No. 11-614

IN THE SUPREME COURT OF THE UNITED STATES

BERNIE E. WARNER,

Petitioner,

v.

SANTANA OCAMPO,

Respondent.

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

PETITIONER'S REPLY BRIEF

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THE WRIT SHOULD BE GRANTED

The Ninth Circuit has created and applied a rule of law where the Confrontation Clause is violated if the jury could have inferred the existence and content of testimonial hearsay from otherwise appropriate testimony. The Ninth Circuit rule holds that the inference available from the testimony—of its own force—violated Ocampo's confrontation rights. Because this rule was not clearly established by any holding of this Court, the decision below violated 28 U.S.C. § 2254(d)(1).

The basis for granting the writ and reversing is now clear. First, Ocampo does not deny the existence of a conflict between the Ninth Circuit's decision and the decisions in other circuits that allow similar testimony. Pet. 27-28; Amicus of Michigan and 22 States, at 5-13. Second, Ocampo does not defend the Ninth Circuit's reliance on four of this Court's pre-*Crawford* opinions, which did not clearly establish a confrontation clause violation based simply on whether a jury could infer the content of out-of-court statements. Pet. 17-21. Third, Ocampo does not defend the Ninth Circuit's reliance on cases from other circuits, which cannot and do not define what law has been clearly established by this Court. Pet. 24-27; Amicus 4-9.

Instead of defending the Ninth Circuit's reasoning, Ocampo argues the Ninth Circuit's inference rule is clearly established by *Crawford v. Washington,* 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 813 (2006), and *Bullcoming v. New Mexico,* 131 S. Ct. 2705 (2011). *Crawford,* however, did not establish the rule adopted by the

Ninth Circuit that bars testimony referencing the existence of, or police reliance on, an out-of-court statement if the jury could infer the testimonial hearsay. And, *Davis* and *Bullcoming* do not constitute clearly established federal law as those opinions did not exist at the time of the state court adjudication. Accordingly, the decision below cannot be sustained.

Ocampo, however, seeks to insulate the decision below from review. To do this, he mischaracterizes the state's decision. His strawman argument is that the state courts simply "conclu[ded] that *any* in-court testimony that is not a verbatim reiteration of the out-of-court accusatory assertion does not violate the Confrontation Clause." Brief Opp. 19 (emphasis added). The state court, however, did not issue such a ruling. Instead, the court stated a variety of reasons for why the testimony was proper under the facts of this case. App. 92a-96a.

On a related point, Ocampo argues the record does not support petitioner's showing the detectives' testimony had non-hearsay purposes. Brief Opp. 14. But the trial record shows this clearly. Pet. 6-11; App. 99a-120a. The state court of appeals recognized that the testimony was relevant of its own accord, and at best "implies that Vasquez gave a statement" (App. 94a) that corroborated another witness. The state court recognized the prosecutor had argued the testimony responded to the defense's contention that the police did not corroborate their investigation. App. 95a. The state appellate court also recognized the trial judge agreed the defense had opened the door to testimony about efforts for corroboration. App. 95a. But the state court also found that the

trial judge and Ocampo's counsel sought to draw the proper Confrontation Clause line at testimony that would have elicited Vasquez's actual statements. App. 94a-96a. [1]

Ocampo also seeks to insulate the decision below from review by claiming petitioner is raising a new issue. He refers to petitioner's explanation that the state courts faced generally admissible testimony, including references to Vasquez that directly served the non-hearsay purpose of explaining the course of investigation. The petitioner's explanation of the trial court record does not insert an issue, much less a new issue. The questions presented do not ask if the testimony was admissible because it was offered for non-hearsay purposes. The questions presented relate solely to the Ninth Circuit's rule where it rejected the testimony because of inferences from the testimony, a Confrontation Clause rule not adopted by this Court.

Finally, Ocampo's claim that the petitioner's arguments are "new" ignores the fact that the petitioner has consistently argued that the detectives

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[1] In two boot strap arguments, Ocampo suggests first that the existence of testimonial hearsay can be shown by the absence of a limiting instruction. That point, however, cuts deeply against Ocampo. It shows that, by not asking for an instruction, counsel did not perceive the inferences identified by the Ninth Circuit were testimonial hearsay requiring such an instruction. Similarly, Ocampo points to the prosecutor's closing argument, which referred to Vasquez, but the closing argument is not evidence. It may be prosecutorial misconduct, but there was no objection, and Ocampo has not pursued a due process claim based upon prosecutorial misconduct. Accordingly the prosecutor's argument does not prove anything.

did not testify to hearsay statements. Nowhere has the state or petitioner conceded Ocampo's view that the detectives testified to Vasquez's statements. At most, the state courts could see implications regarding the outlines of Vasquez's statements, a far cry from admitting testimonial hearsay.

A. The Petition Does Not Raise New Issues, Or Make An Argument Unsupported By The Record

Ocampo argues the "Petition is based upon the assertion that the detectives' statements were not admitted for the truth of the matter asserted" and that the record does not support this argument. Brief Opp. 14. Ocampo's argument misses the point. The petitioner has explained this point as part of illustrating that the issue before the state courts was not simply whether an inference can ever violate the Confrontation Clause. Instead, the state court was considering the testimony in the context of the case before it. For this reason, the Petition properly shows that the Ninth Circuit examined the detectives' testimony outside the context in which the state court rulings were made.

With regard to Ocampo's charge that the record does not support the Petition's characterization of the decisions by the state courts, the Petition is fully supported by the trial court transcript and state court of appeals decision. Both show that the detectives' references to Vasquez served non-hearsay purposes and that the testimony never offered Vasquez's out-of-court statements. *See* App. 92a-96a. Even Ocampo's statement of the case

illustrates how the detectives' references to Vasquez were relevant for non-hearsay purposes.

For example, Ocampo quotes from the testimony of Detective Webb. Brief Opp. 8-9. But Detective Webb's testimony "about Vasquez's statements" was about a fact—that an interview with Vasquez had occurred, which was relevant in that context. Moreover, the judge sustained a defense objection, and did not allow Detective Webb to answer the question concerning the content of the statements by Vasquez. Brief Opp. 8. Ocampo quotes where Webb refers obliquely to the Vasquez interview to explain that the police did not show photo montages to other witnesses, because they had received corroborating evidence from Ocampo's co-conspirator, Jose Hernandez, and two other witnesses. But this is an example of the reference to Vasquez being relevant on its face for non-hearsay purposes. Similarly, Detective Ringer testified that the interview had occurred and affected the course of the police investigation. Brief Opp. 9-12. The judge sustained the defense objection, and did not allow Detective Ringer to testify as to the content of Vasquez's statement. Brief Opp. 10-12.

Neither detective presented an out-of-court statement from Vasquez to prove the truth of the matter asserted. Brief Opp. 10-12. As petitioner has consistently asserted, and as the state court determined, the record supports his view that the detectives did not present any testimonial hearsay from Vasquez.

Ocampo's charge that the petitioner is raising a new issue is rebutted by the fact that the State has

consistently asserted that the detectives' testimony did not violate the Confrontation Clause because the detectives did not introduce Vasquez's testimonial hearsay. The trial judge allowed the detectives to testify about the course of their investigation, including the fact that they interviewed Vasquez. App. 100a-119a. The judge, however, sustained objections and prohibited testimony that would have introduced Vasquez's testimonial hearsay. *See, e.g.,* App. 108a-109a, 116a. The judge did not allow testimony about the content of the Vasquez's statements, saying this would avoid a "*Crawford*-related problem." App. 109a.

On appeal, the prosecutor argued to the Washington Court of Appeals that the detectives' testimony did not violate the Confrontation Clause because Ocampo "cannot establish that any statements were admitted, let alone statements that were *testimonial* under *Crawford*." App. Opp. 7 (emphasis in original). And as respondent in the Ninth Circuit, Warner argued that the detectives' testimony did not admit Vasquez's testimonial hearsay. App. Opp. 40 ("There Was No 'Testimonial' Evidence Admitted, As That Term Is Defined In *Crawford*, Based On The Detectives' Reference To Mesial Vasquez's Statement.") (argument heading). While Ocampo has argued that the detectives introduced Vasquez's testimonial hearsay (App. Opp. 2-3 and 24-38), the state court of appeals and the federal district court determined the detectives' testimony did not introduce any testimonial hearsay. *See, e.g.,* App. 47a, 69a-75a, and 92a-97a.

Thus, the Petition's description of the detectives' testimony is not new. Addressing the

context of the detectives' testimony is inherent in the case, and appropriate to consider in reviewing the Ninth Circuit's ruling.

B. Ocampo Fails To Show This Court's Opinions Clearly Established The Rule Applied By The Ninth Circuit

The Ninth Circuit relied on four of the Court's pre-*Crawford* opinions to determine the testimony in this case violated clearly established federal law. App. 22a. The Petition demonstrates that none of these four pre-*Crawford* opinions clearly established the rule applied below. Pet. 17-21. Ocampo makes no attempt to argue that the four pre-*Crawford* opinions clearly established the rule applied by the Ninth Circuit.

The Ninth Circuit also relied on several circuit court opinions to find that the rule applied below was clearly established. App. 25a-28a. The Petition demonstrates not only that the use of such circuit case law violates 28 U.S.C. § 2254(d)(1), but that the existing circuit court case law actually shows the law was not clearly established. Pet. 24-28. Ocampo does not attempt to defend the Ninth Circuit's reliance on circuit court case law.

Ocampo's sole defense of the result at the Ninth Circuit is that "[t]he Ninth Circuit engaged in a straightforward application of *Crawford* and its progeny. . . ." Brief Opp. 17 (heading 3). *Crawford* did not establish the rule applied below, and Ocampo cannot rely on *Davis* and *Bullcoming* as those opinions issued after the state court adjudication in this case. While *Crawford* clearly established that the admission of testimonial hearsay without prior opportunity for cross-examination violates the

Confrontation Clause, even the Ninth Circuit does not rely on *Crawford* for its view. App 23a (recognizing that "nothing in *Crawford* addressed" whether "in-court testimony could trigger Confrontation Clause concerns by describing, but not quoting, an out-of-court statement that would otherwise come within the Confrontation Clause."). *Crawford* involved the admission of the taped out-of-court statements of witness. *Crawford*, 541 U.S. at 38-40. *Crawford* did not involve testimony that implied the outlines of out-of-court statements. Therefore, *Crawford* did not establish the rule applied by the circuit court.

Similarly, *Davis* and *Bullcoming* also involved the admission of actual out-of-court statements. *Davis*, 547 U.S. at 817 (taped recording of 911 call); *Bullcoming,* 131 S. Ct. 2705 at 2709-10 (laboratory report containing a testimonial certification). Like *Crawford,* neither *Davis*, nor *Bullcoming* clearly established that testimony describing an interview, but not admitting actual out-of-court statements, violates the Confrontation Clause. *Davis* and *Bullcoming* do not support the Ninth Circuit's rule. Moreover, 28 U.S.C. § 2254(d)(1) prohibits application of *Davis* and *Bullcoming* because the opinions issued after the state court adjudication in this case. *Greene v. Fisher*, 132 S. Ct. 38 (2011).[2]

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[2] The Washington Court of Appeals issued the decision on the merits of Ocampo's claim on April 18, 2006. App. 79a. The Washington Supreme Court denied review without comment. App. 98a. This Court issued *Davis* on June 19, 2006, and issued *Bullcoming* on June 23, 2011. *See Davis v. Washington*, 547 U.S. 813 (2006); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). *Davis* and *Bullcoming* do not constitute clearly established federal law for purposes of this case as the

Ocampo also argues that he "need not present facts indistinguishable from a prior Supreme Court case" to obtain relief. Brief Opp. 18. Citing *Ramdass v. Angelone,* 543 U.S. 156 (2000), Ocampo argues the state court unreasonably failed to extend *Crawford* to this case. The Ninth Circuit's decision, however, involves far more than application of *Crawford* to slightly different facts. For the first time the Ninth Circuit has determined that testimony violates the Confrontation Clause, even without introducing an out-of-court statement, when the jury could infer the substance of the out-of-court statement. By creating and applying this inference rule, the Ninth Circuit answered an open question that this Court has not yet resolved. *See Mason v. Yarborough*, 447 F.3d 693, 696-97 (9th Cir. 2006) (recognizing it remained an open question whether the Confrontation Clause applies to testimony that does not actually admit an out-of-court statement); *United States v. Meises*, 645 F.3d 5, 21-22 (1st Cir. 2011) (answering this question for the first time in the First Circuit); *United States v. Maher*, 454 F.3d 13, 21 (1st Cir. 2006) (declining to answer the open question at that time).

Therefore, this is a case where the Ninth Circuit extended this Court's precedent in such a novel context as to render the rule it applied less than clearly established. *Premo v. Moore,* 131 S. Ct. 733, 743 (2011). The Ninth Circuit has harmed the legitimate interests of finality, predictability, and comity by invoking a new rule not dictated by precedent. *Stringer v. Black*, 503 U.S. 222, 228 (1992). This severely comprises the purpose of the

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opinions did not exist at the time the Washington Court of Appeals adjudicated the merits of Ocampo's claim.

habeas corpus statute, *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004), and violates 28 U.S.C. § 2254(d)(1).

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be reversed.

RESPECTFULLY SUBMITTED.

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