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,
Respondent.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent acknowledges the Petition presents a constitutional claim that is "highly important and frequently recurring." Brief in Opposition ("Br. Opp.") 1. Respondent further concedes the Petition concerns "an important issue that has sharply divided the circuits . . . [and] implicates the constitutional right to an impartial jury . . . ." Br. Opp. 7.

The *amicus* brief submitted by dozens of former federal and state prosecutors similarly describes juror Bible consultation as a "recurring and important" issue, and expresses concern "the division among U.S. Courts of Appeals on this issue enables tainted capital sentences to stand and undermines public confidence in the ability of the U.S. criminal justice system to render unbiased judgments." *See* Brief of Former Federal and State Prosecutors 1; *see also* Jeremy B. Sporn, *Legal Injection? The Constitutionality of the Bible in Capital Sentencing Deliberations*, 83 TUL. L. REV. 813, 814-15 (2009) (describing "capital juror Bible consultation" as "a national problem in need of a national solution," and observing "[t]he issue is ripe for review by the United States Supreme Court").

Because the Petition presents important and recurring constitutional questions which have divided lower courts, and also concerns the proper interpretation and application of AEDPA, the Petition should be granted.

I. THE EXISTENCE OF A CIRCUIT "SPLIT" DOES NOT PRECLUDE REVIEW

Despite repeatedly acknowledging this case presents an "important" and "recurring" issue about which lower courts are divided, Respondent suggests the Petition for Certiorari should be denied because, in Respondent's view, it "is not the right vehicle for resolving it." Br. Opp. 7.

Respondent's central argument against review is the claim that the very existence of a "split" among lower courts about the constitutional implications of juror Bible consultation establishes the underlying state court ruling here could not have been an "unreasonable application" of "clearly established" law, as determined by this Court.

Respondent's argument is misguided.

First, this Court has never held the mere *existence of disagreement* among lower courts about an issue *necessarily* precludes finding that a court taking one side of such a disagreement has unreasonably applied clearly established Supreme Court case law. Not surprisingly, Respondent fails to cite a decision of this Court supporting the bold assertion that "the very fact that circuits have divided over whether there is *any* error . . . **eliminates** any plausible argument that existing Supreme Court law resolves this question." Br. Opp. 10 (italics in original; bold emphasis added); *see also id.* at 8 ("The very split among the circuits . . . **eliminates** any conceivable argument that the law is so clear that the state-court decision is subject to

correction on collateral review") (bold emphasis added).[1]

Second, this Court's own actions disprove Respondent's categorical claim that the *existence of disagreement* among lower courts about an issue necessarily precludes finding that a court unreasonably applied clearly established law.

This Court has, for instance, granted certiorari to review habeas cases where there was a split among lower courts about an underlying issue, and proceeded to review the *merits* of arguments for relief under AEDPA's "clearly established" standard. In fact, that is precisely what happened in *Carey v. Musladin*, 549 U.S. 70 (2006), cited by Respondent (Br. Opp. 8). In *Carey*, while noting lower courts "diverged widely" in their treatment of the underlying issue, the Court nevertheless conducted *its own* assessment of whether or not the state court's decision was contrary to, or an unreasonable application of, clearly established law. 549 U.S. at 76-77. Nowhere in *Carey* did this Court say, or even imply, that its conclusion the state court had not

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[1] The Fifth Circuit seemingly was unaware of the purported rule advanced by Respondent here, since that Court was well acquainted with the decisions of other courts regarding juror Bible consultation (13a-20a), but nevertheless concluded Bible consultation during the sentencing phase of Petitioner's trial amounted to an external influence on the jury's deliberations, and thereby deprived him of his Sixth Amendment rights under this Court's precedents. *See also* Sporn, 83 TUL. L. REV. at 842 ("Clearly established federal law on extraneous evidence and outside influence addresses the implications of a capital juror introducing the Bible into the jury room.").

acted unreasonably depended on the existence of disagreement among lower courts.

Moreover, under Respondent's logic, if one or more appellate courts determine this Court's precedents do not control in a given circumstance, then *no court* could properly conclude this Court has set forth "clearly established" law governing that situation. However, Respondent's reasoning is refuted by the fact that this Court sometimes concludes its preexisting decisions have clearly established an applicable rule of law after a lower court determined otherwise. *See, e.g.*, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Wiggins v. Smith*, 539 U.S. 510 (2003).

Third, Respondent's arguments appear predicated on an unduly narrow conception of what constitutes "clearly established" law as determined by this Court.

It is well-settled that under AEDPA the facts of a controversy need not be on "all fours" with the facts of this Court's prior decisions to fall within the ambit of clearly established case law. A lower court can be "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000); *see also Panetti*, 127 S. Ct. at 2858 ("even a general standard may be applied in an unreasonable manner"); *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) ("[AEDPA] permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced."); *Williams v. Taylor*, 529

U.S. 362, 407 (2000) ("[A] state-court decision also involves an unreasonable application of this Court's precedent if the state court . . . unreasonably refuses to extend [a legal] principle to a new context where it should apply."); *Carey*, 549 U.S. at 81 (Kennedy, J., concurring) ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.").[2] That is what occurred in the state court in this case, as the Fifth Circuit correctly observed. (14a, 22a-23a).

Fourth, Respondent's assertions about this Court's prior rulings on "external influences" should be viewed with skepticism in light of prior representations by the State of Texas to this Court.

In May 2008, this Court received a petition for certiorari in a direct appeal from a trial in Texas in which jurors consulted the Bible during capital sentencing deliberations. Opposing certiorari in that case, the State observed "[t]his Court has held that a defendant's Sixth Amendment right to an impartial jury is violated when exposed to outside influences during its deliberations," and opined that "[w]hether an influence is 'external' or 'internal' depends on the facts of each case." *Lucero v. Texas*, 07-1429, Respondent's Brief in Opposition 9. The State

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[2] The First Circuit's observation that this Court has "never decided a case involving a Bible in a jury room," *United States v. Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008), therefore lends no support to Respondent's insistence that the mere existence of a circuit split establishes "Supreme Court case law does *not* resolve this question." Br. Opp. 12 (emphasis in original).

approvingly quoted Judge King of the Fourth Circuit, who, in a dissent from the denial of *en banc* rehearing in another Bible consultation case, explained this Court's case law as follows:

> The external influences recognized by the [Supreme] Court in those decisions are factually diverse, but they share a single characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant . . . .

Id. at 10.[3] Then, having recited Judge King's distillation of this Court's "external influence" case law, the State declared: "This Court's rationale in this area is logical and *clear*." *Id.* (emphasis added).

The State proceeded to cite an example of the application of this Court's "clear" jurisprudence on "external influences" by quoting from the Fifth Circuit's decision ***in this very case***, including the appeals court's conclusion that "the jury's use of the Bible here amounts to a type of 'private communication, contact, or tampering' that is outside the evidence and law, which is exactly what *Remmer* sought to circumscribe." *Id.* at 10-11.

The State continued, explaining to this Court: "the passage Lucero complains of is not analogous to the Biblical instruction that certain murders should be punished by death, as in *Oliver* . . . ." *Id.* at 11.

Texas was correct when it contended in *Lucero* that this Court's "rationale" in its external influence

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[3] *See Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006).

cases is "clear," and when it identified the Fifth Circuit's decision in ***this case*** as exemplifying the application of that clear jurisprudence to juror Bible consultation during deliberations. *Id.* at 10-11. Respondent's dramatic about-face from *Lucero* should cast doubt upon its arguments against certiorari here.[4]

Fifth, Respondent's suggestion that this Court should deny certiorari in any case presented under AEDPA where there is a split among lower courts on the underlying constitutional claim is at odds with this Court's role as the ultimate arbiter of the meaning of the Federal Constitution, and responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Whether a course of conduct is inconsistent with clearly established law, as developed by this Court, is not determined by a head count of lower court opinions – and certainly cannot be resolved merely by identifying disagreements among lower courts. When numerous lower courts differ over the meaning and application of this Court's precedents, such differences are appropriately resolved by this Court.

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[4] In heads-I-win, tails-you-lose fashion, Respondent argues here the split at issue should "be addressed and resolved in a proper vehicle arising on *direct review*," Br. Opp. 1 (emphasis in original), after having urged the Court to deny review in *Lucero*, a direct review case, on the grounds it "is not the best vehicle . . . since the authorities to which Lucero refers are collateral attacks in the appellate courts, not direct appeals in the states' highest courts." *Lucero v. Texas*, 07-1429, Respondent's Brief in Opposition 13.

Finally, Respondent's brief dedicates considerable attention to a purported distinction between external information "affecting the factual record" and external information "shaping moral beliefs." *See* Br. Opp. 12-13, 16-17. While this supposed distinction is made without substantive discussion of this Court's decisions, Respondent's theory is a merits argument at best, and provides no basis for denying certiorari.[5]

II. RESPONDENT'S CLAIM THERE IS NO "GENUINE" OR "REASONED" CIRCUIT SPLIT REGARDING THE STANDARD FOR EVALUATING POTENTIAL PREJUDICE FROM JUROR BIBLE CONSULTATION IS UNAVAILING

Having acknowledged a "real, defined and openly acknowledged" split over Petitioner's first Question Presented (Br. Opp. 11), Respondent disputes that this case involves a second issue over which courts of appeals are divided. Br. Opp. 18.

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[5] Respondent's argument based on *Teague v. Lane*, 489 U.S. 288 (1989), Br. Opp. 14-15, is irrelevant, since retroactivity is not at issue. *Cf.* 19a n.12 (Court of Appeals: "we are not creating a new rule."). Respondent's "invited error" argument (Br. Opp. at 15-16) is specious – and so inconsequential that it was not even mentioned in the Fifth Circuit's decision. Petitioner's trial counsel did not request that the jury consult the Bible during deliberations, or "invite" erroneous judicial determinations. *Cf. United States v. Wells*, 519 U.S. 482, 488 (1997) (invited error doctrine "cannot dispositively oust this Court's traditional rule that we may address a question properly presented in a petition for certiorari").

In its decision below the Fifth Circuit acknowledged its departure from the Eleventh Circuit, observing "[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; Pet. 26.

Confronted with the fact of disagreement between courts of appeals about the appropriate standard for ascertaining prejudice from juror Bible consultation, Respondent resorts to describing the Eleventh Circuit's views in *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), as "meaningless dicta" (Br. Opp. 19), and arguing there is no "genuine" conflict (Br. Opp. 7, 18), or "reasoned split" (Br. Opp. 19), among the circuit courts.

Respondent's selective reading of *McNair* does not alter the fact that courts of appeals disagree about the appropriate standard in these cases, or obviate the need for guidance from this Court regarding the issue. *See* SUP. CT. R. 10(a).

III. THE FIFTH CIRCUIT'S ERRONEOUS APPLICATION OF AEDPA WARRANTS REVIEW

Respondent appropriately acknowledges the need for "careful scrutiny" of alleged errors in capital cases (Br. Opp. 22), but its defense of the Fifth Circuit's harmless error analysis in this case is misguided.

As an initial matter, Respondent mistakenly asserts that Petitioner complains "the state courts improperly truncated his factual examination" during juror testimony about consultation of the Bible. Br. Opp. 22.

Instead, Petitioner's contends the Fifth Circuit erred when it determined the state trial court "made a factual finding regarding the effect of the Bible on the jury." 27a. The state court made no factual finding about the *effect* of the Bible passages on the jurors' deliberations. Rather, the state trial court limited testimony to the "nature and the circumstances" under which the Bible was considered, and *specifically precluded* any testimony about "the effect it had upon the jurors." 129a-131a.[6] The state court obviously 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. *See* Pet. 35-36 & n.23.

Forced to concede the state court received no *direct* evidence regarding the effects of Bible consultation on any juror, Respondent defends the state court's "finding" as a "reasonable inference" based on the objective facts provided by four jurors who testified about juror consultation of the Bible in this case. Br. Opp. 23.

Respondent's effort to justify the Fifth Circuit's deference to the state court misses the mark for several reasons.

First, it ignores the threshold question of whether the state court actually "determin[ed] a "factual issue," as those terms are employed in AEDPA. *See* 28 U.S.C. § 2254(e)(1). As explained above, and in the Petition, the state court did not

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[6] Whether that limitation was proper is immaterial to the issues presented here.

actually find consultation of the Bible was without effect.[7]

Second, it ignores that one of the state court's assertions about the jurors' conduct is patently false. While the state court claimed "a conscientious, dedicated and car[ing] jury considered this case in accord with the Court's Charge and the instructions of the Court," as the Fifth Circuit itself observed, "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. This casts serious doubt on the "reasonableness" of any "inferences" drawn by the state court from juror testimony juror Bible consultation during deliberations in this case.[8] *See* Pet. 36 n.24; 28 U.S.C. § 2254(d)(2). And it certainly should negate "the traditional presumption that jurors are presumed to follow court's instructions," advocated by Respondent. Br. Opp. 24.

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[7] *See* 5a. The state court's opaque and unsubstantiated assertion the jurors rendered their verdict "uninfluenced by any outside influence of any kind shown the Court in this hearing" is not obviously a factual conclusion at all (*e.g.*, it does not indicate whether the Court considered the Bible an "outside influence"), let alone the kind of "finding" which requires deference under AEDPA.

[8] Even Respondent seems to hedge regarding whether Bible consultation affected the jury in this case, entertaining the possibility that the jury might have been influenced, but not "unduly" so. Br. Opp. 24. Similarly, after noting "the Bible was read and discussed only in small groups," Respondent contends this "supports an inference that the Bible was not used as a *material* factor in the overall discussions or decision . . . ." Br. Opp. 23-24 (emphasis added).

Third, Respondent erroneously defends the Fifth Circuit's finding of "harmless error" by observing "all jurors testified that the Bible was read and discussed only in small groups, never during full deliberations." Br. Opp. 23. The notion that this renders the Bible consultation here "harmless" is predicated on a misreading of this Court's precedents, which make clear a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors," *Parker v. Gladden*, 385 U.S. 363, 366 (1966), and can be deprived of a fair trial by juror conduct or an external influence that occurs outside the context of "full" deliberations. *See*, *e.g.*, *Remmer v. United States*, 347 U.S. 227, 229 (1954) (external communication with a single juror outside of jury deliberations).

Finally, Respondent disregards the Fifth Circuit's own qualms about the state court's ruling, including the appeals court's acknowledgments that "[t]he Bible . . . may have influenced the jurors simply to answer the questions in a manner that would ensure a sentence of death" (22a), and that consultation of the Bible "potentially tainted the jury's decision" (29a n.18).[9]

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[9] Respondent's defense of the state court's terse ruling, denying Petitioner a new trial based on juror Bible consultation during deliberations, at times also veers somewhat from the facts. For instance, Respondent represents: "[t]he state court determined that no juror would have changed his or her vote as a result of reading the Bible." Br. Opp. 20 n.1. This assertion lacks any citation because the state court made no such determination.

In short, there is considerable reason to doubt the Fifth Circuit correctly interpreted and applied AEDPA in this case. Petitioner respectfully suggests this Court should review the issue on its merits.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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