No. 08-833

In the Supreme Court of the United States

KHRISTIAN OLIVER, PETITIONER

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress revised federal law to restrict the authority of federal courts to grant habeas relief to prisoners challenging their state-court criminal convictions. Habeas relief, as a threshold matter, is now unavailable unless a petitioner can identify a constitutional defect in light of "clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. 2254(d)(1). Federal courts are now also ordered to defer to state-court factual findings absent any "clear and convincing" contrary evidence. 28 U.S.C. 2254(e)(1).

The questions presented are:

1. Whether a juror's consultation of the Bible during the sentencing phase of a capital case violates this Court's "clearly established" law, in light of the clear split of authority over whether this conduct even implicates a defendant's Sixth Amendment rights in the first place.

2. Whether a habeas petitioner alleging that a jury wrongly reviewed outside evidence must prove the evidence had a "substantial and injurious effect" on the verdict (the standard for collateral review), or must satisfy only a "presumptive prejudice" analysis (the standard for *direct* review), or must satisfy no standard at all, under a theory of an "irrebuttable presumption of prejudice" (never before recognized for this claim at any stage of review).

3. Whether the lower court's fact-bound application of Section 2254(e)(1)—deferring to a finding of historical fact that the jury was not influenced by a Bible that a handful of jurors read at some point during sentencing—was correct under the unique circumstances of this case.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

This case presents the unusual circumstance in which the existence of a clear split is precisely the reason to *deny* review. Respondent readily agrees that petitioner's main constitutional claim (under the Sixth Amendment) is both highly important and frequently recurring. But under the controlling AEDPA standards, the threshold question is not whether petition's constitutional claim is valid, but whether the claimed right was *clearly established by this Court* at the time of the state-court decision. See 28 U.S.C. 2254(d)(1). By refusing to engage the critical AEDPA framework, petitioner has presented the wrong question at the wrong time: if his constitutional claim was not clearly established, a federal court would be required to reject it on that basis alone—without any occasion or need to resolve the underlying constitutional issue.

It accordingly follows that petitioner himself has uncovered the most debilitating problem for his own petition. Since federal courts are statutorily forbidden from granting habeas relief in the absence of clearly established law, the very split petitioner has identified confirms that the law is anything but clearly established in this area. Indeed, the circuits are not simply divided over the availability of habeas relief, but at least one circuit has held that the conduct in question is not even *unconstitutional* in the first place. This claim is therefore not subject to redress in this collateral proceeding. Because the Court can resolve this petition without resolving the constitutional question it purports to present, the split should instead be addressed and resolved in a proper vehicle arising on *direct review*.

Nor are petitioner's other questions worthy of certiorari. Petitioner's request for the Court to reconsider the standard of review for "extrinsic evidence" claims is insubstantial and warrants no further review. Contrary to petitioner's contention, there is no circuit split on this question—presumably because this Court has already definitively resolved the issue in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993) (imposing the "substantial and injurious effect" standard). Petitioner has misread the single Eleventh Circuit decision that he believes conflicts with *Brecht*. That decision found the claim at issue procedurally defaulted, and then, without meaningful analysis, noted that the defendant could not satisfy *any* standard of harmless-error review. The circuit accordingly had no occasion to decide which standard should apply—and it certainly did not use that case as a vehicle to create an (unacknowledged) split while flouting this Court's controlling precedent.

Petitioner's final question presents only a fact-bound issue unworthy of review. The Fifth Circuit's deference to the state-court factual findings in this case operated exactly how Congress intended—and petitioner raises no meaningful legal question to undercut the circuit's (correct) analysis.

Because the only question warranting review is not adequately presented in this (collateral-proceeding) posture, the petition for a writ of certiorari should be denied.

STATEMENT

1. Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. I, 110 Stat.

1218, Congress strictly limited a federal court's power on habeas review to void state criminal convictions. Congress provided that a state-court decision can be set aside on collateral attack only if it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. 2254(d)(1). Congress also commanded federal courts to defer to state-court factual findings absent "clear and convincing" conflicting evidence. 28 U.S.C. 2254(e)(1); see also 28 U.S.C. 2254(d)(2) (similarly insulating state-court factual determinations from challenge unless the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings"). These reforms collectively were designed to "curb the abuse of the statutory writ of habeas corpus" and to preserve the proper degree of deference for state-court determinations. H.R. Conf. Rep. No. 104-518, at 111 (1996).

2. Petitioner murdered Joe Collins on March 17, 1998, during an armed burglary of Collins's house. Pet. App. 263a. Collins had arrived home during the burglary and confronted petitioner and an accomplice. After Collins shot the accomplice in the leg, petitioner pursued Collins, shooting him five times—including at least twice in the face—and continuing to "beat[]" Collins with the butt of his rifle as Collins lay on his back. *Id.* at 267a, 277a. The beating (described as "brutal") had severely "fractur[ed]" Collins skull and "disfigur[ed] his face nearly beyond recognition." *Id.* at 281a. Photographs of the attack depicted injuries so "gruesome" that petitioner moved at trial to have the pictures excluded from evidence. Pet. App. 272a-273a.

This murder and petitioner's subsequent arrest were the culmination of an 18-month "crime spree" that included multiple armed robberies, a car-jacking (where petitioner was found to have pointed a cocked gun at the victim's head), and a violent encounter with a security guard during an attempted burglary at a high school (where petitioner struck the guard, aimed a gun at him, and fired on an approaching janitor). Pet. App. 279a-281a. As the state court described it, the prior offenses "reflect[ed] an escalating pattern of criminal activity," "an increasing willingness to take risks," and "a propensity for violence." *Id.* at 281a.

3. A jury found petitioner guilty of capital murder and sentenced him to death. Pet. App. 2a-3a. Petitioner thereafter filed a motion for new trial based on the claim that some jurors had purportedly read passages of the Bible at some point during the sentencing deliberations. *Id.* at 2a-3a, 285a-286a.

The trial court held a hearing on the motion, and petitioner called four jurors to testify. Pet. App. 285a. The trial court instructed the jurors not to testify about their mental processes, but only to describe the objective circumstances of what occurred in the jury room. *Id.* at 129a-130a. The testimony revealed that a handful of jurors, individually or in small groups, had reviewed certain passages in the Bible before the sentencing verdict was read. *Id.* at 3a-5a, 285a-286a. One of those passages included a section that included the following statement: if a person "smite" someone "with an instrument of iron, so that he die, he is a murderer," and "the murderer shall surely be put to death." *Id.* at 3a.

The jurors also testified that no juror at any time suggested the Bible should be considered as law or evidence, and the Bible was never discussed "as part of or during" any group deliberations. Pet. App. 286a. Two jurors also recalled not reading the Bible until after the final vote was cast on sentencing and while the jurors were waiting to return to the courtroom. *Ibid.* Each juror also confirmed that they received and followed the instructions in the court's charge. *Ibid.*

At the conclusion of testimony, the trial court ruled that, in light of "all the evidence pertaining to the occurrence in the jury room in question in reference to the Biblical quotation," "the conduct of the jury was not improper." Pet. App. 234a. The court further ruled that "a conscientious, dedicated and carrying [sic] 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." *Ibid.*

4. The Court of Criminal Appeals of Texas affirmed the trial court's ruling on direct review. Pet. App. 261a, 286a. It recited the evidence on this claim, and determined that petitioner "failed to prove the presence of a Bible in the jury room was outside influence that affected the jury's verdict in violation of Article 36.13." *Id.* at 286a.

5. This Court thereafter denied petitioner's first certiorari petition. Pet. App. 59a.

6. a. Petitioner subsequently filed an application for a writ of habeas corpus in federal district court. Pet. App. 57a. That court denied petitioner's request for an

evidentiary hearing (a decision petitioner does not challenge here), and also rejected his claims on the merits. *Id.* at 62a-66a.

b. The district court also granted petitioner's request for a certificate of appealability on his Sixth Amendment claims. Pet. App. 67a-68a.

7. A panel of the Fifth Circuit affirmed. Pet. App. 30a.

a. The panel first held that the "jury's use of the Bible during the sentencing phase * * * amounted to an improper external influence on the jury's deliberations." Pet. App. 30a. The panel examined the existing Supreme Court case law on the issue, and concluded that the Court has "clearly established a constitutional rule forbidding a jury from being exposed to an external influence." *Id.* at 12a. The panel then reviewed the existing circuit law, openly acknowledged the split of authority on this question, and determined that the jurors erred in consulting material that was "not part of the law and evidence that the jury was to consider in its deliberations." *Id.* at 20a-21a.

b. The panel next turned to a harmless-error analysis. It held, first, that the *Brecht* standard of review applied to constitutional errors of this nature, Pet. App. 24a; and, second, that the state court's factual findings were entitled to deference: petitioner "failed to demonstrate that the state court's finding that the Bible did not influence the jury lacks 'even fair support in the record,'" *id.* at 28a-29a.

REASONS FOR DENYING THE PETITION

Petitioner has indeed identified an important issue that has sharply divided the circuits—an issue that implicates the constitutional right to an impartial jury, and one that presumably applies to civil as well as criminal matters. See, *e.g.*, U.S. Const. amend VI; *Remmer* v. *United States*, 347 U.S. 227, 229-30 (1954); *Wilson* v. *Vermont Castings*, 170 F.3d 391, 395 (3d Cir. 1999) (applying comparable standards in the civil context); *Haley* v. *Blue Ridge Transfer*, 802 F.2d 1532, 1535 (4th Cir. 1986) (same). This issue, therefore, has the very real potential to deeply affect jury deliberations in virtually every single trial, civil and criminal, across the nation. Nevertheless, though the question truly is important and recurring, this is not the right vehicle for resolving it.

Petitioner's first question presented—focusing on his main constitutional claim—suffers from a variety of critical vehicle problems, and in any event lacks merit. His second question presented—focusing on the standard of review—is not the subject of any genuine circuit split, and is otherwise unworthy of the Court's attention. And his third question presented—a fact-bound attack on the lower court's application of settled law to the unique circumstances of this case—is both incorrect in substance and insubstantial in importance.

The critical constitutional question raised in this petition should be resolved in a case where it will have at least a realistic chance of affecting the outcome. That is not the situation here. Given its recurring nature, another opportunity should soon arise to evaluate the claim where it properly belongs: on *direct review*, outside the stringent AEDPA framework. Given the substantial barriers to

reaching the merits in the procedural posture of this case, the petition should be denied.

I. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THE FIRST QUESTION PRESENTED

Petitioner's first claim—that the jury's limited use of the Bible during sentencing proceedings violated his right to an "impartial jury" (Pet. 21-26)—suffers from at least four substantial vehicle problems and (in any event) lacks merit. Because the Court can resolve this case without resolving the question presented, further review is not warranted.

A. This petition is an unsuitable vehicle for reviewing the underlying constitutional issue for a fundamental reason: the case arises not on direct review but collateral attack. As discussed below, petitioner cannot possibly win under the controlling AEDPA standard. The question is not whether the state courts erred, but instead whether the error was "clearly established" under this Court's precedent. 28 U.S.C. 2254(d)(1). The very split among the circuits—including carefully reasoned decisions by unanimous panels on each side—eliminates any conceivable argument that the law is so clear that the state-court decision is subject to correction on collateral review. This accordingly is the rare case in which the undeniable existence of a circuit split warrants a quick and obvious *deny*. See, *e.g.*, *Carey* v. *Musladin*, 549 U.S. 70, 76 (2006) (finding that evidence of wide lower-court "diverge[nce]" over an issue "[r]eflect[s] the lack of guidance from this Court").

1. In a long series of cases, this Court has repeatedly reinforced that Congress meant what it said when it

ordered federal courts not to upset state convictions not obtained in violation of "clearly established" law, 28 U.S.C. 2254(d)(1). See, *e.g.*, *Brown* v. *Payton*, 544 U.S. 133, 143 (2005) (reviewing state-court decision applying Supreme Court precedent "to similar but not identical facts" and concluding that "[e]ven on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review"); *Wiggins* v. *Smith*, 539 U.S. 510, 520 (2003) (AEDPA "circumscribe[s]" the Court's consideration of petitioner's habeas claims and "limit[s]" its analysis "to the law as it was 'clearly established' by our precedents at the time of the state court's decision"); see also *Carey*, 549 U.S. at 81 (Kennedy, J., concurring) (a rule should be "established in this Court before it can be grounds for relief" on habeas review).

Nor were these congressional constraints on habeas relief mere technical requirements. These restrictions reflect the important and substantial policy interests in "comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); see also *Duncan* v. *Walker*, 533 U.S. 167, 178 (2001) (same). "A federal court's collateral review of a state-court decision must [accordingly] be consistent with the respect due state courts in our federal system." *Miller-El* v. *Cockrell*, 537 U.S. 322, 340 (2003). Part of that respect entails leaving in place *reasonable* state-court decisions, even if a reviewing court disagrees with the ultimate conclusion on the merits. *Bell* v. *Cone*, 535 U.S. 685, 697 (2002).

These principles collectively doom petitioner's claim. In inviting the Court to discard AEDPA's limitations—and reach the merits of a constitutional question over which

the law is unavoidably unclear—petitioner plainly errs. Indeed, petitioner's proposed course of action is indistinguishable from the analysis that resulted in this Court summarily reversing the Ninth Circuit twice on a single day at the start of the 2002 Term. See *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam); *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam). Because it makes no difference "[w]hether or not [the Court] would reach the same conclusion" as the state court here, *Woodford*, 537 U.S. at 27, petitioner's first question presented is irrelevant to the outcome of this proceeding. Review should accordingly be denied. See also *Early*, 537 U.S. at 11 (noting that the Court would reach the same result—reversing the Ninth Circuit for improperly discarding a state-court decision—"[e]ven if we agreed with the Ninth Circuit majority" on the merits).

2. Nor is there any real dispute that the law is unsettled in this area. See Pet. 5 (recognizing the circuit conflict over the "impartiality" question). The very fact that circuits have divided over whether there is *any* error (much less clearly established error) eliminates any plausible argument that existing Supreme Court law resolves this question.

Indeed, the Fourth Circuit has alternately recognized these kinds of juror actions as legitimate (on the one hand) and recognized the uncertainty itself as a basis for denying habeas review (on the other). Compare, *e.g.*, *Burch* v. *Corcoran*, 273 F.3d 577, 590-91 (4th Cir. 2001) (holding that juror's quoting of the Bible during deliberations—both from memory and by reading—"did not constitute an improper jury communication"), with *Robinson* v. *Polk*, 438 F.3d 350, 361-66 (4th Cir. 2006)

(declaring the pre-existing case law non-controlling and distinguishing *Tanner* v. *United States*, 483 U.S. 107 (1987), *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)); and *Robinson* v. *Polk*, 444 F.3d 225, 225-30 (4th Cir. 2006) (Wilkinson, J., concurring in the denial of reh'g en banc). Moreover, the Ninth Circuit—after first outright declaring the practice constitutional, *Fields* v. *Brown*, 431 F.3d 1186, 1208-09 (9th Cir. 2005)—granted en-banc rehearing and ultimately left the question unanswered by concluding that any error was harmless in the context of that case, *Fields* v. *Brown*, 503 F.3d 755, 780-81 (9th Cir. 2007) (en banc). Notwithstanding the technical backtracking, the en-banc majority's opinion still suggested with strong language that the practice was permissible. *Id.* at 780 (characterizing the Biblical verses as "notions of general currency that inform the moral judgment that capital-case jurors are called upon to make"). And, finally, the Tenth Circuit has apparently considered the practice so well settled—and so plainly constitutional—that it refused to grant a certificate of appealability to review an improper-juror-conduct claim. *Neill* v. *Gibson*, 278 F.3d 1044, 1064 n.8 (10th Cir. 2001).

The Fifth Circuit, by contrast, reached exactly the opposite conclusion on the same issue in its decision below, relying on cases from the First, Sixth, and Eleventh Circuits for support. See Pet. App. 14a-23a. The split is therefore real, defined, and openly acknowledged—and is precisely the reason the petition is manifestly *inappropriate* for review.

In short, when lower courts sharply split over a constitutional question—with some suggesting the conduct is perfectly *permissible*—it is difficult to characterize the law as "clearly established." 28 U.S.C. 2254(d)(1). For that very reason, circuit "splits" on the underlying merits are rarely properly resolved in the habeas context, as the "necessary condition for federal habeas relief"—clearly established law—is routinely left unsatisfied. *Kane* v. *Espitia*, 546 U.S. 9, 10 (2005) (per curiam).

3. This split is perhaps unsurprising in light of the fact that existing Supreme Court case law does *not* resolve this question. See *United States* v. *Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008) ("We have never decided a case involving a Bible in a jury room, nor has the Supreme Court.").

As a preliminary matter, the Fifth Circuit has overstated the reach of existing Supreme Court precedent on this subject. Every single decision cited in the panel's opinion addressed *factual* information—the kind of extrinsic evidence that aids a jury's understanding of the defendant's *factual* innocence or guilt—or cases in which third parties sought to coerce jurors into voting a certain way. See, *e.g.*, *Robinson*, 438 F.3d at 363 (finding it reasonable to conclude that "the Bible had no bearing on any *fact* relevant to sentencing, and was therefore not tantamount to 'evidence' that was used against him at sentencing," distinguishing *Parker* and *Turner*) (emphasis in original); *Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006). Petitioner has wholly failed to identify any of this Court's precedent applying the same rule to information implicating only *moral* beliefs—not the kind of evidence typically introduced at trial, but the personal thoughts

and moral outlook that a juror is supposed to bring to deliberations. See, *e.g.*, *Fields*, 503 F.3d at 780 (contrasting "'the [factual] question of innocence or guilty of the offense'" with capital sentencing, which is "'a matter of reasoned moral judgment'").

These distinctions undoubtedly matter: "the task of jurors at the penalty phase is qualitatively different form that at the guilt phase"; "[a]t the penalty phase, jurors are asked to make a normative determination—one which necessarily includes moral and ethical considerations—designed to reflect community values." *People* v. *Danks*, 82 P.3d 1249, 1277 (Cal. 2004). It stands to reason that a rule governing the use of information at one phase therefore might not control the use of a categorically different kind of information at a qualitatively different stage of trial. Because "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law," *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004), the court below erred in assuming that a general rule, structured to meet the needs of controlling a factual record, would apply across the board—even where the kind of inputs affecting moral outlook are not required to be introduced through witnesses at trial. See *Fields*, 503 F.3d at 780 ("It is difficult to see how sharing notes can be constitutionally infirm if sharing memory isn't."); *Billings*, 441 F.3d at 248 (explaining that *Remmer*'s rule does not obviously apply "whenever a juror reads a book that influences his thinking about the case").

Because the Court can dispose of petitioner's claim solely on the lack of clearly established law, there is no

reason to reach the underlying merits: "Our own consideration of the merits * * * is for another day, and this case turns on the recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief." *Wright* v. *Van Patten*, 128 S. Ct. 743, 747 (2008) (per curiam). This alone is a compelling reason to deny review.

B. For predominantly the same reasons, the anti-retroactivity rule in *Teague* v. *Lane*, 489 U.S. 288 (1989) (per curiam), stands as another substantial barrier to reaching the underlying question on the merits. See *Horn* v. *Banks*, 536 U.S. 266, 272 (2002) (per curiam) (holding that *Teague* stands as an independent bar to certain relief sought in habeas proceedings). Under *Teague*'s command, new constitutional rules of criminal procedure are inapplicable on collateral review unless they qualify as "watershed" rules. 489 U.S. at 311. And if petitioner's new rule cannot apply immediately, this case does not present an adequate vehicle for addressing it.

As an initial matter, there is no serious contention that this rule, unlike virtually all others preceding it, fits within the exceedingly narrow category of "watershed" developments. See, *e.g.*, *Tyler* v. *Cain*, 533 U.S. 656, 665, 667 n.7 (2001). And, critically, petitioner's theory, if adopted, would plainly stand as a "new" rule: the holding is not so "'*dictated*'" by existing precedent that no "'reasonable jurist[]'" would decline to adopt it. *Beard* v. *Banks*, 542 U.S. 406, 413 (2004); see also *id.* at 411 (asking whether existing precedent "compels the rule"). The same division of authority cited above—and the same distinctions between the subject-matter of existing precedent (factual record) and the impartiality objection at

issue here (moral outlook)—demonstrate that reasonable jurists not only can but *have* found existing precedent not to "compel" the rule sought in this case. See, *e.g.*, *Fields* v. *Brown*, 503 F.3d 755, 780 (9th Cir. 2007) (en banc); *Robinson* v. *Polk*, 438 F.3d 350, 362-66 (4th Cir. 2006).

Because *Teague* presents its own distinct obstacle to relief irrespective of the underlying merits of petitioner's claim, it demonstrates yet another reason that this case is an inappropriate vehicle for deciding the Sixth Amendment question. *Horn*, 536 U.S. at 272 ("in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state").

C. There is an additional reason why this petition is a particularly poor vehicle to address this constitutional issue: petitioner *prevailed* on this issue below, and simply failed to obtain relief on other grounds. See Pet. App. 23a-30a. Because these constitutional errors are subject to the *Brecht* standard of review, see Part II, *infra*, there is no "need to decide whether there was juror misconduct because even assuming there was," it is apparent that the Bible consultation "had no substantial and injurious effect or influence in determining the jury's verdict." *Fields* v. *Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (en banc); see also Pet. App. 23a-30a (so holding). Because the Court has no reason to resolve the underlying constitutional question when any recognized error would lack the requisite impact on the ultimate disposition, this is not a suitable vehicle for resolving this question.

D. The petition also suffers from a final potential vehicle problem: invited error. As respondent noted in his

supplemental brief before the Fifth Circuit (at 20-21), petitioner's counsel, in his closing argument, explicitly invited the jury to consider passages from the Bible, including one focused on "forgive[ness]." 43 Rep. Rec. 195. Having asked the jury to consider the Bible when exercising moral judgment during sentencing, petitioner cannot obviously now fault the jury for following his counsel's own suggestion. This further undermines this petition as the right vehicle for resolving this important and difficult question. See, *e.g.*, *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (noting invited error as a "consideration[] bearing on whether to decide a question" even after a petition has been granted for review) (citing *Springfield* v. *Kibbe*, 480 U.S. 257, 259-60 (1987) (per curiam)).

E. In any event, petitioner's theory is wrong on the merits. As established above, there is a clear and material distinction between information affecting the factual record and information shaping moral beliefs.

The Court's case law on external influence is focused on the need to ensure that *factual* evidence is admitted through the witness stand, where it is challenged by cross-examination, subject to judicial scrutiny, and tested through the adversarial process. See, *e.g.*, *Turner*, 379 U.S. at 472-73. It logically follows that the category of information barred by the "external evidence" rule is the kind of information naturally subject to these constraints: evidence that ordinarily enters the record through official court proceedings, not through outside sources. *Robinson*, 444 F.3d at 225 (Wilkinson, J., concurring in the denial of en-banc reh'g).

By contrast, the kind of information that typically shapes one's moral beliefs typically arises outside the judicial process (whether gained from religious sources, non-religious sources, philosophy texts, or any other resource). None of this information is subject to cross-examination, introduced through a witness, or tested by the adversary process. And yet no one "suggests that [jurors] are not free to recite these points, including those from the Bible, or to resort to their reasoning." *Fields*, 503 F.3d at 780; *Robinson*, 438 F.3d at 364 ("reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence").

If "morality based" information is permitted prior to the empaneling of a jury, it is difficult to see why a different rule should attach if the same information arises during jury deliberations. The timing has no obvious constitutional significance under any controlling case law. The standard is appropriately focused on *substance*, not timing. If the information is permissible at all, it must be permissible no matter when it is obtained. Along the same lines, extrinsic factual evidence concerning questions of guilt or innocence is problematic no matter when a juror receives the information—for example, a juror learning of a suppressed confession before the jury is empaneled would implicate the same impartiality concerns as a juror learning of the same evidence during deliberations.

Jurors are charged with exercising moral judgment, and it is assumed that they do so when addressing difficult moral issues. It is widely accepted that these judgments are dependent upon a person's life experiences and ordinary interactions. Yet these very influences are

not introduced in open court; they do not become part of the evidentiary record; they are not expressed through the witness stand, cross-examined, or tested against any legal standard by a judge. They are, in fact, part of who the jurors are—and therefore are properly recognized as the collective wisdom brought together when a cross-section of the community is selected to form a 12-person jury. The information shaping a juror's moral outlook is not automatically invalid simply because it arises during the course of trial.

II. THE SECOND QUESTION PRESENTED FAILS TO IMPLICATE ANY CIRCUIT SPLIT AND IS OTHERWISE UNWORTHY OF REVIEW

A. Petitioner is incorrect that this case presents a second purported split. There is no genuine conflict at all over the correct standard for determining harmlessness. Every circuit to have squarely addressed the question has uniformly held that the standard in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993)—the same standard that this Court has repeatedly held applies to virtually all constitutional claims on collateral review, see, *e.g.*, *Fry* v. *Pliler*, 127 S. Ct. 2321, 2325 (2007)—is also the standard that applies here: unless petitioner can show that the error had a "substantial and injurious effect" on the outcome, he cannot obtain relief. See, *e.g.*, Pet. App. 24a-25a ("on habeas review, we do not use the normal harmless error analysis"; "habeas petitioners are not entitled to relief based on a constitutional error unless the error 'had [a] substantial and injurious effect'" on the outcome); *Fields* v. *Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (en banc) (applying *Brecht* to an analogous claim); *Crease* v. *McKune*, 189 F.3d 1188, 1192 (10th Cir. 1999)

(same); *Bibbins* v. *Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994) (same).

Petitioner claims (Pet. 26-28) that the Eleventh Circuit has in fact adopted a lower standard in *McNair* v. *Campbell*, 416 F.3d 1291 (11th Cir. 2005), but that is wrong. In that case, the panel found the prisoner's claim procedurally defaulted, so any comment on the appropriate standard of review was merely dicta. See 416 F.3d at 1307 ("the district court should have dismissed this claim as procedurally barred"). It also was particularly *meaningless* dicta: the panel said only that the error was harmless beyond a reasonable doubt—meaning that the state in that case could have satisfied *any* standard (including the stricter *Brecht* standard), so any holding that a lesser standard applied was dicta once again. See *id.* at 1309 ("Because the state could successfully rebut the presumption of prejudice arising from the jury's consideration of extraneous evidence, McNair would not have been entitled to relief on this claim even if he had properly raised it in the state court.").

What's more, the panel nowhere confronted the "standard of review" question as framed here. It did not acknowledge *Brecht* (in order to adopt or reject it). And it did not ask whether different standards should apply in direct and collateral review. *McNair* accordingly does not create a reasoned split warranting any further review. See also *Fields*, 503 F.3d at 782 n.21 ("the court in *McNair* held that the issue was procedurally defaulted" and "stated that even if it weren't there was no prejudice").

B. In any event, petitioner's theory is irreconcilable with *Brecht* and its controlling rationale. Every one of

Brecht's concerns—fostering comity and federalism, preserving finality, limiting the habeas writ to its traditional function of protecting only those "grievously wronged," and respecting state sovereignty over criminal matters—applies with full force to this case. See 507 U.S. at 633-34.[1]

C. In the alternative, petitioner argues that this kind of constitutional error should be subject to an irrebuttable presumption of prejudice. Pet. 28-34. The novel contention that this type of ordinary constitutional error should be subject in this collateral challenge to automatic reversal—a standard not even applicable on direct review, see *Remmer* v. *United States*, 347 U.S. 227, 229 (1954)—would stand every single one of Congress's core restrictions on habeas review (as all notions of comity, federalism, and finality) straight on its head. Cf. *United States* v. *Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008) (rejecting the argument that the "taint" arising from a "Bible in the jury room * * * cannot be cured"). It would also impose great social costs—requiring countless retrials for "errors" that had no conceivable effect on the

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1. In any event, this question is not adequately presented here, because petitioner clearly fails to satisfy any standard of harmlessness. The state court determined that no juror would have changed his or her vote as a result of reading the Bible. Because that finding is supported by the record and is not "unreasonable" (28 U.S.C. 2254(d)(2)) or contradicted by "clear and convincing evidence" (28 U.S.C. 2254(e)(1)), it is controlling on collateral review. See *Mitchell* v. *Esparza*, 540 U.S. 12, 17-18 (2004). Petitioner therefore cannot satisfy any standard of harmless error: if, as a historical matter, the error was in fact harmless, it necessarily follows that it was legally harmless, too. This is yet another reason that the petition should be denied.

outcome—without any countervailing benefit. See *Rushen* v. *Spain*, 464 U.S. 114, 118-19 (1983).

Finally, Petitioner's theory has no obvious limiting principle and hence would prove unworkable in practice. The petition reflects a clear inability to distinguish this putative constitutional error from any other constitutional error that the Court has repeatedly found is appropriately evaluated under harmless-error review. After all, the claim at its core is that the jury considered "evidence" that should have been excluded from the record. But this complaint describes the vast majority of trial errors: the admission of evidence from wrongful searches and seizures; the consideration of coerced or otherwise flawed confessions; the introduction of tainted evidence; the use of hearsay evidence from witnesses not subject to confrontation; prosecutorial comments about a defendant's refusal to testify; and so on—all leave the jury considering another evidentiary piece that should have been excluded from the puzzle. Yet the Court has routinely found such errors subject to harmless-error analysis, because the impermissible evidence can always be evaluated against the permissible evidence, and a conclusion reached about how an objective juror might have been swayed (or not) by what should not have been there. See *Fry*, 127 S. Ct. at 2325-26; *Brecht*, 507 U.S. at 629-30.

There is absolutely no reason to impose a different standard here—and, perhaps for that very reason, the Court's precedent directly addressing the effects of external evidence has always held that the hint of prejudice could be proved harmless on appeal (even on direct review). See, *e.g.*, *Remmer*, 347 U.S. at 229.

Petitioner has failed to identify any reason to back away from this sound standard.

III. THE THIRD QUESTION PRESENTED ONLY SEEKS TO REVISIT A FACT-BOUND DISPUTE UNWORTHY OF REVIEW

A. Petitioner's final argument is that the lower courts "incorrectly applied" AEDPA's provisions to the facts of this case. Pet. 38. This is a fact-bound challenge. Petitioner does not question the applicable legal framework, and for good reason: Congress was hardly equivocal in its command that federal courts defer to state-court fact-finding. See 28 U.S.C. 2254(d)(2), (e)(1); see also *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983). He simply disagrees with how all the courts to date have understood the factual record.

This is a capital case, and so alleged factual errors do deserve careful scrutiny. But this claim has been carefully addressed by multiple state and federal courts on direct and collateral proceedings. These courts have all scrutinized the factual record and all reached the same conclusion: petitioner has failed to show that any reference to the Bible had any effect on the jury's deliberations. See, *e.g.*, Pet. App. 28a-30a. There is no reason for the Court to grant review for the single purpose of reassessing (and, inevitably, reaffirming) the particular factual-findings in this single case. This claim consequently does not warrant further view.

B. Nor is Petitioner correct that the state courts improperly truncated his factual examination. Specifically, Petitioner argues that he was prevented from questioning the jury about the Bible's impact on the actual

deliberations, yet punished for not demonstrating that very kind of impact. This is incorrect. The state court properly restricted the inquiry into the jury's mental processes—such an inquiry is forbidden under both state and federal law, see Fed. R. Evid. 606; Tex. R. Evid. 606, and for significant policy reasons. See, *e.g.*, *Tanner* v. *United States*, 483 U.S. 107, 120-21 (1987).

Furthermore, the factual findings that the state courts made—and the Fifth Circuit found worthy of AEDPA deference—consisted of two categories of *historical* facts, and each were equally open for petitioner to explore: first, the objective facts surrounding the jury's deliberations (including what materials were reviewed at what time by which jurors); and second, a reasonable inference based on those objective facts. Pet. App. 28a-30a. The state court's ultimate findings accordingly were not based on direct testimony about how the Bible may have affected an individual juror's internal thoughts. They were instead based on what happened (from the view of a neutral outside observer) *factually* during deliberations.

And the state court's findings, far from clearly wrong, in fact had ample record support. A number of jurors, for example, testified that the Bible was not even consulted until after the sentencing vote was submitted; they were simply looking for consolation while awaiting their return to the courtroom. Since a post-hoc reading cannot possibly affect a vote already cast, the court's findings are easily supported by this testimony alone.

Moreover, all jurors testified that the Bible was read and discussed only in small groups, never during full deliberations—an objective fact that supports an inference that the Bible was not used as a material factor in the

overall discussions or decision (since the entire jury was never once focused on it).

Finally, every single juror at the hearing testified that the jury was properly instructed to consider only the Court's legal charge and apply it to the evidence in the record, and that no one, at any point, suggested that the legal standard be supplanted by a religious one. Given the traditional presumption that jurors are presumed to follow the court's instructions, see, *e.g.*, *Fields* v. *Brown*, 503 F.3d 755, 782 (9th Cir. 2007) (en banc) (citing *Kansas* v. *Marsh*, 548 U.S. 163 (2006)), this too supports a finding that the jury was not unduly swayed by any identified "outside" influence.

There is no basis in the record for upsetting these factual findings. Petitioner has not cited any admissible evidence that undercuts these facts, and does not suggest how his view is even consistent with the objective record evidence. This dooms his claim: once the historical facts are established, it is plainly reasonable to infer that the jury was not unduly influenced—if influenced at all—by what a handful of jurors read in the Bible during a time when the group was not deliberating as a whole. Because that conclusion reflects the most natural reading of the factual record, it certainly was not "objectively unreasonable" or undercut by "clear and convincing" evidence. See 28 U.S.C. 2254(d)(2), (e)(1); *Rushen*, 464 U.S. at 121 n.6. The court below hence was correct to defer to the factual findings.[2]

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2. Petitioner has not challenged (and therefore has waived) any objection to the Fifth Circuit's decision on the ground that it asked what *these* individual jurors (as opposed to an objective juror) would

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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have thought. To be sure, it is far from obvious that the Fifth Circuit's holding actually turned on anything but an objective standard. But to the extent an objective standard applies (and, furthermore, to the extent the lower court failed to follow it), any challenge is plainly waived. Petitioner's argument is premised not on the notion that the beliefs of the actual jurors were irrelevant, but rather that they were so highly relevant that the state court erred in refusing to permit a searching inquiry into the specific mental processes of each juror in reaching a final decision. Pet. 34-36. That contention is surely wrong on the law—this Court alone has rejected it on a number of occasions. *E.g.*, *Rushen*, 464 U.S. at 121 n.5. But any contrary challenge, based on the (flawed) notion that the factual findings were wrongly focused on individual juror's mental perceptions, is just as surely waived.