No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD SANDERS, Petitioner

vs.

DOMINGO URIBE, Respondent

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit clearly erred in its decision that the state court reasonably concluded that Petitioner's right to confrontation was not violated by the trial court's refusal to strike the testimony of an eyewitness who declined to answer questions on cross-examination?

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DONALD SANDERS, Petitioner

vs.

DOMINGO URIBE, Warden, Respondent

PETITION FOR WRIT OF CERTIORARI

Donald Sanders ("Sanders" or "Petitioner") petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit affirming the district court's dismissal of his habeas corpus petition with prejudice.

I.
ORDERS AND OPINIONS BELOW

The Ninth Circuit's order affirming the district court in *Donald Sanders v. Domingo Uribe*, Ninth Circuit case no. 16-55120, was not published. *See* Petitioner's Appendix ("Pet. App.") 1. The district court adopted the magistrate judge's report and recommendation and entered judgment against Sanders, dismissing the petition with prejudice. Pet. App. 11-13. Because the Court can look

through the California Supreme Court's denial of review of Sanders's conviction, the relevant state court decision in this 28 U.S.C. § 2254 action is the California Court of Appeal's opinion filed on September 22, 2010. Pet. App. 38-59.

II.
JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit, per the Honorable Tashima and Christen, Circuit Judges, and Rufe, District Judge, affirmed the district court in a memorandum decision entered August 30, 2018. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. Pet. App. 1. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254.

III.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

U.S. Const., Amend. XIV, § 1

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254(a)

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

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(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.
STATEMENT OF THE CASE

Donald Sanders was denied his constitutional right of confrontation when a government witness refused to answer questions on cross-examination at his trial. The witness's testimony should have been stricken. Sanders was nevertheless convicted of two counts of attempted murder and assault with a firearm on the basis of that selective testimony.

The witness, Lanny Thomas, a leader of the motorcycle club where the shooting with which Sanders was charged took place, attempted to control the proceedings against Sanders from the start. He was the only witness to speak with a responding officer at the scene. He did not allow counsel for Sanders to access the clubhouse to investigate the shooting; he did not comply with a subpoena for club membership information so that counsel could contact other witnesses. He injected

inside information from his club into the proceedings -- providing a detective with information from third parties that inculpated Sanders's original codefendant before different third-party information prompted him to recant -- but would not reveal the basis of the information or its sources. On cross-examination he refused to answer questions about law enforcement members of his motorcycle club who were present at the shooting, and how they influenced his testimony. He admitted to discussing his selective testimony, midway through his testimony, with club members at a club-wide meeting in the middle of trial. The trial judge decried that Thomas had assumed the role of "judge and jury."

The evidence against Sanders was limited. Without Thomas's selective testimony, there was only one witness, a victim and Thomas's fellow motorcycle club member, who identified Sanders as a shooter. Like Thomas's, this witness's testimony was inconsistent. He was intoxicated. He, too, recanted his identification of the first shooter based on inside information. In this context, the court's failure to strike Thomas's testimony when he refused to answer material questions resulted in a fundamentally unfair trial.

A. Proceedings in State Court

Donald Sanders was charged with two counts of attempted murder against Joel and Rodney Mason and assault with a firearm in violation of California Penal Code §§§ 664, 187(a), and 245(a)(2). Pet. App. 14. He was also charged with sentencing enhancements for the discharge of a firearm causing great bodily injury to the victims. *Id.*

1. The prosecution's case at trial

Rare Breed is a Gardena, California-based club for motorcycle enthusiasts with more than one hundred members, including law enforcement and members of the Blood and Crip gangs. Lanny Thomas founded the club with others in 1989. The clubhouse grand opening, open to the public and other motorcycle clubs, was coming to a close on September 11, 2005, when there was a loud dispute. Two young men were being disrespectful to Joel Mason's girlfriend and female cousin. Joel, who had been cleaning up, went to confront the men when he was provoked by one the men, later dubbed "S-1", who was bigger than Joel. Joel felt that he had to strike first. He was punching S-1 in the face, pinning him down, when he sensed someone coming toward him from behind and was lifted off of S-1. Joel was shot by S-1, and fell. He was shot again twice. Joel recognized the "frown" of the person who approached him from behind as belonging to Sanders, whom he had seen earlier that day. He did not see Sanders shoot or with a gun. He did not remember what Sanders was wearing. He never identified anybody that shot him.

Meanwhile, Joel's father Rodney Mason, a Rare Breed member and subcontractor who had worked on the clubhouse, was cleaning up in the bar area when Joel and S-1 started fighting. Rodney had been drinking wine at the party. He said there were 20 or 30 people inside the clubhouse at the time of the fight. When his son started to fight S-1, Rodney's concern was to contain his companion, "S-2", whom he "socked." He did not see S-1's gun until Joel had already been shot. Rodney then noticed Sanders approach his son. Because Sanders was another "elder," Rodney thought he might be coming to help. Instead, he said that Sanders

shot Joel. Rodney tried to distract Sanders, calling out and charging at him. Sanders pointed his gun at Rodney. Rodney only realized later that he had been shot twice.

Sheriff's Deputy Vizcarra was one of the responding law enforcement officers after the shooting. When he arrived, he spoke only with Thomas, who was not injured that night. Deputy Vizcarra did not interview anyone else at the scene even though about 40 people remained when he arrived.

Thomas said that the shooting happened "during" the party and that Sanders, president of the "Divided Times" motorcycle club, was one of the shooters. He said that Sanders was wearing a gray sweatshirt that night.

Thomas described S-1 as having a scar on the right side of his face above his lip; he was bald. While Thomas said that S-2 had his hair pulled back in a bun, Rodney described *him* as bald.[1] Thomas said that S-1 wore a red mesh jersey; Rodney said that Sanders did. Rodney said that Sanders's gun was chrome; Thomas said it was black, and that S-1's gun was chrome.

Months later, Rodney and Thomas heard from the "OGs" in the neighborhood that they had identified the wrong person as S-1. Rodney shared this with Joel before attending a live lineup. At the lineup, they did not identify S-1. When asked what "changed his opinion" about the previous identification, Rodney testified that it was information from his "OGs." Rodney also heard that Sanders may not have

[1] The record is unequivocal that Sanders is bald, though Thomas described him as having "black hair" to Vizcarra after the shooting.

been involved in the shooting but "dismissed" this. Together, Joel and Rodney identified Sanders in a live lineup.

Detective Jeff Pohl, a gang detective, was assigned to the case after Vizcarra. He only interviewed the Masons and Thomas; the case was closed six weeks after the shooting. He received a list of license plates of cars and motorcycles parked outside the clubhouse but never followed up. He did not interview other witnesses named in the original report. He did not reach out to law enforcement officers who may have been inside the clubhouse when the shooting took place. No handgun was recovered. As the prosecution admitted to the jury, "there was very limited evidence collected."

2. Lanny Thomas's testimony[2]

Thomas said that a "couple thousand" people had come to the clubhouse grand opening that day. He had not been drinking and the "party was over" when he heard the commotion. The Masons and S-1 were "Blooding" back and forth.[3] Thomas said that Sanders had entered the clubhouse with S-1 and S-2 before the fight. S-2 was trying to defuse the situation—rather than being neutralized by Rodney, S-2 left when Joel struck S-1. Joel was on top of S-1, fighting him, when S-1 retrieved a gun from his waist. S-1 racked his gun, fitfully, and shot Joel. Thomas testified that Sanders had approached Joel, pulling him up by the collar.

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[2] Thomas's testimony, in full, is set forth in Pet. App. 60-408.

[3] This indicated they were from the Blood gang.

Sanders shot Joel twice. Sanders then shot Rodney as Rodney ran toward him. Sanders "stood there for a while, and then he turned and left."

Thomas insisted that no one was inside the clubhouse at the time of the shooting except Joel's girlfriend and cousin, the Masons, S-1, S-2, Sanders, and him. He was the only witness to speak to Deputy Vizcarra on the night of the shooting.

Thomas had heard from Rare Breed members that S-1 was "J," a Blood gang member, and shared this with Detective Pohl. He was later informed by Rare Breed members that Johnny Clark, who was in custody, was the "wrong guy." After receiving that information from Rare Breed club members, Thomas did not identify Clark as S-1 at the live lineup.

On cross-examination, Thomas repeatedly refused to disclose the names of the Rare Breed members who had given him information about S-1, even though that information led to the identification of Clark and then exculpated him. He also refused to name members of law enforcement who may have been at the clubhouse on the night of the shooting. "If they're not here today, apparently they wouldn't do what I'm doing, so I'll leave it at that. . ."

Counsel for Sanders asked the court to order Thomas to respond to the questions. Outside the presence of the jury, the court explained its contempt powers to Thomas, and conducted an inquiry into the potential harm Thomas claimed to face if he revealed his sources. The court found Thomas's claim of fear was unfounded and instead that Thomas was operating off of an "unwritten code" not to snitch. It understood Thomas's perspective this way, "I saw it, so therefore,

it's not necessary for anybody else to get involved, except my testimony alone. I'll be the judge and jury of the identification . . . ." The court admitted: "When I heard [Thomas's statement] . . . the hairs on the back of my neck kind of went up a little bit. I don't think I've heard a witness say that in such direct language . . . ."

The court determined that Thomas's nonanswers were material to the defense— it would order Thomas to "divulge the identity of those individuals that were involved in any way in either the initial identification or the secondary misidentification" of Johnny Clark. The court recessed for the weekend, giving Thomas time to consider his testimony. On Monday, counsel for Sanders argued that if Thomas did not answer, his entire testimony should be stricken. The court ordered Thomas to "divulge the information." Thomas continued to refuse to answer defense counsel's questions. Despite having been ordered not to discuss his testimony with anyone else, he admitted that he had discussed his testimony during a Sunday meeting of one hundred Rare Breed members. He was accompanied in court that day by a couple of them, including a law enforcement officer. Thomas refused to name the law enforcement members of Rare Breed. Indeed, Thomas said that a person inside the club who knew the true identity of S-1 attended the club meeting the day before. But the "club members let [Thomas] decide what was going to take place."

The court noted that this issue would be "significant" on appeal, "perhaps resulting in a reversal." But it determined that rather than strike Thomas's testimony, it would take the "middle ground" by allowing further inquiry on cross-

examination by the defense and a limiting instruction about Thomas's potential attempt to suppress evidence. Sanders's motion for a mistrial was denied.

3. Sentencing and appeal proceedings

On March 23, 2007, Sanders was found guilty of two counts of attempted murder, two counts of assault with a firearm, and special enhancements for discharging a firearm and proximately causing great bodily injury to the victims. Sanders was sentenced to 64 years in prison.

Sanders appealed to the California Court of Appeal and judgment was affirmed on September 27, 2010 in a reasoned decision. Pet. App. 39-59. The California Court of Appeal held that there was no Confrontation Clause violation because the questions Thomas refused to answer went only to a collateral matter. Pet. App. 52-54. The Court of Appeal remanded the case for resentencing on one of the attempted murder counts. The Court of Appeal denied his petition for rehearing.

Sanders filed for review in the California Supreme Court, which was summarily denied on February 16, 2011. Pet. App. 38. Sanders also filed a petition for writ of certiorari in this Court, which was denied on October 3, 2011.

B. Federal proceedings

Sanders filed a pro se federal habeas petition on September 27, 2012 and a First Amended Petition on October 11, 2012. The magistrate judge determined that the California Court of Appeal was not unreasonable in denying Sanders's claim because the questions Thomas refused to answer "related to a collateral issue." Pet. App. 32-34. The magistrate judge surmised that even if there had been a

Confrontation Clause violation, the violation was harmless under *Van Arsdall*. The district court dismissed the petition with prejudice on December 18, 2015. Pet. App. 34.

On September 13, 2016, the Ninth Circuit granted Sanders's request for a certificate of appealability. It appointed the Office of the Federal Public Defender to represent Sanders. Following briefing and oral argument, on August 30, 2018, the Ninth Circuit affirmed the district court.

V.
REASONS FOR GRANTING THE WRIT

A. Fundamental Fairness

The Supreme Court has repeatedly held that the Due Process Clause protects against practices which violate the principles of fundamental fairness, even if not specifically in violation of the guarantees detailed in the Bill of Rights. "Today, as in prior centuries, the writ [of habeas corpus] is a bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring) (internal quotation mark omitted)). The concept of fundamental fairness has been expanded to include protections against violations of the Fourth, Fifth, Sixth, and Eighth Amendments. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also In re Winship*, 397 U.S. 358, 372 n.5 (1970) (Harlan, J., concurring) ("I cannot refrain from expressing my continued bafflement at [the] insistence that due process, whether under the Fourteenth

Amendment or the Fifth Amendment, does not embody a concept of fundamental fairness as part of our scheme of constitutionally ordered liberty.").

B. Fundamental Fairness as applied to Petitioner

The state court decision was contrary to or an unreasonable application of clearly established federal law under section 2254(d)(1). It is clearly established that the Confrontation Clause of the Sixth Amendment, made applicable to states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Maryland v. Craig*, 497 U.S. 836, 844 (1990). The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Craig*, 497 U.S. at 845. The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (citations omitted) (internal quotation marks omitted). Thus, a habeas petitioner states a Confrontation Clause violation, as Sanders has done here, "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Van Arsdall*, 475 U.S. at 680 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

A decision is "contrary to" clearly established federal law as determined by the Supreme Court if "the state court applies a rule that contradicts the governing

law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *Fowler v. Sacramento Cty. Sheriff's Dep't*, 421 F.3d 1027, 1034–35 (9th Cir. 2005).

As set forth above, it is clearly established federal law that a criminal defendant is guaranteed a full and fair opportunity to engage in cross-examination designed "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Van Arsdall*, 475 U.S. at 680 (quoting *Davis*, 415 U.S. at 318). At the barest minimum, the right to cross-examination includes the opportunity to question the witness about matters necessary for the trier of fact to assess the witness's reliability and *credibility*. *Van Arsdall*, 475 U.S. at 680; *Davis*, 415 U.S. at 316, 318. The state court however, determined that cross-examination that bears on a witness's credibility is a "collateral matter" and does not implicate a constitutional right. This is contrary to clearly established federal law.

Most of the questions Thomas refused to answer sought the identities of persons who were present at the Rare Breed party when the shooting occurred, including the identity of all potential witnesses to the shootings. In his cross-examination, defense counsel repeatedly asked Thomas questions seeking the identity of persons whom Thomas acknowledged could identify S-1 (the first shooter), and S-1's companion described as S-2, and thus were percipient to the

events that night. But Thomas's refusals extended to Rare Breed club members who attended the party (and their guests as well), and others (who may or may not have been present that evening) who also purported to know the identities of S-1 and S-2; some of these persons apparently had been the sources of Thomas's and Rodney Mason's earlier identifying, then "unidentifying," Johnny Clark as one of the two shooters. According to Thomas, some of those who said that S-1 was not Johnny were Rare Breed members and some were not, but Thomas refused to identify any of them. Thomas acknowledged that two or more Rare Breed members knew S-1's true identity and he was confident they were correct; Thomas also refused to identify any of those persons.

He testified further about the inside information which prompted him to recant his identification of Johnny Clark. The trial court found that these questions were relevant as the case "really goes to identification, and it goes to the credibility of the people who have testified with respect to either an identification or the inability to make that identification." "[I]t's relevant based upon what's been established up to this point in time that there was a misidentification in the first instance, that you received information that the person that you identified . . . that that person was not the person who was present at that particular time." He was then asked to provide names of the "five or six" law enforcement officers who may have attended a club-wide meeting at which he discussed his testimony in the middle of trial. He again refused to answer. The court noted the importance of bias

and prejudice and expressed concern about the underlying Blood affiliations involved in the case.

Thomas also concealed the identity of other potential witnesses. When Thomas was asked to identify a member of law enforcement who he said was outside the club at the time of the shooting, where defense witnesses placed Sanders, he replied, "I can't give you that information." Thomas knew that if he identified members of his club, defense counsel then would "go to talk to them"; Thomas confirmed his purpose in refusing to answer counsel's questions was to prevent that. Asked whether he had "decided that there was going to be some evidence and testimony you will give us, and some evidence and testimony you won't give us," Thomas agreed.

C. Sanders was prejudiced

Thomas's refusal to answer questions resulted in a trial that was fundamentally unfair for Sanders. Under *Brecht,* for claims subject to harmless error analysis, an error is not harmless if it has a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 623, 637. "Where the record is so evenly balanced that a judge 'feels himself in virtual equipoise as to the harmlessness of the error' and has 'grave doubt' about whether an error affected a jury [substantially and injuriously], the judge must treat the error as if it did so." *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *O'Neal*, 513 U.S. at 435–38 (alteration in original).

The factors to consider in assessing harm include: 1) the importance of the witness's testimony in the prosecution's case; 2) whether the testimony was

cumulative; 3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; 4) the extent of cross-examination otherwise permitted; and 5) the overall strength of the prosecution's case. *Van Arsdall*, 475 U.S. at 684.

In arguing that any error was harmless, Respondent overstated the strength of the prosecution's evidence against Sanders. The entire case, as the trial judge observed, came down to whether or not the jury believes the testimony of the witnesses. There was limited evidence collected and no forensic evidence tying Sanders to the shooting. Rodney and Joel were both intoxicated on the night they were shot, both recanted their earlier identification of Sanders's original codefendant, and Joel identified Sanders as the shooter before recanting *that* identification, saying "I never said that he shot me." In addition, there were numerous inconsistencies in their statements. If Thomas's selective testimony had been stricken, as it should have been, the evidence against Sanders would have been minimal and unreliable. For these reasons, Respondent cannot provide this Court with a "'fair assurance'" that the error did not have a "substantial and injurious effect on the verdict." *Valerio v. Crawford*, 306 F.3d 742, 762 (9th Cir. 2002).

VI.

CONCLUSION

For the reasons stated above, Donald Sanders respectfully asks that the Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: November 28, 2018

By */s/ Moriah S. Radin*
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CERTIFICATE OF SERVICE

I, Moriah S. Radin, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), and who is a member of the Bar of this Court, hereby certifies that, pursuant to Supreme Court Rule 29.3, on November 28, 2018, a copy of Petitioner's **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI** were mailed postage prepaid and electronically mailed to:

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All the parties required to have been served have been served. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 28, 2018 at Los Angeles, California.

/s/ Moriah S. Radin
MORIAH S. RADIN*

*Counsel of Record for Petitioner