No. 11-614

IN THE SUPREME COURT OF THE UNITED STATES

BERNIE E. WARNER,

Petitioner,

v.

SANTANA OCAMPO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the investigating officers testified that a co-participant in the crime, who did not testify at trial and was never subject to cross-examination, "corroborated" or "verified" that Ocampo was the person who shot the victim. The trial prosecutor argued in closing that the co-participant "confirmed" and "corroborated" that Ocampo was the shooter. There were no instructions limiting the jury's use of this testimony.

Did the Ninth Circuit correctly apply controlling precedent from this Court to find that the Washington State Court of Appeals unreasonably concluded that the admission of the co-participant's statement via the police detectives' testimony at trial was *not* a violation of Ocampo's Sixth Amendment right to confrontation?

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RESPONDENT'S BRIEF IN OPPOSITION

Santana Ocampo, by and through his counsel, Suzanne Lee Elliott and Anne Schwartz, respectfully request that this Court deny Warner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Santana Ocampo was convicted of one count of first degree murder with a firearm enhancement entered in Pierce County Superior Court No. 03-1-03985-5 on November 19, 2004. The Washington Court of Appeals affirmed his conviction and the Washington Supreme Court denied review.

On November 23, 2007, Ocampo filed a timely petition under 28 U.S.C. § 2254 in the U.S. District Court for the Western District of Washington. On April 25, 2008, Magistrate Judge J. Kelley Arnold dismissed the petition. On May 29, 2008, the Honorable Franklin D. Burgess adopted the Magistrate's Report and Recommendations. The Ninth Circuit Court later granted a certificate of appealability.

On June 9, 2011, the Ninth Circuit Court of Appeals, reversed the District Court and remanded that case with instructions to grant a writ of habeas corpus

unless the State elected to retry Ocampo. *Ocampo v. Vail*, 649 F.3d 1098 (9th Cir. 2011).

2. *FACTS FROM TRIAL*

At 12:00 a.m., on August 10th 2003, Julio-Morales Castro was murdered at 63rd and McKinley in Tacoma, Washington. Castro was leaving a pool hall and tavern when two young men approached him asking for $2 bus fare. The victim told the young males that he did not have any money. As the victim attempted to drive away, he was shot once in the back of the head. He died from his wounds 10 days later.

Detective John Ringer quickly arrived at the scene of the shooting. He testified that he interviewed persons in the area who heard the shots. From their statements, he concluded that the men involved were members of the Surreno 13 gang. He stated that the police received "street names" of several persons "seen leaving the scene of the pool hall immediately after the shooting." From that list of names, he and his fellow officers eventually concluded that after the victim was shot, Jose Hernandez, Santana Ocampo, Baldemar Vela, and Mesial Vasquez got into Vela's van and fled the scene. Eventually, based upon the statements of the other three men, the police concluded that Ocampo was the shooter.

By the time of trial, Vasquez had returned to Mexico. Thus, he did not appear and testify in person. And, both Hernandez and Vela were problematic witnesses for the State.

a. HERNANDEZ'S CHANGING STORIES

Hernandez, a juvenile, was the first person arrested and gave a statement identifying Ocampo as the shooter. Thirteen days after this statement, Hernandez recanted and told two juvenile detention officers that *he* was the one who shot the victim. Hernandez inculpated himself as the shooter to these detention officers on two separate occasions. At trial, defense witness Christina Young testified that after the shooting, Hernandez was suicidal and he had a gun with him.

After his original confession, prosecutors offered to allow Hernandez to enter a plea in juvenile court to 6 to 7 years in juvenile detention. After Hernandez changed his story, however, prosecutors revoked the original plea offer and told Hernandez that he could plead to second-degree murder in exchange for his trial testimony against Ocampo. At this point, Hernandez again changed his story, and said that the statements he made to the juvenile detention officers were *not* true and affirmed his original statement that Ocampo was the shooter.

Thus, at trial Hernandez testified that Vasquez was with him during the entire night. Hernandez shifted the blame for the murder to Ocampo. He testified that Vela drove him, Ocampo, and Vasquez to a store on 63rd and McKinley to

buy beer. Hernandez and Ocampo saw the victim's car and wanted to steal it for the tire rims. Ocampo had a gun, and as the victim tried to drive away, Ocampo shot him. Immediately after the shooting, Hernandez, Ocampo, and Vasquez ran to Vela's van and got in it. Hernandez testified that Vasquez did not run the same route that he and Ocampo took, and he did not know which route Vasquez took back to Vela's van. Vasquez was a part of their group. Hernandez told the jury that when they got to Vela's van Ocampo was sitting in the front passenger seat, Hernandez was in the rear seat behind the front passenger seat, and Vasquez was sitting next to him in the back seat.

Hernandez was certain that Ocampo was sitting in the front seat. He also testified that Ocampo said "We just smoked this fool." Hernandez stated that Ocampo gave the gun to Vasquez.

b. VELA'S QUESTIONABLE IDENTIFICATION

Three days after Hernandez's confession on August 25th, detectives brought Vela to the police station and questioned him about his involvement in the murder.

Prior to trial, Ocampo moved to suppress Vela's identification of Ocampo as a passenger in his van as he drove away from the scene of the shooting. At the close of that hearing the trial court found that the investigating officers contacted Vela at his home and asked him to accompany them to the station. He was

interrogated for 30 minutes to an hour. The police did not record this initial interview. They destroyed their rough notes.

Vela told the officers that on the night of the shooting he encountered a group of young men drinking behind the store at 40th and McKinley. He too began drinking. He recognized Hernandez. Vela agreed to take the young men to a party. He remained at the party with the young men and continued drinking. Hernandez asked for a ride back to the store. Vela agreed and took Hernandez and two friends. Vela did not know or recognize the other two. He parked his van at the store.

The trial court found:

> Vela walked toward the store at 64th and McKinley and met up with a single female: he engaged her in conversation. A short time later [Hernandez] was tugging at his shirt, worried and in a hurry, saying "we've got to get out of here." [Hernandez] ran back behind the store towards Vela's van.

The trial court went on to find:

> When he got to his van, three young men were already in his van. He believes they were the same three he drove there a short time earlier.

But Vela told the police the only one of the three he knew was Hernandez.

Detectives showed Vela a photomontage of black-and-white photos of known Surreno 13 gang members. Vela identified Jose Hernandez, who he knew as "Little Nightowl" in the montage.

At that point the detectives did not have a photograph of Ocampo because he did not have a criminal record. Coincidentally, however, while Vela was being questioned, Ocampo was in a separate room also being interrogated. The police took advantage of Ocampo's contemporaneous presence at the station and took a color Polaroid photograph of Ocampo in his street clothes.

Detectives went back to Vela and showed him the Polaroid photograph separately from the photomontage. Initially, Vela denied that Ocampo was an occupant in his car. At this point, the detectives informed Vela that "[w]e got the two guys...and they are telling on each other." Vela was still uncertain about the identification. The police then lied to Vela and told him that Ocampo had already confessed to being in the van. In response to the detectives' lies, Vela stated "[h]e probably was. If he is saying he was in my van, then he was."

At trial, Vela could not confirm that Ocampo was in his van the night of the shooting. He testified that he felt pressured to identify Ocampo when detectives questioned him. The detectives were also under pressure to immediately obtain the identification because they did not think they would get another chance. Vela was reluctant to testify in the case because he was concerned about gang retaliation. He answered that he was afraid, but he was firm that he could not say whether Ocampo was the shooter.

In addition, Vela's testimony about the seating in the vehicle contradicted that of Hernandez. Vela testified that Hernandez was in the front passenger seat, and his friends sat in the back seat.

c. THE STATE'S EFFORTS TO SHORE UP THEIR CASE WITH HEARSAY FROM VASQUEZ

The State made several efforts to shore up its case with testimony from the investigating officers that Vasquez would have corroborated the testimony of Hernandez and Vela. Vasquez was not available to testify because he had left the area and returned to Mexico with his family. The State did not know where he was and was not going to produce him at trial.

The State called two detectives to testify to Vasquez's statements that he gave to police. On direct and re-direct examination, these detectives testified that Vasquez was a witness who identified Ocampo as an individual at the murder scene. Vasquez also confessed that he was the fourth occupant in the car that night.

i. DETECTIVE WILLIAM WEBB

Detective Webb questioned Vasquez about the specific clothing the participants were wearing the night of the murder in order to draft a search warrant for Ocampo's residence.

Detective Webb testified about Vasquez's statements.

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 [sic] 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 [the murder scene]
Q: Who was it that identified him as an occupant of the vehicle?
A: Jose Hernandez
Q: Okay. Do you recall when you spoke to Mr. Vasquez, Mesial Vasquez?
A: I believe--let me just 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: 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—
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.
Ms. Platt: Your honor I was going to ask if his statement was consistent with the other statements.
Mr. Berneburg: Your Honor, I--
The Court: Sustained.

On Webb's re-direct examination the State tried to introduce testimony to the jury that Webb did not re-contact the original eyewitnesses at the crime scene because Mesial, Vela, and Hernandez were eyewitnesses who indicated who the shooter was.

Q: Detective you indicated that you did not 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 [sic] 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: 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 co-conspirator that had confessed his involvement and two additional witnesses besides that person who implicated the defendant and we would focus then on that.

The defense objected to the State's testifying question, and the Court sustained the objection as to the form of the question. The court did not give a limiting instruction to the jury.

ii. DETECTIVE RINGER

Detective Ringer did not have firsthand knowledge of Vasquez's statements because he was not one of the officers who interrogated Vasquez. Nonetheless, on direct examination he testified as follows:

A: As we investigated further, we found out 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 was able to give a statement. Later we contacted Baldemar Vela, and he gave a statement that verified what Jose Hernandez said.[1] ***And still later, Mesial Vasquez gave a statement and he verified the other two.***

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[1] This testimony was misleading. Vela did not corroborate Hernandez's statement identifying the shooter. As pointed out above, Vela could not identify the shooter during his questioning by the police or in his testimony at trial.

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.

(Emphasis added).

In response to the prosecutor's questions on re-direct, he testified:

Q: Corroboration. Jose Hernandez—Little Nighthowl—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, [sic] 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?

Defense counsel objected to the State's question on grounds that the anticipated testimony violated Ocampo's right to confront the witness, against him. The court dismissed the jury and heard arguments on the *Crawford*[2] issue. The record reflects that the parties engaged in the following colloquy:

> Mr. Berneburg: Your Honor, with the questioning that's happening, I see where this is going. They are going to bring in a statement next 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.
>
> Mr. Sorenson: Mr. Berneburg 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 through both direct and redirect and now in cross that indicates Mr. Vasquez's corroborating exactly what everyone 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.
>
> Mr. Sorenson: I have gone as far as I intend to go down 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.

Based on the Court's ruling, the State asked Detective Ringer if he corroborated Ocampo's presence at the scene. Detective Ringer testified that he

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[2] *Crawford v. Washington*, 541 U.S. 36 (2004).

was in fact able to corroborate the presence of Santana Ocampo at the scene and he ruled out other suspects.

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.
Q: -- as well. Were you able to corroborate the presence of other people identified by Russel 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.

d. OCAMPO'S ALIBI DEFENSE

At trial, there was a dearth of physical evidence against Ocampo. The police did not find the murder weapon. They did not test Ocampo's clothing for blood spatter evidence or the victim's DNA. When detectives searched Ocampo's residence they seized clothing that Ocampo would have been wearing the night of the murder. In his defense, Ocampo called several witnesses to testify that he was present at the party on 30th and Portland the entire night.

e. CLOSING ARGUMENT

The State relied on the officers' testimony about Vasquez's statements to the police in its closing argument and in closing rebuttal to the jury. In his closing, the prosecutor argued to the jury:

> 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 apparently left the area.
>
> And:
>
> [l]adies and gentlemen, Jose's gone back and fourth to some extent about the facts of this, but his statements, the core of this statements, were corroborated by Mesial Vasquez, Baldemar Vela, and Marcos, as well as physical evidence.

REASONS THIS COURT SHOULD DENY THE PETITION

This Court should deny review because the Ninth Circuit Court of Appeals opinion applied clearly established precedent from this Court and because that court correctly applied the deferential standards of review required by 28 U.S.C. § 2254(d).

1. T HIS COURT SHOULD DENY THE PETITION BECAUSE IT RELIES UPON AN ARGUMENT NOT SUPPORTED BY THE RECORD

This Court should not accept review based upon arguments that do not correctly reflect the record from the state court. Supreme Court Rule 15(2). Warner argues that the Ninth Circuit's Opinion conflicts with other decisions by this Court because Vasquez's statements were not admitted for the truth of the matter asserted but rather for a different – non-hearsay – purpose. Despite the arguments of Warner and Amici, it is clear that the Washington State Court of Appeals permitted the admission of the detectives' summaries of Vasquez's statements for their truth and as substantive evidence of Ocampo's guilt.

The Washington State Appellate Court clearly believed that Vasquez's statements were hearsay. Warner's App. 92a-97a. But the Washington State Appellate court concluded that Ocampo's right to confrontation was not violated because the detectives only "implied the outlines of Vasquez's statement." *Id.* at 93a. That court also incorrectly concluded that there was no confrontation clause issue because Ocampo was able to cross-examine the detective about the statements and the verbatim statements were not admitted. *Id.* But nowhere in its opinion did the Washington State appellate court state that Vaquez's statements were not "testimonial" because they were not introduced for the truth of the matter asserted. The statements clearly were admitted precisely for their "truth." There was no limiting instruction given by the trial court admonishing the jurors not to treat the hearsay as "truthful" evidence that Ocampo was the shooter. And, the trial prosecutor clearly understood that Vasquez's out-of-court statements had been admitted for the truth of the matter asserted because he argued that the out-of-court statements made by Vasquez were evidence "confirming" or "corroborating" that Ocampo was the shooter.

Because Warner's Petition is based upon the assertion that the detectives' statements were not admitted for the truth of the matter asserted and because the record does not support Warner's arguments, this Court should deny the Petition on that basis alone.

2. *THIS COURT DOES NOT REVIEW ARGUMENTS MADE FOR THE FIRST TIME IN THIS PROCEEDING*

In fact, Warner's Petition is the first time that the state has argued that Vasquez's out of court statements were not admitted for the truth of the matter asserted. In the Washington State Court of Appeals, Ocampo argued that the statements obtained from Vasquez by the Detectives and then repeated in court were the product of a structured police interrogation. Thus, the introduction of Vasquez's statements without providing the defendant a chance to cross-examine him was clearly prohibited under the reasoning of *Crawford*. App. Opp. 1-4. In response, the State argued that because neither Detective actually quoted Vasquez, but rather summarized, there was no confrontation clause violation. App. Opp. 5-12.

In his habeas petition, Ocampo again argued that the detectives' testimony, based upon police interrogations of Vasquez, violated the Sixth Amendment. App. Opp. 13-16. Warner responded by inserting a verbatim quotation from the Washington State Court of Appeals' decision and stated that the court's determination was not "an unreasonable determination of the facts in light of the evidence solicited during Mr. Ocampo's state court proceeding." App. Opp. 17-22.

In the Ninth Circuit Ocampo argued that the Washington State Court of Appeals' opinion did not contain any reasoned discussion of whether Vasquez's

statements were "testimonial." App. Opp. 23-28. He posited that this lack of discussion was likely due to the fact that Vasquez's statements, whether admitted in summary form or verbatim, were clearly the product of a structured police interrogation and, thus, clearly "testimonial" as defined in *Crawford*. App. Opp. 28-38. Warner again asserted only that when the state does not introduce a verbatim recitation of the absent witness statements – even those that are the product of a police interrogation of a co-participant in the crime – the confrontation clause is not implicated. App. Opp. 39-49. Finally, in his Petition for Rehearing En Banc, Warner again framed the argument as whether *Crawford* clearly established "that testimony which refers to an out-of-court statement, but does not quote or paraphrase the statement violates the confrontation clause." App. Opp. 51-57.

Now, for the first time Warner argues that Vasquez's statements were not offered for the truth of the matter asserted. But, even if the record supported this contention, which it does not, this Court does not review habeas issues raised for the first time in this Court when reviewing state court decisions. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("[I]t is only in exceptional cases, and then only in cases coming from the federal courts, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below"); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)

("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions").

Thus, again, on this basis alone, this Court should deny Warner's Petition.

3. *THE NINTH CIRCUIT ENGAGED IN A STRAIGHTFORWARD APPLICATION OF CRAWFORD AND ITS PROGENY TO THE FACTS OF THIS CASE AND CORRECTLY CONCLUDED THAT THE WASHINGTON APPELLATE COURT UNREASONABLY APPLIED THOSE CASES*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court explained that the Confrontation Clause guarantees that testimonial statements made by a witness unavailable to testify at trial are inadmissible unless the defendant had an opportunity to cross-examine the witness. *Id.* at 53-54. This Court did not fully articulate what testimonial means, but did explain that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations." *Id.* at 68. This Court further explained that "interrogation" is to be used "in its colloquial, rather than any technical legal, sense," and that a "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition" of interrogation. *Id.* at 53 n.4.

In *Davis v. Washington*, 547 U.S. 813, 822 (2006), this Court explained that statements are testimonial when the circumstances objectively indicate that

there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Vasquez's statement was the product of a classic police interrogation designed to establish who was responsible for murdering the victim.

The Washington Court of Appeals conclusion that, because Ocampo had the opportunity to cross-examine the police who interrogated Vasquez, there was no Sixth Amendment violation, is contrary to *Crawford.* In *Bullcoming v. New Mexico*, -- U.S. -- , 131 S.Ct. 2705 (2011), this Court stated that under *Crawford*, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that particular witness, not his or her surrogate. Warner does not expressly argue otherwise on this point.

As to the second point, it is true that in *Crawford,* this Court did not discuss out-of-court accusatory statements that were not admitted verbatim.[3] But Ocampo need not present facts indistinguishable from a prior Supreme Court case. Rather, a state court may be shown to have unreasonably applied a governing legal principle to the specific and novel facts of a case. *Ramdass v.*

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[3] In *Crawford*, the evidence at issue was a tape-recorded statement made by Crawford's wife.

Angelone, 530 U.S. 156 (2000). Under this standard, a state court can be "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Id.* (emphasis added). In this regard, the analysis under AEDPA differs from past practice only in terms of the source for the legal principle to be applied to the facts of the case. That is, the standard for "clearly established law" under AEDPA is the same as for an "old rule" under *Teague v. Lane*, 489 U.S. 288, *reh'g denied*, 490 U.S. 1031 (1989), except that AEDPA restricts the source of clearly established law to the Supreme Court's jurisprudence. *See Ramdass,* 530 U.S. at 165-66. Where a rule necessarily requires "case-by-case examination of the evidence," the court tolerates "a number of specific applications without saying those applications themselves create a new rule." *Wright v. West*, 505 U.S. 277, 308-309 (1992) (Kennedy, J., concurring in judgment). In other words, when dealing with "a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Id.*

The Washington Court of Appeals conclusion that any in-court testimony that is not a verbatim reiteration of the out-of-court accusatory assertion does not violate the Confrontation Clause is unreasonable. In refusing to extend the governing legal principle to a context in which the principle should have controlled, the Washington court violated the core holdings of the *Crawford*

decision. As this Court stated in *Crawford*, the purpose of confrontation and cross-examination is to "tease out the truth." *Crawford*, 541 U.S. at 67. In *Davis*, this Court stated that the government could not evade the Sixth Amendment "by having a note-taking policeman recite the unsworn hearsay of testimony of the declarant." *Davis*, 547 U.S. at 826. But, under the Washington Appellate court's reasoning, the police could interrogate and obtain accusatory statements from all sorts of unreliable or biased witnesses. The prosecutor could then avoid calling these troublesome witnesses by calling the investigating officer to testify to a summary or an outline of the accusatory statements taken from his or her notes. Under such a rule, the right of confrontation, as described in *Crawford*, would be rendered meaningless.[4]

Here the Ninth Circuit's opinion was the proper application of this Court's precedent. That Court correctly concluded that the Washington appellate court decision was an unreasonable.

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[4] And, this Court has concluded, albeit in a somewhat different context, that in the context of joint trials, the co-defendant's redacted confession cannot be admitted if they include obvious or implied references to the defendant, *see Gray v. Maryland*, 523 U.S. 185, 196 (1998) (holding that "statements that, despite redaction, obviously refer directly to someone, often obviously the defendant" allow the jury to make sufficient inferences of an accusation to violate the confrontation clause).

4. *WILLIAMS V. ILLINOIS WILL HAVE NO EFFECT ON THE RESOLUTION OF THIS CASE*

Warner argues that the grant of certiorari in *Williams v. Illinois*, No. 10-8506, is somehow relevant to the resolution of this case. It is not.

The issue in *Williams* involves the extent to which a testifying expert may testify to the results of other, non-testifying experts. First, there is at least an argument that, as in *Bullcoming*, a straightforward application of *Crawford* would bar any testimony by one expert about the results obtained by another, non-testifying expert. Second, to the extent that there is a significant debate about how *Crawford* restricts expert testimony that is based upon another, non-testifying expert's results, it will be irrelevant here. This case does not concern expert testimony. Rather, it concerns the admission of a co-participant's out-of-court statement, made during police interrogation, that Ocampo was the shooter. This is the type of testimony that falls squarely within the reasoning of *Crawford* and *Davis*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 5th day of January, 2012.

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