No. _____

In the

Supreme Court of the United States

THOMAS E. KNUFF, JR.,
Petitioner,

v.

THE STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1) Does the admission of improper and prejudicial evidence of other criminal acts by way of improper joinder violate a capital defendant's right to due process?

2) Are a capital defendant's due process rights violated when prosecutorial misconduct infects the whole of trial such that the fairness of the jury's verdict is unreliable?

PARTIES TO THE PROCEEDINGS

Petitioner Thomas E. Knuff, Jr., a death-sentenced Ohio prisoner, was the Appellant in The Supreme Court of Ohio.

Respondent, the State of Ohio, was the Appellee in The Supreme Court of Ohio.

RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:
Court of Common Pleas, Cuyahoga County, Ohio
State of Ohio v. Thomas E. Knuff, Jr., Case No. CR-17-618285-A
Judgment Entered June August 28, 2019

Appellate Proceedings:
Ohio Supreme Court, Case No. 2019-1323
State v. Knuff, Slip Opinion No. 2024-Ohio-902
Conviction and Sentence Affirmed March 14, 2024
Application to Reopen denied May 14, 2024

Initial Postconviction Proceedings:
Court of Common Pleas, Warren County, Ohio
State of Ohio v. Thomas E. Knuff, Jr., Case No. CR-17-618285-A
Initial Postconviction Petition filed August 24, 2021 (filing of amended petition pending)

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The opinion of The Supreme Court of Ohio in this cause, reported as *State v. Knuff*, Slip Opinion No. 2024-Ohio-902, is found in the accompanying Appendix as Appendix A. The Supreme Court's Reconsideration Entry, denying motion for rehearing is Appendix B. The Cuyahoga County Court of Common Pleas Journal Entry, *State of Ohio v. Thomas E. Knuff, Jr.*, Case No. CR-17-618285-A, Entry of Sentencing Opinion, Filed August 28, 2019, is Appendix C.

STATEMENT OF JURISDICTION

Knuff invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Ohio Supreme Court on the basis of 28 U.S.C. § 1257(a). The Ohio Supreme Court issued its decision on March 14, 2024. Knuff thereafter sought rehearing, which was denied by the Supreme Court on May 14, 2024. The filing deadline for this petition is August 13, 2024.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following Amendments to the United States Constitution:

Fifth Amendment, which provides in pertinent part:

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

Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

> to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, which provides in pertinent part:

> No State shall…deprive any person of life, liberty, or property, without due process of law; nor deny any person withing its jurisdiction the equal protection of the laws.

INTRODUCTION

Since common law, courts have almost universally prohibited improper character evidence: "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting *Michelson v. United States,* 335 U.S. 469, 475-476 (1948)). But character evidence does, naturally, infect some trials through one means or another. In this trial, it came in through every angle: through the court's refusal to sever unrelated charges from the capital charges, the prosecutor's introduction of excessive inflammatory testimony, and the prosecutor's explicit comments about the defendant's character to the jury: "Doesn't that tell you the character of a human being?"

This case asks, simply: what is the upper limit of improper character evidence that due process will tolerate?

STATEMENT OF THE CASE

On June 21, 2017, two bodies were found at 6209 Nelwood Avenue in Parma Heights, Ohio. Both individuals had died in an altercation that occurred over a month beforehand. The altercation took place between John Mann—the owner of the house—and two guests, Regina Capobianco and Thomas Knuff. Mann and Capobianco died; Knuff survived, but he suffered a severe finger injury that later required amputation.

In an interrogation that took place the following week, Knuff explained to police what had happened on the night Mann and Capobianco died. He explained that Mann wanted Capobianco to leave the house but that she refused; that the two of them had gotten into a fight; that Capobianco had killed Mann; and that she then turned on Knuff. He stated that he ultimately killed Capobianco in self-defense. But the police did not believe him. They believed instead that Knuff had killed both Capobianco and Mann. *See* App. A at ¶¶ 25-29.

The capital trial that followed took over a month and involved over 1300 exhibits and approximately 50 witnesses. None of those witnesses or exhibits shed significant light on the only critical issue in the case: whether it was Knuff or Capobianco who had killed Mann that night. The State mounted a case that relied on character evidence, inflammatory comments, and hours of irrelevant, prejudicial testimony.

The admission of improper evidence began with the charging documents. It is a basic rule of evidence that other "crimes, wrongs, or acts" are inadmissible against

a defendant as character evidence. *See* Fed. Rule Evid. 404(B). But the State attempted to, and did, circumvent this rule. In a 21-count indictment, Counts 1-12 and 19-21 related to the alleged murder, Knuff's treatment of the bodies, and his attempts to evade detection by cleaning the house. *See* App. A at ¶ 30. But six counts, Counts 13-18, relate to two unrelated breaking and entering incidents. *Id.* These crimes were factually and temporally distinct from the capital offenses: approximately a week after Mann and Capobianco's deaths, Knuff broke into two nail salons, breaking the front door of each with a stone and stealing $620 from one and $200 or $300 from the other. Tr. 2781-2782; 2848-2849. Knuff admitted to these crimes; they are not crimes that would have gone to trial had it not been for the capital charges; and they are not crimes that would have been admissible to prove the capital case. *See State v. Tench*, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 138 (holding that evidence of an uncharged robbery around the same period as the alleged murder was inadmissible). But the trial court denied the defense's motion to sever the counts related to the thefts, and therefore the jury heard testimony about these "other crimes, wrongs, or acts" early on, during the first days of the trial.

In its opinion, the Ohio Supreme Court called the evidence in the case "overwhelming," and it was—not overwhelming evidence of guilt, but overwhelming volumes of inflammatory evidence and disparaging comments by the prosecutor. This evidence was designed to show that Knuff was a felon; that he had tried to escape from prison; that he was a bad father and brother; that he was a liar, racist, and frightening person; and that he was a serial killer like the main character of *Dexter*.

Character evidence that Knuff was a felon: Multiple witnesses testified that Knuff had been in prison and was on parole. The jury heard that he had served 16 years for theft and drug-related crimes. Tr. 3019-3020. And the State solicited this testimony not just from Knuff's parole officer—for whom the context might have been necessary and relevant—but also from a nurse who treated him at the hospital (*id.*); the owner of the motel he was staying at (Tr. 3065); multiple friends (Tr. 3297-3298, 3324, 3356, 3439); multiple police officers (Tr. 2694, 3515, 4628, 4647, 4905-4906); his girlfriend (Tr. 4206-4207); his son (Tr. 5257-5259, 5268, 5280); his son's mother (Tr. 3227); his sister (Tr. 3248); Capobianco's sister, who had never met Knuff but still testified about his prison time (Tr. 2562-2563); and an Uber driver who met him exactly once (Tr. 3088, 3093, 3095). The jury could never forget that Knuff had already done prison time.

Character evidence that Knuff attempted to escape from prison: During the penalty phase, the prosecutor solicited testimony suggesting that Knuff had attempted to escape from county jail. The jury heard that Knuff had in his possession "three detailed, full-color replicas of the sheriff's stars worn by correctional staff" as well as several other items. App. A at ¶¶ 228-228. The trial court allowed the jury to hear this evidence, even though it later admitted that the incident "sheds very little light on his 'history, character and background' for mitigation purposes, which is the only purpose for which it may be considered." App. C at 11. Introducing this evidence merely invited the jury to consider it as an impermissible aggravating factor.

Comments that Knuff was a bad father and brother: The prosecutor solicited extensive testimony about Knuff's relationship with his son, then explicitly asked the jury to consider it as character evidence. The prosecutor stated, "Because [Knuff's son] missed [Knuff's] call once while he was in college, [Knuff] doesn't call him back. * * * *Doesn't that tell you the character* of a human being?" App. A ¶ 243 (alterations in original). The State solicited testimony that he taught his son how to make prison alcohol (Tr. 5280), that he was not present enough in his son's life (Tr. 5252), and that he had not apologized for wronging his son (Tr. 5364). The State also asked Knuff's sister about their rocky relationship, a dispute regarding their mother's insurance, and other negative interactions they had. Tr. 3251-3259. None of this was relevant to the question of whether Knuff or Capobianco had killed Mann; it only served to convince the jury that Knuff must have done it because he had a bad relationship with his family.

Comments that Knuff was a liar, a racist, and a frightening person: The State solicited testimony from an Uber driver that Knuff was "sketchy" because he had tattoos on his hands, and the prosecutor asked, "Are you afraid as you sit here today of any sort of payback?" Tr. 3085, 3096-3097. The court permitted questioning about the driver's impressions of Knuff, but it sustained an objection to the last question. Tr. 3097-3098. Additionally, the State was permitted to solicit testimony, over objection, of statements Knuff made that alluded to race. Tr. 3037-3038, 3439, 3388-3389, 3391, 3426, 3446. The State solicited hearsay evidence that Knuff was a "hardened criminal" and an "animal" (Tr. 5167-5170), and from Knuff himself,

regarding his criminal history, that "I've been this way my whole life. I can't help it" (Tr. 3415-3416). And the State went on to emphasize this character evidence in closing, stating that the jury had "a master class * * * in selfish, narcissistic, [and] antisocial behavior" and improperly asking the jury, "Which [of Knuff's statements] can you rely on in the most important of your affairs? I submit to you zero." App. A at ¶¶ 244-245 (alterations in original).

Comments that Knuff was like the main character of "Dexter": Despite no actual connection to the alleged crimes, the TV show *Dexter* became a theme of the prosecution's case. During Knuff's son's testimony, he stated that he thought his father wanted to cut up body parts like on the show *Dexter*, stating, "He would talk about the show Dexter * * * I just always thought that's where he got the idea from was talking about Dexter all the time." Tr. 5317. (Knuff never cut up bodies, but reportedly mentioned the idea to his son.) The State also solicited testimony from the lead detective that "Dexter is a main character from a television series that Dexter is actually a blood stain analysis expert who was a serial killer who dismembers his victims." Tr. 5042. In closing, the prosecutor continued to push the *Dexter* theme and again invited the jury to weigh it as improper character evidence, stating, "Tells his kid about 'Dexter.' What kind of person does that?" App. A at ¶ 249. The Ohio Supreme Court found that the reference to *Dexter* was "irrelevant," but that it did not rise to the level of plain error. Id. ¶ 250.

The State's argument in their case in chief was this: Knuff was a bad person, and therefore he must be guilty of killing two people in cold blood. As a final nail in

his coffin, the prosecutor assured the jury that it could rely on her prosecutorial experience to convict Knuff: "Let me tell you, *I've been doing this a long time*. And the state of Ohio doesn't bring cases based on speculation folks. * * * There is prior calculation and design here. *No one speculated when we brought this case* to you. *We spent months preparing* * * * for this case." App. A at ¶ 241 (Emphasis and alterations in original.)

Given the sheer volume of prejudicial evidence before them, the jury returned guilty verdicts after the trial phase, and recommended a death sentence after the mitigation phase. The trial court sentenced Knuff to death.

On appeal before the Ohio Supreme Court, counsel raised the issues of improper joinder and prosecutorial misconduct, among other issues. After briefing, one of Knuff's direct appeal attorneys passed away, and the Office of the Ohio Public Defender was appointed to replace him. At that point, Knuff filed a motion for further briefing, raising further issues of prosecutorial misconduct and improper evidence, but the motion was denied. The Ohio Supreme Court correctly found that some of the prosecutor's conduct was improper, particularly during closing argument. However, that court ultimately determined that the prosecutorial misconduct did not prejudice Knuff and that the joinder of the two trials was proper.

Knuff now appeals those decisions and invites this Court to provide guidance to trial courts on the issues described herein. The trial proceedings in this case—weighed down by hours of improper character evidence, and rife with inappropriate comments and testimony from the prosecutor—simply did not meet the fairness and

integrity required for due process in a capital proceeding. This Court should make clear that due process requires that courts adhere to the Rules of Evidence, that prosecutors must refrain from misconduct, and that capital defendants must receive fair trials based on relevant, admissible evidence.

REASONS FOR GRANTING THE WRIT

I. The admission of improper and prejudicial evidence of other criminal acts by way of improper joinder violates a capital defendant's right to due process.

The rules of evidence across state and federal systems are designed to limit the introduction of extraneous prejudicial evidence. Ohio Evid. R. 404(B) governs introduction of "other acts" evidence and strictly limits evidence of "other crimes, wrongs, or acts" because of its prejudicial effect. Ohio Evid. R. 404(B) provided, at the time of Knuff's trial:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Ohio Evid. R. 404(B) mirrors Fed. Rule Evid. 404(B) as well as the corresponding Evidence Rule in place in many other states. *See, e.g.*, M.R.E. Rule 404(b); Utah R. of Evid. 404(b); A.R.E. Rule 404(b); Ala. R. Evid. 404(b). Under this rule, the Ohio Supreme Court has held that evidence of an unrelated robbery was inadmissible in a capital trial. *State v. Tench*, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 157 ("Why would Tench's being suspected of armed robbery make him the prime suspect in his mother's disappearance, unless the robbery shows that he has a propensity for violent crime

or for crime in general?").

But the State found a way to introduce propensity evidence in Knuff's capital trial by way of a Trojan Horse: charging and trying the other acts as distinct crimes. And Ohio courts approved of this tactic: the Supreme Court of Ohio determined that the evidence was "sufficiently simple and direct to refute Knuff's claim of prejudice," and as such, Knuff's motion to sever the unrelated charges was properly denied at trial. App. A at ¶ 47. But there is a deeper issue at stake in this case that the Ohio Supreme Court disregarded: in a capital case, due process demands a trial untainted by the prejudice of propensity evidence.

The State's maneuver in this case would likely not have been permitted in federal court. A federal indictment may charge a defendant with two or more offenses only when the offenses "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. Rule Crim. P. 8(a). It is not enough that the crimes occur in the same general period of time. *See, e.g.*, *U.S. v Terry*, 911 F.2d 272, 276-77 (9th Cir. 1990) (joinder improper where defendant was indicted for possession of methamphetamine and possession of a firearm that was found 13 days later); *U.S. v. Hawkins*, 776 F.3d 200, 209 (4th Cir. 2015) ("the fact that all three offenses occurred during a three week period will not sustain joinder, as we have held consistently that a mere temporal relationship is not sufficient to establish the propriety of joinder").

This Court must grant certiorari to correct this wrinkle in due process, particularly for capital cases. On the one hand, "Federal courts have long recognized that evidence suggesting a propensity to commit crimes is patently prejudicial."

Breakiron v. Horn, 642 F.3d 126, 144 (3d Cir. 2011) (collecting cases). However, if the State is allowed to charge a defendant with unrelated crimes along with capital charges, it can effectively sidestep this fundamental tenant of fairness in criminal law. Misjoinder of criminal charges rises to the level of a constitutional violation "if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986). The improper joinder in this case and others does just that.

A. Knuff was tried on factually, temporally, and circumstantially unrelated crimes alongside his capital murder charge, to his prejudice.

Counts 13 through 18 of Knuff's indictment relate to the breaking and entering, vandalism, and theft of two businesses: a hair salon and a nail salon. The thefts happened days after the murders for which Knuff was found guilty and, according to the evidence presented by the State, bore no relation nor resemblance to the capital murders alongside which they were tried. *See* App. A at ¶ 47 (stating that the thefts were "separate and distinct from the evidence that the state used to prove the murders").

Testimony about the thefts was prejudicial to Knuff, and notably occurred very early in the trial. The jury heard that Judy Luong, the owner of one of the businesses, was so fearful after the break-in that she sold her nail salon of 15 years. Tr. 2782. She said, "I got robbed like this, so I'm really scared and I have to sell it." *Id.* The jury saw video and photographic evidence of Knuff engaging in these offenses. Tr. 2880-2881, 2890-2894, 2900-2901; Exs. 649-703. And this evidence was shown before any of the key witnesses for the State: before the medical examiner, before the lead

Detective, before the witnesses who knew Knuff best. One of the jury's first impressions in Knuff's capital case was seeing damning evidence of his guilt—not of capital murder, but of totally unrelated crimes.

The State's aggravated murder case against Knuff was largely circumstantial. Evidence of exactly what events transpired in the Nelwood house leading to the deaths of John Mann and Regina Capobianco is nearly nonexistent, except insofar as only Knuff left the house alive. With naught but circumstantial evidence to support its theory that Knuff killed both Mann and Capobianco, the State instead sought to sway the jury against Knuff by painting him as a man who, if guilty of the theft crimes, must also be guilty of murder.

In charging and trying the theft crimes in the same case, and presenting that evidence up front, the State was able to show that Knuff was a man guilty of *some* crime. And thus, the jury had a guilty man before them, inherently prejudicing the jury against Knuff when it came to the aggravated murders. The theft crimes should never have been tried alongside the aggravated murders, and evidence related to them should never have been before the same jury. It served only to paint to Knuff's character as a guilty man and a criminal—the explicit purposes for which "other acts" evidence is barred under law. And as courts have recognized, "when evidence suggesting 'a propensity or disposition to commit crime * * * reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk.'" *Breakiron*, 642 F.3d at 144 (quoting *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976)).

The Supreme Court of Ohio found that joinder of the theft offenses did not violate Ohio's joinder rule, Ohio Crim. R. 14. It reasoned that the evidence was "separate and distinct from the evidence the state used to prove the murders, and therefore it was "highly unlikely that the jury was confused about which evidence applied to the break-ins and which applied to the murders." App. A at ¶ 47. But in so holding, the Supreme Court of Ohio failed to recognize nor even address that the issue before them was not merely a violation of Ohio's joinder rules, but also a violation of due process.

B. The joinder of unrelated crimes in a capital murder trial, when evidence of those crimes would otherwise constitute inadmissible character evidence, is a violation of due process.

The Ohio Supreme Court's decision misses the crux of this issue—one that has implications for the integrity of capital trials throughout federal and state systems. In a capital case, the inclusion of irrelevant charges means that the State was able, through the tool of the indictment, to bring prejudicial other acts evidence to bear in an aggravated murder trial. This was a violation of due process, and this Court should clarify the requirements of due process when it comes to the joinder of unrelated offenses.

This Court has held that misjoinder rises to the level of a constitutional violation "if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *Lane*, 474 U.S. at 446 n.8. But in a capital case where the issue of joinder merges with the issue of character evidence, lower courts need more guidance than this.

Here, the Ohio Supreme Court applied Ohio's joinder rule without even seriously considering the possibility that Knuff's due process rights were at stake. That the jury would not have been "confused" about what evidence applied to which crimes, as articulated by the state court is, frankly, irrelevant. The prejudice to Knuff was that the State was allowed to prove Knuff guilty of totally unrelated crimes, alongside and before putting the question of whether he was guilty of aggravated murder to the jury, inviting the jury to assume that because he is guilty of one crime, he must be guilty of the other.

There can be no reliability in a proceeding where the jury is predisposed to find a defendant guilty. The jury is an "essential instrumentality – an appendage – of the court, the body ordained to pass upon guilt or innocence." *Sinclair v United States*, 279 U.S. 749, 765 (1929). Where evidence of prejudicial, unrelated acts is allowed before a jury, that essential instrumentality is inherently poisoned against a defendant and there can be no reliability in its final conclusions. As early as 1897, judges have commented that where an indictment includes "several distinct charges * * * it is almost impossible that [a defendant] should not be grievously prejudiced as regards each one of the charges by the evidence which is being given up on the others." *Drew v. U.S.*, 331 F.2d 85 (D.C. Cir. 1964) (quoting *Queen v. King*, (1987) 1 Q.B. 214, 216).

In this case, and in others like it, misjoinder rises to the level of a due process issue. "When the jury learns that the person being tried has previously committed another crime, the prejudicial impact cannot be considered insignificant." *Breakiron,* 642 F.3d at 144 (quotation omitted). "The inquiry is not rejected because character is

irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quotation omitted). Allowing the joinder of unrelated offenses without considering this basic fact of juror psychology means willfully permitting a blind spot in the application of criminal law.

The due process issue is especially stark where, as here, there is no factual connection between the theft offenses and the capital indictment. The witnesses and alleged victims were distinct; the exhibits were distinct; they did not occur at the same time; they did not occur for the same reason; they were not similar offenses, meaning that they were not part of a string of similar crimes. When "joined offenses are not connected and are not provable by the same evidence, joinder is improper." *United States v. Terry*, 911 F.2d 272, 276 (9th Cir.) (citing *United States v. Barney*, 568 F.2d 134, 136 (9th Cir. 1978)); *see also United States v. Quinn*, 365 F.2d 256 (1966) (holding that joinder was improper under Fed. Rule Crim. P. 8(a) and 14 and commenting that there is "always a danger when several crimes are tried together, that the jury may use the evidence cumulatively" (citation omitted)).

The fact that this is a capital case should subject it to greater than usual scrutiny. It is axiomatic that capital proceedings require a "heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *see also State v. Scott*, 91 Ohio St.3d 1263, 1264, 2001-Ohio-99, 746 N.E.2d 1124 (Pfieffer, J. concurring). "[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

The failure to sever the unrelated theft charges allowed the introduction of prejudicial other acts evidence into Knuff's aggravated murder trial, in violation of his constitutional rights to due process and a fair trial.

II. A capital defendant's due process rights are violated when prosecutorial misconduct infects the whole of trial such that the fairness of the jury's verdict is unreliable.

Perhaps the most fundamental component of the American system of justice is the requirement, necessity, and promise of fair trial. In so delivering that promise, prosecutors hold a special duty as representatives of a government that seeks not simply to convict and punish, but to find the truth, render justice, and govern impartially. *Berger v. United States*, 295 U.S. 78, 88 (1935). When the misconduct of prosecutor infects a trial with unfairness, the constitutional protections guaranteed to a criminal defendant are violated. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The key analysis in considering prosecutorial misconduct is whether or not the misconduct impacted the fairness of the trial. *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

In this case, there is no doubt that the misconduct of the prosecutor, separately and in sum, undermined any hope of a fair trial for Knuff, whose very life was on the line. The prosecutor prejudicially disparaged Knuff's character through the solicitation of irrelevant testimony, made ongoing and repeated improper arguments, and relied on misstatements and mischaracterizations in closing during both the trial and sentencing phases of Knuff's capital trial. There is no lens through which to view the conduct of the prosecutor that does not reveal it as a concerted, conscious effort

to prejudice the jury against Knuff in the absence of firm evidence of his culpability of aggravated murder as charged. Despite this, the Supreme Court of Ohio determined the conduct of the prosecutor was, variably, not misconduct, harmless, or, for conduct that trial counsel failed to object to, did not satisfy plain error. App. A at ¶¶ 235-272.

A. In the absence of firm evidence of Knuff's guilt, the prosecution turned to character assassination by way of irrelevant and prejudicial testimony.

The State solicited a broad spectrum of irrelevant and prejudicial testimony in Knuff's capital trial. This included testimony that Knuff's polygraph examination showed that he lied (Tr. 4999); that Knuff was a bad, spiteful father and brother; that Knuff was a racist (Tr. 3037-3038, 3439, 3388-3389, 3391, 3426, 3446); that Knuff was "selfish" and "narcissistic" (Tr. 244); and that Knuff was a hardened felon (s*ee*, Statement of the Case, *supra*, for the innumerable points in the record when testimony was solicited on Knuff's criminal history, prison time, and parole status).

The State also called and solicited testimony from an Uber driver who gave Knuff a ride. Tr. 3070-3105. The interaction between this witness and Knuff bore no relation to any of the crimes with which he was charged, took place three days after the alleged murders and not on a notable date, and had no bearing on any other information about Knuff, admissible or otherwise. But what the witness did provide for the State was testimony about his personal fear of Knuff, including the fear he felt on the stand at that moment. Tr. 3097.

Additionally, the State actively solicited testimony about and comparing Knuff to the television character Dexter, a serial killer who dismembers his victims. Tr.

5042, 5317. During Knuff's son's testimony, he stated that he thought his father wanted to cut up body parts like on the show *Dexter*, stating, "He would talk about the show Dexter * * * I just always thought that's where he got the idea from was talking about Dexter all the time." Tr. 5317. By the time the State drew this irrelevant and prejudicial comparison from Knuff's son, the prosecutor had already solicited testimony from the lead detective that "Dexter is a main character from a television series that Dexter is actually a blood stain analysis expert who was a serial killer who dismembers his victims." Tr. 5042.

The State planned for, solicited, and latched onto this irrelevant, inflammatory, prejudicial comparison of a capital defendant to a television serial killer. In closing, the prosecutor asked the jury to consider the comparisons to *Dexter* as improper character evidence, stating, "Tells his kid about 'Dexter.' What kind of person does that?" App. A at ¶ 249. The Ohio Supreme Court did not determine that this was plain error, but it failed to properly consider the cumulative effect of this statement along with the prosecutor's other misconduct and inflammatory evidence. *Id.* ¶ 250.

If irrelevantly comparing a criminal defendant to a serial killer from a popular television show watched by millions is not prejudicial, it is difficult to imagine what could ever be.

B. The prosecutor relied on factual inaccuracies, disparaging comments, improper character evidence, and erroneous legal assertions to make its arguments in closing during both the guilt and sentencing phases of Knuff's capital trial.

In closing during the trial phase of Knuff's capital trial, the State relied on prejudicial statements, insults, and irrelevant information to craft its argument against Knuff and inflame the jurors against him. As described above, the State asked the jury to assess Knuff's character with the testimony about Dexter. App. A at ¶ 249. The State reiterated irrelevant testimony to support its assertion that Knuff was a bad father and a manipulative figure. Over and over, the State referred to Knuff as a liar and argued a shifting of the burden to the jury, insisting that the jury could not rely on any of Knuff's statements beyond a reasonable doubt. *See* Statement of the Case, *supra*.

While prosecutors "may strike hard blows," they are "not at liberty to strike foul ones." *Berger*, 295 U.S. at 88. As the Sixth Circuit stated, "when the prosecutor has made repeated and deliberate statements clearly designed to inflame the jury and prejudice the rights of the accused, and the court has not offered appropriate admonishments to the jury, we cannot allow a conviction so tainted to stand." *Sizemore v. Fletcher*, 921 F.2d 667, 670 (6th Cir. 1990).

Over and over, the State turned not to factual, physical, or circumstantial evidence that supported the theory of Knuff's guilty of aggravated murder, but rather to irrelevant and prejudicial statements and assertions that served only to paint Knuff as a bad guy, a bad father, and a career criminal. The implication is obvious—someone so bad, someone of such low character, *must* have committed murder.

Prosecutors have long been on notice that they must "refrain from improper methods calculated to produce a wrongful conviction," *Berger*, 295 U.S. at 88. Yet,

cases such as this one persist. In *United State v. Acosta*, for instance, the Sixth Circuit granted a new trial on a plain error standard based on nine instances of improper remarks over three days. 924 F.3d 299, 306-307 (6th Cir. 2019). Like the prosecutor in Knuff, the prosecutor returned to the improper themes "several times and in similar terms; evidently, [the prosecutor] made a choice to emphasize those subjects." *Id.* at 307. Unlike the *Acosta* trial, however, in Knuff's trial there were more than nine identifiable incidents of improper evidence and comments; the presentation of improper evidence throughout the trial "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*, 416 U.S. at 643)).

And this is far from the first time that Ohio prosecutors have crossed the line. In *Hodge v. Hurley*, the Sixth Circuit overturned an Ohio conviction where the prosecutor made several similar comments to the prosecutor in Knuff's case and defense counsel failed to object. 426 F.3d 368, 371-72 (6th Cir. 2005). The prosecutor in that case stated that the defendant "is lying to extricate himself from what he's done," *id.* at 379; similarly, the prosecutor in Knuff's case stated, "one thing we know for sure is this defendant is a liar." Tr. 5717; *see also* 5713-5749. She commented, "You've had a master class here in selfish, narcissistic, antisocial behavior," to which the court sustained an objection. Tr. 5668. She also stated that the State "doesn't bring cases based on speculation," and improperly shifted the burden to the defendant by asking, "Which [of Knuff's statements] can you rely on in the most important of your affairs? I submit to you zero." App. A at ¶¶ 241, 245. This is not the first time

prosecutors have struck foul blows in Ohio, and without intervention from a higher court, it will not be the last. *See, e.g.*, *State v. Kirkland*, 2014-Ohio-1966, 15 N.E.3d 818, ¶¶ 78-98 (initially denying relief on prosecutorial misconduct claim despite finding that "prosecutor's closing argument prejudicially affected Kirkland's substantial rights," then granting subsequent motion for relief and remanding for resentencing); *State v. Kirkland*, 2020-Ohio-4079, 157 N.E.3d 716, ¶¶ 115-124 (denying relief on resentencing despite recognizing further prosecutorial misconduct).

The State continued to use similar inappropriate and prejudicial tactics in closing during the sentencing phase of Knuff's trial. The State insisted to the jury that it only weigh mitigation presented in the courtroom and that it give no weight to what was presented. The State continued to disparage Knuff's character, calling his allocution "pathetic," "embarrassing," and "insulting to the intelligence of every person who heard it." App. A at ¶ 271. Even while counsel is afforded wide latitude in opening and closing statements, the use of such inflammatory language coupled with the ongoing, overwhelming solicitation of and reliance on irrelevant character evidence cannot be said to have no effect or a harmless effect on proceedings. The misconduct of the prosecutor was prejudicial to Knuff, painting him as a character to the jury who must be guilty not because the evidence said so, but simply because he—as articulated by the prosecution—is a bad guy.

C. When a capital trial is rendered fundamentally unfair by prosecutorial misconduct, due process is violated and we can have no faith in the verdict.

When the misconduct of prosecutor infects a trial with unfairness, the constitutional protections guaranteed to a criminal defendant are violated. *Donnelly*,

416 U.S. at 643. The question is not simply whether the prosecutor commits misconduct, but whether that misconduct impacted the fairness of the trial. *Smith*, 455 U.S. at 219. Here, the State's misconduct infected every stage of proceedings and, indeed, the very fundamentals of the State's strategy was built upon a foundation of misconduct. In the absence of clear or compelling evidence of Knuff's guilty beyond a reasonable doubt, the State chose to make the centerpiece of its case Knuff's personal character and to, time and again, paint him as the kind of person who was so bad, so reprehensible as an individual, that he must have committed aggravated murder.

CONCLUSION

By the time the question of Knuff's guilt to the aggravated murders was charged to the jury, it was a foregone conclusion that they would find Knuff guilty. Not because of the overwhelmingly evidence of his guilt. Not even because of evidence beyond a reasonable doubt. But rather because of the overwhelming amount of irrelevant, improper evidence introduced, and because of actions taken by the State that served to mar Knuff's character.

The State sought to and did paint Knuff as a man who must be guilty of aggravated murder, because he was guilty of theft; as a man who must be guilty of aggravated murder because he's just like the television serial killer Dexter; as a man wo must be guilty of aggravated murder because he lied on a polygraph; as a man who must be guilty of aggravated murder because he struck fear into the heart of an Uber driver. The jury's guilty verdict and its later recommendation of death were not reached through the fair and impartial weighing of relevant evidence about

aggravated murder, but rather through a fog of irrelevant and prejudicial facts, testimony, and assertions. The exact kinds of propensity and character evidence that the law forbids and the constitution guarantees protection against.

For all the aforementioned reasons, Knuff respectfully requests that this Court grant his petition for writ of certiorari and order full briefing on the matters raised herein.

Respectfully Submitted,

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