No. S268320

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

DUVAHN ANTHONY MCWILLIAMS,
Defendant and Appellant.

Sixth Appellate District, Case No. H045525
Santa Clara County Superior Court, Case No. C1754407
The Honorable David A. Cena, Judge

ANSWER BRIEF ON THE MERITS

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January 3, 2022

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ISSUES PRESENTED

1. Is the discovery of a parole search condition after an illegal detention an intervening circumstance that triggers assessment of a subsequent parole search under the attenuation doctrine?

2. Does the discovery of the parole search condition attenuate the taint of the detention on the search?

INTRODUCTION

In *Brown v. Illinois* (1975) 422 U.S. 590, the United States Supreme Court set forth an "attenuation" doctrine that constitutes an exception to the exclusionary rule. Under this doctrine, an intervening event in the causal chain between unlawful police conduct and subsequently obtained evidence may sufficiently attenuate the taint of the conduct on the evidence so that suppression of that evidence is unwarranted. *Brown* instructed courts to consider three factors to determine whether the attenuation doctrine applies to particular evidence: the temporal proximity between the detention and discovery of the evidence; the degree to which some intervening circumstance disrupted the causal chain between the detention and that discovery; and the purposefulness and flagrancy of the detaining officer's unlawful conduct. Employing that three-factor test, this Court in *People v. Brendlin* (2008) 45 Cal.4th 262 and the United States Supreme Court in *Utah v. Strieff* (2016) 136 S.Ct. 2056 held that when an officer detains someone unlawfully but in a good faith investigation of a possible crime, the officer's ensuing discovery of an arrest warrant for the detainee constitutes a strong intervening circumstance that generally attenuates the

taint of the detention on a search incident to an arrest pursuant to the warrant.

In this case, a police officer: detained appellant Duvahn McWilliams; discovered during the detention that McWilliams was subject to a parole search condition; conducted a search; and found narcotics, drug paraphernalia, a firearm, and ammunition in McWilliams's car. McWilliams's motion to suppress the contraband on the ground that the detaining officer lacked reasonable suspicion to detain him was denied, and McWilliams pleaded no contest to drug and firearm charges.

The Court of Appeal concluded that the detention was unlawful but nonetheless affirmed, holding that the officer's discovery of the parole search condition sufficiently attenuated the taint of the unlawful detention on the parole search. The concurring and dissenting justice agreed that the detention was unlawful but concluded that the discovery of the search condition did not attenuate the taint of that detention.

McWilliams advances two alternative rationales for reversing the Court of Appeal's judgment. He primarily argues that discovering that a detainee is subject to a parole search condition is not an intervening circumstance *at all* and therefore *never* triggers application of the *Brown* attenuation test. He also contends that if discovery of such a condition is an intervening factor, the discovery of the parole search condition in this case had insufficient attenuating force to preclude suppression of his contraband.

This case thus presents two questions for this Court. First, does the *Brown* framework apply to assess the validity of a search during an illegal but good-faith detention when the search is conducted pursuant to a parole search condition discovered during the course of the detention? Second, does the discovery of the parole search condition attenuate the taint from the illegal but good-faith detention?[1]

These are important questions, with substantial practical implications. The answer to the first question is that the discovery of the search condition must be assessed under *Brown*. Like the arrest warrant, a parole search condition is antecedent to not only the search but also the detention; and like a search incident to arrest, a parole search is permissible under the Fourth Amendment. Discovery of the search condition thus fits the category of actions that trigger inquiry under the *Brown* three-factor test.

After further consideration and deliberation following this Court's grant of review, the Attorney General has concluded that the answer to the second question is that typically the discovery of the search condition will not attenuate the taint of the illegal

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[1] Although appellant's statement of the issues includes not just parole search conditions but also probation search conditions, appellant was not searched pursuant to a probation search condition. The case, therefore, does not present an issue about probation search conditions, and the People will focus on parole search conditions. That being said, the People would expect the analysis presented in this brief to apply to a probation condition.

detention. The Court of Appeal accorded discovery of a parole search condition the same causally disruptive force as discovery of an arrest warrant (an approach this brief will refer to as the equivalency approach). The Attorney General, however, now disagrees with that assessment of the effect of the discovery. Like the dissent, the Attorney General has concerns about ascribing a significant causally disruptive role to a parole search condition—let alone as disruptive a role as *Strieff* and *Brendlin* ascribed to an arrest warrant. In the Attorney General's view, the discovery of an illegally detained person's parole search condition has less causally disruptive force than discovery of an arrest warrant, but it still has some force. That reduced force must be assessed under the *Brown* test (an approach this brief will refer to as the reduced-force approach). In cases in which the search occurred incident to the unlawful detention, the reduced force of the discovery will invariably lead to the conclusion—as it does here—that the search is not attenuated from the taint of the illegal detention. But not always. There may be, for example, rare cases in which a sizable temporal gap between the unlawful detention and the subsequent search alter the *Brown* balance (depending on the purposefulness and flagrancy of the officer's unlawful conduct) such that the taint of the detention is attenuated.

Under this "reduced-force" approach, the taint from McWilliams's illegal detention was not attenuated by the officer's discovery of the parole search condition, and the closely following

search of McWilliams's vehicle was unlawful. The Court of Appeal's judgment should therefore be reversed.[2]

LEGAL BACKGROUND

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" (*Utah v. Strieff*, *supra*, 136 S.Ct. at p. 2060.) For several decades, "the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial"—has been "the principal judicial remedy to deter Fourth Amendment violations." (*Id.* at p. 2061, citing *Mapp v. Ohio* (1961) 367 U.S. 643, 655.) "[T]he exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and . . . evidence later discovered and found to be derivative of an illegality, the so-called 'fruit of the poisonous tree.'" (*Strieff*, at p. 2061, internal quotation marks omitted.)

The United States Supreme Court has held, however, that not all evidence discovered as the but-for result of a Fourth Amendment violation must be suppressed. Sometimes the taint of the Fourth Amendment violation—or police misconduct more generally—is attenuated so that the later discovered evidence is not fruit of the poisonous tree. Three seminal cases on attenuation merit discussion before turning to the particulars of this case: *Brown v. Illinois*, *supra*, 422 U.S. 590, *People v.*

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[2] We understand that the Santa Clara County District Attorney's Office will be filing or joining an amicus brief defending the judgment below.

Brendlin (2008) 45 Cal.4th 262, and *Utah v. Strieff*, *supra*, 136 S.Ct. 2056.

A. *Brown*'s three-factor test for assessing attenuation of the taint of an illegal detention

In *Brown*, police officers investigating a murder unlawfully broke into the defendant's house while he was out, searched that house, and then arrested the defendant despite having neither probable cause nor a warrant. (*Brown*, *supra*, 422 U.S. at pp. 592-593.) After receiving *Miranda* warnings, the defendant twice confessed to the murder. (*Id.* at pp. 594-596.) After the trial court denied a motion to suppress the confessions as the fruits of the numerous Fourth Amendment violations, a jury convicted the defendant of murder. (*Id.* at p. 596.) The Illinois Supreme Court affirmed, concluding that the officers had violated the defendant's Fourth Amendment rights but holding that "the *Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as . . . it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments." (*Id.* at pp. 596-597.)

In reversing, the United States Supreme Court reiterated key "principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded." (*Brown*, *supra*, 422 U.S. at pp. 597-598.) Specifically, the Court cited its refusal in *Wong Sun v. United States* (1963) 371 U.S. 471 to "'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.'" (*Brown*, at

p. 599.) "'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.'" (*Ibid.*)

Wong Sun, for example, required suppression of a defendant's confession following his unlawful arrest because "the statement did not result from 'an intervening independent act of a free will,' and . . . it was not 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.'" (*Brown*, *supra*, 422 U.S. at p. 598.) *Wong Sun* similarly required suppression of contraband discovered as a direct result of that confession. (*Ibid.*) But *Wong Sun* rejected suppression of a codefendant's confession—even though the defendant's confession led to the discovery of that codefendant—because the codefendant voluntarily returned to the police station and confessed several days after his lawful arraignment and release from custody. (*Ibid.*) In doing so, *Wong Sun* reasoned that "in the light of [the codefendant's] lawful arraignment and release on his own recognizance, and of his return voluntarily several days later to make the statement, the connection between his unlawful arrest and the statement 'had become so attenuated as to dissipate the taint.'" (*Id.* at pp. 598-599.)

Following the dichotomy of *Wong Sun*'s holding, *Brown* rejected the argument that *Miranda* warnings per se attenuated the taint of the officers' Fourth Amendment violations on the defendant's subsequent confessions. (*Brown*, *supra*, 422 U.S. at

pp. 600-603.) At the same time, however, *Brown* "decline[d] to adopt any alternative per se or 'but for' rule" precluding suppression of a confession incident to a Fourth Amendment violation. (*Id.* at p. 603.) Instead, "[t]he question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case." (*Ibid.*) "No single fact is dispositive." (*Ibid.*) "The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test." (*Ibid.*)

Brown articulated three factors for courts to consider in determining whether an intervening event has attenuated the taint of a Fourth Amendment violation on the subsequent discovery of evidence: (1) the "temporal proximity of the arrest and the" discovery; (2) "the presence of intervening circumstances" disrupting the causal connection between the Fourth Amendment violation and the discovery; and (3) "particularly, the purpose and flagrancy of the official misconduct." (*Brown*, *supra*, 422 U.S. at pp. 603-604.) Applying those factors, *Brown* "conclude[d] that the State [had] failed to sustain the burden of showing that the evidence in question was admissible under *Wong Sun*." (*Id.* at p. 604.) With respect to temporal proximity and intervention, the defendant's "first statement was separated from his illegal arrest by less than two hours," "there was no intervening event of significance whatsoever," and "the second statement was clearly the result and the fruit of the first." (*Id.* at pp. 604-605.) And with respect

to flagrancy, the officers' conduct "had a quality of purposefulness"; indeed, the "impropriety of the arrest was obvious," as the officers "repeatedly acknowledged . . . that the purpose of their action was 'for investigation' . . . in the hope that something might turn up." (*Id.* at p. 605.)

B. *Brendlin*'s holding that discovery of an arrest warrant can attenuate the taint of an unlawful detention

In *Brendlin*, an officer unlawfully stopped the defendant's vehicle for expired registration tags despite knowing of a pending registration renewal request. (*Brendlin*, *supra*, 45 Cal.4th at pp. 265-268.) During the stop, the officer learned that the defendant had an outstanding arrest warrant, and a search of the defendant incident to arrest revealed drug paraphernalia. (*Id.* at pp. 265-266.) At issue in *Brendlin* was "whether the existence of [the] 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." (*Id.* at p. 267.)

Brendlin observed that "but for the unlawful traffic stop, [the officer] would not have discovered the outstanding warrant for defendant's arrest and would not then have conducted the search incident to arrest that revealed the contraband." (*Brendlin*, *supra*, 45 Cal.4th at p. 268.) "This [did] not mean, however, that the fruits of the search incident to that arrest [had to] be suppressed" because "'exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause

of obtaining evidence.'" (*Ibid.*) "Rather"—as the United States Supreme Court had held in *Wong Sun*—"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." (*Ibid.*, internal quotation marks omitted.)

"Although the significance of an arrest warrant in attenuating the taint of an antecedent unlawful traffic stop [was] an issue of first impression" in *Brendlin*, "the general framework for analyzing a claim of attenuation under the Fourth Amendment" was already "well settled." (*Brendlin*, *supra*, 45 Cal.4th at p. 268.) "'[T]he question before the court'" in an attenuation case "'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.'" (*Id.* at p. 269.) *Brendlin* recognized the three *Brown* factors as the "'[r]elevant factors in this "attenuation" analysis.'" (*Ibid.*)

"Applying the *Brown* factors," *Brendlin* "conclude[d] that the outstanding warrant, which was discovered prior to any search of [the] defendant's person or of the vehicle, sufficiently attenuated the taint of the unlawful traffic stop." (*Brendlin*, *supra*, 45 Cal.4th at pp. 269-270.) "As to the first *Brown* factor, . . . only a few minutes elapsed between the unlawful traffic stop and the search incident to arrest that uncovered the challenged evidence"—a situation that *Brendlin* described as "the typical

scenario in essentially every case in this area." (*Id.* at p. 270, internal quotation marks omitted.) The first factor was therefore either neutral or weighed slightly in favor of suppression. (*Ibid.*)

"As to the second *Brown* factor," *Brendlin* concluded "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." (*Brendlin*, *supra*, 45 Cal.4th at p. 271.) "A warrant is not reasonably subject to interpretation or abuse . . . , and the no-bail warrant [in *Brendlin*] supplied legal authorization to arrest [the] defendant that was completely independent of the circumstances that led the officer to initiate the traffic stop." (*Ibid.*) "The challenged evidence was thus the fruit of the outstanding warrant, and was not obtained through exploitation of the unlawful traffic stop." (*Ibid.*)

Brendlin noted that "[t]he third *Brown* factor, the flagrancy and purposefulness of the police misconduct, is generally regarded as the most important because it is directly tied to the purpose of the exclusionary rule—deterring police misconduct." (*Brendlin*, *supra*, 45 Cal.4th at p. 271, internal quotation marks omitted.) Rejecting the defendant's claim that the unlawfulness of the stop alone made the stop flagrant and purposeful, *Brendlin* reasoned that "a mere mistake with respect to the enforcement of our traffic laws does not establish that the traffic stop was pretextual or in bad faith." (*Ibid.*) The officer in *Brendlin* had justified the stop based on his suspicion—in light of past experience—that the defendant's vehicle was using a temporary

registration sticker from a different vehicle. (*Ibid.*) "Although the People ha[d] conceded that this was insufficient to justify a temporary detention to permit further investigation, the insufficiency was not so obvious as to make one question [the officer's] good faith in pursuing an investigation of what he believed to be a suspicious registration, nor d[id] the record show that he had a design and purpose to effect the stop 'in the hope that something [else] might turn up.'" (*Ibid.*) "Thus, despite the unlawfulness of the initial traffic stop, . . . the drug paraphernalia found on defendant's person and in the car was not the fruit of the unlawful seizure" because "the outstanding warrant sufficiently attenuated the connection between the unlawful traffic stop and the subsequent discovery of the drug paraphernalia." (*Id.* at p. 272.)

C. *Strieff* reaches the same conclusion as *Brendlin* but articulates an additional rationale

In *Strieff*, the Salt Lake City police received an anonymous tip reporting "'narcotics activity' at a particular residence." (*Strieff*, *supra*, 136 S.Ct. at p. 2059.) After surveilling the house for "about a week," the arresting officer detained the defendant as the latter was exiting the suspected drug house. (*Id.* at pp. 2059-2060.) The defendant provided his identification to the officer upon request, and the officer used that identification to ascertain that the defendant "had an outstanding arrest warrant for a traffic violation." (*Id.* at p. 2060.) The officer "arrested [the defendant] pursuant to that warrant" and "searched [him] incident to the arrest," during which the officer "discovered a baggie of methamphetamine and drug paraphernalia." (*Ibid.*)

Accepting Utah's concession that the officer lacked reasonable suspicion for the initial detention, the United States Supreme Court observed that ordinarily "the exclusionary rule encompasses . . . evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree." (*Strieff*, *supra*, 136 S.Ct. at pp. 2061-2062, internal quotation marks omitted.) *Strieff* also observed, however, that because the exclusionary rule is "'applicable only . . . where its deterrence benefits outweigh its substantial social costs,'" the Court had "recognized several exceptions to the rule." (*Id.* at p. 2061.) As in *Brendlin*, the exception particularly at issue in *Strieff* was "the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" (*Ibid.*)

As an initial matter, *Strieff* rejected the state court's conclusion that the attenuation doctrine applies "only to circumstances involving an independent act of a defendant's free will in confessing to a crime or consenting to a search." (*Strieff*, *supra*, 136 S.Ct. at p. 2061, internal quotation marks omitted.) "The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions." (*Ibid.*) "And the logic of [the Supreme Court's] prior attenuation cases [was] not limited to independent acts by the defendant." (*Ibid.*)

Strieff reaffirmed that the attenuation doctrine involves consideration of three factors: (1) "the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence"; (2) "'the presence of intervening circumstances'"; and (3) "'the purpose and flagrancy of the official misconduct.'" (*Strieff*, *supra*, 136 S.Ct. at p. 2062.)

"The first factor, temporal proximity between the initially unlawful stop and the search, favor[ed] suppressing the evidence." (*Strieff*, *supra*, 136 S.Ct. at p. 2062.) "[A] short time interval"—such as the gap of "less than two hours" between the initial illegality and seizure of evidence in *Brown* or the search "only minutes after the illegal stop" in *Strieff*—"favors suppressing the evidence." (*Ibid.*)

"In contrast, the second factor, the presence of intervening circumstances, strongly favor[ed] the State." (*Strieff*, *supra*, 136 S.Ct. at p. 2062.) In support of this conclusion, *Strieff* reasoned—as did *Brendlin*—that the warrant "predated [the officer's] investigation[] and it was entirely unconnected with the stop." (*Ibid.*) *Strieff* also articulated a second rationale not articulated in *Brendlin*: that the officer "had an obligation to arrest" the defendant once he "discovered the warrant," making the arrest "a ministerial act that was independently compelled by the pre-existing warrant." (*Id.* at pp. 2062-2063.) "And once [the officer] was authorized to arrest [the defendant], it was undisputedly lawful to search [him] as an incident of his arrest to protect [the officer's] safety." (*Id.* at p. 2063.)

"Finally, the third factor, the purpose and flagrancy of the official misconduct, . . . also strongly favor[ed] the State." (*Strieff*, *supra*, 136 S.Ct. at p. 2063, internal quotation marks omitted.) In reaching this conclusion, *Strieff* stated that the arresting officer had detained the defendant during "a bona fide investigation of a suspected drug house." (*Ibid.*) The officer's lack of objectively reasonable suspicion that the defendant was engaging in illegal activity did not render the stop "flagrant." (*Id.* at p. 2064.) Rather, the officer had "made two good-faith mistakes" that were "at most negligent": (1) failing to even try a consensual encounter, and (2) detaining the defendant without knowing whether the defendant was "a short-term visitor who may have been consummating a drug transaction." (*Id.* at p. 2063.) *Strieff* also identified circumstances that *could* have evidenced flagrant and purposeful misconduct had they existed, such as a history of "systemic or recurrent police misconduct"; actual knowledge of the illegality of the stop; or a more generalized "dragnet search" that was not tied to any particular suspected crime. (*Id.* at p. 2064.)

STATEMENT OF THE CASE

A. The suppression hearing

Because the parties do not dispute the facts surrounding McWilliams's detention and the resulting search, respondent presents those facts as described by the Court of Appeal below:

> At approximately 6:52 p.m. on January 2, 2017, San Jose Police Officer Matthew Croucher was dispatched to a Broadcom parking lot. A Broadcom security guard had called 911 to report "a possible vehicle burglary."

When Officer Croucher arrived, the security guard informed him that there were two "suspicious individuals on bikes in the [Broadcom] parking lot." The guard stated that the individuals were using flashlights to look into cars. Officer Croucher drove through the lot, finding nothing of note.

As part of his investigation into the guard's report, Officer Croucher drove through an adjacent parking lot that the security guard directed him to. Approximately four or five vehicles were parked in the lot. Initially, nothing in the lot attracted Officer Croucher's attention, but when he used his spotlight, Officer Croucher saw that the front passenger seat of one of the parked cars was occupied. Officer Croucher observed that the seat was fully reclined and saw "the top of what appeared to be a human head." Officer Croucher realized that the occupant was "just somebody hanging out in the car," not sleeping. The car was the only occupied vehicle in the lot. Officer Croucher decided to detain the occupant, later identified as defendant.

Officer Croucher pulled his patrol vehicle approximately two car lengths behind defendant's car. Another officer arrived and pulled to the side of Officer Croucher's vehicle.

Officer Croucher made "verbal contact [with defendant] from the front of [his] vehicle," while the other officer on scene stood a couple of feet behind Officer Croucher. Officer Croucher identified himself as a police officer and instructed defendant to get out of the vehicle for officer safety reasons, as he does "with most car stops . . . or most suspicious vehicles that [he] come[s] across." Defendant's vehicle was suspicious to Officer Croucher because it was in a dark lot of what he believed to be a closed business. The officer had been to the lot many times and passed through it during the day when the businesses were open and there were significantly more vehicles. The interiors of the buildings were dark and no one was walking around the lot. The officer felt he "had reasonable suspicion, based

> on what the security guard told [him], that [defendant] may or may not have been related to the subjects that we were looking for."
>
> Defendant exited his vehicle and moved toward the patrol car at Officer Croucher's request. When Officer Croucher asked defendant for identification, he stated that it was in the car. Officer Croucher directed defendant to retrieve his identification, which he did. Upon running a records check, Officer Croucher learned that defendant was "on active and searchable CDC[R] parole."[3]

(Opinion (Opn.) 3-5.)

The trial court ruled that Officer Croucher had not unlawfully detained McWilliams, and therefore attenuation was never argued by the parties or addressed by the court. (Opn. 5-6.)

B. The Court of Appeal's Opinion

The Court of Appeal disagreed with the trial court and concluded that Officer Croucher lacked reasonable suspicion to detain McWilliams (opn. 8-11), but the court invoked the attenuation doctrine and upheld the denial of the motion to suppress the items found in the vehicle (opn. 11-23).

The majority first noted that the record did not establish the "temporal proximity" between the unlawful detention and the parole search, causing that factor to "weigh[] against attenuation

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[3] "The parties did not question the officer at the suppression hearing regarding what occurred after he learned defendant was on parole. Evidence elicited at the preliminary hearing established that after discovering defendant's parolee status, officers searched defendant's vehicle, finding narcotics, a scale, plastic baggies, an unloaded handgun, and ammunition."

as it [was] the prosecution's burden to establish the legality of the search." (Opn. 12-13, internal quotation marks omitted.)

As to the "intervening circumstance" factor, the court likened the discovery of McWilliams's parole status to the discovery of the arrest warrants in *Brendlin* and *Strieff* because McWilliams's "status as a parolee 'predated Officer [Croucher's] investigation' and 'was entirely unconnected with the stop.'" (Opn. 13; see also opn. 13 ["Defendant's parolee status 'supplied legal authorization to [search] defendant that was completely independent of the circumstances that led the officer to initiate the [detention]'"].) The majority acknowledged but was unswayed by the fact "that [McWilliams's] parolee status [was] different from the arrest-warrant intervening circumstance . . . because an arrest warrant places a duty on law enforcement to make an arrest." (Opn. 13.)

The court held that Officer Croucher did not act purposefully or flagrantly because—like the officer in *Strieff*—he had unlawfully detained McWilliams during a good-faith investigation into a suspected crime rather than executing a detention that was "pretextual, in bad faith, or part of recurrent police misconduct." (Opn. 14-18.)

In closing, the majority suggested that it was bound by *Brendlin* to "determine that Officer Croucher's discovery of defendant's parolee status sufficiently dissipated any taint from the unlawful detention." (Opn. 22-23.)

In her concurring and dissenting opinion, Justice Danner took issue with the court's analysis of the second and third

factors of the attenuation analysis. (Conc. & dis. opn. 2-7.) With respect to the "intervening circumstance" factor, Justice Danner reasoned that McWilliams's "parole status differ[ed] from that of a person subject to an arrest warrant because a parole search condition is 'a discretionary enforcement tool and therefore a less compelling intervening circumstance than an arrest warrant.'" (Conc. & dis. opn. 3-4.) Justice Danner thus recognized that McWilliams's "parole status and attendant suspicionless search condition admittedly predated the detention and were otherwise unconnected to" it, but she found dispositive that a warranted arrest is mandatory while a parole search is discretionary. (Conc. & dis. opn. 3-4.) She therefore concluded that "discovery of [McWilliams's] parole status after the detention and before conducting the vehicle search [did] not constitute an intervening circumstance sufficient to overcome the taint of the illegal detention." (Conc. & dis. opn. 2-3.) Justice Danner also analyzed the third attenuation factor and opined that "Officer Croucher was essentially on a fishing expedition" when he detained McWilliams. (Conc. & dis. opn. 5-6.)

SUMMARY OF ARGUMENT

The Court of Appeal correctly concluded that an officer's discovery that the detainee is subject to a parole search is an intervening circumstance that triggers application of the *Brown* three-factor attenuation test. That conclusion flows from *Brendlin*'s reasoning and one of *Strieff*'s rationales, namely, that the existence of the warrant (or here the parole search condition) is an antecedent lawful basis for a search independent of the

illegal detention. Refusing to apply *Brown* would be at odds with both *Brown*'s and *Strieff*'s rejections of bright-line limits on what kinds of causally intervening events can trigger attenuation.

Under the equivalency approach embraced by the Court of Appeal, the discovery of the parole search condition causally intervenes to the same degree as the discovery of an arrest warrant. The Attorney General no longer advocates that approach because it does not adequately account for *Strieff*'s other rationale—that arresting the detainee was essentially a ministerial function. Unlike an officer who has an obligation to follow the command of an arrest warrant, an officer who discovers a parole search condition has a wholly discretionary choice whether to search. Thus, the discovery of the search condition has a reduced intervening force compared to an arrest warrant.

Under this reduced-force approach, the question becomes how much causally intervening force the Court should ascribe to discovery of a parole search condition. In the Attorney General's view, the Court should accord minimal attenuating value to the discovery such that discovery *alone* cannot attenuate the taint of the antecedent Fourth Amendment violation. The taint can only be attenuated if the first *Brown* factor—the temporal distance between the unlawful detention and the search—was substantial. And even a great temporal distance between illegal detention and search would not attenuate the detention's taint if the officer's initial Fourth Amendment violation was sufficiently purposeful and flagrant. In short, the reduced-force approach would

preclude attenuation in the vast majority of cases where there is an antecedent Fourth Amendment violation, an intervening discovery of a parole search condition, and a roughly contemporaneous search. Applying this approach would require reversal of the judgment, as Officer Croucher's search of McWilliams's vehicle occurred immediately after the unlawful detention.

ARGUMENT

I. THE DISCOVERY OF AN UNLAWFULLY DETAINED SUSPECT'S PAROLE SEARCH CONDITION IS AN INTERVENING EVENT UNDER *BROWN*

McWilliams contends that when an officer learns that a person seized in violation of the Fourth Amendment is subject to a parole search condition, that discovery is not an intervening event that necessitates assessing whether the taint of the seizure is attenuated from a search pursuant to the condition. (OBM 30-53.) Justice Danner espoused that position, but the Court of Appeal correctly rejected it. The very purpose of the attenuation doctrine is to determine whether an intervening event that leads to additional evidence cuts off the taint from the antecedent illegality. It necessarily applies to the discovery of a search condition that leads to a search under the condition.

Four years after *Brendlin* and four years before *Strieff*, Division Five of the First District Court of Appeal considered the attenuation doctrine in connection with a traffic stop in *People v. Durant* (2012) 205 Cal.App.4th 57. There, the detaining officer stopped the defendant's vehicle for making a left turn without signaling. (*Id.* at pp. 60-61.) The officer learned that the

defendant was on probation and searched him, finding an illegal handgun. (*Id.* at p. 61.) The trial court denied a motion to suppress, ruling that the stop was illegal because the defendant was not required to signal but that "the patdown search was authorized by the conditions of [the defendant's] probation." (*Id.* at p. 62.)

The Court of Appeal concluded that "the patdown was authorized by [the defendant's] probation search condition, even if it occurred during a detention that was otherwise unlawful." (*Durant*, *supra*, 205 Cal.App.4th at p. 64.) *Durant* noted that when a search following an illegal detention produces evidence, "[e]xclusion is not required where the connection to the original illegality has become so attenuated or has been interrupted by some intervening circumstance so as to remove the taint." (*Id.* at p. 65.)

"In determining whether [the defendant's] search condition attenuated any illegality in the traffic stop," the Court of Appeal was "guided by *Brendlin*." (*Durant*, *supra*, 205 Cal.App.4th at p. 65.) "Applying the factors used by the *Brendlin* court," *Durant* "conclude[d] that any illegality in the initial traffic detention was attenuated by [the defendant's] probation search condition." (*Id.* at p. 66.) *Brendlin*, of course, applied *Brown*'s three-factor test for attenuation. *Durant*, therefore, implicitly held that *Brown*'s attenuation test applies to an officer's discovery that an illegally detained person is subject to a search condition.

In *People v. Bates* (2013) 222 Cal.App.4th 60, another pre-*Strieff* case, the Sixth District Court of Appeal also concluded

that *Brown*'s attenuation framework applies when an officer learns that a person detained in violation of the Fourth Amendment was subject to a search condition. In *Bates*, police officers interviewed a theft victim who reported that a "Black male" had stolen the victim's phone. (*Id.* at p. 63.) One of the officers suspected the defendant and told the other officers the defendant's name and address and that the defendant was on probation. (*Ibid.*) A couple of hours after the reported theft, one of the officers who did not previously know the defendant saw a tan car in the vicinity of the defendant's residence with "a White female driver, a Black male in the front passenger seat, and a third passenger in the backseat." (*Id.* at p. 64.) The officer stopped the vehicle even though he did not know what the defendant "looked like." (*Ibid.*) The officer ultimately learned that the backseat passenger was the defendant and arrested him. (*Ibid.*)

After determining that the vehicle stop was unlawful, *Bates* turned to the question of whether the "defendant's probation search condition served to attenuate the taint of a Fourth Amendment violation." (222 Cal.App.4th at pp. 64-69.) In concluding that the trial court should have suppressed the evidence, *Bates*—like *Durant*—looked to the attenuation factors considered in *Brendlin*, which *Bates* recognized were "based on those set forth by the United States Supreme Court in" *Brown*. (*Id.* at p. 71, fn. 3.) Unlike the First District in *Durant*, the Sixth District concluded that the search condition did not attenuate, in part because "[a] probation search condition . . . is a discretionary

enforcement tool and therefore a *less compelling* intervening circumstance than an arrest warrant." (*Id.* at p. 70, italics added.)

Contrary to McWilliams's characterization (OBM 48), then, *Bates* did not conclude that discovery of a search condition lacks *any* attenuating force; rather, the Court of Appeal concluded that the discovery has *less* attenuating force than the discovery of an arrest warrant. (See *State v. Fenton* (2017) 163 Idaho 318, 320-321 [noting that *Bates* "held probation search conditions are a *less* compelling intervening circumstance than arrest warrants because probation searches are discretionary" and that defendant who cited *Bates* nonetheless "agree[d] that [his] disclosure of his probationary status [was] an intervening circumstance" (italics added)].)[4]

The Court of Appeal below also concluded that the discovery of the search condition had to be assessed under the attenuation doctrine, but Justice Danner rejected her colleagues' conclusion, citing the Ninth Circuit's decision in *United States v. Garcia* (9th Cir. 2020) 974 F.3d 1071. (Conc. & dis. opn. 4.) McWilliams takes *Garcia* further, by relying on *Garcia* to argue for a per se rule that a parole condition never qualifies as an intervening event. (OBM 48-53.) That reliance is misplaced.

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[4] In *People v. Kidd* (2019) 36 Cal.App.5th 12, 23, the Fourth District similarly noted in dicta that although the People had not invoked the attenuation doctrine based on the officer's subsequent discovery of a probation search condition, the court would have rejected that argument under *Bates* had the prosecutor raised it—thus suggesting agreement that learning the existence of a search condition triggers application of *Brown*.

Garcia appears to be one of the few published cases that has considered *Strieff* in the context of a probation or parole search. In *Garcia*, police officers took an individual into custody after that individual ran into and out of an apartment. (*Garcia*, *supra*, 974 F.3d at pp. 1073-1074.) The officers then conducted a "protective sweep" of the apartment and found the defendant, whom they "handcuffed . . . for reasons unexplained." (*Id.* at p. 1074.) The officers determined that the defendant "was subject to a federal supervised release [search] condition," so they "went back inside the apartment to conduct a full search and found . . . methamphetamine and identification belonging to" the defendant. (*Ibid.*)

Garcia concluded "that the officers violated the Fourth Amendment when they first entered [the defendant's] home without a warrant" and that the attenuation doctrine did not apply to the ensuing search. (*Garcia*, *supra*, 974 F.3d at pp. 1075-1081.) *Garcia* opined that "a suspicionless search condition differs from an arrest warrant in a significant respect" because—under *Strieff*—while "a warrant is a 'judicial mandate' that an officer has a 'sworn duty' to carry out," the "officers' decision to avail themselves of the suspicionless search condition was volitional, not 'ministerial.'" (*Garcia*, at p. 1077.) "The existence of this discretion" led the Ninth Circuit "to conclude that the discovery of [the] suspicionless search condition was not a sufficient intervening circumstance." (*Id.* at p. 1080.) In light of that conclusion, *Garcia* declined to determine the "role the

officers' subjective good faith should [have] play[ed] in the attenuation analysis." (*Id.* at p. 1081.)

As an initial matter, it is not at all clear that *Garcia* supports McWilliams's contention that discovery of a search condition is not a qualifying intervening factor such that *Brown* does not apply. *Garcia*'s conclusion that it could come to a decision by considering only two of the *Brown* factors could instead be understood as meaning that the *Brown* test *is* applicable when the intervening circumstance is discovery of probation or parole status but that the intervening circumstance will not actually result in attenuation unless the first and third factors favor that result.

However, to the extent *Garcia* can be read as authorizing a short-circuiting of the *Brown* inquiry based solely on the discretionary nature of the search condition, the Attorney General disagrees with that approach. Although the Ninth Circuit deemed unnecessary any inquiry into the third *Brown* factor simply on the ground that "the other two factors . . . both favor[ed] suppression" (*Garcia*, *supra*, 974 F.3d at p. 1081), the Supreme Court has held that the purposefulness and flagrancy of an officer's conduct is "'particularly'" important among the three *Brown* factors (*Strieff*, *supra*, 136 S.Ct. at p. 2062; *Brown*, *supra*, 422 U.S. at p. 604; see also *Brendlin*, *supra*, 45 Cal.4th at p. 271 ["The third *Brown* factor, the flagrancy and purposefulness of the police misconduct, is generally regarded as the most important because it is directly tied to the purpose of the exclusionary rule—deterring police misconduct" (internal quotation marks

omitted)]). More generally, the purpose of the *Brown* test is to assess whether an intervening event—the *Miranda* warnings in *Brown*, the arrest warrant in *Brendlin* and in *Strieff*, and parole search condition here—attenuates the taint of the initial Fourth Amendment violation under the totality of circumstances such that the evidence obtained as a but-for result of the antecedent illegality is itself not the product of "unreasonable searches and seizures." (U.S. Const., 4th Amend.) As the United States Supreme Court has stated, "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 108-109 (per curiam).) Not considering "all the circumstances" identified in *Brown* contravenes that command and establishes an unjustified per se rule.

Brown itself rejected a "per se or 'but for' rule" precluding suppression of a confession incident to a Fourth Amendment violation. (*Brown*, *supra*, 422 U.S. at p. 603.) *Brown* cautioned that "[n]o single fact" should be "dispositive" and that "[t]he workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test." (*Ibid.*) Decades later, *Strieff* refused to cabin the attenuation doctrine "to independent acts by the defendant," confirming that the doctrine applies to any event that affects "the causal link between the government's unlawful act and the discovery of evidence." (*Strieff*, *supra*, 136 S.Ct. at p. 2061, internal quotation marks

omitted.) *Brown* and *Strieff* thus counsel against flatly excluding probation or parole status from the universe of causally intervening factors. Like the arrest warrant in *Strieff*, a defendant's parole search condition is undisputedly an independent and antecedent causal basis for a search.[5]

McWilliams makes several other points in favor of his preferred approach, but none is ultimately persuasive. (OBM 48-53.) McWilliams points to the rule of *People v. Sanders* (2003) 31 Cal.4th 318, 333—that if a searching "officer is unaware that the suspect is on parole and subject to a search condition" and

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[5] Similar to the Ninth Circuit in *Garcia*, the Kansas Supreme Court did not fully resolve the flagrancy prong in *State v. Christian* (2019) 310 Kan. 229, an attenuation case that did not involve a search condition. The arresting officer in *Christian* unlawfully detained the defendant and then arrested him for "failure to provide proof of insurance," after which a search of the defendant's vehicle discovered contraband. (*Id.* at pp. 231-233.) The Kansas Supreme Court observed that while "a valid warrant that predates and is unconnected with [an unlawful] stop *independently compels* the officer to make an arrest," an officer merely has "*discretion* to arrest [someone] for no proof of insurance." (*Id.* at p. 238.) The discretionary nature of the arrest in *Christian* thus distinguished the warranted arrest in *Strieff*, which was "an intervening 'ministerial act' consistent with the officer's 'sworn *duty* to carry out [the] provisions' of the arrest warrant." (*Ibid.*) Consequently, "[e]ven if nothing in the record revealed flagrancy, the attenuation doctrine [did] not allow the admission of the evidence" discovered in *Christian*. (*Christian*, at p. 241.) Like *Garcia*, the *Christian* decision can be viewed either as applying *Brown*—albeit with an abbreviated analysis of the third factor—or as simply bypassing the third factor. For the reasons expressed *ante* in the discussion of *Garcia*, the latter approach is incorrect.

conducts an otherwise illegal search, the search is not rendered valid by the officer's later learning of the condition—and argues that discovery of a parole search condition likewise should not constitute an intervening circumstance. (OBM 49-50.)

Sanders reasoned that a search without knowing of the search condition "cannot be justified as a parole search[] because the officer is not acting pursuant to the conditions of parole." (*Sanders*, *supra*, 31 Cal.4th at p. 333.) McWilliams parallels that reasoning and argues that discovery of parole status should not constitute an intervening circumstance because such a discovery does not legitimize an otherwise unlawful search conducted *before* the discovery. (OBM 49-50.) But the necessarily parallelism is lacking. *Sanders*'s holding rested on the principle of Fourth Amendment jurisprudence that reasonableness is assessed "based upon the circumstances known to the officer when the search [was] conducted." (*Sanders*, at p. 332.) Thus, *Sanders* arose in the context of an illegal search followed by discovery of the search condition. But the *Brown* attenuation assessment applies when there is antecedent illegality (e.g., an unlawful detention), followed by discovery of the search condition, followed by the search that is being assessed for taint. In other words, discovery of the parole search condition could be an intervening circumstance only if it *preceded* the search.

In any event, *Sanders* is inapposite because the issue there was whether a Fourth Amendment violation occurred in the first place—an outcome not in dispute here—not whether suppression might be inappropriate under *Brown*'s attenuation doctrine

notwithstanding that violation. (*Sanders*, *supra*, 31 Cal.4th at pp. 331-336; *People v. Casper* (2004) 33 Cal.4th 38, 43 ["It is axiomatic that cases are not authority for propositions not considered"].)

McWilliams's use of *Sanders* is further unpersuasive because taken to its logical conclusion, it would also preclude discovery of *an arrest warrant* from constituting an intervening circumstance. Because the legality of an officer's search of a defendant is "based upon the circumstances known to the officer when [a] search is conducted," an officer who searches incident to an unwarranted arrest without probable cause and *then* learns of an arrest warrant for the defendant cannot retroactively justify the search based on the belated discovery of the warrant. (See *Sanders*, *supra*, 31 Cal.4th at p. 332.) Under McWilliams's logic, then, the officer's inability to use the postsearch discovery of an arrest warrant to justify the search would also preclude the discovery of an arrest warrant from serving as an intervening circumstance under the attenuation doctrine. And that outcome is irreconcilable with the holdings in *Strieff* and *Brendlin*. The propriety of retroactive justification of a search is simply a different legal issue than assessing the attenuating effect of an event after the initial Fourth Amendment violation that then leads to a search.

McWilliams's analogy to the plain view doctrine (OBM 51-52) is no more persuasive than his reliance on *Sanders*. Unlike a defendant's parole status (or an arrest warrant), the officer's ability to view contraband "obtained only because of the officer's

preceding illegal seizure or entry" (OBM 51) is not an independent and antecedent basis for a search.

McWilliams also relies on the distinction between the ministerial duty associated with an arrest warrant (as recognized in *Strieff*) and the discretionary authority conferred by a search condition. (OBM 50-51.) Just because the discovery of a parole search condition has *less* intervening force than the discovery of an arrest warrant, however, does not mean that the former discovery is not an intervening event at all when deciding whether *Brown* must be used to assess attenuation of taint. Although applying *Brown* and refusing to apply *Brown* may lead to the same outcome—suppression—applying *Brown* in the first place is still appropriate to cabin suppression to instances that warrant that remedy, as prescribed by *Wong Sun*.

McWilliams's cited cases (OBM 50-51) do not demonstrate otherwise. *People v. Wilkins* (1986) 186 Cal.App.3d 804 predated *Brendlin* and did not discuss attenuation at all. Similarly, *United States v. Retta* (D.Nev. 2015) 156 F.Supp.3d 1192 predated *Strieff* and its reliance on the independence of the arrest warrant when assessing attenuation. And contrary to McWilliams's characterization, *United States v. Mati* (N.D.Cal. 2020) 466 F.Supp.3d 1046 did not hold that the discovery of a probation search condition is *never* an intervening circumstance; rather, *Mati* ruled that the discovery was not an intervening circumstance *on the facts of that case* because the discovery "was the very object of the prolonged stop" rather than being merely fortuitous. (*Id.* at p. 1061.)

Finally, McWilliams invokes certain policy considerations as support for not applying *Brown*, such as the potential for abuse of the attenuation doctrine. (OBM 52-53.) The Court can more properly account for these considerations by according the proper weight under the second *Brown* factor to the intervening force of the discovery, which—as discussed *post* in Argument II.C—is quite limited. Moreover, recognizing that *Brown* must be applied to the discovery of a parole search condition does not mean that the taint of the antecedent illegality is always attenuated. To the contrary, that will rarely be true. In the most common of situations—discovering the search condition during an unlawful but good faith detention and immediately performing a search—the balance of the three factors demonstrates that the search is so closely tied to police conduct that is at the heart of the exclusionary rule that the search is not free from the antecedent taint.

II. DISCOVERING A SEARCH CONDITION HAS LESS INTERVENING FORCE THAN DISCOVERING AN ARREST WARRANT AND RARELY WILL ATTENUATE THE ANTECEDENT TAINT

Under *Brown*'s test, the discovery that a person detained illegally but in good faith is subject to a parole search condition should have such limited intervening force that the taint of the detention will rarely be dissipated. Only under unusual circumstances, then—such as when the search occurs long after the detention (*Brown*'s first factor)—would suppression be unwarranted because the taint of the primary illegality has been attenuated.

A. The differing approaches of the Courts of Appeal

As touched on earlier, before this case, two opinions from the Courts of Appeal, *Durant* and *Bates*, analyzed the attenuating effect of an officer's discovery of a search condition during an unlawful detention and came to different conclusions.

1. *Durant*'s equivalency approach

"Applying the factors used by the *Brendlin* court," *Durant* "conclude[d] that any illegality in the initial traffic detention was attenuated by [the defendant's] probation search condition." (205 Cal.App.4th at p. 66.) "Although the patdown search and discovery of the gun occurred shortly after the traffic detention, they did not occur until after [the officer] had recognized [the defendant] as a person subject to a search condition." (*Ibid.*) "The search condition supplied legal authorization to search that was completely independent of the circumstances leading to the traffic stop." (*Ibid.*) "Nor [was] there any flagrancy or purposefulness to the alleged unlawful conduct by [the officer]—though the trial court found that the traffic stop was made without reasonable suspicion, it specifically found [the officer] did not act in an arbitrary, capricious, or harassing manner." (*Ibid.*)

Durant thus effectively held that a search condition has the same causally intervening force as an arrest warrant based on the sole attenuation rationale articulated in *Brendlin*: that the warrant provided independent and preexisting justification for a search of the defendant (this brief will sometimes refer to this as the independence rationale).

2. *Bates*'s reduced-force approach

Bates expressly refused to adopt *Durant*'s "implicit assumption that a probation search condition is the same as the arrest warrant present in . . . *Brendlin*." (222 Cal.App.4th. at p. 70.) *Bates* explained, "In the case of an arrest warrant, officers essentially have a duty to arrest an individual once the outstanding warrant is confirmed. A probation search condition, on the other hand, is a discretionary enforcement tool and therefore a *less compelling* intervening circumstance than an arrest warrant." (*Ibid.*, italics added, citation omitted.) *Bates* rejected "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." (*Ibid.*) Weighing that lesser attenuating force against the egregiousness of the officer's conduct, *Bates* held that the officer's unlawful stop of the defendant was sufficiently "purposeful" to warrant suppression. (*Id.* at pp. 70-71.)

The Court of Appeal below, like *Durant*, suggested that it was bound by *Brendlin*'s independence rationale (opn. 16-17; see also opn. 22) and "distinguish[ed] *Bates* on its facts" rather than expressly rejecting its conclusion that discovering a search condition has less intervening force than discovering an arrest warrant (opn. 21-22).

B. Harmonizing *Brendlin* and *Strieff*

As noted *ante*, *Durant* relied on the independence rationale, which was the only rationale articulated in *Brendlin* for ascribing

causally intervening force to discovery of an arrest warrant. (*Durant*, *supra*, 205 Cal.App.4th at pp. 65-66.)[6] After both *Brendlin* and *Durant* were decided, however, the United States Supreme Court in *Strieff* held that discovery of an arrest warrant has causally intervening force for *two* reasons: (1) the same independence rationale set forth in *Brendlin*, and (2) the mandatory nature of the arrest warrant (the ministerial rationale). (*Strieff*, *supra*, 136 S.Ct. at pp. 2062-2063.) While the Court of Appeal below did analyze *Strieff*, it adopted the equivalency approach by effectively treating the ministerial rationale as superfluous to *Strieff*'s holding. (Opn. 13.) Moreover, the majority did so despite *Strieff*'s devoting more space and analysis to the ministerial rationale than the independence rationale. (*Strieff*, at pp. 2062-2063.) The majority evidently took the approach it did because it felt bound by *Brendlin* (opn. 22-23), which had held that the independence rationale alone imbued discovery of an arrest warrant with causally intervening force.

The majority's conclusion was colorable because *Strieff* did not explain the relative importance of or relationship between the independence rationale and the ministerial rationale. One could read *Strieff* as presenting each of those rationales as equal and alternative grounds for holding the taint in *Strieff* was

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[6] Because *Durant* followed the only rationale set forth in *Brendlin*, respondent disagrees with appellant's assertion that *Durant* was wrongly decided *at that time*. (OBM 39-43; see also OBM 30 [describing *Durant* as taking a "Wrong Turn"].)

attenuated. Under this reading, an event satisfying *either* rationale would have the full attenuating force that *Strieff* accorded to an arrest warrant.

That reading, however, likely accords too little force to the ministerial rationale and to standard Fourth Amendment analysis. Again, the United States Supreme Court has "long held that the 'touchstone of the Fourth Amendment is reasonableness.' [Citation.] Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." (*Ohio v. Robinette* (1996) 519 U.S. 33, 39.) Considering only the independence of the intervening event or only whether it involves a ministerial duty would fail to account for the totality of the circumstances. Such separate consideration would instead engage in the "kind of divide-and-conquer approach" that the Supreme Court has held "is improper" (*District of Columbia v. Wesby* (2018) 138 S.Ct. 577, 589) because the entwined effect of the two rationales may be different than if they were considered as untethered alternatives.

Brendlin's holding was ultimately correct under *Strieff* because both cases held that discovery of the arrest warrant attenuated the taint of the antecedent illegality. And *Brendlin*'s reliance on the independence rationale was also correct under *Strieff* because *Strieff* too assessed the discovery of the arrest warrant under that rationale. *Brendlin*'s only shortcoming was not also considering the ministerial rationale.

To the extent that the Court of Appeal below believed it was bound by *Brendlin* not to consider the ministerial analysis, this

Court should clarify that *Brendlin* did not dictate that approach. *Brendlin* did not hold that other circumstances were not relevant to the attenuation analysis. Nor could it have done so, as the Supreme Court in *Brown* recognized that the totality of the circumstances must be considered. (*Brown*, *supra*, 422 U.S. at p. 603.) *Strieff*, moreover, recognized that one of those circumstances was the legal effect of the discovered event on the discovering officer.

Considering the totality of the circumstances here requires consideration not only of the independence of the intervening event but also its legal effect. That bifaceted inquiry combined with the other *Brown* factors yields the conclusion that the circumstances here did not attenuate the taint from the illegal detention.

That conclusion rests in large part on the legal effect of the discovery of the search condition in this case. The condition was as independent from the illegal detention as the arrest warrants in *Brendlin* and *Strieff*. But the legal effect on the officer was vastly different because of the volitional nature of a parole search. Arresting pursuant to a warrant is a "'ministerial act'" because the "decision to arrest pursuant to a warrant is made by the judicial officer who issued the warrant, not the police officer at the scene, who is merely executing it." (*Garcia*, *supra*, 974 F.3d at p. 1077.) Thus, an officer arresting pursuant to a warrant has not made a decision that effectively exploits the illegality of the preceding detention. The arrest is instead the product of judicial command, and the resulting search incident to arrest is not

conduct that should be deterred. (See *Herring v. United States* (2009) 555 U.S. 135, 144 ["To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system"].) Executing a probationary or parole search, in contrast, *is* a deliberate act for which an officer *can* be culpable. (See *Garcia*, at p. 1077 ["the attenuation doctrine does not apply when an officer's decision to exercise his discretionary authority is significantly directed by information learned during an unlawful search" (internal quotation marks and brackets omitted)].) Under the totality of the circumstances, then, the search by Officer Croucher was not sufficiently attenuated from the officer's initial violation of the Fourth Amendment, and the trial court should have suppressed the evidence.

That an ensuing search incident to arrest is discretionary—unlike the arrest itself but like a search under a parole condition—does not invalidate that conclusion. As an initial matter, the comparison proves too much by effectively arguing that courts should simply not rely on the ministerial rationale—not that the rationale compels adoption of the equivalency approach. On its merits, moreover, the comparison ignores that while a search incident to arrest is not *legally* mandatory, such a search is an exception to the Fourth Amendment's bar against unwarranted searches because the United States Supreme Court has considered it *practically necessary* to serve "interests in officer safety and evidence preservation that are typically

implicated in arrest situations." (*Arizona v. Gant* (2009) 556 U.S. 332, 338; accord, *Virginia v. Moore* (2008) 553 U.S. 164, 177.) A parole search, on the other hand, does not arise from any similarly compelling safety concerns. An officer has more practical latitude to decline to conduct a parole search on every person that the officer knows is subject to search than the officer has to decline to search every person incident to an arrest. That difference in necessity favors giving great weight under the totality of the circumstances to the ministerial rationale when the search is incident to an arrest after discovery of a warrant.

C. Strong policy considerations favor the reduced-force approach

Giving proper weight to the individual's and society's interests, the totality of the circumstances will be such that the taint of the initial Fourth Amendment violation will not be attenuated in the mine run of cases.

As *Strieff* explained, the attenuation doctrine is one of three exceptions to the exclusionary rule "involv[ing] the causal relationship between the unconstitutional act and the discovery of evidence." (*Strieff*, *supra*, 136 S.Ct. at p. 2061.) One of the other two causation-related exceptions is "the independent source doctrine," which "allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." (*Ibid.*) The remaining exception is "the inevitable discovery doctrine allow[ing] for the admission of evidence that would have been discovered even without the unconstitutional source." (*Ibid.*) Both the independent source doctrine and the inevitable discovery doctrine thus apply in cases

where a Fourth Amendment violation is *not* a but-for cause of the evidence to be suppressed.

The illegal detention in *Strieff*, in contrast, *was* the but-for cause of the officer's discovery of the arrest warrant and therefore the seizure of the contraband in that case. (*Strieff*, *supra*, 136 S.Ct. at p. 2067 (dis. opn. of Sotomayor, J.) ["the officer's illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant"].) The conclusion that the arrest warrant "broke the causal chain between the stop and the evidence" therefore rested on the "doctrine of proximate causation," under which "a circumstance counts as intervening only when it is unforeseeable." (*Id.* at pp. 2072-2073 (dis. opn. of Kagan, J.), internal quotation marks omitted.) But the officer's "discovery of an arrest warrant . . . was an eminently foreseeable consequence of stopping" the defendant in *Strieff* because "checking for outstanding warrants during a stop [was] the normal practice of [the] police." (*Ibid.*) The dissenting opinions in *Strieff* thus persuasively explain why the discovery of an arrest warrant does not break "the causal relationship between the unconstitutional act and the discovery of evidence" through a search incident to the subsequent arrest. (*Id.* at p. 2061.)

Those dissenting opinions also provide good reason to regard any extension of *Strieff* with caution. As Justice Sotomayor observed, the cumulative effect of the United States Supreme Court's Fourth Amendment jurisprudence "has given officers an array of instruments to probe and examine" citizens in a way that allows them "to target pedestrians in an arbitrary manner" and

"risk[s] treating members of our communities as second-class citizens." (*Strieff*, *supra*, 136 S.Ct. at p. 2069 (dis. opn. of Sotomayor, J.); see also *id.* at pp. 2069-2070 [summarizing various cases and their impact]; accord, *Presley v. State* (Fla. 2017) 227 So.3d 95, 109 (conc. opn. of Pariente, J.); *State v. Edmonds* (2016) 323 Conn. 34, 81 (conc. opn. of Robinson, J.).) And while the case of the "white defendant in [*Strieff*] show[ed] that anyone's dignity can be violated in this manner[,] it is no secret that people of color are disproportionate victims of this type of scrutiny." (*Strieff*, at p. 2070 (dis. opn. of Sotomayor, J.); accord, *United States v. Walker* (2d Cir. 2020) 965 F.3d 180, 189; *Dozier v. United States* (D.C. 2019) 220 A.3d 933, 944 & fn. 15; *In re Edgerrin J.* (2020) 57 Cal.App.5th 752, 770-771 (conc. opn. of Dato, J.); *United States v. Knights* (11th Cir. 2021) 989 F.3d 1281, 1297 & fn. 8 (conc. opn. of Rosenbaum, J.); *United States v. Raygoza-Garcia* (9th Cir. 2018) 902 F.3d 994, 1003 (conc. opn. of Murguia, J.); *Presley*, at p. 109.)

Ensuring that Fourth Amendment violations do not occur in the hopes of making a mid-detention discovery that will attenuate the taint of the violation is in the interest of society and the individuals who experience the deprivation of their Fourth Amendment rights. Ascribing minimal causally intervening force to the discovery of a parole search condition accomplishes that. Under the reduced-force approach, that discovery could trigger attenuation only in cases where not only (1) the detaining officer's unlawful conduct was not purposeful or

flagrant, but (2) a significant temporal gap separated the unlawful detention from the subsequent search.

For example, one can imagine an officer who illegally detains a person on Monday but does not search him. After the detention has ended, the officer performs a records search and learns that the person is on parole. The officer sees the person again on Wednesday and—now knowing that the defendant is on parole—conducts a parole search. Depending on whether the initial unlawful detention was purposeful or flagrant, the break in time between the search and the prior illegal stop could be wide enough to attenuate the taint of the stop on the search. A parolee should not be immunized from ever being searched by an officer who has unlawfully detained the parolee because that immunity would be outsized in comparison to the officer's conduct and seriously undermine the legitimate role of parole searches in furthering rehabilitation. (See *People v. Reyes* (1998) 19 Cal.4th 743, 752.)

Requiring a sufficient temporal gap would address the foreseeability concerns raised in Justice Kagan's dissent in *Strieff*. Discovering a detainee's probation or parole status and immediately searching that detainee during an unlawful detention might be an "eminently foreseeable consequence of stopping" that defendant because "checking for [such status] during a stop [might be] the normal practice of [the] police." (*Strieff*, *supra*, 136 S.Ct. at pp. 2072-2073 (dis. opn. of Kagan,

J.).)[7] Finding contraband while searching a defendant during an entirely separate encounter days later, however, would not be a foreseeable consequence *of the illegal stop*; indeed, such a delayed search would seem no more causally tied to the illegal detention than would any subsequent random probation or parole search.

This understanding of the effect of the passage of time on the propriety of suppression was at work in the United States Supreme Court's proto-attenuation opinion in *Wong Sun*. As described in *Brown*, suppression of one defendant's confession in *Wong Sun* was proper because that confession occurred contemporaneously with an unlawful arrest. (*Brown*, *supra*, 422 U.S. at p. 598.) Inversely, *Wong Sun* held suppression of the codefendant's confession to be unwarranted because the

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[7] This likelihood can be recognized notwithstanding that the actual number of individuals on probation or parole is much lower than the figures cited by Justice Danner below. (Dis. opn. 4 [stating over half a million people in California are on parole or probation].) In 2020, there were an estimated 183,333 individuals on probation in California (see <https://openjustice.doj.ca.gov/exploration/crime-statistics/adult-probation-caseload-actions> [noting state probation population for 2020]), and the number of individuals on parole in 2020 fluctuated between 52,000 and 56,600 (see <https://www.cdcr.ca.gov/research/https-www-cdcr-ca-gov-research-monthly-total-population-report-archive-2020/> [CDCR monthly reports on prison and parole population for 2020]). Moreover, the number of individuals on probation has undoubtedly declined since 2020 following passage of Assembly Bill No. 1950 (2019-2020 Reg. Sess.) (Stats. 2020, ch. 328, § 2), which reduced the maximum length of most felony and misdemeanor probation terms to two years and one year respectively.

codefendant confessed several days later in a separate encounter with the police. (*Ibid.*) And *Brown* described a defendant's decision to confess following *Miranda* warnings as having insignificant intervening force, confirming that the temporal gap in *Wong Sun* was the dispositive difference between the outcomes for the two defendants. (*Id.* at pp. 604-605.)

In practice, however, the reduced-force approach would preclude attenuation in the vast majority of cases. As this Court observed in *Brendlin*, "the typical scenario in essentially every [attenuation] case" is a search that occurs within minutes of the illegal detention. (*Brendlin*, *supra*, 45 Cal.4th at pp. 269-270.) The reduced-force approach would preclude attenuation in any such case, while permitting attenuation in rare circumstances in which there is a substantial temporal gap. The approach thus heeds *Brown*'s admonition not to use a "talismanic" test for attenuation, and it comports with *Strieff*'s refusal to carve out exceptions to the use of the three-factor attenuation inquiry. In sum, by retaining some measure of flexibility while still largely safeguarding Fourth Amendment interests, the temporal approach strikes the right balance of doctrinal and policy considerations.

D. If the Court adopts the equivalency approach, the judgment should be affirmed

As explained above, adopting the reduced-force approach would preclude attenuation in this case because the search of McWilliams's vehicle occurred in the same encounter as the illegal detention. The Court of Appeal's judgment would have to be reversed under that approach. Should the Court instead adopt

the equivalency approach, the judgment would have to be affirmed.

As the majority persuasively explained, the level of flagrancy or purposefulness of Officer Croucher's conduct appears indistinguishable from that of the officer in *Strieff*. Both Officer Croucher and the officer in *Strieff* unlawfully detained suspects while investigating possible but unconfirmed contemporaneous criminal activity; neither officer conducted a stop merely to uncover unknown or unreported crimes. Both officers declined the opportunity to conduct a consensual encounter instead of executing a more intrusive investigative detention. Additionally, in neither case did the unlawful stop occur against the backdrop of a history of systemic or recurrent police misconduct or with the officer's actual knowledge of the illegality of the stop.

In trying to characterize Officer Croucher's conduct as purposeful and flagrant, McWilliams primarily dwells on the objective unreasonableness of the officer's suspicion that McWilliams had anything to do with the individuals on the bicycles. (OBM 58-62.) But that argument is essentially the same as saying that the stop was purposeful and flagrant because it was *unlawful*—an argument that *Strieff* expressly rejected. (*Strieff*, *supra*, 136 S.Ct. at pp. 2063-2064; see also opn. 18 ["Defendant points to no police misconduct here apart from the lack of reasonable suspicion to detain."].)[8] McWilliams offers only

[8] If Officer Croucher's stop had *not* been unreasonable, of course, it would not have constituted a Fourth Amendment violation in the first place.

one piece of record evidence purportedly establishing that Officer Croucher's conduct veered beyond mere illegality into purposefulness and flagrancy: a "somewhat brazen admission that [the officer] orders anyone connected to a suspicious vehicle to get out of the car for officer safety purposes." (OBM 59, citing 2RT 312.) But this "admission" was not "brazen" at all; Officer Croucher was simply explaining that *after* determining that he has reasonable suspicion to detain an individual in a vehicle, he often asks the detained individual to exit the vehicle. (2RT 312.) That practice does not establish that the detention itself, the decision to look up McWilliams's parole status, or the resulting search was purposeful or flagrant. (See *Mimms*, *supra*, 434 U.S. at p. 111 ["the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car . . . can only be described as *de minimis*"].)

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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January 3, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached **Answer Brief on the Merits** uses a 13 point Century Schoolbook font and contains 11,780 words.

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January 3, 2022

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 3, 2022, at San Francisco, California.

J. Espinosa
Declarant

/s/ ***J. Espinosa***
Signature

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