No. 24-5906

In the
Supreme Court of the United States

John Esposito,
Petitioner,

v.

Shawn Emmons, Warden,
Georgia Diagnostic and Classification Prison,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Georgia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Georgia's appellate courts violated the United States Constitution when they deferred to the state habeas trial court's factual determination that a juror's memory was impaired when trying to recall events of decades prior.

2. Whether the state habeas court's dismissal of Petitioner's juror misconduct claim on the adequate and independent state law ground of procedural default was in error.

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INTRODUCTION

In a successive state habeas petition filed over twenty-five years after trial, Petitioner John Esposito claimed a juror committed misconduct by meeting with her pastor after voir dire. The state habeas court determined this claim was procedurally defaulted because Esposito failed to raise the claim on direct appeal, and it denied Esposito's petition because he showed neither cause for the default nor prejudice due to the alleged misconduct, *both* of which are required to overcome procedural default in Georgia. Pet.App.4–5. This case is entirely factbound, presents no split of authority, provides no opportunity to clarify any uncertainty in the law, and was decided on the adequate and independent state-law ground of procedural default. This Court should deny the petition.

Without even a lower state court opinion, much less a split of authority, Esposito asks this Court to take up a question regarding Georgia's appellate standard of review for fact findings in a civil proceeding. Esposito argues that Georgia's "any evidence" standard violates his rights under the Due Process Clause and insists that due process mandates the federal "clearly erroneous" standard. But Esposito fails to explain why this Court would address this issue without allowing the state court to weigh in and without a conflict with any other court. Moreover, even if this was an important question (and it isn't), Esposito's case is certainly not the vehicle to answer it because the state habeas court made clear that the factual determination at issue was not dispositive. His successive petition was denied because the juror misconduct claim was procedurally defaulted without cause, and additionally because the alleged misconduct was not prejudicial.

Esposito argues that the state habeas court's prejudice determination is contrary to federal law, but that doesn't address his other vehicle problems and he also fails to identify any case in this Court or any other court that conflicts with the state habeas court's decision. Nothing in the conversation that the juror had with her pastor could be viewed as an undue influence on the juror's sentencing decision. At bottom, Esposito's arguments are nothing more than poorly contrived interpretations of the juror's conversation with her pastor and fail to present an issue worthy of review by this Court.

STATEMENT

A. Facts of the Crimes

The Georgia Supreme Court summarized the facts established at trial regarding Esposito's crimes:

> The evidence adduced at trial, including testimony recounting Esposito's confession to federal authorities, showed that on September 19, 1996, Esposito's co-conspirator, Alicia Woodward, persuaded Lola Davis to give her a ride from a parking lot in Lumberton, North Carolina. Woodward directed Davis to a nearby location where Esposito entered Davis' automobile. Esposito and Woodward then forced the elderly Davis, without the use of any weapons, to drive to a nearby parking lot and to move to the passenger seat of her automobile. Esposito removed one thousand dollars and Davis' checkbook from her purse, and Woodward drove Davis' automobile to a local bank where she cashed a check for three hundred dollars that she and Esposito had forced Davis to write. Woodward and Esposito then drove Davis to a remote location in Morgan County, Georgia, where Esposito led Davis into a hayfield, forced her to kneel, and beat her to death with tree limbs and other debris. Esposito and Woodward then drove in Davis' automobile to Alabama where they disposed of Davis' automobile and purse. Davis' automobile was shown at trial to contain fingerprints, palm prints, and footprints matching Esposito's and Woodward's. Saliva on a cigarette butt found in the automobile was shown to contain DNA consistent with Esposito's DNA.

> Evidence presented during the sentencing phase showed that, after murdering Davis, Esposito and Woodward traveled to Oklahoma, abducted an elderly couple, illegally obtained money using the couple's bank card, and then drove the couple to Texas where Esposito beat them to death with a tire iron. An FBI agent also testified during the sentencing phase that Esposito had described his and Woodward's plan to abduct and murder yet another elderly woman for money.

Esposito v. State, 273 Ga. 183, 183-84 (2000), *cert. denied*, 533 U.S. 935, *rehearing denied*, 533 U.S. 970 (2001).

B. Proceedings Below

1. Trial Proceedings

A Morgan County grand jury indicted Esposito on December 10, 1996, for one count of malice murder, one count of felony murder, one count of armed robbery, and one count of hijacking a motor vehicle. *Esposito*, 273 Ga. at 183, n.1. The jury trial began September 23, 1998. *Id.* Both prior to voir dire beginning and following the voir dire of juror Janice Lane, the trial court gave an instruction for the potential jurors not to discuss the case with anyone. Pet.App. at 36-37, 49.

As part of the standard questioning in a death penalty case, the trial court asked Lane specific questions about her ability to consider the sentencing options in a death penalty case. *See Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985). Lane informed the trial court that she was "undecided" about capital punishment, but that her reservations would not prevent her from imposing a death sentence. Pet.App. at 38-40. She further stated that her views on the death penalty would not lead her to always vote to impose the death penalty regardless of the evidence. *Id.* at 39-40. When asked if she "could be convinced to sentence

another human being, a defendant, to death," Lane stated, without hesitation: "Yes, sir." *Id.* at 41-42. When asked by Esposito's trial counsel, she also affirmed that she could consider life without parole and life sentences. *Id.* at 48-49.

Esposito was convicted of all four counts. *Esposito*, 273 Ga. at 183, n.1. Esposito was sentenced to death and was also sentenced to life imprisonment for armed robbery and twenty years for hijacking a motor vehicle, to be served consecutively. *Id.* Esposito's convictions were affirmed on direct appeal. *Id.* He did not raise a challenge to Lane's conduct on direct appeal. *See id.*

2. First State Habeas Proceeding

Esposito filed a state habeas petition on May 3, 2002, and an amended petition on November 6, 2006. The state habeas court denied relief on April 5, 2011. Esposito filed an application for a certificate of probable cause to appeal in the Georgia Supreme Court on June 30, 2011. The Georgia Supreme Court issued a summary denial of the application. *Esposito v. Hall*, S11E1608 (March 19, 2012). Esposito did not file a petition for writ of certiorari in this Court.

3. Federal Habeas Proceeding

Esposito next filed a federal petition for writ of habeas corpus on May 8, 2012. On December 10, 2014, the district court denied relief. *Esposito v. Humphrey*, 5:12-cv-163 (M.D. Ga) (Doc. 67). The Eleventh Circuit Court of Appeals affirmed, *Esposito v. Warden*, 818 F. App'x 962 (11th Cir. 2020), and this Court denied certiorari review, *Esposito v. Ford*, 141 S. Ct. 2727 (2021).

4. Successive Federal Habeas Proceeding

On December 29, 2021, Esposito moved to reopen his 28 U.S.C. § 2254 proceeding under Federal Rule of Civil Procedure 60(b)(6) in order to raise the juror misconduct claim he pursues here. *Esposito v. Humphrey*, 5:12-cv-163 (M.D. Ga) (Doc. 84). The district court dismissed Esposito's motion as an improperly filed successive federal habeas petition because he failed to acquire permission from the Eleventh Circuit. *Esposito v. Humphrey*, 5:12-cv-163 (M.D. Ga) (Doc. 90).Esposito appealed, and the Eleventh Circuit stayed his appeal pending resolution of his state habeas petition. It currently remains pending. *See Esposito v. Warden*¸ Case No. 22-11538 (pending, 11th Cir.).

5. Second State Habeas Proceeding

Esposito filed his second state habeas petition on March 7, 2022, which was corrected on March 31, 2022. The petition raised a claim of juror misconduct based upon alleged new information from Lane. Evidentiary hearings were held on May 10, 2023 and July 14, 2023. Pet.App. at 4. During these second habeas corpus proceedings, Esposito produced, for the first time, a 2021 statement and a 2022 affidavit in support of his juror misconduct claim. *Id.* at 91–95. In 2021, according to her unsworn affidavit, Lane met with her pastor after being questioned in voir dire because she had concerns about being able to carry out her civic duty as a juror in a death penalty case as a Christian. *Id.* at 95. In 2022, another investigator for Esposito went to speak to Lane. In the affidavit obtained from that visit, Lane stated that she spoke to her pastor after being questioned in voir dire and he had directed her to a passage from the Book of Romans. *Id.* at 92–93.

Weeks prior to the May habeas hearing, Lane also spoke to the Warden's counsel, and informed counsel that she spoke to her pastor *before* she was called for jury service but did not remember the exact timing. Pet.App. at 82–83.

At the hearing, Lane agreed she had given these conflicting times and explained that she had a stroke in 2000 and could not specifically remember the sequence of events from the time of trial. Pet.App. at 78.

The state habeas court denied relief on February 22, 2024. Pet.App. at 1–16. The court concluded that Esposito's juror misconduct claim was procedurally defaulted based on his failure to raise it on direct appeal because, even assuming *arguendo* there was cause for not raising the claim, Esposito had failed to establish prejudice to overcome that default. *Id.* at 4–16. The court first found that the record was unclear as to when Lane visited her pastor. *Id.* at 9. However, the court then assumed that Lane had visited her pastor after voir dire but still determined that Esposito had failed to prove prejudice. *Id.* at 9. The court explained that nothing in the conversation Lane had with her pastor "unduly influenced her sentencing decision." *Id.* at 13.

Esposito's application for a certificate of probable cause to appeal in the Georgia Supreme Court was denied on July 2, 2024. *See* Pet.App. at 17.

REASONS FOR DENYING THE PETITION

I. Georgia's appellate review standard for trial court factfinding in a civil proceeding does not present an issue worthy of this Court's review.

Esposito asks this Court to grant his petition for certiorari to determine whether Georgia's appellate review standard for trial court factfinding in a civil proceeding satisfies the Due Process Clause. But there is no opinion for this Court to review because the Georgia Supreme Court did not answer this question in summarily denying Esposito an application to appeal. Moreover, Esposito cannot point to any split in authority among the state appellate

courts on this question. And even if this were an issue the Court was interested in, this case is not the vehicle for it for two reasons. First, the state habeas court's factfinding is well supported by the record and survives review even under the federal standard of review Esposito argues should have been applied. Second, the state habeas court alternatively made the factual finding Esposito advocates for here in determining prejudice. Thus, there is no issue here worthy of this Court's review.

In reviewing a trial court's fact findings on appeal, "the standard by which findings of fact are reviewed is the "any evidence" rule, under which a finding by the trial court supported by any evidence must be upheld." *Southerland v. Southerland*, 278 Ga. 188, 188 (2004). Esposito claims this standard deprived him of due process and argues that Georgia must apply the "clearly erroneous" standard used by federal courts. *See United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' 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.").

While Esposito raised juror misconduct in his application for a certificate of probable cause to appeal to the Georgia Supreme Court, that court summarily denied Esposito the opportunity to appeal under the "no arguable merit" standard of review. *See* Georgia Supreme Court Rule 36(1) ("[a] certificate of probable cause to appeal a final judgment in a habeas corpus case involving a criminal conviction will be issued where there is arguable merit"). Consequently, there is no opinion for this Court to review

from the Georgia Supreme Court on this issue.[1] Esposito also does not cite any authority from other courts that supports his position or provides some sort of split of authority. And finally, Esposito does not cite any precedent from this Court that addresses this issue or even calls into question the constitutionality of Georgia's appellate review standard for factfinding in a civil proceeding. Therefore, not only is there no opinion for this Court to review and no split in authority, there is also no conflict between Georgia's appellate standard of review and this Court's precedent.

Moreover, the contrast Esposito attempts to draw between "any evidence" and "clearly erroneous" is a distinction without a difference. "Clear error" and "any evidence" are both highly deferential standards of review. And "[t]he difference in deference [between] clearly erroneous and substantial evidence is often quite vague." Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. Rev. 469, 471-72 (1988) ("reasonableness review … includes substantial evidence [and] sufficiency of the evidence review"). Both standards emphasize that a court may not reverse "simply because it is convinced that it would have decided the case differently," Bourdeau, et al., *5 Am. Jur. 2d App. Rev.* § 590 (2024); *see id.* § 584-85, and neither standard permits the reviewing court to reweigh the evidence.

Under "any evidence" in Georgia, the reviewing court must give "due deference to the opportunity of the trial court to judge the credibility of the witnesses," *Singh v. Hammond*, 292 Ga. 579, 581 (2013), must review the evidence "in a light most favorable to the verdict," and must "not reweigh

[1] Additionally, Esposito does not cite any opinion by the Georgia Supreme Court addressing this issue in a civil case, and Respondent is unaware of one in existence.

evidence or resolve conflicts in testimony," *Hayes v. State*, 292 Ga. 506, 506 (2013) (quotation omitted). Similarly, "[c]lear error is a highly deferential standard of review." *Eggers v. Alabama*, 876 F.3d 1086, 1094 (11th Cir. 2017) (quotation omitted). Trial-court findings are presumptively correct, deference is given to the trial court's credibility findings, and the reviewing court reverses in only the most extreme cases where it comes to a "definite and firm conviction that a mistake has been committed." *U.S. Gypsum Co.*, 333 U.S. at 395. Thus, if the trial court's "account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

So, in virtually all cases, the result will be the same. Under either standard, if there are "two permissible views of the evidence," the reviewing court will affirm. *Id.* And if the trial-court finding so contradicts the weight of the evidence that no reasonable person could reach that conclusion, the reviewing court will reverse. *See id.* Only in the rarest cases might the result differ, where some reasonable evidence supports the trial-court finding (satisfying "any evidence"), but that evidence is so completely contradicted by the bulk of other evidence that the finding "stinks like a 5 week old, unrefrigerated, dead fish" (failing "clear error"). *United States v. Rivera-Carrasquillo*, 933 F.3d 33, 42 (1st Cir. 2019) (quotation omitted). It is not clear that such cases even *exist*, they are certainly rare, and this case is not one of them.

That is, even if Esposito did identify a question the Court should consider, since the outcome of the case would be the same, this isn't the case for the Court to grant certiorari because the state habeas court's factfinding survives review under the federal "clearly erroneous" standard. As previously

mentioned, the state habeas court found Esposito's juror misconduct claim was procedurally defaulted. The court assumed Esposito had shown cause to overcome the default and proceeded directly to prejudice. The misconduct Esposito alleged was that Lane met with her pastor after voir dire in alleged violation of the trial court's instructions and discussed whether her religion allowed her to consider a death sentence. In deciding that question, there arose an issue of whether Lane met with her pastor before or after voir dire. Lane gave three different accounts of her meeting with her pastor, with her last account being she did not recall when she met with her pastor. Lane also informed the state habeas court that she had a stroke in 2000 and had memory issues. Because of Lane's obvious memory problems, the court ultimately found that Esposito had failed to show that Lane met with her pastor after voir dire because the record was "unclear." Pet.App. at 9.

The factfinding at issue turns on a credibility determination between Lane's out-of-court and in-court statements. *See Chalk v. Poletto*, 346 Ga. App. 491, 495 n.11 (2018) (the "[c]redibility of witnesses and the weight to be given their testimony is a decision-making power that lies solely with the trier of fact. The trier of fact is not obligated to believe a witness even if the testimony is uncontradicted and may accept or reject any portion of the testimony.") (citation and punctuation omitted). Lane provided affidavits obtained out-of-court by Esposito's investigators stating she met with her pastor after voir dire, in alleged violation of the trial court's instructions. When questioned about these affidavits by counsel for Respondent, Lane first informed counsel that she met with her pastor before voir dire and later stated that she did not recall when she met with her pastor. Pet.App. at 83. At the evidentiary hearing before the state habeas court, Lane testified that

due to her memory problems she did not recall when she met with her pastor. *See, e.g.,* at 78.

Additional evidence regarding Lane's memory problems became apparent during the evidentiary hearing before the state habeas court. For example, Lane was questioned about her voir dire testimony and, as Esposito admitted, "she was adamant … that she had told the prosecutor she believed in the death penalty." Pet. at 10 (citing Pet.App. at 65–67). However, as pointed out during the evidentiary hearing, Lane's testimony during voir dire showed her hesitancy to impose a death sentence. *See* Pet.App. at 66. As another example, Lane testified at the evidentiary hearing that her second affidavit was notarized over the phone, but later recanted this in-court statement. *See* Pet.App. at 77, 98–99.

Esposito attempts to spin Lane's obvious memory problems as the result of her being uncomfortable with having to testify in court and her having a purposefully insincere selective memory. *See, e.g.*, Pet. at 11, fn. 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"); Pet. at 24, fn. 15 ("Her reluctance to appear [in court] (after being subpoenaed by Mr. Esposito) was reflected in her *selective memory* at the hearing.") (emphasis added). But being uncomfortable and having memory problems are not mutually exclusive and indeed a lack of confidence in one's memory could lead to discomfort in a court hearing concerning events that occurred *over two decades* ago. The state habeas court was under no obligation to ignore Lane's in-court testimony and assume she was lying simply because it did not match Esposito's preferred narrative.

Esposito also asserts that Lane's voir dire testimony allegedly shows she visited her pastor after voir dire. Pet. at 23-24. But again, Esposito's argument requires assumptions which the state habeas court was not required to make. Although Lane showed hesitancy to impose a death sentence during voir dire, this is not contrary to her affidavit statements. In her second affidavit, Lane states that her visit with her pastor "gave her *some* peace about serving as a juror."[2] Pet.App. at 93. It does not state it eliminated all her doubt. Moreover, she was not asked any questions in voir dire that would have revealed whether she had visited her pastor.

So, in sum, aside from Lane's two out-of-court statements, the remainder of Esposito's arguments that the preponderance of the evidence supported his version of the facts are based entirely on assumptions. This is not enough to show, under *any* standard, that the record does not support the state habeas court's finding that it was "unclear" when Lane met with her pastor. *See* Pet.App. at 9.

II. The state habeas court's prejudice determination is not contrary to this Court's precedent and presents no split of authority.

Esposito also challenges the state habeas court's determination that he failed to prove prejudice to overcome the procedural default of his juror misconduct claim. But Esposito does not identify any factually similar case decided by this Court in which prejudice was established. And he does not identify any specific holding of this Court that the state habeas court misapplied. Finally, while Esposito throws out many lower court decisions finding juror misconduct, all are easily distinguishable from this case.

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[2] Lane's first affidavit states only that after visiting her pastor and reading some Bible passages she "fulfilled [her] role as a juror." Pet.App. at 95.

Esposito is wrong, but at most, he has identified a question of solitary, factbound error correction.

Assuming, *arguendo*, Lane visited her pastor *after* voir dire, the state habeas court determined that Esposito still failed to prove prejudice to overcome the default because Lane did not seek or receive guidance as to a sentence or discuss what sentence should be imposed, and the conversation did not affect her sentencing decision. Pet.App. at 13. "As a general matter, showing actual prejudice means showing 'not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Ballinger v. Watkins,* 315 Ga. 369, 378 (2022) (quotation marks omitted) (quoting *Todd*, 268 Ga. at 828).

Esposito argues that the presumption of prejudice standard for juror misconduct claims raised on direct review should also be applied in a collateral proceeding instead of the actual prejudice standard for defaulted claims. *See* Pet. at 32, fn. 19. But state law is clear that a presumption of prejudice does not apply on collateral review, and Esposito has not shown his disagreement with the appropriate prejudice standard is properly before the Court for potential review. *See Ballinger v. Watkins*, 315 Ga. 369, 378, fn. 10 (2022) ("As explained in *Greer v. Thompson*, [], '[e]ven if the law presumes prejudice for certain errors when they are timely raised, a convicted defendant who … is seeking to overcome a procedural bar … does not have the benefit of that presumption of prejudice, and must instead meet the actual prejudice test.'") (citation omitted) (bracket in original) (quoting *Greer v. Thompson*, 281 Ga. 419, 421-22 (2006)). The Eleventh Circuit Court of Appeals has agreed with the state courts holding that a "presumed prejudice"

standard that would apply on direct appeal cannot be applied to a defaulted claim because to do so would "have courts treating collateral review the same as direct review." *Whatley v. Warden*, 927 F.3d 1150, 1186-87 (11th Cir. 2019). Additionally, the court of appeals explained that to hold otherwise would also be in violation of "Georgia procedural laws," which the court concluded would "violate …common sense." *Id.* at 1187.

As the state habeas court recognized, in assessing juror misconduct, "a court assessing prejudicial impact properly considers 'the type of extrajudicial information at issue [],' 'how the extrajudicial … information might have been relevant to the issues decided by the jury,' and 'whether the record evidence suggested that this … information would affect the jury's decision.'" Pet.App. at 9 (quoting *Watkins*, 315 Ga. at 378-79). The habeas court, "[a]pplying these principles, considering the record, and assuming [J]uror Lane committed misconduct," found that "Esposito has failed to meet his burden of proving prejudice." Pet.App. at 9–10.

Regarding the type of information at issue and its relevancy to the issues to be decided by the jury, the record shows the information sought by Lane was not specific to Esposito's case, but only a general question of whether her civic and Christian beliefs were at odds. Unlike her recollection of when the visit with her pastor occurred, Lane's memory of what transpired during that visit has remained substantively unchanged. In all her statements, conversations, and in testimony before the habeas court, she explained that the sole purpose of her visit to her pastor was to determine whether she was able, as a Christian, to sit as a juror on a death penalty case. Pet.App. at 60-61, 77, 84, 92–93, 95. She was clear that during the visit she and her pastor did not discuss anything about Esposito's specific case, did

not discuss the facts of the case, and did not discuss what sentence would be appropriate. *Id.* at 83-84.

Lane testified that she believed in the death penalty but was unclear as to whether her Christian faith allowed it. Pet.App. at 60. Accordingly, she went to her pastor and asked him if the Bible prohibited the death penalty. *Id.* at 61. She testified before the habeas court that her pastor "referred [her] to the book of Romans," although she could not recall to what scripture he referred her. *Id.* at 61.[3] She could not recall at the habeas hearing whether she had read the passage herself,[4] but remembered her pastor paraphrased it for her as ""there was law made that man was supposed to abide by, and if you did not abide by it, then the law was set up to take care of people's offenses." *Id.* at 61.

When further questioned, Lane testified that after her visit with her pastor she believed that the death penalty could be given in "extreme cases," but the Christian faith did not mandate any particular sentence. *Id.* at 84–85.[5] She also explained that she did not believe that the passage she read

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[3] Esposito repeatedly refers to passages in the Bible that Lane did not recall reading and did not reference. At the hearing, Esposito's counsel showed Lane the passage that counsel believed Lane read. Pet.App. at 61–63. However, Lane repeatedly maintained that she only remembered the passage was in Romans but did not recall which passage. *Id.* at 61–63, 75. Lane had not even recalled it was Romans until she was visited by Esposito's third investigator in 2022. *Id.* at 76.

[4] In the affidavit obtained by Esposito, Lane stated that she read the passages. Pet.App. at 92–93.

[5] Esposito takes issues with Lane's colloquial, not legal, use of the word "extreme" and then extrapolates that this meant Lane could not follow the trial court's instructions. *See* Pet. at 34. This not supported by any facts in the record. To the contrary, the jury found four statutory aggravating

suggested what sentence would be appropriate and her pastor never "gave [her] his opinion." *Id.* at 61, 89. Lane testified before the habeas court that if her pastor had informed her that the Bible said she could not consider the death penalty as a sentence, she would have informed the trial court of her inability to serve. *Id.* at 68, 78, 92–93. This exchange was nothing more than clarifying that she was eligible to serve—in her mind ethically, but notably, the ability to consider all sentences is also legally required. Accordingly, the habeas court found that "Juror Lane provided no testimony that suggested her meeting with her pastor was to determine Esposito's sentence or to seek guidance on whether she should impose a particular sentence, and Esposito's arguments to the contrary are conjecture, especially when compared to [J]uror Lane's live testimony before [the] Court." Pet.App. at 15–16.

Lane also specifically testified that the visit did not influence her sentencing decision in Esposito's case and did not influence her beliefs as she already believed in the death penalty. Pet.App. at 87. This testimony is supported by the record as Lane stated during voir dire, on questioning by the trial court, that she was "undecided" about capital punishment but that her reservations would not prevent her from imposing a death sentence. Pet.App. at 38–39. She further said that her views on the death penalty would not lead her to always vote to impose the death penalty regardless of the evidence. *Id.* at 39. She said she did have reservations, but "based on the [] information show[ing] that the person was guilty, then [she] could sentence that person." *Id.* at 40–41. When asked if she "could be convinced to sentence another human being, a defendant, to death," Lane unequivocally stated,

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circumstances including the murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim.

"Yes, sir." *Id.* at 42. She further stated, if polled, she could publicly state that was her vote. *Id.* When asked by trial counsel, she also stated she could consider life without parole and life sentences. *Id.* at 48–49.

The habeas court determined that to find "Juror Lane's meeting with her pastor unduly influenced her sentencing decision," would require speculation, "interpretations of Bible passages not given by [J]uror Lane," and would be ignoring Lane's actual testimony. Pet.App. at 13. Instead, the habeas court found that "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." *Id.* Based on these factual findings, which are clearly supported by the record, the court concluded that "Esposito failed to prove that the alleged extrajudicial communication between Juror Lane and her pastor affected her sentencing decision." *Id.* (citing *Watkins*, 315 Ga. at 378-79). The court concluded that "[J]uror Lane's testimony, taken as a whole, shows she spoke with her pastor to determine whether her Christian faith allowed her to consider imposing a death sentence," and that did not establish actual prejudice. Pet.App. at 16.

The state habeas court's analysis is sound, and the cases cited by Esposito in support are easily distinguished. Pet. at 28–29, 30–37. In the California direct appeal case of *People vs. Hensley*, 330 P.3d 296 (Cal. 2014), for instance, during the sentencing phase jury deliberations, a juror had questions about the role of mercy in their sentencing decisions. *Id.* at 319-20, 326. That evening, the concerned juror contacted his pastor to discuss what role mercy should play in his sentencing decision and the pastor informed the juror "falsely, that the 'law of the land' does not permit a juror to consider

mercy in determining whether to vote for a death verdict. The law of California is otherwise." *Id.* at 324-25. The appellate court concluded that prejudice had been established as the juror had called his pastor to discuss "the very decision under deliberation" and "thus 'deliberately set out to [discuss] … the issues at the trial.'" *Id.* at 324. In contrast, Lane specifically did not discuss the "decisions under deliberation," but solely her ability to ethically serve on a capital jury.

In *Clark v. Broomfield*, 97-cv-20618, 2022 U.S. Dist. LEXIS 83532 (N.D. Cal. 2022), a juror consulted with his pastor during trial about "the propriety of imposing the death penalty." *Id.* at *14. The juror "explained to [his pastor] [the juror's] role in the trial and the facts of the case. [The pastor] told [the juror] that in *these circumstance*s the death sentence would be appropriate because the Bible says, 'an eye for an eye.'" *Id.* (Emphasis added). In contrast, Lane did not discuss the facts of the case with her pastor and no sentence or punishment was discussed or even inferred.

In *Ex part Troha*, 462 So.2d 953 (Ala. 1984), a juror during a rape trial, phoned his brother who was a minister. *Id.* at 954. During that discussion the brothers discussed the juror's "situation," and the juror asked for guidance and scriptures "to enable [him] to make a proper and just decision." *Id.* Most significantly, Lane did not seek guidance on a sentence. She did not discuss the facts of the case with her pastor; it is unclear if she would have even known the facts as she had not yet been selected as a juror and no evidence had been presented.

The facts of this case are also not comparable to those cases in which jurors conducted their own experiments outside the jury room to determine factual issues in the case. *See Watkins*, *supra* (juror conducted a drive test to

determine whether the defendant could have been at the scene); *Hammock v. State*, 277 Ga. 612 (2004) (juror conducted her own test to assess blood spatter evidence). Nor are the facts of Esposito's case analogous to a juror bringing the Bible into the jury room to use passages to help or convince themselves or others to vote for a certain sentence. *See Barnes v. Thomas*, 938 F.3d 526, 532 (2019) (during trial met with pastor and shared the guidance she received with the rest of the jury to sway other jurors to vote for a death sentence); *Jones v. Kemp*, 706 F.Supp. 1534, 1559 (1989) (trial court allowed jury to have Bible during deliberations); *People v. Harlan*, 109 P.3d 616, 623 (Colo. 2005) (Bible brought to deliberations and passages shared with others which "command[ed] the death penalty"); *State v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981) (same); *Carruthers v. State*, 272 Ga. 309 (2000) (prosecutor argued for a death sentence based on the Bible). These cases all involve facts that were not before the state habeas court.

The state habeas court found the facts of Esposito's case are comparable to *State v. Clements*, 289 Ga. 640 (2011), even though *Clements* was a direct appeal case with the more stringent standard of presumptive prejudice. In that case, "a juror discussed her selection with her husband, who requested that she not serve on the jury because it may affect how he would be treated at his place of employment." Pet.App. at 13–14. The Georgia Supreme Court held that the communication between the husband and wife was "inconsequential in light of the uncontradicted evidence that [the juror] and her husband did not discuss the merits of the case but only her selection for the jury." *Id.* at 14 (quoting *Clements,* 289 at 643).

Similarly in the death penalty case of *Henry v. State*, 265 Ga. 732 (1995), also cited by the state habeas court, a sequestered juror who was

concerned about his ability to participate had an "unauthorized contact" with his girlfriend by talking with her through the motel window. *Id.* at 738. The Georgia Supreme Court held that "where the substance of the communication is established without contradiction, the facts themselves may establish the lack of prejudice or harm to the defendant." *Id.* (quoting *Jones v. State*, 258 Ga. 96, 97(1988). The state supreme court concluded that because there was no "discussion about the merits of the case," there was no harm. *Henry*, 265 Ga. at 738-39.

Finally, the habeas court relied on *Monroe v. State*, 315 Ga. 767 (2023), in which "a juror spoke with his spouse and relayed a message to other jurors that there would be 'trouble' when the jury rendered its verdict." Pet.App. at 14. Upon questioning, the other jurors testified that "information they heard would not affect their ability to remain fair and impartial." *Id.* (quoting *Monroe*, 315 at 776). The habeas court noted that, even under "the presumptive standard, this Court had held that 'the trial court was authorized to conclude that the State had carried its burden in establishing beyond a reasonable doubt that [the juror's] alleged misconduct was harmless.'" *Id.* at 14-15 (quoting *Monroe*, 315 at 777).

The habeas court's legal analysis, as set forth above, was correct. Here, Lane testified that her meeting with her pastor did not contribute to her sentencing decision, and nothing in the record suggests otherwise. *See, e.g.,* Pet.App. at 89. The facts are undisputed that during that meeting, Lane and her pastor did not discuss the facts of the case or an "appropriate" sentence. Rather, the record shows that the only information she gathered from the meeting was merely that serving on a capital trial did not conflict with her

Christian faith. Nothing in this Court's precedent is at odds with the state habeas court's prejudice determinations.

CONCLUSION

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

Respectfully submitted.

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