No. 07-1429

IN THE
Supreme Court of the United States

JIMMIE URBANO LUCERO,
PETITIONER,

v.

THE STATE OF TEXAS,
RESPONDENT.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Brief in Opposition of the Respondent, the State of Texas ("State's Br."), underscores the need for this Court to review the Texas Court of Criminal Appeals' decision upholding the death sentence of Petitioner Jimmie Urbano Lucero. This Court should grant the petition for certiorari to resolve a widening split in authority on whether the Sixth Amendment prohibits the introduction of outside materials into capital jury deliberations.

I. Since The Filing Of This Petition, The Split Has Grown Wider Among The Federal Circuits Concerning Whether The Sixth Amendment Prohibits Jurors From Considering Outside Materials, Including A Christian Bible, In Jury Deliberations.

As set forth in Mr. Lucero's petition, there is a well-defined split amongst the federal appellate courts concerning whether the Sixth Amendment requires that a jury reach its decision only through consideration of the evidence presented at trial and the court's instructions, or whether jurors can consider additional materials expressing what are called "notions of general currency," "folk wisdom" or "common precepts." Indeed, this split is widening. Only last month, the Fifth Circuit explicitly "part[ed] company with the Fourth Circuit and join[ed] the majority of other courts to pass upon th[e] issue":

> Most circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence. Here, we face facts that are even more egregious than in those previous cases, as the jurors consulted a specific passage that provided guidance on the appropriate punishment for this particular method of murder. As such, we hold that the jury's consultation of the Bible passages in question during the sentencing phase of the trial amounted to an external influence on the jury's deliberations.

Oliver v. Quarterman, ___ F.3d ____, 2008 WL 3522425, *7-8 (5th Cir. Aug. 14, 2008).

Notwithstanding *Oliver* and the other cases cited in the Petition that stake out two starkly different roles on whether use of a Bible during jury deliberations is permitted under the Sixth Amendment, the State argues that there is no split in authority, and that any split does not merit this Court's attention. Both contentions are wrong.

A. The Circuit Split Is Irreconcilable.

The State attempts to harmonize the split of authority by arguing that the Sixth Amendment permits a jury to consider materials outside the record and not in evidence when those materials are merely "notions of general currency." State's Br. at 12 (citing *Fields v. Brown*, 503 F.3d 755, 780-81 (9th

Cir. 2007) (en banc), *cert. denied,* 128 S. Ct. 1875 (2008)); *see also Robinson v. Polk*, 438 F.3d 350, 363-66 & n.18 (4th Cir. 2006) (permitting materials containing "cultural precept[s]"). The State contends that courts find a Sixth Amendment violation only where the Bible verses consulted by the jury are not limited to such notions. State's Br. at 15.

The State is wrong. At least three federal courts of appeal have flatly rejected the jury's use of "notions of general currency" or any other material outside the record. Indeed, two of those courts found that consideration of a Bible verse violated the Sixth Amendment without inquiring into which verses were used. *United States v. Lama-Ramirez*, 519 F.3d 76, 86 (1st Cir. 2008); *McNair v. Campbell*, 416 F.3d 1291, 1308 (11th Cir. 2005).

Less than one month ago, the Fifth Circuit explicitly decided that the Sixth Amendment prohibits consideration of extra-record Bible verses regardless of the verse read. *Oliver*, 2008 WL 3522425 at *7. *Oliver* concluded that consideration of an extra-record Bible passage commanding that murderers be put to death violated the Sixth Amendment.

In *Oliver,* the Fifth Circuit rejected any distinction between extra-judicial materials constituting so-called acceptable "folk wisdom" or "cultural precepts," and other unacceptable materials. Although it recognized that some courts, such as the Fourth Circuit, seemed to have employed that distinction, the Fifth Circuit explicitly chose to

"part company with the Fourth Circuit" because the Supreme Court has taught the use of a simple, easily applied rule that a jury may not consider any law or evidence outside that presented in the case, period:

> The Supreme Court counsels us that a jury may not consult material that is outside the law and evidence in the case. The Bible passages in question here were not part of the law and evidence that the jury was to consider in its deliberations.

Id. at *7-8. Thus, the First, Fifth, and Eleventh Circuits have rejected the State's notion that certain Bible verses escape the Sixth Amendment's prohibition on outside materials.

The Fifth Circuit's rejection of a purported distinction between "notions of general currency" and other Bible verses is appropriate because there is no logical basis for the distinction. For instance, the State suggests that a Bible passage expresses a "notion of general currency" so long as it does not mention the crime before the jury by name. In the State's view, a verse commanding "an eye for an eye" is acceptable in a capital case, but a verse commanding that murderers be put to death is not. *See* State's Br. at 10-12; *see also Oliver*, 2008 WL 3522425, at *7. But why should this distinction matter to the Sixth Amendment? Neither passage was vetted through the trial process, and both express a divine command to repay injury with like injury. Upon considering the "eye" passage, a jury

would undoubtedly substitute "life" for "eye," arriving immediately at the concept the State agrees could not be directly introduced into deliberations.

The State's other attempts to distinguish permitted from forbidden verses simply suggest that verses are acceptable when they are "harmless" to the defendant. *See, e.g.,* State's Br. at 14 ("Many of the cases Lucero refers to actually find Biblical reference during deliberation to be harmless and subject to case-by-case analysis."). This conflates the inquiry whether there is error with whether that error is harmless.[1]

B. The Split of Authority Is Widening, Well-Developed, And Unlikely To Resolve Itself Without This Court's Review.

The State next suggests that although the federal appellate courts disagree whether the Sixth Amendment prohibits the jury's consideration of all outside materials, the split is not worthy of this Court's attention "since the authorities to which Lucero refers are collateral attacks in the appeals circuit courts, not direct appeals," apparently referring to the generous AEDPA standard of review. State's Br. at 13; *see also* 28 U.S.C. § 2254(d)(1). But while it is true that a court upholding a state court's legal conclusions under AEDPA could, theoretically, reach a different result on direct review, that does not necessarily make the "conflict" of authority any

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[1] Harmless error is addressed *infra*, Part II.

less "compelling" under this Court's rules. S. Ct. R. 10(a). Indeed, this Court has reviewed substantive legal questions in AEDPA-governed federal habeas cases several times in the past few years. *See, e.g., Uttecht v. Brown*, 127 S. Ct. 2218 (2007) (addressing *voir dire* of capital murder juries); *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007) (addressing capital sentencing procedures); *Brown v. Payton*, 544 U.S. 133 (2005) (addressing capital jury instructions and prosecutorial misconduct); *Beard v. Banks*, 542 U.S. 406 (2004) (addressing retroactivity of capital sentencing rule); *Wiggins v. Smith*, 539 U.S. 510 (2003) (addressing ineffective assistance of counsel).

The AEDPA standard of review is of particularly little practical concern where, as here, the conflicting precedents are in fact unlikely to be abandoned by their courts. It is clear as a practical matter that the circuit split will not resolve itself, given that the conflicting legal positions have been carefully reasoned and are gaining adherents from additional courts considering the issue, even as recently as last month. The conflicting interpretations involved were not tentatively sketched but rather endorsed only after substantial consideration, including in some cases *en banc* review and dissenting opinions. *See, e.g., Fields v. Brown*, 503 F.3d 755, 776-81 (9th Cir. 2007) (en banc); *id.* at 783-87 (Gould, J., dissenting); *id.* at 792-97 (Berzon, J., dissenting); *Robinson v. Polk,* 438 F.3d 350, 368-73 (4th Cir. 2006) (King, J., dissenting in part). Furthermore, courts considering an extra-record Bible as a matter of first impression now expressly recognize a circuit split on the issue, and

ally themselves with some circuits while "part[ing] company" with the others. *Oliver v. Quarterman*, ___ F.3d ____, 2008 WL 3522425, *6-7.

This split in authority concerning the scope of the Sixth Amendment's prohibition of outside materials in jury deliberations will only continue to grow absent this Court's intervention. This in turn will lead to disparate results in different circuits on identical facts, undermining public confidence in convictions and, in capital cases, in the administration of the death penalty. It is unseemly for a capital defendant's fate to be decided by the place of his conviction. Mr. Lucero's case, on direct appeal from his conviction, offers the Court an opportunity to resolve the issue cleanly, without AEDPA deference. The Court should not pass up this opportunity to resolve the widening split.

II. The Objective Evidence Of The Jury's Deliberations Shows A Reasonable Likelihood That The Jury's Improper Consideration Of The Bible Caused It To Sentence Mr. Lucero To Death.

The State spends much of its Brief arguing that the jury's consideration of Romans 13:1-6 was harmless to Mr. Lucero beyond a reasonable doubt and could not have caused his death sentence. It claims this is so even though it agrees that, if the jury's consideration of the passage violated the Sixth Amendment, it must be *presumed* that the violation caused Mr. Lucero's death sentence. State's Br. at 9

(citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)).

The State can reach this conclusion only by ignoring two critical points. First, the State ignores federal law requiring that only objective evidence be used to determine if there is a reasonable likelihood that the jury's consideration of the Bible affected its verdict. Second, in examining the objective evidence, the State ignores its heavy burden to prove that the presumptively prejudicial Bible passage is harmless beyond a reasonable doubt and ignores the reasonable interpretation of Roman 13:1-6 as calling for passive obedience to the state's call for punishment.

A. State Evidence Law Does Not Disturb This Court's Precedents Mandating Reversal Unless The Objective Evidence Of The Jury's Deliberations Prove Error Harmless Beyond A Reasonable Doubt.

The State agrees with Mr. Lucero that, under Texas law, juror affidavits are admissible to prove both a Sixth Amendment violation and the objective evidence of its effect on jury deliberations: how the evidence was used, how long, what happened before and after, and so forth. State's Br. at 16.[2] However,

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[2] The State consequently agrees that if this Court holds that Mr. Lucero has alleged a violation of the Sixth Amendment, Texas law will permit him to prove the jury's improper consideration of the Bible with juror testimony. *See* State's Br. at 18 ("[I]f Lucero is correct and the Bible was an outside influence, the state statute *mandates* consideration of the jury's

the State fails to understand that this Court has declared, as a matter of substantive federal law, that wherever the *objective evidence* of a federal constitutional violation and its circumstances fail to prove, beyond a reasonable doubt, that the violation was harmless, the defendant is entitled to reversal of his or her conviction. *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991), *overturned on other grounds*, *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983). In other words, federal law defines "harmless" in "harmless error" to mean "harmless in light of the objective evidence of the error." Subjective evidence "about the mental process by which the verdict was arrived" is irrelevant to this question, regardless of the general purposes for which juror testimony is admissible. *Rushen*, 464 U.S. at 121 n.5.

The State's Brief ignores this basic distinction, insisting that relevant objective evidence "logically include[s]" testimony about jurors' subjective mental processes. State's Br. at 17. This Court instead specifically has distinguished the two types of juror testimony, declaring the former relevant to the harmless error inquiry and the latter irrelevant.

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affidavits.") (emphasis in original). Even if the State did not agree, a ruling from this Court that the consideration of the Bible violated the Sixth Amendment would probably resolve any dispute concerning the admissibility of the juror affidavits in this case. *See Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 368 (Tex. 2000) (suggesting that if "extraneous prejudicial information" constitutes an improper "outside influence," the Texas and federal rules governing juror testimony become indistinguishable).

Rushen, 464 U.S. at 121 n.5. Neither did this Court, by urging investigation of the impact of extra-record influences at an evidentiary hearing, suggest that the impact could be shown through evidence of "subjective mental processes." State's Br. at 17. (citing *Smith v. Phillips,* 455 U.S. 209, 216-17 (1982)). Courts can consider what the improper material was, how it was used, and what happened, but not the jurors' subjective, after-the-fact reports of whether they would have reached the same result even without the improper material.

The State misunderstands not only the federal law of harmless error, but also its relationship to state law: it consistently argues that state evidence law can change or trump Mr. Lucero's right to a federal remedy. *See, e.g.,* State's Br. at 17 (attempting to distinguish *Yates* as "say[ing] nothing about a state court's evidentiary rules"). The remedy for a federal constitutional violation is determined by federal law; otherwise, the federal right would be toothless. Harmless error is simply a particular case of this general principle: this Court has declared that unless objective evidence proves beyond a reasonable doubt that a constitutional error was harmless, the defendant is entitled to the remedy of reversal of his or her conviction. *Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007); *Chapman v. California*, 386 U.S. 18, 21 (1967). Texas can no more change that rule than it can repeal the Sixth Amendment itself. U.S Const. art. VI, cl. 2. The Texas Court of Criminal Appeals' reliance on subjective juror affidavits to ground its harmlessness finding was error.

B. The Objective Circumstances Of The Jury Deliberations Leave A Reasonable Doubt Whether The Jury's Consideration Of Romans 13:1-6 Caused It To Sentence Mr. Lucero to Death.

The State argues that Romans 13:1-6 "speaks for itself," and that "no reasonable juror would" conclude that the Biblical text called for submission to anything but the court or the law. State's Br. at 18-19. The State is wrong. The passage, composed well over a millennia before the modern jury, can more persuasively be interpreted to command obedience to the prosecutor. First, the passage does not urge obedience to laws of any kind, but instead to *a person*: "the one in authority," "God's servant." Pet. App. 99a-100a. The State's insistence that the passage refers to civil laws shoehorns the rule of law into a text where it does not appear.

Second, and more importantly, Romans 13:1-6 is inconsistent with the active role of the modern capital sentencing jury, suggesting that readers take it as a command to submit to the prosecutors rather than apply the jury instructions. While a capital sentencing jury must follow jury instructions, those instructions in fact invest it with broad sentencing discretion. The instructions essentially require the jury to exercise authority itself, indeed, a terrible and "truly awesome" authority, *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985), almost "playing God," *Sandoval v. Calderon*, 241 F.3d 765,

775 n.1 (9th Cir. 2000). No juror would intuitively recognize this power in Paul's command to *submit* to divine authority. Instead, the juror would think first of the only state authority in the courtroom commanding the jury to reach a particular result: the prosecuting attorney.

This command to obey the prosecutor is *presumed* to have caused the death sentence, *Remmer v. United States*, 347 U.S. 227, 229 (1954), and the State cannot point to facts sufficient to both overcome that presumption *and* prove the contrary beyond a reasonable doubt. The State claims that the Bible reading took only two and a half minutes. We do not know if that is true (Mr. Lucero has been denied an evidentiary hearing on the issue), but at any rate the passage's influence could have been far out of proportion to its length. If the outside material had introduced a single impermissible consideration (a single bit of inadmissible evidence concerning Mr. Lucero's history, for instance), brief consideration might suggest relative unimportance. But Romans 13:1-6 did not merely introduce an impermissible consideration in the jury's calculus. Rather, it urged the jury to disregard that calculus altogether, surrendering its discretion to the prosecutor. Two minutes' consideration of this divine command could reduce the remainder of deliberations to an empty formality. Indeed, in this case the jury foreman used the passage to "comfort" and "reassure" jurors about the jury's task, including two initial holdout jurors who subsequently changed their votes, suggesting that the jurors felt that God's command of submission to the prosecution relieved

them of personal responsibility to decide the case. State's Br. at 18; *see also* Pet. App. 47a-48a.

Finally, the overall balance of aggravating and mitigating evidence concerning Mr. Lucero leaves a reasonable doubt concerning whether, if the jury had not been read the Romans text, it would have found a sufficient mitigating circumstance to justify sentencing Mr. Lucero to life in prison. As the State notes, Mr. Lucero presented evidence that his crime occurred in part because of his terrible upbringing and mental impairments. Despite these troubles, Lucero had been able to play a positive role in his extended family. State's Br. at 2-3. It is presumed that the jury's improper consideration of the Bible passage caused it to find no sufficient mitigating circumstance where it otherwise would have, causing prejudice to Mr. Lucero and necessitating a retrial. It cannot be said that the passage was harmless beyond any reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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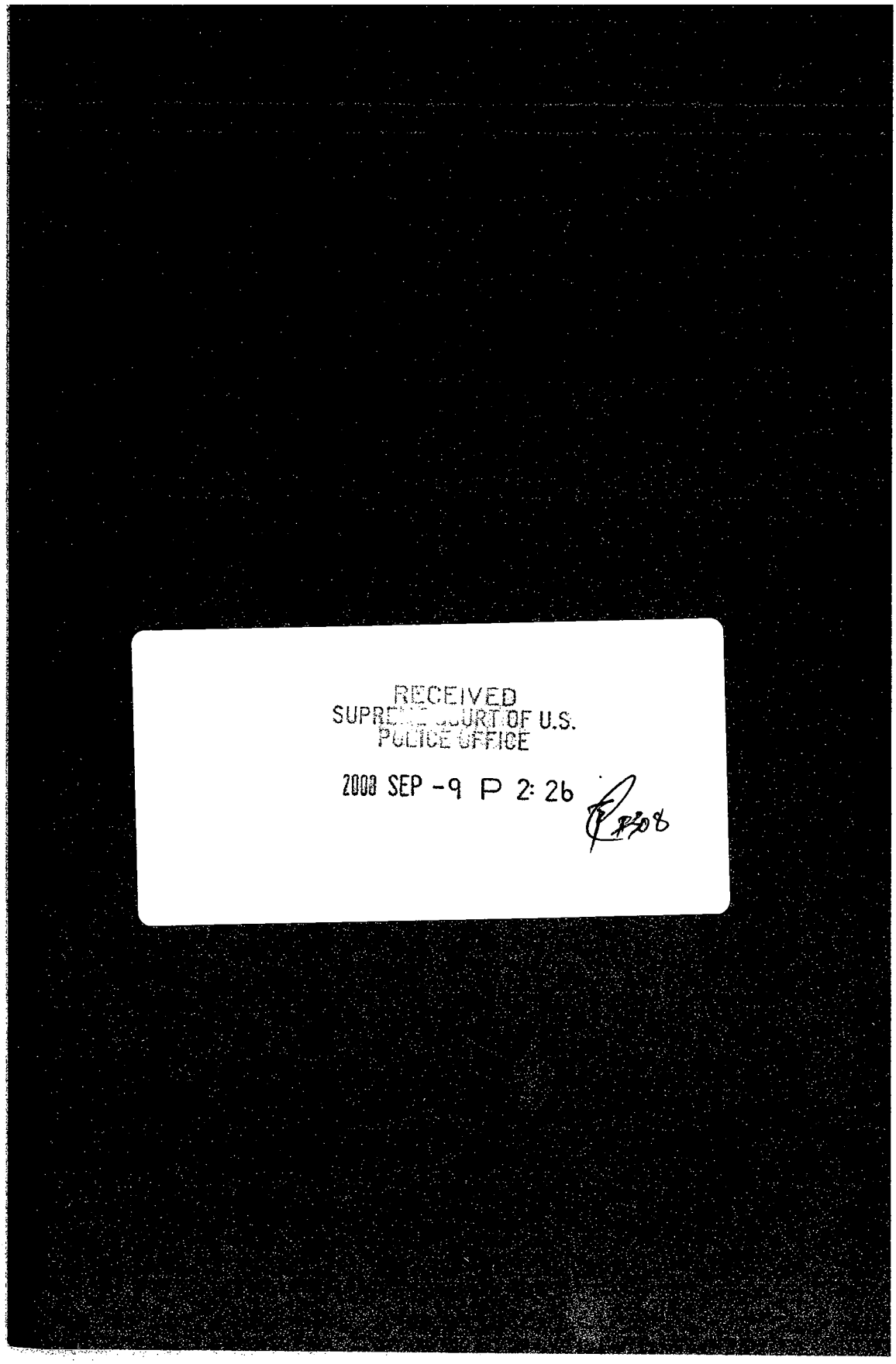
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 2008.

Jeffery A. Koppy

CERTIFICATE OF SERVICE

I, Jeffery A. Koppy, state as follows:

On the 9th day of September, 2008, I caused three copies of Petitioner's Reply To Respondent's Brief In Opposition To Petition For Writ Of Certiorari to be served via first-class mail postage pre-paid to:

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