IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DUVANH ANTHONY McWILLIAMS** **Defendant and Appellant**	Case No. S268320

APPLICATION OF THE SANTA CLARA COUNTY DISTRICT ATTORNEY'S OFFICE FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN QUALIFIED SUPPORT OF RESPONDENT

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

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN *QUALIFIED* SUPPORT OF THE RESPONDENT

TO: THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

Jeffrey F. Rosen, as the District Attorney of the Santa Clara County District Attorney's Office, respectfully requests leave of this Court to file an *amicus curiae* brief in qualified support of Respondent. Support is qualified because Respondent (Attorney General's Office) has, in contrast to the position taken by Respondent in the Court of Appeal, now taken the position that the judgment of the Court of Appeal should not be affirmed.

The Santa Clara County District Attorney's Office (hereafter "Amicus") initiated prosecution of Defendant and Respondent Duvanh McWilliams and represented the People at the trial court level. Our Office has a direct interest in seeing the conviction of Appellant upheld.

More importantly, after a review of the matter, the Santa Clara County District Attorney's Office believes that not only did both the trial court and the Court of Appeal correctly decide the issue at bench, but that resolution of the issue will have a substantial impact upon the administration of justice in criminal cases throughout California.

The question of whether discovery of a detainee's parole status attenuates the connection between an unlawful detention and a search when the search only takes place after discovery of the detainee's parole status is an issue of state-wide importance. However, presently *there is no party* advocating for the most reasonable answer to that question: that discovery of a detainee's parole status (with its attendant parole search condition and reduced expectation of privacy) prior to a search following an unlawful detention should *ordinarily* serve as an intervening

circumstance sufficient to attenuate any taint from the unlawful detention. Amicus believes it would be of potential benefit for this Court to consider additional arguments and authorities explaining why it would be inappropriate to apply the exclusionary rule to suppress evidence discovered during a search made by an officer *aware of* a detainee's parole status and *not conducted for arbitrary, capricious, or harassing reasons* – regardless of whether the search may have been conducted following an unlawful detention.

Although Amicus also "represents" the People insofar as having an interest in the outcome of this case, there are no interested entities or persons to list in this per California Rules of Court, Rule 8.208.

For the reason expressed above, the Santa Clara County District Attorney's Office requests permission to file the enclosed *amicus curiae* brief in qualified support of Respondent.[1]

Date: March 11, 2022

Respectfully submitted on behalf of
JEFFREY F. ROSEN
District Attorney, Santa Clara County

By:
Jeff H. Rubin, Deputy District Attorney
Santa Clara County District Attorney's Office
Attorneys for *Amicus Curiae*

[1] Amicus is not formally seeking to replace the Attorney General's Office as the responding party. However, in light of the Attorney General's about face on the position taken in the Court of Appeal, if this Court believes there should be at least one entity advocating in support of upholding the conviction, Amicus is available to participate in oral argument and/or to serve in any other capacity this Court desires. (Cf., *Humphrey (Kenneth) on H.C* (Cal. 2018) 233 Cal.Rptr.3d 129 (Mem).)

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THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DUVANH ANTHONY McWILLIAMS** **Defendant and Appellant**	Case No. S268320

AMICUS CURIAE BRIEF OF THE SANTA CLARA COUNTY DISTRICT ATTORNEY'S OFFICE IN *QUALIFIED* SUPPORT OF RESPONDENT

Sixth Appellate District, Case No. H045525
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The Honorable David A. Cena, Judge
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

OTHER AUTHORITIES

AMICUS CURIAE BRIEF

I.
INTRODUCTION

Both Appellant [hereafter "Defendant"] and Respondent have overlooked an obvious truth: Because of the significant reduction in any expectation of privacy that accompanies being placed on parole, it is *more reasonable* to treat an officer's discovery of a detainee's parole status as an intervening circumstance than it is to treat an officer's discovery of an arrest warrant as an intervening circumstance. Indeed, the *pre*-search discovery of a detainee's parole status is arguably the most paradigmatic of *all* potential intervening circumstances - especially given that the backdrop to any question involving the scope of the Fourth Amendment is whether it is reasonable to apply the extreme consequence of last resort: the exclusionary rule.

The question of whether discovery of a detainee's parole status is a *unique* question and cannot be determined simply looking at how many points of comparison or distinction can be drawn between parole status and other types of recognized intervening circumstances. (See *United States v. Knights* (2001) 534 U.S. 112, 117 [it "is dubious logic-that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it"].) That said, to the extent considerations laid out in cases involving other kinds of intervening circumstances can provide guidance in resolving the issue of whether discovery of a detainee's parole status should be viewed as an intervening circumstance, those considerations, on balance, strongly weigh *in favor of* treating discovery of parole status as an intervening circumstance.

There *is* significant overlap between the most important reasons the High Court and this Court have held discovery of a detainee's

outstanding arrest warrant is an intervening circumstance and the reasons for why discovery of a detainee's parole status should be viewed as an intervening circumstance. Indeed, even if this Court were solely to look at the overlapping considerations, it is easy to conclude that either circumstance will ordinarily serve to attenuate any connection between an unlawful detention and a subsequent search (so long as the search follows discovery of the parole status or arrest warrant).

However, as will be explored below, there are several reasons for finding that discovery of a detainee's pre-existing lack of a reasonable expectation of privacy from searches that are "not arbitrary, capricious or harassing" (*People* v. *Reyes* (1998) 19 Cal.4th 743, 752) is a *more compelling and significant* intervening circumstance than the mere discovery that a detainee has an outstanding arrest warrant.

II.
AN OFFICER'S DISCOVERY OF A DETAINEE'S PAROLE STATUS THAT PRECEDES A SEARCH CONDUCTED BY THE OFFICER SHOULD GENERALLY (AND IN THE CASE AT BENCH) ATTENUATE ANY CONNECTION BETWEEN THE SEARCH AND AN EARLIER UNLAWFUL DETENTION SUCH THAT IT IS UNNECESSARY TO APPLY THE EXCLUSIONARY RULE

Defendant would have this Court believe that discovery of a detainee's parole status is simply not an intervening circumstance that can attenuate the taint of an unlawful detention. (Appellant's Opening Brief on the Merits [hereafter "AOBM"], p. 30.) Respondent believes that discovery of an unlawfully detained suspect's parole search condition can be an intervening event but is one of weaker intervening force than discovery of an arrest warrant and insufficiently strong in the case at bar to avoid application of the exclusionary rule. (Respondent's Answer Brief on the Merits [hereafter "RABM"], pp. 27-38.)

The caliber of argument and writing on behalf of both parties is very impressive. As to the merits, however, we respectfully suggest both are misguided. Both ignore the significant impact parole status has on a parolee's expectation of privacy and accordingly vastly *underestimate* how powerful of an intervening event is discovery of a detainee's parole status. Conversely, both *overestimate* the significance of one of the few distinctions between discovery of an arrest warrant and discovery of parole status.

Before we begin discussing more specifically where we believe the parties have gone awry, it is important to emphasize that whether the attenuation doctrine should be applied in the instant case is ultimately a question of whether the exclusionary rule should be applied in this case. To that end, what follows is a quick summary of our High Court's view of that remedy.

A. The Exclusionary Rule is Only Applied as a Last Resort

"Whether the exclusionary sanction is appropriately imposed in a particular case … is 'an issue separate from the question whether … Fourth Amendment rights … were violated by police conduct.'" (*United States v. Leon* (1984) 468 U.S. 897, 906.)

"To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," it is sometimes required that courts "exclude evidence obtained by unconstitutional police conduct." (*Utah v. Strieff* (2016) 579 U.S. 232, 234.) But, as the High Court has recognized, application of the exclusionary rule entails significant costs. "Exclusion exacts a heavy toll on both the judicial system and society at large." (*Davis v. United States* (2011) 564 U.S. 229, 237.) "It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." (*Ibid.*) "And its bottom-line effect, in many

cases, is to suppress the truth and set the criminal loose in the community without punishment." (*Ibid.*)

Accordingly, the exclusionary rule is "applicable ***only*** ... where its deterrence benefits outweigh its substantial social costs." (*Id.* at p. 237; *Hudson v. Michigan* (2006) 547 U.S. 586, 591, emphasis added.) It is a remedy of "last resort" not of "first impulse." (*Utah v. Strieff* (2016) 579 U.S. 232, 237–238.)[2]

"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." (*Herring* v. *United States* (2009) 555 U.S. 135, 144.) "As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence." (*Herring v. United States* (2009) 555 U.S. 135, 136; accord *People v. Robinson* (2010) 47 Cal.4th 1104, 1124; see also *Utah v. Strieff* (2016) 579 U.S. 232, 242 [noting that the *unlawful* stop in the case before it was not "part of any systemic or recurrent police misconduct" in finding evidence discovered after an unlawful stop was "sufficiently attenuated by the pre-existing arrest warrant" to preclude application of the exclusionary rule].)

The attenuation doctrine is one of three exceptions to the exclusionary rule involving "the causal relationship between the unconstitutional act and the discovery of evidence" that stem from recognition of the need to avoid application of the exclusionary rule in situations where "the interest protected by the constitutional guarantee

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[2] Our state Constitution forbids "the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court." (*People v. Camacho* (2000) 23 Cal.4th 824, 830.)

that has been violated would not be served by suppression of the evidence obtained." (*Utah v. Strieff* (2016) 579 U.S. 232, 238.) Against that backdrop, we submit that application of the exclusionary rule in the instant case is unwarranted.

B. Law Enforcement's Discovery of a Detainee's Parole Status is *At Least* as Compelling of an Intervening Circumstance as Law Enforcement's Discovery that a Detainee Has an Outstanding Arrest Warrant

As discussed, *infra*, at pp. 27-34 in this brief, it is *more* reasonable to treat discovery of a parole search clause as an intervening circumstance than to treat an arrest warrant as an intervening circumstance. But we will begin our discourse by explaining why discovery of a detainee's parole status is no *less* significant of a reason to attenuate the seizure of evidence from an unlawful detention than the intervening discovery of an arrest warrant.

In *Utah* v. *Streiff* (2016) 579 U.S. 232, the High Court addressed the issue of whether the link between an unconstitutional detention and the discovery of evidence on the detainee was "too attenuated to justify suppression" when an officer "learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest." (*Id*. at p. 235.)

In answering that question, the High Court's analysis in *Streiff* was *guided* (not rigidly constrained) by three factors articulated in its earlier decision *Brown v. Illinois* (1975) 422 U.S. 590: (i) "how closely the discovery of evidence followed the unconstitutional search"; (ii) "the presence of intervening circumstances"; and (iii) "the purpose and flagrancy of the official misconduct." (*Id*. at p. 239.)

We focus our discussion on the second factor (and to a lesser extent on the third factor), as we do not see much visible daylight between the circumstances in the instant case and *Streiff* when it comes to the first factor (temporal proximity), which favors exclusion.[3]

In deciding whether it was reasonable to treat the *discovery of an arrest warrant* as an intervening circumstance (the second factor) and what weight, if any, to give the presence of that intervening circumstance, the High Court in *Streiff* focused on several salient circumstances (sub-factors) relevant to this assessment: (i) the fact the warrant for defendant's arrest "was valid"; (ii) the fact the warrant "predated [the detaining officer's] investigation"; (iii) the fact the warrant was "entirely unconnected with the stop"; and (iv) the fact that arrest on the warrant was "a ministerial act that was independently compelled by the pre-existing warrant" which thus provided lawful authorization for the search. (*Id*. at pp. 240-241.)

In descending order of significance, the following circumstances relevant to the second factor mentioned in *Streiff* are common to both discovery of the parole search condition in the case at bench and discovery of an arrest warrant.

First, like the arrest warrant in *Streiff*, the parole search condition in the instant case *predated* the unlawful police activity. The existence of both is premised on the conduct of the person subject to the search that occurred before the unlawful police activity. Nothing that

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[3] As to the first consideration, while the record lacks clarity on precisely on how long after the unlawful detention the parole search of the defendant's vehicle actually occurred, it does not appear to be a "substantial" amount of time. (See *People v. McWilliams* (Cal. Ct. App., Mar. 8, 2021, No. H045525) 2021 WL 858741, at *7.)

happened before or after the respective unlawful detentions vitiated the existence of the warrant or the parole condition.

Second, like the arrest warrant in *Streiff*, the parole search condition in the instant case was *valid*. This factor is potentially very significant because the *lack of* a valid basis for the search would *independently* render the search unlawful. That was not, however, the situation in *Streiff* nor in the instant case.

Third, like the "valid, pre-existing, and untainted arrest warrant" in *Streiff*, the valid, pre-existing, and untainted parole search condition in the instant case was "entirely unconnected" to the unlawful police activity. (*Strieff*, *supra*, at p. 238.) In other words, both an arrest warrant and parole status "supplied legal authorization" to seize and search defendant that is "completely independent of the circumstances that led the officer to initiate" the stop. (*People v. Brendlin* (2008) 45 Cal.4th 262, 271.) And that *authorization* is based solely on the judgment of a factfinder removed from the immediate circumstances.

Fourth, like the arrest warrant in *Streiff*, the defendant's parole status in the instant case provided a legal basis for a search that does not require any choice by the defendant that could be influenced by the lingering effects of the initial illegality. Put differently, when the officer does not conduct a search of the person until *after* the discovery of the warrant or parole status, "the defendant's conduct is irrelevant, and the police cannot be said to have exploited the illegal seizure that preceded the discovery of the outstanding warrant [or parole status]." (*Brendlin*, *supra*, 45 Cal.4th at p. 270 [bracketed information added].) The challenged evidence is "the fruit of the *outstanding warrant [or parole status*], and was not obtained through exploitation of the unlawful traffic stop." (*Id.* at p. 271, emphasis added.)

Fifth, like the arrest warrant in *Streiff*, the parole search condition in the present case expressly authorized a state intrusion into an area that would otherwise be protected by the Fourth Amendment. In *Streiff*, although the defendant may have been unaware of it, there was a limited reduction in his right to complain about a search of his person incident to arrest due to the issuance of an arrest warrant. (See *Riley v. California* (2014) 573 U.S. 373, 392 ["an arrestee has diminished privacy interests" and searches incident to arrest "are justified in part by 'reduced expectations of privacy caused by the arrest'"].) In the case at bench, the conviction of defendant and attendant placement on parole also diminished his privacy interest - albeit to an exponentially greater extent and with defendant's knowledge. (See this brief, *infra*, at pp. 27-32.)

Sixth, just as the discovery of the outstanding arrest warrant in *Streiff* informed the officer that an independent factfinder (the magistrate) had found there was probable cause to believe that the detainee had committed a crime, the discovery of parole status in the instant case informed the officer that an independent factfinder had not only found probable cause to believe the detainee had committed a crime but had found so beyond a reasonable doubt. Moreover, discovery of the parole status established that the crime was sufficiently serious to warrant placement on parole and sufficiently close in time to the detention that the detainee was still on parole and the need for conducting searches without any suspicion remained necessary in order to deter and reveal criminal activity by the detainee. (See this brief, *infra*, at pp. 32-33.)

Yet another commonality that can be drawn between parole status and an arrest warrant is that that neither is reasonably subject to interpretation or abuse. This factor was not directly discussed in *Streiff*

(and thus presumably was not that important to the High Court) but it *was* mentioned by this Court in *People v. Brendlin* (2008) 45 Cal.4th 262. In *Brendlin*, this Court held discovery of an arrest warrant was "an intervening circumstance that tends to dissipate the taint caused by an illegal traffic stop." (*Id.* at p. 271.) One of the rationales for drawing this conclusion was that "[a] warrant is not reasonably subject to interpretation or abuse." (*Ibid.*)

Brendlin concluded that a warrant is not reasonably subject to interpretation or abuse based in part on the United States Supreme Court's observation in *Hudson v. Michigan* (2006) 547 U.S. 586 that compliance with the warrant requirement is readily determined because a warrant either exists or does not exist. (*Id.* at p. 595, see also *Brendlin*, *supra*, 45 Cal.4th at p. 271.) *Brendlin*'s conclusion was also based in part on the Seventh Circuit's observation in *United States v. Green* (1997) 111 F.3d 515 that, in the case of an arrest made pursuant to a warrant, there is "no chance that the 'police have exploited an illegal arrest by creating a situation in which [the] criminal response is predictable,' such as creating a situation where the criminal will flee, which in turn will give the police an independent basis for an arrest, and thus a search incident to the arrest." (*Id.* at p. 522, see also *Brendlin*, *supra*, 45 Cal.4th at p. 271.)[4]

The *Hudson* and *Green* courts' observations regarding the nature of arrest warrants apply with equal force to search conditions. Like an arrest warrant, a search condition either exists or does not exist. A search condition also does not create a situation in which an individual

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[4] *Brendlin*'s conclusion that a warrant is not reasonably subject to interpretation or abuse was *not* based on an analysis of whether the officer had an independent duty to arrest the defendant.

will conduct himself in a manner that will, in turn, give police an independent basis for arrest and search incident to arrest; the search condition is itself the independent basis for a search.

Under *Hudson*, *Green*, and *Brendlin*, a search condition is not subject to interpretation or abuse.

Moreover, a search conducted pursuant to a parole search clause has built-in constraints. A search conducted pursuant to the search clause may only be conducted by someone aware of the detainee's parole status (see *People v. Sanders* (2003) 31 Cal.4th 318, 332),[5] parole status (and whether an officer checked on a detainee's parole status) is easily determined, and a parole search will be held invalid if conducted for "arbitrary, capricious or harassing" purposes (see *People* v. *Reyes* (1998) 19 Cal.4th 743, 752).

These commonalities, *by themselves*, are more than sufficient to provide a basis for concluding that discovery of parole status is *no less* of an intervening circumstance than discovery of an outstanding arrest warrant.

Nevertheless, the defendant plays down all these important factors mentioned in *Streiff* for finding an arrest warrant to be an intervening circumstance and appears to believe the most salient feature in the *Streiff* analysis is the fact that, unlike an arrest warrant, a parole search condition "creates no mandatory duty for the officer to arrest or take any action to impinge the liberty of the person who has been unlawfully detained." (AOBM at p. 55; see also *id.* at p. 19.) That the defendant would hang his hat on this hook is not surprising since this is the only hook that even superficially distinguishes a pre-existing

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[5] We note in passing that the officer must not only be aware of the detainee's probation status but of the exact parameters of the search clause. (See *People v. Romeo* (2015) 240 Cal.App.4th 931, 955.)

arrest warrant from a pre-existing search clause in a way favoring Defendant.

But while defendant's heavy reliance on this one consideration cited in *Streiff* is understandable, it is still misplaced. As the majority of the Court of Appeal observed, the fact a parole search permits an officer to conduct a search while an arrest warrant compels an arrest (which then permits an officer to conduct a search) is not a sufficiently significant distinction to preclude a court from finding discovery of parole status to be an intervening circumstance supporting application of the attenuation doctrine "where, as here, there is no evidence of flagrant misconduct." (*People v. McWilliams* (Cal. Ct. App., Mar. 8, 2021, No. H045525) 2021 WL 858741, at *11.)

In *State v. Fenton* (Idaho Ct. App. 2017) 413 P.3d 419, the appellate court was also not impressed by the distinction the defendant seeks to draw in the present case. In *Fenton*, the court held discovery of the probation status of an unlawfully detained driver to be an intervening circumstance, notwithstanding the fact that the evidence was discovered during a search by probation officer who had discretion to conduct a search of defendant's vehicle. (*Id.* at pp. 422-423 [and citing to *United States v. Ceccolini* (1978) 435 U.S. 268, 279 for the proposition that a "third party's discretionary act can also constitute an intervening circumstance"].)

Moreover, even if this Court were to ignore the prior reasoning in *Brendlin* and find that there *is* a slightly greater potential for "abuse" when an officer learns he or she has discretion to search (as opposed to when an officer learns there is a court order to make an arrest), this concern with potential police misconduct can be adequately addressed in two ways. First, if the officer is acting in an arbitrary, capricious, or whimsical manner, the evidence will be excluded because a parole

search is invalid in that circumstance. (*People v. Schmitz* (2012) 55 Cal.4th 909, 923.) Second, this concern can be addressed when considering the flagrancy and purposefulness of the officer's conduct when engaging in the search and seizure of a detainee: the third factor in the attenuation analysis. (See *People v. McWilliams* (Cal. Ct. App., Mar. 8, 2021, No. H045525) 2021 WL 858741, at *11-*12; *Strieff*, *supra*, at p. 242.)

Defendant's reliance on this distinction is also misplaced for several reasons *aside from the fact* that it pales in significance to the other common considerations mentioned in *Streiff* for concluding the discovery of the arrest warrant was an intervening circumstance.

First, it is very questionable whether the High Court was particularly concerned with the fact that the warrant mandated an arrest as opposed to merely authorizing an arrest. Consider the structure of the paragraph in *Streiff* from which the defendant seeks to draw sustenance:

> In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." [Citation omitted.] Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, *it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety*. See *Arizona v. Gant*, 556 U.S. 332, 339, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (explaining the permissible scope of searches incident to arrest)." (*Streiff* at pp. 240-241, emphasis added.)

In the first sentence of this paragraph, the *Streiff* Court first explained the *primary* reasons for finding the arrest warrant to be an intervening circumstance: the warrant predated and was unconnected to the arrest and was not otherwise invalid. (*Id.* at p. 240.) Then, *to explain why the search that uncovered the evidence sought to be admitted was valid* (i.e., the ultimate point being made in the last sentence), the High Court identified the arrest warrant as an independently compelled order requiring the ministerial act of arrest – a necessary predicate to the search. The reason the Court included the second through fourth sentences appears largely to provide the necessary linkage to get to the conclusion in the fifth sentence – that the ultimate search was permissible. (*Id.* at pp. 240-241.) This sentiment was echoed later on in the *Streiff* opinion where, after pointing out that while the officer's "decision to initiate the stop was mistaken, his conduct thereafter was lawful," the High Court *again* observed the officer's "actual search of Strieff was a lawful search incident to arrest." (*Id.* at p. 241 [citing *again* to *Arizona v. Gant* (2009) 556 U.S. 332, 339 – a case involving a *warrantless* search].)

Thus, the fact the warrant imposed a duty to arrest primarily became significant in *Streiff* because it provided the officer a reason for conducting a search incident to a custodial arrest.

That the existence of the arrest warrant in *Streiff* is only truly significant due primarily to the fact that it *independently* authorized a custodial arrest is highlighted by considering this Court's decision in *People v. Brendlin* (2008) 45 Cal.4th 262. In *Brendlin*, this Court held discovery of arrest warrant was "an intervening circumstance that tends to dissipate the taint caused by an illegal traffic stop." (*Id.* at p. 271.) The rationale for drawing this conclusion was that "[a] warrant is not reasonably subject to interpretation or abuse [citation omitted] and the

no-bail warrant here supplied legal *authorization* to arrest defendant that was *completely independent* of the circumstances that led the officer to initiate the traffic stop." (*Ibid*, emphasis added.) No mention was made *at all* that the warrant should be deemed an intervening circumstance because it mandated an arrest.

An attenuating circumstance's intervening nature should not (and does not) heavily rest on whether the officers can choose to act pursuant to that circumstance. (See *Johnson* v. *Louisiana* (1972) 406 U.S. 356, 365 [taint of unlawful arrest purged where officers conducted a line-up after defendant had been ordered confined following his court arraignment]; *People v. Boyer* (2006) 38 Cal.4th 412, 449-452 [taint stemming from defendant's unlawful detention purged where defendant refused consent, but stated it was up to his girlfriend and police later asked for and were given consent by girlfriend].)

It is the attenuating circumstance's independence from the illegality that primarily renders it "intervening" and, in the case at bench, it cannot be disputed that the defendant's preexisting parole status was "completely independent of the circumstances leading to" his detention. (*People v. Durant* (2012) 205 Cal.App.4th 57, 66.)

Second, in assessing whether the *Streiff* court was truly more concerned with the mandatory nature of the arrest warrant than with what authorization for a search it provided, look at the nature of the arrest warrant in *Streiff*. The warrant was for a *traffic violation*. (*Streiff* at p. 235.) And an apparently minor traffic violation at that. (See *State v. Strieff* (Utah Ct. App. 2012) 286 P.3d 317, 320, rev'd (2016) 579 U.S. 232 [the warrants check revealed a "small traffic warrant"].)

A search incident to arrest is *not permitted* when the person being "arrested" is not being taken into custody and is merely being

given a citation. (See *Virginia* v. *Moore* (2008) 553 U.S. 164, 177; *People* v. *Macabeo* (2016) 1 Cal.5th 1206, 1219; *In re D.W.* (2017) 13 Cal.App.5th 1249, 1253.)[6]

In California, an arrest warrant in the nature of the traffic warrant in *Strieff* does ***not*** impose a mandatory duty on the officer to even make a custodial arrest. At most, an officer has *discretion* to make a custodial arrest of a detainee who has an outstanding arrest warrant for a misdemeanor or infraction. (See Pen. Code, §§ 853.6(i)(4) [stating

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[6] Although courts often draw a distinction between "citations" and "arrests" when talking about whether a search may be conducted incident to an arrest, "when the officer determines there is probable cause to believe that an offense has been committed and begins the process of citing the violator to appear in court (Veh. Code, ss 40500—40504), an 'arrest' takes place at least in the technical sense: 'The detention which results (during the citation process) is ordinarily brief, and the conditions of restraint are minimal. Nevertheless, the violator is, during the period immediately preceding his execution of the promise to appear, under arrest. (Citations.) Some courts have been reluctant to use the term 'arrest' to describe the status of the traffic violator on the public street waiting for the officer to write out the citation (citations). The Vehicle Code, however, refers to the person awaiting citation as 'the arrested person.'" (*People* v. *Superior Court* (1972) 7 Cal.3d 186, 200.) This type of "arrest" for a minor Vehicle Code violation is considered a "noncustodial" arrest and must "be distinguished in some respects from arrest under other circumstances. Ordinarily, the word 'arrest' implies a sequence of events that begins with physical custody and at least a minimal body search, and concludes with booking and incarceration or release on bail. However, where a minor Vehicle Code violation is involved, the arrest is complete when, after an investigatory stop, 'the officer determines there is probable cause to believe that an offense has been committed and begins the process of citing the violator to appear in court.' (Citation omitted.) This species of arrest does not inevitably result in physical custody and its concomitant, a search." (*People* v. *Monroe* (1993) 12 Cal.App.4th 1174, 1183, fn.5; accord *Henry* v. *County of Shasta* (9th Cir. 1997) 132 F.3d 512, 522.)

officer "shall" release a person arrested for a misdemeanor but stating an officer "may" release a person arrested for a misdemeanor if certain circumstances are present including when there are "one or more outstanding arrest warrants for the person"] and 853.5(a) ["Except as otherwise provided by law, in any case in which a person is arrested for an offense declared to be an infraction, the person *may* be released according to the procedures set forth by this chapter for the release of persons arrested for an offense declared to be a misdemeanor."], emphasis added.)

Third, even when an officer has a mandatory duty to make a custodial arrest, the officer does *not* have a concomitant mandatory duty to conduct a *search* incident to that arrest. It may be "reasonable" to conduct such a search. (See *Chimel v. California* (1969) 395 U.S. 752, 762–763.) It may be a common practice to conduct such a search. It may be unsafe not to conduct such a search. And it may even be negligent for an officer to transport someone to jail without searching the person in advance. But no case has held an officer is either constitutionally or statutorily *required* to conduct a search incident to arrest in whole or part. The decision to search remains discretionary. (See *United States v. Edwards* (1974) 415 U.S. 800, 803 [implicitly recognizing that searches incident to arrest may not be completed at the time of arrest in finding some "searches and seizures that *could* be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention"], emphasis added.) The fact Respondent is forced to characterize an obviously discretionary search as "practically necessary" in order to distinguish it from the search incident to arrest (see RAMB at p. 44) only highlights the point that the *Streiff* court was discussing the mandatory nature of the arrest primarily to establish the search incident to that arrest was *authorized*.

C. Law Enforcement's Discovery of a Detainee's Parole Status is a *More* Compelling Intervening Circumstance than Law Enforcement's Discovery that a Detainee Has an Outstanding Arrest Warrant Because Parolees Have a Severely Reduced Expectation of Privacy that Prevents Them from Being Able to Exclude Evidence of Their Criminality Unless They Have Been Subject to a Search Done for Arbitrary, Capricious, or Harassing Reasons

As discussed above, the fact that the arrest warrant was a pre-existing circumstance *independent of the detention* (a fact that applies equally to parole status) provides the most persuasive reason for treating the discovery of an outstanding arrest warrant as an intervening circumstance. But there is an *additional* and very compelling reason for finding parole status to be an intervening circumstance which is *not* present when the intervening circumstance is mere discovery of an outstanding arrest warrant.[7]

A defendant on parole has a known and significantly diminished expectation of privacy in comparison to a mere arrestee. Subject to the caveat that this dramatically lowered expectation of privacy must be known to an officer, this factor provides a rationale that ***separately***

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[7] It is important to reiterate that while the salient circumstances considered in *Streiff* in deciding whether an arrest warrant is an intervening event can provide some guidance in assessing whether it is reasonable to treat a *different kind* of event as an intervening circumstance, *Streiff* does not dictate those circumstances must be present for an event to be deemed an intervening circumstance or the weight to be given those factors in a different context. For example, most of the factors mentioned in *Streiff* are notably absent when the intervening circumstance in question is the commission of a new crime following an unlawful detention. (See cases cited in this brief, *infra*, at p. 41.) Ultimately, whether a particular intervening circumstance is sufficient to attenuate the connection between unlawful police conduct and the later seizure of evidence must be assessed on its own unique totality of circumstances.

establishes discovery of parole status as an intervening event of greater impact than discovery of a mere arrest warrant. It also justifies treatment of parole status as an intervening event regardless of how much weight the High Court placed on the lack of discretion an officer had in acting upon an arrest warrant in *Streiff* and ***even if*** there were *not* the overwhelming parallels between an arrest warrant and parole status as discussed in this brief, *supra*, at pp. 15-20.

The ultimate touchstone of the Fourth Amendment is reasonableness. (*Lange v. California* (2021) 141 S.Ct. 2011, 2017; *United States v. Knights* (2001) 534 U.S. 112, 118–119; *People v. Schmitz* (2012) 55 Cal.4th 909, 921.) Both the United States Supreme Court and this Court have employed traditional standards of reasonableness to evaluate the constitutionality of searches, including probation and parole searches. [8] (See *Samson v. California* (2006) 547 U.S. 843, 848; *Schmitz*, *supra*, 55 Cal.4th at pp. 921-922; *Knights*, *supra*, 534 U.S. at pp. 118-119; *Reyes*, *supra*, 19 Cal.4th at pp. 750–754.) And "[t]he reasonableness of any search must be considered in

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[8] We recognize the public website of this Court has identified the issue in this case (for purposes of informing the public and press) as encompassing whether a parole *or* probation search condition can serve as an intervening circumstance. (See https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2346436&doc_no=S268320&request_token=NiIwLSEmPkw%2BW1BBSCI9VEJJQFg0UDxTJSBeSzhTMCAgCg%3D%3D.) However, like Respondent, we largely focus our discussion on whether discovery of a detainee's parole status (with its attendant search condition) is an intervening circumstance as that is the intervening circumstance existing in the case at bench. (See RABM, p. 9, fn. 1.) That said, we agree that, notwithstanding the differences between probation and parole (see *People v. Delrio* (2020) 45 Cal.App.5th 965, 975), some of the reasons for or against finding a discovery of a parole search condition to be an intervening circumstance would also bear on whether discovery of a probation search condition should be deemed an intervening circumstance.

the context of the person's legitimate expectations of privacy." (*Maryland v. King* (2013) 569 U.S. 435, 462.)

A parolee has a greatly reduced expectation of privacy that *predates* any search by law enforcement. Not only does the very nature of parole reduce a parolee's expectation of privacy but the regulations subjecting parolees to search by law enforcement "at any time of the day or night, with or without a search warrant or with or without cause" (Pen. Code, § 3067(b)(3)) specifically reduce a parolee's expectation of privacy when it comes to searches of their person or property.

"Parolees are on the 'continuum' of state-imposed punishments. (*Samson v. California* (2006) 547 U.S. 843, 850.) "On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." (*Ibid*; accord *People v. Schmitz* (2012) 55 Cal.4th 909, 921.)

"[P]arole is an established variation on imprisonment of convicted criminals .... The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." (*Samson*, *supra*, 547 U.S. at p. 850.) "In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." (*Ibid*; *Pennsylvania Bd. of Probation and Parole v. Scott* (1998) 524 U.S. 357, 365.)

"[A] State's interest in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." (*Samson v. California* (2006) 547 U.S. 843, 851, 853; see also *People v. Schmitz* (2012) 55 Cal.4th

909, 921 [recognizing "the state's compelling interest to supervise parolees and to ensure compliance with the terms of their release"].)

In California, the extent and reach of the conditions imposed on parolees "clearly demonstrate that parolees . . . have severely diminished expectations of privacy by virtue of their status alone." (*Samson v. California* (2006) 547 U.S. 843, 851, 852.)

Penal Code section 3067, in pertinent part states: (a) Any inmate who is eligible for release on parole pursuant to this . . . shall be given notice that he or she is subject to terms and conditions of his or her release from prison. ¶ (b) The notice shall include all of the following: . . . (3) An advisement that he or she is subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause." (*Ibid.*)

California Code of Regulations, section 2511, in pertinent part, states the notice of parole "shall read as follows: . . . You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer." (*Ibid.*)

Accordingly, "[a] law enforcement officer who is aware that a suspect is on parole and subject to a search condition may act reasonably in conducting a parole search even in the absence of a particularized suspicion of criminal activity, and such a search *does not violate any expectation of privacy of the parolee*." (*People v. Sanders* (2003) 31 Cal.4th 318, 333, emphasis added.)

"The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search condition is to deter the commission of crimes

and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches." (*People v. Sanders* (2003) 31 Cal.4th 318, 333; *People v. Reyes* (1998) 19 Cal.4th 743, 753; see also *People v. Lewis* (1999) 74 Cal.App.4th 662, 671 ["warrantless searches serve a compelling state interest in protecting public safety and ensuring that a parolee is sticking to the straight and narrow life of noncriminality"]; *Samson v. California* (2006) 547 U.S. 843, 851, 853 [quoting a statistical study indicating that "California's parolee population has a 68–to–70 percent recidivism rate"].)[9]

This is not to say that a parolee has *no* expectation of privacy. Parolees still retain a reasonable expectation they will not be subject to searches that are "arbitrary, capricious or harassing", such as when a search is "made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer" (*People v. Reyes* (1998) 19 Cal.4th 743, 752; *People v. Delrio* (2020) 45 Cal.App.5th 965, 972; see also *Samson v. California* (2006) 547 U.S. 843, 851, 856), or when the officer conducting the search has no knowledge of the parole search condition (*In re Jaime P.* (2006) 40 Cal.4th 128, 134).[10] But subject to

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[9] As with probationers, there is a dual concern with parolees: "On the one hand is the hope that he will successfully complete [parole] and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community." (*United States v. Knights* (2001) 534 U.S. 112, 120–121.) However, "the Fourth Amendment does not put the State to such a choice. Its interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on [parolees] in a way that it does not on the ordinary citizen." (*Id.* at p. 121 [bracketed information added].)

[10] "A mere legal or factual error by an officer that would otherwise render a search illegal, e.g., a mistake in concluding that probable

those caveats, a parolee such as the defendant in the instant case has a much more diminished expectation of privacy than a person for whom a mere arrest warrant has issued.

If discovery of an arrest warrant is a hammer that breaks the causal chain between the unlawful detention and the subsequent search, then discovery of parole status is a sledgehammer.

An arrest warrant lets everyone know that there has been a *probable cause* determination by an independent factfinder that a defendant *may* have committed a misdemeanor or felony crime. (See U.S. Const., Amend. IV. ["no warrants shall issue, but upon probable cause"].) In contrast, parole status lets everyone know there has been a "*beyond a reasonable doubt*" determination by an independent factfinder that defendant actually committed a crime, that the crime was a felony, and that the felony was sufficiently serious to merit a sentence to state prison. (See *United States v. Ventresca* (1965) 380 U.S. 102, 108 [noting that there is "a large difference between" proof of guilt and probable cause].)

The expectations of privacy of a person subject to an arrest warrant requiring the person be taken into custody (and thus also potentially subject to a search incident to arrest) *are* somewhat diminished. (See *Birchfield v. North Dakota* (2016) 579 U.S. 438 [136 S.Ct. 2160, 2177 ["once placed under arrest, the individual's expectation of privacy is necessarily diminished"]; *Riley v. California* (2014) 573

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cause exists for an arrest, does not render the search arbitrary, capricious or harassing. . .. It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose, e.g., an officer decides on a whim to stop the next red car he or she sees, that a search based on a probation search condition is unlawful." (*People v. Cervantes* (2002) 103 Cal.App.4th 1404, 1408.)

U.S. 373, 391 ["The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody."].) But the "fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." (*Riley*, *supra*, 573 U.S. at p 392 [and noting that "when 'privacy-related concerns are weighty enough' a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee"].) A person arrested on a warrant may be released from custody shortly thereafter and persons who are released pending trial "have suffered no judicial abridgment of their constitutional rights." (*United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 872.) In contrast, a person subject to a parole condition does *not* retain all their constitutional rights. They may lawfully and repeatedly be subject to suspicionless seizures and/or searches over the course of their years on parole that would otherwise violate the Fourth Amendment.[11]

Lastly, a person who is subject to an arrest warrant may have no subjective expectation that their constitutional rights have been

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[11] Treating discovery of parole status as an intervening event is also consistent with treating commission of a new crime by a detainee after an unlawful detention as an intervening event. (See *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262; *People v. Cox* (2008) 168 Cal.App.4th 702, 705.) A detainee who has previously committed a crime that has resulted in a loss of an expectation of privacy against a seizure or search (i.e., a parolee) is similarly situated to a detainee who commits a crime in front of an officer after an unlawful detention and thus loses an expectation of privacy against an immediate seizure or search. In both circumstances, it is the sudden revelation of that loss of privacy (either as a result of the detainee committing a prior crime or a new crime) that prevents the detainee from excluding evidence of a post-revelation search despite the unlawful detention.

diminished. Whereas a person on parole is keenly aware that they are subject to a diminished expectation of privacy and suspicionless searches and seizures every single day for the entire length of parole so long as the search is not conducted for an arbitrary, capricious, or harassing reasons.

D. Treating Discovery of Parole Status as an Intervening Circumstance is Even *Less Likely* to Encourage Random Stops than Treating Discovery of an Arrest Warrant by Law Enforcement as an Intervening Circumstance

Defendant cites to the decision in *People v. Bates* (2013) 222 Cal.App.4th 60 as "wisely" cautioning that allowing discovery of a probation search clause to serve as an intervening event would "open the door to random vehicle detentions for the purpose of locating probationers having search conditions." (AOBM at p. 14 citing to *Bates*, 222 Cal.App.4th, *supra*, at pp. 70-71; see also AOBM at p. 44.)

But a similar argument was raised by the defense in *Streiff* as a reason for refusing to treat arrest warrants as intervening circumstances and was soundly rejected:

> "Strieff argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. *We think that this outcome is unlikely*. Such wanton conduct would expose police to civil liability. [Citations omitted]. And in any event, the *Brown* factors take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the *Brown* factors could be different. But there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah." (*Strieff*, *supra*, 579 U.S. at p. 243, emphasis added.)

This analysis alone should end the discussion. Still, it is worth pointing out the *rejected* argument had even greater force in *Streiff*

than it has in the case at bench because there are up to *10 times* the number of outstanding warrants in California as there are persons on parole and supervised probation combined.

According to the California Attorney General, there were 183,333 individuals on probation as of December 31, 2020. (See https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Crime%20In%20CA%202020.pdf at p. 58.)[12] According to the California Department of Corrections and Rehabilitation, the projected parole population for Spring of 2021 is 50,793, a number projected to fall to 45,351 in 2022. (See https://www.cdcr.ca.gov/research/ wp-content/uploads/sites/174/2021/05/Spring-2021-Population-Projections.pdf at p. 3.)[13]

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[12] Incidentally, this figure is approximately *one-third* the alleged number of persons on adult supervised probation as reported in *People v. Quinn* (2021) 59 Cal.App.5th 874, 879-880. The erroneous figures in *Quinn* have been relied upon by the dissenting opinion in the Court of Appeal (see *People v. McWilliams* (Cal. Ct. App., Mar. 8, 2021, No. H045525) 2021 WL 858741, at *14 (dis. opn. of Danner, J.) and by the defendant (see AOBM at pp. 47, 55). Moreover, there are reasons even the statistics provided by the Attorney General may overrepresent the number of persons on adult supervised probation. (See https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Crime%20In%20CA%202020.pdf at p. 5.) For example, the statistics may include persons on PRCS. (See this brief, *infra*, at p. 38, fn. 13.) On the other hand, the statistics provided by the Attorney General do not necessarily include persons released on mandatory supervision and this Court has held the "statutory provisions governing mandatory supervision reveals a scheme similar to that governing probationers with respect to the conditions of release." (*People v. Bryant* (2021) 11 Cal.5th 976, 983.)

[13] This figure does not include the number of individuals who are released subject to mandatory search conditions pursuant to their placement on postrelease community supervision (PRCS). (See Pen. Code, §§ 3450, 3453, subd. (f), 3465.) These conditions have been equated to parole search conditions at least regarding the issue of

If the figures provided by the Attorney General are correct, the total number of adults under supervised probation and parole comes to under 240,000 individuals.[14] Meanwhile, according to statistics cited by Justice Kagan in her dissenting opinion in *Streiff*, "[t]he State of California has *2.5 million* outstanding arrest warrants." (*Streiff*, *supra*, 579 U.S. 232 at p. 258 (conc. opn. of Kagan, J.), emphasis added.)[15]

The defendant has argued: "Given the high numbers of persons under parole and probation supervision, the dissent rightly concluded that discovery of a search condition is not comparable to the discovery of an arrest warrant . . ." (AOBM at p. 47.) Defendant's argument is premised on the rationale that because there are a significantly greater number of persons on probation and parole with search clauses than

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whether a searching officer needs to know any more than that a detainee is on PRCS before conducting a search. (See *People v. Douglas* (2015) 240 Cal.App.4th 855.) However, individuals on PRCS may have been included in the Attorney General's statistics on the number of people on probation. (See https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Crime%20In%20CA%202020.pdf at p. 5.)

[14] The number may be misleadingly large since it is only the existence of a probation *search clause* that would be deemed an intervening circumstance and, unlike parolees, persons may be placed on probation without a search clause. (See *People v. Romeo* (2015) 240 Cal.App.4th 931, 951.)

[15] According to the United States Department of Justice Office of Justice Programs Bureau of Justice Statistics, "Survey of State Criminal History Information Systems, 2014," there were 278,337 felony warrants and 780,672 misdemeanor warrants in California. (See https://www.ojp.gov/pdffiles1/bjs/grants/249799.pdf [Table 5a].) Even assuming this figure is more accurate than the statistics cited in Justice Kagan's dissenting opinion, there would still more than four times the number of outstanding arrest warrants in California than there are supervised adults with probation or parole search clauses.

there are outstanding arrest warrants, discovery of parole status or a probation search clause should not be viewed as compelling an intervening circumstance as an outstanding arrest warrant.

However, whatever the precise figures are regarding the number of persons actually subject to parole search conditions (separately or combined with other persons subject to other types of search clauses), that number is certainly *lower than* the number of outstanding arrest warrants in California. Given the analysis of Defendant based on a contrary assumption, Defendant will presumably concede that the fact that there are more arrest warrants than persons with search clauses in California strongly *favors* treating the discovery of a parole or probation search clause as a *more* compelling intervening circumstance than discovery of an arrest warrant.

E. Discovery of Parole Status is No More "Foreseeable" than Discovery of an Arrest Warrant. And, in Any Event, Foreseeability of an Intervening Circumstance is Not the Test for Determining Whether the Intervening Circumstance is Sufficiently "Independent" to Dissipate the Taint of an Unlawful Detention

The defendant raises the idea that a parole search clause is not "independent" of the detention because it is an "eminently foreseeable consequence" of an unlawful detention as it is a police practice to search for such warrant in connection with any stop by the police." (AOBM at p. 14 [quoting from Justice Kagan's *dissenting* opinion in *Strieff* at pp. 2072-2073]; see also AOBM at pp. 38, 46-47, 52-53, 55.) The dissenting justice in the Court of Appeal adopted a similar rationale in support of the conclusion that discovery of defendant's parole status did not break the causal chain. (See *People v. McWilliams* (Cal. Ct. App., Mar. 8, 2021, No. H045525) 2021 WL 858741, at *14 (dis. opn. of Danner, J.) [finding discovery of defendant's parole status did not break

the causal chain because, inter alia, "it was foreseeable that the detention and routine records check could result in discovery that McWilliams was on parole (or probation) and thus subject to a suspicionless search condition, given that more than half a million people are under parole or probation supervision in California."].)

It is also police practice to check to see if a defendant is on parole or probation. (See e.g., *People v. Brown* (1998) 62 Cal.App.4th 493, 495.) However, Justice Kagan's conception of what it means for an intervening circumstance to be viewed as "independent" was rejected by the majority in *Streiff*. The majority in *Streiff* did not dispute that arrest warrants may be prevalent (*id*. at p. 243) but they did not find the "foreseeability" of an arrest warrant being discovered to be of any import. To the contrary, the majority held the arrest warrant was "a critical intervening circumstance that is *wholly independent* of the illegal stop." (*Id*. at p. 242, emphasis added.) The *Streiff* majority could not have reached this conclusion if they had agreed with Justice Kagan's conception of foreseeability that the defendant now asks this Court to adopt. Thus, the fact that it may be a common practice for police to check on a detainee's parole status and there are many people on parole (i.e., making discovery of parole status "foreseeable") is not a valid basis for declining to treat discovery of parole status as an intervening circumstance.

III.
THE CONDUCT OF THE OFFICER IN THE INSTANT CASE WAS NEITHER FLAGRANT NOR PURPOSEFUL AS THOSE TERMS HAVE BEEN CONSIDERED IN *STREIFF*

The third factor in assessing whether to apply the doctrine of attenuation when there has been a violation of the Fourth Amendment is to look at the "purpose and flagrancy of the official misconduct."

(*Streiff*, *supra*, 578 U.S. at p. 241.) The conduct of the officer in the instant case falls squarely outside the realm of what constitutes purposeful and flagrant misconduct as those terms have been construed by the High Court in *Streiff* and thus this factor strongly favors application of the attenuation doctrine in the instant case.

It is difficult to improve upon the succinct and forceful reasoning provided by Respondent for why this factor favors application of the doctrine and admission of the firearm seized in the instant case. (See RABM at pp. 50-52.)[16] We will not reiterate that reasoning. However, here are a few additional reasons for finding the third factor does not favor exclusion of the evidence.

First, as Defendant acknowledges, it appears that the High Court in *Streiff* requires a showing of "systemic or recurrent police misconduct" as opposed to "isolated instance of negligence" before unlawful police conduct will be deemed flagrant. (See AOBM at p. 56; Strieff, supra, at pp. 241-242.) There is no evidence of the former in the instant case.

Second, both the stop in *Streiff* and the stop in the instant case involved engagements made with a relatively light touch by law enforcement. (See *People v. Kasrawi* (2021) 65 Cal.App.5th 751, 763 [rev. granted September 1, 2021, S270040] [although officer did not have sufficient information to justify an investigatory stop, the fact the officer's "approach was assertive enough to make Kasrawi believe he

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[16] We also agree with Respondent's astute analysis of why defendant's attempt to analogize the *post*-search discovery of a search condition to the *pre*-search discovery of a parole search condition is flawed (see RABM at pp. 34-36) as well as why defendant's attempt to treat discovery of evidence in plain view following an unlawful search as akin to discovery of parole status or an arrest warrant is erroneous (*id.* at pp. 36-37).

was not free to leave does not transform this liminal illegal stop into a flagrant abuse of power"].)

Third, the detention in the instant case was, if anything, less "purposeful and flagrant" than that involved in *Streiff*. Unlike the detention in *Streiff*, which was conceded to be unlawful by the State from the very start (see *State v. Strieff* (Utah Ct. App. 2012) 286 P.3d 317, 320), the detention in the case at bench was initially contested and was deemed lawful by one of Santa Clara County's most respected law and motion judges - one deeply versed in Fourth Amendment jurisprudence.

Moreover, in *Streiff*, the officer was clearly seeking to investigate suspected illegal drug activity and had decided well in advance to stop any person leaving a residence - even without determining whether the person was short-term visitor (which made it more likely for the person to have been a recent buyer of drugs) or a long-term visitor. (*Id*. at pp. 235, 241.) In the instant case, the only reason the officer was even in the area was in response to a citizen's call (confirmed at the scene) of persons acting in a manner highly correlated with an intent to burglarize vehicles.

As in *People v. Brendlin* (2008) 45 Cal.4th 262, there was no reason to question the detaining officer's "good faith in pursuing an investigation of what he believed to be [suspicious activity], nor does the record show that he had a design and purpose to effect the stop 'in the hope that something [else] might turn up.'" (*Id*. at p. 271.) Nor is there any evidence at all that the officer "invented a justification" for the stop "in order to have an excuse to [check on defendant's parole status]" or that "a search of the vehicle or its occupants was the 'ultimate goal' of the initial unlawful detention." (*Id*. at p. 272.)

Fourth, the police conduct in the present case is no more flagrant than the conduct of officers in numerous cases that have declined to exclude evidence obtained shortly after unlawful police conduct because of intervening circumstances. (See e.g., *People v. Brendlin* (2008) 45 Cal.4th 262, 268 [discovery of arrest warrant intervening circumstance where traffic stop was unlawful]; *People v. Marquez* (2019) 31 Cal.App.5th 402, 413 [unlawful collection of defendant's DNA evidence was not flagrant violation of Fourth Amendment where officers did not act with improper motive or in inappropriate manner]; *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262 [detainee's decision to commit a new and distinct crime, even if made during or immediately after an unlawful detention, broke the causal link between any constitutional violation and evidence of the new crime]; *People v. Cox* (2008) 168 Cal.App.4th 702, 705 [defendant's subsequent conduct in resisting officers following stop for which there was no reasonable suspicion "was an independent act that dissipated the taint from the unlawful seizure"]; *People v. Prendez* (1971) 15 Cal.App.3d 486, 487-489 [defendant's act in taking flight after an illegal entry into his motel room was an intervening act that permitted use of the evidence seized from him when he was later caught fleeing]; *People v. Guillory* (1960) 178 Cal.App.2d 854, 856 [evidence of attempt to bribe arresting officers after unlawful search and arrest was admissible because bribery attempt was a spontaneous, intervening act].)

And fifth, the defendant's argument that the officer's conduct in the instant case should be viewed as flagrant and purposeful because there is "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" (Appellant's Reply Brief on the Merits [hereafter "ARBM"] at p. 29) is premised on base speculation.

Although in his Opening Brief on the Merits, Defendant acknowledged that, "he could not demonstrate, on the current record, racial bias, implicit or explicit, played a part in the course of action undertaken by the" officer (*id.* at p. 67), in his Reply Brief on the Merits [hereafter "ARBM"], Defendant asserts there is a "strong suggestion that the detention in the present case was, at least in part, a product of implicit racial profiling that should not be ignored by this Court, as it has been by respondent" (*id.* at p. 29).

While instances of racial bias in the criminal justice system should not be, and are not, tolerated (see *Whren v. United States* (1996) 517 U.S. 806, 813 [the "Constitution prohibits selective enforcement of the law based on considerations such as race"]), it appears Defendant is asking this Court to find the alleged "widespread effect of implicit racial bias on law enforcement officers" (AOMB at p. 24) should, by itself, give rise to a "fair inference that this factor played a part" (*id.* at p. 24) in the detention whenever a detainee is African-American irrespective of the absence of any actual evidence that race played any role in an encounter.[17] Under the circumstances, this request should be rejected.

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[17] Defendant highlights the lack of any such evidence in this case by asking this Court to reach his desired result based only on "the *specter* of implicit bias and profiling" (ARBM at p. 23; emphasis added), the "*inference*" that the officer's "roust of McWilliams from his car was motivated by racial bias, implicit or otherwise" (*id.* at p. 29; emphasis added), the "*circumstantial evidence…supporting an inference* that [the officer] would have known that appellant…was Black when he ordered him out of the car," (*ibid.*; emphasis added), the "*fair likelihood*" (as suggested in his opening brief) that the officer would have "done nothing" or made a consensual encounter if the occupant of the car had been White (*id.*; emphasis added) and the "strong *suggestion*" that the detention was based, "at least in part," on implicit racial profiling (*id.*; emphasis added).

IV.
CONCLUSION

In light of the similarities between the most salient characteristics of parole status and arrest warrants, it is not correct to draw a distinction between a search stemming from an officer's voluntary decision to conduct a search incident to a nondiscretionary arrest based on an outstanding warrant and a search stemming from an officer's voluntary decision to conduct a search based on a nondiscretionary reduction in privacy imposed by the state. And when the similarities between discovery of an arrest warrant and parole status are coupled with recognition of the characteristics that render discovery of a search condition a *more* compelling intervening circumstance than an arrest warrant, we respectfully assert the issue is not a close one. The decision of the Court of Appeal should be upheld.

Dated: March 11, 2022

Respectfully submitted on behalf of the

JEFFREY F. ROSEN
Santa Clara County District Attorney

By:

Jeff H. Rubin,
Deputy District Attorney
Santa Clara County District Attorney's Office

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rules 8.486(a)(6) and 8.204(c), I certify that this brief has been prepared using 13-point Georgia font and contains 10,108 words, inclusive of footnotes, but excluding table, covers, and this certificate. I have relied on the word count feature and other features of Microsoft Word, the computer program used to author this brief, for certification.

March 11, 2022

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March 16, 2022

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent **v.** **DUVANH ANTHONY McWILLIAMS** Defendant and Appellant	Case No. S268320

RE: REQUEST TO FILE ERRATA TO AMICUS BRIEF IN QUALIFIED SUPPORT OF RESPONDENT

TO: THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

The Santa Clara County District Attorney's Office (hereafter "Amicus") requests permission to file an errata to one sentence appearing on page 26 of the Amicus Brief. The last sentence on page 26 currently reads:

"The fact Respondent is forced to characterize an obviously discretionary search as "practically necessary" in order to distinguish it from the search incident to arrest (see RAMB at p. 44) only highlights the point that the *Streiff* court was discussing the mandatory nature of the arrest primarily to establish the search incident to that arrest was authorized."

The words highlighted in red should be replaced with the following words: "a parole search".

If this Court would prefer to have the errata in the brief itself, Amicus asks the Court to strike the Amicus Brief and permit the filing of an Amended Amicus Brief containing the errata.

Sincerely,

/s/ Jeff Rubin
JEFF RUBIN
Deputy District Attorney

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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3/11/2022
Date

/s/Kaci Lopez

Signature

Lopez, Kaci (173659)

Last Name, First Name (PNum)

Santa Clara County Office of the District Attorney

Law Firm