No. 24-5018

In the Supreme Court of the United States

MAUREEN MCDERMOTT,

Petitioner,

v.

ANISSA DE LA CRUZ, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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October 2, 2024

CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that petitioner was not entitled to federal habeas relief on her claim that the prosecutor violated her due process rights by including references to the Bible in the prosecution's penalty-phase closing argument.

2. Whether the court of appeals erred in determining that petitioner was not entitled to federal habeas relief on her claim that the prosecutor's exercise of peremptory strikes violated *Batson v. Kentucky*, 476 U.S. 79 (1986).

PARTIES TO THE PROCEEDING

The petitioner is Maureen McDermott. The respondent is Anissa De La Cruz, warden of Central California Women's Facility.

DIRECTLY RELATED PROCEEDINGS

United States Supreme Court:

McDermott v. California, No. 02-8810 (May 5, 2003) (denying petition for writ of certiorari on direct appeal).

United States Court of Appeals for the Ninth Circuit:

McDermott v. Johnson, No. 17-99005 (April 8, 2024) (denying petition for rehearing); (October 26, 2023) (affirming district court judgment) (this case below).

United States District Court for the Central District of California:

McDermott v. Johnson, No. 04-cv-00457-DOC (August 15, 2017) (denying habeas petition) (this case below).

California Supreme Court:

In re McDermott, No. S155331 (May 21, 2008) (denying petition on state collateral review).

In re McDermott, No. S130708 (January 3, 2007) (denying petition on state collateral review).

In re McDermott, No. S092813 (January 14, 2004) (denying petition on state collateral review).

People v. McDermott, No. S016081 (October 30, 2002) (modifying opinion without change in judgment); (August 12, 2002) (affirming judgment on direct appeal).

California Superior Court, Los Angeles County:

People v. McDermott, No. A810541 (June 14, 1990) (entering judgment of conviction and sentence).

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STATEMENT

Petitioner Maureen McDermott was sentenced to death for the murder of Stephen Eldridge. She challenges the denial of federal habeas relief.

1. McDermott lived with Eldridge. Pet. App. 4.[1] They each purchased $100,000 in life insurance and designated the other as the sole beneficiary. *Id.* In early 1985, their relationship deteriorated. *Id.* at 4-5.

McDermott contacted Jimmy Luna, her friend and former coworker, and arranged to pay him $50,000 to kill Eldridge. Pet. App. 5. McDermott told Luna that she wanted Eldridge stabbed because a gun would make too much noise. *Id.* She said she wanted the killing to look like a "homosexual murder" so the police would not investigate too vigorously. *Id.* She suggested that Luna should carve the word "gay" on Eldridge's body or cut off his penis. *Id.* at 37. On three occasions, McDermott arranged for Luna to be at the house she shared with Eldridge so that he could kill Eldridge, but each time Luna became frightened and could not do so. *Id.* at 5. McDermott suggested that Luna find someone to assist him, and Luna asked his friend Marvin Lee to assist. *Id.*[2]

A month before Eldridge's murder, Luna and Marvin attacked but did not kill Eldridge at the home where he lived with McDermott. Pet. App. 5.

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[1] The Appendix to the Petition is consecutively paginated and uses item numbers before each page number (*i.e.*, "1-4"). This brief omits the item number and uses the page number only (*i.e.*, "Pet. App. 4").

[2] Because Marvin Lee's brother, Dondell Lee, later became involved in the plot, this brief refers to each brother by his first name.

They threatened Eldridge with a knife and ordered him to crawl to the bedroom. *Id.* at 38. There, they cut him on the buttocks, yelled homosexual epithets at him, and repeatedly struck him on the head with a bedpost. *Id.*

Afterward, McDermott and Luna renewed their plan to kill Eldridge. Pet. App. 38. McDermott told Luna, "we are going to have to do it again and this time you can't fail." *Id.* McDermott (who is White) told Luna that if Marvin (who is Black) told anyone about the plan, then Luna should kill Marvin too. *Id.* McDermott also used a racial slur to refer to Marvin. *Id.*

On April 28, 1985, the day of the murder, Luna recruited Marvin's brother Dondell to assist. Pet. App. 5. Luna, Marvin, and Dondell entered McDermott's house through a window McDermott had left open for them. *Id.* at 6, 38. When Eldridge arrived home, Dondell met him with a rifle owned by McDermott. *Id.* at 6, 39. Luna stabbed him repeatedly until he slumped to the floor. *Id.* at 39. McDermott then directed Luna to cut off Eldridge's penis. *Id.* (At McDermott's request, Luna cut her on the breast and inner thigh, so that she would also look like a victim of Eldridge's killers. *Id.* at 6, 38.) The autopsy determined that Eldridge had sustained 44 stab wounds, 28 of which were independently fatal, and that his penis was severed postmortem. *Id.* at 39.

2. A jury convicted McDermott of first-degree murder of Eldridge and of the earlier attempted murder. Pet. App. 6. The jury found true beyond a reasonable doubt the special circumstances of murder for financial gain and by means of lying in wait. *Id.* The jury sentenced McDermott to death. *Id.* The

petition focuses on two aspects of her trial.

a. During voir dire, the prosecutor exercised peremptory strikes against eight Black prospective jurors. Pet. App. 15. McDermott's attorney objected, alleging discrimination and moving to dismiss the case under *Batson v. Kentucky*, 476 U.S. 79 (1986), and its California analog, *People v. Wheeler*, 22 Cal. 3d 258 (1978). Pet. App. 73 & n.7.

The trial court found that McDermott's counsel had established a prima facie case of discrimination. Pet. App. 17. The prosecutor explained her reasoning, providing general reasons that applied to all of the eight challenged Black jurors, and individual reasons for four of them. *Id.* at 294-297. The prosecutor summarized that she "didn't feel [the struck jurors] would be good prosecution jurors on the issue of the death penalty." *Id.* at 74. She also explained that she "would have preferred, frankly, to have a number of Black jurors on this case" because "the defendant makes racist remarks which will be coming into evidence" and "I have two black prosecution witnesses[,] Marvin Lee and Dondell Lee." *Id.* The trial court, after reviewing juror questionnaires, stated its "find[ing]" that "in each case" there was "a reasonable relationship of the views expressed either in the questionnaire or orally by the prospective juror that has been excused and the issues in this case." *Id.*

b. At the penalty phase, each side was to argue only once in closing. Pet. App. 373. Defense counsel elected to go second, meaning the prosecutor

would have no opportunity to respond to the defense. *Id.*; 91 RT 11611-11612.[3] The prosecutor told the jury that she "need[ed] to . . . anticipate what [the defense's] arguments might be." Pet. App. 374. At the guilt phase, defense counsel had discussed the Bible in depth at closing argument. 88 RT 11365-11367. At the penalty phase, the prosecutor stated: "Perhaps the defense would argue the Bible. . . . But most biblical scholars, as I understand it, interpret the commandment 'Thou shalt not kill' as in actually meaning 'thou shall not commit murder.'" Pet. App. 384. She mentioned that "there are in fact several references to the death penalty in the Bible." *Id.* at 384-385. She quoted "'Exodus 21, Verse 12'" as stating that "'Whoever striketh a man a mortal blow must be put to death,'" and "'verse 14'" as stating that "'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.* at 385. McDermott's counsel did not object. *See id.* at 235.

3. On direct appeal, the California Supreme Court affirmed McDermott's conviction and sentence. Pet. App. 6, 241.

The court rejected McDermott's *Batson* argument. Pet. App. 190. It concluded that substantial evidence supported the trial court's determination that McDermott had not proved purposeful discrimination. *Id.* at 196-210. "[C]onsider[ing] each of the eight challenged jurors" in turn, it affirmed the trial court's holding that the prosecutor's peremptory challenges were "based on [each juror's] death penalty views and not on [their] race." *Id.* at 196-207.

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[3] RT refers to the reporter's transcript in state court.

It also rejected McDermott's request for "a comparison" of struck Black jurors "with the pool of remaining *unselected* prospective jurors," reasoning that McDermott had not requested that analysis at trial, the comparison was not "feasible" given uncertainty about the order in which prospective jurors would be called, and McDermott's attempt at that analysis in her brief was "inconclusive." *Id.* at 209 (emphasis added).

The court rejected on procedural grounds McDermott's argument that the prosecutor engaged in misconduct by referencing the Bible during the penalty-phase closing argument. Pet. App. 234-235. McDermott raised ten types of improper statements in the penalty-phase argument, but she had not objected to most of them—including the biblical references—at trial. *Id.* The court applied the general rule that prohibits a defendant from raising a prosecutorial misconduct claim on appeal unless the defendant objected at trial "in a timely fashion—and on the same ground." *Id.* at 235.

4. McDermott filed a petition for a writ of certiorari in this Court, seeking review of the state court's *Batson* decision (but not its decision concerning the alleged prosecutorial misconduct). Pet. for Cert. i, *McDermott v. California*, 538 U.S. 1014 (2003) (No. 02-8810). This Court denied certiorari. *McDermott v. California*, 538 U.S. 1014 (2003).

5. McDermott's first state habeas petition, which the California Supreme Court summarily denied "on the merits," Pet. App. 7, did not include the two claims at issue here. C.A. Dkt. 29-2 at 108-115. McDermott's second state

habeas petition raised both the *Batson* claim and the claim based on the prosecutor's biblical references. Pet. App. 166-167, 170. The California Supreme Court denied each claim both "on the merits" and as "procedurally barred . . . on the ground [it was] raised and rejected on appeal." *Id.* at 181.[4]

6. McDermott filed a federal habeas petition in federal district court. Pet. App. 7. The court denied the petition. *Id.*

With respect to McDermott's *Batson* claim, the district court held that the state court correctly determined that McDermott made out a prima facie case of discrimination. Pet. App. 77-78. It then turned to the prosecutor's explanations for striking challenged jurors. *Id.* at 78. The court observed that the state court had not performed a comparative juror analysis to consider whether the prosecutor's "proffered reason[s] for striking a black panelist applie[d] just as well to [an] otherwise-similar nonblack who is permitted to serve." *Id.* at 77 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (*Miller-El II*)). The court conducted that comparative analysis in the first instance and analyzed each stricken Black juror in detail. Pet. App. 79-97. It concluded that "the record and the comparative juror analysis demonstrate that the prosecutor provided sufficiently 'clear and reasonably specific' race-neutral reasons" for each prosecutorial strike of a Black juror. *Id.* at 97-98.

The court also denied McDermott's claim that the prosecutor committed

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[4] McDermott later filed a third state habeas petition, which the California Supreme Court also denied on the merits. Pet. App. 7.

misconduct by referencing the Bible during the penalty-phase closing argument. Pet. App. 133. It held that the claim was "procedurally barred based on counsel's failure to make a contemporaneous objection," though the claim "would have been meritorious" if not barred. *Id.* at 142, 143. It granted a certificate of appealability limited to the allegations based on biblical references—not any other statements petitioner had challenged. *Id.* at 246.[5]

7. The court of appeals affirmed the denial of relief. Pet. App. 3-4.

a. With respect to the claim on which the district court had granted a certificate of appealability, concerning the biblical references at closing argument, the court of appeals held that the claim was not procedurally barred. Pet. App. 9-11. But it rejected the claim on the merits. *Id.* at 11-15. Under 28 U.S.C. § 2254(d)(1), federal habeas relief was available only if the state-court denial of the claim "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." Pet. App. 11. The court rejected McDermott's reliance on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), because those cases "only recited general principles about prosecutorial misconduct related to sentencing and the death

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[5] McDermott had raised other claims of prosecutorial misconduct relating to the penalty-phase closing argument, which the district court also denied. Pet. App. 133; *see id.* at 134 ("Claim 12(B)," prosecutor's use of "epithets"); *id.* at 145 ("Claim 12(D)," prosecutor's "suggest[ion] that [McDermott] was more deserving of the death penalty because she was a woman"). The certificate of appealability concerned only "Claim 12(C)," "the prosecutor's invocation of the Bible," and did not extend to those other contentions. *Id.* at 140, 246.

penalty." Pet. App. 13. They did not "clearly establish[] . . . that invoking religious principles generally or the Bible specifically during closing arguments violates the Constitution." *Id.* at 14. Although the court would have found a constitutional violation if it "were reviewing de novo," habeas relief was unavailable under Section 2254. *Id.*

b. The court of appeals granted a certificate of appealability on McDermott's *Batson* claim but denied the claim on the merits. Pet. App. 4, 15. The court's resolution of this claim turned on whether, under Section 2254(d)(2), the state court's decision that McDermott did not prove purposeful discrimination "'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Pet. App. 19. The court noted "the deference owed to the trial court's assessments of credibility, maturity and demeanor" of the prosecutor and potential jurors. *Id.* at 22. In addition to considering each of the eight challenged jurors individually, the court of appeals (like the district court) compared the struck Black jurors to seated White jurors. *Id.* at 20-31. That comparative analysis "demonstrate[d] that the [state court's] conclusion that the prosecutor's justifications for striking the eight Black jurors were non-pretextual was not unreasonable." *Id.* at 31. The court of appeals concluded that the state supreme court's "finding that the trial court did not err in determining that there was no purposeful discrimination was an objectively reasonable determination of the facts." *Id.* at 33.

Other evidence, the court noted, further supported that conclusion. Pet.

App. 31-33. The prosecutor asked consistent, relevant questions of Black and non-Black jurors, and there was "no evidence of any misrepresentation" in her explanations for the strikes. *Id.* at 32. The trial court had "not rubberstamp[ed]" the prosecutor's strikes, but had taken a recess and reviewed juror questionnaires before ruling on McDermott's motion. *Id.* And, as the prosecutor had explained during trial, key prosecution witnesses were Black, and McDermott (who is White) had made "multiple racist statements" that would come into evidence. *Id.* at 31-32.

McDermott filed a petition for rehearing en banc, which the court of appeals denied without any judge requesting a vote. Pet. App. 35.

ARGUMENT

The court of appeals correctly denied federal habeas relief on McDermott's claim of alleged misconduct relating to the prosecutor's biblical references, which was in any event procedurally defaulted in state court. The court of appeals also correctly denied McDermott's claim challenging the prosecutor's use of peremptory strikes as race-based—an issue on which this Court previously denied certiorari. There is no genuine conflict of authority on either issue. Further review is not warranted.

1. a. McDermott first seeks review of her claim that the prosecutor's penalty-phase closing argument violated due process. Under this Court's precedent, a determination that a prosecutor's comments "undoubtedly were improper" does not, standing alone, establish a constitutional violation. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Rather, "[t]he relevant question is

whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.*; *see Parker v. Matthews*, 567 U.S. 37, 45 (2012) (applying this standard). To assess whether prosecutorial misconduct was "sufficiently prejudicial to violate [a defendant's] due process rights," this Court looks to the "context of the entire trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974).

Where a claim was adjudicated by a state court on the merits, the federal court may grant habeas relief only if the state-court decision 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). "Clearly established Federal law" refers to "the holdings" of "this Court's decisions" at the time of the relevant state-court decision. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). A decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [United States Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000). The state court decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The court of appeals faithfully applied those principles here. It addressed McDermott's argument "that the prosecutor committed misconduct during the penalty phase closing argument by referencing Biblical verses to persuade the jury to impose a death sentence." Pet. App. 8. It examined McDermott's citations to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which "articulated the general principle that an argument that transfers the jury's notion of responsibility" for a capital sentence "is impermissible," and *Godfrey v. Georgia*, 446 U.S. 420 (1980), which held that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Pet. App. 13. The problem for McDermott was that "the Supreme Court has never announced a rule about invocations of religious authority in a closing argument." *Id.* The court of appeals acknowledged its own precedent holding that a prosecutor's references to the Bible in closing argument in a capital case were unconstitutional. *Id.* at 12 (citing *Sandoval v. Calderon*, 241 F.3d 765, 777-778 (9th Cir. 2000)). But Section 2254 precluded relief because "[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.'" *Lopez v. Smith*, 574 U.S. 1, 7 (2014) (per curiam).

b. McDermott faults the court of appeals for "effectively ignor[ing] *Darden* and [*Parker*] as clearly established federal law." Pet. 18. The accusation is curious, since McDermott herself cited *Darden* only once—and *Parker*

not at all—in her opening brief below. *See* C.A. Pet. Br. v-x, 23. Neither case entitles McDermott to relief.

This Court in *Darden* described as "improper" a prosecutor's guilt-stage closing argument which implied the defendant remained a danger to society, referred to the defendant as an "animal," and "reflect[ed] an emotional reaction to the case." 477 U.S. at 180. But the Court concluded that the improper argument did not "so infect[] the trial with unfairness as to" violate the defendant's due process rights. *Id.* at 181. The Court reasoned in part that "[m]uch of the objectionable content was invited by or was responsive to" defense counsel's argument. *Id.* at 182. That reasoning indicates that it was not unreasonable to deny McDermott relief here: like the defendant in *Darden*, McDermott arguably invited the prosecutor's bible references by making her own such references during a prior argument. *See* C.A. Cal. Br. 26, 45, 73.

The Court in *Darden* also reasoned in part that the improper arguments there did not "implicate other specific rights of the accused such as the right to counsel or the right to remain silent." 477 U.S. at 181-182. McDermott seizes on that comment as requiring relief here, arguing that the prosecutor's comments impinged her Eighth Amendment right to reliable sentencing. Pet. 17. McDermott never mentioned *Darden*'s reference to "other specific rights" in her brief below, so the court of appeals had no occasion to address it. *See* C.A. Pet. Br. 20-37; Pet. App. 8-15. The argument fails on its merits: This Court's observation in *Darden* about one of several reasons that claim failed was not

the sort of "holding, as opposed to . . . dicta" that could "clearly establish" a due process violation for purposes of federal habeas. *See Lockyer*, 538 U.S. at 71-72. Nor does *Darden*'s mention of statements that might violate "the right to counsel or the right to remain silent" (477 U.S. at 182) clearly establish anything about the type of Eighth Amendment violation that McDermott asserts.

As to *Parker*, the Court there reversed a lower court's grant of federal habeas relief. 567 U.S. at 45. This Court reasoned that *Darden* "clearly established" the rule that a prosecutor's comments at closing argument "violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* That "very general" standard gave state courts substantial "leeway" for "case-by-case determination." *Id.* at 48. Even though the prosecutor in *Parker* made comments that "could be understood as raising a charge of collusion" and "as directing the jury's attention to inappropriate considerations," the state court's decision rejecting petitioner's claim was not "'lacking in justification . . . beyond any possibility for fairminded disagreement.'" *Id.* at 46, 47. In reaching a contrary conclusion, the lower court in *Parker* had "erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the [state supreme court's] decision." *Id.* at 48. In short, *Parker* reflects that *Darden*'s general standard leaves state courts considerable "leeway," and that habeas relief re-

quires an objectively unreasonable application of this Court's precedent, regardless whether circuit precedent is more specific. That is guidance that the court of appeals properly recognized as precluding relief here. *See supra* p. 11.

McDermott argues that, as with ineffective assistance of counsel claims adjudicated under *Strickland v. Washington*, 466 U.S. 668 (1994), this Court's precedent setting forth "a general standard" does not preclude lower courts from finding constitutional violations based on the "myriad ways" in which that standard may be violated. Pet. 16. McDermott's comparison is beside the point. On federal habeas review, relief is available only if it is "beyond . . . fairminded disagreement" that the "general" standard establishing a constitutional violation is satisfied. *Parker*, 567 U.S. at 47-48 (internal quotation marks omitted). But "[t]he more general the rule, the more leeway courts have," as "'[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Harrington*, 562 U.S. at 101. Here, the court of appeals' conclusion that it was reasonable for the state court not to find a constitutional violation was entirely consistent with those principles.

McDermott asserts that the court of appeals should have analyzed not just the biblical comments but "*all* of the prosecutor's improper comments," which McDermott describes as comprising "an extended stream of invective toward" her. Pet. 14, 23. But the claim on which the district court granted a certificate of appealability, and the arguments McDermott advanced below,

were limited to the "prosecutor's invocation of the Bible" and not any other allegation of misconduct. Pet. App. 246 (district court order granting certificate of appealability on claim relating to biblical references only); C.A. Pet. Br. i-ii, 20-37 (limiting arguments to prosecutor's biblical references). McDermott may not broaden her claim beyond that in this Court. *See* 28 U.S.C. § 2253(c); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005).[6] Even if McDermott's other allegations of misconduct could be considered, they would not establish a constitutional violation in the context of this case, given the "ample evidence" that McDermott plotted and oversaw the grotesque murder and dismemberment of Eldridge. Pet. App. 149; *see id.* at 139 (federal district court holding that other alleged misconduct "did not rise to the level of a constitutional violation within the context of this case"); *id.* at 237 (state supreme court's similar reasoning).

c. McDermott is incorrect that the decision below conflicts with decisions from other circuits by "effectively ignor[ing] *Darden* and [*Parker*]." Pet. 18. As she acknowledges (*id.* at 19), the Ninth Circuit recognizes *Darden* as establishing the standard for prejudice on a prosecutorial misconduct claim. *Deck v. Jenkins*, 814 F.3d 954, 978 (9th Cir. 2016). The decision below did not focus on *Darden* (or *Parker*) because McDermott did not emphasize those cases in her

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[6] The cases McDermott cites (Pet. 23) do not instruct that the prosecutor's comments must be considered in their entirety despite those established principles of party presentation. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (no relief for trial error unless claimant can show "actual prejudice"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (no relief for error in grand jury proceedings unless defendant was prejudiced).

brief; and further examination of them would not have changed the court's denial of her claim. *See supra* pp. 11-14.[7]

McDermott invokes a different series of lower court decisions (Pet. 21-22) to argue that "no court . . . has hesitated to find" religious references of the kind here "improper." *Id.* at 20. But she concedes that these "circuit-level and state cases" cannot clearly establish federal law. *Id.* at 21 n.4. Only one of the cases, *Cauthern v. Colson*, 736 F.3d 465 (6th Cir. 2013), granted federal habeas relief on a claim involving a prosecutor's religious references. But there, the state supreme court had held that the prosecutor's conduct was improper. *Id.* at 476. The facts were also distinct: the petitioner's challenge was not limited to the prosecutor's "biblical references," but included the prosecutor's "litany of the kinds of remarks that courts disfavor." *Id.* at 476. And the prosecutor had improperly "appeal[ed] to the duty of the jury, which is a form of argument that the Supreme Court has expressly criticized." *Id.* at 477. The other cases cited by McDermott (Pet. 21-22) did not grant federal habeas relief on a claim chal-

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[7] Moreover, the cases McDermott cites (Pet. 19) do not establish a conflict over the issue in this case, because none applies *Darden* to a claim involving a prosecutor's religious references. *Evans v. Jones,* 996 F.3d 766, 774 (7th Cir. 2021) (prosecutor referenced facts not before the jury); *Stermer v. Warren,* 959 F.3d 704, 724-725 (6th Cir. 2020) (prosecutor made comments relating to witness credibility); *Hardy v. Maloney,* 909 F.3d 494, 501, 503 (1st Cir. 2018) (prosecutor made statements about witness immunity, witness credibility, and defense theory of the case); *Bennett v. Stirling,* 842 F.3d 319, 323 (4th Cir. 2016) (prosecutor made statements which appealed to racial prejudice).

lenging a prosecutor's religious references. Many of the cases *denied* prosecutorial misconduct claims.[8] Others had no occasion to apply the "clearly established federal law" standard, because they adjudicated claims on direct appeal.[9] And one case addressed a claim that was not premised on prosecutorial misconduct at all.[10]

d. Any effort by this Court to address the merits of McDermott's misconduct claim would be complicated by the rule that "a federal court may not review federal claims that were procedurally defaulted in state court." *Davila v. Davis*, 582 U.S. 521, 527 (2017). The district court held that McDermott's claim of prosecutorial misconduct was procedurally defaulted and could not be addressed on the merits. Pet. App. 142-143. That was because the state supreme court held that McDermott failed to timely object to the prosecutor's biblical references when they occurred. *Id.* at 181, 234-235.

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[8] *See Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998); *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998); *Bennett v. Angelone*, 92 F.3d 1336, 1345-1347 (4th Cir. 1996); *United States v. Giry*, 818 F.2d 120, 133-134 (1st Cir. 1987); *see also Ward v. Dretke*, 420 F.3d 479, 500 (5th Cir. 2005) (denying ineffective-assistance claim); *cf. Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991) (declining to decide whether misconduct claim warranted relief).

[9] *See Tennessee v. Middlebrooks*, 995 S.W.2d 550, 559 (Tenn. 1999); *North Carolina v. Williams*, 510 S.E.2d 626, 642-643 (N.C. 1999); *Hammond v. Georgia*, 452 S.E.2d 745, 753 (Ga. 1995); *Long v. Oklahoma*, 883 P.2d 167, 177 (Ok. 1994); *Pennsylvania v. Chambers*, 528 Pa. 558, 586-587 (1991); *Ice v. Kentucky*, 667 S.W.2d 671, 676 (Ky. 1984); *Michigan v. Rohn*, 296 N.W.2d 315, 317-318 (Mich. 1980).

[10] *Jones v. Kemp*, 706 F. Supp. 1534, 1558-1559 (N.D. Ga. 1989) (addressing claim that jury improperly considered Bible in deliberations).

The court of appeals did not apply the procedural bar. Pet. App. 10. It believed that the procedural bar was removed because the state court's last decision addressing the misconduct claim—the decision denying McDermott's second state habeas petition—"reach[ed] the merits." *Id.* Despite acknowledging that the same state court decision alternatively rejected the claim on procedural grounds, the court of appeals concluded the State did not preserve "those procedural bars in its briefings on this appeal." *Id.*

That conclusion was, at the very least, questionable. The State did address the state court's procedural reasoning in its brief. It explained "there is no question" that the prosecutorial misconduct claim "is procedurally barred" in federal court, because the state court in its second habeas decision "reasserted" the procedural bar "as a basis for denying the claim." C.A. Cal. Br. 51 & n.4. To resolve McDermott's claim, this Court would have to consider not only this question of procedural default but also the additional constraints that stem from the limited certificate of appealability (*see supra* pp. 7, 14-15) and McDermott's briefing below (*see supra* p. 12). Those considerations—which would significantly complicate this Court's review and indeed foreclose relief—underscore why further review of McDermott's meritless claim is unwarranted.

2. McDermott also asks this Court to review the denial of her claim that the prosecutor used peremptory strikes based on race. That claim likewise does not warrant certiorari.

a. There is no dispute about the legal framework for federal habeas review of that claim. The Equal Protection Clause forbids a party from exercising peremptory strikes because of a juror's race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). When a strike is challenged on that ground, the trial court proceeds in three steps. *See Johnson v. California*, 545 U.S. 162, 168 (2005). First, the defendant must "make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Id.* Second, the prosecutor must "'give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e].'" *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*). Third, the trial court must "determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (per curiam). That third step "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). The trial court's "finding" on that issue receives "great deference" because "evaluation of the prosecutor's state of mind lies 'peculiarly within a trial judge's province.'" *Hernandez*, 500 U.S. at 364-365.

On federal habeas review, Section 2254(d)(2) governs the factual question whether the prosecutor engaged in purposeful discrimination. *Rice v. Collins*, 546 U.S. 333, 338-339 (2006). To grant relief, a federal court "must find the state-court conclusion 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Id.* at 338 (quoting 28

U.S.C. § 2254(d)(2)). The state court's factual findings are "presumed correct," *Rice*, 546 U.S. at 339, and petitioner has the burden to rebut that presumption "by clear and convincing evidence," 28 U.S.C. § 2254(e)(1).

Those standards foreclosed McDermott from obtaining relief. On direct review, the state supreme court denied her *Batson* claim in a reasoned opinion which affirmed the trial court's finding that "the overriding reason" why the prosecutor struck eight Black jurors "was the attitude of each toward the death penalty." Pet. App. 195; *see id.* at 16. The district court and court of appeals examined the individual circumstances relating to the challenged Black jurors, and compared them to seated and alternate White jurors. *Id.* at 21-31 (court of appeals); *id.* at 79-97 (district court).[11] They each concluded that "the [state supreme court's] conclusion that the prosecutor's justifications for striking the eight Black jurors were non-pretextual was not unreasonable." *Id.* at 31; *see id.* at 98. The state court's conclusion was also supported by the prosecutor's explanation that she preferred Black jurors because of the "multiple racist statements" made by McDermott (who is White) and the fact that two key "prosecution witnesses . . . [we]re both Black." *Id.* at 31, 32.

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[11] *See, e.g.*, *id.* at 27 (challenged Black juror, unlike seated White juror, "emphasize[d] that if rehabilitation was possible, she would not impose the death penalty"); *id.* at 29 (some "seated and alternate [W]hite jurors," like challenged Black juror, "equivocat[ed]" about the choice between the death penalty and life without the possibility of parole, but "most of th[o]se jurors were strong prosecution jurors for other reasons" and, unlike the challenged Black juror, did not feel "that the death penalty served no purpose").

b. McDermott principally faults the state court for failing to conduct a comparative analysis at step three of the *Batson* inquiry. Pet. 26-29. But McDermott concedes there is no requirement that "a state court must conduct a comparative juror analysis in every case." *Id.* at 27 n.5. Here, the state court satisfied its duty to evaluate purposeful discrimination by considering the facts relating to each peremptory strike and the prosecutor's explanations.

To the extent McDermott argues that the state court's failure to conduct comparative juror analysis constitutes per se error (*see* Pet. 29), she cites no authority of this Court—let alone any clearly established holding—supporting that view. This Court's opinion in *Miller-El II* recognized that a federal court may undertake comparative analysis as a means of evaluating the reasonableness of the state court's decision under Section 2254(d)(2), even if such comparisons were not "put before" the state courts. 545 U.S. at 241 n.2; *see* Pet. 28. But it did not *require* state courts to undertake comparative analysis in denying *Batson* claims.[12] In any event, on habeas review, the federal district court (Pet. App. 79-97) and court of appeals (*id.* at 20-31) *did* conduct a comparative analysis and concluded that the state supreme court's decision denying McDermott's *Batson* claim was reasonable.

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[12] *Cf. Murray v. Schriro*, 745 F.3d 984, 1004 (9th Cir. 2014) ("Neither *Batson* nor the Supreme Court cases following it clearly establish that trial courts must conduct a formal comparative analysis"); *see* Pet. 27 n.5.

McDermott argues (Pet. 29) that this case is like *Brumfield v. Cain*, 576 U.S. 305 (2015), where "no deference [wa]s owed" under Section 2254(d) because the state court made "no determination" on a key argument supporting the denial of petitioner's Eighth Amendment claim, *id.* at 323. But here, the state courts did comprehensively address the question whether McDermott proved purposeful discrimination in the prosecutor's use of strikes, providing a strong foundation for the court of appeals' conclusion that the state court's denial of McDermott's *Batson* claim was not unreasonable.[13]

McDermott also complains that the California Supreme Court "refused" to conduct comparative analysis on appeal "for decades." Pet. 28. But the state supreme court decision on direct appeal in no way suggested that a comparative analysis *could not* be part of an appeal; at most, it determined that the sort of comparative analysis McDermott proposed was not necessary to resolve this case. And even if McDermott's broader concerns with California's historical approach to comparative analysis were presented by this case, they would not warrant this Court's review now: state legislation that took effect on

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[13] McDermott also argues that this case is like *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006), where the court of appeals "found the state court decision unreasonable . . . when it did not conduct a comparative juror analysis." Pet. 30. *Kesser*, a circuit court case, cannot clearly establish the law under Section 2254. *See Lopez*, 574 U.S. at 6. In any event, its reasoning did not turn on the absence of comparative analysis in state court, but on what the federal court's own comparative analysis "reveal[ed]"—namely, "the prosecutor's purposeful and plainly racial motives in excusing" a Native American juror. *Kesser*, 465 F.3d at 361-362. The federal court's analysis here, by contrast, confirmed the reasonableness of the state court's denial of McDermott's claim.

January 1, 2022, imposed a heightened inquiry for evaluating allegations of race-based peremptory challenges and procedures for comparative juror analysis. *See* 2020 Cal. Stat., ch. 318; Cal. Code Civ. Proc. § 231.7(d)(1).[14]

Finally, review of McDermott's *Batson* contentions is further complicated by the fact that McDermott originally requested the state supreme court to compare the stricken Black jurors in her case not to seated White jurors but to "remaining unselected prospective jurors," whether or not the prosecution had a chance to consider them for strikes. Pet. App. 209; *see* Pet. 27; Pet. App. 167. Only after that request was unavailing on direct appeal did she request the comparative analysis she now emphasizes—in her second state habeas petition, which the state court summarily denied "on the merits." Pet. App. 181. Section 2254 requires federal courts to uphold that denial unless the "arguments or theories" that "could have supported" it are indisputably "inconsistent with the holding in a prior decision of this Court." *Harrington*, 562 U.S. at 102. Here, the comparative analysis that McDermott requested surely could have supported the state court's summary denial of relief—a point that is confirmed by the subsequent federal decisions performing that analysis and rejecting

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[14] California trial courts considering an objection under this state statute must now prohibit a peremptory strike whenever "there is a substantial likelihood that an objectively reasonable person would view race as a factor in the use of the peremptory challenge." Cal. Code Civ. Proc. § 231.7(d)(1). And where an attorney's explanation for striking a particular juror would be similarly applicable to other jurors whom the attorney did not strike, the peremptory challenge will be "presumed" invalid. *Id.* § 231.7(e).

McDermott's claims. McDermott offers no argument challenging that conclusion, nor explaining why the state court's decision would not pass muster given the deference due on federal habeas review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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