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KATZ, J., dissenting. I maintain my belief that the death penalty fails to comport with contemporary standards of decency and thereby violates our state constitution's prohibition against cruel and unusual punishment. See Conn. Const., art. I, §§ 8 and 9. Accordingly, I would reverse the judgment of the trial court and remand the case with direction to vacate the penalty of death and to impose a sentence of life imprisonment without the possibility of release.

I am compelled, nevertheless, to address another issue in this case—the defendant Richard Reynolds' claims of prosecutorial misconduct, even though, by resolving them, I undermine what would otherwise be my ultimate determination in the case. In other words, although I do not believe the death penalty has a place in our society, I am so troubled by the claims of prosecutorial misconduct in this case that I feel that justice demands that I address them. I do this despite the fact that the relief afforded the defendant, were he to prevail on these claims, merely would create yet another opportunity for the state to seek the imposition of the death penalty. Just as we, as judges, have a constitutional obligation to declare a penalty unconstitutional when it exceeds the bounds of contemporary and moral standards of decency, we also must, as long as the death penalty remains in place, never lose sight of our ''responsibility to ensure that the ultimate criminal sanction is meted out only in accordance with constitutional principle.'' *Walton* v. *Arizona*, 497 U.S. 639, 674, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) (Brennan, J., dissenting). The unique nature of the death penalty necessitates that all possible protections be brought to bear during the pretrial, guilt and sentencing phases of the prosecution of a capital crime. Accordingly, I turn my attention to the defendant's claims of prosecutorial misconduct in the present case, which I believe warrant this court to invoke its supervisory authority over the administration of justice to vacate the penalty imposed, both to protect the rights of defendants and to maintain reasonable standards among prosecutors throughout the judicial system.

The majority separates the defendant's claims of prosecutorial misconduct into three broad categories. In addressing the claims that fall under the first category, namely, the state's references to the family of the victim, Walter Williams, a Waterbury police officer, the majority scolds the state's attorney for his characterization of the victim's autopsy photographs as the Williams ''family album,'' but, nevertheless, concludes that, while the remarks constituted ''an improper appeal to the emotions of the jury,'' they were not unduly prejudicial because they were ''brief and isolated . . . .''

The second category of impropriety encompasses the defendant's claim that the state's attorney ''invit[ed] the jury to ignore the legal principles that govern the question of whether death is the appropriate sentence.'' In addressing the defendant's claim of impropriety, the majority agrees with the defendant that some of the remarks were, indeed, improper,[1] but concludes that, because they were ''fleeting,'' no new penalty phase is required. The majority also is troubled by several statements made by the state's attorney regarding the mitigating factors alleged by the defendant. In particular, the majority reprimands the state's attorney for using the term ''emotional blackmail'' to manipulate the jurors,[2] but ultimately excuses this inflammatory characterization because it was used only a limited number of times.

The third category of alleged misconduct is classified by the majority as the ''[e]xpression of [p]ersonal [b]eliefs'' and includes a discussion of several improper remarks made by the state's attorney. In addressing these claims of prosecutorial misconduct, the majority castigates the state's attorney for the numerous times that he expressed his personal beliefs during closing argument,[3] but concludes, nonetheless, that while the comments were ''clearly . . . inappropriate,'' they ''represent the kind of lapse that sometimes occurs, without premeditation, in the heat of the moment and at the close of an emotional trial.'' With regard to the ''utterly unsupported assertion that defense counsel, himself, lacked confidence in the viability of the mitigating factors alleged by the defendant,''[4] the majority recognizes that the state's attorney's only purpose was ''to undermine the legitimacy of those mitigating factors on the basis of a wholly irrelevant consideration, namely, the extent to which defense counsel personally believed in the merits of the defendant's case.'' Nonetheless, the majority concludes that, ''[i]n light of the [trial] court's straightforward and timely instruction and defense counsel's informed decision regarding the most efficacious way to address the comments of the state's attorney,'' the defendant's due process rights were not violated.

The majority also points to the comments in the closing argument by the state's attorney vouching for the credibility of Anthony Crawford, a witness for the state.[5] With regard to the comments by the state's attorney concerning the number of gunshots that the defendant allegedly had fired; see footnote 5 of this dissenting opinion; the majority concludes that the defendant did not demonstrate that the comments were harmful. That determination is predicated on the detailed explanation of the facts by the state's attorney supporting Crawford's testimony, along with the defendant's decision not to object, and, instead, to accept ''a general instruction to the effect that the opinions or beliefs of counsel

are not evidence and are not to be considered by the jury.'' With regard to the comments by the state's attorney that he had not made a deal with Crawford in exchange for his testimony, the majority concludes that, although the remarks ''improperly injected [the state's attorney's] own credibility into the case,'' they did not prejudice the defendant. That conclusion is predicated on three things: defense counsel's closing argument disavowing any claim that Crawford had a secret deal; the defendant's express waiver of any remedy other than the general instruction that the expression by counsel of personal opinion or belief is irrelevant; and the defendant's challenge on cross-examination to Crawford's testimony that Crawford had no expectation of leniency.

The majority thereafter concludes that, although, on several occasions, the state's attorney engaged in conduct that clearly was improper, the improprieties did not render the penalty phase hearing fundamentally unfair.[6] The majority additionally concludes that this is not a case warranting the exercise of our supervisory authority over the administration of justice because, in essence, the defendant expressly declined to seek any remedy for the state's improprieties other than requesting the court to give the standard instruction that opinions of counsel are not entitled to any evidentiary weight. I respectfully disagree with the latter conclusion and, pursuant to the court's supervisory authority, would reverse the judgment and order a new penalty phase hearing.

This court recently explained the role that our supervisory authority plays in the context of addressing claims of prosecutorial misconduct. In *State* v. *Payne*, 260 Conn. 446, 450–52, 797 A.2d 1088 (2002), we stated the following: ''Although prosecutorial misconduct is often examined under the rubric of a defendant's due process protections, as in our recent decision in *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002), our review in the present case is limited to whether reversal is required under our supervisory authority. As an appellate court, we possess an inherent supervisory authority over the administration of justice. . . . The standards that we set under this supervisory authority are not satisfied [merely] by observance of those minimal historic safeguards for securing trial by reason which are summarized as due process of law . . . . Rather, the standards are flexible and are to be determined in the interests of justice. . . . *State* v. *Jones*, 234 Conn. 324, 346–47, 662 A.2d 1199 (1995). Of course, our supervisory authority is not a form of free-floating justice, untethered to legal principle. . . . Thus, [e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions. . . . *State* v. *Pouncey*, 241 Conn. 802, 813, 699 A.2d 901 (1997).

''[W]hen prosecutorial misconduct is not so egregious as to implicate the defendant's right to a fair trial, an appellate court may invoke its supervisory authority to reverse a criminal conviction when the prosecutor deliberately engages in conduct that he or she knows, or ought to know, is improper. See, e.g., *State* v. *Ubaldi*, [190 Conn. 559, 575, 462 A.2d 1001, cert. denied, 464 U.S. 916, 104 S. Ct. 280, 78 L. Ed. 2d 259 (1983)]; see also *State* v. *Ruiz*, 202 Conn. 316, 330, 521 A.2d 1025 (1987). *State* v. *Pouncey*, supra, 241 Conn. 811–12. In *Pouncey*, we previously have recognized that reversal is appropriate when there has been a pattern of misconduct across trials, not just within an individual trial. [*State* v. *Pouncey*, supra], 815–16 (noting that the defendant does not claim either that the assistant state's attorney in this case previously has used racially charged rhetoric in her arguments to other juries and concluding that [i]f such a pattern or practice of misconduct were discernible . . . reversal of the defendant's conviction would serve the important purpose of demonstrating that such conduct cannot, and will not, be tolerated).

''Accordingly, we exercise our supervisory authority in this context to redress repeated and deliberate misconduct by a prosecutor seeking to increase the likelihood of conviction even though that conduct does not necessarily require reversal as a due process violation. In accordance with the cases cited previously, we pay particular attention to the fact that the prosecutor knew or should have known that the conduct was improper and was part of a pattern of similar misconduct in other cases. We exercise our supervisory authority in order to protect the rights of defendants and to maintain standards among prosecutors throughout the judicial system rather than to redress the unfairness of a particular trial. We do so in order to send a strong message that such conduct will not be tolerated. Id., 812.'' (Internal quotation marks omitted.)

The present case involves a state's attorney who engaged in such a pattern of deliberate misconduct. This particular state's attorney, personally, is not new to findings of prosecutorial misconduct committed at trial; see *State* v. *Satchwell*, 244 Conn. 547, 568–69, 710 A.2d 1348 (1998) (state's attorney improperly referred to facts not in evidence by citing to redacted portions of transcript); *State* v. *Watlington*, 216 Conn. 188, 193, 579 A.2d 490 (1990) (disapproving of state's attorney's comments in closing argument, but concluding that unpreserved claim did not rise to level of ''egregious misconduct'' requiring reversal); nor is the office over which he has supervisory authority. See *State* v. *Whipper*, 258 Conn. 229, 266–75, 780 A.2d 53 (2001) (state's attorney improperly expressed personal opinion about expert witness, violated trial court's order regarding consciousness of guilt instruction, expressed personal

opinion about defendant's guilt, asked jury to consider matters not in evidence, and vouched for credibility of witnesses); *State* v. *Heredia*, 253 Conn. 543, 565, 754 A.2d 114 (2000) (state's attorney improperly appealed to jurors' passions and prejudices by invoking fear of defendant); *State* v. *Oliveras*, 210 Conn. 751, 763, 557 A.2d 534 (1989) (state's attorney improperly referred to facts not in evidence by referring in closing argument to stricken testimony); *State* v. *Moore*, 69 Conn. App. 117, 125, 795 A.2d 563 (2002) (state's attorney improperly referred to facts not in evidence); *State* v. *Conde*, 67 Conn. App. 474, 499, 787 A.2d 571 (2001), cert. denied, 259 Conn. 927, 793 A.2d 251 (2002) (state's attorney improperly referred to hearsay testimony not in evidence); *State* v. *Dillard*, 66 Conn. App. 238, 246–58, 784 A.2d 387, cert. denied, 258 Conn. 943, 786 A.2d 431 (2001) (state's attorney improperly suggested facts not in evidence, suggested defense counsel acted improperly, and vouched for witness' credibility); *State* v. *Mills*, 57 Conn. App. 202, 208–12, 748 A.2d 318, cert. denied, 253 Conn. 914, 754 A.2d 163 (2000) (reversing case due to state's attorney's argument improperly appealing to passions and prejudices of jury, expressing personal opinions about defendant's guilt and referring to extraneous matters).

Rather than reconsider his tactics, however, the state's attorney in the present case grows emboldened, buoyed by the mere slap on the wrist he has received or the harmless error curtain he has been able to hide behind. The case at hand is a prime example. When his objection to the court regarding defense counsel's failure to address the mitigating factors in any detail failed to achieve the desired result, the state's attorney took matters into his own hands, ''demonstrat[ing] a complete disregard for the [court's] rulings.'' *State* v. *Ubaldi*, supra, 190 Conn. 567. The defendant's seeming acquiescence to this misconduct does not, however, relieve this court of its responsibility to maintain the integrity of the judicial system and to put an end to the prosecutorial misconduct that has been allowed to '' 'reign unchecked' . . . .'' *Smith* v. *Phillips*, 455 U.S. 209, 221, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

I recognize that the issue of whether reversal is warranted requires weighing society's interest in maintaining a justice system that, both in appearance and in practice, treats all defendants fairly against some of the difficulties that might arise during a new trial, including: ''the extent of prejudice to the defendant; the emotional trauma to the victims or others likely to result from reliving their experiences at a new trial; the practical problems of memory loss and unavailability of witnesses after much time has elapsed; and the availability of other sanctions for such misconduct.'' *State* v. *Ruiz*, supra, 202 Conn. 330.

The state's attorney's behavior in this case was calcu-

lated to undermine the legitimacy of the defendant's mitigating factors on the basis of a wholly irrelevant consideration, namely, the extent to which defense counsel personally believed in the merits of the defendant's case. Additionally, the conduct of the state's attorney improperly was '' 'directed to passion and prejudice' '' and ''calculated to incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence.'' *Lesko* v. *Lehman*, 925 F.2d 1527, 1545 (3d Cir. 1991). By injecting inflammatory emotional considerations, expressing his personal opinions about the merits of the defendant's case, vouching for the credibility of the state's witnesses and injecting his oath into the jury's deliberative process, the state's attorney invited the jury to reach a verdict, in a capital case, based on factors outside of the evidence. This invitation allowed an improper and, indeed, unconscionable diminishment of the jury's responsibility.

I am mindful of the emotional trauma to the family of Officer Williams that will likely result from having to go through a new penalty phase hearing. ''Any time those affected by a violent crime are forced to relive their experiences in a new trial, the emotional trauma is significant. . . . [This] highly unfortunate [consequence], however, [does] not outweigh the compelling reasons that exist for reversing the conviction in light of the multiple, extraordinary instances of prosecutorial misconduct.'' *State* v. *Payne*, supra, 260 Conn. 464–65. Nor can I state that the possibility of memory loss by some witnesses and concerns about the unavailability of other witnesses are significant enough in this case to outweigh my reasons for reversing the imposition of the death sentence. The witnesses at the penalty hearing were, for the most part, the same witnesses who testified at the guilt phase of the trial. Their testimony has been memorialized and, if necessary, can be introduced into evidence through a transcript.

Finally, I have considered the availability of other sanctions. This court has stated that reversal of a conviction under our supervisory authority ''generally is appropriate . . . only when the '[prosecutor's] conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal.' *State* v. *Ubaldi*, supra, [190 Conn.] 575.'' *State* v. *Pouncey*, supra, 241 Conn. 812. ''Some tribunals have declined to use such supervisory power on the theory that society should not bear the burden of a new trial because of prosecutorial misconduct where a new trial is not constitutionally mandated. . . . According to some authorities, the evil of overzealous prosecutors is more appropriately combatted through contempt sanctions, disciplinary boards or other means. . . . This court, however, has long been of the view that it is ultimately responsible for the enforcement of court rules in prosecutorial misconduct

cases. . . . Upsetting a criminal conviction is a drastic step, but it is the only feasible deterrent to flagrant prosecutorial misconduct in defiance of a trial court ruling. We are mindful of the sage admonition that appellate rebuke without reversal ignores the reality of the adversary system of justice. The deprecatory words we use in our opinions . . . are purely ceremonial. Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice [of verbal criticism without judicial action]—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Ubaldi*, supra, 571.

Past experience has demonstrated that merely to reprimand, *once again*, a state's attorney who engages in deliberate misconduct that undermines the fairness of a trial does not sufficiently convey disapproval of those tactics. I would conclude, therefore, that nothing short of reversal will deter similar misconduct in the future. Accordingly, mindful of all of the circumstances involved in this case, I would reverse the judgment imposing the death sentence and order a new penalty phase hearing.

Accordingly, I respectfully dissent.

[1] After telling the jury that it had the ''awesome task'' of ''determining whether or not the death penalty should be imposed,'' the state's attorney remarked: ''I took an oath to enforce the laws of the state of Connecticut. The judge took an oath and you as jurors took an oath to see that the laws of the state of Connecticut are upheld and I do this, I make this argument to you . . . because I, like you, have taken an oath to uphold and enforce the law. And, indeed, if the facts are there and the law calls for it, based on my oath and your oath and the court's oath, the death penalty must be imposed. . . . I know it's not easy. I don't take it lightly and I know nobody on this panel takes it lightly and [the judge] doesn't take it lightly, but it's asking—we've been sworn as citizens as part of our civic duty to do.''

[2] In particular, the defendant challenges the following comments by the state's attorney: ''Emotional blackmail. . . . [T]hat's what this mitigating evidence is. It's an attempt to promote emotional blackmail on the jury. And that's not what the death penalty is about. The death penalty is about a person being told by society you have to take responsibility for your conduct, that's what the death penalty is. Society as a community . . . [p]ointing to someone who has committed a terrible crime, who has committed the ultimate crime, and say[ing] to that person you have to take responsibility for your actions. Don't blame your father; don't blame the teacher in school; don't blame your grandparents in Jamaica; don't blame your sister; don't blame your brother; don't blame the courts; don't blame that you run around with the wrong crowd. Step up and take responsibility for your actions. . . . Take responsibility for that. For once in your life, don't hold everybody up to emotional blackmail.''

[3] When addressing the aggravating factors in his closing argument, the state's attorney remarked: ''Now is my chance to argue to you why *I feel that we have proven* each of these aggravants beyond a reasonable doubt. Again, we don't have to prove all three. . . . I—of course, *it's my belief* that the evidence in this case supports the finding that all three have been proven.'' (Emphasis added.)

[4] During his closing argument to the jury, the state's attorney stated: ''I don't know how I can argue or rebut the mitigants. [Defense counsel] refused to argue to you when he had the opportunity what these mitigating factors were and what they all meant. He told you [the state's attorney] is going to stand up and he's going to wave the list and smile and laugh. I'm not laughing . . . . I take nothing about this case lightly. I ask you, *if [defense counsel]*

felt that his mitigating evidence was so strong and so convincing, why didn't he argue it to you when I would have the opportunity to come up and argue against it? I can't argue against anything now. . . . So I'm left here kind of punching in the shadows.

"*If he felt the way I feel—I felt my aggravants are strong. I felt the evidence supported them* and I argued those aggravants to you and I said here they are. Now, [defense counsel] stand up and try to knock them down. *I have confidence in my case.* You can't knock them down. . . . His part of the case is mitigants. *Does he have confidence in his mitigants? No,* because he knows if he puts them up there, I'd have the opportunity to come up and knock them down. So you have to ask that. Where's his big argument for the mitigants? . . . Because this is my last opportunity and because I don't know what [defense counsel] is going to say about mitigants, I am going to say something about them. Because *I do think the mitigants are weak*." (Emphasis added.)

The state's attorney also made the following comments with regard to certain specific mitigating factors: "I'm saying just because they say it's a mitigant doesn't mean it is and I'm not going to point out the one about the middle child. *If you ask me if I thought that was a mitigant, I'd say no.*" (Emphasis added.) Later, he continued: "*If [defense counsel] did not have the courage to stand in front of you and argue the mitigants so I can come up and attack them, you have to ask yourselves how strong are those mitigants*." (Emphasis added.)

[5] The state's attorney, anticipating that defense counsel would argue that Crawford's testimony was suspect because he had received special treatment from the state, commented as follows: "Crawford. He's no altar boy. He told you what he was, and *believe me,* they are going to say, well, don't believe . . . Crawford because he got a break from the state. *He didn't get a break from the state.* I prosecuted him for hindering prosecution in this case. *If I wanted to give Crawford a break in exchange for his testimony, the easiest thing for me to do was not to prosecute him . . . . We don't give a damn what happens to him later on. . . . If I wanted to give . . . Crawford a break in exchange for his testimony, common sense, would I have ever prosecuted him . . .* ? *So . . . Crawford has been given no break.* He came and he testified." (Emphasis added.)

Later, while arguing that Crawford's testimony as to the number of gunshots fired should be believed, the state's attorney remarked: "*You know why I believe . . . Crawford* that there were seven shots? I'm going to tell you why *I believe . . . Crawford . . .* ." (Emphasis added.) The state's attorney then proceeded to recite in detail the facts upon which Crawford's testimony had been based.

[6] We note that the majority has approached this issue by isolating each impropriety and then determining whether that isolated instance rendered the proceeding fundamentally unfair. The ultimate determination, however, is "whether the trial *as a whole* was fundamentally unfair and that the misconduct so infected the trial with unfairness as to make the conviction a denial of due process." (Emphasis added; internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 723, 793 A.2d 226 (2002). Accordingly, it is the effect of the *totality* of the improprieties that determines whether the defendant's due process rights were violated. Id., 728 (*Borden, J.*, concurring and dissenting) ("totality of the improprieties leads to the conclusion that the defendant was deprived of a fair trial").