No. 22-6411

In The
Supreme Court of the United States

GRANVILLE RITCHIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Capital Case

QUESTION PRESENTED

Whether the prosecutor's unobjected-to comments made during his penalty phase closing argument, that the Florida State Supreme Court found were improper but isolated, violated Ritchie's right to a fair penalty phase when the Florida Supreme Court concluded that Ritchie failed to demonstrate the jury would not have returned a recommendation of a death sentence without the prosecutor having made them?

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The Florida Supreme Court's decision petitioned for review appears as *Ritchie v. State,* 344 So. 3d 369 (Fla. 2022).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on June 9, 2022. A motion for rehearing was denied on August 23, 2022, and the mandate issued September 8, 2022. Ritchie adduces that this Court's certiorari jurisdiction is based on 28 U.S.C. § 1257(a). The State acknowledges that § 1257 sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states in part, "[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." Amend. VI, U.S. Const.

The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amend. VIII, U.S. Const.

The Fifth and Fourteenth Amendments to the United States Constitution state in pertinent parts, "The United States as well as any state shall not deprive any person of life, liberty, or property without due process of law," "nor shall any State deprive to any person within its jurisdiction the equal protection of the laws." Amend. V, U.S. Const., Amend. XIV, U.S. Const., § 1.

STATEMENT OF THE CASE AND FACTS

This certiorari petition arises from the Florida Supreme Court's affirmance of Ritchie's conviction and sentence of death for the aggravated child abuse, sexual battery of a victim less than twelve years of age by a defendant over the age of eighteen, and first-degree murder of nine-year-old F.W. In its opinion on direct appeal, the Florida Supreme Court set out the following facts:

> Ritchie sexually battered and strangled to death the nine-year-old child victim in this case, F.W., who had been left in Ritchie's care by a friend of the child's family. Ritchie then dumped the victim's body in the water off of the Courtney Campbell Causeway and fabricated a story about her disappearance. The victim's body was found washed up against the shoreline the day after she had been left alone with Ritchie, and Ritchie was later arrested and indicted on three counts of alleged crimes against the victim: (1) first-degree murder; (2) sexual battery of a victim less than twelve years of age by a defendant over the age of eighteen; and (3) aggravated child abuse. Ritchie's jury found him guilty as charged on all three counts. As to first-degree murder, the jury found that the killing was both premeditated murder and felony murder.

Ritchie, 344 So. 3d 369-374..

After the jury returned a verdict finding Ritchie guilty, the case proceeded to the penalty phase on his first-degree murder conviction. The State presented evidence of three aggravating factors: (1) the victim of the capital felony was a person less than twelve years of age, (2) the capital felony was committed while the defendant was engaged in the commission of a sexual battery, and (3) the capital felony was especially heinous, atrocious, or cruel (HAC).

Ritchie then put on evidence in support of the mitigation he sought, which included three statutory mitigators: (1) Ritchie Has No Significant History of Prior Criminal Activity; (2) The Capital Felony was Committed While the Ritchie was

Under the Influence of Extreme Mental or Emotional Disturbance and (3) Ritchie's Capacity to Appreciate the Criminality of his Conduct or to Conform his Conduct to the Requirements of Law was Substantially Impaired. In addition, Ritchie argued seven non-statutory mitigators, five of which involved his life growing up in Jamaica. The evidence of mitigation included a videotape consisting of shots of the location in Kingston, Jamaica where Ritchie was raised, as well as interviews with Jamaicans who knew him, his family, or about them, and the circumstances regarding how he was raised and the type of person he was.

After the State put on rebuttal evidence and victim impact testimony, the attorneys proceeded to closing statements. During his closing statement, the prosecutor first discussed the evidence demonstrating the aggravation upon which the State was relying to support the jury recommending a death sentence. DR:4274-97. He then turned to the mitigation argued by Ritchie. DR:4297. The prosecutor challenged some of the mitigation for lack of evidence but acknowledged Ritchie had presented sufficient evidence to support two mitigators: that he suffered mental and physical abuse by his father and that he was raised in a poverty-stricken and violent neighborhood in Kingston, Jamaica. The prosecutor challenged the extent to which Ritchie's upbringing mitigated his murder of F.W. He pointed out that Ritchie, as the son of the local political leader ("Don" or "Dan"), benefitted from that privilege and allowed him "to pull himself up out of that situation, move here where he had all these opportunities to this country." DR:4301-4302.

During the course of these comments, the prosecutor stated:

> 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 talk about. He enjoyed the due process right 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 has enjoyed all 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.

DR: 4301-02.

After arguing, as noted above, that Ritchie had successfully managed to remove himself from the situation he found himself in in Jamaica by moving to the United States where he enjoyed opportunities, the prosecutor challenged Ritchie's claim of impaired capacity. Specifically, he referred to the testimony of Dr. Lazarou, a general and forensic psychiatrist who testified on behalf of the State. Dr. Lazarou disagreed that Ritchie suffered from any impaired capacity. Instead, she testified that in her opinion his primary diagnosis was of an antisocial personality disorder and cited his failure to conform to social norms, deceitfulness, conning, use of an alias, impulsivity, consistent irresponsibility to honor financial obligations, and lack of remorse. (DR:4191-97).

The prosecutor continued his closing argument by addressing the evidence supporting Dr. Lazarou's diagnosis that Ritchie suffered from an antisocial personality disorder rather than impaired capacity:

And we saw how he took advantage of those opportunities. He took advantage of them by manipulating all these women in his life for a car, for money, how he hadn't worked for months but how he was still able to live a fairly good life. And in fact, we have seen through his manipulation and the intelligence he has to do that that Dr. Lazarou talked about, over the last five years he's gained all this weight because he manipulated Kelissa Kelley, who we know she is his girlfriend even though she didn't want to tell us that. How about that? That she has been putting money into his canteen, which she didn't rant (sic) to talk about really, for five years and allowed him to gain all this weight and made it comfortable for him in the jail while he waited for this trial.

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. (DR:4302-03).

After hearing evidence and argument from the State and Ritchie, the jury unanimously found that the State had established beyond a reasonable doubt the following three aggravating factors: (1) the victim of the capital felony was a person less than twelve years of age, (2) the capital felony was committed while the defendant was engaged in the commission of a sexual battery, and (3) the capital felony was especially heinous, atrocious, or cruel (HAC). The jury further unanimously found that the aggravating factors proven by the State beyond a reasonable doubt are sufficient to warrant a possible sentence of death. One or more individual jurors found that one or more mitigating factors were established by the greater weight of the evidence. The jury then unanimously found that the aggravating factors proven by the State beyond a reasonable doubt outweigh the established mitigating circumstances. Finally, the jury unanimously recommended the death penalty.

After holding a *Spencer* [FN1] hearing at which neither party presented additional witnesses or evidence, the trial court followed the jury's recommendation and sentenced Ritchie to death.[1] In its sentencing order, the trial court found that the State had proven beyond a reasonable doubt all three of the aggravating factors found by the jury.

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[1] In addition to sentencing Ritchie to death for the first-degree murder of F.W., the trial court also sentenced Ritchie to life imprisonment without the possibility of parole for his conviction of sexual battery of a victim less than twelve years of age by a defendant over the age of eighteen, and to thirty years' imprisonment for his conviction of aggravated child abuse, with all three sentences to run consecutively.

> The trial court assigned great weight to each aggravator and further found the aggravating factors sufficient to warrant the imposition of a death sentence. Regarding mitigation, the trial court rejected several of Ritchie's proposed statutory and nonstatutory mitigating circumstances, but found and assigned moderate weight to the statutory mitigating circumstance that Ritchie had no significant history of prior criminal activity. The trial court also found and assigned the noted weight to the following nonstatutory mitigating circumstances: (1) defendant suffered mental and physical abuse by his father and defendant's father was often absent because of four different families (moderate weight); (2) defendant was raised in a poverty-stricken and violent neighborhood in Kingston, Jamaica (little weight); (3) defendant was the oldest of eighteen siblings and helped raised them (little weight); (4) defendant was gainfully employed at various jobs (little weight); and (5) defendant was kind and generous to others and possesses other positive redeeming qualities (little weight). In imposing the death sentence, the trial court found that the aggravating factors "heavily outweigh" the mitigating circumstances.

Ritchie, 344 So. 3d at 375-376. (footnote omitted).

On September 28, 2020, Ritchie filed his Notice of Appeal in the Florida Supreme Court. On June 9, 2022, the Florida Supreme Court affirmed the judgment and sentence of the trial court. On August 23, 2022, rehearing was denied. On December 21, 2022, Ritchie filed his petition for writ of certiorari in this case, from which this response follows.

REASONS FOR DENYING THE WRIT

Ritchie, having been convicted of the horrifying rape and brutal murder of a child, asks this Court to reverse his death sentence. He claims that comments made by the prosecutor during his sentencing phase closing argument, one which the Florida Supreme Court found was not improper and the second which the court found improper but *isolated* and consisted of four sentences in a closing argument that runs 46 pages, were so highly improper that the unanimous recommendation of the jury

to sentence Ritchie to death should be ignored even though there was *neither any objection to the comments nor any prejudice demonstrated as a result of them.*

Because Ritchie failed to comply with Florida's procedural requirements for properly preserving any errors by raising a contemporaneous objection to the prosecutor's comments, under Florida law he was required to demonstrate that the jury would not have recommended a sentence of death without the improper comments having been made. Ritchie's inability to do so resulted in the Florida Supreme Court properly rejecting his claim. As the court concluded:

> In sum, we cannot say that the improper arguments precluded Ritchie's jury from making a reasoned assessment based on the evidence so as to amount to a denial of due process. Rather, viewing the record in its totality, it was the evidence of Ritchie's horrific and senseless crimes against the victim, not the prosecutor's missteps, that secured the recommendation of death.

Ritchie, 344 So. 3d at 387.

I. Ritchie's Failure to Contemporaneously Object to the Prosecutor's Comments

The Florida Supreme Court has held that "[a]s a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. *See e.g.*, *Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000). *McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999)." *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001). Therefore, under Florida law, Ritchie's failure to contemporaneously object to the prosecutor's comments waived this claim before the court. This procedural waiver of his claim, in turn, creates a procedural impediment to this Court's review of the comments.

A. Florida's Procedural Rules are an Adequate and Independent State Ground for the Florida Supreme Court's Determination

The Court has repeatedly recognized that its jurisdiction "fails" where a state court judgment rests on adequate and independent state law grounds. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); see also *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969). If a state court's decision is based on separate state law, this Court "will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

As the Court has specifically recognized in the past, Florida's law requiring an objection to preserve an error constitutes an adequate and independent state ground that prevents this Court from review of a Florida state court ruling denying a claim deemed waived because there was no objection to the error alleged. *Socher v. Florida*, 504 U.S. 527, 534 (1992) (the Court lacked jurisdiction to review the alleged vagueness of the jury instruction defining the "heinous, atrocious and cruel" aggravator because the defendant failed to object to the instruction, and Florida law requiring an objection to preserve the error rests on an adequate and independent state ground) *Socher,* 504 U.S. at 534.

Although Ritchie's claim was waived in state court because he failed to

properly preserve any error[2], the Florida Supreme Court still reviewed the comments cumulatively to ensure that any combined prejudice resulting from any errors did not amount to a "fundamental error." ("Fundamental error 'reached down into the validity of the trial itself to the extent that a . . . jury recommendation of death could not have been obtained without the assistance of the alleged error." *Ritchie,* 344 So. 3d at 386. *See McDonald,* 743 So. 2d at 505 (quoting *Urbin v. State,* 714 So. 2d 411, 418 n. 8 (Fla. 1998)); *Chandler v. State,* 702 So. 2d 186, 191 n. 5 (Fla. 1997) (holding that for an error to be raised for the first time on appeal, the error must be so prejudicial as to vitiate the entire trial). As the court explained, during a review for fundamental error it "examines the totality of the errors in the closing argument and determines whether the cumulative effect of the numerous improprieties deprived the defendant of a fair penalty phase hearing." *See Muhammad v. State,* 782 So. 2d 343, 361 (Fla.), *cert. denied,* 534 U.S. 836 (2001); *Brooks,* 762 So. 2d at 899; *Ruiz v. State,* 743 So. 2d 1, 7 (Fla. 1999); *Gore v. State,* 719 So. 2d 1197, 1203 (Fla. 1998). The court, having reviewed all the comments made by the prosecutor in this case, including those not raised by Ritchie in his petition before this Court, concluded that even cumulatively the prosecutor's comments did not constitute fundamental error.

[2] Ritchie did object to one comment made by the prosecutor that is not the subject of his petition. However, because there was no ruling made by the trial court on the objection, under Florida law, Ritchie failed to preserve that objection, as well. *Ritchie,* 344 So. 3d at 376 (Fla. 2022).

B. Review for Fundamental Error Does Not Invalidate the Procedural Bar

However, the fact that the Florida Supreme Court conducts a review for fundamental error does not mean that this Court is free to ignore the procedural bar as a result of the lower court's review for fundamental error. The Court in *Socher* rejected the dissent's argument that because the Florida Supreme Court engaged in a fundamental error analysis it did not waive review of a claim regarding an unobjected-to jury instruction. *Socher,* 504 U.S. at 549. The Court noted that the Florida Supreme Court demonstrated the "requisite clarity that the rejection of the defendant's claim was based on the alternative state ground that the claim was "not preserved for appeal." *Id.* at 534.

In the present case, the Florida Supreme Court showed with the same requisite clarity that Ritchie's failure to preserve the error is the reason the claim was deemed waived. *Ritchie,* 344 So. 3d at 376-77 ("because Ritchie *failed to properly preserve any issue for appeal* . . . we consider whether, cumulatively, the comments we determine are improper amount to fundamental error.") (emphasis added).

C. Ritchie's Motion in Limine Does not Qualify Under Florida Law as a Contemporaneous Objection

Nor does Ritchie's filing of a pre-trial motion seeking to prohibit improper penalty phase arguments properly preserve any alleged error. Although Ritchie filed a motion in limine seeking to preclude "improper" argument during the penalty phase, he failed to raise the specific errors about which he now complains (alleged improper comments on his right to trial and alleged anti-immigration sentiment). As

the Florida Supreme Court noted in its decision, it "previously explained that 'the general pretrial motion in limine does not constitute a contemporaneous objection to the prosecutor's arguments.'" *Wheeler v. State*, 4 So. 3d 599, 609 (Fla. 2009); *see also id.* at 609 n.6 (explaining that section 90.104(1), Florida Statues, which 'was amended in 2003 to make a contemporaneous objection to admission or exclusion of evidence unnecessary in order to preserve the issue for appeal where a prior 'definitive ruling' has been obtained . . . (sic) does not apply . . . to claims of error in prosecutorial argument". *Ritchie* 344 So. 3d at 379, n. 5. Therefore, Ritchie's filing of the motion in limine did not preserve the alleged errors under Florida law.

The procedural requirement of a contemporaneous objection is an adequate and independent state ground for the court's decision in this case, and neither the court's review for fundamental error or Ritchie's motion in limine changes this. Aside from the jurisdictional question presented by application of a procedural bar in state court, the lack of a proper objection at trial renders this case a poor vehicle to address the prosecutor's comments.

II. Despite the Difference Between Florida's and Washington's Laws About Reviewing Errors Not Preserved by Objection, the Courts May Not Reach a Different Result

Contrary to Ritchie's assertion that the decision of the Florida Supreme Court "exposes a conflict" between the state supreme courts of 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" (Pet. at 11), there is no conflict between the Florida Supreme Court's

decision in this case and that of any federal circuit court or state court of last resort. Sup. Ct. R. 10(b). Ritchie correctly points out that the Washington Supreme Court has adopted a standard of review concerning *racially* biased comments by a prosecutor which permits appellate review of the comments even when no objection to them is made. *State v. Zamora*, 512 P.3d 512 (Wash. 2022). The State concedes that this clearly differs from the standard of review employed by the Florida courts. However, Ritchie has not alleged the prosecutor's comments demonstrate *racial bias*, nor has he demonstrated that application of Washington's standard of review would necessarily result in the courts reaching a different outcome in his case.

In *Zamora*, the defendant challenged his convictions for two counts of third-degree assault of a police officer. He alleged that the prosecutor committed misconduct during jury selection when he repeatedly asked the potential jurors about their views on unlawful immigration, border security, undocumented immigrants, and crimes committed by undocumented immigrants, which were unrelated to the assault charge. The State asserted that the prosecutor's questions and remarks on border security, unlawful immigration, undocumented immigrants, and drug smuggling fell within the scope of CrR 6.4(b) (regarding jury challenges), that the questions about unlawful immigration and border security were intended to elicit responses from jurors that would reveal how they felt about law enforcement generally because immigration is an area of law where people often have sympathies that are supportive of those violating the law, and that the prosecutor's comment about a "drug bust" in Nogales was relevant because the defendant in the case was

under the influence of drugs. *Id.* at 521.

Even though the defendant in *Zamora* failed to object to any of the questions, the court found that the prosecutor's conduct was improper because the questions about border security and illegal immigration were irrelevant and unnecessarily politicized his voir dire. In reaching its decision, the court noted that it previously ruled in *State v. Monday,* 257 P.3d 551 (Wash. 2011) that when the allegation is one involving *racially biased* prosecutorial misconduct, the court applies an analysis that differs from the analysis used regarding other forms of prosecutorial misconduct.

> Generally, to prevail on a prosecutorial misconduct claim, a defendant who timely objects must prove that the prosecutor's conduct was both improper and prejudicial in the context of the entire trial. Where a defendant fails to object . . . the defendant who did not object must show the improper conduct resulted in incurable prejudice.
>
> When the allegation is that the prosecutor's misconduct implicated *racial bias*, we apply a . . . rule that when a prosecutor "*flagrantly or apparently intentionally appeals to racial bias* in a way that undermines the defendant's credibility or the presumption of innocence," we will vacate the conviction unless the State proves beyond a reasonable doubt that the race-based misconduct did not affect the jury's verdict. *State v. Monday*, 257 P.3d 551 (2011).

Zamora, 512 P.3d at 519. (The court in *Monday* confirmed that the burden placed on the State by this rule is equivalent to the harmless error standard of review: "Such a test exists: constitutional harmless error."). *Monday*, P.3d at 558.

The court in *Zamora* described its "flagrantly or apparently intentionally analysis" as an objective one:

> "[T]he analysis under *Monday* does not ask whether the conduct was intentional. The inquiry is whether it appeared intentional within the context of trial. *Id.* at 522. *To determine whether the prosecutor's conduct in this case flagrantly or apparently intentionally appealed to jurors' potential racial bias*, we ask whether an objective observer could view

> the prosecutor's questions and comments during voir dire as an appeal to the jury panel's potential prejudice, bias, or stereotypes about Latinxs . . . [w]e assess the conduct *within the context of trial.* To aid in our analysis, we consider factors discussed in *Monday*, including *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.*

Zamora, P.3d at 523. (emphasis added). In a footnote, the court further noted that "[u]nlike the rules for general prosecutorial misconduct, the rule for *race-based* prosecutorial misconduct does not differentiate between a defendant who objects and one who does not object." *Id.* at 519 n 11.[3] (emphasis added).

The initial problem that Ritchie faces in his attempt to establish there exists conflict between the Florida and Washington Supreme Courts is that his claim in this case involves what he argues is "anti-immigration sentiment," as opposed to "racial bias." He cites no case that equates "anti-immigration sentiment" with racial bias nor any Washington case that no longer subjects unobjected-to comments about "anti-immigration sentiment" to the same standard of review that it does racially biased comments by a prosecutor. Therefore, he provides no support for his argument that Washington would treat the Florida prosecutor's argument any different than it would other non-racially biased comments.

The second problem Ritchie faces is that given the criteria that the court in *Zamora* stated are the factors used to determine whether race-based prosecutorial misconduct occurred and applying the criteria to the facts of Ritchie's case, it is

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[3] In *Zamora,* the court appears to equate the phrase "ethnic prejudice" with "racial prejudice", stringing them together in its analysis and focusing specifically on the defendant's Hispanic heritage being linked to voir dire about illegal immigration.

questionable whether the result the Florida Supreme Court reached would be any different.

First, the Florida Supreme Court reached its determination that improper comment was made about Ritchie's right to trial based, at least in part, on the context in which they were made. "Although portions of the prosecutor's comments, which we will address below, are improper, *viewed in context*, the argument does not amount to an improper comment on Ritchie's exercise of his right to a jury trial." *Ritchie*, 344 So. 3d at 383. *See Zamora* at 523. ("We assess the conduct within the context of trial.")

Second, even the two statements that the Florida Supreme Court found improper, probably do not violate the criteria set forth in *Zamora*. Had the statements been objected to, the Florida Supreme Court would have applied a harmless error analysis. *Braddy v. State*, 111 So. 3d 810, 846-47 (Fla. 2012). However, the court noted that the aggravators "greatly outweighed" the "scant mitigation" in the case and acknowledged that even if the errors had been preserved by objection and the court applied a harmless error analysis to the comments, there was uncertainty whether similar errors would result in a different outcome in a closer case. *Ritchie,* 344 So. 3d at 388-89. Although the court's statements are clearly dicta given that the errors were not preserved, the statements strongly suggest that even if the court had applied a harmless error analysis, the aggravating factors in this case so far outweigh the mitigation, that the State would likely have demonstrated that the errors were harmless. Such a result would be consistent with this Court's holding in *Darden v. Wainwright*, 477 U.S. 168 (1986) (finding that defendant had a fair trial even though

the prosecutor called defendant an "animal," made several offensive comments, and implied that the death penalty was the only guarantee against a future similar attack.)

Because Ritchie's claim does not argue the prosecutor's comments are racially biased, *Zamora* does not even apply to Ritchie's case. However, even if the criteria used to determine if any comments were flagrantly or apparently intentional were applied to the comments, there is a real possibility that the court would conclude otherwise. Certainly, it cannot be ruled out given the statement from the court that even more adverse facts might not change the result. Thus, it is unlikely that the result in this case would differ even if the Florida Supreme Court applied the test enunciated by the Washington Supreme Court in *Zamora*.

III. The Florida Supreme Court Correctly Concluded That the Prosecutor Did Not Improperly Comment on Ritchie's Right to Trial, Correctly Determined That Most of the Prosecutor's Comments Were Made in Response to Ritchie's Mitigation Evidence and Correctly Required Ritchie Demonstrate the Improper Remarks Prejudiced Him

Ritchie also contends that the Florida Supreme Court's decision in his case is wrong on the merits in multiple ways. He claims that the Florida Supreme Court wrongly concluded that the prosecutor's comments about Ritchie exercising his trial rights were not improper, wrongly concluded that the prosecutor's comments were not made in response to the mitigation evidence presented by Ritchie, wrongly concluded that the improper comments were isolated, and wrongly required that Ritchie demonstrate that the improper comments prejudiced him. Ritchie seeks a fact intensive review of the Florida Supreme Court's fundamental error analysis in a case

that would have no impact beyond the interests of the parties to this case. *See Rudolph v. United States*, 370 U.S. 269 (1962) (recognizing that a certiorari petition predicated on reviewing facts of importance only "to the litigants themselves" was an inappropriate ground to grant a writ). Ritchie has failed to demonstrate that the Florida Supreme Court's fundamental error review was inconsistent with any decision from this Court. Furthermore, the sufficiency of the Florida Supreme Court's treatment of the alleged error is clearly established by a review of that court's opinion. *C.f. Barclay v. Florida*, 463 U.S. 939, 958 (1983) (wherein this Court recognized that the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless). Because no meaningful constitutional question has been presented, the State submits that this Court should deny review of the instant case.

A. Comments About Ritchie's Right to Trial

Initially, the Court should note that Ritchie refers to "trial rights," which could implicate numerous constitutional rights related to a defendant exercising his right to a jury trial, including the right to counsel, the right to remain silent, and double jeopardy, among others. However, the only "trial right" Ritchie argued before the Florida Supreme Court was the exercise of his right to trial by jury. ("Egregiously, the prosecutor attacked Ritchie's choice to exercise his constitutional right to a jury trial"; "[t]he Sixth Amendment right to a jury trial is a fundamental right"; "It is therefore improper for a prosecutor to comment on a defendant's exercise of his or her right to a jury trial"; "A 'request for trial by jury' may not be treated 'as an aggravating

circumstance' in a capital sentencing proceeding"; "it was improper and misleading for the prosecutor to blame Ritchie in the penalty phase closing argument for exercising his right to a jury trial." (IB at 28-32).

Although Ritchie did *highlight* in his brief the portion of the prosecutor's statements copied there that referred to other trial rights a defendant enjoys ("**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**") the closest Ritchie came to arguing that any trial right other than his right to trial was violated by the comments he raises before this Court is when he quoted the Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) stating "the United States Supreme 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." Since Ritchie's argument concerning his "trial rights" is otherwise focused exclusively on his claim that the prosecutor attacked him for exercising his right to trial, the claim that the prosecutor improperly commented on Ritchie's trial rights other that his right to trial is not properly before the Court.

Moreover, the Florida Supreme Court's ruling on this point is correct. Although the State questions whether Ritchie correctly identifies the Doctrine of Unconstitutional Conditions as the basis for prohibiting a prosecutor from criticizing a defendant for exercising a constitutional right, *see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (under the doctrine "the government may not

deny a benefit to a person because he exercises a constitutional right."), Ritchie may be correct that both *United States v. Whitten*, 610 F.3d 168 (2d Cir. 2010) (appellate counsel's failure to raise on direct appeal trial counsel's ineffective assistance for failing to lodge a sufficient objection to the prosecutor's closing argument that the defendant had humiliated the victim by requiring her to testify and be cross-examined at trial excused a procedural bar in his habeas proceeding) and *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991)[4] (the prosecutor made numerous "outrageous" statements which included that he was "offended" that the defendant had exercised his Sixth Amendment right to a trial by jury in the guilt phase of the trial, improperly implied that he had abused our legal system in some way by exercising his Sixth Amendment right to a jury trial, and subsequently questioned whether he was even entitled to his Sixth Amendment rights) support Ritchie's contention that it is improper for a prosecutor to attack a defendant for exercising a constitutional right. However, neither case supports his argument that the prosecutor in his case engaged in this improper behavior.

The Court has held that it is a violation of the Fifth Amendment to "allow the State the privilege of tendering to the jury for its consideration" a defendant's exercise of his constitutional rights. *Griffin v. California*, 380 U.S. 609, 613 (1965) (prohibiting the state's permitting the jury to infer the truth of facts or evidence from defendant's

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[4] The court's statements are clearly dicta as the court acknowledged that it "need not determine whether the prosecutor's improper remarks were sufficiently prejudicial to warrant a new sentencing hearing because, as discussed above, *we concur with the district court that the trial court's improper jury instructions during the penalty phase require vacating the death sentence.*" *Cunningham*, 928 F.2d at 1020.

failure to deny or testify about a matter a person would generally be expected to deny or explain). However, Ritchie has failed to cite any case in which the Court has ever held the Constitution is violated because a prosecutor merely mentions that a defendant possesses a right to trial by jury. *See Jones v. Warden, Georgia Diagnostic & Classification Prison*, 20-12587, 2022 WL 4078631 at *4 (11th Cir. Sept. 6, 2022) ("No binding authority suggests that a defendant is deprived of a fair trial simply because the jury is reminded of the constitutional rights that have safeguarded his proceedings.")

The Florida Supreme Court explained in its decision that merely referencing the right to a jury trial may not "cross the line" into an improper comment due to the wide latitude given attorneys during closing arguments. *Ritchie,* 344 So. 3d at 383. On the other hand, the court acknowledged that error does occur when the remarks "negatively reflect" on the defendant's exercise of such rights. *Ibid.* quoting *Evans v. State*, 177 So. 3d 1219, 1236 (Fla. 2015). The court contrasted the facts in *Evans* from the facts in Ritchie's case. It pointed out that in *Evans* the prosecutor suggested that the defendant was wasting the time of the court and jury by seeking a trial, while noting that the comments of the prosecutor in Ritchie's case did not negatively reflect upon him exercising this right. In fact, while the prosecutor explained that Ritchie "enjoyed" the many rights provided in the United States Constitution, the prosecutor never actually commented at all on Ritchie's choice to exercise his right to trial.

B. The Florida Supreme Court Never Determined that the Prosecutor's Comments About his Right to Trial Was in Response to Mitigation

Ritchie further argues that the court incorrectly determined that these comments were responsive to the mitigation he presented, but the court never determined that the remarks referencing Ritchie's *trial rights* were made in response to mitigation. Rather, the only mention that the court makes concerning comments about Ritchie's trial rights while it discusses the prosecutor responding to mitigation were that (1) "immediately *prior*" to these comments the prosecutor had been doing so, and (2) while addressing the *subsequent* comments the court determined were *improper*, the court found that Ritchie's proposed mitigation allowed the prosecutor to address evidence of his background, experiences, emigration from Jamaica, manipulation of others, and his ability to rise above the situation in which he was born, but not to address the Jamaican legal system, compare it to that of the United States, or comment on his incarceration while awaiting trial. While the State may not agree that any of the subsequent comments demonstrate an anti-immigration sentiment, the State certainly agrees the court correctly determined that the proposed mitigator of substantial impairment permitted the prosecutor to rebut this by addressing Ritchie's manipulation of others and address the weight to attribute to his mitigation based on his childhood and upbringing by pointing out his ability to rise above it.

C. The Florida Supreme Court Correctly Required Ritchie Demonstrate Prejudice

Finally, the Florida Supreme Court correctly required that in absence of an

objection, Ritchie demonstrate that he was prejudiced by the improper comments. Ritchie criticizes this requirement as unworkable and claims it emboldens impermissible argument. Petition at 17.

However, this standard of review is similar to that used by federal courts under similar circumstances. *See* Fed. R. Crim. P. Rule 52(b)12; *United States v. Young*, 470 U.S. 1, 11 (1985) (before a criminal conviction is overturned based on a prosecutor's comments, the comments must be viewed in context to determine whether the prosecutor's conduct affected the fairness of the trial).

Indeed, not only is this standard of review not too harsh a standard of review to employ when a defendant fails to preserve any error, the Court has held that that it is *too lenient* a standard to use in collateral proceedings under similar circumstances. *See United States v. Frady*, 456 U.S. 152, 166 (1982). The Court explained in *Frady* that Rule 52(b)12, by permitting review of unobjected-to errors, balanced the "*need* to encouraging trial participant to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." (emphasis added) and warned that any unwarranted extension of this rule would skew this careful balance. *Id.* at 163. Ritchie's argument seeks to undermine this balance.

Furthermore, the Court has also previously addressed the concern Ritchie expresses regarding the need to deter impermissible argument. It has rejected the idea that reversal of harmless errors is an appropriate method of deterring prosecutorial improprieties, even when the frequency of the improper remarks

continues unabated despite court admonitions. *United States v. Hasting*, 461 U.S. 499, 505–07 (1983). As the Court stated, there is a balance courts must strike between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victims on the other. *Id.* at 509. Application of the harmless error rule strikes this balance. "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.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). In the present case, the prosecutor's comments likely didn't "infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. 180-81 (finding that defendant had a fair trial even though the prosecutor called him an "animal," made several offensive comments, and implied that the death penalty was the only guarantee against a future similar attack). Elimination of the harmless error rule would also eliminate this important balance.

CONCLUSION

The Florida Supreme Court's decision below does not present any conflict with any decision of this Court, nor is any unsettled question of federal law involved. Therefore, the State respectfully requests that this honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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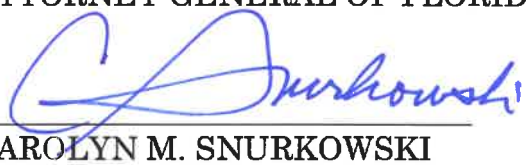

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