No. 23-5996

In the
Supreme Court of the United States

Lyndon Fitzgerald Pace,
Petitioner,

v.

Shawn Emmons, Warden
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals correctly applied this Court's precedent when it determined the state court's denial of Petitioner Lyndon Pace's due process challenges to the prosecutor's sentencing phase closing arguments was a reasonable application of clearly established federal law.

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INTRODUCTION

Petitioner Lyndon Fitzgerald Pace terrorized four women, three of whom were elderly, brutally raping, sodomizing, and killing them. Pet. App. A at 4-5. Three years later, Pace broke into the home of two more elderly women, but they escaped his brutality. *Id.* at 5. After trial, the jury found nineteen statutory aggravating circumstances and imposed four death sentences. *See* Pet. App. D at 135. On direct appeal, Pace argued that the prosecutor's closing arguments so infected his trial with unfairness that his death sentences were unreliable. The Georgia Supreme Court analyzed each of the prosecutor's arguments raised on appeal and held some were improper or "unprofessional." *Id.* at 143-45. However, the court concluded the remarks did not change the outcome of the sentencing phase of the trial. *See id.* The court then analyzed the record as a whole, with specific mention of the prosecutor's "improper comments," and held that, "given the overwhelming evidence of Pace's guilt and the *enormous amount of evidence in aggravation*, … the death sentences in his case were not imposed under the influence of passion, prejudice, or any other arbitrary factor." *Id.* at 145 (emphasis added).

That conclusion was plainly sound, and it certainly is not part of a split of authority nor provide any other reason to grant review here. Nearly fifty years ago in *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, (1974), this Court agreed that review of a prosecutor's closing remarks in a collateral proceeding was a 'narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." (Quoting *DeChristoforo v. Donnelly*, 473 F.2d 1236, 1238 (1st Cir. 1973)). Over a decade later, in *Darden v. Wainwright*, 477 U.S. 168, 181, (1986), the Court

reiterated what it stated in *Donnelly* and explained that even if the prosecutor's remarks were "universally condemned," "[t]he relevant question [was] whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (Quoting *Donnelly* 416 U.S. at 643). However, despite the due process right articulated in these cases, this Court has never concluded a prosecutor's arguments alone created a due process violation.

Because this Court has never held a prosecutor's closing arguments created a due process violation (even those universally condemned), and given the general standard provided in *Donnelly* and *Darden*, the court of appeals correctly concluded that it could not hold the state court's decision was an unreasonable application of clearly established federal law. *See* Pet. App. A at 32; *see also Parker v. Matthews*, 567 U.S. 37, 48 (2012) ("the *Darden* standard is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations"). The court of appeals did not hold, as advocated by Pace, that there was no clearly established federal law applicable to his claims. Instead, the court concluded that it could not hold that that the state court's denial of Pace's due process claim was "beyond fairminded disagreement" given that the specifics of what created a violation was unclear. Pet. App. A at 33. The Eleventh Circuit's decision does not conflict with the precedent of this Court or the other courts of appeals.

Moreover, the court of appeals assumed that "even if *Darden* could lead to a violation of clearly established law" the Georgia Supreme Court's decision was still reasonable. Pet. App. A at 33. The court of appeals condemned the prosecutor's closing argument (much as the Georgia Supreme Court did). *See id.* at 33. But the court of appeals held that because the

aggravating evidence was "enormous" and Pace's crimes were "heinous," it could not conclude it was unreasonable for the state court to determine that the arguments did not unfairly infect the trial proceedings. *Id.* at 33. Neither *Darden* nor *Donnelly* had crimes nearly as aggravated and horrendous as those committed by Pace yet, even with improper arguments, the Court still concluded there was no due process violation in either. *See Donnelly*, 416 U.S. at 639-40 & n.6, 643; *Darden*, 477 U.S. at 171, 180 n.12, 181.

This case is entirely factbound, presents no split of authority, and provides no opportunity to clarify any uncertainty in the law. The Court should deny the petition.

STATEMENT

A. Facts of the Crimes

The court of appeals summarized Pace's many crimes as follows:

> On August 28, 1988, Lula Bell McAfee, age eighty-six, was found dead in her home in Atlanta. She was naked and lying face down on her bed, with a pillow underneath her stomach that pushed her pelvis up, exposing her vaginal and rectal areas. Blood was pouring out of her mouth and her bra and a strip of cloth were tangled around her neck. Her bathroom window was open and the window screen had been removed and left lying on the ground. Her bedroom was "completely ransacked" and a briefcase, car keys, and money were missing. Ms. McAfee's autopsy established that she had been strangled to death. The presence of lubricant on her vaginal and rectal areas suggested that she had been sexually assaulted. Swabs from her breasts revealed the presence of saliva, and vaginal and rectal swabs revealed the presence of sperm. Ms. McAfee had known Pace "since he was a baby."
>
> On September 10, 1988, Mattie Mae McClendon, age seventy-eight, was found dead in her home in the Vine City area of Atlanta. She was lying in her bed with bloodstained sheets pulled over her body.

Her bathroom window was open, the window screen had been torn apart from the outside, and a tree limb just outside the window was broken. Ms. McClendon's autopsy showed that she had been strangled to death and suffered "a very large" vaginal laceration "with a large amount of hemorrhage coming from it." Rectal swabs taken from her body revealed the presence of sperm.

On February 4, 1989, Johnnie Mae Martin, age seventy-nine, was found dead in her home in the Vine City area of Atlanta. She was lying on her bed with a pillow over her head. Her bloodstained nightgown was pulled up around her breasts, a shoelace was wrapped around her neck, and the rest of her body was naked with her legs spread open. A side window was open, the window screen had been pushed back, and a ladder was just under the window on the outside of the house. The house was "ransacked." Ms. Martin's autopsy established that she had been strangled to death and suffered a vaginal laceration and other injuries in her vaginal area. Rectal swabs taken from her body revealed the presence of sperm.

On March 4, 1989, Annie Kate Britt, age forty-two, was found dead in her home in Atlanta. Ms. Britt was lying naked in her bed with a sock knotted tightly around her neck. Someone had pried open a back window, the window screen was lying on the ground, and a pipe underneath the outside of the window was loose and detached from the wall. The house was "ransacked." Ms. Britt's autopsy established that she had been strangled to death, and a broken fingernail, bruises, and scrapes on her body were "consistent with her fighting with her attacker at the time that she was strangled." Her autopsy revealed multiple tears in her anus that appeared as if they had occurred after she died, and rectal and vaginal swabs revealed the presence of sperm.

More than three years later, on September 24, 1992, Sarah Grogan, age sixty-nine, woke up to find that someone had broken into her home in the Vine City area of Atlanta. Ms. Grogan left her bedroom and found a man in her kitchen. As the man chased her back to her bedroom, Ms. Grogan slammed the bedroom door in the man's face. Ms. Grogan got her gun and shot through the door, but the man wasn't there when she opened it to see if her shot had hit him. As she left the bedroom, the man "took a shot at [her]," but she "r[a]n to the front door and got out." Police discovered that the burglar had broken into Ms. Grogan's house through a rear kitchen window where the screen had been ripped from its frame.

> Investigators took fingerprints from the rear window and from other items that the man touched.
>
> Less than a week later, on September 30, 1992, Susie Sublett, an elderly woman living in the Vine City area of Atlanta, woke up to find a man in her bedroom searching through her purse. The man had broken into her home through a side window. Ms. Sub-lett confronted the man, and he threatened to "blow [her] brains out." Ms. Sublett fought the man and chased him out of the window he had broken in through. Ms. Sublett's phone lines had been cut and so had her neighbors', so she called the police from another neighbor's house. When the police arrived, they found that the side window's screen had been removed and that there was a milk crate on the ground below the window. Police took fingerprints from the window screen and from other items that the man touched.
>
> The fingerprints taken from Ms. Grogan's and Ms. Sublett's homes matched Pace's, which were on file from an earlier conviction. Police obtained a warrant and arrested Pace. Pace agreed to give the police samples of his hair and blood. Pace's pubic hair matched hair samples taken from Ms. Martin's and Ms. Britt's murders. And the sperm found in each of the murder victims matched Pace's DNA.

Pet. App. A at 4-5.

B. Proceedings Below

1. Trial and Direct Appeal Proceedings

Following a jury trial in 1996, Pace was convicted of four counts of malice murder, four counts of felony murder, four counts of rape, and two counts of aggravated sodomy. Pet. App. D at 135. "The jury recommended a death sentence for each malice murder conviction after finding beyond a reasonable doubt the existence of 19 statutory aggravating circumstances."[1] *Id.*

[1] "In addition to the death sentences, the trial court sentenced Pace to six consecutive life sentences for the rape and aggravated sodomy convictions." Pet. App. D at 135.

Relevant here, during the sentencing phase of Pace's trial, the prosecutor made several arguments. The Georgia Supreme Court considered the arguments individually and cumulatively and denied relief. *See* Pet. App. D at 143-45.

a. Comparison to Other Serial Killers

The prosecutor made remarks comparing Pace to serial killers Jeffrey Dahmer, Ted Bundy, and John Wayne Gacy:

> When you consider the testimony from all of the defense witnesses, it's quite clear that they have a bias and an interest in the outcome of the case. As well they should. I mean, they are family. Jeffrey Dahmer had a family, and if you ask Jeffrey Dahmer's family what the appropriate penalty would have been for him – now, in his case, the state that he was in didn't have the death penalty, but they would say good things about Jeffrey Dahmer.
>
> Ted Bundy's family would come to court and tell you good things about little Teddy when he was growing up. But Florida and a jury in Florida gave him justice for what he did.
>
> John Wayne Gate's (sic) family would say good things about him.

Doc. 12-19 at 46-47.

Defense counsel objected to the remarks. *Id.* at 47. The trial court allowed the State's arguments about the "credibility of [Pace's] witnesses," but disallowed the comments regarding the sentences received by the other serial killers. *Id.* at 48. The trial court then instructed the jury not to consider "the verdicts in those other cases." *Id*. at 48-49.

The Georgia Supreme Court held that the prosecutor's comparison of Pace to other serial killers and that their families "would have also said nice things about them when they were children," were not "improper." Pet. App. D at 144. However, the court determined that the prosecutor's comment

about the sentences received by the other serial killers was error, but it was "cured" by the trial court's "curative instructions." *Id.*

b. Use of Carton[2]

While showing a cartoon to the jury, the prosecutor made the following remarks:

> In considering the nice child, the good character, and the family circumstances, what this says; and this is a jury. This says, we find the defendant not guilty by virtue of insanity, ethnic rage, sexual abuse, and you name it, okay. That's basically what he is trying to tell you when he talks about his upbringing. That's it's everybody else's fault that he turned into a serial killer but his own. I am asking you not to go for that.
>
> As I told you, the defendant's defense in this case is that he is not to blame, but that society is. Other children live in that same set of circumstances that he did, but they aren't serial killers. So what's the difference? Being poor, uneducated, having no parental guidance doesn't make you a criminal or a murderer. Because if that was true, there would be masses of serial killers walking and running the streets. What I am suggesting to you is that his background is not what caused him to do what he did.

Doc. 12-19 at 57.

The Georgia Supreme Court determined there was "no error" regarding the prosecutor's arguments in conjunction with the cartoon. Pet. App. D at 144. The court explained that while the prosecution could not "inject extrinsic, prejudicial matters that have no basis in the evidence" here, "Pace did present evidence about his childhood and community." *Id.* And,

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[2] Pace states this is a cartoon from Playboy, but the record does not show that that the cartoon's origin information was provided to the jury or the Georgia Supreme Court. *See* Doc. 12-19 at 41-93; Doc. 12-26 at 66. Nor does the record show that the prosecutor knew the cartoon was from Playboy. In fact, defense counsel, during closing argument, referred to the cartoon as being from the "New Yorker magazine." Doc. 12-19 at 89.

pursuant to *Donnelly*, the court refused to give the prosecutor's "remarks …their most damaging (and erroneous) meaning." *Id.* The court concluded that "[a]fter reviewing the use of the cartoon in context …the prosecutor did not exceed the permissible range of argument by using it to briefly urge the jury to hold Pace solely responsible for his crimes, and to not be swayed by excuses for his behavior." *Id.*

c. Putting the Jury in the Victims' Shoes

The prosecutor made the following Golden Rule argument:

> Now, come with me to that scene of the crimes. 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 hands 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.

(D12-19:59-60). The prosecutor continued this argument regarding Pace's other victims. *Id.* at 61-63. Defense counsel did not object to these arguments.

The Georgia Supreme Court held the Golden Rule comments to be improper. Pet. App. D at 145. The court denied relief however, as "Pace did not object to this improper argument and, given the amount of evidence in aggravation, we do not conclude that this argument changed the result of the sentencing phase." *Id.*

d. Prison Life

The prosecutor made the following remarks regarding prison life, which defense counsel objected to:

> Prosecutor: Now, do you think sending him to prison would be punishment when you don't have a house, and you live from pillar to post? You got free room and board, color TV.
>
> Defense Counsel: Objection, your Honor. That's a misstatement. He knows what life in prison is. He knows that's not it.
>
> Prosecutor: … I'm sorry, your Honor. And if anal sodomy is your thing, prison isn't a bad place to be. Give him the punishment he deserves.
>
> Some of you said that the death penalty is appropriate if the defendant is a habitual criminal and the crime is heinous. He is a habitual criminal. The crime couldn't be any more heinous than this. Old ladies who should have been allowed the luxury of dying in their own beds with their loved ones around them, not choked to death and treated like a piece of meat.

Doc. 12-19 at 64-65. The prosecutor continued his argument for several pages without an objection from defense counsel. Doc. 12-19 at 65-72.

In considering the prosecutor's comments about life in prison, the Georgia Supreme Court held that "[t]he State's argument that Pace should not be spared so he could get free room and board and a television in prison [was] not improper." Pet. App. D. at 144. However, the court concluded that the prosecutor's "anal sodomy" remark was "unprofessional." *Id.* But the court determined there was "no reasonable probability that this improper, isolated comment changed the result of the sentencing phase." *Id.*

e. Community Message

The prosecutor argued for the jury to "send a message" to the community and sentence Pace to death. Doc. 12-19 at 66. The Georgia Supreme Court held that "it was not improper for the prosecutor to argue that a death sentence would 'send a message' and deter other killers." *Pace*, 271 Ga. at 844.

f. Religious Comments

Sixth, the prosecutor made religious remarks and commented on Pace's lack of remorse:

> When [defense counsel] talks about -- and he probably will -- the New Testament and the message of forgiveness and mercy, I ask you to think back to the thief, the two thieves on the cross. When Jesus was put on the cross, there were two thieves with him. One of them said to Jesus, in essence, 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's kingdom.
>
> [Pace] too, has never repented. He hadn't said one time I'm sorry.

Doc. 12-19 at 72.

Defense counsel objected and moved for a mistrial on the grounds that the argument was a comment on Pace's "right to remain silent." *Id* at 53. The prosecutor responded that he was not commenting on Pace's silence but was instead commenting on the fact that he had questioned Pace's family members during sentencing as to whether Pace had "expressed any sorrow" in his communications with them and none had testified he did. *Id.* 53-54. The trial court denied the motion for mistrial but told defense counsel he would give a curative instruction if defense counsel provided one. *Id.* at 54. Defense counsel did not, and no instruction was given. *Id.*

The Georgia Supreme Court reiterated the prosecutor's comments and noted that "Pace did not object to any religious references by the prosecutor, and the prosecutor did not argue that divine law called for a death sentence." Pet. App. D at 144. The court held the "religious references in this case do not rise to the level of the inflammatory argument made in *Hammond v.*

State, 264 Ga. 879 [] (1995)." *Id.* at 144-45 (partial citation omitted). The court then "review[ed] the entire argument and sentencing phase of trial" and "conclude[d] that these comments did not change the jury's exercise of discretion from life imprisonment to a death sentence." *Id.*

Regarding the remarks about Pace's lack of remorse, the Georgia Supreme Court pointed out that the "prosecutor frequently asked mitigation witnesses who had spoken or corresponded with Pace after his arrest whether he had ever expressed remorse or said he was sorry." Pet. App. D at 144. The court concluded that the prosecutor's ensuing "argument was not a comment on Pace's right to remain silent" and "the trial court did not err" in denying the motion for mistrial. *Id.*

g. Simulated Tearing of Georgia Law

Seventh, and final, at the end of the prosecutor's closing argument, he made remarks concerning the Official Code of Georgia, which defense counsel objected to:

> Prosecutor: This is a Georgia law book which has the punishment 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.
>
> Defense Counsel: Objection, your Honor, objection. The law provides for very specific reasons how and why the death penalty should or should not be imposed. The court will charge the jury on that.
>
> The Court: That's correct. He is making an argument.
>
> Defense Counsel: That is coming so close to reading the law by asking the jurors to say they are going to snatch the law book. That is inappropriate. The court is going to charge what circumstances would or would not allow the death penalty. I object.

> Prosecutor: My point to you is simply this. If your verdict is anything other than death, what we need to do is take this book (indicating).

Doc. 12-19 at 76-77. The prosecutor then apparently "simulated tearing out a section of the book." Pet. App. D at 145. No further argument was given by the prosecutor and defense counsel did not object further.

The Georgia Supreme Court determined that when "[v]iewed in context, the prosecutor was arguing that if this severe case does not result in a death sentence, no case could possibly result in a death sentence." Pet. App. D at 145. The court concluded that it was "not improper for the State to argue that the defendant deserves the harshest penalty, and the prosecutor's argument [could not] be reasonably construed as 'reading the law.'" *Id.*

Pursuant to OCGA § 17-10-35(c)(1), the Georgia Supreme Court examined Pace's death sentences to determine whether they were "imposed under the influence of passion, prejudice, or any other arbitrary factor." Pet. App. D at 145. In reviewing the record as a whole, the court stated that while "the prosecutor made several improper comments during closing argument in both phases of the trial" it "conclude[d], 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." *Id.*

Pace filed a petition for writ of certiorari and asked this Court to review the state court's decision regarding several of the prosecutor's sentencing phase closing arguments complained of here. *See* Doc. 13-9 at 13-30. The Court denied the petition. *Pace v. State*, 531 U.S. 839 (2000).

2. Federal Habeas Proceedings

Pace next raised his claim challenging the prosecutor's sentencing phase closing arguments in his federal habeas petition filed on February 20, 2009. *See* Doc. 1 at 70-86. In its final order, the district court held the state court did not unreasonably apply this Court's precedent in denying relief. *See* Doc. 52 at 33-42. The district court granted Pace a certificate of appealability on this claim, among others. *See* Doc. 62 at 1.

For two reasons, the court of appeals determined that Pace failed to carry his burden of proving the state court's decision was unreasonable under clearly established federal law. Pet. App. A at 32. First, because this Court has never found even universally condemned prosecutorial arguments to be a due process violation, the court of appeals determined that *Darden* and *Donnelly* left the law "unsettled" as to what constituted a due process violation. Pet. App. A at 32. Given this state of the law, the court of appeals could not conclude that the Georgia Supreme Court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Pet. App. A at 32 (cleaned up).

Second, the court appeals denied Pace's claim because "even if *Darden* could lead to a violation of clearly established law," the court agreed with the Georgia Supreme Court that the "the amount of evidence in aggravation was 'enormous'" and countered any claim of a due process violation from the prosecutor's arguments. Pet. App. A at 33.

The court of appeals also determined that the Georgia Supreme Court "*did* analyze the cumulative effect of the prosecutor's statements." Pet. App. A at 33 (emphasis in original). As explained by the court:

> 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."

Id. (emphasis in original) (quoting Pet. App. D at 145).

REASONS FOR DENYING THE PETITION

The court of appeals' decision does not conflict with this Court's clearly established federal law or any other court of appeals' decision and correctly determines that the state court's decision is not unreasonable under this Court's precedent.

Pace argues that the court of appeals held that this Court's prosecutorial misconduct precedent—*Darden*, *Donnelly*, and *Berger v. United States*, 295 U.S. 78 (1935)—was not clearly established law for purposes of analyzing the state court's decision. *See* Brief at 14-18. This, according to Pace, conflicts with this Court's decision in *Parker* and all the other courts of appeals. *See id.* at 17, 19-20. Pace is wrong on all counts. The court of appeals did not hold that this Court's precedent was not clearly established federal law, and its decision does not conflict with *Parker* or any other court of appeals on this point.

The Eleventh Circuit gave two reasons for denying Pace's claim. First, because this Court has never held even universally condemned prosecutorial arguments to be a due process violation, the court of appeals could not hold that the Georgia Supreme Court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Pet. App. A at 32

(cleaned up). Second, the court of appeals held that even if this Court's precedent was more settled, it still could not hold that the state court's decision was unreasonable. Pet. App. A at 33. Given the vast amount of evidence in aggravation, the state court's denial of Pace's due process claim was certainly "not beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

These holdings are correct, but even if there were some dispute about that, they are intensely factbound appraisals involving no circuit split or any other reason supporting this Court's review.

A. The Eleventh Circuit did not hold that this Court's prosecutorial misconduct precedent wasn't the relevant law for analyzing the state court's decision under § 2254.

In analyzing Pace's claim, the Eleventh Circuit first acknowledged Pace's argument that under *Darden*, *Donnelly*, and *Berger,* "the Georgia Supreme Court unreasonably concluded that the prosecutor's closing argument did not amount to a violation of due process." Pet. App. A at 31. The court agreed that the prosecutor's closing argument was worthy of condemnation, but pointed out that *Darden* holds "that it's 'not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Id.* (quoting *Darden*, 477 U.S. at 181). And, as noted by the court of appeals, none of the cases relied upon by Pace held "'a prosecutor's closing arguments,' in a vacuum, 'were so unfair as to violate the right of a defendant to due process.'" *Id.* (quoting *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287 (11th Cir. 2012)).

The court examined each of the cases relied upon by Pace and determined that none "clearly establish[ed] that his trial fell short of what

due process requires." Pet. App. A at 31. As noted by the court, "[i]n *Darden*, the Court held that a prosecutor's closing 'did not deprive [the] petitioner of a fair trial' even though the prosecutor called the petitioner a 'vicious animal,' said he should be on a 'leash,' and told the jury he 'wish[ed]' someone had 'blown [the petitioner's] head off.'" *Id.* (some brackets in original) (quoting *Darden*, 477 U.S. at 180 n.12, 181). In *Donnelly,* the "prosecutor told the jury during closing that he 'sincerely believe[d] that there [was] no doubt' about the petitioner's guilt and that he suspected that the petitioner stood trial not because he was innocent but because he 'hope[d] that you find him guilty of something a little less than first-degree murder.'" *Id.* (cleaned up) (brackets in original) (quoting *Donnelly*, 416 U.S. at 640 & n.6, 643)). And, in *Berger*, this "Court held that the 'cumulative effect' on the jury of the prosecutor's 'pronounced and persistent' misconduct at trial …was so prejudicial as to warrant a new trial." *Id.* (quoting *Berger*, 295 U.S. at 84-85, 89). "In other words, *Berger* didn't hold that the prosecutor's closing argument alone violated due process." *Id.* Thus, while this Court has clearly held that prosecutorial arguments *could* rise to the level of due process violation, this Court has never actually held such an argument to do so.

As explained by the court of appeals, the lack of any holding by this Court that even condemned prosecutorial closing remarks created a due process violation left this area of the law "unsettled." *Id.* And where the law is uncertain, as held by this Court, "it is not an unreasonable application of clearly established [f]ederal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (cleaned up). Given this precedent, the court of appeals refused to hold 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.'" Pet. App. A at 32 (quoting *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287 (11th Cir. 2012)).

Pace disagrees and relies on *Parker* to support his argument. *See* Brief at 17. But *Parker* is squarely *against* Pace. The Sixth Circuit was reversed for failing to filter the Kentucky Supreme Court's decision through the proper AEDPA review. In *Parker*, "[a]ccording to the Sixth Circuit, the prosecutor violated *Darden* by suggesting that Matthews had colluded with his lawyer, [] and with [his mental health expert] to manufacture an extreme emotional disturbance defense." *Parker*, 567 U.S. at 45. This Court held that even if the prosecutor's remarks were improper, "that would not establish that the Kentucky Supreme Court's rejection of the *Darden* prosecutorial misconduct claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* at 47 (quoting *Harrington*, 562 U.S. at103). In support, the Court pointed out that *Darden* didn't hold there was a due process violation with even more improper arguments. *Id.* at 47-48. And "because *the Darden standard is a very general one*, leaving courts "more leeway . . . in reaching outcomes in case-by-case determinations,' [] *the Sixth Circuit had no warrant to set aside* the Kentucky Supreme Court's conclusion."[3] *Id.* at 48 (emphasis added) (quoting *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004).

[3] This is certainly contrary to Pace's statement that this Court's precedent has "established clear rules defining both what prosecutors may and may not argue and how courts should assess prejudice from improper arguments." Brief at 14.

Pace hangs his argument on the Court's statement in *Parker* that the "clearly established Federal law relevant here is our decision in *Darden*." *Id.* at 45 (quotation marks omitted). But nothing in the court of appeals' decision conflicts with this statement. The court of appeals recognized this Court's precedent as the relevant law but held that this precedent still left this area of the law too unsettled to render the Georgia Supreme Court's decision "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103; *see also* Pet. App. A at 32.

In addition, the court of appeals' decision is not in conflict with other courts of appeals. Pace cites the other ten courts of appeals that have stated *Darden* is the relevant law for examining a state court's decision regarding a challenge to a prosecutor's closing arguments. As shown above, this isn't in conflict with the court of appeals' decision here.[4] These decisions turn not on what is the relevant law but how to apply the fairminded jurist standard to fact-specific prosecutorial misconduct claims. *See 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).

[4] Nor is there a conflict in the Eleventh Circuit's published and unpublished opinions as advocated by Pace. *See* Brief at 21.

In sum, while the court of appeals recognized that this Court has clearly established a due process right prohibiting improper prosecutorial arguments that unduly infect a trial with unfairness, for the past near fifty years, this Court has never granted relief on this right and has never provided any specific rules for analyzing this type of claim. The combination of no relief and the generality of the rule, leaves the law too "unsettled," as determined by the court of appeals, to find this particular state court decision "beyond fairminded disagreement." Pet. App. at 32.

B. The court of appeals held that even if *Darden* provided a more settled holding, there was still no due process violation.

In any event, the Eleventh Circuit also held, in the alternative, that "even if *Darden* could lead to a violation of clearly established law, the Georgia Supreme Court did not unreasonably determine that the prosecutor's closing argument did not render Pace's trial unfair." Pet. App. A at 33. That plainly factbound decision certainly needs no review by this Court.

Looking at prosecutor's remarks in the context of the entire trial, the court of appeals could not conclude that state court's decision was "beyond any possibility for fairminded disagreement."[5] *Harrington*, 562 U.S. at 103; *see also* Pet. App. A at 32. As detailed by the court of appeals, the evidence of Pace's crimes showed that: "Pace brutally raped, sodomized, and strangled to death Ms. McAfee, an eighty-six-year-old woman who Pace had known 'since he was a baby'"; "that Pace brutally raped, sodomized, and strangled to death

[5] This is consistent with this Court's opinion in *Darden*, in which the Court stated: "Because of the nature of petitioner's claims, the facts of this case will be stated in more detail than is normally necessary in this Court." *Darden*, 477 U.S. at168.

Ms. McClendon, a seventy-eight-year-old woman"; "that Pace brutally raped, sodomized, and strangled to death Ms. Martin, a seventy nine-year-old woman"; "that Pace brutally raped and strangled Ms. Britt and sodomized her dead body." Pet. App. A at 33. "And the jury learned about Pace's attempts to inflict the same horrible fate on Ms. Grogan and Ms. Sublett, two elderly women who escaped only because they fought back." *Id.* These crimes led the jury to find "*nineteen* statutory aggravating circumstances." *Id.* (emphasis in original).

The court of appeals agreed with the Georgia Supreme Court that the "the amount of evidence in aggravation was 'enormous'" and refuted any claim of a due process violation from the prosecutor's arguments.[6] Pet. App. A at 33. Pace implies that because the closing argument was given in the sentencing phase the overwhelming evidence of his guilt is less important to the due process analysis. Brief at 16. But there is no reason that would be so; Pace is a serial rapist and killer of elderly women which makes the "heinous" nature of his crimes the driving force behind the jury's sentencing

[6] Pace complains that the court of appeals "did not refer to the jurors' question" asking "Is it possible for a life sentence to be given eliminating any possibility of parole?" Brief at 10; Pet. App. F. First, the court of appeals does not have to mention every argument a petitioner relies on. Second, contrary to Pace's arguments and the dissent in the Georgia Supreme Court, this does not prove that the trial was so infected with unfairness as to render his sentence unconstitutional. Rather, the argument could be made that this note shows the prosecutor's arguments had no effect on the jury's decision because they still considered a life without parole sentence despite the many atrocious crimes committed by Pace. Where there are two possible reasonable explanations, a petitioner has not met his burden of showing that the state court's decision was "beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

decision—not isolated remarks of the prosecutor during closing. *Id.* That is why the court of appeals held the "Georgia Supreme Court's due-process determination wasn't beyond fairminded disagreement." *Id.*

In both *Darden* and *Donnelly*, there was only one murder victim, and despite the improper nature of the prosecutors' arguments, this Court still determined there was no due process violation in each case. *See Darden*, 477 U.S. at 171; *Donnelly*, 416 U.S. at 639-40. This provides ample reason for declining review of the court of appeals' decision. But Pace ignores (or largely glosses over) the facts of his crimes and spends much of his brief asking the Court to engage in a factbound inquiry of the Georgia Supreme Court's decision determining whether each of the prosecutor's remarks were proper. *See* Brief at 22-32.

And on top of everything else, this would be a terrible vehicle for addressing even these factbound arguments. First, the Georgia Supreme Court reviewed the prosecutor's arguments and found some to be improper and one to be unprofessional. *See* Pet. App. D at 144-45. However, the state court, following this Court's precedent, refused to "assume that the prosecutor intended his remarks to have their most damaging (and erroneous) meaning." *Id.* at 144. (citing *Donnelly*, 416 U.S.at 647) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). And nothing in Pace's arguments countermands this Court's long-standing directive.

Second, contrary to Pace's arguments, and as determined by the court of appeals (*see* Pet. App. A at 33), the Georgia Supreme Court performed a cumulative review of the prosecutor's arguments:

> Although 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.

Pet. App. D at 145. Pace does not adequately explain how the Georgia Supreme Court's statutory proportionality review of potential undue "influence of passion, prejudice, or any other arbitrary factor"—especially one that specifically mentions the prosecutor's arguments—is fundamentally different than determining "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting [sentence] a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly*, 416 U.S. at 643). Nor does Pace point to any clearly established federal law that holds it to be a different standard. Given this review, it is unnecessary to reconsider the propriety of the prosecutor's arguments.

Third, the court of appeals stated that the "prosecutor's closing argument 'deserves the condemnation it has received.'" Pet. App. A at 32 (quoting Darden, 477 U.S. at 179). Yet the court still held that the Georgia Supreme Court's denial of relief was reasonable because Pace's crimes were just too aggravated. Simply put, it was Pace's actions, not the prosecutor's words, that caused the jury to give him four death sentences. At the very least, as held by the court of appeals, it was not unreasonable under this Court's precedent for the state court to decline to hold otherwise.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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