CAPITAL CASE

No. 19-7455

IN THE SUPREME COURT OF THE UNITED STATES

RONSON BUSH,
Petitioner,

v.

TOMMY SHARP, Interim Warden,
Oklahoma State Penitentiary,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Mr. Bush's first question presented asks the Court to decide whether § 2254(d)(1)'s "clearly established Federal law" provision authorizes reasonableness review based on general constitutional standards articulated by this Court or, instead, forbids reasonableness review unless this Court has previously decided a case on facts closely related or similar to those underlying the habeas petitioner's claim. Responding in opposition to review, the State insists that the Tenth Circuit's habeas jurisprudence is consistent with this Court's, attempts to minimize the divergence between the Tenth Circuit's habeas jurisprudence and that of other circuits, and tries to change the subject from the proper interpretation of § 2254(d)(1) to the merits of Mr. Bush's due process claim. As explained below, the State's efforts fail.

I. The Tenth Circuit's Interpretation of § 2254(d)(1)'s Clearly Established Federal Law Provision Contradicts *Panetti*.

Mr. Bush's petition showed that *House v. Hatch*, 527 F.3d 1010 (10th Cir. 2008), and subsequent Tenth Circuit decisions that follow *House* contradict *Panetti v. Quarterman*, 551 U.S. 930 (2007), and similar decisions from this Court. The problem for the State is that *Panetti* squarely held that clearly established federal law may be found in "a general standard" articulated in a Supreme Court decision that "involve[d] a set of facts different from" those of the petitioner's case, 551 U.S. at 953, whereas the Tenth Circuit persistently holds that clearly established federal law is limited to Supreme Court decisions "where the facts [we]re at least closely-related or similar to the case *sub judice*," *Bush v. Carpenter*, 926 F.3d 644, 654 (10th Cir. 2019) (quoting *House*, 527 F.3d at 1016). The State doesn't so much respond to this problem as it does stick its head in the sand. The State's BIO never even mentions *Panetti*'s statement that § 2254(d)(1) authorizes reasonableness review based on "a general standard" even where the petitioner's claim is predicated on "facts different from those of the case in which the principle was announced" and, thus, makes no real

attempt to explain how *Panetti*'s language can be squared with the *House* doctrine. That's perhaps not surprising because it's in fact impossible to square *Panetti*'s statement that the facts can be "different" with *House*'s insistence that the facts must be "similar." *See Similar*, Merriam-Webster Thesaurus, https://www.merriam-webster.com/thesaurus/similar (listing "different" as the first antonym for "similar").

The closest that the State comes to wrestling with *Panetti* is to offer a baffling distinction between what it calls "fact patterns" and "factual contexts." The State argues that the *House* doctrine doesn't require a "similar fact pattern," only a "similar factual context," and that that's consistent with *Panetti* because *Panetti* recognized a general standard as clearly established federal law when the general standard was announced under a different fact *pattern* but in a similar factual *context*. But the phrases "fact pattern" and "factual context" are just synonyms of one another. Indeed, the Tenth Circuit—per the author of *House* himself—recognizes the phrases as equivalent for purposes of its § 2254(d)(1) jurisprudence: it has explicitly said that what *House* requires is, indeed, a similar "fact pattern." *Hooks v. Workman*, 689 F.3d 1148, 1176 (10th Cir. 2012) (Holmes, J.).

What the State's "fact pattern"/"factual context" distinction apparently means to posit is that the Tenth Circuit's prerequisite to reasonableness review is only a sort of rough, or highly general degree of, factual similarity between the petitioner's case and the Supreme Court precedent on which he relies. If what the State means to argue is that the Tenth Circuit only requires a situation similar in basic outline, its characterization of Tenth Circuit case law is simply untrue. The Tenth Circuit uses its factual similarity doctrine to deny reasonableness review of state court decisions even when the circumstances of the petitioner's case are roughly or generally similar to those of the Supreme Court precedent on which he relies. Consider the following illustrative cases:

- In *Hooks*, the Tenth Circuit held that Supreme Court cases articulating constitutional standards for the removal of venirepersons in the context of jury selection in a capital case could not constitute clearly established federal law for a petitioner's claim challenging the removal of a venireperson during jury selection in his capital case (a claim with a broadly similar factual backdrop) because the particular reason that the venireperson was removed in *Hooks* was different from the reasons for removal in the Supreme Court cases (i.e., because of a fine-grained factual difference). *Hooks*, 689 F.3d at 1176.
- In *Borden v. Bryant*, the Tenth Circuit held that *Cole v. Arkansas*, 333 U.S. 196, 201 (1948), which recognized that due process requires that a charging document "fairly inform[]" a criminal defendant of the charges, could not constitute clearly established federal law for the petitioner's claim "that his due-process rights were violated because the information filed against him did not include specific dates," inasmuch as *Cole* addressed a charging document that listed the wrong elements, whereas *House* required the petitioner to point to "opinions of the United States Supreme Court" specifically addressing a charging document that included an "allegedly overbroad period of time." 786 F. App'x 843, 846 (10th Cir. 2019) (unpublished).
- In *Gilbert v. Morgan County Dist. Ct.*, the Tenth Circuit held that the Confrontation Clause standards from *Davis v. Alaska*, 415 U.S. 308 (1974)—announced in the context of restrictions on a defendant's cross-examination during trial—could not constitute clearly established federal law for a petitioner's challenge to restrictions on his cross-examination during trial. Even though the claims involved a broadly similar factual scenario, the Tenth Circuit held that *Davis* could not constitute clearly established law because the fact pattern was subtly different: the proposed cross-examination in *Davis* was about bias, whereas the

proposed cross-examination in *Gilbert* was "general impeachment upon a prior bad act." 589 F. App'x 902, 907 (10th Cir. 2014) (unpublished).

- In *Higgins v. Addison*, the Tenth Circuit refused to review a state court's decision for reasonableness under the due process standards articulated in *Deck v. Missouri*, 544 U.S. 622 (2005), because the fact pattern of *Deck* was that the state forced the defendant to wear shackles visible to the jury during trial, whereas the fact pattern of *Higgins* was that the state forced the defendant to wear an ankle monitor visible to the jury during trial. 395 F. App'x 516, 519 (10th Cir. 2010) (unpublished).
- And in Mr. Bush's own case, the Tenth Circuit held that due process standards articulated by this Court in the context of courtroom misconduct by prosecutors weren't clearly established federal law for Mr. Bush's challenge to courtroom misconduct by a prosecutor during trial because the fact pattern in the Supreme Court cases was not that the prosecutor purported to give "an offer of proof of inadmissible evidence." *Bush*, 926 F.3d at 656–57.

These examples illustrate that the Tenth Circuit requires similar facts to Supreme Court precedent at a granular level (similar "fact patterns"), not just a situation that's similar in basic outline or broad strokes (a similar "factual context"). Accordingly, the Tenth Circuit's the-facts-must-be-the-same rule cannot be reconciled with *Panetti*'s the-facts-can-be-different mandate based on the State's proffered distinction between similar fact patterns and similar factual contexts.

Regardless, even pretending that the *House* doctrine required similar facts only at a high level of generality, it would still conflict with *Panetti*. That's because *Panetti* held that a state court decision was an unreasonable application of clearly established federal law based on a general standard articulated in a prior case with broadly dissimilar circumstances—i.e., based on a prior case that involved what the BIO would characterize as a different "factual context." As described in Mr. Bush's

petition (at 13–14), *Ford v. Wainwright* evaluated an executive-branch proceeding and announced its general "fair hearing" standard in the context of a due process claim that challenged, on its face, the Governor's across-the-board policy of excluding all evidence offered by the prisoner. 477 U.S. 399, 412–13, 424 (1986). *Panetti* then held that *Ford*'s fair hearing standard qualified as applicable clearly established federal law even though the *Panetti* Court was evaluating (i) a judicial proceeding (as opposed to an executive-branch proceeding), (ii) a regime under which the decisionmaker was required to consider evidence offered by the condemned (as opposed to excluding it), and (iii) an as-applied challenge to the state judge's failure to provide adequate notice of the effective deadline for submitting expert evidence in the petitioner's particular case (as opposed to a facial challenge). *Panetti*, 551 U.S. at 951–52. Thus, contrary to what the State claims, even if the Tenth Circuit denied reasonableness review only when the petitioner relies on a general standard articulated by this Court in a situation dissimilar in basic outline (i.e., in a different "factual context"), Tenth Circuit law would still contradict *Panetti*.

In short, whether labeled as a fact-pattern-similarity prerequisite, as a factual-context-similarity prerequisite, or with some other essentially synonymous terminology, the Tenth Circuit's settled and persistent misinterpretation of § 2254(d)(1) irreconcilably contradicts *Panetti*. Certiorari should be granted to bring the Tenth Circuit into compliance with this Court's precedent.

II. *Musladin* Engaged in Reasonableness Review and Thus Provides No Support for *House*'s Threshold Bar to Reasonableness Review.

The State argues that the Tenth Circuit's understanding of "clearly established Federal law" is supported by *Carey v. Musladin*, 549 U.S. 70 (2006), and its progeny. But the State does nothing but reassert the same misreading of *Musladin* that resulted in the Tenth Circuit's error in *House*. The State wrongly assumes that *Musladin* and its progeny didn't conduct reasonableness review when, in fact, they did.

And to the extent that *Musladin* was ambiguous on this score, the Court's subsequent decision in *Panetti* clarified it.

None of the cases cited by the State erects a *threshold* factual-similarity *prerequisite* to reviewing a state court decision for reasonableness, which is what the Tenth Circuit does. Rather, as explained in Mr. Bush's petition (at 15), *Musladin* simply held that, in light of doctrinally material distinctions between the Supreme Court precedents cited by Musladin and the claim rejected by the state court in Musladin's case, "it cannot be said that the state court 'unreasonabl[y] appli[ed]'" the Supreme Court precedents. *Musladin*, 549 U.S. at 654. Similarly, *Wright v. Van Patten* recognized that *Strickland v. Washington*, 446 U.S. 668 (1984), did supply clearly established federal law governing the petitioner's claim and held only that it *wasn't unreasonable* for the state courts to decline to extend the more favorable standard articulated in *United States v. Cronic*, 466 U.S. 648 (1984), to the petitioner's case. *See Van Patten*, 552 U.S. 120, 124–25 (2008). And *White v. Woodall* held, not that no clearly established federal law existed, but that "the Kentucky Supreme Court's rejection of respondent's Fifth Amendment claim *was not objectively unreasonable*." 572 U.S. 415, 427 (2014) (emphasis added). The reasonableness review conducted in *Musladin*, *Van Patten*, and *Woodall* is precisely the review that the Tenth Circuit entirely refuses to undertake absent factual similarity. Thus, while the decisions cited by the State support the unexceptional proposition that doctrinally material distinctions between the petitioner's claim and Supreme Court precedent may render a state court's decision a reasonable one, they do not support the Tenth Circuit's rule that factual dissimilarity presents a threshold bar to reasonableness review.

The answer to the question of whether factual dissimilarity presents a threshold bar to conducting reasonableness review is found in *Panetti*, not in *Musladin*, *Van Patten*, or *Woodall*. As described above, *Panetti* squarely holds that factual similarity

between Supreme Court precedent and the case at hand is not a prerequisite to reasonableness review, and because the cases cited by the State undertook a reasonableness review, they are not to the contrary. Indeed, to any extent that *Musladin* might have been read to erect a factual similarity threshold requirement, the Court's decision in *Panetti*—decided after *Musladin*—clarified that no such requirement exists. Certiorari should be granted to correct the Tenth Circuit's entrenched and persistent misreading of *Musladin* and its progeny.

III. The State Essentially Admits that the Tenth and Fifth Circuits Are Divided.

The State all but acknowledges that the Tenth and Fifth Circuits are at odds over § 2254(d)(1)'s clearly established federal law provision. *See* BIO at 20–22. As detailed in Mr. Bush's petition (at 19), the Fifth Circuit has held that *Ford*'s "fair hearing" standard, developed in the distinct context of executive-branch insanity proceedings, constitutes clearly established federal law applicable to a petitioner's contention that he was denied procedural due process in state court on his claim that he suffers from an intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). *See Wiley v. Epps*, 625 F.3d 199, 213 (5th Cir. 2010); *Rivera v. Quarterman*, 505 F.3d 349, 357–58 (5th Cir. 2007). The State cannot muster any argument—because there is none—that the Fifth Circuit's holdings in *Wiley* and *Rivera* are reconcilable with the Tenth Circuit's settled position that "federal courts may no longer extract clearly established law from the general legal principles developed in factually distinct contexts." *House*, 527 F.3d at 1016 n.5.

Instead, the State posits that (a) the conflict might sort itself out and (b) more percolation is needed. The State is wrong on both counts.

The State's half-hearted suggestion that the Fifth Circuit might reconsider its interpretation of § 2254(d)(1) in light of *Shoop v. Hill*, 139 S. Ct. 504 (2019), is meritless. *Shoop* was a summary *per curiam* decision that broke no new ground. *Shoop* rebuked the Sixth Circuit for treating as clearly established federal law a Supreme

Court precedent that "was not handed down until long after the state-court decisions" it reviewed and therefore vacated and remanded for the Sixth Circuit to evaluate the state court decision "based solely on the holdings of this Court that were clearly established at the relevant time." *Shoop*, 139 S. Ct. at 505. That has nothing to do with the Fifth Circuit's holding that the fair hearing standard from *Ford*—a precedent that predated by several decades the state court decisions under review in *Wiley* and *Rivera*—qualified as clearly established federal law in the distinct context of state court intellectual disability proceedings. Nothing in *Shoop* could cause the Fifth Circuit to revisit its position that § 2254(d)(1) *does* permit federal habeas courts to extract clearly established law from general legal principles developed in factually distinct contexts.

The State's suggestion that more percolation would be beneficial is equally unavailing. Section 2254(d)(1)'s clearly established federal law provision is more than two decades old and has been addressed in literally thousands of court of appeals decisions. The Tenth and Fifth Circuit decisions that the State effectively admits are irreconcilable are themselves more than a decade old and have been applied repeatedly in subsequent cases in their respective circuits. This is not a situation in which "frontier legal problems are presented," such that further "'percolation' in" the lower courts "may yield a better informed" decision by this Court. BIO at 21 (quoting *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting)). It is, instead, a situation in which there is already a robust body of lower court case law to illuminate the Court's decisionmaking process. Relatedly, the State's erroneous assertion that the Fifth Circuit's position is an "outlier[]" (BIO at 21), would not suggest that certiorari should be denied even if that were true. To call a circuit's position an "outlier" necessarily admits that many other decisions have addressed the same point—in which case no further percolation is needed.

This Court should grant certiorari because entrenched and repeatedly applied Tenth and Fifth Circuit decisions are in irreconcilable conflict.

IV. The Tenth Circuit's Interpretation of § 2254(d)(1)'s Clearly Established Federal Law Provision Also Conflicts With That of Multiple Other Circuits.

The State denies that the Tenth Circuit is in conflict with circuits other than the Fifth, but its denial rests on a mischaracterization of the relevant case law. In fact, it's the Tenth Circuit's position, not the Fifth's, that's the outlier.

Regarding the First Circuit, the State erroneously asserts that both *Housen v. Gelb*, 744 F.3d 221 (1st Cir. 2014), and *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013), actually left open the question of whether there was clearly established federal law against which to review for reasonableness a state court's rejection of a petitioner's claim that it violates due process to prosecute accomplices on materially inconsistent theories of guilt. In fact, both cases squarely decided the question and reached opposing results. In *Housen*, the First Circuit held that it was "clearly established law" applicable to the petitioner's case that "a criminal defendant has a due process right to a fair trial," and *Housen* thus "gaug[ed] the reasonableness of the [state court's] application of clearly established due process principles to the petitioner's prosecutorial inconsistency claim." 744 F.3d at 227–29. In *Littlejohn*, by contrast, the Tenth Circuit explicitly refused to review the reasonableness of the state court's decision because it held that "Littlejohn's inconsistent-theories argument fails at the threshold because it is not based on clearly established federal law." 704 F.3d at 852–54 (citing *House*). The disparate holdings in *Housen* and *Littlejohn* are driven by the fact that the First Circuit recognizes that a "broad" principle from this Court's cases, such as the right to a fair trial, can constitute clearly established federal law for "a kaleidoscopic array of fact patterns," *Rashad v. Walsh*, 300 F.3d 27, 35 (1st Cir.

2010), whereas the Tenth Circuit improperly erects as a prerequisite to reasonableness review that the petitioner point to "Supreme Court holdings where the facts are at least closely related or similar," *Littlejohn*, 704 F.3d at 849 (quoting *House*).

Turning to the Second Circuit, the State claims that *House* doesn't conflict with that circuit's holding in *Harris v. Alexander*, 548 F.3d 200 (2d Cir. 2008), that there was clearly established federal law to apply to a defendant's claim that he was denied a theory-of-defense instruction. This is so, the State says, because *Thomas v. Goodrich*, 750 F. App'x 637 (10th Cir. 2018) (unpublished), held that a state court's rejection of a petitioner's claim that he was improperly denied a theory-of-defense instruction was not unreasonable. But the decision in *Thomas* was unpublished and non-precedential; it was decided at the certificate-of-appealability stage based on a *pro se* brief, without an answer brief from the State; and—crucially—it didn't mention the *House* doctrine at all, much less actually decide whether there was clearly established federal law to apply under the *House* standard. *Cf. Hooks*, 689 F.3d at 1117 (denying habeas relief by "assum[ing] without deciding" that there was clearly established law to apply). Thus, *Thomas* can't be read as anything approaching an authoritative application of the *House* doctrine, which if applied would have resulted in the denial of Thomas's claim for lack of clearly established federal law.[1]

As for the Third Circuit, the State makes no real effort to reconcile that court's holding in *Jamison v. Klem* that a general standard can support relief under § 2254(d)(1) for claims based on "seemingly limitless combinations of acts and omissions," 544 F.3d 266, 271–74 (3d Cir. 2008), with *House*'s rule that a general standard can support relief only if it was articulated in a case with facts "closely-related or

[1] The same problem applies to the State's reliance on *Young v. Attorney Gen. for New Mexico*, 534 F. App'x 707 (10th Cir. 2013) (unpublished), as an analogue to *Blackmon v. Booker*, 696 F.3d 536 (6th Cir. 2012), which reviewed a defendant's challenge to gang affiliation evidence. *Young* simply didn't address the *House* doctrine.

similar to" the petitioner's. Despite the State's generalized assertion (at 15–16) that there's no conflict between *House* and cases like *Jamison*, it's apparent that *Jamison* would have come out differently in the Tenth Circuit. In *Jamison*, the Third Circuit held that a state court unreasonably applied the clearly established knowing-and-voluntary standard for guilty pleas when it rejected the defendant's complaint that he was not advised of an applicable mandatory minimum sentence. *Jamison*, 544 F.3d at 271–74. The Third Circuit so held even though this Court had never suggested that the failure to advise a defendant of an applicable mandatory minimum sentence would violate the knowing-and-voluntary standard. We know that the petitioner in *Jamison* would have been denied relief in the Tenth Circuit because the Tenth Circuit's application of *House* in *Borden v. Bryant* (summarized in Section I, *infra*) resulted in the denial of relief in a closely analogous situation.

Regarding the Fourth Circuit, the State doesn't address the holding in *Barnes v. Joyner* that a general standard can constitute clearly established federal law as to "myriad factual circumstances," 751 F.3d 229, 246 (4th Cir. 2014), and the State doesn't explain how the grant of habeas relief in *Barnes* could be consistent with the *House* doctrine. In fact, the petitioner in *Barnes* would have been denied relief in the Tenth Circuit because no Supreme Court case has addressed facts similar to the *Barnes* petitioner's claim that his constitutional rights were violated by a juror seeking spiritual guidance from her pastor during death penalty deliberations.

The State argues that the Tenth Circuit's decisions in *Torres v. Lytle*, 461 F.3d 1303 (10th Cir. 2006), and *Hopkins v. Workman*, 47 F. App'x 893 (10th Cir. 2002) (unpublished), show that the *House* doctrine is compatible with the Seventh Circuit's decisions in *Owens v. Duncan*, 781 F.3d 360 (7th Cir. 2015), and *Whatley v. Zatecky*, 833 F.3d 762 (7th Cir. 2016). But even assuming that the former cases were comparable to the latter (they are not), the State's argument would still be a nonstarter because *Torres* and *Hopkins* were decided before *House*, and *House* made explicit

that its factual similarity doctrine was a break with the past and based on a (mis)reading of this Court's then-recent *Musladin* decision. *See House*, 527 F.3d at 1015–18. Under *current* and now well-settled Tenth Circuit law, *Owens* and *Whatley* would have come out differently because this Court has not decided a case on facts closely related or similar to those presented in *Owens* and *Whatley*.

Finally, the State fails to meaningfully grapple with the Ninth Circuit's holding that, under § 2254(d)(1), a "broad rule" may qualify as clearly established federal law that "must be applied" in "many different factual situations." *Musladin v. Lamarque*, 555 F.3d 830, 839 (9th Cir. 2009). That's plainly inconsistent with *House*'s specification that broad rules only qualify as clearly established federal law for cases with closely-related or similar facts, and the State's hand-waving about some supposed difference between fact patterns and factual contexts doesn't show otherwise.

To be fair to the State, it's true that the Tenth Circuit's distinctive *House* doctrine doesn't produce a different outcome in *every* case. *Compare Franklin v. Bradshaw*, 695 F.3d 439, 456–57 (6th Cir. 2012), *with Cole v. Trammell*, 755 F.3d 1242, 1165 (10th Cir. 2014). But it is a unique legal standard that demonstrably does call for different outcomes in many cases. And an intractable, well-developed circuit split in a frequently litigated area—one that produces different outcomes in many cases—is a circuit split that necessitates this Court's intervention.

V. The Merits of Mr. Bush's Due Process Claim Cannot Be Adjudicated Without Reaching the Question Presented.

Lastly, the State is wrong to suggest that Mr. Bush's due process claim could be denied, without reaching the question presented, on the ground that the state court decision in his case wasn't unreasonable. Whether any clearly established federal law exists, and what the content of clearly established federal law is, necessarily must be addressed *before* a court can even begin to determine whether a state court ruling unreasonably applied clearly established federal law. *See Marshall v. Rodgers*,

569 U.S. 58, 62 (2013) ("The *starting point* for cases subject to § 2254(d)(1) is to identify the 'clearly established Federal law' . . . that governs the habeas petitioner's claims.") (emphasis added). Thus, if certiorari is granted, the Court would be required to decide whether the Tenth Circuit is right that clearly established federal law consists only of "Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*," *Bush*, 926 F.3d at 657 (quoting *House*). And assuming that it rejects the *House* doctrine, the Court could simply remand Mr. Bush's case for the Tenth Circuit to assess in the first instance whether the state court's denial of Mr. Bush's claim was an unreasonable application of the clearly established due process standards that govern it.

In any event, Mr. Bush's due process claim warrants habeas relief. This Court has already recognized that it is "clearly established Federal law" that "a prosecutor's improper comments" violate a defendant's constitutional rights if they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, 567 U.S. 37, 45 (2012) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Here, the prosecutor recited to the decisionmaker a litany of inadmissible but damning allegations that utterly undermined Mr. Bush's defense. Among other things with no support in admissible evidence, the prosecutor told the decisionmaker that Mr. Bush planned the killing for a week or more, taunted and tortured the victim, was planning an escape and would kill anyone who got in his way, had no remorse, and laughed about killing the decedent. That these improper comments nominally took the form of a legally pointless "offer of proof," rather than the form of a closing argument or a question posed to a witness, is completely immaterial and in no way negates *Darden*'s status as clearly established federal law applicable to Mr. Bush's claim. Further, as a dissenting state court judge recognized, the presumption that a decisionmaker disregards inadmissible evidence cannot possibly

control here because the prosecutor's representations were so extensive and prejudicial that it's implausible to believe that the decisionmaker could ignore them. Instead, because the inadmissible information that the prosecutor improperly revealed to the decisionmaker was the most damaging thing presented during the entire sentencing trial, the prosecutor's improper comments infected the entire trial with unfairness to such a degree as to render the state court's refusal to recognize the constitutional violation an unreasonable application of *Darden*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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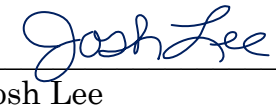

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