No. _____

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ESPOSITO,

Petitioner,

-v-

SHAWN EMMONS, WARDEN,
Georgia Diagnostic Prison,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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September 16, 2024

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JOHN ESPOSITO

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CAPITAL CASE

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No. _____

JOHN ESPOSITO,
Applicant,
v.
SHAWN EMMONS, WARDEN,
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APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.2, applicant John Esposito respectfully requests a forty-five (45) day extension of time, *i.e.*, up to and including November 24, 2024, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia. Mr. Esposito has not previously sought an extension of time from this Court. In support of this request, Mr. Esposito submits the following:

1. On July 2, 2024, the Supreme Court of Georgia denied Mr. Esposito's application for a certificate of probable cause to review the habeas court's denial of relief. *See* Tab. 1. Without an extension, the time to file a petition for a writ of certiorari in this Court will expire on September 30, 2024. *See* S. Ct. R. 30.1; 5 U.S.C. § 6103. Consistent with Rule 13.5, this application is being filed more than 10 days before that date. This Court will have jurisdiction of Mr. Esposito's future petition for writ of certiorari pursuant to 28 U.S.C. § 1257(a).

2. Mr. Esposito was convicted and sentenced to death by a Baldwin County, Georgia jury in September 1999, following a change of venue from Morgan County, Georgia. The

Supreme Court of Georgia affirmed the conviction and sentence. *Esposito v. State*, 273 Ga. 183 (2000). Thereafter, Mr. Esposito was denied relief in initial habeas proceedings in state and federal court. *See Esposito v. Warden*, 818 Fed. App'x 962, 969-69, 974 (11th Cir. 2020), *cert. denied* 141 S. Ct. 2727 (2021).

3. The issues in the instant case stem from newly discovered evidence of juror misconduct. In the summer of 2021, while Mr. Esposito's petition for writ of certiorari was pending before this Court, his legal team re-interviewed jurors in preparation for an anticipated execution warrant in the event this Court denied the petition.[1] During one of these interviews, Janice Lane, one of the jurors who had convicted and sentenced Mr. Esposito to death, disclosed for the first time that she had visited her pastor seeking advice about the Bible's views of the death penalty because of concerns that arose during her voir dire examination about how to reconcile her Christian faith with her civic duty in a capital trial. Ms. Lane indicated that her pastor had recommended certain Bible verses, which she read, and that her pastor's advice allayed her concerns and allowed her to complete her service as a juror in Mr. Esposito's case.

4. The trial judge had given firm instructions at the start of jury selection and again during Ms. Lane's voir dire not to discuss the case with anyone. Thus, Ms. Lane's pastoral consultation, made after she was questioned, was in violation of these instructions and her oath as a juror. Her pastoral consultation and her consideration of the recommended Bible verses, moreover, amounted to outside influences that were not disclosed to the court or parties prior to her selection and service as a juror. After conducting additional investigation of the apparent

[1] Mr. Esposito's legal team previously interviewed the jurors during state habeas proceedings.

misconduct, Mr. Esposito filed a successive habeas petition in the Superior Court of Butts County, GA, pursuant to O.C.G.A. § 9-14-41, *et seq.*, raising the claim that his federal and state constitutional rights to due process, a fair trial, and a reliable sentencing determination were violated by the juror's improper exposure to outside influences.

5. The state habeas court conducted an evidentiary hearing at which Mr. Esposito presented the live testimony of six witnesses, including Ms. Lane; affidavit testimony (which, under O.C.G.A. § 9-14-48(a), constitutes admissible evidence in habeas proceedings); and additional documentary evidence, including relevant portions of the trial transcript. Respondent did not present any evidence at the hearing, apart from the cross-examination of a few of the witnesses.

6. Mr. Esposito's evidence included Ms. Lane's sworn statement, as well as the unsworn statement she endorsed under oath, both of which stated that she had visited her pastor seeking advice about the Bible's views about the death penalty after she had been questioned in voir dire, but before she was selected as a juror. Her pastor recommended some Bible verses to her, including a verse in the Book of Romans. Ms. Lane's statements further indicated that, as a result of her pastoral consultation, her concerns about whether she could reconcile her Christian faith and her civil duty were allayed, and she was able to complete her jury service.

7. Additional evidence corroborated this sworn testimony. Live testimony from the two investigators and the law student who interviewed Ms. Lane in the summer of 2021 and the spring of 2022 demonstrated that Ms. Lane had initially disclosed her pastoral consultation without prompting and had provided details about the visit that confirmed that it took place after she had been questioned in voir dire. The transcript of Ms. Lane's voir dire testimony, moreover, was consistent with her recollection, as it documented that she had significant reservations about

the death penalty at the time she was questioned and never mentioned any consultation with her pastor.

8. At the evidentiary hearing, Ms. Lane retreated from her statements, claiming on direct examination that she could not remember when she had visited her pastor, although she agreed that she had stated under oath that she met with her pastor *after* she was questioned in voir dire and before she was seated on the jury. On cross-examination, Ms. Lane conceded that, a few weeks before, she had told the same Assistant Attorney General questioning her at the hearing that she had spoken to her pastor *before* she was ever called for jury duty, but repeated that she no longer remembered when she had consulted her pastor.

9. Following post-hearing briefing, the habeas court adopted Respondent's proposed order and denied relief, concluding that Mr. Esposito had not established cause and prejudice to excuse the default of his juror misconduct claim. The court reached this conclusion by ignoring both the evidence Mr. Esposito presented in support of his claim and the law.

10. 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." Final Habeas Order, Tab 2 at 7-8 (emphasis in original). The record does not reflect that the court considered any of the evidence Mr. Esposito had presented that bolstered and corroborated Ms. Lane's affidavit testimony. Instead, it found "that based on [the] Juror's [] testimony her memory was impaired on the timing of her visit with her pastor in 1998." *Id.* at 8.

11. Second, the court found that, even if Ms. Lane had 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." *Id.* at 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." *Id.*

12. Third, the court held 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 she recalled suggested a particular sentence. *Id.* at 9-16.

13. Following the habeas court's denial of relief, Mr. Esposito filed a timely application for a certificate of probable cause to review the habeas court's order in the Georgia Supreme Court. *See* O.C.G.A. § 9-14-52(b). Among other claims, he argued that the court should grant review to determine whether its routine application of the "any-evidence" standard for reviewing judicial factual findings provides inadequate protection of federal constitutional rights.[2] He pointed out that the court had recently granted certiorari to review a similar claim in a non-capital case raising a claim of statutory error. *See Capote v. State*, No. S23G1127 (Ga.).[3] In

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[2] In this regard, Georgia is an outlier, providing less scrutiny of judicial fact-finding than virtually any other state.

[3] In *Capote*, the Georgia Supreme Court granted certiorari to determine whether "this Court's precedent interpreting the 'clearly erroneous' standard of review of factual findings in criminal cases, which equates that standard with the 'any evidence' standard [was] correctly

addition to the arguments raised in *Capote*, Mr. Esposito urged that this Court's precedents require, at minimum, that judicial fact-finding in federal constitutional claims be reviewed under the "clearly erroneous" standard of review, as defined by this Court. *See, e.g.*, *Hernandez v. New York,* 500 U.S. 352, 369, 370 (1991) (holding that a state court's factual findings in denying relief under *Batson v. Kentucky* 476 U.S. 79 (1986), should be reviewed under the clearly erroneous standard and observing that the standard requires "a 'definite and firm conviction that a mistake has been committed'") (quoting *United States Gypsum*, 333 U.S. 364, 395 (1948)); *see also 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"). This Court has applied this same standard in reviewing state court habeas decisions. *See, e.g.*, *Foster v. Chatman*, 578 U.S. 488, 500 (2016) (on review of state habeas court's *Batson* ruling, noting that "'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous") (quoting *Snyder v. Louisiana*, 522 U.S. 472, 477 (2008)).

14. Indeed, 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), federal courts apply a more probing review than the "any evidence" review conducted by the Georgia Supreme Court and the Georgia Court of Appeals. A federal court may grant relief where a state court decision "was based on an unreasonable determination of the facts in light of

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decided" and, if not, whether it should be overruled. *See* Order, *Capote v. State*, No. S23G1127 (Ga. Feb. 20, 2024).

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)).

15. Mr. Esposito additionally argued in his application for a certificate of probable cause that his case merited review because the habeas court had erred in its conclusions that the juror's contact with her pastor was neither misconduct nor prejudicial.

16. Following oral argument in *Capote*, but before a decision had issued,[4] the Georgia Supreme Court denied Mr. Esposito's application for a certificate of probable cause "as lacking arguable merit." Tab 1.

17. This capital case thus has several issues that are potentially appropriate to raise in a petition seeking certiorari review in this Court, including whether the Constitution compels greater appellate scrutiny of judicial fact-finding than that afforded by Georgia appellate courts' application of the "any evidence" standard of review and whether a juror's consultation with her pastor during jury selection about the death penalty and her review of recommended Bible verses on the subject violated Mr. Esposito's constitutional rights to due process, a fair trial, and a reliable capital sentence.

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[4] The Georgia Supreme Court has not yet issued a decision in the case.

18. Undersigned counsel respectfully submits that she needs additional time in which to research and draft a petition for writ of certiorari raising these issues and asks for an extension of forty-five (45) days.

19. Undersigned counsel Marcia Widder is senior litigator at the Georgia Resource Center and is appointed counsel on multiple capital habeas cases, two of which became warrant eligible at the end of this Court's last term and thus require renewed investigation and research to prepare for clemency proceedings and potential late-stage litigation. *See, e.g.*, *State of Ga.* v. *Fed. Defender Program, Inc.*, 315 Ga. 319, 346 (2022) (observing that "[clemency] investigations are a substantial undertaking requiring the collection of considerable evidence and the preparation of numerous witnesses to testify at the proceedings").[5]

20. In addition, over the past several months, Ms. Widder has been forced to take significant leave time to deal with an ongoing family medical issue, which has hampered her ability to work on her cases, including Mr. Esposito's. Based on these challenges, Ms. Widder had planned to ask this Court for a 30-day extension of time.

21. Then, on September 13, 2024, the district court in another of Ms. Widder's cases denied habeas relief and a certificate of appealability in the capital habeas case, *Rivera v. Emmons*, No. 113-cv-00161 (S.D. Ga.). A motion for reconsideration under Fed.R.Civ.P. 59(e) is accordingly due on October 11, 2024. The district court's order is 200 pages long and addresses

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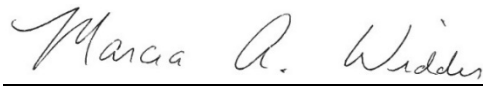
[5] Mr. Esposito is not currently eligible to receive an execution date. In May 2022, a Fulton County Superior Court judge granted a temporary restraining order and interlocutory injunction barring the State from seeking execution warrants for individuals whose federal habeas proceedings were coming to an end during the COVID-19 Judicial Emergency Order, a ruling that includes Mr. Esposito. *See Fed. Defender Program*, 315 Ga. at 323. That injunction remains in place.

issues that counsel has not considered in over four years, when briefing in the case was essentially completed.[6] Counsel anticipates that considerable time will be required to research and write the 59(e) motion, a deadline that cannot be extended. *See* Fed.R.Civ.P. 6(b)(2).

22. Counsel's conflicting obligations will prevent her from researching and drafting Mr. Esposito's certiorari petition by its current deadline. The family medical issue, moreover, will continue to require Ms. Widder's attention and time for the next several weeks, at minimum. In light of her competing obligations and the complexity of the issues in this case, counsel respectfully requests an additional 45 days in which to prepare an appropriate petition for consideration by this Court, *i.e.* up to and including February 22, 2024.

This 16th day of September, 2024.

Respectfully submitted,



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[6] On November 9, 2023, the district court requested supplemental briefing on a discrete portion of the ineffective-assistance-of-counsel claim. *See Rivera*, *supra*, D.157.