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No. \_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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**LUCIOUS WILSON, Petitioner**

**vs.**

**J. SOTO, WARDEN, Respondent**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Is the Ninth Circuit's denial of a certificate of appealability ("COA") on the claim that Wilson's conviction is unconstitutional because the prosecutor committed prejudicial misconduct under *Darden v. Wainwright*, 474 U.S. 438, 446 n.8 (1986), where he argued to the jury that Wilson had committed multiple assaults, thereby urging the jury to convict him on the basis of uncharged conduct, and to reach a non-unanimous decision, contrary to this Court's rule that a COA is required when the district court's denial of a habeas claim is debatable?

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Lucious Wilson (“Wilson” or “Petitioner”) petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit denying his request for a Certificate of Appealability (“COA”) to challenge the district court’s judgment denying his habeas corpus petition with prejudice.

**I.**  
**ORDERS AND OPINIONS BELOW**

The Ninth Circuit’s order denying a COA in *Lucious Wilson v. J. Soto*, Ninth Circuit case no. 17-56555, was not published. *See* Petitioner’s Appendix (“Pet. App.”) 1. The magistrate judge, presiding by consent, dismissed Wilson’s habeas corpus petition with prejudice, entered judgment against him, and denied a COA.

Pet. App. 2-5. Because the Court can look through the California Supreme Court’s silent denial of Wilson’s claim, the relevant state court decision in this 28 U.S.C. § 2254 action is the Los Angeles County Superior Court’s order filed on December 8, 2014. Pet. App. 44-45.

## **II. JURISDICTION**

The Ninth Circuit, per the Honorable Richard Paez and Johnnie Rawlinson, denied Wilson’s request for a COA on June 22, 2018, and the order was entered that day. Pet. App. 1. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **U.S. Const., Amend. V**

“No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .”

### **U.S. Const., Amend. XIV, § 1**

“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”

### **28 U.S.C. § 2253**

“(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.”

**28 U.S.C. § 2254(a)**

“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

**28 U.S.C. § 2254(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.”

**IV.  
STATEMENT OF THE CASE**

Lucious Wilson is serving a 13-year sentence for assault with a deadly weapon and exhibiting a deadly weapon in resisting arrest. The charges were based on an encounter at a McDonald’s where his fiancée was working at the time.



During the incident, Wilson wielded two large knives, ultimately injuring no one but himself - cutting his own neck, arms, and stomach and spreading his blood throughout the restaurant. In the course of the encounter, while holding the knives, Wilson approached Eddie Romero, the victim, and assaulted him. Wilson was eventually disarmed and arrested when Sheriffs' Deputies shot him with high-velocity bean bags. There was video of the entire incident but it was not continuous and was low-quality. For his conduct, Wilson was charged with, *inter alia*, a single count of assault against victim Eddie Romero. Wilson pleaded not guilty by reason of insanity and represented himself at trial.

The magistrate judge denied Wilson's claim that he was denied a fair trial and due process when the prosecutor committed misconduct by arguing to the jury that Wilson had committed multiple assaults on Eddie Romero, thereby urging the jury to convict Wilson on the basis of uncharged conduct, and to reach a non-unanimous decision. The magistrate judge denied the COA; and the Ninth Circuit denied a COA. Pet. App. 1-3.

#### V. **REASONS FOR GRANTING THE WRIT**

The Ninth Circuit failed to heed this Court's instruction to grant a COA when a district court's denial of a claim is debatable when it denied Wilson's request for a COA on his prosecutorial misconduct claim. As shown below, Wilson is entitled to relief on his claim, and 28 U.S.C. § 2254(d) does not bar relief. Necessarily, then, the district court's denial of relief was at least debatable, and Wilson is entitled to a

COA to pursue the claim on appeal. Only by applying a higher standard contrary to this Court's jurisprudence could the courts below deny a COA.

### **A. COA Standards**

A federal habeas petitioner has no automatic right to appeal a district court's denial of a petition but instead must obtain a COA to pursue an appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed.'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). Rather, to receive a COA, a petitioner "need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*

"The COA inquiry asks only if the District Court's decision was debatable." *Id.* at 348. The COA standard is "modest"; "the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir. 2000). "A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El*, 537 U.S. at 338. A petitioner is not required to prove "that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

## **B. AEDPA Standards**

Because Wilson filed his federal habeas petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), AEDPA governs this action. *Doody v. Ryan*, 649 F.3d 986, 1001 (9th Cir. 2011). To obtain relief under AEDPA, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-36 (9th Cir. 2008) (en banc). When a federal habeas court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an unreasonable factual determination, it reviews the claim *de novo* in assessing whether the petitioner’s constitutional rights were violated. *Id.* at 735; *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

## **C. The Relevant State Court Decision**

Wilson’s prosecutorial misconduct claim was denied on the merits in a decision by the Los Angeles County Superior Court and then summarily rejected by the California Supreme Court. Pet. App. 20, 44-46. Under the “look through” doctrine, the Los Angeles County Superior Court opinion is the relevant decision for federal habeas review. *Johnson*, 133 S. Ct. at 1094 n.1.

## **D. Wilson Is Entitled to a COA on the Prosecutorial Misconduct Claim**

Wilson’s federal habeas petition alleges that his due process rights under the 14th Amendment were violated when the prosecutor committed prejudicial misconduct in closing argument. The prosecutor’s comments resulted in an unfair

trial for Wilson because they allowed the jury to convict Wilson on the basis of uncharged conduct. The state court's denial of this claim was an unreasonable application of the clearly established federal law of *Darden v. Wainwright*, 477 U.S. 168 (1986) under 28 U.S.C. § 2254(d)(1), and an unreasonable determination of the facts in light of the evidence before it under 28 U.S.C. § 2254(d)(2). This claim was denied on the merits in state habeas proceedings. The Magistrate Judge's Order found no basis for Wilson's claim, holding that the state could reasonably have concluded that any impropriety by the prosecutor was easily cured by the judge's instruction to the jury. Pet. App. 17-18.

A prosecutor is commanded "to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935). A federal habeas petitioner is entitled to a new trial where misconduct rendered the defendant's trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43, 643 n.15 (1974). In applying the *Donnelly* prejudice standard, the Supreme Court has looked to whether the prosecutor "manipulate[d]" or "misstate[d]" the evidence and whether the prosecutor infringed on other specific constitutional rights guaranteed to the accused. *Darden*, 477 U.S. at 181-82. The Ninth Circuit has "summarized the factors the Supreme Court evaluated in *Darden* to determine whether the petitioner's trial was "fair," and then observed that consideration of the *Darden* factors "appears to be equivalent to evaluating whether there was a 'reasonable probability' of a different result." *Deck v. Jenkins*, 814 F.3d 954, 979 (9th Cir. 2014) (quoting *Hein v. Sullivan*, 601 F.3d 897, 914-15 (9th Cir. 2010)).

Under California law, “a jury verdict must be unanimous. . . . Additionally, the jury must agree unanimously the defendant is guilty of a specific crime.”

*People v. Russo*, 25 Cal. 4th 1124, 1132 (2001) (citation omitted).

Here, Wilson was charged with a single count of assault with a deadly weapon against Edward Romero. Yet the prosecutor urged the jury to find Wilson guilty based on any one of multiple “assaults”:

DA: At that time Ms. Valdez saw the defendant produce a knife and swipe it in a downward motion towards Eddie Romero’s back. I’ve characterized this myself as assault number 1. Pet. App. 49.

DA: This is what I’m characterizing as assault number 2. What we’re about to see right now I’m characterizing it as assault number 2. Pet. App. 52.

DA: Just a downward swiping motion, and Edward Romero has to back out of the way. That’s assault number 2 in this case. Pet. App. 55.

DA: Edward Romero was scared as hell and understandably so. And that, ladies and gentlemen, is assault number 3. Pet. App. 57.

DA: My point is you can actually hang your hat on any one of these motions: the one where he swiped down at the defendant’s back I’m sorry, at the victim’s

back when it's off camera; the second one what we saw through the defendant when he does one of these; and then the third one is here where he comes at the guy like this with two knives. You can hang your hat on any one of those and he'd be guilty of assault with a deadly weapon. Pet. App. 58.

“This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’” *Russo*, 25 Cal. 4th at 1132 (citation omitted). Here, the prosecutor exploited this danger and manipulated the evidence to convince the jury that Wilson committed multiple assaults, or at the very least, he's good for one assault because there were so many. Although the trial court provided a unanimity instruction it did not cure the prosecutor's misleading argument.

The prosecutor's argument rendered Wilson's trial unfair. As it was, the video of the incident did not clearly depict Wilson's actions. (*E.g.* Pet. App. 49 (“Now, this is not caught on video, as you can see, because there's no camera angle that actually captures it.”), *id.*, (“Unfortunately, it's just not caught on camera . . .”)); Pet. App. 51 (“See that part? It goes off camera. It's in that split second.”)). The video was choppy and it is not clear that any assaultive conduct was clearly identifiable. Despite this, the prosecutor did not simply urge the jury to find a single assault, but instead misstated the evidence to argue that there were multiple assaults.

The Magistrate Judge, in denying relief, found that any impropriety by the prosecutor was cured by the trial court's unanimity instruction.<sup>1</sup> The Order fails to take into account that the video of the incident did not clearly depict Wilson's actions. Thus, absent the prosecutor's misconduct, the jury likely would not have been able to agree on the assaultive conduct.

Thus, the state court's denial of this claim was both contrary to and an unreasonable application of clearly established federal law, and was based on an unreasonable factual determination. 28 U.S.C. § 2254(d). *A fortiori*, the district court's denial of the claim is debatable and Wilson is entitled to a COA to appeal the district court's denial of his claim. The refusal of the Ninth Circuit to grant a COA runs afoul of this Court's instructions in *Miller-El*, 537 U.S. at 327, and *Welch*, 136 S. Ct. at 1263.

## VI.

### CONCLUSION

For the reasons stated above, Lucious Wilson respectfully requests that the

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<sup>1</sup> The trial judge instructed the jury that the prosecution "presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." Pet. App. 61.

Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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DATED: September 14, 2018

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