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No. S268320

In the Supreme Court of the State of California

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

v.

DUVAHN ANTHONY MCWILLIAMS,
Defendant-Appellant.

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

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May 10, 2022

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INTRODUCTION

The parties in this case have submitted briefs agreeing that this Court should reverse the Court of Appeal's judgment. Appellant Duvahn McWilliams primarily argues that the discovery of a parole search condition during an unlawful detention can *never* attenuate the taint of that detention. The Attorney General, on the other hand, contends that such a discovery *can* attenuate the taint but only in rare circumstances that are not present in this case, such as when a sizable temporal gap separates the parole search from the detention.

The Orange County Public Defender's Office (the "Public Defender") has filed an amicus brief nominally in support of McWilliams's position. The Santa Clara County District Attorney's Office (the "District Attorney"), on the other hand, has filed a brief contending that this Court should affirm the judgment below because the discovery of a parole search condition is sufficiently analogous to the discovery of an arrest warrant under *Utah v. Strieff* (2016) 579 U.S. 232 to have attenuated the taint of the unreasonable detention on the subsequent search in this case. In sum, the briefing presents this Court with three distinct approaches to the attenuation question: (1) McWilliams's (and the Public Defender's nominal) position that discovery of a parole search condition can never justify attenuation; (2) the Attorney General's position that such a discovery can justify attenuation but to a lesser extent than would discovery of an arrest warrant (the "reduced-force" approach); and (3) the District Attorney's position that the discovery of a parole search condition is at least as strong an

attenuating circumstance as discovery of an arrest warrant (the "equivalency" approach).

For the reasons stated *post*, the approaches advanced by the amicus briefs are not persuasive. Although discovery of a parole search condition can in rare cases result in attenuation, this is not one of those cases because the parole search of McWilliams's vehicle occurred incident to his detention and no other comparable mitigating factor existed to justify attenuation. The Court of Appeal's judgment should be reversed.

ARGUMENT

I. THE PUBLIC DEFENDER DOES NOT OFFER NEW ARGUMENTS OR AUTHORITIES SUPPORTING A CATEGORICAL RULE AGAINST ATTENUATION IN ALL INSTANCES

The Public Defender seems to advocate for a categorical rule with the argument title, "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 doctrine." (Public Defender ACB 8.) Nevertheless, the contents of that section make a fact-specific argument that the discovery of McWilliams's parole search condition did not warrant attenuation under the particular circumstances of this case—an argument consistent with the Attorney General's position. (Public Defender ACB 8-12.) And more generally, the Public Defender's brief makes two observations echoing points the Attorney General has made in arguing for the reduced-forced approach: that the discretionary nature of a parole search makes the officer more responsible for executing that search than the officer would be for executing and searching incident to an arrest

warrant (compare Public Defender ACB 11-14 with ABM 43-45) and that the burden of expanding *Strieff* to shrink Fourth Amendment protections risks falling disproportionately on communities of color (compare Public Defender ACB 14-21 with ABM 46-47). In sum, while the Public Defender has provided reasons why the discovery of a parole search condition should have less attenuating force than the discovery of an arrest warrant—and why the attenuating force was insufficient in this particular case—it has not explained why the discovery of a parole search condition never has any attenuating effect.

II. THE DISTRICT ATTORNEY'S BRIEF DOES NOT PROVIDE PERSUASIVE REASONS TO ADOPT A CATEGORICAL RULE EQUATING THE DISCOVERY OF A PAROLE SEARCH CONDITION WITH THE DISCOVERY OF AN ARREST WARRANT IN ALL INSTANCES

In the answer brief on the merits, the Attorney General explained that *Strieff* employed two rationales in explaining why discovery of an arrest warrant is a strong causally disruptive circumstance for purposes of the attenuation doctrine: (1) the issuance of the warrant is an antecedent decision by a neutral magistrate that independently permits an officer's search of the defendant (the "independence rationale"); and (2) the warrant compels the officer to arrest the defendant rather than leaving it to the officer's discretion to do so (the "ministerial rationale"). (ABM 20, 40-45.) The District Attorney offers numerous arguments why—contrary to the Attorney General's position—the ministerial rationale is insignificant in according causally disruptive force to an arrest warrant, thus rendering discovery of a parole search condition at least as strong of an attenuating

event as discovery of an arrest warrant. (District Attorney ACB 15-38.) As explained *post*, none of the District Attorney's arguments is ultimately persuasive. [1]

The District Attorney first attempts to amplify the relative importance of the independence rationale by fracturing it into six distinct rationales: the antecedent nature of an arrest warrant, the validity of the warrant, its ability to independently justify a search, the lack of connection to any subsequent volitional act by the defendant, that the warrant allows a Fourth Amendment intrusion, and that the warrant reflects probable cause to believe that the arrestee has committed a crime. (District Attorney ACB 16-20.) As an initial matter, the differences between a number of these separately articulated rationales appear illusory—for example, observing that an arrest warrant independently justified a search (District Attorney ACB 17) assumes that the warrant is valid in the first place (District Attorney ACB 17) and seems synonymous with observing that the warrant justifies a Fourth Amendment intrusion (District Attorney ACB 18). More fundamentally, however, the District Attorney's attempt to expand the independence rationale does not square with *Strieff*'s own terse discussion of that rationale in a

[1] The balance of the District Attorney's brief argues in harmony with the Attorney General's position that Officer Croucher's conduct was not sufficiently purposeful or flagrant to preclude attenuation if discovery of a parole search condition *were* deemed to have at least as much causally disruptive force as discovery of an arrest warrant. (Compare District Attorney ACB 38-42 with ABM 50-52.)

unitary way. (*Strieff*, *supra*, 579 U.S. at p. 240 ["In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop"].)

The District Attorney conversely attempts to minimize the importance of the ministerial rationale, citing *State v. Fenton* (Idaho Ct.App. 2017) 163 Idaho 318. (District Attorney ACB 21.) *Fenton* noted that *People v. Bates* (2013) 222 Cal.App.4th 60 and *People v. Durant* (2012) 205 Cal.App.4th 57 disagreed over the causally disruptive strength of the discovery of a probation search condition. But the Idaho court did not take sides in that disagreement. (*Fenton*, at pp. 320-321 & fn. 2.) And *Fenton* specifically did not pass judgment on the comparative importance of the independence and ministerial rationales. *Fenton* instead based its holding of attenuation on the lack of flagrant or purposeful conduct by the detaining officer, who stopped the defendant's vehicle based on repeated innocent miscommunications with the dispatcher and who called the defendant's probation officer to execute a probation search. (*Id.* at p. 322.) That conduct is less purposeful than Officer Croucher's unilateral decision here to execute a parole search after unreasonably detaining McWilliams. Thus, *Fenton* does not support the equivalency approach.

The District Attorney further attacks the importance of the ministerial rationale by parsing the relevant language in *Strieff*, interpreting that language as only *incidentally* noting the mandate to execute an arrest warrant as part of the explanation that an arrest warrant independently authorizes a warrantless

search. (District Attorney ACB 22-23, citing *Strieff*, *supra*, 579 U.S. at pp. 240-241.) But if that hypothesis were true, *Strieff* would not have needed to stress the mandatory nature of an arrest warrant at all; *Strieff* could have simply explained in a single sentence that an arrest warrant authorizes a search incident to that arrest. Instead, *Strieff* emphasized that the agent in that case "had *an obligation to arrest*" the defendant. (*Strieff*, at p. 240, italics added; see also *ibid.* ["'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'"].) And *Strieff*'s statement that "Officer Fackrell's arrest of Strieff thus was a *ministerial act that was independently compelled* by the pre-existing warrant" illustrates that both the independence and the ministerial rationales played an important role in its reasoning. (*Strieff*, at p. 240, italics added.)[2]

The District Attorney next observes that not all arrest warrants are ministerial, but he does not explain why that observation cuts in favor of the equivalency approach. (District Attorney ACB 24-26.) As discussed *ante*, discovery of the arrest warrant in *Strieff* resulted in attenuation because it met both the independence *and* the ministerial rationales. Consequently,

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[2] As noted in the answer brief (ABM 40-43), the Attorney General does not dispute the District Attorney's observation that this Court's pre-*Strieff* decision in *People v. Brendlin* (2008) 45 Cal.4th 262 supported the majority's conclusion below (District Attorney ACB 23-24); this case simply presents the Court with the opportunity to refine its reasoning in *Brendlin* in light of the United States Supreme Court's reasoning in *Strieff*.

Strieff's treatment of the warrant in that case would not necessarily extend to arrest warrants that do *not* mandate arrest.[3] The District Attorney provides no support for its apparent assumption to the contrary.

Additionally, the District Attorney argues that the ministerial rationale cannot be significant because "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." (District Attorney ACB 26.) As noted in the answer brief, however, the United States Supreme Court has repeatedly recognized the de facto necessity of a search incident to arrest for officer safety reasons. (ABM 44-45.) The District Attorney simply dismisses this point without confronting it or explaining how a parole search is necessitated by officer safety or any similar exigency. (District Attorney ACB 26.) In contrast to an arresting officer—who must confront the real risk that the arrestee could resist the arrest and pose a danger to the officer—Officer Croucher did not face any exigency prompting him to immediately search McWilliams.

The District Attorney further contends that satisfying the ministerial rationale is unnecessary to deter officer misconduct because the third factor in the analysis under *Brown v. Illinois* (1975) 422 U.S. 590—the flagrancy and purposefulness of the

[3] The Kansas Supreme Court appears to have reached a similar conclusion in *State v. Christian* (2019) 310 Kan. 229, which distinguished the warrant in *Strieff* from a discretionary arrest for failure to provide proof of insurance. (*Id.* at p. 238.)

officer's misconduct—will encompass whether the officer has acted unlawfully in the hope of finding a basis to search. (District Attorney ACB 21-22)[4] But that contention proves too much because taken to its logical conclusion, the District Attorney's argument leaves no reason why the intervening-circumstances factor (the second *Brown* factor) should *ever* matter as long as the prosecution shows that the officer subjectively acted without improper purpose or flagrancy.

Put another way, the District Attorney's argument ignores the important different purposes served by the second and third *Brown* factors: While the third factor (purpose and flagrancy) focuses on the officer's *subjective* culpability, the second factor (intervening circumstances) focuses on the *objective* general ability of the purported intervening circumstance to break the causal chain between unlawful officer conduct and a resulting search. The distinction is important for at least two reasons. First, the objective nature of the second factor tethers it to the primarily objective nature of the Fourth Amendment analysis. (E.g., *Whren v. United States* (1996) 517 U.S. 806, 814.) Second, the existence of an objective trigger for attenuation prevents the doctrine from resting *purely* on the defendant's ability to contest an officer's subjective good-faith "state of mind, [which] is easy to

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[4]The District Attorney also observes that a parolee can challenge an arbitrary or capricious parole search, but that observation is irrelevant to the exclusionary rule's focus on the degree of purpose and flagrancy for the initial Fourth Amendment violation that preceded the search.

allege and hard to disprove." (*Crawford-el v. Britton* (1998) 523 U.S. 574, 585.)

The District Attorney argues at length that discovery of a parole search condition is actually "a *more* compelling intervening circumstance" than discovery of an arrest warrant because of parolees' relatively voluntary and lasting consent to intrusion on their Fourth Amendment rights. (District Attorney ACB 27-34.) But application of the exclusionary rule turns not on a defendant's subjective privacy interest, but rather on the objective propriety of the *officer's* conduct under the given circumstances. (See *Herring v. United States* (2009) 555 U.S. 135, 144 ["To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system"].) If the District Attorney were correct that application of the exclusionary rule turns on a defendant's voluntary forfeiture of privacy interests, then an officer's search of a parolee suspect would be legal whether or not the officer knew of the suspect's parole status. That, of course, is not the law. (*People v. Sanders* (2003) 31 Cal.4th 318, 334-336.)

Finally, the District Attorney argues that the foreseeability of an unlawful detention leading to the discovery of a parole search condition should not weigh against attenuation. (District Attorney ACB 34-38.) The District Attorney broadly contends that foreseeability should not be a consideration at all because only Justice Kagan's dissent in *Strieff* heavily relied on that concept. (District Attorney ACB 37-38.) The *Strieff* majority,

however, did not dispute Justice Kagan's explanation that the attenuation doctrine arises from the concept of foreseeability. (See *Strieff*, *supra*, 579 U.S. at pp. 257-258 (dis. opn. of Kagan, J.) ["The notion of . . . a disrupting event" for attenuation purposes "comes from the tort law doctrine of proximate causation," so "a circumstance counts as intervening only when it is unforeseeable"].) To the contrary, the majority recognized that while attenuation is a causal doctrine, it does not rest on a break in but-for causation. (*Strieff*, at p. 238.) *Strieff* cited *Hudson v. Michigan* (2006) 547 U.S. 586, which observed, "[W]e have never held that evidence is fruit of the poisonous tree simply because it would not have come to light *but for* the illegal actions of the police." (*Hudson*, at p. 592, internal quotation marks omitted and italics added.) Rejection of a break in but-for causation as the basis for attenuation means that attenuation must rest on—as Justice Kagan explained—a break in proximate causation.

Although *Strieff* rejected Justice Kagan's specific position that the foreseeability of discovering an arrest warrant rendered attenuation improper in that case (District Attorney ACB 34-37), that conclusion rested on *Strieff*'s aforementioned reliance on both the independence and the ministerial rationales in deeming the discovery of an arrest warrant to be a strong causally disruptive circumstance. *Strieff* thus only supports the District Attorney's argument that this Court should ignore the foreseeability of discovering a parole search condition if the Court accepts the District Attorney's foundational premise that the ministerial rationale is relatively unimportant to the attenuation

analysis. And that premise is unpersuasive for the many reasons set forth *ante*. In sum, while the foreseeability concerns in Justice Kagan's opinion were not enough to overwhelm the causally disruptive force of an intervening circumstance that satisfied both the independence and ministerial rationales, those concerns (as well as the racial justice concerns in Justice Sotomayor's dissent) provide ample reason to pause before extending *Strieff*'s holding to other situations—like the discovery of a parole search condition—that satisfy only one of those rationales.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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May 10, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached **Answer to Amicus Curiae Briefs** uses a 13 point Century Schoolbook font and contains 2,696 words.

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