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

APPENDIX

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NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

QUIAD AKEEM CORNELL, Petitioner - Appellant, v. WARREN L. MONTGOMERY, Respondent - Appellee.	No. 24-1304 D.C. No. 5:22-cv-02261-CAS-KS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted March 5, 2025
Pasadena, California

Before: TALLMAN, CLIFTON, and CHRISTEN, Circuit Judges.

Quaid Akeem Cornell appeals the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We affirm.

We review de novo the district court's denial of a petition for habeas corpus. *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). The Antiterrorism and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Effective Death Penalty Act (AEDPA) applies to this petition. Because Cornell seeks relief based on claims already adjudicated on the merits in state court, we cannot grant relief unless the last reasoned decision of the state courts "was contrary to, or involved an unreasonable application of" federal law then clearly established by the Supreme Court, or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

Cornell bases his habeas petition on a claim of ineffective assistance of counsel (IAC). An IAC claim must show (1) that trial counsel's performance was deficient as measured against an objective standard of reasonableness, and (2) that the allegedly deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Trial counsel's "failure to take a futile action can never be deficient performance." *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996). An IAC claim evaluated under § 2254(d) is subject to a "doubly deferential judicial review." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Cornell first contends that his trial counsel was prejudicially ineffective for failing to challenge the police officer's initial detention of him. We reject this contention because the California Court of Appeal properly identified and reasonably applied the law governing police investigative stops. Detective Olvera's

decision to detain Cornell was based on several factors, such as the report of multiple individuals possibly armed, the presence of what appeared to be a lookout, and one group member's attempt to hide behind a vehicle while dropping an object to the ground. *See Navarette v. California*, 572 U.S. 393, 396–97 (2014) (explaining that a law enforcement officer can make a brief investigative stop based on a reasonable suspicion taking into account the totality of circumstances). Because any challenge to the initial detention was unlikely to be meritorious, trial counsel's performance could not have been deficient or prejudicial.

Second, Cornell contends that his trial counsel was ineffective for conceding that the plain view doctrine applied to the seizure of the high-capacity magazine even when, at the time, possession of the magazine was legal in California. We disagree. The legality of a weapon does not by itself defeat a police search and seizure. *See Michigan v. Long*, 463 U.S. 1032, 1052 n.16 (1983). The totality of circumstances known to the police officer(s) at the time supported an inference that the incriminating nature of the magazine was "immediately apparent." *Horton v. California*, 496 U.S. 128, 136–37 (1990) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971)). The California courts reasonably observed that on this record officers' safety was paramount given the events as they unfolded. Because a competent attorney could have conceivably decided that an attempt to suppress the

magazine would fail, Cornell's trial counsel's performance was not deficient.[1]

Third, Cornell contends that trial counsel erred by failing to adequately challenge the search of the red Nissan that led to the discovery of the handgun. Although trial counsel did not make the precise argument that Cornell believes should have been made, trial counsel did move to suppress the handgun on grounds that the police lacked a warrant or consent to search the vehicle. Such performance satisfies our highly deferential review pursuant to *Strickland*.

Cornell finally argues that his trial counsel was ineffective for failing to move to exclude various evidence as the product of an illegal detention, search, and seizure. Because the trial court had ruled that the antecedent police conduct was lawful, however, any attempt to exclude subsequently discovered evidence as "tainted" would have most likely failed.

For the foregoing reasons, the district court properly denied Cornell's habeas petition.

AFFIRMED.

[1] Cornell also argues for the first time on appeal that the plain view doctrine could not have applied because Detective Olvera viewed the magazine only after unlawfully ordering Joanna Kirk out of the Nissan. We deem this argument forfeited. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010). In any case, the record indicates that the magazine might have been plainly viewable through the car window regardless of whether Kirk was ordered to exit, and Cornell fails to account for this possibility.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

QUAID AKEEM CORNELL, **Petitioner,** **v.** **WARREN L. MONTGOMERY, Warden,** **Respondent.**	**NO. EDCV 22-2261 CAS (KS)** **JUDGMENT**

Pursuant to the Court's Order Accepting Findings and Recommendations of United States Magistrate Judge, IT IS ADJUDGED that this action is dismissed.

DATED: February 2, 2024

Christina A. Snyder

CHRISTINA A. SNYDER
SENIOR UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

QUAID AKEEM CORNELL, Plaintiff, v. WARREN L. MONTGOMERY, Warren, Defendant.	Case No. EDCV 22-2261-CAS (KS) **ORDER APPROVING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

I. INTRODUCTION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus (dkt. 1, the "Petition"), all of the records herein, the Report and Recommendation of United States Magistrate Judge (dkt. 9, the "Report"), and Petitioner's Objections to the Magistrate Judge's Report and Recommendation (dkt. 10, the "Objections" or "Obj."). Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those portions

of the Report to which objections have been stated. Having completed its review, the Court accepts the findings and recommendations set forth in the Report.

II. BACKGROUND

On July 30, 2018, petitioner Quaid Akeem Cornell was convicted in state court on one count of murder and two counts of attempted murder. Petition at 2. The jury found that firearm and gang enhancements were appropriate. Id.

Petitioner appealed his conviction to the California Court of Appeal and separately filed a state habeas petition arguing that he was denied his constitutional right to effective assistance of counsel. Id. at 3, 5. On February 25, 2022, the California Court of Appeal reversed the gang and firearm enhancements but affirmed the judgment of conviction in all other respects. Id. at 3. In its opinion, the California Court of Appeal also "considered the substance of [petitioner's] challenges [for ineffective assistance of counsel] and found them meritless." Dkt. 6-18 at 16 n.3. On the same day, the court issued a separate order denying petitioner's habeas petition. See dkt. 6-22. Petitioner subsequently appealed to the California Supreme Court which denied review on May 11, 2022. Dkt. 6-9, 6-10, 6-13, 6-14.

On December 28, 2022, petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 arguing that his trial counsel was constitutionally ineffective.

III. LEGAL STANDARD

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on

an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

IV. DISCUSSION

Petitioner argues that his trial counsel was constitutionally ineffective in litigating a motion to suppress at trial because counsel (1) failed to contest petitioner's initial detention; (2) failed to seek exclusion of evidence obtained as a result of the detention (the gunshot residue on his hands and the statements of one of the government's witnesses, DaShawn Sloan); and (3) mistakenly conceded that a high-capacity magazine was subject to seizure under the "plain view" doctrine. Petition at 22. He contends that the California Court of Appeal's rejection of this claim was "contrary to the clearly established United States Supreme Court precedent of Strickland v. Washington and Kimmelman v. Morrison." 466 U.S. 668 (1984); 477 U.S. 465 (1986). To establish ineffective assistance of counsel under Strickland, Petitioner must demonstrate that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. 466 U.S. at 687.

The Court agrees with the magistrate judge that "[p]etitioner has failed to satisfy both Strickland elements" and that the "decision of the California court of Appeal was not contrary to, or an unreasonable application of, clearly established federal law." Report at 23-24.

The state court found that petitioner's initial detention was "reasonable under the Fourth Amendment." Dkt. 6-8 at 12. The Court agrees with both the state court and the magistrate judge that, *under the totality of the circumstances*, the detaining officer could have had a reasonable suspicion that petitioner was engaged in criminal activity. The officer was dispatched after receiving a report that there were "several subjects" in this area "possibly with weapons." Dkt. 6-18 at 10. While approaching the area, he noticed a man who appeared to be serving as

a lookout. Id. Upon arrival, he saw a group of people (including the petitioner) congregated near two parked cars; one individual was holding an open container of alcohol and another ducked down in an attempt to hide. Id. As the officer approached the group, one of the individuals pulled out a loaded handgun and tossed it to the ground while others began dispersing. Id. Taken together, these facts would be sufficient to give an officer "reason to suspect these people were in the process of committing, or had just committed, a crime and might still be armed." Id. at 12. Thus, petitioner was not prejudiced by counsel's failure to challenge the constitutionality of petitioner's detention.

Nor was petitioner prejudiced by counsel's failure to challenge the gunshot residue and Sloan's statements to the police as "fruit of the violation of petitioner's Fourth Amendment rights." See Petition at 32. As the magistrate judge explained, it "is not reasonably probable that the trial court would have excluded [this evidence as] 'fruit'" of an illegal search when it "had already ruled that [p]etitioner's detention . . . w[as] not illegal." Report at 26. In his objection, petitioner appears to argue that the trial court could have excluded the evidence regardless of the constitutionality of petitioner's detention. See Obj. at 8. However, petitioner does not explain "the other legal issues" he contends may have rendered this evidence inadmissible. Id. In his petition, he only argues that such evidence should be suppressed as "fruit of the violation of petitioner's Fourth Amendment rights." Petition at 32.

Finally, petitioner "fails to articulate how the state court's reasoning or conclusion [regarding the 'plain view' doctrine] were contrary to, or unreasonable applications of, clearly established Supreme Court precedent." Report at 27. While petitioner contends that the high-capacity magazine was not admissible under the "plain view" doctrine because it was not illegal to possess such magazines in California, the state court "wholly rebutted that reasoning [and]

cit[ed] clearly established federal law in doing so." Id. at 26. The United States Supreme Court has "expressly rejected the view that the validity of a Terry search depends on whether the weapon is possessed in accordance with state law." Dkt. 6-8 at 16 (quoting Michigan v. Long, 463 U.S. 1032, 1052 n.16 (1983)).

Accordingly, the Court finds that petitioner has failed to satisfy both Strickland elements and failed to meet the requirements imposed by Section 2254(d). The Court grants petitioner's request for a certificate of appealability.

V. CONCLUSION

Having completed its review, the Court accepts the findings and recommendations set forth in the Report. Accordingly, IT IS ORDERED that: (1) the Petition is **DENIED**; and (2) Judgment shall be entered dismissing this action. The Court **GRANTS** petitioner's request for a certificate of appealability.

Dated: February 2, 2024

Christina A. Snyder

CHRISTINA A. SNYDER
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

QUAID AKEEM CORNELL, **Petitioner,** **v.** **WARREN L. MONTGOMERY, Warden,** **Respondent.**	**NO. EDCV 22-2261-CAS (KS)** **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Christina A. Snyder, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On December 28, 2022, Petitioner, a California state prisoner proceeding with retained counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). (Dkt. No. 1.) On March 3, 2023, Respondent filed an Answer

to the Petition arguing that the sole claim in the Petition – an ineffective assistance of counsel ("IAC") claim – is without merit. (Dkt. Nos. 5, 5-1.) Respondent also lodged relevant state court records. (Dkt. No. 6.) On April 2, 2023, Petitioner's counsel filed a Reply. (Dkt. No. 7.) Briefing on this matter is now complete, and the case is under submission to the Court for decision.

PRIOR PROCEEDINGS

On July 30, 2018, a San Bernardino County Superior Court jury convicted Petitioner of one count of first-degree murder and two counts of attempted murder (Cal. Penal Code §§ 187(a), 664/187(a)).[1] (Reporters' Transcript on Appeal, Volume 5 ("5RT") (Respondent's Lodged Document ("LD") 2) at 1097-98; Clerk's Transcript on Appeal, Volume 2 ("2CT") (LD 1) at 434-36.) The jury found true allegations that the attempted murders were willful, deliberate, and premeditated. (5RT at 1100, 1102-03; 2CT at 443, 450.)

The jury also found true allegations that all three offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (Cal. Penal Code § 186.22(b)(1)(C)). (5RT at 1098, 1100-01, 1103; 2CT at 437, 444, 451.)

The jury further found true allegations that, in the commission of all three offenses, Petitioner personally used a handgun (Cal. Penal Code § 12022.53(b)); Petitioner personally and intentionally discharged a handgun (Cal. Penal Code § 12022.53(c)); a principal personally used a handgun (Cal. Penal Code §§ 12022.53(b), (e)(1)); a principal personally and intentionally discharged a handgun (Cal. Penal Code §§ 12022.53(c), (e)(1)); and a

[1] Petitioner was tried in the same proceeding with codefendant Dwight Haynes. (1RT at 6; 1CT at 1.) Haynes was charged and convicted of the same offenses as Petitioner and the jury made identical findings as to Haynes concerning all of the allegations delineated above. (5RT at 1105-12; 2CT at 410-32.)

principal personally and intentionally discharged a handgun causing great bodily injury and death (Cal. Penal Code §§ 12022.53(d), (e)(1)). (5RT at 1098-1105; 2CT at 438-42, 445-49, 452-56.)

On March 1, 2019, the trial court sentenced Petitioner to a total indeterminate term of 114 years to life in state prison. (5RT at 1131; 3CT at 537-40.)

On December 27, 2019, Petitioner appealed the judgment of conviction to the California Court of Appeal, Fourth Appellate District, Division Two (case no. E072302). (LD 3, 6.) On November 11, 2021, while his direct appeal was pending, Petitioner filed a habeas petition in the California Court of Appeal raising the same IAC claim he raises here (case no. E078051). (LD 11.) On February 25, 2022, after receiving supplemental briefing, in an unpublished, reasoned decision, the California Court of Appeal reversed the gang and firearm enhancements on each count for both defendants but affirmed the judgment of conviction in all other respects. (LD 8.) The appellate court remanded to the trial court with directions to give the prosecution an opportunity to retry the enhancements under amended state law, and for both defendants to be resentenced in any case.[2] (*Id.* at 34.) The California Court of Appeal also specifically addressed Petitioner's IAC claim on the merits in its decision. (*Id.* at 16.) The state appellate court concurrently, but in a separate order, denied the habeas petition without comment or citation. (LD 12.) On May 11, 2022, the California Supreme Court summarily denied review of both of the state appellate court's decisions. (LD 9, 10, 13, 14.)

[2] Although it does not appear that the prosecution elected to retry the enhancements, on September 2, 2022, the trial court vacated the remanded sentence and resentenced Petitioner to a total determinate term of sixty years, plus a consecutive, indeterminate term of thirty-nine years to life. *See People v. Cornell*, No. 16CR-067787 (docket, minute orders, and other case information *available at* https://cap.sb-court.org (last accessed on August 24, 2023)). *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2001) (federal courts may take judicial notice of relevant state court records in federal habeas proceedings), *overruled on other grounds by Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *see also Zinman v. Asuncion*, No. 2:22-cv-00886-JVS-JC, 2022 WL 580731, at *1 (C.D. Cal. Feb. 24, 2022) (taking judicial notice of the dockets of the California Court of Appeal).

Petitioner initiated this action by filing the pending Petition on December 28, 2022.

SUMMARY OF THE TRIAL EVIDENCE

The following factual summary from the California Court of Appeal's unpublished decision on direct review is provided as background. *See* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence).

A. *Prosecution's Case*

1. *The Shooting*

Around 8:00 in the evening on August 27, 2016, Dawn Sutton and her fiancé Harold Cook were talking to their friend Ellen Wimbish in the parking lot of their apartment complex at the corner of 9th and G streets in San Bernardino when they were shot at several times by a group of men. When Sutton heard the first shot, she turned and saw a black man with braided hair, who was neither Cornell nor Haynes, holding a gun. Her initial reaction was to protect Cook because he was disabled and needed a cane to walk, but as she tried to push him out of the way, a bullet hit her thigh and she lost consciousness. As a result of the gunshot wound, Sutton spent a month unconscious in the hospital. The bullet that had entered through her thigh also struck her lungs and ovaries before lodging in her pelvis, where it remains. Cook was shot in the head and died immediately. Wimbish was struck in the foot, and two months later she died from a blood clot that originated near the site of the gunshot wound.

Just before the shooting, a neighbor who was sitting in his car across the street saw a male peeking around a corner suspiciously. Then he heard the sound of multiple gunshots and saw two gun muzzles flash. By the time of trial, the neighbor couldn't remember specific details about what he saw, but the officer who had interviewed him after the shooting said the neighbor reported the shooters were a group of three or four black men.

2. *Sloan's testimony*

The prosecution's main witness was 19-year-old DaShawn Sloan, who had joined the East-side IE Crips when he was 14. Sloan had been charged along with defendants and a fourth East-side IE Crips member named Theo Cobbs for the shooting of Sutton, Cook, and Wimbish.[1] Sloan pled guilty to voluntary manslaughter with a gang enhancement and accepted a sentence of six to 11 years in exchange for agreeing to testify truthfully at defendants' trial.

[1] Cobbs was tried separately from defendants.

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.

Sloan told the jury he had been present for the rival gang shooting that set the events of this case in motion. Around 2:00 a.m. on the day in question, August 27, 2016, he had been playing dice with several other East-side IE

Crips members outside an apartment complex on Sierra Way in San Bernardino, in their gang's territory. As he was inside a friend's car taking a break from the game, he heard gunfire and later learned that two of his fellow gang members had been shot. He believed Seven Tray, a local rival gang, was responsible for the shooting.

Later that afternoon, Sloan went to a birthday party on Dover Drive with several other East-side IE Crips. After spending a couple of hours at the party, he left with five other gang members to visit an apartment near the intersection of 9th and G streets, which was Seven Tray territory. The group took two cars. Sloan, Cobbs, and a gang member named Kevin Winship rode together in Cobbs's black Chevy Impala. Cornell, Haynes, and a member who goes by the name "Little Woodie," took Cornell's red Nissan. Cornell, Haynes, and Cobbs went inside the apartment to talk to some women, while the rest of the group waited outside in the cars. According to Sloan, they were inside the apartment for about 45 minutes. Around 8:00 p.m. they emerged and told the others they'd "be right back." Sloan said he saw Cornell, Haynes, and Little Woodie walk off, turn a corner, and disappear from view. Moments later, Sloan heard several gunshots. When the three men returned, they said, "We gotta go," and the group caravanned back to the party on Dover Drive.

3. *The investigation*

Less than two hours after the shooting of Sutton, Cook, and Wimbish, police officers responded to a call saying there were multiple people possibly with weapons congregating on Dover Drive. They ended up arresting several of the party attendees (including Sloan, Cornell, and Haynes) and seizing four firearms—a loaded nine-millimeter Beretta handgun from Sloan; a Browning

six-millimeter pistol and an expended casing for a .30-06 rifle from Cornell's brother Karlton; a loaded nine-millimeter Taurus handgun on the floorboard of the black Impala, near where Haynes was sitting; and a .45-caliber handgun and a high-capacity magazine in Cornell's Nissan. Sampling at the scene revealed gunshot residue on the hands of Cornell, Haynes, and Sloan.

The police recovered numerous bullet cartridges and fragments from the scene of the shooting at 9th and G streets. Seven of them matched the Taurus handgun found near Haynes in the Impala and 11 matched the handgun found in Cornell's car. Information gathered from cell towers used by Cornell and Haynes between 6:30 p.m. and 10:00 p.m. on August 27 showed a pattern consistent with their phones having traveled from the party on Dover Drive, to the scene of the shooting, then back to the party.

Electronic messages among some of the members of the gang also implicated Cornell and Haynes in the shooting. On the afternoon of August 27, several hours after the early-morning shooting believed to be perpetrated by members of Seven Tray, Cornell messaged Haynes on Facebook, telling him, "We all meeting in the hood," to discuss what had happened. When Haynes replied he didn't know what had happened, Cornell told him to call him as soon as possible. Haynes then messaged Cornell's brother Karlton (also a member of the gang), asking what was up for the day. Karlton responded, "U already kno we doin r shit . . . it could've been anyone of us." Haynes replied, "I keep saying we needs do our shit during the day." Later, Cornell texted Haynes asking where he was because "it's going down right now," and Haynes said he was trying to get a ride. Cornell said he would try to pick him up and later sent another text saying he was on his way to get him.

4. *Gang evidence*

Detective Darren Sims, a gang investigator for the San Bernardino Police Department Specialized Enforcement Team, testified as an expert on the East-side IE Crips. He said East-side IE Crips is a "home-grown" or local gang formed about 25 years ago in San Bernardino. They have approximately 50 known or documented members. Their primary activities are weapons possession, assault, sale of narcotics, vandalism, vehicle theft, and murder.

Detective Sims discussed four predicate offenses committed by East-side IE Crips members. Bryson Hervey was convicted of vandalism over $400, with a gang enhancement, in 2012. Grady McDuffie was convicted of vehicle theft and being a felon in possession of a firearm in 2014. And Anthony Johnson was convicted of being a felon in possession of a firearm, with a gang enhancement, in 2014. Detective Sims said he was familiar with the circumstances of each conviction and had personal knowledge that all Hervey, McDuffie, and Johnson were East-side IE Crips members when they committed the crimes. The prosecution introduced certified court packets for each offense.

Detective Sims said Haynes, Cornell and his brother Karlton, Winship, Cobbs, and Sloan are all active members of the gang. Seven Tray is one of the gang's rivals, and the victims were in Seven Tray territory when they were shot. Detective Sims explained that East-side IE Crips gained a reputational benefit from its members opening fire in Seven Tray territory. The shooters' actions sent the message to Seven Tray and the community that East-side IE Crips will swiftly and brazenly respond to attacks and are even willing to kill to maintain their reputation for power.

B. Defense Case

Both defendants testified in their own defense. Cornell denied being a member of the East-side IE Crips and claimed not to know anything about either of the shootings on August 27. To explain the gunshot residue on his hands, he said he had fired his brother Karlton's rifle into the air earlier that evening as they drove through an uninhabited part of town. He said he was at Dover Drive when the police arrived only because he was looking for his brother and had heard he was there.

Haynes admitted membership in the East-side IE Crips and admitted he'd gone with Sloan to the women's apartment near 9th and G streets that night, but he denied having anything to do with the shooting. He said he and Sloan had ridden in Cobbs's Impala. When they got to the apartment, Sloan got out, armed with a gun. He was joined by three others from another car, and they all walked in the same direction. Once they were out of view, Haynes heard about 12 gunshots, then Sloan's group ran back to the cars and they all left. When they returned to the party on Dover Drive, Sloan reloaded his gun and put it on Cobbs's center console. Haynes said he moved the gun underneath his seat when the police arrived in an attempt to hide it.

On cross-examination, Haynes admitted having deleted all of his Facebook messages with Cornell from the day of the shooting but couldn't remember why he had done so.

(LD 8 (Dkt. No. 6-18) at 3-9.)

PETITIONER'S HABEAS CLAIM

Petitioner presents the following claim for federal habeas relief:

Trial counsel was constitutionally ineffective in his litigation of a motion to suppress based upon the: (1) the failure to contest Petitioner's initial detention at the scene as well as the failure to seek exclusion of the "fruit" of the illegal detention – namely, the gunshot residue on Petitioner's hands and the statements of Mr. Sloan[3]; and (2) mistaken concession that a high-capacity magazine was subject to seizure under the "plain view" doctrine. (Dkt. No. 1-1 at 22-63; Dkt. No. 7 at 6-9.)

STANDARD OF REVIEW

I. The Antiterrorism and Effective Death Penalty Act.

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

For the purposes of Section 2254(d), "clearly established Federal law" refers to the Supreme Court holdings in existence at the time of the state court decision in issue. *Cullen v.*

[3] Petitioner's theory appears to be that his initial detention led to Sloan's detention and subsequent statements to the police.

Pinholster, 563 U.S. 170, 182 (2011); *see also Kernan v. Cuero*, 583 U.S. 1, 8 (2017) (per curiam) ("circuit precedent does not constitute clearly established federal law. . . . [n]or, of course, do state-court decisions, treatises, or law review articles") (internal quotation marks and citations omitted). Supreme Court precedent is not clearly established law under § 2254(d)(1) unless it "squarely addresses the issue" in the case before the state court or establishes a legal principle that "clearly extends" to the case before the state court. *Moses v. Payne*, 555 F.3d 742, 760 (9th Cir. 2009); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011) (it "'is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by'" the Supreme Court) (citation omitted).

A state court decision is "contrary to" clearly established federal law under Section 2254(d)(1) only if there is "a direct and irreconcilable conflict," which occurs when the state court either (1) arrived at a conclusion opposite to the one reached by the Supreme Court on a question of law or (2) confronted a set of facts materially indistinguishable from a relevant Supreme Court decision but reached an opposite result. *Murray v. Schriro*, 745 F.3d 984, 997 (9th Cir. 2014) (citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). A state court decision is an "unreasonable application" of clearly established federal law under Section 2254(d)(1) if the state court's application of Supreme Court precedent was "objectively unreasonable, not merely wrong." *White v. Woodall*, 572 U.S. 415, 419 (2014). Finally, a state court's decision is based on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2) when the federal court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record before the state court." *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir.) (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 710 (2014). So long as "'[r]easonable minds reviewing the record might disagree,'" the state court's determination of the facts is not unreasonable. *See Brumfield v. Cain*, 576 U.S. 305, 314 (2015).

AEDPA thus "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *White v. Wheeler*, 577 U.S. 73, 77 (2015) (*per curiam*) (internal quotation marks and citation omitted). Petitioner carries the burden of proof. *See Pinholster*, 563 U.S. at 181.

DISCUSSION

Habeas Relief Is Not Warranted For Petitioner's IAC Allegations

In his sole claim for relief, Petitioner argues that his attorney was ineffective in arguing a motion to suppress on Fourth Amendment grounds. (Dkt. No. 1-1.) Specifically, Petitioner contends that counsel failed to contest his initial detention at the scene and failed to seek exclusion of the evidence that was obtained as the result of that allegedly illegal detention, namely the gunshot residue on his hands and the statements of Mr. Sloan. Petitioner also argues that his trial counsel mistakenly conceded that a high-capacity magazine was subject to seizure under the "plain view" doctrine. (*Id.* at 22-63; Dkt. No. 7 at 6-9.)

A. Legal Standard

To succeed on his IAC claim, Petitioner must demonstrate that counsel's performance was both deficient and prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because both prongs of the *Strickland* test must be satisfied to establish a constitutional violation, a petitioner's failure to satisfy either prong requires the denial of the ineffectiveness claim. *See Strickland*, 466 U.S. at 697 (no need to address deficiency of performance if prejudice is examined first and found lacking); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the *Strickland* test obviates the need to consider the other").

"To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Richter*, 562 U.S. at 104 (citation omitted). However, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690; *see also Pinholster*, 563 U.S. at 196. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105. Notably, the failure to take a futile action or make a meritless argument can never constitute deficient performance. *See Rupe v. Wood*, 93 F.3d 1434, 1444-45 (9th Cir. 1996); *see also Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (counsel is not obligated to raise frivolous motions, and failure to do so cannot constitute ineffective assistance of counsel); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective assistance.").

To establish prejudice, a habeas petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. The court must consider the totality of the evidence before the jury in determining whether a petitioner satisfied this standard. *Strickland*, 466 U.S. at 695. Additionally,

> [w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also 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 in order to demonstrate actual prejudice.

Id. at 375 (emphasis added).

Finally, while "[s]urmounting *Strickland*'s high bar" alone "is never an easy task," the additional task of "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105 (citations omitted). Both standards are "highly deferential," so "when the two apply in tandem, review is 'doubly' so . . . ." *Id.* (*citing Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Specifically, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* "The Strickland standard is a general one, so the range of reasonable application is substantial." *Id.* "Reliance on 'the harsh light of hindsight' . . . is precisely what *Strickland* and AEDPA seek to prevent." *Id.* at 107 (citations omitted).

B. Relevant Background Facts

On June 13, 2018, during a break in *voir dire* jury selection, the trial court held a hearing on a defense motion to suppress evidence recovered as the result of a warrantless search of Petitioner's car. (1RT at 10, 18-19.) The prosecution called San Bernardino Police Detective Brian Olvera to testify at the hearing. (1RT at 20.) Olvera testified that, on August 27, 2016, he was dispatched – in uniform and driving a marked police car – at approximately 9:30 p.m. to an address on Dover Drive in San Bernardino, California "in regards to several subjects in the area possibly with weapons." (1RT at 20-21.) Olvera was the first officer to arrive at the scene, at which time the officer "observed a black male adult standing in the street" near Dover Drive "looking up and down the roadway." (1RT at 21.) That individual "observed" Olvera, as well. (*Id.*) The officer then proceeded to the address on Dover Drive where he was dispatched. (*Id.*)

When Olvera reached Dover Drive, he used the white overhead lights on his police vehicle "to illuminate several subjects standing near two vehicles," a red Nissan and a black Chevy Impala. (1RT at 21-22.) The vehicles were parked "bumper to bumper" along the curb and "[t]here were several subjects congregating near the rear of the red Nissan," which was parked behind the Impala. (1RT at 22.) Olvera then observed that "one subject had an open alcoholic container" and another individual, a male named Lester Sloan, "began to duck down behind a couple of vehicles." (*Id.*) After Sloan attempted to hide, Olvera began approaching him and observed him toss a black handgun onto the ground. (1RT at 23.) The gun was subsequently determined to be loaded. (*Id.*)

Other officers then arrived on the scene and all of the subjects were detained. (*Id.*) Olvera looked inside the black Impala and saw another handgun inside. (*Id.*) He also looked inside the red Nissan and saw an individual, Joanna Kirk, laying back in the front passenger seat "and appeared to be hiding." (1RT at 24.) In the center console of the red Nissan, inside a cupholder, Olvera discovered "a large Class C handgun magazine." (*Id.*) Kirk told Olvera that the red Nissan belonged to her boyfriend, who she identified as Petitioner. (1RT at 24-25.) At some point Petitioner's mother, Lorelei Cornell, arrived at the scene and told Olvera that the car was registered to her but that her son "possessed the car and used the car on a daily basis." (1RT at 25.) After Ms. Cornell confirmed that she was the registered owner of the car, Olvera asked her for permission to search the vehicle and she agreed. (1RT at 25, 31.) In Olvera's search of the vehicle, he recovered the handgun magazine from the center console as well as a loaded handgun in a hidden compartment in the center console. (1RT at 25-26, 29, 31.) Olvera also testified that when he first observed the magazine in the cupholder, he believed there was a handgun in the car based on his training and experience with firearms. (1RT at 26.) Petitioner was arrested for possession of a concealed firearm based on the handgun Olvera found in the car. (1RT at 32.)

Ms. Cornell was called by the defense to testify at the suppression hearing. (1RT at 33.) Ms. Cornell testified that she did not remember an officer asking for permission to search the red Nissan. (1RT at 33-34.) When Ms. Cornell arrived at the scene officers were already searching it. (1RT at 34.) Ms. Cornell identified the car as hers and asked, "What's going on?" (*Id.*) Ms. Cornell identified the officer she spoke to as an "African American lady," and that officer told her that the officers still searching the car would not find anything because she was first on the scene and had already searched it thoroughly and found the gun. (1RT at 34, 39.) Ms. Cornell responded that she did not give them permission to search her car. (1RT at 34, 38.) Ms. Cornell also testified that she and Petitioner equally shared use of the car. (1RT at 35-36.) Ms. Cornell then left the scene to use her restroom at home, and when she returned she spoke to "a Mexican officer" who told her he knew the car was hers and that they found a gun inside. (1RT at 41.) Ms. Cornell also told that officer that she did not give permission to search the car. (*Id.*)

In rebuttal, the prosecution called Shauna Gates, another police officer with the City of San Bernardino. (1RT at 50.) At the time of the incident in 2016, Gates was a patrol sergeant. (1RT at 50-51.) Gates testified that she initially responded to the scene because Olvera sounded to her over the radio like he needed assistance. (1RT at 51.) When Gates arrived at the scene, other officers were already there. (*Id.*) Gates testified that she was only on-scene in a supervisory role. (1RT at 52.) By the time she arrived one of the officers had already recovered the gun from the vehicle. (*Id.*) Gates did not lead the investigation, search any suspects, or search any vehicles. (*Id.*) Gates recalled that "the mother of one of the subjects being detained showed up" and Gates briefly spoke with her but did not discuss searching the car because Gates had not conducted any searches. (*Id.*) Gates did not have any conversation about having already searched the car or to say that other officers would not find anything else. (1RT at 52-54.) Gates remembered that two vehicles were the focus of the investigation but did not specifically recall one of the subject vehicles being a red Nissan. (1RT at 53.) The

computer aided dispatch log also indicated that Olvera was on the scene before Gates. (1RT at 55.)

After witness testimony concluded, the prosecutor argued that there were two separate grounds justifying the search of the red Nissan. (1RT at 56.) First, he argues that the "plain view exception" applied because Olvera observed the magazine from outside the car, and at the point he made that observation officers had already recovered two other firearms from the scene, the one that had been tossed and another one from the Chevy Impala. (*Id.*) In light of those circumstances, the prosecutor argued that Olvera could infer from observing the magazine "that there's probably a semiautomatic firearm in there." (*Id.*) Second, the prosecutor argued that Olvera got consent from the owner of the car (Ms. Cornell) for the search. (*Id.*) He added that Ms. Cornell's "version of events simply doesn't match up with what happened," in part because the computer aided dispatch log corroborated Olvera's testimony that he was the first officer at the scene. (1RT at 56-57.)

Defense counsel conceded that the plain view doctrine "would certainly justify seizure of the magazine which was described as being in plain view," but that "[t]he gun was described as being in a secret compartment" and was not in plain view. (1RT at 57.) Defense counsel further argued that Olvera's testimony that he received consent to search the vehicle was unreliable because the officer had failed to use a written consent form or activate his belt recorder to memorialize the conversation Olvera claimed he had with Ms. Cornell. (*Id.*) Counsel proffered that the Court "should allow the magazine to come in because it was in plain view but should suppress the weapon which was illegally seized." (1RT at 57-58.)

After hearing arguments, the trial court ruled as follows:

> [The] Court's going to deny the motion to suppress. This is basically an officer's safety issue. We have officers arriving at scene where subjects are

> reported as having multiple firearms. The officer arrives. There are people making furtive gestures, concealing themselves, leaving, tossing weapons under the cars. There are multiple people in and about vehicles. There is gun tossed under the vehicle, the red Nissan. The doors are open. There's 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.
>
> Officers didn't need the consent. There is probable cause to believe that there would be firearm found in that vehicle. It is an automobile. It does not require a warrant based on the totality of the circumstances. So the Court will deny the motion to suppress. Also, the Court would find this is akin to pat-down search of the vehicle for officer's safety reasons.
>
> When there were so many people hanging around, report of a firearm being seen, firearms visible, people acting strangely in the presence of officers, hiding and concealing themselves, it's the equivalent of a pat-down search of the vehicle, and there was cause to believe for officer's safety reasons that they would do that. So the Court will deny the motion to suppress, and the evidence can be used.

(1RT at 58.) The court also clarified that it was not making any ruling on the consent issue because "I don't think consent was even necessary." (1RT at 59.)

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C. State Court Decision

In rejecting Petitioner's underlying challenge to the trial court's suppression ruling, the California Court of Appeal made the following findings of fact and conclusions of law, which included a footnote (also below) rejecting Petitioner's instant IAC claim:

> Cornell argues the suppression ruling was erroneous because the magazine provided no basis to search the rest of the car. He also challenges, for the first time, his detention before the search, arguing all the evidence obtained afterward (the gun, magazine, gunshot residue on hands, and Sloan's statements before and during trial) should have been suppressed.
>
> ****
>
> [Even] if he 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. 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.
>
> We turn now to the only challenge Cornell did make during trial—that the search of his car's center compartment and the seizure of the gun found inside were unlawful. The standard of review on a motion to suppress is well

established. We view the record in the light most favorable to the ruling and defer to the trial judge's factual findings, express or implied, when supported by substantial evidence, but we exercise our independent judgment in determining whether, on that record, the search or seizure was reasonable under the Fourth Amendment.

We may uphold the suppression ruling for any reason supported by the facts and law, regardless of the trial judge's reasoning. We conclude the record provides ample support for the trial judge's determination that the warrantless search of the center console compartment of Cornell's car did not violate the Fourth Amendment. It is well established "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . the suspect is dangerous and . . . may gain immediate control of weapons." In *People v. Lafitte* (1989) 211 Cal.App.3d 1429 (*Lafitte*), the court denied the defendant's motion to suppress a gun the police found in a trash bag in his car after stopping him for driving with a broken headlight. The court concluded the warrantless search was justified by safety concerns because the officers conducted it only after seeing a knife in plain view in the defendant's open glove box and because the defendant was near his car and could potentially gain access to it. Similarly, in *People v. Lomax* (2010) 49 Cal.4th 530, our Supreme Court upheld the seizure of a "semiautomatic handgun wedged in the front between the driver's seat and the center console" based on the plain-view doctrine and officer safety concerns. As in *Lafitte*, the officers noticed a weapon in plain view in the defendant's vehicle after pulling him over for a traffic violation—he'd made an illegal lane change. The court concluded that as soon as the officers saw the "semiautomatic handgun sticking out of the map holder pocket," they were

"justified in seizing the gun [in plain view] *and searching for additional weapons*."

Our case provides an even stronger basis for an additional weapons search than *Lafitte* and *Lomax*. In those cases, the safety risk arose from the sole fact that the defendants had weapons in plain view (and therefore accessible) inside their cars. Aside from the presence of the weapons, nothing else about the defendants was suspicious, they had been stopped for minor traffic violations. Here, in contrast, Detective Olvera was responding to what was already a potentially dangerous situation—a group of people armed with multiple weapons at night. The risk of danger became more apparent when he arrived on the scene and found two guns, the one Sloan tossed to the ground and the one in Cobbs's car.

In challenging the suppression ruling, Cornell attacks individual aspects of Detective Olvera's testimony. He argues the report of "subjects in the area possibly with weapons" was too vague to supply a reasonable suspicion of criminal activity because it didn't specify what kind of weapons and in what manner they were being used. He also points out Detective Olvera never testified that anyone in the group had made any "threatening actions" in his presence, nor did he say he viewed Cornell's girlfriend as a threat when he asked her to step out of the car. Finally, he argues that at the time of the search, it was not illegal under California law to possess a high capacity magazine, and thus there was no reason to search the rest of his car for additional weapons.

These arguments miss the point. In any Fourth Amendment inquiry, the focus is on the totality of the circumstances, not on each individual

circumstance, as if it stood in isolation. And here, when we consider all of the circumstances known to Detective Olvera when he saw the magazine in Cornell's car, we have no trouble concluding his actions were reasonable under the Fourth Amendment. He and his fellow officers had come upon a large group of people at night, and they knew at least one person had been armed with a gun and another person had a gun inside their car. The possibility that they had not yet discovered all of the weapons present, and the risk one could be used against them, cannot be overstated.

Cornell's focus on whether or not he could lawfully possess the ammunition is at odds with long-established Fourth Amendment jurisprudence. In *Michigan v. Long*, the United States Supreme Court "expressly rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law."

Similarly, in *Lafitte*, the court rejected the defendant's claim that the seizure of the knife in his car was unlawful because it was not illegal to possess a knife. Legal or not, a knife can still be used to inflict harm, and the same is obviously true of guns. The *legality* of the weapon is not the relevant issue, rather it is the risk to the officers under the circumstances that determines whether their actions were reasonable under the Fourth Amendment. On this record, we conclude Cornell's constitutional rights were not violated and thus the trial judge properly denied the suppression motion.[3]

[3] 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.

(LD 8 at 12-16 (citations omitted, emphasis in original).)

D. Analysis.

As outlined above, Petitioner argues that his trial attorney failed to contest Petitioner's detention at the scene, failed to seek exclusion of evidence obtained as a result of the illegal detention (the gunshot residue found on his hands and Sloan's statements to the police); and mistakenly conceded that the high-capacity magazine found in Petitioner's car was legally seized by police under the "plain view" doctrine. (Dkt. No. 1-1 at 22.) For the reasons below, the Court concludes that Petitioner has failed to satisfy both *Strickland* elements.

Petitioner argues that his initial detention and the search of his car were not justified by the Fourth Amendment, and the evidence recovered as "fruit" of those alleged Fourth Amendment violations – the gunshot residue and Sloan's statements – should also have been excluded. (*See* Dkt. No. 1-1 at 32 ("The grounds for excluding the gunshot residue and the statements of Mr. Sloan were the same as those for excluding the magazine and the handgun in that they were the product of the same search without a warrant.").) Petitioner then essentially relitigates the Fourth Amendment argument he made in the state courts concerning his detention and the search of his vehicle, contending that the trial court's reasoning – that the search of the car and seizure of Petitioner's person were justified "for officer's safety reasons" – was erroneous. In addition, Plaintiff contends that the information in the dispatch call, Detective Olvera's observation of an individual standing in the street, Sloan ducking down behind a vehicle, Sloan tossing a gun onto the street, the fact that individuals dispersed

from the cars when the officer approached, none of these facts, whether taken individually or together, provided Detective Olvera with reasonable suspicion necessary to detain Petitioner or search his car. (Dkt. No. 1-1 at 30-31, 36-54.)

The state appellate court denied this claim, in pertinent part, as follows:

> These arguments miss the point. In any Fourth Amendment inquiry, the focus is on the *totality* of the circumstances, not on each individual circumstance, as if it stood in isolation. And here, when we consider all of the circumstances known to Detective Olvera when he saw the magazine in Cornell's car, we have no trouble concluding his actions were reasonable under the Fourth Amendment. He and his fellow officers had come upon a large group of people at night, and they knew at least one person had been armed with a gun and another person had a gun inside their car. The possibility that they had not yet discovered all of the weapons present, and the risk one could be used against them, cannot be overstated.

(LD 8 at 15-16 (emphasis in original).) Further, because the state appellate court "considered the substance of [Petitioner's] challenges and found them meritless," the court also concluded that Petitioner "was not deprived of his right to effective assistance of counsel." (*Id.* at 16 n.11.)

The decision of the California Court of Appeal was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). Petitioner fails to establish that "there is no possibility fairminded jurists could disagree that the state court's decision" on his IAC claim "conflicts with [the Supreme] Court's precedents." *Richter*, 562 U.S. at 102. "The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has a particularized and objective basis for suspecting the particular

person stopped of criminal activity." *Navarette v. California*, 572 U.S. 393, 396 (2014) (citation and internal quotation marks omitted). It is well established that the reasonable suspicion analysis "takes into account the totality of the circumstances—the whole picture." *Id.* at 397 (citation and internal quotation marks omitted).

While Petitioner makes a perfunctory attempt to address this standard (dkt. no. 1-1 at 53-54), his analysis is wholly inconsistent with it. As he did in the state courts, Petitioner attempts to parse and separately scrutinize each individual fact that, taken *together*, paint a very different picture of the evidence. For example, Petitioner argues Detective Olvera's testimony that, before reaching the location to which he was dispatched, he exchanged eye contact with an individual in the street who was looking up and down the roadway "is not testimony that would support a reasonable suspicion of criminal activity." (*Id.* at 47.) Without any other facts, that may be true. But, in the totality of the circumstances, Petitioner's argument fails.

The detective testified that he was dispatched to an address on Dover Drive in San Bernardino, California "in regards to several subjects in the area possibly with weapons." (1RT at 20-21.) Based on that information, the detective could have made a reasonable inference that the individual he saw just before reaching the location was a lookout for illegal activity involving firearms. From there, the facts fully supported that inference. When Detective Olvera reached the scene, he saw several people congregating near Petitioner's red Nissan. (1RT at 22.) Olvera then observed Sloan, "duck down behind a couple of vehicles." (*Id.*) When Olvera approached Sloan he tossed a black handgun onto the ground. (1RT at 23.) When other officers arrived, Olvera found another handgun inside the black Impala and saw another individual hiding in the red Nissan. (1RT at 24.) From outside the car, Olvera then saw "a large Class C handgun magazine" in a cupholder on the center console. (*Id.*) In Olvera's subsequent search of the vehicle, he recovered the handgun magazine from the center console as well as a loaded handgun in a hidden compartment in the center console. (1RT at

25-26, 29, 31.) Given this evidence, the state court reasonably concluded that Olvera and his fellow officers arrived at the scene to see a large group of people with at least one weapon, and "[t]he possibility that they had not yet discovered all of the weapons present, and the risk one could be used against them, cannot be overstated." (LD 8 at 16.) Therefore, based on the totality of the circumstances, the state court's conclusion as to Petitioner's IAC claim, as well as the underlying Fourth Amendment claim, was not unreasonable. *Navarette*, 572 U.S. at 397; *see also Strickland*, 466 U.S. at 695 (the court must consider the totality of the evidence in determining whether a petitioner satisfied the two-pronged standard).

Moreover, Petitioner's argument is considerably undermined by the fact that the additional evidence he claims should have been challenged – the gunshot residue and Sloan's statements to the police – should have been excluded as the product of an illegal detention and search when the trial court had already ruled that Petitioner's detention and the search of his car were not illegal. It is not reasonably probable that the trial court would have excluded the "fruit" of a legal search. *See Strickland*, 466 U.S. at 694 (a habeas petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *see also Richter*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

Lastly, Petitioner's argument that his attorney "mistakenly" conceded that the ammunition magazine was properly seized under the plain view doctrine was and continues to be legally frivolous. Petitioner reasons that the ammunition magazine was itself not prohibited under California law at the time of Petitioner's arrest, so it could not have been seized or lead to the further discovery of a gun. (Dkt. No. 1-1 at 33-34.) The state court wholly rebutted that reasoning, citing clearly established federal law in doing so (LD 8 at 16). *Michigan v. Long*, 463 U.S. 1032, 1052 n.16 (1983) ("[W]e have expressly rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law."). Petitioner makes no attempt to challenge the state court's ruling on any legal basis; he simply

raises the argument again here. The argument is legally erroneous and fails to articulate how the state court's reasoning or conclusion were contrary to, or unreasonable applications of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d); *Hurles*, 752 F.3d at 778; *Brumfield*, 576 U.S. at 314.

For the foregoing reasons, Petitioner fails to satisfy either component of the *Strickland* test. *See Rupe*, 93 F.3d at 1445 (an attorney's "failure to take a futile action can never be deficient performance."); *Gonzalez v. Knowles*, 515 F.3d 1006, 1017 (9th Cir. 2008) (a defense attorney "cannot be deemed ineffective for failing to raise [a] meritless claim."); *Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012) ("It should be obvious that the failure of an attorney to raise a meritless claim is not prejudicial, ..."). Indeed, on doubly deferential review, Petitioner's claim must fail. *Richter*, 562 U.S. at 105; *Knowles*, 556 U.S. at 123.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: September 5, 2023

Karen L. Stevenson

KAREN L. STEVENSON
CHIEF U.S. MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

Court of Appeal, Fourth Appellate District, Division Two - No. E078051

S273886

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re QUAID CORNELL on Habeas Corpus.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Appellate Courts Case Information

Supreme Court

Change court

Docket (Register of Actions)

PEOPLE v. CORNELL
Division SF
Case Number S273885

Date	Description	Notes
04/04/2022	Petition for review filed	Defendant and Appellant: Quaid Akeem Cornell Attorney: Ron Boyer
04/04/2022	Record requested	Appellate record imported and available in electronic format.
04/04/2022	2nd petition for review filed	Defendant and Appellant: Andre Dwight Haynes Attorney: Stephen M. Lathrop
04/08/2022	Received Court of Appeal record	One box.
05/11/2022	Petitions for review denied	The petitions for review are denied.
07/28/2022	Returned record	one box

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COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

In re QUAID CORNELL on Habeas Corpus.

E078051

(Super.Ct.No. 16CR067787)

The County of San Bernardino

THE COURT

Having considered the petition for writ of habeas corpus with the appeal in case No. E072302, we GRANT petitioner's request to take judicial notice of the appellate record in that case. (See *In re Reno* (2012) 55 Cal.4th 428, 484 ["this court routinely consults prior proceedings irrespective of a formal request"]; Evid. Code, § 452, subd. (d).) We DENY the petition for writ of habeas corpus.

SLOUGH
J.

Panel: Slough
McKinster
Menetrez

cc: See attached list

MAILING LIST FOR CASE: E078051
In re Quaid Cornell on Habeas Corpus

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. QUAID AKEEM CORNELL et al., Defendants and Appellants.	E072302 (Super.Ct.Nos. 16CR067787 & 16CR067785) OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek, Judge. Affirmed in part; reversed in part with directions.

Ron Boyer, under appointment by the Court of Appeal, for Defendant and Appellant Quaid Cornell.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant Andre Haynes.

Rob Bonta and Xavier Becerra, Attorneys General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette Cavalier and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

After a rival gang shot two members of their gang, defendants Quaid Cornell and Andre Haynes opened fire on a group of civilians who lived in the rival gang's territory, killing one victim and seriously injuring two others. A jury convicted Cornell and Haynes of one count of murder and two counts of attempted murder with true findings on gang and firearm allegations. (Pen. Code, §§ 186.22, subd. (b)(1), 12022.53 , unlabeled statutory citations refer to this code.) The trial judge sentenced Cornell to a total of 114 years to life and Haynes to a total of 153 years to life.

Defendants raise four claims of error on appeal. First, Cornell argues the trial judge erroneously denied his motion to suppress evidence found in connection with his arrest and the search of his car. Second, Haynes argues the prosecutor committed misconduct by insinuating he had orchestrated an attempt to intimidate the People's key witness during trial, and as a result, the judge should have ordered a mistrial. Third, Haynes argues the judge violated his due process and jury trial rights by treating his juvenile adjudication for robbery (committed when he was 16 years old) as a prior strike. And finally, defendants argue, and the People agree, that recently enacted Assembly Bill No. 333 (2021-2022 Reg. Session) (Assembly Bill 333), which significantly modified section 186.22, requires reversal of the gang-related enhancements under sections 186.22

and 12022.53. We agree with the parties on this last point, but conclude defendants' other claims lack merit. We therefore reverse in part and remand to the trial court to (1) give the People an opportunity to retry the enhancements under Assembly Bill 333's new requirements and (2) resentence defendants, either at the conclusion of retrial or upon the People's election not to retry them. We otherwise affirm the judgments.

I

FACTS

A. *Prosecution's Case*

1. *The shooting*

Around 8:00 in the evening on August 27, 2016, Dawn Sutton and her fiancé Harold Cook were talking to their friend Ellen Wimbish in the parking lot of their apartment complex at the corner of 9th and G streets in San Bernardino when they were shot at several times by a group of men. When Sutton heard the first shot, she turned and saw a black man with braided hair, who was neither Cornell nor Haynes, holding a gun. Her initial reaction was to protect Cook because he was disabled and needed a cane to walk, but as she tried to push him out of the way, a bullet hit her thigh and she lost consciousness. As a result of the gunshot wound, Sutton spent a month unconscious in the hospital. The bullet that had entered through her thigh also struck her lungs and ovaries before lodging in her pelvis, where it remains. Cook was shot in the head and died immediately. Wimbish was struck in the foot, and two months later she died from a blood clot that originated near the site of the gunshot wound.

Just before the shooting, a neighbor who was sitting in his car across the street saw a male peeking around a corner suspiciously. Then he heard the sound of multiple gunshots and saw two gun muzzles flash. By the time of trial, the neighbor couldn't remember specific details about what he saw, but the officer who had interviewed him after the shooting said the neighbor reported the shooters were a group of three or four black men.

2. *Sloan's testimony*

The prosecution's main witness was 19-year-old DaShawn Sloan, who had joined the East-side IE Crips when he was 14. Sloan had been charged along with defendants and a fourth East-side IE Crips member named Theo Cobbs for the shooting of Sutton, Cook, and Wimbish.[1] Sloan pled guilty to voluntary manslaughter with a gang enhancement and accepted a sentence of six to 11 years in exchange for agreeing to testify truthfully at defendants' trial.

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] Cobbs was tried separately from defendants.

Sloan told the jury he had been present for the rival gang shooting that set the events of this case in motion. Around 2:00 a.m. on the day in question, August 27, 2016, he had been playing dice with several other East-side IE Crips members outside an apartment complex on Sierra Way in San Bernardino, in their gang's territory. As he was inside a friend's car taking a break from the game, he heard gunfire and later learned that two of his fellow gang members had been shot. He believed Seven Tray, a local rival gang, was responsible for the shooting.

Later that afternoon, Sloan went to a birthday party on Dover Drive with several other East-side IE Crips. After spending a couple of hours at the party, he left with five other gang members to visit an apartment near the intersection of 9th and G streets, which was Seven Tray territory. The group took two cars. Sloan, Cobbs, and a gang member named Kevin Winship rode together in Cobbs's black Chevy Impala. Cornell, Haynes, and a member who goes by the name "Little Woodie," took Cornell's red Nissan. Cornell, Haynes, and Cobbs went inside the apartment to talk to some women, while the rest of the group waited outside in the cars. According to Sloan, they were inside the apartment for about 45 minutes. Around 8:00 p.m. they emerged and told the others they'd "be right back." Sloan said he saw Cornell, Haynes, and Little Woodie walk off, turn a corner, and disappear from view. Moments later, Sloan heard several gunshots. When the three men returned, they said, "We gotta go," and the group caravanned back to the party on Dover Drive.

3. *The investigation*

Less than two hours after the shooting of Sutton, Cook, and Wimbish, police officers responded to a call saying there were multiple people possibly with weapons congregating on Dover Drive. They ended up arresting several of the party attendees (including Sloan, Cornell, and Haynes) and seizing four firearms—a loaded nine-millimeter Beretta handgun from Sloan; a Browning six-millimeter pistol and an expended casing for a .30-06 rifle from Cornell's brother Karlton; a loaded nine-millimeter Taurus handgun on the floorboard of the black Impala, near where Haynes was sitting; and a .45-caliber handgun and a high-capacity magazine in Cornell's Nissan. Sampling at the scene revealed gunshot residue on the hands of Cornell, Haynes, and Sloan.

The police recovered numerous bullet cartridges and fragments from the scene of the shooting at 9th and G streets. Seven of them matched the Taurus handgun found near Haynes in the Impala and 11 matched the handgun found in Cornell's car. Information gathered from cell towers used by Cornell and Haynes between 6:30 p.m. and 10:00 p.m. on August 27 showed a pattern consistent with their phones having traveled from the party on Dover Drive, to the scene of the shooting, then back to the party.

Electronic messages among some of the members of the gang also implicated Cornell and Haynes in the shooting. On the afternoon of August 27, several hours after the early-morning shooting believed to be perpetrated by members of Seven Tray, Cornell messaged Haynes on Facebook, telling him, "We all meeting in the hood," to

discuss what had happened. When Haynes replied he didn't know what had happened, Cornell told him to call him as soon as possible. Haynes then messaged Cornell's brother Karlton (also a member of the gang), asking what was up for the day. Karlton responded, "U already kno we doin r shit . . . it could've been anyone of us." Haynes replied, "I keep saying we needs do our shit during the day." Later, Cornell texted Haynes asking where he was because "it's going down right now," and Haynes said he was trying to get a ride. Cornell said he would try to pick him up and later sent another text saying he was on his way to get him.

4. *Gang evidence*

Detective Darren Sims, a gang investigator for the San Bernardino Police Department Specialized Enforcement Team, testified as an expert on the East-side IE Crips. He said East-side IE Crips is a "home-grown" or local gang formed about 25 years ago in San Bernardino. They have approximately 50 known or documented members. Their primary activities are weapons possession, assault, sale of narcotics, vandalism, vehicle theft, and murder.

Detective Sims discussed four predicate offenses committed by East-side IE Crips members. Bryson Hervey was convicted of vandalism over $400, with a gang enhancement, in 2012. Grady McDuffie was convicted of vehicle theft and being a felon in possession of a firearm in 2014. And Anthony Johnson was convicted of being a felon in possession of a firearm, with a gang enhancement, in 2014. Detective Sims said he was familiar with the circumstances of each conviction and had personal knowledge that all

Hervey, McDuffie, and Johnson were East-side IE Crips members when they committed the crimes. The prosecution introduced certified court packets for each offense.

Detective Sims said Haynes, Cornell and his brother Karlton, Winship, Cobbs, and Sloan are all active members of the gang. Seven Tray is one of the gang's rivals, and the victims were in Seven Tray territory when they were shot. Detective Sims explained that East-side IE Crips gained a reputational benefit from its members opening fire in Seven Tray territory. The shooters' actions sent the message to Seven Tray and the community that East-side IE Crips will swiftly and brazenly respond to attacks and are even willing to kill to maintain their reputation for power.

B. *Defense Case*

Both defendants testified in their own defense. Cornell denied being a member of the East-side IE Crips and claimed not to know anything about either of the shootings on August 27. To explain the gunshot residue on his hands, he said he had fired his brother Karlton's rifle into the air earlier that evening as they drove through an uninhabited part of town. He said he was at Dover Drive when the police arrived only because he was looking for his brother and had heard he was there.

Haynes admitted membership in the East-side IE Crips and admitted he'd gone with Sloan to the women's apartment near 9th and G streets that night, but he denied having anything to do with the shooting. He said he and Sloan had ridden in Cobbs's Impala. When they got to the apartment, Sloan got out, armed with a gun. He was joined by three others from another car, and they all walked in the same direction. Once they

were out of view, Haynes heard about 12 gunshots, then Sloan's group ran back to the cars and they all left. When they returned to the party on Dover Drive, Sloan reloaded his gun and put it on Cobbs's center console. Haynes said he moved the gun underneath his seat when the police arrived in an attempt to hide it.

On cross-examination, Haynes admitted having deleted all of his Facebook messages with Cornell from the day of the shooting but couldn't remember why he had done so.

C. *Verdict and Sentencing*

The jury convicted defendants of one count of murder and two counts of attempted murder. (Pen. Code, §§ 187, subd. (a) & 664, unlabeled statutory citations refer to this code.) For all three counts, the jury found that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subds. (b)(1)(C), (b)(5)); that both defendants personally used and personally discharged a firearm (§§ 12022.5, subd. (b), 12022.53, subd. (c)); and that a principal in a gang-related offense personally discharged a firearm resulting in death or great bodily injury (§ 12022.53, subds. (d) & (e)(1)). In a bifurcated bench trial, the judge found Haynes had suffered a prior strike conviction. (§ 667, subds. (b)-(i).) As noted, Cornell and Haynes received total prison sentences of 114 years to life and 153 years to life, respectively.

II

ANALYSIS

A. *Cornell's Suppression Motion*

1. *Additional background*

Prior to trial, Cornell filed a motion to suppress the evidence seized from his Nissan on the ground the police lacked a warrant to search his car. The judge held a hearing at which the searching officer, Detective Brian Olvera, testified. Detective Olvera said dispatch had received a report that there were "several subjects" on Dover Drive "possibly with weapons." The first thing he noticed as he approached the area was a man standing in the street directly east of Dover, looking up and down as if on lookout. Then he saw a group of people congregated on Dover Drive and turned on his patrol car's overhead lights to get a better view. There were several people standing near two parked cars (later determined to be Cobbs's Impala and Cornell's Nissan). One person was holding an open container of alcohol, and another (later identified as Sloan) ducked down behind one of the cars in an attempt to hide.

Detective Olvera got out of his car with his gun drawn and approached the group. He saw Sloan pull a handgun (later determined to be loaded) from his waistband and toss it to the ground, while the others started to walk away. Detective Olvera identified himself and asked them to stop, at which point additional officers began to arrive and help him detain the members of the group and pat them down for weapons.

Detective Olvera searched the Impala first and found a handgun. He then moved on to the Nissan where a woman (later identified as Cornell's girlfriend) was crouched down in the front passenger seat seemingly trying to hide. She told Detective Olvera the car belonged to Cornell and complied when he asked her to step out. Through the open passenger door of the car, Detective Olvera saw a high capacity magazine sitting in a cupholder in the center console.

At about that point, Cornell's mother arrived and asked Detective Olvera what was going on. She lived around the corner, and someone had just informed her the police had stopped her sons. She told Detective Olvera she was the registered owner of the car and gave him permission to search it. In the enclosed compartment of the center console, Detective Olvera found a loaded handgun that matched the caliber of the magazine in the cupholder.

During argument on his suppression motion, Cornell conceded the plain-view doctrine justified seizing the magazine but argued Detective Olvera needed a warrant to search the remainder of the car.[2] The trial judge denied the motion, concluding the magazine in plain view justified the warrantless search of the center compartment to protect Detective Olvera's and the other officers' immediate safety.

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[2] "The plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." (*Illinois v. Andreas* (1983) 463 U.S. 765, 771; *People v. Superior Court* (*Chapman*) (2012) 204 Cal.App.4th 1004, 1012 ["the law is clear that any incriminating evidence observed in plain view may be seized"].)

2. *Discussion*

Cornell argues the suppression ruling was erroneous because the magazine provided no basis to search the rest of the car. He also challenges, for the first time, his detention before the search, arguing all the evidence obtained afterward (the gun, magazine, gunshot residue on hands, and Sloan's statements before and during trial) should have been suppressed.

As an initial matter, Cornell has forfeited these additional challenges by failing to raise them during trial. "[W]hen defendants move to suppress evidence under section 1538.5, they must inform the prosecution and the court of the specific basis for their motion," and if they fail do so, "cannot raise the issue on appeal." (*People v. Williams* (1999) 20 Cal.4th 119, 129, 136.) Cornell's motion to suppress and his counsel's argument at the hearing were limited to the search of his car and the gun found inside. He never argued his detention was unlawful, never contested the gunshot residue obtained during his arrest or Sloan's statements to the police, and he specifically forfeited his challenge to the magazine by conceding it was lawfully seized as plain-view evidence. (*Id.* at p. 136 "[T]he scope of issues upon review must be limited to those raised during argument . . . . This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions"].)

But even if he 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.

We turn now to the only challenge Cornell did make during trial—that the search of his car's center compartment and the seizure of the gun found inside were unlawful. The standard of review on a motion to suppress is well established. We view the record in the light most favorable to the ruling and defer to the trial judge's factual findings, express or implied, when supported by substantial evidence, but we exercise our independent judgment in determining whether, on that record, the search or seizure was reasonable under the Fourth Amendment. (*People v. Brown* (2015) 61 Cal.4th 968, 975.) We may uphold the suppression ruling for *any reason* supported by the facts and law, regardless of the trial judge's reasoning. (See, e.g., *People v. Superior Court* (*Chapman*), *supra*, 204 Cal.App.4th at p. 1011 [like other areas of appellate review, our review of a suppression ruling "is confined to the correctness or incorrectness of the trial court's ruling, not the reasons for its ruling"].)

We conclude the record provides ample support for the trial judge's determination that the warrantless search of the center console compartment of Cornell's car did not violate the Fourth Amendment. It is well established "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . the suspect is dangerous and . . . may gain immediate control of weapons." (*Michigan v. Long* (1983) 463 U.S. 1032, 1049.) In *People v. Lafitte* (1989) 211 Cal.App.3d 1429 (*Lafitte*), the court denied the defendant's motion to suppress a gun the police found in a trash bag in his car after stopping him for driving with a broken headlight. The court concluded the warrantless search was justified by safety concerns because the officers conducted it only after seeing a knife in plain view in the defendant's open glove box and because the defendant was near his car and could potentially gain access to it. (*Id.* at p. 1431.) Similarly, in *People v. Lomax* (2010) 49 Cal.4th 530, our Supreme Court upheld the seizure of a "semiautomatic handgun wedged in the front between the driver's seat and the center console" based on the plain-view doctrine and officer safety concerns. (*Id.* at p. 563.) As in *Lafitte*, the officers noticed a weapon in plain view in the defendant's vehicle after pulling him over for a traffic violation—he'd made an illegal lane change. (*Lomax*, at p. 541.) The court concluded that as soon as the officers saw the "semiautomatic handgun sticking out of the map holder pocket," they were "justified in seizing the gun [in plain view] *and searching for additional weapons*." (*Id.* at pp. 563-564, italics added.)

Our case provides an even stronger basis for an additional weapons search than *Lafitte* and *Lomax*. In those cases, the safety risk arose from the sole fact that the defendants had weapons in plain view (and therefore accessible) inside their cars. Aside from the presence of the weapons, nothing else about the defendants was suspicious, they had been stopped for minor traffic violations. Here, in contrast, Detective Olvera was responding to what was already a potentially dangerous situation—a group of people armed with multiple weapons at night. The risk of danger became more apparent when he arrived on the scene and found two guns, the one Sloan tossed to the ground and the one in Cobbs's car.

In challenging the suppression ruling, Cornell attacks individual aspects of Detective Olvera's testimony. He argues the report of "subjects in the area possibly with weapons" was too vague to supply a reasonable suspicion of criminal activity because it didn't specify what *kind* of weapons and *in what manner* they were being used. He also points out Detective Olvera never testified that anyone in the group had made any "threatening actions" in his presence, nor did he say he viewed Cornell's girlfriend as a threat when he asked her to step out of the car. Finally, he argues that at the time of the search, it was not illegal under California law to possess a high capacity magazine, and thus there was no reason to search the rest of his car for additional weapons.

These arguments miss the point. In any Fourth Amendment inquiry, the focus is on the *totality* of the circumstances, not on each individual circumstance, as if it stood in isolation. (*Lafitte*, *supra*, 211 Cal.App.3d at p. 1433.) And here, when we consider all of

the circumstances known to Detective Olvera when he saw the magazine in Cornell's car, we have no trouble concluding his actions were reasonable under the Fourth Amendment. He and his fellow officers had come upon a large group of people at night, and they knew at least one person had been armed with a gun and another person had a gun inside their car. The possibility that they had not yet discovered all of the weapons present, and the risk one could be used against them, cannot be overstated.

Cornell's focus on whether or not he could lawfully possess the ammunition is at odds with long-established Fourth Amendment jurisprudence. In *Michigan v. Long*, the United States Supreme Court "expressly rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law." (*Michigan v. Long*, *supra*, 463 U.S. at p. 1052, fn. 16.) Similarly, in *Lafitte*, the court rejected the defendant's claim that the seizure of the knife in his car was unlawful because it was not illegal to possess a knife. Legal or not, a knife can still be used to inflict harm, and the same is obviously true of guns. The *legality* of the weapon is not the relevant issue, rather it is the *risk* to the officers under the circumstances that determines whether their actions were reasonable under the Fourth Amendment. On this record, we conclude Cornell's constitutional rights were not violated and thus the trial judge properly denied the suppression motion.[3]

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[3] 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.

B. *Haynes's Motion for Mistrial*

Next, Haynes argues the trial judge erroneously denied his motion for mistrial. We conclude this argument lacks merit.

1. *Additional background*

On cross-examination, the prosecutor showed Haynes two photographs of the same person and asked if he knew him. Haynes identified the person as "like my step brother" and acknowledged he had been coming to court and watching the trial. The prosecutor then asked Haynes if his stepbrother had come to court on the two days Sloan had testified.

At that point, and at defense counsel's request, the parties had a sidebar conference with the judge about this line of questioning. Defense counsel expressed concern that the prosecution was about to make an improper accusation that his client had orchestrated an attempt to intimidate Sloan. The judge said he had noticed the stepbrother's presence in court and was also concerned by the fact he had sat in the front row, and directly in front of the witness stand, only on the days Sloan had testified. Defense counsel argued the stepbrother's behavior could not be attributed to his client, and the judge explained that what was relevant about the stepbrother's behavior was not its cause but the effect it might have on Sloan's testimony and credibility.

Defense counsel disagreed and characterized the prosecutor's questions as "a flat-out accusation that my client is trying to intimidate witnesses." He warned that if the prosecutor continued with the line of questioning he would move for a mistrial. The

judge responded that the admission of evidence about the stepbrother's behavior in court did not constitute grounds for a mistrial and commented that the prosecutor was "on very solid footing" in bringing it to the jury's attention.

When the prosecutor resumed his cross-examination of Haynes, the following exchange took place:

Q. "What's his name?

A. "Duane.

Q. "What's his full name?

A. "Duane Robinson.

Q. "What does he go by?

A. "Duane.

Q. "Does he go by D Moola?

A. "Not that I know of.

Q. "Isn't that his Facebook name?

A. "I haven't been out in two years so I don't know.

Q. "Did you notice that when Mr. Sloan was testifying he was sitting here in the front row on this side of the courtroom directly in front of Mr. Sloan?

A. "He's been here since before I've been in trial. He comes to almost every court date.

Q. "But during trial, he specifically came when Mr. Sloan was here, right?

A. "He came to every court date besides today.

Q. "So he's been here every day except today?

A. "Yes.

Q. "Did he sit in the front row except for that day?

A. "Yes.

Q. "So that's where you saw him. You saw him here every day?

A. "Yes.

Q. "And he just came here to give you support, right?

A. "Yes.

Q. "Thank you. No further questions."

At the end of the defense case, the prosecutor called Detective Cunningham to rebut Haynes's testimony about Duane's presence in the courtroom. Before the detective took the stand, the judge gave the jury the following limiting instruction: "Okay. Folks, one of the things Detective Cunningham is going to talk about is some people that appeared in the audience one day when Mr. Sloan was testifying. This evidence is going to be offered for a limited purpose as to the effect on Mr. Sloan only, not for you to draw any other conclusions from."

The prosecutor and Detective Cunningham then had the following exchange about Duane:

Q. "I'm going to show you what's been marked Exhibit 132. [⁋] Do you recognize this image?

A. "Yes.

Q. "Where did that come from?

A. "That came from [Mr.] Haynes's Facebook account.

Q. "And we showed another image, as well. Are these the only two images of this person on Mr. Haynes's account?

A. "No.

Q. "Are these the only two images with this person with guns on Mr. Haynes's account?

A. "No.

Q. "Have you ever seen this person in person before?

A. "Yes.

Q. "When was that?

A. "I don't specifically remember the dates, but it was during trial when Mr. Sloan was testifying.

Q. "Where did you see this person?

A. "Sitting in the courtroom in the front row behind the glass.

Q. "And you are pointing to your right-hand side?

A. "Yes, I'm sorry.

Q. "So that would be the side the witness stand is on?

A. "Correct."

As soon as both sides rested, Haynes's counsel made a motion for mistrial based on his earlier objection to the prejudicial nature of the evidence about Duane. Citing the reasons given during the sidebar conference, the judge denied the motion.

2. *Discussion*

Haynes challenges that ruling, arguing the prosecutor committed misconduct by soliciting speculative inferences about his role in Duane's presence at trial, essentially insinuating he had orchestrated the intimidation. He argues the prosecutor's conduct violated his state and federal constitutional rights to a fair trial.

As a threshold matter, "'[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.'" (*People v. Pearson* (2013) 56 Cal.4th 393, 426, quoting *People v. Stanley* (2006) 39 Cal.4th 913, 952; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 679.) At no point during the sidebar conference or his oral motion for mistrial after the close of evidence did Haynes's trial counsel argue that the prosecutor had committed misconduct. Instead, his initial objections were based on the admission of what he argued was overly prejudicial evidence about Duane. But even if we assume Haynes preserved a claim of misconduct by objecting to the prejudicial nature of the prosecutor's line of questioning, we conclude the claim fails on its merits because the evidence elicited by the prosecutor's questions was not overly prejudicial. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1350 [introducing admissible evidence cannot constitute misconduct].)

A trial judge should grant a motion for mistrial when the defendant shows an incident during the trial prejudiced his case in a way that cannot be cured through jury instruction. (*People v. Cox* (2003) 30 Cal.4th 916, 953.) "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*Ibid.*) Given that considerable discretion, our review on appeal is limited to whether the judge's ruling is arbitrary or unreasonable. (*People v. Williams* (1997) 16 Cal.4th 153, 251.)

On this record, we conclude the judge's refusal to grant a mistrial falls well within the bounds of reason. Sloan was a crucial witness in the prosecution's case, and as a result, a key strategy for the defense was to attack his credibility. Sloan was the prosecution's only witness who was both a member of defendants' gang and had personal knowledge of the events immediately preceding the shooting. His testimony that defendants had been the ones to walk around the corner towards the intersection of 9th and G streets immediately before gunshots were fired was important circumstantial evidence of defendants' guilt, which the defense tried to undercut. On cross-examination, defense counsel implied through their questions that Sloan had a motive to shift the blame to their clients and minimize his involvement in the shooting, and Haynes testified in his direct examination that *Sloan*, not he or Cornell, had been the one to walk around the corner just before the shooting. Given Sloan's importance at trial and the fact defendants put his credibility at issue, any evidence that had a tendency to bolster his

believability with the jury was highly relevant to the prosecution's case. (See Evid. Code, § 210 [evidence relevant to the credibility of a witness is admissible].)

The evidence about Duane's presence at trial had the tendency to do just that. Sloan was a longtime member of the gang who had joined at a very young age. He admitted he didn't want to be testifying. It wasn't just that he didn't want his fellow gang members to get in trouble, he also knew that members who snitched or gave information about the gang to the authorities were often punished by their gang. Based on this, the jury could reasonably infer the presence of Haynes's stepbrother, who appeared with guns in photographs on Haynes's Facebook page, might tend to make Sloan nervous or afraid. The jury could also reasonably infer Sloan was telling the truth when he identified defendants as the ones who had walked around the corner. Indeed, Duane's presence had the tendency to explain the vague and sometimes noncommittal nature of Sloan's testimony. Sloan said he saw defendants head towards 9th and G streets and heard gunshots shortly after they disappeared from view, but he made sure to emphasize they could have been going to the store, and he refused to admit their potential involvement in the shooting. In other words, the nature of his testimony was such that the jury could infer he was trying to walk a line, providing enough information to uphold his end of the plea agreement to testify truthfully while simultaneously endeavoring to protect both defendants and himself. "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and therefore is admissible. An explanation of the basis for the witness's fear is likewise relevant to her credibility and is

well within the discretion of the trial court [to admit]." (*People v. Sandoval* (2015) 62 Cal.4th 394, 429-430 (*Sandoval*), cleaned up.)

Haynes argues the incurable prejudice requiring a mistrial came from the prosecutor eliciting the entirely speculative inference that *he* had orchestrated the intimidating conduct. But the prosecutor did no such thing. All of his questions about Duane were focused on whether he was present during trial, where he had been sitting, and whether he was a member of the East-side IE Crips. At no point did the prosecutor ask Haynes whether he had talked to Duane or played any role in his presence at trial, and the prosecutor made no insinuations along those lines during argument. And, crucially, the judge specifically directed the jury not to draw such a conclusion on their own. (See *Sandoval*, *supra*, 62 Cal.4th at p. 430 [limiting instruction was sufficient to cure any potential prejudice resulting from similar evidence of witness intimidation]; see also *ibid.* ["'It is not necessarily the source of the threat—but its existence—that is relevant to the witness's credibility"']. We presume the jury followed that instruction, and as a result, conclude the trial judge properly determined Haynes's case had not been incurably harmed by the evidence.

C. *Haynes's Prior Strike*

Under section 667, a prior juvenile adjudication constitutes a strike if the following conditions are met: "(A) The juvenile was 16 years of age or older at the time the juvenile committed the prior offense. (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2)

as a serious or violent felony. (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." (§ 667, subd. (d)(3).)

Before sentencing, the judge found Haynes had suffered a 2012 juvenile adjudication for robbery (committed when he was 16 years old) and that it constituted a prior "strike" conviction within the meaning of the Three Strikes law. (§ 667, subds. (b)-(i).) To preserve the issue for future consideration, Haynes argues the use of his juvenile adjudication as a prior strike violated his federal constitutional rights to due process and a jury trial because he didn't have the right to a jury trial in the juvenile proceeding. But he also acknowledges that the California Supreme Court rejected this argument in *People v. Nguyen* (2009) 46 Cal.4th 1007, 1022-1028, which is binding authority on appellate courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Following *Nguyen*, we conclude the trial judge did not violate Haynes's constitutional rights in treating his 2012 robbery adjudication as a strike.

D. *Challenges to the Gang Evidence*

In their opening briefs, defendants argued the record contains insufficient evidence to support the gang enhancements (§ 186.22, subd. (b)) because the prosecution failed to prove East-side IE Crips' primary activities include committing any of the predicate offenses listed in section 186.22, subdivision (e). After we issued a tentative opinion

rejecting this claim and concluding the enhancements are sufficiently supported by the record, the Legislature enacted Assembly Bill 333, which increased the requirements for proving gang enhancements. In supplemental briefing, defendants argue, and the People concede, that the trial evidence is insufficient under the new law and we should remand the matter to give the People an opportunity to retry the gang enhancements alleged as to all counts under section 186.22 as amended by Assembly Bill 333. Because defendants' challenge to the sufficiency of the evidence under the former version of section 186.22 lacks merit (as we discuss in part II.D.1 below), we agree that remand will not offend the principle of double jeopardy and is the appropriate remedy under these circumstances.

1. *Sufficiency of the evidence under former section 186.22*

Section 186.22 provides for enhanced punishment when a defendant is convicted of an enumerated felony committed "for the benefit of, at the direction of, or in association with a criminal street gang." (§ 186.22, subd. (b)(1).) To support a gang enhancement under this statute, the People must prove the existence of a criminal street gang whose members engage in "a pattern of criminal activity." (§ 186.22, subds. (e)(1), (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322-323 (*Sengpadychith*).) This means, among other things, the People must prove the group's "primary activities" include committing one or more of the crimes listed in section 186.22, subdivision (e), which—at the time of defendants' trial—included assault with a deadly weapon or force likely to produce great bodily injury, murder, vandalism, vehicle theft, narcotics sales, and illegal possession of firearms. (Former § 186.22, subd. (e).) At the time of

defendants' trial, section 186.22 also permitted the jury to consider the currently charged offenses when considering whether the gang's primary activities including committing qualifying offenses. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465 (*Duran*).)

The primary activities of a criminal street gang are a proper subject for expert opinion. (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1005.) "An expert may generally base his opinion on any 'matter' known to him, including hearsay not otherwise admissible, which may 'reasonably . . . be relied upon' for that purpose." (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) Thus, "[t]he testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*Duran*, *supra*, 97 Cal.App.4th at p. 1465; see also *Sengpadychith*, *supra*, 26 Cal.4th at p. 324.) The reason for the primary activity requirement is to distinguish between criminal organizations and lawful organizations whose members also happen to commit crimes. (*Sengpadychith*, at pp. 323-324 ["The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations"].)

When considering the sufficiency of the evidence to support a jury finding, we review the record in the light most favorable to the judgment, drawing all inferences in favor of the verdict, and we do not reassess the credibility of witnesses. (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610 (*Alexander L.*).)

On this record, we conclude the evidence was sufficient to establish the primary activities element under the former version of section 186.22. Detective Sims's explanation of his experience with the gang provided a sufficient foundation for his testimony that their primary activities included committing qualifying offenses. He then corroborated that testimony by giving the jury four specific examples of gang members committing qualifying offenses. (See *Sengpadychith*, *supra*, 26 Cal.4th at p. 323 [past offenses committed by the gang's members can be probative of the gang's primary activities].) Additionally, the jury could consider the evidence concerning the charged murder and attempted murders as evidence of the gang's primary activities. (*Ibid.*) While this is no longer permitted under the current version of section 186.22, it was allowed at the time of trial.

Contrary to Cornell's assertion, former section 186.22 did not require the prosecution to present more specific or detailed information about East-side IE Crips' primary activities or introduce a multitude of discrete incidents to prove its members consistently and repeatedly committed enumerated offenses. Detective Sims told the jury he had been investigating the East-side IE Crips for years, obtaining information from traffic stops and arrests, service calls in the community, informal field contacts with members and their families, reviewing social media accounts, speaking to other law enforcement officers, and reviewing their reports. This was a sufficient foundation for his testimony on the gang's primary activities, as experts may rely on information from colleagues and gang members in forming their opinions. (E.g., *Sengpadychith*, *supra*, 26

Cal.4th at p. 324; see also *Duran*, *supra*, 97 Cal.App.4th at p. 1465 [primary activities evidence held sufficient where an expert familiar with the gang testified their primary activities included committing specific enumerated crimes and gave a specific example of an instance where a person whom the expert believed was a gang member had previously pled guilty to an enumerated offense]; *People v. Gardeley* (1996) 14 Cal.4th 605, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 [same, where an expert testified that the gang was primarily engaged in the sale of narcotics and witness intimidation and based his opinion on his personal investigations of crimes committed by gang members and information from other law enforcement officers].)

Alexander L. does not dictate a different result. In that case, the only evidence the prosecution presented about the gang's primary activities was its expert's statement that "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotics violations.'" (*Id.* at p. 611.) The reviewing court concluded this statement was insufficient to support a gang enhancement because the prosecution failed to elicit testimony addressing when, where, or how the gang expert obtained the information that formed the basis for his opinion. In other words, the expert provided no foundation or factual support to explain *how* he knew what he claimed he knew—his primary activities testimony lacked a factual predicate. (*Alexander L.*, *supra*, 149 Cal.App.4th at pp. 611-612.) As a result, it was "impossible to

tell" whether his claimed knowledge of the gang's activities was based on highly reliable sources, such as court records of convictions or his own investigations and conversations with gang members, or on "entirely unreliable hearsay." (*Id.* at p. 612, fn. omitted.)

Detective Sims's testimony did not suffer this infirmity. Unlike the expert in *Alexander L.*, he supported his opinion with an adequate foundation (years of investigation, review of law enforcement reports, and contacts in the field), and he testified about specific instances of enumerated crimes. (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324.) Moreover, the prosecution introduced evidence of those specific instances by submitting certified court packets, a form of "highly reliable" evidence that was missing in *Alexander L.* (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 612.)

For these reasons, we conclude defendants' claim of insufficient evidence under former section 186.22 fails. But as we explain next, the prosecution's evidence was insufficient under the current version of section 186.22 that became effective while this appeal was pending.

2. *Assembly Bill 333 requires remand*

Assembly Bill 333 made three significant modifications to section 186.22. It amended the definitions of "criminal street gang" and "pattern of criminal gang activity" and clarified the evidence needed to establish an offense benefits, promotes, furthers or assists a criminal street gang.

Previously, the statute defined a "criminal street gang," as "any ongoing organization, association, or group of three or more persons . . . whose members

individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (Former § 186.22, subd. (f), italics added.) Assembly Bill 333 narrowed the definition to "an ongoing, organized association or group of three or more persons . . . whose members *collectively* engage in, or have engaged in, a pattern of criminal gang activity." (Assem. Bill 333, § 3, revised § 186.22, subd. (f), italics added.) In other words, because the Legislature replaced "individually or collectively engage in . . . a pattern of criminal gang activity" with simply "collectively engage," the statute now requires the People "to prove that two or more gang members committed each predicate offense." (*People v. Delgado* (Feb. 10, 2022, B299482) __ Cal.App.5th __ [2022 Cal.App. Lexis 104, *3]; accord, *People v. Lopez* (2021) 73 Cal.App.5th 327, 344-345.)

As for what constitutes a "pattern of criminal gang activity," previously the prosecution needed to prove "only that those associated with the gang had committed at least two offenses from a list of predicate crimes on separate occasions within three years of one another."[4] (*People v. Sek* (Feb. 1, 2022, B309003) __ Cal.App.5th __ [2022 Cal.App. Lexis 82] (*Sek*), citing former § 186.22, subd. (e).) Assembly Bill 333 made several changes to this definition. Now, the predicate offenses must have been committed by two or more "members" of the gang (as opposed to any persons) and must have "*commonly* benefited a criminal street gang." (§ 186.22, subd. (e)(1), italics added.) The

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[4] Specifically, the statute defined a "pattern of criminal gang activity" to require proof of two or more predicate offenses enumerated in that subdivision, "provided at least one . . . occurred after the effective date of this chapter and the last . . . occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more *persons*." (Former § 186.22, subd. (e)(1), italics added.)

last offense must have occurred within three years of the date of the currently charged offense, and the currently charged offense no longer counts as a predicate offense. (§ 186.22, subd. (e)(1)-(2).) The new law also reduced the number of qualifying offenses that can be used to establish a pattern of criminal gang activity, removing vandalism, looting and a number of fraud-related offenses from the list. (§ 186.22, subd. (e)(1).)

Finally, and perhaps most notably, Assembly Bill 333 requires the prosecution to prove the benefit the gang derives from the predicate and current offenses is "more than reputational." (Stats. 2021, ch. 699, § 3 [enacting § 186.22, subd. (g)].) New section 186.22, subdivision (g), provides, "As used in this chapter, to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant."

These amendments to section 186.22 apply retroactively to this case because they "redefine, to the benefit of defendants, conduct subject to criminal sanctions," and defendants' judgments were not final when Assembly Bill 333 took effect.[5] (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300-301; see also *In re Estrada* (1965) 63 Cal.2d 744 [when a change in law reduces the punishment for a crime, defendants with nonfinal

[5] In addition to amending section 186.22, Assembly Bill 333 also adds a new section 1109 to the Penal Code, which requires separate trials for gang-related charges under section 186.22. We need not and do not decide whether section 1109 also operates retroactively.

judgments are entitled to those "ameliorating benefits"]; *People v. Lopez*, *supra*, 73 Cal.App.5th at p. 344 [concluding substantive changes in Assembly Bill 333 apply retroactively because they "increase[] the threshold for conviction of the section 186.22 offense and the imposition of the enhancement"].)

The parties agree, as do we, that we must reverse the gang enhancements under section 186.22, subdivision (b) as well as the gang-related firearm enhancements because section 12022.53, subdivision (e)(1) incorporates section 186.22, subdivision (d) and requires proof that a principal personally discharged a firearm during the commission of a gang-related offense. (§ 12022.53, subd. (e)(1)(A); *People v. Lopez*, *supra*, 73 Cal.App.5th at p. 346 [reversing the gang-related firearm enhancement based on conclusion that "Assembly Bill 333's changes to section 186.22 affect not only the gang enhancement allegations under that statute but [also] other statutes that expressly incorporate provisions of section 186.22"].) At trial, the jurors were permitted to use the current offenses and a prior vandalism conviction to establish a pattern of criminal gang activity, and they were not required to find the pattern offenses benefited East-side IE Crips. Additionally, the prosecution's theory was that the shooting provided the gang with a reputational benefit, which was sufficient under the law at the time but is no longer permitted under amended section 186.22. Because the People did not ask the jury to find at least some of the elements that Assembly Bill 333 requires (and that the prior law did not require) and because the evidence presented at trial was insufficient to satisfy the increased requirements of the new law, reversal is required.

The proper remedy for this type of failure of proof—where newly required elements were "never tried" to the jury—is to remand and give the People an opportunity to retry the affected charges. (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 71-72, fn. 2; see also *People v. Eagle* (2016) 246 Cal.App.4th 275, 280 ["When a statutory amendment adds an additional element to an offense, the prosecution must be afforded the opportunity to establish the additional element upon remand. [Citation.] Such a retrial is not barred by the double jeopardy clause or ex post facto principles"].)

III

DISPOSITION

We reverse the gang enhancements (§ 186.22, subd. (b)) and firearm enhancements (§ 12022.53, subds. (d) & (e)(1)) on each count for both defendants and remand to the trial court with directions to (1) give the People an opportunity to retry the enhancements under the law as amended by Assembly Bill 333; and (2) if the People elect not to retry defendants, or at the conclusion of retrial, to resentence defendants. In all other respects, we affirm the judgments.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

MENETREZ
J.

THE COURT: Anything further from Defense?
MR. GASS: No.
THE COURT: Argument by the People?
MR. DAGHBANDAN: Yes. There's two different grounds that we have that are independent for that search of the red Nissan. The first is plain view exception. In this case at the point of observing the magazine inside of the vehicle, the officers had already found two guns. They were out there reporting multiple subjects, multiple weapons. And they had already found the Sloan's gun that had been tossed. And they had seen the gun that ultimately was underneath Mr. Haynes in the front passenger seat of the Impala.

And then when you see a magazine in the second car that's related to the subjects, which would infer that there's probably a semiautomatic firearm in there, we have the plain view exception. And asking Ms. Kirk to exit the vehicle was a basic officer's safety maneuver, and the magazine was right there.

The second is consent. And I know that has been contested here in this hearing. And Officer Olvera testified that he did receive consent from the owner of the vehicle. And the owner does admit she is the owner of the vehicle. There's no dispute about ownership and understanding for her to consent. And I know Ms. Cornell testified that she did not give consent. But her version of events simply doesn't match up with what happened.

And we know for a fact that the notion that a sergeant would come up to her and complain about fellow officers, who would make what are clearly false statements that she was the

first on scene and so forth, are just unreliable. And whether she's simply mistaken, confused, or not being honest with this Court, I will leave it to the Court to decide. But it simply cannot match with what really happened. There's no dispute that Officer Olvera was there first. The CAD log supports this. Both officers support this. So Ms. Cornell's testimony doesn't carry much weight. Based on that, I would ask that the motion be denied.

THE COURT: Mr. Gass?

MR. GASS: Plain view would certainly justify seizure of the magazine which was described as being in plain view. The gun was described as being in a secret compartment, required a search, not in plain view and therefore -- again, he testified under the plain view doctrine. Officer Olvera said he didn't need consent. That's convenient because he doesn't have any evidence of consent. We have policies that require us to trust but verify what occurs.

There's a lot of ways to verify, one of them being a consent form which the officers carry around, and they know there's frequently going to be disputes about searches at a later date so they need to get a consent form signed. But they don't necessarily have to have a consent form. They can also turn on the belt recorder that they all have and just record the conversation for us, and we can hear the consent.

He did neither, and therefore we cannot verify and therefore we cannot trust his testimony about consent for the search. He tried to find middle ground by saying he didn't need consent. But obviously, he did. He didn't get it. I think the

Court should allow the magazine to come in because it was in plain view but should suppress the weapon which was illegally seized.

THE COURT: Court's going to deny the motion to suppress. This is basically an officer's safety issue. We have officers arriving at a scene where subjects are reported as having multiple firearms. The officer arrives. 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.

Officers didn't need the consent. There is probable cause to believe that there would be a firearm found in that vehicle. It is an automobile. It does not require a warrant based on the totality of the circumstances. So the Court will deny the motion to suppress. Also, the Court would find this is akin to a pat-down search of the vehicle for officer's safety reasons.

When there were so many people hanging around, report of a firearm being seen, firearms visible, people acting strangely in the presence of officers, hiding and concealing themselves, it's the equivalent of a pat-down search of the vehicle, and there was cause to believe for officer's safety reasons that they would do that. So the Court will deny the motion to suppress, and the evidence can be used.

MR. DAGHBANDAN: Your Honor, just for the record, is the Court finding consent was received in this case? I know that is not the basis of the ruling but --

THE COURT: I don't think -- I'm not even ruling on that because I don't think consent was even necessary. And I don't even need to make a finding on that because consent wasn't necessary. They didn't need it, and I don't think I need to get there.

MR. DAGHBANDAN: Okay.

THE COURT: All right. With that, what do we -- what would we like to do?

MR. DAGHBANDAN: I think we are just ready to come back Tuesday.

THE COURT: All right. We will see you back up here Tuesday at 10:00 a.m.

MR. DUNCAN: And I -- this doesn't need to be on the record. This is a housekeeping matter.

THE COURT: Okay.

(Off the record.)

THE COURT: Counsel, back on the record in Cornell and Haynes. Counsel is present. Defendants are present. Juror No. 92 talked about maybe having childcare issues. She was going to tell me Tuesday. She did call her childcare provider. She indicated to the bailiff that she can't get childcare coverage for Tuesday or to even come back to tell us that she can't. Can we go ahead and excuse her?

MR. GASS: No objection.

MR. DUNCAN: So stipulated.

SUPREME COURT OF THE UNITED STATES

QUAID CORNELL Petitioner, v. WARREN MONTGOMERY, Respondent. _____	)))))))))	NO._____ CERTIFICATE OF SERVICE

I hereby certify that I was appointed to represent the petitioner under the Criminal Justice Act, 18 U.S.C. 3006A and that I have on this date served copies of the petitioner's Petition for Writ of Certiorari by depositing them in the U.S. Mail, first class postage prepaid, and addressed to:

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