No. 11-614

In the Supreme Court of the United States

BERNIE E. WARNER, PETITIONER

v.

SANTANA OCAMPO

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

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 22 OTHER STATES FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the Ninth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when it concluded that testimony describing an interview, but not admitting an actual statement, violates the Confrontation Clause whenever the substance of an out-of-court testimonial statement is likely to be "inferred" by the jury?

2. Where this Court has not clearly established whether the Confrontation Clause prohibits testimony describing a police interview without offering out-of-court statements, did the Ninth Circuit violate 28 U.S.C. 2254(d) by determining the state court adjudication of the confrontation claim was objectively unreasonable?

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INTEREST OF *AMICI CURIAE*

One of the States' core functions is to protect the community by securing state-court convictions and defending those convictions when challenged in federal habeas corpus review. That function creates two distinct interests in having this Court review the questions that the State of Washington has presented in its petition for certiorari.

First, the *amici* States seek to ensure that the lower courts properly apply the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The only decisional law relevant for determining what is "clearly established" law is that of this Court. And this Court has not addressed the issue presented here: whether the Confrontation Clause is violated where the prosecution does not introduce out-of-court statements, but the substance of these statements may be "inferred" from the proffered testimony. The Ninth Circuit's use of lower-court decisions to vacate a state-court conviction is antithetical to the AEDPA standard.

Second, the prosecution's introduction of course-of-investigation testimony for non-hearsay purposes is common, whether to explain the reason the police obtained a search warrant or interviewed a witness, or to rebut a claim that the police failed to conduct an adequate investigation. That a jury may infer a substantive conclusion from such testimony does not violate the Confrontation Clause where the purpose was not to prove the truth of the matter asserted. The *amici* States seek to ensure that lower courts do not improperly ensnare appropriate, non-hearsay testimony in a Confrontation Clause analysis.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue whether a legal principle is "clearly established" by this Court under 28 U.S.C. § 2254(d) is a critical, threshold question for reviewing a state-court decision in habeas. By looking to lower-court holdings, the Ninth Circuit here expanded its review and weighed in on an issue that this Court has not addressed, in violation of the AEDPA. The *amici* States respectfully request that this Court remind the lower courts, yet again, that the AEDPA bars them from using habeas review to reach and resolve the often dynamic, engaging legal issues that emerge in state court criminal cases.

The issue here is whether a state court misapplied this Court's clearly established precedent in determining that the prosecution did not violate the Confrontation Clause by introducing course-of-investigation evidence (but not actual statements), that allegedly allowed the jury to draw "inferences" about the statements of a non-testifying witness. However interesting the issue, it is not one on which this Court has opined. The introduction of testimony conveying the course of a police investigation for non-hearsay reasons is routine, and the lower courts are admittedly divided over whether such evidence violates the Confrontation Clause. That very split among lower-court authorities, in fact, evidences the point that there is no clearly established law from this Court.[1]

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[1] Consistent with Rule 37.2, the counsel for the State of Michigan notified the attorney for Santana Ocampo on November 29, 2011, of the State's intention to file this *amicus* brief.

ARGUMENT

I. There is no clearly established Supreme Court precedent that the introduction of course-of-the-investigation testimony, without more, violates the Confrontation Clause.

A. A critical AEDPA threshold that significantly limits the scope of habeas review is the requirement that a state-court decision be contrary to this Court's "clearly established" precedent.

The form of relief AEDPA authorizes is very limited. Under 28 U.S.C. § 2254(d)(1), a federal court can only grant relief with respect to a state claim adjudicated on the merits if the adjudication was contrary to or an unreasonable application of this Court's clearly established precedent. And the decision regarding what constitutes "clearly established" precedent is derived from this Court's holdings at the time of the relevant state adjudication, rather than from *obiter dictum*. In the last few years, numerous lower courts have forced this Court to reiterate the point.

A review of these recent cases underscores the fact that this Court has "narrowed" the window of cases that may be considered "clearly established," looking for decisions that are nearly on point. E.g., *House* v. *Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008) ("Supreme Court holdings—the exclusive touchstone for clearly established federal law—must be construed narrowly and consist only of something akin to on-point holdings."). See generally Brian Means, *Federal*

Habeas Manual (2011), § 3.32 ("Breadth of the 'clearly establish' limitation"), pp. 222-229.

For example, in *Knowles* v. *Mirzayance,* 129 S. Ct. 1411 (2009), this Court examined whether the Ninth Circuit erred in granting habeas corpus relief based on a claim that the petitioner's trial counsel was ineffective for abandoning a defense of not guilty by reason of insanity where there was "nothing to lose" by advancing the defense. In reversing, this Court held that it had not established a "nothing to lose" standard for *Strickland* ineffective assistance of counsel claims. See *Knowles,* 129 S. Ct. at 1419 ("This Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims."). As a consequence, there was no basis on which to provide relief under 28 U.S.C. § 2254(d). *Knowles,* 129 S. Ct. at 1419.

This Court in *Knowles* relied primarily on this Court's prior decisions in *Wright* v. *Van Patten*, 552 U.S. 120 (2008), and *Carey* v. *Musladin,* 549 U.S. 70 (2006). In *Wright*, this Court examined whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone. The state courts had denied relief, but the Seventh Circuit determined this was a structural error under *United States* v. *Cronic* and granted habeas relief. *Wright,* 552 U.S. at 122. This Court reversed because there was no established Supreme Court precedent precisely on this point: "[b]ecause our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonably applied clearly

established Federal law." *Id.* at 126 (internal quotes and brackets omitted), citing *Musladin*, 549 U.S. at 77.

In *Carey*, this Court examined whether the displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial. *Id.* at 72-73. In examining whether there was any controlling law, this Court stated that "[g]iven the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonably applied clearly established Federal law.'" *Id.* at 77. The Ninth Circuit had wrongly relied "on its own precedent" in determining that the Supreme Court cases that applied to state-sponsored conduct also governed spectator actions.

In sum, to overturn a state-court conviction on habeas review, this Court's precedent must not only be "clearly established," it must directly and definitively resolve the precise legal issue presented. The Ninth Circuit failed to heed that standard here.

B. The lower courts distinguish between a state trial court's admission of third-party hearsay statements and course-of-investigation evidence that merely allows jurors to draw inferences about such statements.

The Ninth Circuit determined here that the prosecution had improperly introduced the testimony of Detectives Ringer and Webb, concluding that the Detectives introduced the substance of non-testifying witness Mesial Vasquez's out-of-court statements. Pet. App. 32a ("the critical substance of Vasquez's

testimonial statement were admitted against Ocampo at trial, albeit not in verbatim form, through Detective Ringer's and Detective Webb's testimony.").

In rejecting these claims on direct review, the primary substantive legal analysis on which the Washington State Court of Appeals relied was the distinction between introducing hearsay statements and merely introducing evidence about interviewing a non-testifying witness. Regarding Detective Webb, the state court correctly determined that the testimonial passage to which Ocampo objected did not convey "the substance of any statements Vasquez made." Pet. App. 93a. Likewise, the state court determined that there was no Confrontation Clause violation involving Detective Ringer, because his "testimony only implied the outlines of Vasquez's statement." Pet. App. 96a.

This analysis—distinguishing between the actual out-of-court statements and a mere description of them when providing course-of-investigation testimony—is consistent with the reasoning in a First Circuit case, *United States* v. *Maher,* 454 F.3d 13 (1st Cir. 2006). There, the First Circuit similarly examined a claim that the prosecution had introduced the hearsay statements of a non-testifying informant:

> Maher's *Crawford* arguments appear to cover two different types of testimony by officers concerning statements by the non-testifying informant-declarant: (1) testimony that the informant said X to the officer, and (2) *testimony from which (Maher argues) the jury would necessarily infer that the declarant had said X, but which did not itself quote or paraphrase the declarant's statements.*

> *Crawford* covers the first category—the admission of out-of-court statements by non-testifying and un-cross-examined declarants through testimony of others.

Maher, 454 F.3d at 20 (emphasis added).

The First Circuit then highlighted the second category of evidence (the same evidence at issue in this case) as presenting an open question that would only be resolved if *Crawford* were "extend[ed]." *Maher,* 454 F.3d at 20 ("Maher makes no effort to explain why *Crawford* should be read to *extend* to the second category, and so we disregard the statements which fall in that category.") (emphasis added). Other circuits have recognized this same distinction. See, e.g., *United States* v. *Cromer,* 389 F.3d 674, 675-76 (6th Cir. 2004) (Where the police witness testified that the reason he had targeted the house where the drugs were discovered was based on information that it was "associated with selling drugs," the Sixth Circuit concluded that "at least arguably [this testimony] did not even put before the jury any statements made by the [confidential informant]"); *United States* v. *Albiola,* 624 F.3d 431, 441 (7th Cir. 2010) (Where the inference was clear from the interview of the witnesses that they could not confirm the existence of the people whose names were listed on the package carrying drugs, the Seventh Circuit stated that the testimony did "not contain any out-of-court statement, so the prohibition against hearsay is not implicated here [where the postal inspector] never testified about the substance of his interviews . . . [but] only said that he had conducted the interviews as part of his investigation, and then, in reporting the findings of his investigation, said that he

had not found any evidence to substantiate the existence of [the people named on the package label].").

One of the lead cases the Ninth Circuit relied on demonstrates that the principles applied were not established by this Court's precedent. See *United States* v. *Meises,* 645 F.3d 5, 21 (1st Cir. 2011) (recognizing that its prior precedent, *Maher*, had expressly reserved this question and that granting habeas relief would require "extend[ing]" *Crawford*). In fact, even the Ninth Circuit's own precedent so recognized. *Mason* v. *Yarborough,* 447 F.3d 693, 696 (9th Cir. 2006) ("there is a real question whether the Confrontation Clause protections apply to Detective Salsedo's testimony, because it is not at all clear that Alder Fenton was a "witness against" Mason as that term has been defined by the Supreme Court. . . . Because Fenton's words were never admitted into evidence, he could not "bear testimony" against Mason.").[2]

The central theme of the Ninth Circuit's cited cases was that *Crawford*'s protections would effectively be abrogated if the police could merely characterize the statements of the non-testifying witnesses to bolster the prosecution's case. E.g., *United States* v. *Silva,* 380

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[2] Even the Ninth Circuit's reliance on the jurisprudence from *Bruton* v. *United States,* 391 U.S. 123 (1968), demonstrates that the principle here is not "clearly established." Pet. App. 27a n.15. In the *Bruton* setting, the Fifth Circuit has determined that "[o]ut-of-court statements of a non-testifying witness that *only inferentially incriminate a defendant when linked to other evidence introduced* at trial do not violate the Sixth Amendment because an instruction not to consider such a statement will be considered effective to remove it from the jury's consideration." *United States* v. *Harper,* 527 F.3d 396, 403 (5th Cir. 2008).

F.3d 1018, 1020 (7th Cir. 2004) ("Under the prosecution's theory, every time a person says to the police 'X committed the crime,' the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers."). See also *Maher*, 454 F.3d at 23 ("The dividing line often will not be clear between what is true background to explain police conduct (and thus an exception to the hearsay rule and thus an exception to *Crawford*) and what is an attempt to evade *Crawford* and the normal restrictions on hearsay. But we are on firm ground in warning prosecutors of the risks they face in backdoor attempts to get statements by non-testifying confidential informants before a jury.").

But one of the key issues interwoven with the analysis is the prosecution's claim that the evidence was not introduced for the truth of the matter, but for some non-hearsay purpose. See, e.g., *Silva*, 380 F.3d at 1019 ("The prosecutor contends that most of the statements were admissible to show 'the actions taken by [each] witness'"). As here, the prosecution noted that Ocampo had opened the door to the line of inquiry with Detective Ringer based on Ocampo's claim that the police investigation had been inadequate. Pet. App. 108a-109a ("[defense counsel] made the statement there had been no efforts to corroborate and I think there certainly were . . . there was testimony both through direct and redirect that indicates Mr. Vasquez's corroborating exactly what everybody else is corroborating."). The Ninth Circuit's conclusion that the testimony violated the Confrontation Clause,

therefore, raises the question whether the evidence was admissible for a non-hearsay purpose.

C. The introduction of course-of-the-investigation evidence, where used to rebut the claim that the police failed to act, does not violate the Confrontation Clause where admitted for a proper, non-hearsay purpose.

The prosecution's introduction of an out-of-court statement not for the truth of the matter asserted does not violate the Confrontation Clause. This is clearly established federal law. See *Crawford* v. *Washington*, 541 U.S. 36, 59 n.9 (2004) ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). Cf. *United States* v. *Cruz-Diaz*, 550 F.3d 169, 177 (1st Cir. 2011) ("when an out-of-court statement is purportedly offered into evidence as non-hearsay—for example, to provide context for police action or inaction—we are concerned about whether the stated purpose for introducing the evidence masks an attempt to evade *Crawford* and the normal restrictions on hearsay.").

Although this Court has never addressed the issue, there is a stable, well developed body of law at the circuit-court level that examines the prosecution's introduction of course-of-the-investigation testimony where such testimony includes hearsay evidence. The "background exception" provides that such evidence is not improper where it is introduced to establish "non-controversial" matters that are preliminary in nature and that do not unfairly prejudice the criminal

defendant on significant disputed matters. See, e.g., *Ryan* v. *Miller,* 303 F.3d 231, 252-53 (2d Cir. 2002) (explaining the "background exception"). See also Wright, Federal Practice & Procedure, § 7005 (2d ed), p. 55 ("Another group falling outside the category of hearsay consists of statements made by one person which become known to another offered as a circumstance under which the latter acted and as bearing upon his conduct.").

This principle, allowing for background evidence, does not apply where the evidence is significant and may likely be misused by the jury. See, e.g., *Silva*, 380 F.3d at 1020 ("Allowing agents to narrative the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's right under the Sixth Amendment and hearsay rule."). See also Weinstein's Federal Evidence, § 802.05[3][b], 802-28.11 ("this 'context' rule does not extend to statements occurring outside of conversations with the defendant that are offered to provide the context for a police investigation.").

But there is a second exception that applies to rebut claims that a criminal defendant raises. *Ryan*, 303 F.3d at 253, citing *United States* v. *Reyes*, 18 F.3d 65, 69 (2d Cir. 1994) ("it can constitute appropriate rebuttal to initiatives launched by the defendant"). See also Wright, Federal Practice & Procedure, § 7005 (2d ed), pp. 59-64 ("if [the law enforcement official] becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused by the jury as evidence of the fact asserted that the content of the statement should, *absent special*

circumstances enhancing probative value, be excluded on the ground that the probative value of the statement admitted for a non-hearsay purpose is substantially outweighed by the danger of unfair prejudice, Rule 403.") (emphasis added).

And one of the circumstances that may justify the introduction of course-of-the-investigation testimony is the one at issue here: where the "propriety of the investigation" has been placed in issue. See *United States* v. *Holmes,* 620 F.3d 836, 841 (8th Cir. 2010) ("Th[e] [officer's statements about what the confidential informant told him] will be allowed into evidence to explain a police investigation, however, only when the propriety of the investigation is at issue in the trial"), citing *United States* v. *Malik*, 345 F.3d 999, 1001-1002 (8th Cir. 2003), and *United States* v. *Davis,* 154 F.3d 772, 778 (8th Cir. 1998). See also Wright, Federal Practice & Procedure, § 7005 (2d ed), p. 60 n.12 ("A challenge to the 'propriety of the investigation' is one such enhancing circumstance" that may justify the introduction of more specific complaints about the crime).

For example, in *Davis,* the Eighth Circuit examined the admissibility of the prosecution's introduction of evidence from the investigating officer of out-of-court statements from other police officers and informants. *Davis,* 154 F.3d at 778. The prosecution argued on appeal that the evidence was offered for non-hearsay purposes to rebut the claim of defense counsel, who had "repeatedly attacked the criminal investigation as defective or improperly motivated and thereby placed the propriety of the investigation in issue." *Id.* In determining that the evidence was

admissible for this non-hearsay purpose, the Eighth Circuit reasoned that there was no abuse of discretion in admitting the evidence because the "challenged testimony helped establish that the [officer in charge] conducted an independent investigation of [the informant's] claims and did not automatically assume the defendants' guilt." *Id.* at 779.

The Eighth Circuit applied this same analysis to the introduction by a police officer of an out-of-court statement that was subject not just to a hearsay challenge but that it violated *Crawford* and the Confrontation Clause. See *United States* v. *Brooks,* 645 F.3d 971, 976 (8th Cir. 2011). The statement from the investigating officer was about information that he "had received about a Mr. Brooks selling narcotics and firearms from that location." *Brooks,* 645 F.3d at 976. In other words, the hearsay evidence from the non-testifying witness directly incriminated the criminal defendant in the crime. The Eighth Circuit determined that the Confrontation Clause was "not implicated" because the evidence was "necessary to explain why the officers went to the residence without a warrant" and therefore was not offered for the truth of the matter asserted. *Id.* at 977.

Here, the Washington State Court of Appeals had noted that Ocampo had similarly placed the propriety of the investigation at issue:

> It was Ocampo's position that the State "closed this case when they got the statement from [Hernandez]. This case was closed. Done. Let's convict the 16-year-old kid, first-degree murder based on Jose Hernandez without even doing the investigation." 7 RP at 1028. Ocampo

> maintained that the State rushed to judgment and blindly accepted Hernandez's statements as gospel, thus overlooking the real killer, Hernandez. See, e.g., 4 RP at 550 (defense counsel questioning Detective Ringer: "Was there ever any suspicion or any need in your mind to corroborate the story [Hernandez] is telling you? Do you guys just take it at face value, 'that was good enough for us, case closed?'")[.]

Pet. App. 88a. The Ninth Circuit noted this same point, i.e., that one of the "major" issues at trial was whether "the detectives had adequately corroborated that Ocampo was present" at the time of the murder. Pet. App. 3a n.3.

The fact that the prosecution had presented this justification for the introduction of the evidence is indispensable to the resolution of the legal issue. And yet, this Court has not navigated these difficult straits, providing the limitation on how far the prosecution may go to clarify that the investigation was adequate. The suggestion here that the police merely accepted Hernandez's word was a serious charge against the investigation's propriety, as even the Ninth Circuit acknowledged. Pet. App. 3a n.3. The clearly established law from *Crawford* is that evidence introduced not for the truth of the matter would not violate the Confrontation Clause. *Crawford,* 541 U.S. at 59 n.9. The issue then is whether the evidence may be improperly used for substantive purposes by the jury and still be subject to exclusion under Rule 403 (substantially more prejudicial than probative). See, e.g., *Meises,* 645 F.3d at 22 n.25 ("the relatively minor

'probative value [of the evidence of why the agent began surveillance or made an arrest] is substantially outweighed by the danger of unfair prejudice' that results from communicating the accusatory hearsay to the jury. Fed. R. Evid. 403."). Without guidance from this Court on this issue, there was no basis for the Ninth Circuit to conclude that the Washington State Court of Appeals had acted in an objectively unreasonable manner.

D. This Court has not addressed the evidentiary issue presented.

This Court's Confrontation Clause jurisprudence has never considered statements that merely suggest substantive out-of-court testimony. The Court has only considered out-of-court testimony that provided substantive information through quotations or paraphrasing. See, e.g., *Crawford* v. *Washington*, 541 U.S. 36 (2004) (tape-recorded statement to police); *Lilly* v. *Virginia*, 527 U.S. 116 (1999) (nontestifying accomplice's confession); *Idaho* v. *Williams*, 497 U.S. 805 (1990) (substantive paraphrases of child's responses during examination); *Ohio* v. *Roberts*, 448 U.S. 56 (1980) (preliminary hearing testimony of witness); *Moore* v. *United States*, 429 U.S. 20 (1976) (declaration of confidential informant). And because this Court has never addressed this particular issue, there is no "clearly established" federal law on point.

The cases the Ninth Circuit cited did not support its contention that this Court's precedent resolved the question about whether this evidence violated the Confrontation Clause. And because AEDPA states that the body of relevant case law is limited to this Court's

holdings, see 28 U.S.C. § 2254(d) ("clearly established Federal law, as established by the Supreme Court"), there was no legal basis for the Ninth Circuit to vacate the state-court conviction. See *Renico* v. *Lett,* 130 S. Ct. 1855, 1865-66 (2010) (holding that the Sixth Circuit erred in relying on the standards established by that court rather than the standard established by Supreme Court precedent). And while lower-court analysis may be helpful in determining whether the application is reasonable, e.g., *Price* v. *Vincent,* 538 U.S. 634, 643 n.2 (2003) (noting that "numerous other courts have refused to find double jeopardy violations under similar circumstances" in evaluating whether the state court was objectively unreasonable determining that there was no double jeopardy), the decisions on which the Ninth Circuit relied here did not grapple with the interplay between the non-hearsay purpose that the prosecution presented where the actual statements themselves had not been introduced.

In sum, the question whether the prosecution violates the Confrontation Clause by introducing police testimony to rebut the claim that the police failed to adequately investigate the crime, which allows the jury to infer the content of statements from a non-testifying witness, is an open one before this Court. Because this Court has not resolved these questions—whether the non-hearsay use of such testimony or whether the characterization of the testimony—nevertheless violates the Confrontation Clause, there is no body of law on which to conclude that the decision of the Washington Court of Appeals was objectively unreasonable.

CONCLUSION

The State of Washington's petition for certiorari should be granted.

Respectfully submitted,

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