Supreme Court No. S268320

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S ANSWER TO AMICUS CURIAE BRIEFS

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Introduction

Appellant Duvanh Anthony McWilliams finds himself in the unusual position of having only a few points to add to Respondent's Answer to Amicus Curiae" ("RAAC") filed by the Attorney General's office. Appellant adopts the Introduction to respondent's answer brief (RAAC 5-6) with three qualifications.

Respondent, in its discussion of the amicus brief filed by the Orange County Public Defender's Office ("OCPD Amicus"), suggests that while it provides solid argument in accord with respondent's contention that discovery of Mr. McWilliams's parole search condition in the present case should not be an attenuating circumstance on the unique facts of the present case, it does not, other than nominally, support appellant's contention that discovery of a search condition following an illegal detention should never be considered an intervening circumstance subject

to the attenuation test. (AAC 6-7.) As explained in Part II below, OCPD Amicus emphasizes that the exclusionary rule, and not the attenuation test, should apply in this circumstance, analogizing it to the situation where an unlawful detention uncovers contraband in plain view, and further noting that discovery of the search condition "is inextricably intertwined with the officer's misconduct because it is the same officer making both decisions . . ." such that ""[a]pplication of the attenuation doctrine would swallow the exclusionary remedy for Fourth Amendment violations."

Second, respondent's answer does not meaningfully address Santa Clara County District Attorney's Amicus ("SCCDA Amicus") brief's discussion of flagrancy. As explained below, the SCCDA Amicus brief, following the majority in the Court of Appeal in the present case and in *Strieff* (*Utah v. Strieff* (2016) 579 U.S. 232, 136 S.Ct. 2056), suggests that "flagrancy" requires bad faith and/or sustained, repeated wrongdoing, ignoring the important teachings of cases like *Brown* (*Brown v. Illinois* (1975) 422 U.S. 590) that police wrongdoing under the Fourth Amendment is flagrant when, as in the present case, it reflects a pattern of wrongdoing – here, the officer's expressed practice of ordering anyone in a "suspicious vehicle" to get out of the vehicle – and when it involves a situation so devoid of an articulable, good faith objective basis for a detention as to suggest that the officer is engaged in a "fishing expedition" to see if something "might come up," a point effectively emphasized by amicus OCPD in Part II of its brief. (See Part IV-A below.)

Finally, respondent's Answer to Amici does not address the "racial justice" aspects of the present case which amicus OCPD explains so effectively in Part III of its brief, and which amicus SCCDA, in its amicus brief, denies has any meaningful role in the present case based on the absence of "actual evidence" that race played a role in the wrongdoing. (See Part IV-B below.)

I. It is Undisputed that the Detention of McWilliams Was Unlawful.

Notably absent from the SCCDA Amicus brief is any argument that the detention of McWilliams was lawful under the Fourth Amendment. The district attorney's only foray into this aspect of the case is a curious suggestion – addressed in Part IV below – that the detention "was deemed lawful by one of Santa Clara County's most respected law and motion judges - one deeply versed in Fourth Amendment jurisprudence . . .", which amicus suggests somehow shows the detention was not "purposeful or flagrant." (SCCDA Amicus at 40.)

The negative pregnant of this contention is the tacit concession by the district attorney that the detention here was unlawful, with amicus making no effort to repeat that unpersuasive grounds advanced by the prosecution in the trial court and in the Court of Appeal and adopted by the "respected law and motion judge."

For the reasons set forth in Part I of appellant's Opening Brief on the Merits, this Court should follow the majority and dissenting opinions of the Court of Appeal and conclude that the detention of McWilliams violated the Fourth Amendment.

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

As suggested in the Introduction, the OCPD amicus brief includes several contentions which support appellant's argument that the *Brown* attenuation balancing test should not be applied to the intervening fact of discovery of a parole or probationary search condition. First, amicus OCPD agrees with appellant that this situation is the virtual equivalent of police discovery, as the direct result of a Fourth Amendment violation, of some contraband in plain view, since both involve a circumstance permitting a search which precedes the Fourth Amendment violation. (AOBM, Part II-B-3; OCPD Amicus at 8-9: "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?")

Second, OCPD amicus aptly explains how the rule proposed by appellant – that discovery of a search condition not be considered an attenuating factor measured by the *Brown* test – comports with the purpose of the exclusionary rule. While framed in the context of the specific wrongdoing in the present case – as emphasized by respondent in its Answer to Amici (RAAC at 6) – the reasoning of the OCPD amicus brief covers the topic more broadly.

> 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.

(OCPD Amicus at 9.)

For the reasons expressed in Part II of appellant's opening brief on the merits and reply brief on the merits, and by OCPD amicus, appellant urges this Court to conclude that the *Brown* attenuation test should not be applied to the situation of discovery of a search condition as a result of an unlawful detention.

III. If the *Brown* Balancing Test Applies, Discovery of a Parole Search Condition Is Significantly Less Attenuating than Discovery of an Arrest Warrant.

As indicated in the Introduction, appellant is in agreement with respondent's critical discussion of SCCDA amicus's analysis of this aspect of the issues before this Court. (RAAC 7-15.) What follows is an amplification of some key points, with emphasis on some matters set forth by appellant in previous briefing.

Throughout its discussion, SCCDA amicus emphasizes that its contention that discovery of parole search condition is equivalent to, or more attenuating than, discovery of an arrest warrant stems from its emphasis on the greatly diminished expectation of privacy of a parolee, even compared to a person with an outstanding arrest warrant. (SCCDA Amicus at 11-13, 19, 28-33.) Respectfully, this contention misses the mark. Someone with an arrest warrant has *no* expectation of privacy vis-a-vis law enforcement's obligation to arrest them as a ministerial act. (See *Strieff*, 136 S.Ct. at pp. 2062-2063 [describing the arrest, and search

incident to arrest of Strieff as a "ministerial act that was independently compelled by the pre-existing warrant . . .", with the majority concluding it was "undisputedly lawful to search Strieff as an incident of his arrest to protect [the officer's] safety.") A parolee, by contrast, has a *reduced* expectation of privacy, such that, as this Court made clear in *Sanders* (*People v. Sanders* (2003) 31 Cal.4th 318), the prophylactic purposes of the exclusionary rule applied to a search of a parolee made before the officer knew the person was on parole requires suppression of the fruit of such a search. (*Id*., at p. 333.)

The theme of SCCDA Amicus's emphasis on a parolee's reduced expectation of privacy argument is that parolees are akin to someone who is still imprisoned for Fourth Amendment purposes. (SCCDA Amicus at 29-30.) This whole tenor of argument misses the point of the issue here, and the significance of this Court's holding in *Sanders* to the present case.

The question is not the reasonableness under the Fourth Amendment of parole search conditions, or the Fourth Amendment status of parolees, both of which are reasonable well settled. Rather, it's how we treat police discovery of a search condition in the context of a plainly unconstitutional detention. Appellant's contention, ignored by amicus, is that the present situation – discovery of search condition as the direct result of an unconstitutional detention – is sufficiently similar to the one in *Sanders* – a constitutionally unlawful search of a parolee by police who, after the search, learn that the person is on parole. In *Sanders*, this Court wisely concluded that such a search violates the

Fourth Amendment not because the parolee had some greater expectation of privacy than he would if the officer had known of the search condition, but because the point of the exclusionary rule is to deter unlawful police conduct. In *Sanders*, this Court concluded that "admission of evidence obtained during a search of a residence that the officer had no reason to believe was lawful merely because it later was discovered that the suspect was subject to a search condition would legitimize unlawful police conduct." (*Sanders*, *supra*, 31 Cal.4th at p. 335.) Clearly, the focus is on the wrongfulness of police officer's conduct with respect to a person the officer has no reason to believe is a parolee when the Fourth Amendment violation took place.

As to this central focus of *Sanders*, there is no meaningful distinction between the sequence of events in *Sanders* – (1) unlawful entry and search of home leading to seizure of contraband, followed by (2) discovery that a resident has a parole search condition – which mandates use of the exclusionary rule under *Sanders*, and the sequence in the present case – (1) unlawful detention, directly producing (2) officer learning of the search condition, leading to (3) search resulting in the discovery of contraband. The crucial fact for Fourth Amendment purposes is that police discovery of the search condition is the direct product of the unlawful police conduct under the Fourth Amendment. Thus, on the facts of the present case, application of the exclusionary rule, and not a finding of attenuation, is compelled by the reasoning of *Sanders*.

A second way to look at this question is through the lens of the recognized limit to searches of known parolees, where this Court made clear decades ago that such a search cannot be "arbitrary, capricious, or harassing." (*People v. Reyes* (1998) 19 Cal.4th 743, 752.) Nothing fits this category better than what transpired in the present case: a parole search that took place as a direct result of a completely unjustified "roust" of a citizen – i.e. a detention entirely devoid of any reasonable justification – by the police, likely occasioned by the fact that the citizen is a young Black man, which, foreseeably, leads to discovery of a parole search condition, and then to an ensuing search without any objective basis to believe the search will likely lead to the discovery of contraband. As amicus OCPD explains well, it is highly foreseeable that such a roust of a young Black man will lead to the officer's discovery of a search condition which, under amicus SCCDA's interpretation, would justify the subsequent search and seizure of contraband, and effectively erase the initial police wrongdoing. (OCPD Amicus at 14-15.) As OCPD's brief makes clear, this is contrary to the settled purpose of the exclusionary rule, to deter unlawful police conduct calculated to evade Fourth Amendment requirements, and should not be countenanced by this Court. (OCPD Amicus at 12-15.)

With this point added into the well-reasoned and careful analysis by respondent in refutation of the points advanced in the SCCD Amicus brief (RAAC 7-15), appellant submits that discovery of a search condition as a result of a Fourth Amendment violation significantly diminished impact as

attenuation compared to the discovery of an arrest warrant.

IV. The Purposefulness and Flagrancy of the Wrongdoing.

A. The Nature of "Flagrancy"

Both amicus briefs address the critical question, largely ignored by respondent, as to what constitutes purposeful and flagrant police misconduct under the attenuation doctrine. The thoughtful discussion by OCPD amicus is consonant with appellant's discussion of this subject, emphasizing, as its heading for this subtopic suggests, that "an officer's decision to make the most of his unlawful intrusion" constitutes "intentional and flagrant'" police misconduct, with amicus properly citing *Brown*, *supra*, 422 U.S. at p. 605 to support this point. (OCPD Amicus at 12.) OCPD amicus then carefully review the trial record to show, as appellant has contended, that the detention of a young Black male in the present case was utterly without arguable justification, and nothing but a "fishing expedition, i.e, an officer "making the most of his position of power under the color of authority . . ." with amicus powerfully employing statistical analysis to show how an unlawful detention of a young Black male in Santa Clara County was likely to lead to discovery of a parole search condition. (OCPD Amicus at 13 ["Black people make up . . . only 3.2% of the population of Santa Clara County . . . [y]et Black people account for 25.5% of California's parolee population. . . . 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."])

In stark contrast, SCCDA amicus tacks in the complete opposite direction, suggesting first that there has to be "systematic or recurrent police misconduct" as opposed to "isolated instances of negligence" before police conduct can be deemed flagrant, purporting to be quoting appellant's brief on the merits as in agreement with this point. (SCCDA amicus at 39.) This discussion ignores a couple of key points. First, as appellant explained in his briefing, and as OCPD amicus reminds us in its brief, Officer Croucher's misconduct here was, by his own admission, "routine" for him, as he admitted that he typically orders anyone in a "suspicious vehicle" to get out (2RT 312), with no acknowledgment that the prerequisite to such an order is (a) reasonable suspicion of criminal wrongdoing by the occupant ordered out of the car and (b) a risk of danger to the officer. It is undisputed that neither were present here; it thus follows that the officer's flagrant and, by his own admission, systematic lack of regard for this aspect of his duties makes the actions here both systematic and recurrent.

Second, citing a long line of authority dating back to *Brown*, appellant challenged the paradigm of "flagrancy" which requires some kind of reprehensibly dangerous or systematic, repeated wrongdoing, emphasizing how the type of "fishing expedition" wrongful detention in the present case is properly characterized as flagrant misconduct. (See AOBM Part III-C-1 ["Flagrancy and Purposefulness of Police Misconduct Should Be Measured by Objective Standards, Focused on the Officer Having Purposeful

Disregard of Fourth Amendment Protections"].)

SCCDA amicus describes this as a "light touch" case by law enforcement. (SCCDA Amicus at 39-40.) If by this amicus means that Mr. McWilliams was not dragged out of the car and beaten, appellant concurs. But there is nothing "light" about a completely purposeless detention based on a pretense, utterly unsupported by the facts, that a young black man reclined in a car is somehow involved in criminal conduct to which there is, objectively speaking, no meaningful nexus to him. And this is not just a "stop"; Officer Croucher ordered a citizen doing nothing wrong, reclined in his vehicle, to get out of his car, when he could have engaged in a consensual encounter; then, after learning, as a direct product of his wrongful act, that McWilliams had a parole search condition, the officer proceeded to subject him to an intrusive search of his person and vehicle that was utterly without objective justification.

As hinted at above, SCCDA amicus indirectly suggests that the wrongdoing in this case was a close question, emphasizing that the law and motion judge found it lawful. (SCCDA Amicus at 40.) Notably, amicus makes no effort to argue the correctness of this conclusion; neither did the Court of Appeal majority, or respondent in the present appeal. This is so because, as argued by appellant in Part I of his brief on the merits – an argument that is both unrefuted and unaddressed by anyone in this Court – there is simply no basis for a reasonable belief that appellant was either connected to the bicycle flashlight burglars, or himself involved in criminal wrongdoing. Thus, the suggestion that the

erroneous decision by "one of Santa Clara County's most respect law and motion judges . . . deeply versed in Fourth Amendment jurisprudence . . ." (SCCDA Amicus at 50) somehow makes the officer's misconduct "less purposeful and flagrant" should be disregarded as without meaningful substance.

SCCDA amicus's further suggestion that the misconduct in *Strieff* was more purposeful, and less random (p. 40), again proves nothing. The *Strieff* majority's conclusion that this was not flagrant wrongdoing was thoroughly and properly discredited in Justice Kagan's dissent. Made as the center point of a "three strikes and you're out" critique of the majority opinion, Justice Kagan takes apart the notion that there was only a "good faith mistake" in *Strieff*.

> Move on to the purposefulness of [Officer] Fackrell's conduct, where the majority is less willing to see a problem for what it is. The majority chalks up Fackrell's Fourth Amendment violation to a couple of innocent "mistakes." Ante, at ___, 195 L. Ed. 2d, at 409. But far from a Barney Fife-type mishap, Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality. At the suppression hearing, Fackrell acknowledged that the stop was designed for investigatory purposes—i.e., to "find out what was going on [in] the house" he had been watching, and to figure out "what [Strieff] was doing there." App. 17-18. And Fackrell frankly admitted that he had no basis for his action except that Strieff "was coming out of the house." Id., at 17. Plug in Fackrell's and Strieff's names, substitute "stop" for "arrest" and "reasonable suspicion" for "probable cause," and this Court's decision in *Brown* perfectly describes this case:

> "[I]t is not disputed that [Fackrell stopped Strieff] without [reasonable suspicion]. [He] later testified that [he] made the [stop] for the purpose of questioning [Strieff] as part of [his] investigation . . . . The illegality here . . . had a quality of purposefulness. The impropriety of the [stop] was obvious. [A]wareness of that fact was virtually conceded by [Fackrell] when [he] repeatedly acknowledged, in [his] testimony, that the purpose of [his] action was 'for investigation': [Fackrell] embarked upon this expedition for evidence in the hope that something might turn up." 422 U. S., at 592, 605, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (some internal punctuation altered; footnote, citation, and paragraph break omitted).
>
> In *Brown*, the Court held those facts to support suppression—and they do here as well. Swing and a miss for strike two.

(*Utah v. Strieff*, *supra*, 579 U.S. at pp. 256-257, dis. opn. of Kagan, J, brackets and ellipses in original.)

Even leaving aside this devastating critique of the majority in *Strieff*, it is clear that the assumption behind SCCDA amicus's assertion that the present case parallels *Strieff* is dubious at best. The officer in *Strieff* was at least investigating a report of narcotics activity based on an anonymous tip and subsequent police surveillance showing there were repeated short-term visitors, and was arguably only "negligent" in that Officer Fackrell didn't know how long Mr. Strieff had been in the residence. (*Strieff*, *supra*, 579 U.S. at pp. 235, 241.) By contrast, here not even the most rampant speculation, or even racist stereotyping concerning a young black reclining in the passenger seat of a car, provides the

slightest rational basis for the officer to have thought that Mr. McWilliams had any connection to the flashlight bicycle attempted burglars, or was doing anything illegal by sitting reclined in his vehicle in the parking lot of a closed business – particularly in light of the well-settled holdings in *People v. Casares* (2016) 62 Cal.4th 808, 838 and *People v. Roth* (1990) 219 Cal.App.3d 211, 215. on virtually the same factual predicate. (See discussion at AOBM, pp.28-29.)

SCCDA amicus analogizes the present case to *Brendlin*, claiming the officer's actions here were in good faith and contending the record does not support a conclusion that the conduct here was based on the officer's "design and purpose to effect the stop 'in the hope that something might turn up." (SCCDA Amicus at 40, citing *People v. Brendlin* (2008) 45 Cal.4th 262, 271.) But there is no other meaningful and reasonable explanation for the detention of appellant. Nothing connected him to the bicycle burglars, and case law from *Roth* and *Casares* had already completely settled that sitting in a vehicle in the parking lot of a closed business provides no basis to detain a person.

Appellant submits that Justice Danner's dissenting view in the present case should carry the day as to flagrancy of the misconduct here, as it ably explains why the officer's misconduct here is precisely the kind of wrongdoing condemned in *Brown* as directed to see if "something might turn up." (*Brown, supra*, 422 U.S. at p. 605.)

> Officer Croucher was essentially on a fishing expedition when he turned into the parking lot next to the one

> from which the security guard reported two people on bicycles had been looking into cars. Any concerns about officer safety here arose from Croucher's own actions in deciding to approach McWilliams's car. McWilliams was sleeping or lying in his car early in the evening in a public parking lot, which itself raises no concerns about criminal activity. It bears emphasizing that there was no particular exigency supporting Croucher's actions – the original report itself lacked any observation of an actual crime.
>
> If Officer Croucher were concerned about McWilliams's safety, he could have asked McWilliams about it. Instead he shined his spotlight on McWilliams and ordered him out of the car. Croucher then told McWilliams to retrieve his identification from his car (seemingly in contradiction to Croucher's expressed fears of officer safety, presumably about the potential presence of a hidden weapon) and checked on McWilliams's status. Croucher's testimony was that ordering people out of vehicles is his routine practice when making vehicle stops or checking on suspicious vehicles.

(Dis. opn. at 6.) From this, and even without reference to the implicit racial bias factors discussed below, the only fair conclusion this Court can reach is that Officer Croucher's misconduct was flagrant, a factor weighing heavily in favor of suppression of evidence with respect to the *Brown* balancing test. (See discussion in OCPD amicus, pp. 12-15.)

B. **The Specter of Implicit Racial Bias.**

The OCPD amicus brief includes a thorough discussion of the racial justice aspects of the present case, presented through the lens of the recently enacted California Racial Justice Act of 2020 ("RJA"). (See OCPD Amicus, pp. 15-21.) Appellant concurs

with this analysis in full.

By contrast, SCCDA amicus dismisses racial bias as a factor in the present case, noting the absence of evidence of express bias on the part of Officer Croucher in the present case, and contending that the implicit racial bias claim is naught but speculation. (SCCDA amicus at 41-42.) These contentions prove too much. Implicit racial bias is not something that can typically be confirmed by testimony. As OSPD amicus aptly puts it, "the RJA creates an evidentiary presumption that all persons are acting with implicit bias . . .", further noting another recent legislative enactment, AB 3070, where our Legislature found "that requiring proof of intentional bias renders [court] procedure ineffective." (OCPD Amicus at 17-18.)

While these new laws are not, strictly speaking, applicable to the present case, they make it plain that our Legislature has recognized that implicit racial bias is pervasive in our society, and that it is a factor that cannot simply be ignored or dismissed based on the absence of a showing of express racial animus. Here, while there is no express evidence showing that Office Croucher targeted Mr. McWilliams because he is Black, the specter of implicit bias and racial profiling cannot simply be dismissed in the present case. Appellant's point, amply supported by the discussion in the OCPD amicus brief, is simply that in light of the pervasive nature of implicit racial bias, this Court's analysis of flagrancy should recognize that the purposeless detention of a young Black male in the present case and a factual situation ripe for its application in the present case

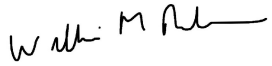
bears a strong suggestion of implicit racial bias, which this Court can and should factor into its analysis of the purposefulness and flagrancy of the officer's unlawful conduct.

CONCLUSION

For the reasons set forth in appellant's briefs on the merits, respondent's brief on the merits and Answer to Amicus, and in OCPD's amicus brief, appellant urges this Court to reverse the judgment of the Court of Appeal.

Dated: June 2, 2022

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

Appellant, by and through his appointed counsel on appeal, hereby certifies that the software used in preparing this brief is Corel Word Perfect X7 and that according to the software report for this document the brief, counting only the portions of the brief required by Rule 8.520(c) contains 4182 words.

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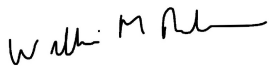

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I declare under penalty of perjury the foregoing is true and correct. Executed this 2nd day of June, 2022, at San Jose, California.

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

STATE OF CALIFORNIA
Supreme Court of California

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