No. 23-5996

IN THE SUPREME COURT OF THE UNITED STATES

LYNDON FITZGERALD PACE,

Petitioner,

v.

SHAWN EMMONS, Warden,
Georgia Diagnostic and Classification Prison,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR REHEARING

GRETCHEN M. STORK
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Gretchen_Stork@FD.org

Petitioner Lyndon Fitzgerald Pace, a Georgia death row inmate, submits this Petition for Rehearing of the May 13, 2024 Order of this Court denying his petition for a writ of certiorari. Counsel's certification that this petition complies with Rule 44.2, is attached. Of note:

> the petition in this Capital case was filed November 8, 2023. The Brief in Opposition was filed December 22, 2023. Thereafter, this Court called for the record and scheduled and rescheduled consideration of the Petition **nine (9) times** before denying it on March 13, 2024. The Court's concern with this case was and is warranted given conflicting decisions by the lower court on the Question Presented, which continue;
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> the Petition for Writ of Certiorari in *Andrew v. White, Warden*, No. 23-6573, which involves egregious examples of prosecutorial misconduct in presenting prejudicial evidence and argument, has also been rescheduled for Conference **nine (9) times** by this Court.

1. Contradictory Decisions Continue in the Eleventh Circuit, i.e. *Carruth v. Comm., Ala. DOC*, 93 F.4th 1338, 1357, (11th Circuit, decided March 1, 2024), States Prosecutorial Arguments are Reviewed Under *Darden v. Wainwright*, 477 U.S. 168 (1986)

The lower court's decision conflicts with all other circuit courts of appeal and is internally inconsistent with its own, other, case law, *i.e. Carruth, supra*. Without check, the Eleventh Circuit has shown that it will continue to apply or disregard this Court's precepts as any given panel of the court sees fit.[1]

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[1] *See, e.g., Lucas v. Warden, Ga. Diag. and Class. Prison*, 771 F.3d 785, 804-805 (11th Cir. 2014)(*Darden* is clearly established law, citing *Parker v. Matthews*,

567 U.S. 37, 45 (2012). In *Medina v. Sec'y, Dept of Corr.*, 733 Fed. Appx. 490 (2018) (unpublished), the panel found that

> The "clearly established Federal law" for purposes of prosecutorial misconduct was set forth in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). *See Parker v. Matthews*, 567 U.S. 37, 45-49, 132 S.Ct. 2148, 2155, 183 L.Ed.2d 32 (2012) (stating that *Darden* was the "clearly established Federal law" for purposes of prosecutorial misconduct).

Id. at 494. But in *Reese v. Sec'y, Florida Dept. of Corrections*, 675 F.3d 1277 (11th Cir. 2012), the court of appeals found that *Darden* "offers Reese no assistance in establishing that the Supreme Court of Florida unreasonably applied clearly established federal law … [o]nly a holding of the Supreme Court can clearly establish federal law, and the *Darden* Court held that the prosecutor's argument did not deprive the petitioner of a fair trial." 675 F.3d at 1289. The *Reese* Court wrote further

> [T]he Supreme Court has never held that a prosecutor's closing arguments were so unfair as to violate the right of a defendant to due process. Reese is not entitled to habeas relief because "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme Court]." *Knowles*, 556 U.S. at 122, 129 S.Ct. at 1419 (internal quotation marks omitted). The Supreme Court has reiterated, time and again, that, in the absence of a clear answer – that is, a holding by the Supreme Court – about an issue of federal law, we cannot say that a decision of a state court about that unsettled issue was an unreasonable application of clearly established federal law.

Id. at 1297-88.

This leads to results like the prosecutorial arguments affirmed in this case.[2]

2. *Darden* is Clearly Established Federal Law that the Circuit Flouted

In *Darden v. Wainwright*, 477 U.S. 168, 182 (1986), this Court found "the relevant question" in cases of prosecutorial misconduct is "whether the prosecutor's comments 'so infected the trial with unfairness as to

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[2] The prosecutor's closing argument at the penalty phase of Mr. Pace's capital trial was a series of outrageous, prejudicial arguments. As set forth in the petition, these included 1) the introduction of a cartoon depicted a jury issuing a verdict and finding a defendant "not guilty by virtue of insanity, ethnic rage, sexual abuse, and you name it," despite the fact none of these were issues in the case, (D.12-19:37-38); 2) an explicit "Golden Rule" argument that jurors should imagine themselves in the place of each of the victims as they were raped and murdered, (D.12-19:59-60, 62-63); 3) the argument that a life sentence would give Pace "free room and board, color TV." (D.12-19:64-65-99), and, when counsel objected, the additional argument that, "if anal sodomy is your thing, prison isn't a bad place to be." (D.12-19:65); 4) an argument that Pace had not repented or said he was sorry, and so was comparable to one of the thieves who was crucified beside Jesus, who also did not repent and so was denied entry to heaven. (D.12-19:72); 5) a repeated argument that jurors would abdicate their duty to innocent victims "screaming out for justice" if they did not impose a death sentence (D.12-19:68-69); 6) an instruction to jurors to ignore mitigating testimony from Pace's family members because jurors in the cases of other infamous serial killers like Jeffrey Dahmer and Ted Bundy "gave justice" in those cases despite the testimony of family members (D.12-19:46-47); and 7) an argument, with a demonstration by the prosecutor, that if jurors did not give a death sentence it meant they were tearing out and throwing away the section of the Georgia law books about the death penalty. (D.12-19:76-77).

make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). And for § 2254(d) purposes, this Court affirmed in *Parker v. Matthews*, 567 U.S. 37, 45 (2012), that with respect to the AEDPA *Darden* constitutes the "clearly established Federal law" for reviewing state court decisions.

Here the court of appeals found there was "no Supreme Court holding" that placed the state court ruling beyond fairminded debate and expressly refused to acknowledge *Darden* as the applicable clearly-established federal law governing Mr. Pace's claim. It instead relied on its own pre-*Parker* precedent in *Reese*.

Here, the lower court stated

> Our holding in *Reese* controls here: because neither *Darden* nor *Donnelly* held that prosecutor's closing argument violated due process, we can't say that the state court's ruling here "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

App. A at 34. It then wrote that because the Georgia Supreme Court performed a statutorily-required sentence review, that meant the state court had analyzed the cumulative effect of the prosecutor's arguments. The lower court and the state court majority did not hold anything with respect to fairness. The lower court wrote that there was "no Supreme Court holding that placed the Georgia Supreme Court's ruling beyond fairminded debate," and "none of the cases Pace has pointed to – *Darden, Donnelly*, and *Berger* – clearly establish that his trial fell short of what due

process requires." App. A at *34. But, the lower court did not consider the jurors' question - whether they could sentence Mr. Pace to life without parole - instead writing that the aggravation in the case was overwhelming.

3. Rogue, Unchecked, Untethered Circuit Decisionmaking

The Eleventh Circuit continues to acknowledge and apply *Darden* as clearly established Federal law as individual panels see fit, with no end in sight. As acknowledged by the lower court concurrence, capital cases "where prosecutors have acted improperly, unprofessionally, and unbecomingly, continue to come before us." App. A at *41 (Rosenbaum, J., concurring).

This Court should emphasize that the minimum courts must do is apply clearly established federal law in reviewing these claims in habeas corpus settings. Rehearing on the Court's denial of certiorari and reversal are appropriate.

Respectfully Submitted,

GRETCHEN M. STORK
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta Street, NW
Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Gretchen_Stork@fd.org

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