

No. _____

IN THE
Supreme Court of the United States

MAUREEN McDERMOTT,

Petitioner,

v.

DEBORAH K. JOHNSON, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

QUESTION ONE:

Every federal judge reviewing Maureen McDermott's prosecutorial misconduct claim (four judges, including the district court and each judge of a Ninth Circuit panel) has concluded that the misconduct in her case amounts to a prejudicial due process violation. Nonetheless, McDermott's death sentence remains intact.

Did the Ninth Circuit's denial of relief rest on a misapprehension of what constitutes clearly established federal law under this Court's decision in *Parker v. Matthews*, 567 U.S. 37 (2012), stating that the law regarding a prosecutor's improper comments was "clearly established" by *Darden v. Wainwright*, 477 U.S. 168 (1986)?

QUESTION TWO:

No state court conducted a comparative juror analysis when evaluating McDermott's *Batson*¹ claim. Did the Ninth Circuit's denial of this claim conflict with 28 U.S.C. § 2254(d)(2) and this Court's decisions, which require deference to the state court's factual findings only when it considers relevant facts?

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

LIST OF PRIOR PROCEEDINGS

United States Supreme Court

Maureen McDermott v. California, Case No. 02-8810, petition for writ of certiorari denied May 5, 2003

United States Court of Appeals for the Ninth Circuit

Maureen McDermott v. Deborah Johnson, Case No. 17-99005, judgment entered October 26, 2023, and rehearing denied April 8, 2024

United States District Court for the Central District of California

Maureen McDermott v. Deborah Johnson, Case No. 2:04-cv-00457-DOC, judgment entered on August 15, 2017

California Supreme Court

In re Maureen McDermott, Case No. S092813, petition denied January 14, 2004

In re Maureen McDermott, Case No. S130708, petition denied January 3, 2007

In re Maureen McDermott, Case No. S155331, petition denied May 21, 2008

Los Angeles County Superior Court

People of the State of California v. Maureen McDermott, Case No. A810541, judgment entered June 14, 1990

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

Petitioner Maureen McDermott respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On October 26, 2023, the Ninth Circuit Court of Appeals denied McDermott’s capital habeas appeal in a published opinion, which is reported at *McDermott v. Johnson*, 85 F.4th 898 (9th Cir. 2023). (See Petitioner’s Appendix (Pet. App.) 1 at 1-34.) April 4, 2024, the Ninth Circuit denied McDermott’s petition for panel rehearing and rehearing en banc. (Pet. App. 2 at 35.)

The district court denied McDermott’s habeas petition in two orders. (Pet. App. 3 at 36-101, Pet. App. 4 at 102-56.) The district court entered judgment against her on August 15, 2017. (Pet. App. 5 at 157.) McDermott timely-filed a post-judgment motion, which was denied on May 14, 2018. (Pet. App. 6 at 158.)

In state court, McDermott challenged her conviction and sentence in three habeas petitions. The California Supreme Court summarily denied her first habeas petition, case number S092813, on January 4, 2004. (Pet. App. 7 at 159.) The second, case number S130708, which included the prosecutorial misconduct and purposeful discrimination claims at issue here, was denied on January 3, 2007. (Pet. App. 8 at 160-80; Pet. App. 9 at 181.) The third petition, case number S155331, was denied on May 21, 2008. (Pet. App. 10 at 183.)

On direct appeal, McDermott also challenged her convictions and sentence based on, inter alia, prosecutorial misconduct and purposeful discrimination in jury selection. The California Supreme Court denied McDermott's direct appeal in a reasoned opinion on August 12, 2002. *People v. McDermott*, 28 Cal. 4th 946 (2002); (Pet. App. 11 at 184-243.).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. The Ninth Circuit's opinion affirming the denial of habeas relief was filed on October 26, 2023, and McDermott filed a timely petition for rehearing, which was denied on April 8, 2024. She is filing this petition within 90 days of the Ninth Circuit's order denying her petition for rehearing. *See* Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254 (a), (d)

(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.

(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.

STATEMENT OF THE CASE

I. The Crime

McDermott and the victim in this case, Stephen Eldridge, met in 1982 and became good friends. They eventually lived together as roommates and became joint tenants of the home they lived in. In December 1984, they each bought \$100,000 in life insurance, designating each other as beneficiary. (Pet. App. 19 at 299-300.)

In 1985, Jimmy Luna and two brothers, Marvin and Dondell Lee, stabbed Eldridge to death in the house he shared with McDermott. Luna was

McDermott's coworker at Los Angeles County-USC Medical Center.

McDermott, 28 Cal. 4th 946, 963 (2002). The prosecution's theory was that McDermott hired Luna to kill Eldridge for financial gain. *Id.* at 962. There was no dispute at trial that Luna and the Lee brothers were the ones who killed Eldridge.

Luna, in exchange for testifying against McDermott, pleaded guilty to first-degree murder for life without the possibility of parole. (Pet. App. 19 at 304.) The Lee brothers were both granted complete immunity, and also testified against McDermott. (See Pet. App. 19 at 301-03.) McDermott maintains her innocence.

II. The Trial

A. Jury selection

During jury selection, the prosecutor used her peremptory challenges to strike eight Black jurors before trial counsel made a *Wheeler*² motion, which is the California analog of a *Batson*³ motion. Compare *Wheeler*, 22 Cal. 3d at 280, with *Batson*, 476 U.S. 79. The prosecutor offered a generic reason for excusing all eight Black jurors—she “didn’t feel they would be good prosecution jurors on the issue of the death penalty” (Pet. App. 19 at 297)—

² *People v. Wheeler*, 22 Cal. 3d 258 (1978).

³ *Batson v. Kentucky*, 476 U.S. 79, 80 (1986).

and provided specific reasons for only four of those eight. (*See, e.g.*, Pet. App. 19 at 295 (juror was not “mature enough”); Pet. App. 19 at 295 (juror was “very, very stupid”); Pet. App. 19 at 294 (only being in favor of the death penalty if a defendant had a prior criminal record, and favoring rehabilitation over the death penalty); Pet. App. 19 at 296 (not wanting the death penalty “unless the defendant would kill again in prison”).) After the court denied counsel’s motion, the prosecutor struck another Black juror. (Pet. App. 19 at 298.) Trial counsel did not object to this strike. (*Id.*) In total, the prosecutor used nine of her 23 peremptory challenges to strike nine of the twelve Black prospective jurors in the jury pool.

Significantly, McDermott’s jury was largely comprised of people who self-identified as religious. Nine of the twelve seated jurors considered themselves religious (Pet. App. 18 at 261, 263-66, 268, 270, 272, 275.) Four of those nine regularly attended church. (Pet. App. 18 at 268, 273, 275.) Even if a person did not regularly attend church at the time of trial, they were, at one point, members of religious organizations or groups. (Pet. App. 18 at 260, 262-63, 271, 274.) One juror had even been employed as a church secretary. (Pet. App. 18 at 259.) Three jurors referenced Biblical or religious sayings in their questionnaires, such as “I believe in an eye for an eye” (Pet. App. 18 at 267), “Let he who is without guilt cast the first stone,” (Pet. App. 18 at 269) and “there but for the grace of God go I” (18 Pet. App. 276.) As for the six

alternate jurors, five of the six considered themselves religious. (18 Pet. App. 277-78, 279-80, 281.) Four of them regularly attended church. (18 Pet. App. 4 at 277-78, 280, 281.)

B. Penalty phase closing argument

The main theme of the prosecutor's closing argument was her personal belief that McDermott did not qualify as a "human being." In rapid succession, she opined that McDermott was a "wolf in sheep's clothing," a "traitor," and a "form" of human being against which "society has a right to protect itself" because they are "extremely treacherous. . . to keep alive." (Pet. App. 19 at 358.) She compared McDermott to an "evil" "Nazi" working in a "crematorium" by day and "listening to Mozart" at night. (Pet. App. 19 at 360.) She argued that the death penalty was warranted because McDermott had "resigned from the human race." (Pet. App. 19 at 387.) She compared McDermott to a "germ[]," a "mad dog[]," and a "snake[]," which society had a right to kill. (Pet. App. 19 at 389.) The prosecutor argued that McDermott was even more deserving of death because she was a woman. (Pet. App. 19 at 385-86.) She then argued that McDermott "used her sex to destroy another human being. . . ." (*Id.* at 386.) The prosecutor encouraged the jury to rely on their gut feelings in deciding whether McDermott had "earned the penalty of death." (Pet. App. 19 at 389.)

The prosecutor also repeatedly referenced the Bible during her closing. After remarking that she was not an expert on the Bible, she held herself out as one. (Pet. App. 19 at 387.) She explained to the jury that most Biblical scholars would interpret the Biblical commandment of “Thou shalt not kill” to not apply to their decision to sentence McDermott to death. (*Id.*) She then drew the jury’s attention to “several references to the death penalty in the Bible,” such as Exodus 21, Verse 12, and quoted that verse for the jury: “Whoever strikith [sic] a man a mortal blow must be put to death.” (Pet. App. 19 at 385.) The prosecutor also quoted from Exodus 21, Verse 14, which she found “incredibly apropos for this situation.” (*Id.*) She argued: “When a man kills another after maliciously scheming to do so, you must take him from my alter [sic] and put him to death.” (*Id.*) Counsel did not object.

The defense argued that, given McDermott’s good behavior, it was unnecessary to kill her. (Pet. App. 19 at 396, 438.) Defense counsel also argued that life without the possibility of parole would be a more severe punishment for McDermott than death. (Pet. App. 19 at 399-400, 410, 471.)

The jury deliberated over three days before returning a death verdict. (Pet. App. 18 at 282-84; Pet. App. 19 at 333-35.)

III. State Appeal And Federal Habeas

In 1999, McDermott appealed her conviction and death sentence to the California Supreme Court. The appeal included the prosecutorial misconduct

claim and the *Batson* claim at issue here. In 2002, the California Supreme Court denied these claims in a reasoned decision. *McDermott*, 28 Cal. At 946; (Pet. App. 11 at 184-243). It denied the prosecutorial misconduct subclaim regarding the biblical arguments exclusively on procedural grounds, based on counsel's failure to object. *Id.* at 1001. In its analysis of McDermott's *Batson* claim, which the court denied on the merits, the California Supreme Court failed to conduct a comparative juror analysis. *Id.* at 966-81.

McDermott filed three state habeas petitions, which were each summarily denied. (7 Pet. App. at 159, 9 Pet. App. at 181, 10 Pet. App. at 183.)

McDermott filed her initial federal petition in 2005 and an amended federal petition in 2007. (Pet. App. 20 at 447-49.) In 2010, the district court granted an evidentiary hearing on several claims, including the *Batson* claim discussed herein. (Pet. App. 20 at 453.) The court found that a hearing was required on the *Batson* claim because "the record here is . . . inadequate in order to refute the inference of bias" raised by the prosecutor's nine peremptory strikes against Black jurors. (Pet. App. 17 at 258.)

While the parties were preparing for an evidentiary hearing this Court decided *Cullen v. Pinholster*, 563 U.S. 170 (2011). The district court then vacated the evidentiary hearing and ordered McDermott to show that 28 U.S.C. § 2254(d) did not bar relief on any of the evidentiary-hearing claims.

(Pet. App. 16 at 255-56.) After briefing, the court denied the evidentiary-hearing claims and ordered merits briefing on all remaining claims, including McDermott's claim of prosecutor misconduct during her closing argument. (Pet. App. 3 at 101.)

In 2017, the district court issued its final order denying the rest of McDermott's petition. (Pet. App. 4 at 102-56.) As to her claim that the prosecutor committed misconduct by quoting Bible verses, the district court found that the claim was meritorious but procedurally defaulted because trial counsel failed to object to the misconduct. (Pet. App. 4 at 140-45.) The district court granted a certificate of appealability on this claim. (Pet. App. 13 at 246.)

McDermott timely appealed to the Ninth Circuit. (Pet. App. 14 at 247-51; Pet. App. 15 at 252-54.) After briefing and oral argument, the Ninth Circuit, in its published decision, extended the certificate of appealability to McDermott's *Batson* claim but denied relief on that claim as well as the prosecutorial misconduct claim. *McDermott*, 85 F.4th at 907, 910.

The appeals panel concluded McDermott's prosecutorial misconduct claim was not procedurally defaulted, and reached the merits of the claim. In denying relief, the panel concluded that the California Supreme Court's denial of McDermott's prosecutorial misconduct claim was not contrary to clearly established Supreme Court precedent:

Although a prosecutor's references to the Bible in closing argument in a capital case have been held unconstitutional as violative of the Eighth Amendment under our circuit precedent, *see Sandoval v. Calderon*, 241 F.3d 765, 776–77 (9th Cir. 2000), only Supreme Court precedent operates as “clearly established” law for AEDPA purposes. *See* 28 U.S.C. § 2254(d)(1); *Lopez v. Smith*, 574 U.S. 1, 7, 135 S.Ct. 1, 190 L.Ed.2d 1 (2014) (per curiam) (holding that “[c]ircuit precedent cannot ‘refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced’ ” (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013))).

McDermott, 85 F.4th at 908. The panel held that the “general principles about prosecutorial misconduct related to sentencing and the death penalty” cannot be clearly established federal law because “[t]he Supreme Court has never announced a rule about invocations of religious authority in a closing argument.” *McDermott*, 85 F.4th at 907.

The Ninth Circuit also denied McDermott's claim that the prosecution violated *Batson*, finding that under the section 2254(d) standard, “reasonable jurists could debate whether the prosecutor used the peremptory challenges to purposely discriminate against black jurors.” *McDermott*, 85 F.4th at 910.

The panel found:

[N]o state court conducted a comparative analysis. [I]n order for us to discharge our responsibility under AEDPA to review a *Batson* claim under section 2254(d)(2), we often will have to conduct a formal

comparative juror analysis, and our responsibility to conduct a comparative juror analysis is not contingent on whether the state court previously performed or did not perform a formal comparative juror analysis.” *Murray*, 745 F.3d at 1005; *see also Jamerson v. Runnels*, 713 F.3d 1218, 1225 (9th Cir. 2013) (“[W]e must perform in the first instance the comparative analysis that the state court declined to pursue.”).

McDermott, 85 F.4th at 910. Noting the contrast between the number of Black potential jurors in the venire pool and the marked absence of any Black jurors on the seated jury, the panel nonetheless denied the claim after conducting its own comparative juror analysis. *Id.*

On April 8, 2024, the Ninth Circuit denied McDermott’s petition for rehearing and rehearing en banc. (Pet. App. 2 at 35.)

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT IN CLOSING ARGUMENT.

A. This Court’s decisions in *Darden v. Wainwright* and *Parker v. Matthews* constitute clearly established federal law.

Despite having “no doubt that the prosecutor’s references to quotations of Biblical verses during closing arguments were unconstitutional prosecutorial misconduct, and prejudiced [Maureen] McDermott,” the Ninth Circuit would allow McDermott to be executed in light of the perceived absence of “clearly established federal law” specific to the use of religious authority during closing argument. *McDermott v. Johnson*, 85 F.4th 898, 907-

08 (9th Cir. 2023). The Ninth Circuit’s decision conflicts with controlling decisions from this Court, conflicts with other circuit court decisions, and reflects an intra-circuit conflict. *See* Rule 10, (a)-(c).

The panel’s conclusion rests on a misapprehension of what constitutes clearly established federal law in a prosecutorial misconduct case such as this one. This Court in *Parker v. Matthews*, 567 U.S. 37 (2012), bluntly stated that the law regarding a prosecutor’s improper comments was “clearly established” by *Darden v. Wainwright*, 477 U.S. 168 (1986), as McDermott has consistently maintained. And, significantly, the facts in McDermott’s case are even *more* similar to those in *Darden* than were the comments at issue in *Parker*, where this Court relied on *Darden* as providing the clearly established law.

The Ninth Circuit narrowly construed the question of clearly established federal law to relate to the prosecutor’s biblical arguments. And, under this Court’s law, no “reasonable jurist” could rationally find that a prosecutor in a capital case may freely rely on biblical authority to tip the verdict in favor of a death penalty verdict. There is no “fairminded disagreement” about it—which is the “critical point” underlying the requirement of clearly established law. *White v. Woodall*, 572 U.S. 415, 427 (2014). At the time McDermott’s claim was denied on the merits in the state court, every jurist was on notice that such comments were universally

condemned, a conclusion that was regularly grounded on principles set forth in this Court’s holdings. But critically, analysis of *all* of the prosecutor’s improper comments (religion-based or not)—as is required in determining the claim—makes the existence of clearly established law even more self-evident.

B. The Ninth Circuit misapplied AEDPA’s “clearly established federal law” requirement.

The Ninth Circuit opinion denies relief for McDermott based on an exceptionally narrow interpretation of the “clearly established law” requirement in section 2254(d)(1), citing an absence of a U.S. Supreme Court case specifically holding that a prosecutor’s invocation of religious principles or Bible passages is constitutionally improper. *McDermott*, 85 F.4th at 908. However, the controlling cases show that this conclusion is founded on an incorrect and overly restrictive interpretation of section 2254(d)(1) given the constitutional error at issue in this case.

Section 2254(d)(1) of AEDPA provides that a federal petitioner may obtain de novo review and ultimate relief upon demonstrating that the state court’s denial of a habeas claim was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). In the current case, this requirement is met.

This Court in *Parker*, which involved a prosecutor's suggestion to the jury that the defendant had colluded with his lawyer and a defense expert to manufacture an "extreme emotional disturbance" defense, the Court stated:

The "clearly established Federal law" relevant here is our decision in *Darden v. Wainwright*, 477 U.S. 168 (1986), which explained that a prosecutor's improper comments will be held to violate the Constitution only if they " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.*, at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Parker, 567 U.S. at 45 (parallel citations omitted). Significantly, the facts in *Darden*, where the prosecutor incorporated the defense's use of the word "animal," made comments "reflecting an emotional reaction to the case," and "implied" the defendant posed a future danger (*Darden*, 477 U.S. at 179-80), were substantially *more* similar to those in McDermott's case than those in *Parker*, and yet the *Parker* Court had no trouble finding that *Darden* constituted the requisite "clearly established federal law" that applied to the relatively dissimilar facts before it. *Parker*, 567 U.S. at 45.

Moreover, this Court has made clear that AEDPA's "clearly established federal law" requirement "does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). To the contrary, this Court has recognized that federal courts may properly find "an application of a

principle unreasonable when it involves a set of facts ‘different from those of the case in which the principle was announced.’” *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)). As the Court recognized in *Wiggins v. Smith*, “[a] federal court may grant relief when a state court has misapplied a ‘governing legal principle’ to ‘a set of facts different from those of the case in which the principle was announced.’” *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Andrade*, 538 U.S. at 76). “[T]he lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since a general standard from this Court’s cases can supply such law.” *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013).

Thus, as a common example, *Strickland v. Washington* sets forth a general standard for reasonable performance of defense counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). This Court has repeatedly applied this general standard to a wide range of actions and omissions by counsel (both in and out of the courtroom) in cases governed by 28 U.S.C. § 2254(d). *See, e.g., Lafler v. Cooper*, 566 U.S. 156 (2012) (granting relief based on counsel’s unreasonable advice regarding plea)). Just as there are myriad ways in which a defendant’s attorney may be found to violate *Strickland*’s “general” standard of deficient representation, there are equally countless ways in which the State’s counsel may cross the line into improper conduct at trial. *See United States v. Williams*, 504 U.S. 36, 60 (1992) (J. Stevens, dissenting)

(“Like the Hydra slain by Hercules, prosecutorial misconduct has many heads.”). In the *Strickland* context, identical facts are never a requirement for finding deficient lawyering; the same is true for conduct by a State’s attorney who violates the similarly general rules governing the proper way to prosecute a case. Indeed, given the indisputably lopsided power and influence of State-backed counsel (*see Berger v. United States*, 295 U.S. 78, 88 (1935) (describing government counsel’s unique ethical responsibilities)), any requirement of identity of facts must be even less strict.

Moreover, the comments at issue in McDermott’s case were not just improper on their face, but also implicated other specific constitutional rights. In *Darden*, for example, the Court ultimately found the comments there did not deprive the petitioner of a fair trial, noting that they “did not implicate other specific rights of the accused” and that “[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense.” *Darden*, 477 U.S. at 181-82. Neither of those observations applies here. It is clearly established that a prosecutor violates a defendant’s Eighth Amendment rights if—as was proved here—she (1) urges a capital jury to reach a sentence based on factors other than those that jurors may legally consider, or (2) undercuts the jury’s sense of personal responsibility. *Caldwell*, 472 U.S. at 330; *Chandler*, 449 U.S. at 574; *see also Godfrey*, 446 U.S. at 428 (holding that capital sentencing statutes must

channel the discretion by clear and objective standards that provide specific and detailed guidance, and make the process rationally reviewable). Also, there is no suggestion that any of the improper comments were “invited” in McDermott’s case.

The Ninth Circuit’s decision evinces a circuit split in the treatment of prosecutorial misconduct claims under *Darden*. The opinion effectively ignores *Darden* and *Matthews* as clearly established federal law, requiring McDermott to meet another more specific requirement. This is at odds with AEDPA’s clearly established federal law requirement as interpreted by this Court and every circuit but the Eleventh Circuit. *See Reese v. Sec’y, Florida Dept. of Corrections*, 675 F.3d 1277 (11th Cir. 2012) (finding *Darden* was not clearly established federal law in a pre-*Matthews* case).

By explicitly falling into step with an outdated Eleventh Circuit precedent, the Ninth Circuit is at odds with the other circuits that recognize *Darden* as the clearly established federal law for § 2254 purposes, as applying to a broad spectrum of misconduct: *See, e.g., Hardy v. Maloney*, 909 F.3d 494, 501, 503 (1st Cir. 2018); *Jackson v. Conway*, 763 F.3d 115, 144 (2d Cir. 2014); *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 1999); *Bennett v. Stirling*, 842 F.3d 319, 323 (4th Cir. 2016); *Geiger v. Cain*, 540 F.3d 303, 308 (5th Cir. 2008); *Stermer v. Warren*, 959 F.3d 704, 724-25 (6th Cir. 2020); *Evans v. Jones*, 996

F.3d 766, 774 (7th Cir 2021); *Sublett v. Dormire*, 217 F.3d 598, 600 (8th Cir. 2000); *Andrew v. White*, 62 F.4th 1299, 1337-38 (10th Cir. 2023).

It is also at odds with the Ninth Circuit's other cases granting relief under AEDPA. *See Deck v. Jenkins*, 814 F.3d 954, 978 (9th Cir. 2016) (granting relief in an AEDPA case under *Darden* where the prosecutor misstated the law in argument).

C. The clearly established federal law requirement is satisfied here.

Even in *Woodall*, the oft-cited authority for narrow interpretation of AEDPA's "clearly established law" requirement, this Court explicitly cautioned against a slavish demand for indistinguishable facts:

This is not to say that § 2254(d)(1) requires an "identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). To the contrary, state courts must reasonably apply the rules "squarely established" by this Court's holdings to the facts of each case. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). "[T]he difference between applying a rule and extending it is not always clear," but "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666.]

Woodall, 572 U.S. at 427 (parallel citations omitted).

Pursuant to *Woodall*, clearly established law under AEDPA may be deemed absent if the claimant identifies "the logical next step from" existing

case law, but that step has not yet been taken and “there are reasonable arguments on both sides.” *Id.* A principle may not be “extended” if there is “the possibility of fairminded disagreement.” *Id.* at 422 n.3.

Here, however, there aren’t “reasonable arguments on both sides” nor is there room for “fairminded disagreement.” While measurements of *prejudice* in particular cases may vary, no court—not one fairminded jurist—has hesitated to find it improper for a capital case prosecutor to make statements like “whoever striketh a man a mortal blow must be put to death,” or “when a man kills another after maliciously scheming to do so, you must take him from my altar and put him to death.” The ban against such comments was not conjured up from thin air by the lower courts; rather, it was based on the broad yet clearly established Supreme Court prohibitions set out in cases like *Darden*. As the Ninth Circuit stated, “religious arguments [made by a prosecutor] have been condemned by virtually every federal and state court to consider their challenge.” *Sandoval*, 241 F.3d at 778-90.

For example, the court in *Cauthern v. Colson*, 736 F.3d 465 (6th Cir. 2013), granted relief under AEDPA when confronted with similar facts, applying the clearly established law of *Darden*. *Cauthern*, 736 F.3d at 473 n.6, 475-76. The prosecutor referred to *Cauthern* in closing argument as “the evil one,” calling him “beyond redemption,” and referring to the language of

the Lord’s Prayer, “deliver us from evil.” *Id.* at 474. The *Cauthern* court asked, citing *Darden*, “whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of denial of due process,” and found that they did. *Id.* at 475.

The clarity of the law in this regard is indeed demonstrated by the longstanding disapproval of religious arguments by prosecutors in both the federal and state courts.⁴ *See, e.g., Cauthern*, 736 F.3d at 475-76; *Ward v. Dretke*, 420 F.3d 479, 496-97 (5th Cir. 2005) (biblical mandate was improper as it “reached beyond the record evidence” and encouraged jury to rely on “notions of divine retribution”); *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996) (“Federal and state courts have universally condemned such religiously charged arguments”); *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998) (finding biblical references “inappropriate” and “problematic”); *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998) (religious arguments are “universally condemned”); *Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (“outrageous” comments included religious appeals); *United States v. Giry*, 818 F.2d 120, 133-34 (1st Cir. 1987) (“There is no question”

⁴ These cases are not cited to in an attempt to fashion “clearly established law” out of circuit-level and state cases, but instead to vividly illustrate how religion-based arguments fall squarely within the broader category of prosecutorial misconduct that is barred by clearly established law, such that there is no fairminded disagreement as to their impropriety.

biblical references were improper.”); *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) (jury must apply law, not Bible); *Tennessee v. Middlebrooks*, 995 S.W.2d 550, 559 (1999) (court has condemned Bible references “so frequently that it is difficult not to conclude that the remarks in this case were made either with blatant disregard for our decisions or a level of astonishing ignorance of the state of the law in this regard.”); *Pennsylvania v. Chambers*, 528 Pa. 558 (1991) (adopting per se reversible error rule); *see also*, e.g., *North Carolina v. Williams*, 350 N.C. 1, 25-26 (1999); *Hammond v. Georgia*, 452 S.E.2d 745, 753 (1995); *Long v. Oklahoma*, 883 P.2d 167, 177 (1994); *Ice v. Kentucky*, 667 S.W.2d 671, 676 (1984); *Michigan v. Rohn*, 296 N.W.2d 315, 317-18 (1980) (all finding biblical references clearly improper).

Whether they are Bible-based or not, prejudicially improper comments and remarks at the penalty phase of a capital case, like those here, are prohibited by clearly established holdings of this Court including *Darden*. There is no room for doubt that all of the improper comments here are squarely within the category of misconduct via “improper comments” established in *Darden* and other Supreme Court holdings. Requiring more than this renders federal habeas relief virtually impossible, beyond what even AEDPA’s authors could have envisioned.

D. The prosecutor's comments viewed together as a whole were improper under clearly established federal law.

The prosecutor's prejudicially-improper commentary went well beyond her references to the Bible, and — as the Ninth Circuit was advised — those other comments must be considered as well.

In determining whether actionable prosecutorial misconduct occurred at trial, a court must consider *all* the relevant circumstances and potential sources of prejudice. *See Bank of Nova Scotia*, 487 U.S. 250, 256 (1988) (prosecutor's misconduct may be assessed only "after examining the record as a whole"); *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (examining State's improper impeachment "in light of the record as a whole."); *see also Browning v. Baker*, 875 F.3d 444, 460 n.5 (9th Cir. 2017) (expanding certificate of appeal to consider all alleged instances of misconduct).

In addition to its emphasis of biblical mandates, the prosecutor's closing argument was, as mentioned, an extended stream of invective toward McDermott, including statements that McDermott did not qualify as a "human being" and likening her variously to a germ, a mad dog, a snake, and an "evil" "Nazi." (9-ER-2194; 9-ER-2223.)

The inclusion of these comments into the analysis here is *required* pursuant to *Bank of Nova Scotia*, *Brecht*, and *Browning*, and only further demonstrates the existence of clearly established law applying to

McDermott's claim. The prosecutor went well beyond mere "religious arguments" focused on by the Ninth Circuit (*McDermott*, 85 F.4th at 908) to urge a death verdict, and clearly established federal law shows her other comments were at least equally improper if not more so. As far back as 1897, this Court made clear that it was improper for the prosecutor to express personal beliefs as to the "indecentcy" of the defendant's conduct. *Dunlop v. United States*, 165 U.S. 486, 498 (1897). That same year, the Court condemned a prosecutor's comment at trial that ridiculed the defendant and presumed his guilt, calling it "highly improper" and prejudicial. *Williams v. United States*, 168 U.S. 382, 398 (1897). The Court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-42 (1940), found a prosecutor's comments were "highly improper" and "overstep[ped] the bounds" when, inter alia, he implied the charges were endorsed by high-level government authority and urged jurors to "take responsibility" for their verdicts lest the country "go down into ruin as did the Roman Empire." Thus, in *Darden*, which involved comments far milder than those at issue here, this Court had no problem condemning remarks calling the defendant "an animal" who "shouldn't be out of his cell unless he has a leash on him"—statements the Court described as "*undoubtedly* improper." *Id.*, 477 U.S. at 180 & n.12 (emphasis added).

Thus, these Supreme Court cases established clear rules that are directly applicable to the prosecutor's argument at McDermott's trial; their dispositive impact here is straightforward. *No* reasonable jurist could deny that, given this precedent, the arguments here were anything other than improper. As for prejudice: Given that every federal judge—including the Ninth Circuit panel—has found here that the biblical references alone were prejudicial, the prejudice from the comments in their entirety is all the more conclusive.

In short, there is indeed clearly established federal law that applies to and guides the precise analysis of prosecutorial misconduct based on improper comments before a jury. And when the requisite analysis must include *all* the improper comments (religious and otherwise), the existence of such established law applicable to this case is all the more clear. Given that clearly established law exists, and prejudice has already been found, this Court should grant a writ of certiorari in order to clarify the reach and breadth of *Darden* and *Parker*.

IV. THE PROSECUTOR ENGAGED IN PURPOSEFUL DISCRIMINATION UNDER *BATSON*.

A. *Batson* requires a sensitive inquiry into discriminatory intent.

A *Batson* challenge involves a three-part test. In step one, the defendant must make a prima facie showing that a peremptory challenge was

based on race. In step two, the burden shifts to the prosecution, who must offer a race-neutral basis for the challenge. In step three, the court must determine whether the defendant has shown “purposeful discrimination.” *Batson*, 476 U.S. at 98. At *Batson*’s third step, a court employs the tools at its disposal, including comparative juror analysis, to evaluate whether purposeful discrimination has occurred. *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005); *see also Green v. Lamarque*, 532 F.3d 1028, 1030 (9th Cir. 2008) (“The ‘circumstantial and direct’ evidence needed for [the third-step] inquiry may include a comparative analysis of the jury voir dire and the jury questionnaires of all venire members, not just those venire members stricken.”). *See also Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (emphasizing importance of conducting a comparative juror analysis in the trial court). At step three, the court need not agree with the prosecutor’s stated reasons; the question is “whether counsel’s race-neutral explanation for a peremptory challenge should be believed.” *Hernandez v. New York*, 500 U.S. 352, 365, (1991) (plurality opinion).

Here, as the Ninth Circuit noted, no state court conducted comparative juror analysis at step three. *McDermott*, 85 F.4th at 910. This analysis was presented in McDermott’s second state habeas petition, which was summarily denied. (*See* Pet. App. 8 at 167 (Section C.4.b); Pet. App. 9 at 161.) Ultimately the Ninth Circuit concluded that despite this, under AEDPA

deference, the state court denial was not unreasonable. But, as discussed below, the state court failed to apply the sensitive inquiry required by *Batson*, including comparative juror analysis, so no AEDPA deference could apply.

B. Because the state court ignored the facts before it, section 2254(d)(2) is satisfied and AEDPA does not bar relief on this claim.

In denying this claim, the Ninth Circuit misapplied section 2254(d)(2), which requires deference to the state court's factual findings only when it considers relevant facts. *Porter v. McCollum*, 558 U.S. 30, 42 (2009) (per curiam) (finding Florida Supreme Court's decision "unreasonable" because that court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"). The state court's failure to conduct comparative juror analysis at *Batson*'s third step in this case means it did not consider indisputably relevant facts in rejecting the constitutional claim.⁵ This type of decision is not entitled to deference under § 2254(d).

⁵ This is not to suggest that under current law a state court must conduct a comparative juror analysis in every case or else run afoul of section 2254(d). See *Murray v. Schriro*, 745 F.3d 984, 1004-05 (9th Cir. 2014) ("Neither *Batson* nor the Supreme Court cases following it clearly establish that trial courts must conduct a formal comparative analysis.") However, as *Murray* acknowledged, it is contrary to clearly established federal law when a court fails to conduct the "sensitive inquiry" *Batson* requires by "rubberstamping" a prosecution's purported race-neutral reasons for peremptory strikes, as the state court did here. *Id.* at 1005. Because appellate judges were not present during jury selection, a comparative juror analysis "is the only means [they] have for assessing the state court's factfinding." *U.S. v. Atkins*, 843 F.3d 625, 637 (6th Cir. 2016) (quoting *Murray*, 745 F.3d at

Here, the state court’s decision, which did not include comparative juror analysis, involved an unreasonable determination of facts in light of the evidence presented. Specifically, the California Supreme Court failed to conduct a searching inquiry of all the relevant circumstances in order to determine whether the prosecutor’s stated reasons were pretextual, in direct contravention of *Batson*’s command that courts “undertake ‘a sensitive inquiry into such circumstantial and direct evidence of intent as may available.’” *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)); see also *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005). This includes a comparative juror analysis in this case.

Miller-El instructs that comparative juror analysis is a powerful tool in evaluating a claim of purposeful discrimination. *Miller-El*, 545 U.S. at 241 (“If a prosecutors proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.”) But for decades, the California Supreme Court refused to conduct this analysis on appeal. In *People v. Lenix*, a 2018 decision, the

1005). The state court here engaged in no such analysis on appeal or on habeas, even after *Miller-El* became settled law and was cited to it.

California Supreme Court admitted that its “former practice of declining to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record.” 44 Cal. 4th 602. Indeed, the California Supreme Court recently reiterated its commitment to performing such an analysis even in cases predating *Miller-El* where no comparative analysis was done at the trial court level. *People v. Nadey*, 2024 WL 3016945 (2024). (“Comparative juror analysis, comparing questionnaire and voir dire responses of challenged jurors with those of similar jurors from a different racial group, must also be considered upon review of these claims.” (Citations omitted)) Yet, that did not happen here, even after this Court’s decision in *Miller-El*.

Failure to conduct a comparative analysis in this case is incompatible with a reasonable factual analysis under section 2254(d)(2). In *Brumfield v. Cain*, this Court granted relief under section 2254(d)(2) where the state court failed to address or make findings on age-of-onset of intellectual disability. *Brumfield v. Cain*, 576 U.S. 305, 323 (2015). The Court found that there was “no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied §2254(d).” *Id.* (citations omitted.) Likewise, here, the state court made no findings or determinations related to comparative juror analysis and accordingly no deference is owed.

The Ninth Circuit's opinion in *Kesser v. Cambra* is instructive. In *Kesser*, the Ninth Circuit found that the "factual basis" for comparative juror analysis is contained in the voir dire, and was part of the evidence presented in the state court proceeding for purposes of evaluating reasonableness under 28 U.S.C. § 2254(d)(2). *Kesser v. Cambra*, 465 F.3d 351, 360, 361 (9th Cir. 2006). After conducting its own analysis, the Ninth Circuit found the state court decision unreasonable under § 2254(d)(2) when it did not conduct a comparative juror analysis, citing *Miller-El. Id.* at 367. Allowing state courts to ignore this critical analysis in a case such as this one when the facts were before it runs afoul of section 2245(d)(2)'s requirement that state courts consider relevant facts.

. The comparative juror analysis performed for the first time in federal court, comparing the questionnaires and voir dire responses of the seated and alternate jurors, shows that that the prosecutor's justifications cannot withstand scrutiny.

For example, the prosecutor did not offer a specific reason for striking one Black prospective juror beyond her conclusory statement that she "didn't feel [the Black prospective jurors struck] would be good prosecution jurors on the issue of the death penalty." (Pet. App. 19 at 297.) This juror's views were comparable to those held by nonblack seated jurors. One Black prospective juror was struck for indicating that life in prison might be worse than the

death penalty—but three seated white jurors all also stated that life imprisonment might be worse than the death penalty. (Pet. App. 19 at 293, 285-87.) A comparison between the responses of these jurors makes clear the pretextual nature of the prosecutor’s stated reason for striking this juror.

The prosecutor gave two reasons for striking another prospective juror who was Black—i.e., she was “very, very stupid” and “couldn’t see herself ever giving the death penalty,” and both were pretextual. (Pet. App. 19 at 294-96.) The record suggests this juror would want a special circumstance to be present before she voted for death. (*See* Pet. App. 19 at 288-90.) A comparative analysis shows a comparable response by a seated white juror, who, consistent with California law, would need “convincing that the death penalty would be the choice to take between those two punishments.” (Pet. App. 19 at 291-92.) Yet this statement did not subject the white juror to peremptory challenge.

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While the Ninth Circuit ultimately disagreed with McDermott's comparative juror analysis, the state court's failure to acknowledge key aspects of the record here resulted in an unreasonable determination of the facts under section 2254(d)(2). Accordingly, no AEDPA deference was owed to the state court's determination of facts, and under de novo review, McDermott is entitled to relief. The Ninth Circuit's decision below conflicts with this Court's decisions interpreting *Batson* and section 2254(d)(2), and this Court should grant certiorari.

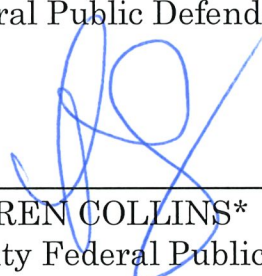
CONCLUSION

Based on the foregoing, McDermott respectfully requests that this Court grant her petition for certiorari.

Respectfully submitted,

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DATED: July 2, 2024

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