No. ___________

In the Supreme Court of the United States

DESHAWN CAMPBELL, PETITIONER

VS.

GENA JONES, RESPONDENT

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

PETITIONER DESHAWN CAMPBELL
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COUNSEL OF RECORD

QUESTIONS PRESENTED

I. Whether AEDPA deference defeats an obvious *Napue* claim despite this Court's holding in *Glossip v. Oklahoma*, 604 U.S. 226 (2025).

II. Given that "AEDPA . . . deference does not mean abdication," whether AEDPA deference was a proper basis to condone racist appeals to "that thirteenth juror, prejudice" despite this Court's "unceasing efforts" to eradicate exactly that.

III. Whether federal courts err in denying a certificate of appealability for a Confrontation Clause / *Crawford* claim where the state introduced a plethora of out-of-court, testimonial, self-exculpating statements from an alternate suspect and the state's justification for circumventing *Crawford* was transparently pretextual.

PARTIES TO THE PROCEEDINGS

Petitioner here, Petitioner-Appellant below, is DeShawn Campbell.

Respondent here, Respondent-Appellee below, is Gena Jones, Warden.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Campbell v. Jones, No. 23-1917
(9th Cir., Feb. 25, 2026)

Campbell v. Grounds, No. 5:12-cv-06089
(N.D. Cal., Aug. 8, 2023)

In re Campbell, No. S265311
(Cal. Supreme Ct., May 11, 2022)

In re Campbell, No. CC126494
(Santa Clara Cty. Superior Ct., Aug. 31, 2020)

In re Cambell, No. S202653
(Cal. Supreme Ct., Jul. 11, 2012)

People v. Campbell, No. S202650
(Cal. Supreme Ct., Jul. 11, 2012)

In re Campbell, No. H037411
(Cal. Ct. App., Apr. 10, 2012)

People v. Campbell, No. H034690
(Cal. Ct. App., Apr. 10, 2012)

People v. Campbell, No. CC126494
(Santa Clara Cty. Superior Ct., Aug. 7, 2009)

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In the Supreme Court of the United States

DESHAWN CAMPBELL, PETITIONER

v.

GENA JONES, RESPONDENT.

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

Petitioner DESHAWN CAMPBELL respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's order below is unreported, but is reproduced at Appendix ("App.") A4–A18. The district court's decision is reproduced at App. A20–A114. The opinion of the California Court of Appeal, Sixth District, which was the state court that most recently issued a reasoned decision on the merits of this case, is unpublished, but is reproduced at App. A118–193 and can be found at 2012 WL 1201647.

JURISDICTION

The Ninth Circuit denied Campbell's petition for rehearing on April 2, 2026. App. A2. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition implicates the Fourteenth Amendment to the United States Constitution, which provides that "[n]o 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."

This petition also involves the Sixth Amendment to the U.S. Constitution, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

INTRODUCTION

Although "the AEDPA standard for reviewing claims on federal habeas is deferential to the state court, . . . deference does not mean abdication and ‘deference does not by definition preclude relief.’ ” *Pitchford v. Cain*, 608 U.S. __, 146 S. Ct. 1345, 1353 (2026) (*quoting Miller-El v. Dretke*, 545 U.S. 231, 240 (2005)). The trial proceedings below were riddled with constitutional error and racial bias. Despite this, the lower courts misapplied this Court’s precedent, including *Napue* and *Crawford*, and basic principles of equal protection under the law, to deny Petitioner habeas relief. The Northern District of California and the Ninth Circuit relied on AEDPA to rubber stamp the California Court of Appeal’s unpublished decision. This Court should grant this Petition in order to address the growing misapprehension that AEDPA insulates state court decisions from federal-court review, regardless of the starkness of the conflict between those decisions and this Court’s holdings, as well as to address the substantive issues raised herein, which present important questions of law ripe for discussion and decision by this Court.

STATEMENT OF THE CASE

A. Nature of the Case

On October 27, 2001, a white San Jose police officer was shot to death. After the shooting, the twenty-two-year-old, intellectually disabled, African-American petitioner spent several days with friends, afraid that the police or the street-gang member Rodney McNary, the actual killer of the officer, might also kill him. Some of the individuals who helped him during that time, under tremendous police pressure, would later testify that petitioner made incriminating, albeit ambiguous, statements to them.

Petitioner's academic level was between fifth and seventh grades and his mental age between ten and twelve years old at the time of the murder. Nonetheless, he took the stand at trial and testified that, on the night of the shooting, he had been at a party that had gotten out of control. McNary, a validated Crip, drove petitioner and another person from the party. As McNary was speeding away to avoid armed assailants, he hit both a person and another car with the Mustang he was driving. McNary and his passengers eventually got out of the car and split up.

At the request of McNary's girlfriend, the owner of the Mustang, petitioner drove in his father's car to help McNary. When he stopped the car, McNary, nearby, walked over to talk to him through the open driver's-side window. Petitioner had brought his father's gun for protection given the fight earlier in the evening, McNary's hit and run, and their being pursued from the party by armed assailants. As a car with normal headlights on pulled up behind them, McNary asked petitioner for the gun, which was clearly visible to him. Petitioner, believing the assailants had found them, handed the gun to McNary. The car then put on emergency lights and, in a moment, McNary shot the officer. Both Campbell and McNary then fled on foot in different directions.

The forensic evidence was consistent with petitioner's version of events, and McNary's guilt. The police car was parked behind petitioner's, with its spotlight directed to the side of the driver's-side door, where petitioner testified McNary was standing. There was no gunpowder residue in the car.

Two witnesses testified that McNary had confessed to the shooting (a third was precluded from testifying because the trial court had found him incredible as a matter of law), though McNary denied doing so to the police when repeatedly questioned, including when he returned to the scene of the crime hours after the shooting, having spent part of that cold night submerged in a creek after throwing the keys to the Mustang, which was parked nearby, into a field. Another witness testified that McNary had told him, "Shawn didn't do it."

The prosecution had not granted McNary immunity, and he had invoked his Fifth Amendment right against self-incrimination before absconding from parole. He was thus unavailable to testify at trial.

B. The Course of Proceedings

Trial Court Proceedings

The Santa Clara County District Attorney's Office charged petitioner with first-degree, special-circumstances murder. An *Atkins* hearing was held, after which the trial court concluded that petitioner was not "mentally retarded" and could be subject to capital punishment. *See* 1-ER-3. Following successful writ proceedings in the state court of appeal, the trial court determined that petitioner was indeed intellectually disabled and thus ineligible for the death penalty. *Id.* Thereafter, the district attorney filed an amended information charging petitioner with murder and possession of a firearm, with various aggravating circumstances. *Id.*

On May 27, 2009, the jury found petitioner guilty of both counts, aggravating circumstances, and two enhancements. *See* 1-ER-12. The court sentenced petitioner to life without parole on count one, with a consecutive 25-years-to-life sentence for the personal-use-of-a-firearm enhancement, and three years, four months on count two and an attendant enhancement.

Direct Appeal and State Habeas

Petitioner appealed his conviction to the California Court of Appeal for the Sixth District. Petitioner argued, among other things, that the admission of several, lengthy McNary out-of-court statements violated petitioner's right to confront the witnesses against him, and the prosecutor's racially charged statements during trial deprived him of a fair trial. 3-ER-600–06; 641–42. In a related state habeas proceeding, petitioner argued that the prosecution violated his due process rights by knowingly allowing the false testimony of McNary's girlfriend – denying she had an agreement with Campbell's prosecutor for sentencing benefits in her then-pending criminal cases if he was satisfied with her testimony against Campbell – to go uncorrected. 2-ER-209–13.

The California Court of Appeal, in an unpublished opinion, rejected petitioner's appellate claims. E153–58, E174–75. It also summarily denied his state habeas petition. 1-ER-99-100. The California Supreme Court denied review. D116.

Federal Habeas Proceedings

The U.S. District Court for the Northern District of California denied petitioner's federal habeas petition. C59–66, C90–91, C95–100. Petitioner sought a certificate of appealability, which the district court denied. E112. Petitioner renewed his request for a certificate of appealability on all claims before the Ninth Circuit. The Court of Appeals granted a certificate of appealability on Claim I (*Napue* error) and Claim II (racial disparagement) herein, but denied it as to the other claims, including Claim III (*Crawford*) herein. The Ninth Circuit affirmed the denial of petitioner's federal habeas petition in an unpublished decision. App. B4.

REASONS FOR GRANTING THE PETITION

A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of 28 U.S.C. § 2254(d)(1), if it correctly identifies the governing legal principle from this Court's decisions, but "unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). The state court unreasonably applied federal law and the federal courts abdicated their responsibility to correct that improper application as to the following claims. This Court should grant review for the following reasons:

I. This Court Should Review the Ninth Circuit's Holding That the Admitted False Testimony by the Third-Party Suspect's Girlfriend Did Not Constitute Clear *Napue* Error Requiring a New Trial

A. The Ninth Circuit's affirmance of the California Court of Appeal's decision conflicts with this Court's decisions in *Napue* and *Glossip*

A prosecutor's knowing use of false testimony "is inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). A conviction obtained through knowing use of false evidence violates the Fourteenth Amendment's Due Process Clause. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

This Court has made it clear that, if *Napue* error occurred, a new trial is required if the false testimony "may have had an effect on the outcome of the trial," *Napue*, 260 U.S. at 272, or, in other words, if there existed " 'any reasonable likelihood [it could] have affected the judgment of the jury.' " *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 260 U.S. at 271). But even where, as here, courts find that false testimony was knowingly allowed to go uncorrected by the prosecution, courts leave many *Napue* claims to founder on the shoal of materiality. Lower courts routinely misapply this standard, even where they profess to honor this Court's dictate that it is the beneficiary of the constitutional error – the State – which is obligated to prove beyond a reasonable doubt that the error did not contribute to the verdict. *United States v. Bagley*, 473 U.S. 667, 680, n.9 (1985).

The lower courts here badly misapplied the materiality standard.[1] The State conceded that the prosecutor knew Carter's testimony was false, but

[1] When the last state court to adjudicate a federal constitutional claim on the merits did not provide an explanation for the denial, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). Where, as here, there is no state court decision to look to, it is presumed that an unexplained denial is on the merits absent any indication to the contrary. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011). The district court presumed the California Supreme Court's denial was on the merits, and proceeded to imagine "what arguments or theories supported or . . . could have supported" the

the Ninth Circuit nonetheless concluded that the California Court of Appeal reasonably viewed the testimony as immaterial because, although Carter "may have helped the State's case," her testimony was not " 'the only direct evidence' " of guilt. App. A at 14, *citing Glossip v. Oklahoma*, 604 U.S. 226, 248 (2025). Although prejudice may be clearest where the false testimony *is* the only direct evidence of guilt, that it not this Court's clearly established prejudice standard –"any reasonable likelihood" that the uncorrected false testimony *could* have impacted the verdict suffices.

The presence of other evidence of guilt is only dispositive of a *Napue* claim where it is "overwhelming." *See, e.g.*, *Jones v. Ryan*, 691 F.3d 1093, 1106 (9th Cir. 2012) (false impression allegedly created by sketches not material because there was overwhelming evidence of guilt unrelated to sketches). That only makes sense since, if the other evidence of guilt is overwhelming, there is not "any reasonable likelihood" that the false testimony could have impacted the jury's verdict. *Napue*, 260 U.S. at 271.

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denial of petitioner's *Napue* claim, and "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of [the Supreme] Court." *Id.* at 102. As discussed *infra*, both the Northern District of California and the Ninth Circuit erroneously concluded that no fair-minded jurist could disagree with the presumed merits decision.

As an initial matter, the evidence of petitioner's guilt was *far* from overwhelming. The only question for the jury to consider was whether petitioner or McNary fired the fatal shot. The jury was presented with physical evidence that did not contradict petitioner's version of events. Thus, witness testimony and credibility – including the credibility of McNary's girlfriend Janielle Carter – was of the utmost importance. No court described the evidence against petitioner as "overwhelming;" in fact, the superior court explicitly stated that the evidence was not. App. C111. The Ninth Circuit was similarly equivocal, observing that "physical and testimonial evidence . . . tied" petitioner to the shooting. App. A14. In any event, any claim that evidence of petitioner's guilt was overwhelming is belied by the length of deliberations – in this single-issue case, the jury was out for *eight* days. 8-ER-1998-2004.

Some circuits explicitly, and erroneously, place the burden on the appellant or petitioner to prove actual prejudice. *See, e.g.*, *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015) (defendant must establish materiality) *Uvukansi v. Guerrero*, 126 F.4th 382, 390 (5th Cir. 2025) ("No majority of the Supreme Court has indicated that *Napue*'s materiality standard is the same as *Chapman*'s harmless error standard."); *United States v. Straker*, 800 F.3d 570 (D.C. Cir. 2015) (defendant failed to show any reasonable probability of effect on verdict). The Ninth Circuit professes not to do so. Op. at 13 (correctly defining materiality as creating "any reasonable likelihood" it could have affected the judgment of the jury and acknowledging that evidence can be material even if "it goes only to the credibility of the witness" (quoting *Glossip*, 604 U.S. at 269)). However, the court's reasoning makes it clear that it does not apply the correct materiality test under *Napue* and *Glossip*. The Ninth Circuit acknowledged that Carter's testimony "may have helped" the State, but declined to find it material. App. A at 14. *See* 1-ER-82 (citing *United States v. LaPage*, 231 F.3d 488, 490, 492 (9th Cir. 2000), which concluded that where the prosecution's theory was "based entirely" on the false testimony of one witness, the *Napue* error "may have" made a difference in the trial's outcome); *Hampton v. Shinn*, 143 F.4th 1047, 1070 (9th Cir. 2025) ("But where, as here, multiple witnesses implicate a defendant in a crime, the defendant will have a harder time showing that the jury's knowledge of any one witness's lie would have undercut the verdict obtained. . . . Knowing that one witness gave false testimony, the jury could still convict the defendant based on other persuasive evidence.").

This case demonstrates that, although the Ninth Circuit may recite the correct materiality standard, it refuses to apply it. This Court should grant review to clarify that the *Napue* materiality test does not require that the challenged evidence be the only, or even the most important, evidence of guilt.

The reason such review is so critical in this case is the great likelihood that petitioner is actually innocent. *See* 10-ER (pleadings re his actual innocence, denied because of clearly established federal law on the subject). Simply compiling the indicia of McNary's guilt goes a long way towards establishing as much (while, concomitantly, illustrating the closeness of the case for purposes of *Napue* review). Apart from submerging himself in a creek on a cold night (definitely not to wash away gunshot residue, he explained), 6-ER-1621, 8-ER-1882-85; and throwing his car keys into a field, 7-ER-1624-25, 1821-22, 1825; and apart from repeatedly confessing to the murder and reporting that Campbell "didn't do it," 8-ER-1865, 1867, 1868-69, 1898-99, 1903, including once to a law-enforcement confidential informant with a long history of providing only truthful, reliable information, *see* 10-ER; McNary also: (1) acted "very suspicious" when stopped by a police officer at the murder scene, appeared nervous, was sweating profusely and fidgeting, was unable to clearly explain where he was coming from or where he was going to, changed his story several times, falsely denied having stolen the bicycle on which he was then riding, and gave a false address when asked where he lived, 6-ER-1594-95; 8-ER-1871-72, 1875-76, 1878-79, 1892-93, 1962; (2) was not answering his cellphone in the hours after the murder, 6-ER-1614-15, 8-ER-1857-60; (3) called his girlfriend a few hours after the murder by placing a three-way call to her from the phone of his mother, who lived in Indiana, 6-ER-1621; (4) gave directions to his girlfriend as to what she should tell the police, 8-ER-1886-88, 1889-91, 1966-69; (5) packed up his house, put things in storage, and drove to Indiana in a rental car with his girlfriend shortly after the murder, 7-ER-1633, 8-ER-1894-94; (6) threatened that anyone who pointed the finger at him for the murder would die, 8-ER-1905; (7) had a long and violent criminal history, 8-ER-1920-21; (8) was a member of the street gang considered to be the most violent in San Jose, 8-ER-1911-14; (9) falsely denied to the police that he had ever been in Campbell's car, found at the scene of the murder, 8-ER-1963-64; and (10) risked being given a lifetime "Three Strikes" sentence on account of the felony hit-and-run he had committed shortly before the officer was shot, at a time when he was on parole, 5-ER-1160-65, 6-ER-1499, 8-ER-1866-67, 1869, 1881.

Just as that essentially "overwhelming" evidence of McNary's guilt was ignored by the Ninth Circuit, so, too, was how obviously important the false, uncorrected testimony of McNary's girlfriend Carter was to the prosecution's case. It was not simply that it "may have helped" that case, it was critical to it, which is precisely why the prosecutor knowingly left her false denials of having a plea agreement with him uncorrected in the first place. She was the only in-court witness to corroborate the McNary out-of-court, self-exculpating statements (*see* Claim III, *infra*). Among other things, she testified that: (1) when she informed McNary of her conversation with a friend who had told her an officer had been shot, McNary appeared confused or baffled, 7-ER-1786, obviously intentionally creating the impression that it was the first McNary had heard of the murder; and she had no information from any source, whether from McNary or anyone else, that he was the murderer, 7-ER-1628-29; (2) McNary told her he had immersed himself in the creek not to try to wash off any gunpowder residue, but to avoid phantom pursuers who were after him because of his actions at a party earlier that night, 7-ER-1836; (3) McNary told her he threw the car keys into the field not because he had just murdered a police officer, but because of the hit-and-run he was involved in as he sped away from the party, id.; and (4) McNary was not worried about a Three Strikes life sentence – the theory of the defense as to why he shot the officer – merely because of that hit-and-run, 7-ER-1838.

The prosecutor relied heavily on Carter's testimony in his closing arguments. At a crucial point in his rebuttal closing argument – the few minutes leading up to its conclusion – he took several minutes to emphasize her credibility. 5-ER-1105-08. That was the ribbon on top of a great deal of preceding argument. *See, e.g.,* 4-ER-811 (referencing her testimony about receiving the call alerting her to the officer's murder and explaining, "this is where the significance – or some significance of Janielle Carter's testimony comes into play"); 4-ER-812-13 (noting that the "defense has spent considerable effort to discredit Janielle Carter," and (incorrectly) responding that she only lied until McNary told her not to); 4-ER-813 (again relying on Carter's testimony of how she learned of the murder, which the prosecutor here characterized as "a gem of a piece for your jigsaw puzzle"); 4-ER-814 ("It's unbelievable to think that Janielle Carter" lied about how she learned of the murder); 4-ER-841 (arguing (nonsensically) that the reason McNary fled the state with Carter shortly after the murder was not because McNary was the murderer, but, rather, to protect Carter from her own criminal troubles); 4-ER-842 (relying on Carter's testimony that she and McNary eventually returned to California from Indiana as another indicium of McNary's innocence); 4-ER-874 ("Janielle Carter came up with a piece that uniquely fit into the puzzle. And we knew that it had that ring of genuineness."); 4-ER-902 (relying on Carter's testimony that she went with McNary within hours of the murder to try to pick up her car abandoned by him near the murder scene as evidence that "McNary didn't know what was going on" with respect to the murder (parenthetically, ignoring the fact that the police had earlier stopped McNary *at* the murder scene while they were processing it).

Unlike the Ninth Circuit, petitioner's jury understood the significance of Carter's testimony. During its eight days of deliberations, it asked to hear *all three* of Carter's recorded statements. 8-ER-1965-72, 1983-94, 2005. And even during trial, the jurors posed numerous questions they wanted answered aimed at Carter's credibility. *See* 8-ER-1973-1982. All that seems like a great deal of prosecutorial and juror effort merely for evidence painted as tangential by the Ninth Circuit.

II. This Court Should Review the Ninth Circuit's Holding That the Prosecution's Racially Charged Statements Throughout Trial Somehow Avoided Violating Petitioner's Due Process Rights

"Because of the risk that the factor of race may enter the criminal justice process, [this Court has] engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McClesky v. Kemp*, 481 U.S. 279, 309 (1987) (*quoting Batson v. Kentucky*, 476 U.S. 79, 85 (1986)); *see also Pena-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments."); *Batson v. Kentucky*, 476 U.S. at 87–88 ("Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975)). "The Constitution prohibits racially biased prosecutorial arguments." *Id.* at 309, n. 30. This Court has recognized that statements capable of inflaming jurors' racial or ethnic prejudices "degrade the administration of justice." *Battle v. United States*, 209 U.S. 36, 39 (1908); *see also United States v. Cabrera*, 222 F.3d 590, 595 (9th Cir. 2000); *Bains v. Cambra*, 204 F.3d 964, 974 (9th Cir. 2000). A conviction will be reversed where a prosecutor's improper appeal to racial prejudice "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

Here, the prosecutor made a number of overtly racist and racially coded remarks, several of them directed at petitioner himself. Most glaringly, the prosecutor argued that McNary was a "mean-looking black man" and a "boogeyman," used by the defense to scare the jurors and distract from Campbell's guilt, but the jurors should not let the defense get away with it because "there's little difference between them." App. C79. The prosecutor went on to mock Campbell's vernacular writing in a letter to his brother, telling the jury that "when you sit there and read it aloud, you laugh or feel dismayed at – at the – I don't know what they call it nowadays. Ebonics? . . . And some of that stuff . . . is the type of stuff people in the 'hood just write that way or speak that way." App. B12. The prosecutor also commented how "sad" it was to see Campbell encouraging his brother to pursue his "stupid" football dreams. 4-ER-850.

The prosecutor's closing arguments were replete with racist rhetoric. In addition to the foregoing: he expressed that police would not have solved the case if they had to rely on a "sense of [African-American] community obligation," 4-ER-824; he mocked the manner in which Campbell's brother spoke, stating, "I can't do it. I tried – I went home and I tried to make that noise that he was making when he would say "Nope' with my mouth," 4-ER-732; he characterized as "obnoxious" a recorded call between Campbell and a woman in which they (intelligently) discussed how race had impacted the police investigation, 4-ER-765; he explained that he could only understand what McNary was saying in a recorded interview because he and his wife had watched the TV show "The Wire," and so he could now understand "a vernacular that some people in some communities use," 4-ER-792; he mocked an African-American witness who had said she might be unable to return to court to complete her examination, stating, "She threatened not to come back. The only thing she has to be the next morning is her – her baby's mama, black and proud, or something like that was her reply," 4-ER-889-90; and he characterized the defense witnesses, all of whom were

African-American except for the police officers, as "a collection of character disorders, these people," 4-ER-911.

The California Court of Appeal did not "believe" that the prosecutor's arguments "demonstrate[d] that the prosecutor was inviting the jury to decide the case based on its own value judgment and not on the facts and the law." App. C60. That, however, was not the operative question. Under this Court's precedent, the question is whether the invocation of petitioner's race was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 24 (1967); *see United States v. Doe*, 903 F.2d 16, 18, 24 (D.C. Cir. 1990) (finding prejudicial plain error where the prosecutor's summation included appeals to racial prejudice). The state court's analysis was contrary to clearly established federal law.

As discussed above, where the jury deliberated for eight days on a case where the sole issue was the identity of the shooter, grave constitutional error cannot so readily be deemed harmless. *See Tomas v. Chappell*, 678 F.3d 1086, 1098 (9th Cir. 2012) ("[L]engthy deliberations suggest a difficult case") (internal citation omitted). The prosecution suggested that the defense presented McNary as the real killer not based on credible evidence of McNary's guilt,[2] but merely because he was a "mean-looking" Black boogeyman, who the defense hoped would scare the jury into believing he was the killer. This invocation of race, bolstered by myriad other references, infected the trial and violated petitioner's due process rights. *Donnelly v. DeChristoforo*, 416 U.S. at 643.

The race-based prosecutorial misconduct herein, found "improper" but not prejudicial by the Ninth Circuit, should be addressed by this Court in keeping with its long and distinguished history of combatting the use of race in the justice system. App. B12; *see, e.g., McCleskey v. Kemp,*481 U.S. at 309 n.30 ("The Constitution prohibits racially biased prosecutorial arguments."); *Rose v. Mitchell,* 443 U.S. 545, 555 (1979) ("[D]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *Pena-Rodriguez v. Colorado,* 580 U.S. at 225 ("A constitutional rule that racial bias in the justice system must be addressed – including, in some instances, after the verdict has been entered – is necessary to prevent a systemic loss of confidence in jury verdicts.")

The Ninth Circuit found a lack of prejudice in the "undoubtedly . . . improper" race-based prosecutorial comments because, even though the

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[2] Petitioner delineated, *supra,* some of the more important credible evidence of McNary's guilt.

comments at issue in *Darden v. Wainwright*, 477 U.S. 168 (1986), were "worse than the prosecutor's comments here," this Court held in *Darden* that they did not deny the defense a fair trial. App. A at 9. The Ninth Circuit was apparently indifferent to the fact that the comments at issue in *Darden were not race-based. See id.* at 180, nn. 9-12 (quoting the prosecutor's comments, which included an argument that the death penalty was the only way to ensure public safety and blaming the division of corrections because the defendant had been out on furlough at the time of the offense). The comments at issue in *Darden* were not worse than the comments at issue here precisely because of that fact. And, regardless, rhetoric does not need to be "worse" than *Darden* in order to merit relief, particularly where the evidence of petitioner's guilt was so close that the jury was out for eight days deliberating on the sole issue of the shooter's identity. *Id.* at 182 ("The weight of the evidence against petitioner was heavy; the 'overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges . . . .' " (quoting the lower court decision)). This Court has taken special care to protect the equal-protection rights of African-Americans in the criminal justice system, the Ninth Circuit herein did not, and this Court should grant the instant petition and show that it means what it has been consistently saying for a very long time, namely, that the disease of racist bigotry that continues to plague our criminal-justice system must be rooted out to fulfill the promises of the Fourteenth Amendment. Finding prosecutorial racist commentary "undoubtedly . . . improper" while providing no remedy is not how that will be accomplished. App. B12.

III. This Court Should Review the Ninth Circuit's Denial of a Certificate of Appealability on the *Crawford* Error Where the State Relied on Pretext to Introduce Unconfronted, Out-of-Court Statements by a Non-testifying Third-Party Suspect

Certificates of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (explaining that issuance of a certificate of appealability requires only that reasonable jurists could debate whether the petition could have been resolved in a different manner or that the issues presented were adequate to deserve further development). "A certificate of appealability does not require a showing that the appeal will succeed." *Id.*

It is well-settled that, if a statement is introduced into evidence for a *legitimate* nonhearsay purpose, it may not violate the Confrontation Clause. *Tennessee v. Street*, 471 U.S. 409, 417 (1985). As Justice Alito recently observed, however, "the current state of our Confrontation Clause jurisprudence is unstable and badly in need of repair." *Franklin v. New York*, 604 U.S. __, 145 S. Ct. 831, 833 (2025) (statement on denial of certiorari). The district court concluded that the California Court of Appeal did not unreasonably apply this Court's precedent because McNary's statements were not admitted for the truth, but rather, to allow the jury to assess McNary's credibility in confessing to a witness called by the prosecution,[3] and the jury is presumed to have followed the limiting instructions administered to it.[4] App. C at 46. This conclusion fails to account for the fact that the prosecutor called in his case-in-chief a *defense* witness to testify about a McNary confession to her, after having unsuccessfully sought pretrial to exclude her as being incredible as a matter of law – a gambit that had worked for the prosecutor with another witness reporting *another* McNary confession. The prosecutor then used that hearsay confession as the pretext to introduce the plethora of unconfronted, testimonial, out-of-court, self-exculpating McNary statements, purporting that those statements were being introduced for solely for the nonhearsay purpose of impeaching *McNary*. The prosecutor in closing, completely unsurprisingly, did not argue that McNary's

[3] That distinction is nonsensical on its face. The jury could not assess the credibility of McNary's confession without considering his self-exculpating, testimonial, out-of-court statements for their truth.

[4] The limiting instructions were similarly farcical. *Cf. Krulewitch v. United States*, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction.") (Jackson, J., concurring).

confession was false but rather that the testifying witness lied in reporting it, which had been the prosecutor's theory all along. *No* excuse to circumvent *Crawford* could be more obviously pretextual than the one herein. Yet, the lower court condoned the State's conduct by improperly applying this Court's authority, specifically *Crawford v. Washington*, 541 U.S. 36 (2004), *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton v. United States*, 391 U.S. 123 (1968).

A. The statements were testimonial

The California Court of Appeal concluded that McNary's exculpatory statements were not testimonial. The Northern District of California district court did not explicitly refute this conclusion; it instead validated the state court's finding on another ground: a limiting instruction was given. 1-ER-46. At least three of McNary's out-of-court statements took place in the context of a police interview, 1-ER-37, and were, thus, testimonial. *Davis v. Washington*, 547 U.S. 813, 823 (2006).

B. The limiting instructions were insufficient

In *Bruton*, the trial court admitted a confession by a codefendant, but also administered a technically correct limiting statement. 391 U.S. at 124–25. Despite the instruction, this Court found a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt" and therefore, the confession "violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126. It is not the only time this Court has reached such a conclusion. *See also Richardson v. Marsh*, 481 U.S. 200 (1987); *Greer v. Miller,* 483 U.S. 756, 766 n.8 (1987) (noting that the Court will normally presume that jurors follow their instructions *unless* they would be unable to do so); *Donnelly v. DeChristoforo,* 416 U.S. 637, 644 (1974) ("There are "some occurrences at trial [that] may be too clearly prejudicial for . . . a curative instruction to mitigate their effect.").

Again, no reasonably competent juror could have followed the limiting instructions herein. There was no comprehensible distinction between using the McNary statements solely to assess the truthfulness of his confession and using them to determine whether he committed the murder to which he confessed.

The prosecutor intentionally circumvented *Crawford* through subterfuge. In *Tennessee v. Street*, 471 U.S. 409 (1985), the defendant had testified that a sheriff's deputy had coerced his confession by reading aloud the codefendant's confession. *Id.* at 411. The trial court allowed the sheriff's deputy to read the codefendant's confession to rebut defendant's testimony, as the two confessions differed materially. *Id*. at 411–12. This, the Court concluded, was a legitimate, nonhearsay purpose to introduce the codefendant's out of court statement. *Id.* at 417.

Unlike in *Street*, however, the prosecutor here called the witness he later impeached knowing full well that the witness would testify that McNary had confessed to the crime for which petitioner was being tried. Unlike in *Street*, the circumstances of the witness's impeachment here belie the notion "that the State was [not] engaged in any improper effort to place prejudicial hearsay evidence before the jury." 471 U.S. at 417–18 (Brennan, J., concurring) (cleaned up). That was *exactly* what the prosecutor did here. His argument to the jury was not that McNary lied in his confession – the need to impeach it being his excuse for introduction of the self-exculpating, testimonial hearsay – but rather, that McNary never made the confession at all, the witness having simply lied about it. This was improper.

C. The statements were hearsay; the prosecution's alleged nonhearsay basis was pretextual.

The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9 (citation omitted). A prosecutor may not, however, introduce testimonial hearsay having a strong tendency to prove the truth of the matter for an asserted impeachment purpose which is a mere subterfuge. *Street*, 471 U.S. 409; *Bruton*, 391 U.S. 123; and *Douglas*, 380 U.S. 415, clearly establish that the Confrontation Clause forbids such a practice.

Other courts have deemed similar conduct grounds for reversal. *See United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) ("The overwhelming weight of authority is . . . that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible."); *United States v. Gomez-Gallardo*, 915 F.2d 553, 556 (9th Cir. 1990) ("The adversarial system breaks down when the defendant is prevented from defining and presenting his own case and the prosecution proves guilt by creating and then destroying its own creation.").

The prosecution here clearly, and improperly, manufactured an opportunity to rebut the defendant's third-party culpability theory by bringing in unconfronted, testimonial hearsay through a back door. That is contrary to this Court's precedent.

Indeed, in *Williams v. Illinois,* 567 U.S. 50 (2012), at least five of this Court's Justices, in the context of a bench trial, agreed that prosecutors should not be permitted "to do through subterfuge and indirection what we previously have held the Confrontation Clause prohibits." *Id.* at 132 (Kagan, J., dissenting).

> If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back. What a neat trick – but really, what a way to run a criminal justice system. No wonder five Justices reject it.

Id. at 133. Given that this was not a bench trial, but rather a jury trial, the prosecutor's use of pretext to circumvent Crawford was even more clearly impermissible.

The mere admission of the McNary statements for a purported nonhearsay purpose should not, *ipso facto*, foreclose a Confrontation Clause challenge. This Court should review the circuit court's denial of a certificate of appealability on this issue, making it clear that reviewing courts must actually examine the relevant questions, including whether the out-of-court statements were introduced as a subterfuge or for a *legitimate* nonhearsay purpose and whether the statements "remained bound up with [their] truth" in order to make that determination. *Williams v. Illinois*, 567 U.S. at 128 (Kagan, J., dissenting).

D. The certificate of appealability should have been granted

Petitioner proved, at absolute minimum, that reasonable jurists could debate whether the trial court's actions violated petitioner's Confrontation Clause rights. *See Miller-El v. Cockrell*, 537 U.S. at 336. The Ninth Circuit thus clearly erred in refusing to grant a certificate of appealability on this claim.

CONCLUSION

Rather than proper deference to state court findings, the federal courts here demonstrated a dereliction of duty, the very abdication that this Court's precedents preclude. For the foregoing reasons Petitioner Deshawn Campbell asks this Court to issue a writ of certiorari to review the decision of the Ninth Circuit in his case.

Dated: June 29, 2026

Respectfully submitted,

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