FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH UNDRAY FORD, *Petitioner-Appellant*, v. SUZANNE M. PEERY, Warden, *Respondent-Appellee.*	No. 18-15498 D.C. No. 2:15-cv-02463- MCE-GGH ORDER

Filed August 18, 2021

Before: William A. Fletcher and Ryan D. Nelson, Circuit Judges, and Donald W. Molloy, District Judge.[*]

Order;
Dissent by Judge VanDyke

[*] The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

SUMMARY[**]

Habeas Corpus

In a case in which a judge of this court sua sponte requested en banc rehearing, and in which appellant filed a petition for rehearing en banc, the panel on behalf of the court denied appellant's petition for rehearing en banc and denied rehearing en banc.

Judge VanDyke dissented from the denial of rehearing en banc.

He wrote that this circuit's cases misapplying AEDPA deference are legion, but the panel majority took this court's habeas dysfunction to a new level by issuing, when first confronted with an en banc petition, an amended opinion that opined about how the majority would refuse to defer to a purely hypothetical state court ruling as to whether the prosecutor's comments at the end of closing rebuttal argument constituted misstatements of law.

As in its now-vacated opinion, the majority began its analysis in its amended opinion by correctly describing the issue as whether the prosecutor's presumption-of-innocence comments constituted misconduct in violation of due process under *Darden v. Wainright*, 477 U.S. 168 (1986). Judge VanDyke wrote that after laying the appropriate prejudice-focused foundation for a proper *Darden* analysis, the majority then diverted to an odd and lengthy dicta

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

discussion. Despite the California Court of Appeal's explicit assumption that the prosecutor did misstate the law, and despite *Darden*'s primary focus on the prejudicial effect from any alleged misconduct (and not the misconduct itself), the majority concluded that "even *if* there were a state-court decision holding that the prosecutor did not misstate the law, we would conclude that such a holding would have been unreasonable."

Judge VanDyke wrote that the majority misconstrued the *Darden* analysis and misapplied AEDPA—again—in its hypothetical dicta. He explained that when appropriately evaluated in context, the prosecutor's presumption-of-innocence remarks did not rise to the level of misconduct; and that given the lack of clearly established law as to the propriety of a prosecutor's remarks in this context, even the majority's hypothetical state court decision would not actually "unreasonably" apply any clearly established law.

Judge VanDyke wrote that the majority's dicta illuminates the potential for abuse of this court's "binding dicta" rule, under which this court views "well-reasoned" dicta as binding. He emphasized that all of this could have easily been avoided if the majority had voluntarily removed its dicta during the first en banc proceedings. He concluded that instead of starting down a path of issuing advisory AEDPA fumbles, the court should have taken the panel's amended opinion en banc to nip this new practice in the bud, and to clarify the badly amorphous binding dicta rule.

ORDER

A judge of this court sua sponte requested a vote on whether to rehear this case en banc. The parties were directed to file simultaneous briefs setting forth their respective positions as to whether this case should be reheard en banc. Appellant filed a petition for rehearing en banc following the panel's order.

Judges W. Fletcher and R. Nelson have voted to deny the petition for rehearing en banc, and Judge Molloy has so recommended. The full court was advised of Appellant's petition for rehearing en banc.

A vote was taken on the sua sponte call and the matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35(f). Appellant's petition for rehearing en banc (Dkt. No. 82) is **DENIED**. Rehearing en banc is **DENIED**.

Judge VanDyke's dissent from the denial of rehearing en banc is attached and filed concurrently with this order.

VANDYKE, Circuit Judge, dissenting from denial of rehearing en banc:

Our circuit's cases misapplying AEDPA deference are legion, and the resultant game of whack-a-mole the Supreme Court has been forced to play with our habeas decisions is so well known at this point as to need no supporting citation.[1] But this case takes our habeas dysfunction to a new level. Initially, the panel majority here refused to provide AEDPA deference, granting habeas relief to Petitioner Keith Ford in a split opinion. Confronted with an en banc petition, the panel was forced to reverse itself, issuing an amended opinion that, this time, begrudgingly deferred to the state court's conclusions on the part of Ford's case that mattered, and so appropriately denied habeas relief. As Judge Nelson observed in his partial dissent from the panel's amended opinion, this was a commendable move that likely saved the panel majority from being reversed either by our own court en banc or by the Supreme Court. *Ford v. Peery*, 999 F.3d 1214, 1227 (9th Cir. 2021) (R. Nelson, J., dissenting in part and concurring in the judgment).

If that had been all that the panel majority did, there would be cause for celebration in the West and hope that perhaps our court was really turning over a new leaf. But alas, like a sullen kid who spits in the cookie jar after being caught red-handed, the panel majority decided that if they couldn't get away with directly defying AEDPA in this case, they could at least opine in their revised opinion about how

[1] To give credit where credit is due: my diligent clerk did prepare a very nice string-cite spanning multiple pages. But including it felt awkward—like trying to shame a career offender with his rap sheet.

they would refuse to defer to a purely hypothetical state court ruling not presented in this case at all.

This appears to be an entirely new phenomenon. Our court has a well-documented habit of not properly deferring to *actual* state court rulings in AEDPA cases, including a long list of summary reversals from the Supreme Court. But I'm not sure I've ever seen our court make up a pretend state court ruling just so it could refuse to apply AEDPA deference to it while pummeling a strawman of its own making. Weird.

Have things gotten so bad for my AEDPA-disdaining colleagues that they are forced to invent stuff that they can then hypothetically refuse to defer to, secure in the knowledge that at least *those* advisory rulings won't get reversed? It's possible. But I tend to think they're likely trying to do something more nefarious. Instead of starting down a new path of issuing advisory AEDPA fumbles, our court should have taken the panel's amended opinion en banc to nip this new practice in the bud. And in doing so, we could have taken this opportunity to clarify our badly amorphous "binding dicta" rule,[2] making clear that attempts like the panel majority's here won't work. Because we didn't, I respectfully dissent from the denial of rehearing en banc.

[2] Though we have referred to this rule as the "[w]ell-reasoned dicta" rule, *see Li v. Holder*, 738 F.3d 1160, 1165 n.2 (9th Cir. 2013), the line between well-reasoned dicta and not-well-reasoned dicta seems to lie largely in the eye of the beholder. I therefore refer to this rule as the "binding dicta" rule.

I.

The majority's amended opinion is a product of what preceded it, so some background is necessary. A jury convicted Ford of first-degree murder for shooting Ruben Martinez point-blank in the head. *People v. Ford*, No. A137496, 2014 WL 4446166, at *1 (Cal. Ct. App. Sept. 10, 2014). Throughout Ford's trial, the court repeatedly admonished the jurors to refrain from deciding any issue in the case until after the entire case was presented and the jury was released for deliberations. And immediately prior to closing arguments, the trial court instructed the jury that "[a] defendant in a criminal case is presumed to be innocent," which "requires that the People prove a defendant guilty beyond a reasonable doubt." The trial court also reminded the jury that "[i]n their . . . closing arguments, the attorneys discuss the case, but their remarks are not evidence." It warned the jury that "[i]f you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." Later, the trial court again reminded the jury that "[y]ou may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt," that "[i]t is up to you to decide whether an assumed fact has been proved," and that no juror should "make up your mind about the verdict or any issue until after you have discussed the case with the other jurors during deliberations."

In his closing arguments, the prosecutor reiterated the trial court's instruction that "[e]vidence is not anything that I say up here. This is just argument . . . . What I am saying here is not evidence." He also informed the jury that "[t]he real work is going to be starting in a little bit, and that's where we're not involved. It's when you guys are all back there together talking about this case." But for the purposes

of his closing, the prosecutor stated, "I'm going to go back over the facts of this case and show you why I have proven beyond a reasonable doubt that the defendant committed murder in this case, beyond a reasonable doubt that he killed Ruben Martinez . . . ." The prosecutor proceeded to discuss at length the evidence of Ford's guilt, all the while referencing the government's beyond-a-reasonable-doubt burden to show that he had met that high burden. "In combination with all the other information," he explained, a statement by Ford during a phone call was "proof beyond a reasonable doubt." He concluded that "when you . . . follow all the evidence and you follow all the law, you're going to reach the same conclusion that I asked you to reach at the beginning of this case that the defendant is guilty of murder . . . ." Ford's counsel then delivered her closing arguments, where she repeatedly emphasized Ford's presumption of innocence.

Lastly, the prosecutor began his lengthy closing argument rebuttal by noting that "[t]his is now my opportunity just to respond to what [Ford's counsel] said." He acknowledged that "it's true [the defendant's counsel] doesn't have to present any evidence. It is my burden of proof," but that "[w]e're way past that point. It's been proven to you every which way . . . that [palm]print was the defendant's . . . ." He continued, "there's always two sides to every story . . . . but if that other side is a clearly unreasonable version of the events, then it's your job as jurors to reject that . . . . [T]hat's part of the beyond-a-reasonable-doubt analysis that you do in this case." "Context is everything. You consider all of the evidence, not just some of it . . . ." "Bottom line, . . . I've provided you with all the information that you need to feel the abiding conviction of the truth of these charges. I have provided the information for you to make that decision" and "to follow

through with your promise to not hesitate to convict once the case has been proven to you beyond a reasonable doubt. This idea of this presumption of innocence is over. Mr. Ford had a fair trial. . . . He's not presumed innocent anymore."

At this point, Ford's counsel objected that the prosecutor "misstate[d] the law." After a sidebar, the judge overruled the objection, reasoning that the prosecutors' comments were "the final comment in the context of argument. [The jury has] been reminded continuously that they're not to form or express any opinions until after they deliberate with their fellow jurors, so I don't think there's any particular harm in that and that this was the final argument, closing argument." So the prosecutor continued with his closing rebuttal argument before the jury: "And so we're past that point. We're at the point now where you go back, look at the information that you have before you . . . . and you should feel comfortable with your decision. . . . And the evidence before you, when you take all of that information together, is that the defendant is guilty of murder."

Following the closing arguments and before releasing the jury to deliberate, the trial court provided the jury with instructions that again reiterated Ford's presumptive innocence. By the time the jury went into deliberations, it had repeatedly received instructions from the trial court, the prosecutor, and Ford's counsel reiterating Ford's presumption of innocence.

After deliberating, the jury returned with a verdict of first-degree murder. *Ford*, 999 F.3d at 1217. The jury could not reach a verdict on some charged enhancements, which, as Judge Nelson pointed out in his original dissent, was consistent with the jury's willingness to hold the government to its burden of proof. *Ford v. Peery*, 976 F.3d 1032, 1049 (9th Cir. 2020) (R. Nelson, J., dissenting), *opinion*

withdrawn and superseded on reh'g, 999 F.3d 1214 (9th Cir. 2021).

Ford appealed to the California Court of Appeal, arguing that the prosecutor's comments regarding the presumption of innocence made at the tail end of the closing rebuttal argument constituted reversable misconduct. *Ford*, 2014 WL 4446166, at *6. In evaluating this argument, the Court of Appeal surveyed several state cases that came to different conclusions as to whether comments in contexts like this constituted misstatements of law. *Id.* at *6–7. Ultimately, however, the Court of Appeal determined that "[w]e need not resolve any conflict between [the state cases] because we conclude any assumed error is harmless under either the state ([*People v. Watson*, 299 P.2d 243 (Cal. 1956)]) or federal constitutional standard (*see* [*Chapman v. California* 386 U.S. 18, 24 (1967)])." *Id.* at *8. Any assumed error was harmless, it reasoned, because: (a) "[t]he [trial] court instructed the jury Ford was presumed innocent until the contrary was proven beyond a reasonable doubt and to disregard any conflicting statements made by the attorneys concerning the law"; (b) "the prosecutor repeatedly reminded the jury of his burden to establish guilt beyond a reasonable doubt;" and (c) "the evidence of Ford's guilt was strong." *Id.* As the California Court of Appeal observed, "[t]he jury was properly informed about the prosecution's burden." *Id.*

The California Supreme Court denied Ford's petition for review, and the California courts and the federal district court all denied his habeas petitions. *Ford*, 999 F.3d at 1223. The federal district court also certified three questions for appeal—none of which, notably, included Ford's claim that the prosecutor's presumption-of-innocence comments violated due process under *Darden v. Wainwright*, 477 U.S.

168 (1986).[3] The district court thereby concluded that Ford failed to make "a substantial showing of the denial of a constitutional right" on this claim. 28 U.S.C. § 2253(c)(2).

In a split opinion with Judge Nelson dissenting, the panel majority granted a certificate of appealability on Ford's *Darden* claim and granted habeas relief on that claim. *Ford*, 976 F.3d at 1041, 1045. There is no need to belabor the errors in its original opinion since the majority has withdrawn and superseded it with the new opinion. To summarize though, the majority: (a) manufactured its own de novo review by ignoring the California Court of Appeal's reliance on a harmlessness test identical to how our own court has applied *Darden*, while simultaneously emphasizing irrelevant omissions from the California Court of Appeal's analysis, (b) engaged in the same prejudice analysis as the California Court of Appeal—but just reached the opposite conclusions on essentially every part of the analysis; and (c) purported to apply AEDPA deference only at the tail end of its opinion, while actually just reincorporating its prior de novo analysis. The majority held that the prosecutor's presumption-of-innocence remarks violated due process under *Darden*. *Id.* at 1044. Judge Nelson wrote a compelling dissent, explaining how the

[3] In *Darden*, a petitioner argued "that the prosecution's closing argument . . . rendered his conviction fundamentally unfair." 477 U.S. at 178. The Supreme Court acknowledged that the prosecutor's comments "undoubtedly were improper," but determined that "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 180 (citation and internal quotation marks omitted). The Supreme Court then evaluated several factors—including the context surrounding the prosecutor's remarks, the trial court's instructions, and the weight of the evidence—and ultimately concluded that the trial was not fundamentally unfair. *Id.* at 182–83.

majority misapplied AEDPA deference and inappropriately evaluated the prosecutor's remarks out of context. *Id.* at 1045–55 (R. Nelson, J., dissenting). After the panel issued its opinions, the government petitioned for panel rehearing or rehearing en banc.

* * *

Up to this point, things had progressed in relatively typical fashion for our court: a panel majority had published an opinion blatantly defying the deference required by AEDPA, the state government petitioned for en banc review, and various off-panel judges had the opportunity to weigh in. But in a surprising and initially welcome turn of events, the panel majority took the unusual step of reversing course, withdrawing its original opinion, and issuing a new, superseding opinion that denied habeas relief.

The welcome surprise, however, was short-lived. As in its now-vacated opinion, the majority began its analysis by correctly describing the issue as whether the prosecutor's presumption of innocence comments constituted "misconduct in violation of due process under *Darden*." *Compare Ford*, 999 F.3d at 1224, *with Ford*, 976 F.3d at 1041. It also acknowledged that prosecutorial misconduct "rises to the level of *Darden* error only if there is a reasonable probability that it rendered the trial fundamentally unfair." *Ford*, 999 F.3d at 1224 (citation omitted). The majority further correctly observed that, because the California Court of Appeal assumed without deciding that the prosecutor misstated the law, there was no state-court decision to defer to on that point—which, of course, was not particularly relevant, given that the majority had just acknowledged that the key inquiry for a *Darden* claim is whether any misstatements actually prejudiced the defendant.

After laying the appropriate prejudice-focused foundation for a proper *Darden* analysis, the majority then diverted to an odd and lengthy dicta discussion. Despite the California Court of Appeal's explicit assumption that the prosecutor *did* misstate the law, and despite *Darden*'s primary focus on the prejudicial effect from any alleged misconduct (and not the misconduct itself), the majority concluded that "even *if* there were a state-court decision holding that the prosecutor did not misstate the law, we would conclude that such a holding would have been unreasonable." *Id.* (emphasis added). But no one contended (or now contends) that the state court did anything other than what it did, which was to simply assume that the prosecutor's presumption-of-innocence remarks constituted misstatements of law so it could address the heart of the *Darden* inquiry: prejudice. And no party urged the majority to stray from the actual issues presented in the case and make up its own hypothetical state court record to create its own faux controversy.

After informing the world what it *would* conclude if presented with a legal question *not actually present in this case*, the majority engaged in an AEDPA-like analysis by purporting to evaluate the reasonableness of its made-up state court decision. *Id.* at 1224–25. It launched into this "analysis" by quoting a single statement from the prosecutor's lengthy closing remarks, with that sole statement forming the entire factual basis for the majority's analysis of the made-up issue. *See id.* at 1224. Nowhere does the majority mention the trial court's repeated admonitions to the jury to refrain from forming any opinions until deliberations, or the trial court's several instructions regarding the presumption of innocence. Nor does the majority mention any part of the context immediately surrounding the prosecutor's remarks, or both counsels'

emphasis throughout their closing arguments on the prosecution's beyond-a-reasonable-doubt burden.

After plucking one statement out of the prosecutor's entire closing arguments, the majority cited several Supreme Court cases that discuss the general importance of the presumption of innocence. *Id.* at 1225. Later, in language meant to resemble the AEDPA standard, the majority concluded that the prosecutor's presumption-of-innocence remarks "were misstatements of clearly established law as articulated by the Supreme Court." *Id.* at 1227. But the Supreme Court cases cited by the majority in its presumption-of-innocence analysis have nothing to do with a prosecutor's remarks in the context of closing arguments.[4] So the Supreme Court cases cited by the majority can't "squarely address the issue in the case or establish a legal principle that clearly extends to [this] context." *Moses v. Payne*, 555 F.3d 742, 754 (9th Cir. 2009) (cleaned up). And, perhaps most fundamentally, the majority simply ignored constitutionally imposed judicial restraints that limit our review to *actual* controversies.

After concluding this bizarre and gratuitous frolic, the majority jumped back to its *Darden* analysis by acknowledging that "[a] violation of due process under *Darden* requires more than a prosecutorial misstatement." *Ford*, 999 F.3d at 1225. In contrast to its prior opinion, the majority now correctly concluded that California's "*Watson* standard is indistinguishable from the *Darden* 'reasonable

[4] *Id.* at 1224–25 (citing *Betterman v. Montana*, 136 S. Ct. 1609, 1612, 1618 (2016); *Delo v. Lashley*, 507 U.S. 272, 278 (1993) (per curiam); *Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Reed v. Ross*, 468 U.S. 1, 4–5 (1984); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

probability' standard." *Id.* Because the California Court of Appeal applied *Watson* in concluding that the prosecutor's remarks were harmless, the majority "therefore conclude[d] that the Court of Appeal applied the functional equivalent of the *Darden* harmlessness test in holding that the prosecutor's statement was harmless." *Id.* And because the majority was "required to give deference to the decision of the Court of Appeal that the prosecutor's misstatements were harmless under the *Darden* standard," the majority held that "a reasonable jurist could have concluded that there was no reasonable probability that, in the absence of the prosecutor's statements that the presumption of innocence was 'over,' the jury would have reached a different conclusion." *Id.* at 1226.

Judge Nelson continued to dissent in part, explaining that the majority's "reversal on rehearing[] is only half noble." *Id.* at 1227 (R. Nelson, J., dissenting in part and concurring in the judgment). Judge Nelson observed that the majority reached its conclusion regarding the prosecutor's comments under a "make-believe, hypothetical de novo review," and that "[i]n context, the comments do not rise to the level of prosecutorial misconduct." *Id.* at 1228, 1229. "The prosecutor made numerous statements supporting the more reasonable interpretation (still largely ignored by the majority on rehearing)" that the presumption of innocence still applied, but the prosecutor had just successfully rebutted it. *Id.* at 1230. And "[t]he surrounding context of the prosecutor's statements also explains the trial court's decision to overrule defense counsel's objection to the contested statements." *Id.* at 1231. "In short, no reasonable juror would interpret the prosecutor's statements, in context, consistent with the majority's isolated gloss." *Id.* And "[e]ven assuming the prosecutor's statements viewed in context rose to the level of a misstatement of clearly

established Supreme Court precedent," Judge Nelson concluded, "the statements are harmless under any standard." *Id.* He therefore concurred in the judgment but "disagree[d] with the decision to grant the COA and much of the majority's convoluted reasoning." *Id.* at 1233.

II.

The majority's misstatement-of-law dicta misconstrues the *Darden* inquiry, is substantively wrong, misapplies AEDPA deference, and inappropriately predicates its conclusion on a made-up state-court decision. Given the dicta's utter irrelevancy to the prejudice-focused *Darden* analysis or the record before it, the majority's insistence on its inclusion in its revised opinion suggests that the dicta is not really meant for this case. Its refusal to remove the dicta evinces a more sinister motivation: after being forced to withdraw its original, deeply flawed opinion, the panel majority is seeking to wring some drop of lemonade from what it now perceives to be a lemon of a case by squeezing a completely advisory rule into its revised opinion. In doing so, the majority is trying to lay the groundwork for future AEDPA cases by proffering dicta that it hopes will simply be accepted as binding by future parties and panels of our court.

This would not be such a problem were it not for our circuit's hopelessly vague binding dicta rule. The panel majority's maneuvering here highlights the potential for abuse of this rule: panels of our court can sneak utterly irrelevant and erroneous dicta into published opinions, with little threat of challenge (or even close review) given its minimal impact on *that* case's outcome, yet potentially create new law in our circuit. This case presents a particularly egregious and completely indefensible example of the rule's potential abuse and therefore warranted our en

banc court's further scrutiny and clarification of the rule's limits.

A. *The Majority Misconstrues The Darden Analysis And Misapplies AEDPA—Again—In Its Hypothetical Dicta.*

First, the majority's misstatement-of-law analysis is obvious dicta in light of the state court's *assumption* that the prosecutor here *did* misstate the law. When evaluating a *Darden* claim, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181. The Supreme Court in *Darden* merely asserted without explanation that the prosecutors' remarks in that case were unlawful, *id.* at 180 ("These comments undoubtedly were improper."), and then spent all its analysis on the comments' prejudicial effects. *Id.* at 180–82 (citation omitted). Thus, especially under AEDPA, "the *Darden* standard is a very general one, leaving courts more leeway . . . in reaching outcomes in case-by-case determinations." *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (per curiam) (citation and internal quotation marks omitted); *see also Rowland v. Chappell*, 876 F.3d 1174, 1189 (9th Cir. 2017).

Indeed, given the "[t]he highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden*," the Supreme Court has expressly castigated a sister circuit for imposing an "elaborate, multistep test" on state courts when conducting a *Darden* analysis on AEDPA review. *Parker*, 567 U.S. at 49. Because *Darden* focuses primarily on the prejudicial effect of alleged prosecutorial misconduct, here the majority's misstatement-of-law analysis in its revised opinion is "clearly unnecessary to its resolution of the case, does not affect its outcome in any

manner, . . . constitutes an advisory opinion" and is "entirely dicta." *Spears v. Stewart*, 283 F.3d 992, 998–99 (9th Cir. 2002) (Reinhardt, J., joined by Hawkins, Thomas, and Paez, JJ., and joined in part by, *inter alios*, W. Fletcher, J., dissenting from denial of rehearing en banc). It is especially ironic that the author of the majority opinion here, Judge Fletcher, previously agreed that when faced with such clearly unnecessary dicta, "the panel could and should have avoided the highly controversial question it unnecessarily reached out for and purported to decide." *Id.* at 999. One wonders: does Judge Fletcher now disagree with his earlier self, or is something other than a principled position about dicta driving his conflicting positions in these cases? Given his dicta's utter irrelevancy to this case's outcome, the only reason that the panel majority would insist on its inclusion is to hopefully bind future panels with its new rule under our court's binding dicta rule. More on that later.

Second, the majority's misstatement-of-law dicta is wrong for the reasons well-explained by Judge Nelson's dissent. *Ford*, 999 F.3d at 1227–33 (R. Nelson, J., dissenting in part and concurring in judgment). When appropriately evaluated in context—context that the majority studiously ignores—the prosecutor's presumption-of-innocence remarks did not rise to the level of misconduct. The Supreme Court has repeatedly made clear that context is critically important when evaluating a prosecutor's statements. *See Boyde v. California*, 494 U.S. 370, 385 (1990) ("[T]he arguments of counsel . . . must be judged in the context in which they are made."); *Darden*, 477 U.S. at 179 ("It is helpful as an initial matter to place these remarks [in the prosecution's closing argument] in context."). In context, the prosecutor's presumption-of-innocence remarks don't mean what they could mean in isolation. Here, the context surrounding the prosecutor's

statements shows that the prosecutor was informing the jury that he had met his beyond-a-reasonable-doubt burden, and that a reasonable juror would have perceived the comments (again, in context) as such. The statements' surrounding context, combined with the trial court's and the prosecutor's repeated references to the government's high burden, reveal that the prosecutor's statements did not impinge on Ford's presumption of innocence, much less contradict or unreasonably apply any clearly established law on the issue.

Third, the majority's conclusion that a hypothetical state court decision would fail even under AEDPA's deferential standard renders its dicta especially problematic. The majority purports to conduct an AEDPA analysis by concluding that its hypothetical state court decision would have been "unreasonable" (as opposed to simply erroneous) and that the prosecutor's presumption-of-innocence remarks were "misstatements of clearly established law as articulated by the Supreme Court," *Ford*, 999 F.3d at 1224, 1227; *cf.* 28 U.S.C. § 2254(d)(1). But as discussed, the Supreme Court in *Darden* merely asserted without explanation that the challenged statements "undoubtedly were improper," and spent all of the Court's analysis in that case on the statements' prejudicial effect. 477 U.S. at 180–82. And none of the presumption-of-innocence cases cited by the majority concern the propriety of a prosecutor's remarks made in the context of a closing argument. *See supra* n.4 and accompanying text. Because these cases do "not squarely address the issue in [this] case or establish a legal principle that clearly extends to a new context . . . , it cannot be said, under AEDPA, there is clearly established Supreme Court precedent addressing the issue before us, and so we must defer to the state court's decision." *Robertson v. Pichon*, 849 F.3d 1173, 1182 (9th Cir. 2017) (cleaned up) (citation omitted). Given the lack of clearly established law

as to the propriety of a prosecutor's remarks in this context, even the majority's hypothetical state court decision would not actually "unreasonably" apply any clearly established law. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam) ("Because our cases give no clear answer to the question presented, let alone one in [the petitioner]'s favor, it cannot be said that the state court unreasonably applied clearly established Federal law." (cleaned up) (citation omitted)). In short, the majority reaches out to opine on a completely hypothetical issue subject to full AEDPA deference—and then refuses to actually give the appropriate deference in its advisory analysis.

Fourth, the majority's erroneous AEDPA application *to its own hypothetical* reveals the depth of the sickness that afflicts our court when it comes to our habeas jurisprudence. Not satisfied with merely defying AEDPA's strict parameters (which our court habitually does), the majority now brushes aside the inconvenient constitutional boundaries of Article III to make up its own imaginary controversy on which to misapply AEDPA deference. *Cf. Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us."); *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) ("[T]he Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional case or controversy, that the issues presented are definite and concrete, not hypothetical or abstract." (citation and internal quotation marks omitted)). No one disputes that the state court assumed that the prosecutor misstated the law in this case. And no party was so audacious as to request an advisory opinion from us on the majority's hypothetical. There is simply no controversy on which we should opine with

respect to the hypothetical that the majority raises sua sponte in its new opinion. *See id.*

Given the majority's plucking of the prosecutor's remarks out of context, misapplication of AEDPA deference, and frolicking beyond the constitutional parameters of our jurisdiction, to say that the majority's misstatement-of-law analysis is fraught with error is an understatement. It's also utterly irrelevant dicta under the *Darden* analysis, yet the majority refused to remove it. The inevitable question is: Why? Why was the majority so insistent on including an irrelevant and erroneous discussion in its opinion?

B. *The Majority's Dicta Illuminates Our Binding Dicta Rule's Potential For Abuse.*

The probable answer lies, unfortunately, in our court's binding dicta rule. Under this rule, our court views "well-reasoned" dicta as binding. *See Li*, 738 F.3d at 1165 n.2.[5]

[5] As support for the proposition that "[w]ell-reasoned dicta is the law of the circuit," *id.*, *Li* cites to Judge Kozinski's separate, plurality opinion in *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir.2001) (en banc) (per curiam) (Kozinski, J., concurring, joined in relevant part by Trott, T.G. Nelson, and Silverman, JJ.). *Li*, 738 F.3d at 1165 n.2. But only three other judges out of the 11-judge en banc court joined the portion of Judge Kozinski's *Johnson* plurality opinion discussing well-reasoned dicta. *See Johnson*, 256 F.3d at 914; *see also Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 796 (9th Cir. 2012) (Tashima, J., concurring). Four years after *Johnson*, however, an en banc panel majority in *Barapind v. Enomoto*, 400 F.3d 744, 750–51 (9th Cir. 2005) (en banc) (per curiam), determined that when an issue "was . . . presented for review" and the panel "addressed the issue and decided it in an opinion joined in relevant part by a majority of the panel," then the panel's "articulation of [the issue] became law of the circuit, regardless of whether it was in some technical sense 'necessary' to our disposition

Specifically, "[w]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *McAdory*, 935 F.3d at 843 (opinion of Hawkins, J., joined by W. Fletcher and Bennett, JJ.) (quoting *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004)). "[B]ut we are not bound by a prior panel's comments made casually and without analysis, uttered in passing without due consideration of the alternatives, or done as a prelude to another legal issue that commands the panel's full attention." *McAdory*, 935 F.3d at 843 (citation omitted) (cleaned up). "[T]he only *dicta* by which we are bound is well-reasoned *dicta*." *Alcoa, Inc.*, 698 F.3d at 796 (citation and internal quotations omitted).[6]

Our binding dicta rule, while no doubt well-intentioned, has serious difficulties. The rule was originally established with the salutary goal of preventing judges from casting aside binding precedent just by labeling it as "dicta." *Cf. Spears*, 283 F.3d at 1006 ("But it is quite a different matter to suggest, as do Judges Reinhardt and Tashima, that the

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of the case." *Barapind*, 400 F.3d at 750–51. A three-judge panel has subsequently relied on *Johnson* and *Barapind* in determining that reasoned considerations of issues "germane to the eventual resolution of the case" are binding. *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019).

[6] Although Judge Tashima stated this rule in his concurrence, he wrote separately to note that he also "concur[red] in Judge Bea's interpretation of *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186–87 (9th Cir. 2003), that the only *dicta* by which we are bound is well-reasoned dicta." *Alcoa, Inc.*, 698 F.3d at 796 (citation and internal quotation marks omitted)).

work product of a panel of this court can simply be disregarded because a later panel finds a way to call it 'dicta' or 'advisory' or some similar invective."); *Johnson*, 256 F.3d at 915 ("If later panels could dismiss the work product of earlier panels quite so easily, much of our circuit law would be put in doubt.").

The first difficulty with our binding dicta rule is that, while the problem it seeks to address is real, it doesn't actually prevent judges so inclined from simply ignoring precedent by recharacterizing it as merely "dicta." *See, e.g.*, *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 698 (9th Cir. 2021) (VanDyke, J., dissenting from the denial of rehearing en banc) (recounting a panel majority's bare assertion that binding precedent was "dicta" so it could ignore inconvenient precedent). Moreover, since the binding dicta rule's inception, several judges on our court have raised legitimate concerns about its scope—and specifically, its tension with Article III.[7]

[7] *See Barapind*, 400 F.3d at 759 (9th Cir. 2005) (Rymer, J., joined by Kleinfeld, Tallman, Rawlinson, and Callahan, JJ., concurring in the judgment in part and dissenting in part) (arguing that "[i]t is one thing for a court of last resort to announce that whatever it says in a published opinion is binding. . . . It is another for an intermediate court such as ours to make every reasoned discussion in a published opinion binding whether it is necessary or not," and raising further concerns about the rule's tension with Article III); *see also Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 745–46 (9th Cir. 2016) (Kleinfeld, J., concurring) (arguing that Part I of the majority's opinion in that case "is a prime example of what Judge Rymer, in her dissent in *Barapind*, called overwriting invited by the *Barapind* majority opinion. The Constitution gives us authority to decide only 'Cases and Controversies.' The federal courts do not have authority to issue advisory opinions. Yet that is what Part I is." (citation omitted)); *Irons v. Carey*, 506 F.3d 951, 952 (9th Cir. 2007) (Kleinfeld, J., joined by Bea, J., dissenting from denial of

And well-intentioned as it may be, the rule creates confusion: it is unclear what qualifies as "well-reasoned," and even the articulation of the rule itself has changed over time. *Compare Spears*, 283 F.3d at 1006 ("[S]o long as the issue is presented in the case and expressly addressed in the opinion, that holding is binding and cannot be overlooked or ignored by later panels of this court or by other courts of the circuit."), *with McAdory*, 935 F.3d at 843 ("Even if [an issue] was not before us in that case, our conclusion with respect to [that issue] is the very type of 'well-reasoned dicta' by which we are bound."). This is because the rule carries with it a healthy dose of an in-the-eye-of-the-beholder quality. For example, when Judge Fletcher (the author of the majority opinion here) did not like the substance of dicta in another published opinion, he joined the parts of a dissental in which Judge Reinhardt argued that a panel's advisory declarations were "wholly improper dicta" that were "clearly unnecessary to its resolution of the case." *Spears*, 283 F.3d at 998–99 (Reinhardt, J., joined by Hawkins, Thomas, and Paez, JJ., and joined in part by, *inter alios*, W. Fletcher, J., dissenting from denial of rehearing en banc). But in the majority opinion here, Judge Fletcher includes the very type of "clearly unnecessary" statements he previously objected to. *See id.* And in another opinion, Judge Fletcher agreed that, pursuant to the binding dicta rule, dicta from another case was dispositive in his panel's case—even though a conviction under the statutory provision at issue in his panel's case was not before the panel in the prior case. *See McAdory*, 935 F.3d at 843–44. Our judges' variable treatment of "dicta" demonstrates that the binding dicta

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rehearing en banc) ("The traditional view, which we seem to have rejected in *Barapind*, is that since we are empowered only to decide cases, not to legislate, only those principles necessary to the decision are binding law of the circuit.").

rule's inherent malleability invites inconsistent application and can be used as a tool to drive results-oriented outcomes.

The evolution of the majority's irrelevant and erroneous dicta in this case especially illuminates the rule's potential for abuse. When called out for its egregious defiance of AEDPA deference in its original opinion, the majority was forced to retreat from its original position. Not content to simply retreat, the majority decided to try to take a hostage or two on the way. Its new opinion denied habeas relief but baked in clearly unnecessary dicta, in an apparent attempt to create a new rule for future AEDPA cases regarding the propriety of a prosecutor's presumption-of-innocence remarks. To be sure, the rule should not apply given the dicta's obvious lack of "reasoned consideration," *McAdory*, 935 F.3d at 843, but the majority buffered it with just enough faux analysis to allow a future sympathetic panel to seize and use it as dispositive to its own AEDPA case. And because the majority slipped in this dicta while now ultimately denying habeas relief, it could safely bet that no one would object—least of all the government, which was now the prevailing party. But in a future case where this issue is actually presented, a panel that is sympathetic to this panel majority's dicta here could simply rely on that dicta as "binding," and not have to provide its own well-reasoned defense of the rule it applies. The law should not be made this way, but the majority's insistence on its dicta's inclusion in its new opinion illuminates that the binding dicta rule creates the possibility for exactly that type of judicial mischief.

III.

All of this could have easily been avoided if the majority had voluntarily removed its dicta during the first en banc proceedings. *See Marino v. Ocwen Loan Servicing LLC*,

978 F.3d 669, 679 (9th Cir. 2020) (Bea, J., concurring) ("[R]ather than foment claims and arguments as to whether the majority's dicta gave reasoned consideration to an issue, or whether the posited hypothetical was germane to eventual resolution of *this* case, it would be better to edit out that hypothetical." (internal quotation marks omitted)). The panel majority's refusal to do so is powerful evidence that it wanted to promote an advisory "rule" that it hoped would nonetheless somehow be deemed binding in the future. If panel majorities won't discipline themselves, our court as a whole should encourage them to do so. It would foster respect for our court and allow the Supreme Court to focus on business more important than cleaning up our unforced errors. *See Circuit Scorecard*, SCOTUSBLOG, https://www.scotusblog.com/statistics/ (last visited Aug. 4, 2021) (showing our court was reversed 15 out of 16 times in the October 2020 term, three times more than any other circuit).