

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS JAMES MOORE

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS,

Respondent.

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

CAPITAL CASE

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QUESTION PRESENTED

In a capital case where the petitioner has always maintained his innocence, where the petitioner testified in his own defense, and where the prosecution's case was primarily testimonial lacking inculpatory physical evidence, did trial counsel provide ineffective assistance by failing to object to inflammatory and impermissible argument by the prosecutor?

PARTIES TO THE PROCEEDING

Petitioner Thomas James Moore was the petitioner in the district court and the appellant in the United States Court of Appeals for the Eleventh Circuit.

Respondent, the Secretary, Florida Department of Corrections, was the respondent in the district court and the appellee in the United States Court of Appeals for the Eleventh Circuit.

NOTICE OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:

Circuit Court of Duval County, Florida

State of Florida v. Thomas Moore, Case No. 1993-1659-CF

Judgment Entered: December 2, 1993

Direct Appeal:

Florida Supreme Court (No. 60-82925)

Moore v. State, 701 So. 2d 545 (Fla. 1997)

Judgment Entered: October 2, 1997

Rehearing Denied: November 18, 1997

Supreme Court of the United States (No. 97-8013)

Moore v. Florida, 523 U.S. 1083 (1998)

Judgment Entered: April 20, 1998

First Postconviction Proceeding:

Circuit Court of Duval County, Florida

State of Florida v. Thomas Moore, Case No. 1993-1659-CF

Judgment Entered: August 4, 2000

Rehearing Denied: September 8, 2000

Florida Supreme Court (SC00-2483, SC01-708)

Moore v. State, 820 So. 2d 199 (Fla. 2002)

Judgment Entered: March 7, 2002

Rehearing Denied: June 20, 2002

Second Postconviction Proceeding:

Circuit Court of Duval County, Florida

State of Florida v. Thomas Moore, Case No. 1993-1659-CF

Judgment Entered: December 12, 2002

Rehearing Denied: February 25, 2003

Florida Supreme Court

Unpublished Order, Case No. SC03-489

Judgment Entered: June 7, 2004

Rehearing Denied: October 8, 2004

Third Postconviction Proceeding:

Circuit Court of Duval County, Florida

State of Florida v. Thomas Moore, Case No. 1993-1659-CF

Judgment Entered: January 4, 2012

Rehearing Denied: February 2, 2012

Florida Supreme Court (SC12-459)

Moore v. State, 132 So. 3d 718 (Fla. 2013)

Judgment Entered: November 27, 2013

Rehearing Denied: February 27, 2014

Federal Habeas Proceedings:

United States District Court for the Middle District of Florida

Moore v. Sec'y, Fla. Dep't of Corrs., Case No. 3:06-cv-127-MMH

Judgment Entered: September 12, 2022

Reconsideration Denied: November 16, 2022

United States Court of Appeals for the Eleventh Circuit

Moore v. Sec'y, Fla. Dep't of Corrs., (No. 22-14207)

Judgment Entered: February 21, 2024

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The Eleventh Circuit's unpublished opinion is reported at 2024 WL 710644 (11th Cir., Feb. 21, 2024) and attached as Appendix (App.) A. The opinion of the District Court for the Middle District of Florida is reported at 2022 WL 4133198 and attached as App. B. The opinion of the Florida Supreme Court denying relief on the claim at issue is reported at *Moore v. State*, 820 So. 2d 199 (Fla. 2002) and attached as App. C.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered its judgment on February 21, 2024. There was no motion for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense. U.S. Const. amend. VI.

[N]or [shall] cruel and unusual punishments [be] inflicted. U.S. Const. amend. VIII.

No State shall...deprive any person of life [or] liberty...without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

INTRODUCTION

A jury convicted Mr. Thomas J. Moore of premeditated and/or felony murder¹ and other offenses based on testimony from his two co-defendants and other self-interested witnesses. At trial, the central question involved the identity of the person who shot and killed Mr. Johnny Parrish. No forensic evidence identified the shooter. The trial amounted to a credibility battle between Mr. Moore, who testified in his own defense and maintained his innocence, and his co-defendants, both of whom admitted guilt and ultimately received favorable plea deals. These events had nothing to do with religion. Nonetheless, during both guilt-phase and sentencing-phase closing arguments, the prosecutor injected religion into the proceedings. The prosecutor impermissibly employed religious connotations to draw a distinction between Mr. Moore, specifically calling him the “devil,” and his co-defendants, described as mere “sinners.”

In analyzing improper prosecutorial arguments, the “relevant question is whether the prosecutor’s comments ‘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 v. DeChristoforo*, 416 U.S. 637, 643 (1974)). “[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Every court that reviewed Mr. Moore’s case found the prosecutor’s comments were improper. But each court incorrectly viewed the strength of the

¹ The jury returned a general verdict finding Mr. Moore guilty of first-degree murder.

evidence as excusing the error. Here, the lack of physical evidence connecting Mr. Moore to the crime, combined with prosecutor's inflammatory argument and the complete absence of any curative measures, denied Mr. Moore a fundamentally fair trial. Trial counsel was ineffective in failing to object to clearly impermissible and inflammatory arguments from the prosecution.

STATEMENT OF THE CASE

A. Facts Relevant to Question Presented

On the afternoon of January 21, 1993, Johnny Parrish was found unresponsive inside his home by a neighbor who noticed smoke emanating from the home. (T. 720-21).² Mr. Parrish was shot twice and died inside the home before the fire began. (T. 737). The Jacksonville Fire Department arrived around 5:30 pm and began searching for "anything out of the ordinary." (T. 901, 903). No containers or flammable liquids were found and no odors or patterns indicating use of accelerants were detected. (T. 904, 913, 919). The police canvassed the neighborhood and spoke with various neighbors at the scene. (T. 1086). The following day, the Petitioner, nineteen-year-old Thomas Moore, found a detective's contact card at his home and voluntarily called the police to inform them about what he observed earlier in the day of Mr. Parrish's death. (T. 1113).

Mr. Moore advised that he had been with several neighbors drinking moonshine at Mr. Parrish's house. (T. 1114). Mr. Moore further advised that when

² "T. __" refers to the trial transcripts in the record on direct appeal to the Florida Supreme Court.

the neighbors left, Carlos Clemons and Vincent Gaines were seen across the street from Mr. Parrish's house. About 30 minutes later, Mr. Parrish's house was on fire. (T. 1155-56). Homicide detective's notes of this phone call indicate that "Thomas is cooperative but wants to remain confidential because he is afraid of subjects Carlos and Slim [Vincent]. They may have done Signal 5, which is a police signal for murder."

Id.

A few days after receiving this information from Mr. Moore, homicide Detective Conn took thirteen-year-old Clemons out of school, transported him to jail, and obtained a statement. (T. 927-30, 952). In his statement to police, Clemons implicated Mr. Moore as the shooter, leading to Mr. Moore's arrest. (T. 944). The following day, Det. Conn interviewed sixteen-year-old Gaines. (T. 938). Initially, Gaines denied any knowledge of Mr. Parrish's death and any involvement in the crime. (T. 952). After Gaines was informed that Clemons already implicated him as the lookout, Gaines acknowledged that he was present and "heard that Carlos [Clemons] and Thomas [Moore] were going to get money from the old man. . ." (T. 955). Mr. Moore, Gaines, and Clemons were all charged as co-defendants in Mr. Parrish's death. Mr. Moore alone faced the death penalty.

The trial began October 26, 1993, and the State presented its theory that co-defendants thirteen-year-old Clemons, sixteen-year-old Gaines, and nineteen-year-old Moore conspired to rob Mr. Parrish. (T. 435). According to the State, Clemons and Gaines let Mr. Moore "talk them into" robbing Mr. Parrish. It was decided that Gaines would stay outside as a lookout and Clemons and Mr. Moore would go inside the

house under the guise of wanting to drink moonshine with Mr. Parrish. (T. 435-36). Once Clemons and Mr. Moore were inside the house, Mr. Moore demanded money from Mr. Parrish and shot him twice. (T. 436).

Lacking inculpatory physical evidence, the State's case against Mr. Moore rested heavily on the testimony of his co-defendants, both of whom had powerful motives to lie and falsely implicate Mr. Moore. Clemons testified that he was introduced to Mr. Moore, and they spoke for about an hour when Mr. Moore suddenly "asked us (Clemons and Gaines) did we have any money." (T. 785-87). After Clemons informed Mr. Moore that they did not have any money, Mr. Moore told him that they "could get some money from Mr. Parrish." (T. 787). Clemons testified that he only agreed to stand outside to act as a "lookout" for the robbery but ended up entering Mr. Parrish's home with Mr. Moore. (T. 788). According to Clemons, Mr. Moore "pulled out a gun and asked Mr. Johnny where the money was at. And he didn't say nothing. And then he shot him in the chest." (T. 796). Gaines testified that Mr. Moore conceived the plan to rob Mr. Parrish. Gaines also testified that he agreed "to be a lookout," but he did not witness Clemons or Mr. Moore enter Mr. Parrish's home. (T. 545). Gaines further testified that after he heard two shots, he saw Clemons run out of the house. (T. 547-48). Clemons was the only eyewitness to the murder.

The State's presentation to the jury also included two witnesses who alleged that Mr. Moore confessed to them: Randy Jackson and Christopher Shorter. Jackson, a two-time convicted felon, testified that he approached Mr. Moore while both were in the county jail, and asked if he committed the Parrish murder, and Mr. Moore said

no. (T. 962, 966). But several days later, when Jackson asked Mr. Moore again if he “kill[ed] Mr. Johnny,” Jackson stated that Mr. Moore confessed. (T. 967). Similarly, Shorter testified that Mr. Moore told him that he committed the murder. (T. 1000). And according to Shorter, Mr. Moore “took the top off the lawn mower and set [Mr. Parrish’s home] on fire to clean up all the fingerprints.” (T. 1003-04).

The defense presented as witnesses Mr. Moore and a teenage neighbor, Terry Ashley, known in the neighborhood as “Little Terry.” Mr. Moore testified that on the day of the murder, he spoke to Mr. Parrish to warn him that he had seen Clemons and Gaines with a gun earlier that day chasing Little Terry. (T. 1104). Mr. Moore testified that he told the police about seeing Clemons and Gaines hanging out near Mr. Parrish’s home and denied ever discussing robbing Mr. Parrish. (T. 1106, 1113). Mr. Moore also denied Jackson’s and Shorter’s claims that he confessed to committing the crime. (T. 1119, 1129-30).³

Little Terry testified about his interaction with Clemons and Gaines the day of Mr. Parrish’s homicide and confirmed Mr. Moore’s testimony that Clemons and Gaines were armed. (T. 1188-90). But, in Clemons’s testimony, although he admitted to chasing Little Terry that day, he denied being armed. (T. 827-28). In addition, when Gaines took the stand, he not only denied that Clemons possessed a gun, but

³ Both witnesses were convicted felons who were significantly flawed and impeached at trial. With respect to Jackson, it was elicited that Jackson failed to disclose Mr. Moore’s alleged confession for eight months – and less than two weeks before trial. (T. 968). Regarding Shorter, his testimony about how the fire was started was undercut by arson investigator, Capt. Mattox, and ultimately unsupported by the physical evidence at the scene. (T. 904, 913, 919, 922). Additionally, both Clemons and Shorter testified that their mothers were close friends. (T. 831, 1012).

he also denied recalling that the Little Terry incident took place in the hours preceding Mr. Parrish's death. (T. 568-69). Whether Mr. Moore's co-defendants were armed was pivotal to the defense, but because the trial judge limited counsel's cross-examination of Gaines on this point, the defense was prevented from fully developing impeachment evidence. Ultimately, the inculpatory evidence at trial was testimonial, and the jury had to choose; believe Mr. Moore or believe Clemons and Gaines.

a. The Closing Arguments

During closing arguments, the prosecution implored the jury to believe Clemons and Gaines were more credible than Mr. Moore. The prosecutor vouched for Clemons's character, stressing that Clemons still "took the stand without any deals."⁴ (T. 1221). The prosecutor further argued that Clemons was more truthful than Mr. Moore as Clemons, unlike Mr. Moore, "never denied his involvement" in the homicide. (T. 1221). In response, the defense reminded the jury that Clemons and Gaines were seen armed with a gun in the hours preceding Mr. Parrish's death. (T. 1241). The defense also argued that Clemons's eyewitness account and demonstration of the shooting lacked reliability as it was undermined by the medical examiner's testimony. (T. 1243). Finally, in attacking the credibility of Clemons and Gaines, the defense urged the jury to consider that Clemons and Gaines were best friends, who had lied

⁴ Clemons plead guilty to second-degree murder and attempted armed robbery with the understanding that he would receive juvenile sanctions contingent upon testifying at Mr. Moore's trial. (T. 810). However, the plea deal was subsequently declared illegal due to Clemons's juvenile status and revoked days before Mr. Moore's trial. (T. 812). Clemons informed the jury that he was still testifying in the case against Mr. Moore because it was "the right thing to do." (T. 813).

for each other in the past, and were “streetwise kids,” as opposed to “unfortunate youths that have been led into something by someone older than them.” (T. 1255).

In guilt-phase rebuttal argument, while discussing the veracity of the trial witnesses, the prosecutor told the jury:

Crime conceived in hell will not have any angels as witnesses. And, ladies and gentleman, as true as that statement is, Grand Park is hell. And that man right there is the devil. (T. 1262).

The prosecutor continued:

Ladies and gentlemen, deals. Yes, ma’am, yes, ma’am, yes, sir, to all of you. I have dealt with [codefendant 1] and I have dealt with [codefendant 2]. I did that as an Assistant State Attorney. I did that the best I knew how. But, ladies and gentlemen, sometimes you have to deal with sinners to get the devil. And I would submit to you what the State did was we dealt with this sinner and we dealt with this sinner to get this devil. (T. 1277).

On October 29, 1993, Mr. Moore was convicted of first-degree murder. Days later, during penalty-phase closing arguments, the prosecutor returned to this inflammatory language, arguing that it was the jury's task to determine the appropriate punishment for the “devil,” Mr. Moore. (T. 1520). Trial counsel failed to object to any of these references. On November 3, 1993, by a vote of nine (9) to three (3), the jury recommended a sentence of death for Mr. Moore.

b. The Proceedings Below

Mr. Moore was convicted of first-degree murder, attempted armed robbery, conspiracy to commit robbery, armed burglary, and arson, and his convictions and death sentence were affirmed on direct appeal by the Florida Supreme Court. *Moore v. State*, 701 So. 2d 545, 547 (Fla. 1997). Mr. Moore subsequently sought and was denied postconviction relief. *See* App. C. Relevant here, Mr. Moore argued that he

was denied his right to due process and a fundamentally fair trial when trial counsel failed to object to improper prosecutorial argument. The Florida Supreme Court failed to address whether trial counsel was deficient but expressed intolerance for such “ill-advised” comments and denied relief. App. C at 194.

On February 10, 2006, Mr. Moore filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The habeas petition was amended on September 17, 2014, and ultimately denied on September 12, 2022. App. B. In analyzing this claim, the district court condemned the comments as “impermissible,” but nevertheless found that habeas relief was unwarranted because the comments did not pervade the proceedings as they were only made on “two occasions.” App. B at 111. With respect, to Mr. Moore’s *Strickland*⁵ claim, the district court concluded there was no “reasonable probability that the outcome of the trial would have been different absent the offending remarks.” *Id.* at 112. The district court also denied a certificate of appealability (hereinafter COA).

On January 20, 2023, Mr. Moore filed a COA raising three claims in the Eleventh Circuit Court of Appeals. On May 3, 2023, a COA was granted on the issue of whether the prosecution presented false testimony from State witness Gaines in violation of *Giglio*.⁶ The Eleventh Circuit denied a COA on Mr. Moore’s claim that unchallenged prosecutorial argument deprived him of a fundamentally fair trial. On February 21, 2024, the Eleventh Circuit affirmed the district court’s denial of relief.

⁵ *Strickland v. Washington*, 466 U.S. 668 (1984)

⁶ *Giglio v. United States*, 405 U.S. 150 (1972)

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Review Whether Trial Counsel's Failure to Object to Improper Prosecutorial Argument Denied Mr. Moore a Fundamentally Fair Trial

This Court has explained that “the Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial.” *Strickland v. Washington*, 466 U.S. 668, 684 (1984). “[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Thus, in evaluating claims alleging improper prosecutorial conduct, the relevant question is whether the prosecutor’s comments or actions “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. The rationale behind this constitutional principle is simple: “[a]rguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury.” *Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir.1985) (*en banc*).

In *Berger v. United States*, this Court found “[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.” 295 U.S. 78, 88 (1935). The *Berger* Court recognized the principle that the respected position of a prosecutor makes it likely that any misconduct will have a prejudicial effect on a jury. *See id.* In reversing *Berger*’s

conviction, the Court found it “highly probable” that the prosecutor’s closing arguments prejudiced the substantial rights of the accused. *Id.* at 89.

In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), this Court addressed the question of improper prosecutorial argument in the context of the prosecutor suggesting that a defendant hoped for a conviction on a lesser offense (and not for acquittal), a remark which the jury was specifically instructed to disregard. *See id.* at 640-41. Under the circumstances, the Court found that these “few brief sentences in the prosecutor’s long and expectably hortatory closing argument” were not so prejudicial as to violate due process. *Id.* at 647-48. However, the Court noted that some instances of misconduct “may be too clearly prejudicial for . . . a curative instruction to mitigate their effect.” *Id.* at 644, 648 n.23.

Caldwell v. Mississippi, 472 U.S. 320 (1985), applied this Court’s jurisprudence on prosecutorial argument in a capital sentencing proceeding, holding that an argument that improperly lessened the jury’s sense of responsibility for sentencing required reversal of the petitioner’s death sentence. The prosecutor in *Caldwell* informed the jury that “your decision is not the final decision” because “the decision you render is automatically reviewable by the Supreme Court.” *Id.* at 325-26. The Court found this argument to be “clearly improper,” because the “uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.” *Id.* at 333. This argument was so prejudicial as to warrant reversal of petitioner’s death sentence.

In *Darden v. Wainwright*, this Court held that the prosecutor’s inflammatory emotional appeals and belligerent castigation of the defendant “deserved . . . condemnation.” 477 U.S. 168, 179 (1986). Among other objectionable remarks, the *Darden* prosecutor “made several offensive comments reflecting an emotional reaction to the case,” including references to the defendant as an “animal” and wishes that the defendant had been killed already or had committed suicide. *Id.* at 180 & nn.11-12. The *Darden* Court found such comments to be “undoubtedly” improper. *Id.* at 180. However, the Court found that these improper comments did not deprive the defendant of a fair trial, in part because of “the overwhelming” evidence supporting a finding of guilt on all charges. *Id.* at 182. This Court noted that *Darden* presented markedly distinct circumstances than *Caldwell*, in part because the comments in *Caldwell* were made at the sentencing phase while those in *Darden* were made at the guilt-innocence phase – one in which “overwhelming” evidence of guilt was presented. *Id.* at 183 n.15.

A. The Prosecutor’s Conduct Here was Worse than in *Donnelly* and *Darden*

The prosecutor’s closing arguments at both phases of Mr. Moore’s capital trial were improper, loaded with religious connotations and “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden*, 477 U.S. at 181, quoting *Donnelly*, 416 U.S. at 643; *Berger*, 295 U.S. 78 at 89 (where the misconduct is not “slight or confined to a single instance,” but “pronounced” the “probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”).

No court below disputed the prosecutor's comments were improper. The Florida Supreme Court found the remarks "ill advised," but concluded there was no denial of due process because the "two [] references to Moore as 'the devil'" were isolated. App. C at 194. Similarly, the district court found that while the prosecutor's comments were impermissible, they were only used on "two occasions," and therefore, did not pervade the proceedings. App. B at 111. However, a proper analysis of the factors identified in *Donnelly* and *Darden* demonstrates that Mr. Moore's case is the rare case in which prosecutorial misconduct resulted in a conviction that violates due process.

B. The Lack of Inculpatory Physical Evidence Against Mr. Moore and the Invocation of Religion to Direct the Jury's Verdict is Decisive

Far from overwhelming, the primary evidence against Mr. Moore came from the testimony of two co-defendants, both of whom were implicated in the crime and ultimately received favorable plea deals in exchange for their testimony against Mr. Moore. With no physical evidence to rely upon, the jury had to choose between Mr. Moore's version of events or that of his co-defendants; their respective testimonies could not be reconciled. Thus, any reason the jury had to credit one version over the other was crucial to Mr. Moore's conviction or an acquittal.

A significant part of Mr. Moore's defense strategy was to persuade the jury that Clemons and Gaines were armed on the day of Mr. Parrish's homicide and were seen chasing Little Terry with a gun. In closing argument, the prosecutor noted that both Clemons and Gaines refuted this contention. The prosecutor portrayed Gaines as an innocent dupe, who "is not very bright . . . [and] is as dumb as a rock..." and urged

the jury to believe that Mr. Moore “master-minded [the] event.” (T. 1221, 1271). Continuing with this narrative, the prosecutor labeled Mr. Moore as the devil, and cast Clemons and Gaines as unwitting sinners in Mr. Moore’s plot. The prosecutor also injected her personal opinion and non-record evidence before the jury, arguing that the co-defendants got the deals they deserved:

Ladies and gentlemen, deals. Yes, ma’am, yes, ma’am, yes, sir, to all of you. I have dealt with [codefendant 1] and I have dealt with [codefendant 2]. I did that as an Assistant State Attorney. I did that the best I knew how. But, ladies and gentlemen, sometimes you have to deal with sinners to get the devil. And I would submit to you what the State did was we dealt with this sinner and we dealt with this sinner to get this devil. (T. 1262, 1277).

The prosecutor’s references to Mr. Moore as “the devil” were by no means accidental. It was a blatant appeal to the passions and prejudices of the jury. The fact that the prosecutor reemphasized this inflammatory analogy a second time in penalty-phase closing, after securing Mr. Moore’s conviction, only reinforces the conclusion that these improper remarks were calculated to secure a death sentence. Although *Darden* makes clear “[i]t is not enough that the prosecutors’ remarks were undesirable or even universally condemned,” here, in the context of a testimonial-dependent case, where witness credibility is critical to the outcome of the case and becomes the target of the prosecutor’s improper closing argument—such egregious conduct amounts to a denial of due process. *Darden*, 477 U.S. at 181; *Stermer v. Warren*, 959 F.3d 704, 734 (6th Cir. 2020) (“In a prosecutorial misconduct case, the point of the Supreme Court’s strength-of-the-evidence question is not to determine whether any reasonable juror could have voted to convict. Rather, when the evidence

is relatively weak . . . the odds that a constitutional error might have affected the outcome become intolerably high. . . . [G]iven the relative weakness of this evidence, the fairness of [the] trial was irreparably undercut by the prosecutor's closing”).

Considering the trial as a whole, where witness credibility was paramount, the improper closing arguments were prejudicial. The severity of the misconduct and trial counsel's failure to object to the prosecutorial argument denied Mr. Moore a fair trial. Petitioner prays that this Court conclude that the prosecutor's conduct in this case "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643; *accord Darden*, 447 U.S. at 182.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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