IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. DUVANH ANTHONY MCWILLIAMS, Defendant/Appellant.	No. S268320 Court of Appeal No. H045525 Santa Clara Co. No. C1754407

BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANT / APPELLANT

Santa Clara County Superior Court
Hon. David A. Cena, Judge
Hon. Eric Geffon, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

CERTIFICATE OF INTERESTED PARTIES
(California Rules of Court, Rules 8.208 and 8.488)

The potential interested entities or persons are:

Name of Interested Entity or Person	Nature of Interest
Duvanh Anthony McWilliams through counsel William M. Robinson	Defendant / Appellant
Santa Clara County District Attorney	Amicus Curiae for Respondent
Attorney General, State of California	Plaintiff / Respondent
Santa Clara County Superior Court Honorable David A. Cena, Judge Honorable Eric Geffon, Judge	Respondent Court

Dated: April 8, 2022

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. DUVANH ANTHONY MCWILLIAMS, Defendant/Appellant.	No. S268320 Court of Appeal No. H045525 Santa Clara Co. No. C1754407

BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANT / APPELLANT

The Orange County Public Defender's Office, by and through counsel, hereby submits this Brief of Amicus Curiae in Support of Appellant.

INTRODUCTION

Two issues are to be resolved. First, is the discovery of a parole or probation search condition an intervening circumstance that removes the taint of an illegal detention under the attenuation doctrine? The answer is: no. Second, what constitutes

purposeful and flagrant police misconduct under the attenuation doctrine analysis? The answer is: the officer's decision to make the most of his unlawful intrusion.

STATEMENT OF INTEREST

The Orange County Public Defender's Office is a public agency charged with the legal representation of indigent criminal defendants in California's second most populous county. The Office consists of approximately 200 attorneys dedicated to the vigorous and competent representation of criminal defendants in the Superior Court, Court of Appeal, and California Supreme Court.

This case concerns the circumstances upon which the attenuation doctrine eviscerates the exclusionary rule. Counsel for Amicus Curiae is familiar with the issues, has read the Appellant's Opening Brief on the Merits, Respondent's Answer Brief on the Merits, Appellant's Reply Brief on the Merits, and the Santa Clara County District Attorney's Application for Leave to File and Amicus Curiae Brief in Qualified Support of Respondent. The Orange County Public Defender's Office has an interest in the matter because the outcome will likely affect a large number of criminal cases in Orange County.

POINTS, AUTHORITIES, AND ARGUMENT

I.
DISCOVERY OF A PAROLE OR PROBATION SEARCH CONDITION IS NOT AN INTERVENING CIRCUMSTANCE THAT REMOVES THE TAINT OF AN ILLEGAL SEARCH AND SEIZURE UNDER THE ATTENUATION DOCTINE

The Fourth Amendment draws a clear line between searches with a warrant and searches without. The general rule is that all evidence obtained as a result of an illegal search or seizure is excluded from evidence at the trial of the accused. (Segura v. U.S. (1984) 468 U.S. 796, 804.) The United States Supreme Court has articulated an exception to this rule when the government has a warrant, even if the officer conducting the search was initially unaware of the warrant. (See People v. Brendlin (2008) 45 Cal.4th 262 (Brendlin); Utah v. Strieff (2016) 579 U.S. 232 (Strieff).)

Here, amicus counsel for respondent asks this Court to expand the exception to include a "pre-existing" condition; namely, the condition of parole status. The argument has no support in Fourth Amendment jurisprudence and such a ruling would cross the bright line drawn by the Fourth Amendment itself: the requirement of a warrant.

Ignoring the warrant requirement would begin the slippery slope towards allowing the exception to swallow the rule. The reality is that nearly every crime "pre-dates" or "pre-exists" the illegal search or seizure that uncovers it. Those crimes that "post-exist" the illegal search or seizure, such as resisting arrest, are already excepted by attenuation doctrine precedent. If, in this case, appellant had contraband in plain view inside his car, would

his illegal detention be attenuated by discovery of the "pre-existing" contraband? After all, as amicus in support of respondent argues, the exclusionary rule is applicable only where its deterrence benefit outweighs its societal costs. (Amicus Brief for Respondent at p. 14.) If the contraband were a deadly weapon, that could have substantial costs to society. Maybe the fact that the weapon "pre-dated" the illegal seizure serves to nullify the illegal conduct of the officer? Not so.

The Fourth Amendment, however, does not provide for a right of the government to introduce evidence it discovers at the trial of an accused. Rather, it provides that "the right of the People to be secure in their persons, houses, papers, and effects ... shall not be violated." (U.S. Const., 4th Amend.) The Framers recognized that the greater danger is not crime by the People, but crime by the Government against the People.

The Fourth Amendment is not result oriented. It is not a sliding scale where the government misconduct is weighed against the misconduct of the accused. (See Thompson v. Louisiana (1984) 469 U.S. 17 [holding there is no "murder scene" exception to the warrant requirement of the Fourth Amendment.].) The question to be resolved is whether discovery of the parole search condition is independent or dependent of the admittedly illegal conduct of the officer in this case. Here, discovery is inextricably intertwined with the officer's misconduct because it is the same officer making both decisions. Application of the attenuation doctrine would swallow the exclusionary remedy for Fourth Amendment violations.

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it." (Herring v. U.S. (2009) 555 U.S. 135, 144, italics added.) "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or is some circumstances recurring or systematic negligence." (Id. at p. 136, italics added.)

Here, Officer Croucher's actions were deliberate. Moreover, the record on appeal does reveal "recurring or systematic police misconduct" (see Strieff, supra, 579 U.S. at p. 233). Officer Croucher admitted that he orders most people connected to a "suspicious vehicle" and most people during "car stops" to get out of the car because "[he has] no idea who this person is." (2RT: 312.) While appellant did not litigate any prior history of illegal search or seizure by Officer Croucher, Fourth Amendment jurisprudence has never required a defendant to present evidence of an officer's detentions of other persons in order to establish a violation that triggers the exclusionary rule.[1]

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[1] The Legislature in California has since declared that recurring and systematic discrimination against Black persons is in fact occurring throughout the criminal justice system, not just in San Jose but throughout California, in its passage of the Racial Justice Act of 2020 [Assemb. Bill 2542].

Additionally, the San Jose Police Department, which employs the officers at issue, has a history of significant disproportionately detaining and searching Blacks and Latinos. (Salonga, Robert, SJPD Data Show San Jose Cops Detained Greater Percentage of Blacks, Latinos (May 9, 2015) The Mercury News, <https://www.mercurynews.com/2015/05/09/sjpd-data-show-san-jose-cops-detained-greater-percentage-of-blacks-latinos/> (as of April 6, 2022).) These findings were based on data obtained from the San Jose Police Department for the year 2014. (Ibid.) "Blacks and Latinos comprise slightly more than a third of the population

The stark difference between Strieff and this case is the involvement of judicial review. In Strieff, a court had made a determination of probable cause for arrest and issued a warrant. "A warrant is a judicial mandate to conduct a search or make an arrest." (Strieff, supra, 579 U.S. at p. 240, quoting U.S. v. Leon (1984) 468 U.S. 897, 920.) An officer acting on a warrant is

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of San Jose, yet they made up nearly two-thirds of the traffic stops in 2014….Once stopped, blacks and Latinos were significantly more likely to be ordered out of their vehicles, frisked and have their cars searched. While few searches turned up evidence, whites were slightly more likely to be carrying drugs or other contraband than blacks or Latinos." (Ibid.)

This is no anomaly in San Jose. A broader study available on the SJPD website revealed that:

- Latino motorists were between 1.7 and 2.6 times more likely to be stopped by police.
- Black motorists were between 1.6 and 1.9 times more likely to be stopped by police.
- Black citizens were 2.8 times more likely than White citizens to be curb sat after a stop.
- Black citizens were 9.0 times more likely and Latino citizens were 3.4 times more likely to experience a field interview following a vehicle stop.
- Black citizens were 2.0 times and Latino citizens were 1.7 times more likely to be searched compared to White citizens.

(Smith, Michael R and Jeff Rojek, San Jose Police Department Traffic and Pedestrian Stop Study (Jan. 18, 2017) University of Texas at El Paso Center for Law and Human Behavior <https://www2.sjpd.org/records/UTEP-SJPD_Traffic-Pedestrian_Stop_Study_2017.pdf> (as of April 6, 2022).)

A 2005-2006 Santa Clara County Civil Grand Jury Report found that complaints about racial profiling by SJPD were "legitimate" (at p. 1) and that SJPD disproportionately arrested Black and Hispanic citizens compared to their presence in the population (at p. 3). (May 1, 2006, available at <https://www.scscourt.org/court_divisions/civil/cgj/2006/RacialProfilingSJPD.pdf> (as of April 6, 2022).)

conducting a ministerial act; an officer deciding to conduct a parole search is a matter of discretion.

The Court in Strieff commented that the officer was not conducting a suspicionless fishing expedition (Strieff, supra, 579 U.S. at p. 233), but here, that is exactly what Officer Croucher did.

II.
AN OFFICER'S DECISION TO MAKE THE MOST OF HIS UNLAWFUL INTRUSION IS INTENTIONAL AND FLAGRANT

What constitutes purposeful and flagrant police misconduct under the attenuation doctrine analysis? The answer is the officer's decision to make the most of his unlawful intrusion. As described by the Supreme Court in Brown v. Illinois (1975) 422 U.S. 590, 605, it is "a quality of purposefulness" towards investigation of an unknown crime. It is acting on a hunch, which is an illegal purpose under Fourth Amendment jurisprudence.

Here, respondent concedes, and all members of the Appellate Court panel correctly concluded, that the officers unreasonably detained appellant, who is Black. First, Officer Croucher intentionally decided to park two car lengths behind appellant in his vehicle.[2] Second, Officer Croucher intentionally illuminated appellant's car with a spotlight. Third, within 30 seconds a second patrol car intentionally arrived. Fourth, officer Dewberry approached and stood a couple of feet from Officer Croucher,

[2] Purposeful is synonymous with intentional. While the record may not contain direct evidence that the officers acted "on purpose," it was the People's burden to produce evidence that the officer's actions were not volitional. In the absence of such evidence, this Court must accept that the officers were human beings capable of intentional acts.

intentionally demonstrating the superior position of the officers over appellant. Fifth, Officer Croucher intentionally used a raised voice. Sixth, Officer Croucher intentionally ordered appellant out of the car. Seventh, Officer Croucher intentionally ordered appellant to walk towards his patrol car. Eighth, Officer Croucher intentionally instructed appellant to produce his identification. Ninth, Officer Croucher intentionally demanded appellant to retrieve his identification from the car. Tenth, Officer Croucher intentionally took possession of appellant's identification. Eleventh, Officer Croucher intentionally took appellant's property to his own patrol car while appellant waited outside. Twelfth, Officer Croucher intentionally used the information he illegally obtained through his unlawful demand of appellant's identification, and intentionally used the ill-gotten information from it to search against police records by intentionally transmitting the information to police dispatch.

Only after these twelve Constitutional violations did Officer Croucher learn that appellant was on parole with a search condition. Upon learning of the search condition, Officer Croucher made a decision to conduct a further intrusion of appellant's privacy without a warrant. (See U.S. Const., 4th Amend., [stating in relevant part "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."].) Here, all parties appear to be in agreement that the unreasonable seizure and search had already occurred.

Since Officer Croucher was not investigating a crime, what was he doing? There can only be one answer: he was fishing. He was making the most of his position of power under the color of authority. It is not surprising that this fishing expedition occurred to appellant, a Black man. Racial disparities are apparent in who the police choose to stop. (See generally, Pierson et al., A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States (July 2020) Nature Human Behavior, Vol. 4, 736-745, <https://www.nature.com/articles/s41562-020-0858-1> (as of April 7, 2022). Officer Croucher was exploiting his authority to unlawfully investigate a Black man who he had no reason to believe was on parole.

It was not just happenstance that a police officer for the City of San Jose was violating the rights of a Black man. According to the 2020 census, Black people make up 7.1% of California's population, and only 3.2% of the population of Santa Clara County.[3] Yet, Black people account for 25.5% of California's parolee population according to the California Department of Corrections and Rehabilitation.[4] The odds were in Officer Croucher's favor that, if he illegally detained a Black man, he could exploit the situation since there was a decent chance that it would turn out that the person would be on parole. Racial

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[3] <https://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html#:~:text=Population%20(up%207.4%25%20to%20331.4,or%20More%20Races%2010.2%25).> (as of April 6, 2022).

[4] <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/11/201912_DataPoints.pdf> (as of April 6, 2022).

profiling was apparent in this case, and the exploitation was conducted in a manner that was obvious to appellant's trial attorney, to appellant's counsel on appeal, to the Attorney General, to the Appellate Court panel, and presumably to the Santa Clara District Attorney who decided to not address the issue of race in their amicus curiae brief. The impact of racial profiling raised by appellant in his Opening Brief is an important factor that must be considered when determining the flagrancy of the police misconduct. (Appellant's Opening Brief ["A.O.B."] at pp. 9-10.)

The Legislature in California declared that all persons operate with implicit bias.

> The Legislature has acknowledged that all persons possess implicit biases (Id. at Section 1(a)(1)), that these biases impact the criminal justice system (Id. at Section (1)(a)(5)), and that negative implicit biases tend to disfavor people of color (Id. at Section (1)(a)(3)-(4)).

(Assembly Bill 2542, § 2(g).)

Having recognized the implicit bias, Officer Croucher's actions make clear that racial profiling occurred in this case.

III.
THE IMPORTANCE OF IMPLICIT RACIAL BIAS IS SUPPORTED BY THE LEGISLATIVE ENACTMENT OF THE CALIFORNIA RACIAL JUSTICE ACT OF 2020

If this court holds that the attenuation exception justifies the search of appellant, the holding will not just permit the evidence in this case – it will permit it in every future instance where an officer finds someone suspicious due to the person's race, so long as the person is later discovered to be on parole or probation. The

connection between the person's race and the search will not be attenuated, it will be enhanced, because it is the same officer engaging in both the decision to detain and the decision to search. These things are directly connected, unlike when a neutral and detached magistrate issues an arrest warrant.

After this case was fully briefed for the Court of Appeal, the California Legislature enacted the California Racial Justice Act of 2020 ("RJA"), which was intended to combat the racial disparities within our criminal justice system. (Assembly Bill 2542.) An inherent part of our criminal justice system is policing and the methods and manners by which that is accomplished.

It is instructive to look at the explicit findings and declarations made by the Legislature when the RJA was enacted. For example;

> Discrimination in our criminal justice system based on race, ethnicity, or national origin (hereafter "race" or "racial bias") has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole. The United States Supreme Court has said: "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." (Rose v. Mitchell, 443 U.S. 545, 556 (1979) (quoting Ballard v. United States, 329 U.S. 187, 195 (1946))). The United States Supreme Court has also recognized "the impact of … evidence [of racial bias] cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses." (Buck v. Davis, 137 S. Ct. 759, 777 (2017)). Discrimination undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under law.

(Assem. Bill 2542, § 2(a).)

As aptly noted, some toxins can be deadly in small doses – and racial profiling, which leads to unlawful detentions, certainly deprives those profiled of equal justice and protection under the law - even when it is later discovered that the person is on parole. What happens to those illegally detained and unlawfully searched who are not subject to such conditions? The public indignity of being subjected to police detainment at the side of the road cannot be condoned on the basis that, in this instance, the police happened to later learn of a lawful reason to intrude upon appellant's privacy.

Unfortunately, "even though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms." (Assem. Bill 2542, § 2(c), italics added.) The Legislature also acknowledged that "[e]ven when racism clearly infects a criminal proceeding…proof of purposeful discrimination is often required, but nearly impossible to establish." (Ibid., italics added.) Furthermore, "current law, as interpreted by the courts, stands in sharp contrast to this Legislature's commitment to 'ameliorate bias-based injustice in the courtroom." (Id. at subdivision (g).)

Thus, the RJA creates an evidentiary presumption that all persons are acting with implicit bias. The enactment of the RJA is recognition that targeting of persons of color for unlawful police detentions is unacceptable. Therefore, the happenstance of finding a search condition after an unlawful and prolonged detention, particularly one of a Black man, does not attenuate the illegality

and the fruits of that unlawful detention must be suppressed. (See People v. Bates (2013) 222 Cal.App.4th 60, 70.)

In a separate bill enacted into California law and effective as of January 1, 2021, "the Legislature [found] that requiring proof of intentional bias renders [court] procedure ineffective." (Assem. Bill 3070.) While Assembly Bill 3070 addresses unlawful discrimination during jury selection, it also evinces the codification of the fact of pervasive discrimination in the criminal justice system and the intent of the Legislature to eliminate it. But, bias and stereotype don't first infect a case at the time a jury is selected. Bias and stereotype exist when an officer illegally detains a person in the first place. It exists when an officer makes a decision to run a records check on a detainee. It exists when an officer makes the decision to search. It is exactly these pernicious consequences that historically have been simultaneously prohibited by the Constitution and yet tolerated by the courts.

In fact, the Legislature's renunciation of bias could not be any more clear: "We cannot simply accept the stark reality that race pervades our system of justice. Rather, we must acknowledge and seek to remedy that reality and create a fair system of justice that upholds our democratic ideals." (Assem. Bill 2542, § 2(b).)

As pointed out by Justice Sotomayor in her dissent in Strieff, "We also risk treating members of our communities as second-class citizens." (Strieff, supra, 579 U.S. at p. 252 (dis. opn. of Sotomayor, J.).)

> But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, The New Jim

> Crow 95–136 (2010). For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, e.g., W.E.B. Du Bois, The Souls of Black Folk (1903); J. Baldwin, The Fire Next Time (1963); T. Coates, Between the World and Me (2015).

(Strieff, supra, (2016) 579 U.S. at p. 254 (dis. opn. of Sotomayor, J.).)

The Legislature has made clear its intent to eliminate "racially discriminatory practices in the criminal justice system, in addition to intentional discrimination." (Assem. Bill 2542, § 2(j), italics added.)

> (g) The Legislature has acknowledged that all persons possess implicit biases (Id. at Section 1(a)(1)), that these biases impact the criminal justice system (Id. at Section (1)(a)(5)), and that negative implicit biases tend to disfavor people of color (Id. at Section (1)(a)(3)-(4)). In California in 2020, we can no longer accept racial discrimination and racial disparities as inevitable in our criminal justice system and we must act to make clear that this discrimination and these disparities are illegal and will not be tolerated in California, both prospectively and retroactively.
> (h) There is growing awareness that no degree or amount of racial bias is tolerable in a fair and just criminal justice system, that racial bias is often insidious, and that purposeful discrimination is often masked

> and racial animus disguised. The examples described here are but a few select instances of intolerable racism infecting decisionmaking in the criminal justice system. Examples of the racism that pervades the criminal justice system are too numerous to list."
> (i) It is the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California. Implicit bias, although often unintentional and unconscious, may inject racism and unfairness into proceedings similar to intentional bias. The intent of the Legislature is not to punish this type of bias, but rather to remedy the harm to the defendant's case and to the integrity of the judicial system. It is the intent of the Legislature to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing. It is the intent of the Legislature to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them.

(Assem. Bill 2542, § 2(g)-(i).)

The RJA requires the Court view a record from a different perspective. Facts to be considered are not just the words in the court reporter's transcript, but also the facts as recognized by the Legislature. The facts in this case establish the necessity for application of the exclusionary rule. The promise of the Fourth

Amendment will never be realized if the courts merely look upon the practice of discrimination with eyes closed.

CONCLUSION

For the reasons stated herein, amicus in support of appellant requests the Court hold the attenuation doctrine does not apply to discovery of a parole search condition following an illegal detention.

Dated: April 8, 2022

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief has been prepared using 13 point Century Schoolbook typeface. The text of the Brief of Amicus Curiae consists of 4,602 words as counted by Microsoft Word word processing program, up to and including the signature line following the conclusion of the brief.

I declare under penalty of perjury that this Certificate of Compliance and correct and that this declaration was executed on April 8, 2022.

Adam Vining

ADAM VINING
Assistant Public Defender

DECLARATION OF SERVICE

People v. Duvanh Anthony McWilliams, Supreme Court Case No. S268320:

STATE OF CALIFORNIA)
)ss
COUNTY OF ORANGE)

Kyle Buller declares that she is a citizen of the United States, a resident of Orange County, over the age of 18 years, not a party to the above-entitled action and has a business address at 801 Civic Center Dr. W., Suite 400, Santa Ana, California 92701.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 8th day of April, 2022, at Santa Ana, California.

Kyle Buller
Kyle Buller
Orange County Public Defender's Office

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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4/8/2022

Date

/s/Kyle Buller

Signature

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