No. _____

IN THE

Supreme Court of the United States

MARTIN JAMES KIPP,

Petitioner,

v.

RON BROOMFIELD, ACTING WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

At Martin Kipp's capital trial, the prosecutor presented evidence that Kipp worshipped Satan and concluded his penalty-phase closing by asserting that Kipp "has murder in his heart, has Satan [in] his soul." After three days of deliberations, the jurors voted for death only after one of them brought a Bible into the jury room and read several passages from it to the others, including the phrase, "an eye for an eye." Eight of the jurors self-identified as Christian. The question presented is:

Whether clearly established federal law requires that a habeas petitioner's claim that his constitutional rights were violated because a juror read passages from the Bible to other jurors during capital-sentencing deliberations be analyzed under the presumed prejudice rule of *Mattox v. United States*, 146 U.S. 140, 150 (1892), and *Remmer v. United States*, 347 U.S. 227, 229 (1954), because the Bible-reading is an impermissible external influence on the jury's deliberations and verdict.

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Martin Kipp and Respondent Ron Broomfield, Acting Warden.[1] The California Attorney General represents Respondent.

On December 15, 1988, Kipp was convicted by jury in Los Angeles County Superior Court of first degree murder, rape, and robbery in *People v. Kipp*, case no. A028286, Judge Michael G. Nott, presiding. Petitioner's Appendix filed concurrently herewith ("Pet. App.") 36; 19 RT 3954-3955.[2] On January 30, 1989, the jury returned a death verdict at Kipp's penalty trial. 24 RT 5255-5256; 5 CT 1447.[3] On February 24, 1989, Judge Nott sentenced Kipp to death and entered judgment against him. 24 RT 5288-5289; 5 CT 1484-1485.

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[1] Although Ron Davis is named as Respondent in the Ninth Circuit's opinion affirming the judgment and its order denying rehearing, the website for the California Department of Corrections and Rehabilitation indicates that Ron Broomfield is currently the Acting Warden of San Quentin State Prison, where Kipp remains in state custody. *See* https://www.cdcr.ca.gov/Facility-Locator/SQ/ (last visited, May 17, 2021). Accordingly, Kipp names Mr. Broomfield as Respondent in this petition rather than Mr. Davis. *See* Supreme Court Rule 35.3.

[2] "RT" refers to the reporter's transcript of trial lodged by Respondent in district court. *See* district court docket 13, lodgment 2. Unless otherwise noted, all references to "docket" are to the district court docket in Kipp's habeas corpus case.

[3] "CT" refers to the clerk's transcript of trial lodged by Respondent in district court. *See* docket 13, lodgment 1.

The California Supreme Court affirmed the judgment on appeal in a published opinion written by Justice Joyce L. Kennard and filed on November 1, 2001 in *People v. Kipp*, 33 P.3d 450, case no. S009169. Pet. App. 177-218.

On November 12, 2003, the California Supreme Court summarily denied Kipp's habeas corpus petition in case no. S093369. Pet. App. 176. On June 28, 2006, the California Supreme Court summarily denied a habeas petition filed by Kipp in case no. S129115. Pet App. 175.

On December 2, 2015, United States District Judge Philip S. Gutierrez denied Kipp's habeas corpus petition and entered judgment against him in *Kipp v. Davis,* C.D. Cal. case no. CV 03-8571-PSG. Pet. App. 35-81. The court granted a certificate of appealability ("COA") on two claims not raised here. Pet. App. 16, 81.

On August 19, 2019, the Ninth Circuit Court of Appeals, per the Honorable Richard A. Paez, Mary H. Murguia, and Jacqueline H. Nguyen (writing), affirmed the judgment in a published opinion in *Kipp v. Davis,* 971 F.3d 866, case no. 15-99020. Pet. App. 2-34.[4] The court granted a COA on the juror misconduct issue raised in this petition. Pet. App. 17. On

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[4] On the same day, the same panel reversed the district court and granted guilt-phase relief in Kipp's appeal challenging his separate Orange County judgment. *Kipp v. Davis*, 971 F.3d 939, 943, 960 (9th Cir. 2020), *rehearing en banc denied,* 986 F.3d 1281 (Mem.) (9th Cir. 2021).

December 21, 2020, the panel denied Kipp's timely-filed petition for panel rehearing and rehearing en banc. Pet. App. 1.

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

Martin Kipp petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming the judgment against him in his habeas corpus action.

INTRODUCTION

Martin Kipp is a Native American on California's death row. He was tried in Orange County for one murder and later tried in Los Angeles County for another murder; the Los Angeles County judgment is the subject of this petition. Soon after the Orange County jury returned a death verdict,[5] Kipp wrote two frustrated, irrational letters to his wife that jailers intercepted. The letters made numerous references to Satan, including that Kipp didn't believe in God anymore but Satan had helped him. Over defense objection, the letters were admitted into evidence. The prosecutor emphasized the letters in his guilt- and penalty-phase closing arguments, where the jury first

[5] As noted above, the Ninth Circuit granted guilt-phase relief from the Orange County judgment in 2020. *Kipp*, 971 F.3d at 943, 960. The State has not appealed that decision or initiated a retrial.

heard the contents of the letters. He argued that Kipp had Satan in his soul. During penalty deliberations, a juror brought a Bible into the jury room and read aloud from it to help the panel decide whether Kipp should live or die. The passage "an eye for an eye" was discussed by the majority-Christian jury. Despite receiving the Satan statements and learning that Kipp had been sentenced to death in Orange County -- a judgment since vacated in federal habeas -- the jury deliberated for over three days before returning a death verdict, showing the prejudice from the misconduct in consulting the Bible.

OPINIONS BELOW

The Ninth Circuit's order denying Kipp's petition for panel rehearing and rehearing en banc is unreported. Pet. App. 1. The Ninth Circuit's opinion affirming the judgment of the district court against Kipp is reported in *Kipp v. Davis*, 971 F.3d 866 (9th Cir. 2020). Pet. App. 2-34. The district court's final judgment dismissing Kipp's habeas corpus petition with prejudice is unreported. Pet. App. 35.

The orders by the California Supreme Court summarily denying Kipp's two habeas corpus petitions are unreported. Pet. App. 175-176. The opinion by the California Supreme Court affirming the judgment against Kipp on direct appeal is reported at *People v. Kipp*, 33 P.3d 450 (Cal. 2001). Pet. App. 177-218.

JURISDICTION

The Ninth Circuit's order denying Kipp's timely-filed petition for panel rehearing and rehearing en banc was filed and entered on December 21, 2020. Pet. App. 1; Ninth Circuit docket 81. The Ninth Circuit's opinion affirming the judgment against Kipp was filed and entered on August 19, 2020. Pet. App. 2, 5; Ninth Circuit docket 71. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rules 13.1 and 13.3 and the Court's order of March 19, 2020 extending the filing deadline for certiorari petitions by another 60 days (here, to May 20, 2021) because of Covid-19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

"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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Eighth Amendment to the U.S. Constitution

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the U.S. Constitution

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254(a)

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(e)

"(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no

reasonable factfinder would have found the applicant guilty of the underlying offense."

STATEMENT OF THE CASE

I. Kipp's Arrest and Pre-Trial Proceedings

Tiffany Frizzell was found dead in a Long Beach hotel on September 17, 1983. Pet. App. 187. Antaya Howard was found dead in a car in Huntington Beach on January 4, 1984. Pet. App. 191. Kipp was charged with murdering Frizzell and Howard in separate actions in Los Angeles and Orange Counties, respectively. Pet. App. 187; 20 RT 4191. The Orange County case was tried first. Pet. App. 187. The prosecution presented evidence of the Frizzell homicide at the guilt-phase of the Orange County trial. *Id.*; *Kipp*, 971 F.3d at 943-946. The prosecution presented evidence of the Howard homicide at the penalty-phase of the Los Angeles County trial. Pet. App. 9. The Orange County jury returned a death verdict on August 24, 1987, and Kipp was sentenced to death on September 18, 1987. *Kipp*, 971 F.3d at 947.

In the Los Angeles County case, on September 22, 1988 the prosecutor announced that he had given defense counsel a letter by Kipp that "has some apparent incriminatory significance." 2 RT 5. The letter was postmarked September 15, 1987, several weeks after the Orange County jury returned a death verdict and several days before the Orange County judge sentenced

Kipp to death. It was addressed to Kipp's wife, also incarcerated in county jail. Pet. App. 188. It states: "I killed, raped, sodomized, beat, swore and laughed at those fucking no good bitches! . . . . 'Satan's' licking both those bitches up now and laughing. Just like I laughed at my trial the whole time." It continues: "[D]oes it at all sound like I'm in anyway SORRY! FUCK NO!" Pet. App. 298 (emphasis in original); *see also* Pet. App. 20. Kipp told his wife, "[i]n our next world we will celebrate and be on top . . . . (We are coming Home Satan!)." Pet. App. 298-299 (original emphasis). The judge denied the defense motion to suppress the letter. 12 RT 2452.

II. The Guilt Trial

A. Prosecution Case

As described by the California Supreme Court, the prosecution presented evidence that Frizzell was found dead in her hotel room naked from the waist down with a cloth belt pulled round her neck. The cause of death was asphyxiation due to ligature strangulation. "There were no signs of forced entry into the room, and no indication that a struggle had taken place there. Frizzell's purse, driver's license, and some $130 in cash were found in a dresser in the room." Pet. App. 187. The trial record shows that earrings, a necklace and a Bulova watch were also found in the room, and that Frizzell "was wearing jewelry and had cash in her purse." 17 RT 3420,

3440-3441. Kipp's fingerprints were found on a telephone in the room and on a book Frizzell owned. Pet. App. 187-188.

A criminalist testified that semen and sperm were present "in Frizzell's vagina and on her external genital area, but not in her mouth or rectal area." Pet. App. 187. "There was no trauma to the external vaginal or anal areas, but there was redness and erosion of the cervix consistent with sexual intercourse." Pet. App. 188. A criminalist further testified that the redness and erosion were consistent with normal, unforced sexual intercourse; that he could not definitively say the wounds were connected with death; that the wounds could have occurred within forty-eight hours of the victim's death; that he did not find any evidence of anal intercourse; and that bruises on the stomach and thigh could have occurred through normal, everyday activity. 17 RT 3631-3636. The prosecution presented evidence that while in custody on the charges, Kipp twice tried to escape from county jail. Pet. App. 188.

B. Admission of the September 15 Letter

The defense objected to the admission of Kipp's September 15 letter on the grounds that it was (1) "so shatteringly prejudicial that it's [sic] probative value is far, far outweighed by it's [sic] prejudicial value" and (2) protected by the spousal privilege. 18 RT 3710. The court rejected Kipp's arguments, ruling that the letter was an admission and more probative than prejudicial. 18 RT 3711, 3714. The prosecutor said he intended to introduce the entire

letter at penalty and asked to admit the references to Satan at guilt. 18 RT 3715, 3723-3726. Defense counsel asked if those references would be admissible at penalty and indicated that, if so, the defense wanted the jury to hear them first at guilt. 18 RT 3724-3726. The court ruled that:

> The reference to Satan, I am willing to take out at the trial phase, but allow at the penalty phase under factor k. [¶] However, if you want them in and know they're going to come in during penalty and you want them in now, then I'll allow them in during the trial phase.
>
> Mr. Brodey [defense counsel]: We want them in now.

18 RT 3726. The court suggested to the prosecutor, "once it's in evidence, during your final argument you can hold it up and show them the portion to read during the deliberations." 18 RT 3729. The prosecutor agreed. *Id.* The court admitted the letter as Exhibit 43. 18 RT 3754.

C. Defense Case

The defense presented no evidence. Pet. App. 189.

D. Prosecution Closing Argument

The prosecutor acknowledged it was a circumstantial case with no eyewitnesses. 18 RT 3843. He argued, "[n]ow, there is one last significant

piece of circumstantial evidence that I would like to relate to you this afternoon": Kipp's September 15 letter. 18 RT 3851. He explained:

> Thus far in the trial, other than an[] allusion by myself in my opening statement as to the contents of the letter, you have not been privy to the contents of the letter. [¶] The letter has now been received in evidence. It has been stipulated that the defendant Martin James Kipp wrote that letter.
>
> And to conclude this afternoon . . . I would like to leave you with the content of a portion of page 7 of that particular letter.
>
> Page 7 reads in part: "I killed, raped, sodomized, beat, swore, and laughed at those fucking no-good bitches. Yeah, it felt great, because neither deserved to live anymore. . . . Well, Satan's licking both those bitches up and laughing."
>
> Ladies and gentleman, that constitutes an admission, a rather chilling admission.

18 RT 3851-3853; *see also* Pet. App. 18.

The next morning, the prosecutor began the second half of his closing by noting: "As I drove home last night I carried with me the rather indelible

impression of the looks in your eyes as I read that letter yesterday afternoon. . . . I realized as I watched your reaction yesterday, that the language that I read was indeed distressing." 19 RT 3855-3856. He argued that "it is very difficult for all of us to acknowledge that there is evil in this world, that there is evil in this very community. But as you know now from the evidence, and as you know now from having heard part of the content of the letter that the defendant wrote, there is. And there's no turning away from it." 19 RT 3857.

E. Defense Closing Argument

Defense counsel began by noting the "moment of drama" when the prosecutor read Kipp's letter in his closing argument, and added that "the moment of drama is the most difficult part to deal with." 19 RT 3892. He asked the jury to evaluate the letter in context. 19 RT 3895. When Kipp wrote the letter, he was awaiting sentencing in the Orange County case. The letter reflects the rantings and frustrations "of a very frightened guy, and a very sick man who's isolated." 19 RT 3894. Some of the statements in the letter "are just out and out untruths"; others are "half truths"; and others are "fantasies" -- for example, there was no sodomy or beating, "[t]he evidence on that is blatantly clear." 19 RT 3894-3895. Kipp was writing to his wife, professing his love to her and also trying "to make himself [look] like a big, tough guy" who "can handle anything." 19 RT 3895. He argued that neither

special circumstance allegation was true. There was no robbery because the property was taken as an afterthought. There was no rape because Kipp entered the room consensually and there was no evidence of force or restraint used on the victim. 19 RT 3897-3899.

F. Prosecution's Rebuttal Argument

The prosecutor emphasized the letter in rebuttal, calling it "a very devastating piece of evidence." 19 RT 3903. He argued that the letter's reference "to a second victim is very, very important" and shows "it was the other poor victim that was sodomized." 19 RT 3904. The defense objected but the court ruled it was acceptable argument. *Id.* The prosecutor urged the jury "to read the letter for yourself." 19 RT 3911.

G. Deliberations and Verdicts

The jury began deliberations at 12:05 p.m. on December 14, 1988. 19 RT 3920. The defense moved for a mistrial based on the prosecutor's argument that Kipp sodomized Howard. 19 RT 3921-3923. The judge denied the motion, 19 RT 3923, but the California Supreme Court later noted that "the prosecution's evidence did not establish that either victim had been sodomized." Pet. App. 199. At around 3:40 p.m., the court sent the redacted letter, Exhibit 43A, to the jury, which had already requested it. 19 RT 3941.

The jury reached a verdict the next day at 3:20 p.m. 19 RT 3951. The jury found Kipp guilty of first degree murder, rape, and robbery, and that the

rape special circumstance was true. Pet. App. 186. The jury deadlocked on the robbery special circumstance allegation. 19 RT 3952, 3966.

III. Penalty Trial

A. Opening Statements

In his opening statement, the prosecutor summarized the case in aggravation. 19 RT 3971-3978. Defense counsel tried to put the September 15 letter in context, explaining that the "letter was written after [Kipp] had been convicted in Orange County, and after he had been given the death sentence there." 19 RT 3994. When he wrote the letter, Kipp was lonely, distraught, and missed his wife. 19 RT 3993-3994. The letter is full of lies, hyperbole, exaggerations, "calls to Satan" —"the rantings and ravings of a disturbed mind." 19 RT 3995. "[T]he point is that this letter the prosecution is using is the single most damaging part of the case. And we don't think it's fair to condemn a man to death based upon a rash, emotional outburst, no matter how ugly and unrepenting that letter is at the time." 19 RT 3996.

B. Prosecution Case in Aggravation

The prosecutor presented evidence that Kipp raped June Martinez in June 1981 and pleaded guilty to that charge in December 1981; assaulted his girlfriend Loveda Newman in November 1983; sexually assaulted and killed Howard in December 1983; and threatened to kill a sheriff's deputy when he

was caught trying to escape from the Los Angeles County Jail in January 1988. Pet. App. 189-191.

C. Defense Case in Mitigation

The defense presented evidence that Kipp was born on the Blackfeet Reservation in Montana to Mary Still Smoking, an alcoholic. Kipp lived in his grandmother's two-room house with twelve to fourteen children. The adults were frequently inebriated, fighting was common, and the children were neglected. At the age of twenty-three months, Kipp was removed from the Still Smoking home by child welfare workers and was placed with John and Mildred "Bobbie" Kipp. John's alcohol abuse and addiction escalated and he physically abused Martin and Bobbie. Pet. App. 193-195.

Kipp enlisted in the Marines and initially performed well, but began abusing alcohol, cocaine, and methamphetamine. After his release from prison in 1983 for raping Martinez, he continued abusing substances. An expert testified on the harmful effects of chronic use of cocaine and methamphetamine. Pet. App. 196.

The main witness on Kipp's life history was psychologist Craig Haney, who testified that Kipp was sorry for his crimes and was upset, angry, and ashamed when he wrote the September 15 letter. 23 RT 4870-4873, 4978-4980.

The prosecutor said he wanted to cross-examine Haney about a letter Kipp wrote on September 7, 1987. 23 RT 4928.[6] The letter said that Kipp would kill prosecutors and prison guards; that "'Satan will lick them all up in a tredge [sic] of horror'"; and that "'Satan has helped me rejuvenate my energy . . . .'" Pet. App. 19; *see also* Pet. App. 313.

Defense counsel objected for lack of notice and on the ground that the prosecutor was just "seeking to get in some enormous prejudicial evidence about Satan which [has] virtually no probative value." 23 RT 4929, 4949. The prosecutor argued that the letter was relevant rebuttal evidence to "any sort of inference of remorse indicated by Doctor Haney's testimony" and to Kipp's state of mind at the times the letters were written. 23 RT 4946. The court admitted the letter. 23 RT 4951-4952.

On cross, the prosecutor read three statements from the September 15 letter and asked if Haney recalled reading them. 23 RT 4981. He said he did. *Id.* Asked on re-direct if he had an opinion on Kipp's state of mind when he wrote the September 15 letter, Haney said his opinion was very consistent with what Kipp told him: he was confused, despondent, and angry, and fluctuating among emotions. 23 RT 4999. Asked whether some statements

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[6] The court and parties later referred to this as the "September 9 letter." This petition uses the term "September 9 letter" unless referring to places in the record that use the September 7 date. *See* Pet. App. 15.

in the letter were consistent with what Kipp told him, Haney replied, "on the surface, no, it's quite inconsistent." However, "[t]his is a man who is in jail just been sentence[d] to death. He is at the very bottom of his life," trying not to show vulnerability to his wife, and angry and upset at the way his trial was conducted. 23 RT 5000-5001.

The court asked counsel at the bench: "Are you aware of what just happened? Two things. Number one, he expressed an opinion. And number two, he just told the jury that he's under sentence of death in Orange County." 23 RT 5002. Defense counsel replied that once the court ruled that the letter was admissible in rebuttal, Haney was "going to have to talk about this letter and explain what this letter is about. [¶] I didn't want him to express the opinion, but I felt we had no choice." 23 RT 5003. As at the guilt-phase, the court suggested that the prosecutor read from the letter in his closing and the prosecutor said he would. 23 RT 5004.

The defense asked the court to reconsider its ruling on the admissibility of the September 9 letter, arguing that the prosecutor "wants to get more of the language about Satan" into evidence and that would just "inflame the jury's passions." 24 RT 5018. Although acknowledging that it could be "reversible error," the court stood by its prior ruling. 24 RT 5017.

D. Prosecution Rebuttal

Over another defense objection, the court admitted the September 9 letter as Exhibit 68 and identified the parts it would redact from the version given to the jury. 24 RT 5089-5090; Pet. App. 308-317.

E. Closing Arguments

In his closing, the prosecutor emphasized that Kipp was not remorseful and that the September 15 letter proved it. Pet. App. 280. Replaying the drama from his guilt closing, he said, "through developments yesterday . . . we have before you a second letter now." Pet. App. 281. He quoted the letter:

> I'd rape and sodomize every woman bitch deputy and gouge their eyes out. But I would let them live as invalids. Yeah, Satan will lick them all up in a tredge [sic] of horror. . . . Yeah, I don't believe in God anymore, because their [sic] isn't one who has ever helped me. But Satan has helped me rejuvenate my energy in a working manner. Don't ever underestimate my intentions, babe, that's all I can say.

Pet. App. 19. He argued: "'When you consider these two letters with the language the defendant used in conjunction with that one 1988 escape

attempt, you have a pretty consistent notion of what is going on in the defendant's mind with regard to remorse.'" Pet. App. 19-20. He concluded by saying, "'[t]his defendant, this real Martin Kipp, has murder in his heart, has Satan [in] his soul.'" Pet. App. 20.

Defense counsel argued that "the letter that Mr. Hodgman is going to introduce at the last of the case, which was unusual, says here, 'Yeah, I don't believe in God anymore because there isn't one who has ever helped me.' This is a man who is down as low as you can go." 24 RT 5221-5222.

F. Instructions, Jury Deliberations and Verdict

The jurors were instructed that "[y]ou must decide all questions of fact in this case from the evidence received in this trial and not from any other source." Pet. App. 290. They were instructed, "[y]ou must not make any independent investigation of the facts or the law, or consider or discuss facts to which there is no evidence. This means, for example, you must not on your own visit the scene, conduct experiments or consult reference works or other persons for additional information." Pet. App. 290-291.

The jury began deliberations at about 2:30 p.m. on Tuesday, January 24, 1989. 5 CT 1388; 24 RT 5247. The jury deliberated the next two days and was off on Friday the 27th. 5 CT 1389-1390; 24 RT 5247, 5252-5253. The jury returned a death verdict on Monday, January 30 at about 2:50 p.m.

24 RT 5255-5256; 5 CT 1447. On February 24, 1989, the judge denied the motion and sentenced Kipp to death. 5 CT 1484-1485; 24 RT 5288-5289.

IV. State Direct Appeal

The California Supreme Court affirmed the judgment on appeal, rejecting claims not at issue here. Pet. App. 177-218.

V. The Juror Misconduct Claim Presented in State Habeas and the Court's Summary Denial of the Claim

In Claim X of his first state habeas corpus petition, Kipp alleged that he was denied his rights under the Sixth, Eighth and Fourteenth Amendments to a fair trial by an unbiased jury, to counsel, to confront witnesses against him, to a reliable capital sentencing determination, and to due process because of juror misconduct during the penalty-phase deliberations. Docket 13, lodgment 8 at 150-154. He based his claim primarily on the declaration of juror Algertha Rivers, which, he argued, showed that "during the penalty phase of trial . . . extraneous information was brought in by one of the jurors and considered by the other jurors when deciding the appropriate punishment to be suffered by petitioner. Since the error biased one or more jurors against petitioner, the court must reverse the death sentence." *Id.* at 150; *see also id.* at 151. Rivers declared:

> I recall that during penalty phase deliberations a female juror with dark, shoulder-length hair brought in a Bible and read it to us. She talked about several verses in the Bible, which she told us would help us

> in making a decision. The jurors talked about standing in judgment of another human being. There was also discussion of the verses which state, "an eye for an eye" and "judge not lest ye be judged." A little over half of the jurors had a religious background and strong religious beliefs.

Pet. App. 236.

Kipp also based his claim on questionnaires completed by prospective jurors, which showed that seven seated jurors self-identified as Christian. Pet. App. 219-232. He also submitted a declaration by the defense trial investigator, who reported that Rivers told him that the jury voted five to six times before reaching a death verdict. Pet. App. 233. The investigator said that another juror, Sharon Heffner, told him that she was Christian (the eighth self-described Christian on Kipp's jury), was one of the final jurors to change her vote to death, and changed her vote after "research[ing] the Bible for the types of crimes that the defendant committed" and concluding that, "according to the Bible the crimes of rape and murder deserve the death penalty." Pet. App. 233-234.

Kipp argued that the jury's consideration of extraneous evidence was misconduct that led to a presumption of prejudice and required relief. Docket 13, lodgment 8 at 152-153. He also requested an evidentiary hearing to be able to further prove his claim. *Id.* at 150. The State did not rebut Kipp's evidence with any other evidence but instead argued that Rivers' declaration

was not credible based on the declaration itself. Docket 13, lodgment 11 at 75-77. The California Supreme Court summarily denied the claim "on the merits for failure to state a prima facie case for relief." Pet. App. 176.

VI. Federal Habeas Action

The district court denied the claim in its order denying Kipp's motion for an evidentiary hearing. Pet. App. 155-158. The Ninth Circuit granted a COA on the claim but denied relief in its published opinion filed on August 19, 2020 and then denied Kipp's petition for rehearing. Pet. App. 1, 17, 30-34. The Ninth Circuit and district court rulings are discussed below.

REASONS FOR GRANTING THE WRIT

I. AEDPA Standards

Kipp filed his federal habeas petition after AEDPA's effective date; therefore, his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 205, 210 (2003). To obtain relief under AEDPA, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-737 (9th Cir. 2008) (en banc).

Under § 2254(d), a habeas petition challenging a state court judgment:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

> Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

When a federal court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an unreasonable factual determination, it reviews the claim *de novo* in assessing whether the petitioner's constitutional rights were violated, *Panetti v. Quarterman*, 551 U.S. 930, 953-954 (2007), *Frantz*, 533 F.3d at 735, *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010), and can grant an evidentiary hearing to allow the petitioner to present further evidence to support his claim. *Brumfield v. Cain*, 576 U.S. 305, 311, 324 (2015).

II. The Petition Implicates an Acknowledged Circuit Split on an Important Issue That Only This Court Can Resolve

The Court should grant certiorari to resolve the conflict in the circuits whether under clearly established federal law, 28 U.S.C. § 2254(d)(1), the reading of Bible verses in the jury room during capital-sentencing deliberations is juror misconduct subject to the presumed prejudice rule of *Mattox* and *Remmer* because it involves an impermissible extraneous or external influence on the jury's deliberations and verdict. Supreme Court Rule 10. The Ninth Circuit acknowledged this conflict in denying Kipp's

claim. It held that because, as in prior cases,[7] it could resolve Kipp's claim for lack of prejudice under *Brecht*, it need not decide the "open question" in the Circuit whether "injecting Bible verses into the jury room constitutes juror misconduct because the jury improperly considered 'extraneous evidence'" and therefore is analyzed under the "*Mattox-Remmer* framework set forth by the Supreme Court."[8] Pet. App. 31-32. The Ninth Circuit explained that "circuits that have addressed the question are split. (*Compare Oliver v. Quarterman*, 541 F.3d 329, 339-40 (5th Cir. 2008) (citing the Eleventh, First, and Sixth Circuits as support that 'most circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence') *with Robinson v. Polk*, 438 F.3d 350, 363-64 (4th Cir. 2006) (holding that the Bible is distinguishable from other types of external influences because 'reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence')." Pet. App. 32-33.

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[7] *Fields v. Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (en banc); *Crittenden v. Ayers*, 624 F.3d 943, 973 (9th Cir. 2010).

[8] *Mattox v. United States*, 146 U.S. 140, 149-150 (1892), *called into doubt on other grounds by Warger v. Shauers*, 574 U.S. 40, 46-47 (2014); *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Remmer v. United States*, 350 U.S. 377, 382 (1956). *See also Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017) (en banc).

Under the *Mattox-Remmer* rule, prejudice is presumed once a petitioner shows that extraneous evidence was "'possibly prejudicial,' meaning it had a 'tendency' to be 'injurious to the defendant.'" The "'burden [then shifts to and] rests heavily upon the state to establish' the contact was, in fact, 'harmless.'" Pet. App. 31-32 (quoting *Godoy*, 861 F.3d at 959, in turn quoting *Mattox*, 146 U.S. at 149-150, and *Remmer*, 347 U.S. at 229). *Mattox-Remmer*'s presumption of prejudice and burden-shifting rules reflect the danger posed by the constitutional errors to which it applies, and is less onerous than the standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), that typically applies to constitutional claims in federal habeas. *Robinson*, 438 F.3d at 375 (King, J., dissenting in part). If *Mattox-Remmer* applies to Bible-reading misconduct claims, Kipp is entitled to that prejudice standard and need not meet *Brecht*. *Clark v. Chappell*, 936 F.3d 944, 969-972 (9th Cir. 2019), *amended on denial of rehearing*, 948 F.3d 1172 (9th Cir. 2020); *Godoy*, 861 F.3d at 970; *infra* at 36-37.

III. The Reading of Bible Verses in the Jury Room During Deliberations Is Misconduct Analyzed Under the Presumed Prejudice Rule of *Mattox* and *Remmer* Because It Involves an Extraneous or External Influence on the Jurors' Deliberations and Verdict

Kipp's claim is based on clearly established, principles of federal constitutional law. "The Sixth and Fourteenth Amendments to the United States Constitution 'guarantee to the criminally accused a fair trial by a

panel of impartial, "indifferent" jurors.'" *Hurst v. Joyner*, 757 F.3d 389, 394 (4th Cir. 2014) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)); *id.* at 394, 398 (holding in AEDPA case that state court's failure to apply *Remmer*'s presumption of prejudice to, and hold an evidentiary hearing on capital petitioner's claim that juror read Bible at her father's suggestion before voting for death "was contrary to or an unreasonable application of the Supreme Court precedents applicable to juror-influence claims") (footnote omitted). "They also protect 'the right of confrontation,' which 'requires that the "jury's verdict must be based upon the evidence developed at the trial."'" *Id.* (quoting *Robinson*, 438 F.3d at 359, in turn quoting *Turner v. Louisiana*, 379 U.S. 466, 472 (1965)). "At its core, these Sixth Amendment rights are designed to ensure '"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 rights."'" *Id.* (quoting *Robinson*, 438 F.3d at 359, in turn quoting *Turner*, 379 U.S. at 472).

The Eighth Amendment guarantees reliable, nonarbitrary, individualized capital sentencing. *Caldwell v. Mississippi*, 472 U.S. 320, 323, 329-330 (1985). And the Fourteenth Amendment guarantee of "due process means a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (habeas case).

Kipp's claim is also based on this Court's "clearly established . . . constitutional rule forbidding a jury from being exposed to an external influence" before rendering a verdict. *Oliver*, 541 F.3d at 336 (AEDPA case). *Tanner v. United States*, 483 U.S. 107, 117-118 (1987), distinguished internal influences on a juror's deliberations, such as a juror's alleged mental incompetence, which are protected from challenge by the "no impeachment" rule of common law and Fed. R. Evid. 606, and external influences, "in which juror testimony impeaching a verdict would be admissible."

This Court has recognized as improper external influences on jurors statements by a bailiff to jurors (*Parker v. Gladden*, 385 U.S. 363, 364 (1966) (per curiam)); a relationship between jurors and government witnesses (*Turner*, 379 U.S. at 466, 467-470); exposure by jurors to a newspaper article (*Mattox*, 146 U.S. at 150-153); and efforts to bribe a juror. *Remmer*, 350 U.S. at 377-378, 382. In those cases, the Court applied a presumption of prejudice to the constitutional claims and granted relief on them. *Id.*

The question here is whether the reading of Bible verses in the jury room during capital-sentencing deliberations is juror misconduct subject to the presumed prejudice rule of *Mattox* and *Remmer* because it involves an impermissible extraneous or external influence on the deliberations and verdict. The answer is "yes," as concluded by the majority of Courts of Appeals to have considered the issue.

In *Oliver*, several jurors testified at a hearing on a new trial motion that during capital-sentencing deliberations a juror read from the Bible aloud to other jurors in the jury room. 541 F.3d at 331-332. The Fifth Circuit concluded, in a case governed by AEDPA, that "it is clear that the prohibition of external influences from *Remmer*, *Turner*, and *Parker* applies to this factual scenario" and "that the jury's consultation of the Bible passages in question during the sentencing phase of trial amounts to an external influence on the jury's deliberations." *Id.* at 336, 340; *id.* at 336 (describing *Remmer*, *Turner*, and *Parker* as "clearly established Supreme Court precedents"). The court explained that "the jury's use of the Bible here" -- "while they were in the jury room debating Oliver's fate" -- "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 340.

Oliver quoted Judge King's dissent from the denial of rehearing in *Robinson v. Polk*, 444 F.3d 225, 231 (4th Cir. 2006), which it aptly described as "cogently synthesiz[ing] these Supreme Court cases":

> The external influences recognized by the Court in those decisions are factually diverse, but they share a single, constitutionally significant characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant. This legal principle unifies the bailiff's remarks disparaging the defendant

in *Parker*, the relationship of confidence between the jury and key prosecution witnesses in *Turner*, and the effort to bribe a juror in *Remmer*.

Oliver, 541 F.3d at 336; *see also Panetti*, 551 U.S. at 953 ("AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'"); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) ("[A] federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'").

Oliver also correctly held that since the jury's consultation of the Bible was an external influence under *Remmer*, *Turner*, and *Parker*, those cases also clearly establish that a presumption of prejudice applies in considering a habeas petitioner's challenge to the misconduct. 541 F.3d at 338-339 n.12.[9]

Oliver noted that "[m]ost circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence." *Id.* at 339. The Eleventh Circuit so ruled in *McNair v. Campbell*, 416 F.3d 1291,

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[9] *Oliver* denied relief because the petitioner did not rebut by clear and convincing evidence the presumption of correctness that applied to the state court's finding, after an evidentiary hearing where four jurors testified, that the Bible did not prejudice the jury's verdict. 541 F.3d at 342-343. By contrast, despite diligently presenting the factual basis of his claim in state court, and requesting evidentiary hearings in state and federal court, Kipp has never received a hearing on his claim.

1297, 1301, 1307 (11th Cir. 2005) (cited in *Oliver*), a capital habeas case governed by AEDPA where the jury foreman "brought a Bible into the jury room during deliberations, read aloud from it, and led the other jurors in prayer." The court applied the *Mattox-Remmer* presumption of prejudice to the claim but ruled that the State successfully rebutted it at a state hearing that included juror testimony, and that the petitioner did not rebut the presumption of correctness to the state court's factual findings by clear and convincing evidence. *Id.* at 1307-1309.

In *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998) (cited in *Oliver*), in the course of denying a habeas claim of prosecutorial misconduct for quoting the Bible in closing argument, the Sixth Circuit explained that "there is error in" "cases in which a Bible was brought in the jury room" "not because the book was the Bible, but because the book was not properly admitted evidence."

In *United States v. Lara-Ramirez*, 519 F.3d 76, 89 (1st Cir. 2008) (cited in *Oliver*), the First Circuit suggested that the presence of a Bible in the jury room is an external influence on deliberations. The court said that "[b]ecause no special rule exists when the Bible is involved, the district court had a duty to investigate 'the colorable claim of juror taint' in this case and explore and exhaust the alternatives to mistrial, just as it would in other situations where extraneous materials have been brought into the jury's deliberations." *Id.*; *see also McNair*, 416 F.3d at 1307 ("Under federal law, any evidence that

does not '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' is presumptively prejudicial.") (Quoting *Turner*, 379 U.S. at 473.)

In contrast to the foregoing cases, in *Robinson*, the Fourth Circuit held that the state court did not unreasonably apply federal law in denying a claim of Bible-reading during capital-sentencing deliberations because "it would have been reasonable . . . to conclude that the Bible is not analogous to a private communication, contact or tampering with a juror, and that the common-law rule against allowing juror testimony applied." 438 F.3d at 363. The court said that "[u]nlike these occurrences, which impose pressure upon a juror apart from the juror himself, the reading of Bible passages invites the listener to examine his or her own conscience from within. In this way, the Bible is not an 'external' influence." *Id.* at 363-364. In *Robinson*, the petitioner presented affidavits by two law students summarizing their interviews of jurors and alleging that "(1) a juror asked for, and the bailiff provided, a Bible during sentencing deliberations; (2) the juror read an 'eye for an eye' passage; (3) the passage was read to the other jurors before a final vote on a death sentence; and (4) the juror read the passage in an attempt to convince his fellow jurors to vote for a death sentence." *Id.* at 358-359. Judge King wrote a persuasive dissent arguing that the Bible-reading was "an

external influence that has the potential to sway a juror against the defendant [and] must be deemed presumptively prejudicial." *Id.* at 369 (emphasis in original).

Oliver and the cases it relies on has the much stronger argument. Like the newspaper in *Mattox* and the bailiff's remarks in *Parker*, the Bible, like any book, is external to the evidence and the law the jury can properly consider. But the Bible is not just any book. To Christians, it is the word of God and a means of ordering one's life and decision-making. *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) ("To the average juror, Webster's Dictionary may be no more than a reference book . . . but the Bible is an authoritative religious document and is different not just in degree, although this difference is pronounced, but in kind."); *Fields*, 503 F.3d at 796 (Berzon, dissenting) ("tens of millions of Americans . . . view the Bible not as a collection of 'notions' about moral principles, but as a repository of hard-and-fast imperatives that must direct daily life"). It is no answer to say that reading from the Bible to other jurors during deliberations is analogous to the situation where a juror quotes the Bible from memory: Reading directly from the Bible itself enhances the power of the message by ensuring the message is accurately conveyed and by dramatically confirming its source. The Bible is too powerful to be unleashed in capital-sentencing deliberations where it

threatens to displace this Court's law requiring reliable, individualized sentencing based on facts presented in the courtroom.

IV. The Application of *Mattox-Remmer* To Kipp's Claim

Kipp's claim is based primarily on a declaration by juror Algertha Rivers. *See supra* at 19-20. The California Supreme Court summarily denied Kipp's claim "on the merits for failure to state a prima facie case for relief," Pet. App. 176, and this is the relevant state court decision for purposes of federal review. *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-1192 (2018). The district court assumed *arguendo* that the Bible reading was misconduct, but, relying on *Fields* and *Crittenden*, concluded that "the California Supreme Court was not objectively unreasonable in holding that Petitioner failed to show a substantial and injurious effect or influence on the verdict." Pet. App. 158. The Ninth Circuit correctly held that the declaration is admissible under Federal Rule of Evidence 606(b), which permits testimony about the consideration of extraneous evidence during jury deliberations. Pet. App. 31. After citing *Fields* and *Crittenden*, the Ninth Circuit held that "we again find it unnecessary to decide the question of whether use of Bible verses during deliberation constitutes misconduct because the state court could have reasonably concluded that any error did not prejudice the jury's verdict." Pet. App. 33. The court applied *Brecht* and held that "[w]eighing the overwhelming weight of th[e] aggravating evidence against the purported

juror misconduct, . . . any misconduct was harmless." Pet. App. 34. The Ninth Circuit erred by denying relief for lack of prejudice under *Brecht* and by not applying the *Mattox-Remmer* framework to his claim.

Kipp adequately raised his *Mattox-Remmer* argument in state and federal court, notwithstanding the sentence in the Ninth Circuit's opinion stating that "Kipp acknowledges that any juror misconduct must have had a 'substantial and injurious effect on the verdict.' *See Fields*, 503 F.3d at 781 . . . ." Pet. App. 33. This is the language of the *Brecht* test applicable to federal habeas claims unless the claim involves a structural error or has its own specific prejudice test. *Brecht*, 507 U.S. at 638. Although Kipp argued in his opening Ninth Circuit brief that he was prejudiced under *Brecht*, he also argued that the district court erred in holding that he had to satisfy *Brecht* in state court. Ninth Circuit docket 11 at 64-67. He argued that "*Brecht* is a different, and more onerous, standard than would have applied to the California Supreme Court's review of Kipp's claim of juror misconduct in the first instance." *Id.* at 65. He said that "[c]learly established federal law required the state court to presume that Kipp was prejudiced by the jurors' consideration of extraneous information unless the government came forward with evidence to rebut that presumption," and the state court's denial of relief ran afoul of 28 U.S.C. § 2254(d). *Id.* at 65-67 (citing *Mattox* and *Remmer*).

In a supplemental brief, Kipp noted that the Ninth Circuit's en banc opinion in *Godoy* was published after he filed his opening brief; explained that "*Godoy* held that *Mattox* . . . and *Remmer* . . . clearly establish the framework that applies to a claim that an improper external influence on a jury violated the defendant's constitutional rights"; argued that *Mattox-Remmer* applied to his juror misconduct claim; showed that California courts apply the same framework[10]; noted that in state court, Respondent did not rebut the presumption of prejudice with "other, contrary evidence," as required by *Mattox-Remmer*, but instead argued that the juror declaration was not credible based on the declaration itself (*see* Ninth Circuit docket 55); showed that § 2254(d) did not bar relief; and argued that the Ninth Circuit should grant relief on *de novo* review under *Mattox-Remmer* because the Bible reading was "possibly prejudicial" and Respondent did not rebut the presumption of prejudice with "other, contrary evidence." Ninth Circuit docket 54 at 3-10. The application of the *Mattox-Remmer* rule to Kipp's claim was also a focus of discussion at oral argument. Ninth Circuit docket 68. Kipp adequately presented and preserved his claim for review here.

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[10] *See, e.g., Godoy*, 861 F.3d at 962 & n.2, 964 n.3; *People v. Williams*, 148 P.3d 47, 79 (Cal. 2006).

Applying the *Mattox-Remmer* rule to Kipp's case, as *Oliver* and other cases discussed above show, bringing a Bible into the jury room and reading passages from it to other jurors during capital-sentencing deliberations introduced an impermissible external influence on the deliberations and verdict and constitutes juror misconduct. *Williams*, 148 P.3d at 79 (stating that the California Supreme Court has held and the Attorney General concedes that "reading aloud from the Bible or circulating biblical passages during deliberations is misconduct"). The jury violated the instructions to decide the case based on "the evidence received in this trial and not from any other source" and to refrain from "consult[ing] reference works." Pet. App. 290-291; *Oliver*, 541 F.3d at 339 ("The Bible passages in question here were not part of the law and evidence that the jury was to consider in its deliberations.").

Under step one of *Mattox-Remmer*, the misconduct was "possibly prejudicial" because it had a tendency to be injurious to Kipp (i.e., it raised a credible risk of influencing the verdict). The phrase "an eye for an eye" "licenses death as a punishment for any murder, a position rejected by the Supreme Court as contrary to the Constitution" and its mandate of individualized capital sentencing. *Robinson*, 444 F.3d at 232 (King, J., dis. from denial of rehearing en banc). Moreover, the prosecutor dramatically emphasized Kipp's statements expressing a belief in Satan in his guilt and

penalty closing arguments, where the jury heard the statements for the first time. "In Christian theology, Satan 'is the great enemy of man and goodness.'" Webster's New World College Dictionary, at p. 1192 (3d ed. 1996). The Bible-reading occurred before a verdict was reached, apparently when the jurors were at an impasse, because Rivers explains that the juror brought in the Bible to "help [jurors] in making a decision." *See supra* at 19; *see also id.* (Rivers tells trial investigator jurors were split over five-to-six votes before reaching verdict); *Fields*, 503 F.3d at 798 (Berzon, J., dissenting). Finally, the jury deliberated for a little over three full days before reaching a death verdict. Lengthy deliberations suggest a difficult case. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc); *see also Parker*, 385 U.S. at 365 (emphasizing that "the jurors deliberated for 26 hours" in finding prejudice from external influence).

Moving to step two of the *Mattox-Remmer* framework, Respondent did not rebut the presumption of prejudice in state or federal court with "other, contrary evidence" showing there is no reasonable possibility that the Bible reading influenced the death verdict. The state court could not reasonably deny Kipp's claim, and Kipp is entitled to relief on *de novo* review, or at least to an evidentiary hearing if the Court is not inclined to grant relief on the current record. *Tanner*, 483 U.S. at 120 ("The Court's holdings requir[e] an evidentiary hearing where extrinsic influence or relationships have tainted

the deliberations . . . ."); *Schriro v. Landrigan*, 550 U.S. 465, 468, 474, 481 (2007); *Hurst v. Joyner*, 757 F.3d 389, 398, 400 (4th Cir. 2014); *Barnes v. Joyner*, 751 F.3d 229, 251, 253 (4th Cir. 2014).

Although the State's failure to rebut the presumption of prejudice under *Mattox-Remmer* should have resulted in Kipp obtaining relief or at least an evidentiary hearing on his claim, *see, e.g., Godoy*, 861 F.3d at 959, 970, the Ninth Circuit applied *Brecht* to deny relief. Some Courts of Appeals that have recognized Bible-reading in deliberations as an external influence and applied *Mattox-Remmer*'s presumption of prejudice rule in that situation have nevertheless required the more onerous *Brecht* standard to be met as a condition to granting relief, and others have not. *Compare Oliver*, 541 F.3d at 341 (applying *Brecht*) *with McNair*, 416 F.3d at 1307-1309 (not applying *Brecht* but denying relief because the State "easily carried its burden of rebutting the presumption of prejudice" under *Mattox-Remmer*).

The fact that "[n]ot all circuits are in agreement regarding the appropriate standard for determining prejudice when a jury improperly consults the Bible during deliberations," *Oliver*, 541 F.3d at 341 n.13, is another reason to grant the writ in Kipp's case. The better rule is that *Brecht* should not apply where, as here, the state court unreasonably denies relief under *Mattox-Remmer* and the petitioner's claim is reviewed *de novo* in federal habeas. Although *Brecht* applies to claims of nonstructural error that

do not have their own built-in prejudice test, *e.g.*, Confrontation Clause claims,[11] it does not apply to claims that have an integrated prejudice component that is less onerous to meet than *Brecht*, *e.g.*, claims that counsel had a conflict of interest under the Sixth Amendment. *See Mickens v. Taylor*, 535 U.S. 162, 166-167, 174-175 (2002).

Even assuming, contrary to *Mattox* and *Remmer*, that the Ninth Circuit properly applied the *Brecht* test to Kipp's claim, it erred in holding that any misconduct was harmless under *Brecht*. Although the Ninth Circuit acknowledges elsewhere in its opinion that "[t]he jury deliberated for about three days" at penalty and "[t]he defense presented a substantial mitigation case," 971 F.3d at 871, 873, it overlooks these facts in concluding that "any [juror] misconduct" "was harmless." *Id.* at 882. The three days of deliberations undermine the Ninth Circuit's conclusion that the aggravating evidence was "overwhelming" and shows this was a close case. *Id.*

The Ninth Circuit's prejudice analysis also overlooks the import of its decision the same day in Kipp's separate appeal challenging his Orange County convictions and death judgment for the murder and attempted rape of Antaya Howard, which was entered more than a year before voir dire began in his Los Angeles County case. *See Kipp*, 971 F.3d 939. At the guilt-phase

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[11] *See, e.g., Winzer v. Hall*, 494 F.3d 1192, 1201 (9th Cir. 2007).

in Orange County, the prosecution presented evidence that Kipp raped and murdered Tiffany Frizzell in Los Angeles County. *Id.* at 943. At the penalty-phase in Los Angeles County, the prosecution presented evidence that Kipp had murdered and attempted to rape Howard. *Kipp*, 971 F.3d at 870.

The Ninth Circuit granted guilt relief in the Orange County case because the Frizzell evidence was impermissible propensity evidence "expressly relied on" by the prosecution "to prove the necessary intent to rape and intent to murder while attempting to rape" Howard. *Kipp*, 971 F.3d at 957. The court stressed that "[b]ased solely on the evidence presented about the Howard crime, the jury could have at most inferred that Kipp was with Howard the night in question, and they might have had sex." *Id.* Yet in finding any errors in Los Angeles County harmless, the court emphasizes the aggravating evidence before the jury of Kipp "brutally raping and killing . . . Howard," Pet. App. 34, charges its other opinion acknowledges were not lawfully proven and which do not weigh in favor of finding prejudice. *Porter v. McCollum*, 558 U.S. 30, 42 (2009) (per curiam). The Ninth Circuit's circular reasoning undermines its analysis and conclusion.

Fields and *Crittenden* are unlike Kipp's case. In *Fields*, a juror conducted research on the Bible outside the jury room, then brought to penalty deliberations a list of notes for and against the death penalty. 503 F.3d at 777 & n.15. In Kipp's case, by contrast, a juror brought a Bible into

the jury room and read directly from it to other jurors while the jury was at an impasse. The penalty deliberations in the *Fields* case lasted about one full day, 503 F.3d at 777-778, much shorter than the three days in Kipp's case, suggesting that the verdict was not as close in *Fields*. Indeed, Fields's case was markedly more aggravated, involving violent attacks against five victims during a three-week, "one-man crime wave" that began shortly after Fields's release on parole for manslaughter. *Id.* at 760-761. *Crittenden* held, after an evidentiary hearing, that "the bare showing that a juror read a religious text outside the jury room does not establish prejudice." 624 F.3d at 973-974.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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