No. 23-5996

IN THE SUPREME COURT OF THE UNITED STATES

LYNDON FITZGERALD PACE,

Petitioner,

v.

SHAWN EMMONS, Warden,
Georgia Diagnostic and Classification Prison,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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

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REASONS FOR GRANTING THE WRIT

After Petitioner was convicted of murder in Atlanta, Georgia, the prosecutor sought the death penalty by:

(1) Providing the jurors a cartoon in which a foreperson states: "We find the defendant not guilty by virtue of insanity, ethnic rage, sexual abuse and you name it." 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;[1]
(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 Petitioner 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.

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[1] App. E. The cartoon was published in Playboy magazine. In the prosecutor's cartoon, page number "150" is visible in the lower left hand corner, corresponding to p.150 of the June 1995 "Playmate of the Year" issue. *See* https://archive.org/details/Playboy199506Dobd99.ml/Playboy%201995-06%20%28%20dobd99.ml%20%29%20/page/n155/mode/2up

Respondent's contention that we cannot know if the cartoon came from Playboy (BIO at 7) is wrong. This prop was a "visual aid," Doc. 12-19:37, that the prosecutor "put up on the wall." Doc. 12-19:88.

The lower court and the Brief in Opposition (BIO) state that this argument cannot result in the reversal of the resulting death penalty because (1) this Court has never found a prosecutor's argument unconstitutional in a capital case and (2) the aggravation in this case was so strong the arguments could not have made any difference. Both arguments are specious.[2]

I. The Lower Court Did Not Apply Clearly Established Federal Law from this Court

Relying on its own 2009 opinion in *Reese v. Sec'y, Florida Dept. of Corrections*, 675 F.3d 1277, 1289 (11th Cir. 2012), the lower court wrote that "*Darden* and *Donnelly*[3] did not clearly establish that a prosecutor's closing argument rendered a trial unfair because 'only a holding of the Supreme Court can clearly establish federal law' and in both cases the Supreme Court 'held that the prosecutor's argument ... did not deprive the petitioner of a fair trial.'" App. A at 32, citing *Reese*. So the lower court believes that because the petitioners in *Darden* and *Donnelly* did not prevail, those cases do not constitute clearly established law.

As explained by Respondent, because "this Court has never held a prosecutor's closing arguments created a due process violation" 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." BIO at 2. "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.'" BIO at 19, citing App. A at 32.

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[2] The questions presented in this reply do not replace but amplify the "Reasons" section of the petition, in light of the BIO.

[3] *Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

To the contrary, this Court held in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007),

> [t]hat the standard is stated in general terms does not mean the application was reasonable. AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, 81. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves "a set of facts 'difference from those of the case in which the principle was announced.'" *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000)(finding a state court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). These principles guide a reviewing court that is faced, as we are here, with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling.

The *Darden* standard is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden,* 477 U.S at 181. In making that determination, this Court found relevant whether the prosecutor's argument, in a guilt phase closing, "manipulate[d] or misstate[d] the evidence;" whether it implicated "other specific rights of the accused such as the right to counsel or right to remain silent;" whether it was "invited by or was responsive to the opening summation of the defense;" the trial court's instructions to the jury; and the weight of the evidence against the defendant. *Darden*, 477 U.S. 168, 182 (1986). The lower court here did not apply *Darden* at all.[4]

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[4] The BIO frames the lower court's refusal to apply *Darden* as that court "recogniz[ing] this Court's precedent as the relevant law." BIO at 18. By its own opinion, the lower court "recognized" *Darden* only to assert it was not a "holding" constituting clearly established federal law. App. A at 32. *See also* BIO at 13, 16, 19 (repeating law is "unsettled").

The BIO, like the lower court, claims this purportedly "unsettled" law means a state court cannot be found unreasonable for "declin[ing to apply a specific legal rule that has not been squarely established by this Court," *id.*, quoting *Knowles v. Mirzayance*, 556 U.S. 111 (2009), BIO at 16.; see also App A. at 32, (quoting *Reese).* *Darden* is not a "specific legal rule" but a standard that is "stated in general terms." *Panetti*, 551 U.S. at 953, and is the clearly established rule governing claims of improper prosecutorial argument. *Knowles* addressed a case where the lower court supplied its own rules, rather than the general rule of *Strickland* in areas the Court has not considered.[5]

In *Knowles*, the Ninth Circuit ruled that counsel was ineffective for failing to pursue an insanity defense following the guilt phase, because under the facts of the case counsel "had nothing to lose" by doing so. [6] This Court held it had "never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims,"[7] 556 U.S. at 122, and that the petitioner himself had acknowledged such a rule was "unrecognized by this Court." *Id.*

Petitioner presents a straightforward claim of improper prosecutorial argument. The lower court was required to address it under the clearly established law of *Darden*, and nothing in *Knowles* suggests otherwise.

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[5] *Strickland v. Washington*, 466 U.S. 668 (1984)

[6] In *Knowles*, the defendant entered pleas of not guilty and not guilty by reason of insanity. He sought to avoid a first-degree murder conviction at the guilt phase by presenting evidence of insanity such that he was unable to form the necessary premeditation and deliberation for a first degree finding. The jury convicted of first degree murder. Counsel then advised withdrawing the insanity defense at the next phase, because the jury had just rejected similar testimony.

[7] The only relief available was under the general standard of *Strickland*, and this Court found it was not unreasonable for the state court to have concluded that counsel did not perform deficiently under *Strickland*. *Knowles* at 123. This Court wrote that it had "repeatedly applied" the "more general standard" established by *Strickland* where "there is no other Supreme Court precedent directly on point" to particular facts. *Id* at 123.

However, the lower court relied on its own 2009 decision in *Reese* to claim *Darden* does not apply. It never mentions this Court's ruling in *Parker v. Matthews*, 567 U.S. 37 (2012), stating without qualification that "[t]he 'clearly established Federal law' relevant here is our decision in *Darden*." *Id.* at 45. Respondent, in turn, never discusses *Reese*.

Respondent seizes on the "general" nature of the *Darden* standard to claim that nothing in the lower court decision "conflicts with" *Parker's* holding that the correct law is *Darden*. BIO at 17-18. It instead claims that *Parker* in fact works *against* Pace, BIO at 17, but does not show how, other than that the Court ruled the state court's rejection of Parker's claim was reasonable.

But similar to *Knowles*, this Court in *Parker* reversed the Sixth Circuit because that court "consult[ed] its own precedents, rather than those of this Court, in assessing the reasonableness of [the state court's] decision." 567 U.S. at 48. This Court found that "after quoting the governing standard from our decision in *Darden*," the Sixth Circuit added a two-part standard to evaluate the "flagrancy" of the prosecutor's conduct. "The highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears scant resemblance to the elaborate multistep test employed by the Sixth Circuit." 567 U.S. 37 at 48-49.

II. All Other Courts Recognize *Darden* as Clearly Established Federal Law

Darden is not just "relevant," it is unequivocally *not* "unsettled." It is the clearly established law governing these claims. In asserting that there is no conflict between the lower court's position and the other circuit courts of appeal, Respondent again claims the other circuit court decisions turn "not on what is the relevant law but how to apply the fairminded jurist standard to fact-specific prosecutorial misconduct claims." BIO at 18. But other circuit courts not only acknowledge *Darden* as clearly established federal law, they actually apply it to the claims at issue.

Other courts do not resist applying *Darden* on the ground it is "too unsettled." They do not refuse to engage with the facts underlying the claims, or defer to the state courts without discussion. For example, in *Stermer v. Warren*, the Sixth Circuit applied *Darden* as clearly established law to a guilt phase closing argument, and found that the prosecutor's injection of personal opinions into the case meant it was "unreasonable for the state court to conclude that the fairness of [the] trial was not irreparably harmed by the prosecutor's closing." 959 F.3d 704, 724, 25 (6th Cir. 2020). The court wrote that while the comments in *Darden* were worse in the abstract than those at issue in *Stermer*, *id*. at 734, *Darden* noted, "'[t]he prosecutors' argument did not manipulate or misstate the evidence,' that '[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense,' and that there was overwhelming evidence against the defendant." *Id,* citing *Darden* at 181-82. The Sixth Circuit found that this was not true in *Stermer*.

Similarly, in *Evans v. Jones*, 996 F.3d 766 (7th Cir 2021), the Seventh Circuit found that a prosecutor's statements during closing argument, that a defense investigator intimidated a witness to recant testimony, violated the Due Process clause. The state court's decision, finding no constitutional violation because the comments were supported by the facts, was objectively unreasonable. *Id*. at 776. Analyzing the case under *Darden*, the court of appeals employed "six factors [to] guide our inquiry: 1) whether the prosecutor misstated evidence; 2) whether the remarks implicate the specific rights of accused; 3) whether the defense invited the comments; 4) the trial court's instructions; 5) the weight of the evidence; and 6) opportunity to rebut the improper remarks." *Id*. at 779. The court emphasized that it "d[id] not apply these factors in a rigid manner" but relied on them "only as a 'guide to determine whether there was fundamental unfairness that infected the bottom line.'" *Id*. (citation omitted). While "not all of *Darden's* factors weigh[ed] in Evans' favor," since the remarks "did not 'implicate other specific rights of the accused such as the right to counsel or the right to remain silent,'" quoting *Darden*

at 182,[8] "and the trial court instructed the jury to disregard any argument … not based on evidence," the court found that the remaining factors required the conclusion the prosecution's comments deprived Evans of his right to a fair trial. *Id*. at 779-780. *See also* Petition at 19.

Likewise, decisions of other panels of the Eleventh Circuit apply *Darden* as clearly established federal law, *see* petition at 21-22, those panels engaged with the underlying facts to find that the improper comments in those cases did not "'so infect the trial with unfairness as to make the resulting convection[s] a denial of due process,'" *Medina v. Secretary, Dept. of Corrections*, 733 Fed.Appx. 490, 495 (11th Cir. 2018), *See also Lucas v. Warden*, GDCC, 771 F.3d 785, 804-805 (11th Cir. 2014).

The arguments here were worse than *Darden*. They were made in the penalty phase, and they came on the wake of multiple improper arguments at the guilt phase closing. *See* Petition at 25 n.11. The lower court did not compare them to the *Darden* standard to assess the state court's handling of the claim. It did not address Petitioner's contention that the state court decision finding that the comments were supported by the facts, was objectively unreasonable. In justifying the lower court's failure to acknowledge the dissenting justices of the Georgia Supreme Court, who rightly found that the penalty phase argument here in reasonable probability changed the jury verdict, Respondent claims that a court need not mention every argument a petitioner makes. *The lower court did not mention any aspect of any of the arguments regarding the prosecutor's closing.* Instead, as the BIO repeats, because the facts of the crimes were bad, the lower court ruled there could therefore could be no due process violation.

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[8] Neither the lower court nor the BIO address Petitioner's claim that the prosecutor's argument violated his right to remain silent. *See* Petition at 8, 28-29.

III. Aggravation Does Not Bar Relief Under *Darden*

The lower court wrote "even if *Darden could* lead to a violation of clearly established law," the state court did not unreasonably determine that the argument did not make the trial unfair because there was too much aggravation. BIO at 19, quoting App. A at 33 (emphasis added). The court went on to hold, without examining the actual closing argument in light of *Darden*, that the crimes in this case were too aggravated for the prosecutor's argument to make a difference and therefore the state court's similar treatment of the claim was reasonable.

The lower court quoted the state court's conclusion that the amount of aggravation was "enormous" three times, App. A at 14, 31, 33, and agreed with the Georgia Supreme Court. *See* App. A at 33 ("[a]s the Georgia Supreme Court found, the amount of evidence in aggravation was 'enormous'"). The BIO cites the "enormous" aggravation quote from the state court opinion on nearly every page.[9] As the state court dissenters correctly wrote, however, "the majority dismisses this issue peremptorily holding that 'given the amount of evidence in aggravation, we do not conclude that this argument changed the result of the sentencing phase. [Cit.]]'" App. D at 146.

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[9] *See* BIO at 1 ("the overwhelming evidence of Pace's guilt and the *enormous amount of evidence in aggravation"* (emphasis in BIO); BIO at 3,("the aggravating evidence was 'enormous'"); BIO at 12, ("the enormous amount of evidence in aggravation …"); BIO at 13 (the lower court "agreed with the Georgia Supreme Court that the 'amount of evidence in aggravation was 'enormous' …"); BIO at 14 ("the enormous amount of evidence in aggravation"); BIO at 20, ("[T]he court of appeals agreed with the Georgia Supreme Court that the (sic) "the amount of evidence in aggravation was 'enormous'"); BIO at 22. ("as determined by the court of appeals (see Pet.App. A. at 33), the Georgia Supreme Court … conclu[ded] given the overwhelming evidence of Pace's guilt and the enormous amount of evidence in aggravation… .").

According to Respondent, the heinous nature of the crimes was the driving force behind the death sentence, not prosecutorial misconduct. BIO at 20-21.[10] This conjecture is refuted by the Georgia sentencing scheme where one juror may elect a sentence less than death, for any reason. "[I]n Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion," other than "narrowing the class of persons …eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 873-74 (1983). The due process inquiry is whether the trial is infected with unfairness. One juror, in reasonable probability, would have made a difference, as found by the state court dissenters:

> [T]he jury in the sentencing phase has moved beyond weighing evidence into weighing imponderables. When faced with the effect of an impermissible argument, the 'amount of evidence' may ensure that confidence in the outcome of the guilt-innocence phase was not undermined; however, the impact of improper argument on a jury's consideration of mercy cannot be as easily quantified. "[T]he exercise of mercy…can never be a wholly rational, calculated, and logical process. [Cit.]"

Pace, App. D at 147 (Hunstein and Fletcher, JJ, dissenting). The state court majority never considered the intangible nature of the jury's penalty phase deliberations. Nor did the lower court. And, like the lower court, Respondent dismisses the fact that the state court relied on the evidence of guilt in its "analysis"

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[10] In addition to its tireless invocation of the "enormous" amount of aggravation, Respondent claims this case is "a terrible vehicle" because 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.'" BIO at 21, citing *Donnelly* at 647. This was the state court's sole citation to any clearly established law, and the court and the BIO got it wrong. *Donnelly* expressly addressed an *ambiguous* remark: "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning." *Id.* at 648. There was nothing ambiguous here in the prosecutor's relentlessly improper argument.

of the claim, BIO at 20, ignoring the Georgia Supreme Court dissenters' reasoning that once guilt is decided, jurors are weighing intangibles.

The lower court, like the state court majority, ignored the important fact the jury here sent a note asking if it was possible to give a life without parole sentence.[11] The note refutes the lower courts' contention that the facts of the crime here mean the improper arguments could have no effect. If the jury found the aggravation to be so overwhelming, as the lower court and Respondent contend, they would have no reason to send out the note. The inquiry "weighs in favor of concluding that there is a reasonable probability that" the argument here affected the penalty phase verdict, *Romine v. Head*, 253 F.3d 1349, 1370 (11th Cir. 2001).[12]

The conclusions of the state and lower courts that the aggravation here overrides any possibility of a sentence less than death is contrary to this Court's guidance. *See Ayestas v. Davis*, 138 S.Ct. 1080, 1100 (2018)(Sotomayer, J., Ginsburg, J., concurring)("The Fifth Circuit[] held otherwise based on its belief that no amount mitigation would have changed the outcome of the sentencing given the 'brutality of the crime.' 817 F.3d, at 898 … That 'brutality of the crime' rationale is simply contrary to our directive in case after case that, in assessing prejudice, a court must 'consider the totality of the available mitigation evidence … and reweigh

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[11] It was not a sentencing alternative, because the prosecutor would not allow it. *See* Petition at 10 n.4.

[12] The BIO asserts that the jury's note could show the prosecutor's "arguments had no effect on the jury's decision because they still considered a LWOP sentence," and constitutes a "reasonable explanation" which defeats any showing that the state court's decision was 'beyond any possibility for fairminded disagreement.'" BIO at 20 n.6, citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Contrary to the BIO, in finding that the Golden Rule argument denied Petitioner due process, the state dissent did not rely solely on the jury's note. It relied on the Georgia sentencing scheme, which favors those intangibles that inform a jury's complete discretion and which come into play after the jury has convicted. *Zant v. Stephens*, 462 U.S. at 873-74.

it against the evidence in aggravation.' *Porter*, 558 U.S., at 41 (internal quotation marks and alterations omitted)."[13] The focus on aggravation to the exclusion of the totality of the circumstances ignores the fact many cases as aggravated as Pace's have resulted in appellate reversal or life sentences at the trial level.

For example, a defendant in a case with remarkably similar facts received a sentence of less than death. Brandon Tholmer, a borderline intellectually disabled man like Pace, was convicted of raping, sodomizing and murdering four elderly women, and was sentenced by a jury to life without parole.[14] There are many state and federal capital cases involving multiple victims have likewise resulted in reversal or life sentences, including serial killers like the Hillside Strangler, Angelo Buono, who killed nine young women in Los Angeles but was sentenced to less than death; and Brian Nichols, who killed a superior court judge, a sheriff's deputy, a court reporter and a federal agent and was sentenced to life without parole by a Georgia jury in 2008. *See also, State v. Davis,* 2011 WL 303215 (Ct.App. Ohio 2011)(jury verdict of life for arson murder of six, including four children ages 8, 5, 4 and 2, their mother and grandmother, after being found guilty of six aggravated murder counts and 19 aggravated arson counts);[15] *People v. Degorski*, 998 N.E.2d

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[13] *See also Williams v. Taylor*, 529 U.S. 362-398 (2000); *Wiggins v. Smith*, 539 U.S. 510. 534 (2003)."*By considering aggravation in isolation, the Fifth Circuit directly contravened this fundamental principle.*" *Ayestas,* 138 S.Ct. at 1100 (Sotomayor, J. and Ginsburg, J., concurring, referring to *Williams, supra.* (emphasis added). *See also Andrus v. Texas*, 140 S.Ct., 1875, 1887 n.6 (2020)(per curiam ("[W]e have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice. Cf. *Wiggins*, 539 U.S. at 537-538 ("[T] he mitigating evidence in this case is stronger, and the state's evidence in support of the death penalty far weaker, than in *Williams,* where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence.").

[14] See Jury Votes to Spare Life of Killer of 4 Women - Los Angeles Times (latimes.com)

[15] In explaining there was too much aggravation here for Pace to prevail, the lower court emphasized that the jury had found "*nineteen* aggravating circumstances." App. A. at 33 (emphasis in opinion).

637 (App.Ct. Ill. 1st Dist.4th Div. 2013)(jury verdict of life for killing of seven employees herded into walk-in coolers during robbery of chicken restaurant). Previous panels of the Eleventh Circuit have expressly held that "the number of victims does not preclude this Court from concluding that prejudice has been established." *Cooper v. Secretary, Dept. of Corrections*, 646 F. 3d 1328, 1356 (11th Cir. 2011)(in case with three victims, where the jury did not vote unanimously for death, the lower court panel noted "given that some jurors nonetheless 'were inclined to mercy even with [] having been presented with [so little] mitigating evidence' … it is possible that, if additional mitigating evidence had been presented, more jurors would have voted for life." *Id*. (citations omitted), and noting this Court has found prejudice in a two-victim case in *Porter v. McCollum*, 558 U.S. 30, 31, 43-44 (2009)).[16]

These and many other cases show the number of victims and the heinousness of the crimes do not automatically curtail or dictate the outcome of a capital jury determination.

[16] Yet Respondent asserts there can be no due process violation given the facts here because *Darden* and *Donnelly* involved only one victim.

CONCLUSION

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

Respectfully Submitted,

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

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