No. _____

October Term, _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEX WHITE
Petitioner

v.

STATE OF CALIFORNIA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED (Rule 14.1(a))

1. Where police officers admitted that their equipment violation stop of the vehicle in which petitioner was a passenger was a pretext to conduct gang investigation and where they were mistaken as to the illegality of the vehicle equipment violation - - the mistaken belief that two license plate lights were required in California - - was their mistake unreasonable and should their admission of a pretextual motive bar a claim of good faith making the stop illegal under the Fourth Amendment?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the California Court of Appeal included the State of California and petitioner Alex White and co-defendant Darron Williams. There are no parties to the proceedings other than those named in the petition. This petition is filed on behalf of petitioner Alex White only. Petitioner believes that the co-defendant does not have an interest in the issue raised as it was neither presented below nor joined in.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alex White, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Five, filed on January 4, 2021.

OPINION BELOW

The opinion of the California Court of Appeal, which was unpublished, and which is the subject of this petition, was issued January 4, 2021 under case number B295147, and is attached as Appendix A. The California Supreme Court's order, issued March 24, 2021, denying review is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Court of Appeal for which petitioner seeks review was issued on January 4, 2021. The California Supreme Court order denying petitioner's timely petition for discretionary review was filed on March 24, 2021. This petition is filed within 150 days of the California Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court, and orders of the Court issued March 19, 2020, April 15, 2020 and July 19, 2021.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment 14:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Vehicle Code section 24601:

§ 24601. License plate light.

Either the taillamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear license plate during darkness and render it clearly legible from a distance of 50 feet to the rear. When the rear license plate

is illuminated by a lamp other than a required taillamp, the two lamps shall be turned on or off only by the same control switch at all times.

California Vehicle Code section 24600

§ 24600. Taillamp requirements, generally

During darkness every motor vehicle which is not in combination with any other vehicle and every vehicle at the end of a combination of vehicles shall be equipped with lighted taillamps mounted on the rear as follows:

(a) Every vehicle shall be equipped with one or more taillamps.

(b) Every vehicle, other than a motorcycle, manufactured and first registered on or after January 1, 1958, shall be equipped with not less than two taillamps, except that trailers and semitrailers manufactured after July 23, 1973, which are less than 30 inches wide, may be equipped with one taillamp which shall be mounted at or near the vertical centerline of the vehicles. If a vehicle is equipped with two taillamps, they shall be mounted as specified in subdivision (d).

(c) Every vehicle or vehicle at the end of a combination of vehicles, subject to subdivision (a) of Section 22406 shall be equipped with not less than two taillamps.

(d) When two taillamps are required, at least one shall be mounted at the left and one at the right side respectively at the same level.

(e) Taillamps shall be red in color and shall be plainly visible from all distances within 500 feet to the rear except that taillamps on vehicles manufactured after January 1, 1969, shall be plainly visible from all distances within 1,000 feet to the rear.

(f) Taillamps on vehicles manufactured on or after January 1, 1969, shall be

mounted not lower than 15 inches nor higher than 72 inches, except that a tow truck, in addition to being equipped with the required taillamps, may also be equipped with two taillamps which may be mounted not lower than 15 inches nor higher than the maximum allowable vehicle height and as far forward as the rearmost portion of the driver's seat in the rearmost position. The additional taillamps on a tow truck shall be lighted whenever the headlamps are lighted.

California Vehicle Code section 24252:

§ 24252. Lighting equipment requirements

(a) All lighting equipment of a required type installed on a vehicle shall at all times be maintained in good working order. Lamps shall be equipped with bulbs of the correct voltage rating corresponding to the nominal voltage at the lamp socket.(b) The voltage at any tail, stop, license plate, side marker or clearance lamp socket on a vehicle shall not be less than 85 percent of the design voltage of the bulb. Voltage tests shall be conducted with the engine operating.(c) Two or more lamp or reflector functions may be combined, provided each function subject to requirements established by the department meets such requirements.(1) No turn signal lamp may be combined optically with a stoplamp unless the stoplamp is extinguished when the turn signal is flashing.(2) No clearance lamp may be combined optically with any taillamp or identification lamp.

California Vehicle Code section 26103

§26103. Adoption and enforcement of regulations; Federal Motor Vehicle Safety Standard

(a) The department may adopt and enforce regulations establishing standards

and specifications for lighting equipment listed in Section 375 and for safety belts, safety glazing material, safety helmets, sirens, tire traction devices, bunk stakes, and synthetic binders. The standards and specifications may include installation and aiming requirements.

(b) A federal motor vehicle safety standard adopted pursuant to Chapter 301 (commencing with Section 30101) of Part A of Subtitle VI of Title 49 of the United States Code that covers the same aspect of performance of a device shall prevail over provisions of this code or regulations adopted pursuant to this code. Lamps, devices, and equipment certified by the manufacturer to meet applicable federal motor vehicle safety standards as original equipment on new vehicles and the identical replacements for those items need not be certified to the department.

Code of Federal Regulations 49 CFR § 571.108

49 CFR § 571.108 Standard No. 108; Lamps, reflective devices, and associated equipment. [Part 2 of 2]

Table I-a—Required Lamps and Reflective Devices

Table I-a—Required Lamps and Reflective Devices				
Lighting device	Number and color	Mounting location	Mounting height	Device activation

License Plate	1 White	On the rear to	No requirement	Steady
Lamp	Additional	illuminate		burning.
	lamps	license plate		Must be
	permitted to	from top or		activated when
	meet	sides		the headlamps
	requirements			are activated
				in a steady
				burning state
				or when the
				parking lamps
				on passenger
				cars and MPVs,
				trucks, and
				buses less
				than 80 inches
				in overall
				width are
				activated.

...

STATEMENT OF CASE

Petitioner, Alex White, was charged in a four count information along with co-defendant Darron Williams. ((1CT 206-211) They were charged in Count 1 with the murder of Herman Owens on April 13, 2015, in violation of California Penal Code[1] section 187, subdivision (a), in Count 2 with the murder of Patrick Keaton, in violation of section 187 that same date, in Count 3, with the attempted murder of Brandon Blake, in violation of section 664/187 that same date, and in Count 4 Discharge of a Firearm from a Motor Vehicle, in violation of Penal code section 26100, subdivision (c) that same date. All counts arose out of a single incident.

It was alleged, in counts 1 through 4, that a principal had personally used and discharged a firearm within the meaning of section 12022.53, subdivision (d) causing great bodily injury or death.

As to all counts it was also alleged that the crimes were committed for the benefit of, direction of and association with a criminal street gang, within the meaning of section 186.22 subdivision (b)(1)(C).

Special circumstances were alleged as to counts 1 and 2 under section 190.2, subdivision (a)(3), multiple murder and under section 190.2, subdivision (a)(21), drive-by murder.

The prosecution did not seek the death penalty.

Petitioner was convicted of all counts and enhancements and both special circumstances allegations. (7RT 1350-1354)

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[1] All section references are to the California Penal Code unless otherwise indicated.

Petitioner was sentenced to life without the possibility of parole in Count 1 and a stayed sentence of life without the possibility of parole in Count 2. A concurrent term of 25 years to life was imposed in Count 3 and a concurrent term of 15 years to life imposed in Count 4. The court stayed all firearm enhancements. The gang enhancements in Counts 1 through 3 were stayed and a 10 year gang enhancement imposed in Count 4. (7CT 1442-1443)

Upon appeal, the California Court of Appeal affirmed petitioner's conviction over claims that his stop by police without reasonable cause violated his Fourth Amendment right to be free from warrantless searches and seizures and detention and that the stop of the vehicle in which he was riding was without reasonable or probable cause. He argued the stop of the vehicle was based upon the erroneous belief by the police that a vehicle in California was required to display two working license plate lights. The vehicle in question had one working light. The police admitted that they had really stopped their vehicle, and other vehicles, because the vehicles had been seen in the vicinity of a gang street celebration. That admission was captured on the police vehicle dash cam.

Petitioner again raised the same issues in the California Supreme Court. The Court denied discretionary review.

The facts underpinning this claim are found in the opinion below.

REASONS FOR GRANTING THE PETITION

I.

The trial court erred in denying petitioner's section 1538.5 motion to suppress evidence because the police officers' unreasonable mistake of law did not justify the traffic stop.

A. Introduction.

On April 2, 2015, eleven days prior to the charged incident, petitioner White was riding in a white Chevy Traverse vehicle driven by Darron Williams when it was stopped for an equipment violation by police. The police wrongly concluded that the vehicle required two working license plate lights and one of the lights on the Traverse was not working. For reasons addressed *post*, the police reliance upon a faulty understanding of the law rendered the stop illegal and an unconstitutional seizure of petitioner's person. Police could not reasonably rely upon the mistake of law because the plain language of the statute was sufficient to apprise of its requirements and was unambiguous. Further, case law in sister jurisdictions with virtually identical statutes concluded that only one license plate light was required. The facts of the detention of petitioner in Williams' car must be suppressed.

B. Pertinent substantive and procedural facts.

Co-defendant Williams filed a written motion to suppress under Penal Code section 1538.5. (2CT 419) The prosecution filed written opposition. (2CT 423) Petitioner joined in Williams' motion. (2RT C-6, C-7) An evidentiary hearing was had after which the defense filed supplemental points and authorities (3CT 497), the prosecution filed supplemental points and authorities (2CT 502) and the

defense filed further supplemental points and authorities (2CT 511)

The gravamen of the motion was that a vehicle driven by Williams, in which petitioner was among the passengers, was stopped without warrant and without probable cause. The prosecution countered that the vehicle was properly stopped because it had a burned-out license plate light. The defense argued that the law only required one operating license plate light - - which the vehicle had - - and that the officers were mistaken as to the law, making the stop illegal.

The testimony of the detaining officer was taken.

Officer Bryan Schilling testified he was working with this partner Garcia in a hybrid black and white vehicle. (2RT C-8) The vehicle was equipped with a forward-facing-recording camera which was activated either by turning on the lights or by pressing a button on the officer's belt. (2RT C-9) At around 11:06 p.m. he stopped a white Chevy Traverse because one of its two license plate lights was burned out and not working. This, he concluded, was a violation of Vehicle Code section 24601 (24601). (2RT C-10-C-11)

Schilling made contact with the driver who was Williams. There was one other person in the front passenger seat and three in the rear passenger seat. (2RT C-11) The three passengers in the rear seat were not wearing seat belts - - a vehicle code violation. Petitioner White was one of the rear passengers. (2RT C-12)

The video from the dash cam recorder was played at the suppression hearing. (2RT C-15) At 45 seconds into the video, the lights from the police vehicle were turned off briefly to document the status of the license plate lights. (2RT C-15–C-16) Officer Schilling opined that the right license plate light was

burned out. (2RT C-16)

Schilling obtained Williams' driver's license and went back to run it for validity and warrants. (2RT C-17) Garcia remained at the car attempting to get identification from the passengers. (2RT C-17) They eventually took all the passengers out of the car. (2RT C-19) They had difficulty verifying Devonte Parker's identity because he spelled his first name differently from what was in the database. They were able to verify the identify of the other passengers, including petitioner White quickly, however. (2RT C-20) The stop took 45 to 50 minutes. (2RT C-21) A citation was written to Williams for the 24601 violation. The others were cited for seatbelt violations. (2RT C-22) Parker did not get a ticket because he was in the front passenger seat wearing a seat belt. (2RT C-30) In other words, the occupants were detained some 45 to 50 minutes in order to verify the identity of Parker, who had done nothing wrong and was not cited.

The officers were patrolling that day because April 2, 2019 was the "hood day" celebration for the 4-2 Gangster Crips. (2RT C-29) The video from the dash cam showed that the Traverse was coming in the opposite direction from the officer's line of travel. The officer's vehicle made a u-turn in order to follow the Traverse. (See video, People's 28, at 11:06:20 p.m.)

The trial judge first denied the motion to suppress because section 24601 required that the license plate be legible and there was no testimony as to that fact either way. (2RT D-11-D-12) The court found that the law did not require two lights to illuminate a license plate. (2RT D-9) It found that the testimony showed the plates were illuminated but did not show they were "legible" as the section requires.(2RT D-9-D-10) It found that the missing light "would not have rendered

it as visible and legible as if both had been working." (2RT D-12) The court, since it found the stop justified, did not reach the issue of reasonable mistake of law. (2RT D-13) The court found the detention to be not unduly prolonged. (2RT D-14-D-15)

At the request of counsel, the trial court later reconsidered the 1538.5 issue. (3RT 1515) The court reiterated its previous findings. (3RT 1518) The court, at that point, stated that it was not the court's ruling that the legibility of the license was a reason for the stop. It opined, "the letter of the vehicle code section and the law is that all lights on a vehicle must be operating." (3RT 1518) The motion for reconsideration was denied. (3RT 1518)

Had the 1538.5 motion been granted, all observations of the officer after approaching the vehicle would have been suppressed. That is, appellant's presence in the same vehicle with Williams, Parker and other known gang members, provided evidence that riding with those particular individuals was more than a one-time occurrence. This undercut appellant's assertion that he was only present in the vehicle on the night of the murder in order to hitch a ride. He did not know of the intentions of the others. The evidence of the April 2nd stop showed that he was more than casually familiar with Williams and that he was participating in "hood day" gang activities with him. This was prejudicial to appellant with respect to the substantive murder charge and the gang allegation. In addition, it allowed the detectives interviewing appellant to impeach his statement that he had only been in the Traverse the day of the murder.

The opinion of the Court of Appeal

In justifying upholding the search, the California Court of Appeal first

noted "That a police officer makes a mistake about the law or the true facts does not automatically render the suspicion unreasonable," citing Heien v. North Carolina 574 U.S. 54 (2014). Opn. p.12-13. It then observed that the Fourth Amendment only tolerates objectively reasonable mistakes. Opn. p.13. It recited its obligation to defer to the trial court' s factual findings while declaring its independence on matters of law.

The reviewing court agreed with petitioner that the trial court had wrongly placed the burden on the defendant to establish illegibility of the license plate. Opn. p.13. Nevertheless it declared that it must "consider the correctness of the trial court's ruling *itself*, not the trial court's *reasons* for reaching its decision." Opn, p. 13, italics original. The court interpreted this as a mission to determine, "not whether [defendant's] vehicle was in fact in full compliance with the law at the time of the stop, but whether [the officer] had ' "articulable suspicion" ' it was not." Opn. p14.

The court then opined that the trial court's finding that the plate was "less visible and legible" without the second light and that the lack of illumination from one side was "an objectively reasonable basis for suspecting that the plate was not "clearly legible" in the darkness at a distance of 50 feet in violation of section 24601." Opn. p.14.

The court then declared, parenthetically, that section 24601 could be read to require two license plate lights, or it could be read to require only one. It based this conclusion on the language in the statute that "When the rear license plate is illuminated by a lamp other than a required taillamp, the *two lamps* shall be turned on or off only by the same control switch at all times. (Emphasis added.)"

Opn. p. 14-15. It opined that the reference to "two lamps" may be referring to one taillamp and one license plate light but that the statute could be reasonably be read either way. Opn. p. 15.

Finally, the court reviewed the evidence and concluded that the object of the officers was to "primarily investigate the gang ties of the occupants." Opn. p.15. The court dismissed the significance of this fact based upon the holding in *Whren v. United States,* 517 U.S. 806 (1996). Opn. p. 16.

C. Standard of Review.

The standard of appellate review of a trial court's ruling on a motion to suppress is well established. The appellate court defers to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, the appellate court exercises independent judgment. *People* v. *Leyba*, 29 Cal. 3d 591, 596-597 (1981) ; *People* v. *Lawler,* 9 Cal. 3d 156, 160 (1973); *People* v. *Glaser*, 11 Cal. 4th 354, 362 (1995)

The denial of a motion to suppress is reviewed de novo. *United States v. Kemmish*, 120 F.3d 937, 939 (9th Cir. 1997). A court's determination of the existence of reasonable suspicion is reviewed de novo. *United States v. Camacho-Uranda* (D.Nev. May 9, 2007, No. 2:06-cv-1129-RCJ-LRL) 2007 U.S.Dist.LEXIS 35023, at *8.

Where the facts are essentially undisputed the court merely exercises its independent judgment in resolving the question of law of whether the search was reasonable within the meaning of the constitution. *People v. Overten,* 28 Cal.App.4th 1497, 1504 (1994).

The "ultimate standard set forth in the Fourth Amendment is reasonableness" *Cady v. Dombrowski* 413 U.S. 433, 439 (1973), and, after *Katz v. United States* 389 U.S. 347 (1967), we ask two threshold questions. First, did the defendant exhibit a subjective expectation of privacy? Second, is such an expectation objectively reasonable, that is, is the expectation that one society is willing to recognize as reasonable? *Bond v. United States*, 529 U.S. 334, 337-338 (2000); *California v. Ciraolo* 476 U.S. 207, 211 (1986); *People v. Camacho* 23 Cal. 4th 824, 830-831 (2000).

In California, to decide whether relevant evidence obtained by assertedly unlawful means must be excluded after June 8, 1982, the appellate court looks exclusively to whether its suppression is required by the United States Constitution. *People* v. *Souza,* 9 Cal. 4th 224, 232 (1994); *People* v. *Glaser*, 11 Cal. 4th 354, 362 (1995); *In re Lance W.*, 37 Cal. 3d 873, 885-890 (1985) .)

Errors of federal constitutional magnitude are subject to a *Chapman*[2] harmless error rule. The *Chapman* standard places the burden on the government to demonstrate that the error is "harmless beyond a reasonable doubt." Denial of a motion to suppress evidence based upon illegal search and seizure, is subject to the *Chapman* "harmless beyond a reasonable doubt" standard of review. See *People v. Verin*, 220 Cal.App.3d 551, 560 (1990); *People v. Minjares*, 24 Cal.3d 410, 424 (1979).

D. Relevant Law.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and

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[2] *Chapman v. California* (1967) 386 U.S. 18.

seizures" and provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. IV. A search conducted without a warrant is unreasonable per se under the Fourth Amendment unless it falls within one of the "specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)*; California v. Acevedo*, 500 U.S. 565, 580 (1991); *People v. Bravo* 43 Cal. 3d 600, 609 (1987); *People v. Woods,* 21 Cal.4th 668, 674 (1999).

Absent a warrant, the burden is on the prosecution to show either that no search occurred, or that a search is reasonable. *People v. Sirhan*, 7 Cal.3d 710, 736 (1972), overruled on other grounds in *Hawkins v. Superior Court*, 22 Cal.3d 584, 593, fn. 7 (1978) ; See *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *People v. Rios*, 16 Cal. 3d 351, 355 (1976); *People v. Camacho, supra*, 23 Cal. 4th at p.830

"A traffic stop for a suspected violation of law is a "seizure" of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment. *Brendlin v. California*, 551 U.S. 249, 255-259, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). To justify this type of seizure, officers need only "reasonable suspicion"—that is, "a particularized and objective basis for suspecting the particular person stopped" of breaking the law. *Prado Navarette v. California,* 572 U.S. 393, 396, 134 S. Ct. 1683, 1688, 188 L. Ed. 2d 680, 686 (2014) (internal quotation marks omitted)." (*Heien v. North Carolina* (2014) 574 U.S. 54 [135 S.Ct. 530, 536, 190 L.Ed.2d 475, 482].)

"The Fourth Amendment tolerates only reasonable mistakes, and those

mistakes—whether of fact or of law—must be objectively reasonable. We do not examine the subjective understanding of the particular officer involved. Cf. *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996)." *Heien v. North Carolina, supra*, 574 U.S. 54 [135 S.Ct. 530, 539-540, 190 L.Ed.2d 475, 486].

E. Discussion.

1. The officer was mistaken in his understanding of the law.

The police officers in this case justified their detention of the vehicle in which petitioner was riding based upon one defective license plate light out of the two which were installed on the vehicle. The officers cited the driver for a violation Vehicle Code section 24601 (§24601). That section reads:

> **§ 24601. License plate light**.
> Either the taillamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear license plate during darkness and render it clearly legible from a distance of 50 feet to the rear. When the rear license plate is illuminated by a lamp other than a required taillamp, the two lamps shall be turned on or off only by the same control switch at all times.

Veh Code § 24601

Section 24601, as can be seen, does not require that two lamps illuminate the license plate. Rather, the section allows for illumination by a single lamp as long as it renders the plate legible from 50 feet. The references are in the singular, designating a "taillamp or separate lamp." There is no mention of a two-lamp requirement.

In arguing in support of the stop, the prosecution cited Vehicle Code section 24252. (2RT C-38)

That section reads:

> **§ 24252. Lighting equipment requirements(a)**
> (a) All lighting equipment of a required type installed on a vehicle shall at all times be maintained in good working order. Lamps shall be equipped with bulbs of the correct voltage rating corresponding

> to the nominal voltage at the lamp socket.(b) The voltage at any tail, stop, license plate, side marker or clearance lamp socket on a vehicle shall not be less than 85 percent of the design voltage of the bulb. Voltage tests shall be conducted with the engine operating.(c) Two or more lamp or reflector functions may be combined, provided each function subject to requirements established by the department meets such requirements.(1) No turn signal lamp may be combined optically with a stoplamp unless the stoplamp is extinguished when the turn signal is flashing.(2) No clearance lamp may be combined optically with any taillamp or identification lamp.

Veh Code § 24252 (§24252)

Indeed, the trial court appears to have relied upon this section to conclude that all installed lights must be functioning. (2RT D-9) It did, however, conclude that two working lights were not required. (2RT D-9)

Reliance upon §24252 was inappropriate. The section specifically refers to "lighting equipment of a ***required*** type" (§24252, emphasis added) which must be maintained. The key condition is that ***required*** equipment must be maintained. However, when read in conjunction with §24601, it is apparent that two functioning license plate lights are not of the "required type." One light will suffice, and, indeed, by common knowledge, many vehicles follow that design and have only one license plate light.

The trial court recognized that two lights were not required but first denied the motion because there was no evidence on whether the plates were "legible." This turned the burden of proof on its head. It is the People's burden to justify a warrantless search or seizure. *People v. Sirhan, supra*, 7 Cal.3d 710, 736. Any deficiency in proof on a key element must fall to the detriment of the party with the burden - - here the prosecution. It was the prosecution's burden to show the plates were not legible, not the defense burden to show they were.

The California Court of Appeal in this case agreed with petitioner that an

improper burden of proof was assigned by the trial court and that the burden of proof was on the prosecution to show the license was not legible. It nonetheless ignored the trial court's ruling and analyzed the "correctness" of the trial court's ruling as opposed to the correctness of the reasons. Court of Appeal opinion, p. 13.

The trial court later opined upon its ruling on reconsideration while reiterating the same findings. At that time, the court found that the stop was legal because the code sections required "that all lights on a vehicle must be operating." (3RT 1518)

To the extent that the trial court was retreating from its earlier rationale, this additional rationale was also unavailing. As noted, the code sections - - 24601 and 24252 - - only mandate that "required" lighting equipment must be maintained and operational. In this instance, the second burned out license plate light was superfluous and, thus, not "required." The fact that it was not operational did not constitute a code violation and could not, therefore, justify the stop.

This case is identical to one in a sister jurisdiction, *Langello v. State,* 970 So.2d 491 (Fla. App., 2007) (*Langello)* . In *Langello*, the officer stopped a vehicle because one of the two license plate lights was inoperable. The officer who stopped Langello believed this violated section 316.221(2), Florida Statutes (2004). Section 316.221(2) requires vehicles to be equipped with "either a taillamp or a separate lamp" that is "placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear." *Langello v. State, supra,* 970 So.2d 491, 492. The Florida statute is virtually

identical to section 24601.

The Florida court agreed with Langello that "as long as he had a single operational light and the tag was 'clearly legible,' he was not violating the statute and the officer did not have probable cause to stop him..." *Langello v. State, supra*, at 492. The court found that "[b]ecause the police did not have probable cause to believe that Langello had committed a traffic violation, the stop of his car was unlawful, and the trial court should have granted Langello's motion to suppress." *Id*. at p. 493

Similarly, in Iowa, which has a virtually identical statute, "having one inoperable light on his license plate is not a violation of the law. See Iowa Code § 321.388 ['Either the rear lamp or a separate lamp shall be so constructed and placed to illuminate with a white light the rear registration place and render it clearly legible from a distance of fifty feet to the rear.']; *State v. Reisetter*, 747 N.W.2d 792, 794 (Iowa Ct.App.2008) [noting a violation of section 321.388 only occurs when the license plate is not illuminated such that it cannot be seen from a distance of fifty feet]." (*State v. Bateman* 859 N.W.2d 671 (Iowa App., 2014) (*Bateman*.)

In *People v. White* 107 Cal. App.4th 636, 643-4 (2003), a pre-*Heien* case, the officer mistakenly believed that having a single Arizona license plate affixed to the car violated the Vehicle Code. However, California Vehicle Code section 5202 incorporates out-of-state requirements into California law, and Arizona law requires only one license plate for motor vehicles. The officer, was, therefore, mistaken.

There are vehicle designs which incorporate a single license plate lamp to

illuminate the plate. There are other designs which employ two lights. There is no telling, however, whether the second light, in those designs, is crucial to the illumination function or merely supplies a backup function should the other fail. That notwithstanding, the California statutes do not require two license plate lamps.[3]

The eventual reasoning of the trial court in upholding the stop appears to mirror the reasoning of *Heien* although the statutory underpinnings were different. As shown here *post*, however, the reasoning of *Heien* does not apply given the language of the California statutes.

Nor does *In re Justin K.* 98 Cal.App.4th 695 (2002), cited by the trial court (2RT D-1), save the issue.[4]

In *Justin K.*, an officer noticed that the defendant was driving a vehicle that had two working brake lights but a non-working "third brake light located in the rear window." *Justin K., supra*, 98 Cal.App.4th at p. 697. The officer stopped the vehicle "for an 'equipment violation'" and discovered the defendant was intoxicated. *Ibid*. The defendant later moved to suppress, contending that the rear center stoplamp was not required to be in good working order.

The *Justin K.* court acknowledged that Vehicle Code section 24603 does not make supplemental stoplamps "required equipment." *Justin K., supra*, 98

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[3] Parenthetically, with the introduction of reflective license plates in California, the license plate light requirement seems less important. Additionally, it does not serve a safety function like brake lights, but merely facilitates police surveillance - - a function now adequately covered by reflective plates.

[4] Actually, while *Justin K.* was cited by the prosecution, the trial court only cited the case for the general proposition that the officer's actions must be objectively reasonable.

Cal.App.4th at p. 699.) However, the court explained, Vehicle Code section 26103, subdivision (a) permits the Department of the California Highway Patrol to adopt the federal standards for lighting equipment. *Justin K., supra*, 98 Cal.App.4th at p. 699. The Department of the California Highway Patrol has adopted the federal safety standards, and the federal standards do require supplemental stoplamps. *Justin K., supra,* 98 Cal.App.4th at p. 699, citing 49 C.F.R. § 571.108, S.51.1.27, S5.3.1.8 & table III (2002). In addition, the court noted, Vehicle Code section 24603 requires supplemental stoplamps installed after January 1, 1987 to comply with the federal safety standards. Since "a supplemental stoplamp . . . that is not working would not be in compliance with that standard," the officer was justified in stopping the defendant's car. *Justin K., supra*, 98 Cal.App.4th at p. 700.

The rationale of *Justin K.* does not apply to the instant case because neither the state code nor the federal safety standards require two license plate lights. Section 24601, addressing license plate lights, has no provision incorporating Federal Motor Vehicle Safety Standards as Section 24603 does. Nor does Vehicle Code section 26103 incorporate those standard.

Even if the Federal Motor Vehicle Safety Standards were incorporated, the Code of Federal Regulations only requires one white license plate lamp mounted on the rear to illuminate the license plate from top or sides. Additional lamps are permitted to meet requirements. They must be activated when the headlights are activated in a steady burning state or when the parking lamps on passenger cars and MPVs, trucks and buses less than 80 inches in overall width are activated. (49 CFR 571.108, Table I [Table I-a--Required Lamps and Reflective Devices]; §§S6.1,

S6.6.)

Thus, a second license plate light, while permitted, is not required equipment under federal safety standards. *Justin K.* is distinguishable and inapposite.

2. Officer's mistake of law was not reasonable.

The trial court did not reach the issue of the good faith reasonableness of the officer's mistake because it found no mistake. The California Court of Appeal, however, conducted a good faith analysis. However, in doing so, it speculated about what the detaining officer might have thought, ignoring what the officer stated as his rationale for the stop - - the burned out light.

As noted, this Court, in *Heien, supra,* has held that an objectively reasonable mistake of law may be tolerated and will not render a detention based thereupon illegal. *Heien v. North Carolina, supra*, 574 U.S. 54 [135 S.Ct. 530, 539-540, 190 L.Ed.2d 475, 486].

On the record of this case, it cannot be said the officer's mistake was reasonable.

The facts of *Heien, supra*, do not aid respondent. Although *Heien* found a reasonable mistake, it is distinguishable because the North Carolina statute differed in language from section 24601. The *Heien* court discerned an ambiguity in the North Carolina statute which does not exist in the California statutory scheme. Further, the statute in question in *Heien* involved brake lights, a matter of public safety.

In *Heien*, an officer stopped a car for driving with only one functional tail light, believing that to be a violation of state traffic law, and, in a subsequent

search, found a significant quantity of cocaine. *Heien, supra,* 574 U.S. 54 [135 S.Ct. 530]. A state court, however, later concluded that driving with a single working tail light was not in fact a violation of state law. *Id.* at 58-59. Nevertheless, the Supreme Court concluded that the warrantless search was reasonable and thus consistent with the Fourth Amendment, holding that "reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition." *Id*. at 60.

However, a close examination of the North Carolina statute reveals why the mistake was reasonable in *Heien* but not in the instant case. There was an ambiguity in the North Carolina statute which does not exist in the pertinent California statutes.

As the this Court noted, a section of the North Carolina statute required that "all originally installed rear lamps" be in good working order. The section provides, in pertinent part:

> (d) Rear Lamps. -- Every motor vehicle, and every trailer or semitrailer attached to a motor vehicle and every vehicle which is being drawn at the end of a combination of vehicles***, shall have all originally equipped rear lamps or the equivalent in good working order***, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle.

(N.C. Gen. Stat. § 20-129, emphasis added.)

No such provision is found in either section 24601 or section 24252 or elsewhere in the Code.

This Court also noted that a section of the North Carolina statute stated that "The stop lamps may be incorporated into a unit with one or more other rear lamps." (N.C. Gen. Stat. § 20-129)

No such provision is found in either section 24601 or section 24252.

This Court then reasoned as follows based upon the North Carolina statute:

> Although the North Carolina statute at issue refers to "a stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." N.C. Gen. Stat. Ann. §20-129(g) (emphasis added). The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," §20-129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.

Heien v. North Carolina, supra, 574 U.S. 54 [135 S.Ct. 530, 540, 190 L.Ed.2d 475, 486-487].

As noted, *ante*, California statutes refer to the license plate light in the singular and there is no general requirement that originally installed equipment be in working order. Thus, the reasoning of *Heien* does not save the illegal stop in the instant case. There is no inherent ambiguity in the California statutory scheme or language.

Recently, a lower California appellate court held that *Heien* does not apply where the statute is unambiguous. The Appellate Division of the Fresno County Superior Court in *People v. Gerberding* 50 Cal.App.5th Supp. 1, 10 (2020) concluded that *Heien* does not apply where the statute is unambiguous, citing *U.S. v. Stanbridge* 813 F.3d 1032, 1037 (7th Cir. 2016).

In *Gerberdin*g, the statute at issue stated, ""No person shall stand or sit upon any street so as in any manner to hinder or obstruct the passage therein of persons passing along the same, or so as in any manner to annoy or molest persons passing along the same, or stand in or at the entrance of any church, hall, theatre, or place of public assemblage so as in any manner to obstruct such entrance." The officer believed defendant violated this statute because a cart

containing all of his belongings was immobile on the sidewalk, blocking the sidewalk, and forcing anyone trying to use the sidewalk to go into the street in order to pass the obstruction. The Appellate Division found this interpretation of the statute was wrong, that it unambiguously applied only to "persons," that it was unreasonable for the officer to conclude appellant was violating the statute and thus, appellant's arrest was unlawful.

In *U.S. v. Stanbridge, supra,* 813 F.3d 1032 (*Stanbrudge*) cited in *Gerberdin*g, the police detained Stanbridge on the ground that he committed a traffic offense by not signaling continuously for 100 feet before pulling alongside the curb to park. *Id* at p.1033. The court found that Illinois law did not require 100 feet of signaling and found the police officers interpretation to be an objectively unreasonable reading of an unambiguous statute.

The *Stanbridge* court opined:

> We agree with Stanbridge that § 11-804 is not ambiguous, and does not require a driver to signal for 100 feet before pulling alongside a curb to park. The minimum signaling distances required by subsection (b) apply only when a driver intends "to turn right or left" (emphasis added). And no other subsection includes an explicit command to signal before moving toward a curb to park. As the district court noted, "[i]f the Illinois General Assembly had meant for the signal requirement to apply to a motorist pulling to a stop at the curb under § 11-804(d), it knew how to do so explicitly, as § 11-804(d) clearly requires the use of a turn signal before 'start[ing] from a parallel parked position'." This is a sensible reading of the statute, and the government has not given us reason to think that the legislature intended to require drivers seeking parking in congested urban areas to continuously signal for 100 feet before determining that a possible parking space is not only large enough, but also free of fire hydrants, yellow curbs, and other parking restrictions.

Stanbridge at p. 1037.

Similar is *United States v. Flores*, 798 F.3d 645, 649-50 (7th Cir. 2015) where the court concluded that a police officer could not reasonably have believed that

motorist's use of license-plate frame found on "vast" number of cars violated the Illinois statute.

The officer in the instant case was apparently aware of the code section upon which he was stopping the vehicle. This is apparent because he wrote a citation citing §24601. Section 24601 has been continually in force since 1959. Stats 1959 ch 3. Amended Stats 1965 ch 1313 § 4. Therefore, it cannot be reasonable for him to have not read the section and been familiar with it. "[A]n officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." *Heien*, 135 S. Ct. at 539-40.

The plain language of section 24601 refers in the singular to "a taillamp or separate lamp" being required to illuminate the license plate. Nowhere is the a mention of the requirement for a second lamp. This is not the case of an interpretation of case law or arcane Fourth Amendment law. The statute's words were apparent and readily available to the officer. He was an officer of 11 years experience. (2RT C-8)

Indeed, the trial court found that two lamps were not required under section 24601. (2RT D-9)

The California Court of Appeal's analysis of the reasonableness of the officer's mistake is unconvincing. The Court appears to accept, at the outset, that the officers were mistaken and that the California law only requires one license plate light. Indeed, the trial court so found. Rather, the court seizes upon the trial court's finding that the plate is less legible with one light than with two. (Opn. 14) While this may be true, that is not the test. The test, under California law, is whether the plate was legible from 50 feet away, not whether it is less legible

with one light. There was no testimony regarding legibility, as the trial court found.

The Court of Appeal's attempt to read ambiguity into a clear statute is also unconvincing. (Opn. 14-15) The court notes the reference to "two lamps" in Vehicle Code section 24601. A reading of that section, however, makes it unambiguous about which "two lamps" it was referencing. There is a distinction made between a "taillamp" and a "separate lamp." Both are in the singular. California law requires two taillamps, one mounted on the left and one on the right and requires that they be red. California Vehicle Code section 24600. The license plate light requirements are governed by Vehicle Code section 24601. Read together, it is clear that the "two lamps" in 24601 refers to the taillamp and the license plate light and requires that they be turned on simultaneously by the same switch. Anyone who has driven a car knows that the license plate light come on when the taillights are turned on. The statutes allow illumination by the taillamp as well as the license plate light. The statute refers to "a separate lamp" - - the license plate lamp - - in the singular. So there is no ambiguity and the section could not be reasonably read any other way.

No excuse was offered for his misreading of the statute. The officer's ignorance cannot then be excused because he did not read the section, nor can it be excused upon the basis that his training was inadequate. This would just pass on the unreasonableness to another member of law enforcement. As noted *ante*, , the sister jurisdictions of Florida (*Langello*) and Iowa (*Reisetter; Bateman*) with virtually identical statutes, have held that only one license plate light is required in 2007, 2008 and 2014. Police routinely receive training and this out of state

authority should have been taught to the officers. Indeed, in *United States v. Sanders* (D.Nev. 2015) 95 F. Supp. 3d 1274, 1284-1285, the court found Nevada officers' stop of a vehicle to be objectively unreasonable because the Ninth Circuit had interpreted a virtually identical Anchorage Municipal Code section as not barring air fresheners hanging from a rearview mirror. The officers were charged with that knowledge. Here, too, the officers should be charged with that knowledge. Failure to properly train cannot be reasonable.

The officer offered no justification for the stop other than the belief that the burned out license plate light constituted a code violation. The mistake was not reasonable and the traffic stop was therefore, illegal.

3. The basis for the traffic stop was admittedly pretextual and that should matter.

The blatant behavior exhibited by the detaining officers was captured on body cam. The officers brazenly admitted that the purpose of their stop was not a traffic violation, but rather a purpose to interrogate the occupants and investigate them. The opinion of the Court of Appeal set out portions of the colloquy which petitioner sets out here in pertinent part:

> "[Officer Garcia]: Man, we cut you guys so much fucken slack today.. . . You saw me fucken circle that motherfucker like four, five, man, like 10 times.
>
> "[Passenger]: Well, we outta there though.
>
> "[Officer Garcia]: I didn't do shit. Well, obviously, we're gonna contact you eventually, right?
>
> "[Passenger]: (unintelligible sound)

"[Officer Garcia]: We let you -- we let you have your party. We let you have your party, right?

"[Passenger]: Right.

"[Officer Garcia]: And so you gotta let us do our thing.

"[Passenger]: That's what we doing though. Like, ya'll see we outta there. Y'all could've been going –

"[Officer Garcia]: You gotta let us do our thing. We – we let you guys go for a long time."

"[Officer Schilling]: Yeah, that is bad.

Opinion, Court of Appeal, p.7

The notion that the officers felt they had a right to "do their thing" in harassing petitioner and his companions because the police "let them have their party" and that the detainees should have known that the police were "gonna contact you eventually" is disturbing to say the least. What is also sad is that the detainees apparently accepted that state of affairs as normal police behavior.

The rationale for the extended detention - - that they could not quickly verify Parker's identity, - - is pure subterfuge. Parker had committed no crime, not even a minor seat belt offense violation, because he was wearing his seat belt. He was not cited for any violation. The quest for Parker's identity was blatantly aimed at checking him for outstanding warrants. Meanwhile the others were detained.

While it is true that this Court has held that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis" *Whren v. United States* (1996) 517 U.S. 806, 81, certain facts about the traffic stop in this case belie

the officer's reliance upon the code violation as a basis for the stop and inform the reasonableness assessment. First, it is apparent from the dashcam video that the officers viewed the Traverse driving toward them, so the rear license plate would not be visible to them. They executed a u-turn and followed behind the Traverse.. (See video, People's 28, at 11:06:20 p.m.) Second, in the conversation captured by the dash cam, the officers said that they had seen the vehicle that night on several occasions prior to the stop and decided to stop them because they attended "hood day." Thus, not only were the officers mistaken on the law, but they had either decided to stop the vehicle prior to observing the license plate light, or they had decided to ignore the alleged violation until it served their purposes.

It would not serve the principles of the Fourth Amendment to allow police officers to declare reliance on the mistaken reading of a statute and then to beg forgiveness based upon a reasonableness argument while all the while the real reason for the stop was admittedly otherwise illegal. That is, it is one thing to say that pretexts don't matter when a valid basis for the stop can otherwise be found. It is another thing to say that pretext doesn't matter where there is no other valid basis for the stop and the officers blatantly admit to the pretext. In the instant case, it is unlikely that gang officers patrolling a gang neighborhood on "hood day" were out seeking to enforce the license plate light laws. The Court of Appeal below recognized this. Opn. 15. They were looking to make a stop of the Traverse and seized upon the non-violation of the license plate laws as an excuse to do so. The strategy failed and the officers should not benefit. Exclusion is the only viable remedy to deter such conduct.

Whren should be circumscribed to apply only to cases in which the pretext

used by the police is actually valid or other valid bases exist of which the officers are aware. This is actually the rule in other contexts. This Court has refused to "extend the principle of *Whren* to all situations where individualized suspicion was lacking." *City of Indianapolis v. Edmond* 531 U.S. 32, 46 (2000) [disapproving pretextual searches that were undertaken pursuant to valid administrative schemes.]

The rule of *Whren* was meant to be a rule of appellate review. In our current environment it should not be used to afford the police carte blanche to conduct otherwise warrantless and illegal stops because they can find some minor violation which serves as a pretext for their illegal behavior. This is especially meaningful in the context of current events in which this sort of behavior is routinely employed to stop minorities and persons of color, oftentimes with tragic results.

Justice Sotomayor said it more elegantly in her dissent in *Utah v. Strieff* ___U.S.___ [136 S.Ct. 2056, 2069-2070, 195 L.Ed.2d 400, 417 (Dissent, Sotomayer) (2016):

> Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. *Whren v. United States*, 517 U. S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). That justification must provide specific reasons why the officer suspected you were breaking the law, *Terry*, 392 U. S., at 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889, but it may factor in your ethnicity, *United States v. Brignoni-Ponce,* 422 U. S. 873, 886-887, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975), where you live, *Adams v. Williams*, 407 U. S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972), what you were wearing, *United States v. Sokolow,* 490 U. S. 1, 4-5, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989), and how you behaved, *Illinois v. Wardlow*, 528 U. S. 119, 124-125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). The officer does not even need to know which law you might have broken so long as he can later point to any possible

> infraction—even one that is minor, unrelated, or ambiguous. *Devenpeck v. Alford*, 543 U. S. 146, 154-155, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004); *Heien v. North Carolina*, 574 U.S. ___, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014).
>
> 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).

Utah v. Strieff ___U.S.___ [136 S.Ct. 2056, 2069-2070, 195 L.Ed.2d 400, 417-418 (Dissent, Sotomayer)(2016):

Put succinctly, where the basis for a traffic stop is invalid, *Whren* should not save the day because this Court has refused to "extend the principle of *Whren* to all situations where individualized suspicion was lacking." *City of Indianapolis v. Edmond*, *supra,* 531 U.S. 32, 46. That is, where the reasons offered for the stop do not amount to reasonable suspicion because they do not state a violation of traffic laws, then the admitted pretextual motive should bar a good faith excuse by the officers.

Here, the recited suspicion was invalid and there was no other reasonable suspicion for the stop. Further, police admitted the equipment violation was a pretext. It then just becomes a case of a pretext stop with no articulable or reasonable cause. The detention and its fruits must be suppressed.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for writ of certiorari and reverse the decision of the Court of Appeal.

Dated: August 18, 2021

Respectfully submitted,

_____

JOHN A. COLUCCI
Counsel of Record for the Petitioner
ALEX WHITE

Appendix A: Opinion of California Court of Appeal Affirming

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALEX WHITE et al., Defendants and Appellants.	B295147 (Los Angeles County Super. Ct. No. BA444963)

APPEAL from an order of the Superior Court of Los Angeles County, Charlaine Olmedo, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal for Defendant and Appellant Alex White.

The Justice Firm and Joe Virgilio for Defendant and Appellant Darron Williams.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Alex White and Darron Williams appeal from their convictions of two counts of first degree murder, one count of attempted murder, and one count of discharge of a firearm from a motor vehicle. White argues the trial court erred in denying his motions to suppress evidence of a traffic stop made a few days before the shooting as well as statements he made to the police when later arrested. He also argues the trial court abused its discretion in admitting a photo of him posing with a gun. We find no error.

Williams raises one argument on appeal: his murder convictions must be vacated under Senate Bill No. 1437 (SB 1437), the newly amended felony murder law. Recently, our Supreme Court in *People v. Gentile* (Dec. 17, 2020, S256698) ___ Cal.5th [2020 WL 7393491], upheld the rule announced in earlier Court of Appeal decisions that relief under SB 1437 cannot be sought on direct appeal. Instead, resentencing must first be brought in the trial court by way of a petition under Penal Code section 1170.95.[1] We also affirm Williams's judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On April 13, 2015, at approximately 3:20 p.m., B.B. was standing in the yard of his mother's house with his brother and three friends. B.B. heard what he thought were firecrackers and looked up to see a white SUV with two guns jutting out the passenger-side windows. Around 20 rounds were fired: his friends H.O. and P.K. were hit and died of their injuries. B.B.

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1 All further undesignated statutory references are to the Penal Code unless otherwise stated.

was not shot but did go to the hospital for a knee injury from diving into the gutter.

At the same time, a crossing guard was working at a school up the street from B.B.'s house. She heard gunshots and saw a white SUV driving rapidly in her direction before making a right turn at the intersection. She identified the SUV in a photograph detectives provided, and said she saw three young African-American occupants of the car.

Three weeks after the shooting, detectives arrested White and interviewed him in a recorded session. White admitted he was in the vehicle during the shooting. He told the detectives that Williams was the driver, and there were one or two other passengers. White acknowledged he was a member of the 4-8 Gangster Crip gang, and said the shooting happened in rival gang territory. He claimed he was only catching a ride that day, and did not participate in the shooting.

White and Williams were charged with the first degree murder of H.O. (§ 187, subd. (a)), the first degree murder of P.K. (§ 187, subd. (a)), the attempted murder of B.B (§§ 664/187), and discharge of a firearm from a motor vehicle (§ 26100, subd. (c)). The information alleged firearm enhancements (§ 12022.53), gang enhancements (§ 186.22, subd. (b)(1)(C)), and special circumstances as to the murder counts (§§ 190.2, subd. (a)(3) [multiple murder] & 190.2, subd. (a)(21) [drive-by murder]).

White and Williams were jointly tried with separate juries. At trial, White's incriminating statements to the police were admitted into evidence. The prosecution also presented Williams's cell phone records showing he was in the vicinity of the crime scene when the shooting occurred, and surveillance footage showing a white SUV that appeared to be a Chevy

Traverse traveling on the street where the shooting took place. A firearms expert testified that 14 bullet casings were recovered from the scene, fired from three guns.

The prosecution also presented evidence of two events that occurred prior to the shooting. First, in 2007, Williams was convicted of a drive-by shooting less than two blocks from the present crime scene. Second, 11 days before the present shooting, Officer Bryan Schilling had pulled over a white Chevy Traverse SUV driven by Williams. White also was in the vehicle along with three other passengers. Everyone in the SUV was a member of the 4-8 Gangster Crips. Officer Schilling had cited Williams for a license plate violation and White (and others) for a seat belt violation. Officer Schilling noticed that Williams was disabled and the vehicle was equipped with levers to allow him to operate the controls with his hands.

A gang expert testified that Williams and White were 4-8 Gangster Crip members. A photo was introduced of White, Williams, and others displaying gang signs; White had a pistol tucked in his waistband. Given a hypothetical mirroring the facts of the case, the expert opined the shooting was committed for the benefit of, and in association with, the gang.

White's attorney called K.V., the mother of victim B.B., to testify. She had been sitting on her front porch when the shooting happened. In testimony that appeared unexpected, she identified White as the shooter.[2] The prosecutor asked K.V. "how certain" she was that White "was the one who did the shooting"?

[2] White's counsel told the court, "Her testimony is a complete surprise to me."

K.V. answered, "I'm certain." She knew White and his family from the neighborhood. She could not identify the driver.

The juries convicted White and Williams on all counts. The court sentenced White to life without possibility of parole on the two murder counts (one of which was stayed) and concurrent terms of 25 years to life (attempted murder) and 15 years to life (discharge of a firearm from a motor vehicle), plus a 10-year gang enhancement. Other enhancements were stayed. Williams was sentenced to two consecutive sentences of life without the possibility of parole plus 39 years to life. Defendants timely appealed.

DISCUSSION

I.

Defendant White's Appeal

White argues the trial court erred in denying his motions to suppress evidence of a traffic stop made prior to the shooting as well as statements he made to the police after he was arrested. He also argues the trial court abused its discretion in admitting a photo of him posing with a gun.

A. *The Motion to Suppress Evidence of the Traffic Stop*

White contends the trial court erred in admitting evidence of a traffic stop that occurred several days prior to the shooting. We report the circumstances of the detention in detail in order to address White's arguments that (1) there was insufficient evidence of a violation of the Vehicle Code to justify a traffic stop; and (2) the officers admitted that the detention was really to investigate defendants' gang association.

1) *The Traffic Stop*

On April 2, 2015, 11 days *prior* to the shooting, Officers Schilling and Garcia were "working gangs" and patrolling the neighborhood on "Hood Day," a celebration by a local gang. Throughout the day, the officers observed a gathering of gang members. At 11:06 p.m., the officers were in their car, idling on the side of the road when Williams drove past them going in the opposite direction. The officers' car did a U-turn and pulled Williams over. A video camera in the police car was activated and connected with microphones in Officers Schilling's and Garcia's belts to record the subsequent events.

Officers Schilling and Garcia exited their car and approached Williams's car. White was a passenger, as were three other men, including Devonte Parker. Williams rolled down his window and asked, "How come I got pulled over?" Officer Schilling responded, "The old license plate light." Officer Garcia asked for ID:

"[Officer Garcia]: You got your ID on you? Anybody in the back got ID on them? Yes? No? Maybe so? . . . . I'm being calm as fuck with you guys right now. All right? We can either do it just chill, or we can do it all with all the bullshit. . . .

"[Officer Schilling]: Hey, Louis, get the three in the back's ID. They're all gonna get fucken cited up.

"[¶] . . . [¶]

"[Officer Garcia]: . . . Well, the guy -- the -- they -- this guy in the middle he has ID. The other two guys or everyone else is playing, fucken, like assholes. We're just gonna fucken pull everybody out one at a time."

Officer Schilling made a call to other officers for assistance. Two additional officers arrived. Each of the four officers took one

passenger out of the car. Officer Schilling asked another officer about Williams: "See the guy in the wheelchair?" An unidentified officer responded, "[Officer] Fernie said he seemed nervous, dude, like shaking." The sound of laughter followed this remark.

As Officer Garcia questioned a passenger about his tattoos and gang affiliations, the passenger protested: "You're making it hard for us, man. We just trying to get home." Officer Garcia responded:

"[Officer Garcia]: Man, we cut you guys so much fucken slack today. . . . You saw me fucken circle that motherfucker like four, five, man, like 10 times.

"[Passenger]: Well, we outta there though.

"[Officer Garcia]: I didn't do shit. Well, obviously, we're gonna contact you eventually, right?

"[Passenger]: (unintelligible sound)

"[Officer Garcia]: We let you -- we let you have your party. We let you have your party, right?

"[Passenger]: Right.

"[Officer Garcia]: And so you gotta let us do our thing.

"[Passenger]: That's what we doing though. Like, ya'll see we outta there. Y'all could've been going –

"[Officer Garcia]: You gotta let us do our thing. We – we let you guys go for a long time."

"[Officer Schilling]: Yeah, that is bad.

"[Parker]: Well, I gave you my name, Officer.

"[Officer Schilling]: You been arrested? . . .

"[Parker]: Yes, I have before.

"[Officer Schilling]: Okay. So you have? Here, man, turn around. Put your . . . hands behind your back. . . . Now, you're going to have to get him to come off, because, otherwise, I'm

gonna take you to the station. . . . Face the wall. . . . I'm gonna find you now. We're gonna stay out here all night, man. . . . And if I find you under some other name – . . . I'm gonna book you on an open. . . . Right now if I find you, I'll take you – I'll take you down and I'll get you fingerprinted."

After finding Parker in the police database under a different spelling than what Parker had given, Officer Schilling asked Parker about his gang affiliation and his activities that day.

When the officers' questioning had continued for about 40 minutes, Officer Schilling asked Officer Garcia, "Want to cite him? . . . Are you gonna cite him?"

"[Officer Garcia]: Yeah.

"[Officer Schilling]: All three of them?

"[Officer Garcia]: Yeah."

Each of the four officers wrote out a ticket. Officer Schilling also continued to question Parker, asking him about a prior conviction, his tattoos, and whether he was able to outrun a police dog. Finally, Officer Schilling told Parker, "All right, man. I'm done clowning you for today. It was too easy." Another passenger asked Officer Schilling, "We the only car y'all pull over tonight?"

"[Officer Schilling]: No.

"[Unidentified Officer]: No.

"[Officer Schilling]: They're been about – a lot more.

"[Unidentified Officer]: We had – we had a good –

"[Unidentified Male]: I'm talking about out of – I'm talking about from where y'all came from . . . to where – to where we came from.

"[Officer Schilling]: Man, I was there all day. Didn't you see me drive up and down that street all day?

"[Unidentified Male]: Y'all was waiting just to – y'all probably. . . .

"[Unidentified Male]: Man.

"[Officer Schilling]: He's all, duh. . . .

"[Unidentified Male]: But why y'all can't . . . .

"[Officer Schilling]: Well, tomorrow, of course, we're gonna come . . . . Fortunately, I'll see you guys tomorrow. We'll try it again tomorrow and see if it goes all day tomorrow."

The officers issued Williams a traffic ticket for a violation of Vehicle Code section 24601 (license plate light), and three tickets to the backseat passengers for violating Vehicle Code section 27315 (not wearing a seat belt). Fifty-four minutes had elapsed since the officers pulled Williams over.

The prosecution opposed the motion, arguing that Officer Schilling had an "objectively reasonable belief that [Williams's] burned-out license plate lamp violated" the Vehicle Code. The prosecution also argued that the detention was not prolonged "in any meaningful way" because ten minutes before the end of the stop, one officer indicated he was still "writing" out a ticket for passenger Parker.

2) *The Hearing*

At the hearing on the motion to suppress, the prosecution submitted the dashcam video into evidence. The video showed that the license plate had lights located on the right and left sides, and that the left-side light was not functioning. Officer Schilling testified he stopped Williams's car on the date in question because "one of the license plate lights was not

working," and he knew this was a violation of Vehicle Code section 24601 (section 24601).

Section 24601 provides that "Either the taillamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear license plate during darkness and render it clearly legible from a distance of 50 feet to the rear. When the rear license plate is illuminated by a lamp other than a required taillamp, the two lamps shall be turned on or off only by the same control switch at all times."[3]

Officer Schilling acknowledged the stop lasted 54 minutes, but said "as soon as we cited everybody, they were free to go. As soon as we found Mr. Parker in the computer, everybody was free to leave at that time." "We only spoke with the occupants of the car until the last ticket was signed. Once the last ticket was signed they were free to leave."

The defense pointed to still photos from the dashcam video showing the license plate was illuminated by a functioning tail lamp, and argued there was no violation of section 24601. The prosecutor acknowledged the license plate was illuminated by one taillamp, but argued that any broken taillight was a violation of section 24601. The prosecution also argued the detention was not prolonged because the officers were "conducting their own conversations with the other passengers in order to determine their identification and to eventually cite them for the seat[]belt violation."

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[3] The parties and the trial court also discussed a second statute, Vehicle Code section 24252, which provides in pertinent part: "All lighting equipment of a required type installed on a vehicle shall at all times be maintained in good working order." (Veh. Code, § 24252, subd. (a).)

The trial court denied the suppression motion. The court was of the view that section 24601 does not require two lights, and focused instead on the statute's requirement that a rear license plate be both illuminated and legible from a distance. The court found that the license plate was illuminated by one lamp but that there was an absence of evidence as to whether the plate was legible: "[T]he plate was illuminated . . . the officer said he could see the plate. But there wasn't further questioning from either side whether the plate itself was legible. [¶] . . . [¶] I find nothing in the record to say that from that distance, even with a burnt-out light, the lettering on the plate was still clearly legible to the officer." The video footage, the court found, was not "accurate" because of the "reflective" nature of the plate which made it "hard to view . . . what was necessarily visible . . . ." Finally, the court concluded the stop was not unlawfully prolonged because writing "tickets can take a while . . . with four individuals."

White's counsel later moved for reconsideration of the court's ruling, which the trial court denied.

3) *The Traffic Stop Did Not Violate the Fourth Amendment*

White argues the trial court erred in denying the motion to suppress because the prosecution did not meet its burden of showing Officer Schilling had a reasonable suspicion of a Vehicle Code violation. The trial court, White contends, inverted the burden of proof when it ruled against him on the ground that White had failed to show substantial evidence that the license plate was legible. In White's view, Officer Schilling was mistaken in concluding that section 24601 required that both license plate lights be operational. Lastly, White argues "it

would not serve the principles of the Fourth Amendment to allow police officers to declare reliance on the mistaken reading of a statute and then to beg forgiveness based upon a reasonableness argument while all the while the real reason for the stop was otherwise illegal."

Under the Fourth Amendment, law enforcement must obtain a warrant before conducting a search or seizure unless an exception to the warrant requirement applies. (See, e.g., *People v. Williams* (1999) 20 Cal.4th 119, 125–126.) "When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment." (*Brendlin v. California* (2007) 551 U.S. 249, 251.) Where a defendant challenges the lawfulness of a search or seizure, "the People are obligated to produce proof sufficient to show, by a preponderance of the evidence," that one of the exceptions to the warrant requirement is applicable. (*People v. Romeo* (2015) 240 Cal.App.4th 931, 939.)

One exception is that a warrant is not required for a brief investigatory stop supported by reasonable suspicion of a crime. (See, e.g., *Cornell v. City and County of San Francisco* (2017) 17 Cal.App.5th 766, 779–780 ["A 'brief, investigatory stop' is justified where an officer has 'reasonable, articulable suspicion that criminal activity is afoot,' implicating the suspect."].) "[T]o justify this type of seizure, officers need only 'reasonable suspicion' — that is, 'a particularized and objective basis for suspecting the particular person stopped' of breaking the law. [Citation.]" (*Heien v. North Carolina* (2014) 574 U.S. 54, 60 (*Heien*).)

That a police officer makes a mistake about the law or the true facts does not automatically render the suspicion

unreasonable. (*Heien*, *supra*, 574 U.S. at p. 66.) However, "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved. [Citation.]" (*Ibid.*; see *People v. Campuzano* (2015) 237 Cal.App.4th Supp. 14, 16 ["an objectively reasonable mistake of law can give rise to a reasonable suspicion under the Fourth Amendment"].)

In reviewing the trial court's denial of a motion to suppress, we defer to the trial court's factual findings where supported by substantial evidence. (See *People v. Woods* (1999) 21 Cal.4th 668, 673.) We review independently whether the search or seizure was legal under the Fourth Amendment requirement of reasonableness. (*People v. Camacho* (2000) 23 Cal.4th 824, 830–831.)

Here, the trial court upheld the warrantless seizure of the occupants of the car based on a finding of insufficient evidence the license plate was legible as required by section 24601. We agree with White that the manner in which the trial court expressed its ruling erroneously placed the burden of proof on the moving party when, in fact, the prosecution bore that burden. The lack of critical evidence, if there was any, inured to the detriment of the prosecution. (See *Romeo*, *supra*, 240 Cal.App.4th at p. 939.)

On appeal "we consider the correctness of the trial court's ruling *itself,* not the correctness of the trial court's *reasons* for reaching its decision. [Citation.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.)

White offers that the correct interpretation of section 24601 is that only one license plate light needs to be functional if the

rear plate is illuminated and is legible from 50 feet. However, for present purposes the authoritative interpretation of the statute is not the test. Instead, we ask whether any misunderstanding of section 24601 by Officer Schilling was objectively reasonable under the facts of the case and thus supported the stop and detention. "The question . . . is not whether [defendant's] vehicle was in fact in full compliance with the law at the time of the stop, but whether [the officer] had ' "articulable suspicion" ' it was not. [Citations.]" (*People v. Saunders* (2006) 38 Cal.4th 1129, 1136.) " ' "[R]easonableness," with respect to this necessary element, does not demand that the government be factually correct in its assessment.' " (*Ibid.*)

The trial court found the broken license plate lamp rendered the license plate less visible and legible than "if both [lights] had been working." While there was still some illumination, and the prosecution did not present evidence the plate was illegible from a distance of 50 feet, we also do not "call upon the officers to be scientists" and measure the extent of illumination from a specific distance. (*People v. Niebauer* (1989) 214 Cal.App.3d 1278, 1292.) Williams's license plate was designed to be illuminated from both sides, and that the plate lacked illumination from one side was an objectively reasonable basis for suspecting that the plate was not "clearly legible" in the darkness at a distance of 50 feet in violation of section 24601.

We also observe that section 24601 not only requires a license plate to be illuminated and legible, but also includes the provision that, "When the rear license plate is illuminated by a lamp other than a required taillamp, the *two lamps* shall be turned on or off only by the same control switch at all times." (Emphasis added.) This reference to "two lamps" being "turned

on" at the same time could be construed to suggest that when a license plate is designed to be illuminated by two lamps, both lamps must be functional. It is true that other parts of the statute suggest that one license plate light may be permitted and the "two lamps" may be referring to one taillamp and one license plate light. The statute reasonably could be read either way.

Finally, White acknowledges that an officer's " 'subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis.' " Yet, he argues that the dashcam video establishes that the officers "had decided to stop the vehicle prior to observing the license plate light." White points to the officers' comments captured on the dashcam video that they had been watching these men all day, and waiting for them. Specifically, when one of the passengers protested that the officers were giving them a hard time, Officer Garcia said he had "circled" the passengers' gathering "like 10 times" that day, and "obviously, we're gonna contact you eventually." As Officer Garcia put it, the officers had "let" the passengers "have" their party, and thus, these men were now obligated to "let" the officers "do [their] thing." When one of the passengers asked if the officers had pulled over other cars coming from the passengers' gathering, Officer Schilling said they had. Officer Schilling volunteered, "I was there all day. Didn't you see me drive up and down that street all day?" Connecting the dots, the passenger responded, "Y'all was waiting just to . . . ." "Duh," Officer Schilling replied.

While we agree that these statements indicate the officers pulled Williams's car over primarily to investigate the gang ties of the occupants, the United States Supreme Court has "made clear that Fourth Amendment challenges based upon a claim that a seizure or search was 'pretextual' are without merit. (See

Whren v. United States (1996) 517 U.S. 806, 813.)" (*People v. Letner and Tobin, supra*, 50 Cal.4th at p. 144 [that an officer may have had a "grudge" against the defendants did not make the stop illegal].) "We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." (*Whren v. United States, supra*, 517 U.S. at p. 813.)[4]

B. *White's Motion to Suppress His Statements to the Police*

1) *The Interrogation*

On May 7, 2015, three weeks after the shooting, Detective Jose Calzadillas and his partner interviewed White at the station. Detective Calzadillas advised White of his *Miranda* rights and White said he understood them, and talked to Detective Calzadillas at length. White acknowledged he was a 4-8 Gangster Crips gang member, and that he was in the car during the April 13th shooting. He was equivocal as to whether there were three or four people in the car. He said a man called Tiny Manson was driving—Williams's moniker was "Little Manson"—and identified a picture of the car. Eventually, White asked to see his mother, and the detectives let her speak with him. White then asked Detective Calzadillas for a lawyer. The detective ignored the request,[5] and kept questioning White for approximately another half an hour.

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[4] Neither White nor the Attorney General discuss "pretextual stop," presumably because of the authorities we cite in the text.

[5] "[Defendant White]: Can I get a lawyer, man?
"[Detective Calzadillas]: You want a lawyer?
"[Defendant White]: Yeah, man."

The following day, on Friday, May 8, 2015, Detective Calzadillas met with White again. The detective said, "your mom got a hold of the detective and said you want to talk to us again?" White responded in the affirmative. Detective Calzadillas asked if White understood that "everything [they] talked about yesterday still stands in effect [–] That you[r] rights and all that stuff stands . . . ." White asked if he could "have a lawyer . . . for my thing. . . . I'm not talking about for today." The detective responded, "Oh, yeah, if you wanted to have the lawyer later on the road, it's fine. But do you want to talk to us now without one?" White responded, "Uh, yeah, it's all right."

White proceeded to talk with Detective Calzadillas. White said there were four people in the car, and admitted that Williams was driving the car. Detective Calzadillas then let White speak with detective Stacey Symkowiak, who knew White and his family. Detective Symkowiak encouraged White to cooperate with the investigation. White said to her at one point, "I need somebody here. . . . My attorney, or somebody." Detective Symkowiak told him, "You don't have an attorney yet," that counsel would not be assigned to him until he went to court "on Monday," and "If you think that's gonna be your lifeline, you're fooling yourself." She told him, "The only chance you have

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"[Detective Calzadillas]: I'm telling you right now, you're going to jail for murder. You have that right. But I'm telling you right now, since you're not saying anything, I – based off my investigation, you're going to jail for murder. Is that how you want to leave it?

"[Defendant White]: Man.

"[Detective Calzadillas: Is that how you want to leave it?

"[Defendant White: Man, like – why y'all – can y'all talk to somebody else since I'm not the only one here?"

right now is that . . . you may not have played as bad of a part as they did, and your chance, your opportunity is to tell" the detectives.

White then spoke with Detective Calzadillas again, and said again there were three or four people in the car. White continued to assert that another passenger in the car had fired the shots.

2) *The Motion to Suppress*

White moved pretrial to suppress his statements to the detectives for violating his right to counsel. The trial court granted the motion in part. The court found that White had implicitly waived his right to counsel at the beginning of his May 7 interview because Detective Calzadillas advised him of his *Miranda* rights and White indicated he understood them and began talking. However, the court found that after White's mother talked with him, White invoked his right to counsel by asking for a lawyer. The court suppressed the rest of White's statements that day. The court further found that the following day, when White asked to speak with the detectives, White again implicitly waived his rights and freely talked with the detectives by initiating a new conversation.

3) *The Admissibility of White's Statements after Speaking with Detective Symkowiak*

White contends that the trial court erred in failing to suppress the statements he made after his conversation with Detective Symkowiak because he had asserted his right to counsel. His argument turns on his statement to the detective that he needed "somebody here . . . [m]y attorney or somebody." He claims Detective Symkowiak "nullified" his right to counsel by badgering him to talk to Detective Calzadillas, and telling White

he could not have counsel until he went to court on Monday, three days later.[6] We conclude the statements were properly admitted.

"If a defendant waives his right to counsel after receiving *Miranda* warnings, police officers are free to question him. [Citation]. If, post-waiver, a defendant requests counsel, the officers must cease further questioning until a lawyer has been made available or the defendant reinitiates. [Citation.] However, the request for counsel must be articulated 'unambiguously' and 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' [Citation] If a defendant's reference to an attorney is ambiguous or equivocal in that 'a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, [precedent does] not require the cessation of

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[6] Respondent argues White forfeited this argument because he did not argue before the trial court that he had invoked his right to counsel during his conversation with Detective Symkowiak. Even if White forfeited the claim due to his counsel's failure to specifically argue that his statements to Detective Symkowiak invoked his right to counsel, because the issue appears to be one of law based on undisputed facts we exercise our discretion to reach the merits of his claim. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party."]; cf. *People v. Linton* (2013) 56 Cal.4th 1146, 1166 [finding forfeiture where "no opportunity was presented to the trial court to resolve any material factual disputes and make necessary factual findings"].)

questioning.' [Citation.]" (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 19.)

"In reviewing a trial court's *Miranda* ruling, we accept the court's resolution of disputed facts and inferences and its evaluations of credibility, if supported by substantial evidence, and we independently determine, from the undisputed facts and facts properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1105.) Where a defendant's statements to the police are undisputed, "we engage in a de novo review of the legal question of whether the statement at issue was [admissible]." (*Ibid.*)

Here, White's statements—"I need somebody here. . . . My attorney, or somebody."—were equivocal as they referred to needing either an attorney "or" some other person. (See *People v. Frederickson* (2020) 8 Cal.5th 963, 1011 [a defendant did not unequivocally invoke his right to counsel when he asked, " 'Hey, when am I going to get a chance to call my lawyer?' "].) This conveyed to a reasonable officer that White might want to invoke his right to counsel, not that he was unambiguously expressing his desire to terminate the conversation. (See *Bacon*, *supra*, 50 Cal.4th at pp. 1104–1105.) In the context of the exchange, White was not asking for a lawyer at that moment, but was talking with Detective Symkowiak about how to proceed with his interrogation by Detective Calzadillas.

Detective Symkowiak was not questioning White about the crime; she was urging him to cooperate: she counseled White to tell Detective Calzadillas "the truth" and to not "play these games." She ostensibly had interrupted White's interrogation to advise White to cooperate because White's family had been

"calling" her and "begging" her to help him. White indicated familiarity with Detective Symkowiak by addressing her by her first name, and asking her to explain why the police would charge him with murder.

In this context, a reasonable officer could have concluded that White did not indicate that he wanted to stop his conversation with detectives immediately and consult counsel. We conclude the trial court did not err in admitting the statements White made after he spoke with Detective Symkowiak.

C. *The Admission of a Photo Showing White with a Gun*

White argues the trial court abused its discretion in admitting a photo showing him making gang signs while posing with a handgun in his waistband. The prosecution pointed to the photo when questioning a defense witness, and asked hypothetically if the photo showed that the person with a gun was a "shooter for the gang." The witness responded, "He could be." White now argues this evidence was impermissible character evidence that had no relevance other than to show he was the sort of person who carries a gun.

Evidence of prior weapon possession may be admissible when relevant to prove some fact (e.g., motive, opportunity, preparation, knowledge or identity) other than a defendant's disposition to possess weapons or to commit a crime. (Evid. Code, § 1101, subd. (b).) However, such evidence should not be admitted if its probative value is substantially outweighed by the probability of undue prejudice, confusion of issues or misleading the jury. (Evid. Code, § 352; *People v. Davis* (2009) 46 Cal.4th 539, 602.) " 'We review for abuse of discretion a trial court's

rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.' " (*Davis*, *supra*, at p. 602.)

We conclude the photo of White with the gun was admissible under Evidence Code section 1101, subdivision (b). White's motive and intent in shooting and murdering two people were relevant to the prosecution's theory that White was a gang member who committed the crime as an attack on a rival gang. (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1073 [evidence that the defendant "possessed numerous firearms had 'tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action' [], namely, that he was a gang member at war with a rival gang"].) Nor was the evidence of a tucked-in pistol unduly prejudicial in comparison to evidence of the violent drive-by shooting. The trial court did not abuse its discretion in concluding the photo's probative value was not substantially outweighed by its prejudicial effect.

D. Cumulative Error

White contends his convictions must be reversed for cumulative error. Because we have no found error, the claim of cumulative error is without merit." (See, e.g., *People v. Reed* (2018) 4 Cal.5th 989, 1018.)

II.

Defendant Williams's Appeal

A. *Williams Was Required File a Petition Under Section 1170.95 to Seek Relief Under SB 1437*

With only slight deviation, Williams raises only a single argument in his opening brief—he was entitled to be resentenced under SB 1437. He does not join in the arguments of defendant

White and accordingly we do not consider those arguments in Williams's appeal.

"Senate Bill 1437 was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill No. 1437 accomplishes this by amending [Penal Code] section 188, which defines malice, and [Penal Code] section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability. Senate Bill No. 1437 also adds the aforementioned section 1170.95, which allows those 'convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts. . . .' (§ 1170.95, subd. (a).)" (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).)

Williams argues his murder convictions must be vacated under SB 1437 because it was undisputed he was not the shooter, and the jury did not make findings that he was a major participant in the crimes or that he acted with reckless indifference to human life.[7] The striking flaw in this argument is

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[7] Williams also argues we should reverse his firearm enhancement because of a "change" in the law, but he does not identify what change he is referring to or cite to any authority. We observe that White's trial counsel informed the court of its discretion under Senate Bill No. 620 to impose a lesser firearm

that SB 1437 relief must be pursued first in the trial court by way of a petition for resentencing under section 1170.95. (*Martinez*, *supra*, 31 Cal.App.5th at p. 729 ["we hold the section 1170.95 petition procedure is the avenue by which defendants with nonfinal sentences of the type specified in section 1170.95, subdivision (a) must pursue relief . . . [¶] . . . [¶] [A] defendant retains the option of seeking to stay his or her pending appeal to pursue relief under Senate Bill 1437 in the trial court."].) Our Supreme Court recently upheld *Martinez* and the other Court of Appeal decisions that have held SB 1437 relief is not available on direct appeal.[8] (*People v. Gentile, supra*, Cal.5th [2020 WL 7393491].) Williams's present effort to raise the issue on appeal fails. Accordingly, we affirm his convictions.

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enhancement, and the court recognized that it had "the discretion to strike or stay" the enhancement under section 12022.53, subdivision (d). The trial court chose not to do so.

[8] The Supreme Court's opinion in *Gentile* was filed several months after briefing in this appeal was complete. *Gentile* cites approvingly and quotes from *Martinez*. During briefing, counsel for Williams was aware that *Martinez* had held that SB 1437 relief was not available on direct appeal. On April 8, 2019, counsel filed a "Petition for Stay of Appeal Pending Outcome of Petition to Vacate Convictions Based on California Penal Code section 1170.95 and People v. Martinez." Counsel stated in his petition to stay the appeal that "there is no direct right of appeal from a conviction of first or second degree murder under the change in the California felony murder rule" and noted that the Court of Appeal had "recently addressed the issue of direct appealability in the case *People v. Martinez[, supra,*] 31 Cal.App.5th [at p.] 719."

DISPOSITION

The judgments against appellants White and Williams are affirmed.

WE CONCUR:

RUBIN, P.J.

BAKER, J.

MOOR, J.

Appendix B- California Supreme Court denial of review

Court of Appeal, Second Appellate District, Division Five - No. B295147

S267071

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ALEX WHITE et al., Defendants and Appellants.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice