Supreme Court No. S268320

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DUVANH ANTHONY MCWILLIAMS,** Defendant and Appellant.	No. H045525 (Santa Clara County No. C1754407)

APPELLANT'S OPENING BRIEF ON THE MERITS

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SUMMARY OF ISSUES ON REVIEW AND CONCESSION BY RESPONDENT

A. "Statement of Issue" on this Court's Website

(1) Is the discovery of a parole or probation search condition an intervening circumstance that removes the taint of an illegal detention under the attenuation doctrine? (2) What constitutes purposeful and flagrant police misconduct under the attenuation doctrine analysis?

B. Issue Presented for Review as Set Forth in Appellant's Petition for Review

1. Police Discovery of Search Condition as Factor Attenuating Prior Illegal Detention.

a. Should the attenuating intervening circumstance rule of *People v. Brendlin* (2008) 45 Cal.4th 262 (*Brendlin*) and *Utah v. Strieff* (2016) 579 U.S. 232, 136 S.Ct. 2056 (*Strieff*, hereafter by S.Ct. pagination) – in which this Court and the United States

Supreme Court concluded that police discovery of an *arrest warrant* for a suspect who is unlawfully detained in violation of the Fourth Amendment can sufficiently attenuate the connection between the illegality and a search incident to arrest pursuant to such a warrant, such that the exclusionary rule should not be applied – be expanded to include discovery of a *discretionary parole or probation search condition* by police as the fruit of an unlawful detention, which, unlike an arrest warrant, does not trigger a mandatory duty on the part of police?

b. Should this Court grant review to address this important question of law and to resolve a dispute between published decisions of the Courts of Appeal? (Compare *People v. Durant* (2012) 205 Cal.App.4th 57 [extending holding in *Brendlin* to cover discovery of search condition as factor attenuating preceding illegality] with *People v. Bates* (2013) 222 Cal.App.4th 60 [disagreeing with *Durant*, holding that a search condition is less attenuating than an arrest warrant because it creates no mandatory duty]; see also majority and dissenting opinions in the present case, following *Durant*, and *Bates*, respectively.)

2. **The "Flagrancy of the Misconduct" Prong of the Attenuation Equation, and the Impact of Racial Profiling.**

a. In evaluating the gravity of the Fourth Amendment wrongdoing in connection with the third, and most critical, "flagrancy of misconduct" prong of the attenuation test, where the defendant in question is Black, should a court consider, as the dissenting justice in the present case suggests, as an aspect of the evolving "broader cultural views on racial injustice," the "no[t]

secret" fact that people of color are "'disproportionate victims of this type of scrutiny' in suspicionless stops"? (App. A, Dis. Opin. at 6-7, quoting *B.B. v. County of Los Angeles* (2020) 10 Cal. 5th 1, 31 (conc. opn. of Liu, J.), and *Strieff* , *supra*, 136 S.Ct. at pp. 2070-2071 (dis. opn. of Sotomayor, J.).)

b. Where, as in the present case, the purported basis for the detention – to investigate possible auto burglaries by two suspects on bicycles shining flashlights into parked cars in the parking lot of a closed office complex – has no conceivable connection to the unlawfully detained defendant – observed by police reclining in a vehicle in a nearby parking lot, with no bicycles, flashlights, or other persons anywhere to be seen – is the gravity of the wrongdoing from the suspicionless stop, considered with or without the racial justice component noted above, sufficiently weak such the attenuating circumstance of the officer's discovery of a parole search condition attenuates the taint of the unlawful detention? Or, as Justice Danner's dissenting opinion explains, does "the close connection between the illegal detention and the search, the absence of any reasonable suspicion of criminal activity, the lack of any exigency or emergency, the highly discretionary actions of the officer, and the officer's own description of his actions as part of his regular practice all counsel against application of the attenuation doctrine"? (App. A, Dis. Opin. at 7)

C. **Respondent's Concession Letter**

Prior to the filing of this brief, respondent filed a letter with this Court advising that "following further internal consideration

and deliberation . . . respondent intends to take the position that the judgment of the Court of Appeal should not be affirmed. Specifically, respondent intends to argue that the officer's post-detention discovery of McWilliams's parole status did not sufficiently attenuate the taint from the officer's unlawful detention of McWilliams to render lawful the subsequent search of McWilliams and his vehicle." (Respondent's Concession Letter of September 14, 2021 ("Resp. Conc, Ltr.").)

SUMMARY OF ARGUMENT

As the grounds for review summarized above make clear, this case presents important related Fourth Amendment issues for this Court to resolve. Appellant will trace the background to the issues presented in the instant case, then summarize his arguments to be advanced.

A. Background to the Argument

The Fourth Amendment exclusionary rule has always embodied a tension between the requirement, as coined by the Supreme Court in *Wong Sun v. United States* (1963) 371 U.S. 471, of suppression of any evidence that is the "fruit of the poisonous tree," and a recognition that some evidence need not be suppressed where its connection to the Fourth Amendment violation by police is so attenuated as to "dissipate the taint" of the wrongdoing. (*Id*., at p. 488; *Brown v. Illinois* (1975) 422 U.S. 590, 603 ("*Brown*").) This Court explained this principle aptly in *Brendlin*.

> [N]ot . . . all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal

> actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. [citations] [B]ut-for cause, or 'causation in the logical sense alone,' [citation] can be too attenuated to justify exclusion. . ."

Brendlin, supra, 45 Cal.4th at p. 268 (citations and internal quotations omitted).)

Since *Brown*, courts have employed a balancing test to determine whether police wrongdoing requires suppression of evidence, again summarized aptly by Court in *Brendlin*.

> [T]he question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." Relevant factors in this 'attenuation' analysis include the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct.

(*Id*., at p. 269 (citations and internal quotations omitted.)

In *Brendlin*, this Court applied the *Brown* balancing test to a situation where, in the course of an unlawful traffic stop, a police officer discovered that the detained person had an outstanding arrest warrant, concluding that the second and third factors provided sufficient attenuation to remove the taint.

As to the second factor, this Court characterized discovery of a no-bail arrest warrant as "an intervening circumstance that

tends to dissipate the taint caused by an illegal traffic stop . . .", noting that "a warrant is not reasonably subject to interpretation or abuse . . .", and that the "no-bail warrant . . . supplied legal authorization to arrest defendant that was completely independent of the circumstances that led the officer to initiate the traffic stop." (*Id.*, at p. 271.)

Looking to the third factor, the flagrancy of the wrongdoing, "generally regarded as the most important" . . . (*ibid.*), this court concluded the officer's unlawful traffic stop was based on the officer's inadvertence in not noticing a temporary registration sticker, not on intentional wrongdoing, noting this was not a situation where the officer "had a design and purpose to effect the stop . . . in the hope that something else might turn up." (*Ibid.*) Based on these considerations, this Court held that contraband seized by police following a search incident to Brendlin's arrest pursuant to the arrest warrant should not be suppressed because the warrant attenuated the harm of the unlawful seizure. (*Id.*, at p. 72.)

Four years after *Brendlin*, the court in *Durant*, *supra*, 205 Cal.App.4th 57, extended the holding in *Brendlin* to encompass, as an intervening circumstance, the factor at stake in the present case: the discovery of probationary search condition. The *Durant* court concluded that under the circumstances of that case, this discovery constituted an attenuating circumstance which purged the taint of an unlawful traffic detention. The unique facts of *Durant* involved an officer pulling over the defendant for not signaling a left turn from a designated left-turn-only lane which,

apparently, is not a Vehicle Code violation, and the officer then immediately recognizing defendant Durant as a person he knew to be on probation with a search condition, then patting him down and seizing a firearm that was on his person. (*Id.*, at 60-61.)

Two years later, the Sixth District, in *Bates*, *supra*, 222 Cal.App.4th 60, took issue with the holding in *Durant*, cautioning that a search condition creates no mandatory duty but is only "a discretionary enforcement tool and therefore a less compelling intervening circumstance than an arrest warrant." (*Id*, at p. 70.) *Bates* wisely cautioned that "discovery after the fact of a probation search condition" should not properly be used to "sanitize any unlawful detention" because "doing so would open the door to random vehicle detentions for the purpose of locating probationers having search conditions." (*Id.*, at pp. 70-71.)

So the law stood in California for the past seven years. In the meantime, a divided U.S. Supreme Court decided *Strieff*, *supra*, 136 S.Ct. 2056, with the majority reaching the same result as *Brendlin*, concluding that discovery of an arrest warrant can attenuate the taint from unlawful detention. Justice Kagan's dissent is salient to the present case, borrowing from tort law to point out that an "intervening cause" in the analogous situation of discovery of an arrest warrant is supposed to be *independent* of the original cause to be considered superseding, but that police discovery of an arrest warrant is, as Justice Kagan put it, "an eminently foreseeable consequence" of an unlawful detention as it is a police practice to search for such warrant in connection with any stop by the police. (*Strieff*, *supra*, 136 S.Ct. at pp. 2072-2073,

dis. opn. of Kagan, J.)

B. **The Present Case**

On a January evening, San Jose Police Officer Croucher was dispatched to the parking lot of a closed office complex in response to a report, from a private security guard, that he saw two persons, riding on bicycles who were suspiciously shining flashlights into parked cars. On arrival, Officer Croucher didn't see anybody in the parking lot on a bicycle, either in the parking lot the security guard had seen this, or in an adjoining lot which he also checked. But in the adjoining lot, he saw something that aroused his suspicions: defendant Duvanh Anthony McWilliams, a Black man, sitting reclined in the passenger seat of a vehicle. Nothing about the situation with McWilliams connected him to the previously observed criminal conduct; there were no bicycles, flashlights, or other persons anywhere to be seen. Nonetheless, and in conformance with a practice which he employs with "most car stops" and "most suspicious vehicles" that he comes across (2RT 312), he ordered McWilliams out of the vehicle, ostensibly for officer safety and to follow up on the reported burglary. Asking no questions related to the burglary, the officer instead demanded that McWilliams produce his identification, which he then checked with dispatch, learning that McWilliams was on parole with a search condition. The ensuing search of the vehicle led to discovery of drugs and a firearm, after which McWilliams was arrested and charged with illegal possession of contraband.

Defendant's suppression motion in the trial court was denied on the grounds that the underlying detention was lawful.

But this conclusion was roundly dismissed in the Court of Appeal, with both the majority and dissent concluding that there was no proper basis to detain McWilliams in connection with the previously observed potential burglaries, or for any other lawful basis.

The appellate panel divided, 2 to 1, on whether the search could be justified based on the officer's discovery of the parole search condition, with the majority following *Durant* and finding sufficient attenuation, characterizing the police wrongdoing as in "good faith," and the dissent following *Bates* and concluding that the parole search condition did not dissipate the taint of the wrongful conduct by the officer, which it characterized as a deliberate "fishing expedition" type of Fourth Amendment violation.

C. **Issues Raised Herein**

The present case concerns a series of related issues which connects the two preceding summaries – the background of the present case, and the history of the attenuation doctrine as applied to parole/probation search conditions as an intervening factor.

Preliminarily, appellant notes that the recent Concession Letter from the Attorney General in the present case – stating that "respondent intends to argue that the officer's post- detention discovery of McWilliams's parole status did not sufficiently attenuate the taint from the officer's unlawful detention of McWilliams to render lawful the subsequent search of McWilliams and his vehicle" – complicates the issues somewhat. The point conceded by respondent would, plainly, require reversal

of the majority's decision in the Court of Appeal and the trial court's order denying the motion to suppress. What is less than clear is the scope of the concession.

For purposes of this brief, appellant will assume, as suggested by the wording of the concession, that respondent's concedes (a) that the initial detention of Mr. McWilliams in the present case was unlawful, (b) that it is correct to apply the *Brown* attenuation test to an officer's discovery, following an unlawful detention, of a parole search condition, and that (c) a proper application of the test, on the facts and circumstances of the present case, requires a determination that discovery of the parole search was insufficient to attenuate the taint from the unlawful detention, which renders the subsequent search and seizure unlawful under the Fourth Amendment,

Thus, in the argument that follows, appellant will briefly focus on the first aspect of the Fourth Amendment issue in the present case, whether the initial detention of Mr. McWilliams was unlawful. We will then turn to the first "larger" question in the present case, not addressed by respondent's concession: whether discovery of a parole/probation search following an unlawful detention should ever be properly be considered an attenuation factor subject to the *Brown* balancing test. Finally, appellant will address the final question on which respondent appears to have also conceded – whether a proper application of the *Brown* balancing test to the facts and circumstances of the present case requires the conclusion now urged by respondent, that the parole search condition is not a sufficient intervening

factor to attenuate for the wrongdoing of the officer, and thus application of the exclusionary rule in this case.

1. **The Unlawfulness of the Detention.**

The first step of the Fourth Amendment analysis in this case would appear to be the most straightforward. Both the majority and dissent below, and now Respondent, agree with appellant's principal contention that the detention which occurred when Officer Croucher ordered McWilliams out of his parked vehicle was without sufficient justification. (Maj. Opn. at 8-11; Dis. Opn. at 1; Resp. Conc, Ltr.)

First and foremost, although Officer Croucher was called to the parking lots in response to a legitimate report of potential burglaries of cars committed by two persons on bicycles, there was not a scintilla of connection between Mr. McWilliams and this potential criminal activity. He was alone, with no bicycles anywhere in view, and no bike rack on his car.

Second, his presence in the parking lot of a closed business is a situation which, under settled case law, does not give rise to a reasonable suspicion of criminal activity that would justify a detention. (*People v. Casares* (2016) 62 Cal.4th 808, 838; *People v. Roth* (1990) 219 Cal.App.3d 211, 215.)

Third, there was no "officer safety" justification for the detention of McWilliams. Officer Croucher conceded in his testimony that he essentially orders the occupant out of their car as a matter of course in every "suspicious" car case. (2RT 312) Put plainly, this "routine" practice of Officer Croucher runs contrary to the settled rule of *Terry v. Ohio* (1968) 392 U.S. 1,

requiring articulable facts supporting a conclusion that a person is armed. Since there was no reasonable basis for the officer to have suspected here that Mr. McWilliams was armed or dangerous, this ground must fail as well.

2. Discovery of the Parole Search Condition Should Not Be an Intervening Factor Which Triggers Application of the *Brown* Balancing Test.

In Part II below, appellant will advance a categorical contention: that the Court in *Durant* took a wrong turn when it adapted and applied this Court's *Brendlin* test, advanced in the context of police discovery of an arrest warrant after an unlawful detention, to the markedly different situation of police discovery of a probation/parole search condition.

In *Bates*, *supra*, 222 Cal.App.4th 60, which disagreed with *Durant*, the Sixth District explained the critical distinction between these two situations: that upon discovery of an arrest warrant "officers essentially have a duty to arrest an individual once the outstanding warrant is confirmed . . ." (*Bates* at 70); whereas, by contrast, a search condition "is a discretionary enforcement tool and therefore a less compelling intervening circumstance. . . ." (*Ibid*.)

Appellant will urge this Court to follow *Bates* and conclude that discovery of a search condition does not rise to the level of an intervening circumstance which can vitiate the taint of an unlawful detention. Rather, it is akin to the situation, commonplace in Fourth Amendment jurisdiction, when the police, after an unlawful entry or groundless detention, see some contraband in

plain view as a direct result of this unlawful conduct. In this circumstance as one New York court poignantly described it, "[t]he 'fruit of the poisonous tree' doctrine cancels out the 'plain view' doctrine." (*People v. Scheu* (Dist.Ct. 1998) 177 Misc.2d 922, 926 [677 N.Y.S.2d 904, 907].)

When this situation – discovery of contraband in plain view following an illegal detention – which mandates exclusion under the above authority and others to be discussed below, is compared with the situation in the present case – an officer's discovery of a parole/probation search condition – there does not appear to be any reason to treat a parole search condition as an attenuating intervening circumstance but not the plain view of contraband following an unlawful detention. In both cases, the officer's "discovery" is the direct fruit of the wrongful detention. In neither case, as contrasted with the arrest warrant found to be attenuating in *Brendlin* and *Strieff*, is there any kind of independent mandatory duty upon the officer to take further action.

In a third sense, the analogy between seeing contraband in plain view as the fruit of an unlawful detention is very analogous to discovery of a search condition as the product of the same unlawful detention. In both cases, the exclusionary rule is properly applied because these are classic situations where there is a strong incentive for an officer, as the Supreme Court put it in *Brown*, to effect an unlawful stop "in the hope that something might turn up." (*Brown*, *supra*, 422 U.S. at p. 605.) As this Court suggested in *Brendlin*, quoting this passage in *Brown*, this is

precisely the type of situation which shows a lack of "good faith." (*Brendlin*, *supra*, 45 Cal.4th at p. 271; see also dis. opn. at p. 5, quoting *Bates*, *supra*, 222 Cal.App.4th at pp. 70-71.)

As a final point, as discussed in detail below, Black men like Mr. McWilliams are a highly disproportionate percentage, compared to overall population numbers, of the persons who are subject to parole or probationary supervision.[1] The legal principal adopted by the court in *Durant*, and followed by the majority in the present case, which recognizes discovery of a parole/probation search condition as an intervening circumstance which can attenuate the harm of an unlawful detention, thus has the unintended effect of incentivizing suspicionless stops of Black men and other persons of color.

For the foregoing reasons and those discussed in Part B below, McWilliams urges this Court to adopt a rule precluding use of a probation/parole search as in intervening circumstance akin to the discovery of an arrest warrant. Instead, the fact of such a discovery should just be one factor – and not a strong one – which a court can consider in making the determination whether evidence obtained as the result of an unlawful detention, arrest, or entry is the fruit of the poisonous tree and subject to suppres-

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1. "At the end of 2016, African Americans made up 26% of parolees but only 6% of California's adult population. Whites also make up 26% of the parolee population but comprise a much larger share—41%—of the total adult population." (Public Policy Institute of California, Joseph Hayes and Justin Goss, "California's Changing Parole Popuplation." (Found at https://www.ppic.org/publication/californias-changing-parole-population/ .)

sion.

3. Application of the *Brown* Balancing Test.

For purposes of the argument presented in Part III below, appellant assumes the court does not accept the preceding argument, and concludes that the *Brown* balancing test for attenuation applies to discovery, after an unlawful detention, of a probation/parole search condition. As to this point, respondent has conceded that "the officer's post-detention discovery of McWilliams's parole status did not sufficiently attenuate the taint from the officer's unlawful detention of McWilliams to render lawful the subsequent search of McWilliams and his vehicle." (Resp. Conc. Ltr.) For the reasons discussed in detail in Part III below, this concession is correct and should be accepted by this Court.

First, echoing the argument in the preceding section, the intervening circumstance here, discovery of parole/probation search condition, is far less compelling than discovery of an arrest warrant, in that it creates no mandatory duty for the officer to arrest or take any action to impinge the liberty of the person who has been unlawfully detained.

Second and most importantly, with respect to the "most important" factor in the *Brown* balancing test, "the flagrancy and purposefulness of the police misconduct . . ." (*Brendlin*, *supra*, 45 Cal.4th at p. 271), this case is eminently distinguishable from *Durant*. Two unique of features of that case, which are markedly absent here, strongly tipped the balance of the application of the *Brown* test. First, the police officer's error in *Durant* was truly

made in good faith. The officer, like the DMV Driver's Handbook, could have reasonably assumed that a person in a dedicated left turn lane is required to use their turn signal; while this is incorrect, effecting a traffic stop based on this misapprehension of the law is truly a good faith error. By contrast, there was no good faith here. Nothing connected Mr. McWilliams to the reported potential burglaries, and case law makes it clear that a person cannot be lawfully detained for being in a vehicle located in the parking lot of a closed business. As Justice Danner points out in her dissent, unlike *Durant*, the detention here smacks of a "fishing expedition" (Dis. opin. at 6), and thus purposeful misconduct.

Second, there is an aspect of "inevitable discovery" in *Durant* that is inapplicable here. In that case, in the midst of the traffic stop, the officer recognized Durant as a person he knew to be on searchable probation. Thus, the connection between the unlawful detention and the probation search in that case is more attenuated than in the present case, where the discovery of the search condition came only when the officer, after ordering McWilliams out of his car, demanded and received his name and date of birth, checked with dispatch, and learned that he had a parole search condition.

Finally, as discussed in Part III-C-4 below, there are indications that implicit racial bias could have played a part in the officer's decision to detain McWilliams, a Black male, in a situation where he might not have detained a White person in the same circumstances. While this factor cannot be established, on

the present record, as a purposeful, subjective factor which led to the unlawful detention, the emerging recognition of the wide-spread effect of implicit racial bias on law enforcement officers gives rise to a fair inference that this factor played a part, making more serious the gravity of the wrongdoing by the officer in the present case.

In sum, and as explained in greater detail in Part III below, a proper application of the *Brown* balancing test to the present case requires a result contrary to *Durant*, and consonant with *Bates*. This Court should conclude, as Respondent has conceded, that "the officer's post-detention discovery of McWilliams's parole status did not sufficiently attenuate the taint from the officer's unlawful detention of McWilliams to render lawful the sub-sequent search of McWilliams and his vehicle." (Resp. Conc, Ltr.)

Statement of the Case

Appellant Duvanh Anthony McWilliams was charged by an amended information, filed on April 10, 2017, with possession for sale of phencyclidine (Health & Saf. Code, § 11378.5, count 1) while armed with a firearm (Pen. Code, § 12022, subd. (c)); transporting phencyclidine (Health & Saf. Code, § 11379.5, subd. (a), count 2); possessing a firearm as a felon (Pen. Code § 29800, subd. (a)(1), count 3); and possessing ammunition as a prohibited person (§ 30305, subd. (a)(1), count 4), with a prison prior (Pen. Code § 667.5, subd. (b)) and a juvenile strike prior (Pen. Code §§ 667, subds (b)-(i), 1170.12). (CT 51-53.)

On June 16, 2017, McWilliams filed a motion to suppress evidence pursuant to section 1538.5. (CT 81-86.) On July 25,

following a hearing, the trial court denied this motion. (CT 104.)

On August 7, 2017, McWilliams pleaded guilty to counts 1, 3, and 4, and admitted the firearm enhancement, prison prior, and juvenile strike prior. (5RT 1235-1237.) On January 19, 2018, the court sentenced McWilliams to seven years in prison. (6RT 1503.) McWilliams timely filed a notice of appeal. (CT 154.)

Statement of the Facts

In the early evening of January 2, 2017, a security guard employed by Broadcom in San Jose called 911 to report "a possible vehicle burglary." (2RT 306-308.) At 6:52 p.m., Officer Matthew Croucher arrived at the parking lot. (2RT 305-306) The security guard who had called 911 told Croucher she had seen "suspicious individuals on bikes in the parking lot," describing two people on bicycles looking into cars with flashlights. (2RT 308, 315.) Officer Croucher drove through the Broadcom parking lot, but there were no vehicles and nothing that attracted his attention. (2RT 309-313.)

He then drove through a second, adjacent parking lot, also near to the Broadcom business. (2RT 309.) In that lot, Croucher noticed several vehicles, only one of which was occupied. (2RT 311.) In that car, Croucher saw a person sitting in the front passenger seat, which was "reclined all the way back." (2RT 310.)

Parking his patrol car about two car lengths behind the occupied vehicle (2RT 316), Croucher illuminated the occupied vehicle with his patrol car's spotlight. (2RT 310.) About 30 seconds after he spotlighted the car, Officer Dewberry arrived as backup, exited her patrol car and stood "a couple of feet" from

Croucher. (2RT 317, 324.)

Using an "elevated" voice, Officer Croucher "identified [himself] as a police officer and instructed the subject to step out of the passenger portion of the vehicle." (2RT 323.) When asked why he ordered the person to get out of the car, Croucher testified as follows:

> I do that with most car stops that I do, or most suspicious vehicles that I come across. . . . It's based on officer safety. I have no idea who this person is or what they have access to that can be used against me, whether it be a firearm, a knife, some type of weapon. So I instructed them out of the vehicle to remove them from that element for my safety.

(2RT 312) He considered this vehicle to be "suspicious" because "it was in a dark area . . . in the parking lot of a closed business," but agreed there was nothing else suspicious about the vehicle. (2RT 312-313)

After Croucher made his command, the sole occupant of the vehicle, defendant Duvanh McWilliams, a Black male, opened the passenger door. (2RT 323[2].) Officer Croucher "reiterated [his]

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2. The original appellate record and opinion do not reflect the fact that appellant is Black. However, this is corrected in the order modifying the Court of Appeal's opinion:

> After we issued our decision in this matter, defendant filed a request to augment the record with a certified rap sheet that "establishes that his 'Race' is 'Black.' " In response to the request, the Attorney General stated, "It is undisputed that [defendant] is Black. Since [defendant] was present at the suppression hearing, [the Attorney General] does not object to judicial notice of a record outside the suppression hearing for the sole purpose of establishing [defendant's] race. (Evid. Code, § 452, subd. (h).)" Accordingly, we grant defendant's request to augment the record by separate

instructions to step out"; McWilliams complied. (2RT 323.) Croucher then ordered McWilliams to walk toward his patrol car, which he did. (2RT 323-324.) Croucher asked McWilliams for his identification; McWilliams said "it was still in the car." (2RT 314.) Officer Croucher told McWilliams to retrieve his identification from the car, which Williams did. (2RT 314.) Officer Croucher then promptly ran a records check, learning McWilliams was a parolee with a search condition. (2RT 314-315.)

Officer Dewberry then searched McWilliams's person and car, finding narcotics, a scale, plastic baggies, an unloaded handgun, and ammunition. (CT 15, 83, 89.)

ARGUMENT

I. The Detention of McWilliams Was Unlawful in that It Was Made Without Reasonable Suspicion that He was Engaged in Criminal Activity or Created a Danger to the Officer.

The first piece of the Fourth Amendment puzzle in the present case is the simplest one to resolve. Both the majority and dissent below, and now respondent in this Court, agree with appellant that the trial court erred in finding there was some reasonable basis to detain McWilliams. (Maj. opn. at 8-11; dis. opn. at 1; Resp. Conces. Ltr.) Although the issue is conceded, it is discussed here, in cursory form, for two reasons: because it was the basis of the trial court's ruling, which underlies the error at issue herein, and because the complete lack of any reasonable basis for detaining appellant is a highly salient fact with respect

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order.

(Opin., Modif. Order, App. B to PFR, at p. 1.)

to one of the key factors this Court must consider in assessing the gravity of the police wrongdoing, as explained below.

The trial court's ruling was that there was "reasonable suspicion to detain and further investigate" based on "the information from the security guard, plus the presence of the defendant in the parking lot of the closed business with no one else seemingly around. . . ." (2RT 332) This conclusion is plainly erroneous on both grounds. The security guard's report to the police, which gave rise to a suspicion that auto burglaries were about to be committed, was that two persons on bicycles were peering into cars with flashlights. (2RT 305-308, 315) Appellant was by himself, in a car, not on a bicycle, and in a different, adjacent lot to the one where the flashlight wielding bicyclists were seen. On these facts, there is not even room for speculation that he might somehow have been connected to the two suspicious persons seen previously by the security guard. Thus, appellant's presence in the area of recent criminal activity does not give rise to any meaningful inference that he – as opposed to the persons on the bicycles – was engaged in any wrongdoing.

As to appellant being in the parking lot of a closed business, this court's decision in *Casares*, 62 Cal.4th 808, and the earlier Court of Appeal decision in *Roth*, supra, 219 Cal.App.3d 211, are plainly controlling. As in these two cases, while there were prior reports of very recent criminal conduct in that area, there was no basis for the police to reasonably suspect appellant, sitting in the passenger seat of his car in an adjacent parking lot, had any connection to this nefarious behavior. There is, for example, no

indication that appellant had a flashlight in his possession, or a bike, or even a bike rack on his car; nor was their any other circumstances suggesting that appellant – sitting recumbent in the passenger seat of his car – had any connection to the pair of bicycle-riding burglary suspects seen earlier.

Thus, *Roth* and *Casares* are controlling. In each case, the defendant was found in a parking lot during off-hours, with no connection to any recent criminal activity. And in each case, as this Court put it in *Casares*, the officer "had no factual basis for a reasonable suspicion, as opposed to a mere hunch, that defendant was then engaged in criminal activity." (*Casares*, 62 Cal.4th at p. 838.)

Finally, there was a third purported ground for ordering defendant out of his vehicle expressed by Officer Croucher, but not by the trial court: Croucher's self-described practice of ordering any person in a "suspicious vehicle" to get out of the vehicle for "officer safety" purposes, based on his concern that such a person could have a weapon. (2RT 312) However, when pressed on the point, Croucher conceded that the only thing that made the vehicle "suspicious" were the two factors discussed above – the report of unrelated criminal activity, and McWilliams's presence, a la *Casares* and *Roth*, in a vehicle located in the darkened parking lot of a closed business. (2RT 313) Nor were there any "specific and articulable facts" suggesting that McWilliams was armed or dangerous. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 24.)

Since it has long been settled that an "inchoate and unparticularized suspicion or hunch" that the defendant was involved in criminal activity is insufficient to support an investigatory detention (*Id.*, at p. 27), there was plainly no constitutional basis for the detention of appellant in the present case.

II. Discovery of a Parole or Probation Search Condition Should Not Be Considered an Intervening Circumstance that Can Attenuate the Wrongdoing of an Unlawful Detention under the *Brown* Balancing Test.

Defendant urges this Court to categorically reject the premise of the holding of the court in *Durant*, followed by the majority here: that police discovery of a parole or probationary search condition is comparable to discovery of an arrest warrant and can operate to attenuate the constitutional wrong of an unlawful detention such that application of the exclusionary rule is not required.

There are a number of salient factors which support this position. Taken together, these factors should lead this Court to follow the lead of the Sixth District in *Bates* and Justice Danner's dissent in the present case, and hold that discovery of a probation or parole search condition is not an intervening circumstance which can attenuate the taint of an unlawful detention.

A. From *Brown* to *Brendlin*, and the Wrong Turn of *Durant*.

In the common understanding of most lawyers and law students, the Supreme Court's decision in *Wong Sun, supra*, 371 U.S. 471, stands for the proposition that if a Fourth Amendment violation is found, evidence is suppressed if it is the "fruit of the

poisonous tree." But the *Wong Sun* court, while coining this talismanic phrase, eschewed this simple formulation, instead describing the real test for determining whether the exclusionary rule requires suppression of evidence after a Fourth Amendment violation.

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

(*Wong Sun*, *supra*, 371 U.S. at p. 487-488.)

1. The *Brown* Balancing Test and Its Early Applications.

A dozen years later, the same court in *Brown v. Illinois*, *supra*, 422 U.S. 590, articulated a three-part balancing test for making this important determination when there were intervening circumstances that came between police violations of the Fourth Amendment and the seizure of evidence by the police. The issue in *Brown* was whether *Miranda* advisements administered to a suspect who had been illegally arrested were sufficient to purge the taint from the officer's illegal conduct. The *Brown* court formulated this inquiry as follows.

> The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening

> circumstances, . . .and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

(*Brown*, *supra*, 422 U.S. at pp. 603-604, footnotes and citations omitted.)

The Supreme Court's application of this test to the facts and circumstances in *Brown* led it to conclude that the *Miranda* warnings were not sufficient to purge the taint of the illegal arrest. (*Id*., at pp. 604-605.) It so concluded because of the temporal proximity of the unlawful arrest to the *Miranda* warnings and elicitation of a confession, but placed greater emphasis on the *flagrancy* of the misconduct, which the Court described as "a quality of purposefulness" about the unlawful arrest, which the officers in that case had admitted was undertaken for investigatory purposes – described by the Court as "an expedition for evidence in the hope that something might turn up." (*Ibid*.)

2. ***Brendlin*, *Strieff*, and Discovery of an Arrest Warrant as an Intervening Factor.**

a. ***Brendlin***

In *Brendlin*, 45 Cal.4th 262, this Court followed courts from other jurisdictions to apply applied the attenuation test to police discovery of an arrest warrant. The Fourth Amendment violation in *Brendlin* was a vehicle stop based on an expired registration tab, where the officer could see a temporary sticker in the rear window, but was unable to tell, from his vantage point, if this sticker matched the vehicle. (*Id*., at 265.) Recognizing defendant Brendlin, the passenger, as one of two brothers he knew who

might have absconded from parole supervision, he asked for his identification, then verified with dispatch that Brendlin was a parolee at large with an outstanding no-bail warrant for his arrest. (*Id*., at p. 265-266.) The ensuing search of defendant and the driver led to discovery of narcotics and paraphernalia. (*Id*., at p. 266.)

Brendlin had an appellate "prehistory." Over a dissent by Justice Corrigan, this Court held in *Brendlin 1* (*People v. Brendlin* (2006) 38 Cal.4th 1107, 1111) that a passenger subject to a traffic stop is not "seized" under the Fourth Amendment. The United States Supreme Court unanimously reversed, concluding, to the contrary, that a passenger is "seized" under the Fourth Amendment when police make a traffic stop of a vehicle. (*Brendlin v. California* (2007) 551 U.S. 249, 263.)

On remand, this Court granted the Government's request that "the parties be directed to file supplemental briefing as to whether the existence of defendant's outstanding arrest warrant – which was discovered after the unlawful traffic stop but before the search of his person or the vehicle – dissipated the taint of the illegal seizure and rendered suppression of the evidence seized unnecessary." (*Brendlin*, *supra*, 45 Cal.4th at p. 267.)

After noting that the issue was one of "first impression for this court", this Court turned to the "well settled" . . . "general framework for analyzing a claim of attenuation under the Fourth Amendment . . .", which it framed as the "question . . . whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some interven-

ing circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." (*Brendlin* at pp. 268-269, quoting *United States v. Crews* (1980) 445 U.S. 463, 471

This Court then described and applied the *Brown* "attenuation analysis" factors relevant to this determination, described as "'the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct. . . .'" (*Id.*, at p. 269, quoting *Boyer, supra*, 38 Cal.4th at p. 448, citing *Brown*, *supra*, 422 U.S. at p. 603-604.)

Brendlin held that discovery of the outstanding arrest warrant sufficiently attenuated the taint of the unlawful traffic stop. Dismissing the significance of the temporal factor in the context of a traffic stop, which it described as "the typical scenario" in cases involving discovery of a warrant which is not particularly helpful for attenuation analysis (*Brendlin* at 270-271), this Court turned to the second factor, noting that prior case law "uniformly holds that an arrest under a valid outstanding warrant – and a search incident to that arrest – is an intervening circumstance that tends to dissipate the taint caused by an illegal traffic stop."

The listed reasons for this put forward by this Court make sense: that such a warrant "is not reasonable subject to interpretation or abuse . . .", that the no-bail warrant in Brendlin's case no-bail warrant here "supplied legal authorization to arrest defendant that was completely independent of the circumstances that led the officer to initiate the traffic stop . . .", and that "no

search of defendant's person or the vehicle was undertaken" until the officer "had confirmed the existing of the outstanding warrant." (*Id*., 271.) Based on these strong factors concerning the intervening circumstance, this Court concluded, without even referencing the purpose/flagrancy prong of the *Brown* test, that [t]he challenged evidence was . . . the fruit of the outstanding warrant, and was not obtained through exploitation of the unlawful traffic stop." (*Ibid*.)

Turning to the third factor, " flagrancy and purposefulness of the police misconduct . . .", which this Court characterized as "generally regarded as the most important because 'it is directly tied to the purpose of the exclusionary rule – deterring police misconduct' . . ." (*ibid*, quoting *U.S. v. Simpson* (8th Cir. 2006) 439 F.3d 490, 496), this Court rejected defendant's suggestion that the illegality was "flagrant" because there was not a valid basis for believing any occupant of the vehicle had violated the law, instead characterizing the stop as based on a "good faith" mistake about a "suspicious registration . . .", adding that the record provided no suggestion that the stop was made "'in the hope that something [else] might turn up.'" (*Ibid*, quoting *Brown*, *supra*, 422 U.S. at p. 605.) Finally, this Court rejected the defendant's contention that suppression was needed to "deter the police from randomly stopping citizens for the purpose of running warrant checks . . .", contrasting it to a situation where a seizure is "flagrantly or knowingly unconstitutional or is otherwise undertaken as a fishing expedition . . .", which would "make it unlikely that the People would be able to demonstrate an

attenuation of the taint of the initial unlawful seizure. This Court characterized what occurred in *Brendlin* as "'a chance discovery of an outstanding arrest warrant' in the course of a seizure that is later determined to be invalid . . ." and concluded the exclusionary rule could not apply (*Id*., at p. 272.)

b. ***Strieff***

In *Strieff*, *supra*, 16 S.Ct. 2056, a divided Supreme Court applied the *Brown* attenuation test to the same situation as *Brendlin*: police discovery of an arrest warrant in the course of an unlawful detention of Strieff, a person suspected of involvement in narcotics activity the police were investigating based on an anonymous tip. (*Id*.,16 S.Ct. at pp. 2059-2060.) It was not disputed that the detention of Strieff was an "unlawful investigatory stop"; after the state appellate courts had divided as to whether suppression was required, the Supreme Court "granted certiorari to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant." (*Id*., at p. 2060.)

The High Court applied the *Brown* test to the case, concluding that suppression of the evidence was not compelled. Noting that the temporal factor favored suppression because discovery of the arrest warrant immediately followed the unlawful detention (*id*., at p. 2062), the Court contrasted the "the second factor, the presence of intervening circumstances . . .", which it described as "strongly favor[ing] the State . . ." noting that Strieff's arrest warrant predated the investigation, and created an "obligation to arrest Strieff"; the Court described a

warrant as "'a judicial mandate to an officer to conduct a search or make an arrest . . .'" and the officer as having a "'sworn duty to carry out its provisions.'" (*Strieff*, at pp. 2062, quoting *United States v. Leon* (1984) 468 U.S. 897, 902, fn. 21.) Describing the arrest, and search incident to arrest of Strieff as a "ministerial act that was independently compelled by the pre-existing warrant . . .", the court concluded it was "undisputedly lawful to search Strieff as an incident of his arrest to protect [the officer's] safety." (*Strieff*, *supra*, at 2062-2063.)

The Court's discussion of the third factor, "the purpose and flagrancy of the misconduct," concludes that it "strongly favors the State . . .", characterizing the officer's decision to stop Strieff as "at most negligent . . .", noting that the officer "should have asked Strieff whether he would speak to him, instead of demanding that Strieff do so . . .", but adding there was no indication that the stop here "was part of any pattern of "systemic or recurrent police misconduct." (*Id.*, at p. 2063.) The Court then summarized its holding as follows:

> [W]e hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected

flagrantly unlawful police misconduct.

(*Id*., at p. 2063.)

There were two dissents in *Strieff*, by Justices Sotomayor and Kagan, both joined by Justice Ginsburg. Justice Kagan's dissent zeroed in on two weak points in the majority's position. First, looking to the purpose and flagrancy of the misconduct, Justice Kagan focused on the fact that the unjustified detention was purposeful, for investigation purposes, "to 'find out what was going on in the house' . . .", making it directly analogous to *Brown*, to the point where the dissent could simply substitute the name of the officer and defendant in *Brown* for the one in *Strieff* and reach the same conclusion, i.e., that "the illegality here . . . had a quality of purposefulness . . .", and that the officer "embarked on this expedition for evidence in the hope that something might turn up." (*Strieff*, at 2072, dis. opn. of Kagan, J., quoting and paraphrasing *Brown*, *supra*, 422 U. S. at 592.)

Second, turning to the intervening factor, Justice Kagan's dissent disputes that discovery of an arrest warrant was truly the type of "independent" intervening cause which breaks the chain of causation, characterizing it instead as "an eminently foreseeable consequence of stopping Strieff, noting how this officer's practice, and the policy of his police department, is to ask for identification and run a warrant check as to anyone they stop, and the high likelihood that such warrants will be found "given the staggering number of such warrants on the books." (*Id*., at 2073, diss. opn. of Kagan, J.)

3. ***Durant*, *Bates*, and Present Case.**

The next chapter of this story begins with *Durant*, and the expansion of the holding in *Brendlin* to include discovery, not of an arrest warrant, but of a probationary or parole search condition.

With respect to the discussion of *Durant* that follows, appellant will make his two-sided view of this case clear up front. As to the first side, discussed in Part II-B below, appellant contends that *Durant* took the *Brendlin* holding too far by analogizing discovery of a probationary search condition to discovery of a warrant because they are fundamentally dissimilar, such that an officer's discovery of probation or parole search condition should not be measured by the *Brown* attenuation test, but rather considered as a direct fruit of the unlawful search. As to the second side, discussed in Part III below, appellant will assume that the *Brown* test is properly applied, and contend that *Durant* should be confined to its unique facts, involving a truly good faith mistake in a traffic stop, and the officer's immediate recognition of Durant as a person subject to a probationary search clause which, when measured against the far different facts of the present case, require a contrary result in the application of the *Brown* test. With that preface, we turn to the facts and holding in *Durant*.

a. ***Durant*.**

We begin with a key background fact: defendant Durant had been stopped in a black Pontiac by police the night before the incident giving rise to the case, with the two officers who stopped

him the following day involved in the earlier stop, in which they learned that Durant was on searchable probation. (*Durant*, *supra*, 205 Cal.App.4th at p. 60.) The next night, these two officers, Taylor and Miller, saw the same black Pontiac –without recognizing it at first – turn left from a dedicated left-turn-only lane without using a turn signal. Believing this was a Vehicle Code violation, the driver, Officer Taylor activated his patrol car lights to effect a traffic stop. Once he had put his patrol car lights on the vehicle, the officer recognized the black Pontiac as the car from the previous night, and his partner, Miller, reminded him that the driver, Durant, was the same person previously stopped. After confirming with Durant that he was still on probation, the officers searched Durant, finding a loaded handgun in his waistband. (*Id*., at pp. 60-61.)

With this factual background, the court in *Durant* first disposed of – or rather, sidestepped – the grounds for denying the motion in the trial court: that the traffic stop was lawful. Recognizing that there may be no requirement to use a turn signal when one is in a dedicated left turn lane because the failure to use a signal would not effect other motorists (*id*., at pp. 62-63), the Court of Appeal concluded it did not need to decide the legality question because the patdown and seizure was justified by Durant's search condition, even if it occurred during an unlawful detention. (*Id.*, at p. 63.)

Acknowledging the requirement that an officer must know of a search condition at the time of a search to make an ensuing search lawful, *Durant* reasoned that the officer here knew of the

search condition when he patted down *Durant*, and that this line of cases did not apply. (*Id*., at p. 64.)

Rejecting the defendant's straightforward argument that the evidence should be suppressed because the officer's knowledge that the person he was pulling over for a traffic stop had a search condition was the direct product of the unlawful traffic stop, and thus the "fruit of the poisonous tree," the court held that the *Brown* attenuation test, as set forth in *Brendlin*, was controlling. It then applied the *Brown* test on the facts and circumstances of Durant's case, and concluded that suppression was not required.

Starting with the "timeliness" factor, the court, citing *Brendlin*, discounted the significance of this factor, noting in passing that "[a]lthough the patdown search and discovery of the gun occurred shortly after the traffic detention, they did not occur until after Officer Taylor had recognized appellant as a person subject to a search condition." (*Durant*, *supra*, at p. 66, citing *Brendlin*, *supra*, 45 Cal.4th at pp. 270–271.)

With respect to the critical second factor, the decision in *Durant* gives no meaningful consideration to the fundamental question at issue here – whether an officer learning of a discretionary search condition is the functional equivalent of an officer learning of an arrest warrant– but instead simply *assumes* this without discussion, finding the test applied in *Brendlin* to be the framework for analysis without considering whether there is a meaningful equivalence between these two types of knowledge as intervening circumstances. In fact, the *Durant* court's only

mention of the second *Brown* factor, "the presence of intervening circumstances . . ." (*Brendlin*, *supra*, at p. 269), is a single sentence: "The search condition supplied legal authorization to search that was completely independent of the circumstances leading to the traffic stop." (*Durant, supra*, 205 Cal.App.4th at p. 66.) The unconsidered assumption in *Durant* that a search condition is the functional equivalent of an arrest warrant will be challenged, as indicated in the next section, by the Sixth District in *Bates*. For present purposes, it suffices to repeat that it was an unconsidered assumption by the *Durant* court.

On the unique facts of *Durant*, and with no attention paid to the rather obvious point that discovery of a search condition, which *permits* a search without probably cause, is a much weaker intervening factor than discovery of an arrest warrant, which effectively *commands* the officer to arrest the person, it was a relatively easy task for the court in that case, focusing on the third *Brown* factor, to conclude that there wasn't "any flagrancy or purposefulness to the alleged unlawful conduct by [Officer] Taylor . . ."; the court noted that "though the trial court found that the traffic stop was made without reasonable suspicion, it specifically found Taylor did not act in an arbitrary, capricious, or harassing manner." (*Durant*, *supra*, 205 Cal.App.4th at p. 66.)

Based on this scant analysis, with no meaningful comparison of the intervening factor in *Durant* with the one in *Brendlin*, the court in *Durant* upheld denial of the suppression motion "[b]ecause [Officer] Taylor was aware of appellant's probation condition before the search, and because the existence

of that probation condition dissipated any taint that might flow from the detention. . . ."(*Durant, supra*, at p. 66.)

b. ***Bates***

The Sixth District's opinion in *Bates*, *supra*, 222 Cal.App.4th 60, decided a year after *Durant*, disagreed with much of *Durant*, and provides a helpful guide for this Court in the present case. Marcus Bates, a young Black male who was on probation with a search condition, was a suspect in a theft of a cell phone from another person. One officer spotted someone who matched the description of Bates, but then lost sight of him. A different officer, who was on foot, looking for Bates, saw a tan car with three occupants, including a white female driver, a Black male front seat passenger, and a rear seat passenger he could not see. He ordered the car to stop. The rear passenger, a Black male, identified himself as Marcus Bates, and matched the description of the suspect; he was immediately placed into handcuffs. (*Id*. at p. 63-64.)

The Sixth District first concluded that the officer's stop of the tan car and its occupants was based on a "show of authority" that amounted to a seizure (*id*., at pp. 65-66), then concluded that this detention was made with "no reasonably articulable suspicion that either the occupants of the tan car or the car itself may have been involved in criminal activity." (*Id*. at p. 66-67.)

The court then turned to a backup argument by the Government, based on *Durant*, that Bates's probationary search condition operated as an intervening factor which purged the taint of the illegal detention. Distinguishing and disagreeing

with *Durant*, the Sixth District flatly rejected this contention.

The *Bates* court's discussion of *Durant* begins with a point suggested above – that the holding in *Durant* "proceeds on the implicit assumption that a probation search condition is the same as the arrest warrant present in . . . *Brendlin* . . ." (*Bates*, *supra*, at p. 70), a point which is plainly deficient because "[i]n the case of an arrest warrant, officers essentially have a duty to arrest an individual once the outstanding warrant is confirmed [citations] . . ." while [a] probation search condition, on the other hand, is a discretionary enforcement tool and therefore a less compelling intervening circumstance than an arrest warrant." (*Bates*, *supra*, at p. 70.)

Bates takes straight aim at the erroneous assumption by the *Durant* court that a probationary search condition operates like an arrest warrant for purposes of attenuation.

> We do not read *Durant* to stand for the proposition that discovery after the fact of a probation search condition will sanitize any unlawful detention without regard to the circumstances surrounding that seizure. We are not comfortable with applying *Durant* to the facts here, as doing so would open the door to random vehicle detentions for the purpose of locating probationers having search conditions. We take no issue with the lawfulness of probation search conditions, nor with the ability of law enforcement to conduct suspicionless searches of known probationers. Our discomfort is in extending these concepts to situations where an individual's probation status is wholly unknown to law enforcement at the time of the initial detention and is used only after the fact to justify an otherwise unlawful search.

(*Ibid*.)

A final aspect of *Bates* is helpful to the issues presented here. Looking to the third *Brown* factor, the flagrancy of the Fourth Amendment violation, *Bates* provides a template for a proper considerations of "purposefulness" of misconduct as factor favoring suppression.

> Bad faith need not be shown for police misconduct to be purposeful. Instead, this factor is met "when officers unlawfully seize a defendant 'in the hope that something might turn up.'" [citations] Unlike the officer in *Durant*, who stopped a car based on a perceived traffic violation, Deputy Gidding stopped the tan car without any observation of possible wrongdoing. As we discussed previously, Deputy Gidding's conduct was based on a hunch that defendant might be in the vehicle. Though we do not suggest Deputy Gidding acted in bad faith, we find his suspicionless stop of the tan car nonetheless purposeful for our attenuation analysis.

(*Id*., at pp. 70-71.)

c. **The Present Case and *Garcia*.**

The opinions by the majority and dissent in McWilliams's case perfectly illustrate the gulf between *Durant* and *Bates*. Both the majority and dissent agree that the detention of McWilliams was made without reasonable suspicion. The majority concluded that a detention was unsupported because, first, with respect to investigation of the auto burglars on bikes, "nothing about defendant matched the [security] guard's description of the individuals involved . . .", and second, because nothing about "defendant's conduct in the neighboring lot [was] suggestive of criminal

activity." (Maj. opin. at 9-10; dis. opin. at 1.)

The court then divided on the question of attenuation. The majority went straight into a consideration of the *Brown* attenuation doctrine, purporting to follow *Brendlin* and *Strieff*. While implicitly recognizing that a parole search condition is a less compelling intervening factor than an arrest warrant because the latter "places a duty on law enforcement to make an arrest . . .", the majority finds an equivalency in the sense that the parole search condition "predated" the officer's investigation and was, according to the majority, "entirely unconnected with the stop." (Maj. opin. at 13.) The majority found a further equivalency because a parole search condition, like an arrest warrant "is not reasonably subject to interpretation," and because the officer in this case "did not perform the search until after he became aware of his authority to do so [under the search condition]." (Maj. opin. at 14.)

In her dissent, Justice Danner disagreed, concluding that "the officers' discovery of McWilliams's parole status after the detention and before conducting the vehicle search does not constitute an intervening circumstance sufficient to overcome the taint of the illegal detention." (Dis. opin. at 2.) The dissent quoted *Bates* with respect to the distinction between a mandatory arrest warrant and the "discretionary enforcement tool" of a search condition. (Dis. opn. at 3.) Then, borrowing a page from Justice Kagan's dissent in *Strieff*, the dissent explained its disagreement with the majority as to the "independence" of the parole search condition, which is essential to an intervening

factor being considered attenuating:

> Because a suspicionless parole search is reasonably subject to abuse by law enforcement (cf. *Brendlin*, *supra*, 45 Cal.4th at p. 271), the existence of discretion, combined with the seemingly routine nature of Officer Croucher's request that McWilliams produce his identification for a records check, leads me to conclude that the intervening circumstance (i.e., discovery of McWilliams's parole status) does not break the causal chain here. Rather, it was foreseeable that the detention and routine records check could result in discovery that McWilliams was on parole (or probation) and thus subject to a suspicionless search condition, given that more than half a million people are under parole or probation supervision in California.

(Dis. opn. at 3-4, citing *People v. Quinn* (2021) 59 Cal.App.5th 874, 879-880 ["California's adult supervised probation population is around 548,000 – the largest of any state in the nation, more than twice the size of the state's prison population, almost four times larger than its jail population and about six times larger than its parole population"].) Given the high numbers of persons under parole and probation supervision, the dissent rightly concluded that discovery of a search condition is not comparable to discovery of an arrest warrant, which this Court in *Brendlin* described as occurring "only in the unusual case. . . ." (Dis. opn. at 4.) From this, Justice Danner concluded "that the discovery of McWilliams's parole status is a link in the chain between his unlawful detention and the search of his vehicle, not a sufficient intervening cause that weighs measurably against suppression." (*Ibid*.)

In reaching this conclusion, the dissent cited a recent Ninth Circuit opinion which reached the same conclusion as *Bates* and the dissent here. In *United States v. Garcia* (9th. Cir. 2020) 974 F.3d 1071, the court distinguished the arrest warrant intervening circumstance in *Strieff* with the "suspicionless search condition" in that case, first citing *Strieff* for the proposition that a warrant is a "judicial mandate" which an officer has a "sworn duty" to carry out, then contrasting that to a suspicionless search condition, characterizing an officer's decision whether to exercise authority pursuant to such a decision as "volitional, not 'ministerial.'" (*Id*., at p. 1077.) *Garcia*, analogizing to other recent Ninth Circuit cases finding *Strieff* inapposite, rejected the use of a search condition as an intervening circumstance which could attenuate police wrongdoing.

> [W]hen an officer's exercise of discretionary authority is "significantly directed" by information learned during an unlawful search, the mere existence of that authority is not an intervening cause that purges the taint of the earlier constitutional violation.

(*Garcia*, *supra*, 974 F.3d at 1078.)

B. Circumstances Which Militate Against Discovery of a Search Condition Being an Intervening Factor.

As the foregoing summary of cases make clear, there are strong, salient reasons for this Court to follow the holdings in *Bates* and *Garcia*, and the dissenting opinion in the present case, and conclude that discovery of a discretionary search condition should not be considered an independent intervening circum-

stance for purposes of attenuation of a Fourth Amendment violation by an officer. A short discussion of these various factors follows.

1. Case Law Precluding Use of a Search Condition to Justify a Search Conducted Before the Officer Knew of the Condition.

In *People v. Sanders* (2003) 31 Cal.4th 318, this Court made clear that a parole search condition cannot justify a search "if the officer is unaware [at the time of the search] that the suspect is on parole and is subject to a search condition. (*Id*., at p. 333.) In this circumstance, the exclusionary rule applies because the evidence was obtained because of the wrongdoing, not the search condition. (*Ibid*.)

The present case differs only in degree from this situation. Here, the unlawful detention of McWilliams was made without any knowledge that McWilliams had a search condition. While, unlike *Sanders*, the actual search in the present case came after the officer learned of the search condition, the search was equally the product of the unlawful detention.

Support for this position can be found in the Ninth Circuit's decision in *Garcia*, which noted that its "conclusion that Garcia's suspicionless search condition was not a sufficient intervening circumstance" is consistent with the Ninth Circuit's case law requiring that an officer must know about a Fourth Amendment search waiver before searching in order for the waiver to justify the search. (*Garcia*, *supra*, 974 F.3d at p. 1080.)

> This rule reflects the significant discretion officers have in deciding whether to conduct a search pursuant to a

> suspicionless search condition. . . . The existence of this discretion, especially combined with the lack of evidence for why the officers decided to avail themselves of the search condition, leads us to conclude that the discovery of Garcia's suspicionless search condition was not a sufficient intervening circumstance.

(*Ibid*.)

2. **A Discretionary Search Condition is Not Analogous to an Arrest Warrant.**

This point has already been made at some length, and is supported by the holdings in *Bates* and *Garcia* discussed above. Thus, it will not be summarized anew here.

We note that our research has shown only one case, besides *Durant*, which has treated a search condition as akin to an arrest warrant. In *State v. Fenton* (Idaho Ct.App. 2017) 413 P.3d 419, the court cited both *Bates* and *Durant*, then applied attenuation analysis without discussing the ways in which a search condition differed from an arrest warrant.

By contrast, a number of other cases have concluded that discovery of a search condition as a result of a Fourth Amendment violation is itself the fruit of the poisonous tree, and ordered suppression of seized evidence. (See, e.g., *People v. Wilkins* (1986) 186 Cal.App.3d 804; *United States v. Mati* (N.D.Cal. 2020) 466 F. Supp.3d 1046, 1061 [discovery of probation search condition was simultaneous with the officers' improper prolongation of the stop; it was "not an intervening event" but rather "the very object of the prolonged stop"]; *United States v. Retta* (D.Nev. 2015) 156 F. Supp.3d 1192, 1198-1199 [officers' knowledge of defendant's

parolee status was fruit of the illegal arrest].)

Plainly, the difference in kind between a "mandatory duty" arrest warrant and an "officer discretion" search condition militates against use of a search condition as an intervening circumstance in attenuation analysis.

3. Analogy to Plain View Citing of Contraband After an Unlawful Detention or Arrest.

If, as argued above, the analogy of discovery of a search condition to discovery of an arrest warrant is inapt, appellant suggests that there is a far more fitting analogy to a situation in which courts agree that the exclusionary rule must be applied. In many situations, an officer effecting an unlawful entry or seizure is able to see, in plain view, contraband which is then seized. While an officer is normally permitted to seize contraband which the officer sees in plain view, the recognized corollary to this rule is that the officer must be in a place he or she is entitled to be when the contraband is in plain view. (See, e.g., *Collins v. Virginia* (2018) ___U.S.___ [138 S.Ct. 1663, 1672].)

In practice, this means that a "plain view of contraband" obtained only because of the officer's preceding illegal seizure or entry is subject to suppression. (See, e.g., *United States v. Davis* (10th Cir. 1996) 94 F.3d 1465, 1469-70 [if the drugs and contraband were "only in plain view as a direct result of an unlawful seizure, then the subsequent plain view search may be a 'fruit' of the seizure and subject to suppression"]; see also *State v. Bean* (Iowa Ct.App. 2020) 952 N.W.2d 180 [if ordering suspect out of vehicle represented an unreasonable search or seizure, "then the

immediate result of the order—the contraband that emerged in plain view—would be excluded as 'fruit of the poisonous tree.'"].)

Discovery of a search condition as the direct result of an unlawful detention is the functional equivalent of seeing contraband in plain sight following the same type of illegality, as in *Bean*. If discovery of a fact permitting – but not requiring – an officer to search is the product of the unlawful police conduct, suppression is required. If anything, viewing contraband in plain view would appear to be a more compelling reason to uphold the search, since the officer in that situation *knows* that a crime has been committed, whereas the officer who discovers a search condition, as in the present case, has nothing but hunch and speculation to support a conclusion that the suspect is engaged in any kind of criminal conduct.

Fairness thus dictates that these two situations be treated the same, with the result of subsequent search suppressed as the fruit of the poisonous tree without consideration of attenuation.

4. The "Foreseeability" of Finding a Discretionary Search Condition as a Result of an Unlawful Detention.

Finally, as also suggested above, this Court should consider policy reasons connected with prevalence of parole and probation search conditions, particularly for persons of color. As several of the cases cited above make clear, suspicionless detentions, like the one in the present case, are calculated to, and likely to, lead to the discovery of discretionary search conditions. (See *Strieff*, *supra*, 136 S.Ct. at pp. 2072-2073, dis. opn. of Kagan, J.; and dis. opn. in present case, at pp. 3-4.) This circumstance militates

against categorizing the discovery of such conditions as an intervening factor for attenuation purposes precisely because it cannot be assumed to be, like an arrest warrant, "independent" of the preceding illegal seizure.

In this sense, and is discussed more in Part III-C-3 below, the *Durant* rule unwisely gives police too much of an incentive to effect purposeless stops, especially of people of color, in the hopes that they will have a parole or probation condition that will then permit a fishing expedition to find "what might turn up." The strong tendency that the *Durant* rule will produce an unintended consequence of encouraging purposeless searches is a further reason counseling against that court's recognition of discovery of a discretionary search condition as an attenuating circumstance, and in favor of the reasons supporting its rejection in *Bates*.

C. This Court Should Reject *Durant*, and Hold, With *Bates* and *Garcia*, that Discovery of a Search Condition After an Unlawful Detention is Not an Independent Intervening Cause Which Triggers Attenuation Analysis.

By now, appellant has hopefully made his position clear. For sound reasons distinguishing the present situation, involving discovery of a search condition, from the holdings in *Brendlin* and *Strieff* concerning arrest warrants, and for the numerous other considerations described above, appellant urges this Court to follow the lead of the courts in *Bates* and *Garcia* and reject the *Durant* court's elevation of a post-unlawful detention discovery of a discretionary search condition to the status of discovery of an arrest warrant.

III. If the *Brown* Balancing Test Applies, Discovery of McWilliams's Parole Search Condition Should Not Be Considered Sufficiently Attenuating to Dissipate the Taint of the Unlawful Detention of McWilliams.

If this Court concludes that the *Brown* balancing test should apply to discovery, after an unlawful detention, of a probation/parole search condition, appellant urges this Court to accept respondent's concession that "the officer's post-detention discovery of McWilliams's parole status did not sufficiently attenuate the taint from the officer's unlawful detention of McWilliams to render lawful the subsequent search of McWilliams and his vehicle." (Resp. Conc, Ltr.)

Applying the attenuation test to the circumstances of the present case compels a conclusion that suppression is mandated, and a reversal of the judgment of the Court of Appeal.

A. The Temporal Factor.

In all of the cases discussed above involving discovery of either an arrest warrant or a search condition following an unlawful detention, the first *Brown* factor, the temporal proximity between the unconstitutional stop and the discovery of the evidence, was found to favor suppression because in each of them, as here, the officer learned of the intervening circumstance very soon after the unlawful detention. (See *Brendlin*, *supra*, 45 Cal.4th at p. 270.; *Durant*, *supra*, 205 Cal.App.4th at pp. 65-66; *Strieff*, supra, 136 S.Ct. at 2062; Opin. at 12-13.) The same applies here.

B. The Intervening Factor: Discovery of the Parole Search Condition.

Under the *Brown* test, the second factor is "presence of intervening circumstances." As discussed in great detail in the preceding section, the intervening circumstance here, discovery of the parole search condition, is far less compelling than discovery of an arrest warrant, in that it creates no mandatory duty for the officer to arrest or take any action to impinge the liberty of the person who has been unlawfully detained.

Moreover, as also argued in detail above, the "independent" nature of this factor is dubious where it is essentially a recognized police practice to stop persons, in cars or otherwise – particularly men of color like appellant – in the hopes that something might come up. As dissenting Justice Danner aptly put it, "it was foreseeable that the detention and routine records check could result in discovery that McWilliams was on parole (or probation) and thus subject to a suspicionless search condition, given that more than half a million people are under parole or probation supervision in California." (Dis. opn. at 3-4, citing *People v. Quinn*, *supra*, 59 Cal.App.5th at pp. 879-880; see also *Bates*, *supra*, 222 Cal.App.4th at p. 70 [use of probation search condition as attenuating intervening circumstance would "open the door to random vehicle detentions for the purpose of locating probationers having search conditions"].)

Thus, on balance, the intervening circumstance here is markedly weaker than it was in *Brendlin* and *Strieff*, providing at most only faint attenuation to the officer's wrongdoing.

C. The Purposefulness and Flagrancy of the Wrongdoing.

We now turn to the third *Brown* factor "the flagrancy and purposefulness of the police misconduct . . .", oft described as the "most important" factor. (*Brendlin, supra*, 45 Cal.4th at p. 271) We divide the discussion here into three parts. First, we review the question posed by this Court's docket statement of the second issue to be considered in this case: "What constitutes purposeful and flagrant police misconduct under the attenuation doctrine analysis?" Second, we will demonstrate the ways in which Officer Croucher's conduct here was *purposeful* and *flagrant*, akin to what the officer in *Bates* did, and very distinguishable from the good faith mistake of the officer in *Durant*.

Finally, appellant will finish this discussion by considering the extent to which implicit racial bias could have played apart in Officer Croucher's conduct in this case.

1. Flagrancy and Purposefulness of Police Misconduct Should Be Measured by Objective Standards, Focused on the Officer Having Purposeful Disregard of Fourth Amendment Protections.

What is purposeful and flagrant misconduct? One could certainly paraphrase the infamous remark of Supreme Court Justice Stewart about obscenity, and say "I know it when I see it." (*Jacobellis v. Ohio* (1964) 378 U.S. 184, 197.) But that won't do.

Does "flagrancy" require, as the majority in *Strieff* seems to suggest, a showing that the officer's conduct is "part of . . . systemic or recurrent police misconduct . . .", as opposed to an "isolated instance of negligence that occurred in connection with a

bona fide investigation"? (*Strieff, supra*, 136 S.Ct. at p. 2063.) It was based on this language that the majority in the present case concluded that there was no flagrancy or purposefulness here. (Maj. opn. at 16-18.) Or is the older case law, such as *Brown*, correct in finding flagrancy and purposefulness where the officer's "impropriety" was "obvious," and where an officer's "investigatory purpose," in the context of the Fourth Amendment violation, is, in essence, an "expedition for evidence in the hope that something might turn up"? (*Brown, supra*, 422 U.S. at p. 605.)

Appellant believes that the dissent in the present case, and the majority in *Bates* got this right. *Bates* reminds us that "[b]ad faith need not be shown for police misconduct to be purposeful. Instead, this factor is met 'when officers unlawfully seize a defendant 'in the hope that something might turn up.'" (*Bates*, *supra*, 222 Cal.App.4th at pp. 70-71, quoting *U.S. v. Williams* (6th Cir. 2010) 615 F.3d 657, 670, and *Brown*, *supra,* 422 U.S. at p. 605.)

Justice Danner's dissent makes a further point, discussed in Part III-C-3 below: that "seemingly small constitutional violations can add up to problems of significant national dimensions . . .", and must be viewed in the context of "broader cultural views on racial injustice." (Dis. opn. at 6.)

Appellant submits that this Court's discussion of this point in *Brendlin* has continued salience. Parsing this Court's words in *Brendlin*, *supra*, 45 Cal.4th at p. 271-272, citing cases which lacked purposeful, flagrant misconduct, one can determine that these qualities are present where police "knowingly overstepped their authority or . . . their conduct was an egregious misuse of

authority . . .” (*McBath v. State* (Alaska Ct.App. 2005) 108 P.3d 241, 250), or where the officer “invented a justification for the traffic stop in order to have an excuse to run [a] warrant check (*People v. Rodriguez* (2006) 143 Cal.App.4th 1137, 1143), or where the “search of the vehicle or its occupants was the ‘ultimate goal’ of the initial unlawful detention. (*State v. Martin* (Kan. 2008) 179 P.3d 457, 463.)

2. The Purposefulness and Flagrancy of Officer Croucher’s Conduct.

There are several aspects of the present case which, contrary to the view of the majority in the Court of Appeal, show that the officer’s unlawful conduct was not a good faith error, but rather a classic example of a deliberate, suspicionless detention undertaken in order to see if “something might come up,” and thus flagrant and purposeful.

First and foremost, the detention here cannot be considered as based on a “good faith mistake,” as the majority suggests. According to the majority, “[r]ather than pursuing a fishing expedition, Officer Croucher was conducting an investigation based on a 911 call reporting ‘a possible vehicle burglary’ in an adjacent parking lot. (Maj. opn. at 17.) Respectfully, this conclusion does not stand up to scrutiny. As the majority’s own opinion makes clear, there was no basis for Officer Croucher to believe that McWilliams, reclined by himself in the passenger seat of his car, had any connection whatsoever to the bicycle-riding, flashlight toting burglars seen by the security guard. He was alone, in a different parking lot than where the bike riders had been seen;

he was not communicating with anyone, and there was no bike rack on his car. (See Maj. opin. at 9.) On these facts, no trained police officer could have conceivably believed he had the reasonable suspicion required to detain appellant in connection with the prior potential burglary.

Likewise, there was no basis to detain appellant for being in a vehicle within the parking lot of a closed business, where there was nothing to connect him to criminal activity. (See maj. opin. at p. 10, citing, inter alia, *People v. Roth*, *supra*, 219 Cal. App.3d at p. 215.)

Simply put, this was not a detention based on a good faith mistake, which strongly suggests it was a purposeful, flagrant violation. This conclusion is confirmed by Officer Croucher's somewhat brazen admission that he orders anyone connected to a "suspicious vehicle" to get out of the car for officer safety purposes. (2RT 312) Thus any conclusion by the officer that McWilliams and his vehicle were "suspicious" was not based on articulable facts, as required to justify a detention, but on speculation and hunch, at most. Put plainly, this type of across the board, unconstitutional practice of an officer, with no regard to the constitutional protections requiring a reasonable suspicion to effect a detention, must be considered a flagrant type of police misconduct.

Given this background, the present case this case is eminently distinguishable from *Durant*. Two unique of features of that case, which are markedly absent here, strongly tipped the balance of the application of the *Brown* test. First, the police

officer's error in *Durant* which led him to undertake a traffic stop was truly made in good faith. The officer in that case could have reasonably assumed that a person in a dedicated left turn lane is required to use their turn signal; while this is incorrect, effecting a traffic stop based on this misapprehension of the law is truly a good faith error. In fact, no less of an authority than the Driver's Handbook, from the California Department of Motor Vehicles, instructs that a turn signal is required in this situation. (See *California Driver Handbook*, p. 48: "A center left turn lane is located in the middle of a two-way street and is marked on both sides by two painted lines. . . . If a street has a center left turn lane, you must use it to prepare for or make a left turn, or prepare for or make a permitted U-turn. . . . To turn left from this lane, *signal*, look over your shoulder, and drive completely inside the center left turn lane." (emphasis added).)[3]

As explained above, by contrast, there was no good faith mistake here. Justice Danner's dissenting opinion lays this out with alacrity.

> Officer Croucher was essentially on a fishing expedition when he turned into the parking lot next to the one from which the security guard reported two people on bicycles had been looking into cars. Any concerns about officer safety here arose from Croucher's own actions in deciding to approach McWilliams's car. McWilliams was sleeping or lying in his car early in the evening in a public parking lot, which itself raises no concerns about criminal activity. It bears emphasizing that there was no particular

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3. Found at https://www.dmv.ca.gov/portal/file/california-driver-handbook-pdf

> exigency supporting Croucher's actions – the original report itself lacked any observation of an actual crime.
>
> If Officer Croucher were concerned about McWilliams's safety, he could have asked McWilliams about it. Instead he shined his spotlight on McWilliams and ordered him out of the car. Croucher then told McWilliams to retrieve his identification from his car (seemingly in contradiction to Croucher's expressed fears of officer safety, presumably about the potential presence of a hidden weapon) and checked on McWilliams's status. Croucher's testimony was that ordering people out of vehicles is his routine practice when making vehicle stops or checking on suspicious vehicles. But if the detention itself is illegal – which this one was – then the subsequent search is a direct and inevitable consequence of the officer's illegal action.

(Dis. opn. at 6.)

A second contrast with the *Durant* case is that the detention of Mr. McWilliams was not based on any kind of reasonable belief that he was either engaged in criminal activity or on searchable probation; by contrast, on the unique facts of *Durant*, the officer, in the course of the detention, recognized Mr. Durant as a person he had contacted the previous night whom he knew to be on searchable probation. (*Durant*, *supra*, 205 Cal.App.4th at p. 60-61.) Thus, the connection between the unlawful detention and the probation search in that case is more attenuated than it is in the present case. In the present case, there is a short, straight line between the unlawful, unjustifiable, not-in-good faith detention of appellant and discovery of the search condition, with Officer Croucher ordering appellant out of his car, demanding he

produce identification, then running it through dispatch to learn of the search condition. (2RT 314-315, 323)

Appellant submits that he has demonstrated the officer's misconduct here – ordering appellant out of his car without any basis to believe he was connected to the bicycle burglars or engaged in any conduct beyond resting in his car – was flagrant and purposeful. As such, the officer's conduct weighs strongly in favor of application of the exclusionary rule and against attenuation.

3. **The Specter of Implicit Racial Bias.**

Finally, as suggested above, there is something of an "elephant in the room" factor at work here. Justice Danner's dissenting opinion sets the stage for this discussion, explaining how courts have only recently begun coming to terms with the pattern of institutional racism which impacts police exercise of authority and violations of Fourth Amendment rights of Americans. While acknowledging the majority view that the seizure in the present case could have been an "honest mistake that does not necessarily call for application of the exclusionary rule . . ." (Dis. opn. at 6), the dissent qualifies this by referencing "a growing recognition that seemingly small constitutional violations can add up to problems of significant national dimensions . . .", a comment followed by a quote from Justice Dato's concurrence in *In re Edgerrin J.* (2020) 57 Cal.App.5th 752.

> "Nearly a century ago Justice Benjamin Cardozo wrote: 'The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.' [Citation.] Nor should they. As our broader cultural views

> on racial injustice evolve, courts and judges are compelled to acknowledge and confront the problem. (See, e.g., *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 31 [471 P.3d 329] (conc. opn. of Liu, J.) [citing 'the troubling racial dynamics that have resulted in state-sanctioned violence, including lethal violence, against Black people throughout our history to this very day']; *Utah v. Strieff* (2016) . . ., 136 S.Ct. 2056, 2070-2071] (dis. opn. of Sotomayor, J.) ['it is no secret that people of color are disproportionate victims of this type of scrutiny' in suspicionless stops].)"

(Dis. opin. at 6-7, quoting *In re Edgerrin J.*, *supra*, at pp. 770-771, conc. opn. of Dato, J.)

Justice Danner's dissent makes clear that these questions should be center-stage in the present case, but were not addressed by the parties on appeal because "[t]he race of McWilliams himself is not established by the record on appeal, although presumably it was known to those involved in the proceedings in the trial court." (Dis. opn. at 7, fn. 1.) However, this concern no longer applies, as the post-opinion augmentation to the record granted by the court cured this error, establishing, as a fact in the record, what was known to everyone associated with the proceedings below: that Mr. McWilliams is Black. (Modif. of Opin, App. B to PFR, p. 1.)[4]

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4. The impact of implied racism was not addressed in the briefing in the Court of Appeal. However, appellant took steps to remedy this by seeking rehearing to permit the parties to brief this important sub-issue. (See *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 121 [appellate court has discretion to consider omitted issue raised on rehearing].) Although rehearing was denied, both the majority, in its modified opinion, and the dissent address this issue. (See Modif. of Opin, App. B to PFR, p. 2 ["there

Highly pertinent to this Court's consideration of the role of implicit racism with respect to the Fourth Amendment issues in the present case is the recent enactment of the California Racial Justice Act of 2020 (A.B. 2542 (2019-2020 Reg. Sess.), eff. 1/1/2021 (hereafter "Racial Justice Act") Our Legislature's passage of this and related new laws reflects an evolving transformation of our collective conscience to a conclusion that reliance on race, to any degree, in deciding which person to subject to constitutional intrusions, such as the detention in the present case, offends our sense of justice. (Pen. Code § 13519.4, subds. (e)-(f); Racial Justice Act, § 2, subds. (c), (g), (h), (i).)

Appellant acknowledges that the record does not *directly* tell us if the fact that Mr. McWilliams was Black contributed to Officer Croucher's decision to detain him without reasonable suspicion. But direct evidence that racial bias motivated a detention, or a credibility finding suggesting such motivation, would be hard to come by, and should not be necessary for a finding that substantial evidence demonstrated that racial bias infected a detention. Such a standard would make it virtually impossible to establish that racial bias infected a detention.

The underlying problem is explained well by a 2013 district court ruling in *Floyd v. City of New York* (SDNY 2013) 959 F.Supp.2d 540.

> [I]t is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited

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[was] no evidence of racial profiling and, indeed, all evidence admitted at the suppression hearing omits any mention of race"].) Thus, this issue is properly before this Court on review.

> intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention.

(*Id*., at p. 557.) Similarly, as the Racial Justice Act, *supra*, section 2, subdivision (c), makes clear, "[e]ven when racism clearly effects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish." Finally, Justice Humes's concurrence in *People v. Bryant* (2019) 40 Cal.App.5th 525, 544, makes the point that"requiring a showing of purposeful discrimination sets a high standard that is difficult to prove in any context".

Appellant reminds this Court that there are significant studies demonstrating that racial profiling grounded in explicit and implicit bias is endemic in law enforcement. (See, e.g., *Floyd*, *supra*, 959 F.Supp.2d at pp. 557-558; Charles R. Epp, Steven Maynard-Moody & Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (2014, Univ. Chicago Press) [reporting that 12.2% of white drivers reported being stopped in a year, compared with 24.5% of Black drivers and demonstrating that car stops of whites and Blacks are substantively different since whites are stopped for violating traffic safety laws and Blacks are subjected to pretextual investigatory stops when they are perceived as suspicious]; The Sentencing

Project, "Report of the Sentencing Project to the United Nations Human Rights Committee: Regarding Racial Disparities in the United States Criminal Justice System" (2013)[5], [data shows that Black people are disproportionately arrested for certain crimes].

In the present case, there is circumstantial evidence that racial bias played a part in the decision to detain McWilliams. Officer Croucher testified that initially he could see only the top of McWilliams's head in his car; however, it is clear that by the time Croucher ordered him out of the car, appellant had already "turned his head and looked at [the officer] through the bottom portion of the window . . ." (2RT 311), after which he "instructed the subject to get out of the vehicle . . ." for "officer safety." (2RT 312) Plainly, then, the officer, who was using his flashlight to illuminate the occupant of the car (2RT 311), could not fail to have seen that appellant was Black. Thus, on the current record, while there is no *direct* evidence that the decision to detain McWilliams was premised on bias or racism on the part of Officer Croucher, what we know about the workings of implied bias in the criminal justice system suggests that this more subtle causative factor could well have played an important role.

In this context, one has to wonder whether, if the person reclining in the car was a white male of the same age, Officer Croucher would have considered this to be a "suspicious vehicle" situation justifying ordering the occupant out of the car. (See 2RT

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5. Found at https://www.sentencingproject.org/wpcontent/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf

312.) There is every reason to believe, given the operation of implied bias in this country, and with respect to law enforcement and the Fourth Amendment, that there is a significant likelihood that if the occupant been a young White male, Officer Croucher would have simply tapped on the car's window to see if the occupant was all right or if he had seen anybody riding around the parking lot in a bicycle. (See maj. opin. at 10-11: "We . . . observe that officer safety permitting, Officer Croucher could have engaged in a consensual encounter with defendant to better assess whether defendant was connected to the "possible vehicle burglary" and individuals on bicycles with flashlights looking into cars." See also dis. opn. at 6: "If Officer Croucher were concerned about McWilliams's safety, he could have asked McWilliams about it.")

Ultimately, appellant cannot demonstrate, on the current record, that racial bias, implicit or explicit, played a part in the course of action undertaken by Officer Croucher. However, given the pervasive nature of implicit racial bias, and a factual situation ripe for its application in the present case being a contributing factor in the officer's decision to make a suspicionless detention of McWilliams, this subtle but important factor should be considered as part of this Court's calculus in assessing the purposefulness and flagrancy of the officer's unlawful conduct.

D. Considering the *Brown* Factors Together, Attenuation is Not Shown, and the Exclusionary Rule Applies.

Appellant submits that respondent's concession in the present case is well taken. As respondent aptly puts it, Officer

Croucher's "post-detention discovery of McWilliams's parole status did not sufficiently attenuate the taint from the officer's unlawful detention of McWilliams to render lawful the subsequent search of McWilliams and his vehicle." (Resp. Conc, Ltr.)

This conclusion follows from the temporal proximity of the discovery of the search condition to the baseless detention by the officer; the weak nature of the intervening factor, discovery of a search condition, which, at most, give rise to a permissive ability of the officer to search without probable cause, as compared to discovery of an arrest warrant, which give rise to a more robust, mandatory duty to arrest and obligation to conduct a search incident to arrest; and to the purposeful, flagrant nature of the officer's Fourth Amendment violation in the present case, as detailed in Part C above.

The conclusion of the court in *Bates* should apply here with equal weight: the "suspicionless" detention of defendant was "purposeful for attenuation analysis. Based on this finding, together with [the] determination that defendant's probation search condition was an insufficient attenuating circumstance . . ." should lead this Court to "conclude that the evidence obtained as a result of the detention and search should have been suppressed." (*Bates*, *supra*, 222 Cal.App.4th at p. 71.)

CONCLUSION

For the reasons set forth above, appellant respectfully asks this Court to (a) affirm the portion of the Court of Appeal's decision finding the detention in the present case as violative of the Fourth Amendment's prohibition against unlawful searches

and seizures, for the reasons advanced in Part I herein; (b) conclude, for the reasons advanced in Part II herein that discovery of a parole or probationary search condition is not an intervening circumstance which subjects a Fourth Amendment violation to attenuation analysis under the *Brown* test, but should instead be analyzed, in the present case, as the fruit of the unlawful detention; or, alternatively, as argued in Part III herein, conclude that, under the *Brown* balancing test employed by this Court in *Brendlin* with respect to the intervening circumstance of discovery of the more compelling discover of an arrest warrant, that discovery of the search condition is not sufficiently attenuating to purge the taint of the officer's purposeful unlawful seizure of Mr. McWilliams in the present case.

In sum, appellant respectfully submits that this Court should reverse the judgment of the Court of Appeal and direct that the case be remanded to the trial court with directions to permit appellant to withdraw his plea and for the trial court to grant the motion to suppress and dismiss the charges against appellant. (See e.g., *People v. Roth*, *supra*, 219 Cal.App.3d at pp. 215-216.)

Dated: October 4, 2021

Respectfully submitted,

William M Robinson

William M. Robinson, Senior Staff Attorney
Sixth District Appellate Program
Attorney for Appellant McWilliams

CERTIFICATE OF WORD COUNT

Appellant, by and through his appointed counsel on appeal, hereby certifies that the software used in preparing this brief is Corel Word Perfect X7 and that according to the software report for this document the brief, counting only the portions of the brief required by Rule 8.520(c) contains 15,059 words, which exceeds the word limit for an opening brief on the merits by 1,059 words. At the same time that this brief is being filed, I have prepared and filed a motion for permission to file a brief that exceeds the word limit.

I declare under penalty of perjury under the laws of the state of California that this declaration is true and correct. Executed at Santa Clara, California, on October 4, 2021.

William M. Robinson, Senior Staff Attorney
Sixth District Appellate Program
Attorney for Appellant McWilliams

DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL

Case Name: ***People v. McWilliams***
Case No.: **S268320**

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within ***APPELLANT'S OPENING BRIEF ON THE MERITS*** to the following parties hereinafter named by:

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X **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

Duvanh Anthony McWilliams
Prison No. BM7046
Chuckwalla Valley State Prison
P.O. Box 2349
Blythe, CA 92226

I declare under penalty of perjury the foregoing is true and correct. Executed this 4th day of October, 2021, at San Jose, California.

/s/ *Priscilla A. O'Harra*
Priscilla A. O'Harra

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. McWILLIAMS**
Case Number: **S268320**
Lower Court Case Number: **H045525**

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/4/2021
Date

/s/Priscilla O'Harra
Signature

Robinson, William (95951)
Last Name, First Name (PNum)