In the Supreme Court of the United States

ROBERT K. WONG, WARDEN, *Petitioner,*

v.

ANTHONY BERNARD SMITH, JR., *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General
DAVID ANDREW ELDRIDGE
Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-6291
Fax: (916) 324-2960
Email: David.Eldridge@doj.ca.gov
Counsel for Petitioner

Blank Page

QUESTION PRESENTED

In only one case, *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), has the Court passed on the merits of a claim that judicial conduct amounted to jury "coercion" under the Constitution. In that case the Court neither found "coercion" nor described what manner or extent of judicial conduct could, if ever, amount to "coercion." Do 28 U.S.C. § 2254(d) and this Court's "clearly established law" permit federal habeas corpus relief on a claim that a state judge unconstitutionally "coerces" jurors to return a guilty verdict by identifying specific evidence in the case as important and instructing them to consider it?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Blank Page

PETITION FOR WRIT OF CERTIORARI

Robert K. Wong, Warden of the State Prison at San Quentin, California (the State), 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 Ninth Circuit (App., infra, 94a) is reported at 580 F.3d 1071. The orders of the district court (App. 36a, 91a) are not published in the Federal Supplement but appear at 2007 WL 841747 and 2007 WL 2253520. The opinion of the California Court of Appeal (App. 1a) is not published.

JURISDICTION

The judgment of the Ninth Circuit was entered on September 8, 2009. (App. 94a.) The State's petition for rehearing and for rehearing en banc was denied on November 20, 2009. (App. 128a.) The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254(d) of Title 28 of the United States Code 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 the 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.

STATEMENT OF THE CASE

Introduction

A crucial issue at respondent Smith's joint trial with co-defendant Hinex was which of them committed a charged sex offense during their joint home invasion robbery. Respondent's jury reported that it was deadlocked on that question of identity, and one juror volunteered the fact the juror harbored doubt as to the identity evidence.

In response to those communications and others, the judge brought to the jurors' attention the previously-admitted tape-recordings of defendants' post-arrest statements. The judge informed the jurors of the "consistencies" and "inconsistencies" in those statements which the judge found "most significant." After a re-playing of the tapes – including respondent's post-arrest denial of guilt on the sex charge – the judge instructed the jurors to "consider and discuss how this comparison affects your finding" on the question of identity. The judge reminded jurors his views were "advisory only" and "not binding," and he cautioned the jurors that "you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses."

After a short period of further deliberation, the jury resolved the identity question against respondent.

On direct review, the California Court of Appeal concluded the trial judge had not coerced the jury. But on federal habeas review the district court granted a writ, finding that state appellate court's conclusion unreasonable. By a two-to-one split, the federal court of appeals affirmed the grant of the writ in a published decision. That federal departure from this Court's standards occasions the present request for this Court's intervention and correction.

The Crimes and the Trial Proceedings

On September 7, 1997, respondent Smith and co-defendant Hinex invaded the home of Mr. and Mrs. S, who were in their 70s and 50s, respectively.

In the front room, after respondent struck Mr. S and threatened to shoot him, Mr. S surrendered $8 in currency to Hinex. (App. 97a.) Respondent soon located Mrs. S in her bedroom, after she had called 911. At gunpoint, Mrs. S surrendered a $100 bill to respondent. Respondent struck Mrs. S; he pointed a gun at her head; he forced her to undress; and he forced her to orally copulate his penis until he ejaculated into her mouth. Mrs. S spit out the ejaculate onto the carpet. Hearing approaching police sirens, respondent told Mrs. S he would return to kill her. He and Hinex fled. (App. 98a.)

When Hinex was arrested a few houses away, Mr. and Mrs. S said he was the robber who sexually assaulted Mrs. S. But when interviewed by the police, Hinex said it was respondent. (App. 98a.)

Viewing a photo lineup the next day, Mrs. S tentatively identified respondent as the one who sexually assaulted her. She told the police she had spit the ejaculate on the carpet. (App. 98a.)

The police arrested respondent on September 12. That day, respondent admitted he was one of the robbers. He denied sexually assaulting Mrs. S. He said Hinex also entered Mrs. S's bedroom, and Hinex took her to another room. (App. 98a-99a.)

DNA testing excluded Hinex and Mr. S, but did not exclude respondent, as the source of the saliva and semen from the carpet and from Mrs. S's T-shirt. (App. 99a.)

In the joint trial, Hinex testified he was outside the residence with a friend while respondent and another person entered the residence and committed the robbery. Respondent did not testify. The jury heard Hinex's and respondent's tape-recorded statements to the police. (App. 100a.)

On the third day of deliberations, the jury returned guilty verdicts on the burglary and robbery charges, but announced through the foreman that it was unable to reach a verdict on the oral copulation charge. The court asked if further deliberation might result in a verdict and, receiving a positive response, returned the jury to deliberations. (App. 100a.)

At the end of that day, with no verdict, Juror 10 wanted to communicate with the judge, who said he did not want to know the jurors' "thought processes." (App. 100a-101a.) The next day, Juror 10 sent the judge a note which questioned Mrs. S's identification, and the fact respondent denied the sexual assault but admitted the other crimes, and whether the only credible evidence was the DNA evidence. The note said there was "reasonable doubt" unless there was "absolute" proof respondent committed the sexual assault. (App. 101a.)

Over defense objection, the judge then told the jurors that to assist them generally, and also to respond to the note, the judge was instructing the jurors further regarding deliberations. The judge directed the jurors to attempt to reach a verdict based solely on the evidence and without regard to consequences or the time required. The jurors were to "discuss your views" and "consider the views" of "fellow jurors." Each juror was neither to hesitate to reexamine the juror's own views nor to hesitate to ask fellow jurors to reexamine theirs. The judge ended with a direction that "each of you must decide the case for yourself," "after full and complete consideration of all the evidence with your fellow jurors." He reminded them to reach a verdict only if that was possible "without violence" to any juror's "individual judgment." (App. 101a-102a.)

After further deliberation, and another note that there was lack of agreement, the judge again instructed the jury over defense objection. The judge told the jurors he believed the defendants' pre-trial statements were "important" to consider, and that among the "consistencies and inconsistencies" in those statements, some were the "most significant":

> Ladies and gentlemen, in reviewing the ten communications you have sent to the Court since you began your deliberations on September 18th, 1998, it appears to the Court that the question as to who actually perpetrated forcible oral copulation upon [Mrs. S] is a matter of controversy among you.

You are, of course, the exclusive judges of the facts, and it is your duty, if you can, to arrive at a verdict one way or another. To that end, I am going to exercise the priviledge [sic] that I have under the laws of the state to comment on the evidence, not to impose my will on you in any way, but simply to have you review certain evidence you may not have considered or discussed during your deliberations.

In my view, it is important that you consider the statements defendant Anthony Smith and James Hinex made to law enforcement following their arrests.

Accordingly, after I have completed my comments, I am going to have those statements played in open court. As you listen to their statements, you should read the transcript which you have been provided with that corresponds to the statement you're listening to. When listening to their statements, you should compare their statements against each other. You should listen for consistencies in there [sic] statements as well as inconsistencies. Consistencies in statements and inconsistencies in statements are proper areas to consider in evaluating evidence.

Among the consistencies and inconsistencies you will hear in James Hinex' statements to Detective Willover, Hinex tells Willover that he and Smith went up to the front door of the S[] home. Hinex said Smith pretended to sell the newspaper. Hinex said Smith went inside the house. Hinex denied going inside the house.

In Hinex' statements to Detective Willover and Detective Ware, Hinex said that Smith was the guy who went into the house. Hinex said Christopher [McCurin] was not at the house when the incident occurred. Hinex denied going into the house.

> Hinex said Smith went to the back of the house with a gun and closed the door. Hinex said Smith was the only one who ran out of the house. In Smith's statement to Detective Willover, he told Willover he and Hinex went in the front door with a gun. Smith told Willover he and Hinex went to the house and Chris stayed in Rob [McKinsey]'s house. Smith told Willover Chris did not go in the house.
>
> Smith said he and Hinex went inside the house. Smith said that he found Ms. S[] in one of the back bedrooms. Smith said he had the gun when he was back there with Mrs. S[]. Smith said that Mrs. S[] gave him a $100 bill.
>
> There are other consistencies and inconsistencies you will hear in their statements, but these are the most significant in my view.

(App. 103a-106a.)

Both defendants' statements were re-played. (App. 106a.) The judge then instructed:

> After making a comparison of the statement of Anthony Smith and James Hinex to law enforcement, consider and discuss how this comparison affects your finding as to who perpetrated the act of forcible oral copulation upon [Mrs. S].
>
> My comments are advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses.
>
> I also remind you again that both the People and the defendant are entitled to the individual opinion of each juror. It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself but should do so only after a discussion of the evidence and instructions with the other jurors.
>
> You should not hesitate to change an opinion if you are convinced it is erroneous; however, you should not be influenced to decide any

> question in a particular way because the majority of the jurors or any of them favor such a decision.
>
> And when you are discussing and deliberating, remember, too, you are not partisans or advocates in this matter, but you are judges.

(App. 106a-107a.)

The jurors went to lunch, with Juror 9 handing the bailiff a note expressing frustration with the deliberations and seeking to be excused for the rest of the day. Juror 9 was instructed to return to deliberate after lunch. Soon after lunch, the jury returned a guilty verdict against respondent on the oral copulation count. (App. 107a.) Respondent was sentenced to prison for twenty years, plus twenty-five years to life. (App. 96a.)

State Post-Trial Proceedings

On direct review, the California Court of Appeal rejected respondent's challenge to the judge's comments (App. 11a-22a), finding the judge properly highlighted both defendants' pre-trial statements (App. 21a). The appellate court added that Hinex's trial testimony grossly contradicted his pre-trial statement, so the comments could have damaged the credibility of Hinex (who was not charged with sexual assault (App. 1a, 2a, fn. 2)) more than respondent's. (App. 21a.)

The appellate court found the judge neither suggested the jurors should find either defendant more credible, nor suggested whether respondent's guilt or innocence was the inference to draw from the pre-trial statements. (App. 21a.) And the court held that a judge's comments need neither recite all evidence nor recite all inferences possible from conflicting evidence. (App. 22a.)

Federal Habeas Proceedings

Respondent filed a federal petition for writ of habeas corpus, claiming jury coercion. Following the Ninth Circuit's view that opinions of "lower federal courts" are relevant to what is clearly established in

this Court's opinions (App. 49a), the magistrate judge noted formulations of "coercion" from lower federal court opinions on habeas and direct review (App. 64a-68a). Asserting the state court did not mention certain record facts, the magistrate found the state appellate court did not "reasonably appl[y] the requirement of *Lowenfield* to consider the totality of the circumstances." (App. 68a-69a.)

District judge Lawrence K. Karlton agreed "in full" (App. 93a), and he specifically added, "[the State's] argument that the Supreme Court has yet to clearly state what amounts to coercion is without merit" (App. 92a). The writ was granted as to the "jury coercion" claim. (App. 93a.)

The Ninth Circuit affirmed in a two-to-one published decision. Without citation, the majority asserted there is a "constitutional dividing line between instructing a jury and coercing it." (App. 111a.) The majority found the judge "[took] over the jury deliberations" by directing the jury to consider evidence which, in the majority's view, tended to establish guilt. (App. 116a.) The majority found this Court's cases compelled reversal on a theory of jury "coercion" under the Constitution, reciting a view that "the case represents the most coercive instruction in any of the coercion cases we have reviewed." (App. 119a.)

In dissent, circuit judge N.R. Smith asserted a belief, as a de novo matter, that the trial judge's comments were, or may have been, "coercive." (App. 123a, 125a-126a.) But he found it reasonable for the state court to disagree:

> In this case, the California Court of Appeal reviewed the trial judge's supplemental instruction and considered his comments on the evidence (even if the court did not expressly restate every fact or circumstance in its decision). In concluding that the verdict was not coerced, the Court of Appeal reasoned that the trial judge did not tell the jury what verdict to reach or expressly indicate what conclusion ought to be reached from the evidence upon which the judge commented. The trial judge

> did not indicate which of the witnesses (the petitioner or his co-defendant) was more credible. He did not express any notion of the petitioner's guilt or innocence. He also did not tell the jury that it had an obligation to reach a verdict. Further, the trial judge did not affirmatively poll the jury or ask the jury about its numerical division. That the trial judge ultimately learned of the jury's division and of the specific concerns of the holdout juror is problematic. That he then selectively summarized the evidence is equally troublesome. But I can find no clearly established federal law indicating that a trial judge may not comment on the evidence when he knows the numerical division of the jury, and no Supreme Court holding requires a state court judge (when commenting on the evidence) to recite any and all evidence that might be relevant, contradictory, or even exculpatory.
>
> I agree with the majority that the evidence the trial judge selectively presented and summarized (given the holdout juror's concerns), may have had a coercive effect on the jury. I dissent because it may at least be reasonable to conclude that it did not. *See* [*Early v. Packer*, 537 U.S. 3, 11 (2002)], 123 S.Ct. 362. On this basis, I would reverse the district court's grant of relief on the basis that the California Court of Appeal's decision was not an objectively unreasonable application of clearly established Supreme Court precedent.

(App. 125a-126a.)

REASONS FOR GRANTING CERTIORARI

This Court's precedents do not clearly establish any constitutional rule even suggesting a trial judge "coerces" a jury when, knowing the jury is divided on a factual question, the judge directs the jury's attention to the evidence which he believes sheds the most light on that question. Indeed, even under supervisory authority from this Court, the judge may "comment[] upon the evidence" and may "express his

opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Quercia v. United States*, 289 U.S. 466, 469 (1933).

But the lack of clearly established federal law is far deeper. This Court has never clearly established the assertion which the Ninth Circuit needed even to commence discussion – i.e., that under the Constitution, jury "coercion" is to be found on a line of judicial conduct, at some point beyond "instructing a jury." This Court's cases do not clearly establish that mere judicial conduct would ever actually combine, in extent or kind, to result in jury "coercion" under the Constitution, given that this Court's constitutional cases have not defined that term in the context of judicial conduct.

The Ninth Circuit majority crafted together a rule restricting the judge's privilege, by patching together what it characterized as "a handful of cases directly applying constitutional limits on the authority of a trial judge to encourage a jury toward productive deliberations resulting in an unanimous verdict." (App. 111a.) In doing so, the Ninth Circuit ignored that not one of this Court's cases clearly establishes the Constitution imposes any "limits" at all on what a trial judge may do in the form of encouragement to deliberate, or instructions on evidence, or factual commentary, or any of them combined. That disregard by the Ninth Circuit far departs from this Court's standards for determining what federal law is clearly established for purposes of 28 U.S.C. § 2254(d)(1).

A. This Court Has Placed Clear Constraints on Discerning When There Is Clearly Established Law

This Court has informed the lower federal courts of two distinct constraints when discerning when this Court has clearly established a rule of federal law applicable to a state criminal case.

First, there is a bar against relying on "dicta" from this Court's cases. *Carey* v. *Musladin*, 549 U.S.

70, 74 (2006) ("In *Williams* v. *Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), we explained that 'clearly established Federal law' in § 2254(d)(1) 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.' *Id.*, at 412, 120 S.Ct. 1495."). When this Court's cases have only found a particular type of conduct violates the Constitution, that bar precludes a federal habeas court from finding those cases have clearly established that an entirely different category of conduct would violate the Constitution. *Musladin*, 549 U.S. at 75-77 (a rule for prejudice in context of "government-sponsored practices" not clearly established to apply in context of conduct by mere spectators). Rather, where there is a "lack of holdings from this Court" on the specific issue, federal courts simply cannot set aside a state court merits adjudication under 28 U.S.C. § 2254(d)(1). *Musladin*, at 77.

Second, there is a categorical bar against relying on rules set forth in this Court's cases arising on direct review of federal prosecutions, unless such cases actually purport to interpret the Constitution. *Early* v. *Packer*, 537 U.S. 3, 10 (2002). Specifically, where a case from this Court reverses a conviction from a "*federal* prosecution[]" and does not "purport[] to interpret any provision of the Constitution," the case's "application to state-court proceedings" is not " 'clearly established.' " *Early*, 537 U.S. at 10 (original emphasis).

The Ninth Circuit disobeyed both constraints, and even attempted to camouflage its disobedience of the latter.

B. Only *Lowenfield* Constrained the State Court Adjudication

The Ninth Circuit purported to "deal with only a handful of cases" from this Court – *Allen* v. *United States*, 164 U.S. 492 (1896), *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), and *Early*, 537 U.S. 3. (App. 95a, 111a.) But, among those three, only *Lowenfield* could have possibly mattered in terms of challenging the state court decision.

Allen was a case arising from a federal prosecution. And the case did not even purport to interpret the Constitution. *Allen*, 164 U.S. at 501-502. Rather, *Allen* merely found no error at all in the challenged jury instructions. *Id.*

Because *Allen* found only the absence of error in the judicial conduct presented, it was error for the Ninth Circuit to attempt to glean from *Allen* any suggestion that other, or more extensive, judicial conduct might be even problematic. (App. 112a ("The third supplemental charge, however, went far beyond *Allen*.").) Petitioner fails to discern such suggestion at all in *Allen*. But any hypothetical suggestions in *Allen* would have been entirely unnecessary to the discussion in *Allen*, making any such suggestions "dicta" only. See *U.S. Bancorp Mortg. Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 23 (1994) (where discussion is beyond "all that was needful for the decision," it is "dictum"); accord, *Hodel* v. *Irving*, 481 U.S. 704, 710, fn. 7 (1987); see *United States* v. *Dixon*, 509 U.S. 688, 706 (1993) (citing *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 463, fn. 11 (1993) as "emphasizing 'the need to distinguish an opinion's holding from its dicta' ").

Likewise, because *Allen* was on direct review from a federal prosecution, and did not purport to interpret the Constitution, reliance on that case was doubly improper. Under this Court's standards, such features categorically imply that *Allen*'s "application to state-court proceedings" is not " 'clearly established.' " *Early*, 537 U.S. at 10.

It follows that a citation to *Allen* cannot support a federal habeas ruling that a state court decision was unreasonable against clearly established law within the meaning of 28 U.S.C. § 2254(d)(1).

Despite an initial reference to *Early* (App. 95a), and a later mention that under *Early* a state court need not refer to this Court's precedents (App. 114a-115a), the Ninth Circuit made no attempt to suggest *Early* provided any basis for challenging the state court adjudication. Indeed, the 2002 decision in

Early post-dated the 2000 state court adjudication by more than two years.

But in any event this Court specifically declined to examine the coercion claim in *Early*. Instead, after considerable discussion regarding the serious defects in the federal court of appeals' attack on the state court adjudication (*Early*, 543 U.S. at 8-11), this Court made solely the following remark regarding the merits: "Even if we agreed with the Ninth Circuit majority (Judge Silverman dissented) that there was jury coercion here, it is at least reasonable to conclude that there was not, which means that the state court's determination to that effect must stand." *Early*, 543 U.S. at 11. Thus, even were one to imagine some adverse language in *Early*, it would be "dicta" too.

Thus, it follows that a citation to *Early* cannot support a federal habeas ruling that a state court decision was unreasonable against clearly established law within the meaning of 28 U.S.C. § 2254(d)(1).

Thus, of the "handful of cases" which the Ninth Circuit purported to reference (App. 111a), there can be no reasonable dispute that only *Lowenfield* was a possible candidate for reliance.

C. *Lowenfield* Does Not Clearly Establish When, If Ever, Judicial Conduct Amounts to "Coercion" Under the Constitution

But *Lowenfield* itself clearly established only two unremarkable points in the constitutional context. In that case arising on federal habeas review of a state court judgment, the defendant claimed "the trial court impermissibly coerced the jury to return a sentence of death by inquiries it made to the jury and a supplemental charge which it gave to the jury following the receipt of a communication from that body." *Lowenfield*, 484 U.S. at 233. The state court had twice asked the jurors (and found them numerically divided on the question) whether further deliberations on their sentencing recommendation would be helpful. The

state court had subsequently re-instructed the jury of the lesser sentence the defendant would receive unless the jury was unanimous as to a sentencing verdict. *Id.*, at 234-235.

This Court recited, "Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield*, 484 U.S. at 241. And this Court further recited, "Our review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court 'in its context and under all the circumstances.' " *Id.*, at 237.

It was not error for the Ninth Circuit to note that *Lowenfield* held the Constitution constrains the state from coercing a jury. (App. 113a.) But merely to say a constraint exists provides no guidance as to what is, and what is not, consistent with that constraint. Cf. *Illinois* v. *Gates*, 462 U.S. 213, 241 (1983) ("no one doubts that 'under our Constitution only measures consistent with the Fourth Amendment may be employed by the government . . . ,' . . . but this agreement does not advance which measures are, and which measures are not, consistent with the Fourth Amendment"). Indeed, while discussing the meaning of the phrase "clearly established" – prior to Congress's adoption of that phrase in 28 U.S.C. § 2254(d)(1) – this Court stated:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of [*Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)].

Anderson v. *Creighton*, 483 U.S. 635, 639 (1987).

Thus, for *Lowenfield* to clearly establish the substance of "coercion" under the Constitution, it would have had to say something more than that "coercion" is an unconstitutional thing, or that determining its existence requires consideration of all the circumstances. Rather, *Lowenfield* would have had to explain clearly just what "coercion" is.

But *Lowenfield* did nothing of the sort. This Court noted the charge in *Allen* was "similar but by no means identical" to the charge in *Lowenfield*. And while this Court found such similarity sufficient to find the charge constitutional, this Court at no point stated (clearly or otherwise) that dissimilarity would have meant the charge was unconstitutional. *Lowenfield*, 484 U.S. at 237-239.

As well, this Court noted that it was fruitless for defendant Lowenfield to rely on three prior decisions from this Court. *Lowenfield*, 484 U.S. at 239-240 (citing *Jenkins* v. *United States*, 380 U.S. 445 (1965), *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), and *Brasfield* v. *United States*, 272 U.S. 448 (1926)). While this Court pointed out that defendant Lowenfield failed to demonstrate his facts were akin to those in the prior decisions, this Court specifically included the caveats that those prior decisions were not based on the Constitution. *Ibid.*

And in *Early* this Court held that, such caveats in a constitutional case, when citing to a prior case not decided under the Constitution, preclude the theory that the later case is elevating the rule of the prior case to constitutional status. *Early*, 543 U.S. at 10. Rather, such caveats mean the rule – even if mentioned in the later constitutional case – is "off the table as far as § 2254(d) is concerned." *Ibid.*

For the second time, again on federal habeas review of a state judgment, again in a published case, again by two-to-one decision, and again on the question of jury coercion, the Ninth Circuit has acted to the contrary and ordered granting of a writ.

The first time was in *Packer* v. *Hill*, 291 F.3d 569 (9th Cir. 2002), wherein the Ninth Circuit majority explicitly relied on the above three non-

constitutional cases cited in *Lowenfield*. *Hill*, 291 F.3d at 579 (citing *Gypsum* and *Jenkins*; see also *Hill*, 291 F.3d at 579, fn. 10 (citing *Brasfield*). Finding the state court erred by failing to apply these purported constitutional principles, *Hill*, 291 F.3d at 579-580, the Ninth Circuit determined de novo that there was jury coercion, *id.*, at 580-583. This Court reversed, specifically explaining that neither the *Gypsum* nor the *Jenkins* federal-prosecution cases were "relevant to the § 2254(d)(1) determination" for "neither opinion purported to interpret any provision of the Constitution." *Early*, 537 U.S. at 10.

In this case, the Ninth Circuit majority omitted express citations to the three non-constitutional decisions which *Lowenfield* had mentioned with caveats. But the Ninth Circuit cited those three cases indirectly: it cited the pages in *Lowenfield* which referred to those three decisions – including the *Jenkins* and *Gypsum* decisions that this Court expressly held were "off the table as far as § 2254(d) is concerned." *Early*, 537 U.S. at 10. To wit, in stating that "*Lowenfield* went so far as to observe that it is impermissible for the judge to instruct the jury it must reach a verdict," the Ninth Circuit cited the page of *Lowenfield* which referred to non-constitutional holdings to that effect in *Jenkins* and *Gypsum*. (App. 114a (citing *Lowenfield*, 484 U.S. at 239 (citing *Jenkins* and *Gypsum*)).) That defied this Court's express correction in *Early*.

With surgical precision, the Ninth Circuit engaged the same device to give material weight to the fact the trial judge here inadvertently knew of the jury's numerical division. That is, the Ninth Circuit cited to the very page of *Lowenfield* which had mentioned that the non-constitutional decision of *Brasfield* had given material weight to the fact the trial judge had expressly inquired as to numerical division. (App. 114a (citing *Lowenfield*, 484 U.S. at 240 (citing *Brasfield*)).) While that defied this Court's implicit correction in *Early*, it also violated the rule against reliance on dicta – for it is one thing for a judge to signal to jurors an interest in their numerical division by inquiring, and quite another

for the judge to become aware because a juror simply volunteers the information without request.

Under *Early*, the Ninth Circuit could not find it clearly established that application to state court proceedings, of any federal rule from pages 239 or 240 of *Lowenfield*, was clearly established. The result is that nothing from *Lowenfield* is clearly established as applicable to state court proceedings, beyond the mere points that (1) "coercion" is forbidden and (2) whether "coercion" exists must be determined by examining all the circumstances. See *Clements* v. *Clarke*, ___ F.3d ___, 2010 WL 175095, *11 (1st Cir. Jan. 20, 2010) ("To the extent that *Lowenfield* does constitute clearly established federal law, that law can be summarized as follows: defendants have a right against coerced jury verdicts, and any potential coercion should be measured based on the totality of the circumstances.").

In this case, beyond the " 'presumption that state courts know and follow the law,' " *Holland* v. *Jackson*, 542 U.S. 649, 655 (2004), the California Court of Appeal actually recited its duty to consider all the circumstances shown by the appellate record. (App. 18a & fn. 8.) Accordingly, *Lowenfield* provided no basis from which the Ninth Circuit could challenge the state court's rejection of the jury "coercion" claim.

The failing by the Ninth Circuit was not happenstance. It is not that this Court has clearly established meaningful contours of what amounts to unconstitutional "coercion" of a jury, but that the Ninth Circuit simply misapplied them here. Rather, this Court's precedents simply do not clearly establish when, if ever, judicial conduct could amount to such "coercion."

This Court's cases might have done so had this Court's cases found a suitable number of actual examples of judicial conduct, which this Court then held was "coercion" under the Constitution. Upon examination of the types or extent of judicial conduct in those examples, there might be room for debate as to what type or extent of judicial conduct had been clearly established to amount to "coercion" under the

Constitution. But in the one constitutional case – *Lowenfield* – this Court clearly established only that the challenged judicial conduct did *not* amount to "coercion" under the Constitution. Thus, in all of this Court's cases, there is not a single *example* of "coercion" under the Constitution, from which a state court could even begin to find a "clearly established" framework for determining substantively what amounts to "coercion."

Worse, even if a *formulation* of "coercion" would be something other than dicta in the absence of a finding that the formulation was satisfied in the particular case, the fact is that this Court has not even announced such a formulation. And no formulation is obvious merely from the word "coercion." For example, one court might think "coercion" occurs when there is any statement or act by the judge which raises a possibility, however slight, that a juror might form a conclusion that the judge has an opinion regarding a question of fact relevant to the case – irrespective whether the judge admonishes the jurors they are the ultimate finders of fact. A second court might think "coercion" probably occurs if a judge overtly suggests a view of the case, but only where the judge fails to instruct the jurors that their independent judgment should prevail. A third court might find there is no "coercion" when a judge expressly challenges jurors in the minority to question the wisdom of their view, given the very fact it is the minority view.

All are interesting formulations, and there are doubtless other possible formulations. But none of them matter, for none of them are formulations to be found in this Court's constitutional decisions. Thus, this Court's precedents do not inform a state court what sort of facts even to look for under the heading of "coercion."

For this reason, it is quite proper that not one other circuit has purported to find, even once, what the Ninth Circuit has purported to find twice. Seven circuits other than Ninth – the First, Second, Fourth, Fifth, Sixth, Seventh, and Tenth – have considered this Court's precedents under the constraints of §

2254(d)(1). Not one has purported to discern a formulation by this Court of what amounts to unconstitutional coercion, and the First Circuit has expressly held that *Lowenfield* clearly establishes solely that whether there was "coercion" must be determined from considering all the circumstances. *Clements* v. *Clarke*, ___ F.3d ___, 2010 WL 175095, at *11. And no other circuit has found an example of unconstitutional coercion in light of § 2254(d)(1)'s constraints. See *Spears* v. *Greiner*, 459 F.3d 200, 205-207 (2d Cir. 2006); *Coleman* v. *Quarterman*, 456 F.3d 537, 547-548 (5th Cir. 2006); *Mason* v. *Mitchell*, 320 F.3d 604, 640-642 (6th Cir. 2003); *Gilbert* v. *Mullin*, 302 F.3d 1166, 1171-1177 (10th Cir. 2002); *Booth-El* v. *Nuth*, 288 F.3d 571, 580-582 (4th Cir. 2002); *Schaff* v. *Snyder*, 190 F.3d 513, 536-536 (7th Cir. 1999); *Green* v. *French*, 143 F.3d 865, 884-888 (4th Cir. 1998).

That is why the Ninth Circuit, in purporting to find clearly established law, has repeatedly resorted to non-constitutional decisions – whether openly or by camouflage. And that has led to the bizarre result here, in that the Ninth Circuit has found it "clearly established" that the Constitution itself barred a state court from doing less than this Court has permitted federal judges to do under supervisory review.

In *Quercia*, which the Ninth Circuit correctly acknowledged to be a supervisory-review decision and not a constitutional case, this Court rejected the theory that a federal judge violates a criminal defendant's right to have a jury determine the facts where the judge plainly states for the jurors his view of the factual conclusions to be drawn from the evidence admitted at trial:

> In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. (Citation.) In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in

> arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and *he may express his opinion upon the facts*, provided he makes it clear to the jury that all matters of fact are submitted to their determination. (Citations.) Sir Matthew Hale thus described the function of the trial judge at common law: "Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, *in matters of fact to give them a great light and assistance by his weighing the evidence before them*, and observing where the question and knot of the business lies, *and by showing them his opinion even in matter of fact*; which is a great advantage and light to laymen." (Citation.)
> . . .

Id., 289 U.S. at 469 (emphasis added).

Although the Ninth Circuit recognized *Quercia* as a "supervisory powers" precedent not binding on the states (App. 111a), it failed to recognize that *Quercia* nonetheless supported the state judgment in this case. As this Court has held, when a practice is permissible even under this Court's "supervisory" authority, then it "a fortiori" cannot provide a basis for relief in a case where the federal court must "approach the issue in constitutional terms." *Spencer* v. *Texas*, 38 U.S. 554, 563 (1967).

Thus, had a judge stated directly that certain specific trial evidence persuaded him that respondent committed the sexual assault, he would have done more than the trial judge did here. Yet that more aggressive statement still would have been within the scope of what this Court holds a federal judge may do. It is bizarre, and a far departure from this Court's standards, for the Ninth Circuit to condemn the state judge for being more circumspect with his comments.

The reality is that it is simply an open question when, if ever, judicial conduct can amount to "coercion" under the Constitution. No case from this Court clearly establishes that it ever is, and indeed

only dicta indicates that judicial conduct ever "might" do so. See *Lowenfield*, 484 U.S. at 241 ("we do not mean to be understood as saying other combinations of supplemental charges and polling *might* not require a different conclusion") (emphasis added). Thus, when a state court has decided such a claim on the merits, a federal habeas court must leave the matter be.

Blank Page

CONCLUSION

The petition for a writ of certiorari should be granted. This Court may also wish to consider summary reversal of the judgment below.

Dated: February 12, 2010

Respectfully submitted

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General

*DAVID ANDREW ELDRIDGE
Deputy Attorney General

**Counsel of Record*
Counsel for Petitioner

SA2007304399
30949878.doc

Blank Page