Supreme Court No. S268320

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

As promised in its pre-briefing letter to this Court, respondent concedes that the trial court erred in denying the motion to suppress, and that the majority of the Court of Appeal erred in affirming this denial. Appellant accepts this concession, and joins respondent in asking this Court to reverse the ruling of the Court of Appeal affirming the judgment and the order denying the motion to suppress.

In the discussion that follows, appellant will highlight two critical points in respondent's argument with which he disagrees, and two equally critical points in which the parties concur.

The first point of disagreement concerns whether discovery of a parole or probation search condition should be considered as an independent factor which attenuates the wrongfulness of a preceding Fourth Amendment violation, subjecting the ensuing

search and seizure to the *Brown* balancing test.[1] As argued in Part II of appellant's opening brief on the merits ("AOBM") and developed in Part II below, this factor is hardly "independent" of the wrongdoing, and does not involve the kind of mandatory duty as in the more typical situation, where the intervening circumstance is an arrest warrant or other truly independent factor. As such, the discovery of a search condition following an unlawful detention is such a potent arena for police abuse that this Court should decline to recognize it as an attenuating circumstance triggering application of the *Brown* test.

A second area of disagreement, discussed in Part II-C of the opening brief on the merits and in Part III herein, concerns a question which this Court posed to the parties when it granted review, namely, "What constitutes purposeful and flagrant police misconduct under the attenuation doctrine analysis?" Respondent barely addresses this issue; insofar as it is discussed, respondent appears to accept a point made by the majority in *Strieff* (*Utah v. Strieff* (2016) 579 U.S. 232), that "flagrancy" is somehow limited to a consideration of the officer's good faith with respect to the Fourth Amendment violation. (See RBM at 50, citing *Strieff*, *supra*, 136 S.Ct. at pp. 2063-2064.)

As discussed below, this badly misses the mark and avoids the more salient discussions of flagrancy going back as far as *Brown*, as highlighted by the dissenting justice in the present case. Where, in a case like this, there is simply no imaginable lawful basis for detaining McWilliams in connection with the

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1. *Brown v. Illinois* (1975) 422 U.S. 590

recent burglaries, or for any other proper purpose, and the officer essentially admits that he rousts every person in a "suspicious vehicle," irrespective of reasonable suspicion existing, and with the overtones of racial profiling that are present in this case, the officer's wrongdoing must be considered "flagrant," an improper "fishing expedition" to see "what might turn up." (See, e.g., *Brown*, *supra*, 422 U.S. at p. 605.) This Court should reject the view of respondent here, and of the majority in the present case and in *Strieff*, that flagrancy turns solely on the subjective good faith of the officer, a factor which has always, and should remain, a minor consideration in Fourth Amendment jurisprudence.

Rather, a Fourth Amendment violation is flagrant, for purposes of considering the effect of an attenuating circumstance under the *Brown* test, where, as older cases like *Brown* make clear, it has no arguable basis under settled law, and is nothing more than a fishing expedition. That's what happened here; and the Government's failure to acknowledge this fact in its discussion is disturbing. However this Court decides the preceding issue as to whether discovery of a search condition should be considered as an intervening, attenuating factor, it should emphasize that the measure of flagrancy is not simply bad faith, but also, importantly, the objective unreasonableness of the Fourth Amendment justification and the officer's use of it as a pretext to conduct an otherwise unlawful intrusion on a person's privacy in the hopes that some kind of criminal contraband or behavior will be discovered.

Notwithstanding these disagreements, appellant concurs with respondent as to two key points. First, if this Court accepts respondent's contention that the attenuation balancing test is triggered by discovery of a search condition, this Court should recognize that it is a comparatively *weak* factor, as measured against the paradigm "discovery of an arrest warrant" factor discussed in *Brendlin* (*People v. Brendlin* (2008) 45 Cal.4th 262) and *Strieff*. Thus, as respondent posits in Part II of its brief, and as appellant discusses below in Parts II and III, its weakness as an attenuation factor, and the fact that it does not involve any kind of mandatory duty on the part of the police to act, should mean that its discovery as the fruit of an unlawful detention is normally insufficient to attenuate the taint of the preceding wrongdoing by the officer.

Second, and leaving aside for the moment the "flagrancy of the wrongdoing" factor, appellant agrees that the "temporal factor" provides a salient basis for distinguishing the present case from the hypothetical one advanced by respondent. Here exploitation of illegality was immediate, as is typically the case when an illegal detention leads to discovery of a search condition. And as respondent notes, citing the dissenting justices in *Strieff*, this is a too-typical situation, because one of the purposes of police officers making suspicionless stops of citizens, particularly of persons of color, is to discover the existence of a highly foreseeable search condition and then engage in now-permissible fishing expeditions for contraband.

To conclude this introduction, appellant and respondent agree that this Court should reverse the majority holding below and make it clear that discovery of a parole or probationary search condition is, typically, not an intervening factor that attenuates the wrong of a immediately preceding Fourth Amendment violation by an officer. In the present case, where the discovery and search occurred immediately after the unlawful detention, there is no attenuation, and the motion to suppress evidence should have been granted.

ARGUMENT

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

Part I of appellant's opening brief on the merits addressed the preliminary question whether Officer Croucher's detention of appellant violated the Fourth Amendment, with appellant arguing that the trial court, who found the detention lawful, got it wrong, and the Court of Appeal – both in the majority and dissent – got it right because there was no lawful basis for the detention, either to investigate the bicycle burglars or for any other purpose. (See AOBM at 27-30.)

Although the Attorney General's briefing in the Court of Appeal disputed this conclusion, in this Court, the Government effectively concedes, *sub silento*, that there was no lawful basis for the detention, indicating, in a footnote, that it is respondent's understanding that the Santa Clara County District Attorney's

Office will be "filing or joining an amicus brief defending the judgment below." (RBM at 11, fn. 2.) Insofar as there may be an argument presented as to the lawfulness of the detention in such an amicus brief, appellant will defer any discussion of this point until after such an amicus brief is filed.

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

The first and principal point of contention between appellant and respondent concerns a key question in the present case: whether discovery of a search condition can be considered as an intervening circumstance which triggers the *Brown* test for measuring attenuation of wrongdoing.[2]

Respondent contends, somewhat half-heartedly, that this factor *should* be measured by the *Brown* test, but that "typically the discovery of the search condition will not attenuate the taint of the illegal detention." (RBM at 9-10; see generally RBM, Part I, at 27-38 [attenuation test should apply] and Part II, at 38-50 [for purposes of applying *Brown* test, discovery of a parole search condition has "reduced-force" compared to discovery of an arrest

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2. In a footnote, respondent suggests that because the present case involves only a *parole* search condition, appellant errs by generalizing the issue to include "probation or parole" search conditions. (RBM at 9, fn. 1.) However, since respondent concurs that the analysis as to a parole search condition would apply to a probation condition (*ibid.*), and probation conditions are by far more common, appellant asks this Court to indicate in its opinion that these types of search conditions are functionally equivalent for purposes of applying attenuation rules.

warrant].) In this section, appellant will address respondent's initial contention, that the attenuation test should be applied.

The touchstone of respondent's reasoning as to this point is its insistence that "[l]ike the arrest warrant in *Strieff*, a defendant's parole search condition is undisputably an independent and antecedent causal basis for a search." (RBM 34) This assertion is true, but only in a minor sense which, as appellant sought to explain in his opening brief on the merits, does not distinguish it from other situations where attenuation analysis is not applied.

A. ***Sanders.***

In the situation presented in *People v. Sanders* (2003) Cal.4th 318, the existence of a search condition is both independent and antecedent to the unlawful search, but is discovered afterwards. On this record, this Court squarely held, without attenuation analysis, that its discovery does not cure the illegality of the preceding search. (*Id*., at p. 333.) Respondent attempts to distinguish *Sanders* on several bases. None are persuasive.

The first attempt is based on the obvious fact that the search in the present case was premised on knowledge of the search condition, whereas in *Sanders* the condition was unknown to the officer at the time of the search. (RBM at 34-35.) This proves too much. In both cases, the discovery of the search condition takes place *after* the Fourth Amendment violation, and is solely the product as a of such violation.

Respondent's second basis for distinguishing *Sanders* is premised on its observation that this Court's holding in that case was focused on the underlying question "whether a Fourth Amendment violation occurred in the first place . . .", whereas in the present case this premise is accepted. (RBM at 35) While this may distinguish the *holding* in *Sanders* from the issue in the present case, it takes nothing away from the legal principle underlying this holding – that a "seizure" unjustified at the time it takes place by any proper basis under the Fourth Amendment can become acceptable after the officer learns, as a result of this wrongdoing, that the person seized has a search condition. In both cases, and for the same reasons relied upon by this Court in *Sanders*, the answer must be "No."

Finally, respondent suggests that appellant's reliance on *Sanders* is unpersuasive because "taken to its logical conclusion, it would also preclude discovery of *an arrest warrant* from constituting an intervening circumstance." (RBM at 36.) The point is not without some persuasiveness, and there are sound reasons, including those eloquently expressed by the dissenting justices in *Strieff*, for such a conclusion. But this issue is not before this Court, and *Strieff* is controlling in any case. Moreover, this assertion ignores the important distinction between discovery of an arrest warrant and discovery of a search condition which respondent otherwise acknowledges as decisive in the present case: that the first circumstance gives rise to a mandatory duty to arrest, and to a search incident to that arrest, and that the second one, before this Court now, does not.

In sum, *Sanders* provides a strong basis for this Court to reject application of the *Brown* attenuation test to discovery of a search condition as a result of an unlawful detention.

B. **Plain View**.

Respondent contends that appellant's analogy to plain view is unpersuasive because, in the hypothetical proposed by appellant – discovery in plain view of contraband when the officer is in a position to see the contraband only because of a preceding unlawful entry – "the officer's ability to view contraband . . . is not an independent and antecedent basis for a search." (RBM at 36-37.)

Respondent has managed to miss the point of appellant's suggested analogy. In a situation like the present case, the search condition is there, providing a lawful basis for a search, but is unknown to the officer until discovered as a result of the illegal detention. Similarly, in the hypothetical situation, the contraband – let's say an unlawful firearm or stash of illegal drugs in the center console of a vehicle – is visible to anyone present and would provide a "plain view" basis for seizure and arrest if and when seen, but is unknown to the officer until he is in position to view it as a result of an unlawful traffic stop. In both cases the objective basis for the search is independent and preexisting to the unlawful detention.

Appellant submits the same rule should apply in both situations: namely, the knowledge of the search condition, or of the presence of the contraband, is simply the fruit of the unlawful search, and the subsequent search and seizure should be subject

to suppression. (See authority discussed at AOBM at 51-52, including *United States v. Davis* (10th Cir. 1996) 94 F.3d 1465, 1469-70 [if the drugs and contraband are in plain view only "as a direct result of an unlawful seizure" a subsequent plain view search is "a 'fruit' of the seizure and subject to suppression"].)

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

Finally, respondent questions appellant's contention that it matters for purposes of considering whether the attenuation doctrine applies to the discovery of a search condition that such a discovery is not similar to the discovery of an arrest warrant at issue in *Brendlin* and *Strieff*. While conceding that "discovery of a parole search condition has less intervening force than the discovery of an arrest warrant . . ." respondent suggests that this "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." (RB 36)

Plainly, though, this is a policy decision for this Court to make; and appellant's contention is that this Court should squarely reject the approach of the court in *People v. Durant* (2012) 205 Cal.App.4th 57 (*Durant*), and should decline to apply the *Brown* balancing test to discovery of a search condition. To hearken back to the previous sub-section, an officer's viewing of contraband in plain view is also an "intervening event"; but it is one so lacking in attenuation, and so much the direct product of the preceding illegality, that application of the *Brown* test is not required.

Ultimately, respondent persuasively concedes, in its Part II discussion, that discovery of a search condition has such weak intervening force that it will "rarely attenuate" the "antecedent taint" of a preceding illegality (RB 38), with the Government further recognizing – at least indirectly – a point advanced by appellant, that it is highly foreseeable that a discretionary search condition will be found as a direct product of an unlawful detention. (See AOBM at 52-53; RBM at 46-48 [discussing with approval Justice Sotamayor's *Strieff* dissent as to the foreseeability of discovery of an arrest warrant, then applying this reasoning as a basis for "[a]scribing minimal causally intervening force to the discovery of a prole search condition"].)

Respondent assumes that the police wrongdoing here was mild, and in good faith (see RBM at 50-52) – a point which appellant disputes vigorously below. But even while making this assumption, respondent urges this Court that there is no attenuation of the police wrongdoing because of the weakness of discovery of a search conditional as an intervening circumstance, at least in the typical situation where there is a close temporal proximity between the police wrongdoing, discovery of the search condition, and the ensuing search finding contraband. (See RBM, Part II, at 38-50.)

Respondent provides a rather fanciful hypothetical situation in which it suggests there would be sufficient attenuation.

> [O]ne 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.

(RB at 48)

This suggested "only if" situation actually proves appellant's point that discovery of a search condition should not, as a matter of policy, trigger the *Brown* test. In this example, discovery of the search condition is plainly not the product of the illegal detention, but of the officer's post-detention initiative in checking to see whether the person he had previously detained – lawfully or unlawfully – has a search condition. This is not akin to asking an unlawfully detained person if he is on probation or parole, or doing a records check during the detention, as occurred in the present case, and as occurs in the typical case. Thus, in effect, respondent's hypothetical, and its contention in connection with it, demonstrates that there is no situation in which discovery of a search condition as a *direct* product of an unlawful detention is so remote as to take it out of the framework of fruit of the poisonous tree.

One could imagine a true "temporal gap" situation, e.g., where an officer discovers the parole search condition as a direct result of an unlawful detention, as in the present case, but does not find contraband on the detainee until a subsequent encounter some weeks later. Assuming this Court concludes that the *Brown* test should apply to discovery of a search condition, this might be

the rare situation where attenuation could be found. But even there, the argument in favor of attenuation is sufficiently weak that it should rarely render the subsequent search lawful under the Fourth Amendment.

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

As explained herein and in Part I of the opening brief on the merits, the applicability of the attenuation doctrine should not be expanded from discovery of an arrest warrant to discovery of a search condition. Appellant urges this Court to follow the lead of the courts in *People v. Bates* (2013) 222 Cal.App.4th 60 (*Bates*) and *United States v. Garcia* (9th. Cir. 2020) 974 F.3d 1071 (*Garcia*) and to reject the *Durant* court's elevation of a post-unlawful detention discovery of a discretionary search condition to the status of discovery of an arrest warrant.

Respondent suggests that the decisions in *Bates* and *Garcia* do not support appellant's position that the *Brown* test should not be applied when police discover a search condition as a result of an unlawful detention. According to respondent, it is determinative that both cases actually employ the *Brown* test, noting that in *Garcia*, the Ninth Circuit concluded that the close temporal connection, combined with the much-weaker intervening factor as compared to discovery of an arrest warrant as in *Strieff*, was sufficient to dispel attenuation without consideration of flagrancy (RBM at 31-32, citing *Garcia*, *supra*, 974 F.3d at pp.

1075-1081) – a position consistent with the one advanced by respondent in the present case – and that in *Bates*, the Sixth District also applied the *Brown* test, with a reduced level of regard for the intervening factor, to conclude that there was not attenuation. (RBM at 28-30, citing *Bates*, *supra*, 222 Cal.App.4th at pp. 64-69.)

Ultimately, it is not crystal clear whether these cases are examples of appellant's contention that the *Brown* test need not be employed with respect to discovery of a search condition as the direct product of an unlawful detention, or of respondent's similar contention that application of the *Brown* test in these circumstances will almost invariably lead to a conclusion that the wrongdoing is not attenuated. *Garcia* does state flatly that discovery of a search condition is not an intervening cause subject to analysis under the *Brown* test, noting that when a search pursuant to a search condition is "'significantly directed' by information learned during an unlawful search, the mere existence of that authority is not an intervening cause that purges the taint of the earlier constitutional violation." (*Garcia, supra*, 974 F.3d at 1078.) And the Sixth District in *Bates*, although describing the discovery of a search condition as a "less compelling intervening circumstance than an arrest warrant . . ." (*Bates*, *supra*, at p. 70), and following the three-part *Brown* test to conclude there was no attenuation (*id*., at pp. 70-71), tempers its recognition of the propriety of probationary search conditions by expressing a vigorous "discomfort" with applying the *Durant* court's attenuation analysis "to situations where an individual's

probation status is wholly unknown to law enforcement at the time of the initial detention and is used only after the fact to justify an otherwise unlawful search." (*Id.*, at p. 70.)

Evidently, both these intermediate appellate courts wisely covered both bases, and thus can be read both as announcing a rule that the *Brown* test should not be applied to the situation of discovery of a search condition as a result of an unlawful detention, and then, as a backup, applying the *Brown* test to conclude there was no attenuation.

As this is the same argument in the alternative advanced herein by appellant, he cannot quarrel with how these two courts framed the issue. However, this Court has the authority to declare that the *Brown* test need not be applied in this situation. For the reasons advanced herein and in Part II of the opening brief, appellant urges this Court to adopt this position.

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

In Parts II and III of respondent's brief, the Government expresses clear agreement with two of the central contentions advanced by appellant: that discovery of a search condition is a much more limiting intervening circumstance than discovery of an arrest warrant; and that a proper application of the *Brown* test in the present case requires suppression of the evidence based on a proper evaluation of the *Brown* factors.

The two disagreements between the parties, addressed below, though somewhat obscure, are important. We briefly

discuss both below. First and foremost, as detailed in Part III-A below, we disagree as to the second question posed by this Court concerning how to measure the flagrancy of police misconduct under the *Brown* test. Adopting the viewpoint of the majority in *Strieff* and of the unpublished Court of Appeal opinion in the present case, respondent focuses on the "good faith" of the officer's conduct as the lightning rod for determining flagrancy. As explained below, this misses both the centrality of *objective* evaluation of the bona fides of the officer's conduct to a proper determination of flagrancy and the recently recognized significance of factors such as implicit racial bias in police targeting of citizens of color, such as Mr. McWilliams in the present case. We urge this Court to follow the lead of the earlier Sixth District opinion in *Bates*, which concluded that "[b]ad faith need not be shown for police misconduct to be purposeful . . ." and is demonstrated in the not untypical "fishing expedition" situation, like the present case, "'when officers unlawfully seize a defendant 'in the hope that something might turn up.'" (*Bates*, *supra*, 222 Cal.App. 4th at p. 70-71 quoting *Brendlin*, *supra*, 45 Cal.4th at p. 271.) In this senses, it matters very much that there was no conceivable reasonable basis to detain appellant, and that Officer Croucher candidly told the court that it is his practice to order people out of cars in a "suspicious vehicle" situation. (2RT 312)

Second, in appellant's view, respondent makes too much of the temporal factor, a circumstance which prior cases have assumed nearly always favors suppression of the evidence, since nearly every important case to apply the *Brown* test in various

contexts involves the typical situation where discovery of the intervening circumstance follows promptly after the officer's Fourth Amendment violation. Virtually every prior case minimizes this factor and emphasizes the critical nature of the "flagrancy" of the officer's conduct.

That said, appellant is willing to accept respondent's proposed application of the *Brown* test, borrowed from *Garcia*, which proposes that there is no attenuation from discovery of a search condition as a direct and immediate product of an unlawful detention without regard to the flagrancy factor.

These disagreements as to the first and third factors should not obscure the more important point: that the parties are in virtual agreement as to the second factor, the nature of the intervening circumstance. As curtly discussed in Part III-C below. respondent properly urges this Court to adopt a rule that gives markedly less weight to discovery of a search condition than to discovery of an arrest warrant. Urging this Court to adopt the holding of the Sixth District in *Bates*, that a search condition is a "'less compelling discretionary enforcement circumstance than an arrest warrant . . ." (RBM 40, quoting *Bates*, *supra*, 222 Cal.App.4th at p. 70), respondent properly contends that *Durant* and the majority in the present case wrongly treat them as functional equivalents. (RBM at 38-50.) Based on this fundamental point, respondent proposes, in virtual agreement with appellant, that discovery of a search condition "would preclude attenuation in the vast majority of cases." (RBM at 50.)

As to the final point in respondent's brief, that if the Court adopts the equivalency approach of *Durant* and the majority below, the judgment should be affirmed (RB at 51-52), appellant briefly recapitulates prior discussion in Part III-D below to demonstrate that there is no proper basis for adopting the equivalency approach, and that even if there were, the flagrancy of the misconduct in the present case, which respondent mistakenly concludes is slight based on the asserted parallel with the reasoning of the majority in *Strieff*, would preclude a finding of attenuation in the present case.

A. The Proper Measure of Flagrancy, and Its Application to the Present Case.

Respondent spends little energy addressing the question posed by this Court on its website summary of issues in the present case, namely, "What constitutes purposeful and flagrant police misconduct under the attenuation doctrine analysis?" According to respondent's rather summary discussion of this point, following the majority in *Strieff*, flagrancy is not present where the officer is arguably investigating contemporaneous criminal activity, as opposed to a situation where the stop is undertaken "merely to uncover unknown or unreported crimes." (RB at 51.) There are two big problems with this approach.

First and foremost, as explained in some detail in the opening brief on the merits, the purposefulness and flagrancy of an officer's misconduct under the Fourth Amendment should largely be measured by *objective* standards (see AOBM at 56-58), and is so patently unreasonable in the present case as to strongly

suggest an improper investigatory purpose. Put simply, there is no conceivable way a reasonable officer could have believed that Mr. McWilliams's presence reclined in his vehicle in the parking lot of a closed office building could have had any connection to the possible burglars on bikes seen by the security guard; moreover settled case law makes it clear that his presence in the parking lot of a closed business, where nothing whatsoever suggests he is engaged in criminal activity, provides no basis for a detention. (See AOBM at 18-19, citing *People v. Casares* (2016) 62 Cal.4th 808, 838 and *People v. Roth* (1990) 219 Cal.App.3d 211, 215.) Viewed objectively, the officer's detention of appellant was patently unreasonable, and should be viewed by this Court as exemplifying a classic example of flagrant misconduct, an unlawful seizure and restraint of a citizen based on an unreasonable hunch that something might turn up.

Moreover, it is precisely here that the specter of implicit racial bias and profiling arises in the present case – a point discussed in some detail by appellant (AOBM at 62-67), but virtually ignored by respondent – arises. Without repeating the detailed arguments in the AOBM, which will be briefly summarized below, appellant reminds the Court that these important considerations must be factored into its analysis of flagrancy.

As a secondary point, appellant takes issue with respondent's curt dismissal of appellant's suggestion that Officer Croucher's expressed practice of ordering occupants out of any "suspicious vehicle," which he carried out in the present case (2RT 312), was improper and demonstrated flagrant misconduct.

According to respondent, the officer was only indicating that once he had already determined that he had reasonable suspicion to detain an individual, he would then order them out of the vehicle. (RBM at 52) This misreads Officer Croucher's testimony. After testifying that he ordered Mr. McWilliams to get out of his car, the following colloquy occurred:

> Q. [by Ms. Arndt, the prosecutor]: Why did you instruct him to exit the vehicle?
>
> A. [by Officer Croucher]: I do that with most car stops that I do, or most suspicious vehicles that I come across.
>
> Q. Why do you do that?
>
> A. It's based on officer safety. I have no idea who this person is, what they have access to that can be used against me, whether it be a firearm, a knife, some type of weapon; so I instructed them out of the vehicle to remove them from that element for my safety.

(2RT 312) Notably, the officer plainly states that he does this with "most car stops" and "most suspicious vehicles" he comes across; and while it may be fair to infer that an officer would only make a "car stop" with reasonable suspicion of some wrongdoing, the term "suspicious vehicle" – which applied to the present case, since it plainly did not involve a "car stop" – includes no such assumption. When asked what was "suspicious" about appellant's vehicle, the officer could only point to the factors which this Court in *Casares* and the Court of Appeal in *Roth* concluded did not give rise to reasonable suspicion of criminality – that appellant was in a vehicle in a "dark area . . . in the parking lot of a closed business . . ." (2RT 312), with the officer

conceding that there was nothing else suspicious about the vehicle. (2RT 313)

Appellant's point in emphasizing the officer's self-described practice of ordering occupants out of virtually any "suspicious vehicle" he comes across is that it was not, as respondent suggests without reference to anything in the record, couched on a preceding fact-based determination of a "reasonable suspicion" basis for detention, but simply a measure of self-protection based on his unreasonable hunch that the vehicle was suspicious, and amounts to a policy of rousting anyone in a vehicle the officer decides looks sketchy to him.

In sum, and using a proper measure of flagrancy, appellant urges this Court to adopt the more expansive view of the dissenting justice in the present case, the dissenters in *Strieff*, and the holding of the Supreme Court in *Brown*, and the Court of Appeal in *Bates*, and conclude that a Fourth Amendment violation is "flagrant" when it is so lacking in objective reasonableness as to give rise to a strong presumption that it amounts to the classic situation of an unlawful seizure of a citizen "in the hope that something might turn up." (*Bates, supra*, 222 Cal.App. 4th at p. 70-71.) This is precisely what happened here. Thus, respondent is wrong, and the "flagrancy" factor weighs strongly in favor of the suppression of evidence in the present case.

B. **The Temporal Factor**

As suggested above, appellant is largely in agreement with respondent as to the import of the temporal factor in the present case. Since the discovery of appellant's search condition was the

direct product of the unlawful detention, and the search of the vehicle pursuant to the officer's knowledge of the search condition proceeded immediately upon the officer learning of the condition, this factor is not indicative of attenuation under the *Brown* test. (See, e.g., *Strieff*, *supra*, 16 S.Ct. at pp. at p. 2062)

Appellant notes that most courts considering the temporal factor in the context of assessing the attenuation from an intervening factor have dismissed its significance, concluding, as this Court did in *Brendlin*, that this is "the typical scenario" in cases involving discovery of a warrant, and thus not of much value for purposes of assessing whether there was attenuation. (*Brendlin, supra*, 45 Cal.4th at pp. 270-271.)

That said, appellant concurs, as a backup to his contention that discovery of a search condition should not be considered as an attenuating intervening circumstance subject to the *Brown* test, with respondent's suggested reframing the test as requiring suppression when the search condition is discovered as a direct and immediate product of an unlawful detention, irrespective of the flagrancy prong. (See RBM at 38, 50.)

C. The Weakness of Discovery of a Search Condition as an Intervening Factor.

As should be obvious by now, appellant also concurs with respondent's contention that discovery of a search condition as a result of a Fourth Amendment violation has "reduced force" as attenuation compared to the discovery of an arrest warrant, with respondent, in an extensive discussion, endorsing the approach of the courts in *Bates* and *Garcia* as to this point, and rejecting the

"equivalency" approach of the court in *Durant*. (See RBM 38-50.)

Since appellant covered this subject in detail in his opening brief in this Court (AOBM 30-53, 55), and respondent concurs, there is no need for further discussion here.

D. **Equivalency and Flagrancy Reexamined.**

The final portion of respondent's brief is a somewhat puzzling alternative contention which merits a quick response. Respondent contends that if this Court concludes, against the urging of both parties in this case, and the holdings in *Bates* and *Garcia*, that discovery of a search condition as a result of an unlawful detention is, as the court in *Durant* concluded, the functional equivalent of discovery of an arrest warrant, the judgment below should be affirmed. The principal basis for this assertion is respondent's contention, discussed above, that with respect to the "most important" factor, "flagrancy and purposefulness of the police misconduct . . ." (*Brendlin*, 45 Cal.4th at p. 271), the present case does not involve flagrancy or purposefulness on the part of Officer Croucher. This contention is incorrect and should not be followed by this Court.

Before explaining why, appellant will restate the obvious: there is no basis for treating discovery of a search condition as the equivalent of discovery of an arrest warrant, given the ministerial nature of the latter factor, combined with the essentially mandatory duty to conduct a search incident to arrest, as compared to the purely discretionary situation presented by a search condition. As should be clear by now, no court which has squarely addressed this situation has concluded that these

situations are equivalent.

That said, appellant takes strong issue with respondent's analysis of flagrancy, as indicated above. While acknowledging that in *Brown* itself flagrancy is measured in significant part on the fact that "the 'impropriety of the arrest was obvious' . . .", and that flagrancy is present when the purpose of the officer's misconduct was "'for investigation . . . in the hope that something might turn up . . .'" (RB at 15, quoting *Brown*, *supra*, 422 U.S. at p. 605), respondent principally relies on the discussion of flagrancy by the majority in *Strieff* to conclude that so long as the unlawful detention occurred during a "bona fide investigation and was only improper because the detention lacked objectively reasonable suspicion the defendant was engaged in illegal activity, it was not flagrant. (RB at 20.) Respondent then adopts the reasoning of the majority of the Court of Appeal in the present case, noting that "the level of flagrancy or purposefulness of Officer Croucher's conduct appears indistinguishable from that of the officer in *Strieff*. (RB at 51.)

For the reasons explained in Part III-A above, this contention is erroneous and should not lead this court to affirm the judgment even if it concludes, with the court in *Durant* and the Court of Appeal majority in the present case, that discovery of a search condition is the functional equivalent of discovery of an arrest warrant. The officer's conduct in the present case was as much a fishing expedition to see what might turn up as the improper arrest in *Brown*, as it was investigatory from the beginning and unsupported by any facts which would have led a

conscientious officer to reasonably suspect that McWilliams was engaged in unlawful conduct.

Moreover the inference that the roust of McWilliams from his car was motivated by racial bias, implicit or otherwise, is strong in the present case for the reasons discussed in Part III-C-3 of the opening brief, but essentially ignored by respondent. As explained there, many studies demonstrate that racial profiling grounded in explicit and implicit bias is endemic in law enforcement. (See AOBM at 65-66 and authorities cited therein.) Appellant noted circumstantial evidence in the present case supporting an inference that Officer Croucher would have known that appellant, sitting in his car and illuminated by the officer's flashlight, was Black when he ordered him out of the car based on his conclusion that his vehicle was "suspicious." (AOBM at 66) Given the prevalence of racial profiling in law enforcement, there is, as suggested in the opening brief, a fair likelihood that, in the same circumstances, but with a young White male in the car, this officer would have done nothing, or commenced a consensual encounter.

The strong suggestion that the detention in the present case was, at least in part, a product of implicit racial profiling should not be ignored by this Court, as it has been by respondent. Reading this together with the other factors demonstrating flagrancy, this Court should reject respondent's contention that this was naught but a good faith constitutional violation by the officer. Thus, even if the "equivalency" approach is adopted by this Court, it should find the officer's constitutional violation to be

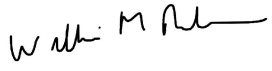
flagrant and conclude that discovery of the search condition did not sufficiently attenuate the officer's wrongdoing.

CONCLUSION

For the reasons set forth above and in the opening brief on the merits, appellant respectfully asks to reverse the judgment of the Court of Appeal and the trial court in the manner specified in the conclusion of the opening brief on the merits, and to direct that the case be remanded to the trial court with directions to permit appellant to withdraw his plea and for the trial court to grant the motion to suppress and dismiss the charges against appellant. (See e.g., *People v. Roth*, *supra*, 219 Cal.App.3d at pp. 215-216.)

Dated: February 23, 2022

Respectfully submitted,



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Attorney for Appellant McWilliams

CERTIFICATE OF WORD COUNT

Appellant, by and through his appointed counsel on appeal, hereby certifies that the software used in preparing this brief is Corel Word Perfect X7 and that according to the software report for this document the brief, counting only the portions of the brief required by Rule 8.520(c) contains 6,514 which is under the word limit for a reply brief on the merits.

I declare under penalty of perjury under the laws of the state of California that this declaration is true and correct. Executed at Santa Clara, California, on February 23, 2022.

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

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

Case Name: ***People v. McWilliams***
Case No.: **S268320/H045525**

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

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

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San Jose, CA 95131

I declare under penalty of perjury the foregoing is true and correct. Executed this 23rd day of February, 2022, at San Jose, California.

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

STATE OF CALIFORNIA
Supreme Court of California

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