No. 13-1227

In the Supreme Court of the United States

MICHAEL D. CREWS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ANTHONY JOSEPH FARINA, JR.,

Respondent.

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

MOTION TO PROCEED *IN FORMA PAUPERIS*

1. The Respondent, by and through his undersigned counsel, asks leave to file a Brief in Opposition to a Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39 of the Supreme Court Rules.

2. Pursuant to 18 U.S.C. § 3006A, Respondent was granted leave to proceed *in forma pauperis* by both the United States Court of Appeals for the

Eleventh Circuit and the United States District Court for the Middle District of Florida.

3. Those courts appointed the Capital Collateral Regional Counsel-Middle Region as counsel for Respondent in the courts below. Undersigned counsel represented Respondent as an Assistant Capital Collateral Regional Counsel in the courts below.

4. Respondent remains indigent and incarcerated at Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026.

Dated this the 11th day of July, 2014.

Respectfully submitted,

_____

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Eleventh Circuit held unanimously that respondent Anthony J. Farina, Jr., was entitled to relief under 28 U.S.C. § 2254. No judge called for a vote on the State's petition for rehearing.

After the prosecutor in the capital-case sentencing phase warned jurors that, pursuant to the Book of Romans, they would "bring judgment on themselves" if they refused to defer to the prosecutor's assessment that death was appropriate (in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)), respondent's counsel failed to object and his appellate counsel failed to raise the issue on appeal (in violation of *Strickland v. Washington*, 466 U.S. 668 (1984)).

The questions presented are:

1. Whether the Eleventh Circuit properly determined, based on its careful and detailed review of the factual record, that the Florida Supreme Court's ruling was based on an unreasonable determination of the facts.

2. Whether, irrespective of the serious factual errors in the Florida Supreme Court's decision, habeas relief is warranted based on the Florida Supreme Court's objectively unreasonable application of clearly established Supreme Court precedents in *Caldwell*, *Strickland*, and related cases.

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STATEMENT OF THE CASE

This case concerns the propriety of the "biblical strategy" used by the prosecution during the penalty-phase trial of Respondent Anthony Farina. In an extraordinary exchange between the prosecutor and Farina's prison pastor and mitigation witness, Reverend Davis, the prosecutor submitted scripture from the Book of Romans into evidence, and through the office of the pastor, interpreted the text to instruct the jury that the Christian Bible precluded mercy and demanded that the jurors defer to the prosecutor's decision to seek the death penalty. The prosecutor deliberately laid the foundation for this evidence during voir dire, and revisited its themes during closing argument. As the Eleventh Circuit held, the "nature and timing of the message and its unremitting delivery, diminished the jurors' sense of responsibility and consideration of mercy" in violation of this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and other cases.

Although the constitutional violation is obvious, Farina's attorney failed to properly object, and appellate counsel failed to raise the issue. And when the issue was raised in state collateral proceedings, the Florida Supreme Court (dividing 4-3), preserved the death sentence in a decision that misperceived critical facts in the record and unreasonably misapplied this Court's precedents.

Applying settled precedent for cases arising under 28 U.S.C. § 2254, the Eleventh Circuit held that Farina is entitled to a new—and fair—sentencing trial. The Eleventh Circuit's decision was unanimous, and the State's petition for rehearing en banc did not prompt a single member of that court to call for a vote on reconsideration.

Petitioner's principal argument is that the court of appeals improperly dubbed as "determinations of fact" what were actually legal conclusions made on independent state law grounds. The prosecutor's conduct, Petitioner argues thusly, was not contrary to clearly established law and was not even improper. But the result is the same in this case whether viewed under § 2254(d)(1) or (d)(2). The Florida court's analysis of the merits of Farina's federal claim is flatly contrary to clearly established federal law. Petitioner cannot resort to § 2254(d)(1) because that provision provides an alternative basis for affirmance in this case.

Because the underlying propositions of law are settled, the Petition amounts to a request for fact-bound error correction. The Petition should be denied.

A. Factual Background

Farina was convicted of felony murder and other offenses for his role in the death of Michelle Van Ness, and the attempted murder of three other employees of a Taco Bell restaurant in 1992. Pet. App. 41-42. His brother, Jeffrey Farina, was convicted as the trigger-man, and was 16 years old at the time of the crime. *Id*. The prosecutor sought death sentences for both defendants, who were tried jointly. Under Florida law, a unanimous jury is not required for the sentencing phase. The jury recommended death for Anthony Farina by a vote of seven-to-five and for Jeffrey Farina by a vote of nine-to-three.[1]

[1] At Farina's trial, the judge found three statutory mitigating factors (no significant history of criminal activity, Anthony was an accomplice in capital felony committed by Jeffery and his participation was relatively minor, age of eighteen at the time of the crime) and fifteen nonstatutory mitigating factors (abused and battered childhood, history of emotional problems, cooperation with the police, involvement in Christianity and Bible study courses while in prison, good conduct in prison, remorse for what happened, assertion of a positive influence on others, no history of violence,

In the retrial, prosecutor John Tanner employed a "biblical strategy." He began laying the groundwork for his use of religious doctrine to influence the jury at the earliest stages. During jury selection, he told the prospective jurors that while they were expected to follow the judge's instructions on the law, they were "*not* required, or expected, to abandon deeply held religious, moral, and conscientious, or other beliefs" and that it was therefore "perfectly legitimate" to disregard the judge's legal instructions in the event of a conflict with moral or religious principles. Pet. App. 289-290 (emphasis added); see also *id.* at 291-293.

During the ensuing trial, the defense presented mitigation testimony from Reverend James Davis, a prison pastor affiliated with Farina's prison, who had counseled Farina. Reverend Davis testified to Farina's reformed character and his genuine embrace of Christianity. Pet. App. 13-19.

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abandonment by his father, poor upbringing by his mother, lack of education, good employment history, and amenability to rehabilitation).

The record reveals that the Farina brothers endured a particularly difficult childhood. Their father was approximately forty years older than their mother and when he left the mother when the boys were still preschool age, he also abandoned the boys completely and had no contact with them. The mother was an alcoholic who would move on a whim (over twenty moves in Anthony's eighteen years, from Wisconsin to Illinois to Florida to Illinois to California to Florida, etc.), took up with a series of men who did nothing to support the family, and offered no guidance to the boys. From a young age the boys were often supporting the family and various adults and young children who were living with them by whatever jobs they could get, by scavenging for recyclable materials to sell, or by shoplifting at the mother's request (actually, the testimony was that the mother forced the boys into shoplifting by telling them that they would do it if they loved her and their young sister). Various relatives, social workers, and law enforcement officers also reported that the boys lived in deplorable conditions (dog feces on the floors of the living quarters, filth and squalor, no decent food). Sometimes they shared a one-room hotel room or trailer with as many as ten to fifteen people.

Anthony was physically abused by one of his stepfathers and placed in a state facility for eighteen months because of the abuse. His mother never visited or called him during that time. Anthony was also sexually abused as a young boy and as a result developed an inability to control his bowels. While Anthony has no formal record of criminal activity, he has committed a number of petty crimes including shoplifting and using illegal drugs (marijuana and crack). Despite all of this, it appears that Anthony had a good employment history, albeit at low-paying jobs. Both boys received an erratic education, and Anthony never finished one year of school in the same school. Pet. App. 95-96.

On cross-examination, Tanner asked Reverend Davis whether he had "put any thought or evaluation into how [Farina] stacked up according to the Bible." Pet. App. 28. He then proceeded to use Reverend Davis as a conduit for the application of Christian theology to the jury's sentencing decision. He began by establishing a foundation for the significance of the Christian Bible to the jury's verdict:

> Q. What is the Bible to you?
> A. It's the infallible word of God, inspired word of God that God gave to us as our—for lack of words, it would be like our instruction manual for life to where we can live by.

Id. at 29. Tanner then asked Reverend Davis for his general impressions of the Book of Romans and, in particular, the first seven verses of chapter 13:

> Q. Are you familiar with the first seven verses of Romans thirteen?
> A. Yes. About honoring authority, submitting to authority. The judge and the prosecutor and the defense attorneys all work for God and are ordained by God as being the authority and in the positions that they are and if they—God is the one that allows them to be there.
> Q. Well, I don't want to say that defense attorneys aren't saved. But they're not the authorities, are they, they are defense lawyers versus the prosecutor?
> A. Right.

Id. at 30. That paraphrase of the Bible was inadequate for Tanner's purposes, so he handed Reverend Davis a copy of the Bible to read into the record. *Id*. at 30-31. Tanner then directed Reverend Davis to read from the Book of Romans:

> MR. TANNER: Your honor, may I hand him something to help with his memory as well?
> DEFENSE: Your honor, I don't know what he's tendered to the witness.
> MR. TANNER: Romans.
> THE WITNESS: It's a copy of the Bible, scripture out of the Bible.
> Q. What does Romans one and two say about authority under God's law?

[Defense objection as to relevance overruled.]

THE WITNESS: Read verse one and two?

MR. TANNER: Yes, sir.

A. Everyone must submit himself to the governor of authorities for there is no authority except for which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted. And those who do so will bring judgment on themselves.

Q. The next verse deals with the prosecutor; does it not? What does it say?

A. For the rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear that the one in authority and do what is right and you will—jumps over here—he will commend you [sic].

Q. And the next verse?

A. Where he is God's servant to do your good, but if you do wrong, be afraid for he does not bear the sword for nothing. He is God's servant and agent to wrath, to bring punishment to the wrongdoer.

Q. And the next?

A. Therefore, it is necessary to submit to the authorities not only because of the possible punishment, but also because of your conscience.

Id. at 30-33. Next, Tanner established, through Reverend Davis, that under one view of the Bible, the government should not show mercy for criminal acts:

Q. Is there anything in scripture that you find that says the laws and the government should excuse crimes because someone is repentant?

A. Specifically the law and government, no.

Q. Tells us as Christians forgive one another?

A. Yes.

Q. But that's not inconsistent with the government's responsibility to uphold the law and bring the punishment which—and the word of the Lord, that you have just read, that bring judgment on themselves; is that correct?

A. That's correct.

Id. at 33-34. Tanner then invoked the beliefs of Jesus Christ to assert both that the death penalty was the appropriate sentence and that mercy was uncalled for:

Q. [W]hen Christ was on the cross there was a condemned felon beside him that repented and accepted Christ; is that right?

A. That's right.

Q. But he didn't take that felon off the cross or forgive the death penalty, did he?

A. No.

Id. at 34. On re-cross examination—despite the absence of any questions on religious theology during redirect—Tanner confirmed his interpretation of the Book of Romans:

> Q. Christ died for sinners?
> A. Yes.
> Q. And Paul died because of Christ?
> A. Yes.
> Q. Is there anything inconsistent with that, that these men face the death penalty for the murder of a seventeen-year-old girl?
> A. No.

Id. at 38. In his closing argument, Tanner again called for submission to the views of those in authority (himself) and adverted to the supposed biblical injunction against showing mercy to those who have committed crimes. Paraphrasing the earlier quotation of Romans 13:2 that those who "'rebel[] against the authority * * * will bring judgment on themselves,'" he told the jury that Farina and his codefendant had "'brought this judgment upon themselves.'" *Id*. at 88.

The jury acted in accordance with the religious authority in which Tanner cloaked the prosecution's position, unanimously recommending a sentence of death. That 12–0 vote stands in striking contrast with the closely divided 7–5 vote in Farina's first trial, when the religious tactic was not employed. Pet. App. 42.

Because Farina's brother was 16 at the time of the crime, his death sentence was subsequently commuted to life.

B. Direct Appeal And State Post Conviction Proceedings

The Supreme Court of Florida affirmed Farina's death sentence by a vote of 4 to 3. Pet. App. 41, 89. The majority "condemned the invocation of religious authority in capital sentencing proceedings," *id*. at 75, but nevertheless concluded there was

no fundamental error in Farina's trial. The majority based this conclusion on several findings of fact. The court found that it was Reverend Davis who "initially broached religion" in his direct testimony and that "there was no other evidence about religion" during the trial. *Id*. at 80, 85. It further found that "[t]he prosecutor's questions were related to [Rev.] Davis's testimony on direct examination." *Id*. at 81.

The three dissenters would have reversed on the basis of the cross-examination of Reverend Davis. The dissenting opinion found it to be "patently clear from the record here that the references to biblical law in the instant case were extensive and egregious." Pet. App. 97 (Anstead, J., concurring in part and dissenting in part). The dissent concluded that, "instead of limiting himself to the topic of reform and rehabilitation for which the witness was called," Tanner "presented the jury with a biblical roadmap by which the defendant had condemned himself to a judgment of death." *Id*. at 104. That cross-examination—which the dissent found to be "obviously planned and well-prepared, but grossly improper"—was exacerbated by questions during jury selection that were designed to foreshadow the biblical argument and by a paraphrase of Tanner's biblical message at the end of his closing argument. *Id*. at 111. The dissent concluded that "[t]his blatant and emotional appeal to religious authority to guide the jury's decision clearly infected the fundamental fairness of the proceeding and should be condemned." *Id*. at 112.

C. Federal Habeas Proceedings

Having exhausted his state remedies, Farina timely filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254. The district court denied the petition. Pet. App. 114.

The court of appeals unanimously reversed, holding that there was clear and convincing evidence that the Florida Supreme Court's rejection of the ineffective assistance of appellate counsel claim was based on unreasonable determinations of fact under 28 U.S.C. § 2254(d)(2). Specifically, the court of appeals found unreasonable the Florida court's determinations that it was Farina who "'first introduced religion into the proceedings,'" that "'there was no other evidence about religion'" during the trial, Pet. App. 284, 291, and that "'[t]he prosecutor's questions were related to [Rev.] Davis's testimony on direct examination,'" *Id.* at 293. The court of appeals also found unreasonable on the face of the record the Florida court's determination that Farina had "'fail[ed] to allege specific objectionable errors'" regarding the jury selection portion of his claim. *Id.* at 289. "[T]he petition itself shows that Mr. Farina did in fact provide the required information," the court of appeals explained. *Id.*

The court went on to review Farina's ineffective assistance claim under this Court's decision in *Strickland* and concluded that Farina's appellate counsel had rendered constitutionally deficient assistance by failing to raise the prosecutorial misconduct claim and, further, that there was "more than a mere 'reasonable probability' that, but for counsel's unprofessional errors, the result of the [appeal] would have been different." Pet. App. 305.

REASONS FOR DENYING THE PETITION

Under this Court's rules, certiorari is warranted only to resolve conflicts of authority or to decide issues of exceptional importance. This case presents neither. The decision below is both correct and unexceptional. Petitioner does not, and could not, assert that there is any disagreement among the lower courts as to the issues presented in this case. The court of appeals correctly applied the proper standard under 28 U.S.C. § 2254(d)(2), as well as this Court's settled decisions in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and related cases, and in *Strickland v. Washington*, 466 U.S. 668 (1984). Because the underlying propositions of law are settled, the Petition amounts to a request for fact-bound error correction in a case that is still in an interlocutory posture. The court of appeals committed no error, and even if it had, there is an alternative ground for affirmance under § 2254(d)(1). Further review is not warranted.

I. THERE IS NO CONFLICT OF AUTHORITY

There is no conflict among the courts of appeals presented by this case, and Petitioner alleges no conflict. To the contrary, the Eleventh Circuit articulated and applied well-settled propositions of federal law decided by this Court in a manner consistent with other courts of appeals. The court properly applied the standard in *Strickland*, 466 U.S. 668, to the unusually egregious facts of this case. It also faithfully applied this Court's line of decisions in *Caldwell*, 472 U.S. 320, and later cases, which clearly establish that efforts by the prosecution to dilute a jury's understanding of its discretion and responsibility or to preclude the consideration of mitigating factors constitute fundamental error in a capital penalty trial. See, *e.g.*,

Darden v. Wainwright, 477 U.S. 168, 183 n.15 (1986); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); see also *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987).

Thus, the Petition does not present even a single point of disagreement among the lower courts that warrants review by this Court.

II. THERE IS NO QUESTION OF EXCEPTIONAL IMPORTANCE

A. The Court Of Appeals Was Correct.

The court of appeals correctly applied the standard under § 2254(d)(2), and this Court's decisions in *Caldwell*, *Strickland*, and other cases, to the Florida court's rejection of Farina's ineffective assistance claim.

1. The court of appeals identified and applied the correct legal standards.

Where a state court has adjudicated a defendant's claim on the merits, 28 U.S.C. § 2254(d) bars habeas relief unless 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," *id.* § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). See Pet. App. 271. In the latter case, although "'[f]ederal habeas courts generally defer to the factual findings of state courts,'" *id.* at 272, "[w]here … there is clear and convincing evidence that, in light of the existing record, the state court unreasonably determined the facts relevant to a given claim, AEDPA deference does not apply, and [the court] exercise[s] plenary review over the claim," *id.* at 294.

a. The Florida Supreme Court's decision turned on glaring errors of fact.

The court of appeals properly concluded that there was "clear and convincing evidence" on a review of the "entire record" that the Florida Supreme Court based its rejection of Farina's ineffective assistance of appellate counsel claim on an unreasonable determination of the facts under § 2254(d)(2). Pet. App. 284. The Florida court's rejection of Farina's claim rested on several clearly unreasonable factual determinations. The state court found that it was Farina who "first introduced religion into the proceedings," *id.* at 79; that "there was no other evidence about religion" during the trial, *id.* at 85; and that "[t]he prosecutor's questions were *related to* [Rev.] Davis's testimony on direct examination," *id.* at 81 (emphasis added).

The court of appeals properly concluded that these determinations were clearly unreasonable on the face of the record. First, as the court of appeals explained, "an examination of the 'entire context of the [resentencing] proceeding' reveals that it was peppered 'with evidence relating to religion.'" Pet. App. 291. The prosecutor discussed religion at length during jury selection, when he advised the prospective jurors that they were "'not required, or expected, to abandon deeply held religious, moral, and conscientious, or other beliefs'" even if such beliefs "'conflict [with] * * * the Judge's instructions,'" *id.* at 290, and acknowledged, "'this is a pretty tense issue just what we're here about, let alone the religious aspect,'" *id.* at 292. He invoked religion repeatedly in questioning the potential jurors, asking, for example, if a potential juror understood "'[t]he Christian concept of someone being saved, that

means that that person is accepting Christ as their savior,'" and another, whether he "believed 'that the State's authority to take a life in appropriate circumstances conflicts with your understanding of your Christian beliefs.'" *Id.* at 292-293. Finally, he discussed with another potential juror "the concept of salvation in Christianity, calling it 'fire insurance,' and commenting that a saved person 'goes to be with the Lord in Heaven regardless of how they die.'" *Id.* at 292.

In addition, as Petitioner concedes, Pet. 15, and as the court of appeals found, the victim impact testimony contained significant religious content, Pet. App. 293. The victim's faith was discussed at length, and three witnesses testified that the victim was in heaven. *Id.* Thus, when Farina presented his mitigation evidence, as even Petitioner concedes, Pet. 15, this indisputably was not the first reference to religion in the trial.

Second, the court of appeals correctly found that the prosecutor's questions on cross-examination were plainly *not* related to Farina's mitigating evidence. Farina offered basic mitigation evidence about his repentance, his reformed character, and his newfound faith. Pet. App. 13-19. Reverend Davis testified that Farina's life in prison is a sobering one and that regeneration is an important aspect of it. *Id.* at 15-16. He further testified that Farina could serve a useful function in helping and ministering to other inmates in prison and made a mercy appeal for life in prison as an alternative to punishment by death. *Id.* at 18-19.

The cross-examination that followed strayed far from the scope of the basic mitigating factors discussed by Reverend Davis. Petitioner argues that on cross-

examination, the prosecutor merely "asked the minister if there was anything in Christianity that was inconsistent with the fact that 'these men face the death penalty for the murder of a seventeen-year-old girl.'" Pet. 17-18. But, as the court of appeals recognized, the prosecutor went far beyond this discussion and well into unconstitutional territory that tainted the rest of the trial and the jury's verdict with it. He introduced holy scripture into evidence, interpreted the biblical text for the jury—through the office of Reverend Davis—to instruct them to submit to his, the prosecutor's, divinely-appointed authority to condemn Farina to death. He made crystal clear to the jury that should they deviate from his will—God's will—they themselves would face the ultimate retribution in hell. This theological tirade went far beyond the scope—and could not reasonably be said to be—"related to" the mitigation evidence Farina presented.

As the court of appeals correctly found, "the prosecutor's cross-examination did not examine the sincerity of Mr. Farina's religious beliefs or repentance. Indeed, the majority of the prosecutor's questions to Reverend Davis on cross-examination and re-cross examination did not concern Mr. Farina personally, but rather, introduced evidence that the Bible commanded the death penalty and "focused on improper, theological matters such as the prosecutor's role as a vehicle of divine retribution and the propriety of the death penalty." Pet. App. 293-294.

Petitioner argues that in Reverend Davis's redirect, "Farina's attorney, Mr. Hathaway, then asked the minister … if there was anything in the Bible saying that the brothers should not get a life sentence to which the minister responded:

'No.'" Pet. 18. But whatever happened on redirect is irrelevant to the Florida court's factual finding that "[t]he prosecutor's questions were related to [Rev.] Davis's testimony on direct examination." Pet. App. 81.[2]

Finally, the court of appeals found that the Florida court unreasonably determined that Farina had "'fail[ed] to allege specific objectionable errors'" about prosecutorial misconduct during the jury selection. Pet. App. 289. As the court of appeals explained, "the petition itself shows that Mr. Farina did in fact provide the required information." *Id*. It is plain from the petition that Farina addressed this claim in detail, citing specific instructions given by the prosecutor and other examples of misconduct. Indeed, Petitioner's only argument in response is that the Florida court was not required to address arguments made in a footnote. Pet. 15. But the Florida court did not base its analysis on this reason, did not even mention it, and indeed addressed the claim in a footnote itself. Pet. App. 65 n.8.

The court of appeals thus correctly found that there was clear and convincing evidence that the Florida Supreme Court based its rejection of Farina's ineffective assistance claim on an unreasonable determination of the facts under § 2254(d)(2). As a result, the court of appeals went on to apply this Court's decision in *Strickland* without the usual deference under AEDPA to a state court adjudication of a claim on the merits.

b. The court of appeals properly applied Strickland.

[2] Petitioner also argues that the Florida Supreme Court's determination was legal in nature and not factual. But this argument fails too. Even if it were a legal determination, as explained *infra*, at 19-20, it was contrary to clearly established federal law.

The court of appeals properly applied this Court's decision in *Strickland*, which sets out a two-part inquiry for ineffective assistance claims:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Pet. App. 296 (quoting *Strickland*, 466 U.S. at 687).

First, the court of appeals properly applied the standard for deficient performance, finding that "appellate counsel's failure to raise the prosecutorial conduct claim fell below the standard of competence required by the Constitution." Pet. App. 308. The court of appeals based this finding on several well-established performance criteria: "the improper comments were 'obvious on the record, and must have leaped out upon even a casual reading of [the] transcript,'" in addition, "[t]he Florida Supreme has repeatedly 'condemned the invocation of religious authority in capital sentencing proceedings,'" and "the fact that such prosecutorial misconduct could lead to potential constitutional violations was well established at the time." *Id*. at 308-309.

Moreover, the court of appeals held that "[n]otwithstanding that appellate counsel did raise other issues on appeal, because the issue of prosecutorial misconduct was substantial, potentially meritorious, and so obvious on the record, counsel's performance was deficient." Pet. App. 309. This holding is consistent with the decisions of other courts of appeals, and with principles articulated by this

Court. See, *e.g.*, *Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013) (abandoning claim that was "obvious" and "clearly stronger" than claim presented indicates deficient performance, unless there was a "strategic justification"), cert. denied, 2014 WL 318418 (U.S. 2014); *Cargle v. Mullin*, 317 F.3d 1196,1202 (10th Cir. 2003) (holding that "'we look to the merits of the omitted issue,' * * * generally in relation to the other arguments counsel did pursue"); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (holding that "a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker"); see also *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing the Seventh Circuit's "clearly stronger" test favorably for the proposition that habeas petitioners may succeed on a *Strickland* claim based on counsel's failure to raise a particular claim).

Thus, the court of appeals correctly concluded that under the extraordinary circumstances of this case, Farina received constitutionally deficient legal assistance.

Second, the court of appeals properly applied the standard for prejudice. A "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Although the claim was not properly preserved for review, had Farina's lawyer raised the argument that the prosecutor's conduct was fundamental error on direct appeal, the state court would have reviewed for fundamental error. The court of appeals correctly found that there was "more than a

mere 'reasonable probability'" that "a claim of such pervasive misconduct by the prosecutor, though raised for the first time on appeal, would have swayed an appellate court to grant relief to Mr. Farina." Pet. App. 305.

Specifically, the court found that "[t]he prosecutor purposely developed and fostered this ascendant-doctrine strategy throughout critical stages of the proceedings," Pet. App. 300, and "[t]he nature and timing of the message and its unremitting delivery diminished the jurors' sense of responsibility and consideration of mercy," *id.* at 305. This calculated approach, the court of appeals explained, which included an instruction to the jury that their "religious beliefs should supersede the court's instructions, indoctrinated the jury to a principle at odds with Mr. Farina's constitutional rights … [and] so diminished the jury's decision-making ability to render the proceedings unfair and unjustly prejudicial to Mr. Farina." *Id.* at 304-305.

Petitioner argues that Farina cannot possibly demonstrate prejudice because the Florida court concluded there was no fundamental error and thus would not have found fundamental error had the issue been raised on direct appeal. But the Florida court based its conclusion on an unreasonable determination of the facts as a matter of federal law. As the court of appeals correctly held, had the Florida court properly considered Farina's claim, there is a reasonable probability "sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, that the outcome would have been different. Pet. App. 60.

2. There was no independent state-law basis for the Florida Supreme Court's decision.

Petitioner argues that the court of appeals was barred from even reviewing Farina's ineffective assistance claim because the Florida court determined as a matter of state law that the prosecutor's misconduct did not amount to fundamental error. Petitioner is mistaken. The claim the Florida court reviewed and rejected was Farina's federal ineffective assistance of counsel claim, which was grounded in the prosecutor's misconduct at his trial. Under Florida law, "'prosecutorial misconduct constitutes fundamental error when, but for the misconduct, the jury could not have reached the verdict it did.'" Pet. App. 75. In concluding that the prosecutor's misconduct did not rise to the level of fundamental error, the Florida court fully evaluated the merits of Farina's federal claim, but found it did not constitute fundamental error.

This is not a case, as Petitioner suggests, where a state court refused to consider a federal law claim on an independent state law ground, such as procedural bar. Cf. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Here, the state court fully considered the merits of the federal claim. Thus, the Florida court's application of the fundamental error standard to Farina's claim presents both state and federal law aspects. This Court has clearly held that where "state law implicates an underlying question of federal law . . . the state law is not an independent and adequate state ground supporting the judgment." *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388 (1986); see *Norris v. Alabama*, 294 U.S. 587, 590 (1935) ("[W]henever a conclusion of law of a state court as to a federal right and findings of

fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."); see also *Coleman v. Thompson*, 501 U.S. 722, 733-34 (1991) (applying rule in federal habeas context). Thus the court of appeals properly reviewed Farina's ineffective assistance claim.

B. There Is An Alternative Basis For Affirmance.

Whether the decision of the Florida court is viewed as an unreasonable determination of the facts in light of the evidence presented or as an unreasonable application of clearly established federal law, the result is the same. The prosecutor's misconduct in this case violated this Court's decisions that clearly establish that a prosecutor may not undermine the jury's sense of discretion and responsibility.

1. Under clearly established Supreme Court precedent, the prosecutor engaged in misconduct.

This Court has held that "[i]n evaluating the prejudicial effect of the prosecutor's argument . . . the uncorrected suggestion that the responsibility for any ultimate determination of death will rest [elsewhere] presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Caldwell*, 472 U.S. at 332-33; see also *Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."); *Lockett*, 438 U.S. at 605 (a law that prevents the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record

and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"). Thus, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29.

That is precisely what happened here. By submitting Scripture into evidence, and using Reverend Davis to interpret the import of that Scripture for the jury, the prosecutor claimed a mantle of religious authority, as "God's servant and agent to wrath, to bring punishment to the wrongdoer." Pet. App. 32. He impressed upon the jurors that it was "necessary to submit to the authorities"—*i.e.*, the prosecutor—"because of the possible punishment" and their "conscience." *Id.* at 33. By exploiting biblical doctrine in this way, the prosecutor led the jury to believe that true responsibility for determining punishment lay with his office and that they should yield to its authoritative judgment. By threateningly suggesting to the jurors that if they refused to acquiesce in the verdict requested by the State, they would be defying God's will and authority, the prosecutor soundly undermined the jury's authority. This was directly contrary to clearly established federal law so that the Florida Supreme Court's decision amounted to an objectively unreasonable application of this Court's established precedent.

In addition, this Court has held that a defendant has a constitutional right to the consideration of "[those] compassionate or mitigating factors stemming from the

diverse frailties of humankind." *Caldwell*, 472 U.S. at 330 (internal quotation marks omitted); see also *Hitchcock*, 481 U.S. at 394 ("[I]n capital cases, the 'sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence."); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (jury must be free to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis and internal quotation marks omitted). Here, the prosecutor's conduct decisively removed those factors from the jury's consideration. This too was contrary to the clear directives of this Court.

Petitioner makes a wrongheaded argument that the prosecutor did not engage in any misconduct at all under clearly established federal law—or otherwise. But this argument fails.[3]

Under Petitioner's view, "[w]hen a defendant presents a minister as a mitigation witness, any cross-examination regarding the Bible is related to the direct examination." Pet. 16. As a matter of law, Petitioner argues, when a defendant presents mitigation evidence as to the defendant's "conversion," the defendant "invite[s] a theological debate" and "cross-examination regarding Christianity's view of being law-abiding and the death penalty." *Id.* at 20. "A

[3] At the oral argument before the Eleventh Circuit, counsel for Petitioner agreed the prosecutor's comments were "bad," "wrong," and "improper," conceding, "I wish [the prosecutor] hadn't have done it. He shouldn't have done it," and admitted that, there was, "No question about it. They improper as can be." Oral Arg. at 37:09-38:30.

prosecutor may cross-examin[e] a minister presented as a mitigation witness with Scripture. There was no error at all, much less structural error." *Id*. at 21.

With respect to Farina's ineffective assistance claim, Petitioner argues that in its experience, "Defense counsels who present ministers as mitigation witnesses do not object to the prosecutors' cross-examination regarding the Bible because they correctly think that they have invited a theological debate by presenting the minister in the first place." Pet. 27 n.3. Moreover, Petitioner continues, "appellate attorneys think likewise and figure that appellate judges will as well (as they should)." *Id*.

But whatever may be the state of federal law as to generalized theological debates in criminal trials, in *this* trial, the prosecutor used biblical doctrine to threaten the jury, diminish its sense of discretion and responsibility, and remove from its consideration constitutionally protected factors in sentencing, such as mercy. The court of appeals properly found that this tactic was so egregious that appellate counsel's failure to even raise it as an issue on appeal constituted deficient performance and prejudiced Farina's trial in violation of his constitutional rights.

2. Relief is therefore warranted under § 2254(d).

For these reasons, under either § 2254(d)(1) or (d)(2), relief is warranted, and the Petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated this the 11th day of July, 2014.