No.

IN THE SUPREME COURT OF THE UNITED STATES

QUAID CORNELL,

Petitioner

v.

WARREN L. MONTGOMERY, Warden,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Cornell's trial attorney at his murder trial failed to move to suppress evidence on grounds that Cornell was detained without reasonable suspicion. The questions presented are"

1. May police officers detain and search all members of group on grounds that the behavior of one person was suspicious?

2. Is trial counsel constitutionally ineffective when he fails to move to suppress evidence gathered during an investigative stop made without individualized reasonable suspicion?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Quaid Cornell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, which affirmed the district court order denying his petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The Ninth Circuit Court of Appeals issued an unpublished decision affirming the district court's order denying the petition for a writ of habeas corpus. App. 1.[1] The district court order denying the petition is unreported. App. 5.

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1 "App" refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and "CT" refers to the Clerk's Transcript.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals affirming dismissal of the petition was entered on March 10, 2025. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law."

The Sixth Amendment to the United States Constitution provides that, in all criminal prosecutions, the defendant shall have the assistance of counsel for his defense.

28 U.S.C. § 2254 (a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

A. State Court Proceedings

On July 30, 2018, a San Bernardino County Superior Court jury convicted Cornell and co-defendant Andre Haynes of two counts of deliberate and premeditated attempted murder and one count of murder. Cal. Penal Code §§ 187, 664. Cornell was sentenced to a prison term of 114 years to life. 3-CT-536-537.

On February 25, 2022, the California Court of Appeal reversed firearm and gang enhancements and otherwise affirmed the judgment. 1-ER-42. Cornell's petition for review on direct appeal and his petition for review of the order denying his petition for a writ of habeas

corpus were denied by the California Supreme Court without comment or citation to authority on May 11, 2022. 1-ER-37-39.

B. Federal Court Proceedings

Cornell timely filed a petition for writ of habeas corpus in the district court on December 28, 2022. CR-1. After a full round of briefing, the district court denied the petition on the merits. 1-ER-3-4. On March 10, 2025, the Court of Appeals affirmed the decision of the district court. App. 1.

STATEMENT OF FACTS

A. The Shooting

On August 27, 2016, at about 8:00 p.m., Dawn Sutton, Harold Cook and Ellen Wimbush were in a parking lot in San Bernardino. 1-RT-89-91. Sutton heard a gun shot and saw a muzzle flash. She saw one of the shooters, who was a Black man with dreadlocks whom she had seen several times before. 1-RT-93-95-96. That man was not appellant Quaid Cornell or his co-defendant Andre Haynes. 1-RT-97-98.

Cook was killed at the scene. 1-RT-131-132-141. Wimbush was shot in her leg. Two months later, she died due to complications from the bullet wound. 1-RT-104-106.

A witness saw a suspicious person peeking into the parking lot area. He got out of his truck to investigate but fled when he heard gunfire. 1-RT-112-114. The witness saw multiple muzzle flashes and two or three shooters. 1-RT-115-120-122.

B. Quaid Cornell's arrest in an unrelated incident the same day

About an hour and a half after the shootings, Cornell was arrested after police were dispatched to investigate a report that there was a group of "15 males . . . who were armed with weapons and were pointing them." 1-RT-169. An office approached five people later identified

as: appellant Quaid Cornell, his brother Karlton Cornell, Theo Cobbs, and prosecution witness DaShawn (aka "Lester") Sloan. 1-RT-172-173-180. Cobbs's black Impala was parked directly in front of the red Nissan, which belonged to Quaid's mother. 1-RT-172-173-186-209-210; 4 RT-803-804.

Sloan ran toward the parked cars while reaching for his waistband. Officer Olvera pointed a gun at him and ordered him to the ground. Sloan then dropped a 9 millimeter Beretta handgun. 1-RT-175-177. Officer Olvera saw co-defendant Haynes sitting in the passenger seat of the Impala. 1-RT-179. Quaid's girlfriend, JoeOnna Kirk, was sitting in the front passenger seat of the Nissan. 1-RT-185-186.

Officers detained and searched the entire group. Police found a handgun and an expended rifle casing in Karlton's pocket. 2-RT-316-318. They found a high capacity magazine in the cup holder of the Nissan where Kirk had been sitting and a handgun in the center console. 1-RT-186-187-206.

C. Gunshot residue evidence

Police swabbed the hands of the people detained and tested the swabs for gunshot residue. 2-RT-296-297-492-493. No gunshot residue was found on Cobbs or Karlton. 2-RT-297. One particle of gunshot residue was found on Kirk's hand, two particles were found on Sloan's, five particles on Haynes, and eleven particles on Quaid. 2-RT-296-297.

An expert witness testified that the presence of gunshot residue can occur after: (1) having fired a firearm, (2) having handled a firearm, (3) having been in close proximity to a firearm when it was discharged, or (4) having touched a surface that had gunshot residue on it. 2-RT-298. The presence of a larger amount of residue on an individual's hands does not indicate that he or she has fired a weapon. 2-RT-305.

D. Ballistics evidence

Twenty 9 milimeter cartridges and eleven .45 caliber cartridges were recovered from the scene of the shooting. 2 RT 477, 481-482, 499. Police also recovered and analyzed 6 expended rounds and 18 bullet fragments. 2 RT 485. An expert testified that seven of the twenty 9 mm cartridges had been fired from the handgun that had been recovered from Cobbs's Impala, where co-defendant Haynes had been sitting. Eleven of the 45 caliber cartridges had been fired from the handgun found in the console of the Nissan where Kirk had been sitting. 2 RT 508.

E. Cell phone tower evidence

FBI Special Agent Kevin Boles testified that he had conducted an analysis of cellular phone service tower data. Boles explained that cellular service towers service a general geographic area and not particular locations. 1-ER-182. The state court clerk's transcripts do not include the maps showing the size of the geographic areas served by the cellular towers examined in this case.

Boles testified that Quaid's number connected to the tower service area for the north end of San Bernardino at around 6:30 p.m. 1-ER-187-188. That phone connected to a cellular service tower that serviced the general area of 5th and Waterman at about 8 p.m. 1-ER-189. The phone connected to a tower at Baseline and the 215 freeway at about 8:04 p.m. 1-ER-190. At approximately 8:30 p.m., the device connected to the towers at Highway 18 and Waterman. 1-ER-192-193. Between 8:34 and 9:51, the phone connected to the same north end tower that it had first connected to near Dover Drive. 1-ER-193. Quaid did not have a cell phone with him at the time of his arrest. 1-RT-220-221 (only Sloan's and Haynes's phones were seized); 4 RT 824 (Quaid's testimony that his phone was at his home on Dover Street when he was arrested).

F. Testimony of cooperating co-defendant DaShawn Sloan

DaShawn aka "Lester" Sloan was charged as a co-defendant in the murders of Cook and Wimbush and the attempted murder of Sutton. After police presented him with the evidence of the 45 caliber handgun found in Quaid's Nissan and the gun shot residue analysis, Sloan decided to cooperate with the prosecution and he gave them a statement implicating Quaid and co-defendant Haynes. 1-ER-211-213. Sloan entered a guilty plea to one count of voluntary manslaughter and agreed to a sentence of 6-11 years in prison in exchange for his agreement to testify truthfully at Quaid and Haynes's trial. 1-ER-13.

The California Court of Appeal found that Sloan was "not a particularly forthcoming witness" but that his testimony circumstantially implicated Quaid and co-defendant Haynes in the shooting. 1-ER-45.

Sloan admitted that he was an Eastside IE Crip gang member. He testified that at about 2 p.m. on the day of the shootings, he had been outside an apartment complex on Sierra Way. He heard gunshots and learned that two Eastside IE Crip gang members had been shot. He believed the shooters were members of a rival gang called Seven Tray. 2-RT-322-330-334-335

Later that day, Sloan went to a party on Dover Drive with Quaid, co-defendant Haynes, Theo Cobbs and Kevin Winship. 2-RT-346-347. Sloan admitted that he had been armed with a handgun. 2-RT-352. According to Sloan, the group eventually left the party together in two cars. Sloan, Cobbs, and Winship left in the Impala and Quaid, co-defendant Haynes, and a man known by the moniker "Little Woodie" traveled in the Nissan. 2-RT-353-354. The two cars drove to a home on G Street that was in Seven Tray territory. Quaid, Haynes, and Cobbs went into an apartment nearby. Sloan said he stayed in the parked Impala for about 45 minutes, talking to Winship. 2-RT-355.

At about 8 p.m., Quaid, Haynes, and Little Woodie came out of the apartment and walked around a corner, saying they would be right back. The group disappeared from view and then a few minutes later, Sloan heard gunshots. The three men returned and said they had to leave. The entire group then drove in two cars back to the party on Dover. 2-RT-357-359.

G. Facebook and text message evidence

On the date of the shootings, in the afternoon, a message was sent from Quaid's Facebook account to co-defendant Haynes, which said "we all meeting in the hood." When asked if he knew "what happened" Haynes said he didn't. Quaid asked Haynes to call him as soon as possible. 2-RT- 347; 3-RT-572; 4-RT-762-763.

Shortly thereafter, Haynes sent a message to Quaid's brother Karlton, asking what was up. Karlton responded, "U already kno we doin r shit… it could've been anyone of us." Haynes replied, "I keep saying we needs to do our shit during the day." 3-RT-684; 4-RT-774-776-816; People's. Exh. 134 [text of Facebook messages].)

Thereafter, Quaid texted Haynes asking where he was, and without specifying what he was referring to, said "its going down right now." Haynes stated he was trying to get a ride, and Quaid said he would try to come and get him. Quaid subsequently sent a message to Haynes that he was on his way. 3-RT-573-574; 4-RT-788-789.

H. Defense Evidence

1. Testimony of co-defendant Haynes

Haynes testified that he went to the party on Dover Drive with Theo Cobbs. At the time, Haynes did not know about the shooting that had occurred on Sierra Way. At about 8 p.m., Haynes, Cobb, and Sloan left the Dover Drive party together. They parked near a house on Temple Street. A second group of people, whom Haynes did not know, drove to the same

location in a white car. 3-RT-630-638-640.

Sloan, carrying his hand gun, walked toward the parking lot with three men from the white car, who were also armed. A few minutes later, Haynes heard at least 12 gunshots. Haynes did not know why the shots were fired and he did not ask. Sloan and the other three armed men ran back to the cars and the entire group went back to the party on Dover Drive. 3-RT-639-643.

According to Haynes, Quaid and his girlfriend JoeOnnna Kirk did not arrive at the Dover Drive party in the Nissan until after the shooting. About thirty minutes later, the police arrived. 3-RT-644-645.

2. Testimony of Appellant, Quaid Cornell

Quaid testified that his brother Karlton is a gang member. Quaid is not a gang member but he sometimes associates with people who are. 4-RT-816. Quaid also testified that he did not know anything about the shootings on Sierra Way or the charged shootings in the parking lot until after he was arrested. 4-RT-823. On the day of the shootings, Quaid and Karlton had driven through "the north end" on their way to pick up Quaid's girlfriend, JoeOnna Kirk. Quaid had left his cell phone at home. 4-RT-825-826. Quaid had fired a rifle that night when he was in an uninhabited area near Kirk's house. 4-RT-885-885-889.

After they returned home, Quaid and Karlton began to argue and Karlton left. Quaid and Kirk drove to the party on Dover Drive to look for Karlton. They found him there with the group that included Sloan and Cobbs. About thirty minutes later, police arrived and arrested them. 4-RT899-903.

Quaid denied that he sent the messages from his Facebook account to Haynes. He explained that sometimes he had let others use his phone and that his phone was logged into his Facebook account. 4-RT-906-907.

3. Testimony of Quaid 's mother, Lorelei Cornell

Lorelei Cornell testified that Quaid and Karlton Cornell are her sons. The home where their family lived was walking distance from the location of the party on Dover Drive. 4-RT-798-799-802.

On the date of Quaid's arrest, Karlton had been arguing with his sister and he left the house. Lorelei sent Quaid and his girlfriend, Kirk, to look for Karlton. About ten minutes later, a person Lorelei did not know knocked on her door and told her that there was incident involving police on Dover Drive. She drove to the party and saw that Quaid and Karlton had been arrested. 4-RT-802-803.

Quaid's girlfriend, JoeOnna Kirk, corroborated Lorelei Cornell's account of Quaid's whereabouts at the time of the shooting. She testified that she and Quaid had been "hanging out" at Quaid's home for about 45 minutes when Lorelei had asked them to look for Karlton. They went to the party on Dover Drive and Quaid was arrested about 15 minutes later. 4-RT-334-336.

I. Arguments of Counsel

The prosecutor argued that Quaid was guilty based on circumstantial evidence. He argued that the presence of the gun that fired the 11 of the shots in Quaid and Lorelei Cornell's car was evidence of Quaid's guilt. 1-ER-94. The prosecutor conceded that JoeOnnna Kirk had been sitting next to the gun in the car when police arrived and that she also had gun shot residue on her hands. I-ER-94-95. He implicitly acknowledged that this evidence pointed circumstantially to her as a perpetrator. However, he argued that the "totality of the evidence" did not identify her as one of the perpetrators. 1-ER-95. However,the prosecutor never explained what evidence absolved Ms. Kirk.

The prosecutor argued that Quaid and Haynes were both members of a gang. 1-ER-96. He attempted to attribute the motive for the shooting to gang retaliation. He acknowledged that the victims were not gang members and that Cook was disabled. However, he insisted that the victims were shot because they were in "Seven Tray" gang territory. He acknowledged that if the gang evidence were disregarded, his theory concerning the identification of the murderers would not "make sense." 1-ER-95-96.

The prosecutor argued that law enforcement had to "put screws to" to Sloan to obtain his cooperation. 1-ER-97. The prosecutor also argued that Karlton had been present at the Sierra Way shooting that allegedly prompted the purportedly retaliatory shooting in this case. 1-ER-99. He quoted a message from co-defendant Haynes to Karlton which stated that they had to "do [their] shit during the day." 1-ER-100-101.

The prosecutor also quoted a message from Quaid to Haynes that "it is going down right now" which was sent at about 3 p.m. 1-ER-102.

The prosecutor argued that Quaid and Haynes had spent the day together. He argued that the fact that they both denied spending the day together was evidence of their guilt. 1-ER-104. He also argued that the fact that they spoke on the phone at times instead of through online messages was "telling." He claimed that the group stopped messaging each other at about 3:40 p.m. because they were all together. 1-ER-104. He claimed that they must have been together between 3:40 and 9:40 p.m. (the time they were arrested) because they were not sending each other electronic communications during that period. 1-ER-104.

The prosecutor also relied on co-defendant Sloan's testimony that three people including Cornell and Haynes had been near the scene of the shooting and walked around the corner before the shots were fired. 1-ER-105.

The prosecutor claimed that Cornell's phone was at the north end of town at 6:30 p.m. and that it then moved toward the murder scene. The prosecutor further argued that the cell phone tower evidence for Haynes's phone showed that he was moving from the north end of town to "close to the murder scene." 1-ER-104-105.

The prosecutor misrepresented the cell phone tower evidence during his closing argument. For example, he argued that the cell tower evidence showed that Cornell's phone was "right at the crime scene." 1-ER-105. However, the cell phone tower expert had testified only that the phone was in a broad geographic area that included that location. 1-ER-177.

The attorneys for Cornell and co-defendant Haynes argued that the state's entire case was based on Sloan's credibility and that Sloan was not credible. Counsel pointed out that Sloan's trial testimony was inconsistent with his guilty plea to manslaughter. 1-ER-132. They argued that Sloan's account was false because he had a motive to fabricate testimony that aligned with the prosecutor's trial theory. 1-ER-149.

Defense counsel also argued that the descripton of one of the shooters given by Sutton did not match Cornell or Haynes and it also did not match any of the other people that Sloan described at trial. 1-ER-133.

Counsel also argued that Quaid had a motive to lie about his actions that night that was consistent with his innocence, that is, that one of the shooters was his brother Karlton. 1-ER-144-145. Defense counsel pointed out that Karlton was one of the people who had been shot at in the incident at Sierra Way. Accordingly, he and not Quaid had a personal motive to retaliate. Id.

During the prosecutor's rebuttal argument, he again mischaracterized the cell phone tower evidence. He repeatedly argued that the defense arguments were flawed because the cell

phone tower evidence "put them at the murder scene" and said Cornell's phone was "at the crime scene." 1-ER-156-159. The prosecutor repeated the same fallacy about the cell tower evidence four more times during his relatively brief rebuttal:

> I mean, they literally -- between Quaid Cornell's testimony and their arguments, no one even tried to explain that away, an innocent explanation of how he happened to be at the murder scene with a bunch of guys and an hour and a half later he's going to be arrested with who happened to be the same gang that he's a part of on a crime that he didn't even commit. ER-159.
>
> What are the odds you say. Hey, this guy, Quaid Cornell who wasn't even there, his phone is having him ping at the location seven minutes before the murder. What are the odds of that? 1-ER-164.
>
> I mean, just think of the odds of guessing that just anybody would be at that location at that time who wasn't and his phone was shown there? 1-ER-164.
>
> Sure the phone shows them at the murder scene. We get it. All right. That's unlucky. That's really unlucky, but who hasn't been there, right? 1-ER-169.

The prosecutor also suggested that because Sloan had implicated other gang members, he was telling the truth. 1-ER-170. The prosecutor argued that the totality of the evidence, including the gun shot residue analysis supported a guilty verdict. 1-ER-170-171.

II. The trial court hearing on the pre-trial motion to suppress evidence

Prior to trial, defense counsel filed a motion to suppress, on Fourth Amendment grounds, evidence taken from Quaid's car, including the magazine and handgun. 1-ER-262.

Outside the presence of the jury, the trial court conducted an evidentiary hearing on the motion to suppress. Officer Olvera testified that on the date of the charged incident, at about 9:30 p.m., he was dispatched to Dover Drive to investigate "several subjects in the area possibly with weapons." 1-ER-226.

While driving to that location, Officer Olvera saw a Black man standing near Dover Drive. The man was "looking up and down the roadway." 1-ER-226.

As the officer approached Dover Drive he saw several people standing near two parked cars. There was a Chevrolet Impala parked in front of a red Nissan. 1-ER-225-226. There was a party going on across the street from the parked cars. 1-ER-255. Officer Olvera saw one person with an open alcohol container.

He also saw DaShawn Sloan ducking behind the cars. 1-ER-227. Officer Olvera saw Sloan drop a handgun onto the ground. 1-ER-228. Around the same time, the other people who had been standing near the two parked cars began to walk away. Officer Olvera and other officers, who had just arrived, stopped and detained all of them. Officer Olvera saw a handgun inside the Impala. 1-ER-226-228.

In the front passenger seat of the Nissan, Officer Olvera saw JoeOnna Kirk. 1-ER-229. According to Officer Olvera, Kirk "was laying back in the seat and appeared to be hiding." Officer Olvera asked Kirk to get out of the car and when she did, he left the car door open. As he looked into the car through the open door, Officer Olvera saw a handgun magazine in the center console cup holder. 1-ER-229.

Kirk said that the Nissan belonged to Quaid, her boyfriend. Quaid's mother Lorelei Cornell arrived and told the officers that the Nissan belonged to her but that Quaid used it regularly. According to Officer Olvera, Lorelei gave him permission to search the car and so he did. Officer Olvera then found a 45 caliber handgun in the compartment of the center console. 1-ER-229-231.

Testifying for the defense, Lorelei said that she had not given Officer Olvera consent to search the Nissan. 1-ER-239. When asked if she, Quaid and Karlton lived close to the scene of the stop, she said "yes, right around the corner." 1-ER-241.

When Lorelei had first arrived at the scene, she saw all four doors of the Nissan were open, the hood was up, and the trunk was open. She had spoken to a female officer who told Lorelei that the Nissan had already been searched and that she, the officer, had found a gun. 1-ER-243.

In rebuttal, police lieutenant Shauna Gates testified that she was one of the officers who had arrived on the scene at Dover Drive. She said she had engaged in a brief conversation with the mother of one of the men detained there. They had not discussed the search of the Nissan. 1-ER-252-254.

2. Defense counsel's arguments at the suppression hearing

Quaid's trial counsel conceded that the magazine had been lawfully seized from the cup holder of the Nissan on grounds that it was in plain view. He argued that because the gun was in a compartment, it could not have been lawfully seized without consent. He also argued that there was no objective evidence of consent because Lorelei had not signed a consent form and her alleged verbal consent had not been recorded with the officer's belt recorder. 1-ER-259-260.

Counsel then said "I think the court should allow the magazine to come in because it was in plain view, but should suppress the weapon because it was illegally seized." 1-ER-260.

The prosecution argued that the searches had been constitutionally permissible because they were "a basic officer's safety maneuver" and because Lorelei Cornell had allegedly consented to the search of the car. 1-ER-258.

3. Trial counsel's post-trial declaration admitting that he misunderstood the law and did not have strategic reasons for his omissions

Trial counsel provided a sworn declaration, attached to the habeas corpus petition filed in the state Court of Appeal. 2-ER-81. In the declaration, trial counsel admitted that, at the time he conceded that the magazine was lawfully seized because it was in "plain view," he was under the

erroneous impression that it was unlawful for a person to possess a high-capacity gun magazine. Counsel also admitted that he had no strategic reason for his failure to object to the trial court's ruling that the search of the Nissan was justified on officer safety grounds. 1-ER-81.

4. The trial court and Court of Appeal decisions

The trial court did not make a finding regarding consent to search the vehicle, because it found that the officers did not need consent. 1-ER-78. The court held that the search of the Nissan was valid for officer safety reasons. The court reasoned that the dispatcher had reported multiple subjects "with firearms." The trial court held that a warrantless search was necessary because:

> There are people making furtive gestures, concealing themselves, leaving, tossing weapons under the cars. There are multiple people in and about vehicles. There is a gun tossed under the vehicle, the red Nissan. The doors are open. There's a magazine in plain view. There is a gun in the passenger seat with another person. This is an automobile. There were people that had access in and out of these automobiles.

1-ER-78.

The trial court held that there was probable cause to believe a firearm would have been found in the Nissan. 1-ER-78. The court also held that "This is basically an officer's safety issue." The trial court found the search of the interior of the Nissan was "akin to a pat-down search of the vehicle for officer's safety reasons." 1-ER-78.

On direct appeal, the Court of Appeal held that trial counsel had forfeited the arguments that Quaid's intitial detention was unreasonable and that all evidence flowing from the detention and search of the Nissan, including Sloan's statements, should have been suppressed.1-ER-53. The Court of Appeal reasoned that trial counsel had never argued that Quaid's initial detention was unlawful. Moreover, trial counsel had not sought suppression of the gun shot residue evidence or Sloan's statements. 1-ER-53

However, despite its holding that the issues were forfeited, the Court of Appeal addressed the merits of those arguments:

> But even if [Quaid] hadn't forfeited a challenge to his initial detention, we would find his claim lacks merit. An officer has the right to stop and temporarily detain a person for investigation upon a "reasonable suspicion" they were or are involved in criminal activity. *Michigan v. Summers* (1981) 452 U.S. 692, 699, fn. 9; *Terry v. Ohio* (1968) 392 U.S. 1, 37.) The report of multiple people possibly armed with weapons, the presence of what appeared to be a lookout, Sloan tossing a gun to the ground, and the group's attempt to disperse upon Detective Olvera's arrival would lead any officer in his position to suspect these people were in the process of committing, or had just committed, a crime and might still be armed. His decision to order the members of the group to stop walking away and to pat them down for weapons was therefore reasonable under the Fourth Amendment.

A footnote in the opinion on direct appeal addresses the ineffective assistance of counsel issue in this appeal. The footnote states:

> While this appeal was pending, Cornell filed a habeas petition arguing his trial counsel rendered ineffective assistance by failing to object to his detention as unlawful and by conceding the plain-view doctrine applied to the seizure of the magazine and gun. Because we have considered the substance of his challenges and found them meritless, we conclude he was not deprived of his right to effective assistance of counsel and, in a separate order filed concurrently with this opinion, deny his petition.

1-ER-57, fn 3.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari because the decisions below conflict with this Court's authority concerning the right to effective assistance of counsel at trial

A. This Court should grant certiorari to resolve the conflicting decisions as to the issue underlying petitioner's IAC claim: whether police may lawfully stop and search an entire group based on the actions of one person

Trial counsel's errors in litigating Cornell's motion to suppress in this case were largely based on counsel's unreasonable failure to contest Cornell's initial detention by police, which was based on the actions of others and without any individualized reasonable suspicion as to

Cornell. Certiorari should be granted to resolve the conflicting Court of Appeals decisions as to whether police may lawfully stop and search an entire group based on the suspicious actions of one purported group member.

To conduct a lawful stop and frisk, police must have a reasonable suspicion that the person who is detained is involved in criminal activity. To be reasonable under the Fourth Amendment, a detention and search ordinarily must be based on individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

Accordingly, the reasonable suspicion standard requires an assessment, based on the totality of the circumstances, "that *the particular person* being stopped has committed or is about to commit a crime." *Chandler*, 520 U.S. at 308;*United States v. Cortez*, 449 U.S. 411, 417-18 (1981). This requirement protects against law enforcement action where the bad acts of one person are attributed to others. *United States v. Rodriguez*, 976 F.2d 592, 595-96 (9th Cir. 1992).

The Ninth and Fourth Circuits have only allowed reasonable suspicion to be attributed to a group when there is sufficient evidence that the members of the group are acting as a unit. *Lyall v. Los Angeles*, 807 F.3d 1178 (9th Cir. 2015); *United States v. Hernandez-Mendez*, 626 F.3d 203 (4th Cir. 2010). *Lyall* reasoned that "[i]f a group or crowd of people is behaving as a unit and it is not possible for the police to tell who is armed and dangerous or engaging in criminal acts and who is not, the police can have reasonable suspicion as to the members of the group." *Lyall*, 87 F.3d at 1195; ER 65. But the facts in *Lyall* do not resemble those in this case.

The Ninth Circuit's memorandum decision in this case unreasonably extended *Lyall*, because there was no evidence, other than Cornell's mere presence in the area, to conclude that the people standing near him at the party were acting as a unit. In *Lyall*, police searched a large

group of people attending an event in a warehouse. Officers, responding to a report of theft, discovered a suspect there, leading to a struggle when they tried to stop him. *Id*. at 1182. During the struggle, the crowd shouted at and behaved aggressively toward the officers. *Id*. In upholding the reasonableness of the detentions of members of the crowd, the Court of Appeals held that under those circumstances, where the group appeared to be acting as a unit, there was reasonable suspicion as to all members of the aggressive group. *Id*. at 1194.

Here, there was no evidence whatsoever that Cornell and the people around him were acting as a unit when police arrived. Specifically, there was no evidence, as in *Lyall*, that Cornell and the others engaged in concerted or hostile action of any kind or that they were even together. The only evidence presented at the suppression hearing was that Cornell was one of several people standing outside a party and that one member of the group behaved in a suspicious manner. Under those circumstances, there could not have been a reasonable suspicion to detain every person in the vicinity.

Moreover, *Lyall* conflicts with the Sixth Circuit's decision in *United States v. Patterson*, 340 F.3d 368 (2003) where officers investigating illegal drug sales observed eight males standing on a sidewalk near a target street corner. When the group began to walk away the officers observed one make a throwing motion toward some bushes. *Id*. at 369-70. Based on the actions of that person, the officers detained the entire group. *Id*. at 370. One of the officers conducted a patdown of Patterson and recovered a firearm. *Id.* In reversing the district court's order denying Patterson's motion to suppress, the Sixth Circuit held that the suspicious act of one of the members of the group could not be considered in the reasonable suspicion analysis with respect to Patterson. *Id.* at 372. "In order to search Patterson, the officers only could factor in Patterson's actions and the circumstances surrounding him alone." *Id.* at 372.

In this case, the Ninth Circuit did not acknowledge petitioner's reliance on *Patterson* in its memorandum decision. However, this case presents an ideal set of facts to resolve the conflicting decisions on this issue. Cornell was merely present when police arrived and he did nothing that could have aroused reasonable suspicion as to him.

In summary, certiorari should be granted to resolve the important question of law as to whether there was reasonable suspicion to detain and search Cornell when the group was not acting as a unit and when Cornell's detention was entirely based on the suspicious actions of another person.

B. Certiorari should also be granted because the Ninth Circuit's decision misapprehends trial counsel's constitutional duty to reasonably argue a motion to suppress evidence prior to trial

The issue of a criminal defendant's constitutional right to effective assistance of counsel in litigating a motion to suppress is a substantial question of great importance. This Court has clearly established that "a single, serious error may support a claim of ineffective assistance of counsel," including counsel's failure to file a motion to suppress. *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986). For a criminal defendant to establish a successful claim of ineffective assistance of counsel, he or she must satisfy a two prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Certiorari should be granted because the Ninth Circuit's decision is contrary to *Strickland* and *Kimmelman*. On the facts of this case, counsel's inexplicable failure to challenge Cornell's detention without reasonable suspicion or even a single fact supporting a suspicion of criminal activity by *him* was an obvious error, easily satisfying the performance prong of *Strickland*. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 62 (1985) ("The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis.") (White, J., concurring in the judgment). Furthermore, Cornell has easily satisfie the *Strickland* prejudice prong, as his Fourth Amendment claim is meritorious and, had suppression been granted, the outcome certainly would have been different.

The Ninth Circuit's memorandum decision holding that counsel's conduct was reasonable in this case relies on *Navarette v. California*, 572 U.S. 393 (2014), which is inapposite. In *Navarette*, an anonymous person called 911 and reported that a vehicle with a specific license plate had run her off the road five minutes earlier. *Navarette,* 572 U.S. at 395. An officer spotted the vehicle and pulled it over. *Id.* This Court concluded that the stop was justified because the eyewitness reported the incident soon after it occurred on a recorded 911 line and the facts she described were confirmed. *Id*.at 399-401.

Navarette simply did not support trial counsel's failure to challenge Cornell's detention in this case, because the opinion does not even discuss the attribution of suspicious behavior by a single person to a group. As set forth in more detail in section A, there is a split of authority as to the standard that applies in such circumstances. Moreover, this Court's long-standing decisions concerning investigatory stops emphasize that a reasonable suspicion must be individualized. As a result, no reasonable trial attorney would have failed to challenge Cornell initial detention based on the holding in *Navarette*. For all of these reasons, certiorari should be granted.

Argument

I. Trial counsel was prejudicially ineffective when he when he failed to argue that the fruit of those unlawful seizures should have been suppressed

A. The clearly established right to effective assistance of counsel with respect to a motion to suppress evidence

Criminal defendants have a Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). "[A]ccess to counsel's skill and knowledge is . . . critical to the ability of the adversarial system to produce just results." *Id*. at 685.

To establish ineffective assistance of counsel, a defendant must demonstrate: (1) that "counsel's representation fell below an objective standard of reasonablenes; and (2) a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 688, 694. Where the ineffectiveness alleged is the failure to raise a Fourth Amendment claim, the defendant must "prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

B. The Fourth Amendment right to freedom from unreasonable searches and seizures

A warrantless search is per se unreasonable unless the government can prove that it fell within one of the narrow exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The prosecutor must prove that there was a valid exception by a preponderance of the evidence. *United States v. Vasey*, 834 F.2d 782, 785 (9th Cir. 1987). Here, a search occurred when Officer Olvera ordered Kirk to get out of the car, left the car door open, came back to the car, and looked inside. 1-ER-229. *Katz v. United States*, 389 U.S. 347 (1967);*United States v. Jones*, 565 U.S. 400 (2012); *Florida v. Jardines*, 569 U.S. 1 (2013).

Because Officer Olvera's intrusion into the interior of the Nissan was a warrantless search, the prosecutor was required to prove that there was a valid exception to the warrant requirement that justified the search.

C. Trial counsel's concession that the magazine was properly seized from inside the Nissan because it was in plain view was professionally unreasonable

1. An officer may only seize items in plain view if he is lawfully observing them and they are evidence of a crime

Trial counsel's conduct was professionally unreasonable when he conceded that the magazine inside the Nissan cup holder was properly seized because it was in "plain view." 1-ER-259-260. To fall within the plain view exception, the officer must be *lawfully* searching the area where the evidence is found and the incriminating nature of the evidence must be "immediately apparent." *Roe v. Sherry*, 91 F.3d 1270, 1272 (9th Cir.1996); *see Horton v. California*, 496 U.S. 128, 135-37 (1990); *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987).

Here, the presence of the magazine in the car was lawful. Because the magazine was not illegal, its incriminating nature could not have been immediately apparent. Accordingly, the plain view exception did not apply. *Horton*, 496 U.S. pp. 135-137. Moreover, as set forth in more detail below, because the officer unlawfully ordered Kirk to get out of the car and then peered through the open door, the officer was not "lawfully" searching the interior of the car.

2. Because there was no legal basis for the officer to order Kirk out of the Nissan, the search was unlawful and the plain view exception did not apply

A police officer may order a person to exit a vehicle during a stop for a traffic violation or if there is probable cause to believe the person in the car has committed a crime. *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *Maryland v. Wilson*, 519 U.S. 408, 410 (1997). However, a *Mimms* order to exit a vehicle does not permit the officer to conduct an additional inspection inside the vehicle as the officer did here. *United States v. Caro*, 260 F.3d 1209, 1210 (10th Cir.

2001).

In *Caro*, the defendant exited his car during a traffic stop and closed the door behind him. The officer opened the door to inspect the number on the doorjamb. The prosecution argued that the search was justified under *Mimms*. However, the Tenth Circuit held that if the occupant was already outside the car and "if [the officer] opened that car door himself in order to effect that inspection, *Mimms* cannot have provided the legal justification for the officer's action." *Id*. at 1209. *Caro* demonstrates that an officer's authority under *Mimms* to order a person to get out of a vehicle does not extend to authority to peer inside the car.

A further reason that *Mimms* cannot justify the search in this case is that *Mimms* applies only to traffic stops. *See Mimms*, 434 U.S. at 109, 111 n.6; *Wilson*, 519 U.S. at 410. There was no traffic stop in this case. Rather, the Nissan was legally parked on the street. Accordingly, the officer did not lawfully order Kirk to get out of the car and then look inside it, so the plain view exception does not apply.

3. Trial counsel admitted that there was no valid strategic reason for his statement conceding that the magazine was legally seized because it was in plain view

While a reviewing court must defer to counsel's reasonable strategic decisions, not all strategic choices are reasonable. *Correll v. Ryan*, 539 F.3d 538, 948 (9th Cir. 2008). Here, trial counsel's declaration concedes that he did not have a valid strategic reason for conceding that the magazine was admissible in evidence on grounds that it was in plain view. 1-ER-81. Counsel admitted that he did not understand that possession of the magazine was not unlawful. *Id*. Accordingly, counsel's decision to concede the issue at the suppression hearing was objectively unreasonable.

4. Trial counsel further erred when he failed to challenge Quaid's detention, because the totality of the circumstances and the anonymous tip did not supply a valid basis to detain Quaid or to search the Nissan

A brief investigatory detention by law enforcement (a *"Terry* stop") is a seizure under the Fourth Amendment and "a 'serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Dunaway v. New York*, 442 U.S. 200, 209 (1979), *quoting Terry v. Ohio*, 392 U.S. 1, 20, 17 (1968).

A. Reasonable suspicion must be individualized

Before officers conduct an investigatory stop, they must have reasonable suspicion that the particular person stopped has or is about to commit a crime. *United States v. Manzo-Jurado*, 457 F.3d 928, 934 (9th Cir. 2006); *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir.) (en banc). The officer must be able to point to facts known prior to the stop that support a reasonable suspicion. *United States v. Thomas*, 863 F.2d 622, 625 (9th Cir. 1988).

Here, trial counsel's representation was professionally unreasonable when he failed to argue that Quaid's detention and the search of the Nissan were not supported by a reasonable suspicion, because the motion would have been plainly meritorious. *Hendrix v. Palmer*, 893 F.3d 906, 922 (9th Cir. 2018).

The trial court denied Quaid's motion to suppress based on an exception to the warrant requirement that had not been argued by the prosecutor. The trial court ruled that "[t]his is basically an officer's safety issue," and that the search of the Nissan had been "akin to a pat-down search of the vehicle for officer safety reasons." 1-ER-260.

The trial court decision failed to acknowledge that there was no evidence that there was a weapon in the Nissan at the time of the search. Officer Olvera was dispatched based on an anonymous tip that there was a group of people on Dover Drive who "possibly" had weapons. 1-

ER-226. 2 However, an anonymous tip that even a particular person has a gun is insufficient, standing alone, to support a *Terry* stop and frisk. (*Florida v. J.L.* (2000) 529 U.S. 266, 268.) Here, the anonymous tip that there was a group of people who possibly had weapons was not a sufficient basis to stop and detain Quaid or to search the interior of the Nissan.

The Court of Appeal Opinion also unreasonably applied *Terry* and *J.L.* when it held that the detention and search were reasonable based on the totality of the circumstances. The Opinion argues a number of factors without acknowledging that none of them pertain to Quaid or his car. The Court of Appeal argued that the fact that Sloan dropped a gun,"the group's attempt to disperse,"and the fact that the officer saw someone who seemed like a "look out" supported a reasonable suspicion. 1-ER-54.

However, a reasonable suspicion must be based on the totality of the circumstances as to the particular person searched or seized not the people around him. Moreover, none of those factors apply to the interior of the Nissan. Accordingly, Quaid's detention and the officer's initial search of his vehicle were unreasonable.

B. A protective pat down of a car is only permitted when there is an individualized suspicion that a person in the vehicle is armed or has immediate access to weapons inside the car

A brief *Terry* "pat-down search" of the interior of a vehicle for officer safety reasons may only be conducted if the officer is aware of both: (1) objective facts supporting a reasonable suspicion of a crime in which the person has been or is about to be involved and (2) objective facts supporting a reasonable suspicion that the person is dangerous and could gain immediate control of a weapon inside the car. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

2 At trial, Officer Olvera changed his description of the tip. He testified that there was a report of "15 males . . . who were armed with weapons and were pointing them." 1-RT-169. However, at the suppression hearing he testified that he had been sent to investigate "several subjects" who "possibly" had weapons. 1-ER-226.

Here, the Court of Appeal unreasonably applied *Michigan v. Long* when it held that police properly searched the Nissan for officer safety reasons as part of a "stop and frisk" of the car. Even if there were grounds to briefly detain Quaid or his vehicle (which there were not) that did not confer an automatic right to conduct a protective search of the interior of the car. *Long*, at 1049. The reasonableness of the decision to perform a protective frisk must be analyzed independently of the grounds for a detention. *Id*.; *Terry*, 392 U.S. at 22–23.

To establish that a protective frisk is justified, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S.Ct. 1868. A "mere 'inchoate and unparticularized suspicion or hunch' " that a person is armed and dangerous is not sufficient. *Maryland v. Buie*, 494 U.S. 325, 332 (1990) (*quoting Terry*, 392 U.S. at 27).

Importantly, the reasonable suspicion justifying a protective search must be individualized: "[e]ven in high crime areas, where the possibility that any given individual is armed is significant; *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted." *Buie*, 494 U.S. at 334 n. 2.

Here, there was no individualized suspicion that anyone could have gained immediate control of a weapon inside the Nissan. When Officer Olvera arrived, there was a group of people standing near some parked cars and another group across the street attending a party. 1-ER-227-255. Officer Olvera never indicated *why* he focused on the group next to the cars as potential suspects and not the party-goers across the street. There was simply no basis to conclude that the group standing by the parked cars were the subject of the anonymous call, that they were armed or dangerous, or that they even knew each other.

The Court of Appeal's analysis relies on Sloan's conduct in tossing a gun to the ground and the fact that the rest of the people near the cars started to walk away. 1-ER-54-56. However, Sloan's suspicious conduct only supported the detention of Sloan. It could not be attributed to every person standing on the street in the immediate area. *Brown v. Texas*, 443 U.S. 47, 51-52 (1979).

Likewise, Officer Olvera's statement that Kirk seemed like she was trying to "hide" in the front passenger seat of the car was a dubious basis for a search. There is not enough space in the front passenger seat of a vehicle that would allow anyone to hide from people standing outside the car. Moreover, Officer Olvera did not indicate that Kirk did anything suspicious when she came out of the Nissan or that she had resisted in any way.

This case is similar to *United States v. Patterson*, 340 F.3d 368 (6th Cir. 2003), where an officer was surveilling a corner that was known for drug-trafficking, and that had been the subject of a recent anonymous complaint. The officer saw the defendant react to the officer's presence by walking away while another man threw something into bushes. *Patterson*, pp. 369-370.

The Sixth Circuit held there was not reasonable suspicion for a *Terry* stop. The anonymous tip did not support the stop because the tip did not allege any specific future unlawful conduct. Moreover, the defendant's actions in walking away from police was innocuous, and the fact that another person in the group threw something away was irrelevant. The Court emphasized that a "warrantless search must be based on individualized suspicion." *Patterson*, 340 F.3d at 372 (*citing Chandler v. Miller*, 520 U.S. 305, 313 (1997)).

Here, the immediate detention of every person in the area of the cars and the search of the Nissan suggests that the officer's rationale, conscious or not, was based in part on their group

characteristics. As this Court has observed, "all Black men cannot be objects of reasonable suspicion" just because a person suspected of wrong doing looks similar to them. *Paine v. Lompoc*, 160 F.3d 562, 566 (9th Cir. 1998).

In this case, the only act that Quaid could have possibly done to arouse "suspicion" was to walk away from the officer. However, the United States Supreme Court explicitly held in *Florida v. Royer*, 460 U.S. 491, 497–98 (1983), that one does not arouse reasonable suspicion merely by attempting to walk away from the police.

This Court has also also recognized that simply leaving an area where others are involved in a police encounter is not inherently suspicious. "Many innocent and prudent people, upon seeing what looks like trouble and potential violence, will depart." *Paine*, p. 566. As a result, the fact that Quaid and the others started to walk away was not grounds to detain them or to search the Nissan.

The Court of Appeal here reasoned that the presence of the magazine in Quaid's vehicle raised an officer safety concern. However, the officer did not find the magazine until *after* he had unjustifiably intruded on Quaid's Fourth Amendment rights.

The officers detained Quaid, forced JoeOenna Kirk to exit the vehicle, and left the car door open so they could see inside. 1-ER-228-229. Only then did they see the magazine in the cup holder inside the vehicle. *Id*. Accordingly, the observation and seizure of the magazine violated Quaid's Fourth Amendment rights and the Court of Appeal unreasonably applied *Terry* and *Michigan v. Long* when it concluded that trial counsel did not err when he conceded that the magazine was admissible as evidence at Quaid's trial.

3. Trial counsel was prejudicially ineffective when he failed to argue that the gun, gun shot residue and statement from Sloan should have been suppressed as the tainted fruit of the unlawful detention of Quaid and the unlawful seizure of the magazine

A. Evidence obtained as the direct result of an unlawful seizure must be suppressed as the tainted fruit of the poisonous tree

The exclusionary rule applies to "both the 'primary evidence obtained as a direct result of an illegal search or seizure' and ... 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.'" *Utah v. Strieff*, 579 U.S. 232, 237 (2016) (*quoting Segura v. United States*, 468 U.S. 796, 804 (1984)).

The exclusionary rule applies to physical evidence and "verbal evidence" that derives from an unlawful search. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). Indirect evidence can also be suppressed under *Wong Sun* so long as there is a "causal connection between the illegality and the evidence." The Court should suppress evidence if the constitutional violation was "the impetus for the chain of events leading to the [evidence]." *United States v. Gorman,* 859 F.3d 706, 716 (9th Cir. 2017) (internal quotation marks omitted).

The government must prove by a preponderance that evidence obtained from any Fourth Amendment violation was not tainted or that the search fits one of the three exceptions to the exclusionary rule: inevitable discovery, independent-source, or attenuation. *United States v. Twilley*, 222 F.3d 1092, 1097 (9th Cir. 2000); *United States v. Petersen*, 902 F.3d 1016 (9th Cir. 2018). Here, trial counsel was prejudicially ineffective when he failed to argue that the handgun, the gun shot residue, and the statements later obtained from co-defendant Sloan all should have been suppressed as the products of the unlawful detention of Quaid without reasonable suspicion and the unlawful seizure of the magazine.

First, the search of the interior of the car console that yielded the handgun was based on the unlawful observation of the magazine. The Court of Appeal held that the intensive search of

the Nissan was justified because the magazine evidence established that a search of the car was necessary for officer safety reasons. 1-ER-56-57.

Likewise, the gun shot residue analysis was tainted because the presence of the magazine and the gun in Nissan was plainly the basis for Quaid's arrest, during which officer's obtained gun shot residue from his hands. If the magazine had not been unlawfully seized, neither would the handgun. Had that been the case, there would have been no basis to arrest Quaid and swab his hands for gunshot residue.

Finally, the incriminating statements elicited from Sloan were also a product of the unlawful seizure of the magazine and the handgun. The officer who interrogated Sloan testified that he confronted Sloan with the gun shot residue and ballistics evidence in connection with obtaining Sloan's statements. 1-ER-212-215-223. Accordingly, Sloan's statements were also tainted by initial unlawful search of the Nissan and Quaid's unlawful detention and they should have been excluded.

B. Trial counsel admitted that there was no strategic reason for his failure to seek suppression of the gun, gun shot residue and Sloan's statements on grounds that they were tainted by the unlawful initial search of the Nissan

The failure to seek suppression of unlawfully seized evidence may not amount to ineffective assistance if it is the result of "strategic considerations." *Kimmelman*, 477 U.S. at 984-85. Here, the record reflects no such strategy. *See United States v. Swanson*, 943 F.2d 1070, 1072 (9th Cir. 1991).

Like his other omissions and errors, trial counsel admitted that he did not have a strategic reason for failing to seek suppression of the gun, gun shot residue, and Sloan's statements on grounds that they were the tainted products of the illegal intrusion into the Nissan. 1-ER-81. Accordingly, this Court should not defer to counsel's judgment.

4. The errors were prejudicial because the prosecutor's case was weak and the tainted evidence was crucial to the verdict

As to *Strickland's* prejudice component, Quaid must show that there "is a [reasonable] probability sufficient to undermine confidence in the outcome and the fundamental fairness" of the trial. *Strickland*, 466 U.S. at 694. As set forth in more detail below, Quaid has met this standard because the prosecutor's case was weak and the tainted evidence was essential to the verdict. Absent the tainted evidence, there was a reasonable likelihood that the jury would have acquitted Quaid of the murder and attempted murder charges.

A. Contrary to the prosecutor's argument at trial, the cell phone tower data did not establish that Quaid had traveled from the party to the location of the shooting and back

The Court of Appeal unreasonably determined the facts when it found that the cell phone tower evidence established that Quaid had been to the murder scene and back. The cell phone tower expert specifically denied that the data he obtained from Quaid's phone number could have placed him in a particular location. The expert explicitly stated, as to the historical cell tower data:

> . . . [Y] ou can't articulate a specific location where a cell phone was. It just provides a general location. So anywhere that cell tower has coverage is a possibility of where that device was at the time that call was placed

1-ER-177.

Nevertheless, the prosecutor repeatedly mischaracterized the probative value of the cell phone data at trial to argue that there was proof beyond a reasonable doubt that Quaid participated in the murders. 1-ER-156-169. The prosecutor misstated and exaggerated the probative value of the cell phone tower evidence six times during his closing argument. For example the prosecutor said that the cell tower data "put them at the murder scene" and that "the phone shows them at the murder scene." 1-ER-156-159-164. However, the cell tower expert

himself explicitly stated that the data could not do that. 1-ER-182. Moreover, Quaid's home was around the corner from the location of the Dover Drive party. 1-ER-241. Accordingly, the fact that Quaid's phone used cell tower service close to that location was not incriminating.

B. The remaining circumstantial evidence could not have established beyond a reasonable doubt that Quaid was a principal or an accomplice in the shooting

Because the prosecutor's case was based almost entirely on evidence obtained from the initial unlawful search, a successful motion to suppress would have affected the outcome at trial. *See Pineda Oliva v. Hedgpeth*, 375 Fed. Appx. 697, 699 (9th Cir. 2010) (granting habeas relief where "only scant evidence pointed to petitioner as the shooter" in the absence of an unlawful but unchallenged eyewitness identification); *See United States v. Alvarez-Tautimez*, 160 F.3d 573, 577 (9th Cir. 1998).

Here, likewise, the remaining untainted evidence was scant. For example, the prosecutor's theory concerning the motive for the shootings did not make sense. He argued that Quaid and Haynes shot the victims in retaliation for a gang shooting earlier that day. 1-ER-96-97. However, there was no evidence that the two women and the disabled man who were shot during the charged incident were gang members. If the goal was to retaliate against the Seven Tray gang with a macho show of violence, why would they have attacked unarmed women and a disabled man who had no apparent gang ties? Because the prosecutor's theory about the motive was weak and there was no evidence placing Quaid at the crime scene, the tainted evidence was essential to the jury verdict.

The only remaining evidence supporting Quaid's conviction consisted of the text and Facebook messages and the testimony of Sloan. Although Sloan's testimony should have been suppressed because it was tainted by the illegal seizures, even if it was properly admitted the

case against Quaid was thin. Sloan plainly had a motive to lie in order to get a light sentence for himself. Moreover, the Court of Appeal decision acknowledged that Sloan's testimony was not entirely credible:

> Sloan was not a particularly forthcoming witness. He admitted he didn't want to testify against his fellow gang members and didn't like the idea of being a "snitch" or providing information about his gang to the authorities. Despite these reservations, his testimony circumstantially implicated Cornell and Haynes in the shooting.

1-ER-45.

Finally, the vague messages in Quaid's Facebook account did not connect him to the homicides. The prosecutor's interpretation of the messages was speculation. In summary, because the evidence against Quaid was weak, there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 688, 694. Accordingly, this Court should reverse the judgment of the district court and grant the writ.

Conclusion

For the reasons set forth above, this Court should grant certiorari, find that Liu's claim that he was denied a fair opportunity to be represented by counsel of his choice was not procedurally barred, reverse the judgment of the district court and remand this case to the district court for further proceedings.

Dated: May 19, 2025.

Respectfully submitted,

/s/ Stephanie M. Adraktas

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