No. 20-___

In The

Supreme Court of the United States

Rodney Lynn Dalton,

Petitioner,

v.

State of Arizona,

Respondent.

On Petition for a Writ of Certiorari from the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the appropriate standard for determining cumulative prosecutorial misconduct in a criminal trial?

PARTIES TO THE PROCEEDINGS

Rodney Lynn Dalton
State of Arizona

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

State of Arizona v. Rodney Dalton, CR-22-0142 – PR, 2023 Ariz. LEXIS 21 (Jan. 6, 2023) (Rev. Denied. 1-6-2023)

State of Arizona v. Rodney Lynn Dalton, No. 1 CA-CR 21-0201, 2022 WL 1468771; 2022 Ariz. App. Unpub. LEXIS 393 (Ariz. Ct. App. MAY 10, 2022) (Mem. Dec.).

State of Arizona v. Rodney Lynn Dalton, Yavapai Cnty. Super. Ct., No.P1300CR201801024 (Ariz. 2021). (Trial; not published)

The opinion of the court of appeals (App. 1a-8a) is not published in the State or Regional report, but is published on LexisAdvance, Westlaw, and the appellate court website. The Arizona Supreme Court decision without opinion is published only on Lexis.

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Petitioner, Rodney Lynn Dalton, respectfully petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals in this case.

JURISDICTION

The judgment of the Arizona Supreme Court denying review was entered on January 6, 2023. The deadline for filing this petition is Thursday, April 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. 5 – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 14, Sec. 1 – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

Rodney Lynn Dalton ("Rodney") seeks a writ of certiorari from the Arizona court of appeals decision upholding his convictions and sentences for kidnapping and four counts of sexual assault.

B. FACTUAL BACKGROUND

Rodney was indicted after his ex-wife, MD, claimed he had sexually assaulted her four times during their marriage by, "not taking no for an answer." The allegations came to light just days after a family court ordered unsupervised visitation with Rodney and his children. Days after the order, Rodney's teenage son, JD, wrote a letter to the authorities asserting he did not want unsupervised visitation with Rodney, whom he claimed had been abusive to the family and had sexually abused his mother.

C. THE PROCEEDINGS BELOW

1. *Trial*

Before trial began, the prosecutor, who knew Rodney and MD from prior misdemeanor proceedings, pushed the court to admit other-act evidence relating to the contentious divorce proceedings and child custody issues between Rodney and MD. The state did not, however, timely disclose to the defense the specific acts it intended to admit in its case-in-chief in a proper basis for their admission. Instead, shortly before trial, the state noticed its intent to introduce other-act evidence if "parental alienation" was raised. It then filed a motion in limine seeking to limit the defense's cross-examination of Rodney's children (including JD, who wrote the letter). The state argued that if the children were impeached with specific acts of poor behavior, or if testimony regarding their behavior during their visits with Rodney were admitted, it would "open the door" to other acts evidence to explain the children's feelings.

The trial court failed to conduct a proper assessment or weighing of all the other-acts the state threatened to introduce, stating that no balancing test was necessary if other acts evidence was offered in rebuttal.

Rodney's defense was that the allegations were recently fabricated so that the children could avoid visitation with him. The court forced a Hobson's choice on Rodney. He could forego a complete defense to the evidence the state presented against him, or—if he decided to probe HD and JD's bias and motive with more

than just general observations of their behavior—he would be forced to undergo an unfair trial in which numerous acts of alleged child abuse would be admitted to explain the reasons for the children's bias and motives.

Although the prosecutor endlessly sought admission of the other act evidence, arguing the defense had "opened the door" to its admission, in fact it was the state who first introduced other act evidence in its opening statement and in examining its first witness, victim MD.

Also in its opening and examination of its first witness, the state adduced evidence regarding (and therefore put at issue) MD's motives for failing to raise her sexual-assault allegations in years-long contentious family court proceedings, and the children's motives for not wanting to visit Rodney or participate in reunification. Notably, although the state explored testimony relating to parental alienation and whether MD's conduct had caused the children to not want to visit Rodney, the strictures of the court's ruling prevented Rodney from responding to the state's evidence without "opening the door" to other-act evidence. Thus, the state presented other-acts evidence early in its case-in-chief, in defiance of the trial court's order that such material could be used in rebuttal only.

Rodney attempted to stay within the bounds of the objectionable limitations imposed but, given the impossibility of the Hobson's choice presented him, he was found to have "opened the door" to other-act evidence in his cross-examination of the

state's first witness. The trial court opened the floodgates to admission of such a considerable amount of other act evidence of child and sexual abuse that it overtook the trial. The other act evidence permeated the trial and was so overwhelming and prejudicial that Rodney did not receive a fair trial.

The prejudice caused by the substantial other act evidence was further enhanced by cumulative prosecutorial misconduct permeating the proceedings. The prosecutor improperly impugned defense counsel's credibility; characterized her own cross-examination questions as "evidence" the jury could consider; vouched for the credibility of the state's witnesses; claimed evidence not presented to the jury or entered into evidence supported the state's case; relied on the untimely disclosed other act evidence; demonstrated an improper contemptuous demeanor; pointed at and made faces at defendant and defense counsel; and shifted the burden of proof. Both her opening remarks and closing statement contained substantial improper material.

Rodney's counsel moved for a mistrial after the first witness' (victim) testimony, and renewed the motion multiple times, alleging that the prosecutor was not following the court's rulings, and pointing out instances of misconduct.

After a 7-day trial, in which the state's case focused on uncharged sexual acts against MD and uncharged acts of child abuse, the jury deliberated for less than three hours and convicted Rodney of all charged offenses.

2. *Appeal*

On appeal, Rodney argued that the judicial errors concerning admission of other acts evidence combined with pervasive prosecutorial misconduct so pervaded the trial that it was impossible for Rodney to receive a fair trial. Absent the cumulative effect of this misconduct, including improper introduction of volumes of marginally relevant evidence, the jury might have reached a different verdict.

The court of appeals applied Arizona court interpretation of federal constitutional law to resolve Rodney's claims against him. It found no prosecutorial error deprived Dalton of a fair trial. This ruling runs contrary to well-established federal constitutional law in light of the record establishing the prosecutor's impugnment of defense counsel's credibility; characterization of her cross-examination questions as evidence the jury could consider; vouching; claim that counseling notes not in evidence bolstered M.D.'s credibility, use of improperly disclosed other-act evidence; improper contemptuous demeanor; improper opening remarks and closing statements, and burden shifting.

Rodney specifically argued that the prosecutor:

1. Impugned defense counsel's credibility by accusing the defense witnesses of having an agenda and trying to tell the jury things it was not supposed to hear, and telling the jury she had "counted at least ten times" defense counsel had said

"something that was totally inaccurate" while claiming her own representations to the jury were accurate. [Tr.3/30/21, P.M., at 99-100; Tr.3/31/21, at 52-53, 55, 75];

2. Characterized her cross-examination questions as "accurate" evidence the jury could consider [Tr.3/30/21, A.M., at 95-104, 115-32; Tr.3/30/21, P.M., at 84-85, 97, 101, 104; Tr.3/31/21, at 55; *see also* Tr.3/29/21, P.M., at 42-55, 57-63];
3. Vouched for H.D.'s credibility by asserting her opinion on the authenticity of H.D.'s tears on the stand [Tr.3/30/21, A.M., 52; Tr.3/31/21, at 36, 68, 70];
4. Claimed evidence outside the record—in the form of "a lot of witnesses [she] could have called" and counseling notes that were not admitted into the record and that would have doubled the length of the trial—supported M.D.'s claims [Tr.3/31/21, at 64-65; IR-126];

5. Used improperly disclosed other-act-evidence in the state's case in chief [IR-88; Tr.3/12/21, at 10-13, 20];
6. Engaged in improper demeanor toward Dalton, who she knew from a prior matter, such as by pointing and staring at him, baiting him, badgering him, and using an improper tone [Tr.3/22/21, at 87-88; Tr.3/29/21, P.M., at 42-55, 57-63; Tr.3/30/21, A.M., at 43; *see also* Tr.3/31/21, at 52-53; Tr.3/23/21, A.M., at 96; Tr.3/29/21, P.M., at 7; Tr.5/13/21, at 23; IR-137];
7. Unconstitutionally shifted the burden of proof to Dalton by arguing he had to explain why J.D. wrote the very letter which

> put the children's conduct at issue, why H.D. went to counseling, and why the couple's counselor wrote "what she wrote 10 years ago," and arguing that the jury could only have reasonable doubt if it found, *inter alia*, that M.D. was "diabolically evil." [Tr.3/30/21, P.M., at 108, 110.]

(P.F.R. at 10-12.)

The court of appeals summarily concluded it could find no error, notwithstanding its recognition that the prosecutor "appeared critical of Dalton's defense and grew increasingly argumentative," and its refusal to condone her "combative behavior." [Mem. Dec., ¶32.] It also found that the identified instances of prosecutorial error did not cumulatively prevent Dalton from receiving a fair trial. [*Id.* at ¶¶30, 33.]

The opening brief federalized the extensive other acts evidence as a denial of the right to present a complete defense under U.S. Const. Amend. VI, XIV, citing *California v. Trombetta*,467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413; *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed. 297. (1973); and *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). (O.B. at 42.), and federalized the prosecutorial misconduct claim under *Donelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (O.B. at 61.). However, the court of appeals used only Arizona law recognizing federal constitutional rights to deny the claim. The federal constitutional claim, however, was fairly presented to the Arizona court of appeals through the opening

brief, and fairly presented to the Arizona supreme court in Rodney's petition for review.

REASONS FOR GRANTING THE PETITION

A. The Arizona Court of Appeals applied the incorrect standard in evaluating the prosecutorial error claims.

In *Donnelly v. DeChristoforo*, this Court stated that unconstitutional prosecutorial misconduct is found when the prosecutor's conduct "so infects the trial with unfairness as to make the resulting conviction a denial of due process." 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d. 431 (1974).

The Arizona court of appeals denied the claim of cumulative prosecutorial misconduct in gross direct contravention of this Court's due process interpretations, which has led to misapplication of federal constitutional law as applied in the State of Arizona.

Arizona misapplied the federal constitutional standards for prosecutorial misconduct in this case. It did not consider each instance of misconduct and determine whether the state had shown that "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v.*

California, 386 U.S. 18, 87 S.Ct. 824m 17 L.Ed.2d 705 (1965). In fact, it did not evaluate each instance of misconduct, but in a single paragraph, disposed of the claims, citing the following cases:

1. *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970)

> *In the closing argument, excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury.*

Id.

The court of appeals cited *Gonzalez* for the proposition that the prosecutor had not behaved improperly during the trial and in closing argument, calling it the prosecutor's "bread and butter." (Mem. Dec. at ¶ 31.) However, "excessive and emotional language" is not permitted to inflame the passions of the jury. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) ("The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury."). Especially remarks that were "focused, unambiguous, and strong." *Caldwell v. Mississippi*, 472 U.S. 320, 340, 105 S.Ct. 231, 86 L.Ed.2d 231 (1985).

2. *State v. Amaya—Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260 (1990) and *State v. Holden*, 88 Ariz. 43, 54-55, 352 P.2d

705 (1960)

> *We give prosecutors wide latitude in their cross-examination of adverse witnesses and in providing impassioned remarks in closing argument.*

(Mem. Dec. at ¶ 32), citing *State v. Amaya—Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260 (1990) and *State v. Holden*, 88 Ariz. 43, 54-55, 352 P.2d 705 (1960) to excuse the prosecutor's misconduct. *Amaya-Ruiz* cites only Arizona cases to determine that the prosecutor's attacks did not constitute fundamental error. *Holden* is about a *defendant's* wide latitude in cross-examining an adverse witness. Neither case involved arguing facts not in evidence. Neither addressed federal constitutional standards.

The court of appeals did not address the prosecutorial vouching that occurred. *United States v. Robinson*, 485, U.S. 25,33 n. 5, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (prosecutorial misconduct may rise to a due process violation in indifferent circumstances, including when a prosecutor "vouche[s] for the credibility of witnesses. It did not address the prosecutor's expression of personal opinion regarding guilt. *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed. 2d 1 (1985). It did not address that the prosecutor had told the jury she had evidence that they had not seen that would have extended the trial another two-and-a-half weeks. *Berger v. United States*, 295 U.S. 78, 84, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Not only did the prosecutor Susan Eazer "suggest that [s]he knew of evidence that was not before the jury, [s]he said so." *Anthony v. Louisana*, __ U.S. __, 143 S. Ct. 29, 34,

214 L.Ed.2d 214 (2022), Sotomayor, J. dissenting from denial of certiorari, joined by Jackson, J.

Because the court of appeals completely disregarded federalized claims of prosecutorial misconduct, this Court should accept certiorari.

B. This Court Has Never Announced a Rule for Reviewing Cumulative Acts of Prosecutorial Misconduct

This Court has yet to recognize a claim for reversible error based upon the aggregated effect of multiple harmless errors. The Ninth Circuit Court of Appeals has observed:

> *It is unclear whether we should employ Brady's prejudice standard to evaluate the cumulative effect of the prosecutorial misconduct and the non-disclosure. Although this circuit has never explicitly used the "reasonable probability" formulation found in the Brady line of cases to analyze alleged prosecutorial misconduct, a number of circuits have concluded that prosecutorial misconduct lends itself to that standard.*

Hein v. Sullivan, 601 F.3d 897, 914 (9th Cir. 2010) (citing *Styron v. Johnson*, 262 F.3d 438, 454 (5th Cir. 2001); *Jones v. Gibson*, 206 F.3d 946, 959 (10th Cir. 2000); *Kennedy v. Dugger*, 933 F.2d 905, 914 (11th Cir. 1991); *cf. United States ex rel. Shaw v. De Robertis*,

755 F.2d 1279, 1281 n.1 (7th Cir. 1985) ("To carry this burden, [a petitioner] must show that it is at least likely that the misconduct complained of affected the outcome of his trial -- i.e., caused the jury to reach a verdict of guilty when otherwise it might have reached a verdict of not guilty."); *see generally Strickler v. Greene*, 527 U.S. 263, 298-301, 119 S. Ct. 1936, 144 L. Ed. 2d 286 & n.3 (1999) (Souter, J., concurring in part and dissenting in part) (tracing the evolution of the "reasonable probability" formulation and noting the applicability of that and synonymous phrases in a number of con-texts).

For example, one panel of the Ninth Circuit Court of Appeals recently held that the failure to provide exculpatory evidence that was not material does not factor into a cumulative error analysis. *See United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011). ... On the other hand, a different Ninth Circuit panel combined the materiality analysis of the Brady violation and a prosecutorial misconduct analysis, although it noted that "[i]t is unclear whether we should employ Brady's prejudice standard to evaluate the cumulative effect of the prosecutorial misconduct and the non-disclosure." *Hein v. Sullivan*, 601 F.3d 897, 914 (9th Cir. 2010).

Cumulative error may be present only "when the 'cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.'" *Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002), quoting *United States v. Rivera*, 900 F2d 1462, 1469

(10th Cir. 1990)). "A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990).

"Under cumulative error review, a court merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Jackson v. Warrior*, 805 F.3d 940, 955 (10th Cir. 2015) (quotation marks omitted). "Cumulative-error analysis is an extension of the harmless-error rule[] and is determined by conducting the same inquiry as for individual error." *Cargle v. Mullin*, 317 F.3d 1196, 1220 (10th Cir. 2003) (quotation marks omitted).

Thus, the 10th Circuit applies the harmless error standard from *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)—whether the errors had a substantial and injurious effect or influence in determining the jury's verdict—to the multiple errors found.

Several months ago, however, a dissent from denial of certiorari indicated that this Court may be inclined to apply the *Chapman* standard of review. *Anthony v. Louisana*, __ U.S. __, 143 S. Ct. 29, 35, 214 L.Ed.2d 214 (2022), Sotomayor, J. dissenting from denial of certiorari, joined by Jackson, J.

As a species of harmless-error review generally, review of constitutional error in a criminal trial does not ask an appellate court to assess "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered."
Sullivan v. Louisiana, 508 U. S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); see also Kotteakos v. United States, 328 U. S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) (holding, as a general matter, that the harmless-error inquiry "cannot be merely whether there was enough to support the result, apart from the phase affected by the error").

Instead, Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), requires that the government bear the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," id., at 24, 87 S. Ct. 824, 17 L. Ed. 2d 705, with the appellate court focusing on "the guilty verdict actually rendered in this trial,"
Sullivan, 508 U. S., at 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182. "That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." Id., at 279-280, 113 S. Ct. 2078,

124 L. Ed. 2d 182.

Id.

State and federal courts alike need clear guidance on cumulative error analysis, at least with regard to prosecutorial misconduct.

CONCLUSION

For the foregoing reasons, Rodney Dalton respectfully requests that this Court accept certiorari and reverse the Arizona court of appeals.

Respectfully submitted,
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