

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SHANE AUSTIN PETERS- PETITIONER

vs.

ERIC ARNOLD- RESPONDENT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma puperis* in the following court(s):

California Supreme Court, Court of Appeal (1st Dist., Div. 5), and Superior Court for Solano County (Note: There was no official grant, but petitioner has never been charged any docketing fees. Petitioner has remained committed to a state prison.)

United States District Court- Eastern District of California (Note: Petitioner's initial *Informa Pauperis* application was denied without prejudice, but he was never charged any docketing fees. Then on December 19, 2019, the District Court made a grant of a subsequent *Informa Pauperis Request*.)

United States Court of Appeals- Ninth Circuit (Note: Official grant of *Informa Pauperis Request* on December 19, 2017 by the Ninth Circuit.)

[] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

/s/ Richard V. Myers

(Richard V. Myers for Shane Austin Peters)

DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Shane Austin Peters, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during The past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
<u>Self-employment</u>	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Income from real Property (such as Rental income)	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Interest and dividends	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Gifts	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Alimony	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Child Support	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Retirement (such as social security, pensions, annuities, insurance)	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Disability (such as social security, insurance payments)	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>

Unemployment payments	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Public-assistance (such as welfare)	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Other (specify): _____	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>
Total monthly Income	<u>\$0.00</u>	<u>\$ n/a</u>	<u>\$0.00</u>	<u>\$ n/a</u>

2. List your employment history for the past two years, most recent first. (Gross monthly pay before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>n/a</u>	_____	_____	\$ <u>0.00</u>
_____	_____	_____	\$ _____
_____	_____	_____	\$ _____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>n/a</u>	_____	_____	\$ <u>0.00</u>
_____	_____	_____	\$ _____
_____	_____	_____	\$ _____

4. How much cash do you and your spouse have? \$0.00. Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
<u>n/a</u>		\$ <u>0.00</u>	\$ <u>0.00</u>
<u> </u>	<u> </u>	<u> </u>	\$ <u> </u>
<u> </u>	<u> </u>	<u> </u>	\$ <u> </u>

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

<input type="checkbox"/> Home n/a Value <u>0.00</u>	<input type="checkbox"/> Other real estate n/a Value <u>0.00</u>
<input type="checkbox"/> Motor vehicle #1 n/a Year, make & model <u>n/a</u> Value <u>0.00</u>	<input type="checkbox"/> Motor vehicle #2 n/a Year, make & model <u>n/a</u> Value <u>0.00</u>
<input type="checkbox"/> Other assets n/a Description <u>n/a</u> Value <u>0.00</u>	

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing Money	Amount owed to you	Amount owed to your spouse
<u>n/a</u>	\$ <u>0.00</u>	\$ <u>0.00</u>
<u> </u>	\$ <u> </u>	\$ <u> </u>
<u> </u>	\$ <u> </u>	\$ <u> </u>

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
n/a	n/a	n/a

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ 0.00	\$ n/a
Are any real estate taxes included?		
[] Yes [] No		
Is property insurance included?		
[] Yes [] No		
Utilities (electricity, heating, fuel, water, sewer, and telephone)	\$ 0.00	\$ n/a
Home maintenance (repairs and upkeep)	\$ 0.00	\$ n/a
Food	\$ 0.00	\$ n/a
Clothing	\$ 0.00	\$ n/a
Laundry and dry-cleaning	\$ 0.00	\$ n/a
Medical and dental expenses	\$ 0.00	\$ n/a
Transportation (not including Motor vehicle payments)	\$ 0.00	\$ n/a

Recreation, entertainment, newspapers, magazines, ect.	\$ <u>0.00</u>	\$ <u>n/a</u>
Homeowner's or renter's	\$ <u>0.00</u>	\$ <u>n/a</u>
Life	\$ <u>0.00</u>	\$ <u>n/a</u>
Health	\$ <u>0.00</u>	\$ <u>n/a</u>
Motor vehicle	\$ <u>0.00</u>	\$ <u>n/a</u>
Other: <u>n/a</u>	\$ <u>0.00</u>	\$ <u>n/a</u>
Taxes (not deducted from wages or included in mortgage payments)	\$ <u>0.00</u>	\$ <u>n/a</u>
(specify): <u>n/a</u>		
Installment payments	\$ <u>0.00</u>	\$ <u>n/a</u>
Motor vehicle	\$ <u>0.00</u>	\$ <u>n/a</u>
Credit card(s)	\$ <u>0.00</u>	\$ <u>n/a</u>
Department store(s)	\$ <u>0.00</u>	\$ <u>n/a</u>
Other: <u>n/a</u>	\$ <u>0.00</u>	\$ <u>n/a</u>
Alimony, maintenance, and support paid to others	\$ <u>0.00</u>	\$ <u>n/a</u>
Regular expenses for operation of business, profession, or farm (attached detailed statement)	\$ <u>0.00</u>	\$ <u>n/a</u>
	\$ <u>0.00</u>	\$ <u>n/a</u>
Other (specify):	\$ <u>0.00</u>	\$ <u>n/a</u>
Total monthly expenses:	\$ <u>0.00</u>	\$ <u>n/a</u>

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on attached sheet.

10. Have you paid- or will you be paying- an attorney any money for services in connection with this case, including the completion of this form

Yes No

If yes, how much? _____

11. Have you paid- or will you be paying- anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? _____ n/a

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been committed to the California Department of Corrections since my conviction in 2011. I have been sentenced to a determinate term of 19 years, plus a consecutive indeterminate term of 15 years to life in prison. I have no assets.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 9-10, 2019.


Signature

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

SHANE AUSTIN PETERS

Petitioner,

v.

ERIC ARNOLD, Warden, California State Prison, Solano

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

QUESTIONS PRESENTED

- (1) Was the evidence presented at petitioner's jury trial in this matter sufficient to support his conviction on a gang enhancement, pled under the provisions of California Penal Code section 186.22(b)(1), under the provisions of the AEDPA?
- (2) Does the Ninth Circuit's opinion in this matter conflict with this Court's holding in *McDaniel v. Brown*, 558 U.S. 120 (2010), exploiting a susceptibility for *McDaniel v. Brown* to be interpreted in a manner that is contrary to the provisions of the AEDPA?
- (3) Does the Ninth Circuit's decision in this case present a substantial question under the AEDPA in regards to a conflict with decisions from this Court in *Williams v. Illinois*, 567 U.S. 50 (2012), *Roviaro v. United States*, 353 U.S. 53 (1957), and *Banks v. Dretke*, 540 U.S. 668 (2004)?

LIST OF PARTIES

In accordance with Supreme Court rule 14.1(b), all parties appearing in the caption of the case on the cover page of the petition and are listed again below:

SHANE AUSTIN PETERS

Petitioner,

v.

ERIC ARNOLD, Warden, California State Prison, Solano

Respondent.

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PETITION FOR WRIT OF CERTIORARI

Shane Austin Peters respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The September 11, 2019 Order of the Ninth Circuit Court of Appeals Staying the Issuance of the Mandate is not reported, but is set forth in Appendix Volume I, Tab 1.

The August 20, 2019 Order of the Ninth Circuit Court of Appeals denying the Petition for Rehearing is not reported, but is set forth in Appendix Volume I, Tab 3.

The April 23, 2019 Memorandum Decision of the Ninth Circuit Court of Appeals, Affirming the Decision of the Federal District Court, Central District of California, is not reported, but is set forth in Appendix Volume I, Tab 5.

The December 12, 2017 Judgment, filed in the Federal District Court, Eastern District of California, is not reported, but is set forth in Appendix Volume II, Tab 8.

The December 7, 2017 Memorandum Decision of the Federal District Court, Eastern District of California, Denying the Petition for Writ of Habeas Corpus and Issuing a Certificate of Appealability is not reported, but is set forth in Appendix Volume II, Tab 9.

The April 10, 2013 Order of the California Supreme Court, Denying the Petition for Review on Direct Appeal, filed in Case No. S208049, is not reported, but is set forth in Appendix Volume II, Tab 10.

The January 28, 2013 Opinion by the California Court of Appeal, First Appellate District, Division Five, Affirming the Judgment of Conviction in Case No. A131097 is not reported, but is set forth in Appendix Volume II, Tab 11.

JURISDICTION

Petitioner filed a petition for writ of habeas corpus in the Federal District Court, Eastern District of California. The habeas petition challenged petitioner's state court criminal conviction on a gang enhancement. The petition was grounded on the contention that the conviction on the gang enhancement was obtained in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The habeas petition was brought under the provisions of 28 U.S.C. section 2254(d).

The habeas petition was denied in the Federal District Court on December 7, 2017. When the District Court denied the habeas petition, it issued a Certificate of Appealability to the Ninth Circuit Court of Appeals.

Petitioner thereafter filed an appeal to the Ninth Circuit Court of Appeals on December 12, 2017.

The Ninth Circuit heard the appeal and issued a Memorandum Decision, affirming the decision of the Federal District Court on April 23, 2019.

Petitioner filed a Petition for Rehearing in the Ninth Circuit on May 2, 2019.

The Ninth Circuit entered its order denying petitioner's Petition for Rehearing on August 20, 2019.

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that:

In all criminal prosecutions, the accused shall enjoy...the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

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

STATEMENT OF THE CASE

This case presents a claim that the Ninth Circuit Court of Appeal's opinion conflicts with this Court's holding in *McDaniel v. Brown*, 558 U.S. 120 (2012) in a way that exploits a susceptibility for *McDaniel v. Brown* to be interpreted in a manner that is contrary to the provisions of the AEDPA.

This case also presents the assertion that the Ninth Circuit Court of Appeal's decision regarding petitioner's confrontation and informant disclosure claims conflict with the decisions of this Court in *Williams v. Illinois*, 567 U.S. 50 (2012), *Roviaro v. United States*, 353 U.S. 53 (1957), and *Banks v. Dretke*, 540 U.S. 668 (2004).

Factual and Procedural History

Facts

The salient facts of this case are that petitioner was convicted of murder and attempted murder, along with jury findings that the crimes were committed for the benefit of a criminal street gang.

Petitioner challenged the state court jury's true finding on the gang allegations in the Federal District Court through a petition for writ of habeas corpus.

The habeas petition was grounded on an insufficiency of the evidence claim as to the jury's true finding on the gang allegation under the Fourteenth

Amendment. The habeas petition was also grounded on the claim that the trial court's failure to require disclosure of the identities of informants violated his Sixth and Fourteenth Amendment rights to confrontation, cross-examination, a fair trial, and due process of law. (HCPA pp. 14-20, 20-28)^{1/}

The gist of petitioner's sufficiency claim is that conclusory basis and background evidence of the kind submitted by the prosecution gang expert in this case (which has no evidentiary value other than to provide a foundation for the expert's testimony) is insufficient to prove collaborative activities and collective organizational structure as between a subset gang and umbrella gang, as required under California law.

Virtually the entire body of evidence that the California Attorney General points to in support of its collaborative activities and collective organizational structure argument in this matter boils down to conclusory, basis testimony provided by the prosecution's gang expert. (AB pp. 23-30.)^{2/}

1 "HCPA" refers to the Memorandum of Points and Authorities in Support of the Petition for Writ of Habeas Corpus, filed by petitioner in the Federal District Court.

"AHCPA" refers to the Memorandum of Points and Authorities in Support of the Answer to the Petition for Writ of Habeas Corpus, filed by the California Attorney General in the Federal District Court.

The gist petitioner's confrontation claim is that the trial court's refusal to require disclosure of confidential informants relied upon by the prosecution gang expert to prove the gang charge resulted in a confrontation and due process violation.

The appellate record in this case establishes that Detective Tribble relied on a large volume of "facts" provided by at least five informants to form his opinions. (ER Vol. II, Tab 6 pp. 2-10, 17, 25-28, 36-40); ER Vol. VI, Tab 10 p. 23.)^{3/} At least one of the informants (informant number 5) provided "testimonial hearsay statements." (ER Vol. II, Tab 6 pp. 37-38.) This reliance involved statements from the informants which Detective Tribble offered for the truth of the matter asserted in giving his opinions. Despite this, the trial judge denied petitioner's request to disclose the identities of the informants as a means to test the veracity of the statements attributed to them by the gang expert. The ruling of

2 "AOB" refers to Appellant's Opening Brief filed in the Ninth Circuit Court of Appeals.

"AB" refers to Appellee's Brief filed in the Ninth Circuit Court of Appeals.

"ARB" refers to Appellant's Reply Brief filed in the Ninth Circuit Court of Appeals.

3 "ER" refers to the Excerpts of Record filed in conjunction with Appellant's Opening Brief in the Ninth Circuit Court of Appeals. Citations to page numbers for the Excerpts of Record refer to the Bates Numbers appearing at the bottom center of each page.

the trial judge was essentially that appellant had no confrontation and cross-examination rights, because, "in general, an expert may base his or her opinion on evidence that ultimately proves to be inadmissible." (ER Vol. II, Tab 6 p. 37.)

The federal habeas petition in this case is governed by the provisions of the Antiterrorism and Effective Death Penalty act of 1996 (hereafter "AEDPA"). The habeas petition was denied by the Federal District Court.

On appeal, the Ninth Circuit Court of Appeals rejected petitioner's core constitutional claims in a memorandum decision.

Procedural History

On October 28, 2011, following a jury trial in the Solano County Superior Court, petitioner was convicted of one count of second degree murder in violation of California Penal Code section 187(a) and one count of attempted murder in violation of Penal Code section 664/ 187. The jury additionally made a true finding as to gang enhancements pled under Penal Code section 186.22(b), which attached to both counts of conviction. On January 14, 2011, petitioner was sentenced to a determinate term of 19 years, plus a consecutive indeterminate term of 15 years to life in prison. (Appendix II, Tab 11 pp. 3, 5, 9.)^{4/}

4 "Appendix" refers to Appendix Volumes I and II, which accompany this Petition for Writ of Certiorari, filed in this Court.

On January 4, 2013, the California Court of Appeal, First Appellate District, Division Five, issued an opinion affirming petitioner's convictions and sentence on direct appeal. Also on January 4, 2013, the Court of Appeal issued an order to show cause returnable in the superior court with regard to a habeas petition filed concurrently with his direct appeal. The superior court denied the habeas petition on May 13, 2014. The issues raised in the habeas petition were not pursued further. (Appendix II, Tab 11.)

On April 10, 2013, the California Supreme Court denied a petition for review taken from petitioner's direct appeal. (Appendix II, Tab 10.)

On March 16, 2015, petitioner sought relief in the Federal District Court for the Eastern District of California by way of a timely Petition for Writ of Habeas Corpus. The petition raised federal claims arising from the decisions of the state courts of review on direct appeal. The petition was brought under the provisions of 28 U.S.C. § 2254(d). The petition is subject to the provisions of the AEDPA. The federal habeas petition challenged the state court judgment on the gang enhancements on grounds that petitioner's conviction on the gang enhancements was obtained in violation of his rights to confrontation, cross-examination, a fair trial, and due process of law under the Sixth and Fourteenth Amendments to the U.S. Constitution. These grounds were the same grounds that petitioner raised on direct appeal in the state appellate courts.

On June 29, 2016, the habeas petition was denied in the Federal District Court. In conjunction with the denial of the habeas petition, the District Court granted a Certificate of Appealability to the Ninth Circuit Court of Appeals. (Appendix II, Tab 9.)

On December 12, 2017, Judgment was filed in the Federal District Court, Eastern District of California. (Appendix II, Tab 8.)

Petitioner thereafter filed an appeal to the Ninth Circuit Court of Appeals on December 12, 2017. (Appendix II, Tab 7.)

On December 14, 2017, Docketing Notice was filed in the Ninth Circuit Court of Appeals. (Appendix I, Tab 6.)

On April 23, 2019, the Ninth Circuit Court of Appeals issued a Memorandum Decision, affirming the decision of the Federal District Court, Eastern District of California, to deny the petition for writ of habeas corpus. (Appendix I, Tab 5.)

On May 2, 2019, petitioner filed a Petition for Rehearing in the Ninth Circuit Court of Appeals. The grounds raised in this Petition for Writ of Certiorari filed in this Court were raised in the Petition for Rehearing filed in the Ninth Circuit Court of Appeals. (Appendix I, Tab 4.)

On August 20, 2019, the Ninth Circuit Court of Appeals issued an Order Denying the Petition for Rehearing. (Appendix I, Tab 3.)

On August 21, 2019, petitioner filed a Motion to Stay the Mandate in the Ninth Circuit Court of Appeals. (Appendix I, Tab 2.)

On September 11, 2019, the Ninth Circuit Court of Appeals issued an Order Staying the Issuance of the Mandate. (Appendix I, Tab 1.)

REASONS FOR GRANTING THE PETITION

This case presents two claims involving issues of first impression in this Court. Each claim is set forth with particularity in the "Questions Presented" portion of this petition.

Claim I

Petitioner has previously asserted in his Petition for Rehearing in this matter that the Ninth Circuit's reliance on *McDaniel v. Brown*, 558 U.S. 120 (2010) in its opinion incongruously interjects an evidence admissibility construct into circumstances where the Ninth Circuit was required to perform its sufficiency of the evidence analysis "with explicit reference to the substantive elements of the criminal offense as defined by state law" under the holdings of *Jackson v. Virginia*, 443 U.S. 307, 324, fn. 16 (1979) and *Bradshaw v. Richey*, 546 U.S. 74 (2005). (APR pp. 10-13, 17-19.)^{5/}

5 "APR" refers to Appellant's Petition for Rehearing filed in the Ninth Circuit Court of Appeals.

Thus, Claim I presents the question of whether the Ninth Circuit's opinion in this matter conflicts with this Court's holding in *McDaniel v. Brown*, 558 U.S. 120 in a way that exploits a susceptibility for *McDaniel v. Brown* to be interpreted in a manner that is contrary to the provisions of the AEDPA.

The question of whether *McDaniel v. Brown* can be utilized in this manner is an issue of first impression in this Court.

Claim II

Petitioner has previously asserted in his Petition for Rehearing in this matter that the Ninth Circuit's decision regarding his confrontation and informant disclosure claims conflict with the decisions of this Court in *Williams v. Illinois*, 567 U.S. 50, *Roviaro v. United States*, 353 U.S. 53, and *Banks v. Dretke*, 540 U.S. 668. (APR pp. 8-9, 12-14.)

Claim II presents the question of whether the rights to confrontation, cross-examination, a fair trial, and due process are violated when a prosecution gang expert is not required to disclose the identities of informants, whose factual statements he conveys to jurors through his testimony. Both *Roviaro v. United States*, 353 U.S. 53, and *Banks v. Dretke*, 540 U.S. 668 appear to compel disclosure under these circumstances.

Petitioner further takes issue with the Ninth Circuit's conclusion that *Williams v. Illinois*, 567 U.S. 50 is a fractured decision which does not constitute clearly established federal law in this habeas proceeding as to any relevant Confrontation Clause claim. (Dec. p. 4.)⁶ The Ninth Circuit fails to cite any authority for the proposition that *Williams v. Illinois* does not constitute clearly established federal law in a 28 U.S.C section 2254(d) habeas proceeding. Petitioner is unaware that this Court has previously decided this specific question in any previous decision.

The question of whether *Williams v. Illinois*, 567 U.S. 50, *Roviaro v. United States*, 353 U.S. 53, and *Banks v. Dretke*, 540 U.S. 668 have been wrongly interpreted in the manner set out herein presents issues of first impression in this Court.

6 "Dec." refers to the Memorandum Decision of the Ninth Circuit in this matter. The Ninth Circuit's decision is contained in Appendix Volume I, Tab 5, which is filed with this petition.

QUESTIONS PRESENTED

I

IS THIS COURT'S DECISION IN *McDaniel v. Brown*, 558 U.S. 120 BEING INTERPRETED IN THE NINTH CIRCUIT COURT OF APPEALS IN A MANNER THAT IS CONTRARY TO THE PROVISIONS OF THE AEDPA?

A

WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE GANG ALLEGATION UNDER THE CALIFORNIA STEP ACT?

In this matter, the prosecution has obtained a true finding on Penal Code section 186.22(b)(1) gang allegations based on the theory that the North Vallejo Savages (hereafter "NVS") are a subset of the larger criminal organization known as the Nortenos. (ER Vol. VI, Tab 10 pp. 12, 14-15, 17-18, 21, 50-55; ER Vol. VII, Tab 11 pp. 37, 61-65; ER Vol. VIII, Tab 12 pp. 32-34.)

Under the California STEP Act^{7/}, in order to qualify as a subset gang under the provisions of Penal Code section 186.22(b)(1), there has to be proof of collaborative activities or collective organizational structure between the subset gang and the larger umbrella group. (*People v. Williams*, 167 Cal.App.4th 983, 987 (2008); *People v. Prunty*, 6 Cal.4th 59 (2015).)

7 California gang offenses are codified under the provisions of the "California Street Terrorism Enforcement and Prevention Act," otherwise known as the "STEP Act." (See, California Penal Code section 186.20.)

Petitioner has argued in his briefing before the Ninth Circuit Court of Appeals that the appellate record discloses a complete lack of evidence of collaborative activities or collective organizational structure between the alleged NVS subset gang and the larger Norteno group. (AOB pp. 28-37; ARB pp. 13, 21-32.)

But, the Ninth Circuit's decision holds that the testimony of the prosecution's gang expert and lay witnesses raised a reasonable inference that the NVS subset and the Norteno group shared some sort of collaborative activities or collective organizational structure, such that they could be considered together for purposes of Penal Code section 186.22(f). (Dec. p. 2; see, AB pp. 18-20, 22-23, 25-26.)

Petitioner respectfully submits that this portion of the Court's decision overlooks his arguments that expert testimony in the form of "basis evidence" or "background evidence" presented by Detective Tribble, along with lay testimony by Richard Eads, does not amount to sufficient evidence of collaborative activities or collective organizational structure. (ARB pp. 16-17.)

As petitioner has argued in his Opening Brief on appeal, under the holding of *In re Alexander L.* 149 Cal.App.4th 605 (2007), "conclusory" "basis" or "background" evidence of the type presented by the prosecution's gang expert, Detective Tribble, is insufficient to establish the elements of a Penal Code section

186.22(b)(1) charge. (AOB pp. 42-46.) Petitioner has also argued in his Opening Brief on appeal that the lay testimony of prosecution lay witness, Richard Eads, simply does not provide proof of collaborative activities or collective organizational structure. (AOB pp. 32-33.) To the contrary, under cross-examination Richard Eads revealed that he did not even know that such things as "the 14 bonds" and "paying up the chain" could be indicative of collaborative activities or collective organizational structure. His testimony simply failed completely to provide any facts from which an inference of collaborative activities or collective organizational structure could be made. (ARB pp. 16-17 & fn. 6.)

The Ninth Circuit was required to follow the holding of *Alexander L.* on this point of law in the instant case, because it constitutes state law pertaining to "the substantive elements" of a criminal street gang charge (*Coleman v. Johnson*, 566 U.S. 650, 655 (2012) [federal courts must look to state law for "the substantive elements of the criminal offense"]]) and because federal habeas review of a sufficiency of the evidence claim is performed "with explicit reference to the substantive elements of the criminal offense as defined by state law" (*Jackson v. Virginia*, 443 U.S. 307, 324, fn. 16 (1979). (See also, *Bradshaw v. Richey*, 546 U.S. 74 (2005) [federal courts must follow state court's interpretation of state law]; and see, *Maquiz MacDonald v. Hedgpeth*, (9th Cir. 2018) 907 F.3d 1212,

1222 (2018), citing *Johnson v. Montgomery*, 899 F.3d 1052, 1058 (2018) [conclusory expert testimony alone is insufficient to find an offense gang related].)

B

HAS THE NINTH CIRCUIT COURT OF APPEALS APPLIED
McDaniel v. Brown, 558 U.S. 120 IN A MANNER WHICH
INCONGRUOUSLY INTERJECTS AN EVIDENCE
ADMISSABILITY CONSTRUCT INTO THE SUFFICIENCY
OF THE EVIDENCE ISSUE AT HAND?

The Ninth Circuit's decision in this matter casts the foregoing arguments by petitioner as to conclusory, basis testimony of the gang expert as an argument that the California Court of Appeal erred in interpreting state law. The Ninth Circuit cites to *McDaniel v. Brown*, 558 U.S. 120 and *Johnson v. Montgomery*, 899 F.3d at page 1058, essentially for the proposition that the collective evidence in this case tending to prove other elements of a 186.22(b)(1) charge culminates in an inference of collaborative activities or collective organizational structure-- an argument which directly contradicts the holding of both *Williams* and *Prunty*.

Consistent with *Maquiz MacDonald v. Hedgpeth*, 907 F.3d at page 1222, footnote 4, petitioner's reliance on *Alexander L.* here is "solely to define the elements of the gang enhancement, as *Jackson* requires," thereby demonstrating agreement with federal sufficiency of the evidence analysis. Petitioner's arguments as to conclusory gang expert testimony under *Alexander L.* simply

underscores the rule that federal habeas review of a sufficiency of the evidence claim is performed "with explicit reference to the substantive elements of the criminal offense as defined by state law." (See, *Jackson v. Virginia*, at 324, fn. 16; and see, *Bradshaw v. Richey*, 546 U.S. 74 [federal courts must follow state court's interpretation of state law].)

Moreover, *Alexander L., Williams*, and *Prunty* are "sufficiency of the evidence" cases pertaining to gang prosecutions and not "admissibility of evidence" cases. These cases do not concern themselves with the question of whether or not a gang expert's testimony was properly admitted at trial. *McDaniel v. Brown*, 558 U.S. 120 has currency only in the confines of "erroneous admission of evidence" cases under the AEDPA and is irrelevant to "sufficiency of the evidence" cases falling outside of the erroneous evidence admission arena. Petitioner has not challenged the testimony of Detective Tribble on grounds it was admitted erroneously. Petitioner's argument is that "basis" or "background" evidence is not admitted as independent proof of facts necessary to satisfy elements of a criminal gang charge. (*People v. Gardeley*, 14 Cal.4th 605, 619 (1996) [testimony relating basis evidence does not "transform inadmissible matter into independent proof of any fact"].) Petitioner's argument is a "sufficiency of the evidence" argument not an "erroneous admission of evidence argument." The Ninth Circuit is required to follow the holding of

Gardeley on this point because it constitutes state law pertaining to "the substantive elements" of a criminal street gang charge. (*Coleman v. Johnson*, at 655 [federal courts must look to state law for "the substantive elements of the criminal offense"]; accord, *Bradshaw v. Richey*, 546 U.S. 74.) Furthermore, basis and background evidence have no evidentiary value other than to provide a foundation for the expert's testimony. This evidence simply does not count as case specific evidentiary facts in the manner that the California Attorney General would have it count under the holding of *McDaniel v. Brown*, 558 U.S. 120. *McDaniel v. Brown* has never been expanded in any opinion issued from this Court to the point that it contradicts the controlling effect of substantial elements case law.

Ultimately, it is not enough in a subset gang prosecution to show that the subset group and the umbrella group are united by things like a shared common name, common identifying symbols, or a common enemy. (*Prunty*, at 72.) Thus, the California Attorney General's reliance on such things as gang colors, graffiti, and a common enemy in this case (AB pp. 25-27) does not constitute proof from which an inference of collaborative activities or collective organizational structure can be drawn. In short, the things that prove other elements of a 186.22(b)(1) charge-- such as predicate offenses and engaging in primary

criminal activities, for example-- cannot be utilized to prove collaborative activities or collective organizational structure.

There are examples of actual proof of collaborative activities or collective organizational structure. They are: (1) shared bylaws or organizational structure, (2) independent activities that benefit the higher ranking individual or group, by for example, sharing a cut of drug sale proceeds, (3) strategizing or working in concert to commit a crime, (4) hanging out together or backing each other up, and (5) mutual acknowledgement of one another as part of that same organization. (*Prunty*, at 77-80.) Ultimately, "[T]he evidence must show that an organizational or associational connection exists in fact, not merely that a local subset has represented itself as an affiliate of what the prosecution asserts is a larger organization." (*Prunty*, at 79.)

The evidence in this case constitutes none of these things. Collaborative activities or collective organizational structure cannot just be inferred from proof tending to establish other required elements of a Penal Code section 186.22(b)(1) charge. Both *Williams* and *Prunty* require independent proof of facts from which collaborative activities or collective organizational structure can be inferred, and the Ninth Circuit was required to perform its sufficiency of the evidence analysis "with explicit reference to the substantive elements of the criminal offense as defined by state law." (See, *Jackson v. Virginia*, at 324, fn. 16; and see,

Bradshaw v. Richey, 546 U.S. 74 [federal courts must follow state court's interpretation of state law]; see also, *Maquiz MacDonald v. Hedgpeth*, at 1222, citing *Johnson v. Montgomery*, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

The Ninth Circuit's opinion additionally holds that the state Court of Appeal did not shift the burden of proof, when it laid out the evidence of a connection between NVS and the Nortenos, and "merely observed that no evidence cut the other way." (Dec. p. 3.)

But the State Court of Appeal's holding was that "[no] evidence indicated the goals and activities of a particular subset were not shared by others." (Opn. p. 10.)⁸/ This holding mimics a passage from the opinion in *Williams*, at page 987 (and from the opinion in *People v. Ortega*, 145 Cal.App.4th 1344, 1356-1357 (2006)) in a way that is ultimately contrary to the actual holding of *Williams*. This was a calculated attempt to distort the holdings in *Williams* and *Ortega*, and not a mere observance that no evidence cut the other way. Thus, under this distorted holding, collaborative activities or collective organizational structure can simply be inferred, in the absence of proof provided by the defendant that the

8 "Opn." refers to the Opinion of the state Court of Appeal. (ER Vol. I, Tab 5.) The Opinion is contained in Appendix Volume II, Tab 11, which is filed with this petition.

goals of the subset are *not* shared with the larger group. In other words, the prosecution is not required to prove collaborative activities or collective organizational structure. (AOB p. 30.)

The State Court of Appeal's finding that petitioner failed to prove the absence of collaborative activities or collective organizational structure under *Williams* does, in fact, shift the burden of proof in contravention of *In re Winship*, 397 U.S. 364, 358 (1970). (AOB pp. 29-33.)

The prosecution's burden to prove every fact necessary to establish the charge beyond a reasonable doubt under *Winship* is constitutional bedrock. The notion that it was appellant's obligation to prove the absence of collaborative activities or collective organizational structure under *Williams* and *Ortega* is objectively unreasonable. (*Coleman v. Johnson*, 566 U.S. 650 [federal court may overturn state court conviction only if state court decision was "objectively unreasonable"]]; accord, *Juan H. v. Allen*, 408 F.3d 1262, 1274-1275 (9th Cir. 2005).)

In the final analysis, petitioner's insufficiency of the evidence claim as to proof of collaborative activities or collective organizational structure clearly meets the test of *Jackson v. Virginia*, 443 U.S. 307 with an additional layer of deference. (See, *Juan H.*, at 1274.) There simply is no evidence NVS and the Nortenos committed crimes together, no evidence the Nortenos directed any of

the activities of NVS, and no evidence NVS owed fealty to the Nortenos or paid tribute to the Nortenos. There is no evidence the Nortenos even knew NVS existed.^{9/} The decision of the State Court of Appeal, therefore, reflects an "unreasonable application of *Jackson* and *Winship* to the facts of this case." (*Juan H.*, at 1275.)

Petitioner lastly notes in advance the Ninth Circuit's holding that there was no Confrontation Clause violation in the gang expert's testimony based on information from confidential informants, because the informants' statements "were offered as a basis for the expert's opinion rather than for their truth." (Dec. p. 3.) Petitioner submits that this holding significantly undercuts the Ninth Circuit's other holding that the evidence supplied by the gang expert was sufficient to establish collaborative activities or collective organizational structure. This is so because "basis" or "background" evidence is not admitted as independent proof of facts necessary to satisfy elements of a criminal gang

9 The prosecution proceeded on a "subset gang" theory in this case because it could not prove the required elements to establish NVS as a criminal street gang in its own right. For example, the prosecution sought to satisfy the primary activities element of a 186.22(b) charge with crimes committed by Norteno gang members, not NVS gang members. (ARB p. 27) But, under *Williams* and *Prunty*, these crimes by Norteno gang members do not apply to meet the primary activities element as to NVS, because no proof of collaborative activities or collective organizational structure between the alleged NVS subset and the larger Norteno group was provided at trial.

charge. (*Gardeley*, at 619.) Basis and background evidence of the kind submitted by the prosecution gang expert in this case simply have no evidentiary value other than to provide a foundation for the expert's testimony. (*Ibid.*; see also, *In re Alexander L.* 149 Cal.App.4th 605 ["conclusory" "basis" or "background" evidence is insufficient to establish the elements of a Penal Code section 186.22(b)(1) charge]; and see, *Maquiz MacDonald v. Hedgpeth*, at 1222, citing *Johnson v. Montgomery*, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

In sum, the Ninth Circuit's opinion cites to *Johnson v. Montgomery*, 899 F.3d 1052 and *McDaniel v. Brown*, 558 U.S. 120 in support of the proposition that petitioner has argued that "the California Court of Appeal erred in interpreting state law." (Dec. p. 3.) But petitioner has not argued that the State Court of Appeal erred in interpreting state law. What petitioner has argued is that the evidence of collaborative activities or collective organizational structure was insufficient under the holdings of *Williams*, *Prunty*, and *Alexander L.*, because the prosecution must prove collaborative activities or collective organizational structure by means other than conclusory, basis testimony elicited from a gang expert. (See, ARB pp. 14-17 [the California Attorney General's assertion that petitioner has argued "misapplication of state law" is a *straw man* supported by a *red hearing*].) It is noteworthy in this regard that the Ninth Circuit's opinion

contains no mention of the holding of *Maquiz MacDonald v. Hedgpeth*, at page 1222, which cites to *Johnson v. Montgomery*, at page 1058 for the proposition that conclusory expert testimony alone is insufficient to find an offense gang related.

In essence, the Ninth Circuit's decision conflates petitioner's actual arguments that the evidence was insufficient to establish collaborative activities or collective organizational structure under California decisional law with the proposition that petitioner has argued that the state Court of Appeal erred in interpreting state law. In the process, the Ninth Circuit's opinion is directly contrary to the holdings from *Maquiz MacDonald v. Hedgpeth*, at page 1221, footnote 3 and *Johnson v. Montgomery*, at page 1059, footnote 1 to the effect that a federal habeas court must rely on California decisional law pertaining to the elements of the offense when evaluating sufficiency of the evidence. Ultimately, the State Court of Appeal's decision in this matter is unreasonable because it is not in "harmony with," and is "discordant" with, the decisions in *Alexander L., Williams, and Prunty*. (See, i.e., *Johnson v. Montgomery*, at p. 1059, fn. 1.)

Petitioner respectfully submits that the Ninth Circuit's reliance on *McDaniel v. Brown*, 558 U.S. 120 incongruously interjects an evidence admissibility construct into circumstances where the Court was required to perform its sufficiency of the evidence analysis "with explicit reference to the

substantive elements of the criminal offense as defined by state law" under the holdings of *Jackson v. Virginia*, at page 324, footnote 16 and *Bradshaw v. Richey*, 546 U.S. 74.

Accordingly, Claim I presents the question of whether the Ninth Circuit's opinion in this matter conflicts with this Court's holding in *McDaniel v. Brown*, 558 U.S. 120 (2010) in a way that exploits a susceptibility for *McDaniel v. Brown* to be interpreted in a manner that is contrary to the provisions of the AEDPA. The question of whether *McDaniel v. Brown* can be utilized in this manner is an issue of first impression in this Court. This Court should grant certiorari in this matter to secure uniformity of decision and to settle an important question of law.

II

**DOES THE NINTH CIRCUIT'S DECISION IN THIS
CASE PRESENT A SUBSTANTIAL QUESTION
UNDER THE AEDPA IN REGARDS TO A CONFLICT
WITH DECISIONS FROM THIS COURT IN *Williams v.
Illinois*, 567 U.S. 50, *Roviaro v. United States*, 353 U.S. 53,
AND *Banks v. Dretke*, 540 U.S. 668?**

Petitioner has argued in the state trial court, the State Court of Appeal, the Federal District Court, and the Ninth Circuit Court of Appeals that the prosecution gang expert relied on information provided by five confidential informants to form his expert opinions, and the trial court's failure to require disclosure of the identities of the informants violated his Sixth and Fourteenth

Amendment rights to confrontation, cross-examination, a fair trial, and due process of law. (HCPA pp. 20-28; AOB pp. 49-51; ARB pp. 37-39; APR pp. 20-21.)

The Ninth Circuit's decision in this matter holds that the State Court of Appeal did not unreasonably apply established federal law in concluding that there was no Confrontation Clause violation in the admission of expert testimony that was based in part on information from confidential informants. (Dec. p. 3.) The Ninth Circuit's decision additionally holds that petitioner's claim regarding the trial court's preventing him from eliciting information identifying the confidential informants on cross-examination of the prosecution's expert is forfeited because he has failed to develop his argument or cite any authority for the proposition that the restriction was improper. (Dec. p. 4.) The Ninth Circuit holds further that the California Court of Appeal's decision is not an unreasonable application of *Roviaro v. United States*, 353 U.S. 53. (Dec. 4.)

Petitioner respectfully submits that the Ninth Circuit's decision overlooks much of what he has argued on his federal appeal in regards to the constitutional violations concerning the informants.

Petitioner's arguments in the Federal District Court emphasize that the gang expert offered information obtained from the informants for the truth of the matter asserted, and the gang expert admitted that he had no personal knowledge

of the information furnished by the informants, that he had not verified the information in any way, and did not know if it was accurate. (HCPA p. 20.) In addition, petitioner's arguments have emphasized that the statements conveyed to the jury by the gang expert constituted testimonial hearsay. (HCPA pp. 22-27; AOB pp. 52-53, 57.) Petitioner's arguments also emphasize that the denial of his informant disclosure motion illegitimately prevented him from cross-examining the gang expert about the informants as the source for much of the information he utilized to form his opinions. (HCPA p. 21.)

Petitioner has made these same arguments in the Ninth Circuit Court of Appeals. (AOB pp. 51-59; ARB pp. 39-42; APR pp. 20-21.)

The Ninth Circuit's decision additionally rejects petitioner's contention that a Confrontation Clause violation occurred when the prosecution gang expert conveyed hearsay statements from confidential informants to the jury. In this regard it is important to note that during his testimony, the gang expert point blank told the jury that he was relying on statements from informants in the formation of his opinions. The record on appeal is very clear on this point:

"Q. My question was: What associates NVS with Rancho?

A. I'm not done. I've also talked to Mr. Eads, who said that the Rancho area is where this gang hailed. And I've also spoken to informants that knew that NVS stood for North Vallejo Savages and that they came from the, quote, unquote, Rancho area."
(ER Vol. VI, Tab 10 p. 23; AOB p. 58.)

But according to the Ninth Circuit's decision, that did not matter because the informants' statements were supposedly offered only as a basis for the expert's opinion rather than for the truth of the matter asserted. (Dec. p. 3.)

As to this holding, petitioner reiterates his arguments from this Petition for Writ of Certiorari (at pages 17, 18, 22, and 23, *ante*) that "basis" or "background" evidence from a gang expert is not admitted as independent proof of facts necessary to satisfy elements of a criminal gang charge. (*Gardeley*, at 619.) Basis and background evidence have no evidentiary value other than to provide a foundation for the expert's testimony. (*Ibid.*) In the final analysis, this "basis evidence" concerning the confidential informants is no different in kind than the expert's other testimony which the State Court of Appeal and the Ninth Circuit rely upon to find the evidence sufficient to establish proof of collaborative activities or collective organizational structure. Virtually all of the gang expert's testimony was conclusory, basis evidence of the kind represented by the testimony concerning the informants.

Thus, if the expert's testimony concerning the informants was mere "basis evidence" not offered for its truth, then the evidence in this case overall was clearly insufficient to establish proof of collaborative activities or collective organizational structure. (*Maquiz MacDonald v. Hedgpeth*, at 1222, citing

Johnson v. Montgomery, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

In addition to the Ninth Circuit's holding that there was no Confrontation Clause violation in this case because Detective Tribble only conveyed "basis" and "background" information, not offered for its truth, the court also holds that *Williams v. Illinois*, 567 U.S. 50 is a fractured decision which does not constitute clearly established federal law in this habeas proceeding as to any relevant Confrontation Clause claim. (Dec. 4.)

The recent decision of the California Supreme Court in *People v. Sanchez*, 63 Cal.4th 665, 697 (2016) was issued to curtail the jury's utilization of testimonial hearsay from a gang expert for the truth of the matter asserted, which has been the tendency in California gang prosecutions for many years. (*People v. Sanchez*, at 686 & fn. 13.) *Sanchez* relies on *Williams v. Illinois* in support of its holdings. Whether or not *Sanchez* can be retroactively applied to petitioner's case, the opinion is instructive on the suitability of *Williams v. Illinois* as existing U.S. Supreme Court authority in the context of proceedings under the AEDPA.

Petitioner notes here that the Ninth Circuit fails to cite any authority for the proposition that *Williams v. Illinois* does not constitute clearly established federal law in a 28 U.S.C. section 2254(d) habeas proceeding. Petitioner is unaware of any such authority. And for the same reasons that the California Supreme Court

found *Williams v. Illinois* to be relevant in nearly identical circumstances, petitioner submits that *Williams v. Illinois* constitutes clearly established federal law issued from this Court under the AEDPA for purposes of this federal habeas proceeding.

Petitioner additionally avers, as he has throughout the proceedings in the courts below, that *Roviaro v. United States*, 353 U.S. 53 and *Banks v. Dretke*, at pages 697-698 constitute clearly established case law issued from the U.S. Supreme Court, which support's his claim that the denial of his informant disclosure motion violated his rights to confrontation, cross-examination, due process, and a fair trial under the Sixth and Fourteenth Amendments. Although *Roviaro* was not decided "on the basis of constitutional claims," subsequent Supreme Court and Ninth Circuit case law makes clear that due process concerns undergird the *Roviaro* requirement. (*United States v. Struckman*, 611 F.3d 560, 580 (9th Cir. 2010), Berzon J. concurring; see also, *Gupta v. Runnels*, 116 Fed. Approx. 816, 817 (9th Cir. 2004) [state court's decision withholding identity of informant was contrary to clearly established U.S. Supreme Court authority in *Roviaro v. United States*].)

Accordingly, Claim II presents the question of whether the rights to confrontation, cross-examination, a fair trial, and due process are violated when a prosecution gang expert is not required to disclose the identities of informants,

whose factual statements he conveys to jurors through his testimony. Both *Roviaro v. United States*, 353 U.S. 53, and *Banks v. Dretke*, 540 U.S. 668 appear to compel disclosure under these circumstances. Claim II presents the further question of whether *Williams v. Illinois* constitutes clearly established federal law in a 28 U.S.C section 2254(d) habeas proceeding. Petitioner is unaware that this Court has previously decided these specific questions in any previous decision.

This Court should grant certiorari in this matter to secure uniformity of decision and to settle important questions of law.

CONCLUSION

For all the reasons expressed herein, this Court should grant the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

Dated: September 20, 2019.

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STATUTORY APPENDIX

28 U.S.C. § 2254(d),(i) & (2)

"(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 or 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."

California Penal Code § 186.20

"This chapter shall be known and may be cited as the "California Street Terrorism Enforcement and Prevention Act."

California Penal Code § 186.22(b)(1)

"(b)(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:...

(C) If the felony is a violent felony, as defined in subdivision (c) of section 667.5, the person shall be punished by an additional term of 10 years."