No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM EUGENE THOMPSON, PETITIONER

v.

PHILIP PARKER, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

THIS IS A CAPITAL CASE

Jamesa J. Drake*
Drake Law LLC
P.O. Box 56
Auburn, Maine 04212
(207) 330-5105
jamesa_drake@hotmail.com

Dennis J. Burke
Assistant Public Advocate
Department Of Public Advocacy
2209 Commerce Drive, Suite D
Lagrange, Kentucky 40031
502/222-6682
dennis.burke@ky.gov

*COUNSEL OF RECORD

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QUESTION PRESENTED

Petitioner William Thompson, had already served twelve years of a life sentence for an unrelated murder, when he killed a prison guard and fled. Thompson pleaded guilty to the guard's murder but a jury trial was held to determine his sentence. Thompson was sentenced to death. His appeals in state court were unsuccessful, so Thompson sought relief in federal court. At the 2012 evidentiary hearing on Thompson's habeas petition, the jury foreman testified that during deliberations, the jurors discussed a news account about another criminal who committed a murder after being paroled at age 70. Thompson argued then – as he does now – that this extrajudicial evidence influence the jurors' sentencing determination. The district court denied relief, holding that "[a] discussion of a news story about an unrelated crime does not constitute extrajudicial evidence which would set aside a verdict." The Sixth Circuit also denied relief, reasoning that, "the jurors' general knowledge about recidivism, even if it includes recollections of unrelated news coverage of other crimes, is fair game for discussion." The court then went further and adopted a definition of "extraneous evidence" that no other court has adopted and most have implicitly rejected. According to the Sixth Circuit: "[A]t a minimum, to be considered extraneous evidence, the evidence must either relate to the case that the jurors are deciding or be physically brought to the jury room or disseminated to the jury."

The Sixth Circuit's analysis raises an important question: is "extrajudicial evidence" limited to material physically brought into the jury room?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Eugene Thompson is a death-sentenced inmate. He respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit").

OPINIONS BELOW

The opinion of the Sixth Circuit under review is reported at *Thompson v. Parker*, 867 F.3d 641 (2017) and is attached at Appendix A. The district court's unpublished memorandum opinion is attached at Appendix B. The amended district court memorandum opinion and order is attached at Appendix C. The Sixth Circuit's unpublished order denying rehearing is attached at Appendix D. The opinion of the Supreme Court of Kentucky reversing and remanding for a new trial following appeal of the initial judgment and sentence of death is reported at *Thompson v. Commonwealth*, 862 S.W.2d 871 (Ky. 1993) and attached at Appendix E. The Opinion of the Supreme Court of Kentucky affirming the judgment and sentence of death upon remand is attached at Appendix F and is reported at *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004). The unpublished opinion of the Supreme Court of Kentucky following postconviction proceedings appears at Appendix G.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its decision on August 14, 2017. The court denied rehearing en banc on October 18, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed…[and] to be confronted with the witnesses against him…." The Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law…."

STATEMENT OF THE CASE

Thompson was serving a life sentence for murder when he killed and robbed Charles Fred Cash, a Department of Corrections Officer, and fled the prison. Thompson was captured; tried by a jury; convicted of murder, first-degree robbery and first-degree escape; and sentenced to death. The Kentucky Supreme Court reversed his conviction and sentence on direct appeal because of errors relating to jury selection. *Thompson v. Commonwealth*, 862 S.W.2d 871 (Ky. 1993).

On remand, Thompson pleaded guilty to all three counts as part of an agreement to avoid jury sentencing, but the Commonwealth sought jury sentencing anyway and the court of appeals ruled that the Commonwealth was entitled to jury sentencing despite the plea agreement. *Commonwealth v. Thompson*, No. 95-CA-0136-MR (Ky. Ct. App. June 10, 1996) (unpublished). The jury returned a death-

penalty verdict, finding two aggravating factors: (1) Thompson had previously committed a murder, and (2) Thompson committed the present murder against a person guard while in prison. The trial court imposed the death sentence.

Thompson unsuccessfully sought direct and post-conviction review in state court. See *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004), *cert. den. Thompson v. Kentucky*, 545 U.S. 1142 (2005) (direct appeal), and *Thompson v. Commonwealth*, No. 2009-SC-000557-MR, 2010 WL 4156756 (Ky. Oct. 21, 2010), as modified on denial of reh'g, Jan. 20, 2011) (unpublished) (state habeas). In 2011, Thompson timely filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky.

Among other things, Thompson claimed that extrajudicial evidence influenced the jurors' sentencing determination in violation of his rights to an impartial jury and to confront the witnesses against him under the Sixth and Fourteenth Amendments to the U.S. Constitution. Thompson's post-verdict investigation, which included juror interviews, revealed that during deliberations, the jurors discussed a news account about another violent criminal who had been imprisoned and yet committed a murder after being paroled at age 70.[1] Index to Contents of State Court Record, RE 39-1, Page ID# 313. (DVD Disc 1, Record on Appeal, 26). Thompson argued then – as he does now – that discussion about this news account played on the jurors' fears that, if

[1] The news account pertained to the trial of "infamous rapist and mutilator" Lawrence Singleton. Singleton initially served time for abducting and raping a California hitchhiker before cutting of her arms and leaving her for dead. Singleton served fourteen years for that crime and was released. Following his release, at the age of 70, Singleton moved to Florida, where he was on trial for killing his neighbor. Index to Contents of State Court Record, RE 39-1, Page ID# 313. (DVD Disc 1, Record on Appeal, 27-29).

Thompson was ever released from prison, he would still be a danger to society no matter his age. Motion Pursuant to RCr 11.42, Index to Contents of State Court Record, RE 39-1, Page ID# 313. (DVD Disc 1, Record on Appeal, 13-16).

In 2012, the district court conducted an evidentiary hearing. At the hearing – which was held 14 years after the trial – the jury foreman testified that he did not remember the details of the deliberations. However, the foreman also testified that the news account "was brought up probably after two or three votes or whatever…I just remember it was brought up and that was it." Transcript of Evidentiary Hearing, RE 32, Page ID# 277. The foreman testified that "it was probably a 9-to-3 or 8-to-4…vote at that time, and there was three holdouts or whatever to the end until the last vote. And it was probably brought up sometime during that period." *Id.* at RE 32, Page ID# 278. The foreman testified that no one physically brought newspaper articles or anything similar into the jury room, but rather that someone had brought up the news story in the course of the jury's deliberations. *Id.*

The district court denied relief, holding that "[a] discussion of a news story about an unrelated crime does not constitute extrajudicial evidence which would set aside a verdict." Memorandum and Opinion, RE 42, Page ID# 374. The Sixth Circuit affirmed the district court's decision. *Thompson v. Parker*, 867 F.3d 641 (2017).

The Sixth Circuit began its analysis by observing that the strictures of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended 28 U.S.C. § 2254, did not apply because the Kentucky courts had not adjudicated Thompson's extrajudicial evidence argument on the merits. *Thompson*, 867 F.3d at

647. The Sixth Circuit also explained that, because Thompson did not lack diligence in developing the factual record in state court, the district court was permitted to hold an evidentiary hearing, and to cite to the facts developed at that hearing. *Id.*

Turning to the merits, the Sixth Circuit recognized a criminal defendant's federal constitutional right to a verdict based on the evidence developed at the trial, without regard to any extraneous influences. *Id.* And, the court also identified the tension between "impartiality" and "ignorance," noting that in order "for jurors to evaluate the evidence before them and do their job intelligently, they must take into account rather than ignore what general knowledge they may have gained from their life experiences." *Id.*

Then, creating the appearance of a settled question that, in actuality has fractured courts around the country, the Sixth Circuit identified a "bright line" "between, on the one hand, jurors' taking into account their wisdom, experience, and common sense when evaluating the evidence admitted at trial, and, on the other hand, jurors' employing extraneous evidence such as news reports of the case being decided by the jurors or physical news items being brought into the jury room." *Id.* at 648 (internal citations omitted; italics in original omitted). Hinting at the physical-possession-of-extrajudicial-material-test that the court would announce, it reasoned "that merely *discussing* a news story about another case that one or some of the jurors *might have read or seen or heard about* is [not] analogous either to seeing extraneous reports *about the case the jurors are deciding* or to having physical news items such

as newspaper clippings either provided to jurors or brought into the jury room by jurors." *Id.* (emphasis original).

The Sixth Circuit remarked that, because the jury's sentencing options were to impose (a) a term of imprisonment for a number of years not less than twenty, (b) a life sentence without the possibility of parole, or (c) a death sentence, "[s]urely the jury's deliberations would naturally include discussing such considerations as the likelihood that Thompson, if released even at an old age, would kill again." *Id.* The court reasoned, "in the context of such deliberations, the jurors' general knowledge about recidivism, even if it includes recollections of unrelated news coverage of other crimes, is fair game for discussion." *Id.* To drive the point home – and in the process, illustrating the very concepts that courts around the country have been struggling with – the Sixth Circuit presented a series of rhetorical questions, presupposing that the answers were obvious (even though the answers are far from obvious):

> What if, for example, a juror were an actuary who had general knowledge of the life expectancy of someone similarly situated to the defendant: would that juror's discussion of the defendant's odds of reoffending be "extraneous evidence" and thus violate the defendant's constitutional rights? Or, what if the jurors in this case, instead of discussing a news story, had discussed a story that had been related in a novel? Would all general knowledge gleaned from reading books be considered "extraneous evidence"? Or only from nonfiction books?

Id. Building to a crescendo, the Sixth Circuit announced its new rule: "[A]t a minimum, to be considered extraneous evidence, the evidence must either relate to the case that the jurors are deciding or be physically brought to the jury room or disseminated to the jury." *Id.* In support of this rule, the court cited to *Warger v. Shauers*, __ U.S. __, 135 S.Ct. 521, 529 (2014), "holding, in a civil case, that 'external'

matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room." *Id.* at 649 (citing *Warger*).[2]

REASONS FOR GRANTING THE WRIT

This Court has repeatedly instructed that the prejudicial use of extrajudicial information offends the federal constitution, but state courts and the federal courts of appeal have struggled to delineate and define the impermissible and permissible use extrajudicial knowledge. Most courts agree that jurors may utilize the general knowledge and intuition gleaned from everyday life experiences to help them evaluate the evidence at trial. This information is technically "extrajudicial," but its use is generally accepted. The lower courts disagree, however, whether jurors may permissibly utilize more specific knowledge, *e.g.* information learned from reading the newspaper, talking with an acquaintance, subject matter mastered in school, or observations made during specialized training. From the perspective of the individual juror, these things are part of *his or her own* life experience, as well, but there is no consensus about whether the use of this information during deliberations offends the constitution. Free from AEDPA's constraints, this case provides a good

[2] The Sixth Circuit mischaracterizes the partial *Warger* quote as its holding. W*arger* actually holds (1) that Federal Rule of Evidence 606(b) "applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire" and (2) that Rule 606(b)(2)(A) does not authorize a court to receive into evidence an affidavit by one juror regarding the internal juror discussion of a second juror, regardless of whether the second juror should have been excluded from the jury. W*arger*, 135 S.Ct. at 525, 529.

vehicle for addressing an issue that has divided the lower courts, and that is germane to every jury trial.

I. A criminal verdict must be based upon the evidence developed at trial, without regard to any extraneous influences.

The rule is uncontested, but application of the rule has proven difficult. For over 100 years, this Court has held that the Sixth and Fourteenth Amendments to the federal constitution guarantee to a criminal defendant the right to trial by an impartial jury and a verdict based solely on evidence in the trial record. See e.g. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (holding that "the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print"); *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1961) (the jury must reach its verdict solely "on evidence received in open court, not from outside sources"); *Skilling v. United States*, 61 U.S. 358, 438 (2010) (Sotomoyor, J., concurring in part and dissenting in part) ("The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors…disregard extrajudicial influences, and decide guilt or innocence based on the evidence presented in court.") (internal citation omitted).

There is, however, a tension between the prohibition on extrajudicial evidence and the expectation that jurors will use their own general knowledge, gleaned from their life experiences, to evaluate the evidence and among other things, make determinations about witness credibility. As this Court explained:

> So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by either own general knowledge of the subject of inquiry.

Head v. Hargrave, 105 U.S. 45, 49 (1881); see also *Beck v. Alabama*, 447 U.S. 625, 642 (1980) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) ("Individuals are not expected to ignore as jurors what they know as men – or women.").[3]

II. As this Court and every lower court except the Sixth Circuit has recognized, evidence may qualify as "extrajudicial" regardless of whether it is physically present in the jury room.

The use of these extrajudicial facts is widely viewed as permissible in theory, but in practice, the distinction between impermissible and permissible extrajudicial

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[3] The advisory note to Fed.R.Evid. 201(a) refers to this general knowledge as "non-evidence facts," and explains that their use is essential to the jury's deliberative process:

> [E]very case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says 'car,' everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the 'car' is an automobile, not a railroad car, that is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum*. These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts.

Citing Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), and Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U. Pa. L. Rev. 139 (1956).

facts is difficult to draw. For example, the Supreme Court of California has recognized that, "[j]urors bring to their deliberations knowledge and believes about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system." *People v. Marshall*, 790 P.2d 676, 699-700 (Cal. 1990). And yet, the California criminal pattern jury instructions contain a standard instruction informing jurors that they "must decide all questions of fact in this case from evidence received in this trial and not from any other source." California Jury Instructions: Criminal § 1.03 (2016). The civil pattern jury instructions provide the same. See California Jury Instructions: Civil § 1.00.5 (2014). The Maryland criminal pattern jury instructions are similarly categorical in their prohibition on any extrajudicial information. Maryland jurors are told that they "are to completely disregard any newspaper, television, Internet or radio reports that [they] may have read, seen or heard" and that they "must not consider any information contained from an outside sources, including conversations [they] may have had with others." 1 David Aaronson, Maryland Criminal Jury Instructions and Commentary § 2.01 (2016).

The difficulty with drawing a distinction between the permissible and impermissible use of extrajudicial evidence was exacerbated by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993), and its progeny, which cast judges as the gatekeepers of specialized knowledge and expertise. This created (or perhaps exacerbated) the problem of so-called "expert jurors," *e.g.* jurors with specialized training, such as doctors, lawyers, accountants, engineers, etc., who might

be inclined to rely on their own expertise to evaluate courtroom testimony. One scholar has characterized the problem thusly:

> The risks posed by juror expertise are troubling in criminal cases. A criminal defendant has the right to be confronted by the evidence against him. And *Daubert/Kumho*[4] and the new Rule 702 make clear that special risks attend the introduction of specialized knowledge into evidence. Given those facts, expertise offered by a jury in a criminal case is doubly problematic: it cannot be screened through the "gatekeeper" process and the defendant has no opportunity to cross-examine it, or even to be made aware of its existence. Criminal defendants thus have profound reason for concern when expertise is offered by a juror as a basis for drawing inferences against them.

Paul F. Kirgis, The Problem of the Expert Juror, 75 Temp. L. Rev. 493, 503-4 (2002).

Solutions to the expert juror problem have splintered courts, too. For example, in a homicide trial in New York, two jurors were nurses, and they performed independent estimations of the victim's blood loss using their own professional experience. *People v. Maragh*, 729 N.E.2d 701, 703 (N.Y. 2000). Their estimations contradicted the medical expert witness's testimony as to the cause of death. *Id.* at 702-3. The Court of Appeals affirmed the trial court's order setting aside the judgment on the ground that the juror-nurses had become de facto witnesses for the prosecution. *Id.* at 706. The court announced a three-part test to determine when a juror commits misconduct by using her expertise during jury deliberations:

> A…grave potential for prejudice is…present when a juror who is a professional in everyday life shares expertise to evaluate and draw an expert conclusion about a material issue in the case that is distinct from and additional to the medical proofs adduced at trial. Other jurors are likely to defer to the gratuitous injection of expertise and evaluations by fellow professional jurors, over and above their own everyday experiences, judgment and the adduced proofs at trial. Overall, a

4 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

> reversible error can materialize from (1) jurors conducting personal specialized assessments not within the common ken of juror experience and knowledge (2) concerning a material issue in the case, and (3) communicating that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence.

Id. at 704-5. Most states disagree with New York's approach. *See* Krisin A. Liska, Note, Experts in the Jury Room: When Personal Experience is Extraneous Information, 69 Stan. L. Rev. 911, n. 88 (collecting cases).

The Sixth Circuit's decision seems unaware of the issue. The court writes:

> What if, for example, a juror were an actuary who had general knowledge of the life expectancy of someone similarly situated to the defendant: would that juror's discussion of the defendant's odds of reoffending be "extraneous evidence" and thus violate the defendant's constitutional rights?

Thompson, 867 F.3d at 648. The court flags the "expert juror" issue, but seemingly fails to perceive the difficult implications of the question it presents.

True, Thompson's case does not present an "expert juror" problem. But the issue nevertheless highlights the way in which courts have approached the issue of extrajudicial evidence: by attempting to define the term. *See e.g. Marquez v. City of Albuquerque*, 399 F.3d 1212, 1223 (10th Cir. 2005) (noting that a juror's personal experience does not constitute extraneous personal information); *Brooks v. Zahn*, 826 P.2d 1171, 1178 (Ariz. Ct. App. 1991) ("We reject the invitation to categorize specialized knowledge possessed by a jury and discussed during deliberations as extrinsic or extraneous information."); *Marr v. Shores*, 495 A.2d 1202, 1205 (Me. 1985) ("There mere communication of personal knowledge by a juror to fellow jurors during deliberations, however improper that communication may be, is part of the

deliberative process itself, and therefore not 'extraneous.'"); *State v. DeMers*, 762 P.2d 860, 863 (Mont. 1998) (deciding that a jurors expertise in human anatomy "is neither extraneous information" nor "outside influence" and holding that the use of that expertise was not misconduct).

In Thompson's case, the Sixth Circuit also sought to craft a definition of "extrajudicial evidence." According to the court: "[A]t a minimum, to be considered extraneous evidence, the evidence must either relate to the case that the jurors are deciding or be physically brought to the jury room or disseminated to the jury." *Thompson*, 867 F.3d at 648. This test is both unworkable and at odds with the majority other courts.

The first part of the test – the evidence must relate to the case – would appear to siphon off a discussion about extrajudicial evidence that unambiguously plays no role in the deliberative process; for example, the jurors talking about a sporting event, or the weather, the lunch menu, or the interior decoration of the jury room, primarily as a means of bonding or just to pass the time. Certainly, that is not what happened in Thompson's case.

Moreover, unlike the Sixth Circuit, other courts have not drawn a bright line between newspaper accounts that discuss the defendant's case and newspaper accounts that discuss other factually similar cases; in either case, the influence is extrajudicial. For example, in *Waldorf v. Shuta*, 3 F.3d 705 (3d Cir. 1993), the Third Circuit vacated a civil judgment and remanded for a new trial after jurors were exposed to media coverage of a jury verdict in an unrelated case but with similar

injuries. The court remarked: "Nor do we find that the risk of actual prejudice in this case is reduced due to the fact that the offending news coverage, involved here, dealt with a factually similar but nonetheless separate, unrelated case." Id. at 713.

The jurors in Thompson's case discussed recidivism among the elderly at a point in the process when they were deciding whether to impose a sentence of death or a term of years (which would possibly result in Thompson's release from prison before his natural death). See id. 648 (recognizing that the news article pertained to recidivism, and commenting that, "[s]urely, the jury's deliberations would naturally include discussing such considerations as the likelihood that Thompson, if released even at an old age, would kill again.").

The last part of the Sixth Circuit's test, which requires that the information be "disseminated to the jury" is also satisfied in Thompson's case. As the foreman explained, the jurors discussed the news article amongst themselves. Transcript of Evidentiary Hearing, RE 32, Page ID# 286.

Thus, for our purposes, the test is reduced to its central component: whether the information is "physically brought" to the jury room. *Thompson*, 867 F.3d at 648. This Court has not drawn that distinction, and neither have other lower courts. See e.g. Andrea G. Nadel, Juror's reading of a newspaper account of trial in federal criminal case during its progress for mistrial, new trial or reversal, 85 A.L.R. Fed 13 (originally published in 1987) (collecting over a hundred cases, and noting that "an important element" in determining whether a juror's reading of a newspaper article entitles a criminal defendant to a new trial "is the content or nature of the article

itself"). The cases do not turn on whether the article is physically produced in the jury room. Indeed, the Sixth Circuit's test would seem to absolve jurors from the prohibition against reading newspaper accounts of the trial during the proceedings. The court's test suggests, by negative implication, that jurors can *read* and *discuss* newspaper accounts without threatening the integrity of their verdict, so long as they do not physically bring the newspaper into the courthouse. Respectfully, this is a distinction without a difference. The salient concern is that the article will influence the juror's decision making, not that newsprint will sully her fingers.

The Sixth Circuit's physical presence test sidesteps the problem of the expert juror, it seems to liberate jurors from the strictures of receiving information about the case only from the courtroom, and it altogether ignores the problem that has motivated this Court's entire extraneous-evidence jurisprudence: that receipt of information outside the crucible of cross-examination results in an unfair process and possibly an inaccurate result.

To illustrate the point, imagine a juror who recites memorized passages from the Bible during deliberations, which the jurors then discuss amongst themselves. Now imagine a juror who reads passages from a Bible that is physically present in the jury room. *Cf. Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008) (collecting federal cases about the bible as extrajudicial evidence). According to the Sixth Circuit, the recitation of biblical passages from memory could never constitute an extraneous influence, but the actual reading from a bible might be improper. There is no legal justification for that distinction. In either case, the biblical passage is an

extraneous influence and whether it prejudices the defendant depends on the way in which it was utilized during the deliberative process, not whether the passage was on the table in the jury room. *See e.g. Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006) ("Under clearly established Supreme Court case law, an influence is not an internal one if it (1) is extraneous prejudicial information; *i.e.* information that was not admitted into evidence but nevertheless bears on a fact at issue in the case; or (2) is an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering with a juror.'") (internal citations omitted).

III. This case is a good vehicle for addressing the issue of extrajudicial evidence that is not physically present in the jury room.

There is no dispute that AEDPA does not apply to this Claim, or that the evidence adduced at the evidentiary hearing may be utilized when resolving this claim. This case is an excellent vehicle for addressing the issue of extrajudicial evidence primarily because this Court can reach the merits directly.

The facts of this case are also simple and uncontested, and there is no debate that discussion of the newspaper article influenced the jury's sentencing decision. This further distills the issue to its core: how should courts differentiate between the permissible and impermissible use of extrajudicial evidence.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Jamesa J. Drake

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Jamesa J. Drake*
Drake Law LLC
P.O. Box 56
Auburn, Maine 04212
(207) 330-5105
Jamesa_Drake@hotmail.com

/s/ Dennis J. Burke

_____

Dennis J. Burke
Kentucky Department of Public Advocacy
207 Parker Drive, Suite 1
LaGrange, Kentucky 40031
(502) 222-6682
dennis.burke@ky.gov

*Counsel of Record