No.

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

PETITION FOR WRIT OF CERTIORARI

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May 13, 2008

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CAPITAL CASE

QUESTIONS PRESENTED

1. Are a defendant's Sixth Amendment rights violated where (i) the jury secretly brings a Bible into the jury deliberation room for assistance in deciding on a verdict in a capital case; and (ii) the jury foreman reads passages of the Bible in an attempt to persuade hold-out jurors to impose a sentence of death?

2. Did the Texas Court of Criminal Appeals err in relying on after-the-fact affidavits of jurors about the effect of the Bible on their deliberations as the basis for finding introduction of the Bible into the jury room to be "harmless error?"

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jimmie Urbano Lucero ("Petitioner" or "Mr. Lucero") respectfully requests this Court to issue a writ of certiorari to review the decision of the Texas Court of Criminal Appeals in this matter.

OPINIONS BELOW

On August 2, 2005, the 251st Judicial District Court for Potter County, Texas, denied Mr. Lucero's Motion for New Trial, in which he argued that his constitutional rights were violated when the jury in his capital trial took a Bible into the jury room and read certain scripture passages from that Bible before sentencing him to die. The trial court reasoned that the evidence of misconduct that Mr. Lucero submitted was inadmissible under Texas evidentiary rules and therefore could not support a motion for a new trial. Petitioner's Appendix ("Pet. App.") 40a-43a.

On February 13, 2008, on direct appeal, the Texas Court of Criminal Appeals issued an opinion affirming Mr. Lucero's conviction. The appellate court did not reach the merits of Mr. Lucero's claim that the jury's introduction of the Bible to the jury room and consideration of Bible passages violated his rights under the Sixth and Eighth Amendments. Instead, the Court of Criminal Appeals concluded that the presence of the Bible and its reading was "harmless error" because post-trial affidavits from the jurors stated that their decision was not affected by the reading of the Bible and that Mr. Lucero

received a fair trial. The Texas Court of Criminal Appeals' opinion is reported at 246 S.W.3d 86 (Tex. Crim. App. 2008), and is reprinted at pages 1a-39a of Petitioner's Appendix to this Petition.

JURISDICTION

The Texas Criminal Court of Appeals issued its decision on February 13, 2008. Pet. App. 39a. That decision became final on February 28, 2008. Tex. R. Civ. P. 79.1 (creating time limits for requests for panel rehearing). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which are reprinted at Pet. App. 121a-122a.

STATEMENT OF THE CASE

On May 26, 2005, Mr. Lucero was sentenced by the 251st District Court, Potter County, Texas, to die by lethal injection for the murders of Maria Fabiana Robledo, Maria Manuela Robledo, and Pedro Robledo on September 6, 2003. The court's sentence followed less than five hours of deliberations by the jury in the penalty phase of his capital trial. Pet. App. 2a, 19a n.9.

A. Mr. Lucero's Sixth Amendment Rights Were Violated When The Jury Foreman Took A Bible Into The Jury Room And Read Passages From That Bible To Coerce Two Jurors Into Sentencing Mr. Lucero To Death.

After the jury's verdict in the penalty phase, Mr. Lucero's appellate counsel, who happened to be following the trial proceedings, interviewed several members of the jury. Pet. App. 61a. One of the jurors informed Mr. Lucero's counsel that during deliberations in the punishment phase of the trial, the jury foreman, apparently unbeknownst to the trial court, brought a Bible into the jury room and read scripture to the other members of the jury relating to "a Christian's duty to obey, conform and consent to the will and laws of man." Pet. App. 47a.

The juror also stated that the foreman read the scripture immediately after the foreman held a "straw vote" that revealed that two of the jurors were in favor of sentencing Mr. Lucero to life in prison rather than death. After listening to the Bible reading, however, those two jurors changed their minds and voted to sentence Mr. Lucero to death.

The juror signed an affidavit attesting to the foregoing facts, and others, on June 23, 2005. The affidavit states:

I served as juror in the case styled The *State of Texas v. Jimmie Urban* [Urbano] *Lucero* in the 251st District Court in Potter County, Texas. During jury deliberations at the punishment phase of the trial, I recall that the jury foreman suggested that we take a "straw vote" or a preliminary vote on the two special issues to see where we, as the jury[,] were.

[¶] The initial vote on both special issues showed 10 jurors were in favor of answering the questions in a way in which the death penalty would be imposed. The remaining two jurors were unwilling to answer those questions in a way in which the death penalty would be imposed. It was a[t] this point in time that the jury foreman took out a Bible which he had with him.

[¶] He read some scripture from the Bible. This scripture had to do with a Christian's duty to obey, conform and consent to the will and laws of man. This reading of scripture occurred before the final votes were taken by the jury on the two special issues regarding the probability that the Defendant would commit criminal acts of violence in the future and the sufficiency of mitigating evidence which would justify

> a life sentence in place of the death penalty.
>
> [¶] Although there was not a unanimous vote by the jury as a whole on the two issues before the reading of the scripture, the vote was unanimous on both special issues some time after the reading of scripture. The foreman of the jury then informed the bailiff and the Court that we had reached a unanimous verdict which called for the death penalty against Jimmie Lucero.

Pet App. 47a-48a.

The State of Texas later obtained sworn affidavits from all twelve jurors, who confirmed Mr. Lucero's evidence that:

- The jury foreman read scripture from the Bible to members of the jury during sentencing deliberations;

- The foreman read the scripture at a time when deliberations were ongoing and two jurors were not in favor of sentencing Mr. Lucero to death; and,

- The jury did not reach a unanimous decision to sentence Mr. Lucero to death until after the scripture was read.

Pet. App. 9a-12a, 99a-100a.

Based on the affidavits, at least one of the Bible passages read to the jury was the New International Version of Romans 13:1-6, which states:

> Submission to the Authorities
>
> 1 Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. 2 Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. 3 For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. 4 For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. 5 Therefore, it is necessary to submit to

> the authorities, not only because of possible punishment but also because of conscience. 6 This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.

Pet. App. 99a-100a.

B. The Trial Court Denies Mr. Lucero's Motion For New Trial.

On June 23, 2005, Mr. Lucero filed a Motion for New Trial in the trial court on the basis of the juror affidavit that he obtained. Mr. Lucero requested an evidentiary hearing to adduce all of the facts relating to the introduction of the Bible to the jury room, and to determine the extent of the Bible's influence on the jury deliberation process. Mr. Lucero argued that the foreman's reading of the Bible to the jury "infringed on each individual juror's duty to base their verdict only on evidence received at trial," and thus was "detrimental to Defendant's constitutional guarantee that the verdict at the punishment phase of the trial be truly unanimous, free from coercion and the product of the juror's individualized assessment of evidence lawfully admitted into [sic] during the punishment phase of the trial." Pet. App. 45a. Mr. Lucero asked the trial court to hold an evidentiary hearing on the jury's consideration of the Bible, and ultimately to order a new trial. *Id.* 46a.[1]

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[1] Mr. Lucero filed an Amended Motion for New Trial on June 27, 2005, in which he added a claim under *Tennard v. Dretke*,

On June 30, 2005, the trial court questioned the admissibility of the juror affidavit, and thus whether it could support a motion for a new trial. The court expressed its view that Rule 606(b) of the Texas Rules of Evidence limits juror testimony to two specific situations: "(1) whether any outside influence was improperly brought to bear upon a juror; and (2) to rebut a claim that the juror was not qualified to serve." The trial court deferred ruling on Mr. Lucero's motion, and instead asked the parties to submit briefs addressing the admissibility of the juror affidavit. Pet. App. 49a-51a.

Mr. Lucero filed his initial brief on July 14, 2005. Pet. App. 52a-63a. Mr. Lucero argued that the juror affidavit was admissible, and therefore was a sufficient basis for a motion for new trial, because the Bible was an improper "outside influence" under Rule 606(b) of the Texas Rules of Evidence. Mr. Lucero directed the court to several cases from other jurisdictions in which the courts set aside the defendant's death sentence and ordered new trials based on the jury's consideration of the Bible during deliberations, including one case in which the court held that the jury's consideration of the Bible violated the defendant's constitutional rights. *Id.* 56a-57a.

In its response to the trial court, the State of Texas argued that the Bible is not an "outside

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542 U.S. 274 (2004). Pet. App. 117a-120a. That claim is immaterial to this Petition.

influence." Pet. App. 71a-80a, 82a-83a. The State also argued that any error that was caused by the jury's consideration of the Bible was harmless. *Id.* 83a-85a.

In support of the latter argument, the State submitted affidavits from all twelve members of Mr. Lucero's jury, which, as noted above, confirmed all of the material facts relating to the foreman's reading of the Bible to the jury. The State argued, however, that any constitutional error caused by the foreman's reading of the Bible was harmless. All of the affidavits submitted by the State contained boilerplate statements that the foreman's reading of the Bible did not cause any jurors to change their vote, that Mr. Lucero received a fair and impartial trial, and that the reading of the scripture did not violate any of Mr. Lucero's rights. *See, e.g.*, Pet. App. 9a, 12a, 14a, 101a.

The trial court denied Mr. Lucero's Motion for New Trial on August 2, 2005. The trial court did not address the merits. Instead, the trial court denied the motion due to "public policy" concerns:

> While I recognize that "sometimes trial courts choose to *wisely* make a full record of factual matters in death penalty cases", [sic] I believe that such action is contrary to the public policy being promoted by Rule 606(b) of the Texas Rules of Evidence, in that it would subject the jurors to the rigors of direct and cross examination regarding

> their deliberations. Such public scrutiny of confidential deliberations would discourage open discussion among jurors and could potentially be threatening to the entire jury process.
>
> To conduct a hearing simply to make a record, without any expectation that the hearing would result in admissible evidence, does not protect jurors from the inconvenience and potential harassment that such a hearing would impose. Therefore, under the present circumstances, I do not believe that the defendant has raised an issue which would require an evidentiary hearing.

Pet. App. 42a (emphasis in original).

C. Mr. Lucero's Direct Appeal Is Denied.

Mr. Lucero filed a notice of appeal to the Texas Court of Criminal Appeals on August 12, 2005. Pet. App. 115a. Mr. Lucero asserted seven points of error from the trial court, including two that arose from the jury foreman's reading of the Bible to the jury:

> 1. The trial court abused its discretion in denying Mr. Lucero's request for an evidentiary hearing on the jury's consideration of the Bible; and,

2. The foreman's reading of the Bible violated Mr. Lucero's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

Pet. App. 2a & n.2, n.3.

In its response brief, the State of Texas reasserted its argument that the juror affidavit that Mr. Lucero submitted to the trial court was inadmissible under Texas Rule of Evidence 606(b), and further argued that the juror affidavits it had obtained proved that any constitutional error was harmless. Additionally, the State argued that Mr. Lucero had waived any constitutional claim, and that the jury's consideration of the Bible in sentencing Mr. Lucero to death did not violate his constitutional rights. Pet. App. 18a-19a.

On February 13, 2008, the Texas Court of Criminal Appeals rejected all of Mr. Lucero's claims, including his Sixth Amendment claim, and otherwise affirmed his conviction and sentence. Pet. App. 19a-20a, 39a.

The appellate court found that it was "unnecessary to decide whether the jury foreman's Bible reading in this case was an 'outside influence,' because this record presents no 'reasonable grounds' that this Bible reading affected the jury's verdict." Pet. App. 19a.

The appellate court based its decision on the juror affidavits that the State submitted to the trial court. Pet. App. 9a-16a, 19a. The court found that the twelve "affidavits clearly indicate that the scripture had no effect on the jury's verdict rendered some hours later," and thus the court could not "conclude that the trial court abused its discretion in declining to hold a hearing on appellant's new trial motions." Pet. App. 19a-20a. The court further concluded that "any constitutional error that appellant may have preserved as a result of this Bible reading was harmless beyond a reasonable doubt." *Id.* 20a. The court also suggested that the jury's consideration of the Bible did not violate the Sixth Amendment or Eighth Amendment in any event. *Id.* 20a n.10. The appellate court did not address, and did not rest its decision on, any consideration of Texas evidentiary law or waiver.

REASONS FOR GRANTING THE WRIT

The Court should review the decision below for two reasons.

First, this Court should resolve a split among the circuits over whether the Bible is extrinsic evidence and/or an "outside influence" that may not be brought into the jury room for assistance in reaching a verdict under the Sixth Amendment. The First and Eleventh Circuits have applied the long-standing precedents of this Court to correctly determine that the introduction of the Bible to the jury room for use in deliberations violates the right to an impartial jury, the right of confrontation, and

the right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments. The Fourth and Ninth Circuits, however, have determined that the introduction of the Bible – or at least specific verses of the Bible – to jury deliberations does not violate the Sixth Amendment because the Bible's content is a matter of "common knowledge" or a "cultural precept."

This case provides an excellent opportunity for the Court to resolve the split by reaffirming its long-standing precedents that the Sixth Amendment guarantees that jury verdicts in criminal cases will be based on the evidence developed at trial, and nothing else. In doing so, it will save the courts from making the sort of *ad hoc* factual determinations that the decisions of the Fourth and Ninth Circuits require.

Second, the Court should clarify that federal law does not allow courts to consider juror affidavits about the deliberative process in determining whether a constitutional error is harmless. This case is particularly compelling on this issue because the lower court denied Mr. Lucero's Sixth Amendment claim on the basis of juror affidavits even though the trial court denied Mr. Lucero an evidentiary hearing to test the veracity of those affidavits.

I. The Court Should Resolve A Split Among The Circuits Over Whether The Sixth Amendment Prohibits Jurors From Bringing The Bible Into The Jury Room For Use In Deliberations.

This Court has long held that the Sixth Amendment guarantees that a jury's verdict will be based solely on the evidence developed at trial, and be free from any and all "extraneous influences." Despite the clarity of the Court's decisions, however, the circuit courts are split over whether the Bible is an external influence that the Sixth Amendment prohibits.

In the decision below, the Texas Court of Criminal Appeals denied Mr. Lucero's claim that his Sixth Amendment rights were violated when the jury foreman brought a Bible into the jury room and used it to coerce two jurors into voting for the death penalty. Although the court below found it "unnecessary" to reach the merits of Mr. Lucero's claim, it cited with approval a decision from the Ninth Circuit, which stated that a defendant's Sixth Amendment rights are not violated where a juror reads passages from the Bible that are matters of "common knowledge" or "notions of general currency." *Fields v. Brown*, 503 F.3d 755, 779-80 (9th Cir. 2007). The Fourth Circuit has reached the same result, albeit for a different reason. It has held that the Bible is an "internal influence," not an "external influence," and thus not prohibited by the Sixth Amendment. *Robinson v. Polk*, 438 F.3d 350, 361-66 (4th Cir. 2006).

On the other hand, the First and Eleventh Circuits have stated that the Sixth Amendment prohibits the introduction of the Bible to the jury room for use in deliberations. *See United States v. Lama-Ramirez*, 519 F.3d 76, 89 (1st Cir. 2008); *McNair v. Campbell*, 416 F.3d 1291, 1307-08 (11th Cir. 2005).

As demonstrated below, the only rule that can be squared with this Court's Sixth Amendment jurisprudence, and that is capable of being applied on a consistent basis, is one that treats the Bible as an external influence that may not be consulted by the jury.

A. This Court Has Consistently Held That The Sixth Amendment Prohibits A Jury From Bringing Any And All Outside Materials Into The Jury Room For Use In Deliberations.

The Sixth Amendment guarantees two fundamental rights relevant to this case. The fundamental rights guaranteed by the Sixth Amendment apply both to the guilt and punishment phases of trial. *Morgan v. Illinois*, 504 U.S. 719, 727-28 (1992).

First, the Sixth Amendment guarantees the accused the right to a trial before an "impartial jury." U.S. Const. amend. VI. That right "guarantees . . . a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). As this Court stated over a century ago, "[i]t is vital in

capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892).

Second, the Sixth Amendment guarantees the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause requires, among other things, a jury's verdict to be "based on the evidence developed at trial." *Irvin*, 366 U.S. at 723. It also "necessarily implies at the very least that the 'evidence developed' against a defendant shall 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." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Extrinsic information or influences upon the jury's deliberations are presumptively prejudicial. *Remmer v. United States*, 347 U.S. 227, 229 (1954).

This Court has recognized at least three times that the contamination of a jury's deliberations with an extraneous influence violates the Sixth Amendment. In *Parker v. Gladden*, 385 U.S. 363, 364 (1966), the Court found that statements made by a bailiff to the jury were "outside influence[s]" that violated the defendant's right to an impartial jury. Similarly, in *Turner*, 379 U.S. at 468, the Court held that a capital defendant was denied his right to an impartial jury where two deputy sheriffs, who gave testimony leading to the defendant's conviction, "freely mingled and conversed with jurors." Also, in *Remmer*, 347 U.S. at 228-29, the Court held that

"[t]he integrity of the jury proceedings" was "jeopardized by [an] unauthorized invasion[]" where an unnamed person remarked to a juror that "he could profit by bringing a verdict favorable to the petitioner."

In addition, although the Court did not directly apply the Sixth Amendment in *Mattox*, the Court stated that the trial court erred by failing to consider affidavits stating that a newspaper and other extraneous influences were introduced to the jury room. *Mattox*, 146 U.S. at 150-51.

The foregoing decisions of this Court stand for the proposition that a jury's verdict must be based on the evidence developed at trial, the court's instructions, and nothing else.

Applying that unequivocal rule to this case, Mr. Lucero's Sixth Amendment rights were violated when the jury foreman secretly brought the Bible into the jury room and read the Bible aloud to the rest of the jury – including two jurors who voted against the death penalty in a preliminary vote – to persuade those jurors to change their votes. Pet. App. 47a-48a. Under *Remmer*, 347 U.S. at 229, the jury's consideration of the Bible was presumptively prejudicial to Mr. Lucero.

This Court should conclude that the Bible's presence in the jury room and use during deliberations violated Mr. Lucero's rights as an "extraneous influence" without even considering the particular passage that was read. But when one

considers the particular passage read in this case – Romans 13:1-6 – it illustrates the substantial prejudice visited upon Mr. Lucero.

The first verse of Romans 13, which is quoted *supra* at pages 6-7, instructs man to "submit himself to the governing authorities, for there is no authority except that which God has established." Moreover, the fourth verse makes clear that the "governing authorities" to which Romans 13:1 speaks are those who are charged with enforcing the law. Thus, in the context of a criminal trial such as Mr. Lucero's, the "governing authorities" are the prosecutors, as they are in charge of enforcing the laws of the State. One state's highest court has interpreted Romans 13 in exactly this manner. *People v. Harlan*, 109 P.3d 616, 631 (Colo. 2005) ("The Romans text instructs human beings to obey the civil government. Here, the State of Colorado was seeking the death penalty.").

Furthermore, the second verse of Romans 13 warns that "he who rebels against authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves." Again, the foreman's reading of that passage effectively instructed the jurors in Mr. Lucero's case that if they did not comply with the prosecutors' request for the death penalty, they would be punished by God.

Thus, the biblical verses that the foreman read aloud effectively instructed the jurors to ignore the evidence that was presented at trial and the court's instructions, and instead submit to the State's

authorities. The prejudicial effect of the reading was compounded by the timing of the reading – *i.e.*, at a time when at least two of the jurors were opposed to sentencing Mr. Lucero to death.

B. The First And Eleventh Circuits Have Stated That The Bible Is An Extraneous Material That May Not Be Introduced Into Jury Deliberations.

Consistent with this Court's decisions in *Turner*, *Parker*, and *Remmer*, the majority of courts that have considered whether an accused's Sixth Amendment rights are violated by the jury's use of the Bible in deliberations, including the First and Eleventh Circuits, have answered that question in the affirmative. In doing so, they have treated the Bible like any other extraneous influence, which is flatly prohibited from consideration by the jury under this Court's precedents.

In *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), the defendant was convicted of capital murder in Alabama state court. The undisputed evidence showed that the jury foreman brought a Bible into the jury room and read aloud from it during deliberations. *McNair*, 416 F.3d at 1301. In his federal habeas petition, the defendant asserted that the Bible was "extraneous evidence" and that the jurors' consideration of it during deliberations deprived him of his right to a fair trial under the Sixth Amendment. *Id.* at 1301-02.

Applying this Court's decisions in *Turner* and *Remmer*, the Eleventh Circuit determined that the Bible is like any other evidence that does not "come from the witness stand" – it is "extrinsic evidence" that the jury may not consider under the Sixth Amendment. *Id.* at 1307-08. The court also held that the constitutional violation that occurred when the jury considered the Bible during deliberations was "presumptively prejudicial." *Id.* at 1307 (citing *Turner*, 379 U.S. at 473). The court ultimately found that the state satisfied its heavy burden of rebutting the presumption of prejudice and found that the error was harmless. *Id.* at 1308-09. But the Eleventh Circuit's ruling on the merits of the defendant's claim was clear: the introduction of the Bible to jury deliberations was a violation of the defendant's Sixth Amendment rights.

The First Circuit reached a similar conclusion in *United States v. Lara-Ramirez*, 519 F.3d 76 (1st Cir. 2008). In that case, the district court declared a mistrial when it learned that a juror brought the Bible into the jury room and that the Bible was used in deliberations. *Lara-Ramirez*, 519 F.3d at 80-81. The defendant moved to dismiss his new indictment on the basis of double jeopardy, arguing that the trial court did not consider alternatives to a mistrial during the initial trial. The district court denied the defendant's motion to dismiss, and the defendant was retried and convicted. *Id.* at 81-82. On appeal to the First Circuit, the defendant argued that his conviction violated the Double Jeopardy Clause. *Id.* at 82.

In determining whether the district court adequately explored alternatives to a mistrial, the First Circuit found that the district court erred by "treat[ing] the Bible in the jury room as qualitatively different from other types of extraneous materials or information that may taint a jury's deliberations." *Id.* at 88; *see also id.* at 89 (finding that "no special rule exists when the Bible is involved"). That finding is consistent with this Court's Sixth Amendment jurisprudence and the Eleventh Circuit's decision in *McNair*, which do not distinguish between the type or nature of extrinsic evidence in determining whether it violates an accused's rights under the Sixth Amendment. If the evidence is outside the record, a constitutional violation has occurred.

In addition, several other courts have vacated jury verdicts based on the introduction of the Bible to jury deliberations, or otherwise suggested that the use of the Bible would be error. For instance, in *People v. Harlan*, 109 P.3d 616 (Colo. 2005), the Colorado Supreme Court affirmed the vacation of a death sentence where the trial court found that jurors "introduced one or more Bibles, a Bible index, and notes of Bible passages into the jury room for consideration by other jurors." *Id.* at 629. The court reasoned that since the Bibles had not been admitted into evidence, they "were extraneous and their introduction was improper and constituted misconduct." *Id.*

The court then examined "how the extraneous information related to critical issues in the case," that is, the propriety of the death sentence, "the

degree of authority represented by the extraneous information," how the information was acquired, whether it was shared, whether the information was considered prior to the jury reaching a verdict, and whether there was a reasonable possibility that the biblical passages would influence a typical juror to the defendant's detriment. *Id.* at 630-31.

Noting that the Bible contains codes of laws and morality, *id.* at 630, the Colorado Supreme Court concluded that the Bible verses, including Romans 13, "created a reasonable possibility that a typical juror would have been influenced to vote for a death sentence instead of life." *Id.* at 631. The court consequently affirmed the vacation of the jury's death sentence. *Id.* at 634.

Other state courts have strongly suggested that consideration of the Bible is an improper extraneous influence. *See, e.g.*, *People v. Williams*, 148 P.3d 47, 79 (Cal. 2006) ("[R]eading aloud from the Bible or circulating biblical passages during deliberations is misconduct."), *cert. denied*, 128 S. Ct. 179 (2007); *Glossip v. State*, 29 P.3d 597, 604-05 (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."); *State v. Kelly*, 502 S.E.2d 99, 103-04 (S.C. 1998) (finding it "improper" for a juror to possess the pamphlet "God, Law, and Capital Punishment" even during guilt deliberations); *Jones v. Francis*, 312 S.E.2d 300, 303 (Ga. 1984) (stating that a court erred by permitting a Bible into jury deliberations); *State v. Harrington*,

627 S.W.2d 345, 350 (Tenn. 1981) (stating that reading "biblical passages" in deliberations "of course, was error which would have required a new sentencing hearing" even absent other errors).

C. The Fourth And Ninth Circuits Have Incorrectly Interpreted This Court's Sixth Amendment Precedents.

In this case, however, the Texas Court of Criminal Appeals erred by siding with the reasoning of the Fourth and Ninth Circuits, which have held that it is constitutionally permissible for jurors to consider the Bible in their deliberations in certain fact-specific circumstances. *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007); *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006). Those cases depart from this Court's clear precedents that require juries to base their verdicts on the evidence developed at trial and essentially permit a free-for-all for jury deliberations in future capital cases.

In *Fields*, 503 F.3d at 777-78, on the evening after deliberations began in the penalty phase of the defendant's trial, the jury foreman consulted the Bible and created a list of verses that are "for" the imposition of the death penalty, and a list of verses that are "against" it, and shared his notes with some of the jurors the following day. Shortly thereafter, the jury reached a unanimous decision to impose the death penalty. The defendant sought habeas relief, arguing that the notes were extraneous materials forbidden from jury consideration by the Sixth Amendment. *Id.* at 777.

On appeal from the district court, the Ninth Circuit recognized the "core principle" that "evidence developed against a defendant must come from the witness stand." *Id.* at 779. However, the Ninth Circuit stated that whether a particular outside influence violates the Sixth Amendment involves a "fact-specific" inquiry that requires courts to determine whether the influence is "common knowledge." *Id.* Although it also found that any error was harmless, *id.* at 781-83, the Ninth Circuit found that the particular biblical passages that the jury considered in *Fields* were not outside influences because they were "commonly known points" or "notions of general currency that inform . . . moral judgment." *Id.* at 780.

Two judges in *Fields* dissented to address the problems with the majority's Sixth Amendment analysis. Judge Gould found that the majority's reliance on "notions of general currency that inform moral judgment" was unpersuasive and more difficult to apply than the majority believed: not *every* word in the Bible is common knowledge, and the notion of common knowledge seemed to encompass not only ethical principles from Christianity, but also ethical principles from other religions and philosophers, and "street-corner wisdom." *Id.* at 784-86 (Gould, J., dissenting in part). Judge Berzon noted that "federal and state appellate courts generally agree . . . that a jury engages in the unconstitutional consultation of extrinsic material by introducing the Bible into deliberations during a capital trial." *Id.* at 796

(Berzon, J., dissenting). He also found that the majority's notion of common knowledge "disregards the careful balance between the various precepts regarding jury deliberations" in American law. *Id.* at 796.

The Fourth Circuit in *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006), also concluded that the Sixth Amendment does not prohibit the use of the Bible in jury deliberations. In *Robinson*, the defendant presented evidence that one of the jurors obtained a Bible from a bailiff, and read an "eye for an eye" passage to the rest of the jurors to convince them to vote for the death penalty. *Id.* at 357-58. The defendant argued in the trial court that the juror's reading of the Bible violated his Sixth Amendment rights and requested a hearing, which was denied. The defendant's claim was rejected both by a state post-conviction proceeding court, and by a federal district court in a federal habeas corpus proceeding. *Id.* at 354.

Like the Ninth Circuit, the Fourth Circuit held that the defendant's Sixth Amendment rights were not violated by the jury's consideration of the Bible, albeit by engaging in a different analysis. The Fourth Circuit held that the Sixth Amendment prohibits only "external influences" on the jury, and thus does not prohibit "influences internal to the deliberation process." *Id.* at 363.

The Fourth Circuit found the Bible to be an "internal influence" because it concluded that the Bible was not "extraneous prejudicial information."

Id. at 361 & n.13.[2] The court also concluded that the Bible was not "an outside influence upon the partiality of the jury," because "the reading of the Bible passages invites the listener to examine his or her own conscience from within." *Id.* at 363. Like the Ninth Circuit's decision in *Fields*, the Fourth Circuit also suggested that the Bible may be considered by the jury because it is a "cultural precept[]," which courts "cannot expect jurors to leave . . . at the courthouse door." *Id.* at 366 n.18.

The Fourth Circuit's opinion was met with a strong dissent arguing that the majority opinion improperly and "artificially" construed this Court's decisions in *Parker*, *Turner*, and *Remmer* establishing the Sixth Amendment's "unmistakably clear" prohibition on external influences on the jury. *Id.* at 371 (King, J., dissenting). The dissent argued that the majority's suggestion that the Bible was permissible because it "invites the listener to examine his or her own conscience from within" was both unsupported by precedent and wrong on the facts, as "the Bible is an authoritative code of morality – and even law – to a sizeable segment of our population." *Id.* at 374.[3]

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[2] The Fourth Circuit expressly noted that its decision "could possibly be different on de novo review," as opposed to AEDPA-governed habeas corpus review. *Id.* at 363.

[3] A denial of rehearing *en banc* prompted another opinion disagreeing with the majority's reasoning, stating that the deliberative use of a Bible violated the Sixth Amendment. *Robinson v. Polk*, 444 F.3d 225, 226 (4th Cir. 2006) (Wilkinson, J., concurring in denial of rehearing *en banc*) (agreeing with

The Fourth and Ninth Circuits, therefore, have split with the First and Eleventh Circuits, as well as the vast majority of state courts that have considered the issue, in determining that the Bible is not an outside influence that the Sixth Amendment prohibits.

D. The Court Should Clarify That The Sixth Amendment Prohibits The Use Of The Bible In Jury Deliberations.

As noted above, this Court's decisions in *Turner*, *Parker*, and *Remmer* created a clear rule: the Sixth Amendment requires jury verdicts to be based solely on the evidence developed at trial and nothing else. Any and all extraneous materials – whether additional evidence or outside influences – violate an accused's right to an impartial jury, the right of confrontation, and more generally, the right to a fair trial.

While the First and Eleventh Circuits have applied that rule, the Fourth and Ninth Circuits have ignored this Court's precedents and held that the Sixth Amendment allows jurors to consider extraneous materials as long as they are matters of "common knowledge," "notions of general currency," or are "cultural precepts." There are several problems with those decisions.

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majority opinion solely on grounds of AEDPA standard of review).

First, as noted, the Fourth and Ninth Circuits' creation of a permissible type of extraneous materials in jury deliberations is plainly inconsistent with this Court's long-standing prohibition against any and all extraneous materials.

Second, the Fourth and Ninth Circuits threaten to sink the federal and state courts into a morass of *ad hoc* fact-intensive decisions about what types of materials are matters of "common knowledge," "notions of general currency," or "cultural precepts." Even within the Bible itself, courts would be called upon to determine which verses are "common knowledge," and which are not. *Fields*, 503 F.3d at 784-85 (Gould, J., dissenting).

Moreover, courts would be placed in the difficult position of deciding which texts, both religious and academic, are "notions of general currency." *Fields*, 503 F.3d at 785 (Gould, J., dissenting). As Judge Gould remarked, that would be "unworkable" in practice:

> Is it solely ethical principles from the familiar Bible? Does it also include ethical principles from other religions? Does it include ethical principles from philosophers? Does it include street-corner wisdom such as might be found in popular novels of any number of current authors whose books line the supermarket shelves?

Id. at 785-86; *see also Robinson*, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., dissenting from denial of reh'g *en banc*) ("The jury room is not the place to debate the respective merits of the Bible, the Koran, the Torah, or any other religious scripture that Americans revere . . . ."). Ultimately, if courts permit juries to consider verses from the Bible, and not texts from other religions, it would "introduce[] something akin to an Establishment Clause violation into the heart of the jury room." *Fields*, 503 F.3d at 785 (Gould, J., dissenting).

The decisions of the Fourth and Ninth Circuits also would produce conflict over the use of other types of texts in jury deliberations, for example, English dictionaries, medical dictionaries, and almanacs. *See, e.g., Fields*, 503 F.3d at 783 (stating that a jury's consideration of a dictionary was error); *Gibson v. Clanon*, 633 F.2d 851, 852-53 (9th Cir. 1980) (reversing a conviction based on improper consideration of medical dictionary's statements concerning the rarity of AB blood); *Haight v. Aldridge Elec. Co.*, 575 N.E.2d 243, 253-55 (Ill. App. Ct. 1991) (ordering a new trial because of a juror's improper use of an almanac); *see also Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1241 (10th Cir. 2000) (collecting cases on the use of extrinsic materials).

A decision in this case that reaffirms the Court's decisions in *Turner*, *Parker*, and *Remmer*, as well as those of the First and Eleventh Circuits, will avoid this uncertainty and uneven applications of the

rule, both of which are particularly important to avoid in capital cases.

II. The Texas Court Of Criminal Appeals Erred By Relying On Subjective Juror Affidavits To Find That The Introduction Of The Bible To Jury Deliberations Was Harmless Error.

The Texas Court of Criminal Appeals also erred when it relied on untested subjective statements in post-trial affidavits from Mr. Lucero's jurors, who had not testified or been subjected to cross-examination, to conclude that the introduction of the Bible to the deliberations had "no effect" on the jury's decision to vote for death. Pet. App. 19a. Federal law does not permit inquiry into juror deliberations and thinking to assess the effect of a trial error, particularly a structural error, on the verdict. Moreover, even if it were proper to consider the jurors' subjective testimony of the Bible's effect on their votes (which it is not), the Texas courts still would have erred because they failed to give Mr. Lucero either an evidentiary hearing to cross-examine the jurors about their affidavits or some other means to test the veracity of the statements in the affidavits.

A. The Texas Courts Failed To Use An Objective Inquiry To Determine Whether The Bible Was Harmless.

Federal constitutional error in a trial requires reversal on direct appeal unless that error is

harmless beyond a reasonable doubt. *Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007). To determine whether an error is harmless beyond a reasonable doubt, courts must use an objective test, not a "subjective enquiry into the juror's minds"; a court inquires into "the force of the evidence presumably considered by the jury" and the objective nature of the error. *Yates v. Evatt*, 500 U.S. 391, 404-05 (1991), *overturned on other grounds*, *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). As a matter of federal law, the prejudicial effect of an error does not depend upon "the idiosyncrasies of the particular decisionmaker." *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984) (finding the testimony of a sentencing judge that he would have imposed the same sentence absent defendant's ineffective assistance of counsel irrelevant to whether the defendant was prejudiced by counsel's performance).

An objective test also must be used to assess the effect of an error occurring during jury deliberations. The testimony of the jurors themselves may be used only for the limited purpose of establishing the "circumstances" of an extraneous influence on the jury (such as to establish that an external influence was brought into the jury room or that an improper contact was made). *Smith v. Phillips*, 455 U.S. 209, 216 (1982) (citing *Remmer*, 347 U.S. at 230). But juror testimony cannot be considered in determining whether the jurors would have reached the same decision absent the extraneous influence. In other words, the *effect* of the extraneous influence can only be assessed using

objective standards. *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983). As this Court explained in *Rushen*:

> A juror may testify concerning . . . whether extraneous prejudicial information was improperly brought to the juror's attention. But a juror generally cannot testify about the mental process by which the verdict was arrived. Thus, the California Court of Appeal refused to consider certain testimony in arriving at its decision that respondent had not suffered prejudice beyond a reasonable doubt.

Id. (internal quotations and citations omitted).

For these reasons, courts have used an objective test to determine whether the improper use of a Bible in jury deliberations prejudiced a defendant. *See, e.g.*, *Fields*, 503 F.3d at 781 n.22 ("[T]he question of prejudice from extrinsic information is an objective one, not a subjective one."); *McNair*, 416 F.3d at 1307-08 (listing "factors to be considered," none of which is a juror's private opinion of the Bible's effect). The objective nature of the test also is required by evidentiary law, which generally prohibits inquiry into the decision-making processes of the jury. *See, e.g., Virgil v. Zavaras*, 298 F.3d 935, 941 (10th Cir. 2002) (citing Fed. R. Evid. 606(b)); *Harlan*, 109 P.3d at 631 ("Neither do we hold that consideration of the [Bible] actually produced the death penalty verdict. To the contrary, [Colorado Rule of Evidence] 606(b) prevents us from

considering any juror testimony that addresses the jury's deliberations or a juror's thought process.").

In this case, the Texas Court of Criminal Appeals violated Mr. Lucero's Sixth Amendment and due process rights by relying on the subjective statements in the juror affidavits to conclude that introduction of the Bible was harmless because "[t]he affidavits clearly indicate that the scripture had no effect on the jury's verdict rendered some hours later." Pet. App. 19a. In reaching that conclusion, the lower court relied on statements in the affidavits that the jurors were not affected by the jury foreman's reading of Romans 13 in reaching their votes for death, and that they would have voted the same way absent the scripture reading. *See, e.g., id.* 14a.

Federal law prohibited the lower Texas courts from relying on the jurors' after-the-fact assurances that the Bible did not affect their thought processes. Instead, the Texas Court of Criminal Appeals should have ignored the subjective aspects of the juror affidavits and squarely examined the text that was introduced to the jury room and its likely effect on the average juror.

B. The Bible Passage Read During Deliberations, Romans 13:1-6, Was Not Harmless.

The State admits that a Bible was brought into the jury room and that at least one Bible passage, Romans 13:1-6, was read directly to jurors

in the jury room during jury deliberations at a delicate time when at least two jurors were holding out for life.

The Texas Court of Criminal Appeals found that Romans 13:1-6, which is quoted above at pages 6-7, was "essentially an admonishment to follow man's law (and, therefore, duplicated what was already in the court's charge)." Pet. App. 19a. But the Texas court's attempt to equate Romans 13:1-6 with the trial court's charge is facile. If the lower court had conducted an objective assessment of the passage, it would have (or should have) concluded that its reading was prejudicial to Mr. Lucero on the facts of this case in at least three respects.

First, by introducing the Bible to the jury room and reading it during deliberations, the foreman introduced an entirely new set of laws and instructions from what many jurors would consider to be a higher authority than the trial court. Many people of religious background, presumably including many of the jurors here, consider God to be the ultimate Authority and consider the Bible to reflect God's precepts. Thus, rather than being tantamount to the trial court's jury instructions, as the lower court suggested, the Bible introduced a competing set of laws and instructions into the jury room – and one that many jurors would follow before following the trial court's instructions. *Harlan*, 109 P.3d at 630; *Jones v. Kemp*, 706 F. Supp. 1534, 1599 (N.D. Ga. 1989).

Second, as discussed above, Romans 13:1-6 encourages jurors to follow the will of the State (prosecution), not the trial court. Paul, writing in the first century, does not consider or address the separation of the judicial and executive power; his words do nothing to differentiate between obedience to a judge in a courtroom and obedience to the executive on the street. Romans 13 speaks instead of "governing authorities" of the Roman Empire generally, recognizing only those who "bear the sword" and those who do not. *See Harlan*, 109 P.3d at 631 ("The Romans text instructs human beings to obey the civil government. Here, the State of Colorado was seeking the death penalty.").

Accordingly, the average juror would understand Romans 13:1-6 to command obedience to the prosecution, "The State of Texas." The State wanted the jury to impose death on Mr. Lucero. There can be little doubt that this was the purpose of the foreman's reading of the passage during a time at which several jurors were unwilling to impose death on Mr. Lucero. Non-judicial sources concur that Romans 13, when read out of context as it was by Mr. Lucero's jury, appears to be "an unequivocal, unrelenting call for obedience to the state" and its punishments. Jan Botha, *Subject to Whose Authority? Multiple Readings of Romans 13* 1 (1994); *see also* Leander E. Keck, *Romans* 311 (2005). The passage further suggests that the State's punishments are invariably just, visited only on the deserving. Keck, *supra*, at 315; Botha, *supra*, at 205.

Moreover, many, including one member of this Court, agree that Paul's mention of the "sword" refers specifically to the authority to sentence criminals to death. Antonin Scalia, *God's Justice and Ours*, First Things, May 2002, available at http://www.firstthings.com/article.php3?id_article=2022 (stating that the sword is "unmistakably a reference to the death penalty"); Southern Baptist Convention Resolution No. 5 (2000), available at http://www.sbcannualmeeting.org/sbc00/res.asp?ID=1295130452&page=0&num=10 (same); Botha, *supra* at 205 (same); C.K. Barrett, *A Commentary on the Epistle to the Romans* 247 (1957) (stating that the sword is a reference to the *jus gladii*, an authority to inflict a death sentence). *But see* Keck, *supra*, at 315 (suggesting the sword does not refer to the *jus gladii* but rather the general Roman law enforcement power); Anthony J. Guerra, *Romans and the apologetic tradition* 162 (1995) (suggesting that the sword refers to Roman military power or an imperial dagger).

Third, Romans 13:1-6 is inconsistent with the jury's function as a check on the State's actions regarding criminal punishment. The Romans text portrays the first-century Christian not as an active participant in a political community, but rather, as a private citizen confronted with the "sword" of imperial authority. His role is not to actively pursue justice or make policy but to "submit." The illustrative act is to pay taxes: the imperial authority requests a particular action (to pay a particular amount of money) and the Christian performs it.

That passive vision of Christian political life is inconsistent with the duty of a juror to evaluate the prosecution's case critically and ensure that the prosecution meets its high burden of proof. The Constitution requires more than passive obedience; the jury must actively decide whether the facts are such that it should "strip a man of his liberty or his life." *Turner*, 379 U.S. at 472. A capital sentencing jury, in particular, must exercise "the truly awesome responsibility" of determining life or death. *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985) (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)). Indeed, the jury's active role is so important that this Court has held that a prosecutor's suggestion that "responsibility for any ultimate determination of death will rest with others" violates the Eighth Amendment. *Id.* at 333. Such a suggestion "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.*

The "intolerable danger" of the jury minimizing the importance of its role is even easier to imagine where the jury is being urged to "delegat[e] ultimate responsibility for imposing a sentence to divine authority." *See, e.g.*, *Sandoval v. Calderon*, 241 F.3d 765, 776-77 (9th Cir. 2000). In *Sandoval*, a prosecutor responded to defense counsel's suggestion that the jury should not "play God" with the defendant's life by reciting Romans 13: 1-5 and telling the jury: "You are not playing God. You are doing what God says." *Id.* at 775 n.1. The court found not only that the prosecutor violated the Eighth Amendment, but that the "eloquent" and

"powerful" language "was strong medicine" that prejudiced the defendant. *Id.* at 778. Such strong medicine also was likely to prejudice Mr. Lucero.

Accordingly, the Texas Court of Criminal Appeals erred in concluding beyond a reasonable doubt that the introduction of Romans 13:1-6 to the jury deliberations in Mr. Lucero's trial did not result in Mr. Lucero's death sentence. This Court should reverse the appellate court's judgment and remand the case for a new sentencing hearing.

C. Federal Law Requires The Texas Courts To Provide Mr. Lucero An Evidentiary Hearing To Test The Veracity Of Juror Affidavits.

Even if the Texas courts were permitted to inquire into the subjective intent of jurors and try to reconstruct their deliberations as if the error had not occurred, the order of the lower court still should be vacated because Mr. Lucero was not in any way afforded his basic, fundamental right to test the veracity of those affidavits, including through cross-examination of the jurors. Instead, the Texas courts simply accepted the jurors' affidavits at their face value as accurate and truthful. Pet. App. 19a-20a. That blind acceptance was error and violated Mr. Lucero's due process right to be heard and meaningfully develop a factual record on the issue. Whatever discretion a trial court possesses in investigating the jury, "the rule of juror incompetency cannot be applied in such an unfair manner as to deny due process." *Schillcutt v.*

Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987). "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982) (citing *Remmer*, 347 U.S. at 230).

In this case, the State has admitted that an extraneous Bible was considered. Assuming that the private thoughts of the jurors were an appropriate basis on which to base a decision that the introduction and reading of the Bible in the jury room were harmless, it would be an abuse of discretion for the Texas courts to resolve that question on the basis of affidavits alone where Mr. Lucero was not given a procedural opportunity to challenge those affidavits or otherwise test the veracity of the statements in them. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Id.* at 216 (quoting *Dennis v. United States*, 339 U.S. 162, 171-72 (1950)). While the testimony of jurors may not be "inherently suspect," *Smith*, 455 U.S. at 217 n.7, neither is it inherently believable, especially when viewed only on the cold record of affidavits rather than live testimony subject to cross-examination. If the subjective memories of the jurors were relevant to whether the admitted error was harmless, Mr. Lucero would naturally wish to probe whether those memories are accurate or the result of hindsight bias. The only way in which that could be done is at an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 13, 2008

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