No. 21-6307

In The

Supreme Court of the United States

DONALD JAMES SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Counsel of Record

Charmaine M. Millsaps
Senior Assistant Attorney General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300
capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT

CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court holding that the prosecutor's comment in closing argument of the guilt phase was not fundamental error.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The Florida Supreme Court's opinion is reported at *Smith v. State*, 320 So.3d 20 (Fla. 2021) (SC18-822).

JURISDICTION

On April 22, 2021, the Florida Supreme Court affirmed the conviction and death sentence in the direct appeal. On May 7, 2021, Smith filed a motion for rehearing. The State did not respond to the rehearing. On June 14, 2021, the Florida Supreme Court denied the rehearing. On November 8, 2021, Smith filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d).[1] Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

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[1] This Court extended the deadline to timely file a petition for writ of certiorari from 90 days to 150 days due to COVID-19. *See* Order of March 19, 2020. This Court has returned to the normal

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> 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.

U.S. Const. amend. XIV, § 1.

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time frame of 90 days for any opinion or order issued after July 19, 2021, but the order denying rehearing in this case was issued shortly before that date. *See* Order of July 19, 2021.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Facts of the murder

On June 21, 2013, Smith met eight-year-old Cherish Perrywinkle, her sisters, and her mother, Rayne, at a Dollar General store in Jacksonville. Smith overheard Rayne explain to an employee that she could not afford to purchase a dress for Cherish, and offered to drive the Perrywinkles to Walmart and buy clothes for the family. Smith explained to Rayne that his wife had a gift card and would meet the group there. At Walmart, they shopped together for hours. It got late and the Perrywinkles had not eaten, so Smith said he would buy them all cheeseburgers at a McDonald's inside the store. Instead, at 10:44 p.m., he vanished with Cherish. Surveillance cameras caught Smith leading her to his van, as well as the two of them driving away. *Smith v. State*, 320 So.3d 20, 24 (Fla. 2021). Cherish was never seen alive again. *Id.* at 25.

The next morning, the police located Cherish's body in a creek behind a church, under a pile of debris. *Smith*, 320 So.3d at 25. Cherish had been brutally raped, then strangled to death. An officer identified Smith, who was soaking wet, behind the wheel of the same van that had left Walmart. It contained the things Rayne had bought at Dollar General. Smith was arrested and charged with kidnapping, sexual battery of a person under twelve, and first-degree murder.

Trial proceedings

At trial, in the closing argument of the guilt phase, the prosecutor told the jury repeatedly not to base the verdict on emotion or anger and that reason, not emotion, should guide their deliberations. (T. 1421-22). The prosecutor later said: back in jury selection one of your fellow jurors commented that "Cherish did not have a voice in this courtroom." (T. 1436). The prosecutor disagreed with the juror's observation and referring to the physical and biological evidence, he stated: "through that evidence she has a voice." (T. 1436). The prosecutor then stated: "And from the grave she's

crying out to you, Donald Smith raped me," "Donald Smith sodomized me," and "Donald Smith strangled me until every last breath left my body." (T. 1436).

Defense counsel did not object. (T. 1437). The defense then waived closing argument in the guilt phase. (T. 1437). The prosecutor did not give rebuttal closing argument. (T. 1437). There was no ruling from the trial court regarding the comment because there was no objection.

The jury convicted Smith of first-degree murder, kidnapping, and sexual battery of a person under 12 years old. *Smith*, 320 So.3d at 26. By special verdict, the jury convicted him of both premeditated and felony murder with kidnapping and sexual battery as the underlying felonies.

At the penalty phase of trial, the State presented one witness, the victim of a 1992 attempted kidnapping by Smith. *Smith*, 320 So.3d at 26. Smith presented nine witnesses, including a psychologist and a neurologist. *Id.* The jury unanimously found six aggravating factors and unanimously recommended a death sentence.

The trial court found the same six aggravating factors including the prior violent felony based on a prior attempted kidnapping of a 13-year-old girl, as well as the heinous, atrocious, and cruel (HAC) aggravator, and the cold, calculating, and premeditated (CCP) aggravator. The trial court gave five of the six aggravators great weight but gave the CCP aggravator "very great weight" and sentenced Smith to death. In her sentencing order, the judge observed that the aggravating factors "heavily outweigh the mitigating circumstances" and sentence of death is the "only proper penalty for the murder of Cherish Perrywinkle." (DA 3134).

Direct appeal in the Florida Supreme Court

Smith appealed his convictions and death sentence to the Florida Supreme Court. Smith raised five issues in the direct appeal. *Smith*, 320 So.3d at 26-27. Smith raised the prosecutor's comment that the victim was crying out from the grave as part of

issue IV in his initial brief. The State's answer brief pointed out that the issue was not preserved by an objection at trial and was being raised as a claim of fundamental error.[2] The State's answer brief relied on the six factors of *Darden v. Wainwright*, 477 U.S. 168 (1986), to analyze the merits of the claim. The Florida Supreme Court rejected the claim and affirmed Smith's convictions for first-degree murder, kidnapping, and sexual battery of a child. *Smith*, 320 So.3d at 24, 33.

Current petition for writ of certiorari in this Court

Smith then filed a petition for a writ of certiorari in this Court arguing that the prosecutor's comment amounted to a due process violation without addressing the fact the issue was not preserved by a contemporaneous objection.

[2] *Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649, 652 (11th Cir. 2020) (holding that federal courts may take judicial notice of state courts' online court records under Fed. R. Evid. 201(e)), *cert. denied*, *Paez v. Inch*, 141 S.Ct. 309 (2020).

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT OF THE GUILT PHASE WAS NOT FUNDAMENTAL ERROR.

Petitioner Smith asserts that this Court should grant review of the Florida Supreme Court's denial of his claim of fundamental error. Smith argues that the prosecutor violated due process in the closing argument of the guilt phase when the prosecutor told the jury that the victim was crying out from her grave that Smith had raped and strangled her. There is a threshold issue because the issue was not preserved by a contemporaneous objection to the prosecutor's comment at trial. The petition, however, does not address the unpreserved nature of the issue in any manner. Florida's concept of fundamental error is not the equivalent to the federal concept of plain error or the federal concept of structural error. Alternatively, there is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision in this case. This Court has never reversed a criminal conviction based on a prosecutor's comment, much less held that a prosecutor's comment amounted to structural error. Nor is there any conflict between the decisions of any other federal circuit court or state court of last resort and the Florida Supreme Court's decision in this case. Smith cites no federal circuit court case or state supreme court case holding that this type of comment is structural error or even reversible error. Because the petition presents an issue over which there is no conflict but that involves a threshold issue, this Court should deny review.

The Florida Supreme Court's decision in this case

Smith in his direct appeal in the Florida Supreme Court raised, among other claims, a claim that the prosecutor's comment in closing argument that the victim was crying out from her grave that Smith raped and strangled her was fundamental error. *Smith v. State*, 320 So.3d 20, 26-27 (Fla. 2021). The Florida Supreme Court concluded that the prosecutor's comment although not "advisable," was not fundamental error. *Id.* at 32-33.

The Florida Supreme Court first noted that Smith did not object to the prosecutor's comment, so it reviewed the comment for fundamental error. *Smith*, 320 So.3d at 31. The Florida Supreme Court concluded that the trial court did not commit fundamental error. *Id.* at 32. The Florida Supreme Court explained that, while closing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence, a prosecutor's comment "may, indeed sometimes must, elicit an emotional response from the jury," particularly "in matters of life and death." *Id.* The Florida Supreme Court observed that the prosecutor's comments were moving to the jury "in substantial measure" because they were characterization of the "disturbing facts in evidence." *Id.*

The Florida Supreme Court discussed this Court's decision in *Darden v. Wainwright*, 477 U.S. 168 (1986), in a footnote. *Smith*, 320 So.3d at 33 n.5. The Florida Supreme Court noted the *Darden* Court relied on six factors in evaluating a due process claim arising from a prosecutor's inappropriate comments. The *Darden* factors are: (1) whether the prosecutor manipulated or misstated the evidence, (2) whether the comments implicated other specific rights of the accused, (3) whether the comments were invited by or responsive to defense counsel's arguments, (4) whether the trial court's instructions ameliorated the harm, (5) whether the evidence weighed

heavily against the defendant, and (6) whether the defendant had an opportunity to rebut the prosecutor's comments. *Id.* at n.5. The Florida Supreme Court applying those factors, concluded that the prosecutor's comment in this case "did not manipulate or misstate the evidence, implicated no specific rights of the accused, and while they were neither invited by the accused nor the subject of an instruction from the court, were insignificant when compared to the weight of the evidence, and drew no response from the defendant." *Id.* The Florida Supreme Court noted that "Smith had an opportunity to rebut the prosecutor's comments in closing argument, but waived closing statement instead." *Id.* at 33 (citing *Darden*, 477 U.S. at 181).

Florida's concept of fundamental error is a threshold issue

The Florida Supreme Court in this case applied fundamental error review to the unpreserved claim regarding the prosecutor's comment. *Smith*, 320 So.3d at 31. This creates a threshold issue in this case which is the differences between Florida's fundamental error test and this Court's structural error test.

Florida's statute governing appeals and collateral review in criminal cases permits the state's appellate courts to review an unpreserved error only if it amounts to fundamental error. § 924.051(3), Fla. Stat. (2020) (providing: an "appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error"); *see also Earl v. State*, 314 So.3d 1253 (Fla. 2021) (affirming the dismissal of an appeal where the defendant could not establish any harm that could be "remedied on appeal" citing § 924.051(7), Fla. Stat. (2020)).

But this Court's standard for structural error is not equivalent to Florida's standard for fundamental error. *McDonald v. State*, 743 So.2d 501, 505 (Fla. 1999) (defining fundamental error "as the type of error which reaches down into the validity

of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error"). Florida's concept of fundamental error is much broader and covers more types of errors than this Court's concept of structural error does. *Compare McFadden v. United States*, 576 U.S. 186, 197 (2015) (stating that the omission of an element from the jury instruction is subject to harmless error analysis and is not structural error citing *Neder v. United States*, 527 U.S. 1, 15 (1999)), *with Knight v. State*, 286 So.3d 147 (Fla. 2019) (permitting fundamental error challenges to the jury instructions of the crime of conviction). The petition, however, does not address the unpreserved nature of the issue in any manner. Florida's fundamental error concept is somewhere in between the federal concept of plain error and structural error. Fed. R. Crim. P. 52(b).

This Court would first have to grabble with these differences between the federal and Florida tests for unpreserved errors and determine which test should apply to this case before reaching the actual issue of the prosecutor's comment. This Court does not normally grant review of cases with threshold issues to avoid these exact types of preliminary dilemmas. *Cf. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (dismissing the writ of certiorari as improvidently granted when there was a threshold issue). Due to this threshold issue, this Court should deny the petition.

No conflict with this Court's jurisprudence

There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review).

This Court has repeatedly observed that most trial errors are not structural error. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907 (2017) (explaining that structural

error affects the entire framework of the trial rather than being simply an error in the trial process itself); *Greer v. United States*, 141 S.Ct. 2090, 2100 (2021) (explaining that structural errors are errors that affect the entire proceeding from beginning to end but, by contrast, discrete defects in the trial are not structural error because such errors do not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence). This Court has never hinted that a prosecutor's comment alone could amount to structural error.

This Court has also warned of the dangers of appellate courts not enforcing the contemporaneous objection rule. *Puckett v. United States*, 556 U.S. 129, 134 (2009). The *Puckett* Court explained that appellate courts not enforcing the preservation requirement would result in sandbagging where defense counsel intentionally remains silent when the error occurs at trial and then belatedly raises the error on appeal only if the trial does not conclude in his favor. Relief based on unpreserved error should be, in the *Puckett* Court's words, "strictly circumscribed." *Id.* Expansive views of plain error or fundamental error by appellate courts would be "fatal" to trials. *Id.*

The Florida Supreme Court in this case applied this Court's due process test for prosecutorial comments. *Smith*, 320 So.3d at 33 n.5 (applying *Darden v. Wainwright*, 477 U.S. 168 (1986)). In *Darden*, this Court, while condemning the prosecutor's comments, held that the comments were not a due process violation and did not deprive the defendant of a fair trial. The prosecutor's comments included calling the defendant an "animal"; expressing a personal wish for Darden's death by saying: "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his (Darden's) face off. I wish that I could see him sitting here with no face, blown away by a shotgun." The prosecutor, referring to Darden, said: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." *Darden*, 477 U.S. at 180 n.12. This Court observed that these "comments

undoubtedly were improper." *Id.* at 180. But the *Darden* Court explained that it is not enough that the prosecutor's comments are "undesirable or even universally condemned"; rather, the relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 181 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). The *Darden* Court relied upon six factors in evaluating a due process claim arising from a prosecutor's inappropriate comments in closing argument: 1) whether the prosecutor manipulated or misstated the evidence, 2) whether the comments implicated other specific rights of the accused (such as the right to remain silent), 3) whether the comments were invited by or responsive to defense counsel's arguments, 4) whether the trial court's instructions ameliorated the harm, 5) whether the evidence weighed heavily against the defendant, and 6) whether the defendant had an opportunity to rebut the prosecutor's comments. The *Darden* Court concluded that the prosecutor's comments "did not deprive petitioner of a fair trial." *Id. See also Parker v. Matthews*, 567 U.S. 37 (2012) (rejecting a claim that the prosecutor's argument, which insinuated that the defendant colluded with his lawyer and expert to manufacture an extreme emotional disturbance defense, violated the due process test established in *Darden* and noting that *Darden* involved a prosecutor's comments that were "considerably more inflammatory," such as referring to the defendant as an "animal").

Using the *Darden* factors, the prosecutor's comment that the victim was crying out from the grave that Smith was the perpetrator was not reversible error, much less structural error. First, the comment did not manipulate or misstate the evidence. The prosecutor's comment that the victim was crying out from the grave that the defendant was the perpetrator, while hyperbole, did not misstate either the evidence or the law. Second, the comment did not implicate other constitutional rights of the defendant such as the right to remain silent or to not testify. Third, while the

comment was not an invited response to defense counsel's arguments, it was a response to a juror's observation about the victim not having a voice in the courtroom. The prosecutor was responding to that observation by saying the evidence was the victim's voice. Fourth, while the trial court did not ameliorate the harm by giving a curative instruction, that was because there was no objection to the comment and no request for a curative instruction. Fifth, the evidence weighs quite heavily against the defendant. Smith's DNA profile matched the DNA found on the victim's neck and anus, an eight-year-old girl, at one in thirty-five quintillion and his DNA profile matched the semen from the victim's vagina at one in twelve quadrillion. (T. 1345, 1349, 1358). Furthermore, the store's numerous surveillance cameras captured the beginning of the kidnapping when Smith walked with Cherish out of the store and drove off with her when he had told her mother they were going to the McDonald's inside the store. It is an understatement to describe the evidence in this case as overwhelming. And sixth, defense counsel had the opportunity to rebut the prosecutor's comment in his closing argument but waived closing argument instead. This comment fails to meet at least five of the six *Darden* factors. While certainly not an advisable argument, the prosecutor's comment was not reversible error, much less structural error. There is no conflict with *Darden*.

Opposing counsel acknowledges that the Florida Supreme Court employed *Darden* to analyze this claim but then argues that the Florida Supreme Court "forgot about the defendant's constitutional rights." Pet. at 6 n.2. But the prosecutor's comment was not a comment on any other constitutional right, such as the defendant's right to remain silent or the right not to testify. Furthermore, opposing counsel acknowledges the sheer strength of the prosecution's case against Smith, but does not explain why the prosecutor's comment was not harmless in light of that evidence, if the issue had been preserved. Pet. at 6 (listing the evidence against Smith as including "witnesses, video, wet clothing, purchased items, the van and DNA").

Smith is really asserting he should be granted a new trial not because his first trial was unfair but as a means of punishing the prosecutor. Pet. at 9 (referring to the case as a "slum dunk" based on the evidence but then stating the prosecutor "chose to enflame the jurors' emotions and sense of retribution to assure a sentence of death"). But, even when a prosecutor's comment is one that would be universally condemned by all courts, this Court has explained that appellate courts should not reverse a criminal conviction merely to punish prosecutorial misconduct. *United States v. Hasting*, 461 U.S. 499 (1983) (condemning a federal circuit court for using its supervisory power to reverse a conviction based on a prosecutor's comment when the prosecutor's comment was harmless error). A criminal conviction should not be reversed unless the comment amounted to a denial of a fair trial. Rather, the appropriate remedy for prosecutorial misconduct is to discipline the prosecutor, not to reverse the conviction. This Court already answered the question raised in the petition adversely to the petitioner in *Hasting*.

There is no conflict with this Court's jurisprudence.

No conflict with other appellate courts

There is also no conflict between that of any federal appellate court or state court of last resort and the Florida Supreme Court's decision in this case. Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's

attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

There is no conflict between the Florida Supreme Court's decision in this case and the federal circuit courts' view of plain error and prosecutorial comments. The prosecutor's comment in this case would not amount to plain error under *United States v. Olano*, 507 U.S. 725 (1993), if this was a federal prosecution. *See, e.g., United States v. Magnan*, 756 Fed. Appx. 807, 822-23 (10th Cir. 2018) (holding, in an aggravated sexual abuse case, that the prosecutor's comment pointing out to the jury that the victim's parents were crying during the victims' testimony, which was an "isolated" comment in a lengthy closing argument, was not plain error). Opposing counsel does not cite any federal circuit court case finding a due process violation involving a similar prosecutor's comment, much less doing so using a structural error analysis. There is no conflict between the federal circuit courts and the Florida Supreme Court's decision in this case.

There is also no conflict with any state court of last resort. In *People v. Cloutier*, 687 N.E.2d 930, 943 (Ill. 1997), the Illinois Supreme Court affirmed the conviction in a capital case where the prosecutor argued in closing of the penalty phase "what is at stake here is nothing short of human justice," because "from their graves there are two women who cry out for human justice. And in this whole world of ours there are only 12 people that could hear them and answer their cries, and that's the 12 of you." The Illinois Supreme Court concluded the prosecutor's comment was "not so inflammatory as to constitute reversible error." Opposing counsel cites no state supreme court case holding that a prosecutor's comment regarding the victim crying out from the grave is structural error. There is no conflict between the lower appellate courts and the Florida Supreme Court's decision in this case.

Opposing counsel improperly relies on conflict between the Florida Supreme Court's decision in this case and prior Florida Supreme Court cases to establish

conflict. Pet. at 8. But the conflict this Court's rules refer to as a basis for review in this Court is conflict among the state supreme courts, not a conflict within one state's caselaw. Sup. Ct. R. 10(b) (providing: "a state court of last resort has decided an important federal question in a way that conflicts with the decision of ***another*** state court of last resort or of a United States court of appeals") (emphasis added). Any conflict within Florida caselaw regarding prosecutors' comments is not a proper basis for review in this Court. There is no conflict among the lower appellate courts.[3]

The prosecutor's comment and the golden rule

Opposing counsel oddly seems to view the prosecutor's comment about the victim crying out from her grave to the jury that Smith was the perpetrator as a "subtle" golden rule violation. It is not. A golden rule violation is an argument by counsel

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[3] While it does not matter for purposes of review in this Court, there is no real conflict between the Florida Supreme Court's decision in this case and the Florida Supreme Court's prior decision in *Urbin v. State*, 714 So.2d 411, 421 (Fla. 1998). Pet. at 9. The Florida Supreme Court did not reverse and remand for a new penalty phase in *Urbin* based on the prosecutor's numerous improper comments in the penalty phase. Rather, the Florida Supreme Court reversed the death sentence on the basis of proportionality. *Urbin*, 714 So.2d at 418 (finding that "death is a disproportionate penalty" in the case of "tragic killing" involving a seventeen-year-old defendant). The Florida Supreme Court specifically noted that its reducing the sentence to life "mooted" the issue of the prosecutor's improper comments but then invoked its "supervisory responsibility" to condemn numerous comments the prosecutor had made during the penalty phase closing argument. *Id.* at 418-19. Among the many comments the Florida Supreme Court condemned in *Urbin* was one comment by the prosecutor that the victim had been shot while "pleading for his life," which the court characterized as a "subtle 'golden rule'" argument and stated that the prosecutor by "literally putting his own imaginary words in the victim's mouth," unduly aroused and inflamed the sympathy, prejudice and passions of the jury. *Id.* at 421. But *Urbin* involved an entire series of improper prosecutorial comments, not merely one comment, as is the situation here. *Id.* at 420-22 & nn.9, 10, & 14. Indeed, the Florida Supreme Court itself noted the sheer number of improper comments made by the prosecutor in *Urbin*. *Id.* at 422 (noting that "so many of these instances of misconduct . . ."). The Florida Supreme Court usually does not reverse based solely on one improper comment by the prosecutor. *Jordan v. State*, 176 So.3d 920, 929 (Fla. 2015) (concluding that the prosecutor's comment: "Don't let him get away with this," while improper was not fundamental error in part because the prosecutor made the comment only once); *Lowe v. State*, 259 So.3d 23, 48 (Fla. 2018) (concluding that the prosecutor's comment comparing the worth of the victim's life to that of the defendant was not fundamental error because the comment "represented a very brief portion" of the State's entire closing argument), *cert. denied*, *Lowe v. Florida*, 139 S.Ct. 2717 (2019). For both these reasons, there is no conflict between this case and *Urbin*.

designed to place the jurors in the role of the victim. *See, e.g.*, *United States v. Hall*, 979 F.3d 1107, 1119 (6th Cir. 2020) (stating that "asking jurors to place themselves in the victim's shoes violates the ban on Golden Rule arguments"); *United States v. Susi*, 378 Fed. Appx. 277, 283 n.5 (4th Cir. 2010) (explaining a golden rule violation is when counsel argue that the jurors should put themselves in the shoes of the plaintiff which is universally recognized as improper quoting *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978)). The prosecutor in this case was not urging the jurors to put themselves in the victim's position and imagine themselves as an eight-year-old girl being repeatedly raped and then strangled to death. Rather, the prosecutor was attempting to convey the victim's thoughts and words to the jury and to have her metaphysically point her finger at the defendant as the perpetrator. The prosecutor's comment was not even a "subtle" golden rule violation. *United States v. Matias*, 707 F.3d 1, 6 (1st Cir. 2013) (explaining that the prosecutor's comment asking the jurors if they had ever engaged in similar conduct was not a "Golden Rule" argument). And even true golden rule violations are often found not to be plain error by the federal circuit courts. *See, e.g.*, *United States v. Hunte*, 559 Fed. Appx. 825, 833 (11th Cir. 2014) (finding three improper golden rule violations were not plain error even considered cumulatively because the prosecutor's comments did not affect the defendant's substantial rights because the jury was instructed that the arguments of counsel are not evidence and because of the overwhelming evidence of guilt).

In sum, the petition presents an issue which does not involve any conflict among the courts but which does involve a threshold issue. There is no basis for granting certiorari review of this case.

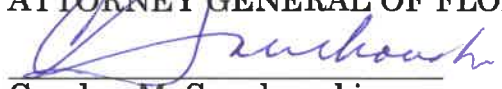
Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



Carolyn M. Snurkowski
Associate Deputy Attorney General
Counsel of Record

Charmaine Millsaps
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
CAPITAL APPEALS
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3584
(850) 487-0997 (FAX)
email: capapp@myfloridalegal.com
charmaine.millsaps@myfloridalegal.com