No. 24-5906

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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

I. This Court has jurisdiction to address the issues presented in this case.

Respondent implicitly challenges this Court's jurisdiction by claiming that Mr. Esposito's case was decided "on the adequate and independent state-law ground of procedural default." BIO at 1. But the habeas court's determination that Mr. Esposito did not establish "cause and prejudice" to excuse the procedural default, *see* App. 5, does not strip this Court of jurisdiction. The habeas court "[a]ssum[ed] arguendo[] that Esposito has shown cause to overcome the default," but concluded that "he has not met his burden of proving prejudice . . . ." *Id.*[1] Its determination that Mr. Esposito failed to show prejudice, however, is not "independent of the merits of the federal claim . . ." *Foster v. Chatman*, 578 US. 488, 497 (2016). *See, e.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (observing that when application of a state law bar "depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded."). To the contrary, the analysis of the sentencing-phase impact of Ms.

[1] Respondent's bald assertion that Mr. Esposito's "juror misconduct claim was procedurally defaulted without cause," BIO at 1, is unsupported by the record and disproven by the evidence showing that Ms. Lane's alleged misconduct was not discovered, through no fault of Mr. Esposito's, until she was interviewed in July 2021, many years after Mr. Esposito's trial and direct appeal. *See, e.g.*, *Watkins v. Ballinger*, 840 S.E.2d 378, 382 (Ga. 2020) (finding cause to excuse petitioner's failure to raise claim that juror conducted an unauthorized drive test during trial, noting that "Watkins' counsel were entitled, in the absence of *any* indication of irregularity, to rely upon the presumption that the jurors would adhere to the very specific instruction of the trial court and not conduct independent and authorized time-drive experiments").

Lane's unauthorized third-party consultation goes to the heart of Mr. Esposito's constitutional claims. Since the question of prejudice to excuse Mr. Esposito's failure to raise this only recently discovered claim on direct appeal is not independent of the federal issue, this Court has jurisdiction. *See Foster*, 578 U.S. at 498-99.

II. Whether Georgia's "any evidence" standard of review of judicial fact-finding is sufficient to vindicate an individual's federal constitutional rights is an important unanswered question that is properly before the Court.

Respondent claims the proper standard of review to apply to judicial fact-finding related to federal constitutional claims is not an important question and was not adjudicated by the court below, and application of a higher standard than "any evidence" would make no difference in this case. None of these arguments hold water.

First, the proper standard of review of a lower court's fact-finding clearly presents an important issue. This Court's numerous certiorari grants to address the proper standard of review underscores the importance of the question. *See, e.g.*, *U.S. Bank N.A. v. Vill. At Lakeridge, LLC*, 583 U.S. 387, 392-93 (2018); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015); *Dickinson v. Zurko*, 527 U.S. 150, 153-54 (1999). Its importance is not diminished by the fact that this Court has not previously addressed the propriety of the "any evidence" standard used by only a small minority of states to review federal constitutional claims. *See, e.g.*, *Teva Pharms. USA, Inc.*, 574 U.S. at 324 (noting the grant of certiorari to address standard for reviewing claims heard solely by the Federal Circuit Court of Appeals). Appellate courts in the eight states that apply some version of the "any evidence" standard of review, *see* Pet. 17-19, adjudicate thousands of cases raising federal constitutional claims each year and the minimal standard they should apply to the review of judicial fact-finding respecting those claims clearly merits this Court's consideration.

Respondent is wrong in claiming that Mr. Esposito did not cite any authority in support of his claim or "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." BIO at 8. The Petition discusses decisions from this Court adopting the federal clear error standard to review judicial fact-finding made in connection with federal constitutional claims raised in state courts. *See* Pet. 15-16. He provided a thorough review of the standards of review afforded by the fifty states, plus the District of Columbia, only a small minority of which apply the "any evidence" standard of review. *See* Pet. 17-23. And he pointed out that even the standard for reviewing judicial fact-finding in habeas cases brought under 28 U.S.C. § 2254 provides more probing review than that afforded by Georgia courts on direct review. *See* Pet. 23 n.13. If Respondent is suggesting that this Court should not address this issue because the Georgia Supreme Court has yet to do so, *see* BIO at 7-8 and n.8, that argument is meritless. *See, e.g.*, *American Federal of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) ("The question being an important one of first impression . . ., we granted certiorari.").

Indeed, Respondent's related claim that the Supreme Court of Georgia had no opportunity to address this issue is flatly refuted by the record. Mr. Esposito presented the standard-of-review issue in his CPC application and the Georgia Supreme Court declined to review the case, despite the fact that a related question arising in a criminal matter on direct review was pending in the court. *See* Order, *Capote v. State*, No. S23C1127, 2024 Ga. LEXIS 52 (Ga. Feb. 20, 2024). Mr. Esposito flagged the court's grant of certiorari in *Capote*, argued that the standard-of-review question was equally, if not more important, in the context of habeas cases, and suggested the court may wish to hold the case pending its adjudication of *Capote*. *See* CPC Application at 1-2, 15-16,

16 n.10 (citing Order, *Capote v. State*, No. S23G1127 (Ga. Feb. 20, 2024), and *Turpin v. Todd*, 519 S.E.2d 678 (Ga. 1999)). Well before the Georgia Supreme Court issued its decision in *Capote*, however, it denied review in Mr. Esposito's case. *See* App. 17 (CPC denial dated July 2, 2024).[2] Thus, contrary to Respondent's suggestion, the Georgia Supreme Court had the opportunity to "weigh in" on the issue, BIO at 1; it simply chose not to.[3]

To adopt Respondent's argument would render an important question of federal constitutional law effectively beyond this Court's reach, given that the Georgia Supreme Court has exclusive appellate jurisdiction over habeas cases, so there is no intermediate appellate court review,[4] *see* Ga. Const., Art. VI, Sec. VI, Par. III(4), the court very rarely grants CPC applications, and there are only a subset of cases where, like here, judicial fact-finding is critically at issue.

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[2] On October 31, 2024, the day after Mr. Esposito filed his Petition for Writ of Certiorari, the Supreme Court of Georgia issued a ruling dismissing certiorari as improvidently granted. *Capote v. State*, __ S.E.2d __, 320 Ga. 191 (2024). Justice Warren, joined by Justice Pinson, wrote a concurring opinion discussing how the "any evidence" standard of review had been applied in civil and criminal cases, and concluding with the observation that "[w]ithout anything approaching certainty as to the right set of principles for determining the appropriate standard of review in this context, I see no basis for revisiting that question." *Id.* at 207.

[3] As the Georgia Supreme Court has explained, denial of a CPC application is an adjudication of the merits of the application. "[I]f a majority of the Justices determine that the application shows that the habeas case has 'arguable merit,' the application will be granted," and that "'arguable merit' means . . . that the petitioner has a fair probability of ultimately prevailing in his case by obtaining habeas relief. Our decision to deny a habeas application is therefore squarely a decision on the merits of the case." *Redmon v. Johnson*, 809 S.E.2d 468, 470 (Ga. 2018).

[4] In Georgia, the writ of habeas corpus is the "*exclusive* post-appeal procedure available to a criminal defendant who asserts the denial of a constitutional right.'" *Mitchum v. State*, 834 S.E.2d 65, 70 (Ga. 2019) (citations omitted). Thus, the standard for reviewing a habeas court's fact-finding has a direct bearing on the State of Georgia's enforcement of federal constitutional rights.

Respondent argues that the proper standard of review is irrelevant in this case, but his argument is based on patently flawed legal analysis and a one-sided construction of the evidentiary record.

Respondent claims that the standard of review is inconsequential in this matter based on a purported comparison of the "clearly erroneous" and "any evidence" standards of review, but Respondent in fact compares the "clearly erroneous" and "substantial evidence" standards, an analysis that has no bearing on the "any evidence" standard of review:

> [T]he 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.

BIO at 8 (emphasis added). The American Jurisprudence citation, like Respondent's quotation from *A Basic Guide to Standards of Judicial Review*, has nothing to do with the "any evidence" standard of review. Sections 584 and 585 address the "'Substantial evidence' standard for appellate review of findings of fact, generally" and "'Substantial evidence' standard on sufficiency of evidence to support criminal conviction." Section 590 is titled "When findings of fact are clearly erroneous on appeal." Respondent's legal citations accordingly do not advance his argument that the "clearly erroneous" and "any evidence" standards are practically indistinguishable.

And they are not. The "substantial evidence" standard of review, like the "clearly erroneous" standard, requires meaningful appellate scrutiny, rather than the near-total deference that "any evidence" review provides. As this Court has explained, while review for substantial

evidence "is somewhat less strict" than clear-error review, substantial evidence review "requires meaningful review" and "not simply rubber-stamping agency fact-finding." *Dickinson*, 527 U.S. at 162. Both standards of review require the appellate court to consider the entire record, including evidence contrary to the findings, to determine whether the lower tribunal's fact-finding is sufficiently supported and legitimate. *Compare, e.g.*, *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 18 (2024) (clear-error review "means we may not set [a district court's] findings aside unless, after examining the entire record, we are 'left with the definite and firm conviction that a mistake has been committed") (citation omitted); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) (clear-error review under F.R.C.P. 52(a) requires affirmance "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety"), *with Am Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (court reviewing for substantial evidence "must take into account contradictory evidence in the record"); *Universal Camera Corp. v. NLRB*, 340 U.S. 477, 487-88 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). As explained in *Dickinson*, both standards of review "require[] judges to apply logic and experience to an evidentiary record . . . ." 527 U.S. at 163.

Such scrutiny is entirely absent from the "any evidence" review afforded under Georgia law. To the contrary, if a decision is supported "by any evidence," the court "must affirm" it. *Emory Univ. v. Levitas*, 401 S.E.2d 691, 695 (Ga. 1991).[5] *Cf. Jackson v. Virginia*, 443 U.S. 307,

[5] This Court has explained the distinction between "substantial evidence" review and something akin to (though nonetheless more probing than) the "any evidence" standard, observing:

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision *merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or*

320 (1979) (rejecting "no evidence" standard to assess sufficiency of criminal verdict and noting that "'a mere modicum of evidence may satisfy a "no evidence" standard' and that "[a]ny evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without evidence . . . —could be deemed a 'mere modicum'") (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 202 (1964)) (Warren, C.J.., dissenting)).

In this case, moreover, the standard for reviewing the habeas court's fact-finding makes a difference. Juror Lane said three different things on five different occasions. First, on three separate days between July 7, 2021, and April 8, 2022, Ms. Lane told members of Mr. Esposito's legal team that she consulted with her pastor about the death penalty *after* she had been questioned during voir dire and before she was selected to serve on the jury. On each occasion, she gave details about the interaction with her pastor and its timing, and she signed two statements, one under oath and one endorsed under oath, to that effect. *See* App. 91-95. Second, approximately two weeks before the evidentiary hearing held on May 10, 2023, Ms. Lane apparently told Respondent's counsel that she thought she went to see her pastor "before [she was] called for jury service." App. 83. The State did not submit any written statement, sworn or not, by Ms. Lane to that effect. Rather, at the May 10, 2023, hearing, the State elicited a one-word response, "Correct," to a question about whether Ms. Lane recalled telling Respondent's counsel that, as best she recalled, she visited her pastor before being called to jury service. App. 83. Third, at the May 10th hearing, Ms. Lane testified that she could not remember when she visited her pastor. App. 72, 78, 82-83.

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evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice.

Universal Camera Corp., 340 U.S.at 467.

Only one of these versions—that Ms. Lane visited her pastor after being questioned in voir dire—was (1) initially volunteered by Ms. Lane when Mr. Esposito's legal team was interviewing her about entirely different subjects on July 7, 2021; (2) twice stated under oath; and (3) corroborated by and consistent with other evidence introduced into the habeas record. *See* Pet. 7-9 (detailing discovery of Ms. Lane's misconduct, her clarification of the term "voir dire" before she signed her first statement, and how she recalled additional details over time); CPC Reply Brief at 2-5 (same). Indeed, Ms. Lane did not change her story until she was contacted by Respondent's attorney shortly before the evidentiary hearing—under circumstances she was unwilling to discuss or remember when questioned in court by Mr. Esposito's attorney, although she freely recalled the meeting when questioned by Respondent's counsel. *See id.* at 47-48, 51.

Ms. Lane's July 9, 2021, and April 8, 2022, statements find support not only in the testimony about how those statements came to be written and signed, and the details she provided about what happened, but are further supported by the transcript of Ms. Lane's voir dire, which reflects her marked hesitation about the death penalty at the time she was questioned by the court and lawyers. Even Respondent concedes that "Lane's testimony during voir dire showed her hesitancy to impose a death sentence." BIO at 11. Contrary to Ms. Lane's recollection at the May 10, 2023, hearing, that by the time of voir dire "all [her] reservations about the death penalty had been resolved," App. 33, Ms. Lane's voir dire transcript reflects that she had substantial hesitation about imposing the death penalty. She told the trial court, "I'm really undecided on how I feel about capital punishment," although she did indicate that her reservations about the death penalty did not mean she could never vote to impose it. App. 39. When the prosecutor initially asked her if she could vote to sentence another person to death, she did not respond. App. 40. Pressed for an

answer, she told the prosecutor, "Not without some reservation." *Id.* Ms. Lane's hesitancy about the death penalty during voir dire is fully consistent with her affidavit testimony and the reports of the investigators who took her statements that it was the questioning in voir dire that prompted her visit to her pastor to address her concerns about whether her Christian faith would permit her to serve as a juror—concerns that were laid to rest by her pastor's advice when she visited him prior to her selection as a juror.[6]

Ms. Lane did not change her story until she was contacted by Respondent's attorney shortly before the evidentiary hearing and purportedly reversed her version of events—under circumstances Ms. Lane was unwilling to discuss or remember when questioned by Mr. Esposito's attorney at the evidentiary hearing, although she freely recalled the meeting when questioned by Respondent's counsel. *Compare* App. 78-79 *with id.* at 82-83.[7]

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[6] It is uncontested that Ms. Lane's visit to her pastor resolved her concerns about sitting on a capital jury. *See, e.g.*, 5/10/23 Tr. at 57-58 (Ms. Lane, in response to the prosecutor's cross-examination question, testifying that her pastor's advice left her feeling that "it was appropriate to cho[o]se to sit on the jury after [she] had been told that there were laws in *Romans.*" *Id.* at 58. Ms. Lane's obvious hesitance about the death penalty during her voir dire examination is thus *inconsistent* with the statement elicited on cross-examination that she had told Respondent's attorney a couple weeks before the hearing that her best recollection "was that [she] went to see [her] pastor before [she was] called for jury service." 5/10/23 Tr. at 52. At the time of her voir dire, Ms. Lane clearly remained uncomfortable with the idea of imposing the death penalty. And, as she stated in her affidavit, had her pastor told her "that serving as a juror in a capital case was inconsistent with [her] faith as a Christian," she would have told the trial court she could not serve on the jury. App. 92. Instead, without disclosing her change of heart, from a juror hesitant about the death penalty to one at peace with it, Ms. Lane was selected to serve and voted to sentence Mr. Esposito to death.

[7] "[T]his case calls forth Wigmore's perceptive observation that a trial court must have discretion to admit a witness's prior statement as inconsistent with the witness's purported lack of memory at trial, because 'the unwilling witness often takes refuge in a failure to remember, and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort.'"

Thus, while there is a "mere modicum" of evidence to support the habeas court's finding that the evidence did not establish that Ms. Lane's pastoral consultation occurred after she had been questioned in voir dire and instructed by the trial court not to discuss the case with anyone, the overwhelming weight of the evidence clearly establishes by a preponderance of the evidence that Ms. Lane's pastoral consultation occurred in violation of the trial court's clear directive.

The proper standard for appellate review of judicial fact-finding relating to federal constitutional claims is an important unanswered question warranting this Court's review and Mr. Esposito's case provides a deserving vehicle to do so. Certiorari accordingly should be granted.

III. This case presents an important question about how courts should assess the impact of extraneous influences on a capital sentencing determination.

Although denigrating the importance of an appellate court's standard for reviewing constitutionally relevant judicial fact-finding, Respondent inconsistently argues that this case is not suitable for this Court's review because it "is entirely factbound . . . ." BIO at 1; *see also* BIO at 13 ("[A]t most, [Mr. Esposito] has identified a question of solitary, factbound error correction."). Of course, Mr. Esposito's first issue, regarding the standard for appellate review of judicial fact-finding, implicates the habeas court's fact-finding, and its interplay with the constitutional standard at issue, rendering the prejudice question a relevant counterpart to Mr. Esposito's first question. *See, e.g.*, *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) (although Court rejected a categorical rule that an expert's refusal to disclose sources of her opinion rendered her testimony insufficient to satisfy "substantial evidence" standard applied to Social Security Administration rulings, the Court

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United States v. DiCaro, 772 F.2d 1314, 1322 (7th Cir. 1985) (quoting 3A J. Wigmore, *Evidence* § 1043, at 1061 (Chadbourn rev. ed. 1970)).

would not address whether the expert's opinion, under the circumstances, was insubstantial, as petitioner "did not petition us to resolve that factbound question" and "did not [in] his briefing and argument focus on anything other than the Seventh Circuit's categorical rule.").

Mr. Esposito, of course, provided relevant citations to this Court's governing precedent regarding juror misconduct and the prejudicial nature of Ms. Lane's misconduct at sentencing. *See* Pet. 30-34. This includes the presumption of prejudice this Court held should apply when third-party communications concerning a matter at issue in a trial intrude upon a jury, *see Remmer v. United States*, 347 U.S. 227, 229 (1954)—a decision the Georgia Supreme Court has disregarded on the ground that it "is 'a rule of federal criminal procedure, rather than a rule of federal constitutional law.'" *Greer v. Thompson*, 637 S.E.2d 698, 700 (Ga. 2006). *See* Pet. 6-7 (habeas court rejecting presumed prejudice argument on the basis of *Greer*). Contrary to Respondent's suggestion, BIO at 13, the Georgia courts' error in rejecting *Remmer*'s presumption of prejudice[8] is properly before the Court, as the issue was raised before the habeas court and in Mr. Esposito's CPC application, and is subsumed in the second question presented here, which asks "[w]hether the state court misapplied federal constitutional law and wrongly concluded" that Ms. Lane had not engaged in prejudicial misconduct.

The fact that this Court has not yet addressed the precise scenario presented here, where a juror improperly consults with a respected religious leader to determine her religion's view of the death penalty in advance of serving on a capital jury, does not immunize the habeas court's ruling. This Court, of course, is not constrained in its review of the merits. *See, e.g.*, *Madison v. Alabama*,

[8] *See, e.g.*, *Hall v. Zenk*, 692 F.3d 793, 805 (7th Cir. 2012); *McNair v. Campbell*, 416 F.3d 1291, 1307 (11th Cir. 2005).

586 U.S. 265, 274 (2019). Moreover, even in federal habeas proceedings, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (citation omitted).

Respondent's argument in support of the habeas court's ruling, moreover, ignores the federal constitution and relies almost entirely on inapposite state court decisions,[9] even though the juror misconduct claim was raised under both the state and federal constitutions—and even Georgia decisions have recognized that juror misconduct can implicate federal constitutional rights. *See, e.g.*, *Watkins*, 840 S.E.2d at 382; *Mitchum*, 834 S.E.2d at 71-72 (observing that this Court "has held, in some circumstances, improper communications with the jury during a defendant's trial and outside of the defendant's presence 'are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment'") (quoting *Parker v. Gladden*, 385 U.S. 363, 364 (1966)). Taking a cue from Respondent, moreover, he "does not identify any factually similar case decided by this Court in which prejudice was [not] established. And he does not identify any specific holding of this Court that the state habeas court [correctly] applied. [Indeed], all [the cases relied on by Respondent] are easily distinguishable from this case." BIO at 12; *see* BIO at 19-20 (discussing state court decisions on which the habeas court relied in adopting verbatim Respondent's proposed order, none of which addressed a juror's decision to contact a third-party to discuss an issue integral to the case).

[9] The one exception is Respondent's reliance on *Whatley v. Warden*, 927 F.3d 1150, 1186-87 (11th Cir. 2019), for the proposition that no presumption of prejudice should apply in habeas. *See* BIO at 13-14. *Whatley* was not a case involving improper third-party contact with a juror and has nothing to say about the presumption of prejudice required in such circumstances by *Remmer*.

Moreover, Respondent's efforts to distinguish the lower court decisions addressing similar claims of juror misconduct that Mr. Esposito discussed in his Petition, *see* Pet. 28-37, BIO at 17-19, are not persuasive. Most especially, Respondent's suggests that no prejudice arose from Ms. Lane's pastoral consultation because Ms. Lane "did not discuss the 'decisions under deliberation,' but solely her ability to ethically serve on a capital jury," BIO at 18 (attempting to distinguish *People v. Hensley*, 330 P.3d 296 (Cal. 2014)), and because there is no evidence she discussed her visit with other jurors, BIO at 19 (attempting to distinguish *Barnes v. Thomas*, 938 F.3d 526, 532 (4th Cir. 2019)). Respondent's arguments are meritless. In *Hensley*, a juror contacted his pastor mid-deliberations to talk about "mercy and sympathy" and denied speaking "about the trial." 330 P.3d at 321. Like Ms. Lane, the juror did not discuss the facts of the case, and the pastor did not tell the juror his views on the proper sentence. *Id.* at 321, 323 His pastor (like Ms. Lane's) directed him to biblical verses addressing the duty to follow secular law. *Id.* After the two prayed together, the juror "seemed to be just a little more at ease about our conversation." *Id.* at 323. In reversing, the California Supreme Court stressed that the juror, like Ms. Lane, "actively solicited his pastor's comments about the role of mercy and sympathy while still wrestling with his decision, and was given directions inconsistent with the jury instructions." *Id.* at 248-49.[10] In *Barnes*, a juror had contacted her pastor because a codefendant's lawyer had argued that jurors would have to answer to God if they voted to impose the death penalty and the juror wanted to make sure she did not burn in hell. 938 F.3d at 529, 531. The Fourth Circuit granted relief, reversing the district court's

[10] Ms. Lane, similarly, testified that her pastoral consultation left her with the understanding that the Bible deems the death penalty "appropriate . . . in extreme cases," App. 84, a position at odds with the Eighth Amendment and Georgia's statutory procedure for capital sentencing. *See* Pet. 33-35.

determination that the juror's misconduct was not prejudicial because "there was no evidence Pastor Lomax had expressed his views on the death penalty or attempted to persuade Juror Jordan to vote for or against it," and the evidence "did not indicate that Juror Jordan explicitly told the other jurors whether the passages she read were for or against imposing the death penalty." *Id.* at 532-33. In finding the pastor consultation prejudicial, the Court observed:

> It is . . . somewhat specious to suggest that the message conveyed to the jury was neutral. . . . Pastor Lomax's instructions that jurors would not go to hell if they 'live[d] by the laws of the land,' . . . served to contradict the statements made by Chambers' attorney that while North Carolina law allowed jurors to impose the death penalty, God's law did not. It is reasonable to conclude that, especially coming from a figure of religious authority, Pastor Lomax's message *assuaged reservations about imposing the death penalty* that the attorney's comments may have instilled.

Id. at 536 (emphasis added). Although Ms. Lane may not have discussed her pastoral visit with her fellow jurors, the Fourth Circuit's observations about the impact of Pastor Lomax's pastoral advice applies with equal force to Ms. Lane's improper consultation. Rather than being relevantly distinguishable, *Barnes* is directly on point.

Respondent twice alludes to testimony from Ms. Lane that her sentencing decision was not influenced by her pastor's advice. Putting aside that this testimony is "somewhat specious," *Barnes*, 938 F.3d at 536, the testimony was also the subject of an objection that was sustained by the habeas court because the testimony was prohibited by Georgia's non-impeachment rule. *See* Pet. 55-57; O.C.G.A. § 24-6-606(b). More importantly, Ms. Lane's pastoral consultation was prejudicial in two distinct ways. First, it transformed her from a juror who was hesitant about the death penalty (and therefore acceptable to the defense despite other factors that may have led to her dismissal) into one who was "at peace" with the prospect of imposing it. As defense counsel W. Dan Roberts testified below, the defense would have struck Ms. Lane had they learned of her

pastoral visit. *See* 7/14/23 Tr. at 43-45 (affidavit of W. Dan Roberts).[11] Second, the spiritual advice Ms. Lane received led her, not only to be "at peace" with the prospect of imposing the death penalty, but to understand that the Bible views the death penalty as "appropriate" in extreme cases—a view at odds with the Eighth Amendment and Georgia law. *See* Pet. 33-35. Clearly, Mr. Esposito has shown that Ms. Lane's improper consultation with her pastor to discuss the central issue at sentencing—whether the death sentence should be imposed—actually harmed him at sentencing. "To the extent that a juror had a conversation with a third party about the spiritual or moral implications of making [the capital sentencing] decision, the communication 'was of such a character as to reasonably draw into question the integrity of the verdict.'" *Barnes v. Joyner*, 751 F.3d 229, 249 (4th Cir. 2014). The Georgia courts' conclusion that Ms. Lane's misconduct was not prejudicial misapplied this Court's precedents and ignored the relevant facts. This Court's intervention is needed to correct an egregious error that should invalidate Mr. Esposito's death sentence.

CONCLUSION

For the reasons set forth above and in the Petition, Mr. Esposito respectfully asks the Court to grant certiorari to review the judgment of the Georgia Supreme Court.

This 15th day of January, 2025.

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[11] Ms. Lane testified in voir dire that her mother had been "pretty badly beaten" by an unknown assailant who had broken into a home seven years before. App. 44; *see also* App. 47 (questioning by defense counsel regarding assault). It is reasonable to believe that the assault on her mother made Ms. Lane an attractive juror to the prosecutor (given the facts of Mr. Esposito's case), despite Ms. Lane's weakness on the death penalty, and that Ms. Lane's hesitation about the death penalty made her an attractive juror to the defense, despite her mother's assault. That calculus would have changed from the defense perspective had defense counsel learned of her visit to her pastor and its impact on her death penalty views—as trial counsel stated in his affidavit.

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