No. 24-5018

IN THE

Supreme Court of the United States

MAUREEN MCDERMOTT,

Petitioner,

v.

ANISSA DE LA DE CRUZ, WARDEN,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CUAUHTEMOC ORTEGA
Federal Public Defender
LAUREN COLLINS
JOHN S. CROUCHLEY
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0081
Lauren_Collins@fd.org

Attorneys for Petitioner
**Counsel of Record*

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. ARGUMENT

A. The prosecutor engaged in prejudicial misconduct in closing argument.

The narrow issue on this petition for a writ of certiorari is whether the Ninth Circuit's denial of relief rested on a misapprehension of what constitutes clearly established federal law. To the extent there was any question that the *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) standard constitutes clearly established federal law applicable to prosecutorial misconduct in closing argument, that question has been answered by *Parker v. Matthews*, 567 U.S. 37, 45 (2012).

Respondent urges this Court to deny review of McDermott's prosecutorial misconduct claim, emphasizing that "a determination that a prosecutor's comments 'undoubtedly were improper' does not, *standing alone*, establish a constitutional violation." (Opp. at 9, citing *Darden*, 477 U.S. at 181 (emphasis added).) Indeed, in addition to proving that the prosecutor's comments were improper, McDermott has also proved that they were prejudicial. *See McDermott v. Johnson*, 85 F.4th 898, 900 (9th Cir. 2023) ("To be clear, we have no doubt that the prosecutor's references to quotations of

Biblical verses during closing arguments were unconstitutional prosecutorial misconduct, and prejudiced McDermott."). The Ninth Circuit's holding on that point is unequivocal. The remaining point of dispute is whether McDermott has also shown that denial of her claim was an unreasonable application of clearly established federal law. Concluding that she has not, the Ninth Circuit misconstrued the *Darden* standard.

Respondent attempts to distance this case from *Darden*, where the petitioner was denied relief because he did not establish prejudice. That argument is a red herring. The parties agree that, in evaluating the prejudice of a prosecutorial misconduct claim, the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. (Opp. at 10, citing *Darden* 477 U.S. at 181 and also *Parker*, 567 U.S. at 45.) There is no question in this case that this standard has been met. In addition to the Ninth Circuit's holding that there is "no doubt" that the prosecutor's misconduct "prejudiced McDermott," the district court in this case also found the misconduct to be prejudicial:

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> Nevertheless, if this claim were not procedurally barred, the allegations in [the prosecutor misconduct claim] would have been meritorious. The prosecutor's arguments based on the Bible, citing two different passages of Scripture, plainly contravened the above-cited authority mandating that appeals to religion by a prosecutor in a death penalty case are improper, as they are based neither on the 'clear and objective' sentencing factors in the California death penalty statute nor the evidence in this case.

(*See* Pet.App. 4-143 (footnote omitted).) Thus, four federal judges have concurred that the prosecutor's misconduct during closing argument was prejudicial. The denial of McDermott's claim was affirmed by the Ninth Circuit, not because she failed to established prejudice, but for a perceived failure of clearly established federal law. *McDermott*, 85 F.4th 898 at 909. Nor did the Ninth Circuit find that McDermott's counsel had invited the prosecutor's biblical references, despite Respondent's arguments below. *See generally, id.*

Respondent's assertion that the *Darden* standard as articulated in *Parker* was "very general" and gave substantial "leeway" for "case-by-case determination," supports McDermott's argument, not Respondent's. (Opp. at 13.) Because *Darden* standard is a general one, "the 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). (*See*

Pet. at 16, comparing to the general standard for reasonable performance of defense counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).)

As Respondent notes, "[t]his 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.'" (Opp. at 13.) That is precisely what happened here. Yet, the district court denied relief for failure to satisfy a procedural requirement, and the Ninth Circuit denied relief based on a lack of clearly established federal law. There is no room for leeway here in applying *Darden* where the question of both misconduct and prejudice has already been answered in the affirmative. Significantly, the facts in McDermott's case are even more similar to those in *Darden* than were the comments at issue in *Parker*, where the Court relied on *Darden* as providing the clearly established law. Indeed, in *Darden*, which involved comments 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. *Darden*, 477 U.S. at 180 & n.12 (emphasis added).

Respondent also faults McDermott for failing to cite to *Darden* and *Parker* repeatedly and emphatically enough below. (Opp. at 11-12.) This is also a red herring, and is no barrier to review. The issue of clearly established

federal law was discussed below squarely and explicitly, with citations to *Darden* as well as other Supreme Court precedent. Yet, conducting its own faulty analysis, the Ninth Circuit found it dispositive that "'the Supreme Court has never announced a rule about invocations of religious authority in a closing argument." *McDermott*, 85 F.4th at 908.

Further, it should be no impediment to this Court's grant of certiorari that the claim on which the district court granted a certificate of appealability was the prosecutorial misconduct subclaim regarding the prosecutor's invocation of the Bible. It does not broaden the scope of that claim to consider the totality of the trial, including the other instances of misconduct. Indeed, this Court's precedents require nothing less. *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."). Respondent concedes that when deciding whether 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). Thus, all the misconduct must be viewed as a whole. This contradicts Respondent's misleading argument (Opp. at 15) that McDermott limited her arguments

below to discussion of the improper Biblical quotations and that analysis must be limited to only those. *See* Ninth Cir. Dkt.39 at 36.

Respondent repeatedly revisits the argument that McDermott cannot establish prejudice based on the context of this case (i.e. the whole case), when in fact she already has. Further, even with the prosecution's argument, the jury deliberated for three days before reaching its decision, and asked a question about consideration of aggravating evidence. (*See* Pet. App. 18 at 282-84 (showing that jury deliberated for portions of three days.) Both are indicia that deliberations were close. *See Thomas v. Chappell*, 678 F.3d 1086, 1098 (9th Cir. 2012) ("[L]engthy deliberations suggest a difficult case." (internal citation omitted.))

Respondent also tries to resurrect the argument, rejected by the Ninth Circuit below (*see* Pet. App. 1 at 10), that McDermott's prosecutorial misconduct claim is procedurally defaulted. (Opp. at 17-18.) Respondent urges that this Court would have to consider the issue of procedural default should it grant cert. It would not. The issue of procedural default is easily disposed of the same way it was addressed below. The Ninth Circuit found that the procedural bar was removed because the last state-court decision was the merits denial of McDermott's second state habeas petition. (*McDermott*, 85 F.4th at 907 "Because the CSC's merits determination in its second habeas decision removed the procedural bar that had applied on direct

appeal, [citation], McDermott now does not need to overcome any procedural bars to obtain habeas relief on the merits of the prosecutorial misconduct claim.") Any attempt to revisit this issue before this Court would be fruitless because "the State did not preserve those procedural bars in its briefings on this appeal." (*Id.*; Pet. App. 1 at 10.)

B. The prosecutor engaged in purposeful discrimination.

Respondent essentially argues that California Supreme Court's analysis of McDermott's *Batson*[1] claim was reasonable, since the federal courts ultimately agreed with the state court's conclusions after engaging in comparative juror analysis. (Opp. at 20-22.) However, the state court's analysis of McDermott's claims of purposeful discrimination in jury selection was far from "comprehensive[]," and was certainly not remedied by the fact that the federal court "confirmed the reasonableness of the state court's denial of McDermott's claim." (Opp. at 22 n.13.) In evaluating this claim, the Ninth Circuit seized on minute distinctions between struck Black jurors and seated white jurors. For example, the Ninth Circuit parsed voir dire and questionnaires to distinguish seated white juror Kathryn P. from Black jurors. (*See, e.g.* Pet. App. 1 at 23; Pet. App. 1 at 27, calling it a "close

[1] *See Batson v. Kentucky*, 476 U.S. 79, 80 (1986).

question.") However, "[a] per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El*, at 247 n.6.

It also is no justification for an unreasonable factual analysis that a new California law now offers a heightened standard for peremptory strikes when "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). That is no defense to purposeful discrimination in this case, and no remedy for the state courts' failure to properly evaluate purposeful discrimination here as the Constitution requires. If anything, the passage of this remedial legislation further supports McDermott's entitlement to relief. In passing CCP 231.7, the California legislature noted the rampant abuse of peremptory challenges in criminal proceedings to exclude jurors on the basis of race and ethnicity. 2020 Cal. Legis. Serv. Ch. 318 (A.B. 3070), § 1(b). These legislative findings speak volumes about state courts' systemic failure to enforce *Batson*'s prohibition on racial discrimination in jury selection, including in McDermott's case. For these reasons, no AEDPA deference is owed to the state court's determination of facts in this.

II. CONCLUSION

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

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: October 15, 2024

By: _____
LAUREN COLLINS*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*