

No. 23-_____

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

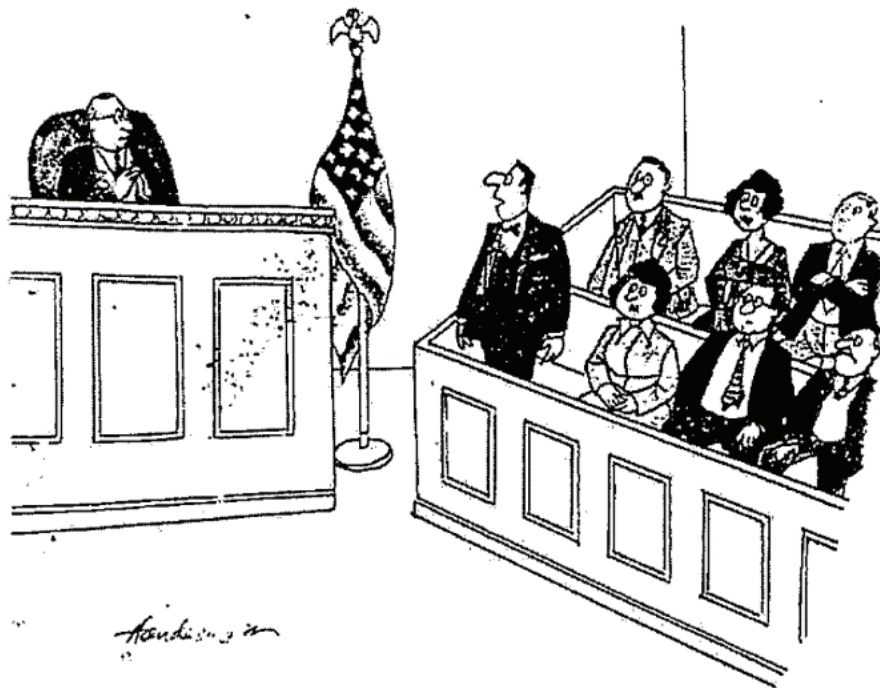
PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Lyndon Pace was convicted of four counts of malice murder in an Atlanta, Georgia trial. Thereafter, the prosecutor asked jurors to sentence him to death based upon:

- (1) A Playboy magazine cartoon



"We find the defendant not guilty by virtue of insanity, ethnic rage, sexual abuse and you name it."

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- The defense never raised "insanity, ethnic rage, sexual abuse and you name it," and the trial court found that the cartoon was not relevant to any issue in the case but allowed the prosecutor to introduce it and seek death based upon what it depicted;
- (2) A repeated Golden Rule argument graphically stating what the victims must have gone through and asking the jurors to imagine themselves as the victims;
 - (3) Argument that because he had been homeless when he was arrested, a life sentence would not punish but provide "free room and board, color TV" and added "if anal sodomy is your thing, prison isn't a bad place to be.";

- (4) A comment on the right to silence in that Jesus was crucified between two sinners, one who repented and one “never repented,” and that “[Pace] too, has never repented. He hadn’t (sic) said one time I’m sorry.”;
- (5) Argument that it was jurors’ duty to choose death because “[t]he blood of innocent victims, four innocent victims scream out” “for you to do your duty” and “justice,” and the jurors would be abdicating their duty as “the conscience of the community” and ignoring the victims if they chose life imprisonment; and
- (6) Argument that a death sentence was required by Georgia statute and if jurors chose life they would have “snatched that section about the death penalty out,” and then simulated ripping a section from the statute. He reiterated that “if your verdict is anything but death, what we need to do is take this book” and simulated throwing it into a trash can.

These arguments violated this Court’s jurisprudence on improper prosecutor argument, *see e.g. Darden v. Wainwright*, 477 U.S. 168, 182 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Berger v. United States*, 295 U.S. 78 (1935), drew two dissents from the Georgia Supreme Court on direct appeal, and were condemned by the concurrence below as “disgusting” and “outrageous.”

The lower court found *Darden* not to be clearly established federal law under Section 2254 of the Anti-terrorism and Effective Death Penalty Act (AEDPA) and held that unless this Court has granted relief on a claim that a prosecutor’s argument violates due process then no due process rule exists.

The following questions are presented:

- 1. Is a lower court bound by *Darden*, given this Court’s holding in *Parker v. Matthews*, 567 U.S. 37 (2012), that *Darden* is clearly established Federal law under the AEDPA?
- 2. Under the totality of the prosecutor’s misconduct, and the fact that jurors still wanted to know whether they could choose life without parole as a sentencing option, was the prosecutor’s argument a harmful violation of due process?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner LYNDON FITZGERALD PACE petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW AND JURISDICTION

The unpublished opinion of the Court of Appeals affirming the denial of relief by the United States District Court for the Northern District of Georgia is attached as Appendix (App.) A.¹ On July 11, 2023, the court denied a petition for panel rehearing and rehearing *en banc*. App. B. The opinion of the district court is attached as App. C. The opinion of the Georgia Supreme Court is attached as App. D.

On September 19, 2023 Justice Thomas granted an application to extend the deadline to file a Petition until November 8, 2023. *See* 28 U.S.C. § 2101 and Supreme Court Rules 13.5 and 30.2. This Court has jurisdiction under 28 U.S.C. § 1254(1).

¹ “A majority of the panel determine whether an opinion should be published. Opinions that the panel believes have no precedential value are not published.” Eleventh Circuit IOP 6, FRAP Rule 36. This Court is less likely to grant certiorari when the lower court’s decision was unpublished. *See, e.g.*, Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U.Pa.L.Rev. 1129 (2021-2022). However, Justice Stevens said the Court “tend[ed] to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.” Jeffrey Cole & Elaine E. Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, *Litigation Spring* 2006, at 8, 67. *See also Plumly v. Austin*, 574 U.S. 1127, 1131-32 (2015)(Thomas, J. dissenting from denial of certiorari)(“True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit...But that in itself is yet another disturbing aspect of the Fourth Circuit’s decision, and yet another reason to grant review. The Court of Appeals had full briefing and argument on Austin’s claim of judicial vindictiveness. It analyzed the claim in a 39-page [here a 34-page] opinion written over a dissent [here, a blistering concurrence]. By any standard – and certainly by the Fourth Circuit’s own – this decision should have been published.”)

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution:

[N]or shall any person...be compelled in any criminal case to be a witness against himself. U.S. Const. amend V.

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence. U.S. Const. amend. VI.

[N]or [shall] cruel and unusual punishments [be] inflicted. U.S. Const. amend. VIII.

No State shall...deprive any person of life [or] liberty...without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254. State custody; remedies in Federal courts [AEDPA]:

(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Introduction: Jurors Ask if They Can Impose Life Without Parole

The breadth of the prosecutorial misconduct here is extraordinary and violated nearly every category of improper argument condemned by this Court. The specific comments were uniquely offensive in addition to being “squarely and obviously improper.” App. A at *41. (Rosenbaum, J., concurring)(“I ...want to underscore my disgust at how outrageous the prosecution’s conduct in closing argument was.”) Two justices of the Georgia Supreme Court found on direct appeal that Pace was entitled to relief based on just one of the prosecutor’s arguments, despite the aggravated nature of the case. *Pace*, 524 S.E.2d 490, 508-509 (1999).

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 make the resulting conviction a denial of due process.’” *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). In finding that the prosecutor’s comments there did not deprive the petitioner of a fair trial, the Court noted that the argument “did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent [cit.] Much of the objectionable content was invited by or was responsive to the opening summation of the defense.” 477 U.S. at 181-82. Other factors considered by the *Darden* Court included the fact the trial court instructed jurors several times that arguments of counsel were not evidence, and the “overwhelming eyewitness and circumstantial evidence” supporting guilt. *Id.*

No court has adjudicated the claim in this case properly under *Darden* to assess whether the comments here taken as a whole deprived Pace of due process at a capital sentencing. The court of appeals deferred to the state court’s denial of

relief, not for the reasons given by the state court but because the lower court concluded *Darden* was not clearly established federal law governing the claim and that therefore the state court decision could not have been unreasonable. It then found that the state court had properly considered the many occasions of prosecutorial misconduct cumulatively, not because the state court actually performed a cumulative analysis and addressed the federal question, but by citing to the Georgia court's state statute-mandated sentence review, pursuant to which the Georgia Supreme Court must review every case in which death is imposed for proportionality, not due process.

Finally, the lower court opined that despite an argument it found reprehensible and for which two state court justices would have granted relief, Pace could not prevail because there was too much aggravation. The state court dissent found that despite the aggravated nature of the crimes the jury "remained open to the possibility of a life sentence, as evidenced by the question they sent the trial court during their sentencing deliberations regarding the possibility of a sentence of life without parole," *Pace v. State*, 524 S.E.2d 490, 509 (1999), a fact ignored by the majority in reaching its conclusion.

A. Course of proceedings

Petitioner was convicted of four counts each of malice murder and rape, and two counts of aggravated sodomy, and sentenced to death in March, 1996, in Fulton County, Georgia. His convictions and death sentences were affirmed by the Georgia Supreme Court in December of 1999, with two justices dissenting based upon the prosecutor's improper argument at the penalty phase. *Pace v. State*, 524 S.E.2d 490 (1999), attached as App. D. Certiorari was denied October 2, 2000. *Pace v. Georgia*, 531 U.S. 839 (2000).

A petition for writ of habeas corpus was filed in the Superior Court of Butts County, Georgia and was denied on July 30, 2007, following an evidentiary hearing. (D.17-19). On January 12, 2009, the Georgia Supreme Court denied a certificate of probable cause to appeal.

On February 20, 2009, Petitioner filed a petition for federal habeas corpus relief in the District Court for the Northern District of Georgia, Atlanta Division. Without an evidentiary hearing, the District Court denied all relief on August 24, 2015, App. C. A certificate of appealability was granted as to five issues, including prosecutorial misconduct in the closing argument of the sentencing phase. (D.62:1). An appeal was timely filed and the United States Court of Appeals for the Eleventh Circuit denied Pace's claims on May 11, 2023. App. A. Rehearing was denied on July 11, 2023. (App. B). Following Pace's application for an extension of time in which to file certiorari, this Court granted a 30 day extension up to and including November 8, 2023.

B. Facts Relevant to the Questions Presented

1. The Crimes and Trial

In 1988 and 1989, there was a series of sexual assaults/homicides of mostly elderly African-American women in the Vine City neighborhood of Atlanta. Three years later, in 1992, Petitioner Lyndon Pace, whose criminal history consisted mainly of petty and related drug offenses, was arrested and charged with burglarizing the homes of two women in the same neighborhood. Utilizing nascent DNA technology, police announced that evidence taken from four of the victims matched Pace, and he was charged with those crimes.

The guilt phase of trial lasted from February 20 to March 5, 1996 and resulted in convictions on four counts each of murder and rape, and two counts of aggravated sodomy. The penalty phase began immediately following the verdict.

Trial counsel's penalty phase strategy was residual doubt and mercy. (D.14-2:104). Family members testified that they did not believe Pace had committed the crimes and that he was the victim of evidence manipulated by the State. Two neighbors of Pace's mother testified that they did not know Pace as an adult but that he had been a nice boy whose single mother had worked hard to raise her family. An ex-girlfriend testified to good character, and a local church minister testified that the community did not support the death penalty and, on cross-examination, his belief the death penalty had been used for political aims.

2. Prosecutor's Closing Argument at Penalty Phase

a. The Cartoon

Immediately prior to closing arguments, the prosecutor noticed his intent to introduce a cartoon. It depicted a jury issuing a verdict and finding a defendant "not guilty by virtue of insanity, ethnic rage, sexual abuse, and you name it." (D.12-19:37).² Pace's trial counsel objected that the cartoon improperly interjected issues of race and social status into the case as well as insanity and abuse, issues that were not raised by the defense, and "trivialize[d] the possible taking of [] human life." (D.12-19:37). The prosecutor claimed that "ethnic rage" referred to "substantial evidence" about being born in the ghetto or the poor side of town and said the local minister had testified to "racial discrimination in terms of seeking the death penalty." (D.12-19:39).

The state trial court acknowledged that "none of those things listed in that cartoon are an issue in this case" (D.12-19:38), but allowed the cartoon. The

² The cartoon was published in Playboy magazine.
<https://archive.org/details/Playboy199506Dobd99.ml/Playboy%201995-06%20%28%20dobd99.ml%20%29%20/page/n155/mode/2up>

prosecutor went on in his closing to show the cartoon to the jury and asserted “[w]e find the defendant not guilty by virtue of insanity, ethnic rage, sexual abuse, and you name it, okay. That’s basically what [Pace] is trying to tell you when he talks about his upbringing. That it’s everybody else’s fault that he turned into a serial killer but his own...the defendant’s defense in this case is that he is not to blame, but that society is.” (D.12-19:57). That defense was in fact never asserted.

b. The Golden Rule Argument

The prosecutor explicitly directed the jurors to imagine themselves in the place of the victims, a classic “Golden Rule” argument:

Now, come with me to that scene of the crime. Imagine that night. Ms. McAfee is laying in bed asleep. She is violently awakened by somebody standing over her. Somebody grabbing at her. If you could imagine being asleep, and you wake up to hand tearing off your clothes. You wake up to hands grappling your body. And just as you wake up and realize what’s going on, your clothes are ripped from you. Something is tied around your neck, and you are strangled.

(D.12-19:59-60). Trial counsel did not object. The prosecutor went on to remark on each of the remaining victims in similar manner. (D.12-19:62-63).

c. Death Because Life in Prison Would Provide Room, Board, TV and Anal Sodomy

The prosecutor told the jury that a life sentence would not adequately punish Pace, who was homeless when he was arrested, because it would give him “free room and board, color TV.” (D.12-19:64-65-99). When counsel objected, the prosecutor repeated, “TV,” then added, before the trial court could rule, “And if anal sodomy is your thing, prison isn’t a bad place to be.” (D.12-19:65).³

³ Because trial counsel objected after the TV remark and before the anal sodomy comment, the Georgia Supreme Court ruled that there was no objection to the anal sodomy comment. It then found that there was no reasonable probability

d. Death Because Pace “Never Said He Was Sorry” – Comment on Right to Silence and About Jesus

The prosecutor told jurors that when the defense talked about mercy they should remember the two thieves crucified alongside Jesus. “One of them said...Lord, remember me when you come into your kingdom. Jesus forgave him and took him into his kingdom. The other thief never repented. I don’t know where he went, but he wasn’t taken into Jesus’ kingdom. [Pace] too, has never repented. He hadn’t (sic) said one time I’m sorry.” D.12-19:72. Trial counsel moved for a mistrial, arguing that this was a comment on “[Pace’s] exercise of his right to remain silent.” (D.12-19:73). Despite finding that the prosecutor’s argument was “very close to the line,” the trial court denied the mistrial. (D.12-19:74). Neither the court nor counsel could think of any adequate curative instruction, and the court gave none. *Id.*

e. Death Because Jurors Were the Conscience of the Community and Owed it to “Innocent Blood”

The prosecutor told the jury that the failure to deliver a death verdict would be abdicating their duty as “the conscience of the community,” and ignoring the victims of the crimes. (D.12-19:67). “[T]he blood of innocent victims, four innocent victims scream out.” (D.12-19:67). He invoked “innocent blood” that was “screaming out for justice” and “scream[] out to you to do your duty,” (D.12-19:68-69), three more times, and argued that duty meant imposing death. (D.12-19:68-69) A motion for mistrial was denied.

f. Death Because Juries Gave Other Serial Killers Death Sentences

that this “improper, isolated comment” changed the result of the sentencing phase, App D., *Pace* at 506, which is not the *Darden* test.

The prosecutor instructed jurors to ignore mitigating testimony from Pace's family because infamous serial killers like Jeffrey Dahmer and Ted Bundy also had families who said nice things about them, and the juries in those cases "gave [] justice" regardless. (D.12-19:46-47). The trial court denied a mistrial but instructed the jury "not [t] concern yourselves with the verdicts in those other cases." (D.12-19:48-49).

g. Death Because a Life Sentence Would Circumvent State Law and Rip the Death Penalty Pages From the Georgia Statute

The prosecutor concluded his closing by waving a copy of the Georgia Criminal Code, and said, "This is a Georgia law book which has the punishments and the crimes in it. If based on the evidence in this case you don't return a death penalty verdict, you have snatched that section of the book about the death penalty out." (D.12-19:76). He then simulated ripping a section out of the book.

Trial counsel objected but before the court could rule, the prosecutor broke in and told jurors, "My point to you is simply this. If your verdict is anything other than death, what we need to do is take this book," and then simulated throwing it into a trash can. (D.12-19-77, D.12-19:86).

3. Defense Counsel's Closing Response: Asking Jurors for Mercy Based on Pace's background as the prosecutor had claimed would be "idiotic" and "insult [the jurors'] intelligence."

Trial counsel referred to the family members' testimony – the focus of his mitigation evidence -- a single time, to ask the jury to forgive the family for disagreeing with the verdict. (D.12-19:83). He spoke repeatedly about the victims, and asked for mercy. Referring to the cartoon, he stated "We didn't come in here and say Lyndon Pace is insane. We didn't come in here and try to insult your intelligence by putting up witnesses to say that he had a deprived family. We did just the opposite." (D.12-29:88). The defense had tried to show Pace was from a

good family which “struggled, but they made it. Then to come in and say, oh don’t sentence him to death because he was poor. That wasn’t done.” (D.12-19:89-90).

4. Jury Note During Deliberations Asking About Rejecting the Death Penalty

During the penalty phase deliberations, the jury sent out a note asking “Is it possible for a life sentence to be given eliminating any possibility of parole?” App. F.⁴ Without consulting the parties, (D.12-26:87) the trial court responded in writing that the jurors were not to consider the question of parole and should assume that their sentence would be carried out. The jury then reached a death verdict.

C. The State Court on Direct Appeal with Two Dissents on Closing Argument

A majority of the Georgia Supreme Court affirmed the death sentences. It concluded that few of the arguments were improper, that counsel failed to object to some, and that curative instructions resolved one impropriety, the comparisons to other serial killers. App. D., *Pace*, 524 S.E.2d at 505-508. As to the “Golden Rule” comment instructing jurors to imagine themselves in the place of the victims, the majority wrote that counsel did not object and that any impropriety was overcome by the aggravated nature of the case. *Id.* at 506-07. The majority did not address whether the proceedings were fundamentally unfair.

The state court did not address whether prejudice resulted from the prosecutor’s comments as a cumulative whole so as to deprive Pace of a fair trial. Pursuant to state statute, the court performed a mandatory proportionality review. Under Georgia law, the Georgia Supreme Court “must review the evidence in every

⁴ The prosecutor had refused to permit life without parole. A statute making life without the possibility of parole an available capital sentencing option was enacted the same year Mr. Pace was indicted. O.C.G.A. § 17-10-16. Because Pace’s crimes predated the enactment of the statute, it did not apply to him unless the State consented. The State refused. D.9-12:7-10.

case in which the death penalty has been imposed and address three statutory questions. *See* OCGA § 17-10-35(c).” *Tate v. State*, 695 S.E.2d 591 (2010).⁵ Here the court wrote

[a]lthough the prosecutor made several improper comments during closing argument in both phases of the trial, we conclude, given the overwhelming evidence of Pace’s guilt and the enormous amount of evidence in aggravation, that the death sentences in his case were not imposed under the influence of passion, prejudice, or any other arbitrary factor. O.C.G.A. § 17-10-35(c)(1). The death sentences are also not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. OCGA § 17-10-35(c)(3).

App. D at 507. This is not the *Darden* test.

Two dissenters found the Golden Rule argument alone, in reasonable probability, “changed the jury’s discretion in choosing between life imprisonment or death,” rendering his sentencing fundamentally unfair. *Pace* at 509, *citing Brooks v. Kemp*, 762 F.2d 1382, 1413 (11th Cir. 1985). The jury at that point had “moved beyond weighing evidence into weighing imponderables,” *id.* at 508, and

the jury was not so appalled by the crimes committed by Pace that they rejected out of hand any sentence other than death. Rather, the record establishes that the jury remained open to the possibility of a life sentence, as evidence by the question they sent to the trial court during their sentencing deliberations regarding the possibility of a sentence of life without parole.

Id. at 509. (Hunstein and Fletcher, JJ, dissenting).

⁵ The questions are: “(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section 17-10-30; and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”

D. The Federal District Court

The District Court deferred to the state court decision under §2254(d)(1). It noted the state court’s “repeated conclusions that the various arguments did not change the result of the penalty phase or change the jury’s discretion,” not the *Darden* standard. Addressing the contention the state court did not properly address the comments cumulatively, the district court wrote that the only argument the state court found to be improper was the Golden Rule argument, so cumulative error analysis was “not available.”⁶ D.52:40-41. It wrote that Golden Rule arguments are permissible.⁷ It concluded that “most importantly,” the “heavy” weight in aggravation left the court confident in the outcome. D.52:42. Fundamental unfairness was not mentioned.

E. The Lower Court

1. *Darden* was not “clearly established”

The court of appeals did not address the reasonableness of the state court’s actual treatment of the prosecutor’s improper comments within the meaning of § 2254(d). It instead found that “there’s no Supreme Court holding” that placed the Georgia Supreme Court’s ruling beyond fairminded debate” because “neither *Darden* nor *Donnelly* held that a prosecutor’s closing argument violated due

⁶ In fact, the state court found the anal sodomy remark to be error, noted that the trial court gave curative instructions on the references to other serial killers which “cured any error” on those remarks, and offered to give curative instructions regarding the prosecutor’s comments on Pace’s right to silence if counsel could suggest any.

⁷ Citing *Reese v. Sec’y, Florida Dept. of Corrections*, 675 F.3d 1277 (11th Cir. 2012). The ruling in *Reese* was not that Golden Rule arguments are not recognized, but that the argument there was not a Golden Rule argument because the prosecutor “did not impermissibly invite ‘the jury to place themselves in the victim’s shoes.’” 675 F.3d at 1292.

process.” App. A at *34. The lower court cited to its own ruling in *Reese*, *see* n.7, *supra*, which pre-dates this Court’s contrary holding in *Parker v. Matthews*, 567 U.S. 37, 45 (2012). Without mention of the jury’s note asking if a life without parole sentence was possible, the lower court wrote “even if *Darden* could lead to a violation of clearly established federal law,” the state court decision was not unreasonable because of the strength of the aggravation case. App. A at *35.

The lower court also found that the Georgia Supreme Court had performed a proper cumulative analysis of the prosecutor’s comments, citing select portions of that court’s state statutory sentence review. App. A at *36. Omitting the citations to the Georgia Code section, O.C.G.A. § 17-10-35(c) and using ellipses to omit the state court’s references to “both phases” of trial and “overwhelming evidence of Pace’s guilt,” the lower court wrote:

Even if *Darden* could clearly establish federal law on this point, the Georgia Supreme Court did analyze the cumulative effect of the prosecutor’s statements. After individually considering each of the challenged statements from closing argument, the Georgia Supreme Court considered them collectively, noting that, “[a]lthough the prosecutor made several improper comments during closing argument..., we conclude, given...the enormous amount of evidence in aggravation, that the death sentences in his case were not imposed under the influence of passion, prejudice, or any other arbitrary factor.”

App. A at *36. This holding did not consider the jurors’ question, and is not the *Darden* rule.

2. Concurrence finds arguments “disgusting” and “outrageous”

Concurring in the judgment “because the law requires it,” Judge Rosenbaum wrote to “underscore [her] disgust at how outrageous the prosecution’s conduct in closing argument was.” Singling out “just a couple of the prosecutor’s egregious remarks,” the concurrence stated

[H]e urged the juror to impose the death penalty rather than send Pace to prison for life because ‘if anal sodomy is your thing, prison isn’t a bad place to be.’ The despicable nature of this comment speaks for itself. Not satisfied with that, the prosecutor also told the jury to sentence Pace to death because if it did not, it would be ‘saying that these victims’ lives didn’t matter.’ It goes without saying that it is never appropriate or even permissible to attempt to guilt a jury into a death verdict. These tactics aren’t close to the line or justifiable. They are squarely and obviously improper.

App. A at *41. The concurrence bemoaned the failure of “the state” to “hold its prosecutors responsible” where they “resort[] to dirty tricks, cheating, and bullying in pursuing a death verdict.” *Id.* at *42.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT DECISION CONFLICTS WITH CONTROLLING DECISIONS FROM THIS COURT, CONFLICTS WITH ALL OTHER CIRCUIT COURT DECISIONS, AND REFLECTS AN INTRA-CIRCUIT CONFLICT. SEE RULE 10, (a)-(c).

A. This Court’s Prosecutorial Misconduct Jurisprudence, i.e. *Darden v. Wainwright*, 477 U.S. 168, (1986), *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and *Berger v. United States*, 295 U.S. 78 (1935), controls

For over a century, this Court has recognized that improper argument by a prosecutor can be “prejudicial to the accused.” *Dunlop v. United States*, 165 U.S. 486, 498 (1897); *cf. Williams v. United States*, 168 U.S. 382, 398 (1897) (holding that prosecutor’s comment on proffered testimony in open court was “highly improper” and “tended to prejudice the rights of the accused to a fair and impartial trial”). These and the following decisions have established clear rules defining both what prosecutors may and may not argue and how courts should assess prejudice from improper arguments. The AEDPA takes these decisions into account. “[C]learly established Federal law,” 28 U.S.C. § 2254(d)(1), includes the following:

In *Berger v. United States*, 295 U.S. 78 (1935), this Court reversed the petitioner’s conviction for conspiracy to issue counterfeit money and held that the prosecutor’s closing argument “contain[ed] improper insinuations and assertions.”

Id. at 85. The prosecutor argued he “knew” that a witness could have identified Berger, and that her failure to do so on the witness stand was the result of “complicated . . . rules of the game” that precluded the prosecutor from eliciting this testimony. *Id.* at 86-87. The *Berger* Court found “[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Id.* at 88. The respected position of the prosecutor makes likely that misconduct will have a prejudicial effect on a jury. *See id.* This Court reversed Berger’s conviction, finding it “highly probable” this misconduct prejudiced the accused. *Id.* at 89.

This Court again addressed the question of improper prosecution argument in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), where the prosecutor suggested the defendant hoped for a conviction on a lesser offense (and not for acquittal), a remark which the jury was specifically instructed to disregard. *See id.* at 640-41. Under the circumstances, this Court found that these “few brief sentences in the prosecutor’s long and expectably hortatory closing argument” were not so prejudicial as to violate due process. *Id.* at 647-48. But, the Court noted that some instances of misconduct “may be too clearly prejudicial for . . . a curative instruction to mitigate their effect.” *Id.* at 644, 648 n.23.

Caldwell v. Mississippi, 472 U.S. 320 (1985), applied this Court’s jurisprudence on prosecutorial argument in a capital sentencing proceeding, holding that an argument that improperly lessened the jury’s sense of responsibility for sentencing required reversal of the petitioner’s death sentence. The prosecutor in *Caldwell* informed the jury that “your decision is not the final decision” because “the decision you render is automatically reviewable by the Supreme Court.” *Id.* at 325-26. This Court found this argument to be “clearly improper,” because the “uncorrected suggestion that the responsibility for any ultimate determination of

death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.” *Id.* at 333. This argument so prejudicial as to warrant reversal of petitioner’s death sentence.

In *Darden v. Wainwright*, this Court reviewed the prosecutions closing argument in a death-penalty case, this time at the guilt-innocence phase. The Court held that the prosecutor’s inflammatory emotional appeals and belligerent castigation of the defendant “deserved . . . condemnation.” 477 U.S. 168, 179 (1986). Among other objectionable remarks, the Darden prosecutor “made several offensive comments reflecting an emotional reaction to the case,” including references to the defendant as an “animal” and wishes that the defendant had been killed already or had committed suicide. *Id.* at 180 & nn.11-12. The *Darden* Court found such comments to be “undoubtedly” improper. *Id.* at 180. However, the Court found that these improper comments did not deprive the defendant of a fair trial, in part because of “the overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges.” *Id.* at 182 (internal quotation marks omitted). This Court noted that *Darden* presented markedly distinct circumstances than *Caldwell*, in part because the comments in *Caldwell* were made at the sentencing phase while those in *Darden* were made at the guilt-innocence phase – one in which “overwhelming” evidence of guilt was presented. 477 U.S. at 183 n.15.7

Finally, in *Romano v. Oklahoma*, 512 U.S.1 (1994), the state at capital sentencing introduced evidence of a prior, separate murder for which a prior jury had sentenced Romano to death. This Court rejected Romano’s argument that this violated the Eighth and Fourteenth Amendments. “We believe the proper analytical framework in which to consider this claim is found in *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974),” and

The relevant question in this case...is whether the admission of evidence regarding petitioner’s prior death sentence so infected the sentencing proceeding with unfairness as to render the jury’s

imposition of the death penalty a denial of due process. See *Sawyer v. Smith*, 497 U.S. 227 (1990)] at 244 (observing “[t]he *Caldwell* rule was . . . added to [*Donnelly*’s] existing guarantee of due process protection against fundamental unfairness”); see also *Darden*, 477 U.S. at 178-181 (in analyzing allegedly improper comments made by prosecutor during closing argument of guilt innocence stage of capital trial, “[t]he relevant question is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” (quoting *Donnelly*, *supra*, at 643)). Under this standard of review, we agree with the Oklahoma Court of Criminal Appeals that the admission of this evidence did not deprive petitioner of a fair sentencing proceeding.

B. In *Parker v. Matthews*, this Court held *Darden* was Clearly Established Federal Law

With respect to the AEDPA, in *Parker v. Matthews*, 567 U.S. 37, 45 (2012), Petitioner argued that the prosecutor’s suggestion that “Matthews had colluded with his lawyer . . . to manufacture an extreme emotional disturbance defense” violated due process. This Court held that “under AEDPA, the Sixth Circuit had no authority to issue the writ of habeas corpus” unless the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law.” “The ‘clearly established Federal law’ relevant here is our decision in *Darden v. Wainwright*, 477 U.S. 168 (1986), which explained that a prosecutor’s improper comments will be held to violate the Constitution only if they “so infect the trial with unfairness as to make the resulting conviction a denial of due process”” *Id.* at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

C. The Lower Court Refused to Recognize *Darden* as Clearly Established Federal Law Based upon a Pre-*Matthews* Eleventh Precedent, *Reese v. Sec’y, Florida Dept. of Corrections*, 675 F.3d 1277 (11th Cir. 2012).

On June 11, *Matthews* was decided. On March 30, 2012, before *Matthews*, the Eleventh Circuit found *Darden* was not clearly established Federal law. *Reese*, *supra*.

Darden offers Reese no assistance in establishing that the Supreme Court of Florida unreasonably applied clearly established federal law when it held that the prosecutor's closing argument, which no court has condemned, did not violate Reese's right to due process. Only 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.

[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 1297-88.⁸

⁸ Concurring in the result only, Judge Martin wrote,

Where a state court has adjudicated...a claim on the merits, habeas petitioners must demonstrate that the state court's decision is contrary to, or involves an unreasonable application of, the Supreme Court's clearly established standard – that "the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)). There can be little doubt that a holding of the Supreme Court squarely established this specific due process standard within the meaning of AEDPA. *See generally Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251 (2009).

D. The Lower Court's Decision Conflicts With All Other Circuits on *Darden* Being Clearly Established Federal Law

The lower court is at odds with the other circuits in refusing to recognize *Darden* as the clearly established federal law for § 2254 purposes. *See, e.g., Hardy v. Maloney*, 909 F.3d 494, 501, 503 (1st Cir. 2018); *Jackson v. Conway*, 763 F.3d 115, 144 (2d Cir. 2014); *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 1999); *Bennett v. Stirling*, 842 F.3d 319, 323 (4th Cir. 2016); *Geiger v. Cain*, 540 F.3d 303, 308 (5th Cir. 2008); *Stermer v. Warren*, 959 F.3d 704, 724-25 (6th Cir. 2020); *Evans v. Jones*, 996 F.3d 766, 774 (7th Cir. 2021); *Sublett v. Dormire*, 217 F.3d 598, 600 (8th Cir. 2000); *Deck v. Jenkins*, 814 F.3d 954, 978 (9th Cir. 2016); *Andrew v. White*, 62 F.4th 1299, 1337-38 (10th Cir. 2023).⁹

It is true that the Supreme Court has never granted habeas relief based upon a prosecutor's closing argument. But that fact alone does not mean the Supreme Court has not clearly established a standard by which such claims should be evaluated. Said another way, the Supreme Court can clearly establish federal law sufficient to support relief under AEDPA by establishing standards even in cases where the habeas petition is denied under that standard.

Id.

⁹ In an unpublished one-judge opinion denying a certificate of appealability, the Fifth Circuit has termed this Court's directive that *Darden* is clearly established federal law to be a "suggestion" and its holding dicta:

McGee argues that inflammatory remarks from the prosecution in McGee's sentencing phase entitle him to relief. ... [t]he Supreme Court has suggested that derogatory remarks by prosecutors may infringe a defendant's due process and fair trial rights. *See Darden v. Wainwright*, 477 U.S. 168, 180-83 (1986)(denying relief when defendant was called an "animal" during the guilt phase). *Darden's* dicta of course cannot clearly establish the law under § 2254(d). [cit.] And in any event, McGee does not explain why *Darden's* dicta--which focused on whether inflammatory remarks could prejudice the way the jury evaluated the defendant's guilt -- would apply with equal

Here, 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.

After recounting the argument in *Darden* and holding in *Donnelly*, 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.”

The lower court went on to dismiss this Court’s ruling in *Berger* as “not hold[ing] that a prosecutor’s closing argument deprived the petitioner of a fair trial,” but instead addressed the “cumulative effect’ on the jury of the prosecutor’s ‘pronounced and persistent’ misconduct at trial.” “In other words, *Berger* didn’t hold that the prosecutor’s closing argument alone violated due process, so the Georgia Supreme Court did not unreasonably apply that decision to the prosecutor’s closing argument in this case.” App. A at *35.

In short, “the Supreme Court has never held that a prosecutor’s closing argument” in a vacuum, “were so unfair as to violate the right of a defendant to due process.” *Reese*, 675 F.3d at 1287. So we can’t say that the Georgia Supreme Court unreasonably determined that

force after the jury convicts the defendant and proceeds to sentencing.”

McGee v. Lumpkin, 2022 WL 18935854 (5th Cir. 2022)(unpublished).

Unpublished opinions in the Eleventh Circuit here, and the Fifth Circuit in *McGee* -- the death belt – defying this Court ought to be corrected. See n.1, *supra*.

the prosecutor's closing argument didn't render Pace's sentencing "so unfair as to violate [his right] to due process."

App. A at *35.

The court went then found that even if *Darden* did apply, the state court "did not unreasonably determine that the prosecutor's closing argument did not render Pace's trial unfair." The state court majority did not hold anything with respect to fairness or unfairness. "We consider the prosecution's closing argument 'in the context of the entire proceeding, including ... the weight of aggravating and mitigating factors.' See *Land v. Allen*, 573 F.3d 1211, 1219-20 (11th Cir. 2009)." *Id.*

The court did not refer to the jurors' question about life without parole after they had heard all of the aggravating circumstances. It then recited four times, using identical language, that the jury had "heard and saw evidence that Pace brutally raped, sodomized, and strangled to death" each of the four victims and had found 19 aggravating circumstances. It went on to assert that the state court did perform a cumulative review of the improprieties of the prosecutor's closing, citing to the state court statutory sentencing review.

E. The Eleventh Circuit Has Disagreements Between Published and Unpublished Opinions on the Question

After *Reese*, *supra*, in 2014, the Eleventh Circuit held *Darden* was clearly established federal law, citing *Matthews. Lucas v. Warden, Ga. Diag. and Class. Prison*, 771 F.3d 785, 804-805 (11th Cir. 2014). The Court found the prosecutor's statements and argument at capital sentencing that individuals escape from prison "every day," and, by implication, a death penalty was the proper punishment, *id.* at 803-04, was harmless, as in *Darden* and *Donnelly*. *Id.*

In 2018, 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). In *Darden*, the Supreme Court held that improper comments by a prosecutor require a new trial only if they “so infected the [original] trial with unfairness as to make the resulting conviction a denial of due process.” 477 U.S. at 181, 106 S.Ct. at 2471 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

Id. at 494.

The panel found that the prosecutor’s arguments – which according to the defense, twice characterized Medina’s story about “some black guy” driving away with the victim was “racist” and based upon a “racist stereotype,” *id.* at 494-95 – were not improper since Medina had told the police that the victim was last seen with “an unknown black man,” which was racial stereotyping by Medina. *Id.* at 495. In any event, even if improper, “there was no evidence that they ‘so infected the trial with unfairness as to make the resulting conviction[s] a denial of due process.’” *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471.

And then there is this case finding *Darden* provided no rule, relying on *Reese* as the controlling authority.

F. The Prosecutor Here was Worse Than in *Darden* and the Patent Prosecutorial Misconduct was Prejudicial

The prosecutor’s sentencing phase argument was thoroughly improper. An appropriate review shows this argument “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden* at 181, quoting *Donnelly*, 416 U.S. at 643; *Berger v. United States*, 295 U.S. 78, 89 (1935)(where the misconduct is not “slight or confined to a single instance,” but “pronounced and persistent,” the “probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”)

1. Sentencing argument

a. The Playboy Magazine Cartoon

This Court has made explicit that the penalty phase of a death penalty trial, “must be conducted with dignity and respect,” *Wellons v. Hall*, 558 U.S. 220 (2010). A defendant has a constitutionally-protected right to present mitigation, *Williams v. Taylor*, 529 U.S. 362, 393 (2000). An argument that mocks and denigrates mitigation, and introduces race into the proceedings is clearly proscribed.

The prosecutor brandished the cartoon from Playboy magazine showing a jury returning a verdict “find[ing] the defendant not guilty by virtue of insanity, ethnic rage, sexual abuse, and you name it.” App. E. He showed the cartoon to the jury and misrepresented the mitigation they were to consider. “In considering the nice child, the good character, and the family circumstances, ...[“]We find the defendant not guilty by virtue of insanity, ethnic rage, sexual abuse, and you name it,[“] okay. That’s basically what [Pace] is trying to tell you when he talks about his upbringing. That it’s everybody else’s fault that he turned into a serial killer but his own...the defendant’s defense in this case is that he is not to blame, but that society is.” (D.12-19:57). This not only denigrated mitigation but “misstate[d] the evidence.” *Darden* at 181-82.

But this prop evidence had nothing to do with the mitigation evidence: Pace’s brother testified to the *opposite* of what the prosecutor claimed: that the family’s impoverished environment had nothing to do with Pace’s criminality. (D.12-18:110). The prosecutor himself deliberately elicited testimony from neighbors that there was nothing wrong with Pace mentally, and that they knew of no abuse. (D.12-18:73-75, D.12-18:93-94). The cartoon and the prosecutor’s accompanying belittling argument prompted defense counsel to inform jurors that to tell them

they should consider evidence the family was poor would be “idiotic” and would “insult their intelligence.” (D.12-19:88-89).

The prosecutor likewise claimed that “ethnic rage” referred to “substantial evidence” about being born in the ghetto or the poor side of town and was to rebut the minister witness’s testimony about “racial discrimination in terms of seeking the death penalty.” (D.12-19:38-39). But the defense never raised race or privilege.¹⁰ Testimony revealing that Pace was raised in a poor Black community is not “ethnic rage.” It was the prosecutor’s mocking reference to racially charged “ethnic rage,” through the cartoon that interjected race into the deliberations, in violation of the 8th and 14th Amendments. *McCleskey v. Kemp*, 481 U.S. 279 (1987). “It is beyond dispute” that “[t]he Constitution prohibits race-based arguments...” *Bennett v. Stirling*, 842 F.3d 319, 323 (4th Cir. 2016), quoting *McCleskey* at 309 & n.30, and finding that under the clearly-established law of *Darden*, a state court’s conclusions that comments “were not appeals to racial prejudice” were unreasonable factual determinations, and the argument violated the Due Process Clause.

This argument trivialized and disparaged mitigating evidence as deceitful and misleading. It encouraged the jury to disregard the individualized sentencing precepts this Court found make capital punishment constitutional. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). It was not ambiguous. *Donnelly*, 416 U.S. at 647 (instructing courts that ambiguous remarks may not be intended to have their most damaging meaning). In ‘mistat[ing]’ and ‘manipulat[ing]’ the actual evidence, this argument was certainly

¹⁰The minister testified, in response to the prosecutor, that he believed Pace’s capital prosecution was political because the longtime District Attorney was running for election that fall -- as was the prosecutor. He also testified that people in the community “knew how the death penalty had been used,” i.e. politically. (D.12-19:21-22).

intended to have its most damaging meaning, and infected the trial with unfairness, in violation of due process. *Darden*, 477 U.S. at 181.¹¹

b. The Golden Rule Argument

“Golden Rule” arguments which “suggest[] to jurors...that they put themselves in the shoes of one of the parties, [are] generally impermissible because [they] encourage[] the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” *Pace*, 524 S.E.2d at 508 (Hunstein, J. and Fletcher, PJ, dissenting)(cleaned up). Accordingly, “Georgia

¹¹ In the comments condemned by this Court in *Darden*, the prosecutor referred to Darden at the guilt phase as an “animal,” who should not be allowed out except on a leash and who he would like to see “blown away by a shotgun.” *Darden* at 179, 180 n.12. Because the comments in *Darden* were made at the guilt-innocence stage of trial, this “greatly reduc[ed] the chance that they had an effect at all on sentencing.” 477 U.S. at 184.

Here the jury heard a degrading, dehumanizing closing argument at guilt/innocence and then the improper sentencing phase argument. That sentencing proceedings may be affected by errors in the preceding guilt phase is not novel; “[i]n making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial.” *Zant v. Stephens*, 462 U.S. 862, 872 (1983)(discussing Georgia’s non-weighting sentencing scheme); *Donnelly*, *supra*, 416 U.S. at 643 (denial of due process turns on “examination of the entire proceedings.” The ultimate impact of the misconduct at the penalty phase cannot be fully assessed without consideration of the prosecution’s characterizations of Pace at the guilt innocence closing.

The guilt phase closing here was more egregious than that in *Darden*, repeatedly conjuring up comparisons not just to an “animal” but to the devil. The prosecutor called Pace a “misogynistic, woman hating demon of the devil,” (D.12-15:59), “Satan’s lap dog, sitting there,” *id.*, and an “unhuman, deviant, pathological killer” (D.12-15:66) of “primitive urge ...[and] deviant desires” *id.* at 69, who had “slithered” and “creeped” into the decedent’s homes and “didn’t care when those loathsome, abhorring urges erupted in him.” (D.12-15:60, 74).

law has clearly and repeatedly disapproved the use of the golden rule argument by prosecutors in criminal cases.” *Id.* at 509.

The so-called Golden Rule argument here was a textbook example of the genre: it explicitly and repeatedly directed the jurors to *imagine* themselves in the place of the victims.

Imagine that night. Ms. McAfee is laying in bed asleep. She is violently awakened by somebody standing over her. Somebody grabbing at her. If you could imagine being asleep, and you wake up to hand tearing off your clothes. You wake up to hands grappling your body. And just as you wake up and realize what’s going on, your clothes are ripped from you. Something is tied around your neck, and you are strangled.

(D.12-19:59-60). He continued this argument, inviting the jury to imagine themselves in the place of the next victim:

So come with me and think about [the next] crime scene. How would you feel in Ms. McClendon’s situation? Again, to wake up with some man standing up over you choking the life out of you and pulling on your clothes.

(D. 12-19:62).

The comments were extensive, deliberate, and devastatingly inflammatory. The two Georgia dissenting judges found this argument “dramatic in its details and [] uttered for the purpose of prejudicing the jury against mercy.” *Pace* at 509. The prosecutor “deliberately used an argument which was prohibited by well-established Georgia case law. The argument was neither isolated nor unintentional. It unambiguously invited the jurors to imagine themselves in the place of two crime victims. It was not mitigated ...by any instruction by the court.” *Id.*

Taking into account the jury’s note inquiring whether a sentence of life without parole was available, the dissenters concluded that “the State’s deliberate and extensive introduction of a prohibited argument...the absence of any factors to

mitigate that impermissible argument, and indicators that the evidence of Pace’ guilt did not automatically predispose the jury to consider only a death sentence,” meant the golden rule argument undermined confidence in the outcome of the sentencing proceeding, *i.e.*, that there was a “reasonable probability that the improper arguments changed the jury’s exercise of discretion in choosing between life imprisonment and death,” (citation omitted) which “rendered Pace’s capital sentencing hearing fundamentally unfair.” *Id.*

c. Death Because Prison Would Gratify With Anal Sodomy

“The despicable nature of this comment speaks for itself.” App. A at *41 (Rosenbaum, J., concurring). The prosecutor told the jury that a life sentence would not adequately punish Pace, who was homeless when he was arrested, because it would give him not only “free room and board, color TV” (D.12-19:64-65), but “if anal sodomy is your thing, prison isn’t a bad place to be.” (D.12-19:65). This comment was inflammatory and grotesque, calculated to dehumanize and disgust. It was intentional. It was “isolated,” as unreasonably found by the state court majority, only in that there were not repeated suggestions Pace would enjoy prison rape if the jury did not sentence him to death. This comment is offensive today; it is difficult to imagine how appalling it was 27 years ago, when it was *illegal* for consenting adults to engage in sodomy.¹²

It was the capstone of a penalty phase closing was an unrelenting succession of improper comments, and which infected the trial with unfairness, in violation of due process. *Darden*, 477 U.S. at 181; *Berger v. United States*, 295 U.S. 78, 89(1935)(where the misconduct is not “slight or confined to a single instance,” but

¹² See *Bowers v. Hardwick*, 478 U.S. 186 (1986), holding Georgia statute criminalizing sodomy between two adults in the privacy of the home is constitutional, overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

“pronounced and persistent,” the “probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”)

d. Death Because Pace Remained Silent and “Never Said He was Sorry”

“When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them.” *Donnelly*, 416 U.S. at 643 (1974). To counter what he believed would be the defense argument for “the New Testament and the message of forgiveness and mercy,” the prosecutor told his own New Testament story suggesting that even Jesus would condemn Pace to hell and argued that Pace’s exercise of his Fifth Amendment right to silence meant he was undeserving of mercy.

I ask you to think back to the thief, the two thieves on the cross...One of them said...Lord, remember me when you come into your kingdom. Jesus forgave him and took him into his kingdom. The other thief never repented. I don’t know where he went, but he wasn’t taken into Jesus’ kingdom. [Pace] too, has never repented. He hadn’t (sic) said one time I’m sorry.

D.12-19:72.

In addition to suggesting that anyone who has not “repented” is destined for damnation and not mercy, this argument was a direct comment on Pace’s right to remain silent. *See Griffin v. California*, 380 U.S. 609 (1965). The trial court found the comment to be “very close to the line,” when trial counsel objected. (D.12-19:74). But the court denied a mistrial after the prosecutor insisted he was commenting upon the testimony of Petitioner’s relatives, whom he claimed to have asked whether Pace had spoken of the crimes and expressed “any sorrow.” *Id.* And neither the court nor counsel could think of any adequate curative instruction so the court gave none. *Id.*

The prosecutor's claim he was simply following up on defense witness testimony about remorse was pretext.¹³ Remorse was not part of the defense witnesses's testimony as Pace professed his innocence throughout both phases of trial. The witness testimony was their belief Pace was innocent despite the verdicts, and for mercy.

This was another example of the prosecutor crafting improper arguments by seizing on some snippet of defense witness testimony and then mischaracterizing and exaggerating it, as in his justifying the cartoon as being responsive to a mitigation argument of race and poverty that the defense never made. Here, it not only "manipulate[d] or misstat[ed] the evidence," it "implicate[d] other specific rights of the accused ... the right to remain silent." *Darden*, 477 U.S. at 182. Yet the argument that the prosecutor's comment that Pace had "never said he was sorry" violated Pace's Fifth Amendment rights, was never addressed by the lower court at all, under *Darden* or *Griffin*.

e. Death Because Juries Gave Other Serial Killers Death Sentences

The prosecutor instructed that the jury should ignore mitigating testimony from Pace's family because infamous serial killers like Jeffrey Dahmer and Ted Bundy and John Wayne Gacy also had families who said nice things about them, and the juries in those cases "gave [] justice" regardless. (D.12-19:46-47). The trial court denied a mistrial but instructed the jury "not [t] concern yourselves with the verdicts in those other cases." (D.12-19:48-49).

¹³ The prosecutor had asked Pace's sister Jennifer if Pace had expressed remorse *for what Jennifer had undergone* when police raided her house after Pace's arrest. Pace's ex-girlfriend was asked: "So he never told you he was sorry about *all of this*?" That was the extent of the purported "remorse" testimony.

This inflammatory argument urging a death sentence because other juries did so denied Pace individualized consideration of his sentence. To present Pace as the equivalent of these notorious individuals – one who killed, dismembered and cannibalized 17 victims;¹⁴ one who kidnapped, raped and murdered dozens of women;¹⁵ and one who dressed as a clown and tortured and killed 33 young men and boys¹⁶ – meant the generic instruction was insufficient to cure “any error that could result,” as held by the state court on direct appeal. *Pace* at 506. To “accept [this] reasoning” would mean “there would never be a viable claim for prosecutorial misconduct, because the most basic of instructions would cure the potential for an inflamed jury.” *Cauthern v. Colson*, 736 F.3d 465, 476 & n.8 (6th Cir. 2013)(granting relief on resentencing where state court unreasonably applied *Darden* and noting prosecutor’s comparison of petitioner to Jeffrey Dahmer and Susan Smith, “two of the most widely-despised criminals” at the time, was “solely inflammatory”).

f. Death Because Jurors Were the Conscience of the Community and Owed it to “Innocent Blood”

Jurors were told that failure to deliver a death verdict would be abdicating their duty “as the conscience of the community.” (D.12-19:67). The prosecutor challenged jurors that “the blood of innocent victims, four innocent victims scream out.” (sic) (D.12-19:67). He admonished that “innocent blood screams out to you to do your duty” and “screams out for justice in this case.” (D.12-19:68) “Again, you are the conscience of the community. Are you going to let this innocent blood go without justice?” (D.12-19:69).

¹⁴<https://www.nytimes.com/1991/08/04/us/17-killed-and-a-life-is-searched-for-clues.html>

¹⁵ <https://www.desmoinesregister.com/story/news/2023/09/08/iowa-state-researcher-thinks-serial-killer-ted-bundy-killed-100-women-not-30-official-count/70784993007/>

¹⁶ <https://vault.fbi.gov/John%20Wayne%20Gacy>

The references to “innocent blood” that was “screaming” for justice were calculated to incite the passions and prejudices of the jurors, and made it impossible for them to follow the directives of this Court and decide the sentence based upon the evidence presented. *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 7171 (1961). They were repeated not once but five times, a “pronounced and persistent,” reprise with a “probable cumulative effect upon the jury which cannot be disregarded as inconsequential.” *Berger*, 295 U.S. at 89 (1935). To drive his points home, the prosecutor followed up with the threat that if jurors returned a life sentence, “you are saying that these victims’ lives didn’t matter.” (D.12-19:70). As the lower court concurrence noted, this was clearly improper. App. A at *41.¹⁷

The prosecutor additionally told jurors it was “up to [them] to stop the violence” and “send a message” because “if you don’t some other person is going to suffer at their hands.” (D.12-19:67-69). This too was improper. *See Darden* at 180 (improper where the “comments implied that the death penalty would be the only guarantee against a future similar act.”). It eviscerated the concept of discretion required by the Eighth Amendment and diminished the jury’s responsibility. *Caldwell*, 472 U.S. at 333.

g. Death Because a Life Sentence Would Mean Gutting Actual State Law

In an argument which rather than “manipulat[ing] or misstat[ing] the evidence,” *Darden* at 182, instead misstated the law, the prosecutor instructed the jury that imposing any sentence other than death was tantamount to disregarding

¹⁷ “It goes without saying that it is never appropriate or even permissible to attempt to guilt a jury into a death verdict. These tactics aren’t close to the line or justifiable.” *Id.*

or revoking Georgia law. This argument was both inaccurate and improper, and yet again served to limit the jury's discretion.

The prosecutor concluded his closing by dramatically brandishing a book containing Title 17 of the Official Code of Georgia, Annotated, and told jurors, "This is a Georgia law book which has the punishments and the crimes in it. If based on the evidence in this case you don't return a death penalty verdict, you have snatched that section of the book about the death penalty out." (D.12-19:76). He then simulated ripping a section out of the book. Trial counsel objected that "[t]he law provides for very specific reasons how and why the death penalty should or should not be imposed," and that the prosecutor was "coming so close to reading the law by asking the jurors to say they are going to snatch the law book." (D.12-19:76-77). Before the trial court could rule, the prosecutor broke in and told jurors, "My point to you is simply this. If your verdict is anything other than death, what we need to do is take this book," and then simulated throwing it into a trash can. (D.12-19-77, D.12-19:86).

This argument told jurors that their obligation to consider a life sentence and Petitioner's individual circumstances had been pretermitted by the drafters of the statute, who had already made the careful decision required.

Properly considering the trial as whole, the closing here was toxic. Each individual argument was patently offensive and harmful; together they permeated the penalty phase proceedings. The severity of the misconduct, and the near total absence of curative judicial instructions denied Pace a fair trial. A proper review must inevitably conclude that the prosecutor's conduct in this case "so infected the trial to with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643; *accord Darden*, 477 U.S. at 182.

2. The Lower Court prejudice analysis violated this Court's precedents which, properly applied, require relief

In *Zant v. Stephens*, 462 U.S. 862, 873-74 (1983), this Court recognized the unique features of Georgia's sentencing scheme, in which the sentencing jury has complete discretion to choose between life imprisonment or death after the finding of one statutory aggravating circumstance:

In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.

Mercy “is particularly favored under Georgia’s statute, which permits the jury in its unbridled discretion to impose a life sentence regardless of the number or strength of aggravating circumstances.” *Romine v. Head*, 253 F.3d 1349, 1368 (11th Cir. 2001). As the two dissenting justices of the Georgia Supreme Court found, the jury was “weighing imponderables” and “the impact of [the] improper argument on [the] jury’s consideration of mercy cannot be [] easily quantified.” App. D, *Pace* at 508-509 (Hunstein and Fletcher, JJ, dissenting). The dissenters considered the evidence that the jury here was not set on a death sentence despite the aggravation.

[T]he jury was not so appalled by the crimes committed by Pace that they rejected out of hand any sentence other than death. Rather, the record establishes that the jury remained open to the possibility of a life sentence, as evidence by the question they sent to the trial court during their sentencing deliberations regarding the possibility of a sentence of life without parole.

Id. at 509.

In addition, here the prosecutor “manipulate[d] or misstate[d] the evidence,” i.e., the use of a Playboy cartoon, unlike *Darden*, and “implicate[d] other specific

rights of the accused such as...the right to remain silent.” *Darden*, supra, 477 U.S. at 181, 182, also unlike *Darden*. The intent was to infect the proceedings with unfairness, and the prosecutor repeatedly so infected the sentenced proceedings. Under *Darden*, relief is required.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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