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Supreme Court of California
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No. S264219

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

LEON WILLIAM TACARDON,

Defendant and Petitioner.

Third District Court of Appeal No. C087681

(San Joaquin County Superior Court Case No. STKCRFER20180003729)

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Although the State acknowledges that the test for determining when a consensual encounter has become a detention focuses entirely on the civilian's perception of the coercive effect of police conduct (Answering Brief ("AB ") 19-21), the State largely disregards the coercive effect a police spotlight has on people sitting in a parked car at night. The State insists the test presupposes an innocent person rather than “a person unreasonably unfamiliar with police-civilian interactions” (AB 20), but anyone, no matter how innocent, who would feel free to drive or walk away after an officer established eye contact, made a U-turn to pull up behind them with the high beams on, turned on a spotlight, got out of the car quickly to approach, and stopped a passenger when she tried to leave, has absolutely no familiarity with actual police-civilian interactions.

The State contends that a ruling in favor of Petitioner Leon Tacardon would force law enforcement officers to approach stranded motorists in the dark, without spotlights, to avoid violating the Fourth Amendment. (AB 32-38.) Fortunately this concern is unfounded, because stranded motorists would reasonably believe the officers were coming to help rather than to investigate crime so there would be no detention (*People v. Brown* (2015) 61 Cal.4th 968, 980), and the deputy in this case was parked no more than twenty feet behind Petitioner’ vehicle, with the entire area illuminated by the high beam headlights from his patrol car, before he ever activated a spotlight. While the spotlight may not have been necessary to determine how to assist those motorists, it sent a strong signal to them that they were not free to leave, and when the deputy saw that a passenger had disregarded the signal, he immediately advised her

she could not leave.

This Court should extend the scope of its unanimous decision in *Brown* and hold that Petitioner could exercise his Fourth Amendment rights because "no circumstances would have conveyed to a reasonable person that [the deputy] was doing anything other than effecting a detention." (*Brown, supra*, 61 Cal.4th at p. 980.)

ARGUMENT

I. Petitioner Was Entitled to Challenge the Deputy's Actions Under the Fourth Amendment After Being Detained by the Deputy

A. Encounters With Law Enforcement Officers Only Remain Consensual If a Reasonable Person Would Actually Feel Free to Leave Because the Officer Did Nothing to Discourage that Person From Leaving

The quintessential example of a consensual encounter in cases potentially implicating the Fourth Amendment involves a law enforcement officer who poses some questions after "'merely approaching an individual on the street or in another public place.'" (AB 18, quoting *Florida v. Royer* (1983) 460 U.S. 491, 497 (plur. opn. of White, J.).) The individual's Fourth Amendment rights are triggered "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." (*United States v. Mendenhall* (1980) 446 U.S. 544, 554 (opn. of Stewart, J.).) "So long as a reasonable person would feel free to 'disregard the police and go about his business,' [Citation], the encounter is consensual and no reasonable suspicion is required." (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) The test for

determining whether an encounter that began with an officer coming upon a parked car has become a detention focuses on "whether a reasonable person in [the defendant's] position would have felt free to leave." (*Brown, supra*, 61 Cal.4th at p. 980, citing *Brendlin v. California* (2007) 551 U.S. 249, 257.)

Petitioner agrees with the State's description of that test as an objective one that presupposes an innocent person (AB 20), but does not understand the State's criticism of Petitioner for characterizing the test as "whether a reasonable, innocent person is 'comfortable' leaving the area." (AB 21, quoting Opening Brief on the Merits ("OBM") 26.) The issue is not, as the State suggests, whether citizens acquiesce in police requests without being told they are free to disregard the request (AB 20-21), but whether under all of the circumstances they believe they are under "no restraint of liberty whatsoever." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) "Feeling free to leave" is if anything more encouraging than "feeling comfortable to leave" (AB 21), according to standard dictionary definitions:

> **Merriam Webster** - Definition of feel free
> —used to tell someone that there is no reason to hesitate about doing something; Feel free to leave whenever you like.
> **Collins** – You say 'feel free' when you want to give someone permission to do something, in a very willing way.
> **Free Dictionary**--feel free
> To not hesitate (to do something); to consider oneself welcome (to do something). The phrase is used to indicate that something is completely permissible or encouraged.

(https://www.merriam-webster.com/dictionary/feel%20free;
https://www.collinsdictionary.com/us/dictionary/english/feel-free;

https://idioms.thefreedictionary.com/feel+free.)

While an officer acting in good faith during the hypothetical encounter on the street may well convey to citizens that they may "decline to listen to the questions at all and may go on [their] way" (*Royer, supra*, 460 U.S. at p. 498), there was nothing about the encounter in this case that suggested anyone in the car was free to leave. Every step taken by the deputy – having the high beams on, establishing eye contact, making a U-turn to drive up close, activating the spotlight, getting out to approach quickly, and promptly stopping a passenger who tried to leave – conveyed to the occupants of the parked car that they should not feel leaving was permissible, much less encouraged.

Although the State cites "numerous long-standing factors" that should be considered in determining whether an encounter is a detention (AB 21), this Court in *Brown* found the defendant was detained under the totality of the circumstances even though none of those factors was present. (*Brown, supra*, 61 Cal.4th at pp. 974-980.) Like the Third Appellate District below (*People v. Tacardon* (2020) 53 Cal.App.5th 89, 98-99), the State focuses entirely on the color of the light, without neutrally considering the totality of the circumstances. (*People v. Kidd* (2019) 36 Cal.App.5th 12, 21.)

This Court should determine under the totality of the circumstances that no one familiar with police encounters would have felt free to drive or walk away from the encounter with a law enforcement authority.

B. Under the Totality of the Circumstances, No Reasonable Person Would Have Felt Free to Leave After the Deputy Activated the Spotlight, Signaling to the Occupants of the Parked Car That They Needed to Remain Where They Were

1. Eye Contact Established That Petitioner Was Well Aware He Was Engaged in an Encounter With Authorities Even Before the Deputy Pulled Up Behind Him and Activated The Spotlight

Although courts must consider the totality of the circumstances rather than a single fact in determining whether a person has been detained (*Bostick, supra*, 501 U.S. at p. 437), the State contends that Petitioner "wrongly tries to draw meaning from the fact that he and Deputy Grubb exchanged eye contact as the deputy drove by the parked car. (OBM 29.)" (AB 41.) Contrary to the State's suggestion (AB 41), Petitioner was not arguing in his opening brief that the eye contact was coercive or used in a threatening manner, but that the deputy was ensuring that Petitioner was aware of his presence even before he turned on the spotlight; as he explained, "I had my high beams on and it was well lit up, they – they saw me as well too. As they were leaning back, I could see them looking at me as I turned by them." (CT 104.) Petitioner knew the deputy was focusing on him and his car and, after the deputy made a U-turn to pull up behind the car, was probably anticipating either a spotlight or an emergency light. (CT 33-34, 88-89, 103-105.) The level of anxiety felt by a reasonable person in Petitioner's situation was much higher than that of the defendant in *People v. Perez* (1989) 211 Cal.App.3d 1492, who was "slouched over in the front seat,"

apparently unaware of what was happening. (*Id.* at p. 1494.)

2. Even Though Civilians Can Use Spotlights Just Like Law Enforcement Officers, a Civilian Shining a Spotlight on a Parked Car Would Have a Dramatically Different Effect on the Occupants' Feelings about Leaving

While explaining statutory restrictions on the use of red and blue lights on emergency vehicles, the State argues that because civilians can also use spotlights, "a spotlight ... is not interchangeable with a red or blue emergency light." (AB 23.) But the question is not whether a motorist could be cited for failing to yield to a spotlight (AB 23), but whether use of a spotlight would convey to Petitioner "a show of authority, directed at him and requiring that he submit by remaining where he was." (*Brown, supra*, 61 Cal.4th at p. 978.)

Given the totality of the circumstances, the deputy's activation of the spotlight conveyed a show of authority to Petitioner, who had known he was the object of the deputy's attention since they established eye contact. It is generally understood that police cars display white lights (*People v. Avecedo* (2003) 105 Cal.App.4th 195, 199; see Veh. Code § 25259), and the spotlight signaled that the deputy intended to approach Petitioner. The area was already "well lit up" (CT 104), so despite the deputy's claim that he was using the spotlight for illumination (CT 34, 89, 105), its primary effect was to let Petitioner know he was not free to leave.

Contrary to the State's suggestion (AB 22-24), the fact that civilians can also use spotlights does not diminish its use as a show of authority by the deputy. If a random civilian in a strange car shined a spotlight on a parked car, its occupants would undoubtedly react

with alarm and attempt to get away as soon as possible, while a spotlight from an officer in a patrol car would be construed as a signal to wait until the officer approached.

While citizens sitting in parked cars at night may not be familiar with the regulations governing the use of various colored lights, they would certainly differentiate between a spotlight from a patrol car that had pulled up behind them and a spotlight directed at them from a rogue car, and would act accordingly.

3. The Deputy Did Not Use the Spotlight to See Inside the Interior of the Vehicle Like the Officers Using Flashlights

The State reaffirms, as Petitioner noted in his opening brief (OBM 17-18), that the United States Supreme Court has explicitly stated that an officer's use of a flashlight to see into a darkened vehicle "'simply does not constitute a search, and thus triggers no Fourth Amendment protection.'" (AB 19, quoting *Texas v. Brown* (1983) 460 U.S. 730, 740.) In addition, the State cites to the same effect *People v. Hill* (1974) 12 Cal.3d 731, 748, overruled on other grounds in *People v. Devaugh* (1977) 18 Cal.3d 889, 896, fn. 5 (AB 19-20), and *Hill* in turn relies on *People v. Superior Court of Santa Clara County (Mata)* (1970) 3 Cal.App.3d 636, 639.) In each of these cases, officers who were already standing by a parked car discovered contraband when they used flashlights to illuminate the interior of the vehicle. (*Texas v. Brown, supra*, 460 U.S. at pp. 734, 739-740; *Hill, supra*, 12 Cal.3d at pp. 741-742; *Mata, supra*, 3 Cal.App.3d at pp. 638-639.) "Observation of that which is in view is lawful, whether the illumination is daylight, lights within the vehicle, ...; that the light comes from a flashlight in an officer's hand makes

no difference." (*Id.* at p. 639.)

While the deputy in this case suggested he was using the spotlight to illuminate inside the vehicle, he could only see "[s]lightly" inside due to the car's tinted rear windows, "So I had to use my flashlight to illuminate inside the vehicle," and promptly discovered the contraband (CT 34-35.) Although the spotlight was not useful in makng the contraband visible in and in view, Grubb apparently kept it shining on Petitioner's car throughout the encounter. (CT 34-35.) The deputy's continuing use of the spotlight was quite different from the "momentary use of the spotlight" to "get a better look at the occupants" of the car next to the patrol car, which was held not to be a detention in *People v. Rico* (1979) 97 Cal.App.3d 124, 130, and from its later use to look into the suspect vehicle. (*Id.* at p. 133.) The deputy in this case was not using "'artificial means to illuminate a darkened area'" (AB 19, quoting *Texas v. Brown, supra*, 460 U.S. at p. 740),because he needed the flashlight to do that. (CT 34-35.)

Instead, the spotlight constituted a show of authority, directed at Petitioner, and requiring him to "submit by remaining where he was." (*Brown, supra,* 61 Cal.4th at p. 978.) The spotlight signaled that the investigation was going to continue, as it did in *Kidd, supra,* 36 Cal.App.5th at pp. 15, 21-22.

4. Officers Will Not Be Forced To Approach Stranded Motorists in the Dark Because Motorists In That Situation Will Understand the Officers Are Coming to Help Them

As the State notes, consensual encounters not only permit law enforcement officers to approach citizens and question them, but

also "permit officers to approach and help stranded motorists, lost children, disoriented or injured civilians, or civilians otherwise in distress in public spaces." (AB 18.) But according to the State, a ruling in favor of Petitioner in this case will "make nighttime vehicle approaches more dangerous and less effective. *Kidd* encourages officers to either ignore the situation for fear of violating the Fourth Amendment or approach the situation in the shadows.... [A] passing patrol officer that wanted to check whether [a] motorist needed assistance would have to approach without the use of a safety spotlight or risk violating the Fourth Amendment... Under *Kidd*, the officer could not stop behind an occupied parked car near [a lost dementia sufferer's] last known whereabouts, turn on a spotlight, and approach the occupants of the car to ask whether they had seen the lost individual." (AB 37-38; see generally AB 32-38.)

The State's concern is misplaced. As the State noted, *Brown* had "'held that deploying emergency lights 'in close proximity to a parked car will [not] always constitute a detention of the occupants.'" (AB 25, quoting *Brown, supra*, 61 Cal.4th at p. 980.) This Court went on to explain that it had anticipated precisely the conundrum the State now posits:

> [A] motorist whose car has broken down on the highway might reasonably perceive an officer's use of emergency lights as signaling that the officer had stopped to render aid or to warn oncoming traffic of a hazard rather than to investigate crime. Ambiguous circumstances may be clarified by whether other cars are nearby or by the officer's conduct when approaching.

(*Brown, supra*, 61 Cal.4th at p. 980.)

If stranded or disoriented motorists would be able to recognize an officer's use of emergency lights as merely offering much-needed

assistance, they would also be able to recognize the use of a spotlight which, as the State notes, conveys less urgency than emergency lights. (AB at 22-24.) In addition, law enforcement officers would not turn off their headlights as they approached but would presumably leave their headlights on to illuminate the area, as the deputy did in this case (CT 104-105), so there is no risk that officers would have to "approach the situation in the shadows." (AB 37.)

The State's misplaced concern raises another question – if officers will almost certainly have sufficient light to approach parked cars safely at night, why is the State concerned that law enforcement officers will violate the Fourth Amendment when they activate a spotlight as they approach these presumptively innocent motorists? Even if the officers' use of a spotlight in that situation would constitute a detention – despite the explanation that it would not in *Brown, supra*, 61 Cal.4th at p. 980 – the vast majority of these stranded motorists or otherwise distressed citizens will not need to invoke their Fourth Amendment rights because no criminal activity is afoot. (*Terry v. Ohio* (1968) 392 U.S. 1, 30.) The obvious answer is that the State does not want any evidence of criminal activity the officers happen to find to be subject to exclusion because the officers lacked reasonable suspicion that the seemingly innocent citizen was, or shortly would be, engaged in criminal activities. (*United States v. Cortez* (1981) 449 U.S. 411, 417-418; *Terry, supra*, 392 U.S. at pp. 21-22, 30.)

The State is also concerned about scenarios like the one in this case. Grubb never suggested that he wanted to approach Petitioner and his friends out of concern that they might be stranded or disorientd. Instead, he saw young people in hoodies sitting in a nice

car in a quiet residential neighborhood during the middle of the evening, with a little smoke coming out of their car windows. (CT 24, 32-34, 87-89, 104-106.) While he did not have reasonable suspicion that they were engaged in any criminal activities, the deputy used high beams, eye contact, pulling in behind the car, and the spotlight to effectively detain the car's occupants so he could conduct an "expedition for evidence in the hope that something might turn up." (*Brown v. Illinois* (1975) 422 U.S. 590, 605.)

There is no constitutional basis for establishing a bright line rule that the use of a spotlight cannot constitute a detention because a contrary holding would make it more difficult for the State to prosecute cases when officers have inadvertently become aware of incriminating evidence. (AB 32-38.) Under the overwhelming weight of authority, the determination of whether the actions of law enforcement officers resulted in a detention can only be made by considering whether, under the totality of the circumstances, the actions would cause reasonable people to believe they were not free to leave. (*Brendlin, supra*, 551 U.S. at p. 257; *Bostick, supra*, 501 U.S. at p. 434; *Royer, supra*, 460 U.S. at p. 497; *Mendenhall, supra*, 446 U.S. at p. 554; *Brown, supra*, 61 Cal.4th at pp. 980-983.)

5. California Authorities Generally Support Petitioner

Although the State contends that prior California decisions do not support *Kidd* or this Petition (AB 24-28), the only actual adverse authority is *Perez, supra*, 211 Cal.App.3d 1492, the case primarily relied on by the court below. (*Tacardon, supra*, 53 Cal.App.5th at pp. 98-99.)

Discussing *Brown*, the State argues first that "this Court

declined an opportunity to hold that spotlights are the same as emergency lights" and could have held "that the color and type of the lights that were deployed were immaterial." (AB 24, 25.) But as Petitioner noted in his opening brief (OBM 20-21), *Brown* did not address the precise issue presented in this case because the Court determined that the most logical inference from the evidence was that the deputy had activated his overhead emergency lights rather than a different form of lights. (*Brown, supra*, 61 Cal.4th at pp. 978-979.) The holding suggested by the State was unnecessary to the resolution of the case, and would have been considered *dicta*. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1158.)

Throughout the opening brief (OBM 18-32), and in this reply brief, Petitioner has shown that *Brown* is consistent with *Kidd, supra*, 36 Cal.App.5th 12, and with Petitioner's contentions before this Court. The State largely ignores the rationale in *Kidd*, arguing vaguely that *Kidd* did not recognize the difference between emergency lights and spotlights (AB 22), or had created "many hours each day where officers could not safely engage in necessary consensual encounters with civilians in parked vehicles" (AB 37), a contention addressed in the preceding subsection. (§ I.B.4, *supra*.) As discussed in the opening brief (OBM 21-22), *Kidd* considered the totality of the circumstances and determined that the defendant was detained after the officer had made a U-turn, pulled in behind him, and activated the spotlights, because"motorists are trained to yield immediately when a law enforcement vehicle pulls in behind them and turns on its lights." (*Id.* at p. 21.) The State fails to consider the totality of the circumstances, focusing only on the color of the lights, and not considering the effect of a spotlight on the occupants of a

parked car. (AB 22-24, 32-38.)

Regarding pre-*Brown* authorities in California cited by the State (AB 26-28), *People v. Bailey* (1985) 176 Cal.App.3d 402, 405-406, holding that the car's occupant was detained when the offcer activated emergency lights, is fully consistent with *Brown, supra*, 61 Cal.4th at p. 975, and not contrary to *Kidd*. As discussed above (§ I.B.3, *supra*), *Rico* was also consistent with *Kidd*, and held that momentary use of a spotlight to the side of the patrol car, or to look inside a vehicle, did not constitute a detention. (*Rico, supra*, 97 Cal.App.3d at pp. 130, 133; see *Kidd, supra*, 36 Cal.App.5th at p. 21.) *People v. Franklin* (1987) 192 Cal.App.3d 935, relying on *Rico,* also held that momentary spotlighting did not constitute a detention, nor did stopping behind the pedestrian where the pedestrian voluntarily approached the patrol car before the officer emerged from his vehicle. (*Id.* at p. 940.)

Both *People v. Garry* (2007) 156 Cal.App.4th 1100, and *People v. Roth* (1990) 219 Cal.App.3d 211, dealt with an officer's conduct after activating a spotlight. *Garry* determined that a pedestrian had been detained when, after activating a spotlight, the officer quickly walked aggressively toward him while questioning his legal status. (*Garry, supra*, 156 Cal.App.4th at 1110-1112. Both *Brown, supra*, 61 Cal.4th at p. 980, and *Kidd, supra*, 36 Cal.App.5th at pp. 21-22, cited *Garry* as an example of post-spotlighting conduct producing a detention, as discussed in section I.C., *infra*. Roth held that a pedestrian had been detained when a deputy shined a spotlight on him, got out of the patrol car with another deputy, and promptly asked the person to approach so they could speak to him. (*Roth, supra*, 219 Cal.App.3d at pp. 213, 215, 215 fn. 3.) In getting out of

his patrol car and promptly detaining M.K., Grubb's actions were as coercive toward Petitioner as the deputy's were toward Roth, as discussed in section I.D., *infra*.

The only California authority contrary to *Kidd* is *Perez*. The officer's headlights and spotlights in *Perez* showed "a male driver and female passenger slouched over in the front seat" who did not respond to the lights, and who were subsequently determined to be under the influence. (*Perez, supra*, 211 Cal.App.3d at p. 1494.) *Perez* held that the officer's "directed scrutiny does not amount to a detention" citing *Franklin* and *Rico* (*id.* at p. 1496), which both involved brief, momentary uses of spotlights and so did not actually support *Perez*. (*Franklin, supra*, 192 Cal.App.3d at p. 940; *Rico, supra*, 97 Cal.App.3d at pp. 130, 133.) *Perez* focused solely on the officer's conduct in turning on spotlights instead of emergency lights, and while the "slouched over" driver of the car in *Perez* was almost certainly unaware of the officer's prior interest, Petitioner was very aware that he was involved in an ongoing encounter with authorities as he watched the deputy drive by, make a U-turn, pull up behind his own car while leaving his high beams on, and activate the patrol car's spotlight. (CT 33-34, 88-89, 103-105.)

With the exception of *Perez*, California authorities are consistent with *Kidd* and with this Petition's contention that the deputy detained him in violation of his Fourth Amendment rights.

6. The State's Contrary Authorities from Other Jurisdictions are Not Persuasive

The State also contends that authorities from other jurisdictions are uniformly again *Kidd* and this Petition. (AB 29-32)

This Court is of course not bound by the decisions of lower federal courts even on matters of federal law, though they can be considered for their persuasive value, if any. (*Nelsen v. Legacy Partners Residential, Inc* (2012) 207 Cal.App.4th 1115, 1133.)

Turning to the main authorities cited by the State from other jurisdictions, they have little persuasive value. *United States v. Tanguay* (1st Cir. 2019) 918 F.3d 1, is not persuasive authority because the court was only considering whether the officer's "use of a flashlight and floodlight to illuminate the interior" of defendant's car constituted a detention. (*Id.* at p. 7.) While acknowledging that such use of the lights "arguably comes close to communicating some type of command," the court determined that "precedent … precludes us from treating this type of conduct as a command," citing *Texas v. Brown, supra*, 460 U.S. at pp. 739-740. (*Tanguay, supra,* 918 F.3d at pp. 7-8.) As discussed previously (§ I.B.3, *supra*), *Texas v. Brown* involved the use of a flashlight to illuminate the car's interior, allowing the officer to observe contraband, not the use of a spotlight or floodlight in an area that was already well illuminated, and where a flashlight was needed to view the interior. (CT 34-35.) In addition, the court did not consider the officer's activation of his emergency light because only rear-facing lights were used, (*Tanguay, supra*, 918 F.3d at p. 8), while *Brown* rejected a similar argument on the grounds that the "reasonable inference to be drawn from the record was that Brown was aware of the deputy's overhead emergency lights flashing in the dark immediately behind his car." (*Brown, supra*, 61 Cal.4th at p. 980.)

United States v. Mabery (8th Cir. 2012) 686 F.3d 591, is no more persuasive. Like *Franklin, supra*, 192 Cal.App.3d at p. 940,

and *Rico, supra*, 97 Cal.App.3d at pp. 130, 133, *Mabery* involved a spotlight being pointed to the side of the patrol car, rather than toward a car that was already fully illuminated by the car's high beams. (*Mabery, supra*, 686 F.3d at p. 594.) Although the officer also activated his rear emergency lights, the court simply ignored that aspect of the encounter (*id.* at pp. 594, 597), which was dispositive in *Brown, supra*, 61 Cal.4th at p. 980, and *Bailey, supra*, 176 CalApp.3d at pp. 405-406. Finally, *Mabery* held that there was no detention even if the patrol car was blocking the only exit out of the parking lot (*id.* at p. 597), which as the State acknowledges is contrary to multiple cases where detentions were found because the officer "block[ed] the parked vehicle's exit path." (AB 31, citing cases.)

The cases from other states are similarly unpersuasive. *State v. Iversen* (S.D. 2009) 768 S.W.2d 534, noted that the officer shined his spotlight on a parked truck, but then does not discuss the effect of the spotlight, simply noting that "the officer's conduct in approaching [defendant's] parked vehicle and speaking to [defendant] was not sufficient to warrant a reasonable belief by [defendant] that he was not at liberty to ignore the officer's presence and go about his business." (*Id.* at p. 539.) Opinions are obviously not persuasive authority for points not raised or considered. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57-58.) Although *State v. Baker* (Idaho 2005) 107 P.2d 1214, determined that "the use of a spotlight alone" would not constitute a detention though the spotlight could be considered under the totality of the circumstances, the court did not actually consider any other circumstances, including prior contact between the officer and the defendant. (*Id.* at pp. 1215, 1218.) The

court also adopted the State's argument that a contrary ruling would require officers to choose between approaching a car in the dark or losing the ability to prosecute based on the evidence uncovered (*id.* at p. 1218), which Petitioner already refuted in section I.B.4, *supra*.

In summary, the authorities from other jurisdictions are not persuasive authority for this Court to rule against Petitioner. This Court should hold, contrary to those authorities, that Petitioner was entitled to exercise his rights under the Fourth Amendment because, under all the circumstances, no reasonable person in his position would have felt free to leave after the deputy had activated his spotlight. Petitioner had made eye contact with the deputy, and followed his actions as he made a U-turn and pulled up behind Petitioner's car with the high beams on. (CT 33-34, 88-89, 103-104.) At the end of that sequence, no reasonable person would have felt free walking or driving away simply because the deputy activated a spotlight instead of emergency lights. (CT 34, 89, 105.)

C. Under the Totality of the Circumstances, No Reasonable Person Would Have Felt Free to Leave When a Deputy Approached the Car As Soon As Possible After Activating a Spotlight and Alerting Dispatch

Section C of the answering brief contends that Petitioner's discussion of both the deputy's eye contact with Petitioner before activating the spotlight, and the deputy's approach to the car as soon as possible after activating the spotlight, are irrelevant to the determination of whether Petitioner was detained. (AB 39-41.) This section encapsulates the flaw in the State's entire approach to this case, which focuses on the single fact that the deputy activated a spotlight instead of emergency lights, without considering the

deputy's actions before and after that decision. As the Supreme Court explained, it needed to reverse the outcome in *Bostick* because "the Florida Supreme Court rested its decision on a single fact – that the encounter took place on a bus – rather than on the totality of the circumstances." (*Bostick, supra*, 501 U.S. at p. 437.)

Petitioner has already addressed the State's criticism of eye contact between the parties (§ I.B.1,*supra*), and the State similarly errs in claiming that Petitioner "misconstrues" the nature of the deputy's approach to the car by stating that he "'approached [Petitioner's]s car as soon as that was possible.'" (AB 39, citing OBM 29.) Petitioner had already explained in the opening brief that the deputy "approached the car as soon as he could after activating the spotlight and alerting dispatch" (OBM 28), and the deputy testified that after alerting dispatch "then I would immediate – as quick as possible – I tend to get out of my vehicle." (CT 103.)

The State contends the deputy then "began calmly walking towards the car. (CT 34, 103, 105.)" (AB 39), and though the State often describes the deputy as walking "calmly" toward the car (AB 9, 17, 38, 40), the deputy never actually used that adverb in describing his approach. (CT 34, 103, 105.) Petitioner acknowledged in his opening brief that the deputy did not approach Petitioner as aggressively as the officer in *Garry, supra*, 156 Cal.App.4th at pp. 1110-1112 (OBM 28), and the State argues that the action is irrelevant unless it was similarly aggressive. (AB 39-40.) But the fact that the deputy got out of his vehicle as quickly as possible after calling dispatch is an important circumstance in confirming his intention to detain the inhabitants of the car. As Petitioner noted in his opening brief (OBM 29), if an officer merely activated a spotlight and left it on

indefinitely, or walked away in another direction, reasonable people sitting in the car might well conclude they were free to leave, that the officer was not interested in them after all. (*Mendenhall, supra*, 446 U.S. at p. 554.) No reasonable person could come to that conclusion once the deputy began walking directly toward their car, even if there was a brief pause while the deputy checked in. (CT 103.)

The State dismisses *Kidd's* contention that the officer's action in promptly getting out of his vehicle and beginning to approach the car removed "any ambiguity" caused by the fact that the officer had used a spotlight rather than emergency lights in effecting the detention. (AB 40-41, citing *Kidd, supra*, 36 Cal.App.5th at pp. 21-22.) Arguing that "[n]othing in the Fourth Amendment requires an officer to wait a certain amount of time between observing a civilian in public and approaching that individual" (AB 40), the State again focuses on a circumstance in isolation rather than as part of the totality of circumstances. (*Bostick, supra*, 501 U.S. at p. 437.) In taking this position, the State not only ignores the analysis of the lower court in this case, which touted Grubb's delay while contacting dispatch as a reason for not finding a detention (*Tacardon, supra*, 53 Cal.App.5th at p. 99), but also ignores the analysis in *Brown*, which as discussed above (§ I.B.4, *supra*), noted that "[a]mbiguous circumstances may be clarified … by the officer's conduct when approaching." (*Brown, supra*, 61 Cal.4th at p. 980.)

The State's assumption that a particular circumstance is irrelevant unless it exactly matches a circumstance in a prior case is contrary to the long line of Fourth Amendment jurisprudence since *Terry*, and "fails to heed this Court's clear direction that any assessments as to whether police conduct amounts to a seizure

implicating the Fourth Amendment must take into account 'all of the circumstances surrounding the incident' in each individual case." (*Michigan v. Chesternut* (1988) 486 U.S. 457, 572, quoting *INS v. Delgardo* (1984) 466 U.S. 210, 215.)

Considering the totality of the circumstances, this Court should determine that the deputy's actions after activating the spotlight in starting to walk toward the car as soon as possible would inevitably remove any possible ambiguity in the mind of a reasonable person that Grubb intended to detain everyone in the car. (*Brown, supra,* 61 Cal.4th at p. 980; *Kidd, supra*, 36 Cal.App.5th at pp. 21-22.)

D. Under the Totality of the Circumstances, No Reasonable Person Would Have Felt Free to Leave After The Deputy Detained a Passenger As Soon As She Tried to Leave

Finally, the State contends that there is no basis for believing Petitioner was aware of the deputy's immediate detention of M.K., and even if he were aware of that detention, a reasonable person in his position would still have felt free to drive or walk away. (AB 41-43.)

While it is true that the "magistrate did not make a factual finding that [Petitioner] heard (or even saw) the exchange with M.K." (AB 41), the magistrate clearly found the exchange had occurred (CT 131), and did not suggest there was any doubt as to whether Petitioner heard or saw the exchange. The magistrate determined there was no detention because the car was stopped before the deputy became involved and the deputy then observed the contraband in plain sight using his flashlight, so there was no

need for the magistrate to make a factual finding. (CT 132-133.)[1]

The reasonable inference to be drawn from the record is that Petitioner would have been aware of the exchange occurring right behind his small car. (See *Brown, supra,* 61 Cal.4th at p. 980.) Petitioner and the deputy were watching each other after making eye contact; as the deputy testified, "they saw me as well too. As they were leaning back, I could see them looking at me as I turned by them." (CT 104.) As the deputy approached the car, Petitioner was certainly aware when M.K. suddenly got out of the car a few feet away from him (CT 34, 90-94, 106-110), and with the engine off and the windows cracked in a nice neighborhood (CT 33, 105, 131), the reasonable inference is that he would be able not only to see but to hear the exchange.

But the State argues that, even assuming Petitioner was fully aware that Grubb had immediately detained M.K., Petitioner himself was not detained because "Fourth Amendment rights are personal," the "'arrest of one person does not mean that everyone around hm has been seized by the police,'" and Grubb did nothing to detain Petitioner. (AB 42-43, quoting *United States v. Drayton* (2007) 536 U.S. 194, 206.)

While it is true that Fourth Amendment rights are personal

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[1] The State suggests the superior court could not have made a factual finding that Petitioner had heard the exchange, erroneously citing *People v. Laiwa* (1983) 34 Cal.3d 711, 718. (AB 41-42.) While the 1986 amendment to Penal Code section 1538.5 effectively made the magistrate's findings binding on the superior court (*People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223), superior courts were the fact finders prior to the amendment, when *Laiwa* was decided. (*Ibid.*, and *ibid.* fns. 2-3; see *Laiwa, supra*, 34 Cal.3d at p. 718.)

and may not be asserted vicariously, the issue typically involves a person "aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property ..." (*Rakas v. Illinois* (1978) 439 U.S. 128, 133-134.) Petitioner is not claiming he was aggrieved by M.K.'s detention or any evidence seized as a result of her detention, but that he himself was detained and his property seized.

Drayton, supra, 536 U.S. 194, demonstrates how an arrest does not result in anyone else's detention.[2] Drayton and Brown were traveling on a bus together when, following a stop, officers boarded and began questioning passengers. (*Drayton, supra*, 536 U.S. at pp. 198-199, 203-206.) None of the passengers were detained, because the officers gave them no reason to believe they were required to answer questions, and did not "suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter." (*Id.* at pp. 203-204.) Brown consented to a voluntary search and was arrested after an officer found objects similar to drug packages. (*Id.* at pp. 199, 205.) The officer then "addressed Drayton in a polite manner and provided him with no indication that he was required to answer [the officer's] questions" (*id.* at p. 206), but arrested him after finding similar objects during a

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United States v. Hernandez-Reyes (W.D. Tex. 2007) 501 F.Supp.2d 852, distinguished *Drayton* in a case where Border Patrol agents saw two people washing cars in a parking lot, and the court found "that the detentions and almost immediate arrest of the only other person present in the parking lot ... supports the Court's conclusion that a reasonable person would not have felt free to terminate the encounter with [the agent]." (*Id.* at p. 859.)

consensual search. (*Id.* at pp. 199, 206.)

"An arrest is a wholly different kind of intrusion upon individual freedom" from a detention, "and it is inevitably accompanied by future interference with the individual's freedom of movement,…" (*Terry, supra*, 392 U.S. at 26.) But a detention accomplished by a show of authority requires that the officer convince a reasonable person that he or she was not free to leave (*Mendenhall, supra*, 446 U.S. 554), which the officers in *Drayton* took pains not to do. (*Drayton, supra*, 536 U.S. at pp. 203-204, 206.) As discussed many times before, all of the deputy's actions in this case would have demonstrated to a reasonable person in Petitioner's position that he was not free to disregard the deputy and go about his business, including the immediate detention of a passenger when she attempted to go about her business. (*Bostick, supra*, 501 U.S. at p. 434.) A reasonable person in the position of Petitioner, the driver of a car under the intense scrutiny of law enforcement, would be even more certain that he or she could not leave once the deputy immediately detained one of the car's passengers, and it is of little moment that the deputy detained M.K. but not Petitioner. (AB 43.)

After the deputy pulled up behind Petitioner's car, activated a spotlight and began walking toward the car as soon as possible, his prompt detention of one out of the three occupants of a small car would constitute an additional, intimidating show of authority sufficient to communicate to any reasonable person sitting in the driver's seat that he or she was not free to leave. (*Brendlin, supra*, 551 U.S. at pp. 254, 257)

CONCLUSION

Whether Deputy Grubb detained Petitioner Leon Tacardon when he activated the spotlight, when he quickly approached the car after activating the spotlight, or when he detained the passenger, this Court should hold that the deputy's actions violated Petitioner's Fourth Amendment rights, and reverse the decision of the Third Appellate District.

While in closing the State lists a variety of factors that are not present in this case (AB 44-45), those factors were also not present in *Brown, supra*, 61 Cal.4th 968, yet this Court unanimously determined that the driver of the parked car had been detained. As in *Brown*, this Court should conclude that, under the totality of the circumstances, no reasonable person in Petitioner's position would have felt free to drive or walk away from the obvious law enforcement interest in the vehicle he or she was driving.

For all the above reasons, Petitioner asks this Court to determine that the deputy violated his Fourth Amendment rights and remand the case for further proceedings in accordance with its decision.

DATED: June 11, 2021 LAW OFFICE OF PAUL KLEVEN

/s/ Paul Kleven
PAUL KLEVEN
Attorney for Petitioner
Leon William Tacardon

CERTIFICATE OF COUNSEL

I certify that this Reply Brief on the Merits contains 6,805 words, as calculated by my WordPerfect x9 word processing program.

/s/ Paul Kleven
PAUL KLEVEN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA:

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Stockton, CA 95202

Office of the District Attorney
San Joaquin County
222 East Weber Avenue
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Leon Tacardon
(Address last known to Attorney)

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KATHY YAM

People v. Tacardon
California Supreme Court Case No. S264219
Third District Court of Appeal No. C087681

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S264219**
Lower Court Case Number: **C087681**

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