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In the

Supreme Court of the United States

WILLIE JASPER DARDEN,

PETITIONER,

V.

STATE OF FLORIDA,

RESPONDENT.

No. 76-5382

WASHINGTON, D. C.
MARCH 28, 1977

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WILLIE JASPER DARDEN, Petitioner,	:	
v.	:	No. 76-5382
STATE OF FLORIDA, Respondent.	:	

Washington, D. C.

Thursday, March 28, 1977

The above-entitled matter came on for argument at 1:46 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GEOFFREY M. KALMUS, ESQ., 919 Third Avenue, New York, New York 10022; on behalf of the Petitioner.

RICHARD W. PROSPECT, ESQ., Assistant Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32304; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-5382, Darden against Florida.

Mr. Kalmus, you may proceed when you're ready.

ORAL ARGUMENT OF GEOFFREY M. KALMUS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KALMUS: Mr. Chief Justice, may it please the Court:

My name is Geoffrey Kalmus. I'm a partner in a private firm in New York City. And I'm here representing Willie Jasper Darden.

We ask in this case that the Court set aside Mr. Darden's conviction for first degree murder and sentence to death because of gross prosecutorial misconduct during summation.

The Court has not heretofore in reviewing a state conviction held that the prosecutor's closing argument so far transcended the bounds of legitimacy and decency as to constitute a deprivation of a defendant's Fourteenth Amendment rights.

Nonetheless, it did recognize in Justice Rehnquist's opinion in DeChristoforo that prosecution's remarks to the jury may so infect the trial with unfairness as to make the resulting conviction a denial of due process.

Moreover, it has ruled in many other contexts that

the circumstances of a criminal trial or other sorts of misconduct during it may so impair the fundamental integrity of the jury's determination and deliberations as to constitute a denial of due process.

We ask, therefore, in this case that the Court apply settled doctrine to vacate a conviction and a jury-recommended death sentence infected by willful, outrageous prosecutorial misconduct.

As we see it, if ever a prosecutor's misconduct in summation can constitute a denial of a fair trial, this is such a case.

I'd like first to focus a little bit on the evidence because it's crucial here. It's crucial that the Court understand that this was not a case in which the evidence was overwhelming. This was a case in which the jury might rationally and reasonably go either way at the end of the evidence.

We think the case was doubtful. We think that the evidence plainly shows that, notwithstanding the respondent's views to the contrary.

Now, what was the evidence here?

QUESTION: At what stage of the argument was there challenge or objection made to the argument?

MR. KALMUS: Your Honor, there was only one objection taken in the course of the prosecutor McDaniel's argument,

and that was rather far along in it. And at that point defense counsel stood up and objected to one of McDaniel's statements that he wished the defendant had been maimed or his head had been blown off or he'd been -- cut his own throat, of which there were a good many such statements.

That was the only objection taken. The trial judge, simply without any discussion, said, overruled. Proceed, Mr. McDaniel.

But turning to the question of the evidence as it stood at the close of the defense case, there were only three significant items of evidence supporting the prosecution's claim that Mr. Darden had committed this robbery-murder of a man named Turman.

Two of the items of evidence were identifications, those by Mrs. Turman who was working in the furniture store when the assaillant came in, and that of a young man named Mr. Arnold, a 16 year old boy who kind of happened in the back door while the crime was in progress and was also shot and injured by the assailant.

Both of those identifications were sharply challenged at the trial. And both of them, I think, were put in substantial doubt. That subject was one in which we dealt at length in our brief, because at the time we submitted our brief, the identification issue was also one upon which the Court had granted cert.

You may recall that in early January cert was limited to the first question presented, that of the prosecutorial misconduct.

One can judge Mrs. Turman's identification of the assailant in a few fashions. Number one, she gave a description to a deputy sheriff right after the crime that bore no resemblance to the petitioner.

Number two, she described the assailant as wearing clothing that differed markedly from that which petitioner was described as wearing by somebody who had seen him at the scene of his automobile accident which, according to the prosecution, happened as he was fleeing the crime.

Number three, Mrs. Turman never was asked to, or in fact, identified the petitioner in any kind of a formal lineup, be it photo or live.

Number four, her only pretrial identification came into evidence on the direct testimony at trial occurred at a preliminary hearing when the petitioner was the only black man in the courtroom seated with counsel at the defense table, and was -- Mrs. Turman was asked to point him out, and she did. And one can judge the reliability of that identification by what she said when she was asked by the Court, in effect, are you sure? And she responded, why, when I walked into the courtroom and was seated in the back and I saw him from the rear, I knew this was the man who had

killed my husband. This was somebody she had seen for a few minutes during a robbery, and she claimed to know him when she walked in from his back.

Mr. Arnold's identification -- this is the 16 year old boy -- was subject to substantial infirmity as well. First of all, he testified at trial that he had seen the assailant for only 20 to 25 seconds, and that part of that time he was looking down at Mr. Turman who had been shot and lay in the doorway and was trying to give aid to him.

Number two, he said his mind went blank during that 20 or 25 seconds.

Number three, he was never the subject of a proper lineup, be it photo or otherwise. He did, while in the hospital, identify the petitioner's photo in a group shown to him, but his testimony was, at the trial, that four of the six photos shown to him looked nothing like the petitioner. And that the one he did see and identify, lo and behold, it bore the petitioner's name across it, Darden across the chest, and the date, 9-9-73, the date of the crime.

And Mr. Arnold testified that he had read about the crime before he was asked to make this photo identification.

The final piece of evidence that the state had that amounted to anything was a gun. And the gun was indisputably of the calibre used in the crime, a .38, and it was found some 40 feet from the highway, and roughly the

same distance from the place at which the petitioner had had his automobile accident -- no dispute that he had the accident a few miles from the scene of the crime at around the same time. And that gun was found a day later, not very far fromthe automobile accident, and not very far from the highway. And indeed, there was no dispute that anybody might have tossed it out of a passing car.

So that was the state's case, as the case went to the jury. On the defendant's side, the defendant had taken the stand in his own behalf, he was the only witness in his own behalf. He had told what I believe the record demonstrates to be a coherent and plausible story, not inconsistent with the prosecution's story but for the identification; not in itself inherently an implausible story. And that was the case for the defense.

So in sum,the case as it reached the summation stage was a close one. And we think the prosecution's summation itself in part demonstrates that.

I think one can ask the rhetorical question, quite appropriately, would any sensible prosecutor have carried on the way McDaniel did here if he thought he had an easy winner? Is this the kind of thing that any experienced -- and this was an experienced prosecutor -- would do if he were comfortable with his case? And we think the answer to that is an obvious one, and that McDaniel's conduct itself

demonstrates that he thought his case was a shaky one.

As to the merits of the summation -- the demerits of the summation -- the character of McDaniel's conduct, I don't think that one need pass beyond the brief of the respondent, and the opinion of the Supreme Court of Florida to know how it should be characterized.

The respondent's brief, what did it call the summation by McDaniel here? Utterly irrelevant is one phrase. Without rational relationship to the question of guilt or innocence. Inflammatory and irrelevancies -- the state said. Improper appeals to the jury's emotion. Finally, the ravings of the prosecution.

That's the state's characterization, not ours, of the summation by McDaniel.

I think if you read the state's brief, it's only real argument in defense of this summation, apart fromthe procedural points that it has raised, is, that the summation was so bad that no sensible jurors would have paid any attention to anything that McDaniel said.

Now, the majority in the Supreme Court of Florida -- the conviction and the death sentence were affirmed by 5 to 2 -- the majority opinion also recognized, we think, that the closing argument was an improper one.

What did they say? They said that although the prosecution's remarks under ordinary circumstances would

constitute a violation of the code of professional responsibility, in this particular case they amounted to harmless error when the totality of the record is considered.

Again, the language used by the prosecution, Justice Boyd wrote for the majority, would possibly have been reversible error if it had used regarding a less heinous set of crimes.

Illogically, however, the Supreme Court of Florida said, this crime was such a shocking one that all of this inflammatory, irrelevant nonsense was proper.

QUESTION: Did they say that it was proper, or did they say that it wouldn't have any greater impact than the evidence itself?

MR. KALMUS: I don't think they quite said that, Mr. Chief Justice.

QUESTION: They surely didn't say it was proper.

MR. KALMUS: No --

QUESTION: So you misspoke yourself there considerably.

MR. KALMUS: I think your comment is certainly a fair one, your Honor.

QUESTION: Mr. Kalmus, the majority of the Supreme Court of Florida, I take it, did disagree with you as to the closeness of the evidence. In that second to last paragraph at page 163 of the appendix, they say that

it was pretty much of an overwhelming --

MR. KALMUS: I quite agree with you, they do say that. I have read the record a few times, and have tried to summarize it as we see the case, and -- balancing it on both sides. And we do not read it that way at all. And I might say that in terms of our description of the evidence as it went to the jury, the state's brief doesn't disagree with us in any substantial way. The state takes the same facts and says, we think those are overwhelming.

But they're not quarrelling at all with the presentation of the facts in our brief.

QUESTION: Mr. Kalmus?

MR. KALMUS: Yes, sir.

QUESTION: The Florida Supreme Court said it did not approve the prosecutor's argument. What it said, as I read the opinion, was, that it amounted to harmless error, in view of the overwhelming character of the evidence against the defendant.

MR. KALMUS: They did use the phrase, amounting to harmless error, at one point in their opinion. Thatis quite true.

QUESTION: You think it would have been stronger if they'd used it more than once?

MR. KALMUS: No, I think it would have been stronger if they had said more accurately, this kind of conduct cannot

amount to harmless error; that there is some conduct so outrageous, willful conduct -- no question about that here, the state concedes it -- that goes so far beyond the bounds that it cannot be harmless error. We cannot say that the jury was either so smart as to disregard it entirely, or so detached as to ignore the many statements from the prosecutor that drew into issue all kinds of matters having nothing to do with the guilt or innocence of the defendant.

QUESTION: Would you not agree that a completely dispassionate, objective description of what had taken place, the actions of the petitioner, would have in itself amounted to a shocking kind of statement; just saying exactly what had happened?

MR. KALMUS: I agree, Mr. Chief Justice, that the crime was a shocking one. And the conduct of the assailant --

QUESTION: That's not quite my question. The question is, if you objectively and calmly and quietly described precisely what had happened, would that not shock the listener?

MR. KALMUS: I think that it might have that effect, Mr. Chief Justice. But it would be, in effect, based upon the evidence.

Our quarrel here is that the prosecution's summation -- Mr. McDaniel's summation -- had nothing whatever to do with the evidence. And the state doesn't

quarrel with that in their brief. They say yes, it's quite right. Most of what he said had nothing to do with the evidence.

QUESTION: But at some point the defense even talked about the animal that committed the crime.

MR. KALMUS: Justice Marshall --

QUESTION: I think you ought to separate the two.

MR, KALMUS: At one point, one of the defense counsel, in summation, and there were two on each side, said that the assailant who would do these kinds of acts would be an animal. Of course, he didn't attach that label to the petitioner, who he said had not committed the acts at all, which was in accord with the petitioner's testimony.

The prosecution picked up on that, and --

QUESTION: Well, you aren't really complaining about that, areyou?

MR. KALMUS: No, your Honor, that is one of the many items in summation which we have relegated to a footnote somewhere in our brief. We complain much more vigorously about some of the other conduct in summation.

I think, just to get a little of the flavor of it -- and I don't think you can get it entirely without reading the summation in text, in full text -- but one can get a sense of it from just a few quotations from one of McDaniel's themes, one that he began with; it's one that

he ended with. And it is threaded throughout his argument.

As far as I'm concerned, he said, there should be another defendant in this courtroom. That is the division of corrections, the prisons.

They had let him out on a weekend furlough; that was the reason the issue came up.

As far as I'm concerned, he went on, this animal was on the public for one reason: because the division of corrections turned him loose, let him out, lets him on the public. Can't we expect them to stay in prison when they go there? Can't we expect them to stay locked up once they go there? Do we know they're going to be out on the public with guns, drinking?

Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed. He's criminally negligent.

And then he went on to tie this into its significance to the case.

And he said, the only way I know that he's not going to get out on the public is to put him to death, convict him of first degree murder. It's the only way I know, it's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because --

QUESTION: Is that by itself an improper argument when you're dealing with a statute that constitutionally

authorizes the imposition of a death penalty, for a prosecutor to say, the only way you can be sure this man will not repeat this kind of an offense is to impose the death penalty?

MR. KALMUS: This was not in the punishment determining stage of the trial, your Honor. This was in the guilt determining stage. And I think --

QUESTION: You would say it was not wrong in the punishment determining stage, but it is wrong in the guilt determining stage.

MR. KALMUS: I'm not certain it would be appropriate in the punishment determining stage, but I'm confident it isn't appropriate when the court has not yet reached the stage of the case.

And the passage that I have partially quoted goes on much the same theme.

Again if one looks at some of his other themes, he talks about the defendant and his, McDaniel's wish that the defendant had been maimed or killed or shot himself or blown his head off over and over again, he comes back to that theme, obviously for no purpose other than to rouse up the jury, to get them to decide this case without regard to the evidence.

Again, there is the theme of putting the prosecutor's credibility itself at issue; something that every court for

long, long -- for many years has condemned. And yet it was done here over and over again by the prosecution, both by prosecutor White and by prosecutor McDaniel saying, I know sure as I'm standing here, this man is guilty; McDaniel again saying, why if I were in the petitioner's shoes, I would have lied like my teeth fell -- until my teeth fell out also.

Remarks over and over again of that kind.

I think one can fairly conclude only that the prosecution's misconduct was willful. The state doesn't dispute that.

And I think that's one of the key reasons here why there must be a reversal.

I'd like to turn to some comparison of this situation with that in DeChristoforo in which Mr. Justice Rehnquist set out a number of guidelines for dealing with this kind of an issue.

Before I do that, I'd like to ask whether there are any questions that the Court would like to put with respect to the procedural points that the state has raised, and with which we have dealt in our reply brief.

Turning to the merits, then, in the comparison with DeChristoforo, there were, I think, three criteria that the Court thought crucial in DeChristoforo, crucial there in finding that there was no denial of due process through the prosecutor's statement.

There, you'll remember what the court was concerned with was a one sentence, rather ambiguous remark, that according to the First Circuit -- at least the majority in the First Circuit -- had indicated to the jury, perhaps, that the defendant had sought to plead guilty to some lesser crime than first degree murder, and that the state -- the prosecution had turned him down. So there was some implication of guilt.

It was a single sentence which this Court found rather uncertain and ambiguous in its meaning, and of little probable impact in the context of the entire case.

Three criteria that Mr. Justice Rehnquist spoke about. One was, how large a role did the prosecutor's conduct, if one may call it that in DeChristoforo, occupy in the context of the whole summation; indeed, in the context of the trial? And the answer there was, it was one sentence out of what the Court characterized as a lengthy summation.

Here, we have quite the opposite. Here, one has 35 typewritten pages of summation by prosecutor McDaniel, and I tried to measure it, and I think you come down around 10, 12 pages if you cut out the irrelevancies, the ravings, the carryings on about all kinds of matters that had nothing to do with the case.

Secondly, Mr. Justice Rehnquist focused in DeChristoforo on whether the prosecution's conduct was willful, or was it a misstatement in the heat of argument.

There it was fair to infer from the fact that a single sentence was involved, and the judges in the Massachusetts Supreme Court, and the Federal District Court, and the Court of Appeals, and here, all disagreed about what that one sentence probably conveyed to the jury. It was fair to conclude that the misstatement was accidental, or just poor phrasing by the prosecutor in the context of something that came out without prior planning.

Our case, no doubt about it, the state doesn't contest it, this was a calculated, willrul effort to rouse up the jury, to distract them from the evidence, to tell them that -- what I am telling you, Mr. McDaniel was saying, is relevant to your consideration.

QUESTION: Well, areyou -- you don't mean that in its full sweep, what you just said, do you? Supposing the prosecutor in the midst of a 30 minute summary goes off on a ten minute total irrelevancy about, you know, how the weather's been the last few days. But it's not at all prejudicial to the defendant. Don't you have to combine the two to make your argument?

MR. KALMAS: I agree, Mr. Justice Rehnquist, that if it had been of such palpable irrelevancy as what nice weather we've been having, then one would say without any hesitation that maybe the prosecutor was a little crazy, but that it had nothing to do with the case, the jury could not

have been moved by it, or rational jurors would not have been moved by it.

Our case doesn't fit that mold at all. The comments -- the many, many comments of McDaniel were not off to one side. They were cut through from the beginning to the end, number one.

Number two, they were not of such palpable irrelevance that sensible jurors -- unsophisticated, but people of average intelligence -- would say, gee, obviously that's got nothing to do with this case. I'm going to disregard it. They wouldn't say that to themselves about the kinds of things that McDaniel was going on about. They would say, and this Court said way back in Burger v. United States, Justice Southerland's opinion, that the prosecutor comes here not merely with official backing, but presumably to do justice. And therefore, I think jurors would say to themselves, we can take it that the things that he says have some relevance to our consideration of this man's guilt or innocence.

And I think that if you read these remarks in context, one must suppose, one can't avoid supposing, that any average group of jurors would have so understood the remarks, and would have taken them into account in deciding whatever they decided.

QUESTION: If the prosecutor had just go a transcript

of the testimony, the prosecution's testimony of the survivors, and, in effect, read that to the jury. Would you be complaining about his -- the outrageous character of his arguments?

MR. KALMUS: I don't think that I could complain if the prosecution had confined itself to the evidence. That evidence, in this case, was terrible. And the evidence was a legitimate consideration to the jury in deciding whether to convict or to acquit.

I think that when the prosecutor willfully departed into matters that were obviously not evidence, were not related to the evidence, that then, indeed, there is a right to complain, and there is a right to have a trial free of that emotional kind of diatribe.

I think, just in closing, that Justice Stevens made the point just last week in Gardner, and the statement was quoted this morning, to the effect that the community as well as the defendant are entitled to have a trial conducted in a intelligent, equitable, non-emotional fashion, and to have a jury decide the case without the interjection of improper emotional factors.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kalmus.

Mr. Prospect.

ORAL ARGUMENT OF RICHARD W. PROSPECT, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. PROSPECT: Mr. Chief Justice, and may it please the Court:

My name is Richard Prospect, and I'm appearing here on behalf of the Respondent, the State of Florida.

I've just sat here for the last fifteen minutes and listened to the number of times with which Mr. Kalmus has attributed to the State, the Respondent in this cause, with admitting, conceding and otherwise not contesting the fact that the statements that appear in this record that were uttered during the closing argument of the State's case are irrelevant, outrageous, ridiculous and otherwise as having no place in any trial in our state our any other.

I replied to him by saying, what else could I do? The statements are there. I'm not about to tell the Court that they're not. I'm not about to tell the Court they mean something other than the plain meaning of their words are.

My question is, or my position, is: of those portions of the remarks that absolutely are irrelevant to any business at hand, there is nothing that can be said except, were they prejudicial to this defendant?

The other portions that were more or less listed in the petitioner's dissection on the argument are, at least in part, in response to certain things that the jury heard

first by defense counsel.

Now, the mention about the division of -- I'm sorry, the mention about, the only way I know this man is not going to get back out on the public is to sentence him to death; now that came in response to something defense counsel started off in the first argument the jury heard. If you'll read that you'll find that Mr. Maloney, the first defense counsel, stated that, ladies and gentlemen, on the evidence the State has presented today, they are asking you to kill my client.

Now, McDaniel quickly corrected that misimpression. He very clearly and substantially told the jury that, ladies and gentlemen we're not here to do that right now. We're here to determine guilt or innocence, and nothing else.

We have a second stage of the proceeding in which I will ask for the death penalty, and I'm going to ask for it, because that's the only way I know to keep this man off the streets.

Now, that's something we can justify, because it is in response to what occurred.

The other matters -- and let's not nitpick over any of them, let's not re-read them, or anything else. I know they're there. You know they're there. Let's decide whether they deprived this man of a fair trial.

Now, anybody, and probably everybody who is familiar

with this record will quickly agree that these arguments had no place there. Everybody except defense cousnel. It's not until the last page, as it appears in the appendix, does that objection occur. Why is this?

They were either asleep, they didn't think anything was wrong with the remarks, or -- and I believe this comes into the rationale of the Estelle and Francis cases -- they thought perhaps we just go t reversible error. It doesn't take a legal wizard to sit there and listen to the man take off and -- in a rant, and know that something is not right.

QUESTION: Can you conceive of a lawyer not objecting?

MR. PROSPECT: No, I cannot.

QUESTION: Defense counsel?

MR. PROSPECT: No, I cannot.

QUESTION: Well, can you --

MR. PROSPECT: Well, no, I can. I can if --

QUESTION: Yes.

MR. PROSPECT: -- as I was about to say --

QUESTION: Yes.

MR. PROSPECT: -- if they think they've got reversible error.

QUESTION: But even at that --

MR. PROSPECT: Because that's on the backside. Up front they've got a shot at the verdict.

QUESTION: You'd make an objection, Darden's

lawyer would? What I'm driving at is, why is it that petitioner doesn't raise the question of ineffective assistance of counsel? That's what I don't understand. And he doesn't raise it.

MR. PROSPECT: Perhaps Mr. Kalmus can answer that when he gets back. I don't know.

QUESTION: And he doesn't raise it.

MR. PROSPECT: Well, is it ineffective? If he doesn't object, thinking they've got a shot at the verdict? I mean, if he's right today when he says that the evidence was close -- I don't happen to agree, but if he's right --

QUESTION: Yes.

MR. PROSPECT: -- and you got a close case, you got a shot at that verdict. Because you could always walk out that day. But if you're wrong, you've got built-in error.

QUESTION: I just don't like playing games with lives.

MR. PROSPECT: Exactly. Exactly. That's why I think the rationale of Francis and Estelle applies. If something is occuring that you don't like, get on your feet and say so.

QUESTION: Mr. Prospect.

MR. PROSPECT: Yes, sir.

QUESTION: Your opponent also made the point, there's

no objection until toward the end of the argument. But there was an objection on the second page of the argument, on page 122. Of course, it's to the argument not being supported by evidence in the record. But that's the substance of much of his criticism of the argument.

MR. PROSPECT: Well, no, it's really a very pointed and specific objection.

QUESTION: He says, now I object. There's been no testimony to this.

MR. PROSPECT: Exactly. I'm sorry, I believe Mr. Darden -- go ahead, I'm sorry.

QUESTION: That's on the second page of the argument. So he did start to object right away.

MR. PROSPECT: But not on the basis of anything being inflammatory or prejudicial. Apparently, McDaniel misstated something, something of no consequence. And Mr. Goodwill said, there's been no testimony. And McDaniel replies, I'm sorry, I believe Mr. Darden testified to it. I don't believe so, says Goodwill. And the court reinstructs the jury. Ladies and gentlemen, it's your recollection of the evidence that is what is important.

Now, if something that trivial warrants --

QUESTION: That kind of indicated his attitude towards the objection, though. He was not very sympathetic to it. Right at the outset.

MR. PROSPECT. I beg your pardon, sir.

QUESTION: The court's disposition of the objection was, well, the jury's heard the evidence. It can decide for itself.

MR. PROSPECT: Well, I don't think it indicates any prejudice toward the defendant. It is a fact.

QUESTION: And that's the way the judge handled the second objection, too.

MR. PROSPECT: No, that second objection, as I pointed out in the brief, is really nothing more than a request that the man stick to what evidence he had. Now, apparently -- we've got to remember, you want to go to the beginning of things, go to the very beginning, and we see that Mr. Maloney says, ladies and gentlemen, we've been here five days. We've got a long trial. And after -- or in response to the statement, the only thing he hasn't done that I know of is cut his throat. All right. Maloney gets on his feet and says, your honor, that's about the fifth time that he has commented that he wished someone would shoot this man or that he would kill himself. I wish the court would instruct Mr. McDaniel to stick with what little evidence he has.

And then as perhaps a less than professional response, McDaniel comes back with, you don't have any evidence yourself, Mr. Maloney.

Now, we can't get the feel of this on the printed page, but apparently the court was fed up with that and replied, all right, gentlemen, proceed with your argument. The objection's overruled.

QUESTION: The judge apparently wasn't offended by the argument either. He overruled that objection, too. He just said, go ahead with the argument.

MR. PROSPECT: Well, he overruled a request for an instruction that McDaniel stick with what little evidence he had. That is the only form of a quote objection unquote. He didn't say, I object, your honor, on the basis, it is prejudicial, inflammatory or unconstitutional, and I want a mistrial, or I want at least a curative instruction Had he done that, he would have given the trial court the opportunity to rectify any error that was happening.

QUESTION: Your view is the trial judge wouldn't recognize there was anything improper about this argument? Without the counsel explaining it to him?

MR. PROSPECT: No, no I'm not going to say he couldnt recognize it. I'm sure he did.

QUESTION: But the objection didn't prompt any curative instruction at all.

MR. PROSPECT: He didn't ask for it.

QUESTION: Wouldn't you have thought the trial judge would have had some -- what?

MR. PROSPECT: He didn't ask for a curative instruction.

QUESTION: Well, but you're saying that the judge had to have that explained to him, or the judge didn't realize it was necessary.

MR. PROSPECT: No, I think there's two different things: what the judge realized, and what he was asked to do.

QUESTION: Do we have any -- there's also discussion off the record, about page 127 -- Mr. Goodwill said in one of his examinations, I believe of Mrs. Hill -- and there apparently was another interruption there. It seems to me there were perhaps three interruptions of closing argument -- of counsel during the argument.

MR. PROSPECT: I can't, and don't, read it that way, sir. I don't know what that indicates. It only indicates to me that McDaniel stopped his argument; there was a discussion off the record, between whom, we do not know; and he continued.

QUESTION: Is it the practice in Florida, when one objects to closing argument, always to do so orally in the presence of the jury? Or is it sometimes done, you try to have a side bar and not make such a fuss? Because it's rather rude to interrupt counsel, as you know. You try to avoid that sort of thing sometimes.

MR. PROSPECT: I would say that based on my experience,

objections are made in front of the jury. And generally, I really don't recall the necessity for having them taken out of the courtroom in order to discuss something. I believe the objection, on whatever the grounds it's based on, is aired before thejury.

QUESTION: You would not think it's fair to infer that the discussion off the record on page 127 might have related to the content of the closing argument?

MR. PROSPECT: No, sir, it may just as well have related to a conference between McDaniel and his co-counsel as to what he was going to say next, for all we know. I mean, it just doesn't show that, one way or the other.

Now, we have taken the position, of course, that it's one thing for a prosecuting attorney to prejudice a defendant by his closing arguments, and it's another thing to inflame them, and it's quite another thing, but the same, to go outside the evidence when he does the other two.

That is why we propose that threefold test. And we've submitted it to the Court -- for the Court's consideration -- in determining proper guidelines to let all concerned know what it is that is proper and what is not proper closing argument at least on behalf of a prosecutor. We don't seem to have that restriction on defense.

Now, as we stated, without an objection, there was no chance to straighten out the jury. Now, in a nutshell,

in a paragraph in the brief, we stated that petitioner has claimed that by engaging in all this irrelevant matter, and this ridiculous argument, the jury -- he referred to them inhis brief and in his reply as rural, as coming from rural Florida -- he's implied that they were so malleable and receptive to this type of argument, that they automatically, more or less, and necessarily, went back in their jury room and based their verdict on what Mr. McDaniel said. They disregarded the evidence, and they were so moved by the man's tirade that they came in with a verdict based -- with guilty, based on that.

However, he fails to mention , either today, or in reply, the fact that Goodwill got up after all this nonsense and said, ladies and gentlemen, we're not here to listen to this man pound the table, to yell, to run around and throw papers. Don't let him embarrass you into a verdict. You can't convict him on what that man says. On the same token, you can't acquit him on what I say. We're only here to help you.

That's what the judge told them in the very beginning. He neutralized any effect. And I dispute that these people were so receptive to being improperly influenced.

Now, I personally take dispute with the rural Floridian aspect of this case. It's appeared twice, but it wasn't mentioned today. But nonetheless, it was in the

reply brief.

The case was tried in Citrus County, Florida. It is not like Jacksonville or Miami. Apparently, petitioner is of the opinion that anybody who comes from that area and who would sit on a jury in a murder case would be the rural type.

Now, to me, rural means farm and/or country. And it's very interesting because we Floridians who are from that state know one thing, and that is, there are very few natives. Most of us are transplanted.

If we look at the jury selection on the whole --

QUESTION: I missed it. Now what is this rural area in Florida?

MR. PROSPECT: Citrus County Florida.

QUESTION: And the town?

MR. PROSPECT: Crystal River is the closest of any size. Very pretty, but not large.

QUESTION: I know where it is.

MR. PROSPECT: So if we look -- if we look at the jury selection as a whole and we examine the jurors who sat, we see that Mrs. Macy is a native of Ohio; her husband is retired Army. Mr. Dorminy has been in Crystal River since 1971, nand had jury service in Georgia. Mr. Carhuff is from New Jersey; been in Florida for two years. Mr. Schneider is from Illinois; he lived in Florida for six years. Mrs.

Lucker had been in Florida since 1968; she was the wife of a retired aviation inspector. Mr. Parker had been in the area for three years; he is a nuclear operator for the Florida Power Corporation. Mr. Embach hasbeen in Citrus County since 1970; shift supervisor for the nuclear plant at Florida Power. Mr. Hudson may be a native; he doesn't say. All that his questioning reveals is that he works as a construction laborer. Mrs. Mulroy is someone perhaps more to petitioner's liking; she happens to come from Queens, New York City.

QUESTION: That's not rural.

MR. PROSPECT: Exactly, sir. Her husband was a 30 year FBI regional director before he retired, and they lived in as many as 14 different places from Nebraska to this city here today to Virginia and Westchester. And I believe that's either in the State of New York or Connecticut, I'm not sure.

QUESTION: It's not rural, either.

MR. PROSPECT: Mr. Pelellat is a retired fireman from Sarasota Florida. He's lived in Citrus County since 1971. We have Mrs. Hann, H-a-n-n, who lives in Crystal River, but she was a retired supervisor from the Security First National Bank of Los Angeles, California. And finally, Mr. Waller, nine years with and living in Citrus County with the County Road Department maintenance crew.

So we've got two people who may be natives who may possibly represent rural people from rural Florida, whatever that means. We look at the other people who were not selected for the jury and we have everyone coming from -- we have people coming everywhere from California to New Hampshire; we have a marine biologist from Texas, Indiana, Orlando; a schoolteacher from Orlando from Indiana; and two other people who had been in the area from five to two years.

So we simply just don't have whatever is supposed to be -- he's supposed to mean by a rural jury. And I think the jury and it's composition and it's possible effect -- or the effect of the argument on this jury -- has to be considered very closely tied with the necessity and the rationale behind an objection.

If these people are going to be swayed, then we've got to stop it as soon as it begins. But if they're not, then they can be rehabilitated by what counsel said in his response, in his rebutting closing argument, where he repeated, listen, ladies and gentlemen, only to the evidence. Forget this wild man over here. We're not here to do anything but to decide guilt or innocence. And we of course concluded our discussion of the jury with, based on this profile,

Now this is just -- this only reflects the questions and answers which would indicate where the people

are from and what they do. Now, this doesn't reflect their responses to other questions. Standard jury questions which are asked in all cases relative to predisposition to guilt/ innocence, notoriety of the case, and so forth. You'll see some very intelligent answers, especially those relating to Witherspoon. You'll see some very intelligent people.

And we submit that these people were sophisticated enough to know that when McDaniel took off, that's all he was doing, taking off. And it was perhaps -- they viewed him with legal egg on his face, if that's a possible phrase to use.

We just don't think that they were persuaded to rush to judgment, put that verdict as guilty, and come back out and say, well, based on our being inflamed, we reacted from our heart and not our head.

I just don't believe that. And I've got an idea that they didn't believe it either or else they would have objected. Now, they would have at least gotten up there and said, your honor, would you please stop this man -- or I object on the grounds of this. Let's stop it.

But perhaps they did try to take a shot at the verdict, knowing that they had reversible error. Because you've got to remember, isn't it always good, if you're on the defense side, to get a new trial, especially in a capital case.

Now, if they were convinced it was reversible error, they know they've got to go to the Florida Supreme Court. That Court hears all capital cases, as well as everything else. It takes time.

We conceivably could have had a reversal occurred, had to try this man within five years or more from the offense, or more. The second trial is always fun. You've got the possibility of missing witnesses. You've always got the possibility, even with available witnesses, dimming memories.

And every witness you've got against you, you can automatically ask, you mean to tell me to tell me you can remember something that clearly that happened four, five or six years ago.

It's a good shot to try and get that reversal in the second trial. And it's an even better shot to try for the acquittal, because then you can go home that day.

And I think that the issue involved here considering the lack of objection, considering the very thing they're yelling about the most, the contents of the argument, consider all of that, and in light of the entire argument, and I think you really have to conclude that although McDaniel -- I -- even though I represent the State, I feel like I'm representing one man, and his conduct -- even though he hurt himself, but not the case, I think you've got to say,

that viewed in its totality, Willie Jasper Darden may not have received a perfect trial, not the antiseptic onehad Darden merely, as you suggested, Mr. Chief Justice, dispassionately read something or summarized the evidence; but he got a fair one. And that's what we're here about. And if nothing --

QUESTION: If in Florida one makes an objection to the trial judge on a particular ground, and the trial judge overrules the objection, is it generally presumed that i f another similar instance arises, the lawyer is not required to make the objection again; that the --

MR. PROSPECT: Yes, sir; that's correct.

QUESTION: -- trial judge's ruling would be the same on a subsequent judgment.

MR. PROSPECT: Yes, sir. As a matter of fact, I believe we have case law to the effect that once you know it'd be useless in light of a previous ruling, you don't have to do it. It's still preserved properly. But using that, I'll still ask for one objection in this record which isn't there.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kalmus.

MR. KALMUS: If I might take just a moment.

REBUTTAL ARGUMENT OF GEOFFREY M. KALMUS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KALMUS: I think that what the State is asking here is that the prosecutor be given license to procede willy nilly in whatever fashion he may and on whatever grounds he may wish to, and put the defense counsel in the box, standing up and objecting everytime something is said, or letting it go by.

We all know that that's a difficult lawyer's decision to make in context. But here the State is saying, even though the prosecutor willfully makes outrageous arguments that he has no business making and he knows he has no business making, still the defense counsel is going to be kept in that box.

And it seems to us that that's not a tactical choice that can fairly be imposed against willful misconduct by prosecution.

As to your question, Mr. Justice Marshall, as to why there was no ineffective assistance of counsel issue here, the issue was not raised in the courts below, and we didn't feel that it could be raised here for the first time. Perhaps it was raiseable on habeas, I don't know. Although I know from past experience, it's a very difficult one to win.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:35 o'clock, p.m., the case in the above-entitled matter was submitted.]

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