CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
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Class Six - Part Three:
Disclosure - Closing Argument

Disclosure and Preservation of Evidence

Prosecutors have a well established obligation to disclose to defense counsel any evidence favorable to the defense in the possession of the prosecution or law enforcement agencies. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." It affirmed a decision of the Maryland Court of Appeals that John L. Brady, who had been convicted of murder in the commission of a robbery and sentenced to death, was entitled to a new sentencing trial because the prosecutor, who had allowed Brady's counsel to see some statements made by his co-defendant, had not disclosed one in which the co-defendant admitted committing the murder. Brady had testified at trial that he participated in the crime, but said the co-defendant did the actual killing.

The Court found that a prosecutor's repeated assertion that a defendant's undershorts were stained with blood, even though he knew they were stained with paint, violated due process in *Miller v. Pate*, 386 U.S. 1 (1967).

The Supreme Court has set out three components or essential elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Prejudice has since been defined as a reasonable probability that the disclosure would have produced a different result. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (granting habeas corpus relief in a capital cases where such a showing was made).

A prosecutor may not knowingly present false testimony. *United States v. Bagley,* 473 U.S. 667, 680 (1985); *Giglio v. United States,* 405 U.S. 150, 153-54 (1972); *Napue v. Illinois,* 360 U.S. 264, 269 (1959). To show such a violation, a defendant must show: (1) the prosecutor presented false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material.

In *Napue* and *Giglio*, the Court unanimously found due process violations where prosecutors did not disclose promises their offices had made to key witnesses who testified that they received no consideration from the prosecution in connection with their testimony.[1]

In *Napue*, it was discovered after trial that the prosecution had promised the witness that it would seek a reduction in his sentence in exchange for his testimony. The Court concluded that the witnesses' trial testimony was false.

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1. In *Giglio*, Chief Justice Burger delivered the opinion for seven of the Court's justices. Justices Powell and Rehnquist did not participate.

In *Giglio*, the prosecutor who presented the case to the grand jury promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. Another prosecutor, unaware of the promise, tried the case and obtained a conviction. The witness, asked during his testimony trial if any promises had been made, denied that there had been any. The trial prosecutor, unaware of the promise, did not disclose it. The Supreme Court held that the government was responsible for disclosing the promise, even though the trial prosecutor was not aware of it, and that the failure to disclose it constituted a violation of due process requiring a new trial.

But the Court found the prosecution's failure to disclose the victim's prior criminal record did not violate due process in *United States v. Agurs*, 427 U.S. 97 (1976). Agurs argued that the victim's prior convictions of assault and carrying a deadly weapon would have supported her claim of self defense. (The prior conviction for carrying a deadly weapon was a knife, the same weapon that the victim had when he was killed in the incident for which Agurs was convicted of murder.) The Court, in an opinion by Justice Stevens, observed that prosecutors may not always know whether evidence will be exculpatory at trial. Although "the prudent prosecutor will resolve doubtful questions in favor of disclosure," the Court held that a prosecutor is not required to disclose any information that might affect the jury's verdict. The Court held that a defendant is entitled to a new trial only upon a showing that "the omitted evidence creates a reasonable doubt that did not otherwise exist." The Court elaborated:

> This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evince is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

The Court found significant that the prior record was not requested by Agurs' defense counsel, even though counsel was unaware of its existence. It concluded: "Since the arrest record was not requested and did not even arguably give rise to any inference of perjury, since after considering it in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable," the failure to disclose the victim's record did not deprive Agurs of a fair trial and, thus, due process.

Justice Marshall, joined by Justice Brennan, dissented, expressing the view that the decision "so narrowly defines the category of 'material' evidence * * * as to deprive it of all meaningful content" and "usurps the function of the jury as the trier of fact in a criminal case." The proper standard for materiality, Marshall asserted, is whether there is "a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

The Court narrowed its definition of materiality even further in *United States v. Bagley*, 473 U.S. 667 (1985). Bagley requested before trial "any deals, promises or inducements made to [Government] witnesses in exchange for their testimony." Nevertheless, the prosecution did not disclose that its principal witnesses had signed contracts with the Bureau of Alcohol, Tobacco and Firearms during the investigation committing it to pay money to the witnesses commensurate with the information furnished. Bagley found out about the contracts through requests to the government through the Freedom of Information Act and the Privacy Act. Reversing a Ninth Circuit decision holding that Bagley was entitled to a new trial because of the prosecution's failure to disclose the contracts, the Court concluded, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence

in the outcome."[2] Justice Brennan, joined by Justice Marshall, dissented, expressing the view that this standard

> stretches the concept of "materiality" beyond any recognizable scope * * * into a result-focused standard that seems to include an independent weight in favor of affirming convictions despite evidentiary suppression. Evidence favorable to an accused and relevant to the dispositive issue of guilt apparently may still be found not 'material,' and hence suppressible by prosecutors prior to trial, unless there is a reasonable probability that its use would result in an acquittal.

In many jurisdictions, discovery by the defense is very limited. It may be nothing more than disclosure of any statements made by the defendant and the reports of any experts who may be called by the prosecution. For that reason, the prosecution's duty to disclose exculpatory evidence is very important. *Miller v. Pate*, the case previously described in which the prosecutor knowingly argued that paint was blood, was a clear case. In most cases the question of whether the evidence was material is closer. The following case – and the division of the Court – shows how close and how fact intensive that inquiry may be.

2. *United States v. Bagley,* 473 U.S. 667, 682 (1985) (Blackmun, J., joined by Justice O'Connor). In a separate opinion, Justice White, joined by Chief Justice Burger and Justice Rehnquist, agreed with the definition of materiality, but took issue with Justice Blackmun's suggestion that Bagley might be entitled to relief under the standard.

Anthony GRAVES, Petitioner-Appellant,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.

United States Court of Appeals,
Fifth Circuit.
442 F.3d 334 (2006).

Before DAVIS, WIENER, and GARZA, Circuit Judges:

W. EUGENE DAVIS, Circuit Judge:

Petitioner Anthony Graves appeals the district court's denial of his writ of habeas corpus. Because we conclude that the statements suppressed from the defense were both exculpatory and material, we reverse the judgment of the district court with instructions to grant Graves' writ of habeas corpus.

I.

Anthony Graves was convicted of capital murder and sentenced to death in 1994 for the capital offense of murdering six people in the same transaction. * * * [The case had been previously remanded to the district court on Graves' claim that the state failed to disclose to Graves (1) that the co-defendant, Robert Earl Carter, informed the district attorney that Graves was not involved in the charged crime on the day before he testified to the contrary at Graves' trial, and (2) Carter's alleged statement implicating his wife in the crimes.]

On remand, an evidentiary hearing was held before Magistrate Judge Froeschner who, after reviewing briefly the facts of the crime, made the following factual findings in his report and recommendation.

> Carter's wife, Cookie, was also indicted for the offense of capital murder. Attorneys Calvin Garvie and Lydia Clay-Jackson, who defended Graves at trial, believed this indictment to be a sham based on false evidence presented to the grand jury and

obtained only in order to pressure Carter [who had been sentenced to death at his trial] to testify against Graves. Nevertheless, Burleson Country District Attorney Charles Sebesta, who prosecuted Graves, insisted that the State believed from early on that Cookie participated in the killings and that all evidence pointed to the involvement of three people. * * *

Prior to the beginning of Graves' trial, the District Attorney's office had been in negotiations with Carter and his appellate attorney for Carter's testimony against Graves. According to Sebesta, no final agreement on the terms had been reached prior to Carter's arrival in Brazoria County for Graves' trial, although any final plan was to involve the use of a polygraph exam before he testified. The early discussions also involved Carter's condition that the State would not ask him questions about his wife's role in the murders.

Sebesta met with Carter in the early evening of October 21, 1994.[2] According to Sebesta, Carter almost immediately claimed, "I did it all myself, Mr. Sebesta. I did it all myself." When Sebesta stated that he knew that was not true because of the number of weapons used, Carter quickly changed his story and claimed that he committed the murders with Graves and a third man called "Red." Carter had earlier implicated a person named "Red" during the murder investigation, and the State believed that Theresa [Cookie] Carter may have been known by that nickname. When Sebesta proposed that "Red" was actually Cookie, Carter denied it and agreed to take a polygraph exam.

* * * [The polygraph] report states that Carter signed a polygraph release statement, had the exam explained to him, and then changed his story once more before the exam was given by stating that he had killed the Davis family with Graves but without "Red." The interviewer then posed the following questions to Carter: (1) "[W]as your wife, Theresa, with you [at the time of the murders]?" and (2) "[W]hen you refer to 'Red' in your statement, are you taking about your wife, Theresa?" Carter answered "no" to both questions. The polygraph examiner concluded that Carter was not being truthful in either response. When the polygraph results were explained to him, Carter once more changed his story. He now admitted that Cookie was involved in the murders with himself and Graves. He also stated that he had invented the character "Red" but later admitted that Cookie was sometimes called "Red." When Sebesta asked him if Theresa had used the hammer in the murders, Carter answered "yes."

In addition to the tentative deal to forego questions about Cookie in exchange for testifying against Graves, the State had also been working on a broader agreement that would allow Carter to accept a life sentence rather than death if his case were reversed in appeal. This required Carter to testify against both Graves and Cookie. By the time the October 21 meeting concluded, he had tentatively assented to do so, though no final agreement was reached. The next morning, however, Carter refused to testify against Cookie and reverted to the initial terms already worked out with the State. Both Carter and Sebesta then accepted the tentative agreement as the final deal for his testimony.

At the evidentiary hearing, [defense attorney] Garvie denied that he knew before, or at any time during, trial that Carter had told Sebesta he killed the Davis family himself. Sebesta testified that he mentioned the statement to Garvie on the morning Carter testified. The Court accepts Garvie's version of this event based on his credibility as a witness and as being consistent with his vigorous defense of Graves at trial. Sebesta did reveal part of the polygraph results on the

2. This was the evening of the second day of the guilt/innocence phase of the trial.

morning of October 22 when he told the trial judge: "last night at 8:30 Mr. Carter took a polygraph[,] and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But, obviously, we can't go into polygraphs here, but I think counsel is certainly entitled to know that." Garvie asked no questions about what the polygraph involved. Garvie's co-counsel testified that it did not occur to the defense to inquire into Sebesta's statement because they believed the indictment against Cookie was unfounded. * * * The State then called Carter to the stand and revealed to the jury that he was testifying in exchange for an agreement that questions would not be asked about his wife.

* * * On June 19, 1998, Graves' former attorney took a deposition from Carter in which he claimed to have acted alone. That statement was excluded from the record by the state court as inherently unreliable because Graves' attorney failed to notify the State, as required by law, in order to allow cross-examination. Carter again recanted his trial testimony in a May 18, 2000, deposition attended by both Sebesta and Graves' current counsel. Sebesta later appeared on the Geraldo Rivera show *Deadly Justice* on September 3, 2000, and repeated Carter's self-confession. Sebesta stated: "yes, and at that point he [Carter] did tell us, 'Oh, I did it myself. I did it.' He did tell us that."

The magistrate judge found that Sebesta did not reveal Carter's statement that he committed the murders alone to the defense and that because Graves' attorneys had no way of knowing about the statement, they had no reason to exercise due diligence to discover it. The magistrate also found that this statement was not material because Carter's claim that he acted alone contradicted the evidence and because the jury already had considerable evidence of Carter's multiple inconsistencies and credibility issues.

As to the statement linking Carter's wife Cookie as a direct participant in the crimes, the magistrate found that the defense did not exercise due diligence to discover the statement after Sebesta told them about the polygraph results. He also found that the statement is not exculpatory because it implicated Graves based on the government's three person theory. The statement would also have contradicted the testimony of one of Graves' witnesses who testified that Cookie and Graves were not close and that Cookie was home at the time of the murders.

Considering the effect of the statements together, the magistrate found that the same conclusion would be reached [by the jury]. * * *

The district court considered Graves' objections to the magistrate's report and recommendation, dismissed them all and accepted the magistrate's report, denying Graves' *Brady* claims. * * *

II.

In a federal habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo.* Whether evidence is material under *Brady* is a mixed question of law and fact.

Both of Graves' *Brady* claims were dismissed by the Texas courts as abuses of the writ, *i.e.* on procedural grounds.[3] Because these claims were not adjudicated on the merits in State court, a prerequisite for the applicability of 28 U.S.C. 2254(d), the heightened standard of review provided by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") does not apply. * * *

III.

In *Brady v. Maryland,* 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by

3. In our decisions granting [a certificate of appealability], we concluded that Graves had established cause for the procedural default because the state did not disclose the statements until after Graves filed his initial habeas petition. Graves' petition was remanded to the federal district court for an evidentiary hearing and a decision on the merits of his *Brady* claims, from which Graves now appeals.

the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley,* 514 U.S. 419, 433 (1995). *Brady* applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant. *Giglio v. United States,* 405 U.S. 150 (1972).

The *Kyles* decision emphasizes four aspects of materiality. First, * * * [t]he question is not whether the defendant would have received a different verdict with the disclosed evidence, but "whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." A "reasonable probability of a different result" is shown when the suppression "undermines confidence in the outcome of the trial."

Second, the materiality test is not a test of the sufficiency of the evidence. The defendant need not demonstrate that after discounting the inculpatory evidence by the undisclosed evidence that there would not have been enough evidence to sustain the conviction. Rather, a *Brady* violation is established by showing "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Third, harmless error analysis does not apply. Fourth, "materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item."

Graves bases his *Brady* claims on two suppressed statements the state admits Carter made on the evening before Carter testified at Graves' trial – first, that Carter committed the crimes alone, and second, that Carter's wife Cookie was an active participant in the murders.

No one disputes that Carter was the state's star witness. Graves made no self-incriminating statements to the police before his trial. He testified before the grand jury denying all involvement and explaining his whereabouts on the night of the murders. The only potentially incriminating statements allegedly made by Graves were heard over the jailhouse intercom system. The persons reporting these statements were effectively cross-examined on the reliability of the intercom system, their ability to recognize Graves' voice since his cell could not be seen from their listening post, and their failure to make contemporaneous reports of the comments.

The only physical evidence tied to Graves that was marginally linked to the crimes was a switchblade knife brought forward by Graves' former boss that was identical to one that he had given to Graves as a gift. The medical examiner testified that the knife wounds on the victims were consistent with that knife *or* a knife with a similar blade. Graves' medical expert testified that a wide range of knives with similar dimensions to the switchblade were also consistent with the victims' wounds including holes in skull caps of some of the victims. None of the murder weapons were recovered. Thus, it is obvious from the record that the state relied on Carter's testimony to achieve Graves' conviction. It is in this context that the materiality of the suppressed statements must be examined.

a. The suppressed statement by Carter that he committed the crimes alone.

The district court found that Graves was not aware of Carter's statement that he committed the crime by himself but found that the statement was not material.[4] Our original assessment of this statement was that it "was extremely favorable to Graves and would have provided powerful ammunition for counsel to use in cross-examining Carter." *Graves I,* 351 F.3d at 155. * * *

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4. District Attorney Sebesta contradicted Graves' counsel and testified at the habeas hearing that he told Graves' defense counsel Garvie of this statement outside the courtroom the morning after Carter made the statement. The district court did not find Sebesta credible on this point.

Carter's statement that he acted alone in committing the murders is particularly significant because it was the first statement Carter made that implicated himself without also implicating Graves. The only other statement Carter made pre-trial exculpating Graves was before the grand jury. In that statement Carter claimed that neither he nor Graves was involved in the murders. At trial the state recognized that its case depended on the credibility of Carter and the prosecutor emphasized Carter's consistency in his various statements in naming Graves as an accomplice. In Carter's grand jury testimony Carter testified that he only gave Graves' name to investigators because he was coerced.[5] The prosecutor explained Carter's grand jury testimony by pointing out that Carter's testimony, that neither he nor Graves was involved, followed threats by Graves.[6] Carter's suppressed mid-trial statement exculpating Graves was not coerced and would have undercut the state's argument that Carter did not implicate Graves before the grand jury because Graves threatened him. The state's case depended on the jury accepting Carter's testimony. Given the number of inconsistent statements Carter had given, the state faced a difficult job of persuading the jury that Carter was a credible witness, even without the suppressed statement. Had the defense been able to cross-examine Carter on the suppressed statement, this may well have swayed one or more jurors to reject Carter's trial version of the events.

Perhaps even more egregious than District Attorney Sebesta's failure to disclose Carter's most recent statement is his deliberate trial tactic of eliciting testimony from Carter and the chief investigating officer, Ranger Coffman, that the D.A. knew was false and designed affirmatively to lead the jury to believe that Carter made no additional statement tending to exculpate Graves. District Attorney Sebesta asked Carter to confirm that, with the exception of his grand jury testimony where he denied everything, he had always implicated Graves as being with him in committing the murders. Carter answered in the affirmative. Sebesta also asked Ranger Coffman, after Carter testified, to confirm that all of Carter's statements except the grand jury testimony implicated Graves. Sebesta also confirmed through Ranger Coffman that he understood his obligation to bring to the prosecutor's attention any evidence favorable to the defense. * * * Sebesta clearly knew of the statement and used Ranger Coffman as well as Carter to present a picture of Carter's consistency in naming Graves that Sebesta clearly knew was false.

b. The suppressed statement by Carter that Cookie was an active participant in the murders.

The state stipulated that Carter told Sebesta, "Yes, Cookie was there; yes Cookie had the

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5. Before the grand jury, Carter testified as follows:

> I couldn't harm anybody, but during interrogation, between seven and eight hours or so, I was told that they got enough evidence on me to give me the death penalty. I know I haven't done anything wrong. I know I wasn't in Somerville like they say I was. They say they know that I didn't do it, but I know who did it and they wanted me to give a name so I tried to tell them that I don't know anybody.
>
> And by being pressured, being hurt, confused and didn't know what to think, I said Anthony Graves off the top of my head.

6. After eliciting testimony from Carter that Graves had threatened him physically and verbally while they were housed in the Burleson County Jail, the following exchange took place between Sebesta and Carter as Carter testified at Graves' trial:

> Sebesta: What did you do when you went to the Burleson County grand jury?
>
> Carter: Lied.
>
> Sebesta: Why did you lie?
>
> Carter: Because I was afraid.
>
> Sebesta: How did you go about lying to them?
>
> Carter: Saying that I made up the whole story, that it didn't take place.

hammer." * * * Sebesta did not inform Graves' counsel of this statement. He did disclose to the court and counsel that Carter had failed a polygraph regarding Cookie's involvement.[7] The district court found that after hearing about the polygraph, Graves did not exercise due diligence to discover the substance of the statement. The district court also found that the statement was not exculpatory because it did not exculpate Graves. Rather it was consistent with the state's three person theory, that the crime was committed by Carter, Cookie and Graves. We disagree on all points.

Due Diligence?

* * * Sebesta's statement did not reveal or even imply that Carter gave a statement affirmatively naming Cookie as an active participant in the murders. The defense had specifically requested any information related to any party, other than Graves and Carter, who the state alleged was involved in the crime. They had no evidence that Cookie was involved in the crime and viewed her indictment as a tool to get Carter to testify. This assumption was confirmed by Sebesta's discovery response. * * * Sebesta asked Carter to confirm their agreement that he would not ask any questions about his wife and to confirm that he had "not asked [him] any question about what she may or may not know about it." When the defense cross-examined Carter, they asked about Cookie's whereabouts and who possessed the hammer. Carter's testimony was obviously different than the statement he gave Sebesta the previous night that Cookie was there and Cookie had the hammer.

* * * Graves' counsel had specifically requested the information disclosed in the statement. We view Sebesta's statement regarding the polygraph, his discovery responses and questioning of Carter as misleading and a deliberate attempt to avoid disclosure of evidence of Cookie's direct involvement. At a minimum, Sebesta's minimal disclosure was insufficient to put the defense on notice to inquire further, particularly in light of the state's discovery disclosure.

Exculpatory?

* * *

The statement regarding Cookie's direct involvement in the crime is exculpatory for several reasons. First, each party's theory about how many people were actively involved in the crime is just a theory based on the number of people killed and the number of weapons used. The defense had submitted that two people were probably involved and had specifically requested any information related to any party, other than Graves and Carter, who the state alleged was involved in the crime. Although Cookie had been indicted, the defense viewed the indictment as a tool to pressure Carter into testifying. As we noted in our prior opinion, "if Graves had been furnished with Carter's statement, it could have provided him with an argument that those two persons were Carter and his wife rather than Carter and Graves." Also, Carter's statement, placing Cookie directly at the scene and actively involved in the murders, puts his deal with the state to testify only on the condition that he not be questioned about Cookie's involvement in a different light. It provides a stronger argument to Graves that Carter was lying about Graves involvement to save Cookie.

* * *

c. The statements considered together?

The sole remaining issue under Graves' *Brady* claim is whether, considered together, the two statements * * * are material. We conclude that they are. If both statements had been timely furnished to Graves, he could have persuasively argued that (1) the murders were committed by Carter alone or by Carter and Cookie; and (2) Carter's plan from the beginning was to exonerate Cookie, but a story that he acted alone was not

7. Sebesta made the following statement: "There is something I need to put on the record from a[sic] exculpatory standpoint. It cannot be used, but last night at 8:30 Mr. Carter took a polygraph and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But, obviously, we can't go into polygraphs here, but I think Counsel is certainly entitled to know that."

believable, so he implicated Graves so the prosecution would accept his story and decline to prosecute Cookie.

The state argues that the combined statements are not material because they are inconsistent and could have been damaging to Graves if the jury believed that the most credible account of the murders involved three killers, Carter, Cookie and Graves. The problem with the state's argument is that it analyzes the significance of the suppressed evidence against a backdrop of how the defense presented its case at trial without the suppressed statements. If the two statements had been revealed, the defense's approach could have been much different (as set forth above) and probably highly effective.

* * * In *Giglio v. United States,* the Supreme Court reversed the defendant's judgment of conviction and remanded for a new trial because the prosecutor failed to disclose a promise of leniency to a key witness. The court concluded that the suppression affected the co-conspirator's credibility which was an important issue in the case and therefore material.

In *Banks v. Dretke,* 540 U.S. 668 (2004), the * * * state withheld evidence that would have allowed defendant to show that two essential prosecution witnesses had been coached by police and prosecutors before they testified and also that they were paid informants. In addition, prosecutors allowed testimony that they were not coached to stand uncorrected at trial. [The Court found a *Brady* violation.] In *Kyles v. Whitley,* 514 U.S. 419 (1995), the defendant's conviction was reversed and remanded for a new trial. The prosecution had suppressed statements of key witnesses and an informant who were not called to testify resulting in a *Brady* violation because their statements had significant impeachment value. Graves' case presents a cumulation of the elements found violative of a defendant's right to exculpatory evidence in the above cases.

IV.

Because the state suppressed two statements of Carter, its most important witness that were inconsistent with Carter's trial testimony, and then presented false, misleading testimony at trial that was inconsistent with the suppressed facts, we have no trouble concluding that the suppressed statements are material. * * * If the defense had known about the statement placing Cookie at the scene and given Carter's continuing condition that he would only testify if he were not asked about Cookie's involvement, the defense could have explained every statement implicating Graves as a means of protecting Cookie. * * * In addition, Carter's statement that he committed the crimes alone is important as the only statement he made exculpating Graves while implicating himself. The combination of these facts leads us to conclude "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435. Stated differently, disclosure of the statements "would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Id.* at 441.

* * *

Anthony Graves Released

By the time Anthony Graves was returned to Burleson County for retrial, District Attorney Charles Sebesta had retried. The new District Attorney, Bill Parham, brought in former Harris County assistant district attorney Kelly Siegler, who had sent nineteen men to death row, as a special prosecutor to examine the case against Graves.

After Siegler, assisted by a former Texas Ranger, reviewed the case, Parham moved to dismiss the case against Graves in a pleading that said, "We have found no credible evidence which inculpates this defendant." Parham told reporters that he was "absolutely convinced" of Graves's innocence. "There's not a single thing that says Anthony Graves was involved in this case," he

said. "There is nothing."[1]

Siegler stated: "It's a prosecutor's responsibility to never fabricate evidence or manipulate witnesses or take advantage of victims. And unfortunately, what happened in this case is all of these things." She said that "Charles Sebesta handled this case in a way that could best be described as a criminal justice system's nightmare" and that Graves's trial was "a travesty".[2]

Graves had been assigned an inexperienced, incompetent lawyer to handle his state post-conviction proceedings. After the lawyer filed a woefully inadequate petition for relief, the Texas Court of Criminal Appeals rejected arguments made on behalf of Graves that he was entitled to file a new petition and be represented by a competent lawyer. The Court held that condemned inmates were not entitled to competent representation in such proceedings – only that the lawyer must be competent when appointed. *Ex parte Graves*,70 S.W.3d 103 (Tex. Cr. App. 2002).

For a thorough account of the Graves case, *see* Pamela Colloff, *Innocence Lost*, published in the TEXAS MONTHLY (October 2010), http://www.texasmonthly.com/story/innocence-lost, and her later *Innocence Found: Why Did Anthony Graves Spend Eighteen Years Behind Bars – Twelve of Them on Death Row – for a Crime he did not Commit?* TEXAS MONTHLY (January 2011) available at: www.texasmonthly.com/story/innocence-found.

Pamela Colloff also examines the failure of the Texas Bar to take any action against prosecutor Charles Sebesta for his misconduct in the case in *Why Was This Prosecutor Never Punished?*, TEXAS MONTHLY (Dec. 13, 2013), www.texasmonthly.com/story/why-was-prosecutor-never-punished. In summarily dismissing the complaint filed by attorney Robert Bennett in 2006, the bar stated that "there is no just cause to believe that [Sebesta] committed professional misconduct." According to the *Texas Tribune*: "In ninety-one criminal cases in Texas since 2004, the courts decided that prosecutors committed misconduct, ranging from hiding evidence to making improper arguments to the jury. None of those prosecutors has ever been disciplined."[3]

However, the State Bar of Texas later – in July 2014 – found "just cause" to pursue a disciplinary action Sebesta. He chose to have his case heard by an administrative judge, which means that the proceedings will be confidential until a final judgment is made. The maximum penalty he faces is disbarment and loss of his license to practice law in Texas.

Texas gave Antony Graves $1.4 million to compensate him for the 18 years he spent in prison. Since his release, Graves has spoken about his case and worked for reforms in the criminal courts including eliminating solitary confinement. *See* http://anthonybelieves.com; www.texastribune.org/2011/06/16/anthony-graves-tt-interview; http://news.linktv.org/videos/democracy-now-june-22-2012/1570.

1. Pamela Colloff, *Free at Last*, TEXAS MONTHLY, Nov. 2010,

2. *Id*.; Brian Rogers, *Team overturning Graves case blasts ex-DA*, HOUSTON CHRONICLE, Oct. 28, 2010, Pamela Colloff, *Innocence Found*, TEXAS MONTHLY, January 2011.

3. Brandi Grissom, *Study: Prosecutors Not Disciplined for Misconduct*, Texas Tribune, Mar. 29, 2012.

ARIZONA, Petitioner,
v.
Larry YOUNGBLOOD.

Supreme Court of the United States
488 U.S. 51, 109 S.Ct. 333 (1988).

Rehnquist, C.J., delivered the opinion of the Court, in which White, O'Connor, Scalia, and Kennedy, JJ., joined. Stevens, J., filed an opinion concurring in the judgment. Blackmun, J., filed a dissenting opinion, in which Brennan and Marshall, JJ., joined.

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent Larry Youngblood was convicted by a Pima County, Arizona, jury of child molestation, sexual assault, and kidnaping. The Arizona Court of Appeals reversed his conviction on the ground that the State had failed to preserve semen samples from the victim's body and clothing. We granted certiorari to consider the extent to which the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant.

On October 29, 1983, David L., a 10-year-old boy, attended a church service with his mother. After he left the service at about 9:30 p.m., the boy went to a carnival behind the church, where he was abducted by a middle-aged man of medium height and weight. The assailant drove the boy to a secluded area near a ravine and molested him. He then took the boy to [a house and sodomized him five times.] * * * The entire ordeal lasted about 1 1/2 hours.

* * * At the hospital, a physician treated the boy for rectal injuries. The physician * * * used [a] swab to collect samples from the boy's rectum and mouth. He then made a microscopic slide of the samples. The doctor also obtained samples of the boy's saliva, blood, and hair. The physician did not examine the samples at any time. The police placed the kit in a secure refrigerator at the police station. At the hospital, the police also collected the boy's underwear and T-shirt. This clothing was not refrigerated or frozen.

Nine days after the attack, on November 7, 1983, the police asked the boy to pick out his assailant from a photographic lineup. The boy identified respondent as the assailant. Respondent was not located by the police until four weeks later; he was arrested on December 9, 1983.

On November 8, 1983, Edward Heller, a police criminologist, examined the sexual assault kit. He testified that he followed standard department procedure, which was to examine the slides and determine whether sexual contact had occurred. After he determined that such contact had occurred, the criminologist did not perform any other tests, although he placed the assault kit back in the refrigerator. * * * He did not test the clothing at this time.

Respondent was indicted on charges of child molestation, sexual assault, and kidnaping. * * * The prosecutor * * * asked the State's criminologist to perform an ABO blood group test on the rectal swab sample in an attempt to ascertain the blood type of the boy's assailant. This test failed to detect any blood group substances in the sample.

In January 1985, the police criminologist examined the boy's clothing for the first time. He found one semen stain on the boy's underwear and another on the rear of his T-shirt. The criminologist tried to obtain blood group substances from both stains using the ABO technique, but was unsuccessful. He also performed a P-30 protein molecule test on the stains, which indicated that only a small quantity of semen was present on the clothing; it was inconclusive as to the assailant's identity.* * *

Respondent's principal defense at trial was that the boy had erred in identifying him as the perpetrator of the crime. In this connection, both a criminologist for the State and an expert witness for respondent testified as to what might have been shown by tests performed on the samples shortly after they were gathered, or by later tests

performed on the samples from the boy's clothing had the clothing been properly refrigerated. The court instructed the jury that if they found the State had destroyed or lost evidence, they might "infer that the true fact is against the State's interest."

The jury found respondent guilty as charged, but the Arizona Court of Appeals reversed the judgment of conviction. It stated that "'when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.'" The Court of Appeals concluded on the basis of the expert testimony at trial that timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated respondent. * * *

* * *

There is no question but that the State complied with *Brady* and [*United States v.*] *Agurs*[*,* 427 U.S. 97 (1976)] here. The State disclosed relevant police reports to respondent, which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.

If respondent is to prevail on federal constitutional grounds, then, it must be because of some constitutional duty over and above that imposed by cases such as *Brady* and *Agurs.* Our most recent decision in this area of the law, *California v. Trombetta,* 467 U.S. 479 (1984), arose out of a drunk-driving prosecution in which the State had introduced test results indicating the concentration of alcohol in the blood of two motorists. The defendants sought to suppress the test results on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, "the officers here were acting in 'good faith and in accord with their normal practice'"; second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim; and, third, even if the samples might have shown inaccuracy in the tests, the defendants had "alternative means of demonstrating their innocence." In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta,* but here, unlike in *Trombetta,* the State did not attempt to make any use of the materials in its own case in chief.[1]*

* * *

The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady,* makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the

1. In this case, the Arizona Court of Appeals relied on its earlier decision in *State v. Escalante*, 734 P.2d 597 (1986), holding that "'when identity is an issue at trial and the police permit destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process.'" The reasoning in *Escalante* and the instant case mark a sharp departure from *Trombetta* in two respects. First, *Trombetta* speaks of evidence whose exculpatory value is "apparent." The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*. Second, we made clear in *Trombetta* that the exculpatory value of the evidence must be apparent "before the evidence was destroyed." Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was simply an avenue of investigation that might have led in any number of directions. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.

results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.,* those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

In this case, the police collected the rectal swab and clothing on the night of the crime; respondent was not taken into custody until six weeks later. The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence – such as it was – was made available to respondent's expert who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion – and we agree – that there was no suggestion of bad faith on the part of the police. It follows, therefore, from what we have said, that there was no violation of the Due Process Clause.

* * * The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.

* * *

Justice STEVENS, concurring in the judgment.

Three factors are of critical importance to my evaluation of this case. First, at the time the police failed to refrigerate the victim's clothing, and thus negligently lost potentially valuable evidence, they had at least as great an interest in preserving the evidence as did the person later accused of the crime. Indeed, at that time it was more likely that the evidence would have been useful to the police – who were still conducting an investigation – and to the prosecutor – who would later bear the burden of establishing guilt beyond a reasonable doubt – than to the defendant. In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence.

Second, although it is not possible to know whether the lost evidence would have revealed any relevant information, it is unlikely that the defendant was prejudiced by the State's omission. * * *

Third, the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant suggests that the lost evidence was "immaterial." * * * In declining defense counsel's and the court's invitations to draw the permissive inference, the jurors in effect indicated that, in their view, the other evidence at trial was so overwhelming that it was highly improbable that the lost evidence was exculpatory. * * *

With these factors in mind, I concur in the Court's judgment. I do not, however, join the Court's opinion because it announces a proposition of law that is much broader than necessary to decide this case. It states that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due

process of law." In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair. This, however, is not such a case. Accordingly, I concur in the judgment.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

The Constitution requires that criminal defendants be provided with a fair trial, not merely a "good faith" try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law. * * *

I

* * *

* * * *Trombetta* addressed "the question whether the Fourteenth Amendment . . . demands that the State preserve potentially exculpatory evidence on behalf of defendants." Justice MARSHALL, writing for the Court, noted that while the particular question was one of first impression, the general standards to be applied had been developed in a number of cases, including *Brady v. Maryland* and *United States v. Agurs*.[1] Those cases in no way require that government actions that deny a defendant access to material evidence be taken in bad faith in order to violate due process.

* * * The failure to turn over material evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile.'"

* * *

* * * [T]he proper standard must focus on the materiality of the evidence, and that standard "must reflect our overriding concern with the justice of the finding of guilt."

Brady and *Agurs* could not be more clear in their holdings that a prosecutor's bad faith in interfering with a defendant's access to material evidence is *not* an essential part of a due process violation. Nor did *Trombetta* create such a requirement. * * * Although the language of *Trombetta* includes a quotation in which the words "in good faith" appear, those words, for two reasons, do not have the significance claimed for them by the majority. First, the words are the antecedent part of the fuller phrase "in good faith and in accord with their normal practice." That phrase has its source in *Killian v. United States,* 368 U.S. 231, 242 (1961), where the Court held that the practice of discarding investigators' notes, used to compile reports that were then received in evidence, did not violate due process. In both *Killian* and *Trombetta,* the importance of police compliance with *usual procedures* was manifest. Here, however, the same standard of conduct cannot be claimed. There has been no suggestion that it was the usual procedure to ignore the possible deterioration of important evidence, or

1. * * * In *Napue v. Illinois,* 360 U.S. 264 (1959), the prosecution failed to inform the defense and the trial court that one of its witnesses had testified falsely that he had not been promised favorable treatment in return for testifying. The Court noted that a conviction obtained by the knowing use of such testimony must fall, and suggested that the conviction is invalid even when the perjured testimony is " 'not the result of guile or a desire to prejudice ... for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'" In *Giglio v. United States,* 405 U.S. 150 (1972), the Court required a federal prosecutor to reveal a promise of nonprosecution if a witness testified, holding that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." The good faith of the prosecutor thus was irrelevant for purposes of due process. And in *Roviaro v. United States,* 353 U.S. 53 (1957), the Court held that in some cases the Government must disclose to the defense the identity of a confidential informant. There was no discussion of any requirement of bad faith.

generally to treat material evidence in a negligent or reckless manner. Nor can the failure to refrigerate the clothing be squared with the careful steps taken to preserve the sexual-assault kit. The negligent or reckless failure to preserve important evidence just cannot be "in accord with . . . normal practice."

Second, and more importantly, *Trombetta* demonstrates that the absence of bad faith does not end the analysis. The determination in *Trombetta* that the prosecution acted in good faith and according to normal practice merely prefaced the primary inquiry, which centers on the "constitutional materiality" of the evidence itself. There is nothing in *Trombetta* that intimates that good faith alone should be the measure.

* * *

II

* * * [B]ecause I do not find the question of lack of bad faith dispositive, I now consider whether this evidence was such that its destruction rendered respondent's trial fundamentally unfair.

* * *

* * * This case differs from *Trombetta* in that here no conclusive tests were performed on the relevant evidence. There is a distinct possibility in this case, one not present in *Trombetta,* that a proper test would have exonerated respondent, unrebutted by any other conclusive test results. As a consequence, although the discarded evidence in *Trombetta* had impeachment value (*i.e.,* it might have shown that the test results were incorrect), here what was lost to the respondent was the possibility of complete exoneration. *Trombetta* 's specific analysis, therefore, is not directly controlling.

The exculpatory value of the clothing in this case cannot be determined with any certainty, precisely because the police allowed the samples to deteriorate. But we do know several important things about the evidence. First, the semen samples on the clothing undoubtedly came from the assailant. Second, the samples could have been tested, using technology available and in use at the local police department, to show either the blood type of the assailant, or that the assailant was a nonsecreter, *i.e.,* someone who does not secrete a blood-type "marker" into other body fluids, such as semen. Third, the evidence was clearly important. A semen sample in a rape case where identity is questioned is always significant. Fourth, a reasonable police officer should have recognized that the clothing required refrigeration. Fifth, we know that an inconclusive test was done on the swab. The test suggested that the assailant was a nonsecreter, although it was equally likely that the sample on the swab was too small for accurate results to be obtained. And, sixth, we know that respondent is a secreter.

If the samples on the clothing had been tested, and the results had shown either the blood type of the assailant or that the assailant was a nonsecreter, its constitutional materiality would be clear. But the State's conduct has deprived the defendant, and the courts, of the opportunity to determine with certainty the import of this evidence[.] * * * Good faith or not, this is intolerable, unless the particular circumstances of the case indicate either that the evidence was not likely to prove exculpatory, or that the defendant was able to use effective alternative means to prove the point the destroyed evidence otherwise could have made.

* * * To put it succinctly, where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.

The first inquiry under this standard concerns the particular evidence itself. It must be of a type which is clearly relevant, a requirement satisfied, in a case where identity is at issue, by physical evidence which has come from the assailant. Samples of blood and other body fluids, fingerprints, and hair and tissue samples have been used to implicate guilty defendants, and to exonerate innocent suspects. * * *

A corollary, particularly applicable to this case, is that the evidence embody some immutable characteristic of the assailant which can be determined by available testing methods. So, for example, a clear fingerprint can be compared to the defendant's fingerprints to yield a conclusive result; a blood sample, or a sample of body fluid which contains blood markers, can either completely exonerate or strongly implicate a defendant. As technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase. Current genetic testing measures, frequently used in civil paternity suits, are extraordinarily precise. The importance of these types of evidence is indisputable, and requiring police to recognize their importance is not unreasonable.

The next inquiry is whether the evidence, which was obviously relevant and indicates an immutable characteristic of the actual assailant, is of a type likely to be independently exculpatory. * * * Focusing on the *type* of evidence solves [the] problem [of the evidence being unavailable]. A court will be able to consider the type of evidence and the available technology, as well as the circumstances of the case, to determine the likelihood that the evidence might have proved to be exculpatory. * * *

* * *

III

Applying this standard to the facts of this case, I conclude that the Arizona Court of Appeals was correct in overturning respondent's conviction. The clothing worn by the victim contained samples of his assailant's semen. The appeals court found that these samples would probably be larger, less contaminated, and more likely to yield conclusive test results than would the samples collected by use of the assault kit. The clothing and the semen stains on the clothing therefore obviously were material.

Because semen is a body fluid which could have been tested by available methods to show an immutable characteristic of the assailant, there was a genuine possibility that the results of such testing might have exonerated respondent. The only evidence implicating respondent was the testimony of the victim. There was no other eyewitness, and the only other significant physical evidence, respondent's car, was seized by police, examined, turned over to a wrecking company, and then dismantled without the victim's having viewed it. The police also failed to check the car to confirm or refute elements of the victim's testimony.[9]

Although a closer question, there was no equivalent evidence available to respondent. * * * Nor would the preservation of the evidence here have been a burden upon the police. There obviously was refrigeration available, as the preservation of the swab indicates, and the items of clothing likely would not tax available storage space.

Considered in the context of the entire trial, the failure of the prosecution to preserve this evidence deprived respondent of a fair trial. * * *

Youngblood Exonerated, Freed

Twelve years after the Supreme Court's decision, Youngblood's lawyers requested new, more sophisticated DNA tests on the evidence that were not available in 1983. The test results cleared Youngblood and he was set free.

The DNA profile from the evidence was entered into national convicted offender databases. In early 2001, officials got a hit, matching the profile of Walter Cruise, who was serving time in Texas. In August 2002, Cruise plead guilty to the crime that Youngblood had been wrongfully convicted of and was sentenced to twenty-four years in

9. The victim testified that the car had a loud muffler, that country music was playing on its radio, and that the car was started using a key. Respondent and others testified that his car was inoperative on the night of the incident, that when it was working it ran quietly, that the radio did not work, and that the car could be started only by using a screwdriver. The police did not check any of this before disposing of the car.

prison.

Youngblood said: "For 17 years, I knew I was innocent. They tried to get me to plea for less time, but I would never confess, especially to something like that."[1]

Dr. Edward Blake, a forensic scientist with expertise in DNA, called the Supreme Court's *Youngblood* decision "a flawed legal precedent that stands on the shoulders of an innocent man" that had undermined practices regarding the collection, maintenance and proper preservation of evidence. He said that the effect of the decision had been "to lower the standards of evidence collection" allowing law enforcement agencies "that are poorly run or mismanaged or don't give a damn * * * to let down their guard and be lazy."[2]

After learning that DNA evidence exonerated Youngblood and revealed that someone else committed the crime, David L., the victim of the crime – then in his late twenties – walked in front of a freight train and was killed.

1. Barbara Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N. Y. TIMES, Aug. 11, 2000.

2. *Id.*

CLOSING ARGUMENT

If you want to excite prejudice you must do so at the close, so that the jurors may more easily remember what you said.

- Aristotle, RHETORIC, Book III, Chap. 14

STATE of Louisiana
v.
Joseph WILSON, Jr. and Henry A. Moses.

Supreme Court of Louisiana
404 So.2d 968 (1981).

WATKINS, Justice Ad Hoc.

This is an appeal from a conviction of Joseph Wilson, Jr., and Henry A. Moses of first degree murder in the shooting death of Henry Ball, III. * * * The jury was all white. Wilson and Moses are blacks, and the victim, Ball, was white.

* * *

The incident, which had obvious racial overtones, took place on Sunday, September 17, 1978, at the Oakwood Shopping Center, Gretna, Louisiana. The victim, Ball, and approximately eighteen other white males had gathered in the Oakwood Shopping Center parking lot. * * * The defendants, Wilson and Moses, were also in the parking lot when a confrontation took place between them and the group of white males, in the course of which the defendants pulled out their guns and fired several shots. One of the bullets struck Ball, fatally wounding him. Immediately thereafter, some of the whites in the group severely beat one defendant, Moses, and ran over the other defendant, Wilson, with a van, for the ostensible purposes of self-defense, or arrest, or both.

Defendants contend that remarks made to the jury in the assistant district attorney's closing argument and rebuttal had the obvious effect of arousing racial prejudice among members of the

jury, which was all white, and were totally irrelevant to the crime of murder which was allegedly committed. We find the assistant district attorney's statements out of place, irrelevant to the proceedings, and of a clearly inflammatory racial nature.

The closing argument of the assistant district attorney is filled with direct and indirect appeals to the racial prejudices of the all white jury. We quote the first remark, and the objections of counsel, motion for mistrial, and the manner in which the assistant district attorney continued:

> MR. LIETZ, (Assistant District Attorney): Why is it a black Sunday? Because these two animals decided to shoot white honkies.
>
> MR. PARENT [defense counsel]: Objection, Your Honor.
>
> MR. TOOLEY [defense counsel]: May it please the Court, this is gross. I ask for a mistrial.
>
> THE COURT: I deny your motion. The jury will disregard that statement.
>
> MR. PARENT: Note our objection, Your Honor.
>
> MR. LIETZ: They were going to shoot white honkies. They were going to shoot them. There is no question in their mind what they had to do. You saw the pictures. You saw the keys in the car. You saw where the car was parked, way away from everything. That was the getaway car. They were going to go shoot white honkeys. What did they mean? They meant business.

The assistant district attorney then went on to say:

> Ladies and gentlemen, both of these men were in this together. They left Oakwood Shopping Center, armed themselves and came back to shoot whitey, to kill whitey, and that's exactly what they did. These gentlemen had the opportunity to leave at any time, at any time. Nobody forced them into that shopping center with guns to kill whitey."

Counsel for defendants did not object to these latter remarks at that time or move for a mistrial.

After closing arguments of defense counsel, the assistant district attorney, in rebuttal, made further racial remarks, which we quote, together with counsel's objections, and motion for a mistrial.

> Ladies and Gentlemen, yes, they said I am fostering racial prejudice. Ladies and Gentlemen, they started yesterday on voir dire about prejudice. They took the stand and said niggers. I didn't say niggers. I didn't start this off. Ladies and Gentlemen I don't care if they are black, white, green. They are murderers. These witnesses they said, Mouse said these two fellows said Mouse said, "Let's get the Niggers." How come none of the other boys heard that. Mr. Tooley says Moses is innocent. He shot in the air. Ladies and gentlemen, do you think these two black males or any kind of males, these two animals over here –
>
> MR. TOOLEY: Objection, Your Honor.
>
> MR. PARENT: Objection, Your Honor.
>
> MR. TOOLEY: I ask for a mistrial.

THE COURT: It's not necessary to use these kinds of terms. The jury will disregard it.

Under Louisiana law, a mistrial is mandatory when a prosecutor refers "directly or indirectly" to race or color, where "the remark or comment is not material and not relevant and might create prejudice against the defendant in the mind of the jury." [La. Code Criminal Procedure] art. 770(1); *State v. Kaufman*, 278 So.2d 86, 96 (La.1973).

In *Kaufman*, this Court stated:

> The purpose of this mandatory prohibition of our 1966 code is to avoid the use of racial prejudice to obtain convictions. This is in accord with our jurisprudence since our earliest days as an American jurisdiction. It is, of course, founded upon a stringent requirement that trials be conducted in accordance with law

and that convictions be founded on evidence of quilt and not upon prejudice. Without this mandatory rule of law, the convictions of innocent defendants may be secured, not because of their guilt, but because of their race.

* * *

It is true that defense counsel did not object and move for a mistrial on each occasion when the assistant district attorney made remarks appealing to racial prejudice in his closing remarks. However, it is apparent from a reading of Louisiana jurisprudence * * * that race is such a sensitive matter that a single appeal to racial prejudice furnishes grounds for a mistrial, and that a mere admonition to the jury to disregard the remark is insufficient. Thus, it was unnecessary for defense counsel to move for a mistrial on each occasion when a racial remark was made. Such repeated objection to improper closing remarks is not expected of defense counsel, particularly as the effect of such repeated objection in the presence of the jury might be to call the jury's attention to remarks that defense counsel would wish to be overlooked. Also, the effect of defense counsel's repeated objections, might be to further alienate the jurors against the defendant. Particularly would this be the case where the jury is all white and blacks are charged as the result of a shooting of whites. In such a case, objection would further arouse the latent racial prejudices of the jury, and heighten the chances that the jury would enter a verdict of guilty. Furthermore, it will be noticed from the portions of the record quoted above that defense counsel did again move for a mistrial when the assistant district attorney made further racial remarks in his rebuttal.

It might be argued that since the alleged crime arose as a result of a racial incident references to race were relevant to a determination of the case, and hence the remarks did not fall within the grounds for a mistrial [.] * * * When the alleged criminal conduct arises out of an incident among persons filled with racial animosity our system of criminal justice requires that those charged with the responsibility for the conduct of criminal trials strictly avoid any actions which might influence the jury to decide the guilt or innocence of the accused upon prejudice rather than on the law and the evidence. * * * Here, the repeated references to "whitey" and "white honkies" in connection with the defendants' supposed characterization of whites, and "animals" as a description of the defendants were obviously intended to appeal to racial prejudice, as they had no relevance to the elements of the crime of murder with which defendants were charged, and did not tend to enlighten the jury as to a relevant fact.

Quite the contrary. The jury is a time-honored and respected institution, indispensable to our system of criminal justice, and its members are expected to arrive at a verdict in a calm and detached fashion, without having latent racial prejudices, which are sometimes strong, aroused by brutal incitements to convict and thereby obtain revenge inherent in racial remarks such as those made by the assistant district attorney in this case. We cannot lend the sanction of the laws of this state, which we deem sacred, to the achievement of such base purposes. Our Codal law and our jurisprudence, compel a reversal of defendants' conviction.

* * *

STATE of Washington
v.
Kevin L. MONDAY, Jr.

Supreme Court of Washington (En Banc).
257 P.3d 551 (Wash. 2011).

Kevin L. Monday Jr. was convicted of one count of first degree murder and two counts of first degree assault stemming from a shooting in Pioneer Square, Seattle, Washington. * * * Finding that his trial was fatally tainted by prosecutorial misconduct, we reverse.

* * *

Monday * * * contends, correctly, that the State committed improper conduct by injecting racial prejudice into the trial proceedings. The State

repeatedly invoked an alleged African American, antisnitch code to discount the credibility of his own witnesses. First, we find no support or justification in the record to attribute this code to "black folk" only. Commentators suggest the "no snitching" movement is very broad. Prosecutor Konat intentionally and improperly imputed this antisnitch code to black persons only. Second, this functioned as an attempt to discount several witnesses' testimony on the basis of race alone. * * * "[T]heories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial."

Neither was it an isolated appeal to racism. Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing, a careful word here and there can trigger racial bias. [citations omitted] Among other things, the prosecutor in this case, on direct examination of a witness, began referring to the "police" as "po-leese." Monday contends, and we agree, that the only reason to use the word "poleese" was to subtly, and likely deliberately, call to the jury's attention that the witness was African American and to emphasize the prosecutor's contention that "black folk don't testify against black folk." This conduct was highly improper.

The State contends that even if the conduct was improper, Monday still bears the burden of showing a substantial likelihood that the misconduct affected the verdict, and, it contends, given the overwhelming evidence of Monday's guilt, this is a burden he has not met. It also notes that Monday's counsel did not object and that we have held that without a timely objection, reversal is not required "unless the conduct is 'so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" * * * Similarly, objecting to improper conduct but failing to request a curative instruction does not warrant reversal if an instruction could have cured the prejudice. * * *

* * * The constitutional promise of an "impartial jury trial" commands jury indifference to race. If justice is not equal for all, it is not justice. * * * Because appeals by a prosecutor to racial bias necessarily seek to single out one racial minority for different treatment, it fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct. * * *

Such a test exists: constitutional harmless error. Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict. We hold that when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. We also hold that in such cases, the burden is on the State.

In this case, we cannot say beyond a reasonable doubt that the error did not contribute to the verdicts. The prosecutor's misconduct tainted nearly every lay witness's testimony. It planted the seed in the jury's mind that most of the witnesses were, at best, shading the truth to benefit the defendant. Under the circumstances, we cannot say that the misconduct did not affect the jury's verdict.

* * *

[Concurring opinion of Madsen, J., omitted.]

J.M. JOHNSON, J. (dissenting).

* * *

I agree that the prosecutor made several problematic expressions over the course of a month-long trial. I do not agree, however, that reversal of Monday's convictions is the appropriate remedy. The convictions should be affirmed based on the jury's proper application of the law to the evidence, not reversed in the name of deterrence. It is possible to deter any improper trial conduct without delaying or denying justice

for Francisco Green and his family[.] * * *

* * *

Alfred Brian MITCHELL, Appellant
v.
STATE of Oklahoma, Appellee.

Court of Criminal Appeals of Oklahoma.
136 P.3d 671 (Okla. Crim. App. 2006).

CHAPEL, Presiding Judge.

In 1992, Alfred Brian Mitchell, Appellant, was tried by a jury and convicted of First-Degree Malice Aforethought Murder [and other crimes and was sentenced to death. His death sentence was set aside in federal habeas corpus proceedings because of the prosecution's presentation of misleading and untruthful testimony from a forensic chemist and its failure to turn over exculpatory DNA evidence. *See Mitchell v. Gibson,* 262 F.3d 1036 (10th Cir.2001).]

* * *

* * * [A] new jury was impaneled for the resentencing trial * * *. This time the jury found two aggravating circumstances: 1) the murder was "especially heinous, atrocious, or cruel"; and 2) the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution." The jury again recommended the death penalty, and the trial court so ordered. From this judgment and sentence, Mitchell appeals.

* * *

Mitchell asserts that during his resentencing the prosecutor engaged in highly prejudicial and unprofessional conduct, including pointing and yelling directly at the defendant. Although such claims are difficult to fully evaluate on appeal – as we have only transcripts and not videotapes of what occurred – we are troubled by both the documented behavior of the prosecutor and the trial court's response to that behavior.

The challenged conduct apparently began during voir dire. During a bench conference on another objection, defense counsel noted that she objected to the prosecutor's behavior toward Mitchell, in particular, pointing at him and speaking angrily to him. The trial court responded: "You show me some law, you show me some law that says you cannot point at a defendant." Defense counsel then argued: "It's prejudicial and it allows him by conduct to be asserting his personal opinion about how he feels about our client." Without addressing this argument or the propriety of the prosecutor's behavior, the trial court summarily overruled the objection and allowed the prosecutor to continue.

During his final closing argument, the prosecutor again directly confronted the defendant, as he encouraged the jurors to send Mitchell a message by their verdict.[210] At a bench conference, defense counsel asserted:

> Your Honor, I object. I would like the record to reflect that Mr. Wintory has walked over to counsel table and is pointing at our client and he's talking directly to our client, and I believe that's inappropriate. It is akin to, by conduct, him expressing his personal opinion, he's showing his dislike for our client. It's prejudicial. It's more prejudicial than probative. It's violative of due process. It's not fair.

The trial court responded: "It's his closing argument. It's overruled."

The prosecutor then continued with his argument about what the jury could say to Mitchell through its verdict, and apparently continued to yell and point directly at Mitchell as he did so.

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210. The prosecutor was arguing: "Ladies and gentlemen of the jury, you can with one voice say to him, you killed her in a way that is especially heinous, atrocious, and cruel. She consciously suffered. Ladies and gentlemen, together you can say, Alfred Brian Mitchell, you may not want to accept responsibility –". At this point defense counsel objected and asked to approach.

PROSECUTOR: So what you all can do together is right to him, right to him, you're guilty of murder, you killed her in a way that was especially heinous, atrocious, and cruel. She consciously suffered. She suffered from when you attacked her near the chair, while she ran down the hallway, while she ran for the phone, while she slammed the door, she suffered when you grabbed her and ripped the phone from her hands, she suffered when you stripped her clothes from her, she suffered when you stripped her earring from her, she suffered when you forced her on the floor, she suffered when you sexually assaulted her, she suffered after you –

DEFENSE COUNSEL: Your Honor, I object.

THE COURT: Overruled.

PROSECUTOR: She suffered after you sexually assaulted her. You can tell him this with your verdict, that she suffered when you took the golf club to her, she suffered when you took your fist to her, she suffered when you rolled her over and you stuck the compass in her neck one, two, three, four, five, six times, she suffered when you broke the golf club over her head, she suffered while she laid there pleading and screaming and crying.

DEFENSE COUNSEL: Your Honor, may I approach?

THE COURT: No. Your objection is overruled.

DEFENSE COUNSEL: I need to make a record.

THE COURT: This is closing argument.

DEFENSE COUNSEL: I need to make a record.

THE COURT: Approach.

(The following was said at the bench:)

THE COURT: Counsel, what you're doing is interrupting the flow. I have ruled on this objection three times.

DEFENSE COUNSEL: I would like the record to reflect he is yelling and pointing at our client.

THE COURT: This is closing argument. I know of no cases that you cannot point at a defendant, nor do I know of no cases that you cannot raise your voice. This is closing argument. Your objection is overruled.

DEFENSE COUNSEL: Move for a mistrial.

THE COURT: Overruled

The trial court then told the prosecutor that he could proceed, and he did.[212] The prosecutor concluded by telling the jury that together their verdict could tell the defendant: "Alfred Brian Mitchell, you're sentenced to death. You're not entitled to mercy."

Even the plain paper pages by which this Court obtains its limited view of this scene cannot fully silence or obscure the emotional crescendo with which this proceeding concluded. Neither the

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212. The prosecutor continued as follows:

She suffered when you sexually assaulted her, she suffered after you sexually assaulted her, and you took the golf club to her. Ladies and gentlemen, your verdict can look right at him and say, she suffered when you broke the golf club over her head and you still weren't done. She suffered moaning, screaming, begging, crying, "Why, why, why?" When you went for the coat rack, she suffered the first time you hit her with the coat rack, she suffered the second time you hit her with the coat rack, she suffered the third, fourth, five, six, God knows how many times, until she was quiet and you were done. Ladies and gentlemen, your verdict can say after she started crying and screaming the last time – and not Kareem; him – picked it up the last time and crushed her skull and she stopped suffering.

Mitchell also challenges the manner in which the prosecutor aligned himself with the victim and spoke for the victim in this portion of his closing argument. *See Spees v. State,* 735 P.2d 571, 575-76 (improper for prosecutor to align himself with victim); *Tobler v. State,* 688 P.2d 350, 354 (improper to invoke sympathy for victim).

prosecutor nor the trial court questioned defense counsel's assertions that the prosecutor was standing immediately in front of the defendant, yelling and pointing at him, as he addressed him directly. And this Court has little doubt that these theatrics continued, perhaps increasing in intensity, each time the trial court refused to limit or prevent them. Despite the bench conferences, the jury could not have missed the fact that defense counsel was objecting to the confrontational and disrespectful way the prosecutor was addressing the defendant, or the fact that the trial court was adamantly allowing, if not condoning, this behavior.

We conclude that the manner in which the prosecutor presented his closing argument – yelling and pointing at the defendant as he addressed him directly – was highly improper and potentially prejudicial. There can be little doubt that the content and presentation of this closing argument was carefully calculated to inflame the passions and prejudices of Mitchell's jury. The prosecutor's conduct allowed him – perhaps more forcefully than words alone could do – to express the utter contempt and disdain that he personally felt toward the defendant and his crime. This Court concludes that prosecutors should not be allowed to do through their actions and demeanor what we have expressly forbidden them to do with their words, namely, assert their personal opinion about the defendant or the crime. While we continue to recognize the "liberal freedom of speech" that is appropriate to closing argument, we also recognize that this freedom, like most, remains constrained by the rights of others, including the right to due process and to a reliable capital sentencing.

Perhaps even more disturbing than the behavior of the prosecutor is the trial court's repeated refusal to in any way constrain or condemn this behavior. * * * Trial judges are responsible for protecting and upholding the honor, dignity, and integrity of the proceedings held before them. They are not powerless to control the bad behavior of the parties and attorneys who come before them; nor must they await a specific ruling from an appellate court in order to find a particular behavior improper.[220] * * *

This Court finds that the prosecutor in this case committed serious and potentially prejudicial misconduct. * * *

Due to this and other errors, Mitchell's death sentence was reversed and the case remanded to the trial court with instructions to reassign it to another judge. C. Johnson and Lewis, JJ., concured. Lumpkin, Vice Presiding Judge, and S. Taylor (sitting by designation in lieu of A. Johnson, J., who was recused) concurred in the results.

The U.S. Constitutional Standard

The Supreme Court held in *Griffin v. California*, 380 U.S. 609 (1965), that a prosecutor's comments on the defendant's failure to testify at trial violated the privilege against compulsory self-incrimination and required reversal.

The Court held that a prosecutor's improper arguments did not render a trial fundamentally unfair and reversed a grant of habeas corpus relief in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). At DeChristoforo's trial, the prosecutor expressed his personal opinion as to DeChristoforo's guilt and argued that, although the defense lawyer had urged the jury to return a verdict of not guilty, the defense actually hoped the jury would find DeChristoforo guilty of a lesser offense. The state court, the Supreme Judicial Court of Massachusetts, found both comments improper, but held that the first did not violate due process and the second was cured by the trial court's instruction to the jury to disregard it.

The United States Court of Appeals for the

220. Although this Court has not, for example, specifically ruled that prosecutors cannot spit on defendants, surely most trial courts could reasonably infer that such behavior is impermissible.

Second Circuit reversed the federal district court's denial of habeas corpus relief, holding that the argument violated due process. The Supreme Court reversed in an opinion by Justice Rehnquist, holding there was no due process violation because "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" 416 U.S., at 642 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Justice Douglas dissented, expressing the view that there had been a due process violation and commenting, "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."

The Court vacated a death sentence where a prosecutor urged the jury not to view itself as finally determining whether petitioner would die, because a death sentence would be reviewed for correctness by the Mississippi Supreme Court. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Court, in an opinion by Justice Marshall, held that the argument diminished jurors' sense of responsibility for imposing a death sentence in violation of Eighth Amendment's heightened need for reliability in the determination that death is the appropriate punishment.

Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented, expressing the view that the comments of the prosecutor did not amount to constitutional error because, "[d]uring the course of a heated trial prosecutors may make many statements that stray from debating society rules as to relevancy, but the ultimate inquiry must be whether the statements rendered the proceedings as a whole fundamentally unfair."

Willie Jasper DARDEN, Petitioner
v.
Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections.

Supreme Court of the United States
477 U.S. 168, 106 S.Ct. 2464 (1986)

Powell, J., delivered the opinion of the Court. BLACKMUN, J., filed a dissenting opinion in which Brennan, Marshall, and Stevens, JJ., joined.

Justice POWELL delivered the opinion of the Court.

This case [concerns] * * * whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment. * * *

I

Petitioner was tried and found guilty of murder, robbery, and assault with intent to kill in the Circuit Court for Citrus County, Florida, in January 1974. Pursuant to Florida's capital sentencing statute, the same jury that convicted petitioner heard further testimony and argument in order to make a nonbinding recommendation as to whether a death sentence should be imposed. The jury recommended a death sentence, and the trial judge followed that recommendation. On direct appeal, the Florida Supreme Court affirmed the conviction and the sentence. * * *

* * *

II

* * * On September 8, 1973, at about 5:30 p.m., a black adult male entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman * * *

* * * When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money,

then ordered her to the part of the store where some box springs and mattresses were stacked against the wall. At that time Mr. Turman appeared at the back door. Mrs. Turman screamed while the man reached across her right shoulder and shot Mr. Turman between the eyes. * * *

* * * [The man attempted to force Mrs. Turman to perform oral sex on him, but was interrupted by a 16-year old part-time employee, Phillip Arnold, at the store. The man attempted to shoot Phillip, but the gun first misfired; he then shot Phillip three times, twice as he was fleeing. Phillip survived the incident; Mr. Turman died later that night.]

* * *

On the day following the murder petitioner was arrested at his girl friend's house in Tampa. A few days later Mrs. Turman identified him at a preliminary hearing as her husband's murderer. Phillip Arnold selected petitioner's picture out of a spread of six photographs as the man who had shot him.

* * *

IV

* * *

* * * Closing argument came at the end of several days of trial. Because of a state procedural rule petitioner's counsel had the opportunity to present the initial summation as well as a rebuttal to the prosecutors' closing arguments. The prosecutors' comments must be evaluated in light of the defense argument that preceded it, which blamed the Polk County Sheriff's Office for a lack of evidence, alluded to the death penalty, characterized the perpetrator of the crimes as an "animal," and contained counsel's personal opinion of the strength of the State's evidence.

The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred. Some comments implied that the death penalty would be the only guarantee against a future similar act.[10] Others incorporated the defense's use of the word "animal."[11] Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case.[12] These comments undoubtedly were improper. But * * * it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). * * *

* * * [T]he comments] did not deprive

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10. "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. 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 the people that turned him loose."

11. "As far as I am concerned, and as Mr. Maloney said as he identified this man this person, as an animal, this animal was on the public for one reason."

12. "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." "I wish someone had walked in the back door and blown his head off at that point." "He fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself." "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." "[D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat." After this, the last in a series of such comments, defense counsel objected for the first time.

petitioner of a fair trial. The prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. [T]he idea of "invited response" is used not to excuse improper comments, but to determine their effect on the trial as a whole. The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The * * * "overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges," reduced the likelihood that the jury's decision was influenced by argument. * * * Defense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner. For these reasons, we agree with the District Court below that "Darden's trial was not perfect – few are – but neither was it fundamentally unfair."

* * *

Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

* * * Today's opinion * * * reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

I

A

The Court's discussion * * * entirely ignores standards governing the professional responsibility of prosecutors in reaching the conclusion that the summations of Darden's prosecutors did not deprive him of a fair trial.

The prosecutors' remarks in this case reflect behavior as to which "virtually all the sources speak with one voice," that is, a voice of strong condemnation. The following brief comparison of established standards of prosecutorial conduct with the prosecutors' behavior in this case merely illustrates, but hardly exhausts, the scope of the misconduct involved:

1. "A lawyer shall not . . . state a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused." Yet one prosecutor stated: "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." And the other prosecutor stated, with respect to Darden's testimony: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out."

2. "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." Yet McDaniel's argument was filled with references to Darden's status as a prisoner on furlough who "shouldn't be out of his cell unless he has a leash on him." Again and again, he sought to put on trial an absent "defendant," the State Department of Corrections that had furloughed Darden. He also implied that defense counsel would use improper tricks to deflect the jury from the real issue. Darden's status as a furloughed prisoner, the release policies of the Department of Corrections, and his counsel's anticipated tactics obviously had no legal relevance to the question the jury was being asked to decide: whether he had committed the robbery and murder at the Turmans' furniture store. Indeed, the State argued before this Court that McDaniel's remarks were harmless precisely because he "failed to discuss the issues, the weight of the evidence, or the credibility of the witnesses."

3. "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." Yet McDaniel repeatedly expressed a wish "that I could see [Darden] sitting here with no face, blown away by a shotgun." Indeed, I do not think McDaniel's summation, taken as a whole, can accurately be described as anything but a relentless and single-minded attempt to inflame the jury.

B

* * *

* * * Almost every page [of the transcript of the closing argument] contains at least one offensive or improper statement; some pages contain little else. The misconduct here was not "slight or confined to a single instance, but . . . was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

C

* * *

* * * I simply do not believe the evidence in this case was so overwhelming that this Court can conclude, on the basis of the written record before it, that the jury's verdict was not the product of the prosecutors' misconduct. The three most damaging pieces of evidence – the identifications of Darden by Phillip Arnold and Helen Turman and the ballistics evidence – are all sufficiently problematic that they leave me unconvinced that a jury not exposed to McDaniel's egregious summation would necessarily have convicted Darden.

* * *

Darden testified at trial on his own behalf and denied any involvement in the robbery and murder. * * * The trial judge who had seen and heard Darden testify found that he "emotionally and with what appeared on its face to be sincerity, proclaimed his innocence." In setting sentence, he viewed the fact that Darden "repeatedly professed his complete innocence of the charges" as a mitigating factor.

Thus, at bottom, this case rests on the jury's determination of the credibility of three witnesses – Helen Turman and Phillip Arnold, on the one side, and Willie Darden, on the other. I cannot conclude that McDaniel's sustained assault on Darden's very humanity did not affect the jury's ability to judge the credibility question on the real evidence before it. Because I believe that he did not have a trial that was fair, I would reverse Darden's conviction; I would not allow him to go to his death until he has been convicted at a fair trial.

* * *

III

Twice during the past year * * * this Court has been faced with clearly improper prosecutorial misconduct during summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:

> This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. * * * If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial. Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court – recalling the bitter tear shed by the Walrus as he ate the oysters – breeds a deplorably cynical attitude

towards the judiciary.

I believe this Court must do more than wring its hands when a State uses improper legal standards to select juries in capital cases and permits prosecutors to pervert the adversary process. I therefore dissent.

Florida executed Willie Jasper Darden by electrocution on March 15, 1988.

Note

In addition to the foregoing quotation of Judge Jerome Frank by Justice Blackmun, Judge Frank said the following in his dissent in *United States v. Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir. 1946), with regard to the practice of courts using "vigorous language in denouncing government counsel" for misconduct in closing argument, but nevertheless upholding convictions:

> * * * If government counsel in a criminal suit is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent. He should not be permitted to summon that thirteenth juror, prejudice. * * * When the government puts a citizen to the hazards of a criminal jury trial, a government attorney should not be allowed to increase those hazards unfairly. When * * * such an attorney has done so, * * * it is our duty to give these defendants another trial.
>
> * * * [R]eversal in a case like this might well serve as a deterrent: If it became known that misconduct of a [prosecutor] had caused the public the expense of a new trial, his resultant unpopularity might tend to make him subsequently live up to professional standards of courtroom decency. If this court really meant business about such behavior * * *, if it actually considered such behavior reprehensible, it would, at a minimum, announce that if, in any future case any government lawyer should thus conduct himself, it would deprive him of the right to practice in this court and would recommend that he be removed from his office as a representative of our government.
>
> * * *
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> A legal system is not what it says, but what it does. * * *
>
> * * *
>
> Lawyers may talk rhapsodically of JUSTICE. * * * But, in the last analysis, there is only one practical way to test puddings: If, again and again in concrete instances, courts unnecessarily take the chance of having innocent men sent to jail or put to death by the government because they have been found guilty by juries persuaded by unfair appeals to improper prejudices, then the praises of our legal system will be but beautiful verbal garlands concealing ugly practices we have not the courage, or have grown too callous, to contemplate.

155 F.2d 631, 659-663.

Jay Wesley NEILL, Plaintiff-Appellant,
v.
Gary GIBSON, Warden, Oklahoma State Penitentiary, Respondent-Appellee.

United States Court of Appeals
for the Tenth Circuit
278 F.3d 1044 (10th Cir. 2001),
cert. denied, 537 U.S. 835 (2002).

TACHA, Chief Judge.

* * *

First, the prosecutor, challenging Neill's proffered mitigating factor that he was acting under an extreme emotional disturbance when he committed these crimes because he feared losing his relationship with Johnson, noted Neill was "a vowed homosexual. He had a gay lover he didn't want to lose." The prosecutor then compared Neill's situation to the breakup of a heterosexual relationship or marriage, arguing neither situation

justified murder. These comments on Neill's homosexuality were accurate, in light of the evidence, and were relevant to both the State's case and Neill's defense theory. * * *

* * *

The prosecutor made a second comment on Neill's homosexuality:

> * * * I'd like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you're sitting in judgment on – disregard Jay Neill. You're deciding life or death on a person that's a vowed [sic] homosexual.

Defense counsel then unsuccessfully objected. * * *

The prosecutor continued

> I don't want to import to you that a person's sexual preference is an aggravating factor. It is not. But these are areas you consider whenever you determine the type of person you're setting in judgment on. . . . The individual's homosexual. He's in love with Robert Grady Johnson. He'll do anything to keep his love, anything.

There does not appear to be any legitimate justification for these remarks. They are improper. * * *

In this case, without in any way condoning the prosecutor's remarks, we cannot say that they tipped the scales of justice in the State's favor or precluded jurors from considering the evidence fairly. The State's evidence, which was largely undisputed, overwhelmingly established that, during a bank robbery, Neill stabbed three bank employees to death, including one woman who was seven months pregnant. Neill also attempted to decapitate each woman with a knife. He forced the five customers who entered the bank during the robbery to lie face down in the back room where he had stabbed the bank employees. Neill then shot four customers in the head, killing one and wounding three others, and attempted to shoot the fifth, an eighteen-month-old child. Afterwards, Neill flew to San Francisco with Johnson, where they spent the stolen money on expensive jewelry and clothing, hotels, limousines and cocaine. Except for trying to shoot the child, Neill admits committing these crimes. In addition to overwhelmingly establishing Neill's guilt, this evidence also fully supports the three charged aggravating factors: Neill created a great risk of death to more than one person; he committed these murders to avoid arrest and prosecution for the bank robbery; and the murders were especially heinous, atrocious or cruel.

Neill did present some significant mitigating evidence. He admitted committing these crimes, with the exception of trying to shoot the child, and he expressed his remorse. In addition, Neill testified at sentencing concerning his background, including his childhood medical problems, his physically abusive father and stepfather, Neill's newly found Christian faith, his relationship with Johnson, and Neill's hope that his testifying would facilitate his and the victims' healing. He also assured jurors that he would not pursue any appeals if they sentenced him to life without parole instead of death. Neill further testified that he had corresponded with one of the injured victims, who had forgiven him. And Pamela Matthews, who was the first person in the bank after the robbery and who discovered the victims, also testified concerning Neill's communications with her, his remorse, and her forgiving him.

Nevertheless, in light of the overwhelming evidence supporting Neill's guilt and the charged aggravating factors, weighed against this mitigating evidence, we cannot say that the prosecutor's improper comments influenced the jury's verdict or otherwise rendered the capital sentencing proceeding fundamentally unfair. * * *

LUCERO, Circuit Judge, dissenting.

* * *

Th[e] second set of comments, in which the

prosecutor blatantly and directly – over objection – urges the jury to consider Neill's homosexuality in weighing the aggravating and mitigating evidence during his capital sentencing proceeding, speaks for itself. It is not responsive to petitioner's mitigation claim that he "was suffering extreme mental and emotional disturbances with regard to his relationship with [Johnson] which affected his mental thought processes." * * *

But what is it that makes the comments more than merely improper? As prosecutors know, gays and lesbians are routinely subject to invidious bias in all corners of society. *See* Richard A. Posner, SEX AND REASON 291 (1992) ("The history of social policy toward homosexuals in Western culture since Christ is one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment.") * * *. Although gays and lesbians face increasing acceptance in our culture, in the eyes of many, "gay people remain second-class citizens." * * *

The openly gay defendant thus finds himself at a disadvantage from the outset of his prosecution. When a prosecutor directs the jury to make its guilt-innocence or life-death determination on the basis of anti-homosexual bias, that disadvantage is magnified exponentially and raises constitutional concerns. This is so because prosecutors occupy a position of trust, and their exhortations carry significant weight with juries. * * *

* * *

* * * Exploiting his position of trust and spinning the reality of anti-gay prejudice to a pivotal position in the capital-sentencing phase, the prosecutor undermined the possibility that petitioner's sentence would be based on reason rather than emotion. * * *

* * *

In weighing the strength of the evidence, the proper inquiry under our precedent is not whether, as the majority requires, the prosecutor's comments actually tipped the scales in the state's favor, but whether they "plausibly could have tipped the scales in favor of the prosecution." Utilizing plausibility as the central inquiry, the alternative proposition – that the prosecutor's comments tipped the scales in favor of the prosecution – is a reasonable one, especially given that a death penalty assessment requires unanimous juror approval. * * *

There is also the fact that the prosecutor's second set of comments unambiguously directed the jury to consider petitioner's homosexuality in imposing a life or death sentence. * * *

* * *

* * * The state now seeks, however, to diminish the impropriety of the remarks by claiming that "sexual orientation was relevant to the issues in the case because it was the problems arising from the relationship with Johnson that provided the motivation for the robbery and murders." * * *

* * *

* * * I reject the proposition that the subject remarks were harmless because the defendant brought up the fact of his homosexuality and gay relationship. Under "he brought it up" reasoning, a direct appeal to a jury that it consider a defendant's race would be permissible if a defendant introduced evidence of his ethnicity – or that of a partner – or if it was otherwise apparent that a defendant belonged to a particular minority group; and an appeal to consider a defendant's religion would be permissible if the defendant introduced relevant testimony about his religious persuasion – or that of a partner – or if it was otherwise apparent. * * *

* * *

* * * Remarkably, there was no curative instruction. * * * The trial court's overruling of defense counsel's objection effectively stamped an imprimatur of approval on the prosecution's comments, leaving the jury with the impression that it was acceptable to consider the fact of

defendant's homosexuality in determining whether to sentence him to life or death.

* * * Was defense counsel able to cast the prosecutor's comments in a light likely to neutralize them?

No. * * * Given the trial court's refusal to correct the subject error, defense counsel had no alternative but to sit on his hands.

* * * In the face of such a blatant due process violation, the Oklahoma Court of Criminal Appeals' decision that Neill's appellate counsel was not ineffective in failing to challenge the violation is an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). Neill's appellate counsel was deficient in failing to raise this prosecutorial misconduct claim, and Neill was prejudiced by this deficient performance. To my mind, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Oklahoma executed Jay Neill by lethal injection by on December 12, 2002.

The PEOPLE, Plaintiff and Respondent,
v.
Freddie FUIAVA, Defendant and Appellant.

Supreme Court of California.
269 P.3d 568 (Cal. 2012).

CANTIL–SAKAUYE, C.J.

After a jury trial, defendant Freddie Fuiava was convicted of the first degree murder of Los Angeles County Deputy Sheriff Stephen Blair and the premeditated attempted murder of Blair's partner, Deputy Robert Lyons. * * * The jury returned a verdict of death for the murder of Deputy Blair.

* * *

There was no dispute at trial that defendant shot and killed Deputy Blair. The evidence concerning the circumstances of the shooting, however, was conflicting. The prosecution's theory of the case was that defendant, a convicted felon who was carrying two handguns in violation of the law and the conditions of his parole, opened fire on the deputies in order to avoid being arrested and returned to prison. The defense version of the events was that Deputy Blair instigated the gunfight by shooting at an unarmed friend of defendant's, and then turned his weapon on defendant when defendant tried to intervene – and that defendant fired only at Blair (not at Deputy Lyons) in order to protect his friend and himself from Deputy Blair's attack.

* * *

[The defendant was part of a gang known as "Young Crowd." Deputy Blair was part of a group of deputies called the "Vikings."]

[A member of the Young Crowd testified that Deputy Sheriff] Blair was part of the Vikings and on one occasion he had told [the witness], "Fuck Young Crowd, this is the Vikings." * * *

Defendant testified that around the time of the shooting, there was a "big problem going on"

between Young Crowd and the sheriff's deputies, because weeks before, the deputies were threatening, beating up and harassing members of the gang. In defendant's view, the Vikings were "[j]ust a bunch of white cops that ... mess around with the homeys all the time." Defendant testified that on the day of the shooting, he and other Young Crowd members were speaking of the recent shooting of Jose Nieves by sheriff's deputies, as well as another Young Crowd member who had been shot and killed by deputies in December of 1990.

* * *

The parties stipulated that Deputy Blair had a tattoo on his leg consisting of a picture of a Viking and the letters "LXXI" above it.

* * *

Defendant raises a number of claims of asserted misconduct during the prosecutor's arguments to the jury at the close of the guilt phase of the trial. He failed to object to nearly all of these instances at trial. He urges, however, that his failure to object should be excused because repeated objections would have run the risk of alienating the jury. We are not persuaded. Defendant's proposed exception to the rule requiring contemporaneous objection would, in essence, swallow the rule that in order to preserve a claim of misconduct, the defendant must make an objection and request an admonition so that the trial court has an opportunity to attempt to alleviate the potential harm caused by the prosecutor's action.

* * *

Defendant * * * objected at trial, and was overruled, when the prosecutor referred to defendant as a "punk."[25] The prosecutor's use of the epithet in this circumstance was not misconduct, but was "founded on the evidence in the record and fell within the permissible bounds of argument." * * *

* * *

We are quite troubled by two instances of improper actions by the prosecutor that, we conclude, were not preserved for appeal. We briefly discuss here these instances of misconduct to express our disapproval of such behavior.

First, the prosecutor elicited from Deputy Lyons that he was testifying in the uniform he wore on the night of the shooting, which, in fact, still had Deputy Blair's blood on it, and that Lyons wore the uniform "because [Deputy Blair] meant a lot to me"; it "was the last time that I saw him," after which Deputy Lyons apparently briefly wept. During closing argument, the prosecutor reminded the jury of Deputy Lyons's emotional moment on the stand by stating that Deputy Lyons "stood up here and bared his soul to you. There was no holding back. [¶] Do you think he wanted to cry up here? Do you think it made him feel good in front of his fellow co-workers? [¶] These guys don't wear their emotions on their sleeve. They are very deep inside. They can't let their emotions come out." By presenting this witness to the jury in his bloodstained uniform and eliciting the deputy's emotional testimony, the prosecutor improperly engaged in inflammatory conduct that appealed to the passions of the jury. Further, in reminding the jury of this aspect of Deputy Lyons's testimony during argument, the prosecutor exceeded the permissible bounds of commenting on Lyons's demeanor while testifying as an indication of his sincerity by improperly referring to facts not in evidence concerning what Deputy Lyons felt about his emotional breakdown, and how law enforcement officers in general deal with their emotions. * * *

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25. Defense counsel made an objection while the prosecutor was in the middle of telling the jury, "When we allow punks like this ... to roam the street, terrible things happen." Defense counsel did not state a specific ground for the objection. The trial court overruled the objection, stating, "It's argument." The prosecutor soon thereafter rhetorically asked, "Do you think this punk had any respect for the law?"

Second, during his closing arguments, after discussing the basic dispute in the case – whether "Deputy Blair fired on an unarmed gang member because he [Blair] is a Viking or it didn't happen" – the prosecutor continued, " * * * if I am worthy enough – I actually asked permission before doing this – I am going to become a Viking. [¶] You see what this is? It's just a pin. [¶] . . . [¶] A triangle and a Viking." The prosecutor then affixed the pin to the lapel of his suit coat. The prosecutor's act of – in his own words – literally "becom[ing] a Viking" in front of the jury constituted improper "vouching" in several ways. * * *[26] The prosecutor essentially gave unsworn testimony that the Vikings were not a group of rogue deputies as the defense suggested, but were, instead, simply anyone who (with the deputies' permission) wore a Viking pin in solidarity with the deputies. Further, the prosecutor placed his own prestige and the prestige of his office behind the Vikings, and in so doing, improperly interjected into the trial his personal view of the credibility of the heart of the defense case. Indeed, the prosecutor's comments that he had "asked permission" to become a Viking, and, nonetheless, wondered if he was "worthy" of doing so, implied to the jury that the status of the prosecutor and his office actually was less than that of the Vikings. In addition, the prosecutor's act implicitly * * * suggest[ed] that because the other members of the Vikings (including, now, the prosecutor himself) would act only honorably, Deputy Blair also would have acted honorably. Having successfully opposed the admission of defense evidence regarding the Vikings' and other deputies' bad reputations, the prosecutor should not have sought to interject what amounted to equally immaterial evidence of the Vikings' good reputation.

26. Contrary to defendant's assertions on appeal, defense counsel did not object to the prosecutor's donning the Viking pin as constituting improper vouching. Defense counsel objected to the prosecutor's argument solely on the ground that there had been no testimony regarding the significance of the pin, and did not object to the prosecutor's continuing to wear the pin in keeping with the trial court's direction not to discuss its significance.

* * *

Defendant contends the prosecutor committed prejudicial misconduct during the penalty phase of the trial. Based upon our reading of defendant's appellate briefs, we conclude he forfeited the large majority his claims of misconduct by failing either to object or to request appropriate admonitions at trial and by failing to adequately raise them on appeal. To the extent defendant relies simply on the number of asserted instances of misconduct he has raised on appeal to demonstrate that any objections would have been futile and that therefore his failure to preserve his claims during the trial should be excused, such reliance is misplaced. The prevalence of asserted misconduct raised for the first time on appeal cannot establish that, had defense counsel made proper objections at trial, the trial court would have consistently overruled those objections, the prosecutor would have persisted in engaging in the asserted misconduct, or the jury would have been alienated by defendant's bringing the prosecutor's asserted improprieties to the court's attention. * * * Similarly unpersuasive is defendant's blanket assertion that admonitions would not have been effective in curing any possible prejudice. Defendant's suggestion that we are required to review his forfeited claims of prosecutorial misconduct for "plain error" also is without merit.

To the extent, however, defendant at least partially preserved two particular claims of misconduct regarding the prosecutor's closing argument to the jury, we conclude neither instance constituted prejudicial misconduct. First, defendant observes that, in arguing that the jurors should not let their "religious convictions save [defendant's] life," the prosecutor reminded the jury of the adage in the King James version of Genesis 9:6: "Whoso sheddeth man's blood by man shall his blood be shed for in the image of God made He man." We agree that the prosecutor's use of this adage, even taken in context, exceeded an acceptable comment that religious doctrine would not prohibit the jury from imposing the death penalty if that verdict was

appropriate under the law, and instead encouraged it to rely on the Bible as justification for imposing that punishment. * * * Nonetheless, defendant objected to the prosecutor's comment and the trial court sustained the objection and advised the jury, "I'm going to strike that last argument, ladies and gentlemen. We are not going to be referring to the Bible." The misconduct therefore was not prejudicial. To the extent defendant contends on appeal that the trial court's admonition was insufficient, he forfeited such a claim by failing to request a different admonition.

Second, defendant asserts the prosecutor committed an improper act of "vouching" when he drew the jury's attention to the absence of testimony from defendant's wife, Tina Fuiava. Although the trial court overruled defendant's nonspecific "improper argument" objection to the prosecutor's initial comments on the failure of the defense to call Tina as a witness, it sustained defendant's objection to the subsequent suggestion that the failure to call her might have been because "they are afraid that they couldn't argue lingering doubt when I asked her what he told her." As with the prosecutor's biblical reference, we deem the trial court's action sufficient to have prevented prejudice, and to the extent defendant contends the court's admonition was insufficient, he forfeited that claim.

As with our discussion of defendant's claims of guilt phase prosecutorial misconduct, we take this opportunity to comment on an aspect of the prosecutor's penalty phase closing argument that, although forfeited as a basis for reversal on appeal, warrants condemnation. In two instances the prosecutor improperly suggested to the jury that it speculate regarding aspects of defendant's violent criminal history that were not presented at the trial – by describing defendant as a "killing machine" (although there was no evidence that defendant had killed anyone other than Deputy Blair), and then, with regard to defendant's victims, asking that the jury speculate "How many others are there?" (*See People v. Yeoman* 72 P.3d 1166 (Cal. 2003) ("[c]ertainly a prosecutor should not invite the jury to speculate"); *People v. Bolton* 589 P.2d 396 (1979) (the prosecutor engaged in misconduct by "invit[ing] the jury to speculate about – and possibly base a verdict upon – 'evidence' never presented at trial").)

* * *

[The conviction and death sentence were upheld.]

Bongani Charles CALHOUN
v.
UNITED STATES.

Supreme Court of the United States
133 S.Ct. 1136 (2013).

The petition for a writ of certiorari is denied.

Statement of **Justice SOTOMAYOR**, with whom Justice BREYER joins, respecting the denial of the petition for writ of certiorari.

I write to dispel any doubt whether the Court's denial of certiorari should be understood to signal our tolerance of a federal prosecutor's racially charged remark. It should not.

Petitioner Bongani Charles Calhoun stood trial in a federal court in Texas for participating in a drug conspiracy. The primary issue was whether Calhoun knew that the friend he had accompanied on a road trip, along with the friend's associates, were about to engage in a drug transaction, or whether instead Calhoun was merely present during the group's drive home, when the others attempted to purchase cocaine from undercover Drug Enforcement Agency (DEA) agents. * * * It was up to the jurors to decide whom they believed.

The issue of Calhoun's intent came to a head when the prosecutor cross-examined him. Calhoun related that the night before the arrest, he had detached himself from the group when his friend arrived at their hotel room with a bag of money. He stated that he "didn't know" what was happening, and that it "made me think . . . [t]hat I didn't want to be there." (Calhoun had previously testified that he rejoined the group the next

morning because he thought they were finally returning home.) The prosecutor pressed Calhoun repeatedly to explain why he did not want to be in the hotel room. Eventually, the District Judge told the prosecutor to move on. That is when the prosecutor asked, "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you – a light bulb doesn't go off in your head and say, This is a drug deal?"

Calhoun, who is African-American, claims that the prosecutor's racially charged question violated his constitutional rights. Inexplicably, however, Calhoun's counsel did not object to the question at trial. So Calhoun's challenge comes to us on plain-error review, under which he would ordinarily have to "demonstrate that [the error] 'affected the outcome of the district court proceedings.'" *Puckett v. United States*, 556 U.S. 129, 135, 129 (2009) (quoting *United States v. Olano,* 507 U.S. 725, 734 (1993)). Yet in his petition for writ of certiorari, Calhoun does not attempt to make that showing. Instead, Calhoun contends that the comment should lead to automatic reversal because it constitutes either structural error or plain error regardless of whether it prejudiced the outcome. Those arguments, however, were forfeited when Calhoun failed to press them on appeal to the Fifth Circuit. Given this posture, and the unusual way in which this case has been litigated, I do not disagree with the Court's decision to deny the petition.[1]

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1. The prosecutor's comment was not an isolated one, but Calhoun similarly failed to challenge the reprise. During defense counsel's closing argument, counsel belatedly criticized the prosecutor's question. On rebuttal, the prosecutor responded: "I got accused by [defense counsel] of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Okay, you got African-American[s] and Hispanics, do you think it's a drug deal? But there's one element that's missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [magnates]? None of them are real estate investors."

There is no doubt, however, that the prosecutor's question never should have been posed. * * * Such argumentation is an affront to the Constitution's guarantee of equal protection of the laws. And by threatening to cultivate bias in the jury, it equally offends the defendant's right to an impartial jury. * * * Thus it is a settled professional standard that a "prosecutor should not make arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3–5.8(c), p. 106 (3d ed.1993).

By suggesting that race should play a role in establishing a defendant's criminal intent, the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation. There was a time when appeals to race were not uncommon, when a prosecutor might direct a jury to "'consider the fact that Mary Sue Rowe is a young white woman and that this defendant is a black man for the purpose of determining his intent at the time he entered Mrs. Rowe's home,'" *Holland v. State,* 22 So.2d 519, 520 (1945), or assure a jury that " 'I am well enough acquainted with this class of niggers to know that they have got it in for the [white] race in their heart,'" *Taylor v. State,* 100 S.W. 393 (Tex. Crim. 1907). The prosecutor's comment here was surely less extreme. But it too was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason.

It is deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century. Such conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice. In discharging the duties of his office in this case, the Assistant United States Attorney for the Western District of Texas missed the mark.

Also troubling are the Government's actions on appeal. Before the Fifth Circuit, the Government failed to recognize the wrongfulness of the

prosecutor's question, instead calling it only "impolitic" and arguing that "even assuming the question crossed the line," it did not prejudice the outcome. This prompted Judge Haynes to "clear up any confusion – the question crossed the line." 478 Fed.Appx. 193, 196 (C.A.5 2012) (concurring opinion). In this Court, the Solicitor General has more appropriately conceded that the "prosecutor's racial remark was unquestionably improper." Yet this belated acknowledgment came only after the Solicitor General waived the Government's response to the petition at first, leaving the Court to direct a response.

I hope never to see a case like this again.