NO. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In response to defense counsel's contention that the police failed to investigate other suspects, two investigating detectives testified about their interview with a person not called as a witness. The detectives testified that the interview occurred, and described how the interview affected their investigation. They did not testify to any actual out-of-court statements made in the interview. The state courts held that the detectives' testimony did not violate the defendant's confrontation rights because the testimony did not admit out-of-court statements by the interviewed person. The Ninth Circuit granted habeas corpus relief. The questions presented are:

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?

PARTIES

The petitioner is Bernie E. Warner, the Secretary of the Washington Department of Corrections. Mr. Warner is the successor in office to Eldon Vail, who was the respondent-appellee in the Ninth Circuit, and he is substituted pursuant to Supreme Court R. 35.3. The respondent is Santana Ocampo.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Bernie E. Warner, the Secretary of the Washington Department of Corrections, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Ocampo v. Vail,* 649 F.3d 1098 (9th Cir. 2011) (App. 1a-42a). The order denying a timely petition for rehearing *en banc* is unreported. App. 43a. The order of the United States District Court for the Western District of Washington, and the report and recommendation of the United States Magistrate Judge are unreported. App. 45a-48a, and App. 49a-78a. The opinion of the Washington Court of Appeals on direct appeal, and the order of the Washington Supreme Court denying review are unreported. App. 79a-97a, and App. 98a.

JURISDICTION

The court of appeals entered its opinion on June 9, 2011. App. 1a. The court denied a timely petition for rehearing *en banc* on August 16, 2011. App. 43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The sixth amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him...." U.S. Const. amend. VI.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

INTRODUCTION

Santana Ocampo was charged with shooting and killing Julio Morales-Castro during an attempted robbery. One theory of Ocampo's defense was the police failed to adequately investigate other possible suspects, and unreasonably focused on accusing Ocampo. At trial, both the prosecution and defense asked questions causing the investigating detectives to explain why they focused on Ocampo, and not other suspects. The detectives testified

about how they identified and interviewed the three young men who were with Ocampo on the night of the shooting. One of the three young men, Mesial Vasquez, was unavailable for trial. The detectives testified the interview of Vasquez "corroborated" and "verified" other information, allowing the detectives to focus on Ocampo and obtain a search warrant. The testimony, however, did not quote or paraphrase any statements from Vasquez.

On direct appeal, and later in federal habeas review, Ocampo alleged the detectives' testimony about the interview of Vasquez violated the Confrontation Clause. Applying *Crawford v. Washington,* 541 U.S. 36 (2004), the Washington Court of Appeals determined the testimony about the interview of Vasquez did not violate the Confrontation Clause because Vasquez's statements were not admitted at trial. App. 92a-97a. Determining that the detectives at most implied the outline of Vasquez's statements, and did not testify as to the substance of those statements, the state appellate court rejected Ocampo's claim and affirmed the conviction. App. 92a-97a. The district court denied federal habeas corpus relief. App. 44a-78a.

The Ninth Circuit, however, held that the testimony describing the Vasquez interview violated the Confrontation Clause, and that the state court adjudication of this issue was unreasonable under 28 U.S.C. § 2254(d). App. 1a-42a. The Ninth Circuit reached this result by extending this Court's decisions beyond their actual holdings and by relying on newly decided cases from other circuits. The Ninth Circuit's ruling, thus, defies established precedent from this Court and ignores the

deferential nature of federal habeas review under AEDPA.

Furthermore, the Ninth Circuit has adopted a strict rule where an inference must be treated as testimonial hearsay. This rule is not based in rulings by this Court, and it is inconsistent with the view of other circuits facing similar testimony. For these reasons, this Court should grant the Secretary's petition and reverse the Ninth Circuit's judgment.

STATEMENT

A. The Murder Of Morales-Castro And The Police Investigation

On the night Morales-Castro died, Vela agreed to drive Ocampo, Hernandez, and Vasquez to a local grocery store to buy beer for a party. After Vela parked his van, Hernandez, Ocampo, and Vela walked through a back alley to the store. Outside the store, Vela began talking with a girl, and Ocampo and Hernandez continued walking. As they walked, Ocampo and Hernandez decided to steal a car they saw parked near a pool hall. Ocampo told Hernandez he had a gun, and would keep a lookout while Hernandez stole the car. But as Hernandez was attempting to steal the car, Morales-Castro exited the pool hall and walked toward the car. Ocampo approached Morales-Castro, asking for money to catch the bus. Morales-Castro said he had no money, and attempted to drive away. As he did, Ocampo pulled out his gun and shot Morales-Castro once in the head, killing him. Ocampo and Hernandez ran back to the store and met up with Vela. The two told Vela, "Come on, come on, we got to go," and the three ran to the van. As they drove

away, Ocampo said, "Yeah, we just smoked this fool." Later, Ocampo bragged about the shooting to others.

During the police investigation, witnesses reported seeing three Hispanic males running from the scene, and a blue van driving away from the area. The witnesses described the three males as gang members, and described the area as a common hangout for a local gang. Detectives showed photographs of suspected gang members to the witnesses, who identified Hernandez as one of the males seen running from the scene. When detectives interviewed Hernandez, he indentified Ocampo as the person who shot Morales-Castro. Hernandez also identified Vela as the third male seen running from the scene of the shooting. When the detectives contacted Vela, he was reluctant to provide information for fear of gang retaliation, but Vela admitted giving Hernandez and two of Hernandez's friends a ride in his van. According to detectives, Vela readily identified Ocampo as being in the van. The detectives also interviewed Vasquez after learning he was the fourth person in the van. After Vasquez corroborated information received from Hernandez and Vela, the detectives focused their investigation on Ocampo. They obtained a warrant to search Ocampo's house, and subsequently arrested Ocampo.

B. The State Trial Court Proceedings

The prosecution charged Ocampo with first degree murder. Hernandez testified in detail about Ocampo shooting Morales-Castro during the attempt to steal the car. Vela also testified about the events

prior to and after the shooting. Vasquez, however, did not appear at trial, having returned to Mexico.

One theory of Ocampo's defense was that the police negligently and recklessly investigated the murder by focusing on Ocampo and failing to investigate other suspects. App. 87a-88a. This led two detectives, Ringer and Webb, to testify about Webb's interview of Vasquez. But, consistent with the trial judge's rulings on defense counsel's objections, the detectives did not testify to any statements made by Vasquez.

Detective Ringer mentioned the Vasquez interview first when he testified about steps taken to identify the three males seen running from the scene of the shooting. Ringer testified that when police showed photographs of suspected gang members to witnesses from the crime scene, the witnesses made identifications from the photographs, but some of the identifications were of people not connected to the shooting. Ringer explained:

> A. As we investigated further, we found that one of the photographs, Jose Hernandez's identification of him, was accurate, but then some of the others were people that they knew but had not actually been involved in the shooting.
>
> Q. Okay. How were you able to determine that?
>
> A. Well, eventually Jose Hernandez was arrested, he gave a statement. Later we contacted Baldemar Vela, and he gave a statement that verified what Jose

Hernandez had said. And still later, Mesial Vasquez was interviewed and he also verified the other two. And these excluded several individuals that had been named that night.

Q. So he verified – Baldemar and he verified Jose Hernandez's statement?

A. That's my understanding, yes.

App. 102a.

Detective Ringer went on to explain that they had arrested Hernandez and obtained a search warrant of Ocampo's home based on Hernandez's statement. App. 102a-103a. On cross-examination, defense counsel attempted to suggest the investigation was negligent because the detectives decided not to investigate other suspects whose photographs had been identified by witnesses:

Q. Now, some of the photographs that were identified by these people later turned out, at least according to your investigation, to not be involved in this case, right?

A. That's correct.

Q. And the reason you say you knew that was because of a statement given by Jose Hernandez, right?

A. That was just part of it. Statement given by Jose Hernandez, statement given by Baldemar Vela, statement by Mesial Vasquez.

Q. Initially the first statement you had was Jose Hernandez, right?

A. First one, yes.

App. 104a-105a.

Later in cross-examination, defense counsel asked Detective Ringer if he had "any suspicion or any need in your mind to corroborate the story" Hernandez had given. App. 105a. Detective Ringer said, "I personally need to corroborate as much as you can." App. 105a.

On redirect examination, the prosecutor followed up on how Detective Ringer sought "corroboration." He asked the detective if he tried to corroborate Hernandez's participation in the shooting:

Q. Okay. Were you able to corroborate that [Hernandez] actually was a participant?

A. Yes.

Q. How were you able to do that?

A. Through his own -- his own admissions, through Baldemar Vela, through Mesial Vasquez.

Q. What do you mean through Mesial Vasquez?

A. My understanding, statement he gave also indicated that [Hernandez] was present.

Q. Okay. And Mesial Vasquez would be the fourth person in the van?

A. That's correct.

App. 107a.

The defense did not object until the prosecutor asked Detective Ringer if he took steps to corroborate Ocampo's presence in the van. Anticipating the question could introduce Vasquez's actual statements, defense counsel objected before Detective Ringer answered. App. 108a. In a side-bar, the prosecutor argued that defense counsel had stated that there had been no efforts to corroborate. The trial judge recognized the potential *Crawford* problem and ruled he would not admit Vasquez's out-of-court statements. App. 109a. Consistent with the judge's ruling, the prosecutor and detective did not refer to Vasquez's out-of-court statements. The prosecutor asked if Detective Ringer was able to corroborate Hernandez's and Ocampo's presence at the scene, and Ringer answered "yes." App. 109a. The prosecutor then asked if Detective Ringer was able to corroborate the presence of other persons, and he answered, "Not as listed, no." App. 110 a.

A reference to the Vasquez interview next came up when the lead detective, Detective Webb, testified that he had interviewed Vasquez after Hernandez had identified Vasquez as an occupant of Vela's van on the night of the shooting. Detective Webb testified that Vasquez was reluctantly helpful and that Vasquez told him the facts of what had happened, but Detective Webb did not relate any of Vasquez's actual statements to the jury. When the prosecutor started to ask, "Were those facts consistent with --," the defense objected and the trial judge sustained the objection. App. 113a-114a.

Later, in testifying about the search of Ocampo's house, the prosecutor asked Detective Webb whether the police were looking for specific

clothing and how they obtained a list of specific clothing. Detective Webb said, "We solicited information from both Mr. Hernandez and Mr. Vasquez as to what everybody might have been wearing that night." App. 114a-115a. Detective Webb, however, never repeated any out-of-court statements from Vasquez about the clothing.

As in the cross-examination of Detective Ringer, defense counsel attempted to challenge the adequacy of the investigation that led to identifying Ocampo as a suspect. In particular, defense counsel asked Detective Webb whether, after Hernandez identified Ocampo as the shooter, Detective Ringer followed up on this identification by showing the witnesses from the crime scene a photograph of Ocampo. Detective Webb said he did not believe Detective Ringer did so. App. 115a-116a. On redirect examination, the prosecutor followed up this point:

> Q. (By Ms. Platt) Is there a reason you didn't go back later and show photo montages with Santana Ocampo to witnesses?
>
> A. I would say we had a coconspirator that had confessed his involvement and two additional witnesses besides that person who implicated the defendant and we would focus then on that.
>
> Q. After you have that degree of evidence, is it unusual for you to not go around and interview witnesses you have already interviewed several times?

A. No, because witnesses can be – perception of things can oftentimes be confused.

App. 116a-117a.

On recross-examination, the defense again attempted to discredit the police for not following up with the crime scene witnesses to corroborate Hernandez's statements. The prosecutor followed up on this issue on further redirect examination:

Q. Detective Webb, after Jose Hernandez made his statement to you, did you attempt to corroborate any information that he gave you as far as who was the shooter on August 10th?

A. Yes.

Q. And how did you do that?

A. Mesial Vasquez, passenger in the car that transported them to the 63rd and McKinley area, and the driver of the vehicle, Mr. Baldemar Vela, I believe is his last name, V-e-l-a. He was the driver of the vehicle that basically confirmed.

App. 117a. The defense did not object to the question or move to strike the answer.

C. The State Appellate Court Proceedings

Ocampo appealed from his conviction to the Washington Court of Appeals. Among his claims, Ocampo alleged Detectives Ringer's and Webb's testimony violated the Confrontation Clause. As a general matter, the court recognized that one of Ocampo's defenses was to attack the investigation. App. 87a-88a. Applying *Crawford v. Washington,*

541 U.S. 36 (2004), the Washington Court of Appeals rejected the claim. App. 92a-97a.

First, it addressed Detective Webb's testimony that Vasquez was reluctantly helpful. The court ruled there was no violation because none of Vasquez's statements were actually admitted in the testimony. App. 93a ("the detective did not testify to the substance of any statements Vasquez made."). Second, it addressed Detective Ringer's testimony concerning the conduct of the investigation after the witnesses identified Hernandez from photographs. The court recognized the "testimony implies that Vasquez gave a statement to law enforcement corroborating Hernandez's statement of those involved in the shooting." App. 94a. However, both defense counsel and the trial judge were keenly aware of *Crawford*, and while the judge allowed testimony about the fact of the Vasquez interview to respond to the corroboration issue raised by the defense, the judge did not allow testimony that would introduce Vasquez's actual statements. App. 94a-96a. There was no confrontation violation because the detective's "testimony only implied the outlines of Vasquez's statement." App. 96a.

The Washington Supreme Court denied review without comment on January 3, 2007. App. 98a.

D. Federal Habeas Corpus Proceedings

1. The District Court's Decision

Ocampo filed a habeas corpus petition under 28 U.S.C. § 2254. Among his claims, Ocampo alleged the detectives' testimony regarding the Vasquez interview violated the Confrontation Clause.

The magistrate judge recommended the district court deny relief. App. 49a-78a. The magistrate judge determined Detective Webb's testimony did not violate the Confrontation Clause because "[t]here was no testimony as to the substance of any statements made by Mr. Vasquez and defense had the ability to cross examine the detective." App. 69a. The magistrate judge concluded, "As no out of court statements made by Mr. Vasquez were entered into the record through the detective, the court agrees that petitioner's right to confrontation was not violated by this testimony." App. 69a. The magistrate judge similarly rejected Ocampo's challenge to Detective Ringer's testimony, concluding the state court did not unreasonably apply clearly established federal law when it determined Detective Ringer's testimony did not violate the Confrontation Clause. App. 74a-75a.

The district court adopted the report and recommendation, and denied relief. App. 47a ("As detailed by the Magistrate Judge, there was no testimony as to the substance of any statements made by this potential witness and Petitioner had the opportunity to cross examine the testifying law enforcement officer.").

2. The Ninth Circuit's Decision

The Ninth Circuit determined Ocampo was entitled to habeas relief on his confrontation claim. App. 1a-42a. The Ninth Circuit determined the state court had correctly identified *Crawford* as the controlling authority for Ocampo's claim, but the state court unreasonably applied this authority to the facts of Ocampo's case. App. 19a-42a. Despite the fact that the detectives' testimony did not quote

or paraphrase any of Vasquez's out-of-court statements, and without regard to how the testimony was offered to respond to defense counsel's challenge to the adequacy of the detectives' investigation, the Ninth Circuit determined Vasquez's "statements" were admitted at trial in violation of the Confrontation Clause. App. 21a-32a.

Rejecting the state court's view of the record, the Ninth Circuit concluded Detective "Ringer's testimony indisputably conveyed some of the critical substance of Vasquez's statements to the jury, in violation of the Confrontation Clause, even though his testimony was not detailed." App. 21a. The Ninth Circuit also held "the state appellate court's factual understanding regarding the limited nature of Webb's testimony about Vasquez was objectively unreasonable under AEDPA, and that, reasonably understood, Webb's testimony concerning Vasquez violated the Confrontation Clause." App. 21a.

The Ninth Circuit concluded "before *Crawford*, it was clearly established that testimony from which one could determine the critical content of the out-of-court statement was sufficient to trigger Confrontation Clause concerns…." App. 21a. The circuit court cited four pre-*Crawford* decisions to conclude this Court "treated out-of-court statements as statements triggering the protections of the Confrontation Clause, even if the in-court testimony described rather than quoted the out-of-court statements…." App. 22a. "It was therefore clearly established Supreme Court law before *Crawford* that in-court descriptions of out-of-court statements, as well as verbatim accounts, are 'statements' and can violate the Confrontation Clause, if the requisite requirements are otherwise met." App. 22a. The

court concluded nothing in *Crawford* changed this proposition. App. 23a.

The Ninth Circuit's conclusion, however, relied on its view that "several other circuits have applied the principle that testimony communicating the substance of absent witnesses' statements can run afoul of the Confrontation Clause even when there is no verbatim account of the out-of-court statement." App. 25a. Based on these circuit court decisions, the Ninth Circuit concluded it was an unreasonable application of *Crawford* for the state court to "regard summarizing – or 'outlining' – the substance of out-of-court testimonial statements, directly or in a way from which 'the nature of the statement ... [can be] readily inferred,' *see Favre* [*v. Henderson*], 464 F.2d [359,] 362 [(5th Cir. 1972), as incapable of violating the Confrontation Clause." App. 28a. The Ninth Circuit then articulated its rule for finding a constitutional violation in the detectives' testimony as follows: "if the substance of an out-of-court testimonial statement is likely to be inferred by the jury, the statement is subject to the Confrontation Clause." App. 28a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's ruling vacates a state court murder conviction based upon a Confrontation Clause rule that this Court has never established. When detectives testified about how an interview of Vasquez affected their investigation of Ocampo, they testified to the fact and effect of the interview, and addressed defense counsel's challenge to the adequacy of the investigation. The detectives, however, did not introduce any actual out-of-court statement. The trial judge and the state appellate

court drew the correct Confrontation Clause line by allowing the detectives to refer to their reliance on the interview, while sustaining objections to the admission of any actual out-of-court statement. Consequently, the state appellate court reasonably determined no testimonial hearsay was admitted, and there was no violation of Ocampo's confrontation rights.

However, the Ninth Circuit's new rule precludes testimony referring to the fact of an interview whenever the substance of an out-of-court statement "is likely to be inferred" from testimony, even if the testimony does not quote or paraphrase an out-of-court statement. The Ninth Circuit's rule is particularly troubling when combined with its ruling that the state courts had an unreasonable view of the facts so that every reference to the Vasquez interview must be viewed as testimonial hearsay, regardless of whether there was a non-hearsay purpose of responding to the defense's challenge to the reasonableness of the investigation.

This Court's pre-*Crawford* opinions do not support the Ninth Circuit's conclusion that this rule regarding references to an investigatory interview is clearly established federal law. None of the Court's four opinions cited by the Ninth Circuit involve testimony that describes an interview without admitting an actual out-of-court statement. Thus, under existing case law from this Court, the Ninth Circuit should have recognized that the state court could reasonably conclude that the testimony here, responding to defense attacks on the adequacy of the investigation, was not "testimonial hearsay" when it did not introduce any actual out-of-court statement.

The Ninth Circuit decision further calls for this Court's review because it relies on circuit cases, contrary to this Court's repeated admonition that circuit court decisions cannot clearly establish federal law for purposes of 28 U.S.C. § 2254(d). Moreover, the circuit court opinions show there is not universal agreement regarding this issue. The lower courts have often disagreed with regard to testimony that merely describes an out-of-court statement without offering the actual out-of-court statement into evidence.

Finally, the Ninth Circuit's ruling should be reviewed because it fails to apply the deference owed under 28 U.S.C. § 2254(d). The Ninth Circuit's extension of this Court's decisions are contrary to this Court's repeated holdings that habeas corpus relief is available only when the state court adjudication is objectively unreasonable. The Ninth Circuit has failed to give proper deference to the state court determination of the facts and the law. The Court should grant certiorari and reverse.

A. This Court's Decisions Do Not Establish That Non-Hearsay Testimony That Describes An Interview, But Does Not Introduce An Out-Of-Court Statement, Violates The Confrontation Clause

The Ninth Circuit correctly recognized "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." App. 23a. The court, however, concludes that four opinions from this Court show that it was "clearly established Supreme

Court law before *Crawford* that in-court descriptions of out-of-court statements, as well as verbatim accounts, are 'statements' and can violate the Confrontation Clause if the requisite requirements are otherwise met." App. 22a (citing *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Moore v. United States*, 429 U.S. 20 (1976); *Williamson v. United States*, 512 U.S. 594 (1994)).

The Ninth Circuit's rule for the Confrontation Clause goes beyond this Court's rulings in two respects. First, the four cases from this Court do not involve testimony that describes an interview without quoting or paraphrasing an out-of-court statement. Second, the four cases do not address testimony about an out-of-court statement that serves non-hearsay purposes. Because this Court has never found a Confrontation Clause violation absent the admission of an out-of-court statement offered to prove the truth of the matter asserted, it was not unreasonable for the state courts to conclude that the testimony did not violate the Confrontation Clause because it did not quote or paraphrase Vasquez's statements. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring) (Confrontation Clause is implicated only by the introduction of statements).

1. The Four Supreme Court Cases Cited By The Ninth Circuit Involve Recitation Of Out-Of-Court Statements Offered For The Truth Of The Matter Asserted

The Ninth Circuit relies first on *Idaho v. Wright*, 497 U.S. 805 (1990), describing the testimony in that case as "allowing a pediatrician to describe a child's answers to his questions about

sexual abuse from 'notes [that] were not detailed.'" App. 22a (quoting *Wright*, 497 U.S. at 811). But the Ninth Circuit mischaracterizes the testimony and holding in *Wright*. The pediatrician's notes of the interview were "not detailed," but the pediatrician's testimony provided a detailed presentation of the out-of-court statements, not a mere description that the interview had occurred. The pediatrician testified:

> Q. . . . what was her response to the question "Do you play with daddy?"
>
> A. Yes, we play – I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.
>
> Q. And 'Does daddy play with you?' Was there any response?
>
> A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.
>
> Q. And then what did you say and her response?
>
> A. When I asked her 'Does daddy touch you with his pee-pee,' she did admit to that. When I asked, 'Do you touch his pee-pee,' she did not have any response.
>
> * * *
>
> A. . . . She did, however, say that daddy does do this with me, but does it a lot more with my sister than with me.

> Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?
>
> A. That was a volunteered statement. . . .

Wright, 497 U.S. at 810-11.

Unlike the Ocampo trial, *Wright* involved actual out-of-court statements admitted for the truth of the matter asserted in the statements. *Wright* did not clearly establish a rule applicable to the detectives' testimony about the Vasquez interview. In particular, *Wright* does not set forth the Ninth Circuit's rule that applies the Confrontation Clause when a jury can infer the probable content of an out-of-court statement. [1]

The Ninth Circuit cited *Ohio v. Roberts*, 448 U.S. 56 (1980), for the general rule that the Confrontation Clause and the hearsay rules "'protect similar values ... and stem from the same roots.'" App. 22a (quoting *Roberts*, 448 U.S. at 66). *Roberts*, however, involved the admission of a transcript of prior statements provided by a witness in a preliminary hearing. *Roberts*, 448 U.S. at 59-60. The statements were offered for the truth of the matter asserted. *Roberts* does not address the applicability of the Confrontation Clause to inferences drawn from non-hearsay testimony that

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[1] Moreover, the hearsay in *Wright* may not be "testimonial" under *Crawford*, as the out-of-court statements were made not to the police, but to a pediatrician conducting a medical examination of the victim. *Wright*, 497 U.S. at 809-11. The continuing value of *Wright* under 28 U.S.C. § 2254(d) is suspect at best because the holding in *Wright* concerned the admissibility of hearsay under the *Roberts* reliability standard.

describes an interview, but does not admit an actual out-of-court statement.

Nor does *Moore v. United States*, 429 U.S. 20 (1976) support the rule created by the Ninth Circuit. *Moore* also involved the admissibility of express out-of-court statements, not inferences. The trial judge in *Moore* relied on an out-of-court declaration for the truth of the matter asserted in the declaration. *Id.* at 21. *Moore* contains no indication that it resolved an issue of constitutional law. Rather, *Moore* appears to concern the rules of evidence governing hearsay in federal prosecutions.

Finally, the Ninth Circuit cited to *Williamson v. United States*, 512 U.S. 594 (1994). As with the other cases, *Williamson* involved the admission of the declarant's actual statements for the truth of the matter asserted. *Id.* at 596-97. Moreover, the Court declared it was not addressing "Williamson's claim that the statements were also made inadmissible by the Confrontation Clause. . . ." *Id.* at 605. Thus, *Williamson* did not establish the constitutional rule applied by the Ninth Circuit in this case.

Contrary to the Ninth Circuit's decision, this Court has applied the Confrontation Clause to bar testimony only if a statement is admitted to prove the truth of the matter asserted. The Court has not extended this rule to bar general references to an out-of-court statement when the general reference has a non-hearsay purpose. As none of Vasquez's out-of-court statements were admitted for the truth of the matter asserted, the detectives' testimony about the Vasquez interview did not violate a holding of this Court.

2. Clearly Established Federal Law Provides That A Statement Is Hearsay Only If Offered For The Truth Of The Matter Asserted

The Ninth Circuit's decision also conflicts with the law regarding what constitutes testimonial hearsay under the Confrontation Clause. Even when actual out-of-court statements are explicitly admitted, if they are not admitted to prove the truth of the declarant's assertions, they are not hearsay in violation of the Confrontation Clause. *Tennessee v. Street*, 471 U.S. 409, 413-14 (1985); *see also Anderson v. United States*, 417 U.S. 211, 220 n. 8 (1974) ("[E]vidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement."); *Nat'l Bank of the Metropolis v. Kennedy*, 84 U.S. 19, 25 (1872) (testimony about conversations offered to prove the conversation occurred are not hearsay).

In *Street*, the prosecutor alleged Street, Clifford Peele, and two other men murdered the victim. *Street,* 471 U.S. at 411. After the prosecutor admitted evidence of Street's confession to the murder, Street contended the confession was false and derived from a confession by Peele. *Id.* To rebut this contention, the prosecutor admitted Peele's confession. *Id*. at 411-12. Rejecting Street's argument that the admission of Peele's confession violated the Confrontation Clause, the Court held, "The *non-hearsay* aspect of Peele's confession - not to prove what happened at the murder scene but to prove what happened when respondent confessed – raises no Confrontation Clause concerns." *Id*. at 414 (emphasis in original).

The testimony in Ocampo's case is similar to *Street*. Detectives Ringer and Webb testified about the Vasquez interview to explain why, after Hernandez's identification of Ocampo, they did not show Ocampo's photograph to the crime scene witnesses. Similarly, testimony that Vasquez provided information about what clothing to look for in a search was not offered to prove Ocampo wore certain clothing, but to explain the reasonableness of the investigation. Testimony that mentioned the Vasquez interview explained why the detectives focused their investigation on Ocampo, rather than other suspects, and rebutted the defense suggestion that the detectives failed to follow up on other possible leads.

3. The Court's Grant Of Certiorari In *Williams v. Illinois* Shows That There Is Not Clearly Established Federal Law On This Issue

This Court is currently considering *Williams v. Illinois*, No. 10-8505, where the question presented is "Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause." Petitioner Williams cites the Ninth Circuit's decision in *Ocampo*, *Idaho v. Wright*, and *Moore v. United States* to argue the expert's testimony violated the Confrontation Clause even without conveying out-of-court statements. *See* Petitioner's Merits Brief, No. 10-8505, at 15-18. Respondent Illinois argues – similar to the Washington Court of Appeals – that no out-of-court statements were admitted in Williams' trial. *See* Brief in Opposition, No. 10-8505. The

issue and arguments in *Williams* illustrate how this Court's decisions do not clearly establish that the testimony against Ocampo violated the Confrontation Clause. Instead, *Williams* shows how the rule applied by the Ninth Circuit is not "clearly established federal law."

B. The Circuit Court Case Law Does Not Clearly Establish The Rule Fashioned By The Ninth Circuit

The Ninth Circuit cited several circuit court cases to shore up its conclusion that the detectives' testimony violated the Confrontation Clause. But a circuit court decision does not constitute clearly established federal law under 28 U.S.C. § 2254(d)(1). *Renico v. Lett,* 130 S. Ct. 1855, 1866 (2010). Consequently, a failure to apply a circuit court "decision cannot independently authorize habeas relief under AEDPA." *Id.* Nor can circuit court decisions be used to "illuminate" this Court's precedent if the holdings of the Court do not establish the rule applied by the circuit courts. *Id.* By using circuit case law to grant relief, the Ninth Circuit violated 28 U.S.C. § 2254(d)(1).

Beyond the Ninth Circuit's erroneous reliance on circuit court cases, the cases cited by the Ninth Circuit, along with other circuit court decisions, show that the circuits are divided in evaluating police testimony about an investigatory interview that does not introduce an out-of-court statement.

1. The Circuit Courts Cases Cited By The Ninth Circuit Confirm The Law Is Not Clearly Established

Just five years ago, the Ninth Circuit recognized the rule in this case was not clearly

established. *See Mason v. Yarborough*, 447 F.3d 693, 696 (9th Cir. 2006). In *Mason,* the court recognized "there is a real question whether the Confrontation Clause protections apply to" a detective's testimony about an investigative interview if the testimony does not introduce the actual out-of-court statements. *Id.* at 696. A detective testified that he had interviewed and arrested Mason's co-defendant. Mason argued that the testimony revealed the content of the interview. The Ninth Circuit found the detective's testimony "did not mention Mason at all" and therefore it was not clear that the co-defendant "was a 'witness against' Mason as that term has been defined by the Supreme Court." *Id.* The *Mason* court read *Crawford* as "concluding that "'witnesses' against the accused … [means] those who 'bear testimony,'" and that testimony, "is typically, '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id*. (internal citation omitted). The court noted that because the co-defendant's words were never admitted into evidence, "he could not 'bear testimony' against Mason." Id. Senior Circuit Judge Wallace concurred: "It is not an unreasonable application of federal law, as set out by *Crawford*, to hold that a person did not 'bear testimony' when none of his words were ever introduced into evidence. *Id*. at 697 (Wallace, J., concurring).[2]

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[2] Judge Wallace explained: "Under the applicable Supreme Court precedents, [the co-defendant] was not a 'witness against' Mason, and thus Mason's allegations fall entirely outside of the protections of the Confrontation Clause of the Sixth Amendment." *Mason*, 447 F.3d at 696-97 (Wallace, J., concurring). "[B]ecause the content of [the] statement was never admitted into evidence, the California Court of Appeals

The Ninth Circuit discarded the *Mason* ruling in a footnote, App. 24a n. 13, and relied instead on the First Circuit's recent decision in *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011) to conclude that "no verbatim account" is required to violate the Confrontation Clause. But the First Circuit in *Meises* held *for the first time* that *Crawford*'s rule against testimonial hearsay applied even if the out-of-court declarant's actual statements were not admitted. *Meises,* 645 F.3d at 21-22. The First Circuit explained how this had previously been an open question in that circuit:

> "In *United States v. Maher*, 454 F.3d 13 (1st Cir. 2006), we declined to discuss *Crawford's* applicability to 'testimony from which… the jury would necessarily infer that the declarant had said X, but which did not itself quote or paraphrase the declarant's statements.' *Id.* at 20-21. We observed that the defendant in that case had made 'no effort to explain why *Crawford* should be read to extend' to such statements. *Id.* at 21."

Meises, 645 F.3d at 21 (quoting *United States v. Maher*, 454 F.3d at 20-21).

Meises contradicts the Ninth Circuit's conclusion that clearly established federal law supported its rule. Similarly, two other cases cited by the Ninth Circuit illustrate how the law on this issue is not settled. In *Taylor v. Cain*, 545 F.3d 327, 334-36 (5th Cir. 2008), the court recognized "there is no United States Supreme Court case with nearly

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did not unreasonably apply Supreme Court precedents when it held that Mason's claim lacked merit because 'Alder Fenton's confession was not admitted into evidence.'" *Id.* at 697.

identical facts," but cited *Ohio v. Roberts* and circuit cases to find a confrontation error. In *Ryan v. Miller*, 303 F.3d 231, 248 (2nd Cir. 2002), the court acknowledged there was no Supreme Court ruling directly on point.

Contrary to the Ninth Circuit's rule, it is not clearly established in the circuit courts that the Confrontation Clause treats the detectives' testimony as testimonial hearsay. *See Smith v. McKee*, 598 F.3d 374, 387 (7th Cir. 2010) (recognizing this "is a somewhat murky area of the law."); *United States v. Cromer*, 389 F.3d 662, 674 (6th Cir. 2004) (recognizing the courts are just starting to resolve what constitutes "testimonial" hearsay).

2. The Ninth Circuit Rule Conflicts With The Decisions Of Other Courts

The Court should grant review because other circuit courts have held that testimony similar to the testimony in Ocampo's trial is not testimonial hearsay. The Seventh Circuit determined a postal inspector's testimony about interviews conducted during an investigation did not present testimonial hearsay, even though the inspector testified about the interviews having occurred and the findings of his investigation. *United States v. Albiola*, 624 F.3d 431, 441 (7th Cir. 2010). Like the Washington courts, the Seventh Circuit relied on the fact that the inspector's testimony "does not contain any out-of-court statement, so the prohibition against hearsay is not implicated here." *Id.* at 441. The inspector "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" a particular fact.

Id.; *c.f. Jones v. Bassinger*, 635 F.3d 1030, 1047 (7th Cir. 2011) (granting relief from extensive out-of-court statements, but indicating the police could have properly testified about acting on information received in an interview).

The Sixth Circuit reached a result similar to the Washington courts when it reviewed a police officer's testimony that he began investigating the defendant for drug crimes because of information received from a confidential informant, including information used to obtain a search warrant. *United States v. Cromer*, 389 F.3d at 674-76. The Sixth Circuit determined the officer's testimony did not violate the Confrontation Clause because the testimony "did not even put before the jury any statements made by the CI." *Id.* at 675-76. The Eighth Circuit determined an officer's testimony that he was present at interview and heard no intimidating statements was not hearsay "inasmuch as [the] testimony did not recount an out-of-court statement, it could not be hearsay." *United States v. Wilson*, 665 F.2d 825, 830 (8th Cir. 1981).[3]

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[3] The circuit courts recognize such testimony may be admissible for non-hearsay purposes. For example, a statement was not hearsay when offered to explain why an agent's notes omitted certain information. *United States v. Vasquez-Rivera*, 407 F.3d 476, 482 (1st. Cir. 2005). Testimony about a confidential informant's statement offered to explain why the officers were at the defendant's home was not hearsay. *United States v. Brooks*, 645 F.3d 971, 977 (8th Cir. 2011). Testimony offered to show why an agent believed the informant was credible did not violate the Confrontation Clause. *United States v. Christie*, 624 F.3d 558, 569 (3rd Cir. 2010). Testimony produced in response to defense cross-examination and offered to explain why detectives conducted certain interviews did not

C. The Ninth Circuit's Decision Fails To Apply The Deferential Standards Imposed By 28 U.S.C. § 2254

As shown above, a fair-minded jurist reviewing the record could reasonably find no confrontation error in this case. The detectives' testimony did not introduce out-of-court statements, and the testimony explained the course of the detectives' investigation to rebut the defense's contention that the detectives had conducted an inadequate investigation. When viewed in the context of the case, a fair-minded jurist could reasonably determine the references to the Vasquez interview were not testimonial hearsay and did not violate the Confrontation Clause.

The Ninth Circuit's decision to the contrary violated 28 U.S.C. § 2254(d). It extended this Court's holdings to announce and apply a constitutional rule that is not a holding of this Court. It violated the statute because it failed to provide the proper level of deference when evaluating the state court adjudication of Ocampo's claim.

1. The Ninth Circuit Decision Extends This Court's Holdings To Create And Apply A New Rule

"The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." *Harrington v. Richter*, 131 S. Ct. 770, 783 (2011). "[A] federal court may grant habeas relief on a claim 'adjudicated on the merits' in

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violate the Confrontation Clause. *United States v. Jiminez*, 564 F.3d 1280, 1286-88 (11th Cir. 2009).

state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). The applicant must show the state court decision was contrary to or an unreasonable application of "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

The fact that a rule may be necessarily implied by a holding of the Court is not sufficient to make the rule clearly established federal law under 28 U.S.C. § 2254(d)(1). *Kane v. Espitia*, 546 U.S. 9, 10 (2005); *Mickens v. Taylor*, 535 U.S. 162 (2002). Rather, if this Court has not addressed the issue in a holding, the rule is not clearly established, and the state court adjudication cannot be an unreasonable application of clearly established federal law. *Carey v. Musladin*, 549 U.S. 70 (2006).

These limitations on relief under AEDPA are similar to, albeit distinct from, the limitations imposed by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *See Horn v. Banks,* 536 U.S. 266, 272 (2002); *Williams*, 529 U.S. at 412. Both AEDPA and the *Teague* doctrine prohibit relief unless the applied rule was clearly established, but AEDPA extends the principles by requiring the rule to be clearly established by a holding of this Court. *Williams,* 529 U.S. at 412. These limits serve to protect the reasonable judgments by state courts, and the State's interest in the finality of judgments.

Beard v. Banks, 542 U.S. 406, 413 (2004). The limits reflect the primary function of habeas corpus is "to ensure that state convictions comport with the *federal* law that was established at the time petitioner's conviction became final." *Sawyer v. Smith*, 497 U.S. 227, 239 (1990) (emphasis in original). The principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Id*. at 234.

The strict limits protect "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990). Under the similar *Teague* analysis, a rule is not clearly established unless reasonable jurists would have felt compelled by existing precedent to grant the relief required by the rule. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Application of an old rule in a new setting, or in a manner not dictated by precedent, constitutes the creation of a new rule. *Stringer v. Black*, 503 U.S. 222, 228 (1992). Even if application of the existing rule in the novel situation may be considered "governed" by prior precedent, the new application of the rule still creates a "new rule." *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

Extending precedent so as to apply an old rule in a novel setting does as much harm to the interests of finality, predictability, and comity as does the invocation of a new rule that was not dictated by precedent. *Stringer*, 503 U.S. at 228. The same holds true under AEDPA. Invalidating the state court adjudication because the state court did not

extend this Court's precedent in a manner that this Court has not yet done would severely comprise the habeas corpus statute. As this Court recognized, "Section 2254(d) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (citing *Teague v. Lane*, *supra*).

The Ninth Circuit decision is precisely the type of extension of this Court's rulings that the Court has repeatedly rejected.[4] *Crawford* provides a rule governing the admission of testimonial hearsay offered for the truth of the matter asserted, but the Court has never held that the Confrontation Clause is violated when the testimony merely suggests the content of, and does not actually admit, the out-of-court statement. Nor has the Court addressed how *Crawford* applies to such testimony where the reference to an out-of-court statement is presented not to prove the truth of the matter asserted, but instead has a non-hearsay purpose.

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[4] *Thaler v. Haynes*, 130 S. Ct. 1171, 1173-75 (2010) (prior holdings on *Baston* claims did not clearly establish a rule that a judge must personally observe the juror's demeanor before concluding the demeanor provides a race neutral reason for excluding the juror); *Beghuis v. Smith,* 130 S. Ct 1382, 1392-96 (2010) (prior decisions did not clearly establish a specific method or test state courts must use in reviewing a claim that the jury was not drawn from a fair cross section of the community); *Renico v. Lett*, 130 S. Ct. 1855, 1865-66 (2010) (prior precedent did not clearly establish a particular three-prong standard for determining whether a trial court abused its discretion in declaring a mistrial on a hung jury)

The Court should grant the writ of certiorari because the Ninth Circuit created and applied a new rule by extending this Court's precedent, and by relying on circuit case law to determine this novel extension of the law was clearly established. In doing so, the court violated 28 U.S.C. § 2254(d).

2. The Ninth Circuit Did Not Give Proper Deference To The State Court Adjudication Of This Claim

Federal courts owe a high level of deference to state court adjudications under 28 U.S.C. § 2254(d). *See*, *e.g.*, *Brown v. Payton*, 544 U.S. 133, 141-47 (2005); *Bell v. Cone*, 543 U.S. 447, 455 (2005). The statute "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). The statute requires the petitioner show not only that a constitutional error occurred, but that the state court decision on the claim of constitutional error was objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). This is a "highly deferential standard for evaluating state-court rulings," that is "'difficult to meet.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (quoting *Harrington,* 131 S. Ct. at 786).

To obtain relief under the statute, the petitioner bears the heavy burden to show "there was no reasonable basis for the state court to deny relief." *Harrington,* 131 S. Ct. at 784. Federal habeas relief is precluded "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 786. "And as this Court has explained, '[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-

case determinations.'" *Id.* (quoting *Yarborough*, 541 U.S. at 664)). "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington*, 131 S. Ct. at 786. The "prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87.

The Ninth Circuit failed to give deference in two ways. First, it held that the state court adjudication was "legally unreasonable" when the state court concluded there was no testimony to the substance of Vasquez's statement. App. 31a. As shown above, this conclusion was flawed because the Ninth Circuit extended this Court's holdings and reached a result in conflict with several circuit court decision that would allow general testimony about an interview where the testimony did not offer out-of-court statements. Second, the Ninth Circuit failed to give deference when it concluded that the state court "ignored" how "testimony that Vasquez's statement 'implicated' Ocampo contains critically important substance," and therefore unreasonably determined the facts. App. 31a. When a state court ruling depends on a factual determination, it is "presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual

determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Under 28 U.S.C. § 2254(d)(2) it is not sufficient that reasonable minds might disagree about the correct resolution of a factual issue. *Rice v. Collins*, 546 U.S. 333, 341-42 (2006). To be an unreasonable determination of the facts, the evidence must be "too powerful to conclude anything but" the contrary of that reached by the state court. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005).

In this case, the state courts reasonably viewed the references to the Vasquez interview not as revealing a statement by Vasquez, but as showing how the detectives pursued a reasonable investigation. The Ninth Circuit ruling fails to give proper deference to the state court determination by insisting that the inferences the Ninth Circuit drew are the only plausible view of the detectives' testimony.

The Court should grant the writ of certiorari because the Ninth Circuit's failure to give the proper level of deference required under 28 U.S.C. § 2254(d) is inconsistent with the rulings of other circuits and the rulings of this Court.

CONCLUSION

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

RESPECTFULLY SUBMITTED.

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November 14, 2011

APPENDIX

Description **Page**

[FILED]

[JUNE 9, 2011]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANTANA OCAMPO,	)	No. 08-35586
	)	
Petitioner-Appellant,	)	DC. No.
	)	3:07-cv-05671-FDB
v.	)	
	)	OPINION
ELDON VAIL,	)	
	)	
Respondent-Appellee.	)	

Appeal from the United States District Court for the Western District of Washington

Franklin D. Burgess, Senior District Judge, Presiding

Argued and Submitted
August 2, 2010 – Seattle, Washington.

Filed June 9, 2011

Before: William C. Canby, John T. Noonan, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

COUNSEL

Suzanne Lee Elliot, Seattle, Washington, for the petitioner-appellant.

Robert M. McKenna, Attorney General of Washington, and Gregory J. Rosen, Assistant Attorney General, Olympia, Washington, for the respondent-appellee.

OPINION

BERZON, Circuit Judge:

Following a jury trial in Washington state court, Santana Ocampo was found guilty of first-degree murder for the August 9, 2003, fatal shooting of Julio Morales-Castro. Ocampo maintains that his constitutional right to confront witnesses was denied in his jury trial by the admission of testimony by law enforcement officers regarding statements made by a potential witness who did not testify. The district court denied his federal petition for habeas corpus relief. We reverse.

I.

Julio Morales-Castro was fatally shot in the head on the evening of August 9, 2003, while sitting in his car outside a pool hall in Tacoma, Washington. Members of the Hispanic gang Surreño 13 frequently "hung out" in the area. A witness at the scene reported seeing a blue minivan driving away after the shooting; other witnesses reported seeing three young, male, Hispanic gang members running from the scene.

The primary issue at trail was whether Ocampo was present at the scene of the crime. The prosecution claimed that Ocampo was in the van and, with a Surreño 13 gang member named Jose Hernandez,[1] attempted to steal Morales-Castro's car before shooting him. Ocampo's defense was that he was at a party, a Quinceañera,[2] the entire time.

Detectives investigating the shooting showed photos of several Surreño 13 gang members to witnesses, who identified Hernandez as one of the young men running from the scene.[3] Hernandez implicated Ocampo and led detectives to Baldemar Vela and Mesial Vasquez, who were also interviewed.

At trial, Detective Webb testified that during his first interview with police, Hernandez named the person who shot Morales-Castro. Webb went on to state that, on the basis of this information, he drafted a search warrant for Ocampo's residence and arrested Ocampo when the search warrant was served. Webb also reported that on the basis of the

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[1] Hernandez testified that he was not a gang member. But both the prosecution and the defense maintained that he was, and detectives explained that he was in their reports as a Surreño 13 gang member or a known associate of the gang.

[2] A Quinceañera is a coming-of-age ceremony held by some Latin Americans on a girl's fifteenth birthday.

[3] Witnesses also identified a gang member named Nick Solis as one of the young men running from the scene. Detectives did not follow up on this lead because Hernandez told them that Solis was not present. Whether Hernandez's claim that only he and Ocampo were present at the shooting was believable, and whether the detectives had adequately corroborated that Ocampo was present and Solis was not, was a major issue in the trial.

information provided by Hernandez, he believed Ocampo was the shooter.

Hernandez also testified at the trial. He named Ocampo as the shooter, maintaining that his factual account at trial was consistent with the information he provided the police in his initial post-arrest statement.[4]

Another witness at Ocampo's trial was Vela. (Both he and Hernandez were problematic witnesses for reasons discussed below.) Vasquez, in contrast, did not appear at trial. Instead, two detectives were allowed to testify that his statements to police had corroborated Hernandez's statements to the police, and by implication, his testimony at trial. This appeal is focused on those detectives' testimony about what Vasquez had said to the police.

Although this appeal centers on the two detectives' testimony about Vasquez, we begin by discussing Vela's and Hernandez's police interviews and trial testimony in detail. Their statements and testimony are pertinent both to the merits of the confrontation issue, for reasons that will appear, and to assessing the degree of prejudice caused by any Confrontation Clause violation.

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[4] While the defense impeached Hernandez with several inconsistencies between his testimony and his post-arrest statement, there was no suggestion that Hernandez's identification of Ocampo as the shooter was in any way inconsistent with his post-arrest statement to police.

A. *Vela*

Vela was reluctant to provide information to police because he was afraid of retaliation by the Surreño 13 gang. He did tell detectives, however, the following:

Vela, out drinking with Hernandez on the night of the shooting, gave a ride in his van to Hernandez and two of Hernandez's friends. When Vela stopped near the pool hall to purchase beer, Hernandez and his two friends got out of the van and went in one direction, while Vela walked in another. About two minutes before Hernandez reappeared, Vela heard what he thought was the sound of a firecracker.

When he returned from wherever he had gone, Hernandez, nervous and sweating, found Vela outside the store and insisted that they needed to leave because "someone was tripping on him."[5] Vela and Hernandez then took different routes back to Vela's van. When Vela arrived, Hernandez and his two friends were already seated in the van. According to Vela, he drove, and Hernandez was in the front passenger seat. As he was driving, Vela heard someone in the backseat say, "I was tripping, so I had to shoot him."

After giving his story, Vela identified Hernandez from a montage of black-and-white photographs. What happened next is disputed: According to Vela's trial testimony, he could not identify the two friends with Hernandez the night of the shooting. During his interrogation, the

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[5] Vela explained this statement as meaning "someone was messing with him [or] something of that nature."

detectives gave him a single, color, Polaroid photograph and asked if the person in the photograph was one of Hernandez's friends. Vela testified that when he told the detectives that he did not know, they responded by telling Vela that the person in the photograph had already admitted to being in the van. Vela then responded by saying, "He probably was. If he is saying he was in my van, then he was."

Detectives Yerbury and Ringer testified differently from Vela. They explained that when interviewed, Vela was so scared of gang retaliation that he talked about moving away or joining the military. According to the detectives, Vela "minimized his knowledge" and spoke in vague generalities. The detectives showed Vela a photograph of Ocampo, who was being interviewed in a different room. They did this because they were concerned that if they waited until Ocampo had been booked, Vela would be uncooperative and back-pedal. According to the detectives, Vela readily identified Ocampo as one of Hernandez's two friends,[6] although he did not know if Ocampo was the one who spoke of shooting someone.

B. ***Hernandez***

Hernandez agreed to testify for the State in exchange for a second-degree murder plea agreement

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[6] Before trial, the trial court denied Ocampo's motion to suppress Vela's identification. The court found Vela not credible in denying he had identified Ocampo and in claiming that he had not seen Hernandez's friends on the night of the shooting sufficiently well to identify them.

with a recommended sentence of 244 months.[7] He testified as follows:

On the night of the shooting, Vela gave him, Ocampo and Vasquez a ride. When Vela stopped at the pool hall, Hernandez and Ocampo wandered off and decided to steal a car they saw because it had valuable tires and rims. Ocampo told Hernandez that he had a gun and would keep a lookout while Hernandez broke into the car. As Hernandez was walking toward the car, Morales-Castrol left the pool hall and headed toward the same car. Hernandez then attempted to walk away, but Ocampo urged him not to. Complying, Hernandez continued forward and stood near the front of Morales-Castro's car while Ocampo approached Morales-Castro and asked him for bus money. Morales-Castrol responded he had no money. He then attempted to drive off, but Ocampo shot him in the head.

The State also called a juvenile detention officer, who testified that Hernandez had confided that he was in custody for murder and that he was the shooter. He informed her that she was the only one who knew the truth, and that he was going to plead not guilty. Hernandez then told another detention officer the same thing. The two officers

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[7] Hernandez was originally offered a deal with a recommended sentence of detention in a juvenile facility until the age of 21 in exchange for testimony against Ocampo. The state revoked the deal after Hernandez told two juvenile detention officers that he was the shooter. After his confessions, he was recharged as an adult and agreed to the second, less favorable plea agreement.

decided that they had to file a report about his confessions and did so. The State argued to the jury that Hernandez's confessions were lies, designed to show off to his friends and to ensure that he was not regarded as a snitch.

C. *Vasquez*

As noted, this case centers on what Detectives Ringer and Webb said at trial about corroborating statements made by the other passenger in the van that night, Vasquez. Vasquez was not available at trial because, according to the State's "best information . . . he and his family [had] returned to Mexico."

Ringer had not personally interrogated Vasquez. He nonetheless testified that Vasquez's statements helped eliminate as suspects some individuals whom other witnesses had identified as being involved in the shooting.[8]

> A As we investigated further, we found that one of the photographs, Jose Hernandez's identification of him, was accurate, but then some of the others were people that they knew but had not actually been involved in the shooting.
>
> Q Okay. How were you able to determine that?
>
> A Well, eventually Jose Hernandez was arrested, he gave a statement. Later we contacted Baldemar Vela, and he gave a statement that verified what Jose Hernandez said. And still later, Mesial

[8] The apparent double-hearsay problem presented by this scenario is not an issue raised in this appeal.

Vasquez was interviewed and he also verified the other two. And these excluded several individuals that had been named that night [by witnesses who saw young men fleeing after the shooting].

Q So he verified – Baldemar and he verified Jose Hernandez's statement?

A That's my understanding, yes.

Later in his testimony, Ringer again emphasized that Vasquez's statements had been used to rule out people who had previously been suspects:

Q Now, some of the photographs that were identified by these people later turned out, at least according to your investigation, to not be involved in this case, right?

A That's correct.

Q And the reason you say you knew that was because of a statement given by Jose Hernandez, right?

A That was just part of it. Statement given by Jose Hernandez, statement given by Baldemar Vela, statement by Mesial Vasquez.

The prosecution later sought to use Detective Ringer's testimony about Vasquez's statements to confirm Hernandez's participation and to implicate Ocampo:

Q Were you able to corroborate that [Hernandez] actually was a participant?

A Yes.

Q How were you able to do that?

A Through his own – his own admissions, through Baldemar Vela, through Mesial Vasquez.

Q What do you mean through Mesial Vasquez?

A My understanding, [sic] statement he gave also indicated that [Hernandez] was present.

Q Okay. And Mesial Vasquez would be the fourth person in the van?

A That's correct.

Q And at some point, Santana Ocampo's name surfaced during the course of the investigation?

A It did.

. . .

Q Were you able to corroborate that he was in the van at the time of the shooting?

[DEFENSE COUNSEL]: I am going to object, request a side-bar.

. . .

(Jury not present)

[DEFENSE COUNSEL]: Your honor, with the questioning that's happening, I see where this is going. They are going to bring in next a statement by Mesial Vasquez [that] Santana Ocampo was in the van. Mesial Vasquez is not here, we are not able to confront this witness, don't know where he is. State's not going to produce him and I want to make sure there is no hearsay from Mesial

Vasquez of my client being in that van coming into this testimony. Improper, it's hearsay, and we are not able to confront this witness, who is absolutely confrontable, if he were here.

[PROSECUTOR]: [The defense counsel] asked if there had been any evident [sic] – actually, he made the statement there had been no efforts to corroborate and I think that there certainly were, and I think there certainly was, and I think there has – there was testimony both through direct and redirect and now in cross that indicates Mr. Vasquez's corroborating exactly what everybody else is corroborating.

THE COURT: Well, I don't think it opens the door to introduce Vasquez's statement beyond the extent that there has already been testimony to efforts to corroborate. I think that's a dangerous road to go down and certainly don't want to have a *Crawford*-related problem.

[PROSECUTOR]: I have gone as far as I intend to go in that regard. I just have a couple more.

THE COURT: All right.

[DEFENSE COUNSEL]: I understand. I had to make sure that didn't happen.

THE COURT: Okay. We will take just a real quick break, let the juror finish up in there and then we will resume.

(Recess taken)

(Jury present.)

THE COURT: Okay, please be seated.

Q Detective Ringer, you were able to corroborate the presence of Jose Hernandez at the scene?

A Yes.

Q And you were able to corroborate the presence of Santana Ocampo at the scene –

A Yes, we were.

Hernandez testified immediately after Detective Ringer and named Ocampo as the shooter. His testimony clarified that he had also named Ocampo as the shooter in his post-arrest statements to police.

Detective Webb testified shortly after Hernandez. Unlike Detective Ringer, he had spoken directly with Vasquez about the shooting. When he began to testify about that interview, the defense objected to some of the questions regarding Vazquez's interview:

Q Did Mr. Vasquez talk to you about the murder that occurred on August 10th?

A He did.

Q Okay. Was he helpful as far as giving you information, or was he reluctant to talk?

A Reluctantly helpful.

Q Did he tell you the facts as he saw them and as he knew them about what had happened on August 10th?

A He did.

Q Were those facts consistent with –

[DEFENSE COUNSEL]: Your Honor, I am going to object here, we have a right to confront this witness.

THE COURT: I am going to sustain to the question.

[PROSECUTOR]: I was going to ask if his statement was consistent with other statements.

[DEFENSE COUNSEL]: Your Honor, I –

THE COURT: Sustained.

Other portions of Webb's testimony, however, did indicate that Vasquez had identified Ocampo as being present at the shooting. For example, in discussing how he came up with a list of clothing items for a search warrant for Ocampo's residence, Webb testified that he "solicited information from both Mr. Hernandez and Mr. Vasquez as to what everybody might have been wearing that night." Moreover, on redirect, Webb testified that he did show a photo montage with Ocampo's photo to witnesses to the shooting in part because Vasquez had identified Ocampo as the shooter:

> Q Detective, you indicated that you didn't go back and show additional photo montages which included Santana Ocampo to witnesses after you got statements from Mesial Vasquez, after you got statements from Baldemar Vela and after you got statements from Jose Hernandez. Is that something that you would usually do when you have three eyewitnesses indicate the

shooter is, do you then go around with pictures to –

[DEFENSE COUNSEL]: Objection. Mischaracterizes the evidence.

THE COURT: Sustain to the form of the question.

Q Is there a reason you didn't go back later and show photo montages with Santana Ocampo to witnesses?

A I would say we had a coconspirator that had confessed his involvement and *two additional witnesses* besides that person who implicated the defendant and we would focus then on that.

(Emphasis added).

The importance of the two detectives' testimony regarding Vasquez's interview was highlighted by the prosecution in closing arguments. The prosecution emphasized Vasquez's statements:

> The detectives didn't stop with Mr. Vela. They talked to Mesial Vasquez, it's my understanding they talked to him on August 27th about his whole scene and he confirmed Jose Hernandez. He was there driving back and forth, a shooting happened, all confirmed by Mesial Vasquez, who at this point we don't know where he is. He's probably left the area.

And the prosecutor went on to argue "Ladies and gentlemen, Jose's gone back and forth to some extent about the facts of this, but his statements, *the core of*

his statements, were corroborated by Mesial Vasquez, Baldemar Vela and Marcos[9], as well as physical evidence." (Emphasis added). The prosecutor also emphasized that "there is corroborating evidence that Jose Hernandez was being truthful," and that the one thing about which Hernandez had always been consistent was that Ocampo was the shooter. Finally, in its rebuttal, the prosecution argued that Jose Hernandez's testimony should leave the jury "convinced beyond a reasonable doubt [because] this . . . fourth guy in the car backs him up."[10]

Ocampo did not testify, but he presented several witnesses who testified that he was at the Quinceañera at the time of the shooting. The defense argued in closing that Hernandez killed Morales-Castro and was lying to save himself, Nick Solis, and, possibly, Vasquez. The jury, not persuaded, found Ocampo guilty of first-degree murder.

Ocampo appealed his conviction on the ground, among others, that his right to confrontation was denied by the two detectives' testimony regarding statements by Vasquez. Identifying

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[9] Marcos is Jose Hernandez's older brother. He was not at the scene of the crime, but provided information to the detectives corroborating his brother's version of events. His trial testimony contained contradictions as to whether Ocampo was at the Quinceañera during the time that Hernandez was not. In closing, the defense argued that Marcos and Hernandez could easily have concocted their story together before each spoke to the police.

[10] The State never claimed anyone other than Vasquez was in the van with Ocampo, Hernandez, and Vela. So the context makes it clear that "fourth guy" refers to Vasquez. The prosecutor also referred to Vasquez as the fourth person in the van when questioning witnesses.

Crawford v. Washington, 541 U.S. 36 (2004), as the controlling authority, the Washington Court of Appeals held that "Ocampo [was] not entitled to a new trial based on this issue." Regarding Detective Ringer's testimony, the state appellate court noted that Ocampo did not object to that testimony, and cited *State v. Swan*, 790 P.2d 610, 635 (Wash. 1990) for the proposition that "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." The court of appeals also cited *State v. Lynn*, 835 P.2d 251, 254 (Wash. Ct. App. 1992), which requires a constitutional error raised for the first time on appeal to be manifest, and suggested that the Confrontation Clause error raised by Ocampo was not manifest because "Detective Ringer's testimony only implied the outlines of Vasquez's statement."

As to Detective Webb's testimony, the court held that there was no Confrontation Clause violation because "the detective did not testify to the substance of any statements Vasquez made." The court also noted that Ocampo was able to cross-examine Detective Webb on whether any statements were made.

Finally, as to the prosecutors' closing remarks focusing on what Vasquez had said, the court noted that Ocampo did not object to the remarks, citing *State v. Brown*, 940 P.2d 546, 564-65 (Wash. 1997), for the proposition that a "defendant's failure to object waives improper closing remarks unless the comments are so flagrant and ill-intentioned that the resulting prejudice could not be alleviated by a

curative instruction." The Washington Supreme Court denied review.

Ocampo then filed a federal habeas petition raising several claims. Denying the petition, the district court reasoned, as to Ocampo's confrontation claim, that there was no Confrontation Clause problem, because (1) "no testimony as to the substance of any statements made by Mr. Vasquez" was presented by Detective Webb; (2) allowing Detective Ringer's testimony was not contrary to, or an unreasonable application of, clearly established Supreme Court law; and (3) the state court's decision regarding Detective Ringer's testimony was not based on an unreasonable determination of the facts.

On appeal, Ocampo pursues the Confrontation Clause claim alone.

II.

Ocampo's petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), and his claims were rejected by the state courts on the merits. So we may grant relief only if the last reasoned state decision was " 'based on an unreasonable determination of the facts in light of the evidence presented in [the] State court proceeding' " or on a legal determination that was " 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' " *Kennedy v. Lockyer*, 379 F.3d 1041, 1046 (9th Cir. 2004) (quoting 28 U.S.C. § 2254).

To meet the "unreasonable determination" standard under § 2254(d)(2), the habeas court "must be convinced that an appellate panel . . . could not

reasonably conclude that the finding is supported by the record . . . [or] that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) (internal citations omitted). "[T]he state-court has before it, yet apparently ignores, evidence that supports petitioner's claim." *Id.* at 1001.

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). The state court's decision must be "more than incorrect or erroneous"; it "must be objectively unreasonable." *Lockyear v. Andrade*, 538 U.S. 63, 75 (2003). As the Supreme Court recently emphasized in *Harrington v. Richter*, ____ U.S. ____, 131 S. Ct. 770 (2011), " '[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.' " *Id.* at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)) (alteration in original). " '[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court.' " *Id.* (quoting *Knowles v. Mirzayance*, 556 U.S. ___, ___, 129 S. Ct. 1411, 1413-14 (2009)) (alteration in original). "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported,

the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.*

A.

[1] The merits of Ocampo's Confrontation Clause claim are governed by *Crawford*,[11] the Supreme Court's landmark decision construing the Sixth Amendment "right [of a criminal defendant] . . . to be confronted with the witnesses against him." *Crawford* held that the Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54.

[2] The state appellate court correctly identified *Crawford* as the controlling authority for Ocampo's Confrontation Clause claim. Our initial question, then is whether the state appellate court unreasonably applied *Crawford* to the facts of

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[11] It is possible to read the state appellate court's decision as rejecting Ocampo's confrontation claim, at least as to Detective Ringer's testimony, on the basis of a state procedural rule. But the State has not raised a procedural default defense to the Confrontation Clause claim either in the district court or here, and, in its briefing to us, it terms the state court's Confrontation Clause ruling as one "on the merits." The defense has therefore been waived. *See Franklin v. Johnson,* 290 F.3d 1223, 1230-31 (9th Cir. 2002). Although we have discretion to consider procedural default *sua sponte*, we do so only in extraordinary circumstances. *Slovik v. Yates,* 556 F.3d 747, 751-52 n.4 (9th Cir. 2009); *Vang v. Nevada,* 329 F.3d 1069, 1073 (9th Cir. 2003); *Franklin*, 290 F.3d at 1233. There are no extraordinary circumstances in this case warranting *sua sponte* consideration.

Ocampo's case. *See Williams*, 529 U.S. at 413. In addressing that question, we consider in turn three issues: first, whether Vasquez's statements to police were testimonial; second, whether those statements were admitted against Ocampo at trial; and third, whether the Confrontation Clause exception recognized in *Crawford* applies, i.e., whether, although Vasquez was unavailable to testify, Ocampo had had a prior opportunity to cross-examine him.

1.

Under *Crawford*, the admission of Vasquez's statements to the two detectives is not a Confrontation Clause violation unless those statements were testimonial. 541 U.S. at 53-54; *Davis v. Washington*, 547 U.S. 813, 821 (2006).[12] There is no question that they were.

[3] *Crawford* explained that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." 541 U.S. at 52. "Whatever else the term ['testimonial'] covers, it applies at a minimum to . . . police interrogations." *Id.* at 68. On Ocampo's appeal, the state appellate court so acknowledged, stating that the definition of "testimonial . . . includes statements elicited in response to structured police questioning during an investigation." In *Davis*, the Supreme Court noted, similarly, that "[t]he product of such interrogation, whether reduced

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[12] *Davis* was decided two months after the state appellate court's decision in this case, but well before the Washington Supreme Court denied review. *Davis*, in any event, simply elucidates *Crawford*; it is *Crawford* that sets forth the governing clearly established Supreme Court precedent with regard to the basic coverage of the Confrontation Clause.

to writing . . . or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial." 547 U.S. at 826. Here, Vasquez's statements were made to detectives questioning him as part of their investigation into the events surrounding Morales-Castro's murder, and as such were undoubtedly testimonial.

2.

[4] The state appellate court implied that Vasquez's statements were not admitted against Ocampo at trial. Specifically, the state court stated that Detective Webb "did not testify to the substance of any statements Vasquez made," and that "Detective Ringer's testimony only implied the outlines of Vasquez's statement." We conclude that Ringer's testimony indisputably conveyed some of the critical substance of Vasquez's statements to the jury, in violation of the Confrontation Clause, even though his testimony was not detailed. We also hold that the state appellate court's factual understanding regarding the limited nature of Webb's testimony about Vasquez was objectively unreasonable under AEDPA, and that, reasonably understood, Webb's testimony concerning Vasquez violated the Confrontation Clause.

(i) We begin by considering the clearly established Supreme Court law regarding the degree of detail in which an out-of-court statement must be presented at trial to be covered by the Confrontation Clause. Our conclusion is that before *Crawford*, it was clearly established that testimony from which one could determine the critical content of the out-of-court statement was sufficient to trigger Confrontation Clause concerns, and that, far from

undermining that standard, *Crawford* established principles with which that aspect of the pre-*Crawford* Confrontation Clause jurisprudence are fully consistent.

[5] Before *Crawford,* the Supreme Court treated out-of-court statements as statements triggering the protections of the Confrontation Clause, even if in the in-court testimony described rather than quoted the out-of-office statements: In *Idaho v. Wright*, 497 U.S. 805 (1990), the Court held that the trial court had violated the defendant's confrontation rights by allowing a pediatrician to describe a child's answers to his questions about sexual abuse from "notes [that] were not detailed." *Id.* at 811; *see id*, at 825-827. Also, both the Confrontation Clause and the hearsay rules cover "statements" offered as proof of a fact at trial, *Crawford*, 541 U.S. at 51-52; Fed. R. Evid. 801(a) and (c), and both the constitutional confrontation assurance and the hearsay rules "protect similar values . . . and stem from the same roots." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quotations omitted), *abrogated on other grounds by Crawford*, 541 U.S. 36. Before *Crawford*, the Court routinely considered descriptions of out-of-court statements, as well as questions or transcripts of them, as "statements" for hearsay rule purposes. *See, e.g., Moore v. United States*, 429 U.S. 20 (1976); *Williamson v. United States,* 512 U.S. 594, 597 (1994). It was therefore clearly established Supreme Court law before *Crawford* that in-court descriptions of out-of-court statements, as well as verbatim accounts, are "statements" and can violate the Confrontation Clause, if the requisite requirements are otherwise met.

[6] *Crawford* altered Confrontation Clause law so that it generally covers "testimonial" out-of-court statements, 541 U.S. at 51-52, whether or not they "fall[ ] within a firmly rooted hearsay exception." *Roberts*, 448 U.S. at 66. But nothing in *Crawford* addressed, or undermined, the established principle that 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.

[7] To the contrary, it would be an unreasonable application of the core Confrontation Clause principle underlying *Crawford* to allow police officers to testify to the substance of an unavailable witness's testimonial statements as long as they do so descriptively rather than verbatim or in detail. *Crawford*'s holding rests on the premise that "the use of *ex parte* examinations as evidence against the accused" was "the principal evil at which the Confrontation Clause was directed." 541 U.S. at 50. In applying this principle in *Davis*, the Court did "not think it [was] conceivable" that the Confrontation Clause could be interpreted to allow "a note-taking policeman [to] recite the unsworn hearsay testimony of the declarant." 547 U.S. at 826 (emphasis omitted). In other words, *Crawford* was concerned with ensuring that out-of-court testimonial statements, taken *ex parte* and without trial-like protections, were not used as evidence before the jury if the speaker could not be cross-examined. Permitting a police officer to summarize or outline an out-of-court statement in no way corrects for the affront to the purpose of the Clause, as it was explained in *Crawford*. The Confrontation Clause provides a procedural check on [t]he

involvement of government officers in the production of testimonial evidence." *Crawford*, 541 U.S. at 53. Where the government officers have not only "produced" the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language - contradictions, hesitations, and other clues often used to test credibility – are lost, and instead, a veneer of objectivity conveyed.

Labeling such digested testimony as a mere "outline" of, rather than a description or summary of, the substance of out-of-court statements cannot reasonably alter these conclusions or toss the testimony outside the reach of the Confrontation Clause as interpreted in *Crawford*.[13] Whatever

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[13] *Mason v. Yarborough*, 447 F.3d 693 (9th Cir. 2006) suggested that, under *Crawford*, there is an open question as to whether testimony alluding to a non-testifying witness's statements violates the Confrontation Clause if the witness's words are never admitted into evidence, indicating that if a witness's "words were never admitted into evidence, he could not 'bear testimony' against [the defendant]." *Id.* at 696. But *Mason* did not decide this issue or engage in any substantive discussion of it. More importantly, the testimony in *Mason* alluded to the codefendant's statement without implicating Mason. "For all the jury knew, [the codefendant] confessed to his own involvement in the shootings and was arrested." *Id.* In was opaque evidence of that kind that *Mason* had in mind. Here, as explained in more detail below, Detectives Ringer and Webb testified regarding statements by Vasquez that, as described by the detectives, indisputably implicated Ocampo. Thus, the "bear testimony against" concern articulated in *Mason* has no application here.

locution is used, out-of-court statements admitted at trial are "statements" for the purpose of the Confrontation Clause both pre- and post-*Crawford* if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify at trial.

(ii) In both non-AEDPA cases[14] and cases covered by AEDPA, several other circuits have applied the principle that testimony communicating the substance of absent witnesses' statements can run afoul of the Confrontation Clause even when there is no verbatim account of the out-of-court statement. The First Circuit recently held that "the right to cross-examine an out-of-court accuser applies with full force" even in circumstances where "the actual statements" of the out-of-court declarant were not admitted. *United States v. Meises*, ____ F.3d ___, 2011 WL 1817855 at *12 (1st Cir. May 13, 2011). Relying on *Crawford*, the First Circuit concluded that "[i]t makes no difference that the government took care not to introduce [the out-of-court declarant's] 'actual statements' " because "[t]he

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Moreover, the recent Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) undermines the reasoning in *Mason*. Specifically, in *Melendez-Diaz*, the Supreme Court clarified that "[t]he text of the [Sixth] Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter . . . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation," noting that any other view "would be contrary to longstanding case law." *Id.* at 2534 (footnote omitted) (emphasis in original).

[14] We discuss several non-AEDPA cases because they express a general, consistent understanding of the reach of the Confrontation Clause, and so are at least informative as to whether a contrary view would be unreasonable.

opportunity to cross-examine the declarant 'to tease out the truth,' *Crawford*, 541 U.S. at 67, is no less vital when a witness indirectly, but still unmistakeably, recounts a [declarant's] out-of-court accusation." *Id.* The First Circuit went ont o reason that "if what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's Sixth Amendment right to confront the declarant is triggered." *Id.*

Other circuits agree. The Seventh Circuit, relying on *Crawford*, has recognized that allowing police to refer to the substance of witnesses' statements as they "narrate 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 rights under the sixth amendment." *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004). Similarly, in *Favre v. Henderson*, 464 F.2d 359 (5th Cir. 1972), the Fifth Circuit held that the defendant's confrontation rights, as defined by the Supreme Court in *Dutton v. Evans*, 400 U.S. 74 (1970), were violated because "testimony was admitted which led to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged." *Favre*, 464 F.2d at 364. "Although the officer never testified to the exact statements made to him by the informers, the nature of the statements . . . was readily inferred." *Id.* at 362.

The Fifth Circuit has applied the same logic in at least one post-AEDPA habeas case: In *Taylor v. Cain*, 545 F.3d 327 (5th Cir. 2008), the Fifth Circuit

relied on *Ohio v. Roberts* on the salient point in granting habeas in case with facts similar to those here. The court held that "[p]olice officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant." *Id.* at 335.

In another post-AEDPA habeas case, the Second Circuit clarified that "[t]he relevant question is whether the way the prosecutor solicited the testimony made the source and content of the conversation clear." *Ryan v. Miller*, 303 F.3d 231, 250 (2d Cir. 2002). *Ryan* held that "[i]f the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible" under the Supreme Court's Confrontation Clause precedents. *Id.* at 249.[15]

Finally, the Eleventh Circuit, relying on *Dutton*, also held, pre-AEDPA, that the Confrontation Clause is violated when police testify to the substance of inculpatory out-of-court statements. *Hutchins v. Wainwright*, 715 F.2d 512, 516 (11th Cir. 1983); *see id.* ("Although the officers'

[15] In an earlier, non-AEDPA habeas case, the Second Circuit relied on the principle established in *Bruton v. United States*, 391 U.S. 123 (1968), in holding that testimony containing implicit accusations violates the Confrontation Clause even if the testimony does not "reveal [ ] in detail" the content of the out-of-court statements at issue. *Mason v. Scully*, 16 F.3d 38, 43 (2d Cir. 1994). *See also United States v. Reyes*, 18 F.3d 65, 69 (2d cir. 1994) ("[A]lthough the jury was not told exactly what words [the co-defendants] had spoken, [the witnesses] testimony clearly conveyed the substance of what they had said").

testimony may not have quoted the exact words of the informant, the nature and substance of the statements suggesting there was an eyewitness and what he knew was readily inferred").

[8] In sum, it is both clearly established Supreme Court law unaffected by *Crawford* and an unreasonable application of the rule adopted in *Crawford* to regard summarizing – or "outlining" – the substance of out-of-court testimonial statements, directly or in a way from which "the nature of the statement . . . [can be] readily inferred," *see Favre*, 464 F.2d at 362, as incapable of violating the Confrontation Clause. Instead, if the substance of an out-of-court testimonial statement is likely to be inferred by the jury, the statement is subject to the Confrontation Clause.

[9] (iii) Applying this principle, Detective Ringers' and Detective Webb's testimony concerning Vasquez's statements constituted the introduction of testimonial statements against Ocampo for Confrontation Clause purposes.

Detective Ringer testified about how the police identified the suspects in the shooting, which was in part by ruling out others, who had previously been identified by witnesses, as not having been involved. As to that process of identifying the suspects, Detective Ringer stated that "eventually Jose Hernandez was arrested, he gave a statement. Later we contacted Baldemar Vela, and he gave a statement that verified what Jose Hernandez said. And still later, Mesial Vasquez was interviewed and he also verified the other two." He repeated later that a "statement by Mesial Vasquez" was one reason he "knew" that some of the people identified as

having been involved were not involved. The only fair reading of this testimony is that Vasquez stated that certain people were not suspects, but did not so state concerning Ocampo. Vasquez's out-of-court statement exonerating others who had been identified from photographs as involved in the crime, but not Ocampo, was inculpatory as to Ocampo, as it indicated that Vasquez, who was present, did not exonerate Ocampo. Further, as there were only four people in the car, and Ocampo's defense was that he was not one of them, eliminating some suspects from among those identified by witnesses was itself of importance, as it made it less likely that someone other than Ocampo was one of the four people in the car. As the prosecutor later said in closing, central to the case was "whether the defendant was there or whether it was someone else there."

Later, Detective Ringer testified that he had corroborated Hernandez's participation in the shooting in part through statements made by Vasquez, and went on to say that he had also corroborated Ocampo's presence at the scene, although he did not give any details about how he had corroborated Ocampo's presence. Immediately after Ringer testified, Jose Hernandez testified that Ocampo was the shooter.[16] Corroborating Hernandez's participation thus helped to inculpate Ocampo, as it was a link in the chain of evidence that gave credence to Hernandez's identification of Ocampo as the shooter. If the jury had had only Hernandez's word that he himself was involved in the crime, then it could have had a harder time

[16] Hernadnez also testified that his testimony at trial was consistent with his initial post-arrest statements to police.

believing his overall story about how the crime occurred.

In sum, Ringer's testimony did not provide any specific details about Vasquez's out-of-court statements. But it did convey some critical substance about those statements: That certain others were not among those present at the scene, that Ocampo was not among those identified as not present, and that Hernandez was a participant in the shooting. All together, Ringer's testimony indicated that Vasquez had confirmed Ocampo's presence at the scene of the crime. The State recognized as much in its brief: "Detective Ringer's testimony did not relate any of the substance of Vasquez's statements *other than Ocampo's presence there*." (Emphasis added). And that presence was the key issue in the case, as Ocampo's defense was that he was not there.

More specific that Ringer's testimony about Vasquez's statements to the police was Detective Webb's testimony about those statements. While Ringer had not personally spoken with Vasquez, Detective Webb had. He testified that Vasquez talked to him about the murder and was "reluctantly helpful." Webb then went on to testify that he came up with a list of clothing items to search for at Ocampo's residence based in part on information solicited from Vasquez "as to what everybody might have been wearing that night." Finally, and most importantly, Webb testified that he "didn't go back later and show photo montages with Santana Ocampo to witnesses" because "a coconspirator . . . had confessed his involvement and *two additional witnesses* besides that person [had] *implicated the defendant*." (Emphasis added). It was clear from the context of the prosecutor's previous question, to

which an objection had been sustained, and from the other evidence at the trial that the "two additional witnesses" had to be Vela and Vasquez.

The Washington Court of Appeals' determination that Detective Webb "did not testify to the substance of any statements Vasquez made," was thus either legally or factually unreasonable. To the extent that the Court of Appeals meant that the testimony was not to the "substance" of Vasquez's statements because it was in summary form and not in detail, the conclusion was legally unreasonable given clearly established Supreme Court law, for the reasons already surveyed. To the extent the Court of Appeals ignored that the "two additional witnesses," in context, necessarily included Vasquez, or that testimony that Vasquez's statement "implicated" Ocampo contains critically important substance, its conclusion was "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2); *see also Taylor*, 366 F.3d at 1001 ("the state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim").

Were there any doubt as to what a jury would have understood about Vasquez's out-of-court statements from the two detectives' testimony – which we do not think there is – it is dispelled by the prosecutor's remarks at closing. Those remarks highlighted the testimony about Vasquez's statements as critically important, stressing that "the core of [Hernandez's] statements" – which were that Ocampo was present and was the shooter – "were corroborated by Mesial Vasquez . . . ." As in *Hutchins*, "the prosecutor's reliance on the hearsay

testimony in closing argument was such that a reasonable juror could have concluded only that [Vasquez] identified [Ocampo] as the perpetrator." 715 F.2d at 516.

[10] In sum, 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. The prosecutor's closing argument then framed for the jury precisely what they were meant to take from the detective's testimony about Vasquez: that he had confirmed both Ocampo's presence that night and that Ocampo was the shooter. The state appellate court's conclusion to the contrary, premised on its characterization of the detectives' testimony as only "outline" or lacking "substance," was an unreasonable application of clearly established Supreme Court precedent.

3.

Under *Crawford*, testimonial statements may be admitted if the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him. 541 U.S. at 53-54. This exception has no application here, whether or not Vasquez was actually unavailable, as Ocampo never had an opportunity to cross-examine Vasquez.

Crawford held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability *and* a prior opportunity for cross-examination." *Id.* at 68 (emphasis added). This conclusion rested on the premise that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a

particular manner: by testing in the crucible of cross-examination." *Id.* at 61. As a result, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 69.

[11] Although the Washington Court of Appeals suggested otherwise, this confrontation requirement was not satisfied by the fact that "Ocampo was able to cross-examine the detective[s] on whether any statements were made." *Crawford* was emphatic that questioning an in-court witness who relates the statements of an absent witness is no substitute for the direct confrontation guaranteed by the Sixth Amendment, noting, for example, that Sir Walter Raleigh was denied his right to confront his accuser despite being "perfectly free to confront those who read [the accuser's] confession in court." *Id.* at 51; *see also Davis*, 547 U.S. at 826 (having a police officer stand in for an absent witness is not "conceivable"). Without doubt, the proposition that the opportunity to cross-examine an in-court witness about an out-of-court testimonial statement by an absent witness is sufficient is contrary to clearly established Supreme Court law.

[12] The state court admitted the critical substance of Vasquez's testimonial statements against Ocampo, and, because Vasquez did not testify, Ocampo had no opportunity to cross-examine Vasquez. Ocampo's federal constitutional right to confront the witnesses against him was therefore violated. The state appellate court's decision holding otherwise was an objectively unreasonable application of *Crawford*.

B.

[13] We now turn to whether the Confrontation Clause violation at Ocampo's trial requires the issuance of a writ of habeas corpus. A Confrontation Clause violation is harmless, and so does not justify habeas relief, unless it " 'had substantial injurious effect or influence in determining the jury's verdict.' "[17] *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "[W]hen a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995).

In general, the inquiry into whether the constitutionally erroneous introduction of a piece of evidence had a substantial and injurious effect is guided by several factors: "the importance of the testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of cross-examination permitted, and the overall strength of the prosecution's case." *Whelchel v. Washington*, 232 F.3d 1197, 1206 (9th Cir. 2000) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)); *accord Slovik*

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[17] The Washington Court of Appeals did not make a harmlessness determination under *Chapman v. California*, 386 U.S. 18 (1967). Even if it had, our analysis would still be governed by the *Brecht* standard. *See Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010) (holding that after *Fry v. Pliler*, 551 U.S. 112 (2007), "we need not conduct an analysis under AEDPA of whether the state court's harmlessness determination . . . was contrary to or an unreasonable application of clearly established federal law," but should instead apply the *Brecht* standard "without regard for the state court's harmlessness determination").

v. Yates, 556 F.3d 747, 755 (9th Cir. 2009). As to the weight given to corroborating testimony in Confrontation Clause cases, we have explained that:

> While corroborative evidence may, as a general rule, make the wrongful introduction of other evidence harmless, this concept has no application where: (1) there was a reason for the jury to doubt the only eyewitness testimony; (2) the third party testimony was not exceptionally strong; and (3) the physical evidence connecting the accused to the crime was limited and explained by [the defendant's theory of the case].

Whelchel, 232 F.3d at 1208.

Applying these factors, we conclude that the admission of Detective Ringer's and Detective Webb's testimony regarding Vasquez's statements, in combination with the prosecutor's closing remarks, had "a substantial and injurious effect or influence in determining the jury's verdict." *See Brecht*, 507 U.S. at 623.

First, the importance of Vasquez's statements was underscored by the prosecutor's several references to Vasquez's out-of-court statements in closing argument.[18] Moreover, as discussed above,

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[18] Our purpose in recounting the prosecutor's use of Vasquez's statements in closing argument is not to treat that argument as itself constitutional error. Instead, the argument serves both to confirm the importance of the testimony as to Vasquez's statements, given the evidence as a whole, as well as to confirm how the jury most likely understood those statements.

the prosecutor framed the detectives' testimony about Vasquez's statements in such a way that the jury was encouraged to conclude, as it probably would have anyway, that Vasquez had identified Ocampo as the shooter. *See Hutchins*, 715 F.2d at 516.

For example, the prosecutor accurately identified a central issue in the case as being "whether the defendant was there or whether it was someone else there." She then minimized the importance of Vela's equivocations on the stand about whether he could identify Ocampo as one of the people in the car by reminding the jury that Hernandez's testimony was also "all confirmed by Mesial Vasquez." Similarly, the prosecutor urged the jury to ignore the fact that Hernandez had "gone back and forth to some extent about the facts," because "the core of his statements, were corroborated by Mesial Vasquez." In her rebuttal the prosecutor told the jury they should be "convinced beyond a reasonable doubt" that Jose Hernandez was a participant in the events as he reported, "[b]ecause . . . this . . . fourth guy in the car [Vasquez] backs him up."

Second, without Vasquez's statements corroborating Hernandez's version of events, the evidence implicating Ocampo as the shooter could well have been disbelieved. The other two people present in the car, Hernandez and Vela, gave testimony that was internally contradictory, inconsistent with each other's, and indeterminate.

To begin, there were structural reasons "for the jury to doubt" the testimony of Hernandez, the only eyewitness to the shooting. *See Whelchel*, 232

F.3d at 1208. Hernandez was an accomplice. The Supreme Court has long recognized that accomplices are questionable witnesses. *See Crawford v. United States*, 212 U.S. 183, 204 (1909) (admonishing that "the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses"). The jury instructions in this case included a standard accomplice instruction, which the prosecution discussed in closing argument, warning the jury that Hernandez's statements should be viewed with "great caution." Moreover, Hernandez's plea agreement was predicated on testifying against Ocampo, so he would have been risking additional punishment had he not testified that Ocampo was responsible for the murder. *Cf. Whelchel*, 232 F.3d at 1207-08. After acknowledging these weaknesses inherent in Hernandez's testimony, the prosecutor once more stressed that "there is corroborating evidence that Jose Hernandez was being truthful."

Another reason "for the jury to doubt" Hernandez's testimony was that it was inconsistent in several respects with his pre-trial version of events. On cross-examination, the defense impeached Hernandez with several inconsistencies between his testimony and his taped post-arrest statement to the police, including inconsistencies about how he got to the Quinceañera; whether Vela bought beer for him before the shooting; whether he saw the gun after the shooting; how long he stayed at the Quinceañera after the shooting; who he left with; and where he went. Hernandez had no real explanation for these inconsistencies, and instead

insisted, implausibly, that the transcript of his taped statement was incorrect.

Yet another reason the jury could well have disbelieved Hernandez's basic story inculpating Ocampo was that other witnesses contradicted Hernandez's testimony as to central facts. For example, although Hernandez testified that only he and Ocampo fled from Morales-Castro's car to Vela's van after the shooting, the other witnesses at the scene uniformly testified that they saw a group of three individuals fleeing. Hernandez maintained that Morales-Castro acted drunk and smelled of alcohol when entering his car, but there were no drugs or alcohol in Morales-Castro's system when he was admitted to the hospital. And Hernandez's story was that after the shooting, he was in the back seat of the van with Vasquez, while Ocampo sat up front with Vela. Vela, in contrast, testified that Hernandez was in the front seat, and that someone in the back of the van confessed to being the shooter. If Hernandez was correct about where Ocampo sat, then according to Vela, Ocampo was not the shooter.

There was yet one more, exceedingly strong reason for disbelieving Hernandez's account of the crime: Hernandez twice confessed to juvenile detention officers that *he*, not Ocampo, was the shooter that night. And Hernandez's ex-girlfriend also testified that Hernandez had told her that he had shot Morales-Castro.[19] Absent a strong reason to disbelieve Ocampo's alibi, a reasonable jury could have chosen to believe Hernandez's confession and to

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[19] For various reasons, including her age and drug use, Hernandez's ex-girlfriend may not have been the most credible witness.

conclude that he had made up the story that Ocampo was both present and the shooter so as to obtain a favorable plea agreement.

Nor was the third-party testimony the prosecution offered "exceptionally strong." *Cf. Whelchel*, 232 F.3d at 1208. The only prosecution witness other than Hernandez who ever claimed to see Ocampo at the scene was Vela. But Vela testified on cross-examination that he did not actually know who the passengers in his van were, and only identified Ocampo in his interview with police as a passenger after he was told that Ocampo had already confessed to being in the van. Also, Detective Ringer admitted that the use of a single, color Polaroid of Ocampo in seeking Vela's identification was a potentially suggestive method for obtaining a reliable identification.

Furthermore, the conflict between the testimony of Vela and Hernandez about seating positions is crucial: While Vela represented that Hernandez was in the front passenger seat as they left the scene, Hernandez's story was that he, Hernandez, was sitting in the back. Thus, either Hernandez's statement is true and there is a 50% chance Hernandez was the source of the inculpatory statement, testified to by Vela – "I was tripping, so I had to shoot him," – or Vela's statement is true – that is, Hernandez was sitting in the front – and there is yet another factual inaccuracy undermining Hernandez's testimony.

Finally, the physical evidence "was limited and explained by" Ocampo's theory of the case. *Cf. Whelchel*, 232 F.3d at 1208. In closing argument, the prosecution offered clothing found in Ocampo's room

and the ballistics of Morales-Castrol's gunshot wound as "physical evidence," arguing that both were consistent with Hernandez's account. But neither piece of evidence conforms, or even corroborates, that Ocampo was the shooter. Even if the clothes found in Ocampo's room were the very ones that Hernandez saw him wearing that night, that only proves that Hernandez saw him at some point that evening. And the consistency between Morales-Castro's wound and Hernandez's description of the incident only strengthens Hernandez's claim that he witnessed the shooting. It says nothing about whether Ocampo was the one he saw pull the trigger, or whether, instead, it was Hernandez himself (as he had told three people at three different times), or a third person (for example, Vasquez or Solis).

[14] In sum, the overall case against Ocampo was as far as can be from "overwhelming." *Cf. Moses v. Payne*, 555 F.3d 742, 755 (9th Cir. 2009) (constitutional error does not warrant reversal when there is "overwhelming evidence" of the defendant's guilt). The "physical" evidence the State offered only had significance in showing that several ancillary aspects of Hernandez's testimony (from where the shot was fired and what clothes Ocampo owned) were not demonstrably false. The prosecutor acknowledged that *the* issue in the trial was whether it was Ocampo or someone else who was with Hernandez when Morales-Castro was shot. And the only evidence of witnesses who testified at trial linking Ocampo to the scene came from Hernandez and Vela. The jury had several, weighty reasons to disbelieve Hernandez, and Vela was far from sure of

his identification of Ocampo and did not directly link Ocampo to the shooting.

[15] Given these considerable weaknesses in the prosecution's case, the testimony regarding Vasquez's statements, emphasized by the prosecutor's references to Vasquez at closing, cut to the heart of Ocampo's defense, which was that he had never left the Quinceañera. Vasquez's out-of-court testimonial statements, as testified to by Detectives Ringer and Webb, indicated that Ocampo was present at the scene of the crime, and, indeed was "implicated" in the shooting. The prosecution – like a trial judge – was obviously aware that *Crawford* restricted its ability to rely on Vasquez's out-of-court statements, yet, as the repeated references to that statement in the prosecution's closing comments to the jury confirm, without the core of those statements – that Ocampo was present at the scene of the crime and involved in it – there might well have been no conviction. The prosecution therefore tried to walk a fine - indeed, non-existent – line between conveying to the jury that Vasquez confirmed Hernandez's story and avoiding a Confrontation Clause violation. It succeeded as to the first but, for that very reason, failed under clearly established Supreme Court law as to the second.

We, of course, cannot know whether, had Vasquez testified, he would have confirmed Hernandez's story regarding Ocampo's role in the crime or whether he would have been exposed as a possible liar through effective cross-examination. For present purposes, however, what matters is that he did not appear at trial; his statements thus should not have been admitted at all, whether in "outline,"

summary, unavoidable inference, or verbatim; and, given the weakness of the two other key trial witnesses and of the physical evidence, we necessarily have "grave doubt" that without Detectives Ringer and Webb's accounts of what Vasquez said, the result would have been a conviction of Ocampo. *See O'Neal*, 513 U.S. at 435. When a court is thus "in virtual equipoise as to the harmlessness of the error under the *Brecht* standard, the court should treat the error as if it affected the verdict." *Fry*, 551 U.S. at 121 n.3 (citations and quotations omitted). We conclude that the erroneous admission of the substance of Vasquez's statements to police, given particular force for the jury by the prosecutor's repeated references to those statements in closing, was prejudicial under the *Brecht* standard.

III.

[16] The Washington Court of Appeals unreasonably applied clearly established Supreme Court Confrontation Clause jurisprudence to the facts of this case. The error was prejudicial because the testimony concerning Vasquez's out-of-court statements to the two detectives bolstered the state's weak case against Ocampo, and flatly contradicted Ocampo's alibi defense. We reverse the district court's denial of Ocampo's petition for writ of habeas corpus and remand with instructions to grant a writ of habeas corpus unless the State elects to retry Ocampo within a reasonable amount of time to be determined by the district court.

REVERSED and REMANDED.

[FILED]

[AUG. 16, 2011]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANTANA OCAMPO,	)	No. 08-35586
	)	
Petitioner-Appellant,	)	D.C. No.
	)	3:07-cv-05671-FDB
v.	)	Western District of
	)	Washington,
ELDON VAIL,	)	Tacoma
	)	
Respondent-Appellee.	)	ORDER
	)	

Before : CANBY, NOONAN, and BERZON, Circuit Judges

The petition for rehearing en banc was circulated to the full court and no judge called for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

[FILED]

[MAY 30, 2008]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SANTANA OCAMPO	) JUDGMENT IN A
	) CIVIL CASE
v.	)
	) CASE NUMBER:
HAROLD CLARK	) C07-5671FDB
	)

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

1. The Court adopts the Report and Recommendation.
2. This petition is **DISMISSED WITH PREJUDICE.**

May 30, 2008

BRUCE RIFKIN
Clerk

s/ D. Forbes
By, Deputy Clerk

[FILED]

[MAY 29, 2008]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SANTANA OCAMPO,	)	Case No. C07-5671FDB
	)	
Petitioner,	)	ORDER ADOPTING
	)	REPORT AND
v.	)	RECOMMENDATION
	)	DISMISSING HABEAS
HAROLD CLARKE,	)	PETITION WITH
	)	PREJUDICE
Respondent.	)	
	)	

This matter comes before the Court on the Report and Recommendation of the Magistrate Judge that Petitioner's request for habeas corpus relief be denied and the petition be dismissed with prejudice. The Petitioner has filed objections to the Report and Recommendation.

Petitioner's habeas corpus petition challenges his Washington State conviction of murder in the first degree. Petitioner was sentenced to 360 months of confinement. The sentence included a 60-month enhancement for a deadly weapon.

Petitioner initially objects to a determination of the petition without providing Petitioner an evidentiary hearing. An evidentiary hearing is held in federal habeas cases only under the most limited circumstances. See *Baja v. Ducharme*, 187 F.3d 1075, 1077-79 (9th Cir. 1999). An evidentiary hearing on a claim for which the petitioner failed to develop a factual basis in state court can be held only if petitioner shows that: (1) the claim relies either on (a) a new rule of constitutional law that the Supreme Court has made retroactive to cases on collateral review, or (b) a factual predicate that could not have been previously discovered through the exercise of due diligence, and (2) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. See 28 U.S.C. § 2254(e)(2). In short, if Petitioner did not present in state court the facts he wishes to present now, for instance by developing them in his state habeas proceedings, he cannot do so now unless he can bring himself within the provisions of section 2254(e)(2) outlined above.

The Court concludes that Petitioner has failed to demonstrate that the provisions of 28 U.S.C. § 2254(e)(2) apply in the instant case. An evidentiary hearing is not required on issues that can be resolved by reference to the state court record. *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998). Moreover, Petitioner is only entitled to an evidentiary hearing on claims that, if proven, would entitle him to relief. See, e.g., *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). Here, the

Court has been able to resolve all of Petitioner's claims by reference to the state court record. Petitioner's claims rely on established rules of constitutional law. Petitioner has not set forth a factual basis for claims that could not have been previously discovered by due diligence. Finally, the facts underlying the claims are insufficient to establish by clear and convincing evidence that no reasonable fact finder would have found Petitioner guilty of the offense. Petitioner is not entitled to an evidentiary hearing.

Petitioner's first two issues relate to law enforcement testimony. These issues concern improper law enforcement opinion and vouching for the credibility of a witness. As detailed by the Magistrate Judge, these claims are without merit. The testimony was introduced into evidence without objection. Additionally, the Washington appellate court found the testimony was not improper. Petitioner has failed to show the decision of the Washington appellate court resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law, or that the state court ruling resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence.

Petitioner's third issue involves an allegation that the right to confrontation was denied when a law enforcement officer testified regarding contacts with a potential witness. As detailed by the Magistrate Judge, there was no testimony as to the substance of any statements made by this potential witness and Petitioner had the opportunity to cross examine the testifying law enforcement officer. The Washington appellate court found no violation

of the right to confrontation, as did the Magistrate Judge. This Court agrees that the right of confrontation was not denied.

Petitioner contends in claim four that improper identification procedures were employed. As noted by the Magistrate Judge, this claim is unexhausted and procedurally barred. There exit (sic) no basis to consider the photo identification claim on the merits.

Finally, Petitioner raises a claim of insufficiency of evidence to convict. As demonstrated in the Report and Recommendation, the testimony presented at trial is sufficient evidence of guilt.

The Court having reviewed the Report and Recommendation of the Hon. J. Kelley Arnold United States Magistrate Judge, objections to the Report and Recommendation, and the remaining record, does hereby find and Order:

(1) The Court adopts the Report and Recommendation;

(2) This petition is **DISMISSED WITH PREJUDICE**.

(3) The Clerk is directed to send copies of this Order to Petitioner's counsel, and the Hon. J. Kelley Arnold.

DATED this 29th day of May, 2008.

s/ Franklin D. Burgess
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

[FILED]

[APRIL 25, 2008]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SANTANA OCAMPO,	)	Case No. C07-5671FDB
	)	
Petitioner,	)	REPORT AND
	)	RECOMMENDATION
v.	)	
	)	
HAROLD CLARKE,	)	**NOTED FOR:**
	)	**May 23, 2008**
Respondent.	)	
	)	

This habeas corpus action, filed pursuant to 28 U.S.C. 2254, has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636 (b)(1)(B) and Local Magistrates' Rules MJR 3 and MJR 4. Respondent has filed an answer to the petition (Dkt. # 13). Petitioner has filed a traverse (Dkt. # 15 and 16). This mater is ripe for review.

BASIS FOR CUSTODY AND FACTS

Petitioner is incarcerated for one count of murder in the first degree. He was convicted in Pierce County Superior Court and sentenced to 360

months of confinement. The sentence included a 60-month enhancement for a deadly weapon.

The Washington State Court of Appeals summarized the facts as follows:

> Late on the evening of August 9, 2003, Julio Morales-Castro was shot in the head while he sat in his car outside a pool hall. Morales-Castro died from those injuries. At the scene, a witness reported seeing a blue minivan drive away after the shooting. Other witnesses reported seeing three or more young Hispanic male gang members running from the scene of the shooting. The area around the pool hall was a common hangout for members of the Hispanic gang Surreno 13.
>
> Detectives identified Jose Hernandez as one of the males running from the scene. Detective David Devault interviewed Hernandez, who implicated Ocampo. Based on Hernandez's statements, Detectives Robert Yerbury and John Ringer interviewed Baldemar Vela.
>
> Vela told the detectives he was reluctant to provide information because he was afraid Surreno 13 would retaliate. Vela explained that on the night of the shooting, he was out drinking and partying with Hernandez. Vela gave a ride in his van to Hernandez and two of Hernandez's friends. Hernandez sat in the front

seat. Vela stopped near the pool hall to purchase beer. Hernandez and his two friends got out of the van and went in a different direction from Vela.

Vela was talking to someone when Hernandez reappeared. Two minutes earlier, Vela heard what he thought was the sound of a firecracker. Hernandez was nervous and sweating and his two friends were standing across the street. Hernandez told Vela that they needed to leave because "someone was tripping on him." 3 Report of Proceedings (RP) at 416. The four then took off in Vela's van, again with Vela and Hernandez in the front seat. As he was driving, Vela overheard someone in the backseat say, "I was tripping, so I had to shoot him." 3 RP at 422.

Vela identified Hernandez from a montage of black and white photos. What happened next is disputed. According to Vela, he never looked at Hernandez's two friends on the night of the shooting and could therefore not identify them. The detectives gave him a single Polaroid color photograph and asked if the person was one of the friends. When Vela stated that he did not know, the detectives responded by telling Vela that the person had already admitted to being in the van. Vela then said, "He probably was. If he is saying

he was in my van, then he was." 3 RP at 459.

Detectives Yerbury and Ringer denied Vela's version of the interview. The detectives explained that Vela was scared enough of gang retaliation that he talked about moving away or joining the military. Vela "minimized his knowledge," talking in vague generalities. 4 RP at 525. After Vela identified Hernandez, the detectives wanted to see if he could identify Ocampo. But the detectives did not have a picture of Ocampo. He had never been booked into jail and had not obtained a driver's license or identification card. Because the detectives were concerned that if they waited until Ocampo was arrested Vela would be uncooperative and backpedal from what he had told them, they took a Polaroid photograph of Ocampo, who was being interviewed in a different room. When they showed the picture to Vela, he readily identified Ocampo as one of Hernandez's two friends, although he could not say if he was the one who made the claim of shooting Morales-Castro.

The State charged Ocampo with first degree murder. Before trial, Ocampo moved to suppress Vela's identification. The trial court denied the motion after hearing Vela and Detective Ringer's testimony. The court

found that Vela was not credible in denying that he had identified Ocampo or in asserting that he had not seen Hernandez's friends on the night of the shooting. The court concluded that although the single photograph of Ocampo was unduly suggestive, Vela's identification contained sufficient indicia of reliability to make it admissible. The court found significant Vela's certainty in the identification; Vela's prolonged opportunity to observe Ocampo on the night of the shooting; Vela's motivation to observe Ocampo after the shooting; and that Vela's identification was made only two weeks after the shooting.

At trial, the State called Hernandez, who agreed to testify truthfully at Ocampo's trial as part of a plea agreement to second degree murder. Hernandez testified that on the night of the shooting, Vela gave a ride to him, Ocampo, and Mesial Vasquez. When Vela stopped at the pool hall, Hernandez and Ocampo wandered off and came across a car with nice tire rims. The two decided to steal the car. Ocampo told Hernandez that he had a gun and would keep a lookout while Hernandez broke into the car. Hernandez began walking toward the car when Morales-Castrol exited the pool hall and headed toward the same car. Hernandez headed in a different

direction. Once Morales-Castro was in the car, Ocampo approached him and asked for $2 to catch the bus, Morales-Castro stated that he had no money and then attempted to drive off, but as he did so, Ocampo pulled out his gun and shot Morales-Castro in the head.

The State also called Carla Bach, a juvenile detention officer at the Pierce County juvenile detention facility. Bach testified that during one shift, Hernandez approached her while several other detainees were around and he loudly asked if she knew why he was in custody. Bach indicated that she did not know and Hernandez responded, "I am in here for murder." 6 RP at 809. Hernandez then smiled and said that he was the shooter. Bach testified that she did not initially file a report on Hernandez's claim because, in her experience, juvenile detainees routinely exaggerated and misstated their crimes to gain status in the facility. Bach testified that the detainees would "battle" each other, going back and forth with who had the "better" crime. 6 RP at 810. Bach then explained why a report was eventually filed on Hernandez:

> Like I said, I have known Jose since he came in I think at 12; always really liked him. And my coworker, Dawn, we both

> have had a really good rapport with Jose, so I happened to see her on break and I told her of the incident because that was the main staff that works in foxtrot [detention pod] and she just kind of - - we both blew it off and said, there's no way, no way he could have been the shooter. That pretty much ended the conversation.
>
> Then I think, I don't know if it was the next day or within that week, Jose talked to her and admitted the same thing that he admitted to me, so we both thought at the time we need to make a report. 6 RP at 813. Bach clarified on cross-examination that they decided to file a report after Hernandez's second disclosure because they felt it was a "serious enough situation." 6 RP at 822.

Ocampo did not testify, but he presented several witnesses who each testified that Ocampo was at a party at the time of the shooting. Ocampo argued in closing that Hernandez killed Morales-Castro and that he was lying to save himself and possibly Vasquez.

> The jury found Ocampo guilty as charged.

(Dkt. # 14, Exhibit 5).

PROCEDURAL HISTORY

Petitioner filed a direct appeal through counsel and raised the following claims:

> Issue No. 1. The State Improperly Invaded the Province Of the Jury By Having Witnesses Express Opinions That The State's Star Witness, Hernandez, Was Credible And That Law Enforcement Believed Hernandez's Statement That Ocampo Shot and Killed Julio Morales-Castro Rather Than Hernandez's Admission That He, Hernandez, Killed Mr. Morales-Castro.
>
> Issue No. 2. Repeatedly Eliciting Testimony As To The Credibility Of Key Witnesses And Improperly Arguing Credibility Together With Personal Opinion Is Prosecutorial Misconduct Constituting Manifest Error Which May Be Raised First Time On Appeal. Because This Case Turns On Witness Credibility The Error Is Manifest And Not Harmless And Ocampo's Conviction For Felony Murder In The Second [sic] Degree Must be Reversed.
>
> Issue No. 3. The State Denied Ocampo His Right To Confront Witnesses When It Repeatedly Elicited From Law Enforcement Information Attributed To Mesial Vasquez, Even

Though Mesial Vasquez Did Not Testify.

Issue No. 4. The Court Erred When It Denied Ocampo's Motion to Suppress is [sic] Pre-Trial Identification By Baldemar Vela Because The Showing Of A Single Polaroid Was Impermissibly Suggestive And Vela Testified He Was Not Sure Ocampo Was One Of The Three People He Drove Away From The Scene Of the Shooting. [Error is Assigned To Disputed Finding of Fact starting at Line 24 though 26 on page 4; Finding starting at line 3 through 11 of page 5; Finding starting at line 12 though 13 on page 5. Error is assigned to the Conclusions as to Disputed Facts found on page 5; to the Conclusion starting on line 7 though 10 on page 6; the Conclusion starting on line 11 though 16 on page 6; the Conclusions starting on line 23 though 25 on page 6; Conclusion starting on line 3 though line 10 on page 7] (Note the Findings and Conclusions are attached as exhibit A and that they are not numbered).

Issue No. 5. Baldamar Vela Was Put In The Untenable Position Of Having To Claim The Police Acted Improperly During His Interview In Which The police Claim He identified Ocampo As One Of The Passengers In His Van That Left The Scene Of The Shooting.

> Issue No. 6. The Untainted Evidence Was Not Sufficient To Establish That Mr. Ocampo Shot And Killed Mr. Morales-Castro During The Course Or Furtherance Of A Robbery.

(Dkt. #14, Exhibit 3).

On April 18, 2006, the Washington State Court of Appeals affirmed the conviction and sentence (Dkt. # 14, Exhibit 5). Petitioner filed for discretionary review with the State Supreme Court and raised the following claims:

1. The State Improperly Invaded The Province Of The Jury By Having Witnesses Express Opinions That The State's Star Witness, Hernandez, Was Credible And That Law Enforcement Believed Hernandez's Statement That Ocampo Shot And Killed Julio Morales-Castro Rather Than Hernandez's Admission That He, Hernandez, Killed Mr. Morales-Castro.

2. Repeatedly Eliciting Testimony As To The Credibility Of Key Witnesses And Improperly Arguing Credibility Together With Personal Opinion Is Prosecutorial Misconduct Constituting Manifest Error Which May Be Raised First Time On Appeal. Because This Case Turns On Witness Credibility

The Error Is Manifest And Not Harmless And Ocampo's Conviction For Felony Murder In The Second Degree [sic] Must Be Reversed.

3. The State Denied Ocampo His Right To Confront Witnesses When It Repeatedly Elicited From Law Enforcement Information Obtained During Police Interviews Attributed To Mesial Vasquez, Even Though Mesial Vasquez Did Not Testify.

4. The Untainted Evidence Was Not Sufficient To Establish That Mr. Ocampo Shot And Killed Mr. Morales-Castro During The Course Or Furtherance Of A Robbery.

(Dkt. # 14, Exhibit 6).

In the federal Habeas Corpus petition that is now before this court petitioner raises the following claims:

1. Denial of right to impartial jury; due process.
2. Prosecutorial misconduct; right to a fair trial.
3. Denial of right to confrontation.
4. Denial of due process; suggestive and unreliable identification procedure.
5. Insufficiency of evidence.

(Dkt. # 3).

Respondent concedes that petitioner has exhausted issues one, two, three, and five. Respondent contends the fourth issue is unexhausted because it was not presented to the Washington Supreme Court in the motion for discretionary review.

EVIDENTIARY HEARING

If a habeas applicant has failed to develop the factual basis for a claim in state court, an evidentiary hearing may not be held unless (A) the claim relies on (1) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, or there is (2) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. §2254(e)(2) (1996). Petitioner's claims rely on established rules of constitutional law. Further, petitioner has not set forth any factual basis for his claims that could not have been previously discovered by due diligence. Finally, the facts underlying petitioner's claims are insufficient to establish that no rational fact finder would have found him guilty of the crime. Therefore, petitioner is not entitled to an evidentiary hearing.

STANDARD

Federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. *Engle v. Isaac*, 456 U.S. 107 (1983). Section 2254 is explicit in that a federal

court may entertain an application for writ of habeas corpus "only on the ground that [the petitioner] is in custody in violation of the constitution or law or treaties of the United States." 28 U.S.C. § 2254(a) (1995). The Supreme Court has stated many times that federal habeas corpus relief does not lie for errors of state law. *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Estelle v. McGuire*, 502 U.S. 62 (1991).

Further, a habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). A determination of a factual issue by a state court shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

DISCUSSION

1. Issues relating to witnesses credibility, issues one and two.

Petitioner's first two issues relate to his argument that law enforcement officials and the prosecutor vouched for the credibility of the State's star witness, Mr. Hernandez. The Washington State Court of Appeals addressed these two issues and held:

> Ocampo maintains that the State offered several improper opinions on the

veracity of Hernandez and Vela's testimony and statements to detectives. It is improper for a witness to give an opinion on guilt or the veracity of the defendant or a witness. *State v. Dolan*, 118 Wash. App. 323, 329, 73 P.3d 1011 (2003) (improper opinion testimony violates "the defendant's constitutional rights to a jury trial and invades the fact-finding province of the jury"); *State v. Jerrels*, 83 Wash. App. 503, 507, 925 P.2d 209 (1996). We take a narrow view of what constitutes improper opinion testimony. *State v. Demery*, 144 Wash.2d 753, 760, 30 P.3d 1278 (2001). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley*, 70 Wash. App. 573, 578, 854 P.2d 658 (1993), *review denied*, 123 Wash.2d 1011 (1994). Whether testimony constitutes an impermissible opinion depends upon the circumstances of each case. *Heatley*, 70 Wash. App. at 579.

Ocampo first contends that Detective Devault gave an improper opinion on Hernandez's veracity. Detective Devault testified that, based on his interview of Hernandez, he obtained an arrest warrant for Ocampo. The prosecutor then asked the following

question: "Did you feel that he was telling the truth to you?" 3 RP at 369. Detective Devault responded without objection, "Yes, I do." 3RP at 369. Assuming this exchange was improper, Ocampo may not now raise the issue.

A party is stopped from assigning error to the admission of evidence that the party relied upon in its case. *Storey v. Storey*, 21 Wash. App. 370, 376, 585 P.2d 183 (1978). *Review denied*, 91 Wash.2d 1017 (1979). Likewise, a defendant who makes a tactical choice hoping for some advantage "may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right." *State v. Elmore*, 139 Wash.2d 250, 280 n.7, 985 P.2d 289 (1999) (quoting *State v. Lewis*, 15 Wash. App. 172, 177, 548 P.2d 587, *review denied*, 87 Wash.2d 1005 (1976)), *cert. denied*, 531 U.S. 837 (2000); *see also In re Pers. Restraint of Pirtle*, 136 Wn2d (sic) 467, 488, 965 P.2d 593 (1998) (defense counsel afforded wide latitude and flexibility in his choice to trial psychology and tactics).

Ocampo did not object to the detective's testimony that he believed Hernandez at the interview precisely because it supported his theory of the case. Ocampo's trial defense was that law enforcement and the prosecutor's office negligently and recklessly

investigated Morales-Castro's murder. *See, e.g.*, 7 RP at 1007 (defense counsel's closing argument: "That is the definition of negligence. The police investigation started off negligent: (sic)). 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?"); 7 RP at 1003 (defense counsel's closing argument: "Hernandez shot and killed Julio Morales-Castro . . . . Jose Hernandez lied about it to save himself. He lied about it to save or cover for two other people."). Ocampo is precluded from assigning error to Detective Devault's testimony for the first time on appeal.

Ocampo also contends that Detective Ringer testified to "believ[ing] Hernandez's version of events over

others." Br. of Appellant at 13 (citing 4 RP at 539). But again, Ocampo is stopped from raising this assignment of error. Moreover, we note that Ocampo cites his cross-examination of the detective, where he testified that witnesses at the crime scene identified members of the Surreno 13 gang that told them Hernandez was not involved. Ocampo elicited this testimony. Detective Ringer did not offer an opinion on the veracity of Hernandez's disclosures.

Ocampo next contends that Detective Ringer testified that "Vela was not being truthful when he testified he could not identify Ocampo as one of the persons in the back of his van." Br. of Appellant at 16. Ocampo is incorrect. Detective Ringer did not offer an opinion on the truthfulness of either Vela's trial testimony or his statements to the detectives. What Detective Ringer did testify to was his opinion that when Vela talked to the detectives, he talked in vague generalities and appeared to be minimizing his knowledge of the night of the shooting. Detective Ringer also testified to his concern that Vela would change his story if the detectives did not have him immediately attempt to identify Ocampo. Detective Ringer's testimony was based on his experience in interviewing people and Vela's own

> admitted fear of gang retaliation if he cooperated. *See* ER 702, 704; *Heatley*, 70 Wash. App. at 578. Detective Ringer's testimony was not improper.
>
> Lastly, Ocampo contends that Bach gave improper opinion by testifying that she and her coworker did not initially believe Hernandez was the shooter. But [a]gain, the record reflects that Ocampo did not object because Bach's testimony aided his trial defense. Before Bach's testimony, Ocampo sought and obtained assurances that Bach would not offer a *current* opinion on whether Hernandez was the shooter. Bach testified that a report was not initially filed for Hernandez's shooting claim because they thought he was "puffing" and they believed there was "no way, now way he could have been the shooter." 6 RP at 813. Bach then explained that the situation became serious, and a report was necessary, when Hernandez again claimed to be the shooter. Bach's testimony supported Ocampo's defense: Although Bach and her coworker really liked Hernandez, they were no longer confident in their disbelief of his claims. We reject this assignment of error.

(Dkt. # 14, Exhibit 5, pages 7 to 10).

Petitioner also claims the prosecutor vouched for the credibility of the witness in closing argument and in eliciting testimony from Mr. Hernandez that

he had agreed to plead guilty to a lesser charge in return for his truthful testimony. There was no objection or request to redact the terms of the plea agreement. The Washington State Court of Appeals held that under Washington law failure to object waived any error (Dkt. # 14, Exhibit 5, page 10). The court found the decision not to object was tactical and aimed at establishing the "State's devotion to a man Ocampo professed to be a liar and the real murderer." The court noted the prosecutor did not offer any personal opinion a to Mr. Hernandez's credibility.

It is improper for the prosecution to vouch for the credibility of a government witness. *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981); *United States v Potter*, 616 F.2d 384, 392 (9th Cir. 1979), *cert. denied*, 449 U.S. 832 (1980); *United States v. Davis*, 564 F.2d 840, 866 (9th Cir. 1977), *cert denied* 434 U.S. 1015 (1978). However, a prosecutor's assertions regarding the relative believability of the state and defense witnesses are not objectionable if they were inferences drawn from the evidence, not representations of his personal opinion. *Duckett v. Godinez*, 67 F.3d 734, 742 (1995).

Merely asking a defendant to speculate as to why his or her testimony conflicts with the testimony of another witness does not constitute prosecutorial misconduct. *See United States v. Wellington*, 754 F.2d 1457, 1468 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1986).

> Vouching for the credibility of a government witness may occur in two ways: the prosecution may place the

> prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. The first type of vouching involves personal assurances of a witness's veracity and is not at issue here.
>
> The second type of vouching involves prosecutorial remarks that bolster a witness's credibility by referenced to matters outside the record. It may occur more subtly than personal vouching, and is also more susceptible to abuse. This court has declared that such prosecutorial remarks may be fatal if: . . . the remarks, fairly construed, were based on the District Attorney's personal knowledge apart from the evidence in the case and that the jury might have so understood them.

Roberts, 618 F.2d at 533-34 (citations omitted). Here, the evidence was in the record and there was no objection to introduction of the evidence. Petitioner has failed to show the decision of the Washington State Court of Appeals resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or that the state court ruling resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. Petitioner's first and second claims are without merit.

2. *Right to confrontation.*

Petitioner claims his right to confront witnesses was violated when a detective testified regarding contacts with Mr. Vasquez. Mr. Vasquez was allegedly the fourth person in the van the night of the shooting. He was allegedly not present when the shooting occurred.

A detective testified he spoke with Mr. Vasquez and Mr. Vasquez was reluctantly helpful. There was no testimony as to the substance of any statements made by Mr. Vasquez and defense had the ability to cross examine the detective. The Washington State Court of Appeals found Mr. Ocampo's right to confrontation was not violated by this testimony (Dkt. # 14, Exhibit 5, page 12). As no out of court statements made by Mr. Vasquez were entered into the record through the detective, the court agrees that petitioner's right to confrontation was not violated by this testimony.

Petitioner also complains of Detective Ringer's testimony. The Washington State Court of Appeals considered the claim and stated:

Ocampo next cites Detective Ringer's testimony concerning identifications made by witnesses at the crime scene:

> Q. And when you showed these photographs, were you able to identify anybody in the photographs?
>
> A. They did make identifications.
>
> Q. You seem reluctant to say that . . . Why are you reluctant?

A. Well, in the long run some of the identification proved erroneous.

Q. Why do you say that?

A. As we investigated further, we found that one of the photographs, Jose Hernandez's identification of him, was accurate, but then some of the others were people that they knew but had not actually been involved in the shooting.

Q. Okay. How were you able to determine that?

A. Well, eventually, Jose Hernandez was arrested, he gave a statement. Later we contacted Baldemar Vela, and he gave a statement that verified what Jose Hernandez said. And still later, Mesial Vasquez was interviewed and he also verified the other two.

RP at 515. The prosecutor used this testimony in closing argument: "Ladies and gentlemen, Jose's gone back and forth to some extent about the facts of this, but his statements, the core of his statements, were corroborated by Mesial Vasquez, Baldemar Vela and Marcos, as well as physical evidence." 7 RP at 993.

As the prosecutor's closing reflects, the detective's testimony implies that Vasquez gave a statement to law enforcement corroborating Hernandez's statement of those involved in the shooting. However, the record

establishes that defense counsel was keenly aware of the Vasquez/*Crawford* issue and did not view the quoted testimony to be problematic or objectionable. Later in Detective Ringer's testimony, defense counsel made the following remarks in a sidebar:

> [DEFENSE COUNSEL]: Your honor, with the questioning that's happening, I see where this is going. They are going to bring in next a statement by Mesial Vasquez [that] Santana Ocampo was in the van. Mesial Vasquez is not here, we are not able to confront this witness, don't know where he is. State's not going to produce him and I want to make sure there is no hearsay from Mesial Vasquez of my client being in that van coming into this testimony . . . .
>
> [PROSECUTOR]: Defense counsel] asked if there had been any evident [sic] - actually, he made the statement there had been no efforts to corroborate and I think that there certainly were, and I think

there certainly was, and I think there has - there was testimony both through direct and redirect and now in cross that indicates Mr. Vasquez's corroborating exactly what everybody else is corroborating.

THE COURT: Well, I don't think it opens the door to introduce Vasquez's statement beyond the extent that there has already been testimony to efforts to corroborate. I think that's a dangerous road to go down and certainly don't want to have *Crawford*-related problem.

[PROSECUTOR]: I have gone as far as I intend to go in that regard. I just have a couple more.

THE COURT: All right.

[DEFENSE COUNSEL]: I understand. I had to make sure that didn't happen.

RP at 556-57.

Ocampo is not entitled to a new trial based on this issue. First, he did not object to Detective Ringer's

testimony. *See State v. Swan*, 114 Wash.2d 613, 661, 790 P.2d 610 (1990) ("The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial."), *cert. denied*, 498 U.S. 1046 (1991). Second, and as previously noted, Detective Ringer's testimony only implied the outlines of Vasquez's statement. *See State v. Lynn*, 67 Wash. App. 339, 345, 835 P.2d 251 (1992) (RAP 2.5(a), permitting a manifest constitutional error to be raised for the first time on appeal, requires an error that is "unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed," and having "practical and identifiable consequences in the trial.") Third, Ocampo did not object to the prosecutor's closing. *See State v. Brown*, 132 Wash.2d 529, 561, 940 P,2d (sic) 546 (1997) (defendant's failure to object waives improper closing remarks unless the comments are so flagrant and ill-intentioned that the resulting prejudice could not be alleviated by a curative instruction), *cert. denied*, 523 U.S. 1007 (1998). Fourth, defense counsel incorporated Vasquez's corroboration in the beginning of his closing argument where he suggested that Hernandez and Vasquez were trying to pin their actions on him.

(Dkt. # 14, Exhibit 5, pages 13 to 15).

In *State v. Swan*, the Washington Sate (sic) Supreme court stated:

> We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction. Thus, in order for an appeallate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. Moreover, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal."

State v. Swan, 114 Wash.2d 613, 661 (1990).

Petitioner in this case did not object to Detective Ringer's testimony and did not object to closing argument. Petitioner fails to show that the Washington State Court of Appeals decision rejecting

his claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or that the state court ruling resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. Petitioner's third claim is without merit.

3. *Identification by photograph.*

Petitioner argues it violated his constitutional rights when Mr. Vela was asked to identify him from a color Polaroid picture taken of Mr. Ocampo. While Mr. Ocampo presented this issue to the Washington State Court of Appeals, the issue was not included in his motion for discretionary review to the Washington State Supreme Court (Dkt. # 14, Exhibit 6).

Respondent argues the claim is unexhausted and procedurally barred. The court agrees. In order to satisfy the exhaustion requirement, petitioner's claims must have been fairly presented to the state's highest court. *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985). Petitioner did not present his claim regarding photo identification of him in his petition for discretionary review. Thus, the issue was never before the Washington State Supreme Court. A federal habeas petitioner must provide the state courts with a fair opportunity to correct alleged violations of prisoners' federal rights. *Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 888 (1995). It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. *Id.*, *citing Picard v. Connor*, 404 U.S. 270 (1971) and

Anderson v. Harless, 459 U.S. 4 (1982). This claim is unexhausted.

Normally, a federal court faced with an unexhausted or mixed petition dismisses the petition without prejudice, so that the petitioner has an opportunity to exhaust the claims in state court. Now, however, petitioner is barred from filing another petition in state court as any attempt to file another petitioner will be deemed time barred. *See* RCW 10.73.090.

Federal Courts generally honor state procedural bars unless it would result in a "fundamental miscarriage of justice," or petitioner demonstrates cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner here cannot show cause and prejudice in state court.

To show cause in federal court, petitioner must show that some objective factor, external to the defense, prevented petitioner from complying with state procedural rules relating to the presentation of his claims. *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991). Here, petitioner simply failed to raise his issue in his motion for discretionary review.

In his traverse petitioner asks the court to consider this claim. Petitioner argues his appellate counsel was instructed to raise the issue but did not do so. The claim of ineffective assistance of appellant counsel is also unexhausted. The court should not consider the photo identification claim on the merits.

4. *Sufficiency of evidence*.

Petitioner alleges the evidence remaining in the case is insufficient to convict him. Evidence is sufficient to support a criminal conviction if the

record reasonably supports a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 320 (1979). The question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id., citing Johnson v. Louisiana*, 406 U.S. 356, 362 (1972).

In this case a witness, Mr. Hernandez, testified petitioner shot the victim in the course of a failed attempt to steal the victim's car. The testimony that petitioner was present that night was corroborated by the driver of the van. Further, the driver of the van testified Mr. Hernandez was in the front seat next to the driver when the driver heard someone in the back seat say "I was tripping, so I had to shoot him." 3 RP at 422. The testimony shows the persons in the back seat were Mr. Ocampo and Mr. Vasquez. Mr. Hernandez's testimony that Ocampo was the shooter along with Mr. Velas's (sic) testimony placing Mr. Ocampo in the back seat is sufficient evidence of guilt.

This petition should be **DISMISSED WITH PREJUDICE**. Pursuant to 28 U.S.C. §636(b)(1) and Rule 72(b) of the Federal [R]ules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **May 23, 2008**, as noted in the caption.

DATED this 25 day of April, 2008.

/S/ *J. Kelley Arnold*
J. Kelley Arnold
United States Magistrate Judge

[FILED]

[APRIL 18, 2006]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

STATE OF WASHINGTON,	)	NO. 32536-5-II
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED
	)	OPINION
SANTANA OCAMPO,	)	
	)	
Respondent.	)	
	)	

QUINN-BRINTNALL, C.J. - A jury convicted Santana Ocampo of first degree murder. On appeal, he maintains that the trial court abused its discretion in admitting a suggestive photo identification; several witnesses gave improper opinions about the veracity of key witnesses; the prosecutor committed misconduct; and testimonial hearsay statements were improperly admitted. We affirm.

FACTS

Late on the evening of August 9, 2003, Julio Morales-Castro was shot in the head while he sat in his car outside a pool hall. Morales-Castro died from these injuries. At the scene, a witness reported

seeing a blue minivan drive away after the shooting. Other witnesses reported seeing three or more young Hispanic male gang members running from the scene of the shooting. The area around the pool hall was a common hangout for members of the Hispanic gang Surreño 13.

Detectives identified Jose Hernandez as one of the males running from the scene. Detective David Devault interviewed Hernandez, who implicated Ocampo. Based on Hernandez's statements, Detectives Robert Yerbury and John Ringer interviewed Baldemar Vela.

Vela told the detectives he was reluctant to provide information because he was afraid Surreño 13 would retaliate. Vela explained that on the night of the shooting, he was out drinking and partying with Hernandez. Vela gave a ride in his van to Hernandez and two of Hernandez's friends. Hernandez sat in the front seat. Vela stopped near the pool hall to purchase beer. Hernandez and his two friends got out of the van and went in a different direction from Vela.

Vela was talking to someone when Hernandez reappeared. Two minutes earlier, Vela heard what he thought was the sound of a firecracker. Hernandez was nervous and sweating and his two friends were standing across the street. Hernandez told Vela that they needed to leave because "someone was tripping on him." 3 Report of Proceedings (RP) at 416. The four then took off in Vela's van, again with Vela and Hernandez in the front seat. As he was driving, Vela overheard someone in the backseat say, "I was tripping, so I had to shoot him." 3 RP at 422.

Vela identified Hernandez from a montage of black and white photos. What happened next is disputed. According to Vela, he never looked at Hernandez's two friends on the night of the shooting and could therefore not identify them. The detectives gave him a single Polaroid color photograph and asked if the person was one of the friends. When Vela stated that he did not know, the detectives responded by telling Vela that the person had already admitted to being in the van. Vela then said, "He probably was. If he is saying he was in my van, then he was." 3 RP at 459.

Detectives Yerbury and Ringer denied Vela's version of the interview. The detectives explained that Vela was scared enough of gang retaliation that he talked about moving away or joining the military. Vela "minimized his knowledge," talking in vague generalities. 4 RP at 525. After Vela identified Hernandez, the detectives wanted to see if he could identify Ocampo. But the detectives did not have a picture of Ocampo. He had never been booked into jail and had not obtained a driver's license or identification card. Because the detectives were concerned that if they waited until Ocampo was arrested Vela would be uncooperative and backpedal from what he had told them, they took a Polaroid photograph of Ocampo, who was being interviewed in a different room. When they showed the picture to Vela, he readily identified Ocampo as one of Hernandez's two friends, although he could not say if he was the one who made the claim of shooting Morales-Castro.

The State charged Ocampo with first degree murder. Before trial, Ocampo moved to suppress Vela's identification. The trial court denied the

motion after hearing Vela and Detective Ringer's testimony. The court found that Vela was not credible in denying that he had identified Ocampo or in asserting that he had not seen Hernandez's friends on the night of the shooting. The court concluded that although the single photograph of Ocampo was unduly suggestive, Vela's identification contained sufficient indicia of reliability to make it admissible. The court found significant Vela's certainty in the identification; Vela's prolonged opportunity to observe Ocampo on the night of the shooting; Vela's motivation to observe Ocampo after the shooting; and that Vela's identification was made only two weeks after the shooting.

At trial, the State called Hernandez, who agreed to testify truthfully at Ocampo's trial as part of a plea agreement to second degree murder. Hernandez testified that on the night of the shooting, Vela gave a ride to him, Ocampo, and Mesial Vasquez. When Vela stopped at the pool hall, Hernandez and Ocampo wandered off and came across a car with nice tire rims. The two 'decided to steal the car. Ocampo told Hernandez that he had a gun and would keep a lookout while Hernandez broke into the car. Hernandez began walking toward the car when Morales-Castro exited the pool hall and headed toward the same car. Hernandez headed in a different direction. Once Morales-Castro was in the car, Ocampo approached him and asked for $2 to catch the bus. Morales-Castro stated that he had no money and then attempted to drive off, but as he did so, Ocampo pulled out his gun and shot Morales-Castro in the head.

The State also called Carla Bach, a juvenile detention officer at the Pierce County juvenile

detention facility. Bach testified that during one shift, Hernandez approached her while several other detainees were around and he loudly asked if she knew why he was in custody. Bach indicated that she did not know and Hernandez responded, "I am here for murder." 6 RP at 809. Hernandez then smiled and said that he was the shooter. Bach testified that she did not initially file a report on Hernandez's claim because, in her experience, juvenile detainees routinely exaggerated and misstated their crimes to gain status in the facility. Bach testified that the detainees would "battle" each other, going back and forth with who had the "better" crime. 6 RP at 810. Bach then explained why a report was eventually filed on Hernandez:

> Like I said, I have known Jose since he came in I think at 12; always really liked him. And my coworker, Dawn, we both have had a really good rapport with Jose, so I happened to see her on break and I told her of the incident because that was the main staff that works in foxtrot [detention pod] and she just kind of -- we both blew it off and said, there's no way, no way he could have been the shooter. That pretty much ended the conversation.
>
> Then I think, I don't know if it was the next day or within that week, Jose talked to her and admitted the same thing that he admitted to me, so we both thought at the time we needed to make a report.

6 RP at 813. Bach clarified on cross-examination that they decided to file a report after Hernandez's second disclosure because they felt it was a "serious enough situation." 6 RP at 822.

Ocampo did not testify, but he presented several witnesses who each testified that Ocampo was at a party at the time of the shooting. Ocampo argued in closing that Hernandez killed Morales-Castro and that he was lying to save himself and possibly Vasquez.

The jury found Ocampo guilty as charged. This appeal followed.

ANALYSIS

VELA'S IDENTIFICATION

Ocampo maintains that the trial court erred in admitting Vela's identification of him as being in the backseat of the van on the night of the shooting. Ocampo argues that the identification procedure was fatally flawed by the detectives' use of a single color photo when they had previously shown Vela black and white photomontages. We disagree.

An out-of-court identification violates due process if it is based on suggestive factors that "give rise to a very substantial likelihood of irreparable misidentification." *State v. Hilliard,* 89 Wash.2d 430, 438, 573 P.2d 22 (1977) (quoting *Simmons v. United States,* 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). An identification tainted by suggestive factors is still admissible if, under the totality of the circumstances, the identification is reliable. *Neil v. Biggers,* 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); *State* v. *Vaughn,* 101 Wash.2d 604, 607-08, 682 P.2d 878 (1984). This determination

involves several considerations: the opportunity of the witness to view the defendant at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the defendant; the level of certainty demonstrated at the confrontation; and the time between the crime and the confrontation. *Biggers,* 409 U.S. at 199; *Vaughn,* 101 Wash.2d at 608.

The trial court correctly concluded that Vela's identification was tainted by the fact that he was shown only a single photo. "The presentation of a single photograph is, as a matter of law, impermissibly suggestive." *State v. Maupin,* 63 Wash. App. 887, 896, 822 P.2d 355, *review denied,* 119 Wash.2d 1003 (1992). The suggestiveness was heightened by the use of a color Polaroid photo when Vela had previously been shown black-and-white booking photos. Nonetheless, a trial court has broad discretion to determine whether a tainted identification is reliable and therefore admissible. *State v. Kinard,* 109 Wash. App. 428, 432, 36 P.3d 573 (2001), *review denied,* 146 Wash.2d 1022 (2002). A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Neal,* 144 Wash.2d 600, 609, 30 P.3d 1255 (2001).

The court concluded that several factors made the identification reliable in spite of the taint: Vela's certainty in the identification; the short period between the shooting and the identification; and Vela's prolonged opportunity and motive to observe Ocampo, particularly after someone began talking about the shooting. Ocampo disputes the court's ruling, relying on Vela's testimony that he did not identify Ocampo and that he did not see who

Hernandez's two friends were. But the court found Vela's testimony not credible. The court found credible Detective Ringer's testimony that Vela readily identified Ocampo. We do not review credibility determinations. *In re Pers. Restraint of Davis,* 152 Wash.2d 647, 682-83, 101 P.3d 1 (2004). Ocampo fails to show that the trial court abused its discretion in admitting Vela's identification.

OPINION TESTIMONY

Ocampo maintains that the State offered several improper opinions on the veracity of Hernandez and Vela's testimony and statements to detectives. It is improper for a witness to give an opinion on guilt or the veracity of the defendant or a witness. *State v. Dolan,* 118 Wash. App. 323, 329, 73 P.3d 1011 (2003) (improper opinion testimony violates "the defendant's constitutional right to a jury trial and invade[s] the fact-finding province of the jury"); *State v. Jerrels,* 83 Wash. App. 503, 507, 925 P.2d 209 (1996). We take a narrow view of what constitutes improper opinion testimony. *State v. Demery,* 144 Wash.2d 753, 760, 30 P.3d 1278 (2001). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley,* 70 Wash. App. 573, 578, 854 P.2d 658 (1993), *review denied,* 123 Wash.2d 1011 (1994). Whether testimony constitutes an impermissible opinion depends upon the circumstances of each case. *Heatley,* 70 Wash. App. at 579.

Ocampo first contends that Detective Devault gave an improper opinion on Hernandez's veracity.

Detective Devault testified that, based on his interview of Hernandez, he obtained an arrest warrant for Ocampo. The prosecutor then asked the following question: "Did you feel that he was telling the truth to you?" 3 RP at 369. Detective Devault responded without objection, "Yes, I do." 3 RP at 369. Assuming this exchange was improper,[1] Ocampo may not now raise the issue.

A party is estopped from assigning error to the admission of evidence that the party relied upon in its case. *Storey v. Storey,* 21 Wash. App. 370, 376, 585 P.2d 183 (1978), *review denied,* 91 Wash.2d 1017 (1979). Likewise, a defendant who makes a tactical choice hoping for some advantage "may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right." *State v. Elmore*, 139 Wash.2d 250, 280 n.7, 985 P.2d 289 (1999) (quoting *State v. Lewis*, 15 Wash. App. 172, 177, 548 P.2d 587, *review denied*, 87 Wash.2d 1005 (1976)), *cert denied*, 531 U.S. 837 (2000); *see also In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 488, 965 P.2d 593 (1998) (defense counsel afforded wide latitude and flexibility in his choice of trial psychology and tactics).

Ocampo did not object to the detective's testimony that he believed Hernandez at the interview precisely because it supported his theory of the case. Ocampo's trial defense was that law enforcement and the prosecutor's office negligently and recklessly investigated Morales-Castro's murder.

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[1] *See Jerrels,* 83 Wn. App. at 508 (mother improperly testified that she believed her children were telling the truth when they accused the defendant of sexual abuse).

See, e.g., 7 RP at 1007 (defense counsel's closing argument: "That is that definition of negligence. The police investigation started off negligent"). 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?'"); 7 RP at 1003 (defense counsel's closing argument: "Hernandez shot and killed Julio Morales Castro. . . .Jose Hernandez lied about it to save himself. He lied about it to save or cover for two other people."). Ocampo is precluded from assigning error to Detective Devault's testimony for the first time on appeal.

Ocampo also contends that Detective Ringer testified to "believ[ing] Hernandez's version of events over others." Br. of Appellant at 13 (citing 4 RP at 539). But again, Ocampo is estopped from raising this assignment of error. Moreover, we note that Ocampo cites his cross-examination of the detective, where he testified that witnesses at the crime scene identified members of the Surreño 13 gang that Hernandez told them were not involved. Ocampo elicited this testimony. Detective Ringer did not offer an opinion on the veracity of Hernandez's disclosures.

Ocampo next contends that Detective Ringer testified that "Vela was not being truthful when he testified he could not identify Ocampo as one of the persons in the back of his van." Br. of Appellant at 16. Ocampo is incorrect. Detective Ringer did not offer an opinion on the truthfulness of either Vela's trial testimony or his statements to the detectives. What Detective Ringer did testify to was his opinion that when Vela talked to the detectives, he talked in vague generalities and appeared to be minimizing his knowledge of the night of the shooting. Detective Ringer also testified to his concern that Vela would change his story if the detectives did not have him immediately attempt to identify Ocampo. Detective Ringer's testimony was based on his experience in interviewing people and Vela's own admitted fear of gang retaliation if he cooperated. *See* ER 702, 704; *Heatley,* 70 Wash. App. at 578. Detective Ringer's testimony was not improper.

Lastly, Ocampo contends that Bach gave an improper opinion by testifying that she and her coworker did not initially believe Hernandez was the shooter. But again, the record reflects that Ocampo did not object because Bach's testimony aided his trial defense. Before Bach's testimony, Ocampo sought and obtained assurances that Bach would not offer a *current* opinion on whether Hernandez was the shooter. Bach testified that a report was not initially filed for Hernandez's shooting claim because they thought he was "puffing" and they believed there was "no way, no way he could have been the shooter." 6 RP at 813. Bach then explained that the situation became serious, and a report was necessary, when Hernandez again claimed to be the shooter. Bach's testimony supported Ocampo's

defense: Although Bach and her coworker really liked Hernandez, they were no longer confident in their disbelief of his claims. We reject this assignment of error.

PROSECUTORIAL MISCONDUCT

Ocampo maintains that the prosecutor committed misconduct in eliciting Hernandez's testimony that his plea agreement required truthful testimony and in asking Vela if he was accusing the detectives of improper behavior. We disagree.

In *State v. Green,* 119 Wash. App. 15, 24, 79 P.3d 460 (2003), *review denied,* 151 Wash.2d 1035, *cert. denied,* 543 U.S. 1023 (2004), Division One of this court held that a plea agreement provision requiring truthful testimony should be redacted upon request because it improperly vouches for a witness's credibility. *But see* ER 603 (requiring a witness to declare under oath or affirmation that she will testify truthfully). However, the failure to object waives any error. *Green,* 119 Wash. App. at 24-25 & n.19. If there is no redaction request, the prosecutor does not commit misconduct by making an argument based on the plea agreement provision. *State v. Clapp,* 67 Wash. App. 263, 274, 834 P.2d 1101 (1992) (prosecutor could tell jury that witness "escaped prosecution in exchange for his truthful testimony"), *review denied,* 121 Wash.2d 1020 (1993).

Here, Ocampo did not object to the prosecutor's question and Hernandez's testimony that, as part of his plea agreement, the State would make a certain sentencing recommendation if Hernandez promised to testify truthfully at Ocampo's trial. Again, the decision not to object appears to have been a tactical one, aimed at

establishing the State's devotion to a man Ocampo professed to be a liar and the real murderer. Without an objection, it was permissible for the prosecutor to argue in closing that the State decided to offer Hernandez a reduced charge in exchange for his truthful testimony, and that it did so only after it obtained additional evidence corroborating Hernandez's account.[2] Contrary to Ocampo's argument on appeal, the prosecutor did not offer a personal opinion on Hernandez's credibility. This assignment of error fails.

Ocampo also contends that the prosecutor committed misconduct by asking Vela: "So you are going to sit here and tell us that the police acted that improperly when they talked to you?" 3 RP at 462. For support, Ocampo cites *State v. Fleming,* 83 Wash. App. 209, 921 P.2d 1076 (1996), *review denied,* 131 Wash.2d 1018 (1997), and *State v. Casteneda-Perez,* 61 Wash. App. 354, 810 P.2d 74, *review denied,* 118 Wash.2d 1007 (1991). In *Fleming,* 83 Wash. App. at 213-14, the court held improper the prosecutor's argument that the jury had to convict the defendant unless it thought the victim was lying, confused, or fantasizing about being raped. In *Casteneda-Perez,* 61 Wash. App. at 362-63, the court held improper the prosecutor's questioning of witnesses and the defendant on whether they were accusing police officers of lying.

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[2] *See generally State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984) (if an accomplice's testimony is the only evidence against the defendant, trial court must instruct the jury to subject the testimony to careful examination and to act upon it with great caution), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 157, 761 P.2d 588 (1988), and *State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991).

Fleming and *Casteneda-Perez* are inapt. The prosecutor's question here rebutted defense counsel's questioning during cross-examination. There, Vela testified that the detectives were "pretty aggressive" during his interview with them, that six to eight detectives surrounded him and badgered him with questions, and that the detectives misled him into making a positive identification of Ocampo. 3 RP at 453. The prosecutor did not commit misconduct by following up on Vela's testimony and asking whether he was accusing the detectives of misconduct during the interview. *See State v. Russell,* 125 Wash.2d 24, 86, 882 P.2d 747 (1994) ("Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements."), *cert. denied,* 514 U.S. 1129 (1995).

VASQUEZ AND RIGHT TO CONFRONTATION

Ocampo lastly maintains that his right to confrontation was violated by the admission of testimonial hearsay statements from Vasquez. The admission of testimonial hearsay violates a defendant's right of confrontation unless the declarant is unavailable and there was a prior opportunity to cross-examine the declarant. *Crawford v. Washington,* 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A statement is "testimonial" if a reasonable person in the declarant's position would expect it to be used prosecutorially. *Crawford,* 541 U.S. at 52; *State v. Shafer,* 156 Wash.2d 381, 390 n.8, 128 P.3d 87 (2006). This definition includes statements elicited in response to structured police questioning during an investigation. *Crawford,* 541 U.S. at 52-53 & n.4;

State v. Walker, 129 Wash. App. 258, 268, 118 P.3d 935 (2005).

According to Hernandez, Vasquez was the fourth person in Vela's van on the night of the shooting but he was not with Hernandez and Ocampo when the shooting occurred. Vasquez did not testify at trial. In arguing that Vasquez's statements were improperly admitted, Ocampo first cites a passage where a detective testified that he spoke with Vasquez about the shooting and that Vasquez was reluctantly helpful. But the detective did not testify to the substance of any statements Vasquez made. Ocampo was able to cross-examine the detective on whether any statements were made. Ocampo's right to confrontation was not violated here.

Ocampo next cites Detective Ringer's testimony concerning identifications made by witnesses at the crime scene:

> Q And when you showed these photographs, were you able to identify anybody in the photographs?
>
> A They did make identifications.
>
> Q You seem reluctant to say that. . . Why are you reluctant?
>
> A Well, in the long run some of the identification proved erroneous.
>
> Q Why do you say that?
>
> A As we investigated further, we found that one of the photographs, Jose Hernandez's

> identification of him, was accurate, but then some of the others were people that they knew but had not actually been involved in the shooting.
>
> Q Okay. How were you able to determine that?
>
> A Well, eventually Jose Hernandez was arrested, he gave a statement. Later we contacted Baldemar Vela, and he gave a statement that verified what Jose Hernandez said. And still later, Mesial Vasquez was interviewed and he also verified the other two.

4 RP at 515. The prosecutor used this testimony in closing argument: "Ladies and gentlemen, Jose's gone back and forth to some extent about the facts of this, but his statements, the core of his statements, were corroborated by Mesial Vasquez, Baldemar Vela and Marcos, as well as physical evidence." 7 RP at 993.

As the prosecutor's closing reflects, the detective's testimony implies that Vasquez gave a statement to law enforcement corroborating Hernandez's statement of those involved in the shooting. However, the record establishes that defense counsel was keenly aware of the Vasquez/*Crawford* issue and did not view the quoted testimony to be problematic or objectionable. Later in Detective Ringer's testimony, defense counsel made the following remarks in a sidebar:

[DEFENSE COUNSEL]: Your honor, with the questioning that's happening, I see where this is going. They are going to bring in next a statement by Mesial Vasquez [that] Santana Ocampo was in the van. Mesial Vasquez is not here, we are not able to confront this witness, don't know where he is. State's not going to produce him and I want to make sure there is no hearsay from Mesial Vasquez of my client being in that van coming into this testimony. . . .

[PROSECUTOR]: [Defense counsel] asked if there had been any evident -- actually, he made the statement there had been no efforts to corroborate and I think that there certainly were, and I think there certainly was, and I think there has -- there was testimony both through direct and redirect and now in cross that indicates Mr. Vasquez's corroborating exactly what everybody else is corroborating.

THE COURT: Well, I don't think it opens the door to introduce Vasquez's statement beyond the extent that there has already been testimony to efforts to corroborate. I think that's a dangerous road to go down and certainly don't want to have *Crawford*-related problem.

> [PROSECUTOR]: I have gone as far as I intend to go in that regard. I just have a couple more.
>
> **THE COURT:** All right.
>
> [DEFENSE COUNSEL]: I understand. I had to make sure that didn't happen.

4 RP at 556-57.

Ocampo is not entitled to a new trial based on this issue. First, he did not object to Detective Ringer's testimony. *See State v. Swan,* 114 Wash.2d 613, 661, 790 P.2d 610 (1990) ("The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the tria1."), *cert. denied,* 498 U.S. 1046 (1991). Second, and as previously noted, Detective Ringer's testimony only implied the outlines of Vasquez's statement. *See State v. Lynn,* 67 Wash. App. 339, 345, 835 P.2d 251 (1992) (RAP 2.5(a), permitting a manifest constitutional error to be raised for the first time on appeal, requires an error that is "unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed," and having "practical and identifiable consequences in the trial."). Third, Ocampo did not object to the prosecutor's closing. *See State v. Brown,* 132 Wash.2d 529, 561, 940 P.2d 546 (1997) (defendant's failure to object waives improper closing remarks unless the comments are so flagrant and ill-intentioned that the resulting prejudice could not be alleviated by a curative instruction), *cert. denied,* 523 U.S. 1007 (1998). Fourth, defense counsel incorporated Vasquez's corroboration in the

beginning of his closing argument where he suggested that Hernandez was the shooter and that he was lying to save himself and possibly Vasquez. Thus, the State's reference to Vasquez's corroboration did not undermine Ocampo's trial defense that he had an alibi and that Hernandez and Vasquez were trying to pin their actions on him.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

s/ Quinn-Brintnall, C.J.
QUINN-BRINTNALL, C.J.

We concur:

s/ Houghton, J.
HOUGHTON, J.

s/ Van Deren, J.
VAN DEREN, J.

[FILED]

[JANUARY 3, 2007]

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 78703-4
	)	
Respondent,	)	**ORDER**
	)	
v.	)	C/A NO.
	)	32536-5-II
SANTANA OCAMPO,	)	
	)	
Petitioner.	)	
	)	

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens and J.M. Johnson, considered this matter at its January 3, 2007, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia Washington this 3rd day of January, 2007.

For the Court

s/ Gerry L. Alexander
CHIEF JUSTICE

[FILED]

[MARCH 16, 2005]

IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE STATE OF WASHINGTON

STATE OF WASHINGTON,	) VERBATIM
	) REPORT OF
Plaintiff,	) PROCEEDINGS
	)
v.	) Superior Court
	) No. 03-1-03985-5
SANTANA OCAMPO,	)
	) Court of Appeals
Defendant.	) No. 32536-5-II
	) Pages 467-670
	) Volume 4 of 7

APPEARANCES

PROSECUTING ATTORNEY in and for the County of Pierce State of Washington, by MR. PHIL SORENSEN and MS. KAREN PLATT, Deputy Prosecuting Attorneys, appeared on behalf of the State.

LAW OFFICES OF BERNEBURG WICKENS ARJIMO, P.S., by MR. JAY BERNEBURG, Attorney at Law, appeared on behalf of the Defendant, who was present in person.

BE IT REMEMBERED that on the 14th day of October, 2004, the above-captioned cause came on duly for hearing before the HONORABLE JAMES R. ORLANDO, Judge of the Superior Court in and for the County of Pierce, State of Washington; the following proceedings were had, to-wit:

[513] [Testimony of John Ringer]

The information we got was somewhat generic but had centered around a group of individuals who gathered and hung around a closed down business on the corner of 63rd and McKinley, be actually the southeast corner. There was abandoned cars behind the business, and beer bottles and beer cans. And information in the neighborhood was that there was a group of Hispanic gang members who gathered there and drank and partied. And indications were that the individuals seen leaving the scene of the homicide were members of this group.

Q Okay. And is the area you are talking about visible on the diagram that we see there?

A Yes, it is.

Q That's Plaintiff's Exhibit No. 18.

A Okay. The abandoned business is actually 6301 McKinley. People I contacted were here at 6217 McKinley, Ramirez-Garcia and his girlfriend, Jacklyn Russell.

THE COURT: Hold on a second.

INTERPRETER 2: Interpreters couldn't get the second address.

A Second address, 6217 McKinley.

Q **(By Mr. Sorensen)** Based on the information you received, what did you do as a follow-up?

A I began identifying – attempting to identify members of the surenos 13 Hispanic gang that was purportedly the group that hung here. I pulled reports associated with an individual by

the name of Pablo Ortiz, who I knew to be a sureno 13 gang member. I began pulling pictures of all his associates, going through reports, found people listed as sureno 13. So I compiled a group of 13 photographs of suspect sureno 13 gang members.

Q And how did you know Pablo Ortiz was a sureno 13?

A I had contact with Pablo Ortiz through the years. I knew he claimed to be a sureno 13, knew that he was active in the street life, was an organizer, was a leader and selfproclaimed sureno 13.

Q So based on this, you were able to identify a pool of names?

A That's correct.

Q And then once you identified a pool of names, what did you do then?

A Well, we had been given several street names as potential individuals who had been leaving the scene of the pool hall immediately after the shooting, and was able to come up with photographs for these individuals. We then took photographs back to – took photographs to 6217 McKinley and showed Jacklyn Russell and her boyfriend, Ramirez-Garcia. Also ended up showing photographs to the owner of the pool hall, Jesus Rodriguez.

Q And these photographs, are they commonly referred to as booking photographs?

A They are.

Q And when you showed these photographs, were you able to identify anybody in the photographs?

A They did make identifications.

Q You seem reluctant to say that. What do you mean? Why are you reluctant?

A Well, in the long run some of the identification proved erroneous.

Q Why do you say that?

A As we investigated further, we found that one of the photographs, Jose Hernandez's identification of him, was accurate, but then some of the others were people that they knew but had not actually been involved in the shooting.

Q Okay. How were you able to determine that?

A Well, eventually Jose Hernandez was arrested, he gave a statement. Later we contacted Baldemar Vela, and he gave a statement that verified what Jose Hernandez had said. And still later, Mesial Vasquez was interviewed and he also verified the other two. And these excluded several individuals that had been named that night.

Q So he verified – Baldemar and he verified Jose Hernandez's statement?

A That's my understanding, yes.

Q Based on these identification procedures that you went through, did you do follow-up on that as well?

A Yes.

Q What did that consist of?

A Well, eventually Jose Hernandez was arrested and interviewed, and based on his statement, search warrant was obtained by Detective Webb for the home address of Santana Ocampo.

Q Did you participate in processing that search warrant?

A I did.

Q So you actually went to the scene?

A I did.

Q Was Ocampo, Mr. Ocampo, present at the scene when you were there?

A He was.

Q Is he present in the courtroom today?

A He is. He's sitting at the table with the headphones on.

Q What was your role in the search warrant processing?

A I was left in charge of the residence and responsible for searching the residence and making sure that items of evidence were taken, while Mr. Ocampo was taken from the residence by Detectives Webb and Devault.

Q So you didn't have anything to do with his removed from the scene?

A I did not.

* * * *

[539] [Cross-Examination of John Ringer]

Q And you developed these photographs because you had information that the people involved may have been involved in this surenos trece, surenos whatever, right?

A That's correct.

Q You eventually gathered 13 photographs and they were all either known gang members or associates and affiliates of people who were gang members?

A Correct.

Q Jose Hernandez was among those?

A Yes, he was.

Q You mentioned that Baldemar Vela was afraid of retaliation from some of these gang people, right?

A Yes, he stated that.

Q In your conversations with Jesus Rodriguez, it was the same concerns were expressed, weren't they?

A He had some serious concerns, yes.

Q Now, some of the photographs that were identified by these people later turned out, at least according to your investigation, to not be involved in this case, right?

A That's correct.

Q And the reason you say you knew that was because of a statement given by Jose Hernandez, right?

A That was just part of it. Statement given by

Jose Hernandez, statement given by Baldemar Vela, statement by Mesial Vasquez.

Q Initially the first statement you had was Jose Hernandez, right?

A First one, yes.

* * * *

[550]

Q Now, you said you were aware that Jose Hernandez had given a statement, correct?

A I was informed of that, yes.

Q You were aware that Jose Hernandez was affiliated as a gang member, right?

A Correct.

Q You knew that Jose Hernandez was 14 years old, right?

A I believe that's the age he was at the time.

Q Was there ever any suspicion or any need in your mind to corroborate the story this kid is telling you? Do you guys just take it at face value, "that was good enough for us, case closed"? Wasn't there any problem with his story in your mind?

A With Jose Hernandez?

Q Yeah.

A I personally need to corroborate as much as you can.

Q Well, with that in mind, you showed a series of photos to Jacklyn Russell, right? And she correctly identified Jose Hernandez, she saw

him running from the scene, right?

A That's correct – well, she identified him as one of those, yes.

Q Right. And same thing with Ramirez-Garcia, right?

A I believe so.

Q And same thing with Jesus Rodriguez, right?

A I believe so.

Q But after you got the booking photograph of Santana Ocampo, you never went back to Jacklyn Russell with a similar group of photos and asked her to identify. This was a person who correctly identified Jose Hernandez, but you never went back to her with a booking photograph that included a picture of Santana Ocampo and asked her to look through the pictures and see if there was anybody she recognized, did you?

A After the interview with Baldemar Vela, my involvement with this case pretty much ended. I can't speak to what occurred after that. I had other cases of my own that I was dealing with. I did not provide further follow-up.

Q So your testimony is that you did not do that, right?

A That's correct.

Q And you did not do it with Ramirez-Garcia or Jesus Rodriguez either, did you?

A That's correct.

* * * *

[554] [Re-Direct Examination of John Ringer]

Q Corroboration. Jose Hernandez -- Little Nightowl -- surfaces, his name, early on in the investigation?

A Very first -- yeah, within the first hour or so.

Q Okay. Were you able to corroborate that Little Nightowl actually was a participant?

A Yes.

Q How were you able to do that?

A Through his own -- his own admissions, through Baldemar Vela, through Mesial Vasquez.

Q What do you mean through Mesial Vasquez?

A My understanding, statement he gave also indicated that Little Nightowl was present.

Q Okay. And Mesial Vasquez would be the fourth person in the van?

A That's correct.

Q And at some point, Santana Ocampo's name surfaced during the course of the investigation?

A It did.

Q Well, did his name actually surface or did "Chino"?

A "Chino" surfaced from Jose Hernandez.

Q And Chino is what?

A Is a childhood name given to Santana Ocampo?

Q And that's how he's known on the street?

A Correct.

Q And is Chino affiliated with the sureno 13?

A He is.

Q And were you able to corroborate the discovery of Chino's name, Santana Ocampo, during the course of your investigation?

A I was able to corroborate that his street name was Chino, yes.

Q Were you able to corroborate that he was in the van at the time of the shooting?

MR. BERNEBURG: I am going to object, request a side-bar.

THE COURT: I am going to let the jury take a short break here, went a little long. Go ahead and step in the jury room. Probably be back with you here just shortly.

(Jury not present.)

MR. BERNEBURG: Your Honor, with the questioning that's happening, I see where this is going. They are going to bring in next a statement by Mesial Vasquez Santana Ocampo was in the van. Mesial Vasquez is not here, we are not able to confront this witness, don't know where he is. State's not going to produce him and I want to make sure there is no hearsay from Mesial Vasquez of my client being in that van coming into this testimony. Improper, it's hearsay, and we are not able to confront this witness, who is absolutely confrontable, if he were here.

MR. SORENSEN: Mr. Berneburg asked if there had been any evident -- actually, he made the statement there had been no efforts to corroborate

and I think that there certainly were, and I think there certainly was, and I think there has -- there was testimony both through direct and redirect and now in cross that indicates Mr. Vasquez's corroborating exactly what everybody else is corroborating.

THE COURT: Well, I don't think it opens the door to introduce Vasquez's statement beyond the extent that there has already been testimony to efforts to corroborate. I think that's a dangerous road to go down and certainly don't want to have *Crawford*-related problem.

MR. SORENSEN: I have gone as far as I intend to go in that regard. I just have a couple more.

THE COURT: All right.

MR. BERNEBURG: I understand. I had to make sure that didn't happen.

THE COURT: Okay. We will take just a real quick break, let the jurors finish up in there and then we will resume.

(Recess taken.)

(Jury present.)

THE COURT: Okay, please be seated.

Q **(By Mr. Sorensen)** Detective Ringer, you were able to corroborate the presence of Jose Hernandez at the scene?

A Yes

Q And you were able to corroborate the presence of Santana Ocampo at the scene –

A Yes, we were.

Q -- as well. Were you able to corroborate the presence of other people identified by Russell and Ramirez and Jesus Rodriguez?

A As being at the scene?

Q As being at the scene or participating in the shooting.

A Not as listed, no.

MR. SORENSEN: I don't have any further questions.

RECROSS EXAMINATION

BY MR. BERNEBURG:

Q You testified that Chino, Santana Ocampo, was identified as affiliated with the surenos 13, right?

A I did.

Q But that wasn't then, that was after as a result of the investigation. You didn't know that at the time, if you did, you would have had a photo.

A Well, couldn't have had a photo, there was no photos existing of him at the time.

Q But you didn't have him associated with that until after your investigation.

A During the investigation, we became aware of that, correct.

MR. BERNEBURG: Thank you. Nothing else.

FURTHER REDIRECT EXAMINATION

BY MR. SORENSEN:

Q During the investigation you were an active part of, you became aware of it?

A Yes.

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[FILED]

[MARCH 16, 2005]

IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE STATE OF WASHINGTON

STATE OF WASHINGTON,	) VERBATIM
	) REPORT OF
Plaintiff,	) PROCEEDINGS
	)
v.	) Superior Court
	) No. 03-1-03985-5
SANTANA OCAMPO,	)
	) Court of Appeals
Defendant.	) No. 32536-5-II
	) Pages 671-800
	) Volume 5 of 7

APPEARANCES

PROSECUTING ATTORNEY in and for the County of Pierce State of Washington, by MR. PHIL SORENSEN and MS. KAREN PLATT, Deputy Prosecuting Attorneys, appeared on behalf of the State.

LAW OFFICES OF BERNEBURG WICKENS ARJIMO, P.S., by MR. JAY BERNEBURG, Attorney at Law, appeared on behalf of the Defendant, who was present in person.

BE IT REMEMBERED that on the 18th day of October, 2004, the above-captioned cause came on duly for hearing before the HONORABLE JAMES R. ORLANDO, Judge of the Superior Court in and for the County of Pierce, State of Washington; the following proceedings were had, to-wit:

* * * *

[732] [Direct Examination Detective Webb]

Q Okay. During the time that you were investigating this case, did you have occasion to speak with Mesial Vasquez?

A Yes.

Q And how is it that you decided that he was a person that you want to speak with in your investigation?

A He was identified as being an occupant in the vehicle that went to 64th or 63rd and McKinley.

Q Who was it who identified him as an occupant of the vehicle?

A Jose Hernandez.

Q Okay. Do you recall when you spoke with Mr. Vasquez, Mesial Vasquez?

A I believe - - let me refer real quickly to my report. August 27th.

Q Did Mr. Vasquez talk to you about the murder that occurred on August 10th?

A He did.

Q Okay. Was he helpful as far as giving you information, or was he reluctant to talk?

A Reluctantly helpful.

Q Did he tell you that facts as he saw them and as he knew them about what had happened on August 10th?

A He did.

Q Were those facts consistent with - -

MR. BERNEBURG: Your Honor, I am going to object here, we have a right to confront this witness.

THE COURT: I am going to sustain to the question.

MR. PLATT: I was going to ask if his statement was consistent with the other statements.

MR. BERNEBURG: Your Honor, I - -

THE COURT: Sustained.

Q **(By Ms. Platt)** Detective Webb, do you know where Mesial Vasquez is at this time?

A The best information that we have is that he and his family have returned to Mexico.

Q Detective Webb, you have indicated that you spoke on the 23rd of August with Marcos Hernandez and also Jose Hernandez. Based on your conversation with these two, what did you do next in your investigation?

A I believe the 23rd was a Saturday. Based on the information that was provided on Monday, I drafted a search warrant for the residence of Mr. Ocampo.

Q Okay. And what was it that you - - the search warrant was designed to look for?

A Items of evidence, clothes and/or weapons.

Q Okay. Did you have specific items of clothing that you were looking for?

A Yes.

Q And how did you come up with a list of items

of clothing that you were looking for?

A We solicited information from both Mr. Hernandez and Mr. Vasquez as to what everybody might have been wearing that night.

Q And then you draft a search warrant to look for the same types of items of clothing - -

A Correct.

* * * *

[752] [Cross Examination Detective Webb]

Q Okay, all right. So you are aware that Detective Ringer had located several eyewitnesses and showed them that group of black and white photographs?

A Correct.

Q Booking photos. And you know that from the identifications that were made, that these people correctly identified Jose Hernandez and Nick Solis and people that they saw. Right?

MS. PLATT: Objection. Mischaracterization of testimony, Your Honor.

Q **(By Mr. Berneburg)** I will rephrase. Those people correctly identified Jose Hernandez as people that they saw, correct?

A He identified them, I don't know if they correctly identified him.

Q And those people also identified Nick Solis as somebody that they recognized?

A That is my understanding.

Q To your knowledge, after August 23rd, when

Jose Hernandez made his statement, did Detective Ringer then recontact these people or any other detective with a new photo montage which included the defendant, Santana Ocamp?

A I don't know the answer to that. I don't believe so.

* * * *

[759] [Re-Direct Examination Detective Webb]

Q Detective, you indicated that you didn't go back and show additional photo montages which included Santana Ocampo to witnesses after you got statements from Mesial Vasquez, after you got statements from Baldemar Vela and after you got statements from Jose Hernandez. Is that something that you would usually do when you have three eyewitnesses indicate the shooter is, do you then go around with pictures to - -

MR. BERNEBURG: Objection. Mischaracterizes the evidence.

THE COURT: Sustain to the form of the question.

Q **(By Ms. Platt)** Is there a reason you didn't go back later and show photo montages with Santana Ocampo to witnesses?

A I would say we had a coconspirator that had confessed his involvement and two additional witnesses besides that person who implicated the defendant and we would focus then on that.

Q After you have that degree of evidence, is it unusual for you to not go around and interview witnesses you have already interviewed several times?

A No, because witnesses can be - - perception of things can oftentimes be confused.

* * * *

[762]

RECROSS EXAMINATION

BY MR. BERNEBURG:

Q Detective, you said it wasn't unusual after you had a couple of statements to go back and interview the eyewitnesses, right?

A It wouldn't be unusual to not interview the witnesses. I wouldn't say it would be necessarily unusual.

Q Jose Hernandez is your main witness, he said he was there, he saw it, he was like your main witness?

A I don't know that I would agree with that.

Q Would you agree it would be unusual to have a witness, important, Jose Hernandez, a month later to make two confessions to two different detention officers which names himself as the shooter?

MS. PLATT: Objection, Your Honor, assuming - - I am sorry. It is argumentative, I think it's also assuming facts not in evidence.

MR. BERNEBURG: They are in evidence and - -

THE COURT: I think it's beyond the redirect.

MR. BERNEBURG: Your Honor, the counsel asked if it was unusual to go out and interview witnesses under these circumstances. The question is, is it not, given the new change in circumstances, it wouldn't be unusual or at least we should be allowed to inquire.

MS. PLATT: I withdraw the objection.

THE COURT: Go ahead, inquire.

Q **(By Mr. Berneburg)** Given the change in circumstances that Jose Hernandez has made vastly different statements, it wouldn't be unusual to go out and interview your witnesses at that point, would it?

A We did. We did some preliminary follow-up on that.

Q But your testimony earlier was that you did not go back out to the eyewitnesses with further montages that included Santana Ocampo, even after the change in statements by Jose Hernandez.

A Correct.

Q All right. You said the person that threatened Jesus Rodriguez said something to the effect of, "Don't testify against my homey." And we know Nick Solis is surenos, correct?

A Correct.

Q We know Little Nightowl, Jose Hernandez, is surenos, correct?

A Correct.

Q You have since gathered information Santana Ocampo is at least involved with them to some degree?

A Correct.

Q He didn't specify what homey, did he?

A No, I said he didn't name a name.

MR. BERNEBURG: Thanks, nothing further.

THE COURT: Anything else, Miss Platt?

FURTHER REDIRECT EXAMINATION

BY MS. PLATT

Q Detective Webb, after Jose Hernandez made his statement to you, did you attempt to corroborate any information that he gave you as far as who was the shooter on August 10th?

A Yes.

Q And how did you do that?

A Mesial Vasquez, passenger in the car that transported them to the 63rd and McKinley area, and the driver of the vehicle, Mr. Baldemar Vela, I believe is his last name, V-e-l-a. He was the driver of the vehicle that basically confirmed.

MS. PLATT: No further questions of this witness.

MR. BERNEBURG: Nothing.

THE COURT: Okay, thank you. You may step doWash.

(Witness excused.)

THE COURT: We are going to go ahead and take the noon recess. We will reconvene at 1:30. Please don't discuss the case with anyone or allow anyone to discuss it in your presence. Have a good lunch and see you back at 1:30.

(Recess taken.)

* * * *

[FILED]

[MARCH 16, 2005]

IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	VERBATIM
	)	REPORT OF
Plaintiff,	)	PROCEEDINGS
	)	
v.	)	Superior Court
	)	No. 03-1-03985-5
SANTANA OCAMPO,	)	
	)	Pages 975-1103
Defendant.	)	Volume 7 of 7
	)	

APPEARANCES

PROSECUTING ATTORNEY in and for the County of Pierce State of Washington, by MR. PHIL SORENSEN and MS. KAREN PLATT, Deputy Prosecuting Attorneys, appeared on behalf of the State.

LAW OFFICES OF BERNEBURG WICKENS ARJIMO, P.S., by MR. JAY BERNEBURG, Attorney at Law, appeared on behalf of the Defendant, who was present in person.

BE IT REMEMBERED that on the 20th and 21st day of October, and the 19th day of November, 2004, the above-captioned cause came on duly for hearing before the HONORABLE JAMES R. ORLANDO, Judge of the Superior Court in and for the County of Pierce, State of Washington; the following proceedings were had, to-wit:

[991] [Closing Argument by Ms. Platt]

* * * *

are involved. As he's driving away from the scene, he indicates Little Nightowl, Jose, is in the seat next to him and he hears voices in the back, "Yeah, I shot the fool, he was tripping."

He's in the car with a murderer. He realizes that. That's a scary thing for him. It's probably a scary thing for anyone. Why would he change his story? Why wouldn't he want to be a witness in this case?

The detectives didn't stop with Mr. Vela. They talked to Mesial Vasquez, it's my understanding they talked to him on August 27th about this whole scene and he confirmed Jose Hernandez. He was there driving back and forth, a shooting happened, all confirmed by Mesial Vasquez, who at this point we don't know where he is. He's apparently left the area.

Ladies and gentlemen, there's more physical evidence that's been collected in this case and that happened on August 25. The detectives served a search warrant on Santana Ocampo's house. In the search warrant, they collected clothing from Santana Ocampo that was consistent with what Jose Hernandez told them Santana had been wearing on the night of this incident. The detectives collected that clothing and put it into evidence. That's Plaintiff's Exhibit No. 35.

Ladies and gentlemen, in an effort to hold all of the . . .

* * * *

[993]

that he said that he was the trigger man, the State still - - the State revoked that offer, but still left in the same position, two people responsible for this crime. Evidence from one person.

Once again, a plea bargain was offered to Jose, but it wasn't such a nice deal this time, it was a lot harder: Plead guilty to murder in the second degree with a firearm sentencing enhancement, if you testify truthfully, 244 months in custody. And Jose realized he'd messed up. He messed up when he claimed that he was the shooter. He messed up to even be involved in this. He indicted that he knows now Julio Morales Castro had a wife and two kids and Jose felt bad about what happened.

He indicated that he's just as guilty as the person who pulled the trigger. If Jose feels just as guilty, what must the person who pulled the trigger be feeling?

Ladies and gentlemen, Jose's gone back and forth to some extent about the facts of this, but his statements, the core of his statements, were corroborated by Mesial Vasquez, Baldemar Vela and Marcos, as well as physical evidence.

Santana Ocampo, when he was arrested on August 25th, the detectives talked to him a little bit. He told Detective Webb he was at a party from ten o'clock at night until 1:00 in the morning and he never, ever left . . .

* * * *

[1059] [Closing Argument by Mr. Sorensen]

* * * *

house, got the blue bandannas in his pocket. Got the big puffy black jacket, got the gray Dickeys, he's got the whole set of gear.

Argument or a fight. Did they go to Hermani's house? Didn't they go for Hermani's first?

"Mrs. Oliviera, was you son drinking?" "Oh, no, I never saw him drink." How good are her perceptions of what's going on at this party? You know, in all fairness, this is just another party for her. You know, this is just some other night for her. And she sits and she watches, what?

Some said it was 10 to 20 of these guy who were hanging together and what are they doing? They're drinking. Just sneaking a beer here and there? No, they're pounding beers as fast as they can get them. Stealing them out of the fridge. They are swiping cases out of the car that supposedly they unloaded. Was it black Camaro, was it green Thunderbird? Well, you know, who was doing it? Was it Sanchez? Was it Ruiz? Was it Ocampo? Had to be Ocampo, he had to be there.

There is one thing that's consistent and that's Jose Hernandez's crystallized testimony about the moment in time that we are concerned about. That moment in time when Jose Julio Morales was shot in the head. He's absolutely consistent on that.

To say that the physical evidence would prohibit his story is ridiculous, of course. Where did this shell casing go? Did it fly out this way? Did it strike the car, bounce, did it strike the wall and bounce? Did he get caught up in Ocampo's clothing

and he took a step and it fell? Did he take a step back and it fell? Who knows how the shell casing landed.

Did they kick the shell casing? Was it closer to the curb? Was it further away from the curb? Who knows. They recovered it. How it got there is anyone's guess. Was ejected from the gun.

On thing - - you are required to find beyond a reasonable doubt that he's guilty of all the elements of the crime. I want you to think about one thing: Are you convinced beyond a reasonable doubt that Jose Hernandez was at least a participant in this thing?

I think you probably are. Why? Because he says he was. And Baldemar Vela backs him up. And this third guy, fourth guy; third guy if you count him, fourth guy in the car backs him up. But you believe because you believe Jose Hernandez when he says, "I was there, I was a participant, I helped - - I helped it happen."

Carla Bach tells you it's better to lose points than it is to become a snitch. Jose Hernandez is going to do and say whatever he needs to do to protect himself in . . .

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