No. 08-____

IN THE
SUPREME COURT OF THE UNITED STATES

KHRISTIAN OLIVER,
Petitioner,
v.
NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does juror consultation of the Bible during sentencing deliberations deprive a defendant of his federal constitutional rights?

2. When evaluating possible prejudice to a defendant resulting from juror consultation of the Bible during sentencing deliberations, what standard of proof should apply, or should there be an irrebuttable presumption of prejudice?

3. Did the Fifth Circuit misapply or contravene federal law by requiring Petitioner to present "clear and convincing" evidence to rebut what the Fifth Circuit believed was the state court's finding "that the Bible did not prejudice the jury's decision," given the state trial court refused to permit or consider juror testimony about the effect of the Bible consultation on the jurors or their deliberations?

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The Opinion of the United States Court of Appeals for the Fifth Circuit addressing issues presented in this Petition was filed on August 14, 2008, is reported at 541 F.3d 329, and is reproduced in the separately bound Appendix to this Petition as Appendix A at 1a.[1] The Fifth Circuit's October 3, 2008 order denying rehearing is reproduced as Appendix C at 53a. Its October 13, 2008 judgment is reproduced as Appendix D at 55a.

The Fifth Circuit's November 16, 2007 Opinion addressing Petitioner's request for a stay to present new evidence in state court is published at 2007 WL 4014629, and is reproduced as Appendix B at 31a.

The November 9, 2005 Opinion of the United States District Court for the Eastern District of Texas, Beaumont Division, addressing issues presented in this Petition, is published *sub nom. Oliver v. Dretke* at 2005 WL 3050436, and is reproduced as Appendix E at 57a. Its February 2, 2006 Order, granting Petitioner's request for a Certificate of Appealability regarding issues presented in this Petition, is reproduced as Appendix F at 67a. Its September 29, 2005 Opinion addressing issues not raised in this Petition is published *sub nom. Oliver v. Dretke* at 2005 WL 2403751.

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[1] References to the Appendix to this Petition are in the form "1a."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fifth Circuit issued its final opinion on August 14, 2008. The Fifth Circuit denied Petitioner's timely petition for rehearing on October 3, 2008. 53a.

CONSTITUTIONAL & STATUTORY PROVISIONS

"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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

UNITED STATES CONSTITUTION, Amendment VI.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

UNITED STATES CONSTITUTION, Amendment VIII.

"No state shall . . . 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."

UNITED STATES CONSTITUTION, Amendment XIV.

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

28 U.S.C. § 2254(d) & (e)(1).

INTRODUCTION

Petitioner was convicted of murder by a Texas jury, and sentenced to death. After his trial, Petitioner's counsel learned that members of the jury had consulted the Bible during their sentencing deliberations.

Petitioner moved the state court for a new trial, and for a hearing on the issue of the jury's consultation of the Bible.

The state trial court judge conducted a hearing on the Bible consultation issue, but specifically precluded testimony about the *effect* of any of the Bible consultation on members of the jury. In the presence of the four jurors who appeared to testify, the trial judge instructed: "[W]e can't go into the effect it had upon the jurors. And we have to be very careful about avoiding the effect it had upon any juror, if any. It's a matter of simply determining . . . what occurred in the jury room."

During the hearing, juror testimony revealed that: more than one juror brought a Bible into the jury room; at least one juror read Bible passages aloud to a group of jurors; jurors passed around a Bible with highlighted passages; one juror reviewed a specific Bible passage after observing another juror reviewing it; and one of the Bible passages the jurors consulted described as a "murderer" who "must be put to death" someone who commits acts much like those Petitioner was alleged to have performed.

Following the juror testimony, the trial judge denied the motion for a new trial. Petitioner's direct appeal to the Texas Court of Criminal Appeals and

subsequent effort to obtain state habeas relief were unsuccessful.

Petitioner then sought federal habeas review. The district court denied a writ of habeas corpus, but granted Petitioner a certificate of appealability regarding the juror Bible consultation issue.

On appeal, the Fifth Circuit determined that juror consultation of the Bible in this case was a constitutional error, which had deprived Petitioner of his Sixth Amendment rights. The court of appeals nevertheless denied the request for a writ of habeas corpus because the court (incorrectly) concluded it was required to defer to a "finding" by the state trial judge that "the Bible did not prejudice the jury's decision," when the state trial judge had foreclosed any evidence about the effect of the Bible consultation, and therefore could not have rendered such a finding.

Although the Fifth Circuit correctly determined that juror consultation of the Bible in this case was a constitutional error, its harmless error analysis was predicated on a misapplication of federal law.

Because the Fifth Circuit erred, and because its decision in this case addresses important issues related to the recurring problem of juror consultation of the Bible during deliberations (frequently in capital cases), about which lower courts disagree, this Petition should be granted.

STATEMENT OF THE CASE

A. Trial

On April 20, 1999, a Nacogdoches County, Texas jury convicted Petitioner of "capital murder based on his killing of [Joe] Collins during the commission of a burglary." 34a.

It was alleged at trial that on March 17, 1998, Petitioner, his then-girlfriend Sonya Reed, and cohorts Bennie and Lonny Rubalcaba, were driving around Nacogdoches County, Texas, when they stopped at the empty home of Mr. Collins to burglarize his house. 33a.

Petitioner and Lonny Rubalcaba broke into the house using bolt cutters, while Reed and Bennie Rubalcaba remained in their vehicle. 33a.

Collins came home during the break-in. Petitioner and Rubalcaba tried to escape out a back door, but the door was bolted from the outside and the windows were barred. Collins then fired a shot from his gun, hitting Rubalcaba in the leg. 33a.

Petitioner and Rubalcaba were also armed with a pistol, and with a rifle they had found in Collins's home. After Collins shot Rubalcaba, Petitioner shot back. Petitioner fired some shots inside the house and some outside in the front yard, where Collins ended up on his back. 33a, 263a-265a.

According to the trial testimony of Bennie Rubalcaba, Petitioner then struck Collins several times in the head with the butt of the rifle. 33a. A forensic expert at trial testified that the gunshots probably were fatal, but that the blows from the rifle could have been fatal on their own. 2a.

The group departed the scene, bringing the wounded Lonny Rubalcaba to a hospital, where they reported he had been the victim of a drive-by shooting. The next day, however, police officers interrogated the Rubalcabas, who provided information – and later testimony – that led to Petitioner's arrest and subsequent conviction. 34a; 262a-265a.

B. Sentencing Proceeding

The trial court commenced Petitioner's sentencing proceeding immediately after the jury delivered its verdict on guilt. Petitioner and prosecutors presented several days of testimony regarding aggravating and mitigating factors that affect whether death is an appropriate punishment.

After the presentation of the evidence and closing arguments – which included the prosecutor arguing Petitioner should be put to death because of the nature of the beating allegedly inflicted on Collins with the butt of the rifle – the trial court delivered a sentencing charge to the jury.

Unlike during the guilt phase of the trial, the court did not instruct the jury to limit its deliberations to the evidence heard on the witness stand and to the law as presented by the court. *See* Charge on Punishment, reproduced as Appendix L at 345a-350a.

The jury retired to conduct deliberations. As required by the Texas death penalty statute in effect at the time, the jury considered and answered two special questions: (1) whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to

society," and (2) whether, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, [] there is a sufficient mitigating circumstance or circumstances that a sentence of life imprisonment rather than a death sentence be imposed." 347a-348a; *see also* TEX. CODE CRIM. PROC. art. 37.071(2)(b)(1) & art. 37.071(2)(e)(1). The jury was directed not to answer the first question affirmatively or the second question negatively, "unless [it] agrees unanimously." 347a-348a; *see also* TEX. CODE CRIM. PROC. art. 37.071(2)(d)(2) & art. 37.071(2)(f)(2).

After deliberating, the jury returned a verdict form answering the first question affirmatively and the second question negatively. 347a-348a. Upon receiving this verdict, the trial court entered a judgment of death, as required by statute. TEX. CODE CRIM. PROC. art. 37.071(2)(g).

C. Motion for New Trial and Hearing on Juror Consultation of the Bible During Sentencing Deliberations

During post-sentencing juror interviews, Petitioner's trial attorneys discovered that some members of the jury brought copies of the Bible into the jury deliberation room, and that several jurors had read Bible passages aloud, and consulted Bible passages with other jurors.

Among the Bible passages some jurors consulted during sentencing deliberations was Numbers 35:16-19:

> And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.
>
> And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.
>
> Or if he smite him with an hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.
>
> The revenger of blood himself shall slay the murderer: when he meeteth him, he shall slay him.

3a-4a n.3.

Petitioner filed a motion for new trial with the trial court and requested a hearing. 3a. Petitioner argued the jury's consultation of the Bible during sentencing deliberations violated his rights, including his federal constitutional rights.

1. State Trial Court Limitation on Testimony About Juror Consultation of the Bible

On June 25, 1999, the state trial court held a hearing on Petitioner's motion for a new trial based on juror consultation of the Bible during sentencing deliberations. 70a. Although no juror had been willing to provide sworn written testimony regarding juror consultation of the Bible, four jurors appeared to testify at the hearing in response to subpoenas commanding their appearance.

Prior to hearing any testimony, however, the court heard argument on the propriety of allowing

any testimony about jury deliberations. The State argued that no testimony was warranted, because Petitioner failed to provide any juror affidavits attesting that the jury had considered any "outside influence," and because it would be improper for jurors to testify at all about the effect of any such "outside influence" on the deliberative process. 76a-90a.

Counsel for Petitioner responded that the court could make the threshold determination of whether there was an external influence based on affidavits of Petitioner's attorneys describing the juror interviews, because "none of [the jurors] wanted to give an affidavit." 94a.

The trial court allowed jurors to testify, but *specifically precluded* testimony about the *effect* of any of the Bible consultation on members of the jury.[2]

In the presence of the four jurors who appeared to testify (74a-76a), the trial judge instructed: "[W]e can't go into the effect it had upon the jurors. And we have to be very careful about avoiding the effect it had upon any juror, if any. It's a matter of simply determining . . . what occurred in the jury room." 130a; *see also* 131a ("But we must stay away from what influence it had upon any juror in their verdict in the case.").

During the examination of the four jurors, the court, lawyers and witnesses all adhered to the

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[2] Each juror was sequestered during the testimony of the others. 132a-134a.

court's ruling precluding testimony about the effects of the Bible consultation. *See, e.g.*, 134a-135a ("[Y]ou've been in the court while the Judge made his ruling about the limited inquiry we can make . . . . And I'm going to try to ask questions in such a way that don't get into areas about what the Bible passage, how they effected you."); 150a-151a (juror hesitant to testify for fear of "getting into what happened" because he "didn't want to say anything wrong"); 166a-167a (judge sustaining objection to question eliciting testimony about effect of reading Bible passage on juror); 182a-183a (judge and lawyer colloquy about question that "goes into that area that [the court] said we're not suppose to ask. Were they influenced . . . .").

2. Juror Testimony About Bible Consultation

The testimony of four jurors made clear that: more than one juror brought a Bible into the jury room during deliberations (135a-136a; 201a); at least one juror read Bible passages aloud to a group of jurors (150a-152a; 157a-158a; 166a; 177a; 189a-192a); jurors passed around a Bible with highlighted passages (138a-142a; 146a; 153a-155a); one juror reviewed a specific Bible passage after observing another juror reviewing it (138a-139a, 146a); and one of the Bible passages the jurors considered directs that someone who "strik[es] a person with an object and kill[s] him, as [Petitioner] did to Collins – is a murderer and must be put to death" (21a; 139a-140a).[3]

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[3] Throughout this Petition the term "consultation" is used as shorthand to refer to the various ways in which the jurors'

For instance, juror Mike McHaney testified that another juror, Kenneth Grace, read Bible passages aloud to a group of jurors. 150a-152a, 157a-158a, 166a. He also testified that juror Donna Matheny (whose father recently had died and was not in court) showed him a specific passage from the Book of Numbers, and that he and Matheny later showed that same Bible passage to another juror, Rhonda Robinson. 138a-142a, 146a, 153a-155a.

The other three jurors confirmed many of the details of McHaney's testimony. Two other jurors testified that some jurors brought Bibles into the jury room, and recalled a juror reading the Bible aloud. *See* 177a-179a (juror Symmank); 189a-192a (juror Rodrigues). The fourth juror testified that at least one juror brought a Bible into the jury room and there "were a couple of jurors that did read the Bible." 201a, 204a (juror Webb).

The testimony made clear that some of the Bible consultation occurred during sentencing deliberations. *See, e.g.*, 166a, 189a-190a; 201a; 207a.

3. State Trial Court's Ruling on Motion for New Trial

Following the juror testimony, the trial court judge denied Petitioner's motion for a new trial from the bench:

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reviewed, read from and/or discussed the Bible during their deliberations.

> [T]he ruling of this Court is, that having heard all the evidence pertaining to the occurrence in the jury room in question in reference to the Biblical quotation which is on file in the case, it is the Judgment of this Court that the conduct of the jury was not improper. And that a conscientious, dedicated and car[ing] jury considered this case in accord with the Court's Charge and the instructions of the Court and rendered their verdict in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing. And, therefore, the Motion for New Trial is overruled.

234a.

D. State Appeals & State Habeas Proceedings

Petitioner filed a timely appeal to the Texas Court of Criminal Appeals, challenging, *inter alia*, the trial court's ruling on the motion for new trial. Petitioner argued that "[t]he jury's consideration of the Bible in this cause was constitutional error . . . in violation of U.S. Const. amend. VI . . . [and also] violates the Eighth Amendment's prohibition against cruel and unusual punishment." Brief of Appellant on Direct Appeal at 115-16.

The Court of Criminal Appeals rejected Petitioner's appeal, and held the Bible did not constitute an improper outside influence.[4] 286a.

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[4] This Court denied Mr. Oliver's petition for a writ of certiorari. *Oliver v. Texas*, 537 U.S. 1161 (2003).

Petitioner then filed a state post-conviction application for writ of habeas corpus raising, *inter alia*, these same issues. While the application was pending before the Court of Criminal Appeals, Petitioner discovered that a Danish journalist had interviewed Juror Michael Brenneisen about the jury's use of the Bible during its deliberations.[5] *See* 47a. Petitioner notified the court of the existence of this evidence and requested a hearing. The court denied the application, and characterized Petitioner's request for a hearing as an improper "subsequent application," dismissing it as "an abuse of the writ." 288a-289a.[6]

E. Federal Habeas Proceedings

1. The District Court Opinion

Having exhausted his state court remedies (6a),[7] Petitioner filed a federal habeas corpus petition with the United States District Court for the Eastern District of Texas. Petitioner raised the same

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[5] The journalist, Egon Clausen, interviewed Mr. Brenneisen while doing research for his book, ØJE FOR ØJE. Egon Clausen, ØJE FOR ØJE: EN BERETNING FRA DET MODERNES BAGSIDE (Gyldendal) (2003). Mr. Brenneisen told the journalist that jurors were not warned against bringing Bibles to the jury room, that "about 80 percent" of the jurors did so, and that the jurors consulted Bible passages together and compared their teachings to the facts of the case. 326a-329a.

[6] This Court denied Mr. Oliver's petition for a writ of certiorari. *Oliver v. Texas*, 538 U.S. 1001 (2003).

[7] Petitioner had asked the lower federal courts to stay the federal proceedings so that he could seek a hearing in state court based on the new evidence contained in the Brenneisen interview. *See* 47a-51a.

arguments he presented to the state courts, and also sought to obtain an evidentiary hearing based on a sworn transcript of the interview with juror Brenneisen. 47a-48a; 63a-64a.

The district court denied the request for a hearing on the basis that Petitioner had "not provided this court with sworn testimony from the juror or journalist,"[8] and therefore has not established, as required by 28 U.S.C. § 2254(e)(2), "that but for relying on the Bible, no reasonable juror would have answered the special issues in the way that resulted in his receiving a death sentence." 63a-64a. The court then rejected the habeas petition, construing the trial court's ruling on the motion for new trial as a "pure question of fact" that could be dislodged only upon showing that the decision was "based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings" under 28 U.S.C. § 2254(d)(2), and concluding the state trial court's "factual determination" was not unreasonable. 61a-65a.

On February 2, 2007, the district court granted Petitioner's request for a Certificate of Appealability with respect to the issues related to the jury's consultation of the Bible. 67a-69a.

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[8] As the Fifth Circuit noted, "Clausen swore under oath in Denmark that the transcript was a true representation of his interview with Brenneisen." 6a n.5.

2. The Fifth Circuit Opinion

Petitioner appealed to the Fifth Circuit, which issued an opinion regarding his "claim that the jury improperly consulted the Bible when deliberating during the sentencing phase of his trial."[9] 7a-8a.

The Fifth Circuit first concluded that this Court's decisions in *Parker v. Gladden*, 385 U.S. 363 (1966), *Turner v. Louisiana*, 379 U.S. 466 (1965), and *Remmer v. United States*, 347 U.S. 227 (1954), "clearly established a constitutional rule forbidding a jury from being exposed to an external influence." 12a.

Finding it "clear" those precedents apply to Petitioner's claim, the Fifth Circuit held that "when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line." 14a, 20a.[10]

In reaching this conclusion, the Fifth Circuit observed that the jurors deliberating about

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[9] The Fifth Circuit had previously addressed the district court's denial of a hearing on the new evidence, and a number of other unrelated claims presented by Petitioner. *See Oliver v. Quarterman*, 254 F. App'x 381 (5th Cir. 2007), reproduced at 31a.

[10] The court acknowledged this Court has not previously addressed the precise facts of Petitioner's case, but held "it is clear that the prohibition of external influences . . . applies to this factual scenario," because, it would be unreasonable to refuse to extend the rule to this "'new context where it should apply.'" 14a (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)).

Petitioner's sentence "referenced a specific [Bible] passage that stated that someone who engages in a particular act – striking a person with an object and killing him, as [Petitioner] did to Collins – is a murderer and must be put to death," and "the Bible passage in this instance was evidence of the circumstances of the offense that militates for . . . the imposition of the death penalty." 21a-22a (quotation omitted).

Having concluded Petitioner's Sixth Amendment rights had been violated by juror consultation of the Bible during sentencing deliberations,[11] the Fifth Circuit then considered whether the violation should be deemed "harmless," notwithstanding the constitutional error.

Noting that the Petitioner's claim was before it on habeas review rather than direct appeal, the court observed "we do not use the normal harmless error analysis," and proceeded to apply the standard set out in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) – whether the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." 24a. The court

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[11] While agreeing with Petitioner that his Sixth Amendment rights had been violated, the Fifth Circuit rejected Petitioner's Eighth Amendment claims. Petitioner maintains that the imposition of the death penalty following the juror consultation of the Bible during sentencing deliberations at issue in this case also violates the Eighth Amendment. Moreover, as this Court recognizes "due process alone has long demanded that, if a jury is to be provided the defendant . . . the jury must stand impartial and indifferent to the extent required by the Sixth Amendment." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992).

further observed that, under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), it was required to defer to any relevant state court factual findings unless Petitioner presented "clear and convincing" evidence to the contrary. 27a.

The Fifth Circuit quoted the state trial judge's oral ruling on Petitioner's motion for a new trial, in which he asserted that the jurors had "rendered their decision 'in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing.'" 27a. From this, the Fifth Circuit concluded that, "[i]n essence, the state court made a finding that the Bible did not prejudice the jury's decision." 27a. The Fifth Circuit made no mention of the fact that before and during that hearing, the state trial court judge precluded any juror testimony about the effect of the Bible consultation, nor did the Fifth Circuit explain how the state court could have rendered a factual finding about a subject that was specifically excluded from discussion during the hearing.

Because it believed it was required to defer to the state trial court's "finding" regarding the effect of juror consultation and discussion of the Bible, the Fifth Circuit affirmed the district court's judgment denying habeas relief. 30a.

Petitioner moved for rehearing. On October 3, 2008, the Fifth Circuit denied the motion. 53a-54a.

REASONS FOR GRANTING THE PETITION

Petitioner was sentenced to death by jurors who consulted, discussed and read aloud Bible passages while deliberating about his fate.

This was not an isolated incident. Numerous federal and state courts have been confronted with appeals or requests for post-conviction relief based on juror consultation of the Bible.[12] Courts

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[12] *See, e.g.*, *Fields v. Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (*en banc*), *cert. denied sub nom.*, *Fields v. Ayers*, 128 S. Ct. 1875 (2008); *Billings v. Polk*, 441 F.3d 238, 248-49 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 932 (2007); *Lenz v. Washington*, 444 F.3d 295, 310-12 (4th Cir. 2006), *cert. denied sub nom. Lenz v. Kelly*, 548 U.S. 928 (2006); *Lynch v. Polk*, 204 F. App'x 167, 173-75 (4th Cir. 2006), *cert. denied.*, 127 S. Ct. 3021 (2007); *Robinson v. Polk*, 438 F.3d 350, 357-66 (4th Cir. 2006*), reh'g denied*, 444 F.3d 225, *cert. denied*, 127 S. Ct. 514 (2006); *McNair v. Campbell*, 416 F.3d 1291, 1301-09 (11th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006); *Burch v. Corcoran*, 273 F.3d 577, 590-91 (4th Cir. 2001), *cert. denied*, 535 U.S. 1104 (2002); *Peterson v. Polk*, No. 1:03-CV-00651, 2007 WL 1232076, *8-*12 (M.D.N.C. April 26, 2007), *certificate of appealability denied sub nom. Peterson v. Branker*, No. 07-16 (4th Cir. May 8, 2008), *cert. filed*, *Peterson v. Branker*, No. 08-7039; *United States v. Battle*, 264 F. Supp. 2d 1088, 1192-93 (N.D. Ga. 2003); *Jones v. Kemp*, 706 F. Supp. 1534, 1558-60 (N.D. Ga. 1989); *Lucero v. Texas*, 246 S.W.3d 86, 94-95 (Tex. Crim. App. 2008), *cert. denied* 129 S. Ct. 80 (2008); *Willoughby v. Commonwealth*, Nos. 2006-SC-000071-MR, 2006-SC-000100-MR, 2007 WL 2404461, *1 (Ky. Aug. 23, 2007); *California v. Williams*, 148 P.3d 47, 77-81 (Cal. 2006), *cert. denied sub nom. Williams v. California*, 128 S. Ct. 179 (2007); *Colorado v. Harlan*, 109 P.3d 616 (Colo. 2005), *cert. denied*, 546 U.S. 928 (2005); *California v. Danks*, 82 P.3d 1249 (Cal. 2004), *cert. denied sub nom. Danks v. California*, 543 U.S. 961 (2004); *Ohio v. Franklin*, No. 19041, 2002 WL 1000415, *11-*12 (Ohio App. May 17, 2002), *cert.*

confronting these situations have adopted divergent views about how to evaluate claims for relief based on such juror conduct.

While this Court has previously denied petitions in some of the cases where juror consultation of the Bible was at issue, review of this case is particularly appropriate for two reasons.

First, the Fifth Circuit's decision in this case takes sides on a pair of important issues related to juror consultation of the Bible during sentencing deliberations, about which federal courts of appeals are divided. *See* SUP. CT. R. 10(a).

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denied, 127 S. Ct. 362 (2006); *Kansas v. Kleypas*, 40 P.3d 139, 204-05 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002); *Glossip v. Oklahoma*, 29 P.3d 597, 604-05 (Okla. Crim. App. 2001); *Young v. Oklahoma*, 12 P.3d 20, 47-49 (Okla. Crim. App. 2000); *South Carolina v. Kelly*, 502 S.E.2d 99 (S.C. 1998), *cert. denied*, 525 U.S. 1077 (1998); *North Carolina v. Barnes*, 481 S.E.2d 44, 67-68 (N.C. 1997), *cert denied sub nom. Chambers v. North Carolina*, 522 U.S. 876 (1997) and *sub nom. Barnes v. North Carolina*, 523 U.S. 1024 (1998); *Bieghler v. Indiana*, 690 N.E.2d 188, 203 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998); *California v. Mincey*, 827 P.2d 388, 424-26 (Cal. 1992), *cert. denied*, 506 U.S. 1014 (1992); *Grooms v. Kentucky*, 756 S.W.2d 131, 142 (Ky. 1988); *Jones v. Francis*, 312 S.E.2d 300, 303 (Ga. 1984), *cert. denied*, 469 U.S. 873 (1984); *Tennessee v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981), *cert. denied*, 457 U.S. 1110 (1982); *Keen v. Tennessee*, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258, *28-*32 (Tenn. Crim. App. June 5, 2006) *cert. denied*, 127 S. Ct. 2250 (2007); *Burns v. Tennessee*, No. W2004-00914-CCA-R3-PD, 2005 WL 3504990, *44-*46 (Tenn. Crim. App. Dec. 21, 2005); *Ackerman v. Florida*, 737 So.2d 1145, 1148 (Fla. App. 1999), *rev. denied*, 751 So.2d 50 (Fla. 1999).

Second, although the Fifth Circuit correctly concluded this Court's clearly established precedents forbid the juror conduct at issue here, it nevertheless erred when it deferred to a non-existent factual determination by the state trial court – and therefore applied the incorrect standard of review.

Because Petitioner has been sentenced to death in contravention of his constitutional rights, and has been denied habeas relief based on a misapplication of 28 U.S.C. § 2254(e)(1), the Petition should be granted. *See* SUP. CT. R. 10(a), (c).

I. THE FIFTH CIRCUIT'S DECISION EXTENDS A CONFLICT AMONG FEDERAL COURTS OF APPEALS REGARDING WHETHER JURY CONSULTATION OF THE BIBLE DURING DELIBERATIONS IS A CONSTITUTIONALLY-PROHIBITED "EXTERNAL INFLUENCE" ON THE JURY

As the Fifth Circuit correctly observed, this Court "has clearly established a constitutional rule forbidding a jury from being exposed to an external influence." 12a. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363 (1966), *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) ("The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."), *Remmer v. United States*, 347 U.S. 227, 229 (1954) ("any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"); *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and

willing to decide the case *solely* on the evidence before it . . . .") (emphasis added).

Applying that clearly established constitutional rule to this case, the Fifth Circuit concluded that the jury's consultation of the Bible during the sentencing phase of the trial amounted to an external influence on the jury's deliberations, and thereby deprived Petitioner of his Sixth Amendment rights. 14a, 22a-23a.

Unlike the Fifth Circuit, the Fourth Circuit has repeatedly rejected the view that jury consultation of the Bible during jury deliberations constitutes an improper external influence.[13] *See, e.g.*, *Robinson v. Polk*, 438 F.3d 350, 363-64 (4th Cir. 2006) (holding Bible passages did not qualify as "external influences" under the Sixth Amendment because they had no "evidentiary relevance to the jury's determination of the existence of these aggravating and mitigating circumstances," and in any event "the reading of Bible passages invites the listener to examine his or her own conscience from within . . . ."), *reh'g denied* 444 F.3d 225, *cert. denied*, 127 S. Ct. 514 (2006); *Billings v. Polk*, 441 F.3d 238, 248 (4th Cir. 2006) (rejecting claim based on juror consultation of Bible at home the night before sentencing deliberations because "it is not at all clear that a juror's consultation of the Bible even

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[13] In reaching that conclusion, the Fourth Circuit remarked it could find "no Supreme Court case addressing whether allegations of Bible reading fall into either of these categories" of improper external influences on the jury. *Robinson v. Polk*, 438 F.3d 350, 363-64 (4th Cir. 2006).

constitutes a 'private communication, contact or tampering' with the jury under *Remmer*"), *cert. denied*, 127 S. Ct. 932 (2007); *see also Lenz v. Washington*, 444 F.3d 295, 310-12 (4th Cir. 2006), *cert. denied sub nom. Lenz v. Kelly*, 548 U.S. 928 (2006); *Burch v. Corcoran*, 273 F.3d 577, 590-91 (4th Cir. 2001) (juror's reading from Bible during sentencing deliberations "did not constitute an improper jury communication").[14]

The Ninth Circuit appears to embrace the Fourth Circuit's approach.[15] A divided *en banc* panel of that court rejected a constitutional claim of juror misconduct, where the jury foreperson had consulted the Bible and made notes "for" and "against" the death penalty (including verbatim copies of several Bible passages), and then shared those notes with fellow jurors during sentencing deliberations. *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007) (*en banc*), *cert. denied sub nom. Fields v. Ayers*, 128 S. Ct. 1875 (2008).[16] Observing "there is no Supreme Court

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[14] Within the Fourth Circuit there is considerable dispute about that court's approach to constitutional claims based on juror consultation of the Bible. *See Robinson v. Polk*, 444 F.3d 225, 226 (4th Cir. 2006) (*per curiam*) ("Judges Michael, Motz, King, and Gregory voted to rehear the case *en banc*, and Chief Judge Wilkins and Judges Widener, Wilkinson, Niemeyer, Luttig, Williams, Traxler, Shedd, and Duncan voted against rehearing *en banc*.").

[15] *See Robinson*, 438 F.3d at 363 n.16 ("We note that the Ninth Circuit recently reached a similar conclusion that the Bible is not 'extrinsic, factual material' to a jury.").

[16] Like in the Fourth Circuit, the issue is the subject of substantial disagreement among court members. The *Fields* decision divided an *en banc* panel of fifteen Ninth Circuit

authority on Biblical references in the jury room,"[17] the panel majority distinguished this Court's leading "external influence" decisions, and concluded that the Biblical verses in the foreperson's notes are "notions of general currency that inform the moral judgment that capital-case jurors are called upon to make."[18] 503 F.3d at 778-80 (distinguishing *Mattox v. United States*, 146 U.S. 140 (1892), *Remmer*, *Turner* and *Parker*).[19]

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judges 9-6. Judge Gould filed an opinion concurring in part and dissenting on the Bible consultation issue, joined by Judges McKeown and Wardlaw. 503 F.3d at 784 ("[T]he majority argues that Bible verses are not similar to extrinsic materials that we and the Supreme Court have previously found prejudicial because they are 'notions of general currency that inform the judgment' of capital jurors. This argument is unpersuasive.") (citation omitted). Judge Berzon filed a separate dissenting opinion, joined by Judges Reinhardt and Thomas, which similarly concluded the jury improperly considered extrinsic material. *Id.* at 789-813.

[17] *Cf. Robinson*, 444 F.3d at 230 (Wilkinson, J., concurring in denial of rehearing *en banc*) ("Whether the presence of a Bible is an external influence upon the jury or simply a part of the jury's internal processes is a question the Supreme Court has not even broached, much less settled.").

[18] After setting out several reasons why the juror conduct at issue was not improper, the panel majority added: "[t]hat said, we do not need to decide whether there was juror misconduct because even assuming there was, we are persuaded that [the jury foreperson's] notes had no substantial and injurious effect or influence in determining the jury's verdict." 503 F.3d at 781.

[19] The Tenth Circuit seemingly agrees with the Fourth and Ninth Circuits, having denied a certificate of appealability for a claim based on the "jury's consulting a Bible during its deliberations" because the petitioner failed to show the claim makes a "substantial showing of the denial of a constitutional

Meanwhile, the Fifth Circuit's decision largely conforms with the Eleventh Circuit's decision in *McNair v. Campbell*, 416 F.3d 1291, 1301, 1308 (11th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006) (finding jurors had "considered extrinsic evidence during deliberations" where a juror "brought a Bible into the jury room during deliberations, read aloud from it, and led the other jurors in prayer").[20]

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right." *Neill v. Gibson*, 278 F.3d 1044, 1064 n.8 (10th Cir. 2001).

[20] The Supreme Courts of Colorado and California agree with the Fifth Circuit that juror consideration of the Bible during deliberations violates the guarantee of a fair trial. *See Colorado v. Harlan*, 109 P.3d 616, 629 (Colo. 2005) ("The trial court properly found that one or more jurors introduced one or more Bibles, a Bible index, and notes of Bible passages into the jury room for consideration by other jurors . . . . [T]hese materials were extraneous and their introduction was improper and constituted misconduct."), *cert. denied*, 546 U.S. 928 (2005); *California v. Williams*, 148 P.3d 47, 79 (Cal. 2006) ("This court has held that reading aloud from the Bible or circulating biblical passages during deliberations is misconduct."), *cert. denied*, 128 S. Ct. 179 (2007). Other state courts of last resort have suggested that juror consultation of the Bible during deliberations is improper. *See, e.g.*, *Tennessee v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981) (jury foreman "buttress[ing] his argument for imposition of the death penalty by reading to the jury selected biblical passages . . . was error which would have required a new sentencing hearing"), *cert. denied*, 457 U.S. 1110 (1982); *Grooms v. Kentucky*, 756 S.W.2d 131, 142 (Ky. 1988) ("[O]n retrial the court is instructed that jurors should not be allowed to take Bibles into the jury room with them."); *Glossip v. Oklahoma*, 29 P.3d 597, 605 (Okla. Crim. App. 2001) ("Any outside reference material, including but not limited to Bibles or other religious documents . . . should not be taken into or utilized during jury deliberations.").

* * * *

Jury consultation of the Bible during sentencing deliberations is a recurring problem – which most often arises in the context of capital cases. Because lower courts are divided about the threshold issue of whether Bible consultation constitutes a constitutionally-proscribed "external influence" on the jury, this Court should grant the Petition, and provide much needed guidance to the lower courts.

II. FEDERAL COURTS OF APPEALS DISAGREE ABOUT THE APPLICABLE STANDARD FOR EVALUATING POTENTIAL PREJUDICE TO THE DEFENDANT RESULTING FROM JUROR CONSULTATION OF THE BIBLE

Having determined the jury's consultation of the Bible was a constitutional error, the Fifth Circuit considered whether that error was harmless. 23a-30a.

A. Federal Courts of Appeals Disagree About the Appropriate Standard for Ascertaining Prejudice From Juror Consultation of the Bible

As the Fifth Circuit itself observed, "[n]ot all circuits are in agreement regarding the appropriate standard for determining prejudice when a jury improperly consults the Bible during deliberations." 24a n.13.

In *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), the Eleventh Circuit evaluated juror consultation of the Bible during deliberations in the context of a habeas petition, and determined that

"[u]nder federal law, any evidence that does not 'come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel' is *presumptively prejudicial*." 416 F.3d at 1307 (quoting *Turner v. Louisiana*, 379 U.S. 466, 473 (1965), and citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)) (emphasis added). "In order to give rise to this presumption, a defendant need only demonstrate that jurors had contact with extrinsic evidence." *Id.* Once the defendant has established such contact, "the State bears the burden of rebutting the presumption by showing that the jurors' consideration of the extrinsic evidence was harmless to the defendant." *Id.*

Acknowledging its departure from the Eleventh Circuit approach, in this case the Fifth Circuit held that Petitioner is entitled to relief only if the constitutional error had a "substantial and injurious effect of influence in determining the jury's verdict." 24a (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). In so doing, the Fifth Circuit joined the Ninth Circuit in concluding that, on habeas review, this Court's *Brecht* standard controls when ascertaining whether prejudice arises from jury consultation of the Bible. *See Fields v. Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (*en banc*).

Petitioner submits the Fifth Circuit erred in this case by applying the *Brecht* standard to evaluate potential prejudice from the constitutional error in question.

As explained below, once it is established that jurors consulted the Bible during sentencing

deliberations, the imposition of a harmless error analysis is inappropriate. Petitioner contends in such cases a court should presume the Bible consultation influenced the deliberative process, and vacate the sentence. If, however, a harmless error analysis is to be applied, the Eleventh Circuit's standard is more appropriate than the *Brecht* standard applied by the Fifth Circuit in this case, and the by Ninth Circuit in *Fields*.

As this Court recognized in *Brecht* itself, there is a "spectrum of constitutional errors." 507 U.S. at 629. If any harmless error examination is to be conducted in cases where jurors consult the Bible during deliberations – out of the sight of the parties and the court – that assessment should be governed by a less onerous standard than *Brecht's* "substantial and injurious effect or influence" requirement. *Cf. Chapman v. California*, 386 U.S. 18 (1967) (standard for deciding whether to set aside conviction because of constitutional error is whether error "was harmless beyond a reasonable doubt").

Because federal courts of appeals disagree about the appropriate standard for ascertaining prejudice from juror consultation of the Bible, this Court should grant the Petition, and provide guidance to the lower courts.

B. This Court Should Consider Whether Juror Consultation of the Bible During Sentencing Deliberations in a Capital Case Gives Rise to an Irrebuttable Presumption of Prejudice

As this Court has recognized, in limited circumstances it is appropriate to presume an adverse effect from a constitutional error, without

requiring a showing of actual harm. *See, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 635 (2005) (shackling of defendant in courtroom during trial); *Sullivan v. Louisiana*, 508 U.S. 275, 279-81 (1993) (erroneous reasonable doubt instruction); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of right to self-representation); *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) (counsel "actively represented conflicting interests"); *Geders v. United States*, 425 U.S. 80, 91 (1976) (defendant denied access to counsel between direct and cross-examination); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (complete deprivation of right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (trial conducted by biased judge).

While such errors are "the exception and not the rule," *Rose v. Clark*, 478 U.S. 570, 578 (1986), Petitioner submits that in connection with consideration of the appropriate standard for ascertaining prejudice resulting from jury consultation of the Bible, this Court should consider whether juror consultation of the Bible during the sentencing phase *of a capital case* should give rise to irrebuttable presumption of prejudice.[21]

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[21] Some state courts of last resort have suggested that error of the sort at issue in this case is so serious that it warrants setting aside the jury's sentence, without requiring a showing of prejudice. For instance, the Tennessee Supreme Court, faced with a situation in which "the jury foreman buttressed his argument for imposition of the death penalty by reading to the jury selected biblical passages," stated that "[h]is action, of course, was error which *would have required a new sentencing hearing* absent the error in excluding jurors from cause in violation of the *Witherspoon* standard." *Tennessee v.*

When evaluating whether a constitutional error warrants redress without inquiry into its effects in a particular case, this Court has generally distinguished between "structural defects in the constitution of the trial mechanism" and "trial errors" – typically presuming prejudice in the former cases, and applying a case-specific harmless error analysis in the latter cases. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991).

The "common thread" connecting cases deemed amenable to a harmless error analysis "is that each involved 'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be *quantitatively assessed* in the context of other evidence presented in order to determine whether its admission was harmless . . . ." *Fulminante*, 499 U.S. at 307-08 (emphasis added).

Juror consultation of the Bible during sentencing deliberations is a constitutional error not readily susceptible to harmless error analysis. Although the fact of juror conduct can sometimes be uncovered through hearings and testimony, the *effects* of Bible consultation cannot be "quantitatively assessed" in the way that "trial errors" may be. Once the Bible becomes part of the deliberative process, its impact on deliberating jurors is a matter of speculation, without an accompanying record from which juror decisionmaking reasonably can be inferred. *See Riggins v. Nevada*, 504 U.S. 127 (1992) (refusing to apply harmless error analysis to forced

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Harrington, 627 S.W.2d 345, 350 (Tenn. 1981) (emphasis added).

administration of antipsychotic mediation during defendant's trial because "[e]fforts to prove or disprove actual prejudice . . . would be futile, and guesses whether the outcome of the trial might have been different . . . would be purely speculative . . . . [T]he precise consequences of forcing antipsychotic medication upon [the defendant] cannot be shown from a trial transcript.").[22]

Requiring a case-specific harmless error analysis of the effects of juror Bible consultation is also problematic because this issue will almost invariably arise in the context of a claim that the juror conduct was improper – as it did here. This may engender juror defensiveness or antagonism toward the Defendant – neither of which is conducive to uncovering the truth about the actual effect of the Bible consultation from the jurors themselves. *Cf. Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudiced a case is difficult, partly because the juror may have an interest in concealing his own bias, and partly because the juror may be unaware of it. The problem may be

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[22] When jurors deliberately look beyond the evidence presented at trial and consult the Bible for guidance, a defendant has irretrievably been deprived of his constitutional rights. *Cf. Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and *willing* to decide the case *solely* on the evidence before it . . . .") (emphasis added); *see also Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (rejecting application of harmless error inquiry when jury rendered verdict based on constitutionally-deficient "reasonable doubt" instruction because "there has been no jury verdict within the meaning of the Sixth Amendment").

compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror . . . . [I]n certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.").

The problem of uncovering the truth about the effect of juror Bible consultation is compounded by the fact that inquiry into juror deliberations is substantially limited. *See Mattox v. United States*, 146 U.S. 140, 149 (1892) ("[A] juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.") (quotation omitted); Fed. R. Evid. 606(b) ("a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes . . . ."); *see also* Tex. R. Evid. 606(b); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 375 (Tex. 2000) (noting Texas Rule of Evidence 606(b) is "designed to balance concerns about the threat of jury misconduct with the threat from post-verdict juror investigation and impeachment of verdicts"). In this case, the trial court imposed precisely such a limitation on the testimony of the jurors who appeared at the hearing on Petitioner's motion for a new trial.

Adopting a presumption of prejudice once it is established that jurors consulted the Bible during sentencing deliberations in a capital case would be consistent with this Court's recognition of the need for special procedural safeguards in administering the death penalty. *See, e.g.*, *Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981) (Double Jeopardy Clause applicable to capital sentencing proceedings); *see also Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (discussing "procedural protections that our capital jurisprudence steadfastly guards").

Such a rule would also further the "'acute need' for reliable decisionmaking when the death penalty is at issue." *Deck v. Missouri*, 544 U.S. 622, 632 (2005) (citing *Monge v. California*, 524 U.S. 721, 732 (1998)); *see also Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("'Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.'") (quoting *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988)); *cf. Robinson v. Polk*, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., concurring in denial of rehearing *en banc*) (observing the Bible's "place as a canon of scriptural authority is so powerful that it threatens to supplant the individualized sentencing inquiry into the nature and consequences of the crime and the particular aggravating and mitigating circumstances brought forward in the evidence"); *Robinson v. Polk*, 438 F.3d 350, 366 (4th Cir. 2006) ("[B]ecause the Bible

occupies a unique place in the moral lives of those who believe in it, its teachings cannot blithely be lumped together with a private communication, contact, or tampering with a juror without clear guidance from the Supreme Court.").

III. THE FIFTH CIRCUIT MISAPPLIED OR CONTRAVENED FEDERAL LAW BY DEFERRING TO A FACTUAL "FINDING" NEVER MADE BY THE STATE TRIAL COURT, AND THEREFORE ERRONEOUSLY IMPOSED A HEIGHTENED STANDARD FOR PROOF OF HARM RESULTING FROM THE DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS

The Fifth Circuit erroneously determined that the state trial court "made a factual finding regarding the effect of the Bible on the jury." 27a. As a result, the court reviewed Petitioner's habeas claim under the deferential standard imposed by AEDPA, 28 U.S.C. § 2254(d), and accordingly denied the claim for relief because "he has not presented clear and convincing evidence to rebut the presumption of correctness" due the "state court's factual finding . . . ." 29a-30a.

The state court did *not* make any factual finding about the *effect* of the Bible passages on the jurors' deliberations. On the contrary, the state trial court limited testimony to the "nature and the circumstances under which" the Bible passage was "considered or was before . . . the jury," and *specifically precluded* any testimony about "the effect it had upon the jurors." 129a-130a.

Before hearing any testimony at all, the state court admonished both parties that "we have to be very careful about avoiding the effect it had upon any juror," 130a; *see also* 131a ("But we must stay away from what influence it had upon any juror in their verdict in the case."), and the ruling was adhered to during testimony. *See*, *e.g.*, 134a-135a, 150a-151a; 166a-167a; 182a-183a.

It is therefore obvious that the court could not have found juror consultation of the Bible had no effect on the jurors or their deliberations, because the court received no evidence from which it could reasonably draw such a conclusion.[23]

The Fifth Circuit did correctly observe the state trial court judge stated from the bench that the

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[23] The Fifth Circuit cited as support for the view the consultation of the Bible had no impact on the jurors that "the court instructed the jury that '[i]n deliberating upon the cause you are not to refer to or discuss any matter or issue not in evidence before you . . . .'" 29a. The Fifth Circuit itself identified one significant flaw in this argument – "the jurors disobeyed the court's instructions ['you are not to refer to or discuss any matter or issue not in evidence before you'] by consulting the Bible." 29a n.18. Another problem, which the Fifth Circuit seemingly overlooked, is that this instruction was issued only preceding deliberations as to guilt. *See* 343a. The court failed to give such instructions to the jury prior to sentencing deliberations. *See* 345a-350a; *see also* 192a ("Q. … You got no instructions either way concerning how to use the Bible verses, did you? A. Correct."). Both the absence of this admonition in the jury charge for sentencing, and the fact that numerous jurors referred to and/or discussed the Bible, cast serious doubt on the state trial court's assertion that the jury "considered this case in accord with the Court's Charge and the instructions." 234a.

jurors were "uninfluenced by any outside influence of any kind." 27a. The Fifth Circuit described this as – "[i]n essence" – a "finding that the Bible did not prejudice the jury's decision." 27a. Yet the Fifth Circuit's opinion makes no mention of the fact that state trial court precluded any testimony about the effects of the Bible consultation during the hearing on Petitioner's motion for new trial – or of the fact that no such testimony was provided. This limitation on the scope of the evidence is incompatible with an interpretation of the state trial court's oral ruling as a "finding that the Bible did not prejudice the jury's decision." 27a.[24]

The Fifth Circuit's erroneous conclusion that the state court found "the Bible did not prejudice the jury's decision" materially altered its harmless error analysis. Specifically, this mistake led the court to presume the constitutional error in question was harmless, and place the burden on Petitioner to demonstrate otherwise through "clear and convincing evidence." *Cf.* 26a-27a ("While the facts before us regarding the jury's use of the Bible are perhaps more egregious than in these previous cases, the procedural posture here constrains our analysis.").

Absent this error, the Fifth Circuit would have undertaken a prejudice analysis consistent with this

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[24] Even if the state trial court did intend to render a factual finding "that the Bible did not prejudice the jury's decision," that factual determination clearly would be unreasonable "in light of the evidence presented [and not presented because it was precluded] in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Court's precedents. And while Petitioner contends that the Fifth Circuit should have either presumed prejudice or employed a standard like the "harmless beyond a reasonable doubt" standard of *Chapman*, even if the court had instead employed the *Brecht* standard on its own (without also deferring to a supposed state court finding that the constitutional error in question had no prejudical effect), there is considerable reason to doubt the Fifth Circuit would have found the constitutional error here "harmless" – particularly since *Brecht* itself "imposes a significant burden of persuasion *on the State*." *Fry v. Pliler*, 127 S. Ct. 2321, 2328 (2007) (Stevens, J., concurring in part and dissenting in part) (emphasis added).

For instance, even while defending a finding of harmless error, the Fifth Circuit acknowledged: "[t]he Bible may have influenced the jurors simply to answer the questions in a manner that would ensure a sentence of death" (22a), the evidence of the effect of the Bible consultation on the jurors "cuts both ways" (29a), and consultation of the Bible "potentially tainted the jury's decision" (29a n.18).

This suggests that had it not erroneously deferred to what it believed was a factual determination by the state trial court, the Fifth Circuit likely would have found the constitutional error in question was not harmless. *Cf. Parker v. Gladden*, 385 U.S. 363, 366 (1966) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors."); *Fry*, 127 S. Ct. at 2327 n.3 ("We have previously held that, when a court is 'in virtual equipoise as to the harmlessness of the error' under the *Brecht* standard, the court should

'treat the error . . . as if it affected the verdict.") (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)).

Because the Fifth Circuit incorrectly applied the AEDPA, and therefore improperly denied Petitioner relief, this Court should grant the Petition to provide appropriate guidance regarding the implementation of this important statute.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 5, 2009