NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY KIRKLAND, Petitioner,

vs.

STATE OF OHIO, Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: EXECUTION DATE IS SEPTEMBER 18, 2024)

Timothy F. Sweeney (OH 0040027)*
MEMBER OF THE BAR OF THIS COURT
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
Phone: (216) 241-5003
Email: tim@timsweeneylaw.com
*COUNSEL OF RECORD

Andrew P. Avellano (OH 0062907)
MEMBER OF THE BAR OF THIS COURT
Attorney at Law
4200 Regent Street, Suite 200
Columbus, Ohio 43219
Phone: (614) 237-8050
Email: drewavo@wowway.com

Counsel for Petitioner Anthony Kirkland

CAPITAL CASE:
EXECUTION DATE IS SEPTEMBER 18, 2024

QUESTIONS PRESENTED

I.

Is a capital sentence invalid, and imposed in violation of the capital defendant's constitutional rights, when during the final closing argument advocating for a sentence of death the prosecutor leads the jury to believe, without objection by defense counsel or correction by the trial judge, that the judge has already decided the defendant should be sentenced to death for his crimes and will, in fact, impose a death sentence, if the jurors follow their oaths and return a verdict of death?

II.

Is a capital defendant's right to the effective assistance of appellate counsel prejudicially denied, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, when his appointed appellate counsel fails to raise in the direct appeal the obvious claims of prosecutorial misconduct and ineffective trial counsel arising from the prosecutor's representation to the jury in the final closing argument that the trial judge has already decided the defendant should be sentenced to death for his crimes and will, in fact, impose a death sentence, if the jurors follow their oaths and return a verdict of death?

DIRECTLY RELATED CASES

1. *State v. Kirkland*, Case No. 2018-1265 (Supreme Court of Ohio), judgment entered August 18, 2020, reconsideration denied Oct. 13, 2020, & application to reopen the direct appeal denied March 16, 2021

2. *Kirkland v. Ohio*, Case No. 20-7462 (United States Supreme Court), cert. denied May 17, 2021

3. *State v. Kirkland*, Case No. 2010-0854 (Supreme Court of Ohio), judgment entered May 13, 2014 & reconsideration denied Sept. 24, 2014 & remanding for new mitigation and sentencing hearing May 4, 2016

4. *Kirkland v. Ohio*, Case No. 14-7726 (United States Supreme Court), cert. denied April 6, 2015

5. *State v. Kirkland*, Case No. C-1200565 (Court of Appeals of Ohio, First Appellate District), post-conviction appeal, pending and stayed

6. *State v. Kirkland*, Case No. C-100277 (Court of Appeals of Ohio, First Appellate District), appeal dismissed on November 24, 2010

7. *State v. Kirkland*, Case No. B-0901629 (Ohio Ct. of Common Pleas, Hamilton County), judgment of original death sentence entered on March 31, 2010 & current death sentence entered on August 28/29, 2018

8. *State v. Kirkland*, Case No. B-0904028 (Ohio Ct. of Common Pleas, Hamilton County), judgment of sentence in related case entered on March 31, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Kirkland respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio, of March 16, 2021, in *State v. Kirkland*, 2021-Ohio-717, 161 Ohio St. 3d 1473, 164 N.E.3d 476 (2021).

OPINIONS BELOW

The judgment of the Supreme Court of Ohio for which Petitioner seeks a writ of certiorari is reported at *State v. Kirkland*, 2021-Ohio-717, 161 Ohio St. 3d 1473, 164 N.E.3d 476 (2021). (*Appx*-0001.)

This Court's denial of certiorari of May 17, 2021, as to review of the Ohio Supreme Court's August 18, 2020, decision on direct appeal is reported at *Kirkland v. Ohio*, 2021 U.S. LEXIS 2425, 209 L. Ed. 2d 763 (2021). (*Appx*-0054.)

The Supreme Court of Ohio's opinion and judgment on direct appeal, issued on August 18, 2020, is reported at *State v. Kirkland*, 2020-Ohio-4079, 160 Ohio St. 3d 389 (2020). (*Appx*-0004.) The Supreme Court of Ohio's order of October 13, 2020, denying Petitioner's timely motion for reconsideration is reported at *State v. Kirkland*, 2020-Ohio-4811, 154 N.E.3d 109 (2020). (*Appx*-0053.)

The order of the Supreme Court of Ohio of May 4, 2016, remanding the case to the trial court for a new mitigation and sentencing hearing, is reported at *State v. Kirkland*, 2016-Ohio-2807, 145 Ohio St. 3d 1455, 49 N.E.3d 318 (2016). (*Appx*-0109.) The order of the Supreme Court of Ohio of November 9, 2016, denying reconsideration of the order of remand, is reported at *State v. Kirkland*, 2016-Ohio-7681, 147 Ohio St. 3d 1440, 63 N.E.3d 158 (2016). (*Appx*-0110.)

This Court's denial of certiorari of April 6, 2015, as to review of the Ohio Supreme Court's May 13, 2014 decision, is reported at *Kirkland v. Ohio*, 575 U.S. 952, 135 S. Ct. 1735, 191 L. Ed. 2d 705 (2015). (*Appx*-0108.)

The earlier opinion of the Supreme Court of Ohio of May 13, 2014, which affirmed the convictions and the initial death sentence, is reported at *State v. Kirkland*, 2014-Ohio-1966, 140 Ohio St. 3d 73, 15 N.E.3d 818 (2014). (*Appx*-0055.) The order of the Supreme Court of Ohio of September 24, 2014, denying reconsideration, is reported at *State v. Kirkland*, 2014-Ohio-4160, 140 Ohio St. 3d 1442, 16 N.E.3d 684 (2014). (*Appx*-0107.)

The trial court's current sentencing opinion of August 28/29, 2018, and related judgment, in which that court—on remand and after a new mitigation and sentencing hearing in July/August 2018—sentenced Petitioner to death, are unreported. (*Appx*-0111 to -0130.)

The trial court's initial sentencing opinion of March 31, 2010, and related judgment, in which that court sentenced Petitioner to death, are unreported. (*Appx*-0131 to -0150.)

JURISDICTION

The Supreme Court of Ohio issued its judgment denying the application to reopen the direct appeal on March 16, 2021. (*Appx*-0001.) This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, which provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment, which provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, which provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 11.06 of the Rules of Practice of the Supreme Court of Ohio, which provides for reopening a direct appeal in a capital case to raise claims that appellate counsel was ineffective in the appeal, is in the Appendix at *Appx*-0151.

STATEMENT OF THE CASE

A. The first trial in 2010.

Petitioner was found guilty by a jury in Hamilton County, Ohio in 2010 of the aggravated murders of two teenagers, Esme K. (in 2009) and Casonya C. (in 2006), as well as, for each victim, capital specifications of aggravating circumstances; this required Petitioner's case to proceed to the penalty phase for a determination of whether his sentence would be life or death.

The pertinent aggravating circumstances were: (1) that Petitioner committed both aggravated murders while committing or attempting rape and/or aggravated robbery, and (2) that both aggravated murders were part of a course of conduct involving the purposeful killing of two or more people. That "course of conduct" specification was based on the purposeful killings of Esme K. and Casonya C. plus that of two other women, in or about 2006 and 2008, respectively: Mary Jo Newton and Kimya Rolinson. Petitioner pleaded guilty to those two murders on the first morning of his trial, and the trial thus proceeded before a jury on the two capitally-charged aggravated murders of Esme K. and Casonya C.

During the penalty phase in 2010, Petitioner presented evidence of remorse by way of his confessions to the murders, his suffering a personality disorder, and his extensive abuse during childhood by a sadistic and alcoholic father. The trial court summarized: "The defendant's biological father . . . was alcohol dependent and extremely violent toward the defendant and his mother. In addition to physically abusing the defendant, the defendant was forced to watch his father beat and rape

the defendant's mother." (2010 Sentencing Opinion at 7 (*Appx*-0143).)

The jury returned a verdict for the death sentence. The trial court imposed that sentence. (*Id.* at 8-14 (*Appx*-0144 to -0150).)

B. The first appeal to the Supreme Court of Ohio.

Petitioner appealed to the Supreme Court of Ohio, where he raised several issues. Among these were claims that the prosecutor had engaged in multiple instances of misconduct during the penalty-phase closing argument.

The Supreme Court of Ohio agreed, concluding that the prosecutor:

(1) improperly argued that a sentence less than death is meaningless and would not hold Petitioner accountable for the two victims' deaths when Petitioner had already received life sentences for Newton and Rolinson's murders;

(2) improperly speculated about the victims' objective experiences during the crimes;

(3) made arguments based on "facts" that were not in the record; and

(4) improperly and repeatedly argued that the nature and circumstances of the murders themselves were aggravating circumstances, and asked the jury to weigh those against the mitigation.

State v. Kirkland (Kirkland I), 2014-Ohio-1966, ¶¶ 78-96, 140 Ohio St. 3d 73, 83-87 (2014). (*Appx*-0069 to -0075.)

The court also found that the prosecutor's closing argument prejudicially affected Petitioner's substantial rights: "In sum, we find that the state's closing remarks in the penalty phase were improper and substantially prejudicial." *Kirkland I*, 2014-Ohio-1966, ¶ 96, 140 Ohio St. 3d at 87. (*Appx*-0075.)

Nonetheless, the court declined to remand the case for a new sentencing

hearing because it determined that its own "independent evaluation of the capital sentence" would itself be capable of "cur[ing] errors in penalty-phase proceedings." *Kirkland I*, 2014-Ohio-1966, ¶97, 140 Ohio St. 3d at 87. (*Appx*-0075.) Upon conducting that evaluation, in which the court did "not consider the state's improper argument," *id.,* 2014-Ohio-1966, ¶ 98, the court affirmed Petitioner's death sentence. *Id.*, 2014-Ohio-1966, ¶¶ 141-66, 140 Ohio St. 3d at 95-98. (*Appx*-0086 to -0091.)

There were three dissents; all three believed the case should be remanded for a new sentencing proceeding. Two of the dissenting justices believed the prosecutorial misconduct mandated a new sentencing proceeding; they believed the new penalty phase was necessary to "preserve the unique role of the jury in capital cases," *id.* at ¶ 194 (Lanzinger, J., dissenting), and to avoid "undermin[ing] the very foundation of the jury system in Ohio." *Id.* at ¶ 199 (O'Neill, J., dissenting). (*Appx*-0101, -0103.)

C. After *Hurst*, the Supreme Court of Ohio ordered a new sentencing phase.

On January 12, 2016, this Court issued its opinion in *Hurst v. Florida*, 577 U.S. 92 (2016). There, the Court made clear that the Sixth Amendment requires that a capital defendant's death sentence must be based on a jury verdict, not a judge's factfinding. *Id.* at 102 ("The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding.").

Relying upon *Hurst*, Petitioner filed in the Supreme Court of Ohio on March 3, 2016, a motion for order or relief, in which he asked that court to vacate his death sentence and remand the matter to the trial court for a new sentencing trial.

On May 4, 2016, the Supreme Court of Ohio issued an order granting Petitioner's motion and remanded the case to the trial court "for new mitigation and sentencing hearing." *State v. Kirkland*, 2016-Ohio-2807, 145 Ohio St. 3d 1455 (2016). (*Appx*-0109.) The State sought reconsideration, but that was denied on November 9, 2016. *State v. Kirkland*, 2016-Ohio-7681, 147 Ohio St. 3d 1440 (2016). (*Appx*-0110.)

D. The second penalty phase in 2018: Prosecutorial misconduct occurred again.

After pretrial proceedings and a change in counsel, the new penalty-phase trial began on July 23, 2018, in the Hamilton County Court of Common Pleas; it was conducted over the next two weeks.

Petitioner again presented evidence of remorse and of the extensive abuse he suffered during childhood by his sadistic and alcoholic father. He also presented testimony from a psychiatrist with expertise in diagnostic brain imaging technology, Dr. Joseph Wu. Dr. Wu testified that Petitioner had been suffering with traumatic brain injuries for many years and at all times relevant to the murders. This was demonstrated using three different types of brain scanning technology and was corroborated by Petitioner's medical and mental health records, and his long history of diagnosed Axis I mental illnesses, including bipolar disorder.

Petitioner also presented testimony from a second expert—a psychologist, Dr. Patti van Eys—that Petitioner suffers with the serious mental illness of post-traumatic distress disorder, with dissociation. (Transcript of Trial 2 ("T2") at 1353, 1406-57.) Dr. van Eys described how Petitioner's serious mental illnesses have impacted his life and behavior, including his involvement in these crimes. (T2 at

1406-58.) She opined that, because of his severe mental illness, Petitioner was not able to conform his conduct to the requirements of the law. (T2 at 1354, 1450-58.)

As in the first trial, the prosecutor *again* engaged in multiple acts of egregious misconduct, which included:

- The prosecutor wrongfully used the pretrial competency report of Dr. James Hawkins for the improper purposes of intentionally misleading the jury, presenting false "evidence," and unfairly denigrating the testimony and opinions of Petitioner's expert Dr. van Eys. (T2 at 1460-61, 1475-77, 1536.)

- The prosecutor misled the jury in closing argument about the abuse Petitioner had suffered as a child and young teen at the hands of his abusive and alcoholic father. (T2 at 1535-36, 1570-82.)

- The prosecutor repeated in closing argument some of the same acts of misconduct which the Supreme Court of Ohio had found he committed during Petitioner's first trial in 2010, including referencing alleged subjective experiences of victims, relying on facts outside the record, and/or arguing the nature and circumstances of the murders as aggravating circumstances. (T2 at 1522, 1582-86.)

- The prosecutor misrepresented the jury's sentencing decision as not being a subjective decision. (T2 at 1574 ("And it is not subjective. It is not subjective.") (*Appx*-0155).)

But, worst of all, the elected prosecutor engaged in unconscionable misconduct in the final closing argument—the last presentation to the jury by either party—by unambiguously leading the jury to believe that the trial judge has already decided the defendant should be sentenced to death for his crimes and will, in fact, impose a death sentence, if the jurors follow their oaths and return a verdict of death:

> The Judge will instruct you on that. All we want you to do is what Judge Dinkelacker tells you to do. That is all we want you to do. And it is not subjective. It is not subjective. It is as Mark [the asst. prosecutor] said,

> it is the weighing process. You decide what happened in these cases versus the mitigation presented to you. That's all you do.
>
> And if you feel and you are sure that aggravation even to the slightest extent outweighs the mitigation, you need to tell the Judge you have returned a death verdict and we ask every single one of you, would you be able to be the 12th juror to sign that verdict form. And every one of you said, yes, I could do that.
>
> I was listening to Defense Attorney's close, and he said Kirkland never had a chance. You know who didn't have a chance? These four girls right here that you see in front of you. They didn't have a chance. He had every chance in the world.
>
> Mark laid out the whole weighing thing. We just want you to follow your oath. That's all we want. It is very simple, go back, the Judge will tell you you will select a foreman or forelady and decide at that point if the aggravation outweighs the mitigation. That's all you have to do. And if you are certain of it, you must do it. ***And I want to be very candid with you about something. If you do, Judge Dinkelacker is going to sentence him likewise. That's going to happen***.

(T2 at 1574-75 (emphasis supplied) (*Appx*-0155 to -0156).) There were no objections to these statements, and the trial judge did not interject to refute or correct the prosecutor's statements or provide any curative instruction.

The prosecutor then briefly summarized the aggravation and mitigation. He ended the final closing argument by belittling the mitigation case and telling the jury that the entire defense strategy was to find one juror who will not follow their oath. He then urged the jurors to do their jobs just as the police, the prosecutor, *and the judge* had done theirs, thereby ending by referencing back to his previous assurance, only minutes earlier, that the judge agrees death is the appropriate sentence and will impose it if the jurors do their jobs:

> You know, if we had an actual scale here to weigh aggravation versus mitigation, the aggravating side would be so heavy, it would drive

> through three floors of granite through this courtroom right now. That's how heavy it would be compared to that mitigation, that mitigation is a joke. It is almost insulting. I know they are doing their best, trust me. I get it. They are good lawyers. They are doing all they can do. But it is a joke. [A defense objection is overruled].
>
> The entire strategy here is to find one Juror who won't follow their oath. One. That's what they want.
>
> You all swore to follow your oath, all of you. You can end this now. The police did their job. We did our job. The Judge has done his. Now do yours. And tell the Judge the aggravation clearly outweighs the mitigation.
>
> Thank you.

(T2 at 1587-88 (*Appx*-0168 to -0169).)

Minutes later, the trial court's instructions to the jury emphasized the importance of the closing arguments in determining the sentence: "Although the arguments of counsel are not evidence in this case, the law permits you to consider the arguments of counsel to the extent they are relevant to the sentence that should be imposed upon Anthony Kirkland." (T2 at 1598.)

E. The second penalty phase trial resulted in a death sentence.

The jury returned a verdict for the death sentence. As the prosecutor had promised the jury, the trial court did, indeed, impose that same sentence. (2018 Sentencing Judgment and Opinion (*Appx*-0111 to -0130).)

F. The second appeal to the Supreme Court of Ohio.

Petitioner again appealed to Supreme Court of Ohio. He raised eleven propositions of law, including one proposition which addressed three discrete instances of prosecutorial misconduct during the State's closing argument. *State v.*

Kirkland (Kirkland II), 2020-Ohio-4079, ¶¶ 115-121, 160 Ohio St. 3d 389, 410-12, 157 N.E.3d 716, 740-41. (*Appx*-0032 to -0035.) However, that proposition did *not* include most of the instances of prosecutorial misconduct described above and did not include the elected prosecutor's reprehensible misconduct in representing to the jury that the trial judge also agrees a death sentence is the appropriate punishment for Petitioner's crimes and will, in fact, impose a death sentence if the jurors follow their oaths and return a verdict of death.

The court rejected all propositions of law and affirmed the death sentence. *Kirkland II*, 2020-Ohio-4079, 160 Ohio St. 3d 389. (*Appx*-0004 to -0052.) After rehearing was denied on October 13, 2020 (*Appx*-0053), Petitioner sought certiorari from this Court on March 17, 2021. The Court denied certiorari on May 17, 2021. *Kirkland v. Ohio*, 2021 U.S. LEXIS 2425, 209 L. Ed. 2d 763 (2021). (*Appx*-0054.)

G. The application to reopen the direct appeal.

Meanwhile, on November 30, 2020, the Supreme Court of Ohio appointed the undersigned counsel to represent the indigent Petitioner for purposes of filing, under S.Ct.Prac.R. 11.06 (*Appx*-0151), an application to reopen the direct appeal to assert claims of ineffective assistance of appellate counsel which occurred in the direct

appeal.[1]

On January 8, 2021, Petitioner timely filed his application to reopen, with a supporting affidavit, as per S.Ct.Prac.R. 11.06. (*See* Application to Reopen; Affidavit in Support.) The State filed its opposition on February 3, 2021.

Among the claims of ineffective assistance of appellate counsel which were raised by Petitioner in his Application, he alleged in Proposition Nos. 1 and 2 that his appellate counsel were deficient under federal constitutional standards in failing to raise "numerous meritorious issues of prosecutorial misconduct." This included the elected prosecutor's egregious misconduct—in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and/or *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)—in leading the jury to believe, during the final closing argument, that the trial judge has already decided the defendant should be sentenced to death for his crimes and will, in fact, impose a death sentence, if the jurors follow their oaths and return a verdict of death: **"I want to be very candid with you about something." "Judge Dinkelacker is going to sentence him likewise." "That's going to happen."** (Application to Reopen at pp. 2-3, 7-9 (quoting T2 at 1574-75 (*Appx*-0155 to -0156)); Affidavit in Support at pp. 14-16.)

He also claimed in Proposition Nos. 1 and 3 that his appellate counsel were

[1] Under the Rule, an application to reopen in a capital case is due in the Supreme Court of Ohio "within ninety days from the issuance of the mandate of the Supreme Court, unless the appellant shows good cause for filing at a later time." S.Ct.Prac.R. 11.06(A) (*Appx*-0151). The mandate for Petitioner's direct appeal was issued on October 13, 2020. As such, by rule, his Application to Reopen was due on or before January 9, 2021.

ineffective under federal constitutional standards by failing to raise in the direct appeal the prejudicially ineffective performance of *trial counsel* for failing to identify and object during trial to the many instance of prosecutorial misconduct as alleged in Proposition No. 2, including the prosecutor's misconduct in leading the jury to believe, during the final closing argument, that the trial judge has already decided the defendant should be sentenced to death for his crimes and will, in fact, impose a death sentence, if the jurors follow their oaths and return a verdict of death. (Application to Reopen at pp. 2-3, 9-11; Affidavit in Support at p. 17.)

On March 16, 2021, the Supreme Court of Ohio denied the application to reopen in a two-sentence order: "This cause came on for further consideration upon the filing of appellant's application for reopening under S.Ct.Prac.R. 11.06. It is ordered by the court that the motion is denied." (*Appx*-0001.)

There were two dissents. Justice Michael Donnelly would have granted reopening on several issues including appellate counsel's failure to raise the prosecutor's misconduct and the ineffective performance of trial counsel. (*Appx*-0002 to -0003.) Justice Jennifer Brunner would have granted reopening on the failure to raise the prosecutor's misconduct. (*Appx*-0002 to -0003.)

REASONS FOR GRANTING THE WRIT

I. Petitioner's death sentence is invalid, and was imposed in violation of his constitutional rights, when Petitioner's sentencing jury was led to believe by the prosecutor during his final closing argument advocating for a death sentence—without objection by defense counsel or correction by the trial judge—that the trial judge has already decided Petitioner should be sentenced to death for his crimes and will, in fact, impose a death sentence, if the jurors follow their oaths and return a verdict of death.

A. Due Process and Eighth Amendment principles are squarely applicable to the prosecutor's prejudicially improper remarks.

The prosecutor has a special duty and functions as the government's representative, "whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). A capital defendant is entitled to a determination of his sentence in a proceeding that is free of prosecutorial misconduct which renders the proceeding fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

Improper arguments or remarks by a prosecutor can, at some point, "so infect the trial with unfairness" as to make the resulting conviction or death sentence a denial of due process. *Id.* at 643. *See also Sawyer v. Smith*, 497 U.S. 227, 243 (1990) (the rule of *Donnelly* protects any capital defendant "who [can] show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair. It was always open to this petitioner to challenge the prosecutor's remarks at his sentencing proceeding, by making the showing required by *Donnelly*."); *Romano v. Oklahoma*,

512 U.S. 1, 12 (1994) ("It is settled that [the Due Process] Clause applies to the sentencing phase of capital trials.").

Capital cases also require additional protection because of the critical importance, under the Eighth Amendment, that any capital sentence is "humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). The jury must be permitted to render a reasoned, individualized sentencing determination, one which satisfies "the principle that punishment should be directly related to the personal culpability of the criminal defendant,"[2] has duly considered the "compassionate or mitigating factors stemming from the diverse frailties of humankind,"[3] and is attentive to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[4] These protections are a "*constitutionally indispensable* part of the process of inflicting the penalty of death." *Eddings*, 455 U.S. at 112 (quoting *Woodson*, 428 U.S. at 304). *See also Kansas v. Marsh*, 548 U.S. 163, 174 (2006); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

---

[2] *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

[3] *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality).

[4] *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Therefore, in addition to the *due process protection* in capital cases against a prosecutor's improper arguments or remarks, *the Eighth Amendment* also prohibits certain prosecutorial arguments or remarks which undermine the constitutionally required need in such cases for reliable, jury-determined, individualized sentencing, by creating an "unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously.'" *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring) (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)).

In *Caldwell*, the Court held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer who has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere. *Caldwell*, 472 U.S. at 328-329; *id.* at 342 (opinion of O'Connor, J.). The Court there determined that false information of that type might produce "substantial unreliability as well as bias in favor of death sentences." *Id.* at 330. "*Caldwell* prohibits the prosecution from misleading the jury regarding the role it plays in the sentencing decision." *Romano*, 512 U.S. at 8 (1994); *see also Darden v. Wainwright*, 477 U.S. 168, 184, n. 15 (1986) ("*Caldwell* is relevant only to certain types of comment -- those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.").

Caldwell provides "an additional measure of protection against error, beyond that afforded by *Donnelly*, in the special context of capital sentencing." *Sawyer*, 497 U.S. at 244. Its concern is with "the 'unacceptable risk' that misleading remarks could

affect the reliability of the sentence." *Id.* at 244 (quoting *Caldwell*, 472 U.S. at 343 (opinion of O'Connor, J.)). "The *Caldwell* rule was designed as an enhancement of the accuracy of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings." *Sawyer*, 497 U.S. at 244.

B. The prosecutor's remarks denied Petitioner due process under *Donnelly* and violated his Eighth Amendment rights under *Caldwell*. The death sentence imposed in these circumstances is unreliable, infected with bias, and must be set aside.

The prosecutor's improper argument in the final closing argument, and trial counsel's failure to object, resulted in *both* the denial of due process which rendered Petitioner's sentencing proceeding fundamentally unfair *and* misled the jury as to its role in the sentencing process in a way which allowed the jury to feel less responsible than it should for its capital sentencing decision. As a result, there was substantial unreliability, as well as bias in favor of a death sentence, injected at a critical point in Petitioner's case and without correction, retraction, clarification, or curative instruction of any kind. Even *had* a correction of some sort occurred here, *Caldwell* nevertheless holds that general remarks to the effect that the jury bears responsibility for the sentencing decision are not sufficient to cure the prejudice caused by improper prosecutorial arguments aimed at diminishing the jury's sense of responsibility. *Caldwell*, 472 U.S. at 340 and n.7.

The prosecutor's audacious comments—leading the jury to believe that the trial judge, like the prosecutor, has already decided that death is appropriate for Petitioner's crimes and will, in fact, impose that sentence—are as bad as, if not worse,

than anything encountered in *Caldwell*, *Donnelly*, or any other in this Court's line of due process and Eighth Amendment jurisprudence. The prosecutor, in effect, led the jury to believe the judge was a thirteenth "juror" as to life or death, and then corruptly told the jurors, immediately before deliberations began, how the judge would vote *and* that his vote would be for death too. The assurance was not "linked to any arguably valid sentencing consideration," 472 U.S. at 336, and it was made with such certainty and arrogance that its prominence as a central focus of the prosecutor's final appeal to the jury cannot be diminished or undone by any "context." This was cynical misconduct of the worst kind in a capital case. **"I want to be very candid with you about something." "Judge Dinkelacker is going to sentence him likewise." "That's going to happen."** (T2 at 1574-75 (*Appx*-0155 to -0156).) "We did our job. The Judge has done his. Now do yours. And tell the Judge the aggravation clearly outweighs the mitigation." (T2 at 1587-88 (*Appx*-0168 to -0169).)

There is nothing more unfair in a capital sentencing proceeding than to suggest to the jury—in the judge's presence and without correction, retraction, or curative instruction by the judge—that the judge has already made up *his* mind on the critical issue of life or death and that he will, in fact, impose death. The comments were an unambiguous invitation for the jury to believe and conclude, and regardless of whether the invited conclusion was accurate or not, that the trial judge and the prosecutor—both of whom are respected elected officials—had already agreed in advance that death was the appropriate punishment for Petitioner's crimes and that the jury simply needed to "follow their oath" to enable the judge to do what they all

agreed "should" be done. The prosecutor assured the jury of Petitioner's preordained death sentence: "I want to be very candid." "[The judge] is going to sentence him likewise." "That's going to happen."

The prosecutor's comments more than suggested to the jury that he knew the trial judge had already made up *his* mind on the critical issue of the appropriateness of the death sentence, and that the judge was thus no longer impartial. The prosecutor's statement, although made in the judge's presence, was not corrected by the judge and no curative instruction was provided to address the improper argument, thereby leaving the jury with the reasonable conclusion that the judge agreed with the elected prosecutor's representation. A few minutes later, during the court's instructions to the jury, the trial judge even told the jury that they are "permit[ted] to consider the arguments of counsel to the extent they are relevant to the sentence that should be imposed upon [Petitioner]." (T2 at 1598.)

It is, of course, the duty of the trial judge to be impartial. That is a fundamental constitutional tenant of a judiciary in a democratic society and is a rudimentary requirement of due process. *In re Murchison*, 349 U.S. 133, 138 (1955); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) ("We have recognized that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. The right to an impartial adjudicator, be it judge or jury, is such a right."). A trial judge may not intimate his opinion about the parties, witnesses, or evidence, and certainly not about what the judge believes the jury's ultimate decision should be. *See, e.g.*, *State ex rel. Wise v. Chand*, 21 Ohio St. 2d 113, 256 N.E.2d 613 (1970).

Any opinion or intimation by the judge at any time during the trial about the desired outcome, ***especially as to whether death is the appropriate sentence in a capital case***, is non-harmless error and violates the defendant's constitutional rights. That rule is no less violated if the judge's purported views on the outcome are relayed to the jury by the prosecutor in the judge's presence, and most certainly so when the judge remains silent and fails to interject or correct them.

In defiant violation of *Caldwell*, the prosecutor's improper comments also sought to give the jury "a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case[,]'" and, because it was not corrected, would have so affected "the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." *Caldwell*, 472 U.S. at 340-41. The Court has held, in recognition of the Eighth Amendment command of individualized sentencing, that "capital sentencing must have guarantees of reliability, and must be carried out by jurors who would view all of the relevant characteristics of the crime and the criminal, and take their task as a serious one." *Sawyer*, 497 U.S. at 235-36. Jurors who have been led to believe, as here, that the life vs. death sentencing decision has already been made by the judge, in favor of death, are not likely to take their task as seriously as the Eighth Amendment requires in this context. The prosecutor invited each of Petitioner's jurors to believe: "The judge and the prosecutor both believe death is the appropriate punishment. That's good enough for me. Let's get this over with quickly and go home."

What's more, the comments unquestionably enabled jurors to feel less responsible for their sentencing decision than the Constitution requires. The comments did so because they unfairly invited those jurors, most reluctant to impose death, to take comfort in the knowledge, confidently (even arrogantly) conveyed by one respected elected official, that *both* respected elected officials in the trial—the prosecutor and the judge—already agreed a death sentence was appropriate for Petitioner's crimes. And the comments would have empowered those jurors most in favor of death to use that prosecutor-represented description of the judge's views to persuade, if not bully, any jurors who were on the fence or in favor of life, such as: "The judge agrees with this sentence. How can you vote for life?" In these and other ways, the comments had the actual and intended effect of diminishing the juror's appreciation for the "awesome responsibility" their life-or-death sentencing decision in a capital case is otherwise supposed to have. The comments injected bias, prejudice, and improper considerations into the jury's sentencing determination. They are exactly what *Caldwell* aimed to protect against—a jury that did not feel the full weight of their "truly awesome responsibility" in recommending a death sentence.

The Court has said that, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). The elected prosecutor's comments here did that too because they flatly misrepresented both the jury's *and* judge's respective roles under Ohio law in relation to the sentencing decision in a capital case.

The jury is to make its own independent determination of the sentence which the capital defendant should receive, by weighing the aggravating circumstances and mitigating factors, and coming to an individualized sentence which is grounded in the constitutional principles outlined above. The issues of whether, how, when, why, and what sentence might be imposed *by the judge*—who is to be the ultimate decision-maker whenever death had been the jury's conclusion—is totally irrelevant to, and has absolutely nothing to do with, *and must never enter into or influence*, the jury's independent role. The jury's role certainly does not include being told in advance that the judge believes death is appropriate.

The judge's role, by contrast, when death has been the jury's conclusion, is to make his/her own *independent* sentencing determination after the jury's involvement has concluded: "Ohio . . . requires the judge to determine, independent of the jury, whether a sentence of death *should* be imposed." *State v. Mason*, 2018-Ohio-1462, ¶ 39, 153 Ohio St. 3d 476 (2018) (emphasis in original). The judge in that respect must undertake an *independent* weighing of the aggravating circumstances and mitigating factors and come to his or her own conclusion—an "independent determination of punishment," in the words of the Supreme Court of Ohio (*State v. Mason,* 2018-Ohio-1462, ¶ 37, 153 Ohio St. 3d at 487)—as to whether death is the appropriate sentence. *See* Ohio Rev. Code § 2929.03(D)(2)(c) and (D)(3); *Mason*, 2018-Ohio-1462, ¶¶ 6-12,

37, 153 Ohio St. 3d at 478-79, 486-87.[5] The judge must also consider any allocution the defendant may choose to make to the judge *before* the sentence is imposed. *See, e.g.*, *State v. Roberts*, 2013-Ohio-4580, ¶¶ 51-76, 137 Ohio St. 3d 230, 240-46 (2013). The judge is *not* a thirteenth juror. He or she must make an independent sentencing determination, must undertake his/her own independent weighing of aggravation and mitigation, and must consider any allocution the defendant may choose to make, *before* deciding on life or death.

The elected prosecutor's guarantee of a death verdict by the judge with the jury's acquiescence proclaimed the opposite of what Ohio law requires. The comments misrepresented the *jury's role* by leading them to believe their deliberations for death are properly informed by, and may take into consideration, the judge's revealed belief that death is the appropriate punishment for Petitioner's crimes and *will be imposed* by the judge if they only follow their oaths ("that's going to happen"), thereby invading the jury's independent role. The comments likewise misrepresented the *judge's role* under Ohio law by suggesting the judge's mind was already made up that death would be his sentence too, which would violate the judge's legal obligation to engage in an independent weighing, to consider any allocution, and to make his/her own independent sentencing determination, after the jury has concluded its service.

[5] *See also State v. Roberts*, 2006-Ohio-3665, ¶¶ 154-55, 110 Ohio St. 3d 71, 92-93 (2006) (court granted new sentencing proceeding in a capital case because the prosecutor, after the jury had unanimously returned its death verdict, helped write the sentencing opinion for the trial judge).

Such a flagrant misrepresentation of the judge's role, *a fortiori*, is also an equally flagrant misrepresentation of the jury's role, and vice versa. *See, e.g.*, *Caldwell*, 472 U.S. at 342 (O'Connor, J., concurring) ("[T]here can be no 'valid state penological interest' in imparting inaccurate or misleading information that minimizes the importance of the jury's deliberations in a capital sentencing case.").

The prosecutor's argument as detailed above is an "invalid" argument in a capital case and is "impermissible under the Eighth Amendment." *Sawyer v. Smith*, 497 U.S. at 236. It was intentional and was calculated to ruin Petitioner's prospects with the jury for a life sentence. This was not the misconduct of an over-worked line prosecutor who had misspoken or made an inadvertent error. These were the calculated and intentional comments of the ***elected prosecutor*** of Hamilton County Ohio, which—largely because of him—is one of the most active death-penalty counties in the entire nation. *See, e.g.*, Dan Horn, *Why is a Murder Trial Here So Much More Likely to End With a Death Sentence?* CINCINNATI ENQUIRER (February 14, 2018) ("The county has a larger death row population per capita than the home counties of Los Angeles, Miami or San Diego. And it has more people on death row than all but 21 of the more than 3,000 counties in the United States.").[6]

The position of elected county prosecutor in such a large county as Hamilton County, Ohio (which includes Cincinnati) is one of significant status, power, and prestige, and it was certainly perceived in that way by the lay people who comprised

[6] Available at: https://www.cincinnati.com/story/news/politics/2018/02/14/why-does-hamilton-county-send-so-many-death-row-its-complicated/316507002/.

Petitioner's jury in July-August 2018. The prosecutor's own website brags: "The Prosecutors Office has 180 professionals making it one of the largest law firms in Cincinnati." *See* "About the Prosecuting Attorney's Office," Hamilton County Prosecutor Office (https://hcpros.org/about-the-prosecuting-attorneys-office/.) The elected prosecutor is the leader of that office, and he answers to the public—the county's approximately 800,000 residents—every four years. It was thus a trusted and respected elected official who engaged in the subject misconduct, thereby more firmly sealing its illicit effectiveness with the lay jurors who respected him, as he surely intended it would.

This is the same elected prosecutor whose misconduct in Petitioner's first trial, during the closing argument, resulted in the Supreme Court of Ohio finding in that earlier appeal, that parts of the argument were "improper and substantially prejudicial." *Kirkland I*, 2014-Ohio-1966, ¶ 96, 140 Ohio St. 3d at 87 (*Appx*-0075). When that court ordered a new sentencing proceeding in 2016, after *Hurst*, the elected prosecutor publicly made known his displeasure with the high court. (T2 at 201-09; Court's Exhibits 3, 4, 5 and 6.) This included his statement that: "I just have a great problem with judges that decide that they don't like the death penalty. Fine. Run for governor, run for legislator, but don't do it from the bench. . . . That's horse crap." (T2 at 205.) It also included a strong expression of disagreement with the Supreme Court of Ohio's underlying decision finding prosecutorial misconduct during closing argument in Trial 1: "[W]hat I said was ***totally appropriate*** and I can tell you right now I am very confident in this. With the makeup of the supreme court

today, that would never happen." (T2 at 204 (emphasis supplied).) With respect to one of the Justices on Ohio's high court, who was in the 4-3 majority which ordered the re-sentencing proceeding, the elected prosecutor said: "I mean, the guy's a train wreck and that's all I can tell you . . . . We had a justice on the Supreme Court that vowed he was never going to follow the law and that was one of the votes that shoved this thing back here and I just take great exception to it." Angenette Levy, *Judge Denies Request for Gag Order in Serial Killer Resentencing,* WKRC (July 19, 2018).[7]

Petitioner's sentence of death, as imposed in these circumstances, is invalid and unreliable. It was imposed in violation of due process, it was injected with impermissible bias, and it was made by a jury whose appreciation for the importance of its sentencing decision was fatally diluted by the elected prosecutor's improper comments leading the jury to believe that the judge had already decided Petitioner should be sentenced to death for his crimes. It must be set aside as violative of Petitioner's constitutional rights.

[7] Available at: https://local12.com/news/local/resentencing-for-tri-state-serial-killer-underway.

C. Petitioner's trial counsel had a duty to zealously protect Petitioner's constitutional rights to a reliable and individualized capital sentencing proceeding, but they utterly failed to do so by allowing, without objection or request for mistrial, the elected prosecutor's invalid and impermissible final closing argument about the judge's intention to impose death.

Petitioner's trial counsel had a duty to be attentive to prosecutorial misconduct, to make necessary objections or motions to address such misconduct, and to zealously protect Petitioner's right to an individualized capital sentencing proceeding, which is not infected by prosecutorial misconduct and other improper factors. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Ashby*, 808 F.2d 676, 679 (8th Cir. 1987) ("it is still incumbent upon the party to make the objection in order to preserve the issue for appeal"); *United States v. Warner*, 855 F.2d 372, 374 (7th Cir. 1988) ("Counsel has a '"duty to object, and even at the risk of incurring the displeasure of the trial court, to insist upon his objection."'") (citing cases).

Trial counsel also had a duty to ensure that prosecutorial arguments which this Court has held to be "invalid" in a capital case and "impermissible under the Eighth Amendment," *Sawyer v. Smith*, 497 U.S. at 236, do not reach Petitioner's jury. These duties were especially heightened in *this case* given the history of the case and of this prosecutor. *See also infra* Part II at pp. 30-31 & n.8.

Petitioner's trial counsel failed to make any objections to the elected prosecutor's improper remarks and failed to seek a mistrial or any corrective instruction from the trial judge. On the contrary, Petitioner's trial counsel did

nothing; they allowed the prosecutor's brazen misconduct to occur and to prejudicially infect Petitioner's capital sentencing proceeding, resulting in his death sentence.

Such dismal performance is deficient under the constitutional standards of *Strickland*, and it prejudiced Petitioner because it enabled bias and other constitutionally impermissible factors in favor of death to infect Petitioner's capital sentencing proceeding. Trial counsel's lack of care was in clear disregard of the due process and Eight Amendment principles applicable under this Court's *Donnelly* and *Caldwell* jurisprudence.

Petitioner's sentence of death, as imposed in these circumstances, is invalid and unreliable. It was imposed in violation of due process, it was injected with impermissible bias, and it was made by a jury whose appreciation for the importance of its sentencing decision was fatally diluted by the elected prosecutor's improper comments leading the jury to believe that the judge had already decided Petitioner should be sentenced to death for his crimes. It must be set aside as violative of Petitioner's constitutional rights.

II. Petitioner was denied his rights to the effective assistance of appellate counsel, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, when his appointed appellate counsel failed to raise in the direct appeal the obvious claims of prosecutorial misconduct and ineffective trial counsel arising from the prosecutor's representation to the jury in the final closing argument that the trial judge has already decided Petitioner should be sentenced to death for his crimes and will, in fact, impose a death sentence, if the jurors follow their oaths and return a verdict of death.

The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel on a criminal appeal of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). It is the duty of appellate counsel to advocate and support the cause of their client to the best of their ability, raising all non-frivolous issues for review. *Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988).

A claim of ineffective assistance of appellate counsel is subject to the familiar two-part standard under *Strickland*: deficient performance and resulting prejudice. *Smith v. Murray*, 477 U.S. 527, 535-36 (1986) (applying *Strickland* to claim of attorney error on appeal); *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

The failure to raise a meritorious issue whose strength is firmly established by this Court's existing precedent constitutes particularly deficient performance by appellate counsel in a capital case. Appellate counsel have a duty to identify and raise an issue which is, so to speak, a clear winner, *i.e.*, an issue which is obvious on the record and must have leaped out upon even a casual reading of the transcript, and one for which there is a reasonable probability that the omitted claim would have resulted in a reversal on appeal. *See, e.g.*, *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995); *Matire v. Wainwright*, 811 F.2d 1430, 1438-39 (11th Cir. 1987); *Eagle*

v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001) ("Where, as here, appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so. . . . Her failure to raise it, standing alone, establishes her ineffectiveness."); *Mayo v. Henderson*, 13 F.3d 528, 536 (2d Cir. 1994) (prejudice prong satisfied if an argument not advanced by counsel on appeal would have resulted in a new trial).

The failure to raise such a winning issue not only violates an appellate counsel's duties as they exist in any criminal case, but it is especially deficient in a *death-penalty case*. In this respect, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) ("ABA Guidelines") requires appellate counsel in a capital case "to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards of applicable high quality capital defense representation . . . [and] to present issues in a manner that will preserve them for subsequent review." ABA Guidelines, Guideline 10.15.1(C). (The ABA Guidelines are available at: *American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003)). This Court has recognized the ABA Guidelines as providing guides for assessing the performance of counsel in ineffective assistance of counsel claims. *See, e.g.*, *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)

The need for appellate-counsel vigilance in a capital appeal is particularly

important with respect to issues of prosecutorial misconduct such as those which were missed in Petitioner's appeal. For example, Judge Gilbert S. Merritt, Jr., of the Sixth Circuit, has stated: "[T]he greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance--an old, widespread, and persistent habit." Gilbert S. Merritt, Jr., *Symposium: Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677, 677 (2009).

That required vigilant attention, on direct appeal, to prosecutorial misconduct was even more important in Petitioner's case given the history of the Hamilton County prosecutor's office and of this elected prosecutor. The office's prosecutors have committed misconduct during trial, and/or have been criticized by judges and justices for doing so, in several capital cases. This includes the serious misconduct during Petitioner's first death penalty trial in 2010. *Kirkland I*, 2014-Ohio-1966, ¶¶ 82-96, 140 Ohio St. 3d at 84-87 (2014) (*Appx*-0070 to -0075). *See also Kirkland II*, 2020-Ohio-4079, ¶¶ 115-124, 160 Ohio St. 3d at 410-12 (*Appx*-0032 to -0036).[8]

Under these standards, and in this context, Petitioner's appellate counsel were prejudicially ineffective in their representation of Petitioner in his direct appeal to

[8] There are many other examples involving this same prosecutor's office. *See State v. Graham*, 2020-Ohio-6700, ¶ 119 (2020); *Gumm v. Mitchell*, 775 F.3d 345, 383 (6th Cir. 2014); *State v. Wogenstahl*, 1996-Ohio-219, 75 Ohio St. 3d 344, 352-56, (1996); *State v. Fears*, 1999-Ohio-111, 86 Ohio St. 3d 329, 332 (1999); *id.* at 352 (Moyer, C.J., joined by Pfeifer, J., concurring in part and dissenting in part). *See also* Alice Lynd, *Unfair and Can't be Fixed: The Machinery of Death in Ohio*, 44 U. TOL. L. REV. 1, 39 (2012) (citing affidavit which lists "fourteen death penalty cases in a twelve-year period from 1988 to 2000 in which the Ohio Supreme Court found improper statements to the jury by Hamilton County prosecutors, but in each case a majority concluded those remarks did not merit a new trial").

the Supreme Court of Ohio. As addressed in Part I, which is incorporated fully here, Petitioner's appellate counsel missed a clear winning issue of prosecutorial misconduct and related trial-counsel ineffectiveness, an issue which would or should have resulted in the reversal of Petitioner's death sentence and a remand for a new sentencing proceeding.

The prosecutorial misconduct that was committed due to the elected prosecutor's comments in the final closing argument, of the judge's purported belief that death is the appropriate punishment for Petitioner's crimes and is the sentence the judge will impose too, was obvious on the record. So too was the fundamental unfairness, caprice, and bias, if not malfeasance, which these comments injected into the jury's decision making. So too was the constitutional impropriety of these comments, as firmly established by *Caldwell*, in misrepresenting the jury's role, in enabling the jury to feel less responsible for their sentencing decision, and in ensuring that the jury did not feel the full weight of their "truly awesome responsibility" in that regard. The trial counsel's ineffectiveness in allowing this all to occur was equally obvious.

The conclusion that the performance of Petitioner's appellate counsel was constitutionally deficient is bolstered by the fact that appellate counsel's brief on direct appeal raised much weaker issues—and, even then, did so very superficially, given the stakes—notwithstanding the fact that substantial, meritorious *Caldwell* and *Donnelly* issues were obvious upon even a casual reading of the trial transcript. *See Kirkland II*, 2020-Ohio-4079, 160 Ohio St. 3d 389 (*Appx*-0004). No court,

reviewing Petitioner's direct appeal, can fairly conclude that the "adversarial testing process" worked in his direct appeal. *Strickland v. Washington*, 466 U.S. at 690.

And, because the prosecutor's comments violated *Caldwell*, any requirement to show prejudice from appellate counsel's errors is met: The *Caldwell* violation itself establishes the required prejudice. The Court there consistently emphasized that the Eighth Amendment requires a heightened standard of reliability in the capital sentencing decision, *Caldwell*, 472 U.S. at 341, and concluded: "Because we cannot say that this effort [at minimizing the jury's death-sentencing responsibility] had no effect on the sentencing decision, that [sentencing] decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* That standard plainly places the burden of proving the absence of prejudice on the State. Prejudice will be presumed unless the reviewing court can say that the improper argument had no effect on the jury's decision. *Id.*

Stated another way, a death sentence which, because of a *Caldwell* violation, is infected with unconstitutional bias, caprice, and arbitrariness, cannot stand under any possibly relevant standard of prejudice. "*Caldwell*'s deference to the fundamental character of the jury's role manifests itself precisely in its refusal to require actual prejudice to the defendant. *Caldwell* views a prosecutorial argument as a basis for reversal if, when viewed within the context of the whole, it had an effect upon the jury's perception of its role in the sentencing proceeding." *Sawyer v. Butler*, 881 F.2d 1273, 1294 (5th Cir. 1989) (*en banc*), *aff'd*, *Sawyer v. Smith*, 497 U.S. 227 (1990). "[I]n *Caldwell* we found that the need for reliable sentencing in capital cases required a

new sentencing proceeding because false prosecutorial comment created an 'unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously."" *Sawyer v. Smith*, 497 U.S. at 235 (quoting *Caldwell*, 472 U.S. at 343 (opinion of O'Connor, J.). *See also Commonwealth v. Montalvo*, 651 Pa. 359, 404, 205 A.3d 274, 301 (2019) ("Because the jury was misled regarding its most fundamental role in determining the sentence of life imprisonment or death, we conclude that the prejudice prong of the ineffectiveness test is satisfied."); *Commonwealth v. Baker*, 511 Pa. 1, 511 A.2d 777, 790 (Pa. 1986) (recognizing "the inherent bias and prejudice" to the defendant that resulted from the prosecutor's *Caldwell* violation).

Even if viewed, *arguendo*, purely as an error of prosecutorial misconduct under the more general fundamental fairness standard of *Donnelly*, and without the separate Eight Amendment violation recognized in *Caldwell* for comments such as those at issue here, the requisite standards of prejudice are still met because of appellate counsel's error. There is a reasonable probability that, had the prosecutor's improper comments about the judge been raised in the direct appeal, the outcome of the appeal would have been different. *Strickland.* An appellate court, reviewing the record, could confidently conclude that jurors, who had *not* been led to believe before deliberating that the judge already agrees death is the appropriate punishment, are much more likely to fairly consider and weigh, in favor of life, the significant mitigation evidence that was presented in Petitioner's case, with the result that one or more jurors are substantially likely to find in favor of a life sentence. In a weighing state, such as Ohio, one juror for life is all that is needed for the result to be a life

sentence. *See State v. Brooks*, 1996-Ohio-134, 75 Ohio St. 3d 148, 162 (1996) ("In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors.").

With faithful application of this Court's precedent under *Caldwell* and *Donnelly*, there would or should have been near certainty that Petitioner's death sentence would be vacated and the case remanded again for another sentencing proceeding. There is a reasonable probability that the result on direct appeal would have been different because the error was not harmless.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

/s/ Timothy F. Sweeney

Timothy F. Sweeney (OH 0040027)*
MEMBER OF THE BAR OF THIS COURT
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
Phone: (216) 241-5003
Email: tim@timsweeneylaw.com
*COUNSEL OF RECORD

/s/ Andrew P. Avellano

Andrew P. Avellano (OH 0062907)
MEMBER OF THE BAR OF THIS COURT
4200 Regent Street, Suite 200
Columbus, Ohio 43219
Phone: (614) 237-8050
Email: drewavo@wowway.com

Counsel for Petitioner Anthony Kirkland