

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GERMAINE COULTER, SR.

PETITIONER,

v e r s u s

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN

FORMA PAUPERIS

Pursuant to Title 18 U.S.C. §3006A(D)(7) and Rule 39 of this Court, Petitioner Patrick Asfour asks for leave to file the attached Petition for Writ of Certiorari without prepayment of fees or costs and to proceed *in forma pauperis*.

The United States District Court for the Western District of Oklahoma appointed counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Leave to proceed *in forma pauperis* was granted in the United States District Court for the Western District of Oklahoma and the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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UNITED STATES OF AMERICA,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Mr. Coulter's Sixth Amendment rights were violated by the fact that the jury deliberations became publically known on how the jury was divided numerically, and the coercion of one juror to ultimately change her "No" to the verdict to guilty on counts 1 and 2. The United States court of appeals entered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.
2. Whether the Tenth Circuit erred in failing to find plain error and a denial of due process under the Fifth Amendment due to the prosecutorial misconduct that occurred in Mr. Coulter's trial when the prosecutor intentionally elicited hearsay testimony of two different murders.

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
TABLE OF CONTENTS	iii-iv
TABLE OF AUTHORITIES	v-vi
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT REGARDING PROCEEDING IN FORMA PAUPERIS	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
CONCISE STATEMENT OF THE CASE.....	2
A. Factual Background Related to Issues in Petition.....	2
B. Proceedings Below	6
REASONS FOR GRANTING THE WRIT	8
I. Mr. Coulter’s Sixth Amendment rights to a fair and impartial jury were violated and the verdicts for counts 1 and 2 were tainted denying Mr. Coulter his rights under the Sixth Amendment to the United States Constitution. The Court should grant certiorari because the United States Court of Appeals has so far departed from accepted and usual course of judicial proceedings and clarity and proper scope regarding numerical inquiry of jurors when polling the jury and coercion of jurors.	
II. Compelling reasons exist for Mr. Coulter’s Petition for A Writ of Certiorari to be granted because the United States Court of Appeals has so far departed from accepted and usual course of judicial proceedings regarding the egregious prosecutorial misconduct which so infected his trial as to make his convictions a denial of due process.	
CONCLUSION	25
CERTIFICATE OF SERVICE.....	26

APPENDIX	27
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A Order and Judgment OF THE 10TH CIRCUIT COURT OF APPEALS

TABLE OF CITED AUTHORITIES

UNITED STATES SUPREME COURT

<u>Brasfield v. United States</u> , 272 U.S. 448 (1926)	7,10,,13,17
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637, 643 (1974)	18,21,22
<u>Lowenfield v. Phelps</u> , 484 U.S. 231, 239-40, 108 S. Ct. 546, 552 (1988)	10,13
<u>United States v. Agurs</u> , 427 U.S. 97, 108 (1976)	18
<u>United States v. Bagley</u> , 473 U.S. 667, 676 (1985)	18
<u>United States v. Martin Linen Supply Co.</u> , 430 U.S. 564, 565, 97 S. Ct. 1349, 1351 (1977) ...	24
<u>United States v. Olano</u> , 507 U.S. 725, 732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)	23
<u>United States v. Thomas</u> , 449 F.2d 1177, 1181 (D.C. Cir. 1971) (en banc)	15

UNITED STATES COURTS OF APPEAL

<u>Amos v. United States</u> , 496 F.2d 1269, 1272 (8th Cir. 1974)	13
<u>In re Sittenfeld</u> , 49 F.4th 1061, 1066 (6th Cir. 2022)	12
<u>United States v. Hargrove</u> , 911 F.3d 1306, 1309 (10th Cir. 2019)	9
<u>United States v. McElhiney</u> , 275 F.3d 928, 931 (10th Cir. 2001)	9,15
<u>United States v. Haber</u> , 251 F.3d 881, 888 (10th Cir. 2001)	15
<u>United States v. LaVallee</u> , 439 F.3d 670, 689, (10 th Cir. 2006)	15

UNITED STATES CODE

18 U.S.C. § 1591	6
18 U.S.C. § 1594(c)	6
18 U.S.C. § 3006A	1
28 U.S.C. § 1254(1)	1

FEDERAL RULES

Fed. R. Crim. P. 31(a)	15
Fed. R. Civ. P. 606(b)	23
Fed. R. Crim. P. 52(b)	34

UNITED STATES CONSTITUTION

U.S. Const. amend. V	8, passim
U.S. Const. amend. VI	8, passim

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was reported at 57 F4th 1168 and was entered on January 18, 2023. The Order and Judgment are attached to this Petition as Appendix “A”.

JURISDICTION

The Order and Judgment was entered on January 18, 2023. A Petition for Rehearing filed by Mr. Coulter was denied on February 2, 2023. A copy of the denial is attached as Appendix “B.” The Jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

STATEMENT REGARDING PROCEEDING IN FORMA PAUPERIS

The United States District Court for the Western District of Oklahoma appointed counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Leave to proceed *in forma pauperis* was granted in the U.S. District Court for the Western District of Oklahoma as well as the U.S. Court of Appeals for the 10th Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...”

The Fifth Amendment to the United States Constitution provides in relevant part that “No person shall be...deprived of life, liberty, or property, without due process of law...”

CONCISE STATEMENT OF THE CASE

A. Factual Background Related to Issues in Petition.

The government presented its case largely through testimony of prostitutes Megan Mullins (“Mullins”) and Elizabeth Andrade (“Andrade”), Does 1-3, and law enforcement expert testimony and at the arrest of Andrade.

1. Hearsay Testimony Related to Murders

During the jury trial, the prosecutor elicited improper hearsay testimony involving two womens’ deaths, Diaz and Jamie, which testimony inculpated Mr. Coulter. The women’s deaths were in different years and locations. Both deaths were years before the charged child sex trafficking conspiracy dates of January 1, 2018 to February 19, 2018. Diaz’s death was approximately 2011 or 2012, and Jaime’s death was around 2005. The prosecutor focused on the long gone time periods of 2011-2012 and 2005, instead of the 2018 charged conspiracy. The Court overruled in part and sustained in part the objections. At bench conference the Court cautioned the prosecutor “But I asked you before to get to the relevant time period, and you’ve been **wandering around in this 2008 time period** for some significant portion. I want you to move on.” (ROA, Vol. III, at 171, 172); Emphasis added. The prosecutor did not stop, ignoring the time frame of the alleged conspiracy, later asking Andrade about the death of Diaz (which was years before the alleged conspiracy). And the prosecutor used the distant time period testimony regarding the death of Diaz in closing arguments.

Mullins testimony regarding Diaz: The improper questions and testimony were that Diaz “was killed”. Though the deaths were separated by years, what was common to the two dead women was Coulter.

Regarding Diaz's death, the prosecutor asked incriminating questions until through Mullins Coulter was fully implicated. Review of the transcript shows that the prosecutor is "begging" the question that Coulter was involved in Diaz's death. The following improper sequence of questions by the prosecutor to Mullins inferred to the jury Coulter was involved in Diaz's death:

- Do you know who killed her?
- Do you have someone in mind that you believe was responsible?
- In the past, have you said that someone else was responsible?
- What did Mr. Coulter say about Ms. Diaz dying?
- What did he say?
- What did Mr. Coulter say about Ms. Diaz dying?

Asking Mullins regarding Ms. Diaz passing away:

Q. (By the prosecutor): What happened to her?

Trial counsel objected on the basis of hearsay. The District Court overruled, stating trial counsel had opened the door and the Court was going to let her follow up. Trial counsel submits the District Court's ruling was an abuse of discretion. Trial counsel's questions were innocuous and were not manner, means, circumstances or how Diaz died.

Intentionally placing before the jury Coulter was involved in the killing of Diaz.

Q. (By the prosecutor): All right. What do you believe happened to her?

Trial counsel objected speculation, but was overruled.

A. (By Mullins): I mean, she was killed.

The prosecutor continued, asking Mullins if she knew who killed Ms. Diaz, the obvious implication Coulter was involved:

Q. (By the prosecutor): Do you have someone in mind that you believe was responsible?

Q. (By the prosecutor): In the past, have you said that someone else was responsible?

Q. (By the prosecutor): What did Mr. Coulter say about Ms. Diaz dying?

The prosecutor ultimately got the answer unduly prejudicing Coulter. The inference was that Coulter was involved in the killing:

Q. (By the prosecutor): What did Mr. Coulter say about Ms. Diaz dying?"

A. (By Mullins): We shouldn't let bad things happen to daddy.

"Daddy" was Coulter. The jury knew this. The testimony throughout trial was that "daddy" was Coulter.

4. The prosecutor used the testimony of the killing of Diaz in a case that had nothing to do with her killing in closing arguments to improperly influence the jury against Coulter.

Mullin testimony regarding Jaime: Jamie was pushed out of a car to her death. The inference that Coulter was involved in her death was also improperly educed by the prosecutor:

Q (By the prosecutor): Who is Doe 2's ___?

A (By Mullins): Jamie. She's passed away.

Q What happened to her?

A She got pushed out of a car on the highway and got hit head on.

Q Who pushed her?

A I wasn't around. I don't know.

Andrade (testimony regarding Diaz's death)

Q What happened to Elizabeth Diaz?

A She passed away. She was given a hotshot.

Q Who gave her a hotshot?

MR. ZUHDI: Objection. Relevance, your Honor.

THE COURT: What's the relevance?

MS. ANDERSON: Your Honor, there has been testimony about what happened to Ms.

Diaz --

THE COURT: Right.

MS. ANDERSON: -- and what was said about that.

THE COURT: All right. Why don't you all approach, please.

The prosecutor interjected two deaths inferring Coulter was involved. Both deaths had no relevance to the charges. The prosecutor in closing pulled in the history that "Mr. Coulter hit the girls.", "beat up Lizzie Diaz, had locked her in a closet with a big tire in front of it and "told the other girls that if they let her out, they would get it worse." The prosecutor said Coulter lost everything, his money, cars, houses, most of the girls, and he was in jail. The prosecutor, after the lead in of beatings and Coulter losing everything, told the jury that Diaz died while he was in jail and then topped off with an undue prejudicial inference that Coulter was responsible for Diaz's death, "We shouldn't let bad things happen to daddy."

2. Jury Deliberation Facts (discussed in more detail in Reasons for Granting Writ)

Jury deliberations began 7/19/19 and were continued to 7/22/19. After the jury trial concluded on Friday and after approximately six hours of deliberation, the jury announced they were hopelessly deadlocked on Count 3. The Court polled the jury on Count 3 and the jury confirmed they were hopelessly deadlocked. The court declared a mistrial on Count 3. The Court then read the verdict on Count 1 and Count 2 as guilty. The court polled the jury by asking all jurors to raise their hand if it was their verdict. One juror (Juror Noland) did not raise her hand. After questioning

occurred, Juror Noland answered “no” when asked “Does that constitute your individual verdict?” The Court then directed the jury to continue their deliberations. All jurors, with the exception of Juror Noland, returned to the deliberation room. Out of the presence of the jury, the Court rescinded the mistrial on Count 3. Juror Noland was emotional and did not go back into the deliberations room. The jury was brought back into the courtroom and were told to come back the following Monday to continue deliberations, including deliberations on Count 3. The jury ultimately reached a guilty verdict on Counts 1 and 2. The jury remained deadlocked on Count 3. A motion for new trial was filed on 8/5/19. The court denied the motion.

B. Proceedings below.

1. On 11/13/18, a Superseding Indictment was filed solely charging Coulter. Count 1 charged Coulter with conspiracy to commit child sex trafficking and count 2 alleged child sex trafficking, in violation of 18 U.S.C. § 1591(a)(1), (a)(2), (b)(2), and (c). All in violation of 18 U.S.C. § 1594(c). Jury trial occurred on 7/15/19 - 7/19/19. Coulter was sentenced 9/28/2 and was committed to the custody of the FOB for 360 months as to Count 1 and 2, concurrently.
2. The Tenth Circuit’s Order and Judgment affirmed the judgment of the district court. With regard to Ground Five of his Brief of Appellant, the court of appeals held that since the district court had no reason to suspect the verdict was not unanimous, once the poll revealed Juror Noland did not agree with the guilty verdicts, the court conducted no further inquires, so in essence the court of appeal found no foul. If this assertion by the court of appeals were correct, then polling of the jury is an unnecessary waste of time. The court of appeals continued that “As far as the district court was aware, Ms. Noland could have disagreed with the verdict as to Count 1, Count 2, or both, or could have wished to continue deliberating on Count 3.” But, this analysis by the court of appeals

contradicts the court of appeals' finding four pages earlier in the opinion: the court of appeals stated "When the court questioned her about whether the verdict on Counts 1 and 2 represented her vote, she responded, "No." Appx. P. 28 – 31. As is plain, the court of appeals presented two opposite findings on the exact same subject. The court of appeals contradicting itself on this critical analysis establishes that the district court, even if not meaning to, conducted a numerical inquiry and thus violated *Brasfield, infra*.

With regard to Ground Two of Mr. Coulter's appeal and the prosecutorial misconduct that occurred at his trial, the Tenth Circuit held that Mr. Coulter did not show "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." Appx. P. 23. The appellate court also stated that "He has not demonstrated that the alleged error was "clear or obvious under current law." Appx. P. 23. The Tenth Circuit holding that plain error wasn't shown by Mr. Coulter on appeal departs from reason and from the accepted and usual course of judicial proceedings and sanctions the bad misconduct by the prosecutor such that this Court's supervisory power should be exercised.

4. A Petition for Rehearing filed by Mr. Coulter. Coulter asked the reviewing court to review the court's holding that hearsay testimony, over objection, of a death that occurred approximately nine years before the trial (with the inference that Mr. Coulter was involved in the death) under the facts of the jury actions, was harmless based on "overwhelming" evidence and that the testimony of the death was "comparatively insignificant." Coulter also asked for rehearing on the Tenth Circuit's usurping the province of the jury in finding evidence "overwhelming" when, under the facts of this case and the jury's deadlocked jury verdict status for a time and ultimate hopeless deadlock on Count

3, indicates the evidence was not “overwhelming.” The Tenth Circuit denied the Petition for Rehearing on February 2, 2023.

REASONS FOR GRANTING THE PETITION

- I. Mr. Coulter’s Sixth Amendment rights to a fair and impartial jury were violated and the verdicts for counts 1 and 2 were tainted denying Mr. Coulter his rights under the Sixth Amendment to the United States Constitution. The Court should grant certiorari because the United States Court of Appeals has so far departed from accepted and usual course of judicial proceedings and clarity and proper scope regarding numerical inquiry of jurors when polling the jury and coercion of jurors.
- II. Compelling reasons exist for Mr. Coulter’s Petition for A Writ of Certiorari to be granted because the United States Court of Appeals has so far departed from accepted and usual course of judicial proceedings regarding the egregious prosecutorial misconduct which so infected his trial as to make his convictions a denial of due process.

I.

There exist compelling reasons for the granting of this petition for a writ of certiorari. Mr. Coulter has a constitutional right to a fair and impartial jury. U.S. Const. amend. VI. Mr. Coulter’s Sixth Amendment rights were violated by the fact that the deliberations became publically known on how the jury was divided. The United States Court of Appeals entered a decision that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power. Supreme Court Rule 10(a). The juror that told the Court it was not her verdict and then refused to go back and deliberate with the other jurors and ultimately, after the weekend break, was brought into the Judges chambers was coerced. The United States Court of Appeals’ failure to find that a mistrial should have been granted because Mr. Coulter’s right to a fair and impartial trial had been impaired is a decision entered by the United States Court of Appeals that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power.

With respect to the coerciveness of the Allen charge given in the case herein, the Tenth Circuit Court has adopted a case-by-case approach. United States v. McElhiney, 275 F.3d 928, 931 (10th Cir. 2001).

Coulter's Sixth Amendment rights were violated during jury deliberations and as a result, Coulter was unduly prejudiced and denied his rights under the Sixth Amendment. The trial court erred in denying Coulter's motion for mistrial based on the jury deliberations and the individual juror that did everything she could do under the circumstances to stand by her pronouncements in open Court that the findings of guilty were not her verdict and that she did not want to deliberate anymore with her fellow jurors. The trial court's decision was, respectfully, based upon a clearly erroneous finding of fact or an erroneous conclusion of law or manifest a clear error of judgment. *Id.*, United States v. Hargrove, 911 F.3d 1306, 1309 (10th Cir. 2019). Mr. Coulter's Sixth Amendment rights were also violated by the fact that the deliberations became publically known on how the jury was divided, that is 11 for guilt and 1 that guilty was not her verdict on the counts. Therefore, there is substantial doubt as to the accuracy and integrity of the guilty verdicts of Counts 1 and 2. Count 3 was hopelessly deadlocked and no verdict was decided upon.

Facts, legal authority and Argument: After the jury trial concluded on a Friday early evening, and after approximately six hours of deliberation, the jury announced they were hopelessly deadlocked on Count 3. The Duty to Deliberate, Instruction 39, had been given to the jury (ROA, Vol. I, at 545; Vol. III, at 978, 981, 994). The jury foreman provided the Court with a verdict form he signed marked as guilty on Counts 1 and 2. The Court polled the jury on Count 3 and the jury confirmed they were hopelessly deadlocked. With no objection from either party, the court declared a mistrial on Count 3. The Court then read the verdict on Count 1 and Count 2 as guilty. (ROA,

Vol. III, at 979). The court polled the jury by asking all jurors to raise their hand if it was their verdict. One juror, Juror Noland, did not raise her hand. The court then asked her “does it constitute your verdict in all respects?” to which Juror Noland replied “Can I get a moment?” The court replied, “Certainly” and then Juror Noland began to exit the courtroom. The court stopped her, saying “No, no. Stay here. Stay here. Go ahead and be seated. Go ahead and be seated.” Once the juror came back to her seat and sat back down in the jury box, the court asked her: “Ms. Noland, is the verdict that’s indicated on the verdict form with respect to Count 1, which is a guilty verdict, and with respect to Count 2, which is a guilty verdict – does that constitute your individual verdict as well as that of the other jurors?” to which Juror Noland answered, “No.” The Court thereupon directed the jury to continue their deliberations. (ROA, Vol. III, at 979-982, 985).

In Brasfield v. United States, 272 U.S. 448 (1926), the trial court had, after deliberations stalled, inquired as to how the jury was divided, and was informed simply that the jury stood nine to three. The jury resumed deliberations and subsequently found the defendants guilty. This Court concluded that the inquiry into the jury's numerical division necessitated reversal because it was generally coercive and almost always brought to bear in some degree, the serious – though not crucial – and improper influence upon the jury. *Id.*, 272 U.S. at 450. Although the decision in Brasfield was an exercise of this Court's supervisory powers, 3 it is nonetheless instructive as to the potential dangers of jury polling. Lowenfield v. Phelps, 484 U.S. 231, 239-40, 108 S. Ct. 546, 552 (1988).

In the case herein, the court directed the jury to deliberate further after the unusual occurrences in the courtroom of Juror Noland attempting to leave the courtroom after stating “No” to the verdicts of guilt of counts 1 and 2. “After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the

poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.” Fed. R. Crim. P. 31(d).

All the jurors, with the **exception** of Juror Noland, returned to the deliberation room. After a short recess, proceedings resumed out of the jury’s presence. The trial court informed the parties Ms. Noland felt uncomfortable going back into the jury room and continuing with deliberations. The Court said the juror was emotional and did not go back into the deliberations room. The jury was brought back into the courtroom and were told to come back the following Monday to continue deliberations, including deliberations on Count 3.

The trial court then wanted to bring Juror Noland in to question her with respect to her reluctance to deliberate and whether she was able to deliberate. Trial counsel objected to individually questioning Juror Noland because of “...we would look on it as very – more pressure that she’s already gone through...We would object to that.” Trial counsel did not agree to specific questioning of Juror Noland.

The trial court decided to have Juror Noland in chambers for questioning with counsel present to determine if she was ready to deliberate. The juror was brought into chambers and questioned by the court about whether she could continue deliberations. Juror Nolan answered in the affirmative and she would follow the court’s instructions. At the conclusion of the court’s questioning, Juror Nolan tellingly offered a statement which evidences the undue coercion and pressure she was feeling when she offered, not in response to any question, that “I felt like I was at the principal’s office.” Mr. Coulter submits that the in chambers questioning by the Court regarding Juror Noland was not similar to or like the in chambers questioning of jurors when jurors have sensitive answers to voir dire questions or to discuss sensitive topics in voir dire. For example, in the conduct of its Remmer

hearing, and pursuant to Fed. R. Civ. P. 606(b), the court has a vital interest in seeing that jurors are not harassed or placed in doubt about what their duty is and that false issues are not created. In Remmer v. United States, 347 U.S. 227, 229-30, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954), the Supreme Court held that "unauthorized invasions" on the jury proceedings can oblige the trial court to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." This is a Remmer hearing. In re Sittenfeld, 49 F.4th 1061, 1066 (6th Cir. 2022). Mr. Coulter submits the evidence supports that Juror Noland was coerced, and harassed, the evidence being that she waited until the safety of the courtroom to not raise her hand as the court asked to indicate the verdict of guilty on Counts 1 and 2 constituted her unanimous verdict, and to voice her response of "No" to the verdicts of guilty on Counts 1 and 2 represented her vote, that she tried to get away and leave the Courtroom after her announcement of "No", and that Juror Noland refused to go back into the jury deliberation room with the other jurors after she had attempted to leave the courtroom and, after the court sent the jury back to the jury room to continue to deliberate that early evening, Juror Noland refused to return to the jury room. The court then sent the jury home for the weekend.

After the weekend recess, the following Monday morning before the deliberations resumed, Mr. Coulter filed his motion for mistrial. During closed proceedings, argument on Coulter's motion for mistrial occurred. The trial court denied Coulter's motion for mistrial. The previously stated questioning in Chambers of only Juror Noland took place, over the objection of counsel for Mr. Coulter, by the court to see if she would deliberate. As Juror Noland was leaving the chambers to return to the courtroom, she made the statement that evidenced the undue coercion she was subjected to, "I felt like I was at the principal's office." At 10:30 a.m. the jury, including Juror Noland,

returned to the courtroom and a modified Allen instruction was read. At 10:34, the jury commenced deliberations. At 2:07 p.m., the jury announced a verdict. The jury remained hopelessly deadlocked as to Count 3, but returned a unanimous verdict of guilty as to Count1 and Count 2. As set forth herein, the verdict was achieved Mr. Coulter submits by undue coercion, constitutionally prohibited by the Sixth Amendment to the United States Constitution, and therefore the guilty verdicts to Counts 1 and 2 should have been reversed and vacated.

Mr. Counter submits it is likely the proceedings conducted by the trial court coerced Juror Noland in arriving at her final verdict. Amos v. United States, 496 F.2d 1269, 1272 (8th Cir. 1974). Juror Noland was the subject of undue pressure and coercion. The deliberations became public, how the jury was divided became public, and the juror who had voted not guilty became publically known. The deliberations were no longer secret. In Brasfield, *supra*, after deliberations stalled, the trial court inquired as to how the jury was divided, and was informed simply that the jury stood nine to three. The jury returned to deliberate and subsequently, found defendants guilty. The United States Supreme Court concluded the inquiry into the jury's numerical division required reversal because it was generally coercive and almost always brought to bear "in some degree, serious although not measurable, an improper influence upon the jury." Id., at 450; Lowenfield, 484 U.S. at 239. Mr. Coulter submits the undue pressure and coercive facts wrongly forced Juror Noland to change her strong stance that the guilty verdicts were not her verdicts. Further, the obvious numerical division exposed in open Court showing to the world that Juror Noland was the only juror that at the very least stood steadfastly by her clear manifestation of her juror deliberated finding. Juror Noland did not find Mr. Coulter guilty of Counts 1 and 2 and at that time, she was the only juror holdout, obviously with the numerical division of 11 (guilty) to 1 (not guilty) as to Counts 1 and 2.

As argued in the motion for mistrial, the fact that Juror Nolan waited until the sanctity of the courtroom to reveal her true verdict of not guilty indicated she wanted to get out of the deliberations with the other jurors to inform the Court in person she wanted a not guilty verdict. The facts show that Juror Nolan did not want to reveal her not finding Mr. Coulter guilty of Counts 1 and 2 until she was in the Courtroom and under the protection of the Judge. The facts show the juror felt pressure to keep her verdict secret until she was in open court, until she could freely and safely state in open court, her true verdicts while in the presence and safety of the courtroom.

Then the fact that Juror Nolan refused to go back into deliberations when the Court asked her to go back in deliberations with the other jurors shows she was experiencing undue and heavy pressure from the other jurors, and that it was a very tough experience for her. Juror Nolan was obviously and visibly distressed when asked if the guilty verdicts were hers during the polling of the jury. And after the jury was dismissed, the manner in which "...she physically rushed out of the courtroom ahead of the other jurors in order to distance herself from them as quickly as possible", evidences the substantial undue pressure she felt. Indeed, the Tenth Circuit acknowledged that the juror "...became "emotional" and refused to return to the jury room." Appx. P. 29.

All these facts make it clear Juror Nolan felt pressure to find Coulter guilty (ROA, Vol. I, at 479, 481). Mr. Coulter submits the undue pressure Juror Nolan experienced and received is unconstitutional, and therefore his rights under the Constitution were violated since Juror Nolan was subjected to undue pressure until she finally, through Mr. Coulter submits was undue pressure that is Constitutionally prohibited, to come in line and join the other jurors in finding Mr. Coulter guilty of Counts 1 and 2.

It was publically revealed Juror Nolan was the sole juror to holdout for not guilty. Juror Noland's identity was revealed in open court. The division of the jury was known, 11 to 1 for guilty on counts 1 and 2, and all in attendance knew the sole "No" was Juror Noland, as she stated so in open court. Juror Nolan knew the Court knew she was the sole "No". When the polling of the jury occurred, there were numerous individuals in the courtroom who were not representing the parties in the case.

While it is true a district court may issue an Allen instruction "urg[ing] deadlocked jurors to review and reconsider the evidence in the light of the views expressed by other jurors so as to avoid a mistrial," that instruction can not "impose[] such pressure on the jury such that the accuracy and integrity of [the] verdict becomes uncertain." United States v. LaVallee, 439 F.3d 670, 689, (10th Cir. 2006).

As stated in McElhiney, 275 F.3d at 940, "Pursuant to the Sixth Amendment, "[e]very defendant in a federal criminal case has the right to have his guilt found, if found at all, only by the unanimous verdict of a jury of his peers." United States v. Thomas, 449 F.2d 1177, 1181 (D.C. Cir. 1971) (en banc); see also United States v. Haber, 251 F.3d 881, 888 (10th Cir. 2001) ("The Sixth Amendment guarantees a federal criminal defendant the right to a unanimous verdict.") (internal quotation marks omitted); Fed. R. Crim. P. 31(a) ("The verdict shall be unanimous.").

Only juror Noland knows everything she went through, both the mental anguish to oppose the other jurors, attempting to leave the courtroom when she stated "No" to the verdicts of guilty on counts 1 and 2, so unsettling that she refused to go back into the jury room with her other jurors, to the unquantifiable pressure of being questioned in the Judge's chambers and her telling comment as she left chambers describing the in chambers experience as "I felt like I was at the principal's office."

Under the facts, Juror Noland finally changing to guilty on counts 1 and 2 cannot be relied on as constitutionally sound. Coulter's Sixth Amendment rights were violated and he was unduly prejudiced when he was not guaranteed the right to a unanimous verdict. The trial court erred in denying the motion for mistrial and in overruling the objection to the coercive nature of individually questioning the juror. Coulter's Sixth Amendment rights were also violated by the fact the deliberations became publically known on how the jury was divided. For these reasons, Coulter's convictions should have been reversed by the appellate court.

Additional Analysis under Supreme Court Rule 10(a). The Tenth Circuit entered a decision, finding the court did not abuse its discretion in the district court's post-trial interactions with the jury on various grounds, that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The court of appeals held that since the district court had no reason to suspect the verdict was not unanimous, once the poll revealed Juror Noland did not agree with the guilty verdicts, the court conducted no further inquiries, so in essence the court of appeal found no foul. But, Mr. Coulter submits the polling of the jury is exactly for the purpose to determine if in fact the guilty verdict is unanimous, not as presented by the court of appeals that the district court had no reason to suspect the verdict was not unanimous. If this assertion by the court of appeals were correct, then polling of the jury is an unnecessary waste of time. The court of appeals continued that "As far as the district court was aware, Ms. Noland could have disagreed with the verdict as to Count 1, Count 2, or both, or could have wished to continue deliberating on Count 3." The court of appeals used this analysis, Mr. Coulter submits the analysis is speculative, to support its finding that since as far as the district court was aware, Juror Noland could have been disagreeing with anything regarding the 3 counts, so there was no numerical

inquiry. But, this analysis by the court of appeals contradicts the court of appeals finding four pages earlier in the opinion: the court of appeals stated “When the court questioned her about whether the verdict on Counts 1 and 2 represented her vote, she responded, “No.” Appx. P. 28.

As is plain, the court of appeals presented two opposite findings on the exact same subject, and the finding to support the court of appeals finding that “As far as the district court was aware...”, which is the court of appeals speculation used to support that a numerical inquiry was not made, flies in the face of the actual words spoken in open court when Juror Noland was questioned about her verdicts specifically on counts 1 and 2. The court of appeals on the one hand states “As far as the district court was aware, Ms. Noland could have disagreed with the verdict as to Count 1, Count 2, or both, or could have wished to continue deliberating on Count 3.”, and then on the other hand states “When the court questioned her about whether the verdict on Counts 1 and 2 represented her vote, she responded, “No.” Appx. P. 28. The district court asked her specifically about her verdict on count 1 and on count 2. Juror Noland was the only juror that said “No” to the verdicts. The numerical composition fo the jury was at that time obvious and plain to all, 11 to 1 for guilty on counts 1 and 2. The court of appeals contradicting itself on this critical analysis establishes that the district court, even if not meaning to, conducted a numerical inquiry and thus violated Brasfield *supra*. Therefore, compelling reasons exist for granting a petition for a writ of certiorari.

The facts support that Juror Noland was coerced into changing her verdicts on counts 1 and 2 to guilty, and the court of appeals finding that Mr. Coulter presented no authority that she was pressured from other jurors. The authority was that the facts regarding Juror Noland set forth herein showed a violation of Mr. Coulter’s Sixth Amendment right to a fair and impartial jury through Juror Noland’s actions and her treatment, therefore the court of appeals’ decision has so far departed from

the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

II.

The Tenth Circuit erred in failing to find plain error and a denial of due process under the Fifth Amendment due to the prosecutorial misconduct that occurred in Mr. Coulter's trial when the prosecutor intentionally elicited hearsay testimony of two different murders. Compelling reasons exist for Mr. Coulter's petition for a writ of certiorari to be granted based on egregious prosecutorial misconduct which so infected his trial as to make his convictions a denial of due process. Additionally, the Tenth Circuit's failure to find the prosecutor committed prosecutorial misconduct during direct examination and closing argument contradicts this Court's decision in Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974), which stated that prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." To constitute a due process violation, the prosecutorial misconduct must be "...of sufficient significance to result in the denial of the defendant's right to a fair trial." United States v. Bagley, 473 U.S. 667, 676 (1985) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)).

With regard to Mr. Coulter's ground of error setting forth the prosecutorial misconduct, the Tenth Circuit held that Mr. Coulter did not show "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." Appx. Pg. 23. The appellate court also stated that "He has not demonstrated that the alleged error was "clear or obvious under current law." Appx. P. 23. However, Mr. Coulter states the Tenth Circuit's statements are not correct.

The Tenth Circuit held that plain error wasn't shown by Mr. Coulter on appeal. But this holding departs from reason and a plain reading of Mr. Coulter's argument in his brief and from the

accepted and usual course of judicial proceedings. The holding also sanctions the conduct by the prosecutor such that this Court's supervisory power should be exercised.

1) In his brief of appellant, Mr. Coulter showed the Tenth Circuit how the plain error occurred by stating that it stemmed from the government's questions about the deaths of Ms. Diaz and Ms. Biggers and the prosecution's reference to Ms. Diaz's death during its' closing argument. The misconduct was flagrant and enough to influence the jury to convict on grounds other than the evidence that was resented during the trial;

2) Mr. Coulter recited the relevant testimony which Coulter submitted was improperly elicited by the prosecutor in his brief and argued why it was damaging to him. In the Statement of the Case herein, relevant excerpted portions from the Brief of Appellant are included and incorporated herein. In addition, in the argument of the brief of appellant, Mr. Coulter stated:

The Court improperly allowed hearsay and speculative testimony of Mullins of what she believed happened. The hearsay was not relevant, was unduly inflammatory, as was the speculative testimony "I mean, she was killed".

The above misconduct was so flagrant, it had to have influenced the jury to convict on grounds other than the evidence presented. The prosecutor improperly brought in the inference or conclusion that Coulter was involved in at least Diaz's killing and inferring Coulter's involvement in Jamie's death, which was flagrant, influenced the jury to convict on grounds other than the evidence of child sex trafficking.

The damage to Mr. Coulter's rights to a fair trial was already inflicted by the prosecutor's questions and explanation to the Court regarding the objection to Andrade's testimony regarding Diaz's death.

At the bench conference on the objection the prosecutor stated that “they were led to believe that Mr. Coulter was responsible for Ms. Diaz being given a hotshot, which is some type of drug that induces an overdose.”

The Court stated “That's not what we're here about.” The Court sustained the objection to the testimony of Ms. Andrade.

The prosecutor interjected two death inferring Coulter was involved. Both deaths had no relevance to the charges. The Court abused its discretion in holding that trial counsel opened the door regarding the death of Ms. Diaz. There was never a finding that trial counsel opened the door regarding Jamie's death.

Improper Closing Argument

The prosecutor's improper comments during closing argument deprived Coulter of a fair trial. Coulter was not accused of murder. The comments were calculated to inflame the jury's passions by implying/stating that Coulter had committed other crimes, killing. The prosecutor's comment was not singular and isolated. The prosecutor in closing pulled in the history that “Mr. Coulter hit the girls.”, “beat up Lizzie Diaz, had locked her in a closet with a big tire in front of it and “told the other girls that if they let her out, they would get it worse.” The prosecutor said Coulter lost everything, his money, cars, houses, most of the girls, and he was in jail. The prosecutor, after the lead in of beatings and Coulter losing everything, told the jury that Diaz died while he was in jail and then topped off with an undue prejudicial inference that Coulter was responsible for Diaz's death, “We shouldn't let bad things happen to daddy.” Recited from the Brief of Appellant.

3) “The improper comment deprived Coulter of a fair trial and was so egregious as to influence the jury to convict Coulter on hearsay testimony of the killing of Diaz and the inference and/or conclusion that Coulter was involved.” Aplt. Brf. 31;

4) The prosecutor improperly brought in two women’s deaths, both of which could be inferred by the jury as murder, and that Coulter was involved. Objections by trial counsel were overruled. Both deaths were not relevant to the case. The only purpose to bring in the deaths was to unduly prejudice Coulter and improperly influence the jury to convict him on inflammatory irrelevant hearsay and speculation. Re-direct and direct examination questions by the prosecutor constituted prosecutorial misconduct which violated due process and denied Coulter his right to a impartial jury. In closing arguments, the prosecutor used the killing of Diaz to wrongly influence the jury and the improper conduct was so significant as to fundamentally deny Coulter a fair trial.

That the Tenth Circuit found that “Ms. Andrade said nothing to indicate that Mr. Coulter was responsible for Ms. Biggers’s death” and “Any prejudice here was minimal because the evidence did not suggest that Mr. Coulter was involved in the deaths” Appx. 23, is an unreasonable conclusion based on the actual questions and answers. There was no other possible motive to bring up the murders other than the unambiguous inference that Coulter was responsible for the murders. For the Tenth Circuit to conclude that the “...prejudice here was minimal...” regarding the clear inference that Mr. Coulter was responsible for both murders is an insufficient legal conclusion, completely lacking basis in reason.

5) Also, contrary to the appellate court’s holding, Mr. Coulter did cite Supreme Court precedent to support his alleged error was clear and obvious under current law. Appx. A. P. 23. Mr. Coulter cited within his opening brief the cases of Donnelly, Bagley, and Agur, to support his position

that plain error occurred in his trial and the prosecutorial misconduct adversely influenced the jury's verdict.

Further, contrary to the holding by the Tenth Circuit otherwise, the evidence was not overwhelming, and even in the face of significant prosecutorial misconduct, at least one juror was not on board for convicting Coulter of any counts. In fact when the jury was polled as to the verdict, the juror said "No". Ultimately, after coercive pressure was placed on juror Noland, as discussed herein, Coulter was found guilty in counts 1 and 2, but the jury remained deadlocked on count 3.

The prosecutor improperly used the hearsay statements made by persons unavailable for questioning at trial. The persons were not identified or known. Unlike the prosecutor's comment in Donnelly, *supra*, during closing argument in a state first-degree murder trial as to defendant's expectations of the kind of degree of murder of which he may be convicted did not deprive him of the right to confrontation, where the prosecutor simply stated his own opinions and introduced no statements made by persons unavailable for questioning at trial. Donnelly, 416 U.S. at 638. The prosecutor in the case herein introduced statements made by persons unavailable for questioning at trial, if indeed they existed at all, thereby depriving Coulter's rights.

The improper comment deprived Coulter of a fair trial and was so egregious as to influence the jury to convict Coulter on hearsay testimony of the killing of Diaz and the inference and/or conclusion that Coulter was involved. Though counsel made objection to the hearsay and speculative testimony of Diaz's death during direct examination, counsel did not make a contemporaneous objection to the prosecutor's comments of Diaz's death in closing. However, contrary to the Tenth Circuit's opinion, and as set forth above, Coulter did show "plain error" that "affects substantial right." The plain error also pled by Coulter in his appellate brief was that the prosecutor improperly

made comments on the death of Diaz in 2010 or 2011 in closing arguments (of a child sex trafficking case alleged to be in 2018) and stated the inference was that Coulter was involved when she “got killed.”

Since plain error was shown by Coulter, “...under Fed. R. Crim. P. 52(b), a circuit court has the “discretion” to notice the plain error if such “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” United States v. Olano, 507 U.S. 725, 732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993). Because the Tenth Circuit failed to notice the plain error in this case, the Tenth Circuit’s holding was flawed, and the appellate court departed from the accepted and usual course of judicial proceedings and sanctioned such a departure, an exercise of this Court’s supervisory power is called for.

The misconduct by the prosecutor was flagrant and obvious. Implicating Coulter in two women’s deaths in direct examination and in closing arguments influenced the jury to convict on grounds other than any evidence of child sex trafficking. The improper hearsay and speculative testimony unduly prejudiced Coulter, the prosecutor’s improper questions also implied Coulter was implicated in the deaths, rendered his trial proceedings fundamentally unfair, and the errors were not harmless. The Tenth Circuit even recognized that the testimony elicited by the prosecutor was hearsay. App. Pgs. 18, 19. The prosecutor’s improper questions, conduct and remarks denied Coulter a fair trial, and a new trial was required.

The evidence in this case was not overwhelming as evidenced by the hung jury and deadlocked count 3. The panel, despite having found that Ms. Mullin’s testimony about Ms. Diaz’s

death was hearsay¹ (Appx. A., pg. 39), agreed with “the Government that it can prove by a preponderance that any hearsay error was harmless.”, and that “No part of the Government’s case depended on Ms. Diaz’s death”, thereupon concluding that Ms. Diaz’s death “was comparatively insignificant.” Appx. A., pgs. 19, 20. That the Government’s case did not depend on a nine or ten year old death based solely on hearsay does not account for the unduly prejudicial impact that the death of Ms. Diaz and the obvious inference that Mr. Coulter was involved in her death had upon the jury. The Tenth Circuit’s conclusion that the testimony, over Mr. Coulter’s objection, “was comparatively insignificant” belies the jury’s actions and verdicts in the case and violates due process. United States v. Martin Linen Supply Co., 430 U.S. 564, 565, 97 S. Ct. 1349, 1351 (1977).

The appellate court failed to recognize the unduly prejudicial impact had upon the jury of the introduction in the trial the death of a women with the direct inference Mr. Coulter was involved. The Tenth Circuit’s reasoning that the any inference Mr. Coulter was involved in Ms. Diaz’s death was weakened because he was in jail when he died is, respectfully, speculative. The jury could have just as easily thought Mr. Coulter could have had someone else kill her. In fact, the chilling testimony that Mullins claimed Mr. Coulter told her “We shouldn’t let bad things happen to daddy” supports the jury more likely to believe that Coulter had the ability to have her killed.

The jury’s conduct, and juror Noland’s stark contrary verdict she had in the case at the first polling of the jury, and the attendant facts that she tried to leave the courtroom after she said the guilty verdicts were”not her verdict”, that she then tried to leave the courtroom, and that she did not

1

Mr. Coulter’s hearsay objection was overruled by the district court. Mr. Coulter also objected on speculation when Mullins was asked did she know what happened, which objection was also overruled.

want to return to the jury room, reveals the jury was greatly impacted by the hearsay testimony and that the evidence was not overwhelming.

CONCLUSION

The Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

THE ZUHDI LAW FIRM

A handwritten signature in black ink, appearing to read "Bill Zuhdi", is written over a horizontal line.

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Germaine Coulter, Sr.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GERMAINE COULTER, SR.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Bill Zuhdi, member of the bar of this Court, do hereby certify that I have served a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on counsel for the Respondent, United States of America, by depositing the same in the U.S. Mail, postage prepaid, to:

Solicitor General of the United States
Department of Justice, Room 5614
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

this 3rd day of May, 2023. All parties required to be served have been served.



Bill Zuhdi