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## Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury

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# OKLAHOMA LAW REVIEW

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## CATALYZING MORE ADEQUATE FEDERAL HABEAS REVIEW OF SUMMATION MISCONDUCT: PERSUASION THEORY AND THE SIXTH AMENDMENT RIGHT TO AN UNBIASED JURY

RYAN PATRICK ALFORD\*

### *I. Introduction*

*The prosecutor is not a witness; and he should not be permitted to add to the record either by subtle or gross improprieties. . . .*

*. . . [Federal habeas corpus] is a built-in restraint on judges — both state and federal; and it is also a restraint on prosecutors who are officers of the court. . . . Prosecutors are often eager to take almost any shortcut to win, yet as I have said they represent not an ordinary party but We the People.<sup>1</sup>*

The great writ of habeas corpus is sparingly granted when appellants raise claims related to prosecutor's alleged summation misconduct.<sup>2</sup> Prosecutors routinely engage in unseemly arguments during summation, including using invective against defendants and their counsel so as to arouse hatred against them, and making emotionally manipulative arguments that implicitly argue

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1. *Donnelly v. DeChristoforo*, 416 U.S. 637, 650-51 (1974) (Douglas, J., dissenting).

2. See ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 17 (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fhrcscsc.pdf> (showing that in a large sample of federal habeas petitions, the writ was granted on the merits in less than one percent of the cases surveyed).

that the jury must convict the defendant to do justice to a pitiful victim deserving of sympathy.<sup>3</sup> Only the most egregious instances of the introduction of prejudicial and irrelevant lines of argument receive serious consideration by federal courts. The reasoning applied to these extreme cases is instructive, however, and reveals much about the ambivalent attitudes of federal courts when addressing an issue that appears subjective and difficult to resolve. A sample case study provides the best introduction to this problem.

In 2004, the Federal District Court for the Central District of California granted Tak Sun Tan's petition for a writ of habeas corpus.<sup>4</sup> Tan had been convicted of murdering Haing S. Ngor, a legendary figure in Los Angeles's Cambodian community.<sup>5</sup> Ngor was the only Cambodian celebrity whose fame transcended linguistic and ethnic boundaries and who had been recognized as an American hero. Ngor had starred in and received an Academy Award for his semi-autobiographical portrayal of a Cambodian doctor in *The Killing Fields*.<sup>6</sup> Later in life, he cofounded two major relief agencies.<sup>7</sup>

Despite being marginally related to his murder, the details of Ngor's life in Khmer Rouge concentration camp and the death of his wife and immediate relatives was introduced by the prosecution in its closing arguments by means of a theory of the case that was unsupported by the evidence, but likely to evoke a prejudicial emotional response.<sup>8</sup> Although there were no witnesses to the crime, the prosecution surmised in its opening statement that Ngor had been slain because he failed to turn over to his murderers a gold locket containing the "only remaining picture" of his deceased wife.<sup>9</sup> Ngor's wife had perished in Cambodia during childbirth; although Ngor was a trained obstetrician, he could not use his medical training to save her or the baby's life for fear of revealing himself as a doctor, and thereby marking himself for death as one of the "intellectuals" deemed enemies of the Khmer state.<sup>10</sup>

The defense had offered evidence that Ngor had always worn the locket underneath his shirt, arguing that it was far more likely the locket had been discovered in a search that took place after he was shot than being the reason for the fatal shooting.<sup>11</sup> The large locket was made of twenty-four-karat gold

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3. *See infra* Part II.

4. *Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1111 (9th Cir. 2005).

5. *Id.* at 1103.

6. *Id.* *See generally* THE KILLING FIELDS (Warner Bros. 1984).

7. Martin Wroe, *Ngor: Killed by Enemies?*, PITTSBURGH POST-GAZETTE, Feb. 28, 1996, at D5.

8. *Tak Sun Tan*, 413 F.3d at 1104-05.

9. *Id.*

10. *Id.* at 1104.

11. Appellees' Joint Brief at 21 & n.11, *Tak Sun Tan*, 413 F.3d 1101 (Nos. 04-55775, 04-55792, 04-55815).

and worth thousands of dollars.<sup>12</sup> Nevertheless, the court allowed the prosecution to argue a theory that was unsupported by the evidence but which permitted highly prejudicial and emotionally charged suggestions about why the locket had great sentimental value to Ngor, an issue that was, at best, clearly tangential to the case against the defendants.<sup>13</sup> In summation, the prosecution argued:

While Dr. Ngor stood helplessly by, his wife and their unborn baby died.

....

Now, you may be saying to yourself, that's incredibly tragic, but what does that have to do with this murder case? I'll tell you, because the tragedy didn't end there.

After his wife died, Dr. Ngor managed to save the only picture of her, a photograph from her identification card. He kept that photo with him through all the hardship he continued to endure. . . .

Dr. Ngor's wife's picture was always with him. And ultimately this picture, this photo that meant more to Dr. Ngor than life itself, is why he died. Dr. Haing Ngor died, Dr. Haing Ngor was murdered, when he refused to surrender his wife's picture to these three gang members.

....

. . . Dr. Haing Ngor, who survived so much hardship, who survived torture, who survived the death of his wife and their unborn child, who survived the killing fields of Cambodia where a million of his fellow countrymen died, Dr. Ngor dies on the cold pavement of a carport . . . .

....

They killed him because he would not give up the one thing that was most precious to him, the one thing that meant more to him than anything else in his life, and that was his locket with the picture of his wife.

....

. . . They can have his watch but they can't have his locket. And so the defendant kills him.<sup>14</sup>

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12. *Tak Sun Tan*, 413 F.3d at 1107.

13. *See id.* at 1106-08 (introducing the testimony of Dr. Ngor's niece regarding the sentimentality of the locket).

14. Final Report and Recommendation of the United States Magistrate Judge at 23-27, *Tak Sun Tan v. Runnels*, No. CV 01-4281-MMM (C.D. Cal. Apr. 14, 2004) (Walsh, Mag. J.) [hereinafter Magistrate Report].

The problem was that “none of the evidence reasonably support[ed] the inference that Dr. Ngor willingly gave up his watch but refused to part with the necklace and locket or that he did so because he was defending his late wife’s only remaining photograph.”<sup>15</sup> Through cross-examining a detective, the defense had established that Ngor possessed a large framed photograph of his deceased wife in his apartment, and that Ngor had made a negative of the identification photograph inside the locket, which would allow him to make copies.<sup>16</sup> As Tak Sun Tan and his copetitioner’s argued on appeal of the grant of the writ:

In summary, the claim that the locket contained the only picture of Ngor’s wife was simply false. The claim that Ngor struggled for the locket was nothing more than speculation.

Thus, a falsehood — the only picture — served as a premise for arguing facts not in evidence — the motive for a struggle for which there was no basis in logic.

The falsehood about the watch and the fictionalization of the struggle gave rise to the next form of misconduct — appeals to sympathy.<sup>17</sup>

On the basis of the prosecutorial misconduct in summation, the magistrate judge recommended that the district court issue the writ, and ordered that Tan be retried or released.<sup>18</sup> The district court endorsed the report, but stayed the ruling pending the appeal.<sup>19</sup>

The Court of Appeals for the Ninth Circuit disagreed. The panel reversed and remanded with instructions to enter judgment in favor of the respondents.<sup>20</sup> The court reasoned that the prosecution’s theory was not mere speculation and that any prejudice to the petitioner would have been cured by the trial court’s limiting instructions: “Despite the petitioners’ contention to the contrary, this is not an ‘extraordinary situation[]’ where we can lay aside the ‘crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.’”<sup>21</sup>

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15. *Id.* at 32.

16. *Id.* at 33.

17. Appellees’ Joint Brief, *supra* note 11, at 17.

18. Magistrate Report, *supra* note 14, at 51.

19. Order Granting Respondent’s Application for Stay Pending Appeal, *Tak Sun Tan*, No. CV 01-4281-MMM (C.D. Cal. Filed May 24, 2004) (Morrow, J.).

20. *Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1118 (9th Cir. 2005).

21. *Id.* at 1115 (alteration in original) (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985)).

The *Tak Sun Tan* case casts the problems raised by claims of prosecutorial misconduct in summation into sharp relief. In particular, the case demonstrates how unclear the line between speculation and a reasonable inference from the facts is, and what an “extraordinary situation” in which limiting instructions should be deemed ineffective would look like. With the help of communication theory (in particular, the subdiscipline of persuasion theory), this Article will answer these questions.

With most issues, the key problem facing habeas petitioners seeking federal review is that their claims of error have been procedurally defaulted by not being raised below or have been barred by state court decisions based on state law.<sup>22</sup> These screening procedures, most of which Congress enacted as part of the Antiterrorism and Effective Death Penalty Act,<sup>23</sup> operate as a trap for the unwary. Nevertheless, a different sort of barrier is raised when even the best appellate advocates collaterally attack state convictions on the grounds of inflammatory and marginally relevant evidence. When this issue is raised, courts seemingly have an aversion to grappling with the difficult problems that accompany the issue. Many courts seem to look for reasons not to decide the claim on the merits,<sup>24</sup> and even when the issue is reached, courts may rely on what the dissenters in *Darden v. Wainwright* called “an entirely unpersuasive one-page laundry list of reasons for ignoring this blatant misconduct.”<sup>25</sup>

This Article takes the position that aversion to the claim of error of summation misconduct is not primarily ideological. Rather, the threat of grappling with troubling questions about the proper role of emotion in the trial process and the limits of oratorical persuasion within a criminal trial cause this aversion. This conclusion is borne out by the fact that courts have not been reticent to address on habeas review the remarks of prosecutors that implicate specific constitutional rights, such as the right to remain silent.<sup>26</sup> Because questions related to well-defined specific constitutional rights can be resolved by reference to legal scholarship alone, and require no reference to the theories of communications scholars or other interdisciplinary researchers, these issues have been addressed far more effectively.

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22. See 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 6.2, at 318-19 (5th ed. 2005).

23. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered titles of U.S.C.).

24. See *infra* Part III.B.

25. *Darden v. Wainwright*, 477 U.S. 168, 194 (1986) (Blackmun, J., dissenting).

26. See, e.g., *Portuando v. Agard*, 529 U.S. 61 (2000).

The question of where to draw the outside limits of emotionally freighted arguments that threaten to inflame the passions of jurors against the defendant is one that requires reference to persuasion theory, the field of social scientific enquiry into how attitudes are formed and changed by conscious attempts to refine the techniques of influence. The reluctance of the federal judiciary to address this issue may be due in part to a feeling that courts lack the institutional competence to do so. Nonetheless, legal scholars familiar with the work of persuasion theorists can add to the court's institutional competence by supplementing the pool of jurisprudence from which the courts draw their sustenance. Law review articles that promote an interdisciplinary turn to communication research (including persuasion research) may stimulate the confidence of the federal courts to address this issue on habeas review. This Article posits that a dialogue between communications scholars and jurists is essential to determining the proper bounds of the techniques of persuasion in the courtroom, and to evaluating when arguments that cross these lines should be considered so fundamentally unfair as to call into question whether the trial did not comport with the minimum guarantees of due process.

By considering how persuasion theory can shed light on the issue of improperly manipulative attempts to persuade jurors, this Article will hopefully provide guidance to jurists considering whether prosecutorial misconduct of this type is sufficiently egregious to warrant issuance of the great writ. In particular, the model of persuasion and attitude change developed by persuasion theorists can provide a solid basis for drawing the line between what is prejudicial and what is harmless, so that decisions concerning prosecutorial misconduct can be made in a more objective and transparent manner.

Parts II and III of this Article explains why habeas corpus review is the best forum for effective consideration of claims of prosecutorial misconduct. In particular, Part II demonstrates that state appellate courts lack the necessary institutional competence to address summation misconduct, citing three pertinent examples of dysfunctional state court systems. These examples illustrate the disparate reasons why state appellate courts do not effectively curtail prosecutors' systematic abuses.

Part III then discusses the emergence of the current framework for considering claims of error related to inflammatory evidence, and demonstrate why this framework preserves the two difficult questions of demonstrating prejudice and incurability. Part III.A illustrates why the constricted federal habeas review of summation misconduct in state criminal trials prevents the Fourteenth Amendment from fulfilling its promise. This failure largely results from the unfavorable development of jurisprudence after the Supreme Court's decision in *Darden v. Wainwright*, which is an often-overlooked yet critical

case. Part III.B reveals, however, that the federal courts' problems addressing summation misconduct are not merely due to Supreme Court precedent, but are related to the fact that drawing a line between mundane and extreme examples of summation misconduct calls for interdisciplinary skills that jurists rarely possess. Part III.C discusses how this lack of understanding of the fundamental characteristics of inflammatory summations has led to a problematic approach to the harmless error analysis of claims of summation misconduct. Part III.D then proposes that the way forward to a reformed jurisprudence addressing inflammatory summations requires reframing the issue to implicate the specifically enumerated Sixth Amendment right to an unbiased jury, rather than the right to a trial that comports with the general guarantees of due process.

Part IV draws upon communication research from the subdiscipline of persuasion theory to yield insight into the reformulation of the issue of inflammatory summations. Parts IV.A, IV.B, and IV.C use the insights of persuasion researchers and cognitive scientists to show that the Sixth Amendment test, which applies to claims that the right to an unbiased jury was implicated by prejudicial pretrial publicity, provides a more rational framework for conceptualizing the prejudice caused by inflammatory summations. Part IV.D indicates how those interested in catalyzing the doctrinal reform proposed here — related to how inflammatory summations are analyzed on federal habeas review — can draw upon persuasion theory when making arguments in favor of a new approach. Part V concludes and reiterates why simple justice requires that we take this issue seriously and catalyze this change.

## *II. State Courts Lack the Necessary Institutional Competence to Tackle Prosecutorial Misconduct*

State appellate courts have failed to adequately address prosecutorial misconduct. In his groundbreaking study of prosecutorial misconduct at trial, Albert W. Alschuler demonstrated that the practice of making prejudicial comments about defendants during criminal trials was widespread but, despite being widely practiced, was largely ignored when raised on appeal.<sup>27</sup> In part, the lack of sympathy towards appellant's claims of prosecutorial misconduct at trial is a function of the widespread perception that the defendant was plainly guilty.<sup>28</sup> Learned Hand took the position in 1939 that reversal of a conviction would be a disproportionate response to the wrongdoing of the

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27. Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 644 (1972).

28. *See id.* at 645.



prosecutor when the defendant was obviously guilty.<sup>29</sup> This position has become enshrined in the form of the harmless error test, which is discussed at length below.<sup>30</sup> Despite motivating a legal test, however, the perception that a convicted defendant is plainly guilty appears to have flourished as an extralogical consideration in the minds of judges when considering claims of error related to prosecutorial misconduct.

Alschuler noted that there was no clear way for courts to determine if prejudicial remarks had any effect on the jury, or whether they were expunged from the jurors' minds after a curative instruction was issued.<sup>31</sup> Consequently, the courts' approach to this type of claim of error was largely ad hoc.<sup>32</sup> Despite the emergence of a doctrinally fixed harmless error test, the "threshold of error [was] set too low."<sup>33</sup> Today, it is still highly probable that a court will find prejudicial remarks by the prosecutor that have no basis in the evidence to be harmless.<sup>34</sup> Despite the appellate courts increasing attention to the due process rights of criminal defendants, the reversal rate on claims of error related to prosecutorial remarks that are irrelevant and prejudicial has remained minimal.<sup>35</sup>

Appellate courts generally focus their attention on the details of the case before them, rather than systematic problems in the administration of justice, such as the need to deter prosecutors (especially as a class) from engaging in misconduct. Consequently, they rarely reverse convictions to deter a district attorney's office from engaging in prosecutorial misconduct, despite the fact that they routinely do so in order to shape the conduct of the police force.<sup>36</sup> Warrantless searches, forced confessions, and other police practices have merited reversal to deter the police from engaging in these actions.<sup>37</sup> Nonetheless, appellate courts have ignored the parallel between these types of conduct and improper comments by prosecutors at trial. Appellate courts have clearly recognized the harm. The Supreme Court has described prejudicial

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29. *United States v. Lotsch*, 102 F.2d 35, 37 (2d Cir. 1939).

30. *See infra* Part III.A.

31. Alschuler, *supra* note 27, at 638.

32. *Id.*

33. *Id.* at 642.

34. *See id.* at 647 (discussing "a variety of procedural snares" that make appellate review an ineffective "device for controlling prosecutorial misconduct").

35. *Id.*

36. *Id.* at 645-46.

37. *See, e.g., Chimel v. California*, 395 U.S. 752 (1969) (reversing a conviction where the police had exceeded the scope of a search incident to arrest by searching the entire house without a search warrant); *Brown v. Mississippi*, 297 U.S. 278 (1936) (reversing the convictions of several African-Americans who had been beaten by authorities until they were willing to make confessions).

appeals to the jury as “foul blows” that “are apt to carry much weight against the accused,”<sup>38</sup> but appellate courts have never spoken of the need for deterrence, only correction.

The federal judiciary has failed to understand the need to bar prosecutors, who are repeat players in the criminal justice system, from engaging in a pattern of misconduct. Unlike police officers who are accused of misconduct, the proper name of a trial prosecutor who engaged in misconduct is rarely mentioned in the opinion.<sup>39</sup> This form of self-censorship, which is often described in terms of “professional courtesy,”<sup>40</sup> has had disastrous effects, as prosecutors who have been repeatedly scolded by state appellate courts — although never by name — have gone on to commit further and more egregious ethical and legal violations. This part of the Article will discuss three such prosecutors, and afterwards will turn to the question of why state appellate courts have so often adopted “the attitude of helpless piety” decried by federal courts that have addressed prosecutorial misconduct.<sup>41</sup>

#### *A. California: The Appellate Courts’ Failure to Understand the Problem’s Scope and Depth*

Scenarios involving prosecutorial misconduct unfold along the following lines:

Appellate courts uphold the conviction, admonishing the prosecutor not to do it again. When a court does overturn the conviction, it shields the prosecutor from embarrassment, omitting his or her name from the opinion or releasing its ruling in a way that few eyes ever see it.

In their rulings, appellate justices sometimes urge lawyer disciplinary officials to punish prosecutors, but such prompting is hollow. . . .

. . . .  
 . . . Few prosecutors nationally have been indicted, and they were acquitted or, at worst, convicted of a misdemeanor and fined.<sup>42</sup>

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38. *Berger v. United States*, 295 U.S. 78, 88 (1935).

39. *See infra* text accompanying note 42.

40. Professional courtesy usually entails such restraint as not interrupting opposing counsel during his summation. *See* KENNEY F. HEGLAND, *TRIAL AND PRACTICE SKILLS* 199 (2d ed. 1994) (acknowledging “an unspoken convention that it’s not nice to object during your opponent’s opening or closing unless things are terrible”).

41. *See* *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

42. Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, *CHI. TRIB.*, Jan. 14,

The failure to understand how mere admonitions fail to deter prosecutors' serious misconduct has had serious consequences. The courts' inability to grasp this fact has undermined public confidence in the administration of justice, owing to certain well-publicized cases involving repeat offenders against the rules of prosecutorial misconduct. Foremost among these is the example of Rosalie Morton.

Rosalie Morton was a career prosecutor in the same office that prosecuted Tak Sun Tan — the Los Angeles County District Attorney's Office. The year 1974 marked the first appellate opinion criticizing her courtroom misconduct. In *People v. Mendoza* she made "numerous erroneous and inflammatory statements" before the jury.<sup>43</sup> In 1977, in an unrelated case the California Court of Appeals concluded that she had engaged in twenty separate instances of misconduct during that trial,<sup>44</sup> but the court again upheld the conviction.<sup>45</sup> Reportedly, Morton bragged about her courtroom conduct even after the appellate courts' rulings.<sup>46</sup> Her name was not mentioned in these opinions, despite the fact that the court did mention defense counsel by name when criticizing his conduct.<sup>47</sup>

Morton's attitude to these "ritualistic verbal spankings"<sup>48</sup> was revealed in another judicial opinion. In *People v. Congious*,<sup>49</sup> the court voiced its displeasure at the fact that Morton not only continued to assert that she had done a good job in those cases where the appellate court had disapproved of her conduct, but that she "took pride in our admonitions, apparently because we did not reverse the judgment rendered."<sup>50</sup> While the court mentioned her by name, the opinion was unpublished.<sup>51</sup>

As could be expected, the private censure had no effect on Morton. In a later trial, she engaged in a pattern of behavior that would produce, in the form of an opinion from the California Supreme Court that criticized her conduct,

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1999, at A1. This study of prosecutorial misconduct earned the Chicago Tribune one of Atlantic City Press Club's National Headliner Awards. *Chicago Tribune, ABC News Win A.C. Press Club's Top Awards*, PRESS ATLANTIC CITY, Mar. 18, 2000, at B8.

43. *People v. Mendoza*, 112 Cal. Rptr. 565, 570 (Ct. App. 1974).

44. *People v. Kelley*, 142 Cal. Rptr. 457, 462-65 (Ct. App. 1977).

45. *Id.* at 468.

46. Paul J. Speigelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 123 (1999) (citing *People v. Congious*, No. B020979 (Cal. Ct. App. Dec. 4, 1987)).

47. *Id.*

48. This phrase was used by Circuit Judge Jerome Frank in *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

49. No. B020979 (Cal. Ct. App. Dec. 4, 1987).

50. Speigelman, *supra* note 46, at 123 (quoting *Congious*, No. B020979).

51. *Id.*

describing her technique as providing “a manual on conduct a prosecutor should avoid.”<sup>52</sup> In *People v. Hill*, the California Supreme Court reversed and remanded a conviction because of her misconduct, and the defendant was ultimately released after spending more than ten years on California’s death row.<sup>53</sup> In that case, the cumulative effect of Morton’s misconduct was so severe that the court concluded that the defendant was thereby denied his right to a fair trial. Additionally, the court mentioned Morton by name, and recommended that she face disciplinary action for ethical violations.<sup>54</sup> Only in the aftermath of the long overdue personal reproach was the scope of Morton’s prosecutorial misconduct revealed, along with the true attitude of the Los Angeles County District Attorney’s Office towards her conduct. Hill’s attorney later stated that Morton’s “record was well known but the district attorney’s office has never done anything to curb her.”<sup>55</sup> Nevertheless, the district attorney’s office resisted firing Morton, even after the opinion in the Hill case became public. Other prosecutors’ offices have even affirmatively rewarded misconduct, even after judicial censure.<sup>56</sup>

*B. Illinois: Institutional Competence Is Impaired by an Overly Close Nexus Between Courts and Prosecutors*

The Cook County State’s Attorney’s Office, which prosecutes crimes in the Chicago metropolitan area, is one of the country’s largest and most prolific.<sup>57</sup> A longitudinal study in 1999 revealed that no Cook County prosecutor had ever received public censure from any disciplinary body for misconduct,<sup>58</sup> nor had any prosecutor been dismissed for misconduct in the ten years preceding the study.<sup>59</sup> In a case with striking similarities to *People v. Congious*, two career prosecutors were cited by the appeals court by name for over fifty

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52. *Id.* at 124.

53. *People v. Hill*, 952 P.2d 673, 686 (Cal. 1998).

54. *Id.* at 686 n.13.

55. *Court Overturns Murder Conviction*, DAILY NEWS (L.A.), Mar. 31, 1998, at N3.

56. *See infra* text accompanying notes 62-71.

57. In 1998, the office prosecuted approximately 67,000 felonies and 380,000 misdemeanors. *Talk of the Nation: Prosecutorial Misconduct in the United States May Be Leading Innocent People to Jail or Death Row and Letting Prosecutors Go Unpunished for Their Actions* (NPR radio broadcast Feb. 24, 1999), available at <http://www.npr.org/templates/story/story.php?storyId=1046012>.

58. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1.

59. Ken Armstrong & Maurice Possley, *The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at A1.

instances of argumentative misconduct.<sup>60</sup> Like Rosalie Morton, neither received sanctions from the court or any disciplinary body.<sup>61</sup>

Furthermore, the study revealed that “[i]n the past two decades, appeals courts have hammered one Cook County prosecutor after another only to see that attorney promoted rather than reprimanded.”<sup>62</sup> Scott Arthur, a career prosecutor, was named in an opinion of the Illinois Supreme Court that suggested that he stood by when a key witness committed what he knew to be perjury.<sup>63</sup> He was subsequently promoted to the head of the suburban office where that trial took place, and later became the state attorney’s chief of criminal prosecutions.<sup>64</sup>

Prosecutors who were implicated in serious misconduct during criminal trials, including perjury, were even promoted to the bench. Raymond Cornelius, who was later tried for perjuring himself and knowingly presenting false evidence during a capital murder trial, was such a prosecutor,<sup>65</sup> as were four others.<sup>66</sup> Ironically, two of these prosecutors, Carol Pearce McCarthy and Kenneth Wadas were later selected by the Illinois Judicial Commission to serve as Chicago-area circuit judges, while Quinn became a judge of the Illinois Appellate Court.<sup>67</sup> Between 1979 and 1999, forty-two Cook County prosecutors went on to become judges after cases they prosecuted were reversed for misconduct.<sup>68</sup> They are now responsible for policing prosecutorial misconduct, as is Alexander Vroustouris, who became the City of Chicago’s inspector-general a mere month after he was personally admonished by an appeals court for summation misconduct.<sup>69</sup> Although the prosecutors’ offices in Chicago and Los Angeles may not be typical, owing to the fact that they are both large cities with complex race relations problems and sprawling judicial systems, examples of longstanding patterns of prosecutorial misconduct remaining unchecked by the judiciary in other areas are not hard to find. Oklahoma City is the example that will be discussed here. There, a district attorney ran roughshod over the judicial system and, in so

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60. *People v. Weinger*, 428 N.E.2d 924, 931-35 (Ill. App. Ct. 1981).

61. *Armstrong & Possley*, *supra* note 59.

62. *Ken Armstrong & Maurice Possley, Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, at A1.

63. *People v. Jimerson*, 652 N.E.2d 278, 284 (Ill. 1995).

64. *Armstrong & Possley*, *supra* note 62.

65. *Ken Armstrong & Maurice Possley, Prosecution on Trial in Dupage*, CHI. TRIB., Jan. 12, 1999, at A1.

66. *Armstrong & Possley*, *supra* note 42.

67. *Id.*

68. *Ken Armstrong & Maurice Possley, New Judge Has Record of Jury Bias*, CHI. TRIB., Nov. 5, 1999, at A1.

69. *Armstrong & Possley*, *supra* note 42.

doing, obtained such popularity among the nation's prosecutors so as to be elected President of the National District Attorneys Association, to be called "a true patriot" by the serving Attorney General of the United States,<sup>70</sup> and to serve on President George W. Bush's Department of Justice transition team.<sup>71</sup> The fact that an overbearing prosecutor could intimidate and control the judiciary in a way that may not have been possible in the context of a larger city's criminal justice system illustrates the varied reasons why state judicial systems lack institutional competence to address prosecutorial misconduct effectively.

*C. Oklahoma: The Political Balance of Power Impairs the Appellate Courts' Competence to Address Claims of Summation Misconduct*

It is a hallmark of a fair and civilized justice system that verdicts be based on reason, not emotion, revenge, or even sympathy. Arguments that improperly encourage the jury to impose a sentence of death based on considerations of sympathy for the victims may constitute due process error. . . . "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, *based on reason rather than caprice or emotion.*"

. . . .  
 . . . [S]ome of these comments, especially in conjunction with those discussed below, would not assist a jury in rendering a just verdict based on reason.<sup>72</sup>

Another barrier to the effective review of criminal convictions secured by means of prosecutorial misconduct stems from the institutional positions of powerful district attorneys and the relatively weak position of the judges that are sometimes called upon to address their repetitive and systematic misconduct. There is no better example of how a weak state judicial system was overpowered by a powerful and malicious district attorney than that of Cowboy Bob Macy and the Oklahoma Court of Criminal Appeals.<sup>73</sup>

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70. Ken Armstrong, *'Cowboy Bob' Ropes Wins — But at Considerable Cost*, CHI. TRIB., Jan. 10, 1999, at A13.

71. Sara Rimer, *A Proud and Unwavering Believer in the Death Penalty*, N.Y. TIMES, Feb. 10, 2001, at A10.

72. *Le v. Mullin*, 311 F.3d 1002, 1015 (10th Cir. 2002) (per curiam) (citations omitted) (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)) (reasoning that District Attorney Robert Macy's closing argument was a due process violation).

73. Macy was so powerful within Oklahoma politics that he was able to convince state lawmakers to amend the firearms laws, so that he and other prosecutors would be allowed to bring weapons into courthouses and wear weapons within the courtroom. See MARK FUHRMAN,

For over twenty years, Robert “Cowboy Bob” Macy was the district attorney for the judicial department that includes Oklahoma City.<sup>74</sup> He amassed a record number of death sentences on his watch, having personally obtained the imposition of the death penalty in fifty-four capital murder cases.<sup>75</sup> He handed out cards during his election campaigns that touted his record in obtaining death sentences, and was reelected repeatedly.<sup>76</sup>

Early in his career, Macy was cited repeatedly for misconduct by the Oklahoma Court of Criminal Appeals, often for summation misconduct.<sup>77</sup> Macy’s use of emotion in his summations became particularly controversial. After describing the plight of the victim of a homicide — and the evil nature of the defendant — in the most emotive terms possible, Macy would often break down into tears before the jury. Crying during his “fire and brimstone closing argument” soon became Macy’s signature tactic.<sup>78</sup>

Bob Macy was a prosecutor without any effective checks on his authority. He was never seriously criticized in the press,<sup>79</sup> at least not until a scandal unfolded where it was revealed that a forensic scientist’s false testimony had sent a probably innocent man to the Oklahoma death chamber. Macy’s political untouchability stemmed from the fact that he had prosecutorial oversight over almost every Oklahoma politician. He was responsible for investigating public corruption in Oklahoma County (which contained the statehouse) as well as other counties, including their district attorneys and police officers.<sup>80</sup> Macy was able to convert this political power into influence over the judicial system. After suffering reversals from the Oklahoma Court

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DEATH AND JUSTICE: AN EXPOSÉ OF OKLAHOMA’S DEATH ROW MACHINE 25 (2003); Charles T. Jones, *DAs Want Law to Let Them Tote Guns*, DAILY OKLAHOMAN (Oklahoma City), Nov. 6, 1981, at 32. See generally Act of May 17, 1982, ch. 291, § 1, 1982 Okla. Sess. Laws 738, 738 (codified at 19 OKLA. STAT. § 215.29 (2001)). This law remained on the books even after Macy “was dragged from the courtroom after reaching for his gun when a jury acquitted six defendants.” FUHRMAN, *supra*, at 25; see also *Oklahoma*, USA Today (Arlington, Va.), Apr. 19, 1990, at 11A.

74. Rimer, *supra* note 71.

75. *Id.*

76. *Id.*

77. See *McCarty v. State*, 1988 OK CR 271, ¶¶ 12-13, 16, 765 P.2d 1215, 1220-21; see also FUHRMAN, *supra* note 73, at 29.

78. FUHRMAN, *supra* note 73, at 27.

79. *Id.* at 28.

80. *Id.* at 32.

of Criminal Appeals due to prosecutorial misconduct in his summations,<sup>81</sup> Macy fought back.

[J]udges are elected in Oklahoma . . . and Macy's endorsements were crucial. Any judges who ran afoul of Macy risked having him actively campaign against him.

Judges on the Oklahoma Court of Criminal Appeals were appointed, but they run on retention ballots. Two judges on the state court of criminal appeals, Ed Parks and Charles Chapel, were singled out by Macy after having written strong opinions criticizing the prosecutor and overturning some of his death penalty convictions. According to several courthouse observers, Macy engaged in a campaign of public comments and private lobbying that pressured Parks and Chapel to start siding more with the prosecution [when hearing criminal appeals].<sup>82</sup>

Macy's campaign against Judges Parks and Chapel was taken up by the media, which can influence Oklahoma's judicial retention elections via its endorsements.<sup>83</sup> He was quoted in the news media criticizing Parks openly, while an Oklahoma daily newspaper opined that:

"Another convicted killer has won a new trial because of an Oklahoma Court of Criminal Appeals majority that seems more interested in finding reasons to reverse than in upholding the death penalty." . . . Judge Parks's decision "continues the nitpicking *that has become so tiresome to citizens* who wonder if a death sentence will ever be carried out in Oklahoma." . . . [A] "number of district attorneys doubt [Judge Parks's] commitment to that particular law, based on what they say is his record of siding with defendants."<sup>84</sup>

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81. See, e.g., *McCarty*, ¶¶ 12-13, 16-17, 765 P.2d at 1220-21 (holding that it was prosecutorial misconduct when Macy said, "I wonder if [appellant] was grinning and laughing that night when he murdered Pam Willis.' . . . [J]ustice demands his conviction of murder one and it does your Honor,' 'He killed that girl. He needs to pay for it.' . . . [T]he death penalty is the appropriate punishment that should be done for the right motive, it should be done for love of the victims . . . and his future victims . . ." (first alteration in original)).

82. FUHRMAN, *supra* note 73, at 30. See generally 20 OKLA. STAT. § 33 (2001) (providing the system by which voters may choose to retain judges on the Oklahoma Court of Criminal Appeals).

83. Cf. Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907 (2002) (noting that State Bar evaluations are crucial to obtaining newspaper endorsements, which are themselves the key to elections, as the public is usually unfamiliar with candidates for judicial office).

84. FUHRMAN, *supra* note 73, at 101 (emphasis added) (second alteration in original) (quoting Editorial, *More Judicial Nitpicking*, DAILY OKLAHOMAN (Oklahoma City), Nov. 30,



Two years after Parks was criticized publicly by Macy, he sat in judgment on another case involving the prosecutor's misconduct; in *Pierce v. State*,<sup>85</sup> the court upheld a death sentence despite extreme prosecutorial misconduct. In *Pierce*, not only had the prosecution made improper comments,<sup>86</sup> but also evidence existed showing that the prosecution's forensic expert misrepresented the strength of the evidence against the defendant, Jeffrey Todd Pierce.<sup>87</sup> The prosecution also failed to obey a valid court order to transfer the disputed forensic evidence to a defense expert, thereby frustrating any attempt to uncover its misconduct.<sup>88</sup>

Parks was scheduled to face retention election during the year in which he concurred with the court's opinion.<sup>89</sup> It is unclear whether he could have survived another round of criticism from Macy and *The Daily Oklahoman*<sup>90</sup> over his supposed lack of commitment to the death penalty. Parks specially concurred in the court's holding that characterized all of the prosecutorial misconduct committed by the prosecutors and the forensic expert as harmless.<sup>91</sup> The court's reasoning in the *Pierce* case has subsequently been criticized as "bad law" by academic commentators.<sup>92</sup> Neither the majority opinion nor Parks's special concurrence mentioned Bob Macy by name.<sup>93</sup> Two years later, the directors of the district attorneys association opposed retention

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1988, at 8).

85. 1990 OK CR 7, 786 P.2d 1255.

86. *Id.* ¶ 13, 786 P.2d at 1260.

87. *See id.* ¶ 36, 786 P.2d at 1265; *see also* Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001) (holding that the chemist, Joyce Gilchrist, had lied repeatedly when testifying in another capital murder case); Jim Yardley, *Inquiry Focuses on Scientist Employed by Prosecutors*, N.Y. TIMES, May 2, 2001, at A14 (discussing investigations into the testimony of Oklahoma City police laboratory scientist Joyce Gilchrist).

88. *Pierce*, ¶¶ 16-17, 786 P.2d at 1261.

89. John Griener, *Appellate Judge Plans Retirement*, DAILY OKLAHOMAN (Oklahoma City), Sept. 4, 1992, at A6.

90. In 1999, the *Columbia Journalism Review* ran a five part series about *The Daily Oklahoman* that named it "The Worst Newspaper in America," which according to Rev. Robin Meyers, "tries to keep [Oklahomans] fearful and bigoted." Bruce Selcraig, *The Worst Newspaper in America*, COLUM. JOURNALISM REV., Jan./Feb. 1999, at 46, 51.

91. *Pierce*, ¶ 1, 786 P.2d at 1267 (Parks, J., specially concurring).

92. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 805 (1991).

93. *See Pierce*, 1990 OK CR 7, 786 P.2d 1255. Parks retired in 1992 due to ill health and passed away six months later. John Greiner, *Funeral Services Set for Former Appeals Judge*, DAILY OKLAHOMAN (Oklahoma City), June 8, 1993, at A8.

of Judge Charles Chapel of the Court of Criminal Appeals,<sup>94</sup> who was not on the court at the time *Pierce* was decided.<sup>95</sup>

It is impossible to determine whether the pressure not to overturn Macy-obtained death sentences during a year in which he faced a retention election influenced Parks's consideration of the *Pierce* case. What is clear is that the Oklahoma Court of Criminal Appeals failed to act to correct a serious miscarriage of justice. Jeffrey Todd Pierce was on death row for fifteen years before he was cleared by DNA evidence.<sup>96</sup> As soon as Macy was told of the DNA tests that exonerated Pierce, he announced his early retirement.<sup>97</sup>

"Anyone brave enough to stand up to Macy could pay a heavy price,"<sup>98</sup> but if the Oklahoma state judiciary had ordered further inquiry into Macy's tenuous capital murder convictions, Jeffrey Todd Pierce may not have spent years on death row. Another defendant, who steadfastly maintained his innocence, may not have been executed if his trial had been subjected to searching appellate review.<sup>99</sup> Furthermore, had the Oklahoma judiciary revealed the culture of misconduct that existed in the Oklahoma City District Attorney's crime lab, Macy likely would have been forced from office years earlier. His key assistants, many of whom also engaged in misconduct,<sup>100</sup> would not have subsequently been appointed judges,<sup>101</sup> thus continuing the vicious cycle of tolerance of serious prosecutorial misconduct, in a manner similar to what occurred in Cook County.<sup>102</sup>

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94. John Griener, *Voters Can't Judge Judges, Expert Says*, DAILY OKLAHOMAN (Oklahoma City), Oct. 27, 2004, at A1.

95. The opinion was written by then Vice Presiding Judge Lane, and Chapel's name does not appear as one of the remaining four judges' names following the opinion. *See Pierce*, 1990 OK CR 7, 786 P.2d 1255.

96. Glenna Whitley, *Oklahoma Railroad*, DALLAS OBSERVER, July 21, 2005, at 21.

97. *Id.*

98. *Id.*

99. Deborah Hastings, *Fair-Trial Questions Follow Man's Execution*, DUBUQUE TELEGRAPH-HERALD, Nov. 4, 2001, at A6 (describing the plight of Malcolm Johnson, whose death sentence was based on false testimony that police chemist Joyce Gilchrist offered at trial); *see also Johnson v. Oklahoma*, 484 U.S. 878, 882 (1987) (Marshall, J., dissenting) (arguing that Malcolm Johnson's writ for certiorari should be granted because "the trial court unconstitutionally stacked the deck against petitioner at both stages of this capital proceeding"), *denying cert. to Johnson v. State*, 1987 OK CR 8, 731 P.2d 993.

100. *See, e.g., Pierce*, ¶ 13, 786 P.2d at 1260 (addressing the alleged misconduct of Macy's assistant, Barry Albert).

101. Whitley, *supra* note 96.

102. *See supra* Part II.B.

These three examples of prosecutors' offices steeped in misconduct demonstrate more than just a pattern of abuse. Problematic district attorneys' offices can operate unchecked for many years in a variety of different regions for varying reasons. Whether it is because the local district attorney is a powerful figure in local politics, as in Oklahoma or in other mainly rural states, or because the criminal justice system is perverted by close connections between the judiciary and the prosecutors office or by excessive judicial timidity, as in Chicago and Los Angeles, patterns of prosecutorial misconduct often remain undisturbed.

The case studies also indicate that state appellate courts lack the institutional competence to address prosecutorial misconduct that is extreme in nature and that does not squarely fall underneath the holding of an earlier opinion. This may be because of the close nexus between the district attorney's office and the court system that allows even prosecutors who have engaged in repeated abuses to become appellate judges, as in Illinois; because the judiciary fails to recognize that repeated warnings have no effect when prosecutors are rewarded for their misconduct, as in California; or because appellate judges are cowed by a district attorney who can threaten their livelihood, as in Oklahoma.

*III. Effective and Searching Federal Habeas Review of Summation  
Misconduct Is Justified, but Lacking: The Effects of Darden v. Wainwright*

State appellate courts' apparent lack of institutional competence to adjudicate claims of summation misconduct is of central importance. To answer the question of whether federal habeas review should be more searching when the claim of error relates to inflammatory summations that create unfair prejudice, we must acknowledge the inability of the states' appellate court systems to address this problem adequately. Nevertheless, scholars advocating a narrow scope of habeas review of state criminal trials have predicated their argument on the assumption that state appellate courts are the most competent body to review claims of error that stem from state criminal trials.<sup>103</sup>

Under this "corrective process" model of federal habeas corpus, federal collateral review should only be available to petitioners "if the state itself failed to provide adequate process to correct the constitutional violation" on direct appeal.<sup>104</sup> As previously demonstrated,<sup>105</sup> however, many state courts do not provide adequate process to correct certain classes of prosecutorial

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103. E.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 525 (1963).

104. Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 577 n.12 (1993).

105. See *supra* Part II.

misconduct. Thus, even under the narrowest view of the proper scope of habeas review, federal courts should have a role to play in addressing prosecutorial misconduct that implicates the defendant's rights under the Sixth Amendment to the U.S. Constitution, owing to the inability of state judicial systems to protect a defendant's federal constitutional right to a fair trial. Unfortunately for appellants seeking to make arguments in the federal forum, federal habeas doctrine has not developed in a way that provides for meaningful review of claims of error related to summation misconduct.

This Part details the growth of the current habeas corpus review of summation misconduct. After starting in Part III.A with an examination of the *Darden* decision, Part III.B then analyzes the motivations underlying the federal courts' treatment of summation misconduct. Next, Part III.C details the case law following *Darden*. Lastly, Part III.D indicates that the right to an impartial jury may be the key to catalyze doctrinal shift regarding habeas review of summation misconduct.

#### *A. The Emergence of the Problematic Darden Standard for Claims of Summation Misconduct*

While the reader's familiarity with the general framework of federal habeas is assumed,<sup>106</sup> a specific understanding of how claims of prosecutorial misconduct in closing arguments are reviewed is not. This section will discuss the evolution of the standard applied on habeas review to this claim, and show why the jurisprudential framework that has emerged is plainly unhelpful, especially because it impedes review of claims of summation misconduct within the only forum with the institutional competence to address them adequately. The root of the problem can be traced to a single problematic case, although opinions addressing this issue before that time also demonstrated a lack of patience for petitioners raising this claim.

In 1986, the United States Supreme Court addressed the issue of habeas review of inflammatory rhetoric during a prosecutor's closing argument directly. The holding appeared to foreclose the possibility of prevailing on this type of claim in even the most exceptional circumstances. In *Darden v. Wainwright*,<sup>107</sup> the court considered whether a due process violation had occurred when a prosecutor, Mr. White, made a summation that contained extremely inflammatory comments.<sup>108</sup> The statements in question included

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106. See 28 U.S.C. §§ 2242-2250, 2252-2254 (2000); 28 U.S.C.A. §§ 2241, 2251 (West 2006).

107. 477 U.S. 168 (1986).

108. *Id.* at 178-79.

calling the defendant “an animal” while comparing his brutality to the basic goodness of the victims:

[The victim] was a pathetic figure[,] who worked and struggled all of her life to build what little she had . . . and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal. And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. . . . It's the work of an animal, there's no doubt about it.<sup>109</sup>

The prosecutor then described the crime in the most emotive of terms, before unleashing a venomous and shocking tirade against the defendant:

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 [the victim] had had a shotgun in his hand when he walked in the back door and blown [the defendant'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 [the defendant's] head off at that point.<sup>110</sup>

The majority of the Justices decided that this was harmless error, despite what the dissenting opinion characterized as “a relentless and single-minded attempt to inflame the jury.”<sup>111</sup> The majority opinion noted, however, that “[t]hat 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,”<sup>112</sup> and then proceeded to redefine the test for determining whether the comments had deprived the defendant of due process. The *Darden* test, which subsequently became well-entrenched in federal jurisprudence,<sup>113</sup> considers “whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”<sup>114</sup> This language seems to strongly suggest that inflammatory closing arguments alone can never be a due process violation, even if the comment at issue is extreme in nature, reprehensible, or even an ethical violation.<sup>115</sup>

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109. *Id.* at 179 n.7 (citation omitted).

110. *Id.* at 181 n.12 (citations omitted).

111. *Id.* at 192 (Blackmun, J., dissenting).

112. *Id.* at 179 (majority opinion).

113. *See, e.g., Whitehead v. Cowan*, 263 F.3d 708, 728-29 (7th Cir. 2001).

114. *Darden*, 477 U.S. at 181.

115. *Id.* at 168, 180 n.12.

The *Darden* opinion was a clear illustration of the maxim that hard cases make bad law. Merely accepting the case for review precipitated a rift in the United States Supreme Court, as Justices Burger and Powell were becoming increasingly upset at the four “liberal” justices voting to grant certiorari in death penalty cases.<sup>116</sup> This is because, according to Burger and Powell, the purportedly liberal justices knew that there was little chance that death penalty decisions would be reversed, but granted certiorari nonetheless merely to unleash an “acid stream of . . . dissents.”<sup>117</sup> The tenor of the opinion reflected the acrimony on the Court: the opinion was “nasty” because Justice Powell was “pissed.”<sup>118</sup> Willie Jasper Darden was executed on March 16, 1988,<sup>119</sup> while Amnesty International officials and many others continued to argue that he was factually innocent.<sup>120</sup>

Academic observers have been critical of the reasoning found in *Darden* because it provides little guidance for anyone attempting to determine whether the remarks “so infected” the trial as to make it “fundamentally unfair.”<sup>121</sup> Thus, the standard allows prosecutors to use “overwhelming rhetoric” to overcome the jury.<sup>122</sup> Courts have struggled to apply *Darden*, and have looked to the majority opinion to determine why the admittedly extreme remarks were not fatally infectious to the trial process. The Supreme Court has considered

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116. EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 162 (1998).

117. *Id.* at 149.

118. Michael Mello, “*In The Years When Murder Wore the Mask of Law*”: *Diary of a Capital Appeals Lawyer (1983-1986)*, 24 VT. L. REV. 583, 1140 (2000).

119. *Florida Executes Celebrated Killer*, N.Y. TIMES, Mar. 16, 1988, at A15. In the interest of presenting an executed inmate as a real person, rather than just an exemplar for a legal analysis, I offer this quotation from Darden, from an essay he contributed to a volume written by death row inmates:

We are humans who face death because of the faulty wording of a legal appeal or the capriciously bad stomach of a judge or juror. . . . I feel I was chosen at random. And while morally it is no worse to execute the innocent than to execute the guilty, I will proclaim until the electric chair’s current silences me that I am innocent of the charge that sent me here.

. . . .

One of the most profound teachings of Jesus is: “Judge not that ye be not judged.” I think that before we can hold up the lamp of understanding to others, we must hold it up to ourselves. That, I believe, is what death is all about.

Willie Jasper Darden, Jr., *An Inhumane Way of Death*, in *FACING THE DEATH PENALTY* 203, 203-05 (Michael L. Radelet ed., 1990) (quoting *Matthew* 7:1 (King James)).

120. *See, e.g.*, James David Barber, *Will Florida Kill an Innocent Man?*, ST. PETERSBURG TIMES, Mar. 13, 1988, at D3.

121. *See, e.g.*, Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 422-23 (1992).

122. *Id.*

several factors in determining whether comments made at trial are fundamentally unfair:

(1) whether the comments were isolated or pervasive, (2) whether they were deliberately or accidentally placed before the jury, (3) the degree to which the remarks had a tendency to mislead and prejudice the defendant, (4) whether the prosecutor manipulated or misstated the evidence, (5) the strength of the overall proof establishing guilt, (6) whether the remarks were objected to by counsel, and (7) whether a curative instruction was given by the court.<sup>123</sup>

The dissenters in *Darden* labeled the factors that the majority relied upon when deciding that case as “an entirely unpersuasive one-page laundry list of reasons for ignoring this blatant misconduct.”<sup>124</sup> The same complaint can be applied to the list of factors that the courts of appeals have synthesized from *Darden*, *DeChristoforo*, and other Supreme Court cases addressing this issue, and this complaint is not without merit. The history of cases in which prosecutorial misconduct in summation has been held to be harmless indicates that the list of factors is sufficiently malleable to find any number of reasons for discounting the effect of inflammatory rhetoric in cases that were even more extreme than *Darden*.<sup>125</sup> The question that must be answered is why the courts have been content with such an elastic framework for the review of this claim of error, and why they rarely find that inflammatory summations deprive the defendant of his right to a fair trial.

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123. *Gordon v. Kelly*, No. 98-1905, 2000 WL 145144, at \*7 (6th Cir. Feb. 1, 2001) (citations omitted) (citing *Darden v. Wainwright*, 477 U.S. 168, 182-83 & n.14 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 339 (1985); *United States v. Young* 470 U.S. 1, 12-13 (1985); *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974); *Berger v. United States*, 295 U.S. 78, 84-85 (1935)).

124. *Darden*, 477 U.S. at 194 (Blackmun, J., dissenting).

125. *See, e.g.*, *Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002) (reasoning that Prosecutor Robert Macy’s rhetorical question to the jury — “whether it would be ‘justice [to] send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while [the victim] lies cold in his grave? Is that justice? Is that your concept of justice? How do [the victim’s son] and [the victim’s other son] and [the victim’s nephew] go visit him?’” — did not, among other inflammatory arguments, constitute due process violation); *see also* *Comer v. Schiro*, 463 F.3d 934, 960-61 (9th Cir. 2006) (holding summation misconduct did not rise to the level of a due process violation because the jury was told that the prosecutor’s argument was not evidence, among other reasons); *Dawkins v. Artuz*, No. 02-2424, 2005 WL 2660412, at \*2 (2d Cir. Oct. 17, 2005) (noting that “[t]ypically, remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute egregious misconduct,” yet failing to define “egregious misconduct”).

*B. Beyond Unfavorable Precedent: Determining Why the Federal Courts Are Uncomfortable Evaluating Summation Misconduct*

It is tempting to conclude that the opinion in *Darden*, which “indicate[d] a serious disregard for the concept of procedural fairness to the defendant in a criminal trial and increase[d] the possibility of continued erosion of the rights of the accused,”<sup>126</sup> was merely an attempt to cut off review of habeas decisions in capital cases at the Supreme Court. This would not be entirely accurate. A review of jurisprudence suggests instead that for decades, the federal courts have been uncomfortable with drawing limits on the use of emotion in closing argument.

The case law reveals a longstanding debate on the proper role of emotion in argument, which has never been settled. *Darden* merely confirmed that the Supreme Court was not ready to address this issue effectively, largely owing to the convoluted way in which the issue has been construed by the federal courts over the past decades. The elastic standard that courts have synthesized from the Supreme Court’s decisions in *Darden* and *DeChristoforo*, is the result of two issues. The first issue centers on the fact that the courts give no indication of which factors should be given greater or lesser importance in these situations. The second, in no small part, results from the key case in this area, *Darden*, being decided on the basis of a “punt” necessitated when those justices opposed to the death penalty forced the Court to address summation misconduct directly.

*1. The Thicket of Misinformation in the Pre-Darden Jurisprudence of Summation Misconduct*

The federal courts’ inability to perceive the true nature of the harm caused by inflammatory comments in summation is a longstanding problem. Opinions addressing this issue have frequently been focused on detailing the reasons why this conduct is common, and therefore excusable, rather than on drawing a line between acceptable and unacceptable rhetorical practices. When confronted with a claim of error related to a highly emotive argument advanced by a prosecutor in a criminal trial, courts routinely considered the positive value of this conduct, or on reasons why it should be excused.

In the jurisprudence that both precedes and follows *Darden*, three justifications for inflammatory prosecutorial summations have been adduced: (1) Emotional appeals from the prosecution are necessary, owing to the alleged

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126. Hillary L. Pettegrew, *Sixth and Eighth Amendments — Erosion of Defendant's Right to an Impartial Jury and a Fundamentally Fair Trial*, 77 J. CRIM. L. & CRIMINOLOGY 796, 820 (1986).



latitude provided to defense counsel in this area; (2) emotional arguments are impossible to avoid in certain cases, owing to the piteous subject matter; and (3) some emotional richness in arguments is necessary to preserve narrative integrity and to maintain the attention of the jury and to stimulate them to action. Each justification will be discussed in turn in the Article's next part. None of these rationales withstand serious scrutiny, but they have had a great influence over the way the issue has been conceptualized and have influenced the opaque reasoning of *Darden* and other related cases. After the fallacious nature of these justifications are exposed, this Article will point to jurisprudence that might move us away from the *Darden* standard, and describe how this case law and other material — especially studies from persuasion theorists and researchers — might be used to catalyze a new framework for habeas review summation misconduct.

2. *Spurious Justifications Courts Commonly Invoke When Discounting the Prejudicial Effect of Inflammatory Summations*

Judge Learned Hand's opinion in *United States v. Wexler*,<sup>127</sup> handed down in 1935, established the prototypical rationales used to defend inflammatory prosecutorial summations:

It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches this mood and that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction.<sup>128</sup>

The first of these defenses — that prosecutors will be left unarmed if they are prohibited from making emotional appeals in the face of overt appeals to the jury's pity by defense counsel — is doubly problematic. It is patently false that courts have “allowed those [defense] appeals in misericordiam which long custom has come to sanction.”<sup>129</sup> Rather, academic commentators have argued that it is always “improper on summation to appeal to the sympathy of the jury, either directly or indirectly. In nearly all jurisdictions, the court will

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127. 79 F.2d 526, 530 (2d Cir. 1935).

128. *Id.* at 529-30; *see also* Torres v. Costello, No. 97-CV-5480, 2001 WL 811924, at \*10 (E.D.N.Y. Jun. 1, 2000) (citing *Wexler*, 79 F.2d at 530); *United States v. Walker*, No. SI 96 CR. 736(HB), 1998 WL 637488, at \*2 (S.D.N.Y. Sep. 17, 1998) (same).

129. *Wexler*, 79 F.2d at 530.

instruct the jury not to let passion or sympathy enter into its deliberations.”<sup>130</sup> Even a tangential reference to the defendant’s misery, if judged to be a covert appeal for mercy or pity, can be and has been found to be improper.<sup>131</sup> Courts have held that a defense attorney’s calculated attempt to make an appeal to the jury’s pity can be a per se ground for a mistrial, new trial, or reversal.<sup>132</sup> There is no need for the prosecution to fight rhetorical fire with fire, nor should this be considered acceptable, because a prosecutor “is the representative not of an ordinary party to a controversy . . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”<sup>133</sup> Furthermore, to tolerate this excuse is to rely upon a folk theory of justice that is a mere caricature of the adversarial model of criminal litigation.<sup>134</sup>

Second, it is misleading to claim that the subject matter of violent crime cases makes emotional appeals to the jury inescapable. Unfortunately, this second rationale elaborated by Learned Hand has had an enduring influence, despite being ill-founded. The elements of a gruesome murder can be proven by the prosecution in as dispassionate a presentation as is possible, or they can use the emotional responses that the facts engender to their own advantage. The view that emotional outbursts and emotional manipulation by a prosecutor — as practiced by “Cowboy Bob” Macy, Rosalie Morton, or the prosecutors in the *Tak Sun Tan* trial — is nothing more than a by-product of certain types of evidence is an indefensible position. As a result, this position is rarely elaborated in full. It is usually presented by means of a passing reference and without argumentative support, as in *Wexler*.<sup>135</sup>

In *Dixon v. Pennel*,<sup>136</sup> the federal district court excused a prosecutor’s appeal to the jurors’ sympathy for the victim, where he had “point[ed] to a

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130. 6 AM. JUR. *Trials* § 16 (2005).

131. See, e.g., *Towns v. State*, 381 S.E.2d 405, 407 (Ga. Ct. App. 1989) (holding that defense counsel’s statement in closing argument that appellant “would love to have a defense expert, I’m sure. And if he was a Nelson Rockefeller or Donald Trump, you can get people that are experts,” was not a fact to be argued to jury and that the trial court did not abuse its discretion in ruling the argument to be improper).

132. L.B. Frantz, Annotation, *Counsel’s Reference in Criminal Case to Wealth, Poverty, or Financial Status of Defendant or Victim as Ground for Mistrial, New Trial, or Reversal*, 36 A.L.R.3d 878 (2003).

133. *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds by* *Stirone v. United States*, 361 U.S. 212 (1960).

134. *United States v. Young*, 470 U.S. 1, 26 n.4 (1985) (Brennan, J., dissenting) (criticizing the notion “that a trial is something like a schoolyard brawl between two children. Such an excuse smacks of the ‘sporting theory of justice,’ a theory long recognized as ‘only a survival of the days when a lawsuit was a fight between two clans’”).

135. See *supra* text accompanying notes 127-28.

136. No. 00-CV-75524-DT, 2003 WL 173958 (E.D. Mich. Jan. 7, 2003).

picture of [the victim] and sa[id] that was all [the victim's relatives] had left of her."<sup>137</sup> The court explained that "it was likely that *the nature of the crime itself would have produced juror sympathy* before the prosecutor made any of the alleged improper comments."<sup>138</sup> Similar reasoning was advanced by the Court of Appeals for the Tenth Circuit in *Duvall v. Reynolds*,<sup>139</sup> which held:

We do not condone comments encouraging the jury to allow sympathy, sentiment, or prejudice to influence its decision. Nevertheless, after reviewing the record, we cannot conclude that these comments affected the outcome of the penalty phase. The State's strong evidence . . . *makes it probable that the nature of the crime produced sympathy for the victim long before the prosecutor gave his closing remarks.*"<sup>140</sup>

In *Duvall*, the prosecutor made the following disputed statement, among others: "Ladies and gentlemen, in this case you may find that only those who show mercy shall seek mercy, and that as a verdict of this jury, that you may show him the same mercy that he showed [the victim] on the night of the 15th of September."<sup>141</sup> This is the most prejudicial form of an appeal to pity, as it is yoked with an appeal to the jurors to harden their heart toward the defendant because of what someone — perhaps the defendant, or perhaps not, if we take the presumption of innocence seriously — did to the victim.

Needless to say, the conclusion that these inflammatory arguments are harmless because of the jurors (supposedly already existing) preconceptions is problematic. If it was taken seriously as a proposition of law, courts would need to hold that any argument should be considered harmless if facts existed that would tend to increase its effectiveness. The jurisprudence prohibiting defense attorneys from appealing to pity on the basis of the defendant's poverty would need to be revised so as to find this harmless where the defendant is, in fact, poor.<sup>142</sup> Additionally, this line of reasoning cannot be squared with opinions claiming that the seriousness of the misconduct can be judged by how often it appeared over the course of the trial,<sup>143</sup> because

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137. *Id.* at \*5.

138. *Id.* (emphasis added).

139. 139 F.3d 768 (10th Cir. 1998).

140. *Id.* at 795 (emphasis added) (citation omitted).

141. *Id.* at 795.

142. *Cf. Towns v. State*, 381 S.E.2d 405 (Ga. Ct. App. 1989) (holding that defendant was not entitled to argue that he had no defense expert because he couldn't afford one).

143. *See, e.g., Floyd v. Meachum*, 907 F.2d 347, 355-56 (2d Cir. 1990) (holding that repeated references to the defendant as a liar were clearly excessive and inflammatory, and were a violation of due process).

according to the reasoning of *Dixon*, this would merely attempt to call to mind repeatedly what the jurors are already experiencing — sympathy for the victim.<sup>144</sup>

Despite these problems, the “inescapability” rationale for denying habeas to a petitioner who has suffered from prosecutorial misconduct during summation has been advanced repeatedly in the recent past.<sup>145</sup> An appellate court can merely invoke the fact that the jury was likely to feel sympathetic for the victim — and disinclined to show mercy to the defendant — as a means of discounting the effect of carefully selected tactics that prey upon these tendencies. The obvious counterargument — that making illicit and devastating use of preconceptions is not at all analogous to the mere existence of prejudices — has yet to be invoked in the opinions drawing upon this rationale.

*Darden* can be understood as the Supreme Court’s “punt” when faced with this issue because of the existing aversion of the courts to deal with the nuances of summation misconduct. The justification of the misconduct was itself an attempt to avoid line drawing, but the Court was forced in *Darden* to deal with facts too extreme for this approach. The transparency of these rationales for ignoring prosecutorial misconduct in summation required a response from the judiciary. *Darden* was an inadequate response, but it was not unreasonable to expect doctrinal refinement that would help to distinguish acceptable rhetorical embellishment from inflammatory misconduct. Unfortunately, the doctrinal development that followed merely tinkered with the framework established by *Darden*, and did not address the underlying problem of an unweighted balancing test. As the next part of this Article will make clear, this tinkering was not a sufficient response. This will lead to the question of how a more thorough realignment of the doctrine might be catalyzed.

### *C. The Case Law Following Darden: Harmless Error Review of Summation Misconduct is Unsystematic, Inconsistent, and Troubling*

In the period that followed the Supreme Court’s clarification of the harmless error standard, the Court provided no indication of which, if any, of the listed factors (such as whether or not a curative instruction was issued, or whether

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144. *Dixon v. Pennel*, No. 00-CV-75524-DT, 2003 WL 173958 at \*5 (E.D. Mich. Jan. 7, 2003); *see also* *Walker v. Gibson*, 228 F.3d 1217, 1243 (10th Cir. 2003) (holding that even if the prosecutor’s appeals to the jurors’ emotions were improper, this would be insufficient to render the trial fundamentally unfair, because the nature of the crime itself would likely have produced juror sympathy before the prosecutor made any of these comments); *White v. Withrow*, No. 00-74231-DT, 2001 WL 902624 (E.D. Mich. June 22, 2001) (same).

145. *See, e.g., Walker*, 228 F.3d at 1243.

the evidence against the defendant was overwhelming) should be given added weight. Various circuit courts of appeals expressed dissatisfaction with this state of affairs, and began to craft their own multipronged tests, which would seek to distinguish between the mundane and extreme examples of rhetorical excess in prosecutors' summations.<sup>146</sup>

Some reconfiguration of the test from *Darden v. Wainwright* was also necessary after the Supreme Court refined the harmless error analysis in *Chapman v. California*,<sup>147</sup> which accordingly redefined the standard of review for cases presented in this posture.<sup>148</sup> Before discussing whether the Court would apply this standard to summation misconduct, however, the harmless error standard that now applies on habeas review must be explained in more detail.

The Supreme Court's decision in *Brecht v. Abramson*,<sup>149</sup> although partially superseded by the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>150</sup> created a new structure for habeas review. The new structure is applied even when considering claims of error that traditionally had been neglected or ignored, or where the burden of demonstrating injury had been placed on the petitioner.<sup>151</sup>

Under *O'Neal v. McAninch*,<sup>152</sup> the key case interpreting *Brecht*, on federal habeas review of a state conviction, the petitioner still has the burden of proving that the constitutional error had "substantial and injurious effect" on the verdict or sentence.<sup>153</sup> Following *Brecht* and *O'Neal*, the petitioner is now required to make some showing that the constitutional error had an effect on

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146. See, e.g., *Gonzalez v. Sullivan*, 934 F.2d 419, 424 (2d Cir. 1991) (crafting a balancing test where the weight of the evidence against the defendant is the central consideration); *Lesko v. Lehman*, 925 F.2d 1527, 1540 (3d Cir. 1991) (applying harmless error analysis from *Chapman v. California*, 386 U.S. 18 (1967), to prejudicial comments made by the prosecutor); *Brooks v. Kemp*, 762 F.2d 1383, 1400 (11th Cir. 1985) (en banc) (applying a two-step harmless error analysis to claims of prosecutorial misconduct in summation).

147. 386 U.S. 18 (holding that constitutional error is grounds for reversal unless the prosecution can prove beyond all reasonable doubt that the error did not contribute to the defendant's conviction). The harmless error analysis is applicable to all claims of error, even on collateral review. *Hopper v. Evans*, 456 U.S. 605, 613-14 (1982).

148. *Chapman*, 386 U.S. at 24 (holding that "error . . . in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless").

149. 507 U.S. 619 (1993).

150. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered titles of U.S.C.).

151. The AEDPA leaves the harmless error structure of *Brecht* intact. See 2 HERTZ & LIEBMAN, *supra* note 22, § 31.1, at 1505 n.12.

152. 513 U.S. 432 (1995).

153. *Id.* at 436 (quoting *Brecht*, 507 U.S. at 627).

the jury. This showing was not required under *Chapman*,<sup>154</sup> but nevertheless, it appears that *O'Neal* still mandates that, in situations where it cannot be conclusively determined that the constitutional error did not contribute to the verdict, the court should find for the petitioner.<sup>155</sup> This is clearly a more favorable standard than the one the Court applied in *Darden*. After *O'Neal*, it is clear that an off-the-cuff approach to harmless error analysis was no longer consistent with the Supreme Court jurisprudence; as in their cases construing *Brecht*, the Court rejected it:

[T]he question . . . [for] the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which “the jury *actually rested* its verdict.” The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.<sup>156</sup>

Despite the new and more rigorous framework for harmless error analysis on habeas review, a careful analysis of the opinions resolving claims of prosecutorial misconduct in summation reveals that the post-*Brecht* advantages purportedly obtained by petitioners are illusory. It is as difficult as ever to prove that an error, or even a set of concerted and connected errors, so permeated the trial with unfairness so as to create a due process violation, where the trial became “fundamentally unfair.” Therefore, the “improvement” — that once the constitutional magnitude of the error is proven, prejudice need not be demonstrated — is worthless. Courts still frequently cite *Darden* as the defining standard, and petitioners’ arguments are routinely rejected because the misconduct in their cases was less extreme than that which occurred in *Darden*.<sup>157</sup> All the attitudes and misconceptions about

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154. See *supra* note 147 (explaining that *Chapman* placed the burden on the prosecution).

155. *O'Neal*, 513 U.S. at 436.

156. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (citations omitted) (quoting *Yates v. Evatt*, 500 U.S. 391, 404 (1991)); see also *Brecht*, 507 U.S. at 623 (“[T]he standard for determining whether habeas relief must be granted is whether the . . . error ‘had a substantial and injurious effect or influence in determining the jury’s verdict.’” (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))).

157. See, e.g., *Bartlett v. Battaglia*, 453 F.3d 796, 801-02 (7th Cir. 2006) (“[P]rosecutorial misrepresentations . . . are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.” (citing *Darden*, among other cases)); *Derrickson v. Meyers*, No. 04-4497, 2006 WL 1140224 (3d Cir. May 1, 2006) (construing *Darden* as holding that there

trial practice are still on display in these opinions: that emotion is inevitable during summations in trials for violent crimes; that prosecutorial excesses in closing argument largely consist of invited responses; and, that some degree of narrative exposition is required, which naturally includes emotional appeals to the jury. Very little has changed since *Darden* was decided thirty years ago.

*D. Catalyzing Doctrinal Shift in the Review of Summation Misconduct on Habeas Review: Using the Right to an Unbiased Jury as a Guide to Doctrinal Realignment*

Given the fact that developments in federal habeas corpus doctrine did not yield any real change, despite the application of the *Darden* standard to claims of summation misconduct, the question that must be answered is where appellate attorneys should focus their efforts. The key to this inquiry is determining how petitioners might obtain a more amenable standard of review for their claims of summation misconduct.

The best way forward for advocates hoping to avoid making an argument that appears foreclosed by *Darden* is to frame the issue of prosecutorial misconduct in summation as a violation of a specific constitutional right, so that they can obtain the benefit of the doubt if it is not possible to establish that the error did not affect the verdict. In this manner, a viable habeas claim can be established without prior proof that the entire trial was rendered fundamentally unfair by the prosecutor's remarks.<sup>158</sup> The method advocated here is to contend that the inflammatory summation implicated the defendant's Sixth Amendment right to a fair and impartial jury, in a manner analogous to inflammatory pretrial publicity.

*1. The Implication of the Right to a Fair and Impartial Jury Through Inflammatory Prosecutorial Summations*

The great value of the trial by jury certainly consists in its fairness and impartiality. . . .

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. . . The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in

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is "no error when 'prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused").

158. See *Paxton v. Ward*, 199 F.3d 1197, 1217 (10th Cir. 1999).

opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror ought to test him by this rule.<sup>159</sup>

The Sixth Amendment reads, in relevant part, that “the accused shall enjoy a right to a speedy and public trial, by an impartial jury . . . .”<sup>160</sup> This right requires that jurors be unbiased.<sup>161</sup> The right to an unbiased jury was incorporated into the guarantees of the Fourteenth Amendment, and is applicable to state criminal trials.<sup>162</sup> Additionally, the denial of this right in a state criminal trial is a cognizable issue on federal habeas review.<sup>163</sup>

The right to a fair and impartial jury is implicated whenever a jury has been exposed to prejudicial and irrelevant information about the defendant circulated by the press.<sup>164</sup> An impartial jury must deliver a verdict that is shaped solely by the evidence presented at trial, and thus the jurors’ exposure to pretrial publicity condemning the accused is problematic.<sup>165</sup> Generally, the more inflammatory the media coverage, the more likely it is that the right will be deemed implicated. Change of venue is required if one of various types of showings has been made, including one that “inflammatory publicity has so saturated community that jurors’ objectivity must be called into question.”<sup>166</sup> The failure to grant a change of venue under these circumstances can be grounds for mistrial,<sup>167</sup> reversal on appeal,<sup>168</sup> or the granting of the writ of habeas corpus.<sup>169</sup> Crucially, in extreme cases, the prejudice generated by pretrial publicity can be imputed to the jurors; actual prejudice towards the accused need not be proven when requesting relief.<sup>170</sup>

Federal courts use a multifactor test to decide whether pretrial publicity was extreme enough to have warranted imputing bias to all prospective jurors. The

159. *United States v. Burr*, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807) (No. 14,692g).

160. U.S. CONST. amend. VI.

161. *United States v. Frost*, 125 F.3d 346, 379 (6th Cir. 1997).

162. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

163. 1 HERTZ & LIEBMAN, *supra* note 22, §11.2c(6), at 562-66.

164. *See Rideau v. Louisiana*, 373 U.S. 723 (1963).

165. 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, *CRIMINAL PROCEDURE* § 23.1(a), at 362 (2d ed. 1999).

166. Peter G. Guthrie, Annotation, *Pretrial Publicity in Criminal Case as Ground for Change of Venue*, 33 A.L.R.3d 17 (2005); *see also* *United States v. Moreno Morales*, 815 F.2d 725 (1st Cir. 1987).

167. *See United States v. Mase*, 556 F.2d 671 (2d Cir. 1977) (noting that the defendant’s first trial ended in a mistrial when the trial judge learned that a number of jurors had read certain newspaper articles linking the defendant to organized crime).

168. *Marshall v. United States*, 360 U.S. 310, 313 (1959).

169. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

170. *See, e.g., Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985).



test's factors are (1) whether the volume of publicity was stimulated by the upcoming trial, (2) whether the publicity was inflammatory or merely factual, (3) whether it involved matters directly or tangentially related to the defendant's case, (4) whether the publicity was recent, and (5) what was the source of the publicity.<sup>171</sup>

*2. Comparing the Sixth Amendment Test Applicable in Instances of Prejudicial Pretrial Publicity to the Darden Standard*

A fruitful comparison can be made between the tests used to determine whether juror bias can be assumed on the basis of inflammatory pretrial publicity and whether prosecutorial misconduct in summation should be considered constitutional error. A brief analysis reveals that if prosecutorial misconduct in summation was subjected to the balancing test applied to inflammatory pretrial publicity, it is likely that the court would presume that the jurors had become prejudiced against the defendant.

In essence, when the multipart test is applied to summation misconduct, each of the factors has more weight than a typical instance of prejudicial pretrial publicity. First, when summation misconduct is noteworthy, it is not because of a single passing remark, demonstrating that the volume is sufficient. Second, by definition, summation misconduct is inflammatory and not merely factual, because factual recapitulation of the evidence is not misconduct. Third (and again, by definition), summation misconduct relates to the instant case, and therefore, it could not be more recent, coming directly before the deliberations in which jurors are required to be fair to the accused. Finally, the prosecutor has significant prestige in the community, and because of his position as the advocate for the victim of violent crime, he or she is more likely to be perceived by the jurors as a trustworthy source than a mere journalist or editorial writer.

An analysis of how summation misconduct might be judged according to the factors of the test for inflammatory pretrial publicity will follow (at length) below. The pertinent question at this stage of the inquiry, however, is whether this test might ever be applied to inflammatory remarks made in summation. Case law indicates that the inflammatory pretrial publicity test has been found to be most appropriate when the media has saturated the public consciousness with inflammatory depictions of the accused.<sup>172</sup> Nevertheless, it remains

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171. *See, e.g.*, *United States v. Bakker*, 925 F.2d 728, 731-34 (4th Cir. 1991) (applying the prejudicial pretrial publicity analysis to the context of the trial of the well-known televangelist Jim Bakker); *United States v. Church*, 217 F. Supp. 2d 696, 698 (W.D. Va. 2002).

172. *See Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (holding that granting the writ of habeas corpus was required in part by the "inherently prejudicial publicity which saturated the community").

unclear why prosecutorial misconduct should only be seen as a potential violation of the due process right to a fair trial, rather than as implicating the right to a fair and unbiased jury, because inflammatory summations accomplish the same evil. Furthermore, “[t]he Constitution gives us no standard for determining impartiality and procedures for determining it are not chained to any rigid formula,”<sup>173</sup> and as such, it is unclear why the sensible balancing test developed for measuring the impact of pretrial publicity should not be applied in cases where inflammatory comments were made directly to the jury, and particularly when this was done in order to induce the biases that could also have been generated by inflammatory pretrial publicity.

No lesser authority than the Supreme Court has spoken in favor of doctrinal flexibility when considering the right to a fair and impartial jury, because “[i]mpartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, *the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.*”<sup>174</sup> As will be demonstrated below, there are clear reasons why this flexibility should be used to adapt the test for inflammatory pretrial publicity to cases requiring an assessment of the severity of summation misconduct.

In cases involving excessive pretrial publicity, the Court has used language that suggests that the Sixth Amendment guarantees not only that an impartial jury be seated, but that the defendant be *tried* by an impartial jury, i.e., that the jury should also be unbiased at the time of deliberation.<sup>175</sup> The pertinent question is why pretrial publicity is treated as if it is more likely to generate juror bias than inflammatory comments made during summation. As discussed above, it is possible to draw a parallel between the accepted notion that inflammatory pretrial publicity implicates the right to an unbiased jury and the proposed conclusion: that inflammatory summations should also be seen as implicating that right. This is a rational conclusion because persuasion theory demonstrates that these inflammatory summations have an even more prejudicial effect on jurors than hostile pretrial publicity. Nonetheless, to make the case that the same test should be applied to claims of error involving pretrial publicity and inflammatory summations, the criteria detailing why the latter is even more prejudicial than the former should be discussed in detail, with persuasion theory providing insight along the way.

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173. *United States v. Haynes*, 398 F.2d 980, 983 (2d Cir. 1968).

174. *United States v. Wood*, 299 U.S. 123, 145 (1936) (emphasis added).

175. *See, e.g., Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 553 (1976).

*IV. Using Persuasion Theory as a Means of Determining the Likelihood that Inflammatory Content Is Prejudicial: A Model for Harmless Error Analysis of This Issue*

The application of two elements of the test protecting the right to a fair and impartial jury to the issue of summation misconduct is relatively straightforward. By definition, the prosecutor's conduct is only error if inflammatory and directly related to the defendant. One must consider in more depth, however, the question of whether the prosecutor is a more damaging source of potential prejudice than the media, along with the issue of whether the timing of the inflammatory summation increases or decreases the prejudice to the defendant.

Persuasion theory, the subdiscipline of communication theory concerned with techniques of attitude formation and change, is particularly relevant here because the theory considers the question of what factors influence the audience's propensity to be affected by one source of information rather than another. Two key theories from persuasion research are critical to the analysis of whether an inflammatory summation should be judged to carry more risk of prejudice to defendants than, all else being equal, negative pretrial publicity. The first relates to the role of primacy and recency in opinion formation, as discussed in Part IV.A, while the second is the two-track model of cognitive processing, which is discussed in Part IV.B. The two-track theory draws attention to the role played by extralogical elements of the communicative context — including the viewer's conception of the speaker's "source characteristics" (in classic terminology, *ethos*), as defined by modern persuasion researchers — and how they are used. This focus will lead to the consideration in Part IV.C of whether inflammatory messages are more prejudicial than we might otherwise expect if we did not consider the cumulative impact of the closing argument's extralogical features and whether curative instructions are capable of curing such prejudice. After examining these three issues, Part IV.D will discuss how to make the argument that the test applied in cases of excessive pretrial publicity should be applied to cases involving inflammatory summations.

*A. Persuasion Research on the Primacy Effect and the Recency Effect Indicates That Both Pretrial Publicity and Inflammatory Summations Are Likely to be Highly Prejudicial*

Researchers in the field of persuasion theory have long investigated the optimal time for the delivery of messages aimed at convincing listeners or changing their behavior.<sup>176</sup> The issue of when it is best to place one's most

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176. QUINTILIAN, *INSTITUTIO ORATORIA* bk. 6, ch. 4, div. 22 (circa AD 95), *translated in* 3

compelling arguments stems from the need for salience, as human beings have a limited cognitive capacity.<sup>177</sup> If the human memory is limited, and new information replaces old, we must consider whether it would be better to deliver our messages sooner or later in order for them to impact the decision maker's behavior. Nevertheless, cognitive processing is not simple. Humans use various heuristic strategies to sort out the information they believe requires their attention, and thus various biases can be introduced in opinion formation by adapting communication strategies to account for these techniques.<sup>178</sup> Such strategies can include delivering messages at the beginning and the end of the decision making process.<sup>179</sup> The strengths and weaknesses of these disparate strategies will shed light on whether inflammatory summations are more prejudicial than pretrial publicity, because these two dangers occur either near the beginning or at the end of the jurors' decision-making processes.

*1. Explaining the Similarity of Harm Done by Prejudicial Pretrial Publicity and Inflammatory Summations: The Serial Position Effect*

One can structure persuasive messages so as to take advantage of what researchers have labeled the "recency effect."<sup>180</sup> The recency effect is essentially a cognitive bias that affects our perceptions. Empirical research suggests that people tend to remember the last thing that occurs within a sequence of events more than those which happened earlier, and the latest event is also more likely to affect people's opinions and preferences.<sup>181</sup> As noted above, the structure of human memory is thought to be the source of this phenomenon.<sup>182</sup> Empirical studies have also demonstrated that the recency effect is at play during trials; jurors are more likely to remember and be influenced by trial events that occur shortly before they begin deliberating.<sup>183</sup>

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QUINTILLIAN, *THE ORATOR'S EDUCATION* 135 (Donald A. Russell ed. & trans., Harvard Univ. Press 2001).

177. Richard Henson, Short Term Memory for Serial Order (Nov. 1, 1996) (unpublished Ph.D. dissertation, Cambridge University) (on file with author).

178. See generally RICHARD E. PETTY & JOHN. T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986).

179. See Peter A. Frensch, *Composition During Serial Learning: A Serial Position Effect*, 20 *J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION* 423 (1994).

180. John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 *AM. J. CRIM. L.* 139, 184-85 (2000).

181. See Stanley Zdep & Warner Wilson, *Recency Effects in Opinion Formation*, 23 *PSYCHOL. REP.* 195 (1968).

182. See Murry Glanzer & Anita R. Cunitz, *Two Storage Mechanisms in Free Recall*, 5 *J. VERBAL LEARNING & VERBAL BEHAV.* 351 (1966).

183. Michael J. Sacks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?* 6 *S. CAL. INTERDISC. L.J.* 1, 25 (1997) (citing JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* ch. 7 (1975)).

Trial attorneys have historically been firm believers in the recency effect, devoting a great deal of attention to closing arguments for precisely this reason.<sup>184</sup> Indeed, because of the recency effect, the closing argument has often been labeled the “make or break” moment of the trial, and lawyers are advised by many experts and consultants to plan their entire trial strategy with the aim of constructing the optimal closing argument.<sup>185</sup>

The recency effect might not initially appear to square up with the courts’ preoccupation with adverse pretrial publicity, because the key concern voiced in the case law appears to be that the jurors have already made up their mind about the defendant’s guilt before the trial, and there is very little attention paid to the problem of the jurors being exposed to damaging information during the trial. Nevertheless, these two phenomena are actually closely related.

Persuasion theorists label the power of first impressions to fix opinions the “primacy effect.”<sup>186</sup> It is the root cause of our fear that “you never get a second chance to make a first impression.” Paradoxically, the primacy effect is closely related to the recency effect. Collectively, the primacy and recency effects are called the “serial position effect,”<sup>187</sup> which posits that the closer an event or item of information is to the beginning or the end of a sequence, the more likely it is to be remembered.<sup>188</sup>

The jurisprudence responding to the problem of excessive pretrial publicity has responded appropriately to the primacy effect, and jurists — including Thurgood Marshall — who have addressed the problem seem to have an intuitive grasp of the cognitive heuristics at play.<sup>189</sup> The jurisprudence of relating the effect of prejudicial pretrial publicity demonstrates awareness that once people adopt a theory that helps them to structure (or otherwise make sense of) the information they are receiving, they will discount any information that would tend to disprove that theory.<sup>190</sup> This folk explanation

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184. PETER C. LAGARIAS, *EFFECTIVE CLOSING ARGUMENT* (2d ed. 1999).

185. Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 329, 334 (2006).

186. See, e.g., Norman Miller & Donald T. Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 J. ABNORMAL & SOC. PSYCHOL. 1 (1959).

187. Alice F. Healy, David A. Havas & James T. Parker, *Comparing Serial Position Effects in Semantic and Episodic Memory Using Reconstruction of Order Tasks*, 42 J. MEMORY & LANGUAGE 147, 147 (2000).

188. See Frensch, *supra* note 179, at 424.

189. See *Johnson v. Oklahoma*, 484 U.S. 878, 882 (1987) (Marshall, J., dissenting).

190. Cf. *Mu’Min v. Virginia*, 500 U.S. 415, 429-32 (1991) (discussing the relationship between pretrial publicity and the likelihood that a venireperson will have developed fixed opinions about the defendant).

of what underlies a cognitive bias is not far from the truth,<sup>191</sup> and corresponds well with the currently accepted explanation for the primacy effect within persuasion theory.<sup>192</sup> Nonetheless, there has been no demonstration in the case law of any similar concern for the recency effect, which may be more powerful in the context of a trial.<sup>193</sup>

The lack of attention to the recency effect from jurists is unfortunate, especially after two empirical studies involving simulated trials uncovered strong evidence of the recency effect at work.<sup>194</sup> This evidence is not surprising, given the relative complexity of the information presented at the trial. Faced with such complexity, jurors are likely to shift into end-of-series (EOS) reasoning heuristics — and away from beginning-of-series heuristics like the primacy effect — whereby it is more likely that the information presented last in the sequence will carry more weight with the decision makers.<sup>195</sup>

### *2. Explaining the Similarity of the Harm Done by Prejudicial Pretrial Publicity and Inflammatory Summations: The Asymmetric Rebound Effect*

Another heuristic that can amplify the power of the recency effect during a criminal trial is the “asymmetric rebound effect,” whereby a strongly held belief can be jarred by powerful and unexpected information.<sup>196</sup> The asymmetric rebound effect could manifest in many different ways in a criminal trial. The most important possibility to consider here is that inflammatory remarks, including shocking and irrelevant details about a victim’s pain and suffering, might be used to stimulate the rebound effect.

After a defense attorney has attempted to depict his client as likeable and humane, and perhaps even evoked sympathy for a simple person facing the awesome power of the state, a juror may be inclined to give the defendant the

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191. See RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 172, 175 (1980).

192. This also corresponds closely with a powerful theory of jury persuasion developed by legal theorists, known as the “story” or “narrative” model. See Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

193. See Mitchell, *supra* note 180, at 184-85.

194. Warner Wilson & Howard Miller, *Repetition, Order of Presentation, and Timing of Arguments and Measures as Determinants of Opinion Change*, 9 J. PERSONALITY & SOC. PSYCHOL. 184, 188 (1968); Zdep & Wilson, *supra* note 181, at 196-97.

195. Mitchell, *supra* note 180, at 179.

196. Robin M. Hogarth & Hillel J. Einhorn, *Order Effects in Belief Updating: The Belief-Adjustment Model*, 24 COGNITIVE PSYCHOL. 1, 36 (1992).

benefit of the doubt, as the law requires. Highly emotive descriptions of a grisly crime might be used, however, to produce the asymmetric rebound effect, whereby the jurors would become incensed that they were “suckered” into believing that the defendant was deserving of sympathy and of the protections of the Bill of Rights. This effect will be doubly effective when coupled with the often-used rejoinder that while the “[defense counsel] talks about [the defendant’s] rights[, w]hat about [the victim’s] rights?”<sup>197</sup> The argument that victims did not receive the rights being afforded the defendant when he or she was murdered is a common variation in inflammatory summations, and is one that is likely to produce the asymmetric rebound effect.<sup>198</sup> Accordingly, the existence of this powerful heuristic (and its frequent exploitation by prosecutors) indicates that summation misconduct may create more prejudice to the defendant’s right to a fair and unbiased jury than adverse pretrial publicity.

*B. Illustrating the Harm Caused by Inflammatory Speech to Rational Deliberation: Petty and Cacioppo’s “Elaboration Likelihood” Model of Opinion Formation and Change*

Further evidence of why serial position effects and the asymmetric rebound effect indicate that inflammatory summations have great potential to create prejudice to the defendant during jury deliberations can be found in the work of Richard Petty and John Cacioppo.<sup>199</sup> In their widely influential cognitive model of persuasion, the elaboration likelihood (EL) model, they distinguished between the circumstances that encourage central processing of information (i.e., systematic, rational analysis of the content of a persuasive argument), and peripheral processing of information, which relies more on shortcuts and heuristics to evaluate the validity of a persuasive message.<sup>200</sup> The EL model will be very useful to our analysis of the potential inflammatory summations have to prejudice the right to a fair trial.<sup>201</sup>

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197. *People v. Henderson*, 568 N.E.2d 1234, 1264 (Ill. 1990).

198. *See, e.g., People v. Hudson*, 6 Cal. Rptr. 2d 690, 698 (Ct. App. 1992) (holding that the prosecutor’s comments that “[t]he defendant has a right to a trial, but all of us, as potential victims have rights at stake here, as does [the victim]. What about her rights?” were not prejudicial); *People v. Smith*, 604 N.E.2d 858 (Ill. 1992).

199. *See* Valerie P. Hans & Juliet Dee, *Whiplash: Who’s to Blame?*, 68 BROOK. L. REV. 1093, 1112 (2003) (citing PETTY & CACIOPPO, *supra* note 178; Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 123 (1986)).

200. *Id.* (citing RICHARD E. PETTY & JOHN T. CACIOPPO, *ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES* 257 (1996)).

201. Again, we must assume that end-of-series reasoning is adopted by the jurors because of the sheer amount of information offered for their evaluation during the course of the trial, at

As will be described below, the EL model explains why emotive arguments and appeals to authority by prosecutors can be especially effective in the context of an emotionally charged trial. If the prosecutor can characterize the defense's arguments as being overly complex, and at the same time denigrate the defendant as being unworthy of a great deal of effort on the part of the jurors — both common tactics that involve the intuitive exploitation of cognitive biases — it is more likely that the jurors will adopt heuristic shortcuts during deliberations.<sup>202</sup> Two such shortcuts that benefit the prosecution include relying on one's emotional responses to people as a method of assigning blame and relying on the relative authority of the two attorneys when deciding between the versions of events that they advocate.<sup>203</sup>

More recent research that draws upon the EL model demonstrates how inflammatory summations containing attempts to provoke sympathy for the victim and anger towards the defendant damage the jurors' cognitive capabilities and force them to resort to the above-mentioned heuristics.<sup>204</sup> As one legal observer succinctly summarizes psychological research on the topic, "research consistently shows that people who are angry tend to blame more."<sup>205</sup> It might be more accurate, however, to say that the research indicates that assigning blame becomes easier when people are angry, as "anger and sadness affected participants' attributions of causal responsibility, which in turn affected blaming."<sup>206</sup> This distinction is important, as it clarifies that the prosecutors exploitation of the jurors' anger makes it easier for the jurors to blame the defendant. Further, the connection is properly made between the transitory emotion and the heuristic of blame, rather than between

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least until some evidence of the cues prosecutors use to stimulate EOS reasoning are introduced below. However, this is fully consistent with lawyers' folk theory of the importance of summary and recapitulation of evidence during closing arguments.

202. See Joel Cooper & Issac M. Neuhahs, *The "Hired Gun" Effect: Assessing the Effect of Pay, Frequency of Testifying, and Credentials on the Perception of Expert Testimony*, 24 *LAW & HUM. BEHAV.* 149 (2000); Hans & Dee, *supra* note 199.

203. See William L. Benoit & Alan Strathman, *Source Credibility and the Elaboration Likelihood Model*, in *PERSPECTIVES ON PERSUASION, SOCIAL INFLUENCE, AND COMPLIANCE GAINING* 95 (John S. Seiter & Robert H. Gass eds., 2004); Hans & Dee, *supra* note 199. While this explanation is a gross oversimplification of a complex process, it is largely accurate. In essence, once the decision has been made to rely on the heuristics, and the jurors have switched to peripheral-channel processing, the trial has passed the point of no return. No amount of rational argumentation can repair this damage, since the juror's cognitive processing has already been shunted away from the central route.

204. Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 *BROOK. L. REV.* 959 (2003).

205. *Id.* at 969.

206. *Id.*



a type of person (i.e., one who is habitually angry) and the likelihood of assigning blame.

Additionally, arousing anger creates a long-lasting effect on decision-making capabilities.<sup>207</sup> Inflammatory summations that provoke anger towards the perpetrator make it more likely that the jurors will blame the defendant, despite the fact that this is not a rational determination. The stimulus of this cognitive heuristic plainly implicates the right to an impartial jury, assuming an impartial jury is one capable of reasoned deliberations. It should be noted that many of the inflammatory summations from Rosalie Morton and Bob Macy, among others mentioned earlier in this Article,<sup>208</sup> were plainly intended to provoke anger. Additionally, these summations often aimed to stimulate fear.

The effect of fear within an inflammatory summation should also not be underestimated, particularly considering the racial dynamics of closing arguments in criminal trials.<sup>209</sup> As Neal Feigenson summarizes the research: “When people’s mortality is made salient, they punish more severely those who transgress cultural norms. . . . They indulge in more racial/cultural stereotyping. And they attribute more blame to members of outgroups.”<sup>210</sup> Thus, fear provokes fallacious reasoning, and undercuts rational decision-making processes.

As noted in the case studies at the outset of this Article, inflammatory summations often contain grisly recitations of the murder, which tend to catalyze sympathy, anger, and fear in the jurors, as well as a maudlin appreciation of their own mortality. The evocation of these sentiments, which impair judgment, in combination with the complex material in front of the jurors, which favors end-of-series decision making, maximizes the likelihood that the jurors will adopt the above-mentioned decisional heuristics. Once prosecutors convince the jurors that the evidence and the legal standards are being made needlessly complex by the defense — a key trope in prosecutorial summations<sup>211</sup> — they are well on their way to stimulating peripheral channel processing. By introducing the inflammatory elements of their summation, prosecutors can then rely upon cognitive heuristics that work in their favor.

In addition to amplifying the affect of the jurors’ emotions on their decision making, summations that stimulate peripheral-route processing will favor the prosecutor because jurors will rely on the authority heuristic.<sup>212</sup> Simply put,

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207. *Id.* at 970-71.

208. *See supra* Part II.

209. *See* Alford, *supra* note 185.

210. Feigenson, *supra* note 204, at 973 (footnotes omitted).

211. *See id.* at 986; *see also* Mitchell, *supra* note 180, at 178-79.

212. *See* Benoit & Strathman, *supra* note 203.

when the jurors are dissuaded from examining the evidence critically, they will turn to an evaluation of the sources' characteristics when deciding which lawyer's narrative is more credible. This heuristic clearly favors the prosecution; even the Supreme Court has recognized that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence."<sup>213</sup> When jurors adopt peripheral-route processing methods in response to claims about complexity (and, more problematically, about the defendant's unworthiness) and because their cognitive resources are degraded by the presence of strong emotions, the jurors are far more likely to see prosecutors as authority figures and give their arguments more weight. This process is of course aided by blatant appeals to authority made by the prosecutors, who cast themselves as defenders of the community, elevating their authority and prestige. Appeals to authority are a tactic that has been held to be prosecutorial misconduct,<sup>214</sup> but which is usually found to be harmless.<sup>215</sup> In the light of the research performed by EL model researchers, the potential for prejudice inherent in appeals to authority should be reevaluated.

*C. Persuasion Theory Research Also Explains Why Curative Instructions Do Not Mitigate Summation Misconduct*

While the psychological dynamics described above appear to establish that inflammatory summations will usually be more damaging than unfair pretrial publicity, an obvious rejoinder to this argument must be anticipated. Courts frequently rely on the argument that curative instructions, given by the judge directly before deliberations, can eliminate any prejudice that might have resulted otherwise: "In determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceeding, [including] the ameliorative effect of any curative instructions given . . . ."<sup>216</sup> As the courts frequently note when discussing summation misconduct, "[a] curative instruction purges the taint of a prejudicial remark because '[the] jury is presumed to follow jury instructions.'"<sup>217</sup> As the instructions can follow directly after the summations (without the delay that is expected when the problem stems from adverse pretrial publicity), they would seem to be better

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213. *United States v. Young*, 470 U.S. 1, 18-19 (1985).

214. *Id.* (holding that "the prosecutor's remarks unfairly prejudiced the jury's deliberations or exploited the Government's prestige in the eyes of the jury").

215. *Id.* at 15.

216. *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995).

217. *United States v. Simon*, 964 F.2d 1082, 1087 (11th Cir. 1992) (quoting *Adams v. Wainwright*, 709 F.2d 1143, 1147 (11th Cir. 1983)).

suited to addressing the former problem rather than the latter. Because the instructions are last in the sequence of information, they would also seem to negate any problem associated with end-of-series decision making and its associated heuristics.

We must analyze the nature of curative instructions before presenting the studies from persuasion theory that suggest that post hoc attempts to destroy the effect of introducing prejudicial information. The overall evaluation of the value of curative instructions in the federal jurisprudence is troubling. When courts have held that a prosecution's summation is too prejudicial to be considered harmless error, they have also held that they will not presume that the curative instruction was effective, despite the general presumption that these instructions have the required effect.<sup>218</sup> Yet, there is rarely any discussion or critical analysis of why certain types of misconduct are "too extreme" or "so powerful" as to cast aside the presumption. The decisions to rely on or to discount the presumption are seemingly made on a basis that is wholly ad hoc.

The inconsistent standards applied when determining whether a curative or limiting instruction was likely to be effective are in fact doubly problematic, given the long history of judicial criticism of the presumption that these instructions are effective. As Justice Jackson wrote, "The naive assumption that prejudicial effects can be overcome by instructions to the jury [is one that] all practicing lawyers know to be unmitigated fiction."<sup>219</sup> Twenty years later, Judge Walter Gewin scoffed at the idea that curative instructions were useful, arguing that "one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'."<sup>220</sup> A decade later, Judge Ruggero Aldisert utilized another telling analogy when describing the problem, stating that "[a] drop of ink cannot be removed from a glass of milk."<sup>221</sup>

Empirical research confirms that these judges' suspicions of the inefficacy of curative instructions were well-founded. Harry Kalven and Hans Zeisel's groundbreaking empirical study of jury behavior contained an extensive discussion of the effects of cautionary and curative instructions, and concluded that they were wholly ineffective.<sup>222</sup> Later empirical research has validated

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218. See, e.g., *United States v. Smith*, 308 F.3d 726, 739-40 (7th Cir. 2002).

219. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted).

220. *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) (emphasis added).

221. *Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976).

222. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 127-30, 177-80 (1966). Chief Justice Earl Warren later cited this conclusion with approval in *Spencer v. Texas*, 385

Kalven and Zeisel's findings, and even demonstrated that the curative instructions were counterproductive: they *increased* the likelihood that the prejudicial information would be remembered and relied upon by jurors.<sup>223</sup> Participants in mock trials conducted as part of experiments have freely admitted to ignoring limiting instructions and using information they had been instructed not to rely upon during jury deliberations.<sup>224</sup>

The EL model accounts for the results of these studies, which only appear paradoxical before we see them through the lens of persuasion theory. Researchers working within this paradigm demonstrate that a jury that has been induced by a prosecutor to adopt the decisional heuristics used during peripheral-route processing is no longer open to the reason-based appeals of central-route processing.<sup>225</sup> Once the switch has been made to peripheral route processing, the central-route is no longer open, and rational argumentation simply falls upon deaf ears.<sup>226</sup> Because the jurors (or rather, their minds, since the decision is not made consciously) have already decided to conserve cognitive resources, their minds will not make the effort to understand the jury instructions, which would seek to warn them against using the decisional heuristics that they have already decided to employ.<sup>227</sup> The jurors cannot be told to ignore the stink of the skunk thrown into the jury box, because they are too concerned with the stench to pay the judge any mindful attention.

While limiting or cautionary instructions may be useful when the jury is engaged in central-channel processing during the trial (e.g., when they are attempting to understand technical evidence being presented by an expert witness), they are woefully inadequate for the purpose of repairing the damage

U.S. 554, 575 (1967) (Warren, C.J., dissenting).

223. Valerie Hans & Anthony Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235 (1975) (Can.).

224. Rosselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

225. See Timothy D. Wilson, David B. Centerbar & Nancy Brekke, *Mental Contamination and the Debiasing Problem*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 185 (Thomas Gilovich et al. eds., 2002).

226. Cf. Anna A. Romero, Christopher R. Agnew, & Chester A. Insko, *The Cognitive Mediation Hypothesis Revisited: An Empirical Response to Methodological and Theoretical Criticism*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 651, 651-65 (1996) (explaining how demotivation to engage in elaboration likelihood and other high-context approaches lessens the effect of admonitions to resist persuasive techniques).

227. The complexity of jury instructions themselves speaks against the use of cognitive resources, and thus in the absence of compelling reasons, jurors are unlikely to accord them much weight. This is evinced by the countless studies that demonstrate "jury comprehension of instructions is appallingly low." Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78 (1988). This is doubly true once peripheral-route processing is in progress.

done in summations. Such instructions are then, to quote Learned Hand, only a “recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else.”<sup>228</sup> Even if the doctrine that courts should presume these instructions to be effective is merely and wholly pragmatic,<sup>229</sup> to make use of it as a legal fiction merely to deny the claims of appellants who have been subjected to prosecutorial misconduct is breathtakingly cynical, especially in the face of such damning judicial and scholarly criticism.

*D. Using Persuasion Theory Within Arguments for Change in Sixth Amendment Doctrine to Protect Defendants from Inflammatory Summations at State Criminal Trials*

Because of the widespread acceptance of the EL model among social psychologists and the increasing awareness of its utility among legal theorists who discuss legal persuasion,<sup>230</sup> the time appears right to bring it to the attention of jurists. This effort is especially appropriate if appellate attorneys are willing to challenge inflammatory summations on the ground that they deny the defendant his right to a fair and impartial jury as outlined above. After the discussion of the power of an inflammatory summation to derail rational consideration of the evidence, and an explanation of how the EL model and other strands of persuasion theory can account for this effect, there is no remaining reason for considering pretrial publicity to be more damaging to the right to a fair jury. This argument should be made in legal briefs, not merely in law reviews.

The only barrier to catalyzing doctrinal change in this manner is the weight of jurisprudence that has treated summation misconduct and pretrial publicity differently, especially in the context of habeas corpus review. While this Article has demonstrated that there is no real reason for the difference, and that the presuppositions that encourage us to view and treat pretrial publicity and summation misconduct differently are incorrect, *stare decisis* gives this jurisprudence an inertia of its own. Nevertheless, it is arguable that *stare decisis* should be no obstacle:

The degree of authority belonging to . . . a precedent depends, of necessity, on its agreement with the spirit of the times or the

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228. *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

229. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

230. *See, e.g.*, Gordon Bermant, Chalran Nemeth & Neil Vidmar, *Psychology and the Law: Status & Challenge*, in *PSYCHOLOGY AND THE LAW* 3, 6-7 (Gordon Bermant, Chalran Nemeth & Neil Vidmar eds., 1976); Feigenson, *supra* note 204; Hans & Dee, *supra* note 199; Wissler & Saks, *supra* note 224.

judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible.<sup>231</sup>

As fairness is not a concept that can be defined with precision, flexibility was once a hallmark of the Supreme Court's Sixth Amendment jurisprudence. Advocates must remind the courts of what Chief Justice Hughes noted — that “[i]mpartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”<sup>232</sup> While *Darden* and its progeny do not constitute an ancient formula, the EL model has exposed their doctrine as both outdated and highly artificial.

Reform is clearly necessary given the abuses chronicled in the first parts of this Article. Advocates hoping to succeed in reforming the jurisprudence must remind the courts of these facts, and demonstrate that there is a compelling moral reason to bring the doctrine of prosecutorial misconduct into line with that of pretrial publicity — justice. The Sixth Amendment to the United States Constitution and basic principles of fairness require that jurors not only have an open mind when they are empaneled, but that they remain committed to rational deliberation and consideration of the evidence at the close of the arguments.

There is good reason to believe that the EL model will be helpful for appellate counsel raising claims of prosecutorial misconduct in summation, because of its explanatory power and academic popularity. It is possible that the federal courts have been reluctant to address the issue because it appears to be so subjective and intractable, especially when the court can only see the cold record of the alleged misconduct. Nevertheless, persuasion theory could be the key to convincing the judiciary that there are objective measures for the harm caused by the misconduct, and for the likelihood that the harm could not have been cured via cautionary or limiting instructions. The federal courts' excessive caution when adjudging these claims on habeas review, as demonstrated by the case study of *Tak Sun Tan v. Runnels*,<sup>233</sup> must give way to careful yet balanced analysis guided by the tenets of persuasion theory; if not, the high-minded phrases that guarantee the right to a fair trial and that a

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231. *United States v. Sprague*, 44 F.2d 967, 970 (D.N.J. 1930) (quoting DANIEL HENRY CHAMBERLAIN, *THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT* 19 (1885)), *rev'd*, 282 U.S. 716 (1931).

232. *United States v. Wood*, 299 U.S. 123, 145-46 (1936).

233. *See supra* notes 4-21 and accompanying text.

jury's decision shall be made on the basis of the evidence will be rendered meaningless.

#### V. Conclusion

As the illustrations of the appellate process in California, Illinois, and Oklahoma demonstrated, federal habeas review does not merely provide one forum among many in which claims of prosecutorial summation misconduct can be raised effectively. As discussed above, there are many reasons why state courts may lack the necessary institutional competence to address the problem adequately. In California, the state appellate courts demonstrated that they did not understand how an inadequate and purely rhetorical response to serious instances of prosecutorial misconduct encouraged prosecutors to continue to plan and encourage summation misconduct. In Illinois, because prosecutors and judges were part of the same courthouse culture and because prosecutors who engaged in serious summation misconduct had been elevated to the bench, grave misconduct went unchecked — and was even rewarded. In Oklahoma, the appellate judiciary was cowed by an all-powerful prosecutor into ignoring his abuses and those of his assistants.

Therefore, it is unfortunate that the Supreme Court's ruling in *Darden v. Wainwright* is so dyspeptic, even openly hostile to the adjudication of this issue on habeas review. As noted above, this case has been construed as barring relief in cases that are shockingly egregious, on the grounds that the Supreme Court had held that even extreme examples of misconduct did not warrant reversal. This is due to the showing that must be made when the alleged due process violation does not implicate another specifically guaranteed constitutional right. This Article has chronicled the longstanding power of the *Darden* standard, which endures despite the fact that it was a ruling in a particularly divisive case to the Supreme Court and it demonstrated ad hoc and unpersuasive reasoning. Furthermore, as demonstrated above, *Darden* and its progeny are firmly rooted in theories of courtroom persuasion and rhetoric that are incorrect when considered against a backdrop of modern persuasion theory and empirical research.

The way forward is to attempt to characterize the summation misconduct as a violation of the specific right to a fair and impartial jury. The analysis demonstrating the promise of this approach (which relies heavily on persuasion theory) shows that there is no reason to believe that summation misconduct is any less injurious to the exercise of the right to an impartial jury than inflammatory or prejudicial pretrial publicity, and that it would be appropriate to use the same criteria and constitutional tests for both potential violations. The early jurisprudence on the right to a fair and impartial jury

supports the extension of the test from situations involving prejudicial pretrial publicity to instances of severe summation misconduct. The studies cited in this Article applying the EL model of persuasion and attitude change to jury persuasion indicate that there is good reason to believe that courts should be even more wary of the effect of inflammatory summations on the right to the unbiased jury than when they consider the effects of prejudicial pretrial publicity. Creating a unified test of whether pretrial publicity or inflammatory courtroom argument impaired a defendant's Sixth Amendment rights would be a positive development for petitioners bringing federal habeas claims, as under the test currently applied to cases involving excessively prejudicial pretrial publicity, many examples of summation misconduct would be considered reversible error, even when the deferential standard applicable to the review of state convictions is applied.

Furthermore, the EL model, along with the research on the primacy and recency effects and the asymmetric rebound effect, demonstrates the highly prejudicial effect of summation misconduct on the right to a fair and unbiased jury. This Article draws the conclusion that this material should be brought to the attention of jurists, so that the federal courts might overcome their reluctance to address this issue, which reluctance is related, in part, to the notion that the issue cannot be understood or measured using objective criteria. Persuasion research demonstrates, however, that the test used to challenge prejudicial pretrial publicity is far more objective than that the test involving the synthesis of the factors listed in *Darden* and *DeChristoforo* (especially insofar as the latter relies on the amorphous notion of "particularly egregious" misconduct, which is never defined) as the former using criteria for evaluating the probability of prejudicial effect that are well-supported by the tenets of persuasion theory.

It is clear that a novel course of action, such as an attempt to convince the courts that summation misconduct implicates the right to a fair and impartial jury, is necessary. In the forum of last and only effective resort — the federal court adjudging the petition for the great writ of habeas corpus — courts routinely sweep aside the issue of summation misconduct with cursory analysis, despite the fact that these "foul blows" that "hurt[ ] the defendant just as much . . . [as] prejudicial blasts com[ing] from the trumpet of the angel Gabriel."<sup>234</sup> As seen from the case study of *Tak Sun Tan*, even the most egregious and damaging foul blows will escape review unless some reform of the jurisprudence occurs. Over thirty years ago, David Crump, an Assistant

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234. *Ex parte Peterson*, 117 S.W.3d 804, 817 n.57 (Tex. Crim. App. 2003) (quoting *United States v. Nettl*, 121 F.2d 927, 930 (3d Cir. 1941)).



District Attorney writing what was to become an influential law review article, complained:

[A]buses of [closing] argument[s] are aggravated by poor development and enforcement of restrictions, for in spite of the number of decisions concerning arguments from the appellate courts of most jurisdictions in this country, the amount of study that has been applied to the subject is surprisingly small. There is, therefore, a need for a comprehensive review of all laws of argument that actually influence opposing attorneys' conduct.<sup>235</sup>

Crump volunteered this assessment in 1974, writing the very year (but presumably before) the Supreme Court's decision in *Donnelly v. DeChristoforo*. The poor development of the regulations on argument continued apace, and the jurisprudential landscape of this issue is in even worse shape, despite (or perhaps because of) the innumerable appellate opinions where the claim of error is raised. This is perhaps not surprising, considering how courts' analyses consist of little more than a mechanical application of the factors the Supreme Court later elucidated in *Darden*. Then, as now, a comprehensive review is required. This will not come from academic commentators, however, but from practicing attorneys.

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235. David Crump, *The Function and Limits of Prosecution Jury Argument*, 28 Sw. L.J. 505, 505-06 (1974) (footnotes omitted).