No. 13-1227

In the Supreme Court of the United States

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

v.

ANTHONY JOSEPH FARINA, *RESPONDENT*.

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

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REPLY BRIEF OF PETITIONER

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CAPITAL CASE

Question Presented

Whether a habeas court may evade the highly-deferential standard of review in the habeas statute by characterizing its legal and policy differences with the state court as unreasonable factual determinations and grant the writ on the basis of ineffectiveness of appellate counsel contrary to the state court's holding that the cross-examination of the mitigation witness was not fundamental error under state law?

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REPLY BRIEF

Farina asserts that this Court should not grant review for three reasons: 1) that there is no conflict among the lower courts; 2) the panel applied the correct legal standards; and 3) there is an alternative basis to affirm because even applying the AEDPA standard the panel's decision was correct. None of these assertions is correct. First, there is conflict among the lower courts but, more importantly, there is conflict between the panel's decision and this Court's caselaw. There is conflict with this Court's procedural decisions regarding the AEDPA as well as conflict with this Court's substantive decisions. Second, the panel did not correctly apply the AEDPA. Rather, the panel improperly engaged in *de novo* review. Nor did the panel correctly apply *Strickland v. Washington*, 466 U.S. 668 (1984), to this claim of ineffective assistance of appellate counsel even under *de novo* review. Third, there is no alternative basis to affirm. The panel's decision certainly is not the proper analysis under the AEDPA. As will be explained in more depth, none of these reasons is a valid reason to deny review. This Court should not only grant certiorari, it should summarily reverse, as this Court has done in similar cases where the panel did not follow the AEDPA.

Conflict Among the Lower Courts and with this Court

First, there is a conflict among the lower courts. More importantly, there is conflict with this

Court's precedent both procedurally and substantively.

Farina asserts that this Court should not grant review because there is no conflict among the Courts of Appeals. BIO at 9. But there is a conflict among the Courts of Appeals on the issue of the prosecutor's use of biblical references in closing argument in post-AEDPA cases. *Compare Greene v. Upton*, 644 F.3d 1145, 1159 (11th Cir. 2011), and *Middlebrooks v. Bell*, 619 F.3d 526, 543 (6th Cir. 2010), *vacated on other grounds, Middlebrooks v. Colson*, 132 S.Ct. 1791 (2012), *with Cauthern v. Colson*, 736 F.3d 465, 474-78 (6th Cir. 2013). Indeed, there is an intracircuit conflict regarding the specific issue of ineffective assistance of appellate counsel for failing to raise the issue of biblical references. *Compare Shere v. Sec'y, Fla. Dep't. of Corr.*, 537 F.3d 1304, 1310 (11th Cir. 2008), *with Farina v. Sec'y, Fla. Dep't of Corr.*, 536 Fed.Appx. 966 (11th Cir. 2013).[1]

There is also conflict among the state courts of last resort as the State noted in its petition. Pet. at 20-21 (noting the various jurisdictions take conflicting views on the propriety of biblical

[1] Farina makes much of the Eleventh Circuit denying the State's petition for rehearing en banc. The Eleventh Circuit, however, may well have found that there was not the conflict required by their en banc rule because *Farina* was an unpublished opinion whereas the case that it directly conflicted with, *Shere*, was a published opinion. While a panel may evade its own circuit's en banc review by the simple expedient of labeling a case unpublished, it cannot evade this Court's review by that device. *See Felkner v. Jackson*, 131 S.Ct. 1305 (2011)(reversing summarily an unpublished Ninth Circuit opinion for not adhering to the AEDPA standard).

references in closing arguments). For example, while the North Carolina Supreme Court has "more often than not," concluded that a prosecutor's biblical references in closing argument are "within the acceptable parameters allowed to counsel when arguing hotly contested cases," the Pennsylvania Supreme Court has held that all biblical references in closing arguments are *per se* reversible error. *Compare State v. Haselden*, 577 S.E.2d 594, 608 (N.C. 2003), *with Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991). There is conflict among both the federal circuits and the state supreme courts.

More importantly, however, in this AEDPA case, is the conflict between the panel's decision and this Court's caselaw because the AEDPA limits the law upon which habeas relief may be granted to this Court's precedent. The panel's decision conflicts with the numerous cases from this Court that were cited in the State's petition, as well as this Court's recent case of *Marshall v. Rodgers*, 133 S.Ct. 1446 (2013). In *Rodgers*, this Court explained that in an AEDPA case, circuit precedent may not be used to "refine or sharpen" Supreme Court jurisprudence. *Id.* at 1450. The *Farina* panel, in violation of *Rodgers*, followed the reasoning of the Ninth Circuit in *Sandoval v. Calderon*, 241 F.3d 765, 775-77 (9th Cir. 2000). There is significant conflict between the panel's decision and this Court on the issue of the proper application of the AEDPA.

There is also substantive conflict with this Court's caselaw. The panel's decision limiting cross-examination of the minister to the subject of the genuineness of defendant's conversion conflicts with

this Court's recent decision in *Kansas v. Cheever*, 134 S.Ct. 596 (2013). In *Cheever*, this Court unanimously upheld the prosecutor's use of a court-ordered mental health evaluation in the cross-examination of a defense expert in a capital case. The Sixth Circuit had granted habeas relief, distinguishing *Buchanan v. Kentucky*, 483 U.S. 402 (1987), in which this Court held that when a defendant presents an expert to testify that the defendant lacked the requisite mental state, the prosecution may present psychiatric evidence in rebuttal. The *Cheever* Court reasoned that prohibiting the prosecution's rebuttal would "undermine the adversarial process" by allowing a defendant to present "a one-sided and potentially inaccurate" view of the evidence. *Id.* at 601. This Court noted that a defendant "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Id.* at 601. Limiting rebuttal would undermine the "core truth-seeking function of the trial." *Id.* at 602. This Court observed that when "a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him." *Id.* at 601 (citing *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984)(en banc).

Here, as in *Cheever*, prohibiting the prosecution's cross-examination of the minister would "undermine the adversarial process" by allowing a defendant to present "a one-sided and potentially inaccurate" view of the mitigation. Just as a defendant has no right to set forth to the jury all

the facts which tend in his favor without laying himself open to cross-examination, he has no right to present mitigation witnesses without laying those witnesses open to cross-examination. Here, as in *Cheever*, limiting cross-examination of the minister would undermine the "core truth-seeking function of the trial." As then-Judge Scalia observed in *Byers*, when a defendant appeals to a subject as the reason why he should not be punished for murder and introduces testimony for that purpose, "the state must be able to follow where he has led." *Byers*, 740 F.2d at 1113. Farina presented his conversion to Christianity as a reason why he should not be sentenced to death, *i.e.,* as mitigation. He presented a minister in support of that mitigation and therefore, the prosecutor was permitted to cross-examine that minister regarding Christianity, including its view of the duty to obey authority and laws. The prosecutor must be free to follow where the defendant's mitigation case leads including Christian theology.

The panel's reasoning also conflicts with this Court's decision in *Parker v. Matthews*, 132 S.Ct. 2148, 2155 (2012). In *Matthews*, this Court unanimously summarily reversed a panel of the Sixth Circuit finding the panel had granted habeas relief "on the flimsiest of rationales." *Id.* at 2149. According to the panel, the prosecutor in closing argument implied that the defendant colluded with his lawyer and doctor to manufacture a defense and denigrating the defense itself. *Id.* at 2154, n.2. But this Court pointed out that the panel selectively quoted the prosecutor's comments omitting the portion of the argument where the prosecutor denied any charge of collusion. *Id.* at 2154. The panel

determined that the comments violated due process under *Darden v. Wainwright*, 477 U.S. 168 (1986). *Matthews*, 132 S.Ct. at 2153. While the panel read the comments as denigrating the defense itself, this Court reasoned that the state court could have read the comments as highlighting the defendant's motive to exaggerate. The *Matthews* Court observed that there was no precedent of this Court that supported the panel's conclusion that due process prohibits a prosecutor from emphasizing a criminal defendant's motive to exaggerate. *Id.* at 2154. Alternatively, even reading the comment as denigrating the defense, this Court concluded that the comments were not sufficient to warrant habeas relief because *Darden* itself held that a closing argument which was "considerably more inflammatory" did not warrant habeas relief. *Id.* at 2155.

Here, as in *Matthews*, the panel took the prosecutor's questions during jury selection out of context. Here, as in *Matthews*, no precedent of this Court supports the panel's conclusion that the Eighth Amendment prohibits a prosecutor from cross-examining a minister, presented as a mitigation witness, about religion. *Farina*, 536 Fed.Appx. at 968, 984. There is significant conflict with this Court's caselaw on both the procedural issues related to the AEDPA and on the underlying substantive issue.[2]

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[2] The Assistant Attorney General handling the case in the Eleventh Circuit did not concede ineffectiveness of appellate counsel during the oral argument. BIO at 21, n.3. Rather, he understandably relied heavily on the controlling Eleventh Circuit precedent of *Shere.* Nor did he concede that the cross-examination was fundamental error. Rather, at most, he conceded that the cross-examination would have been error if

Incorrect Legal Standards

Second, the panel applied incorrect legal standards. The panel both misidentified which provision of the AEDPA applied and then misapplied even that provision.

Farina argues review should be denied because the panel identified and applied the correct legal standards. BIO at 10. The correct legal standard is § 2254(d)(1), not § 2254(d)(2). The Florida Supreme Court's refusal to address matters raised solely in a footnote, which merely quoted the prosecutor's questions during jury selection out of context and which was not accompanied by any developed argument, is a policy, not a fact. A "fact" is defined as an "actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." BLACK'S LAW DICTIONARY (9th ed. 2009). The factual provision of the habeas statute, § 2254(d)(2), does not apply at all.

And the panel did not even correctly apply § 2254(d)(2), which requires an ***unreasonable*** determination of the facts in light of the evidence presented in the State court proceeding. Farina asserts that the Florida Supreme Court based its conclusion that there was no fundamental error on an "unreasonable determination of the facts as a matter of federal law." BIO at 17. While the Florida Supreme Court read the trial transcript very

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there had been an objection, which may well be an accurate statement of Florida law (but not federal constitutional law).

differently from the panel, that reading was not unreasonable. During jury selection, the prosecutor explained to the prospective jurors that it was "perfectly legitimate" to have religious scruples against the death penalty. The prosecutor was attempting to identify those citizens who object to the death penalty on moral or religious grounds for the purpose of having them stricken for cause. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992)(stating that prospective jurors who are unalterably opposed to the death penalty should be disqualified). The prosecutor was not telling the jurors to disregard the jury instructions and follow the Bible instead; quite the contrary, the prosecutor was attempting to ensure that such citizens never served as jurors in the case in the first place. The state court's reading was perfectly plausible. *Burt v. Titlow*, 134 S.Ct. 10, 16 (2013)(finding the record "readily" supported the state court's factual finding); *Matthews*, 132 S.Ct. at 2155 (agreeing with the state supreme court's reading rather than the Sixth Circuit's reading). The panel's reading, which ignores *Morgan* and the purpose of such questioning, is the unreasonable reading.

Additionally, the only comment the prosecutor made in closing argument was: "they have brought this judgment upon themselves by their choices." *Farina v. State*, 937 So.2d 612, 634 (Fla. 2006). While the Florida Supreme Court doubted whether this was a biblical reference "at all," they treated the comment as an allusion to the Book of Romans, albeit a "facially ambiguous" one that lacked "the force of other more obvious references we previously held did not constitute fundamental error." *Id.* at 634-35. The district court, on the other hand,

reading the same comment, concluded that the prosecutor made no biblical references in closing argument. *Farina v. Sec'y, Dep't. of Corr.*, 2012 WL 1016723, *48 (M.D.Fla. 2012)("The prosecutor did not mention or argue religion in his closing argument.") This disagreement alone establishes that the Florida Supreme Court's view of the matter was reasonable. *White v. Woodall*, 134 S.Ct. 1697, 1703, n.3 (2014)(considering the courts of appeals' divergent approaches as evidence of fairminded disagreement). Moreover, it was the state court that treated the comment as a biblical reference thereby giving the defendant's view of the comment the benefit of the ambiguity, which can hardly be classified as "unreasonable" when a federal district court was unwilling to do likewise. It was the panel's reading that was "unreasonable," not the Florida Supreme Court's.

Farina claims the panel "properly applied" *Strickland v. Washington*, 466 U.S. 668 (1984), and "faithfully applied" *Caldwell v. Mississippi*, 472 U.S. 320 (1985). But the panel did not "properly" and "faithfully" apply the AEDPA. Unfortunately, as this Court has observed, the AEDPA "is a provision of law that some federal judges find too confining, but that all federal judges must obey." *Woodall*, 134 S.Ct. at 1701.

Moreover, the panel did not properly apply *Strickland* in this AEDPA case. As this Court has explained, under the AEDPA, double deference is required in the *Strickland* context – once to appellate counsel's decision not to raise the issue on appeal and once again to the state court's ruling that there was no deficient performance. *See Knowles v.*

Mirzayance, 556 U.S. 111, 123 (2009)(noting the "doubly deferential" judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard). The panel did not defer to the state court's conclusion that there was no deficient performance. *Farina,* 937 So.2d at 634 (finding no deficient performance on the part of appellate counsel because appellate counsel could have reasoned that the prosecutor's alleged misconduct, which "was not properly objected to, was a weaker claim with less chance of success" than the twelve issues that appellate counsel actually did raise and appellate counsel could have "reasonably concluded" that those twelve issues "represented his strongest arguments").

Even under a *de novo Strickland* analysis, the panel's finding of prejudice is patently incorrect. BIO at 16-17. The panel speculated that the Florida Supreme Court would have granted relief on the basis of fundamental error if the issue had been raised in the direct appeal when, in fact, the Florida Supreme Court explicitly found the cross-examination in this case was not fundamental error. *Farina*, 937 So.2d at 632. The panel's finding of prejudice also ignores the Florida Supreme Court's statement that they had "consistently held that a prosecutor's references to biblical authority during closing argument were not fundamental error" in cases with much more explicit biblical references than the "they have brought this judgment upon themselves by their choices" comment made in this case. *Farina*, 937 So.2d at 630, 635 (citing cases). Not only was there no "reasonable probability" that the Florida Supreme Court would have found the cross-examination to be fundamental error; there is

an absolute certainty that the Florida Supreme Court would not find fundamental error because it did not. Unlike a normal *Strickland* claim, there is no "probability" aspect to this case. We know exactly what the Florida Supreme Court found: they found no fundamental error in the state habeas petition. There necessarily was no prejudice from appellate counsel not raising the issue in the direct appeal as a matter of both historical fact and logic. The panel's finding of prejudice is patently incorrect and is not a "proper' application of *Strickland*.

No Alternative Basis to Affirm

Third, there is no alternative basis to affirm the panel's decision. The panel's decision is not the correct result under the AEPDA.

Farina argues that this Court should not grant review because, even applying the AEDPA, the panel's decision was correct. BIO at 19. But the end result is not the same under the AEDPA. Farina quotes random, only tangentially-related dicta from a bevy of cases that are not about either ineffectiveness or cross-examination. BIO at 19-21. Clearly established Federal law under the AEDPA includes "only the holdings, as opposed to the dicta, of this Court's decisions." *Woodall*, 134 S.Ct. at 1702. State courts are not required to extend this Court's precedent under the AEPDA because, by definition, if a case must be extended, it is not clearly established law. *Id.* at 1706. Applying any of these cases requires more than the expansion of precedent in violation of both the language of the AEPDA and this

Court's recent holding in *Woodall*, it requires a taffy pull.

Farina, like the panel, relies heavily on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Farina*, 536 Fed.Appx. at 968, 974, 982, 984. But *Caldwell* is not a religious reference case. This Court has never held that a prosecutor may not refer to the Bible (or even hinted that a prosecutor may not refer to the Bible in cross-examining a minister presented as a mitigation witness). There is no alternative basis to affirm the panel's decision.

Finally, the Florida Supreme Court's decision was entitled to AEDPA deference under this Court's precedent and the panel did not accord the state court's decision that proper deference. This Court should grant certiorari and summarily reverse.

CONCLUSION

This Court should grant certiorari and summarily reverse.

Respectfully submitted,

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