No. 24-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2024

JOHN ESPOSITO,

Petitioner,

-v-

SHAWN EMMONS, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

CAPITAL CASE

After receiving the trial court's instructions not to discuss the case with anyone, one of the jurors who sentenced Mr. Esposito to death sought advice from her pastor about how to reconcile her Christian faith with her civic duty to serve on a capital trial. Her pastor's guidance and the Bible verses he recommended allayed her concerns about imposing the death penalty and gave her peace of mind about serving on the jury. Mr. Esposito presented this misconduct in state habeas proceedings, with compelling proof of the juror's misconduct. Nonetheless, the habeas court denied relief in an opinion at odds with the overwhelming weight of the evidence. The Georgia Supreme Court, in turn, denied review, even though it had recently granted certiorari in another case to determine whether its application of the "any evidence" standard for reviewing judicial fact-finding should be replaced by a more rigorous standard of review—a critical issue in this case. These facts give rise to the following questions:

1. Given the risk that meritorious federal constitutional claims will be denied due to an appellate court's excessively deferential review of judicial fact-finding, does the Due Process Clause require application of the federal clearly erroneous standard, *i.e.*, whether, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), or some another standard more probing that Georgia's "any evidence" standard of review?

2. Whether the state court misapplied federal constitutional law and wrongly concluded that the juror had not engaged in prejudicial misconduct because she did not discuss the specifics of the case and her pastor did not recommend the sentence she should impose but merely sanctioned a decision to impose the death penalty as consistent with her Christian faith.

RELATED PROCEEDINGS

Trial and Direct Appeal

State v. Esposito, No. 96-SU-CC-349 (Baldwin Cty. Super. Ct.,[1] September 30, 1998)

Esposito v. State, No. S00P0654 (Ga. October 30, 2000), *reh'g denied* (November 30, 2000)

Esposito v. Georgia, No. 00-9669 (S. Ct. June 25, 2001), *reh'g denied* (August 27, 2001)

State Habeas Proceedings

Esposito v. Hall, Warden, No. 2002-v-321 (Butts Cty. Super. Ct. April 29, 2011)

Esposito v. Hall, Warden, No. S11E1608 (Ga. March 19, 2012)

Federal Habeas Proceedings

Esposito v. Humphrey, Warden, No. 5:12-CV-163 (M.D. Ga., Macon Div., December 10, 2014)

Esposito v. Warden, No. 15-11384 (11th Cir. June 23, 2020), *reh'g denied* (September 15, 2020)

Esposito v. Warden, No. 5:12-CV-163 (M.D. Ga. March 30, 2022) (denying Rule 60(b) motion)

Esposito v. Warden, No. 22-11538 (11th Cir. December 13, 2022) (order staying appeal)

Extraordinary Motion for New Trial Proceedings

State v. Esposito, No. 96-SU-CC-349 (Morgan Cty. Super. Ct., June 11, 2022)

Esposito v. State, Nos. S22D1240, S23A0104 (Ga. November 29, 2022)

Successive State Habeas Proceedings

Esposito v. Emmons, No. 22-SU-HC-0003 (Butts Cty, Super. Ct., February 22, 2024)

Esposito v. Emmons, No. S24E818 (Ga. July 2, 2024)

[1] Following a change of venue from Morgan County, Georgia. The case was subsequently transferred back to Morgan County.

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Esposito respectfully submits this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Georgia.

INTRODUCTION

One of the twelve jurors who voted to sentence Petitioner John Esposito to death was so concerned about whether her Christian faith would permit her to sit on his capital jury that she sought out her pastor's guidance to inquire about her religion's view of the death penalty before she was selected to serve. This fact, only recently discovered, is not in dispute. The issues of contention in the case are whether this visit occurred before or after the juror, Janice Lane, had been questioned in voir dire and instructed by the judge not to discuss the case with anyone, and the legal ramifications of her pastoral consultation. Although the overwhelming weight of the evidence demonstrates that Ms. Lane consulted with her pastor in between the time she was questioned in voir dire and her selection as a juror, the habeas court, relying on questionable factual and legal determinations, found that the record was unclear when Ms. Lane's exchange with her pastor occurred and thus Mr. Esposito had not proven misconduct and that, regardless, he had not been prejudiced. *See* Habeas Order (App. 1-16).

Georgia is among only a small handful of states that essentially rubber-stamp judicial fact-finding if there is the slightest scintilla of evidence in support, irrespective of its credibility or the weight of the countervailing evidence.[2] At the time Mr. Esposito filed his application for a

[2] This standard of review appears to apply in Georgia in all appellate cases with the exception of the direct appeal issue of the sufficiency of the evidence supporting criminal convictions, which apply the more probing standard set forth in *Jackson v. Virginia*, 443 U.S. 307

certificate of probable cause to appeal ("CPC Application") in the Georgia Supreme Court, that court had recently granted certiorari to address whether Georgia's "any evidence" standard for reviewing judicial fact-finding in criminal cases should be overruled. *See* Order, *Capote v. State*, No. S23C1127, 2024 Ga. LEXIS 52 (Ga. Feb. 20, 2024). In his CPC Application, Mr. Esposito flagged the *Capote* certiorari grant, pointing out that the issues in that case had direct bearing on his own, given that the Georgia Supreme Court applies the same standard of appellate review in habeas cases (and other civil cases). *See, e.g.*, *Turpin v. Todd*, 271 Ga. 386, 390 (1999) ("Factual determinations made by the habeas court are upheld on appeal unless clearly erroneous, *i.e.*, there is no evidence to support them.") (citations omitted). Without waiting to issue its decision in *Capote*, however, the Georgia Supreme Court denied Mr. Esposito's request for an appeal. App. 17. *Capote* remains pending following oral argument on June 12, 2024.

Whether the federal constitution demands a more probing consideration of judicial fact-finding than Georgia law provides presents a question this Court has not addressed, although the Court routinely applies the clear-error standard articulated in *Gypsum* to its review of a trial court's factual determinations in state cases. *See, e.g.*, *Hernandez v. New York,* 500 U.S. 352, 369 (1991) (applying clearly erroneous standard on direct review to assess trial court's non-discrimination determination and noting that the standard required the reviewing court to be "left with the definite and firm conviction that a mistake had been committed") (quoting *Gypsum*, 333 U.S. at 395); *see also Foster v. Chatman*, 578 U.S. 488, 500 (2016) (applying clear-error review to state habeas

(1979). *See, e.g.*, *Stinson v. State*, 364 S.E. 2d 9s10, 910 (Ga. App. 1988) (noting that the "any evidence" standard for reviewing sufficiency of the evidence in criminal appeals was overruled by *Jackson*).

court's determination that prosecutor had not discriminated on the basis of race in exercising peremptory strikes) (citing *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)); *Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999) (observing in Confrontation Clause case on direct review that "we review the presence or absence of historical facts for clear error"). As discussed below, this case presents an excellent vehicle to address the issue.

OPINIONS BELOW

The Georgia Supreme Court's denial of a certificate of probable cause to appeal of the Georgia Supreme Court is unpublished and is reproduced in the Appendix hereto at Pet. App. 17. The unpublished order of the Butts County Superior Court is reproduced in the Appendix hereto at Pet. App. 1-16.

JURISDICTION

This court has jurisdiction to hear this case under 28 U.S.C. § 1257(1). The Supreme Court of Georgia denied an application for certificate of probable cause to consider the state habeas court's order denying relief on July 2, 2024. On September 19, 2024, this Court extended the deadline to file a petition for writ of certiorari to October 30, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments:

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in pertinent part: ""[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. Esposito and his girlfriend Alicia Woodward were indicted on felony and malice murder and related charges in Morgan County, Georgia, for the death of Lola Davis, an elderly woman kidnapped from North Carolina and killed in Georgia. Following a change of venue to Baldwin County, Mr. Esposito was convicted and sentenced to death. *Esposito v. State*, 273 Ga. 183, 183 n.1 (2000). Several months after Mr. Esposito's trial, Ms. Woodward was allowed to plead guilty in exchange for a life sentence.

As relevant to Mr. Esposito's juror-misconduct claim, jury selection in his capital trial began on Wednesday, September 23, 1998. Potential juror Janice Lane,[3] whose conduct is at issue in this matter, reported to court that day. App. 18-19, 23. After the venire was sworn, App. 29-30, 32-33, and before questions began, the judge gave Ms. Lane and her fellow prospective jurors these instructions:

[3] At the time of trial, Ms. Lane went by the name of Janice Seagraves. She subsequently remarried and for many years used the name Janice Harris, the name that is on her first and second sworn affidavits. She subsequently divorced her second husband, Bruce Harris, and now goes by her maiden name, Janice Lane. *See* App. 59, 69, 98. This petition will refer to her as "Ms. Lane." Relevant portions of the record are included in the appendix. Citations to portions of the evidentiary record below not included in the appendix will be designated as "[Date of Hearing] Tr. at [page number]."

> From this point forward it is very important that you not . . . discuss this case with anyone or allow anyone to discuss it with you. It is very important that you follow those instructions from this point forward.
>
> If anyone attempts to communicate with you in any way concerning this case, notify me of that fact immediately upon returning to court.

App. 36-37.

Following the court's initial instructions, the prosecutor introduced the case and asked six "statutory voir dire questions" about potential bias. App. 17. Thereafter, the prospective jurors were questioned individually by the court and the parties about, among other things, their views on the death penalty.

In Ms. Lane's individual questioning, she told the court, "I'm really undecided on how I feel about capital punishment." App. 38. When the prosecutor first asked whether she could "vote to sentence another human being to death," she did not respond. App. 40. Pressed by the prosecutor about whether imposing a death sentence was something she could do, she initially answered, "Not without some reservation," but eventually confirmed that she could vote for the death penalty. App. 40-42. Defense counsel asked if she could also consider imposing a life sentence, and she said she could. App. 48-49. At the end of her voir dire examination, the trial court inquired, "Ms. [Lane], you heard my instructions this morning about not . . . talking to anybody or letting anybody talk to you about this case? You understood those?" and she answered that she had. App. 49. Neither party challenged Ms. Lane for cause. App. 49-50. She was excused for the day with instructions to return to court on Monday morning, September 28. App. 50.

This case concerns Ms. Lane's actions following her voir dire. As she stated many years later in two separate signed statements, one under oath and the second validated under oath, Ms. Lane was troubled about whether her Christian faith would allow her to vote to impose the death

penalty and, after she was questioned in voir dire but before she was selected to serve on the jury, she sought counsel from her pastor to find out her religion's views about the death penalty. Her pastor recommended certain Bible verses to her, which he summarized for her and she subsequently read. Her pastor's advice led Ms. Lane to understand that the Bible deems the death penalty "appropriate in extreme cases." App. 84. Ms. Lane testified that her pastoral consultation allowed her to be at peace with the prospect of serving on Mr. Esposito's jury. App. 92-93.[4]

Mr. Esposito's jury was struck on Monday, September 28, 1998, and Ms. Lane was selected as a juror. 5/10/23 Tr.. at 107-08. Following the presentation of evidence and argument at Mr. Esposito's capital trial, Ms. Lane, along with eleven other jurors, voted to convict Mr. Esposito as charged and, at sentencing, voted to impose the death penalty. At no point prior to, during, or after trial, while the case was pending on direct review, did Ms. Lane advise the court or counsel about her consultation with her pastor.

She likewise did not share this information when she was interviewed in 2007 in connection with Mr. Esposito's initial habeas proceedings. Because the factual basis of the claim was never discovered during state post-conviction proceedings, the issue was never litigated on the merits. Following the denial of relief in state habeas proceedings, Mr. Esposito's subsequent efforts to obtain federal habeas relief were unsuccessful. *See Esposito v. Warden*, 818 Fed. Appx. 962 (11th Cir. 2020) (affirming district court's denial of habeas relief), *cert. denied sub nom Esposito v. Ford*, 141 S. Ct. 2727 (June 7, 2021).

[4] Ms. Lane's April 8, 2023, Affidavit, which includes as attachments her unsworn signed statement of July 9, 2021, and an earlier affidavit dated September 1, 2007, is included in the Appendix at 91-97.

Following the conclusion of his federal habeas proceedings, Mr. Esposito became eligible to receive an execution date.[5] In preparation for possible clemency proceedings, Mr. Esposito's legal team—all new since initial state habeas proceedings—decided to speak with jurors in the case again, to get their thoughts about how new evidence sought or developed since the trial might impact their views about the case and the appropriate punishment. *See* 5/10/23 Tr. at 90-91, 103-04. As part of that effort, Rachel Chmiel, a longtime investigator at the Georgia Resource Center, and Kaylee Brilhart, a law school intern working there over the summer, traveled to Live Oak, Florida, where they believed Ms. Lane was living, in early July 2021, seeking to interview her. 5/10/23 Tr. at 89-92; 7/14/23 Tr. at 23-24.

Both Ms. Chmiel and Ms. Brilhart testified at the evidentiary hearing about locating Ms. Lane at the retirement community where she had moved. Ms. Lane was working at the reception desk when they first approached her, and she agreed to speak with them about the case after she got off work. Before Ms. Chmiel and Ms. Brilhart returned, Ms. Lane had looked up the case on the internet and greeted them with questions about what she had discovered during her research when they all convened a few hours later. *See* 5/10/23 Tr. at 91-93; 7/14/23 Tr. at 23-25.

In the course of their conversation, Ms. Lane volunteered that she had been concerned about whether she could serve on a capital jury in light of her Christian faith and had accordingly sought counsel from her pastor on this subject. 5/10/23 Tr. at 93-94; 7/14/23 Tr. at 25-26. Ms.

[5] Subsequently, in May 2022, a Fulton County Superior Court judge granted a temporary restraining order and interlocutory injunction barring the State from seeking execution warrants for individuals whose federal habeas proceedings were coming to an end during the COVID-19 Judicial Emergency Order, a ruling that includes Mr. Esposito. *See State of Ga. v. Fed. Defender Program, Inc.*, 882 S.E.2d 257, 267 (Ga. 2022). That injunction remains in place.

Chmiel asked follow-up questions to learn about what had prompted Ms. Lane to seek her pastor's advice, when in the course of the trial proceedings she had met with her pastor, and whether her meeting with her pastor had resolved her concerns about reconciling her Christian faith with her civic duty. 5/10/23 Tr. at 94-96.

Ms. Lane abruptly ended the conversation about a half hour into it, but agreed that Ms. Chmiel could handwrite a statement based on what Ms. Lane had told them for her to sign. *Id.* at 96-97. Before signing the statement, Ms. Lane reviewed it with Ms. Chmiel and asked her what "voir dire" meant; Ms. Chmiel "explained . . . what that is, that it's the questioning by the attorney during jury selection, and so, once we clarified that, she confirmed that that was accurate." *Id.* at 98-99; 7/14/23 Tr. at 28.

In relevant part, Ms. Lane's signed statement provides:

> After being questioned as a potential juror during the voir dire process in 1998, I sought counsel from my church pastor about being a juror in a capital trial. I had questions about reconciling my civic duty with being a Christian. After reading Bible passages he recommended, I fulfilled my role as a juror in the *State v. John Esposito* trial.

App. 95 (Statement of Janice Harris, dated July 9, 2021).[6]

[6] Although the July 21, 2021, statement is unsworn, Ms. Lane subsequently endorsed its contents as true and correct in a sworn affidavit dated April 8, 2022. *See* App. 93. Georgia law makes clear that this endorsement rendered her initial unsworn statement a part of her sworn testimony: "Whether a testifying witness repeats an unsworn statement verbatim or acknowledges its truth and accuracy generally, the result is the same: the witness adopts the previously unsworn statement as part of his present, sworn testimony." *CSX Transp., Inc. v. Belcher*, 529 S.E.2d 737, 739 (Ga. 2003). Ms. Lane's unsworn statement accordingly constituted sworn testimony admissible properly before the habeas court and this Court. *See* O.C.G.A. § 9-14-48(a) (recognizing sworn affidavits as admissible evidence at a state habeas evidentiary hearing).

Following the interview with Ms. Lane, Mr. Esposito's legal team conducted additional investigation before filing the successive petition in this case on March 7, 2022. This included interviewing Ms. Lane's pastor at the time of trial, John H. Dubose, Jr., who had no recollection of this meeting, but was "sure it happened as Janice remembers it. It seems like exactly the kind of situation for which she would seek my pastoral guidance." 5/10/23 Tr. at 176 (Dubose affidavit). Subsequent to filing the habeas petition, Mr. Esposito's legal team re-interviewed Ms. Lane and obtained a sworn affidavit attesting to what she had previously stated and providing additional information about her conversation with her pastor, including more details about when she had gone to see him, and her recollection that he had referred her to a verse in the Book of Romans and that her pastoral consultation had given her peace of mind about serving on Mr. Esposito's jury. *See* 5/10/23 Tr. at 107-110. As stated in her sworn affidavit:

> After being questioned as a potential juror during the voir dire process in 1998, I sought counsel from my church pastor about being a juror in a capital trial. I attended First Christian Church in Milledgeville at the time. I had questions for my pastor about reconciling my civic duty with being a Christian. After reading Bible passages he recommended, I fulfilled my role as a juror in the *State v. John Esposito* trial. I attended church the Sunday before the trial started, but I made a separate visit to talk to my pastor about my jury service prior to that Sunday. I recall my pastor directing me to a verse in the book of Romans, which dealt with following man's laws because they are governed by God. I looked this verse up after my visit with my pastor. If my pastor had advised me that serving as a juror in a capital trial was inconsistent with my faith as a Christian, I would have told the Judge that I could not serve as a juror. My conversation with my pastor gave me some peace of mind about serving as a juror.

App. 92-93 (Affidavit of Janet Harris, dated April 8, 2022).

The evidentiary hearing took place on May 10, 2023, and July 14, 2023. Mr. Esposito presented the testimony of six witnesses—Ms. Lane and the four people who had interviewed her on behalf of the Georgia Resource Center, and attorney Kimberly Sharkey, who had represented

Mr. Esposito in his initial state habeas proceedings—as well as documentary evidence, including affidavits and relevant portions of the transcript of Mr. Esposito's voir dire and sentencing-phase closing arguments. Respondent did not present any evidence at the hearing and cross-examined only three of the witnesses, only one of whom, Ms. Lane, was questioned about the merits of Mr. Esposito's claim.[7]

The record clearly reflects that Ms. Lane was uncomfortable and flustered at being called as a witness at the evidentiary hearing conducted on May 10, 2023. She testified that she "absolutely" would have preferred not to be in court that day. App. 59. Contrary to her sworn affidavit, which provided specific details about her visit to her pastor and when it occurred, and her earlier signed handwritten statement she later endorsed under oath, Ms. Lane testified on direct examination at the evidentiary hearing that she could not remember many details about her visit to her pastor, including when it happened, stating that she did not "remember the sequence of events, when I talked to my pastor, but it was prior to being selected as a juror." App. 72. Moreover, while the transcript of her voir dire reflects Ms. Lane's marked hesitation when asked about whether she could vote to impose the death penalty, *see* App. 38-40, she was adamant at the evidentiary hearing that she had told the prosecutor she believed in the death penalty and that defense counsel had been forced to ask her if evidence could be presented that would make her change her mind to not give the death penalty. App. 65-67. She verified in court that she had attested to the accuracy of both

[7] Counsel for Respondent asked mitigation specialist Rebecca Cohen a single question, whether she would have told Ms. Lane that Ms. Lane was not required to speak with her. 5/10/23 Tr. at 71. Counsel questioned investigator John Morledge to clarify that the notary who attested to Ms. Lane's signature on her April 2022 affidavit, LaVern Bentz, was a man. *Id.* at 116-17. Respondent did not ask investigator Rachel Chmiel or law-student Kaylee Brilhart any questions.

her April 8, 2023, affidavit and her July 9, 2021, signed handwritten statement at the time she signed them. App. 72-73, 78.

Ms. Lane's admitted reluctance to testify in court,[8] App. 59, may have led her to be less than forthcoming during her direct examination.[9] When questioned by Mr. Esposito's counsel, for example, she frequently responded that she could not recall what she had told Ms. Chmiel, Ms. Brilhart, and Mr. Morledge about her pastoral consultation, or about her meeting with Respondent's counsel roughly two weeks before her testimony. App. 71-72, 76-79. Yet, on cross-examination, Ms. Lane was able to recall details not only of her recent visit with Respondent's counsel, but also her visit to her pastor almost 25 years before, including that her car was the only one in the church parking lot at the time, that she did not discuss any specifics about Mr. Esposito's case with her pastor, and that he did not recommend any particular sentence, but "just said there was a verse in Romans that talked about the laws being created for this type of situation." App. 84. Nonetheless, she confirmed to Respondent's counsel that she presently did not recall when she visited her pastor, although she agreed she had told Respondent's counsel roughly two weeks before that she had visited him before she was "called for jury service." App. 82-83. Ms. Lane also

[8] Ms. Lane appeared in court pursuant to a subpoena Mr. Esposito served on her. She accepted the offer from investigators from the Georgia Resource Center to drive her to and from her home out of town to attend the hearing.

[9] Indeed, Ms. Lane appears to have been so rattled about having to appear in court that she mistakenly claimed that her April 8, 2023, affidavit had not been properly notarized because the notary never showed up and purportedly notarized her affidavit over the phone—testimony Ms. Lane realized was mistaken upon arriving home and which she corrected by an affidavit she signed the next day. *See* App. 98-99.

stated, in response to Respondent's counsel's question, that she understood her pastor to be telling her that the Bible deemed it "appropriate to give the death penalty in extreme cases." App. 84.

The habeas court, adopting verbatim a proposed order authored entirely by Respondent, agreed that Mr. Esposito had failed to show cause and prejudice to excuse the default of this claim. It reached this conclusion by ignoring both the evidence Mr. Esposito presented in support of his claim and the law.

First, the court acknowledged that Ms. Lane's affidavit indicated "she sought counsel from her pastor after being questioned '*during* the voir dire process,'" but rejected this timing because she testified at the evidentiary hearing that she could not recall when she spoke with her pastor, admitted that she had informed counsel for Respondent that she visited her pastor before voir dire began (and thus before she was instructed by the trial court not to "discuss the case with anyone"), and had "explained . . . that she had a 'stroke in 2000,' which affected her memory." App. 7-8 (emphasis in original). The record does not reflect that the court considered any of the evidence Mr. Esposito presented that bolstered and corroborated Ms. Lane's affidavit testimony. Instead, it found "that based on Juror's Lane's testimony her memory was impaired on the timing of her visit with her pastor in 1998." App. 8.

Second, the court found that, even had Ms. Lane visited her pastor to discuss the death penalty after being questioned in voir dire and receiving the court's instructions not to discuss the case, her pastoral consultation did not amount to misconduct because she "testified that she did not discuss the case with her pastor" and "only asked her pastor if she could serve as a juror in a capital trial under her Christian faith." App. 9. Moreover, the court noted, Ms. Lane recalled "that

her pastor did not suggest any sentence for the crimes and did not provide any testimony that suggested that she asked her pastor what sentence should be imposed." App. 9.

Third, the court concluded that, regardless, Mr. Esposito had not established prejudice for the default because he had not demonstrated that Ms. Lane's contact with her pastor and consideration of the Bible influenced her sentencing decision, as neither her pastor nor the specific Bible verse Ms. Lane recalled suggested a particular sentence. App. 9-16.

Mr. Esposito filed a CPC application in the Georgia Supreme Court seeking review of the habeas court's order and consideration of the proper standard for appellate review of judicial fact-finding in habeas cases, pointing out that the court had recently granted certiorari to review a similar standard-of-review issue on direct appeal in a criminal case. *See Capote*, No. S23C1127, 2024 Ga. LEXIS 52. Nonetheless, rather than granting leave to appeal or holding the case pending a decision in *Capote*, the Supreme Court of Georgia denied the CPC Application. This petition follows.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

After learning of Ms. Lane's improper pastoral consultation, Mr. Esposito filed a successive habeas petition in state court, arguing that her exposure to outside influences violated his federal constitutional right to a fair and impartial jury, and a reliable death sentence under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *See* Corrected Petition for Writ of Habeas Corpus at 8-15 in *Esposito v. Caldwell*, No. 2022-SU-HC-0003 (Butts Cty. Ga. Mar. 31, 2022). He made these claims again in his CPC Application. *See* CPC App. at 27-48.

With respect to the standard of review issue, which only arose after the state habeas court had issued its order and Mr. Esposito was seeking appellate review, Mr. Esposito urged that the federal constitution demands more scrutiny from appellate courts than Georgia's any-evidence standard for reviewing judicial fact-finding provides, arguing that "[s]uch extreme deference is insufficient to ensure that federal and state constitutional rights—the sole grounds for seeking habeas relief [in Georgia]—are adequately protected." CPC App. at 20. He further pointed out that this Court had applied the "clearly erroneous" standard, as construed in *Gypsum*, 333 U.S. at 395, to review state court fact-finding in cases implicating federal constitutional rights. *See* CPC App. at 20-22 (citing cases).

REASONS WHY THE CERTIFICATE SHOULD BE GRANTED

I. The Due Process Clause Demands Greater Scrutiny of Judicial Fact-Finding than Georgia's Any-Evidence Standard Provides.

The standard an appellate court applies to review a lower court's determinations "is often 'outcome determinative,' in the sense that the difference between victory and defeat on appeal can turn on whether the standard by which the appellate court reviews the trial court's decision on an issue is plenary or deferential." Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 Syracuse L. Rev. 531, 531 (2004). "[A]pplication of a standard that is highly deferential to the lower court's decision may dictate affirmance of a decision that would have been reversed under a less deferential standard." Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court,*34 S. Ill. Univ. L.J. 73, 74 (2009). *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (noting "some practical difference in outcome

depending on which standard ['substantial evidence' or 'clearly erroneous'] is used"). Georgia's standard for reviewing judicial fact-finding is as deferential as can be—under the "any evidence" standard, "a finding by the trial court supported by any evidence must be upheld." *Singh v. Hammond*, 70 S.E.2d 126, 128 (Ga. 2013). The standard, accordingly, provides as little review as possible, dictating acceptance of the fact-finding court's determinations unless there was literally zero evidence to support it.[10]

Given its impact on outcomes, a court's standard of review thus has due process implications where federal constitutional rights are at issue. In *Jackson v. Virginia*, for instance, this Court repudiated the "no evidence" standard for reviewing state criminal convictions, noting that the "'no evidence' rule" set forth in *Thompson v. Louisville*, 362 U.S. 199, 199 (1960), "is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt . . . ." *Jackson*, 443 U.S. at 320. As the Court observed, "it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt. The *Thompson* doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored." *Jackson*, 443 U.S. at 320 (citing *In re Winship*, 397 U.S. 358 (1970)). *See, e.g.*, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 508 n.27 (1964) (noting that the Court "has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments" by "making

[10] Under the any-evidence standard, as noted by Georgia Supreme Court Justice Warren, "in a hypothetical during argument [in *Capote*], even if a trial court finds that the proponents of certain testimony were liars and lacked credibility, but credits the testimony nonetheless in its ruling, that constitutes *any* evidence—an unquestionably absurd result that a reviewing court could not correct under the any-evidence standard." Amicus Brief on behalf of the Georgia Association of Criminal Defense Lawyers, in *Capote v. State*, No. S23G1127 (Ga.).

an independent constitutional judgment on the facts of the case," and that "[t]he simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review") (cleaned up) (citations omitted).

This Court has determined that, at minimum, a state court's factual findings should be reviewed under the clearly erroneous standard set forth in *Gypsum*, pursuant to which a reviewing court may reject factual findings "when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gypsum*, 333 U.S. at 395 (emphasis added). *See, e.g.*, *Snyder*, 552 U.S. at 487 (applying *Gypsum* standard to reject state trial court's non-discrimination finding on direct appeal; *Hernandez*, 500 U.S. at 369 (applying *Gypsum* standard to affirm trial court's non-discrimination finding); *see also Lilly*, 527 U.S. at 136-37 ("We, of course, accept the Virginia courts' determination that Mark's statements were reliable for purposes of state hearsay law, and, as should any appellate court, we review the presence or absence of historical facts for clear error. But the surrounding circumstances relevant to a Sixth Amendment admissibility determination do not include the declarant's in-court demeanor . . . or any other factor uniquely suited to the province of trial courts. For these reasons, when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause.")

The *Gypsum* clearly erroneous standard of review, though deferential, is far from toothless. In *Dickinson v. Zurko*, this Court addressed the "subtle" differences between the "substantial

evidence"[11] applied to the review of agency fact-finding under the Administrative Procedures Act ("APA") and the more exacting clearly erroneous standard of review applied to judicial fact-finding, noting "the basic similarity of the reviewing task" of both standards, "*which requires judges to apply logic and experience to an evidentiary record,* whether that record was made in a court or by an agency." 527 U.S. at 1936 (emphasis added). Indeed, the Court observed, even the "somewhat less strict" substantial evidence standard does "not simply rubber-stamp[] agency fact-finding. The APA requires *meaningful review*; and its enactment meant stricter judicial review of agency factfinding than Congress believed some courts had previously conducted." *Id.* (emphasis added).

As to the clearly erroneous standard, this Court has explained that its deference to the trial court's credibility determinations and fact-finding expertise does "not insulate his findings from review," as "[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

The importance of an appellate court's meaningful review of judicial fact-finding is reflected in the fact that the vast majority of states require more probing review than does Georgia's any-evidence standard. Mr. Esposito has identified only seven other states that apply a similar standard, though, unlike Georgia, some require that the evidence supporting the finding is

[11] "This Court has described the . . 'substantial evidence' standard as requiring a court to ask whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson*, 527 U.S. at 1935 (citation omitted).

competent, credible, and/or reasonable. Colorado, Oregon, and South Carolina have the closest standards to Georgia's any-evidence standard. *See, e.g.*, *Martinez v. People*, 542 P.3d 675, 683 (Colo. 2024) ("Applying a clear-error standard, we must affirm the district court's findings unless they are without 'support in the record.'"); *In re Domestic P'Ship of Staveland and Fisher*, 455 P.3d 510, 519 (Ore. 2019) (The state constitution "requires a party challenging a finding of fact to establish that there is 'no evidence' to support it." . . . . The only question, then, is whether there is some evidence in the record to support the trial court's finding.") (citations omitted); *State v. Brockman*, 528 S.E.2d 661, 666 (S.C. 2000) ("[W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling."). In Maine, North Carolina, Ohio, and Vermont, the states have an arguably more stringent standard that requires the appellate court to consider the quality of the evidence. *See, e.g.*, *State v. Sullivan*, 181 A.3d 178, 182 (Me. 2018) ("A finding of fact is clearly erroneous only if the record lacks any competent evidence to support the finding.")[12]; *Howard v. Iomaxis, LLC*, 887 S.E.2d 853, 857 (N.C. 2023) (under the "competent evidence" standard, "a trial court's findings of fact 'will be upheld if supported by *any* competent evidence' in the record.") (emphasis in original) (citation omitted); *Myers v. Garson*, 614 N.E.2d 742, 746 (Ohio 1993) ("[A]n appellate court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the findings of fact and conclusions of law

[12] *But see, e.g.*, *Morin v. Dubois*, 713 A.2d 956, 958 (Me. 1998) ("Findings are clearly erroneous when no competent evidence supporting the finding exists in the record; the factfinder clearly misapprehended the meaning of the evidence; or the force and effect of the evidence, taken as a whole, rationally persuades us to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case.") (citation omitted).

rendered by the trial court."); *State v. Nault*, 908 A.2d 408, 410 (Vt. 2006) ("Under the clearly erroneous standard, we will 'uphold the court's factual findings unless, taking the evidence in the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable or credible evidence to support them.'") (citation omitted).

By contrast, sixteen states, plus the District of Columbia, apply the *Gypsum* standard to the appellate review of judicial fact-finding. *See, e.g.*, *State v. Grubb*, 546 P.3d 586, 592 (Alaska 2024); *Sanford v. Sanford*, 137 S.W.3d 391, 397 (Ark. 2003); *Companions & Homemakers, Inc. v. A&B Homecare Sols., LLC*, 302 A.3d 283, 292 (Conn. 2023); *Jackson v. George*, 146 A.3d 405, 419 (D.C. App. 2016); *State v. McCraney*, 719 N.E.2d 1187, 1189-90 (Ind. 1999); *Kusi v. State*, 91 A.3d 1192, 1203-04 (Md. 2014); *The Woodward School for Girls, Inc. v. City of Quincy*, 13 N.E.3d 579, 588 (Mass. 2014); *Greiff v. Greiff*, 984 N.W.2d 34, 48-49 (Mich. 2022); *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 407 (Minn. 2019); *Johns v. State*, 926 So. 2d 188, 194 (Miss. 2006); *Hoeber v. State*, 488 S.W3d 648, 653 (Mo. 2016); *Unionamerica Mortgage & Equity Trust v. McDonald*, 626 P.2d 1272, 1273 (Nev. 1981); *Knorr v. Norberg*, 872 N.W.2d 323, 326 (N.D. 2015); *State v. Morillo*, 285 A.3d 995, 1003 (R.I. 2022); *Erickson v. Erickson*, 1 N.W.3d 632, 641 (S.D. 2023); *In the Interest of Tiffany Marie S.*, 470 S.E.2d 177, 185 (W. Va. 1996); *State v. Gallaga (In re United States Currency Totaling $75,000.00)*, 539 P.3d 92, 95 (Wyo. 2023).

Another two states apply a *Gypsum*-plus standard. *See, e.g.*, *In re Elaine Emma Short Trust Agmt.*, 465 P.3d 903, 925 (Haw. 2020) (trial court's fact-finding is clearly erroneous "when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made") (citations omitted); *Ashby v. State*, 535 P.3d 828, 836 (Utah 2023)

("We will set aside a district court's factual finding as clearly erroneous only if it is against the clear weight of the evidence, or if we otherwise reach a definite and firm conviction that a mistake has been made.") (citation omitted).

Twenty-four states apply a different form of review that nonetheless appears to require appellate courts to scrutinize the record, while according due deference to the lower court's factual determinations. *See, e.g.*, *Fletcher v. Eddins*, 392 So. 3d 17, 18 (Ala. 2023) (judicial findings based on testimony may not be disturbed unless they are "clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence") (internal citations omitted); *Pouser-Webb v. Pouser*, 975 P.2d 704, 710 (Ariz. 1999) (trial court's fact-finding is not clearly erroneous "if substantial evidence supports it") (citation omitted); *Guardianship of Saul H.*, 514 P.3d 871, 883 (Cal. 2022) ("[A]n appellate court should accept a trial court's factual findings if they are reasonable and supported by substantial evidence in the record."); (citation omitted); *Kellner v. AIM Immunotech Inc.*, 320 A.3d 239, 257 (Del. 2024) (appellate court must accept trial court's fact-findings where they are "sufficiently supported by the record and are the product of an orderly and logical deductive process"); *Edwards v. State*, 351 So. 3d 1142, 1149-50 (Fla. 2022) (trial court's fact-finding must be supported by "competent, substantial evidence," *i.e.*, "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion" and "sufficiently relevant and material") (citations omitted); *Latvala v. Green Enters.*, 485 P.3d 1129, 1138 (Idaho 2021) (trial court's findings are clearly erroneous if unsupported by "substantial and competent evidence," meaning "evidence . . . that a reasonable trier of fact could accept and rely upon in making the factual finding") (citation omitted); *People v. Morgan*, 817 N.E.2d 524, 528 (Ill. 2004) (trial court's factual findings reviewed for manifest error, *i.e.*, error

which is "clearly evident, plain, and indisputable") (citation omitted); *City of Cedar Rapids v. Leaf*, 923 N.W.2d 184, 196 (Iowa 1999) (trial court's fact findings reviewed for substantial evidence, but constitutional issues are reviewed de novo); *State v. Evans*, 389 P.3d 1278, 1280 (Kan. 2017) (judicial fact-finding reviewed for "substantial competent evidence"); *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (judicial findings are clearly erroneous where they are not supported by substantial evidence, *i.e.*, "evidence that a reasonable mind would accept as adequate to support a conclusion" and having "sufficient probative value to induce conviction in the minds of reasonable men") (citations omitted); *Johnston v. Vincent*, 359 So. 3d 896, 911 (La. 2023) (trial court's findings reviewed under the "manifest error-clearly wrong standard," which "requires more than reviewing the record for some evidence supporting or controverting the district court's findings," and requires a finding that "there is no reasonable factual basis for the district court's conclusion, such that it is 'clearly wrong'") (citations omitted); *State v. Kirn*, 530 P.3d 1, 10 (Mont. 2023) ("A trial court's factual findings are clearly erroneous if they are not supported by substantial credible evidence, if the trial court has misapprehended the effect of the evidence, or if a review of the record leaves the appellate court with the definite and firm conviction that a mistake has been made.") (citation omitted); *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 335 P.3d 211, 213 (Nev. 2014) ("We will not disturb such a finding if it is supported by substantial evidence."); *State v. Monegro-Diaz*, 286 A.3d 154, 157 (N.H. 2022) ("[W]e accept the circuit court's factual findings unless they lack support in the record or are clearly erroneous."); *State v. Gamble*, 95 A.3d 188, 195 (N.J. 2014) (judicial factual findings must be "supported by sufficient credible evidence in the record" and may be reversed where the trial court's finding "is 'so clearly mistaken that the interests of justice demand intervention and correction'") (citations omitted);

Lukens v. Franco, 433 P.3d 288, 293 (N.M. 2018) (judicial fact-findings subject to "substantial evidence" review, *i.e.*, "evidence that a reasonable mind would regard as adequate to support a conclusion") (citations omitted); *Thoreson v. Penthouse Int'l*, 606 N.E.2d 1369, 1370 (N.Y. 1992) (fact-finding court's decision "should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence"); *State v. Alba*, 341 P.3d 91, 92 (Okla. Crim. App. 2015) ("[T]his Court defers to the trial court's findings of fact unless they are not supported by competent evidence and are therefore clearly erroneous."); *Commonwealth v. Johnson*, 231 A.3d 807, 818 (Pa. 2020) (fact-finder's credibility determinations upheld where there is adequate supporting record, but appellate review is "not blindly deferential"); *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007) ("[W]hen dealing with the trial court's findings of fact, we review the record de novo with a presumption of correctness, and we must honor those findings unless there is evidence which preponderates to the contrary.") (citing, *inter alia*, Tenn. R. App. P. 13(d)); *Thilghman v. State*, 624 S.W.3d 801, 806 (Tex. Crim. App. 2021) ("When a trial judge makes express findings of fact, an appellate court must examine the record in the light most favorable to the ruling and uphold those fact findings so long as they are supported by the record."); *Perel v. Brannan*, 594 S.E.2d 899, 903 (Va. 2004) ("As to purely factual determinations made by the trial court, we will not disturb those findings unless they are plainly wrong or without evidence to support them."); *State v. Griffith*, 195 P.3d 506, 508 (Wash. 2008) ("We review a trial court's factual findings for substantial evidence."); *State v. Wiskerchen*, 921 N.W.2d 730, 736 (Wis. 2019) ("A circuit court's finding of fact is not clearly

erroneous unless it is against the great weight and clear preponderance of the evidence.") (citation omitted).[13]

Whether Georgia's any-evidence standard of review adequately protects a litigant's federal constitutional rights presents an important, unanswered question. And the proper standard for appellate review of fact-finding is a critical issue in this case. In habeas proceedings below, Mr. Esposito bore the burden of proving juror misconduct by a preponderance of the evidence.[14] In support of his claim that Ms. Lane visited her pastor to discuss the death penalty *after* she had been questioned in voir dire and instructed more than once by the trial court not to discuss the case, Mr. Esposito presented the following evidence:

- Ms. Lane's two signed statements, one made under oath and the other endorsed under oath, stating that, subsequent to her voir dire examination, she had visited her pastor to seek counsel about whether, as a Christian, she could serve on a capital jury and that her pastoral consultation put her at ease about serving as a juror in Mr. Esposito's case. App. 91-95.

- The transcript of Ms. Lane's voir dire, which reflects that she vocalized significant reservations about her ability to vote for the death penalty and

[13] Even in federal habeas corpus proceedings, where federal courts must "accord the state trial court substantial deference," *Brumfield v. Cain*, 576 U.S. 305, 314 (2015), a federal court will scrutinize the facts more closely than a Georgia appellate court. A federal court may grant relief where a state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). *See, e.g.*, *Brumfield*, 576 U.S. at 312 (finding that state court's rejection of a hearing on petitioner's intellectual disability "was premised on an "unreasonable determination of the facts"); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (granting relief where state court's non-discrimination finding was unreasonable in light of all the evidence and noting that deference under 28 U.S.C. § 2254(d) "does not by definition preclude relief") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

[14] *See, e.g.*, *Bruce v. Smith*, 553 S.E.2d 808, 811 (Ga. 2001) ("To obtain habeas relief, a petitioner must prove by a preponderance of the evidence that the judgment attacked is invalid because a constitutional right was violated.") (citation omitted); *Crawford v. Linahan*, 253 S.E.2d 171, 174 (Ga. 1979) (habeas petitioner's burden "is to be carried by the preponderance of evidence").

did not mention consulting her pastor about her religion's view of the death penalty. App. 18-50.

- The testimony of the individuals who took Ms. Lane's two statements, which demonstrated that she volunteered on her own the information about her pastoral visit when she was being interviewed about unrelated subjects in July 2021, that she reviewed her statements carefully before signing them, and that she questioned investigator Rachel Chmiel about the meaning of the term "voir dire" before endorsing the accuracy of her first written statement and signing it. *See* 5/10/23 Tr. at 93-96; 7/14/23 Tr. at 26-28.

Mr. Esposito's claim is thus supported not only by Ms. Lane's sworn testimony, but contemporaneous documentation from the trial and corroboration by the individuals who spoke with her years later and drafted her statements based on what she told them. This evidence was *not* disproven by Ms. Lane's later live testimony, given roughly two weeks after Respondent's counsel met with her, that she no longer recalled when her pastoral visit occurred.[15]

[15] Ms. Lane admitted at the hearing that she would have preferred not being called as a witness. App. 59. Her reluctance to appear (after being subpoenaed by Mr. Esposito) was reflected in her selective memory at the hearing. While she claimed on direct examination that she could not remember numerous aspects of her conversation with her pastor or even her recent meeting with Respondent's attorney, her memory was much better on cross-examination by Respondent's counsel, as she recalled details not only of their meeting a couple weeks before, but even of the interview conducted back in 2007 and the topics Ms. Lane had discussed with her pastor in 1998. *Compare* App. 71-73, 76-79 (direct examination expressing memory lapses with respect to her pastoral visit, interviews by Mr. Esposito's investigators, and her meeting with Respondent's attorney) *with* App. 82-85, 89 (cross-examination by Respondent's attorney regarding the same subjects with few memory lapses). "The tendency of unwilling or untruthful witnesses to seek refuge in forgetfulness is well recognized." 2 McCormick on Evidence, § 251 at 214 (7th ed. 2013); *see, e.g.*, *Nance v. State*, 629 A.2d 633, 645 (Md. 1993) (citing *McCormick* passage as grounds to admit prior inconsistent statement); *State v. Matthews*, 88 F.3d 375, 384 (R.I. 2014) (same). The habeas court should not have construed Ms. Lane's selective memory to undermine her detailed sworn statements.

Nor is it meaningfully refuted by the sole evidence Respondent presented to counter Mr. Esposito's evidence that Ms. Lane's pastoral consultation occurred after she was questioned in voir dire—Ms. Lane's one-word concession, on cross-examination, that, at the time Respondent's counsel met with her a couple weeks before, she told Respondent's counsel that she "went to see [her] pastor before [she was] called for jury duty." App. 83. That flimsy evidence[16] has virtually no credibility, particularly considering that Ms. Lane's voir dire transcript makes no mention of her pastor or their discussion, topics that would naturally have come up when she was explaining her unease with imposing the death penalty to the trial court and prosecutor. *See* App. 38-40.

The habeas court did not address any of the evidence supporting Ms. Lane's sworn statements that she visited her pastor *after* she had been questioned in voir dire and before she was selected. The court's finding that Mr. Esposito had failed to prove by a preponderance of the evidence that she had done so, a finding supported only by the slightest hint of evidence, was against the overwhelming weight of the evidence and clearly erroneous.

This is not a situation where the habeas court was faced with two plausible versions of events and reasonably chose between them. On the contrary, Ms. Lane's two signed statements were consistent with objective evidence (the voir dire transcript) and corroborated by the testimony

[16] Ms. Lane answered "correct," to Respondent's attorney's question, "do you recall telling me that, at the time, that [to] the best of your recollection, it was that you went to see your pastor before you were called for jury service," but confirmed that it was her testimony in court that she did not currently recall when she went to see her pastor. App. 83. Respondent presented no corroborating evidence, such as a written statement (sworn or not). Although a prior inconsistent statement is admissible both to impeach a witness and as substantive evidence under Georgia law, *see, e.g.*, *Rivers v. State*, 768 S.E.2d 486, 493 (Ga. 2015), Ms. Lane's one-word response cannot reasonably be read to rebut her earlier, detailed account, supported by objective evidence, that she visited her pastor after she was questioned in voir dire.

of the investigators and law student who interviewed her about her pastoral consultation. The "[d]ocuments [and] objective evidence . . . contradict[]" Ms. Lane's evidentiary hearing testimony that she no longer remembered when she visited her pastor and her one-word concession that she had told Respondent's counsel that she met with her pastor before she was called for jury service. *Anderson*, 470 U.S. at 575. These factors warrant a finding of "clear error even in a finding purportedly based on a credibility determination." *Id. See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 257-58 (2001) (district court clearly erred where, despite "a modicum of evidence offering support for the District Court's conclusion, . . . *[t]he evidence taken together* . . . does not show that racial considerations predominated in the drawing of [the district's] boundaries") (emphasis added); *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1505 (4th Cir. 1988) (rejecting district court's finding of discrimination where "the evidence so outweighs the plaintiffs' claims of discriminatory application that we cannot accept the district court's conclusion" and noting that "[t] o the extent that the court's conclusion rests on its decision to disbelieve Harris-Teeter's witnesses, the objective evidence refutes it, and we are left with the definite impression that the trial court was mistaken"); *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1213 (11th Cir. 1985) (noting that a witness's vague testimony "does not contradict, with clarity sufficient to support the trial court's finding, the earlier testimony of this same witness," and that "this contradiction in [the witness's] testimony and all the evidence" demonstrated that the district court's finding was clearly erroneous).

Because a reviewing court could conclude that the habeas court clearly erred in finding that Mr. Esposito failed to prove by a mere preponderance of the evidence that Ms. Lane met with her pastor to discuss the death penalty after she had been questioned in voir dire and instructed not to

discuss the case with anyone, this case presents an excellent opportunity for this Court to address the standard that state courts must apply in reviewing factual determinations made in considering federal constitutional claims. Mr. Esposito respectfully asks the Court to grant certiorari on this issue.

II. The Habeas Court Erred in Concluding that Ms. Lane Did Not Engage in Misconduct and that Mr. Esposito Suffered No Prejudice from Her Impermissible Pastoral Consultation.

A. Ms. Lane's Consultation with Her Pastor About the Death Penalty and Review of Bible Verses He Recommended to Her Constituted Misconduct.

The habeas court held that, even assuming Ms. Lane visited her pastor after the trial court had instructed her not to discuss the case with anyone, her actions did not amount to misconduct because (1) she "testified that she did not discuss the case with her pastor," (2) she "only asked her pastor if she could serve as a juror in a capital trial under her Christian faith," (3) "her pastor did not suggest any sentence for the crimes," and (4) she "did not provide any testimony that suggested she asked her pastor what sentence should be imposed." App. 9. The habeas court's determination is based on a misunderstanding of the law.

In contravention of the trial court's repeated instructions to Ms. Lane and other jurors that they have no contact with third parties about the case, *see* App. 36-37, 49, Ms. Lane initiated a meeting with her pastor to discuss its central sentencing issue—the death penalty—and what her Christian faith had to say about it.[17] Her pastor recommended Bible verses, which he summarized

[17] "Given a jury's role during the sentencing phase of a capital case, 'the matter pending before the jury' is to determine whether or not the defendant ought to receive the death penalty." *Barnes v. Joyner*, 751 F.3d 229, 249 (4th Cir. 2014) (quoting *Remmer v. United States*, 347 U.S.

for her and she read. App. 61, 84, 92-93, 95. Her takeaway from the recommended Bible verses was that "it was appropriate to give the death penalty in extreme cases." App. 84. As a result of meeting with her pastor and reading the Bible verses he recommended, she "felt it was appropriate to cho[o]se to sit on the jury" because she "had been told that there were laws in Romans." App. 89.

The habeas court's determination that Ms. Lane's actions did not amount to misconduct because she did not discuss specific factual details about the crime or sentencing with her pastor misapplied the law. Ms. Lane's actions, seeking spiritual guidance about *the central issue* at sentencing, clearly amounted to juror misconduct that threatened her impartiality. In *People v. Hensley*, 330 P.3d 296, 324 (Cal. 2014), for instance, the court reversed a death sentence due to one juror's misconduct in consulting his minister, even though the juror testified he did not discuss the trial or any of the facts of the case and simply asked his minister about his "responsibilities as a citizen, and believing in mercy and grace." The court found that "as the Attorney General concedes, [the juror] committed misconduct. Although instructed not to discuss the case except during deliberations, [the juror] called his pastor for spiritual advice on the use of mercy and sympathy in making a decision on penalty, the very decision under deliberation. He thus 'deliberately set out to [discuss] … the issues at the trial.'" *Id.* (citations omitted). Similarly, in *Clark v. Broomfield*, No. 97-cv-20618, 2022 U.S. Dist. LEXIS 83532, at *24 (N.D. Cal. 2022),

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227, 229 (1954)); *see id.*at 248-49 (rejecting state's argument that the juror's discussion with his minister about the death penalty was not the issue before the court; to the contrary, "'the matter before the jury' . . . was the appropriateness of the death penalty for the[] defendant[]" and, given that the juror's "conversation with a third party about the spiritual or moral implications of making this decision, the communication 'was of such a character as to reasonably draw into question the integrity of the verdict,' . . . .").

the court noted that "[i]t is uncontested that [the juror's] contact with his minister was improper. He approached a non-juror he no doubt esteemed as a moral authority and, in contravention of his instructions as a juror, discussed the case and sought his minister's opinion on a question he believed would eventually be put to the jury. This was . . . conscious misconduct by a juror designed to solicit extraneous opinion related to the juror's function." The court reached this conclusion without the need to resolve an evidentiary dispute about whether the juror had actually discussed the evidence with his minister. *Id.* at *17. *See also Ballinger v. Watkins*, 882 S.E.2d 312, 320 (Ga. 2022) (finding in successive habeas case that juror committed misconduct by undertaking a "drive test . . . designed and carried out specifically to address [a] key issue. . . . T]here is little question that the extra-judicial information here was highly pertinent to a critical substantive issue in the case"); *Hammock v. State*, 592 S.E.2d 415, 418 (Ga. 2004) (new trial granted where "the juror's misconduct in the present case affected the key issue of self defense").

The information Ms. Lane received from her pastor and the Bible, moreover, was extraneous to the case. "The theory of our [judicial] system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). "Information is deemed extraneous if it derives from a source external to the jury." *Beck v. State*, 852 S.E.2d 535, 539 (Ga. 2020) (citation omitted). Both Ms. Lane's contact with her pastor and her reading of the Bible passages he recommended to her accordingly exposed her to improper outside influences, irrespective of whether she believed that, by not mentioning the case, she had complied with the trial court's order not to discuss it with anyone.

Here, in direct contravention of the trial court's explicit and repeated instructions not to discuss the case with third parties, Ms. Lane visited her pastor with the express intent of discussing a central issue in the case—the imposition of the death penalty—and she thereafter consulted Bible passages her pastor recommended. This was misconduct that, as discussed below, could reasonably be expected to impact her sentencing verdict. The habeas court accordingly was wrong to conclude that Ms. Lane's actions were appropriate and consistent with her role as a juror.

B. The Habeas Court Wrongly Concluded that Ms. Lane's Improper Pastoral Visit Was Not Prejudicial, Simply Because Her Pastor and the Bible Verses She Read Did Not Direct Her to Impose the Death Penalty.

The habeas court held that, even assuming Ms. Lane's actions were misconduct, they were not prejudicial. App. 9-16. Specifically, the court concluded that Mr. Esposito did not establish prejudice to excuse the default of his claim because "Juror Lane plainly testified that she did not seek guidance on what sentence should be imposed and that nothing she was told by the pastor or that she read in the Bible suggested a particular sentence," and, accordingly, "Esposito failed to prove that the alleged extrajudicial communication between Juror Lane and her pastor affected her sentencing decision." App. 13. The court found support in several decisions from the Georgia Supreme Court addressing "irregularities" in the jury, App. 13-15, but, as Mr. Esposito argued in his CPC Application, were all either distinguishable or supported Mr. Esposito's position. *See* CPC Application at 43-47.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences." *KPNX Broadcasting Co. v. Arizona Superior Court*, 459 U.S. 1302, 1306 (1982) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966)). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," *Irvin*

v. Dowd, 366 U.S. 717, 722 (1961), a right that is threatened by a juror's exposure to prejudicial extraneous influences. A juror's exposure to outside influences "can violate a defendant's 'right to confront and cross-examine witnesses against [him]' under the Sixth Amendment to the United States Constitution," as "jurors who do extra-judicial research," as Ms. Lane did here, "'bec[o]me, in a real sense, unsworn witnesses against the [defendant] in violation of the Sixth Amendment.'" *Ballinger v. Watkins*, 882 S.E.2d 312, 318 (Ga. 2022) (citations omitted). *See also, e.g.*, *Turner v. Louisiana*, 379 U. S. 466, 468 (1965) (defendant's right to due process was violated where deputy sheriffs who were witnesses in the case "ate with [the jurors], conversed with them, and did errands for them" while the jurors were sequestered).[18]

Given the substantial threat to cherished constitutional rights that third-party contacts pose, the United States Supreme Court has held that "any private communication, contact, or tampering directly or indirectly, with a juror during trial about the matter pending before the jury is, for

[18] Ms. Lane's actions, moreover, undermined Mr. Esposito's rights to a full and complete voir dire, the mechanism for selecting fair and impartial jurors, and his right to exercise knowledgeable challenges. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors."); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (noting that "lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts."); *Witherspoon v. Illinois*, 391 U.S 510, 512, 519-20 (1968) (state law requiring for-cause dismissal of any juror who voiced "conscientious scruples against capital punishment," or indicated "that he is opposed to the same," violated due process as it removed jurors who could nonetheless "make the discretionary judgment entrusted to him by the State" and "produced a jury uncommonly willing to condemn a man to die"). Georgia law as well recognizes the critical nature of voir dire to selecting a fair and impartial jury. *See, e.g.*, *Ellington v. State*, 735 S.E.2d 736, 752 (Ga. 2012); *Green v. State*, 757 S.E.2d 856, 858 (Ga. 2014). Instead, Ms. Lane's pastoral consultation transformed her from a prospective juror with serious misgivings about the death penalty when she was questioned during voir dire to one whose reservations had secretly been cleared away by the time she was seated as a juror.

obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Remmer v. United States*, 347 U.S. 227, 229 (1954).[19]

Even without this presumption, prejudice is shown on the facts of this case. Here, Ms. Lane consulted with her pastor about the central issue at sentencing—the death penalty—and her pastor, in discussing this subject with her, directed her to one or more passages from the Bible, including a passage from Romans.[20] Ms. Lane's visit to her pastor was prompted by her concern about the central issue at sentencing, and her pastor's advice directly impacted her attitude towards the death

[19] Although Georgia law recognizes this presumption on direct review, *see, e.g.*, *Henry v. State*, 462 S.E.2d 737, 744 (Ga. 1995) (citation omitted), the Georgia Supreme Court has held that "the *Remmer* presumption is 'a rule of federal criminal procedure, rather than a rule of federal constitutional law," and that, in a habeas case, the petitioner "must instead meet the actual prejudice test . . . ." *Greer v. Thompson*, 637 S.E.2d 698, 701 (Ga. 2006) (internal citation omitted). Decisions from this Court and several federal appellate courts reviewing state court decisions in habeas proceedings suggest otherwise. *See, e.g.*, *Dietz v. Bouldin*, 579 U.S. 40, 48 (2016) (listing *Remmer* and its presumption of prejudice as one of "[t]his Court's precedents implementing" the guarantee of an impartial jury); *Barnes*, 751 F.3d at 242 ("*Remmer* clearly established . . . a presumption of prejudice, . . . when the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury."); *McNair v. Campbell*, 416 F.3d 1291, 1308 (11th Cir. 2005) ("Because it is undisputed that jurors in the guilt phase of McNair's trial considered extrinsic evidence during their deliberations, our analysis focuses on whether the State can rebut the resulting presumption of prejudice."); *Moore v. Knight*, 368 F.3d 936, 942-43 (7th Cir. 2004) (state "post-conviction court's finding that there was no prejudice was especially unreasonable due to the fact that a presumption of prejudice applies in situations where *ex parte* communications were made to the jury by a third party"). While Mr. Esposito maintains that the *Remmer* presumption applies, he submits that the record demonstrates that he was actually prejudiced by Ms. Lane's consultation with her pastor and her reading of biblical passages he recommended.

[20] "Romans 13:1-5[is] a passage from the Bible's New Testament commonly understood as providing justification for the imposition of the death penalty." *Sandoval v. Calderon*, 241 F.3d 765, 775 (9th Cir. 2000) (granting sentencing relief due to the prosecutor's improper argument espousing the death penalty's biblical support).

penalty. Had her pastor told her that serving as a juror in a capital trial was inconsistent with her Christian faith, she testified she "would have told the Judge that [she] could not serve as a juror." App. 92. Instead, Ms. Lane's "conversation with [her] pastor gave [her] some peace of mind about serving as a juror." App. 92-93. Indeed, she came away from her meeting with her pastor with the understanding that the Bible says it is "appropriate to give the death penalty in extreme cases."[21] App. 84.

That understanding of the Bible, however, is at odds with the *legal* standard for imposing a death sentence under the federal constitution and Georgia law, *i.e.*, the law that Ms. Lane and her fellow jurors were required to follow in determining the "appropriate" punishment. As this Court has made clear, "the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (citations omitted); *see, e.g.*, *Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024) (noting that "a

[21] "The ordinary meaning of 'appropriate' is 'especially suitable or compatible' or 'fitting.'" *Bell v. Hargrove*, 867 S.E.2d 101, 107 (Ga. 2021) (quoting Merriam-Webster's Collegiate Dictionary 61 (11th ed. 2006) (defining "appropriate")). *See also, e.g.*, *Aliyev v. Barr*, 971 F.3d 1085, 1086 (9th Cir. 2020) ("'Appropriate' means 'suitable or proper in the circumstances.'") (quoting *New Oxford American Dictionary* at 77 (3d ed. 2010)); *Warren v. State*, 939 S.W.2d 950, 954 (Mo. App. 1997) ("[T]he plain meaning of the word 'appropriate' when used as an adjective is 'suitable,' 'proper, 'fitting,' or 'necessary.'") (quoting *Webster's New Twentieth Century Dictionary* 91 (2d ed. 1983); *Stewart v. Albertson's, Inc.*, 481 P.3d 978, 988 (Ore. App. 2021) ("The adjective 'appropriate' means 'specially suitable: FIT, PROPER.'" (quoting *Webster's Third New Int'l Dictionary* 106 (unabridged ed. 1986)). As the Georgia Supreme Court has observed, "the problem lies with *a prospective juror who already has made up his mind about the appropriate sentence* — either conditionally upon proof of some critical fact or absolutely — before the evidence is in, and who simply will not listen to the full range of evidence or heed the charge of the court." *Edenfield v. State*, 744 S.E.2d 738, 752 (Ga. 2013) (emphasis added). Ms. Lane's understanding of the Bible's view of capital punishment indicates that, in an "extreme" case, her mind was made up irrespective of the mitigating evidence that might be presented—a view that would have disqualified her from serving had she disclosed her pastoral visit prior to her service. *See Morgan*, 504 U.S. at 729.

sentencer may not 'refuse to consider . . . any relevant mitigating evidence'") (quoting *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982)).

Georgia law requires no less. *See, e.g.*, O.C.G.A. § 17-10-30(b) (directing trial courts to instruct capital sentencing juries about their responsibility to consider "any mitigating circumstances" and "authorized" aggravating circumstances in determining sentence); *Brantley v. State*, 427 S.E.2d 758, 765 (Ga. 1993) (granting sentencing relief where jury instructions may have "restrict[ed] the jury's consideration of mitigating circumstances," in light of the United States Supreme Court's interpretation of the Eighth Amendment). Under the law, that a case is "extreme" does not alone establish that the death penalty is "appropriate," or even that it is a legally available punishment. "In contrast to biblical law, Georgia law gives the jury the discretion to recommend life imprisonment or death, provides stringent procedures and safeguards that must be followed during the trial, and permits the jury to impose the death penalty only in limited circumstances." *Carruthers v. State*, 528 S.E.2d 217, 222 (Ga. 2000) (vacating death sentence due to prosecutor's improper argument that the Bible supported the death penalty). Whether a case is "extreme" does not alone determine whether death is the appropriate sentence. Rather, "the existence of multiple aggravating circumstances is not involved in the determination of whether a defendant who has been found *eligible* for the death penalty should receive that sentence." *Simpkins v. State*, 486 S.E.2d 833, 836 (Ga. 1997).

The pastor's extrajudicial advice and the Bible verses he referenced,[22] moreover, would tend to encourage a reasonable juror who shared Ms. Lane's Christian faith to vote in favor of the

[22] As noted, although in April 2022, Ms. Lane remembered that her pastor had referred her to "a verse in the Book of Romans," App. 92, and, at the evidentiary hearing, testified that that

death penalty. Significantly, Ms. Lane's misconduct and its transformative effect on her opinions, turning her from the juror who in voir dire expressed considerable reservations about imposing the death penalty into a juror at peace with doing so, occurred without the knowledge of defense counsel or the court. Had she informed the court and counsel of her transgression, she would not have served on Mr. Esposito's jury. *See* 7/14/23 Tr. at 43-45 (affidavit of trial counsel W. Dan Roberts).

Numerous courts have vacated death sentences imposed under similar circumstances. In *Barnes v. Thomas*, 938 F3d 526, 528 (4th Cir. 2019), for instance, "a juror improperly consulted with her pastor about whether she could vote to impose the death penalty without running afoul of her religious beliefs." The pastor pointed the juror to "some scriptures in the Bible . . . that explained everything" and "assured her that . . . her religious beliefs permitted her to vote for the death penalty." *Id.* at 532, 534.[23] The court found that the pastor's "thoughts on whether the Bible

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verse was Romans 13:1, App.63-64, she stated in both her unsworn signed statement and her sworn affidavit that she "fulfilled [her] role as a juror" in Mr. Esposito's case "[a]fter reading Bible *passages* [her pastor] recommended . . . ." App. 92, 95 (emphasis added.) Thus, it is reasonable to believe that Ms. Lane's pastor referred her to other portions of the Bible as well, many of which offer strongly pro-death-penalty views.

In *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989), the court granted sentencing relief in a Georgia case where the trial judge had permitted jurors to bring a copy of the Bible into sentencing deliberations. Although the court could not ascertain "[h]ow the jurors used the Bible," it held that the petitioner's rights to a fair trial and reliable sentence were violated by the Bible's presence during deliberations, noting that the Bible, an "extra-judicial code of conduct [that] mandates death for numerous offenses," could be viewed by jurors as "an authoritative religious document" with "great potential to influence the jury's deliberations." *Id.* at 1599. .

[23] Indeed, it appears that the pastor in *Barnes* may have directed the juror to the same verse that Ms. Lane's pastor recommended: "'To remedy the effect of the [defense counsel's] argument [that they would face God's judgment if they imposed the death penalty, juror] Jordan brought a Bible from home into the jury deliberation room' and read a passage to all the jurors, which

condones the death penalty . . . constitute[] an outside influence on the jury's partiality" and overturned the district court's denial of habeas relief. *Id.* at 536.

Similarly, in *Clark v. Broomfield*, No. 97-cv-20618, 2022 U.S. Dist. LEXIS 83532 (N.D. Cal. May 9, 2022), the court granted sentencing relief where a juror sought his minister's counsel about the death penalty during trial, even though the juror did not discuss his consultation with other jurors.[24] The court observed that the evidence "supports the reasonable inference that, as the gravity of his role in the anticipated penalty phase began to weigh on him, [the juror] began to question his preconceptions about the death penalty" and that the juror's "'useful' conversation with his minister freed him from the doubt that likely caused him to seek out his minister's advice in the first place and steeled his resolve to adhere to his prior opinion about the propriety of the death penalty." *Id.* at *34-35.[25]

Numerous other courts have similarly ruled. *See, e.g.*, *Jones*, 706 F. Supp. at 1559 (reversible error where jurors consulted Bible during sentencing deliberations); *Hensley*, 330 P.3d at 319-26 (vacating death sentence where juror consulted his pastor about the Bible's views on the

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provided 'that it is the duty of Christians to abide by the laws of the state.'" *Barnes*, 751 F.3d at 235 (citation omitted).

[24] "In California, where a jury verdict imposing a death sentence must be unanimous, . . . prejudice may be established merely by showing undue influence on just one juror." *Clark*, 2022 U.S. Dist. LEXIS 83532, at *32 (citation omitted). Georgia, like California, requires that the jury unanimously vote to impose a death sentence. *See* O.C.G.A. § 17-10-31(c). And the Georgia Supreme Court has recognized that actual prejudice was established where a single juror's vote is impacted. *See, e.g.*, *Turpin v. Todd*, 519 S.E.2d 678, 681 (Ga. 1999) (prejudice found where "there was a substantial probability that at least one juror would have voted for a life sentence" instead of the death penalty but for the improper communication).

[25] The California Attorney General did not appeal this ruling. *See, e.g.*, *Clark v. Smith*, 2023 U.S. Dist. LEXIS 73127, No. 3:97-cv-20618 (N.D. Cal. Apr. 26, 2023) (order granting extension of time to complete the conditions of the habeas relief order).

death penalty and noting that the juror "actively solicited his pastor's comments about the role of mercy and sympathy while still wrestling with his decision, spoke to him about this subject for 15 to 20 minutes, and was given directions inconsistent with the jury instructions"); *People v. Harlan*, 109 P.3d 616 (Co. 2005) (death sentence vacated due to jurors' improper consideration of biblical passages advocating the death penalty, including the passage from Romans that Ms. Lane read at her pastor's suggestion); *Grooms v. Commonwealth*, 756 S.W.2d 131, 145 (Ky. 1988) (concluding that "highly prejudicial error occurred" where jurors relied on biblical passages to impose the death penalty and noting that "[if] evidence of biblical references to capital punishment is not competent during the penalty phase of a capital trial, it is axiomatic that a jury may not independently consult the biblical scriptures for guidance in reaching its life and death decision"); *State v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981) (reversible error at sentencing for jury foreman to "buttress[] his argument for imposition of the death penalty by reading to the jury selected biblical passages"); *see also Carruthers*, 528 S.E.2d at 222 (vacating death sentence due to prosecutor's improper argument that the Bible supported the death penalty, noting that "[i]n contrast to biblical law, Georgia law gives the jury the discretion to recommend life imprisonment or death, provides stringent procedures and safeguards that must be followed during the trial, and permits the jury to impose the death penalty only in limited circumstances"); *Ex parte Troha*, 462 So. 2d 953 (Ala. 1984) (reversible error in non-capital case where "juror's conversation with his minister brother and the selective reference to specific Biblical passages might have unlawfully influenced the verdict rendered").

In this case, moreover, the prejudice to Mr. Esposito was amplified by the prosecutor's own grandiose use of the Bible to spur the jury to impose a death sentence. *See* 7/14/23 Tr. at 65

("[T]he good book says, 'How long shall the wicked be allowed to triumph and exalt.' He's wicked."); *id.* at 67 ("'How these men of evil boast.' He is a man of evil."); *id.* at 68 ("I'm not going to sugar coat it. And he boasted. He boasted. These are his words, not Fred Bright [the prosecutor]'s words. These are his words, his boasting. * * * And what did this man of evil boast?"); *id.* at 69 ("And what else did this man of evil—how these men of evil boast—on those five licks . . . . Arise and judge the earth.").[26] The prosecutor, moreover, concluded his sentencing phase closing with a poignant query about victim Lola Davis's widowed husband's approach to death and his heavenly meeting with his murdered wife:

> I don't know how many days Mr. Foster Miles Davis has left on this earth. It's probably few. Probably his days are numbered. He's been hanging on for two years. But justice would be when Mr. F.M. Davis goes to the Pearly Gates in heaven and sees his beloved wife of fifty years, Mrs. Lola, and he can say, "honey, there was justice on this earth." On behalf of the State of Georgia, on the front page of that document at the bottom, it says, "we,' the jury fix the punishment at," and we ask that you check off the word "death." Thank you.

7/14/23 Tr. at 74. The prosecutor's summation thus likely resonated with the extraneous religious authority Ms. Lane had improperly sought and obtained from her pastor, thereby amplifying its harmful effect.

The habeas court did not address any of these factors in its prejudice assessment. Instead, it cited several Georgia Supreme Court decisions as support for its no-prejudice finding, none of

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[26] The prosecutor's words appear to have at least a couple of sources in the Bible. Psalm 94 includes the verses:

> O Lord, how long shall the wicked,
> how long shall the wicked exult?
> They pour out their arrogant words,
> All the evildoers boast.

Psalm 82 includes the lines: "Arise, O God, judge the earth; for you shall inherit all the nations."

which addressed a juror's consultation with her pastor regarding the Bible's views about the death penalty and none of which even remotely supported the habeas court's conclusion that Mr. Esposito was not prejudiced by Ms. Lane's pastoral consultation. *See* App. 13-15; CPC Application at 43-47 (distinguishing these cases).

CONCLUSION

The States play a vital role in the enforcement of federal constitutional rights. The minimally necessary standard for their review of judicial findings of fact that undergird the adjudication of federal constitutional claims presents an important unanswered question for this Court—and the answer that could, in criminal cases, ultimately conserve scarce judicial resources by allowing the correction of clear errors at an early stage, before cases proceed to federal court for collateral proceedings. This case presents a good opportunity for the Court to address the question, given that the habeas court denied Mr. Esposito's claim of prejudicial juror misconduct on the basis of highly dubious findings of fact at odds with the evidence, as well as erroneous conclusions of law that merit correction. For the reasons set forth above, Mr. Esposito respectfully asks the Court to grant certiorari to review the judgment of the Georgia Supreme Court.

This 30th day of October, 2024.

Respectfully submitted,

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