19-7485

No. _____

ORIGINAL

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Michael J. Aguon, — PETITIONER
(Your Name)

vs.

Warren L. Montgomery, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael J. Aguon, CDCR# AR1623
(Your Name)

CSP-Los Angeles County, A-4-228
(Address)

P.O. Box 4430, Lancaster, CA. 93539
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I

IN LIGHT OF THE FACT THAT THE PROSECUTION'S GANG EXPERT IS AND WAS AT ALL TIMES A POLICE OFFICER ENGAGED IN INVESTIGATING CRIMES WHEN INTERVIEWING ALLEGED GANG MEMBERS, THE HEARSAY RELIED ON FOR HIS OPINION MUST CONSTITUTE "TESTIMONIAL HEARSAY, AND ITS ADMISSION AT TRIAL VIOLATED CRAWFORD V. WASHINGTON'S HOLDING," THUS, THE NINTH CIRCUIT COURT'S DENIAL OF THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY MUST BE VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS AS THE ISSUE IS CLEARLY "DEBATABLE AMONGST JURISTS OF REASON"

II

POLICE QUESTIONING A DETAINEE ABOUT HIS MEMBERSHIP TO A CRIMINAL STREET GANG, REQUIRES MIRANDA V. ARIZONA WARNINGS. IF THIS WARNING IS NOT GIVEN, ANY RESPONSE OR STATEMENT BY THE SUSPECT CAN NOT BE USED AS EVIDENCE OF GUILT AT TRIAL. HENCE, WHEN PETITIONER MADE SUCH COLORABLE ALLEGATIONS IN THE STATE COURTS, AND DENIED HIM AN OPPORTUNITY TO DEVELOP THE RECORD, THAT STATE COURT'S DECISION REST UPON UNREASONABLE DETERMINATIONS OF THE FACT IN LIGHT OF THE RECORD, THEREFORE, THE NINTH CIRCUIT COURT'S DENIAL OF THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY MUST BE VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS AS THE ISSUE OF WHETHER PETITIONER WAS IN CUSTODY IS CLEARLY "DEBATABLE AMONGST JURISTS OF REASON"

III

UNDER THE CIRCUMSTANCES, THE SUFFICIENCY OF THE COLORABLE ALLEGATIONS THAT DEFENSE COUNSEL: (a) FAILED TO OBJECT TO ELIZABETH HIDAY'S 'INTERPRETATION OF WHAT PETITIONER SAID OR MEANT,' (b) FAILED TO OBJECT TO TESTIMONIAL HEARSAY FROM THE GANG EXPERT WHO WAS A POLICE OFFICER ENGAGED IN INVESTIGATING CRIMES, (c) FAILED TO OBJECT TO ADMISSION OF STATEMENTS MADE DURING POLICE QUESTIONING WITHOUT MIRANDA V. ARIZONA WARNING ABOUT GANG MEMBERSHIP, (d) FAILED TO OBJECT TO THE ADMISSION OF PREJUDICIAL AND IRRELEVANT EVIDENCE THAT PETITIONER HAD POSSESSED AN UNCONNECTED FIREARM DURING A TRAFFIC STOP (e) FAILED TO OBJECT AND SEEK CLARAFICATION OF JURY INSTRUCTIONS CALCRIM NOS. 358 & 359, (f) THE CUMULATIVE EFFECT OF EACH DEFENSE COUNSEL'S ERRORS, ALL WORKED TO DENY PETITIONER OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS. THE STATE COURT'S DECISION TO DENY HIM AN ORDER TO SHOW CAUSE, AND AN EVIDENTIARY HEARING TO DEVELOP THE FACTS, IS OBJECTIVELY UNREASONABLE, AND "DEBATABLE AMONGST JURISTS OF REASON."

QUESTIONS PRESENTED (Continued...)

IV

BECAUSE THE STATE COURTS, AS WELL AS THE DISTRICT COURT BLAMED PETITIONER FOR THE UNDEVELOPED RECORD THAT WOULD SUPPORT HIS CLAIMS, AND SUCH CLAIMS REST LARGELY ON THE RECORD ON THE APPEAL; THUS, IT WAS INCUMBENT UPON APPELLATE COUNSEL TO RAISE THE STRONGEST CLAIMS ON DIRECT APPEAL. SO THE STATE COURTS' DECISION WAS BASED ON UNREASONABLE DETERMINATION OF FACTS IN LIGHT OF THE RECORD IN THE STATE COURT. THE NINTH CIRCUIT COURT'S DECISION IS DEBATABLE AMONGST JURISTS OF REASON. HENCE, A CERTIFICATE OF APPEALABILITY SHOULD BE ISSUED IN THIS CASE.

V

WHETHER THE PROSECUTOR COMMITTED PROSECUTOR MISCONDUCT DURING CLOSING ARGUMENT IS "DEBATABLE AMONGST JURISTS OF REASON," THE NINTH CIRCUIT COURT'S DECISION TO DENY THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY MUST BE VACATED AND CASE REMANDED.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner, Michael J. Aguon, CSP-Los Angeles County, P.O. Box 4430, Lancaster, California 93539

Warren L. Montgomery, Warden of Calipatria State Prison, P.O. Box 5005, Calipatria, California 92233, Respondent.

Respondent's attorneys, Xavier Becerra, Attorney General of California, 300 S. Spring Street, Suite 1702, Los Angeles, California 90013

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "C" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Appellate State court appears at Appendix "D" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 25, 2019.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

AMENDMENT V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor hsall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor 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....

AMENDMENT VI: In all criminal prosecutions the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crimes have ben committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his Defense.

AMENDMENT XIV: ... ; Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

For brevity, Petitioner adopts the factual background recited by the State Court of Appeal, Fourth Appellate District, in its unpublished decision, which is attached as Appendix "D," as if fully set forth below, with exceptions to other factual allegatiosn raised by Petitioner to the lower federal courts, as shown below.

SUMMARY OF ARGUMENT

In 2004, Justice Scalia, writing for the majority, held in Crawford v. Washington(2004)541 U.S. 36, that: "the Confrontation Clause bars the use of testimonial, out-of-court statements offered for the truth of the matter asserted." An example is, statement obtained through police questioning a subject for criminal purposes. The Crawford made clear that statements made to law enforcement, about a crime, easily would fall within the definition of "testimonial."

The Ninth Circuit carved out an exception to Crawford, holding in United States v. Vera(9th Cir. 2014)770 F.3d 1232, 1237, that "there is no Crawford problem when an expert applies his training and experience to the source before him and reaches an independent judgment." "Accordingly, the key question for determining whether an expert has complied with Crawford is the same as for evaluating expert opinion generally." (Id.)

However, experts are not all the same. There are no experts in texts, case law, medical field, anywhere showing that experts investigate and prosecute crimes. The only people that investigate and prosecute crimes are the law enforcement officers. Gang experts are not some people with a psychology degree or some degree for that matter. All noted gang experts in California courts are law enforcement officers tasked to investigate, gather evidence and prosecute crimes.

It is imperative, despite the gang aspect of this case, for the Supreme Court to clarify that the "label" "expert" IS NOT an exception to the holding in

Crawford.

[T]he California Supreme Court attempted to curve this Confrontation Clause violation in People v. Sanchez(2016)63 Cal.4th 665, holding that: "only if the gang expert relates 'case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are testimonial hearsay, violating Crawford.'" (Id at pp. 676-677, 679-694.) It overturned a 20 year-old holding in People v. Gardeley, that allowed the use of such testimonial hearsay in gang cases.

However, the California Courts are denying relief, claiming that Sanchez does not apply retroactive. (In re Thomas(2018)30 Cal.App.5th, 744, 752-759.) But one thing is for sure, no California Court nor Federal Court has addressed the obvious, yet critical fact: "gang experts are law enforcement tasked to investigate and prosecute crime, and gather evidence, including questioning subjects."

This Supreme Court has dealt with unsavory gang cases, in determining the constitutional issues surrounding it, objectively. (e.g., Dawson v. Delaware(1992) 503 U.S. 159, 163-167 [holding that, it was constitutional error to admit evidence of the defendant's membership in a white racist prison gang because it was not relevant to any issue being decided at the sentencing...].)

This Supreme Court never created an exception to the Confrontation Clause established by Crawford, i.e., that gang-law enforcement-experts are exempted from the Confrontation Clause protection.

While gangs plague our streets, it is no excuse to ignore what Justice Scalia, with the mojority of this Court, held in Crawford.

As for the ineffective assistance of counsel claims. Petitioner has been representing himself thoroughout these proceedings, attempting to procure records, defense case file from his attorneys, and had filed a complaint with the State Bar to address this problem. (See Appendix "E," Correspondences with attorneys and Complaint.) Each attorney blaming one another of withholding the defense case

file. (Cf., Letter from Attorney Sheela, dated Aug. 31, 2015 claiming Attorney Mr. Cline had the file; with Attorney Cline's letter, dated Feb. 28, 2016, claiming that he did not have all of the original file... App. "E.") A Pro Se prisoner can not be blamed for the undevelopment of the habeas corpus record. This Supreme Court in fact, in Williams v. Michael Taylor(2000)529 U.S. 420, 431 held that, "the phrase "failed to develop" implies lack of diligence or some other fault on the part of the petitioner.... However, if the failure to develop the record is not the fault of the petiitoner, the district court must determine whether to conduct an evidentiary hearing...."

In this case, it was not Petitioner's fault that the record was undeveloped. Rather, the attorneys that represented him, were hinding documents, lying about who had what documents in their possession, prejudicially subjecting Petitioner to limited documentary proof of their ineffectiveness.

Based on the foregoing allegations, pleadings, records, Petitioner asks this Court to grant certiorari, vacate the denial by the Ninth Circuit Court, and remand the case for further proceedings. If not to clarify the Confrontation Clause, but also to clear conflicting decisions by the Ninth Circuit and Second Circuit Court of Appeals, who had acknowledged the very issue before this Court in United States Mejia, 545 F.3d 179 (2d Cir. 2008), who, reached a different opinion regarding law enforcement gang experts.

The record before this Court, pleadings allegations, suffice to conclude that the issues litigated are debatable enough to warrant the issuance of a certificate of appealability.

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REASONS FOR GRANTING THE PETITION

For too long, California Courts have been permitted to utilize law enforcement officers, to investigate, gather evidence of, and prosecute gang cases. Then, those law enforcement officers, under the guise of "expert testimony," get up on the stands daily, to relate "testimonial hearsay, from cooperating witnesses, confidential informants, individuals the officers suspect of being involved in gangs, during police questioning.

This is no expert testmony regarding the effects of alcohol on an individual. Nor the opinion about the destine between objects, the psychological effects are under battered woman syndrome. Gang expert opinions are rooted on police investigations about gang activities and their particular membership to a specific gang in the neighborhood, with the exclusive purpose of providing that information at any gang trial, to established that very purpose -- that any given crime was committed by gang members and for gang purposes. There is no ongoign emergency, nor suggestions that police questionings are for illustration purposes.

On the subject of ineffective assistance of counsel claims. It is quite frequently, that prisoners litigating these claims, do not have the resources to investigate what their attorneys did or did not do, based on the information they had during their representation. Ergo, those claims end, as a result of the lack of supporting documents, or supporting declarations from the attorney him or herself, explaining why they took the steps they took.

[H]ere, Petitioner try to procure said supporting documents, and was faced with obstructionist attorneys that were concern about revealing their inequities, rather then the rights of Petitioner.

Petitioner realleges the factual and legal basis from his traverse, in support for the issuance of a certificate of appealability. (Appendix "F.")

I & II

BECAUSE OF THE NATURE OF THE GANG EXPERT'S DUTIES TO INVESTIGATE, GATHER EVIDENCE, QUESTION SUBJECTS, AND PROSECUTE GANG CASES, THESE GANG EXPERTS SHOULD NOT BE EXEMPT FROM THE CONFRONTATION CLAUSE PROTECTIONS ESTABLISHED BY CRAWFORD V. WASHINGTON; AND THEREFORE, THE LOWER NINTH CIRCUIT ERRED IN DENYING PETITIONER THE ISUANCE OF A CERTIFICATE OF APPEALABILITY

It is important for the Court to clarify this critical problem in american courts. Especially in California Courts, where generally, and daily, prosecutors present "gang" expert testimony to established the truth of the matters stated by that gang expert. In other words, gang-police officer/experts question subjects about their affiliations with a criminal street gang, in order to use such statements at a later trial.

Under California Penal Code §186.22 et seq., prosecutors are burdened with the task of establishing that a particular group is a criminal street gang, and that members to it engage in criminal activities for the benefit of, in association with, to further that criminal street gang.

These "gang" police officers/experts get on the stand and regurgitate what they obtained during their gang/police investigation, to the jury. The Second Appellate Circuit acknowledged this much in United States v. Mejia, 545 F.3d 179 (2d Cir. 2008), stating that, "gang expert exceeded the bounds of Crawford v. Washington, by presenting testimonial hearsay 'in the guise of an expert opinion,' from cooperating witnesses and confidential informants." (Id.)

However, the Ninth Circuit Courts give these gang officers the label "experts," as an exemption to the black letter of Crawford. (Cf., United States v. Vera, 770 F.3d 1232 (9th CIr. 2014) [tehre is generally NO Crawford problem when an expert applies his training and experience to the source before him and reaches an independent judgment."].) But labeling the witness/officer an expert, should not be an exemption to the protections from Crawford, because of the

very nature of that "expert's" duties as an investigating law enforcement officer.

The district Court relied on Vera, to deny Petitioner federal habeas relief. But, based on the rationale of Crawford, the nature of that gang experts' investigating duties, and the Second Circuit's decision, the issue is debatable, and should have entitled Petitioner to the issuance of a certificate of appealability.

Petitioner requests that this Supreme Court grant certiorari, vacate the order denying a COA, and remand with directions to grant a COA.

III.

BOTH ATTORNEYS AT TRIAL AND SENTENCING, PLAYING GAMES WITH THE DEFENSE CASE FILE WHERE NECESSARY DOCUMENTS EXIST, TO SUPPORT PETITIONER'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL, IS EVIDENCE OF THEIR CONSCIOUSNESS OF GUILT. AS SUCH, THERE'S AMPLE SUPPORT TO THE ALLEGATIONS OF THEIR INACTIONS. THE NINTH CIRCUIT ERRED IN DENYING PETITIONER A CERTIFICATE OF APPEALABILITY. THIS SUPREME COURT SHOULD GRANT CERTIORARI, VACATE SUCH DENIAL, AND REMAND FOR FURTHER PROCEEDINGS.

This Supreme Court has acknowledged that it is quite difficult for an unrepresented prisoner to investigate their claims, and provide support for their allegations. It is why this Court decided Martinez v. Ryan, _U.S._, 132 S.Ct. 1309, 1317-1318 (2012), stating that prisoners, untrained in the law, may not comply with the state court's requirements.

That difficulty is amplified when the attorneys start withholding documents, evidence of their inactions and inadequate investigative efforts in file.

But the reviewing courts simply ignore this painful fact, and deny daily prisoners, for the record being undeveloped, when that problem was born from the attorney's obstructinist behavior in the first place.

Because the Ninth Cirucit overlooked at the evidence of conciosuness of guilt by the attorneys' alleged to be ineffective in violation of the Sixth Amendment, they erred in denying Petitioner a certificate of appealability.

Therefore, a simply review of the record would show that the issue is clearly debatable, entitling Petitioner to the issuance of a certificate of appealability.

Petitoner respectfully prays that this Supreme Court, despite its difficult calender and cases, looks at my issues, and vacate the Ninth Circuit's denial of a certificate of appealability. The Confrontation Clause requires that gang-police/ experts stop testifying regarding "testimonial hearsay" in California courts.[1]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Aguon

Michael J. Aguon
Petitioner,
Date: January 23, 2020

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1. Its noteworthy that the Ninth Circuit, in its most recent decision dealing with Crawford, and California Gang Experts, seem to agree, albeit impliedly with United States Mejia, but more importantly, it acknowledged that, "statements to private individuals are much less likely to be testimonial than statements to law enforcement officers.'" (See Lucero v. Holland, 902 F.3d 979, 988-990, esp. fn. 5 (9th Cir. 2018).) So in one case it acknowledges that statements to police are testimonial, which is exactly the situation is here. It was a complete error to deny Petitioenr a certificate of appealability.