No. 19-8614

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD LEON FIELDS, JR., PETITIONER

v.

UNITED STATES OF AMERICA
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim, raised for the first time on collateral review, that the prosecutor's paraphrasing of a story from the Book of Daniel misled the jury about its role in the capital-sentencing process, in violation of the Eighth Amendment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Okla.):

United States v. Fields, No. 03-cr-73 (Nov. 15, 2005)

Fields v. United States, No. 10-cv-115 (Dec. 15, 2016)

United States Court of Appeals (10th Cir.):

United States v. Fields, No. 05-7128 (Feb. 25, 2008)

United States v. Fields, No. 17-7031 (Dec. 30, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C24) is reported at 949 F.3d 1240. The opinion and order of the district court (Pet. App. A1-A53) is not published in the Federal Supplement but is available at 2017 WL 1030713.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2019. On March 19, 2020, this Court extended the time to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment. The petition

for a writ of certiorari was filed on May 28, 2020. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted of two counts of first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 7(3), 13, and 1111(a) and (b); two counts of using and carrying a firearm during and in relation to the commission of first-degree murder, in violation of 18 U.S.C. 7(3), 13, 924(c), (d) and (j); one count of robbery with a firearm within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 7(3) and 13; and one count of burglary of an automobile within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 7(3) and 13. Pet. App. C2. Following a capital sentencing hearing, the jury unanimously recommended a capital sentence on each of the first-degree murder counts, and the district court imposed that sentence for each of those counts. Id. at C2-C3. The court of appeals affirmed, and this Court denied review. See 516 F.3d 923 (10th Cir. 2008), cert. denied, 556 U.S. 1167 (2009). The district court then denied petitioner's motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Pet. App. C3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Ibid.

1. On July 10, 2003, petitioner murdered Charles and Shirley Chick at the Winding Stair Campground in the Ouachita National Forest in Oklahoma. 516 F.3d at 927. Petitioner "potentially began planning the Chicks' murder two days before the offense, when he first saw them" at the campsite. Id. at 941 (citation omitted). On the evening of the murder, petitioner drove to the campsite, taking with him a "covering for head and body made to resemble underbrush" (which petitioner called "his sniper suit") and "a camouflaged and powerfully scoped rifle." Id. at 927. When he arrived, he located the Chicks on a vista some distance from their campsite. Ibid. He then retrieved his rifle, donned his "sniper suit," hid near the campsite, and waited for the Chicks to return. Ibid.

After the Chicks returned and sat together at a table, petitioner "waited and watched them for about twenty minutes." 516 F.3d at 927. He then shot Charles Chick in the face. Ibid. Shirley Chick got up and began to flee, but petitioner hindered her escape by shooting her in the foot. Ibid. After he caught up to her, he shot her twice in the head. Ibid.; see Pet. App. A23. He then returned to the table and shot Charles Chick in the head. 516 F.3d at 927. The Chicks died from their head wounds. Ibid. Petitioner took money from Charles Chick's pocket and Shirley Chick's purse, and also stole various personal items from their van. Pet. App. A24.

2. In August 2003, a grand jury in the Eastern District of Oklahoma indicted petitioner on two counts of first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 7(3), 13, and 1111(a) and (b); two counts of using and carrying a firearm during and in relation to the commission of first-degree murder, in violation of 18 U.S.C. 7(3), 13, 924(c), (d) and (j); one count of robbery with a firearm within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 7(3) and 13; and one count of burglary of an automobile within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 7(3) and 13. Pet. App. C2. In June 2005, petitioner pleaded guilty on all counts. Ibid.

In July 2005, the district court held a capital sentencing hearing in accordance with the Federal Death Penalty Act of 1994, 18 U.S.C. 3591 et seq. Pet. App. C2. At the conclusion of the hearing, toward the end of the government's rebuttal argument, the prosecutor made the following statement:

> Thousands of years ago the king of the world's greatest then existent civilization and most powerful empire held a great feast for thousands of his ruling friends. They ate, they drank from golden and silver goblets that they had stolen from the temple of a subdued and now enslaved nation. They drank wine and they worshiped pagan idols. All of a sudden the fingers of a hand began to write on the palace wall. The king saw the hand and was so frightened, he was so scared, that his clothing literally came loose. He became white. He shook. His knees banged together. He cried out: Bring the astrologers, bring the wise men of the nation. Whoever interprets this saying on the wall will become the third most powerful member of my government. He will have great riches.

> The wise men came in. They studied, they deliberated, they conversed, they conferred and they thought. But they couldn't read much less interpret the writing on the wall. The king's face turned ashen. The queen, though, remembered a forgotten man. She called for him after talking to the king. And the king made the man the same offer. The man, though, he turned down all of the riches, all the honor and all of the prestige. The man bravely interpreted the writing on the wall. And the writing on the wall said in three words, your kingdom has come to an end, your kingdom will be divided and given to your neighboring enemies, and then the prophet said the writing said you have been weighed in the balance and found wanting. Sure enough, that night the king was killed. His kingdom was separated among his neighboring enemies.
>
> The Defendant weighed his options on July 10, 2003. Under the Court's instructions and the law given by the Court, the Defendant should be, as it were, weighed in the balance and found wanting.

5 C.A. App. 133-134; see Pet. App. C20. The story described in the prosecutor's statement largely mirrors a story in the Book of Daniel. See Daniel 5:1-30. Petitioner's counsel did not object to the prosecutor's statement. Pet. App. C20.

In order to establish petitioner's eligibility for a capital sentence under the Federal Death Penalty Act, the government was required to prove beyond a reasonable doubt both (1) petitioner's homicidal intent and (2) at least one aggravating factor specified in the statute. See 18 U.S.C. 3591(a)(2), 3593(e); Jones v. United States, 527 U.S. 373, 376-377 (1999). The jury found both the requisite homicidal intent, see Pet. App. C2, and two statutory aggravating factors: petitioner had "committed the offense after substantial planning and premeditation to cause the death of a person" and had "intentionally killed or attempted to kill more

than one person in a single criminal episode," 18 U.S.C. 3592(c)(9) and (16); see Pet. App. C2.

Having found petitioner eligible for a capital sentence, the jury was required to consider whether the aggravating factors sufficiently outweighed the mitigating factors to justify that sentence. See 18 U.S.C. 3593(e); Jones, 527 U.S. at 377. The jury could consider an aggravating factor if it unanimously found that the government had established it beyond a reasonable doubt, and a mitigating factor if any one juror found that the defendant had established it by a preponderance of the evidence. See 18 U.S.C. 3593(c)-(d); Jones, 527 U.S. at 377. The jury accordingly considered the two statutory aggravating factors described above, four additional non-statutory aggravating factors established by the government, and 17 mitigating factors established by petitioner. Pet. App. C2-C3. The jury unanimously found that the aggravating factors sufficiently outweighed the mitigating factors to justify a sentence of death. Id. at C3.

In accordance with the jury's recommendation, the district court imposed a capital sentence. Pet. App. C3. On appeal, petitioner did not raise any claim relating to the prosecutor's statement described above. The court of appeals affirmed, and this Court denied certiorari. See 516 F.3d 923 (10th Cir. 2008), cert. denied, 556 U.S. 1167 (2009).

3. The district court denied petitioner's subsequent motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence.

Pet. App. A1-A53. As relevant here, the court rejected petitioner's claim, raised for the first time on collateral review, that the prosecutor had committed misconduct during closing argument by using the "writing on the wall" story. Id. at A45-A48. In addition to contesting the claim on the merits, the government had invoked the procedural bar applicable to claims not raised on direct review, which petitioner had sought to overcome by asserting that the failure to raise the argument was due to ineffective assistance of counsel. Id. at A35-A36. Noting the overlap between the merits of the underlying issue and the assertion that counsel was ineffective for filing to raise it, the court "focus[ed] on the merits." Id. at A36.

The district court explained that relief was warranted only if "the remarks prejudiced [petitioner's] chances of receiving life without the possibility of parole instead of the death penalty." Pet. App. A47. The court found that the prosecutor's statement did not satisfy that standard and that appellate counsel therefore was "not ineffective for failing to raise these issues on appeal." Id. at A48. The court observed that "the argument was not delivered in biblical style" and that "[t]he prosecutor did not argue that God or any other religious authority justified the death penalty in this case." Id. at A47. The court explained that the prosecutor instead related the story "to emphasize the defendant knew what could happen to him when he decided his course of action on July 10, 2003 and it was now up to the jury to impose

the appropriate sentence based upon the court's instructions, which included a balancing (i.e., weighing) of the aggravating and mitigating factors." Ibid.

The district court disagreed with petitioner's contention that the prosecutor's remarks in this case resembled remarks that the Ninth Circuit had deemed improper and prejudicial in Sandoval v. Calderon, 241 F.3d 765 (2000), cert. denied, 534 U.S. 847, and 534 U.S. 943 (2001). Pet. App. A46-A47. The court observed that the prosecutor in Sandoval had told the jury that they were "doing what God says" by imposing the death penalty; had cast the jury in the role of "an avenging minister of God" responsible for "bring[ing] wrath upon those who, like Sandoval, practice evil"; and had delivered his remarks in an "unmistakably Biblical" style. Id. at A46-A47 (quoting Sandoval, 241 F.3d at 778-779). The court found the remarks in this case "clearly distinguishable" from those in Sandoval. Id. at A47. The court also noted that, whereas the jury in Sandoval had "deliberated over three days before advising 'it was hopelessly deadlocked,' only to later return to court with a unanimous verdict," the jury in this case "rendered their sentencing verdict in less than four hours." Ibid. (citation omitted).

4. The court of appeals granted a certificate of appealability and affirmed in part and reversed in part. Pet. App. C1-C24.

On the claim at issue here, the court of appeals rejected petitioner's contention that the prosecutor engaged in misconduct by relating the "writing on the wall" story during closing statements and that trial counsel had been constitutionally ineffective for not objecting. Pet. App. C19-C23. The court noted that petitioner "relie[d] heavily" on the Ninth Circuit's decision in Sandoval, and it identified "at least three important differences" between the remarks here and those in Sandoval. Id. at C21-C22.

First, the court of appeals observed that, unlike the prosecutor in Sandoval, the prosecutor here "did not effectively 'urge the jury to decide the matter based upon factors other than those it was instructed to consider.'" Pet. App. C22 (quoting Sandoval, 241 F.3d at 776) (brackets omitted). The court emphasized that, to the contrary, the prosecutor in this case "concluded his argument by stating: 'Under the Court's instructions and the law given by the Court, [petitioner] should be, as it were, weighed in the balance and found wanting.'" Ibid. (citation omitted). And the court explained that, "[b]y expressly referring to the law and instructions given by the trial court, the prosecutor seems to have been suggesting to the jury only that it should weigh the aggravating factors against the mitigating circumstances * * * and ultimately find that [petitioner] should be sentenced to death." Ibid.

Second, the court of appeals emphasized that "there was no reference by the prosecutor in [petitioner's] case to any 'higher law,'" as there had been in Sandoval. Pet. App. C22. And third, the court explained that "the arguments by the prosecutor in [petitioner's] case did not seek to 'undercut the jury's own sense of responsibility for imposing the death penalty'" or "seek to 'delegate the ultimate responsibility for imposing a sentence to divine authority.'" Id. at C22-C23 (quoting Sandoval, 241 F.3d at 777) (brackets and ellipsis omitted).

The court of appeals further determined that this case was "also distinguishable from Sandoval in terms of prejudice." Pet. App. C23. The court explained that "even assuming that the prosecutor's arguments in [petitioner's] case were improper, it is clear to us that, unlike the situation in Sandoval, they did not prejudice [petitioner's] 'chances of receiving life without possibility of parole instead of the death penalty.'" Ibid. (quoting Sandoval, 241 F.3d at 778). The court noted that, unlike the prosecutor in Sandoval, the prosecutor here "did not, by way of his challenged arguments, 'cloak the State with God's authority,' nor did he 'invoke divine authority to direct the jury's verdict.'" Ibid. (quoting Sandoval, 241 F.3d at 779) (brackets and ellipsis omitted). The court also explained that, "unlike the situation in Sandoval, the evidence presented at [petitioner's] sentencing proceeding 'overwhelmingly supported the

jury's verdict,' and the jury quickly reached a unanimous verdict." Ibid. (quoting Sandoval, 241 F.3d at 779).

The court of appeals accordingly determined that "the prosecutor's arguments, though perhaps misguided, were ultimately harmless." Pet. App. C23. The court also found that petitioner "was not prejudiced by his trial counsel's failure to object to the arguments." Ibid.

Although the court of appeals affirmed the district court's judgment on the claim at issue here, it reversed the district court's judgment on a separate claim, namely, that petitioner's counsel had been ineffective for failing to investigate and present at trial an expert's opinion that petitioner may have suffered from brain damage. Pet. App. C4-C13. The court of appeals concluded that the district court should have conducted an evidentiary hearing before addressing that failure-to-investigate claim, and it remanded the case for such a hearing. Id. at C13. The court of appeals also stated that, if the district court "ultimately denies that claim of ineffective assistance following an evidentiary hearing, it will in turn have to reconsider [petitioner's] claim of cumulative error." Id. at C23. The court of appeals noted that any such analysis of cumulative error "will have to include * * * the claim directly challenging the allegedly improper remark made by the prosecutor during closing argument, since [the court of appeals] resolved that claim on the basis of harmlessness." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 6-16) that the prosecutor's statements during closing argument violate his constitutional rights under the Eighth Amendment. The petition for a writ of certiorari is interlocutory, and petitioner procedurally defaulted the claim on which he seeks this Court's review. In any event, the court of appeals correctly rejected petitioner's claim, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. Under this Court's ordinary practice, the interlocutory posture of a case "alone furnishe[s] sufficient ground for the denial of the application." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to the district court "is not yet ripe for review by this Court"); see also, e.g., Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari); Mount Soledad Mem'l Ass'n v. Trunk, 567 U.S. 944, 944 (2012) (statement of Alito, J., respecting the denial of the petitions for writs of certiorari). That approach promotes judicial efficiency, because the proceedings on remand may render the issues presented in a petition moot. That approach also enables issues raised at different stages of lower-court proceedings to be consolidated in

a single petition for a writ of certiorari after all lower-court proceedings conclude. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.").

Departing from this Court's ordinary practice of denying interlocutory petitions would be particularly unwarranted here. The court of appeals reversed the district court's judgment in part and remanded the case so that the district court could hold an evidentiary hearing on a separate ineffective-assistance-of-counsel claim and could revisit petitioner's claim of cumulative error. See Pet. App. C23. If the lower courts grant relief on the ineffective-assistance claim, petitioner will be entitled to a new sentencing hearing, mooting any claim of error at the closing statements of his original one. In the event that he does not obtain such relief, the court of appeals has specifically instructed the district court to consider the prosecutor's remarks as part of its analysis of cumulative error. See ibid. The further proceedings in the lower courts will thus substantially affect any consideration of the issue on which petitioner seeks a writ of certiorari. After those proceedings, petitioner will be able to assert his current contentions to the extent remain relevant, together with any additional claims that arise on remand, in a single petition. See Garvey, 532 U.S. at 508 n.1.

2. Even putting aside the interlocutory posture, further review is independently unwarranted because the claim on which petitioner seeks this Court's review is procedurally barred. As a general rule, if a criminal defendant has defaulted a claim "by failing to raise it on direct review," the claim may not "be raised in habeas." Bousley v. United States, 523 U.S. 614, 622 (1998). In this case, petitioner neither objected to the prosecutor's remarks in the trial court nor challenged those remarks on direct appeal. See Gov't C.A. Br. 64-70, 78-79. Although the court of appeals did not directly address procedural default in the decision below, the government invoked that doctrine in both the district court and the court of appeals and may reassert it here. 9 C.A. App. 725-726; Gov't C.A. Br. 64-70, 78-79; see Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 38 (1989) ("[A] prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.'") (citation omitted).

In order to overcome the procedural bar applicable to claims not raised on direct review, petitioner must either (1) demonstrate "'cause' and actual 'prejudice'" or (2) show "that he is 'actually innocent.'" Bousley, 523 U.S. at 622 (citations omitted); see Murray v. Carrier, 477 U.S. 478, 488 (1986). Petitioner has sought to establish cause and prejudice by asserting that his failure to raise the claim was due to ineffective assistance of counsel. But

he has not proved ineffective assistance, which requires him to demonstrate both constitutionally inadequate performance and a reasonable probability that it affected the jury's verdict. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The court of appeals determined that trial counsel's failure to object to the prosecutor's remarks did not amount to ineffective assistance, see Pet. App. C23; the district court determined that appellate counsel's failure to challenge the prosecutor's remarks similarly did not amount to ineffective assistance, see id. at A48; and petitioner has not challenged those determinations here. Petitioner also has not argued that he is actually innocent of the crimes for which he was convicted; nor could he, given that he pleaded guilty. Petitioner thus cannot establish any basis for overcoming the procedural default.

3. The need to consider petitioner's prosecutorial-misconduct claim through the lens of ineffective assistance renders this case an unsuitable vehicle for reviewing that claim on the merits. In any event, the court of appeals correctly rejected the claim.

A defendant may establish that a prosecutor's comments violated his constitutional rights in one of two ways: (1) showing that the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process," Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974), and (2) showing that "the prosecutor's remarks so prejudiced a specific right, such as the

privilege against compulsory self-incrimination, as to amount to a denial of that right," ibid. This Court's decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), illustrates the latter type of violation. In Caldwell, the Court explained that the Eighth Amendment prohibits "rest[ing] 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." Id. at 328-329. The Court concluded that a prosecutor had violated that right by telling the jury during the penalty phase that its verdict was "'not the final decision'" and was "'automatically reviewable,'" thereby encouraging "the sentencing jury [to] shift its sense of responsibility to an appellate court." Id. at 325-326, 330.

In this case, the court of appeals correctly recognized that the prosecutor's telling of the "writing on the wall" story did not warrant relief Caldwell. Unlike in Caldwell, the prosecutor in petitioner's case did not "minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell, 472 U.S. at 341. To the contrary, the court found that the prosecutor "did not seek to 'undercut the jury's own sense of responsibility for imposing the death penalty'" and that "the prosecutor's arguments * * * did not seek to 'delegate the ultimate responsibility for imposing a sentence to divine authority.'" Pet. App. C22-C23 (brackets, citation, and ellipsis omitted). "Rather," the court emphasized, "the prosecutor

expressly asked the jury at the conclusion of his argument to follow the trial court's instructions, conduct the required weighing of aggravating and mitigating factors, and find the death sentence to be appropriate for the two murder convictions." Id. at C23.

Even if petitioner could establish a constitutional violation, the "finding of constitutional error [would] not end the inquiry." Sandoval v. Calderon, 241 F.3d 765, 778 (9th Cir. 2000), cert. denied, 534 U.S. 847, at 534 U.S. 943 (2001). To obtain relief on collateral review under the harmless-error rule, petitioner was required to make the further showing that "the prosecutor's improper argument 'had a substantial and injurious effect or influence in determining the jury's verdict'" -- i.e., that the prosecutor's remarks "prejudiced [his] chances of receiving life without possibility of parole instead of the death penalty." Ibid. (quoting Brecht v. Abrahmson, 507 U.S. 619, 623 (1993)) (brackets and internal quotation marks omitted); see United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004). The court of appeals correctly determined that, "even assuming that the prosecutor's arguments in [petitioner's] case were improper, it is clear" that "they did not prejudice [petitioner's] 'chances of receiving life without possibility of parole instead of the death penalty.'" Pet. App. C23 (quoting Sandoval, 241 F.3d at 778). As the court observed, "the prosecutor did not, by way of his challenged arguments, 'cloak the State with God's

authority,' nor did he 'invoke divine authority to direct the jury's verdict.'" Ibid. (brackets, citation, and ellipsis omitted). Underscoring the harmlessness of any error, "the evidence presented at [petitioner's] sentencing proceeding 'overwhelmingly supported the jury's verdict,' and the jury quickly reached a unanimous verdict." Ibid. (citation omitted).

4. Petitioner's contrary arguments lack merit. First, petitioner errs in contending (Pet. 6) that the court of appeals "ignor[ed]" the "distinction between claims that a prosecutor's improper remarks violated the right to due process generally," which are analyzed under a fundamental-fairness standard, and those like Caldwell or this case "alleging that the misconduct undermined a specific constitutional guarantee." Contrary to petitioner's suggestion, the court expressly recognized that it was addressing a claim under the "Eighth Amendment." Pet. App. C21 (citation omitted). The court also contrasted the case at hand with the Ninth Circuit's decision in Sandoval, which it recognized involved a claim that a prosecutor's comments had "violate[d] the Eighth Amendment." Ibid. (quoting Sandoval, 241 F.3d at 776). And the court made the substantive Eighth Amendment determination at issue under Caldwell, asking whether the prosecutor's comments "undercut the jury's own sense of responsibility for imposing the death penalty," and determining that they did not. Id. at C22 (brackets and citation omitted).

Petitioner's assertion (Pet. 6) that the court of appeals instead erred by applying the general due-process "fundamental fairness" standard appears to be premised on the court's further determination, after finding that the prosecutor's comments in this case did not undercut the jury's sense of responsibility, that the prosecutor's comments were "harmless in light of the overall evidence presented * * * and the length of the jury's deliberations." But that portion of the court's analysis simply reflects its application of the harmless-error rule applicable on collateral review, not its application of the due-process fundamental-fairness standard. The court began that portion of its analysis by quoting from Sandoval's application of the harmless-error rule. Pet. App. C23 (quoting Sandoval, 241 F.3d at 778). And the court ended that portion of its analysis with the statement that "the prosecutor's arguments * * * were ultimately harmless." Ibid. Nowhere in that (or any other) portion of the opinion did the court refer to due process or fundamental fairness.

Second, petitioner errs in suggesting (Pet. 16) that the harmless-error rule does not apply "to instances of prosecutorial conduct in capital sentencing proceedings." The Court in Caldwell recognized that relief was warranted there only "[b]ecause we cannot say that this effort had no effect on the sentencing decision." 472 U.S. at 341. The Court's foundational decision on harmless error, Chapman v. California, 386 U.S. 18 (1967), involved improper comments in a capital case. Id. at 19-24. And the Court

has since repeatedly applied the harmless-error rule in capital cases. See, e.g., Jones v. United States, 527 U.S. 373, 402 (1999); Arizona v. Fulminante, 499 U.S. 279, 301-302, 309-312 (1991); Clemons v. Mississippi, 494 U.S. 738, 752-754 (1990); Satterwhite v. Texas, 486 U.S. 249, 257-258 (1988).

Third, petitioner's disagreement with the lower courts' factual findings and their application of the Caldwell standard to the circumstances of this case does not warrant this Court's review. Petitioner asserts, for example, that the prosecutor "recounted the story in a Biblical style," Pet. 13, even though the district court found that "the argument was not delivered in biblical style," Pet. App. A47 (emphasis added). Petitioner also describes the prosecutor's argument as an "invocation of divine authority to direct a jury's verdict," Pet. 13 (citation omitted), even though the court of appeals explained that the prosecutor "did not * * * 'invoke divine authority to direct the jury's verdict,'" Pet. App. C23 (brackets, citation, and ellipsis omitted; emphasis added). Petitioner's factbound contentions do not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); see also Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in

Johnston] has been applied with particular rigor when the district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

5. Finally, petitioner errs in contending that this Court's review is needed because the Sixth, Eighth, and Tenth Circuits have all "abandon[ed]" the "distinct standards of review in the capital sentencing context" set out in Donnelly (for due-process challenges) and Caldwell (for Eighth Amendment challenges). Pet. 8, 10 (capitalization and emphasis omitted); see Pet. 8-11. In fact, each of those circuits has recognized the importance of that distinction. See, e.g., Strouth v. Colson, 680 F.3d 596, 606 (6th Cir. 2012) ("Prosecutorial misconduct not linked to a constitutional guarantee violates the Due Process Clause only if it renders the defendant's trial fundamentally unfair.") (emphasis added), cert. denied, 571 U.S. 829 (2013); Paxton v. Ward, 199 F.3d 1197, 1217 (10th Cir. 1999) ("[T]his court has drawn an important distinction between an ordinary claim of prosecutorial misconduct * * * and a claim that the misconduct effectively deprived the defendant of a specific constitutional right"); Miller v. Lockhart, 65 F.3d 676, 683 (8th Cir. 1995) (distinguishing between an "Eighth Amendment claim" under Caldwell and "due-process" claims under Donnelly).

The cases that petitioner cites (Pet. 9-11) do not support his contention that the Sixth, Eighth, and Tenth Circuits have

abandoned that doctrinal distinction. In Cuesta-Rodriguez v. Carpenter, 916 F.3d 885 (2019), cert. denied, 140 S. Ct. 844 (2020), the Tenth Circuit specifically noted the "distin[ction]" between "fundamental-fairness analysis" under Donnelly and application of "'specific guarantees of the Bill of Rights'" in accordance with Caldwell. Id. at 913 (citation omitted). In Weaver v. Bowersox, 438 F.3d 832, cert. denied, 549 U.S. 1098 (2006), the Eighth Circuit considered five categories of challenged statements, some of which implicated the Eighth Amendment and some of which did not. See id. at 840. The court recited the due-process standard at the outset and applied that standard to several claims, id. at 840-841, but it also determined that one category of statements improperly "diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment under Caldwell," id. at 840 (citation omitted). Finally, in Beuke v. Houk, 537 F.3d 618 (2008), cert. denied, 557 U.S. 906 (2009), the defendant argued that "the prosecutor's closing argument during the penalty phase violated his due process rights," and the Sixth Circuit properly applied the Donnelly due-process standard. Id. at 646.

Even if petitioner could show that some circuits have applied Donnelly and Caldwell inconsistently, such intra-circuit conflicts would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). And in any event, whatever other circuits might have done in other cases, petitioner

has failed to establish that the court of appeals has committed any error in this case. Nor has he shown that the decision below conflicts with the decision of any other court of appeals. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2020