn 22.) In *Layton*, a conservation officer in the field approached several hunters as they were returning to their cars. The officer looked inside the defendant's truck, saw a bag that might contain illegal game, opened it and found contraband. *Layton*, *supra*, 552 N.E.2d at p. 1281.) The officer conducted this inspection under 1.19 of the Illinois Statutory Code, which allows entry onto "all lands and waters to enforce the provisions of this Act," authorized wardens to, "examine all buildings, private or public clubs (except dwellings) . . . vessels, *car* . . . conveyances, *vehicles*, watercraft or other means of transportation or shipping whatsoever, tents, game bags, game coats *or other receptacles*, and to open and examine any box, barrel, package, or other receptacle in the possession of a common carrier," and required hunters and fishermen to provide access to wardens

and to allow all "in the field" examinations of any equipment or device. (*Id.* at p. 1282.)

Unlike this case, the officer in *Layton* approached hunters in the field and inspected their license, catch, and cars all according to express statutory authorization. Significantly, the encounter in *Layton* occurred in the field, there was no vehicle stop, and obviously no roving vehicle stop. (These same facts, an in the field contact of a hunter standing by his stopped vehicle, also distinguish *Elzey v. State* (Ga. Ct. App. 1999) 239 Ga.App. 47, 51cited in AOB at p. 17.) Nevertheless, the prosecution contends the warden's approaching the hunters in the field constituted an detention analogous to stopping Mr. Maikhio's car, and based on this detention, the prosecution argues *Layton* stands for the proposition that "under the doctrine of implied consent, just as stops of fisherman or hunters on foot or at game checkpoints are constitutional, so too are individual vehicle stops." (AOB, 29.)

But *Layton* is hardly a stepping stone to this general proposition. The Illinois statute, while more permissive and inclusive than section 1006, did not sanction vehicle stops. In another Illinois decision, a conservation officer stopped a vehicle on a public highway adjacent to a well known hunting area after observing the driver and passenger in orange hunting gear. (*Levens*, *supra*, 713 N.E.2d 1275, 1276.) In reliance on *Layton*, the *Levens*

Court readily concluded the conservation officer could reasonably believe the defendant has recently engaged in hunting. (*Id.* at p. 1276.) But the court explained that while *Layton* allowed for inspections of hunters in the field, "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." (*Levens*, *supra*, 713 N.E.2d 1275, 1277.)

This of course is precisely the lower court's conclusion this case. The difference is that the authorizing statute in Illinois specifically included vehicles. *Layton* allowed for the on site inspection of a vehicle. Yet in a factual setting very similar to this case, where a conservation officer had cause to believe the occupants of the vehicle had recently been hunting or fishing, and where the stop occurred on a road literally adjacent to the hunting area, *Levens* required reasonable suspicion before the officer could stop the vehicle. *Levens* relied on *Layton* but says nothing about implying consent in the area of vehicle stops or to other places or things not authorized in the statute. Neither *Levens* nor any non checkpoint case find a hunter's expectation of privacy reduced upon leaving the reservation.

But conservation officers are of course not without recourse. They must have reasonable suspicion. Mr. Maikhio respectfully submits that is precisely the point of equipping Fish and Game Officers with high powered telescopes. In *Levens*, the court found the stop lawful because the game warden had reasonable suspicion the defendant was engaging in unlawful roadside hunting. (*Levens supra*, 713 N.E.2d at p. 1277.) In this case, Officer Fleet had a powerful scope that he testified allowed him in the normal course to see the anglers catch. Officer Fleet's telescope was designed to secure reasonable suspicion.

Other jurisdictions have come to the same conclusion as the *Levens* Court. For example, the court in *State v. Boyer* (2002) 42 P.3d 771, 774-775, 777, while upholding the warden's suspicionless request the defendant display his fishing license and his catch, found that fish and game officers who detain a vehicle, in this case a boat, did require reasonable suspicion. The prosecution cites *Boyer* for the broad holding that fish and game wardens do not need reasonable suspicion before conducting reasonable inspections. (AOB, 23.) *Boyer* reviewed four separate intrusions, the license and catch display requests, the boat detention and the warden's stepping onto the transom to view the defendants' catch. *Boyer* illustrates that fish and game cases eschew a one size fits all general rule and focus instead on the

particular rules that apply to the particular intrusion.

The prosecution cites also cites *State v. Colisimo* (2003) 669 N.W. 2d 1 for the same broad proposition that wardens may inspect without probable cause. (AOB, 24-25.) But just as in *Boyer*, the *Colisimo* court was careful to distinguish the warden's right to inspect a stopped vehicle, the situation in *Layton*, from the right to stop a vehicle where the warden has ample cause to believe its occupants have recently been fishing, the situation in *Levens*. Noting that the United States Supreme Court has proscribed suspicionless stops of drivers, *Colisimo* found that:

> The initial contact between officer and angler did not amount to a stop. Rather, Officer Steen merely began conversing with Colosimo after the portage truck driver had on his own volition stopped the truck pulling the trailer upon which Colosimo's boat rested. Thus, we are presented with a situation quite distinct from that facing the Court in *Prouse*. Here, Officer Steen walked up to the already stopped boat that rested on the trailer of a parked truck...there is no seizure for Fourth Amendment purposes when an officer merely walks up to a parked motor vehicle and converses with the driver.

(*Colisimo*, *supra*, 669 N.W. at p.4.)

Levens, *Boyer* and *Colisimo* acknowledge what the United States Supreme Court found to be true in *Delaware v Prouse supra*, 440 U.S. 648, namely that a vehicle stop is a severe intrusion under the Fourth Amendment. The severity of that intrusion is neither minimized by

proximity to a wildlife area nor vitiated by implied consent. The prosecution's attempt to extract from *Perez* and *Layton* a rule that hunters and fishermen may be stopped in their vehicles "at or near the time and place of that activity" fails for lack of support. The prosecution ignores well established authority distinguishing the severity of a traffic stop from that in checkpoint and in field inspections. The prosecution further ignores notice requirements and the absence of authorization.

III.

THE STOP OF MR. MAIKHIO'S VEHICLE CANNOT BE JUSTIFIED UNDER THE SPECIAL NEEDS DOCTRINE BECAUSE THE STOP WAS PRIMARILY FOR LAW ENFORCEMENT PURPOSES AND THE SEVERITY OF THE INTRUSION OUTWEIGHS THE STATE'S NEED FOR *THIS* METHOD OF ENFORCING FISH AND GAME LAWS.

The prosecution argues the late night detention and search of Mr. Maikhio's vehicle was justified under the United States Supreme Court's special needs doctrine. (AOB, 18-23; 31-37.) Despite the surfeit of game preserve cases, the Court of Appeal majority described the "special needs" argument in the context of roving stops by game wardens as one of first impression. The dissent focused instead on game wardens' broad regulatory authority which impliedly included stopping vehicles close to the wildlife area. But assuming the DFG's surreptitious unannounced practice amounts to a viable program or policy, the special needs rule does not apply for two

reasons. First, because Officer Fleet abandoned his regulatory function in favor of pure law enforcement; and second because this stop involved a severe intrusion which DFG has failed to show was necessary to or particularly effective in to advance the state's interest in protecting wildlife.

A. The Special Needs Balancing Test as Applied to Wildlife Areas.

A special need is one where 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. (*Indianapolis v. Edmond* (2000) 32, 38 [121 S.Ct. 447, 148 L.Ed.2d 333; see also *Ferguson v. City of Charleston* (2001) 532 U.S. 67, 69 [121 S.Ct. 1281, 1284, 149 L.Ed.2d 205].) In the context of a drug interdiction checkpoint stop, *Edmond* held that, "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." (531 U.S. at p. 47.)

United States. v. Fraire, *supra*, 575 F.3d 929, 930, upheld a vehicle checkpoint set up at the entrance to the Kings Canyon National Park to "mitigate the illegal taking of animals in the park" due to hunting. In reliance on a large body of United States Supreme Court Fourth Amendment balancing test cases including, *Edmond*, *Illinois v. Lidster* (2004) 540 U.S.

419, 426, [124 S.Ct. 885, 157 L.Ed.2d 843], and *Brown v. Texas* (1979) 443 U.S. 47, [51, 99 S.Ct. 2637, 61 L.Ed.2d 357], the *Fraire* Court set out the two part test as first, determining whether "the primary purpose of the [intrusion] was to advance 'the general interest in crime control." (*Fraire*, *supra*, 575 F.3d at p. 932.) If it is, "then the stop . . . is per se invalid under the Fourth Amendment." (*Id*; see also *Illinois v. Lidster*, *supra*, 540 U.S. 419, 426, describing this as the "presumptive rule of unconstitutionality"). Second, if the court determined the intrusion was not per se invalid as a crime control device, then the court must "judge [the intrusion's] reasonableness, hence, its constitutionality, on the basis of the individual circumstances." (*Id.*) This question 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." (*Id.*)

B. The Purpose of this Stop was Primarily for Law Enforcement.

Although readily acknowledging there was law enforcement overlap, *Fraire* concluded the checkpoint was not primarily for law enforcement, instead "the goal was *prevention, not arrests*." (*Fraire*, *supra*, 575 F.3d at p. 933.) The prevention goal was advanced "by deterring would-be poachers, and by *educating the park-going public about the hunting prohibition*." (*Id.*)

As the United States Supreme Court has declared, "we consider all the available evidence in order to determine the relevant primary purpose." (*Ferguson*, *supra*, 532 U.S. 67, 81.) Considering all the evidence here, Officer Fleet's goal was indisputably law enforcement, and more specifically to make arrests. Officer Fleet elaborated on why his "custom and practice" was to wait until a "suspect" leaves the pier: "Well another aspect of it *is it solidifies possession for me that that person has no intention of releasing whatever they have in their possession*, fish or lobsters." (T, 9.) He testified that he patrols Ocean Beach Pier because "there's more people on the pier that are possibly violating that I have watched." (T, 18.) Fleet made clear the scope provided him "with a really good view" of what anglers were catching; he can ordinarily see "whether it's a lobster of a fish." (T, 14.) He could see for example that Mr. Maikhio was using a handline. In some instances, however, the "geographics of the pier" prevented him from seeing the catch. (T, 14.) Officer Fleet and his DFG colleagues were outfitted with law enforcement tools whose purpose was to allow them to obtain evidence of illegality. Their goal is arrests, not prevention.

Officer Fleet repeatedly testified he used this surveillance technique so he would not blow his cover, and he readily conceded that if he and his partner were stationed at the pier or the parking lot then those inclined to

poach would throw their unlawful catch back into the sea. This would defeat arrests but not conservation or prevention. Indeed by failing to announce his presence, Officer Fleet did nothing to educate the other pier fishermen or to deter them from reeling in unlawful catch. Rather Officer Fleet was waiting for anglers to pull in unlawful catch. Fleet approached all of those fishing off the pier as potential violators and potential arrestees, not as members of the public needing education or deterrence. By making the stop and arrest three blocks away from the pier, Officer Fleet only deterred those anglers he caught, and seemingly *preserved* the possibility of catching other anglers, rather than educating and deterring all anglers with a public arrest at the pier or parking lot. [3]

The prosecution argues that *Edmond* and *Ferguson* were both

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[3] The prosecution seemingly contends that Officer Fleet's testimony regarding his practices is not relevant since *Edmond* found the primary purpose inquiry should only "be conducted at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." (AOB, 35 citing *Edmond*, *supra*, 531 U.S. at p. 48.) Mr. Maikhio has been unable to find another case where the sole evidence of a special needs "program" is adduced through the testimony of the enforcement officer. Officer Fleet testified about the "training" that is "taught to us all through the Academy. If people are engaged in fishing activities, obviously there's probable cause to contact that person." But no evidence was presented aside from Fleet that Fish and Game Officers are taught they may contact persons in their vehicles after leaving the pier. The prosecution bore the burden of introducing sufficient evidence about the program, (*Badillo v. Superior Court* (1957) 46 Cal.2nd 269, 273), but the only evidence of the program is how Officer Fleet has chosen to enforce it.

designed to gather evidence of 'penal law' and are therefore "completely distinguishable from the DFG's administrative scheme, the primary purpose of which is to protect fish and wildlife in California." (AOB, 34-35.) The Court of Appeal dismissed as "disingenuous," and a "distinction without a difference," the argument that here Officer Fleet was only promoting 'compliance' with, and not 'enforcing,' California's fishing laws and regulations."

The prosecution nevertheless insists the instant stop was "to accomplish the DFG's main objective of protecting fish and wildlife in California." (AOB, 37.) It is true that the DFG has a governmental interest in protecting California's fish and wildlife, but DFG officers wear more than one hat. Their primary goal may be preservation, but they have a variety of means to accomplish this goal including the enforcement of *criminal* statutes -- and not only those affecting fish and game. As Officer Fleet explained, "we're state peace officers so we do a lot of non-Fish and Game laws but our main objective is to *enforce* California Fish and Game laws and regulations." (T, 3; see also http://www.dfg.ca.gov/ the main webpage setting forth DFG's manifold functions and purposes including "recreation" resource management," "spills," "education," and "enforcement."). Repeatedly, the prosecution conflates the larger goals and functions of the DFG, and in

particular the larger goal of "compliance" with this particular surreptitious surveillance/detention activity. But when DFG pursues a law enforcement regime, they may not assert a regulatory or conservation function when the only real purpose is to stop vehicles to cite criminal offenders.

The prosecution contends *New York v. Burger*, *supra*, 482 U.S. 691, "demonstrates that *Edmond* and *Ferguson* are inapplicable to this case." (AOB, 36.) In a footnote in *Ferguson*, the Supreme Court noted the administrative scheme in *Burger* was not "designed to gather evidence to enable convictions under the penal laws." (*Ferguson*, *supra*, 532 U.S. at p. 83, fn. 21.) Instead, *Burger* involved an inspection regime of a closely regulated industry – auto junkyards -- which the Supreme Court expressly found to be substantially similar to the inspection regime approved in *Biswell, supra,* 406 U.S. 311, and other closely regulated business cases. (See Section II.A.)

As they did in *Biswell*, the Supreme Court in *Burger* found the state had to satisfy three criteria in order to conduct warrantless inspections: an interest sufficiently compelling to warrant closely regulating the industry, a showing that warrantless inspections furthered the goals of the overall purpose behind the regulatory scheme, and that, "the statute's inspection program, in terms of the certainty and regularity of its application, [must]

provid[e] a constitutionally adequate substitute for a warrant . . . :it must *advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers*." (*Burger*, *supra*, 482 U.S. 691, 702-703, emphasis added.) "To perform this first function" of advising the owner about regular inspections, *Burger* required that the statute to be "sufficiently comprehensive and defined that the owner of commercial property *cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes*." (*Burger*, 482 U.S. 691, 703.)

Even somehow assuming that section 1006 authorized the instant vehicle stop, the stop was not for a periodic, ostensibly neutral inspection, and motorists like Maikhio were, to say the least, insufficiently apprised their vehicles were subject to off-site stops and inspections. Instead, the DFG pursues a regime of secrecy and their secrecy about this policy is solely for law enforcement purposes.

The prosecution argues that "even if a primary purpose of the DFG is viewed as enforcing the fish and game laws and regulations, such a primary purpose pursuant to an administrative scheme, does not render a search scheme unconstitutional." (AOB, 37.) In *State v. Larsen*, *supra*, 650 N.W.2d 144, 152, the Minnesota Supreme Court rejected the state's identical analogy

to *Burger* and found Fish and Game officers subject to the very same "constitutional constraints" as other state officials. (*Id.*)

But even to the extent the DFG's rules and regulations could be construed as an administrative scheme, this scheme neither authorizes off-site vehicle stops nor apprises anglers they are subject to such stops. In contrast to Officer Fleet's late night detention on a public street, the agents in *Burger* were conducting a lawful warrantless inspection in accordance with time place and manner dictates in a statute apprising junk yard owners that precisely this sort of inspection within their premises would occur. Before conducting this search, the New York officers had not conducted surveillance or foresworn a public search in favor of secrecy. The officers in *Burger* did not wait for the junk yard owners to leave the premises and then search their cars. Moreover, the *Burger* search was conducted according to rules that not only apprised the business owners of the nature of the search and circumscribed the discretion of the inspecting officers.

By contrast, Mr. Maikhio had no idea his vehicle could be stopped several blocks away from the pier, and Officer Fleet clearly exercised his discretion not only in making the stop but in what he did afterward.

C. Even if the Stop of Mr. Maikhio's Vehicle was not Primarily for Law Enforcement, the Balancing Test Favors Him Because the State has Failed to Show the Efficacy of These Individual Stops when Balanced Against the Severity of the Intrusion.

In *Delaware v. Prouse*, *supra*, 440 U.S. 648, the Supreme Court conducted the most analogous balancing test, weighing the severity of a particular intrusion against the state's overall need and the efficacy of the chosen method. In resolving the balance between the individual's Fourth Amendment interests and the State's interest in highway safety, the court found that the incremental contribution to highway safety of the random spot check did not justify the practice under the Fourth Amendment. (*Prouse*, *supra*, 440 U.S. at p. 659.) The balance here similarly weighs against the State's overall interest in preserving wildlife because the suspicionless stop's incremental contribution to highway safety is outweighed by the degree of the intrusion and the inefficiency of these stops.

1. A vehicle stop is a substantial fourth amendment intrusion.

Mr. Maikhio had a substantial privacy interest in driving his vehicle on a public street at night. In *Delaware v. Prouse*, *supra*, 440 U.S. 648, the United States Supreme Court disallowed the stop of a motorist to determine whether they were properly licensed. In determining whether the stop was

permissible under the Fourth Amendment, the Court balanced the stop's intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests. As for the intrusion, in reliance on *Brignoni-Ponce, supra, Prouse* found it could not "agree that stopping or detaining a vehicle on an ordinary city street is less intrusive than a roving-patrol stop on a major highway." (*Id.* at p. 657.) Describing the severity of a traffic stop, the *Prouse* Court found that:

> 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. "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." [Citations.]

(*Prouse*, *supra*, 440 U.S. at p. 657.)

The prosecution argues that here the intrusion is not as severe because only those who have recently been hunting or fishing are stopped and such persons have a reduced expectation of privacy. (AOB, 21.) With this, the

prosecution seemingly reprises their implied consent arguments. To reiterate: game preserves are not closely regulated industries. The anglers at this pier lacked notification. Largely because of *Prouse*, the cases the prosecution relies on -- *Perez*, *Layton*, *Colisimo* and *Elzey* -- do not authorize 'roving' vehicle stops by wardens off or even on the wildlife area. (See Section II, *infra*.) The prosecution's "rule" legitimizing stops at or near a wildlife area close in time to hunting or fishing activity fails upon closely inspecting any of its tenets.[4] [5]

The prosecution does not discuss the actual severity of a vehicle stop as set out in *Prouse*. First, the program at issue here rejects an inspection or even a stop within the confines of a game preserve, an area that might allow

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[4] The prosecution also compares various cases justifying stops by wardens who had reasonable suspicion, to cases where the courts found that wardens had made random stops. (AOB, 33-34.) The prosecution suggests that because the instant stop was not randomly made, -- that is, Officer Fleet knew Mr. Maikhio had caught something, -- it is less intrusive then the random stop cases. (*Id.* at p. 34.) It is true that none of the cases cited in this discussion involve the same facts in this case. But together these cases indicate the many jurisdictions that simply require wardens to have reasonable suspicion to stop vehicles *within* a game preserve. Moreover, *Levens*, *supra*, 713 N.E. 2d 1275, 1279, is factually very similar to this case and requires wardens to have reasonable suspicion of illegality even when they know the driver has recently been hunting.

[5] *State v. Keehner* (1988) 425 N.W. 2d 41, 42-44, a case the prosecution argues upheld a random stop (AOB, 34), actually involved a reasonable suspicion stop based on prior and present observations of the defendant "glassing the field" and thus preparing to hunt by the roadside, which is illegal in Iowa.

wardens more discretion. Second, there is little or no difference between stopping a car on a public highway for a "compliance check," as described in *Prouse* and stopping a car on a public urban highway in this case. In both instances the vehicles are pulled over by an unsettling show of authority and such stops are embarrassing, anxiety producing and time consuming. Which is not to say such vexations should not be borne by those who violate laws such as Fish and Game misdemeanors. Rather, it is to say that regardless of the socially beneficent motives that lay behind them, based on the nature of the intrusion, this class of vehicle stops requires reasonable suspicion.

Moreover, the prosecution's argument these stops are limited to those who have recently been hunting and fishing ignores that it is precisely the same intrusion visited on these hunters and anglers. This argument is really a suspicion-based argument and contends in essence that *partial* reasonable suspicion is sufficient once it is transmuted into the special needs calculus. Not so. The degree of intrusion must be considered independently. Moreover, such 'partial reasonable suspicion' is in fact another way of saying the officer knew the fisherman caught something but had a hunch the catch might be illegal. In *People v. Hernandez* (2008) 45 Cal.4th 295, 298 a police officer stopped a truck with no license plates but a valid temporary registration card in the belief that such cards are easily and often forged.

While crediting the officer with his particular expertise and knowledge, this Court found the stop unlawful in the absence of objective indicia of criminal activity, noting that "[c]ourts from other jurisdictions also seem uniformly to have concluded that permitting officers to stop any car with temporary permits would be to countenance the exercise of the unbridled discretion condemned in *Delaware v. Prouse*, *supra*, 440 U.S. at page 663." (*Hernandez*, *supra*, 45 Cal.4th at p. 301.) Allowing wardens to stop anyone they believe has caught something at some place "near" a wildlife area similarly sanctions the exercise of unbridled discretion.

Both the prosecution, and the lower court dissent cite to a sentence from Justice Blackmun's brief concurrence from *Prouse* (in which he was joined by Justice Powell) in which he states: "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." (*Prouse*, *supra*, 440 U.S. at p. 664.) By using both terms, 'individualized,' and 'random,' in his concurrence, Justice Blackmun seemingly meant the particular hunters and anglers a warden encounters within the preserve.[6]

[6] As a Minnesotan, Justice Blackmun might have been aware of Minnesota Statute 97A.251 that requires persons within a game preserve to submit to inspection of equipment used to take wild animals *while in the field*, and

Accordingly, Mr. Maikhio respectfully suggests that in 1979 when he wrote this, Justice Blackmun was speaking of examinations within game preserves and did not envision the instant activity -- that is telescopic observation and a late night stop on a city street three blocks away from the preserve so that a Fish and Game Officer could investigate law breakers without blowing his cover – as falling within the category of the "somewhat individualized' yet '*perhaps largely random* examinations' by game wardens.

2. The state's interest in protecting wildlife does not justify the inefficiency or intrusiveness of this particular technique.

The severity of the intrusion must be balanced against "the gravity of the public concerns served by the seizure, and the degree to which the seizure advances the public interest." The prosecution argues here that the State has a "compelling interest in protecting wildlife," and this in part involves combating poaching. (AOB, 19-20, 32.) Indisputably the state has an important interest in protective wildlife but the prosecution offers little on the "degree to which" the use of telescope surveillance and off site vehicle

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which forbid a refusal "to allow inspection of a motor vehicle, boat, or other conveyance used while taking or transporting wild animals." As discussed, in reliance on *Prouse*, the Minnesota Court in both *State v. Colisimo, supra*, 669 N.W.2d 1, 4 and *State v. Larsen* , *supra*, 650 N.W.2d 144, 150, nevertheless found that officers could not stop a vehicle even within a game preserve without reasonable suspicion. The officer in *Colisimo* cleverly got around this by stationing himself in an area where vehicles were already stopped. Officer Fleet declined such a tactic.

stops "advance the public interest" at this pier. The Ocean Beach pier is half a mile long and approximately 12 feet wide. It does not present the enforcement problems posed by a vast lake, river, or a long stretch of California coastline. (Significantly, DFG officers are allowed to inspect vessels under section 1006, which are of course usually within a protected wildlife area; and under Fish and Game Section 7022 [*Di Bernardo, supra*, 79 Cal.App.3d Supp. at p. 6.] .)

In addition, the prosecution fails to show how these vehicle stops are efficacious given the evidence showing they are inefficient. Many special needs cases present specific data showing the efficacy of the particular method. (E.g. *Michigan Dept. of State Police v. Sitz supra*, 496 U.S. 444, 454, [sobriety checkpoint showing a 1.5% arrest rate in upholding that checkpoint. 496 U.S. at 454, 110 S.Ct. 2481.]; *Martinez-Fuerte*, *supra*, 428 U.S. at p. 554 [exhaustive statistical information showing the number of vehicles passing through annually and within 120 hour period, referrals to secondary, and deportable aliens discovered].) In *Prouse*, *supra*, 440 U.S. 659-660; the court found no empirical evidence of the effectiveness of the suspicionless stops. But *Fraire* rejected a strict reliance on data, concluding that "the lack of empirical data of effectiveness meant there was nothing to overcome the presumption of ineffectiveness derived from "'common

sense.'" (*Fraire*, *supra*, 575 F.3d at pp.933-34, citing *Prouse*, *supra*, 440 U.S. at 659-60, [stating that 'common sense' suggested the 'contribution to highway safety made by the discretionary stops' would be 'marginal at best.').]

The prosecution has failed to provide any objective data showing that off site stops that lack reasonable suspicion are necessary or efficient or any explanation of why other obviously less intrusive methods under which the officers discretion is restrained such as checkpoint stops or on- site patrols are less successful. In the absence of data, and thus relying on common sense, Mr. Maikhio submits that focusing on particular fishermen offsite, observing some of them for as long as two hours (T, 8, 15), *leaving* the pier area un-patrolled (and it is clear that when Officer Fleet had backup, that officer participated in the stop, thus leaving the pier unpatrolled [T,17), and making a stop that undoubtedly consumes a fair amount of time, is inefficient. (And while Officer Fleet testified he returned the catch he recovered, it is unclear from the record, given the obviously substantial amount of time these stops consume, whether the fish and crustaceans were still alive.) It fails to educate others at the dock and fails to deter anglers inclined to poach.

Moreover, the policy promotes the apprehension of comparatively modest fish and game offenders, namely those who take undersized or out-of -season fish or lobsters *when the warden lacks reasonable suspicion* based on his telescopic observations. Certainly these telescopic observations provide DFG officers with reasonable suspicion when larger animals are at issue; and in situations such as observations onto a boat under which DFG is allowed to inspect under section 1006 . (See AOB, 39, citing *People v. Nguyen* (1984) 161 Cal.App.3d 687, 690-691, where the wardens observations of the defendants gill net fishing through a binocular provided not only reasonable suspicion but probable cause to arrest; and *People v. Taitman* (1993) 20 Cal.App.4th 1, 6, where Fish and Game Officers using a high powered scope could see the defendants illegally scuba diving for abalone.)

The prosecution's argument that a warden's telescopic observation of possible abalone poachers from the cliffs is not defeated by transferring the unlawful catch to a car. (AOB, 27.) Similarly unfounded is the prosecution's argument that wardens who cannot precisely determine the size of smaller fish lack probable cause. (AOB, 27.) Reasonable suspicion does not require such precise calculations, only a supportable belief the fish are undersized. (See e.g. *Brierton v. Department of Motor Vehicles* (2005)

130 Cal.App.4th 499, 504 [upholding stop for possible traffic violation based on tire squeal]; *United States v. Sanders* (8th Cir. 1999) 196F.3d 910, 913 [stop upheld because officer reasonably believed truck was built after 1973].) Presumably wardens are trained to or rapidly develop the experience necessary to have a reasonable sense of meaningful size differences. The DFG publications include many helpful charts and drawings meant to illustrate the differences between adult and juvenile fish and crustaceans. (See http://www.dfg.ca.gov/marine/pdfs/oceanfish2010.pdf ; 9-21;80-88.)

Finally, the prosecution's assertion that requiring reasonable suspicion will lead to anglers hurrying to their cars and rapidly driving off the wildlife areas is unfounded. (AOB, 38.) Assuming that DFG continues this policy, to the degree that DFG officers have not with their high powered scopes already developed reasonable suspicion the catch violates the law, anglers who hasten to their cars or who drive recklessly add to the quantum of reasonable suspicion. (*People v. Souza* (1994) 9 Cal.4th 224, 235 [flight and haste are valid factors in assessing the totality of circumstances.].)

The policy is less efficient but it also is more intrusive when less intrusive policies exist. In resolving the balance between the individual's Fourth Amendment interests and the State's interest in highway safety, the United States Supreme Court in *Prouse* found that the incremental

contribution to highway safety of the random spot check did not justify the practice under the Fourth Amendment. (*Prouse*, *supra*, 440 U.S. at p. 659.) The Court arrived at that conclusion because of less intrusive "*alternative mechanisms available, both those in use and those that might be adopted.*" (*Ibid.*, emphasis added,) In this case, less intrusive alternatives include a checkpoint stop at the start of the pier. The checkpoint would deter and educate as well as apprehend poachers and it would check the discretion of the DFG officers. Another less intrusive alternative would be to patrol the pier. Assuming Officer Fleet's concern about revealing himself to be a DFG officer is legitimate, he could patrol the pier undercover. In those apparently frequent instances when Officer Fleet is partnered, one DFG officer could patrol the pier undercover while the other could operate the checkpoint or conduct stops outside the pier based on reasonable suspicion.

Because the random suspicionless vehicle stop is inefficient, overly intrusive of protected constitutional rights, and based on a desire to issue citations, not protect wildlife, it is unreasonable under the Fourth Amendment.

CONCLUSION

The trial court correctly found that the vehicle stop in this case violated the Fourth Amendment. The order suppressing evidence should be affirmed.

Dated: 10/18/10

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE FOR THE STATE OF CALIFORNIA, Petitioner/Appellant, v. BOUHN MAIKHIO, Respondent/Defendant.	S180289 Court of Appeal No. D055068 (Super. Ct. No: CA211301) **ANSWER BRIEF ON THE MERITS**

CERTIFICATE OF WORD COUNT

I, MATTHEW C. BRANER, hereby certify that based on the software in the word processor program, the word count for this document is 13,363 words and is printed in a 13-point typeface.

Dated: 10/18/10

Respectfully submitted,

By: _____
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CERTIFICATE OF SERVICE

CASE NAME: People v. Maikhio
Supreme Ct. No.: S180289
Ct. Appeal 4th DCA, Div. 1 No.: D055068
Superior Court No.: CA211304

I, Vanessa Thompson, declare as follows:

I am employed in the County of San Diego, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 450 "B" Street, Suite 1100, San Diego, California 92101, in said County and State.

On October 18, 2010, I served the foregoing document:

ANSWER BRIEF ON THE MERITS

on the parties stated below, by the following means of service:

☐ **BY MAIL**: On the above-mentioned date I personally deposited in the United States Mail true and correct copies thereof, each in a separate envelope, postage thereon fully prepaid, addressed to the following **[See Service List]**. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY PERSONAL SERVICE**: On the date of execution of this document, I personally served true and correct copies of the above-mentioned document(s) on each of the following **[See Service List]**.

☐ **BY FAX**: From fax number (619) 338-4735, I caused each such document to be transmitted by fax machine, to the parties and numbers indicated above, under California Rules of Court, Rule 2.306. The fax machine that I used complied with Rule 2.301 and no error was reported by the machine.

☐ **BY E-MAIL**: On the above-mentioned date, I caused a true copy of said document to be emailed to said parties' e-mail addresses as indicated on the attached Service List. (Rules of Court, Rule 8.212(c))

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 18, 2010

Vanessa Thompson
Declarant

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