CASE NO. 13-17596

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAYCEE DUGARD AND A. DUGARD

Plaintiffs and Appellants,

vs.

THE UNITED STATES OF AMERICA

Defendant and Appellee.

On Appeal From The United States District Court for
The Northern District of California
Case No. 3:00 CV-04718 CTB
Hon. Carlos T. Bea, Circuit Judge, Sitting by Designation

BRIEF OF NATIONAL CENTER FOR VICTIMS OF CRIME AS *AMICUS* CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF *AMICUS*

The National Center for Victims of Crime (NCVC), formerly the National Victim Center, was founded in 1985, and is a nonprofit organization headquartered in Washington D.C. NCVC is regarded as one of the nation's most effective resource and advocacy centers for victims of crime. NCVC has an interest in this case due to its extensive work and dedication in representing the interests of crime victims, including those who have been victims of sexual abuse, incest, rape, and other violent crimes. *Amicus* has authority to file this brief pursuant to Federal Rule of Appellate Procedure 29 and has filed an accompanying Motion for Leave to file this brief. A party's counsel has not authored the brief in whole or in part nor has contributed money in any way in support of this *amicus* brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, *amicus* National Center for Victims of Crime (NCVC) is an independent, tax-exempt, nonprofit organization, who does not issue stock and does not have a corporate parent.

TABLE OF AUTHORITIES

I.

INTRODUCTION

A Federal parolee is in the custody of the United States government. *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972). When Phillip Garrido was inexplicably given parole after serving less than fifteen (15) years of a fifty (50) year sentence, at least he was still under the supervision of his federal parole officer Houston Antwine, who had a duty to monitor Garrido's behavior while on parole and to protect the public, not just the victim of the underlying case. Antwine's lack of supervision of Garrido grossly exceeded deliberate indifference – it constituted complete non-feasance of his appointed duties. Despite the United States Parole Commission's "zero tolerance" rule for illegal drug use, which required any infraction to be reported to the Parole Commission, Garrido committed seventy (70) parole violations, none of which were reported by Antwine to the Parole Commission. [Brief of Appellant Appendix Addendum].

Nonetheless, the government has declared, with a straight face, and so far successfully, that Antwine is immune from liability to Jaycee Dugard and her children and to everyone else except the victim of the underlying offense for which Garrido was originally sent to prison. The Plaintiffs' theory of liability is straightforward. The government claims that under 28 U.S.C. § 2674, the United States is only liable to the extent that a similarly situated private individual is liable

under applicable state law. However, an important consideration under California law is whether the imposition of a duty will have a public policy impact. Here, allowing Appellants Jaycee Dugard and A. Dugard to proceed against the government by imposing a duty upon the federal government, by way of parole officer Antwine, would have no negative public policy impact. Instead, imposing a duty would have a positive public policy impact in requiring workers to do their jobs, which would protect foreseeable victims from harm.

The balance of this brief will be devoted to what California law appears to be.

II.

CALIFORNIA LAW AS EXPRESSED BY CALIFORNIA CASES

A. California Supreme Court Law

Johnson v. State, 447 P.2d 352 (Cal. 1968), which was cited in Chief District Judge Smith's dissent, is binding precedent in this jurisdiction and held that a parole officer's failure to warn a foster parent of the foster child parolee's dangerous propensities, rendered the parole officer liable to the foster parent. The California Supreme Court considered whether immunity, which is the exception, not the rule, was appropriate for the parole officer (and the government) where he had made a decision to withhold information that could have prevented the assault by the child parolee upon the foster parent. *Id.* The court noted that there is a

difference between the decision to parole an individual and decisions that are made by a parole officer after the person receives parole. *Id.* at 361-62. While the decision to parole is immune from liability, the discretionary decisions made by the parole officer afterward present no reasons for immunity. *Id.* The decision to parole is entitled to immunity because, if not, it would discourage people from being granted parole because the government would be afraid the parolee would commit additional crimes, for which the government could be liable. This would have drastic public policy consequences.

However, the decisions of the parole officer after a person is paroled do not have the same public policy consequences. Instead, denying immunity to a parole officer based upon his failure to perform his job duties, such as warn a parole board when the parolee has violated his parole conditions, would have a positive impact in protecting the public from the dangerous parolee.

In *Johnson*, the court highlighted a long list of cases from California and the 9th Circuit that established the principle "that, although a basic policy decision (such as standards for parole) may be discretionary and hence warrant governmental immunity, subsequent ministerial actions in the implementation of that basic decision must still face case-by-case adjudication on the question of negligence." *Id.* at 362. This principle is typically applied to situations, like here

and in *Johnson*, that involve a failure to warn of foreseeable, latent dangers flowing from the basic, immune decision. *Id.*

In holding that the parole officer was not immune, the court stated:

> "…this is a classic case for the imposition of tort liability. Defendant failed to warn plaintiff of a foreseeable, latent danger, and this failure led to plaintiff's injury from precisely the expected source; courts encounter this type of allegation daily and are well suited to resolve its validity under traditional tort doctrine. The loss, moreover, falls peculiarly on plaintiff, who, having no administrative recourse, must achieve vindication in litigation or not at all."

Id. at 363.

Here, the same result should be reached as in *Johnson.* In *Johnson,* the plaintiff was not a victim of the underlying offense, but someone injured by the parole officer's failure to communicate. Reasonable warning was an administrative function, not a judicial one, and by failing to warn, the parole officer was liable. Here, the parole officer had a decision as to whether to report the seventy (70) parole violations of his parolee Garrido. The parole officer made a decision not to report these violations to the Parole Commission, which his job required him to do. The parole officer's failure to warn resulted in Garrido committing the heinous, life-altering crimes against Appellants because had the parole officer warned the Parole Commission of Garrido's parole violations, his parole would have been revoked, eliminating his ability to commit the crimes. As in *Johnson,* the parole's officer's failure to warn should render him (and the

government) liable for those failures.

The *Johnson* case should end the need for further analysis inasmuch the highest Court in California has held that a parole officer can be liable to a third party member of the public, not the victim of the underlying offense, for negligent failure to perform his duties with regard to a supervisee.

B. California Appellate Court Decisions

The panel majority in this case held that under California law, parole officer liability only extends to specifically identifiable victims under such cases as *Beauchene v. Synanon Foundation, Inc.*, 151 Cal. Rptr. 796 (1979) and *Rice v. Center Point, Inc.*, 65 Cal. Rptr. 3d 312 (2007). *Beauchene* exonerated a drug treatment center [based on the statutory immunity under Government Code §845.8] from liability for escaped prisoners. The same rationale applied in the *Rice* case, which also involved a substance abuse treatment center. *Rice* specifically noted that the treatment center had a "special relationship" with the perpetrator, but held that the special relationship would only impose liability on particularly identifiable victims, not the public at large.

Beauchene, Supra held that policy considerations were involved in determining duty, including consequences to the community from imposing a duty and moral blame attached to the defendant's conduct. The negative community

consequences cited included the suppression of innovative treatment program for the offenders.

Here, the community impact is much different from *Beauchene.* IN THIS CASE, THERE ARE NO NEGATIVE COMMUNITY CONSEQUENCES TO REQUIRE A MAN WHO RECEIVES A FEDERAL PAYCHECK TO DO HIS JOB! The moral blame of Antwine and the government is tremendous. Antwine repeatedly ignored clear signs of uncontrolled drug use by a person who was on parole for a heinous, drug-induced crime.

The appropriate California Appellate Court precedent is *Myers v. Quesenberry*, 144 Cal. App. 3d 888 (1983). In that case, the Court recognized the obvious fact, that a doctor has a special relationship with his patient, and then held the doctor liable where that special relationship gave the doctor important information not known to the general public about specialized risk of harm to the general public if the doctor did not take reasonable steps to affect the patient's behavior. In *Myers*, the doctor knew his patient should not drive an automobile due to her uncontrolled diabetes, but failed to warn her not to drive. As a result, the patient drove and seriously injured the plaintiff. The duty was to the general public. Likewise, *Bragg v. Valdez*, 111 Cal. App. 4th 421 (2003), supported the liability of a psychiatrist to the general public where he was alleged to have released a patient the doctor knew was violent, solely because of financial reasons

– in this case because the patient did not have health insurance to pay for his hospitalization. The paradigm applied in that case is this: one person (the doctor) has specialized knowledge not available to the general public of a serious risk of serious physical harm to the general public if the doctor does not exercise reasonable care in his treatment of the patient. Failure to exercise reasonable care left the physician liable to the general public. Likewise, in this case, one person, (the parole officer) had specialized knowledge not known to the general public, that Garrido was regularly using drugs and alcohol in violation of his parole, which made him a violent predator and highly dangerous. The failure to initiate parole violation proceedings should result in the liability of the parole officer to members of the public injured by the parolee.

III.

PROBABLE CALIFORNIA LAW AS EXPRESSED BY OTHER JURIDICTIONS

None of the California cases cited by either side are from the State Supreme Court, except *Johnson v. State, Supra*. As such, if this Court does not certify this case to the Supreme Court of California, then other precedents from other jurisdictions are important.

The case directly on point, (but apparently, without saying so, applying Alabama law) is *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982) (en banc). In that case, a parole officer was held liable for failure to submit known important

medical records to the parole board to consider in making its decision of whether or not to parole Thomas Whisenhant, who, while on parole, murdered three women of the general public. Failure of the parole officer to properly submit important information to the parole board known by the parole officer, resulted in liability. That is exactly what Antwine repeatedly and egregiously failed to do.

Another analogous case from Massachusetts is *A.L. v. Commonwealth*, 521 NE.2d 1017 (Mass. 1988), wherein a probation officer, who was aware that the probationer, a child molester, was Court ordered to not be permitted to teach or associate with young boys, failed to verify the probationer's employment at a school – with predictable, disastrous results. The probation officer was liable to two boys, who were members of the general public.

In *Taggart v. State*, 822 P.2d 243 (Wash. 1992), a parole officer was held to be subject to liability to the general public for simple failure to exercise reasonable control over a parolee potentially including inadequate monitoring of his drinking and drug use, employment, and his lack of counseling.

Likewise, in *Acevedo v. Pima County Adult Probation Dept.*, 690 P.2d 38 (Ariz. 1984), the Supreme Court of Arizona recognized that negligent failure of a probation officer to supervise his supervisee, a convicted child molester, by permitting him to rent a house from a man with five minor children living in the residence, subjected the officer to liability to the general public.

State officials were not immune from liability to a member of the general public and her husband for rape by a furloughed prisoner during hours he was supposed to be at a halfway house. *Reynolds v. State Div. of Parole & Community Servs.*, 471 NE.2d 776 (Ohio 1984).

Finally, the Supreme Court of Utah has thoroughly addressed the issue of "the conditions under which the custodian of a dangerous person has a duty to prevent injuries to others" in the recent case of *Scott v. Utah County, et al.*, 356 P.3d 1172 (Utah 2015). In *Scott*, the County and a private entity that used inmates on a work release program were held liable to a woman, who was abducted, raped and beaten by a work release inmate. The allegations included that there was an insufficient screening of the inmates, who did not meet release qualifications, which were driven by job needs of the employers rather than suitability of the supervisees. Furthermore, the program had been rife with supervisees drinking and using drugs on the job and leaving the worksite for hours at a time. The plaintiff's rapist was ten miles from the work release site where he was supposedly working, when the rape occurred. The Utah Supreme Court overruled its previous precedent, which had limited liability for negligent supervision to members of a distinct group, but not the general public. The Court adopted *The Second Restatement of Torts,* Sec 319, which holds that someone with custody of a dangerous person has a duty to exercise reasonable care to prevent the dangerous

person from harming others.

IV.

CONCLUSION

California requires reasonable care by custodians of prisoners and other dangerous people. The duty extends to all members of the public. The *Second Restatement of Torts* and the majority of states have the same requirement. The Court should reverse the decision of the panel and remand the case for trial or, in the alternative, certify the case to the California Supreme Court.

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I electronically filed the foregoing *Amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Appellee's counsel of record is a registered CM/ECF user and will be served by the appellate CM/ECF system.

Dated: October 14, 2016

Respectfully submitted,

By: /s/ Antonio R. Sarabia II

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