OCTOBER TERM 2019

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD LEON FIELDS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

THIS IS A SECTION 2255 CAPITAL CASE

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CAPITAL CASE – QUESTION PRESENTED

In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), this Court identified two distinct standards of review applicable to claims of prosecutorial misconduct. Where the prosecutorial misconduct constitutes a due process violation, relief is warranted only if the entire proceedings were rendered fundamentally unfair. But where the misconduct implicates a specific constitutional provision, relief may be granted so long as it effectively deprived the defendant of the protections guaranteed by that right. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court made clear that the latter standard applies to prosecutorial argument that violated the capital defendant's Eighth Amendment right to a reliable sentencing determination by misleading the jury as to its role.

In the wake of *Donnelly* and *Caldwell*, the Tenth Circuit, like other circuit courts of appeals, faithfully applied a heightened standard of review to claims that a prosecutor's remarks in capital sentencing interfered with the jury's sense of responsibility for imposing death. However, in more recent cases—including this case, in which the prosecutor concluded his closing argument in support of the death penalty by retelling a lengthy story from the Bible—federal circuit courts have eschewed the principles articulated in *Donnelly* and *Caldwell*.

The question presented is whether *Donnelly* and *Caldwell* remain good law and, if so, whether the Tenth Circuit erred in applying a fundamental-fairness analysis to reject Petitioner's claim that the prosecutor diminished the capital sentencing jury's sense of responsibility by arguing that a death sentence was preordained by religious edict.

LIST OF ALL PROCEEDINGS

United States v. Fields, No.03-CR-73-RAW (E.D. Okla. July 22, 2005) (trial)

United States v. Fields, No. 05-7128 (10th Cir. Feb. 25, 2008) (direct appeal)

Fields v. United States, No. 08-6504 (U.S. Sup. Ct. Apr. 6, 2009)

Fields v. United States, No. 10-CIV-115-RAW (E.D. Okla. Dec. 15, 2016) (§ 2255)

United States v. Fields, No. 17-7031 (10th Cir. Dec. 30, 2019) (§ 2255 appeal)

In re Fields, No. 20-7026 (10th Cir. May 28, 2020) (authorization to file successive § 2255 granted)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Edward Leon Fields, Jr., is a federal capital prisoner. Despite pleading guilty and accepting responsibility for the murders he committed, he was sentenced to death after penalty proceedings during which the prosecutor improperly invoked religious authority in support of a death sentence, undermining the reliability of the jury's sentencing deliberations. Petitioner respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Tenth Circuit's partial denial of Mr. Fields's motion for relief under 28 U.S.C. § 2255.

OPINIONS BELOW

The Tenth Circuit affirmed Mr. Fields's convictions and sentences on direct appeal. *United States v. Fields*, 516 F.3d 923, 928 (10th Cir. 2008). The Supreme Court denied review. *Fields v. United States*, 129 S. Ct. 1905 (2009).

On December 15, 2016, the United States District Court for the Eastern District of Oklahoma, in the absence of an evidentiary hearing, denied relief and a certificate of appealability ("COA") on all claims in Mr. Fields's Amended Motion to Vacate, Set Aside, or Correct a Sentence under 28 U.S.C. § 2255. The memorandum opinion and order is unreported and attached as Appendix A. On March 9, 2018, the United States Court of Appeals for the Tenth Circuit granted a COA on four grounds. The Case Management Order is attached as Appendix B. On December 30, 2019, the Tenth Circuit affirmed the district court's opinion in part and reversed and remanded in part. The decision, *United States v. Fields*, 49 F.3d 1240 (10th Cir. 2019), is attached as Appendix C.

On May 28, 2020, the Tenth Circuit authorized Mr. Fields to file a successive motion pursuant to 28 U.S.C. § 2255 based on *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). Order, *In re Fields*, No. 20-7026, at *1-2 (10th Cir.).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit's order denying, in part, Mr. Fields's § 2255 motion was entered on December 30, 2019. On March 19, 2020, this Court ordered that the deadline to file any petition for a writ of certiorari due on or after that date be extended to 150 days from the date of the lower court judgment. *See* U.S. Sup. Ct. Order No. 589. This petition is timely filed.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution states that, "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The Eighth Amendment to the United States Constitution bars "cruel and unusual punishments."

STATEMENT OF THE CASE

Mr. Fields was charged in the Eastern District of Oklahoma with the July 10, 2003, murder of Charles and Shirley Chick. He pleaded guilty to all the charges against him.

During a trial limited to sentencing, the Government argued forcefully in favor of the death penalty. At the conclusion of his closing argument, the prosecutor launched into an extended retelling of a Biblical story: the well-known "writing on the wall" sermon from the Book of Daniel. In this story, God judges King Belshazzar for his misdeeds and sentences him to death. The prosecutor stated, in relevant part:

> Thousands of years ago the king of the world's greatest then existent civilization and most powerful empire held a great feast for thousands of his ruling friends. They ate, they drank from golden and silver goblets that they had stolen from the temple of a subdued and now enslaved nation. They drank wine and they worshipped pagan idols. All of a sudden the fingers of a hand began to write on the palace wall. The king saw the hand and was so frightened, he was so scared, that his clothing literally came loose. He became white. He shook. His knees banged together. He cried out: Bring the astrologers, bring the wise men of the nation. Whoever interprets this saying on the wall will become the third most powerful member of my government. He will have great riches. The wise men came in. They studied, they deliberated, they conversed, they conferred and they thought. But they couldn't read much less interpret the writing on the wall. The king's face turned ashen. The queen, though, remembered a forgotten man. She called for him after talking to the king. And the king made the man the same offer. The man, though, he turned down all of the riches, all the honor and all of the prestige.
>
> The man bravely interpreted the writing on the wall. And the writing on the wall said in three words, your kingdom has come to an end, your kingdom will be divided and given to your neighboring enemies, and then the prophet said the writing said you have been weighed in the balance and found wanting. Sure enough, that night the King was killed. His kingdom was separated among his neighboring enemies.

Op. at 45–46 (citing Tr. of Jury Trial, Vol. XIV, at 3466–67). The prosecutor then went on to say: "The Defendant weighed his option on July 10, 2003. Under the Court's instructions and the law given by the Court, the Defendant should be, as it

were, weighed in the balance and found wanting." Op. at 46. At no point during this lengthy soliloquy did trial counsel object.

Although the jury found seventeen nonstatutory mitigators in response to the defense presentation, it sentenced Mr. Fields to death after just four hours of deliberation.

Mr. Fields sought post-conviction relief under 28 U.S.C. § 2255, alleging that his Sixth Amendment right to counsel was violated by trial counsel's failure to object to the Government's blatantly improper invocation of the Bible. Petitioner's Memorandum of Law in Support of Motion for Relief Pursuant to 28 U.S.C. Section 2255 or in the Alternative Pursuant to 28 U.S.C. Section 2241 ("Memorandum") is attached as Appendix D. In support of his argument that the prosecutor's argument was objectionable, Petitioner cited *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), in which this Court held that "[w]hen specific guarantees of the Bill of Rights are involved," the Court takes "special care to assure that prosecutorial conduct in no way impermissibly infringes them." Memorandum at 88. Additionally, Petitioner cited *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985), which granted relief based on an improper prosecutorial argument that misled the jury about its proper role, as the argument was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* Petitioner argued that, under *Donnelly* and *Caldwell*, he need not show that the prosecutor's comments rendered his sentencing fundamentally unfair. Rather, he is entitled to relief because the

prosecutor deprived him of his right to reliable capital sentencing by diminishing the jury's sense of responsibility for imposing death.

The district court rejected Mr. Fields's claim. While recognizing that religious arguments are "condemned by both state and federal courts," it found that the prosecutor's arguments here were not improper because they could be distinguished from those at issue in a factually similar case. Op. at 46–48 (referencing *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000), in which the Ninth Circuit vacated a capital sentence based on the prosecutor's improper use of religion in closing argument). Having determined that the prosecutor's statements were not improper, the district court held that counsel was not ineffective for failing to object.

On appeal, the Tenth Circuit affirmed the denial of relief, concluding that that "the prosecutor's arguments, though perhaps misguided, were ultimately harmless" in light of the "overwhelming[]" evidence supporting the verdict and the fact that the jury "quickly reached a unanimous verdict." *Fields*, 949 F.3d at 1273.[1] Having determined that the argument was harmless, the court held that trial counsel's failure to object was not ineffective and that the district court did not abuse its discretion by denying relief. *Id.*

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[1] The Tenth Circuit agreed with the district court's analysis distinguishing the prosecutor's argument here from that held to be improper in *Sandoval*, but it denied relief based on its finding that Mr. Fields failed to establish prejudice. *See Fields*, 949 F.3d at 1272 ("[E]ven assuming that the prosecutor's arguments in Fields's case were improper, it is clear to us that, unlike the situation in *Sandoval*, they did not prejudice Fields's chances of receiving life without possibility of parole instead of the death penalty.") (internal quotation marks omitted).

REASONS FOR GRANTING THE WRIT

THE TENTH CIRCUIT ERRONEOUSLY APPLIED A FUNDAMENTAL-FAIRNESS STANDARD OF REVIEW TO AN EIGHTH AMENDMENT PROSECUTORIAL MISCONDUCT CLAIM, REFLECTING AN ONGOING EROSION OF THIS COURT'S JURISPRUDENCE.

This Court should exercise its discretion and grant the requested writ of certiorari because the Tenth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. U.S. Sup. Ct. R. 10(c). As explained above, the Tenth Circuit denied relief to Mr. Fields based on a finding that the prosecutor's appeal to religion during capital sentencing proceedings was harmless in light of the overall evidence presented at his sentencing hearing and the length of the jury's deliberations. In so doing, the court extended an ongoing trend in which circuit courts of appeals are ignoring the *Donnelly* distinction between claims that a prosecutor's improper remarks violated the right to due process generally and those alleging that the misconduct undermined a specific constitutional guarantee, as well as *Caldwell*'s application of that distinction to the capital sentencing context. This Court should grant the writ to reaffirm the critically important holdings of *Donnelly* and *Caldwell*.

A. This Court Has Clearly Established Two Standards Applicable to Claims of Prosecutorial Misconduct, and Applied the Stricter Standard to Violations of the Eighth Amendment's Guarantee of Reliable Capital Sentencing Proceedings.

This Court first articulated divergent standards for prosecutorial misconduct claims that implicate general due process, and those that implicate specific constitutional guarantees, in *Donnelly v. DeChristoforo.* In that case, the petitioner sought to vacate his life sentence based on a claim that "certain of the prosecutor's

remarks during closing argument deprived him of his constitutional right to a fair trial." 416 U.S. at 638. Analyzing this claim, the Court explained:

> This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Id. at 643 (internal citations omitted). The Court took a similar approach in *Darden v. Wainwright*, 477 U.S. 168 (1986), applying the generalized fundamental-fairness standard to a claim of prosecutorial misconduct where the prosecution's objectionable remarks did not "implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 181–82.

By contrast, in *Caldwell*, a case involving remarks that interfered with the Eighth Amendment right to a reliable capital sentence, the Court rejected the proposition that "the ultimate inquiry must be whether the statements rendered the proceedings as a whole fundamentally unfair." 472 U.S. at 347–50 (Rehnquist, J., dissenting) (quoting *Donnelly*, 616 U.S. at 642); *see also id.* at 338 ("[A]lthough *Donnelly* does clearly warn against holding every improper and unfair argument of a state prosecutor to be a federal due process violation, it does not insulate all prosecutorial comments from federal constitutional objections."). Rather, because the prosecutor's remarks "prejudiced a specific right," the Court held that if the misconduct had *any* effect on the sentencing decision, "that decision [did] not meet

the standard of reliability that the Eighth Amendment requires." *Id.* at 341; *see also Sawyer v. Smith*, 497 U.S. 227, 235 (1990) ("*Caldwell*, unlike *Donnelly*, was a capital case; and while noting the principle set forth in *Donnelly*, the Court in *Caldwell* determined to rely not on the Due Process Clause *but on more particular guarantees of sentencing reliability* based on the Eighth Amendment." (emphasis added)).

B. Circuit Courts of Appeals that Once Faithfully Applied *Donnelly* and *Caldwell* Now Ignore their Distinct Standards of Review in the Capital Sentencing Context.

In the wake of *Donnelly* and *Caldwell*, the Tenth Circuit—like other circuit courts of appeals—faithfully applied a heightened standard of review to claims that a prosecutor's remarks in capital sentencing proceedings had interfered with the reliability of the jury's decision.[2] For instance, in *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999), the Tenth Circuit affirmed the district court's grant of habeas relief under 28 U.S.C. § 2254 after determining that the prosecutor's capital sentencing argument led the jury to believe that the defendant had no mitigating evidence to present, when in fact the defendant had been improperly barred from presenting that evidence. *Id.* at 1218. In state post-conviction proceedings, the state court had held that the prosecutor's remarks "did not deny Mr. Paxton his

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[2] Immediately following *Caldwell*, the Tenth Circuit did fail to apply the *Caldwell* distinction in evaluating a prosecutorial misconduct claim in the capital sentencing context. Specifically, in *Hopkinson v. Shillinger*, 866 F.2d 1185, 1238 (10th Cir. 1989), a divided panel explicitly rejected a heightened standard of review on a capital petitioner's claim that improper prosecutorial argument violated his Eighth Amendment right to a reliable sentencing. However, the Tenth Circuit subsequently recognized that the holding in *Hopkinson* had been overruled by this Court's decision in *Sawyer*. *See Davis v. Maynard*, 911 F.2d 415, 417 (10th Cir. 1990).

constitutional right to a fair sentencing proceeding," but the Tenth Circuit refused to afford deference to that holding, explaining:

> [I]n considering whether the closing argument denied Mr. Paxton fundamental fairness, the state appellate court did not assess the remarks under the appropriate constitutional standard; indeed, the state court simply did not refer to controlling Supreme Court authority for guidance either directly or indirectly. In our view that authority compels the conclusion that the argument here prejudicially infringed on Mr. Paxton's constitutional rights.

Id. at 1218 (citing, inter alia, Petitioner's Eighth Amendment right to reliable sentencing, which was violated by the prosecutor's prejudicial argument). The Tenth Circuit subsequently affirmed that "prosecutorial misconduct could have an effect on a jury that would violate a defendant's specific rights under the Eighth Amendment as articulated by [*Caldwell*]." *Le v. Mullin*, 311 F.3d 1002, 1013 n.3 (10th Cir. 2002)[3]; *see also Glossip v. Trammell*, 530 F. App'x 708, 721–22 (10th Cir. 2013) ("[I]f prosecutorial misconduct [in Petitioner's penalty phase capital trial] denied Glossip a specific constitutional right, a valid habeas corpus claim may be established without proof the entire trial was rendered fundamentally unfair." (citing *Paxton*, 199 F.3d at 1217)).

Recently, however, the Tenth Circuit refused to grant relief under § 2254 to a petitioner who made a claim similar to the one asserted in *Paxton* regarding prosecutorial interference with the right to present mitigating evidence. *See Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 910–14 (10th Cir. 2019). While the court's

[3] In *Le*, the court determined that the petitioner in that case had not presented evidence that his specific Eighth Amendment right had been violated, and therefore applied a fundamental-fairness analysis. 311 F.3d at 1013 n.3.

decision relied upon a finding that the prosecutor's comments were not improper, it also stated that there was no clearly established federal law requiring heightened review of the alleged impropriety. The court provided no rationale for departing from the position it adopted in *Paxton*, in which it expressly found that this Court's jurisprudence *mandated* application of a standard more rigorous than the fundamental-fairness standard. A few months later, the Tenth Circuit applied the generalized due process standard in analyzing Mr. Fields's § 2255 prosecutorial misconduct claim, although here the court made no comment on Petitioner's argument for heightened review.

Unfortunately, the Tenth Circuit is not the only court of appeals to apparently abandon adherence to *Donnelly* and *Caldwell*. For instance, in *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995), the Eighth Circuit found that the prosecutor's argument that a capital defendant's death would be quick and painless improperly diminished the jury's sense of responsibility for imposing death. *See id.* at 1362 ("The assurance of a quick and easy death—like the assurance of appellate review that was denounced in *Caldwell*—'is no valid basis for a jury to return a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence.'" (quoting *Caldwell*, 472 U.S. at 336)). The court then explained:

> We cannot say that the prosecutor's description of an "instantaneous" death had no effect on the sentencing decision. A decision based on such an argument does not meet the standard of reliability that the Eighth Amendment requires. On this basis alone, we hold that Antwine's sentence is constitutionally invalid.

Id.; *see also Copeland v. Washington*, 232 F.3d 969, 974–75 (8th Cir. 2000) (citing *Paxton*'s holding that Supreme Court precedent required reversal of the state court's decision applying a fundamental-fairness analysis to an Eighth Amendment violation). Yet, in *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), the circuit court applied the due process standard articulated in *Donnelly* to review the prosecutor's argument to a capital jury that executing the defendant was necessary to further the war on drugs, despite finding that the comments "diminished the jury's sense of responsibility for imposing the death sentence." *Id.* at 840–42.

The same shift is evident in the jurisprudence of the Sixth Circuit. *Compare DePew v. Anderson*, 311 F.3d 742, 749–50 (6th Cir. 2002) (improper prosecutorial comments generally require a four-part fairness analysis, but automatic reversal warranted where comments went to "the heart of the defendant's sole mitigating theory" in contravention of the Eighth Amendment), *with Beuke v. Houk*, 537 F.3d 618, 649–50 (6th Cir. 2008) (analyzing prosecutorial comment improperly referencing his personal fear of the defendant and others "calculated to incite the passions and prejudices of the jurors" under four-factor due process test).

C. The Question Presented Is Exceptionally Important.

The distinction between the general due process standard the Tenth Circuit applied in this case and the Eighth Amendment standard it should have applied was significant. This Court has long placed a high professional duty on prosecutors, holding that "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Likewise, the Court's death penalty jurisprudence has consistently recognized that "the penalty of

death is qualitatively different from a sentence of imprisonment, however long," and that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also California v. Ramos*, 463 U.S. 992, 998–99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (because "death is different," courts must "impose[] protections that the Constitution nowhere else provides"). Yet circuit courts of appeals, including the Tenth Circuit in this case, are evaluating prosecutors' foul blows against the Eighth Amendment right to reliable capital sentencing proceedings under the same standard used to analyze due process violations in all criminal trials.

Here, there is no doubt that the prosecutor's close paraphrase of the writing on the wall sermon was improper. Religious arguments "have been condemned by virtually every federal and state court to consider their challenge." *Sandoval*, 241 F.3d at 777; *see also Cauthern v. Colson*, 736 F.3d 465, 476-77 (6th Cir. 2013) ("[B]iblical references . . . are particularly inappropriate in a sentencing proceeding, because they can create the inference that the death penalty is mandatory through their appeal to a higher authority, and because they allow a jury to delegate its own responsibility for the imposition of the sentence."); *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998) (inappropriate for prosecutor to tell jurors that capital punishment is sanctioned by the Bible); *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996)

("Federal and state courts have universally condemned such religiously charged arguments as confusing, unnecessary, and inflammatory."); *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991) (finding prosecutor's appeals to religious beliefs, including comparison of defendant and Judas Iscariot, to be "outrageous"); *United States v. Giry*, 818 F.2d 120, 133 (1st Cir. 1987) (reference to Bible is improper appeal to jurors' private religious beliefs).

Even though the prosecutor's version did not explicitly contain the words "God," "religion," or "the Bible," he recounted the story in a Biblical style, such that any "lay juror would readily understand the words" used "as referring to Scripture." *Sandoval*, 241 F.3d at 778. And, as in *Sandoval*, "[t]hose learned in the [Old] Testament would recognize the argument as closely following" the Biblical passage from which it was drawn. *Id.*[4] Nor can there be doubt as to the prosecutor's motivation for telling this lengthy parable, the only possible relevance of which was as an "invocation of divine authority to direct a jury's verdict." *Sandoval*, 241 F.3d at 779; *see also Giry*, 818 F.2d at 134 ("The complete irrelevance of the [religious reference] suggests that its sole purpose was to inflame the jury's passions."). Finally, at the close of his argument, the prosecutor perfected his appeal to religion by linking the court's instruction regarding the weighing of aggravators and mitigators in sentencing, saying: "Under the Court's instructions and the law given

[4] According to the PEW Research Center, 79 percent of adults in Oklahoma are Christian, and 48 percent of Oklahoman adults read scripture at least once a week. *See* PEW Forum, https://www.pewforum.org/religious-landscape-study/state/oklahoma/.

by the Court, [Fields] should be, as it were, weighed in the balance and found wanting," just as King Belshazzar was weighed and found wanting by God.[5]

It is impossible to "say that this effort had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 341; *see also Sandoval*, 241 F.3d at 779 ("We do not know what actually happened in the jury room, but we cannot assume that the prosecutor's religious argument did not persuade at least one of the jurors to change a vote for life to death . . . ."). Hence, under the *Caldwell* standard, the sentencing decision "does not meet the standard of reliability that the Eighth Amendment requires" and Petitioner deserves a new sentencing. *Caldwell*, 472 U.S. at 341. Yet because the Tenth Circuit failed to adhere to the divergent standards identified in *Donnelly* and *Caldwell*, the district court's denial of relief stands.

Of course, the shift by the Tenth Circuit and other courts of appeals away from *Donnelly* and *Caldwell* also carries unwelcome consequences beyond this case. First, application of a harmless error standard to all instances of prosecutorial misconduct ignores the "fundamental difference between the nature of the guilt/innocence determination . . . and the nature of the life/death choice at the penalty phase." *Ramos*, 463 U.S. at 1007. As the Court explained in *Ramos*:

> [In the guilt phase,] the central issue [is] whether the State has satisfied

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[5] The Tenth Circuit suggested that this statement cured any improprieties in the prosecutor's sermon, saying that he "expressly asked the jury at the conclusion of his argument to follow the trial court's instructions, conduct the required weighing of aggravating and mitigating factors, and find the death sentence to be appropriate for the two murder convictions." *Fields*, 949 F.3d at 1272. In fact, the statement likely made the constitutional error worse. Not only did the prosecutor suggest that jurors should consider religious principles in the sentencing determination in addition to the statutory sentencing factors, he actually suggested that the religious source was authoritative in interpreting and weighing the statutory sentencing factors.

> its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized.

Id. at 1008; *see also Zant v. Stephens*, 462 U.S. 862, 902 (1983) (Rehnquist, J., concurring) ("[Capital] sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does."). Given the subjective and individualized nature of the jury's determination in sentencing, it is far more difficult for a judge to conclude that, regardless of the prosecutor's argument, no reasonable jury could have sentenced the defendant to life based on the evidence presented.

Second, application of an inappropriately forgiving standard to assess prosecutorial violations of the Eighth Amendment in capital proceedings has consequences that extend beyond each individual case. As Justice Stevens once observed in evaluating prosecutorial misconduct in a non-capital trial: "an automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case." *Rose v. Clark*, 478 U.S. 570, 588–89 (1986) (Stevens, J., concurring). The powerful interest in obtaining a death sentence is

equally strong, meaning that application of harmless error review to instances of prosecutorial conduct in capital sentencing proceedings "can only encourage prosecutors to subordinate the interest in respecting" the Eighth Amendment in favor of securing a particular sentence.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

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