No. _____

In the
Supreme Court of the United States

GRANVILLE RITCHIE
Petitioner,

v.

STATE OF FLORIDA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Capital Case

QUESTION PRESENTED

Does the United States Constitution prohibit a prosecutor from suggesting to a capital penalty jury that the defendant, as a foreigner and an immigrant, is unworthy of the many constitutional trial rights which are accorded to natural born citizens?

STATEMENT OF RELATED PROCEEDINGS

Ritchie v. State, No. SC20-1422, 344 So. 3d 369 (Fla. 2022) (Florida Supreme Court opinion and judgment rendered June 9, 2022; order denying rehearing issued on August 23, 2022; mandate issued on September 8, 2022).

State v. Ritchie, No. 29-2014-CF-011992000-AHC (Florida Thirteenth Judicial Circuit Court judgment and sentence entered on September 11, 2020).

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INTRODUCTION

Petitioner Granville Ritchie, a native Jamaican, was sentenced to death following a jury trial wherein his veteran prosecutor poisoned the jury by urging them to sentence Mr. Ritchie to death based in part on his exercise of constitutional trial rights and the xenophobic insinuation that immigrants deserve less constitutional consideration than true American citizens.

The Florida Supreme Court's refusal to guarantee immigrants a death penalty system free of explicit, intentional bias against them illustrates a profound, systemic rot and it cannot stand. It is inconsistent with not only the state of Washington's practice of automatic reversal but also with any basic principles of due process and the heightened reliability the law requires for death sentences, not to mention the principle upon which our country was forged – that human dignity has nothing to do with the circumstances of one's birth.

There is currently no legal question that Florida enjoys the right to seek and obtain the ultimate punishment of death. But nothing in the Constitution remotely suggests that any state possesses the right to kill based not on how heinous the crime nor who the defendant is at his core – but on where he was born and raised, and that he had the temerity to come here. This is especially true now, and in 2019 when Mr. Ritchie's penalty trial occurred, as the 2018 midterm elections revealed an astonishing proliferation in xenophobic rhetoric.

OPINION BELOW

The opinion of the Florida Supreme Court (App. 1a–58a) is reported at *Ritchie v. State*, 344 So. 3d 369 (Fla. 2022). The order of the Florida Supreme Court denying Petitioner's motion for rehearing (App. 1b) is reported at *Ritchie v. State*, No. SC20-1422, 2022 WL 3593821 (Fla. Aug. 23, 2022).

JURISDICTION

The Florida Supreme Court issued its judgment affirming Petitioner's death sentence on June 9, 2022, and denied Petitioner's motion for rehearing on August 23, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury … and to have the Assistance of Counsel for his defense."

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fifth and Fourteenth Amendments to the United States Constitution provide in relevant part that the United States as well as any state shall not 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."

STATEMENT OF THE CASE

Mr. Ritchie was charged with the aggravated child abuse, sexual battery, and first-degree murder of a nine-year-old girl. R. 103-06. The case proceeded to trial in September of 2019 before a jury.

I. The Guilt Phase

The evidence at trial established that on May 16, 2014, Mr. Ritchie and Eboni Wiley picked up the victim from her home in Tampa. Tr. 1710. Ms. Wiley was a friend of the victim's family, and she and Mr. Ritchie had recently become involved in a romantic relationship. Tr. 1688, 1698-1702. Mr. Ritchie drove them to a restaurant and then to his apartment. Tr. 1713-16. Upon arrival, Mr. Ritchie gave Ms. Wiley a drug similar in its effects to Ecstasy. Tr. 1716. Mr. Ritchie then sent Ms. Wiley to procure marijuana for him. Tr. 1722. Ms. Wiley left without the victim. Tr. 1722-24.

While in the apartment, the victim was manually strangled until she died. Tr. 2580. Following her death, Mr. Ritchie informed Ms. Wiley via phone that the victim had left the apartment to buy candy at a nearby pharmacy. Tr. 1730-31. Not finding her at the store, Ms. Wiley returned to the apartment, where she and Mr. Ritchie fabricated a story concerning the victim's whereabouts. Tr. 1733-34, 1746-48.

Ms. Wiley initially lied to police and said she had taken the victim to visit a female friend of hers, and while at that location, the victim had run away from the friend's apartment. Tr. 1752. After being interviewed several more times, however, Ms. Wiley admitted that she and Mr. Ritchie had taken the victim to his apartment, where the child disappeared while in his care. Tr. 1782, 1870.

Phone records proved that later that evening, Mr. Ritchie drove from his apartment in Tampa toward Clearwater, across a bridge. Tr. 2912-83. The victim's body was recovered from the water the next day. Tr. 2089-95.

The Defense did not concede that Mr. Ritchie committed any of the charged crimes. Tr. 3400 05, 3671-88. Ultimately, the Defense suggested that Ms. Wiley was the one who murdered the victim, motivated by anger from a recent argument she and the victim had and fueled by a drug Ms. Wiley admitted made her feel like "Satan was manipulating her." Tr. 3673-75, 3678-80. The prosecutor asserted that the victim was alive when Ms. Wiley left Mr. Ritchie's apartment, that a sexual battery occurred, and that an argument was not enough motive for Ms. Wiley to kill the victim. Tr. 3715-16.

Ultimately, the jury found Mr. Ritchie guilty as charged of Murder in the First Degree, Sexual Battery, and Aggravated Child Abuse. R. 947-48; Tr. 3778-79.

II. The Penalty Phase

The State began the penalty phase by presenting victim impact testimony from the victim's mother. As to two of the aggravating factors – the victim was less than twelve years of age and the murder was committed during the commission of a sexual battery – the State relied on guilt phase evidence. As to the heinous, atrocious, and cruel aggravator, the State presented a pathologist, who testified that the victim's death was extremely painful. Tr. 3844-45, 3852 53, 3861-62.

To prove the harsh circumstances of Mr. Ritchie's childhood, the Defense introduced a video depicting the area of Jamaica where he grew up and people who knew him. The Defense also sought to establish that Mr. Ritchie's capacity to appreciate

the criminality of his conduct or to conform to the requirements of law was substantially impaired, and that the murder was committed while Mr. Ritchie was under the influence of extreme mental or emotional disturbance. Tr. 3910. To that end, a doctor testified that Mr. Ritchie suffered from frontal lobe damage resulting from car accidents and childhood injuries, as well as executive functioning impairment, which caused impulsive behavior. Tr. 3895, 3901-03. The doctor also told the jury that Mr. Ritchie's IQ score of 78 meant that he was borderline. Tr. 3933-35. A neuropsychologist echoed that Mr. Ritchie had brain injuries from childhood physical trauma, which resulted in a failure to regulate impulses and control his emotions. Tr. 4027-28, 4034-35, 4040.

In response to the Defense's mental health mitigation, the State presented the rebuttal testimony of a doctor who claimed Mr. Ritchie did not have any brain damage (Tr. 4147-48), and a psychologist who claimed Mr. Ritchie's school, employment, and jail records did not indicate he had any diminished mental capacity. Tr. 4189, 4203-05.

In penalty phase closing argument, the prosecutor, Scott Harmon, commented on Mr. Ritchie's exercise of his trial rights, juxtaposed with his immigrant status:

> He immigrated here to this country years ago. And as he lived here, he enjoyed the benefits of this country we live in, the greatest country on the face of the earth.
>
> He enjoyed all these benefit[s] we talked about. He enjoyed the due process rights we talked about. He enjoyed the fact that we carry the burden of proof to prove his guilt, that he is presumed innocent, that he is entitled to a jury of his peers to not just determine whether he's guilty or not, but a jury of his peers to determine the appropriate sentence. Because this isn't Jamaica or some other country, this is the United States where this defendant gets to have you determine his sentence, not some bureaucrat, not some single judge, not some single person, not some star chamber, but you, his fellow citizens.

> He [h]as enjoyed all of these benefits. He's enjoyed the benefit of a neutral and unbiased judge. He's enjoyed the benefit of competent—very competent defense counsel during the case.

Tr. 4301-02.

The prosecutor also compared life in Jamaica with Mr. Ritchie's supposedly privileged life here while in jail awaiting trial, arguing that his ability to have his girlfriend deposit money in his jail canteen account enabled him to purchase food and thus gain weight. Tr. 4302. The prosecutor added: "You really think that would happen in Jamaica? You think that would happen in the countries of the Caribbean? It happens here in this country because he enjoyed all those rights, the constitutional rights." Tr. 4303.

The jury returned a unanimous verdict finding that Mr. Ritchie should be sentenced to death for the murder conviction. R. 958-60; Tr. 4366-68. A *Spencer* hearing[1] was held but neither party presented additional evidence or witnesses. R. 2088-2101. The trial judge imposed a death sentence as to the murder and prison sentences on the remaining counts. R. 1045-70; 2102-58.

III. The Direct Appeal

Mr. Ritchie, through counsel, argued three issues on appeal. Chief among them is the only issue that he brings to this Court – that the prosecutor's closing argument deprived him of an impartial jury and a fair penalty phase trial.

[1] *See Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The majority opinion of the Florida Supreme Court recognized that the prosecutor's penalty phase closing argument included several improper themes, including "anti-immigrant" rhetoric which "impl[ied] that [Mr. Ritchie] had "bit the hand that fed him." " App. 28a. However, the majority failed to perceive that any of it amounted to an improper comment on trial rights and instead misinterpreted the prosecutor's insidious comparison of Mr. Ritchie's trial here in the United States with a hypothetical one he would have had in Jamaica as a compliment of sorts – showcasing how far Mr. Ritchie had come from his troubled upbringing and homeland. App. 27a. The majority ultimately declined to award Mr. Ritchie a new penalty phase because trial counsel had not objected below and because the comments, even including ones that "[have] no place in our courts", did not amount to a denial of due process. App. 29a, 37a.

The penalty phase summation in Mr. Ritchie's case inspired a powerful dissenting opinion by Justice Labarga, in which he argued that Mr. Ritchie deserved a new penalty phase trial because the egregiousness of the prosecutorial misconduct reached down into the validity of the penalty phase itself. App. 54-55a. Justice Labarga recognized that Mr. Ritchie's trial did not take place in a vacuum but instead between the 2018 mid-terms and the 2020 presidential election, a time where the issue of immigration was "polemical, emotionally and politically charged". App. 49a. He asserted that the prosecutor created a narrative that Mr. Ritchie was an ungrateful immigrant who squandered the opportunities afforded him by the United States, and he recognized the danger that the jury considered Mr. Ritchie's immigrant status, a

national hot button emotional issue at the time of the penalty phase in this case, in its decision to recommend a sentence of death. App. 48a, 52a.

SUMMARY OF THE ARGUMENT

I. Had Mr. Ritchie's constitutional rights been violated by Washington state prosecutors instead of ones in Tampa, and had his case been heard by the Supreme Court of Washington instead of Florida's, he would not be on death row right now. That is because when a prosecutor in Washington flagrantly or intentionally appeals to jurors' potential racial or ethnic prejudice, bias, or stereotypes, the resulting violation of the defendant's constitutional right to a fair trial before an impartial jury is incurably harmful and requires reversal even if unobjected-to. Washington recognizes that appealing to such prejudices is a violation of the right to an impartial jury guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. Florida does not. In contrast, Florida requires the defendant to prove that race- or ethnic-based prosecutorial misconduct was the sole and proximate cause of the death verdict against him.

II. The decision below is wrong. The Florida Supreme Court's majority decision badly misconstrued the prosecutor's comments on Mr. Ritchie exercising his American trial rights as an accolade. And even in regard to the remarks the majority recognized were designed to stoke the jurors' anti-immigrant ideology, the majority's ruling requiring that Mr. Ritchie prove prejudice is an unworkable system. Because capital verdicts are meted out – or not – by human beings with varied life experiences and moral judgments, there is no guarantee that any capital prosecutor will obtain a death verdict even in the most aggravated of cases, even in Florida. The problem of race-based prosecutorial misconduct has been around long enough for us to know that nothing

short of reversal works. That is the only effective sanction when this type of prosecutorial misconduct occurs.

III. The case presents an issue of exceptional importance. Mr. Ritchie's death sentence was obtained in violation of the reliability standards of the Eighth Amendment, as well as the due process protections of the Fifth, Sixth, and Fourteenth Amendments. Neither a defendant's immigrant status nor his exercise of trial rights is a proper aggravating factor or a legitimate reason to impose a death sentence. Countenancing this sort of "us vs. them" argument inevitably renders Florida's death penalty capricious and unreliable. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."). *See also* 18 U.S.C. § 3593(f) (enshrining special federal protections against discrimination by requiring every juror to certify that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual sentencing decision) (emphasis supplied). Florida has no equivalent protection.

REASONS FOR GRANTING THE PETITION

I. State supreme courts are divided on the question presented.

The majority decision below exposes a conflict between Florida and Washington, and contradicts the clear teachings of this Court by undermining principles of consistency, predictability, and fairness in the law governing the imposition of the death penalty.

A. The Florida Supreme Court's decision in Mr. Ritchie's case will embolden prosecutors to urge jurors to base their deliberations on anti-immigrant sentiments. The majority decision below turned the prosecutor's insidious argument on its head, as if Mr. Harmon were giving him a compliment. That Court apparently thinks that when the prosecutor exhorted the jury that Mr. Ritchie "enjoyed the benefits of this country", "the greatest country on the face of the earth", and received the specific benefits that the State "carr[ied] the burden of proof", that he got to be "presumed innocent", and was given a "neutral and unbiased judge", "competent defense counsel", and "a jury of his peers" "[b]ecause this isn't Jamaica or some other country", that this somehow cast Mr. Ritchie in a positive light. App. 27a (emphasis supplied). It didn't, nor was it intended to.

The majority agreed with Mr. Ritchie only to the extent that "portions of the prosecutor's argument went too far." App. 27a. The majority held that "it was improper for the prosecutor to comment about the Jamaican legal system or to compare it to the legal system in the United States." App. 27a. The majority also agreed with Mr. Ritchie that the prosecutor's comparison of Mr. Ritchie's access to amenities here in pretrial

detention in America to what they presumably would have been in a Jamaican jail "served no purpose except to imply that he had "bit the hand that fed him." " App. 28a.

Ultimately, despite giving lip service recognition that Mr. Ritchie's prosecutor engaged in "improperly expressed anti-immigrant sentiment" which "has no place in our courts", the majority decision below mischaracterized those comments as "isolated". App. 28-29a. To the contrary, they were not isolated; they were an emphasized and repeated theme.

B. Washington holds prosecutors accountable for stoking anti-immigrant prejudices and stereotypes by finding such rhetoric to be a violation of the constitutional right to an impartial jury, and it awards new trials to correct the violation. The prosecutor in *State v. Zamora*, 512 P.3d 512, 515 (Wash. 2022), began voir dire by asking the jury about border security, illegal immigration, and crimes committed by immigrants. He asked jurors whether they felt they were closer to choosing a side of "we have [or] we don't have enough border security." *Id.* at 516. When one of the jurors expressed skepticism about building a wall or any other physical border, the prosecutor went so far as to ask her if she thought she would feel differently if an immigrant entered the country and hurt or killed someone. *Id.* at 517. Like Mr. Ritchie's trial counsel, Zamora's attorney failed to object. *Id.*

Unlike Florida, Washington asks whether the prosecutor's questions and remarks flagrantly or intentionally appealed to jurors' potential bias. *Id.* at 522. If the answer is yes, then the prejudice is incurable, and reversal is required. *Id.* Washington considers the apparent purpose of the statements, whether the comments were based

on evidence or reasonable inferences in the record, and the frequency of the remarks. *Id.* at 523.

Applied to the facts of that case, the Supreme Court of Washington found that the criminal prosecution of Zamora (for committing violence against police officers) did not remotely have anything to do with immigration so the prosecutor's mention of border security, immigration, undocumented immigrants, and drug smuggling was wholly irrelevant. *Id.* Next, the court found that the obvious purpose of the remarks was to highlight the defendant's perceived ethnicity and invoke stereotypes that people from Latin America are "criminally" and "wrongly" in the country, are involved in criminal activities, and pose a threat to the safety of "Americans." *Id.* at 524. The court also determined that the prosecutor asking about crime at the border, border security, and undocumented immigrants committing crime was not isolated.

Finally, since the topics of border security, undocumented immigrants, and alleged criminal acts committed by immigrants were very much in the zeitgeist contemporaneous with Zamora's trial, the court found that "anyone watching the news between 2016 and 2019" could understand such rhetoric as an intentional appeal to the jurors' potential racial or ethnic bias toward immigrants. *Id.* at 524.

Recognizing that past efforts to address ethnic-based prosecutorial misconduct had proved to be an insufficient deterrent, the Supreme Court of Washington, in order to "enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system" and safeguard "a criminal defendant's fundamental protection of life

and liberty against race or color prejudice," adopted the tested and proven rule of automatic reversal. *Id.* at 525.

Florida, in contrast, is content to allow prosecutors to traffic in xenophobia and ethno-nationalism by suggesting to juries that they should take into consideration that this immigrant defendant came to the United States of America and abused our public resources by committing a crime, and that he received but did not deserve the full panoply of constitutional trial rights.

What happened in Mr. Ritchie's case is even worse than the comments in *Zamora*. While it's true that Zamora's liberty was on the line, his life was not. Mr. Ritchie's is. *Zamora* did not involve any comment on exercise of trial rights or any suggestion that Zamora was not entitled to the trial he was receiving. Mr. Ritchie's prosecutor cruelly wove that well-known error together with the ungrateful immigrant theme. In this case, the whole became exponentially more toxic than the sum of its parts.

II. The Florida Supreme Court's decision is incorrect.

This majority decision below misapprehended the impact of the prosecutor's comments on Mr. Ritchie's exercise of his trial rights given that they were inextricably intertwined with the disparaging comments about Jamaica and his immigration status.

A. The prosecutor's comments on Mr. Ritchie's exercise of his trial rights, intertwined with anti-immigrant sentiment, cannot be rationally construed to carry any positive connotation. The majority decision characterized the prosecutor's comments as ones made in "a positive fashion". App. 27a. But the clear, and relentlessly negative,

implication of the prosecutor's "us vs. them" tactic is not only that Mr. Ritchie had betrayed us and our country but that he was still doing it as he sat in the courtroom. He "bit the hand that fed him" [App. 28a], and was taking advantage of the rights afforded by "the greatest country on the face of the Earth." T. 4301. The corollary negative implication is that he should never have been here in the first place.

The dissent saw these comments for what they were, and emphasized "[t]he issue of immigration was a polemical, emotionally and politically charged issue that permeated the political debate [during the time period between the 2018 mid-term elections and the 2020 general presidential election], and Ritchie's guilt and penalty phases took place in the middle of it." App. 49a.

B. The prosecutor's comments violated the "unconstitutional conditions doctrine". The unconstitutional conditions doctrine prevents the prosecution from "trenching on [a] defendant's rights and privileges". *United States v. Whitten*, 610 F.3d 168, 194 (2d Cir. 2010), quoting *United States v. Parker*, 903 F.2d 91, 98 (2d Cir. 1990). Accordingly, the prosecution cannot use a defendant's exercise "of specific fundamental constitutional guarantees against him at trial". *Whitten*, at 194, quoting *Burns v. Gammon*, 260 F.3d 892, 896 (8th Cir. 2001). "[A] capital-sentencing scheme cannot allow the jury to draw an adverse inference from constitutionally protected conduct such as a request for trial by jury". *Whitten*, at 194. *See also Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (among the prosecutor's numerous comments, "which we can only describe as outrageous", he sought to inflame the jury by "improperly

imply[ing] that Cunningham had abused our legal system in some way by exercising his Sixth Amendment right to a jury trial").

C. The prosecutor's comments on Mr. Ritchie's exercise of his trial rights, intertwined with anti-immigrant sentiment, were not responsive to any of his mitigating evidence. The majority below mischaracterized the prosecutor's repeated references to Ritchie's constitutional rights as being a response to his mitigation. App. 24-26a. That was neither the intent nor the impact of Mr. Harmon's diatribe. If he were truly rebutting Mr. Ritchie's traumatic childhood mitigation he could readily have done so without repeatedly and deliberately drawing the jurors' attention to his constitutional trial rights.

Instead he immediately rattled off all the trial rights Mr. Ritchie had freeloaded; then suggested that the jurors themselves were personally being impacted by all of his leeching: "[b]ecause this isn't Jamaica or some other country, this is the United States where this defendant gets to have you determine his sentence, not some bureaucrat, not some single judge, not some single person, not some star chamber, but you, his fellow citizens." T. 4301-02.

D. The ethnic-based prosecutorial misconduct in this case was far from isolated. Even though its assessment of the closing argument identified several instances of prosecutorial misconduct, the majority mischaracterized these repeated violations as "isolated" remarks. App. 34a. But the comments on Mr. Ritchie's exercise of his trial rights weren't isolated; they were a theme. The prosecutor hammered home the 'immigrants shouldn't be able to come here and be treated like American citizens'

refrain ten times in two separate portions of his penalty phase closing argument. Tr. 4301, 4302, 4303.

E. Requiring capital defendants to prove actual prejudice is unworkable in capital cases; it emboldens rather than deters constitutionally impermissible argument. Jury deliberations are private, and whether one or more of Mr. Ritchie's jurors were swayed by the prosecutor's jingoist diatribe is undiscoverable – there is certainly not a place on the verdict form for that. [By contrast, federal jurors are both instructed on and required to certify that "consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be." 18 U.S.C. § 3593(f) (emphasis supplied).] The majority's prejudice analysis misunderstands how capital jurors make their ultimate life or death decisions. Under the majority's rationale, simply by categorizing a case as "substantially aggravated and minimally mitigated" [App. 35a] any amount of intentional and destructive prosecutorial misconduct is forgiven.

The majority opinion also overlooks the fact that what is aggravating enough to warrant a death sentence despite the presence of mitigation, or what is mitigating enough to extend mercy despite the presence of substantial aggravation, is different for every juror. The prejudicial impact of the prosecutor's misconduct cannot be diminished – as the majority opinion does – by the fact that "the trial court found, the aggravators

"greatly outweigh" the scant mitigation". App. 42a (emphasis supplied). An individual juror or jurors, or the jury as a whole – if untainted by flagrantly improper anti-immigrant argument – could have evaluated the credibility of the competing experts differently than the judge did, and could have found any of Mr. Ritchie's mitigation regarding the tragic circumstances of his upbringing or his mental health much more compelling. *See Holsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988). And, under Florida law, if even a single juror had voted for life, the judge would have been prohibited from imposing a death sentence.

III. The case presents an issue of exceptional importance.

This Court said in *McCleskey v. Kemp*, 481 U.S. 279, 310 n. 30 (1987), that "[t]he [United States] Constitution prohibits racially biased prosecutorial arguments. And in *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986), this Court recognized that prosecutorial comments to the jury which "implicate other specific rights of the accused" are among the factors to be considered in determining whether there has been a violation of due process. A "request for trial by jury" may not be treated "as an aggravating circumstance" in a capital sentencing proceeding and a capital-sentencing scheme cannot allow the jury to draw an adverse inference from such constitutionally protected conduct. *Zant v. Stephens*, 462 U.S. 862, 885 (1983). If the government invites the jury to vote for death based on "inferences from conduct that is constitutionally protected ... for example ... the request for trial by jury, ... due process of law would require that the jury's decision to impose death be set aside." *Id.*

That is exactly what the prosecutor did in Mr. Ritchie's penalty phase trial – used against him his exercise of his right to "competent defense counsel", his right to be "presumed innocent", his right to hold the State to their "burden of proof to prove his guilt", his right to a "jury of his peers", his right to a "neutral and unbiased judge", and to humane treatment in pretrial detention, i.e. his specific fundamental constitutional rights. Tr. 4301-02.

As if that weren't bad enough, the jury was then asked "You really think that would happen in Jamaica? You think that would happen in the countries of the Caribbean? It happens here in this country because he enjoyed all those rights, the constitutional rights." Tr. 4303.

The prosecutor's argument that Mr. Ritchie had somehow undeservedly exercised his constitutional trial rights, juxtaposed with arguments that he was a foreigner who was lucky to be prosecuted in America, functioned as a calculated distinction between "us" (the prosecutor, the jury, and all of our other law-abiding countrymen) and "them" (Mr. Ritchie and other intruders). It sent a message that immigrants who commit crimes should be punished more severely than American-born offenders because wasting our country's good grace and draining our resources compounds the crime itself. These improper comments served no purpose but to urge jurors to sentence Mr. Ritchie to death in order to assist in the solution of the pressing social problem of violent crime and to deter future law-breaking (and possibly future immigration).

While all judicial proceedings require fair and deliberate consideration this is particularly important in a capital case because, as this Court has emphasized, the Eighth Amendment requires a heightened degree of reliability in capital cases:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); *Sumner v. Shuman*, 483 U.S. 66, 71-72 (1987).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to an impartial jury. Plenty of bias, conscious and unconscious, persists among Americans against people they perceive as interlopers. Around the time of Mr. Ritchie's trial, nearly a quarter (22%) of Americans said immigration was the "most important problem" faced by our country. Frank Newport, *Immigration Surges to Top of Most Important Problem List*, Gallup, July 18, 2018, https://news.gallup.com/poll/237389/immigrationsurges-top-important-problem-list.aspx. A capital prosecutor cannot be permitted to add fuel to this fire.

The specific myth about immigrants which Mr. Ritchie's prosecutor was fueling here – that they are a drain on our publicly-funded systems – is an extremely popular trope. Gretchen Frazee, *4 myths about how immigrants affect the U.S. economy*, PBS News, Nov 2, 2018, https://www.pbs.org/newshour/economy/making-sense/4-mythsabout-how-immigrants-affect-the-u-s-economy ("Myth #1: Immigrants take more

from the U.S. government than they contribute … Fact: Immigrants contribute more in tax revenue than they take in government benefits."). In fact over one-third of U.S. adults (34%) say immigrants are a burden because they take jobs and social benefits, and approximately 19% of Americans say that immigrants carry more responsibility for crime. Ana Gonzalez-Barrera and Phillip Connor, *Around the World, More Say Immigrants Are A Strength Than A Burden*, Pew Research Center, Mar. 2019, at 3-9.

With that as a backdrop, Mr. Ritchie's prosecutor exploited any anti-immigrant sentiment any of his jurors was potentially harboring in order to stigmatize Mr. Ritchie as a violent outsider and a threat to our American way of life. These arguments were not merely a dog whistle – they were more like a train whistle – designed to inflame Mr. Ritchie's jurors against him for being able to exercise American rights – rights that this country (unlike other lesser counties like Jamaica, as the prosecutor would have it) bestows upon individuals charged with a crime.

Further proof that prosecutor Harmon's disparagement of Mr. Ritchie's Jamaican origin served no purpose other than fear-mongering was that he was flat wrong. Jamaica's constitution guarantees comparable due process and other legal protections to those afforded by the United States justice system, including providing

legal representation to the accused as well as an impartial judiciary.[2] Jamaicans also enjoy the right to trial by jury.[3]

Additionally, considering that this was a death penalty case, the prosecutor's baseless comments were especially pernicious because no matter the differences between a jury trial here or abroad – one thing is certain. If Mr. Ritchie had been tried in Jamaica, he would not be on death row. Jamaica's last execution was in 1988.[4] According to a 2019 Amnesty International report, while Jamaica has retained the death penalty as a legal punishment, it does not have anyone on death row.[5] Jamaica's last death row inmate's death sentence was commuted in 2015 and no new death sentences have been reported.[6]

No state is immune, especially not one as heavily populated with immigrants as Florida, from such bias infecting court proceedings. Because his prosecutor repeatedly

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[2] Jamaica Constitution, Chapter II, Section 20(1) and (2) ("fair hearing within a reasonable time by an independent and impartial court"); (6)(c) and (d) ("shall be permitted to defend himself in person or by a legal representative of his own choice"); (5) ("Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."); and (8) (double jeopardy prohibition).

[3] For murder trials, "twelve jurors shall form the array". The Jury Act, Section 31(1) (Jam.) https://moj.gov.jm/sites/default/files/laws/Jury%20Act.pdf

[4] *Jamaica: Submission to the U.N. Universal Periodic Review*, Amnesty Intl., Apr. 19, 2010, at 3.

[5] *Death Sentences and Executions Annual Reports, Amnesty International Global Report*, 2019, at 14, 17, 55. https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF

[6] *Death Sentences and Executions Annual Reports*, Amnesty Intl., 2013–2018.

called the jurors' attention to the panoply of constitutional rights Mr. Ritchie was able to take advantage of – which (according to the prosecutor) would not have been available to him if he'd stayed in Jamaica – where by the prosecutor's clear implication he belonged – Mr. Ritchie's death sentence is unreliable because it is tainted by xenophobic prejudice.

This rhetoric is disgraceful, full stop. The prosecutor here plainly focused on and denigrated Mr. Ritchie's country of origin – and contrasted it with the "greatest country on the face of the earth" – in urging the American jury to return a death verdict. This xenophobic appeal is wholly inconsistent with Mr. Ritchie's due process rights and the objective goal of capital sentencing – that the defendant is sentenced for his crime, not for his nationality or any other immutable trait. It is intolerable for a prosecutor to infect this process with ethnic prejudices and to encourage the jury to make its life or death decision based on bias rather than reason and the evidence presented.

Mr. Ritchie's death sentence, imposed after such a tainted jury verdict, cannot constitutionally be carried out. This Court should grant certiorari to remedy the egregious violation, to prevent its recurrence, and to ensure reliability in capital sentencing.

CONCLUSION

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

Respectfully submitted,

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