No. 20-8093

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals correctly denied federal habeas relief to the petitioner on his claim of jury misconduct.

DIRECTLY RELATED PROCEEDINGS

Supreme Court of the United States:

Kipp v. California, No. 01-10497, certiorari denied October 7, 2002 (direct appeal)

United States Court of Appeals for the Ninth Circuit:

Kipp v. Davis, No. 15-99020, judgment entered August 19, 2019; petition for rehearing and rehearing en banc denied December 21, 2020 (this case below)

United States District Court for the Central District of California:

Kipp v. Davis, No. CV 03-8571, judgment entered December 2, 2015 (this case below)

California Supreme Court:

In re Kipp, No. S129115, petition denied June 28, 2006 (state collateral review)

In re Kipp, No. S093369, petition denied November 12, 2003 (state collateral review)

People v. Kipp, No. S009169, judgment entered November 1, 2001 (state automatic appeal)

California Court of Appeal, Second District:

Kipp v. Superior Court, No. B037651, interlocutory petition denied October 12, 1988

California Superior Court, Los Angeles County:

People v. Kipp, No. A028286, judgment entered February 24, 1989

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CONSTITUTIONAL PROVISIONS

STATEMENT

1. Petitioner Martin James Kipp was convicted and sentenced to death for raping and murdering 18-year-old Tiffany Frizzell. Pet. App. 5-6.

a. The evidence at the guilt-phase of petitioner's trial showed that on September 15, 1983, Frizzell traveled to Long Beach to start college. Pet. App. 187. Her dormitory was not yet open to students, so she stayed at a nearby hotel. *Id.* On the morning of September 17, a housekeeper found Frizzell's dead body on the bed in her room. *Id.* A piece of clothing covered her face, she was wearing a blouse without a bra, and she was naked from the waist down. *Id.* A cloth belt was pulled tight around her neck. *Id.* A small hook, apparently from Frizzell's missing bra, was embedded in the skin of her back, and one of her fingernails was broken. *Id.* Semen and sperm were in her vagina and on her external genital area. *Id.* Her body was bruised and abraded, and she had "petechial" hemorrhages and had a deep ligature mark on her neck which an expert testified were consistent with strangulation. *Id.* at 187-188.

Petitioner's fingerprint was found on the telephone in Frizzell's room. Pet. App. 187. Two days after Frizzell's body was discovered at the hotel, a canvas bag was found a half-mile away. *Id.* at 188. The bag contained various items of Frizzell's, including a camera, a purse, a pair of shorts, a bra that was torn and missing its fastener, and a book with Frizzell's name written inside the cover. *Id.* Petitioner's fingerprints were found on that book. *Id.* A month after Frizzell's body was discovered, petitioner sold to a second-hand dealer a

personal stereo and cassette player that Frizzell's mother identified as belonging to her daughter. *Id.* In addition to this physical evidence, the prosecution introduced testimony about two attempts that petitioner made to escape from jail while awaiting trial for the murder of Frizzell, which the prosecution argued showed petitioner's consciousness of his guilt. *Id.*

The prosecution also introduced a letter from petitioner to his wife, postmarked September 15, 1987, in which petitioner confessed and bragged about having "raped, sodomized, beat, swore, and laughed at" two "no-good bitches" who did not "deserve[] to live anymore." Pet. App. 139. The letter stated that the crimes "felt great," and that "Satan's licking both those bitches up now and laughing." *Id.* Frizzell had been about to start college at the time of the crime, *see supra* p. 1, and the letter described one of the victims as a "little tramp [who] played it off as a college sweetheart" but "was anything but that, and a loose fuck to boot," Pet. App. 139. The prosecutor had offered to redact all references to the other victim; but when the defense's motion to exclude the letter entirely was denied, defense counsel stated that he did not want the reference to the other victim redacted because he did not want jurors surprised by reference to the other murder in any subsequent penalty phase. Pet. App. 139; *see infra* pp. 4-5 (noting references to other victim in penalty phase). The jury therefore also saw petitioner's description of his other victim as a "black prostitute" who liked to "play games" with people and "said 'Okay, okay Kipp'" as petitioner "crushed" her throat. Pet. App. 92.

The jury convicted petitioner of first-degree murder, rape, and robbery, and found true beyond a reasonable doubt the special circumstance that the murder was committed in the course of a rape. Pet. App. 189; *see* Cal. Penal Code § 190.2 (a)(17)(C). The jury deadlocked on whether an additional robbery special circumstance had been proven true beyond a reasonable doubt. Pet. App. 189.

b. At the penalty phase, the prosecution introduced evidence of numerous other crimes that petitioner had committed. Before murdering Frizzell, petitioner had choked and raped J.M. Pet. App. 8. J.M. told jurors that, in 1981, petitioner had met her at a bar and lured her to his truck. *Id.* He turned on the stereo, and encouraged her to shut the door to better hear the music. *Id.* at 8, 190. When she complied, petitioner drove away to another location, refusing her requests to be taken back. *Id.* at 8. J.M. was unable to let herself out of the truck because it had been modified to remove the inside door handle where she was sitting. *Id.* Petitioner pushed J.M. into the back of the truck, where a windowless shell was welded in place over the bed of the truck. *Id.* at 8, 190. Petitioner removed her clothes, began to strangle her, and raped her. *Id.* at 8. When J.M.'s body had gone limp and she was unable to breathe, petitioner demanded that she orally copulate him. *Id.* She said she would need fresh air to do that—and when he opened the door for that to happen, she escaped, flagged down a motorist, and reported the incident to the police. *Id.* Petitioner's attack left J.M. with severe bruises on her neck and

she had to wear a neck brace for two weeks afterwards. *Id.* Petitioner was convicted of rape for the attack. *Id.*

In November 1983, shortly after he murdered Frizzell, petitioner attacked his then-girlfriend L.N. *See* Pet. App. 8-9. L.N. testified that when she refused to have sex with petitioner, he responded by punching her in the head and choking her. *Id.* She escaped by telling him she was about to vomit and needed to go to the bathroom. *Id.* When she got to the bathroom, she locked the door and managed to climb out the window as petitioner was kicking down the door. *Id.* Although petitioner was arrested, L.N. explained that she did not press charges because petitioner had threatened to kill her and her son if she did. *Id.*

In December 1983, petitioner sexually assaulted and murdered 19-year-old Antaya Yvette Howard. Pet. App. 9. Howard's body was found in a car that had been parked in an alleyway for several days and was emitting a foul odor. *Id.* The police arrived and found Howard's decomposing body covered by a blanket in the back of the car. *Id.* Her blouse was open and missing two buttons, and her bra had been rolled up, exposing her breasts. *Id.* She had died of asphyxiation due to strangulation, with trauma to the head contributing to her death. *Id.* Petitioner denied having known Howard, but his fingerprints were on the car's window and on a beer can in the front

passenger floorboard, and he had been seen drinking with her at a restaurant before her murder. *Id.*[1]

Finally, the jury heard further details about one of petitioner's attempted escapes pending trial—including that when petitioner was apprehended, he had threatened to kill a Sheriff's sergeant in what a witness described as "a very big way and a very humiliating" way to both the sergeant and the sergeant's family. Pet. App. 99; s*ee also id.* (recounting petitioner's comments that jail authorities were lucky to have found him because he would have been gone by the morning, and saying, with reference to the threats against the sergeant, that time was on petitioner's side).

The defense's extensive mitigation case included evidence of the history of depredations inflicted against petitioner's Native American tribe; the difficulties of life on the reservation where he grew up, including poverty and alcoholism; petitioner's abysmal familial upbringing; his extensive drug abuse; testimony from friends and relatives asking that his life be spared; and a

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[1] Petitioner was separately tried in Orange County for the murder of Howard, and was convicted and sentenced to death. Pet. App. 5, 187. In a separate decision issued the same day as its decision denying relief in this case, the same panel of the court of appeals granted petitioner federal habeas relief with respect to the conviction in the Howard case. The guilt-phase of the Howard trial had included evidence of petitioner's rape and murder of Frizzell, which the jury was allowed to use in determining petitioner's identity as the person who killed Howard and whether he had intended to commit rape and kill. *Kipp v. Davis*, 971 F.3d 939, 945, 950-960 (9th Cir. 2020). The court held that such use of evidence regarding the other murder under the circumstances violated due process. *Id.* at 960; *but see id.* at 960-965 (Nguyen, J., dissenting).

description of the conditions and security for prisoners serving life without parole sentences. Pet. App. 192-197. One of the defense witnesses was a psychologist. *Id.* at 14. The psychologist testified that he had interviewed petitioner multiple times and that petitioner had expressed shame, sorrow, and regret for his actions. *Id.* According to the psychologist, petitioner had explained that he wrote the September 15 letter containing expressions of satisfaction about the killing because he was upset and angry about having been sentenced to death for the murder of Howard. *Id.* at 14, 132; *see supra* p. 2 (describing September 15 letter).

In rebuttal, the prosecution introduced evidence of another letter, which petitioner wrote to his wife on or about September 9, 1987. Pet. App. 197. In that letter, petitioner stated that he would "rape and sodomize every woman bitch deputy and gouge their eyes out" but "let them live as invalids." *Id.* at 19. He said if he ever got an "opportunity to escape," he would "go on a spree," and kill the prosecutors and their families. *Id.* He stated that Satan had helped him "rejuvenate [his] energy in a working manner," and that it would be wrong to "ever underestimate [his] intentions." *Id.* at 19, 313; *see generally id.* at 97 (quoting trial court's explanation that the letter was admissible for the jury to weigh when evaluating the "tremendous amounts of hearsay statements" that the psychologist had relayed about what petitioner had told him). The prosecutor, in his closing argument, also referred to the statements

that petitioner had made in the September 15 letter that had been admitted in the guilt phase. *Id.* at 19. The jury returned a verdict of death. *Id.* at 15.

c. The California Supreme Court affirmed the judgment on appeal. Pet. App. 177-218. This Court denied certiorari. *See Kipp v. California*, 537 U.S. 846 (2002).

2. In state-court habeas proceedings, one of petitioner's claims was that he was denied his rights under the Sixth, Eighth, and Fourteenth Amendments due to jury misconduct during the penalty phase deliberations. D. Ct. Dkt. 13, lodgment 8 at 150-154. In particular, petitioner claimed that one juror had brought in a Bible and read passages aloud to the group for discussion. Petitioner supported that claim with a declaration from juror A.R., who stated that:

> [D]uring penalty 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 decisions. 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. The California Supreme Court summarily denied the petition. *Id.* at 176. It included the jury misconduct claim among the claims that it denied "on the merits." *Id.*

3. Petitioner included the same jury misconduct claim in his petition for federal habeas relief. The federal petition, however, relied not only on the

declaration of juror A.R. that was presented to the state court, but also on additional information from a private investigator's interview of A.R. and other jurors. Pet. App. 233-238. The investigator's declaration stated that the investigator had interviewed 10 jurors. *Id.* at 233. It recounted statements from three of them, including statements about the lineup of successive votes and why one juror changed her mind to vote for death. *Id.* at 233-235.[2]

a. The district court denied habeas relief. Pet. App. 82-174. With respect to the jury misconduct claim, the court "assum[ed] *arguendo* that the juror declaration is admissible evidence and that the Bible reading was misconduct." Pet. App. 158. Even if those assumptions were correct, the court continued, the California Supreme Court would not have been "objectively unreasonable" to conclude that "Petitioner failed to show a substantial and injurious effect or influence on the verdict." *Id.*; *see also id.*at 157-158 (observing that the risk of prejudice was diminished by the instructions for jurors to base their decision

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[2] The petition states that the investigator's affidavit was submitted in petitioner's state habeas proceedings. *See* Pet. 20. That is incorrect. The state court record included a different affidavit from that investigator, which concerned different subjects; but the affidavit that is reproduced in the appendix to the petition and on which petitioner relies with respect to the claim in this petition was not in the state court record. *See* D. Ct. Dkt. 13, lodgment 8. Indeed, the investigator's affidavit on which petitioner now relies is dated a year after the California Supreme Court denied the state-court petition. *Compare* Pet. App. 175, *with id.* at 235. The state court petition also included affidavits from several other jurors—but those affidavits did not contain the information given in the private investigator's affidavit on which petitioner now relies. *See* D. Ct. Dkt. 13, lodgment 8 (Exhibits 303, 309, and 312); *see generally infra* pp. 11-12 (describing limitations on new evidence in federal habeas under *Cullen v. Pinholster*, 563 U.S. 170, 179-185 (2011)).

only on the evidence received at trial and on the judge's instructions of law). The court noted that the Bible passages allegedly read in the jury room "included the provision to 'judge not lest ye be judged,'" which "weigh[ed] against the death penalty." Pet. App. 157; *see id.* (observing that the Bible passages in petitioner's case were less severe than those in another case where jurors had read and discussed passages stating that "Whoso sheddeth man's blood by man shall his blood be shed," and "He that smiteth a man, so that he dies, shall surely be put to death"). And the court noted the extent of the aggravating evidence presented at the trial. *Id.* at 158.

b. The court of appeals affirmed. Pet. App. 2-34. With respect to the jury-misconduct claim, the court determined that petitioner had not met the requirement for a federal habeas petitioner to show that an error had "a 'substantial and injurious effect on the verdict'" in order to obtain relief. *Id.* at 33; *see generally Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). The court reasoned that the verses that were allegedly read in the jury room—"'an eye for an eye' and 'judge not lest ye be judged'"—were verses "tending to support opposing views." Pet. App. 33. The jury was instructed to base its decision on the evidence in court and the law as stated by the judge. *Id.* at 34. And petitioner's case featured "overwhelming aggravation evidence." *Id.*; *see also id.* (noting that "the extent of [petitioner's] violence against women was devastating," including the "brutal" rape-murders of two women, the rape and choking of a third, and "violently assaulting and threatening to kill" a fourth);

id. (petitioner also "twice tried to escape from jail, showed an utter lack of remorse, and threatened to commit violent atrocities again in the future"). Weighing "the overwhelming weight of this aggravating evidence" against "the purported juror misconduct," the court concluded that any misconduct was harmless. *Id.* at 34; *see also id.* at 33 ("the state court could have reasonably concluded that any error did not prejudice the jury's verdict"). As a result, the court saw no need "to decide the question of whether use of Bible verses during deliberation constitutes misconduct" under cases such as *Mattox v. United States*, 146 U.S. 140 (1892), and *Remmer v. United States*, 347 U.S. 227 (1954). *Id.* at 33; *see generally infra* pp. 15-16 (discussing *Mattox* and *Remmer*).

ARGUMENT

Petitioner principally argues that this Court should grant certiorari to resolve a purported conflict among lower courts as to "whether under clearly established federal law . . . the reading of Bible verses in the jury room during capital-sentencing deliberations" is juror "misconduct" subject to a rule of "presumed prejudice." Pet. 22. But the decision below does not squarely implicate any tension between the lower courts on that question: the court of appeals resolved the case on harmlessness grounds and expressly declined to decide whether the state court should have treated the reading of Bible verses as misconduct or applied a presumed prejudice rule. Pet. App. 33. In any event, nothing in this Court's clearly established law required the state courts

to presume prejudice under the particular circumstances of this case. No further review is warranted

1. Under *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), federal habeas relief is generally available only to correct an error that "'had substantial and injurious effect or influence in determining the jury's verdict.'" Petitioner argues that "[e]ven assuming . . . that the Ninth Circuit properly applied the *Brecht* test to [his] claim, it erred in holding that any misconduct was harmless under *Brecht*." Pet. 38; *see id.* at 38-39. But that argument is unpersuasive.

To begin with, petitioner's argument that the references to Bible verses had a substantial and injurious effect on the jury's verdict rests in substantial part on evidence that was never presented in state court. *See* Pet. 20; Pet. App. 233-234; *supra* p. 8 n.2. In particular, the declaration by petitioner's private investigator about his interviews of various jurors—which is the source of the petition's allegations about the history of jury deliberations and why particular jurors changed their votes—was not submitted to the state courts. *See* Pet. 20 (discussing juror A.R.'s statements about the number of penalty-phase votes during deliberations, and juror S.H.'s statements about when and why she changed her vote); Pet. App. 233-235 (2007 declaration of investigator Alan Clow).[3] Because that evidence was not before the state courts, it cannot serve

[3] In the state court proceedings, petitioner submitted only the much more limited allegations in A.R.'s declaration, and information from other jurors about other subjects. *See* Pet. App. 236-238; *supra* p. 8 & n.2.

as a basis for federal habeas relief under 28 U.S.C. § 2254(d). *See Cullen v. Pinholster*, 563 U.S. 170, 179-185 (2011).

In any event, even accounting for the new evidence, the court of appeals correctly concluded that petitioner could not demonstrate prejudice under *Brecht*. Petitioner alleged that a single juror read a handful of Bible verses during deliberations. Pet. 20. But the verses mentioned—"judge not lest ye be judged" and "an eye for an eye," *see id.*—were well-known adages that jurors would have known quite apart from any religious context and whether or not a Bible was physically present. Nor did the verses militate toward a decision adverse to petitioner; to the contrary, the admonition to "judge not lest ye be judged" would reasonably be understood as admonishing *against* harshness toward petitioner. Finally, although the petition repeatedly quotes the written passages in which petitioner referenced Satan in explaining his delight in past murders and intention to kill again, *see* Pet. 1-2, 7, 9-10, 13, 15, 17-18, 35-36, those letters do not establish the prejudice that habeas relief would require: The petition does not challenge the admission of those letters or the references to Satan; it challenges only the jurors' reading of specific Bible verses. And those verses made no references to Satan, Satanism, or anything similar.

When viewed in light of the evidence that was before the jury, any effect or influence that the Bible verses had on the verdict cannot plausibly be viewed as "substantial" or "injurious." *Brecht*, 507 U.S. at 638. Petitioner had committed a series of exceptionally brutal crimes against women, had twice

attempted to escape from custody, had threatened his girlfriend's and her child's life to prevent her from cooperating with prosecutors, and had threatened to mutilate and kill those who were guarding him in jail and prosecuting him in court. *See supra* pp. 3-6. Years after the murders, moreover, petitioner wrote that killing his victims "felt great"; described them as "no good fucking bitches" who did not "deserve[] to live"; derided this victim (Frizzell) as a "little tramp [who] played it off as a college sweetheart" but "was anything but that, and a loose fuck to boot"; and mocked another victim as "a black prostitute" who spoke submissively while petitioner killed her. Pet. App. 92. Under these circumstances, the court of appeals was correct to conclude that it was the facts of petitioner's offenses which led to his death sentence—not the already well-known Biblical verses of which he complains.

2. Petitioner argues that this Court's decisions in *Mattox v. United States*, 146 U.S. 140 (1892), and *Remmer v. United States*, 347 U.S. 227 (1954), required the state courts to apply a rule of presumed prejudice under the circumstances of this case. Pet. 24. He states that "[u]nder the *Mattox-Remmer* rule, prejudice is presumed once a petitioner shows that extraneous evidence [before the jury] was possibly prejudicial, meaning it had a tendency to be injurious to the defendant." *Id.* (internal quotation marks omitted). The burden then shifts to and rests with the State "to establish the contact was, in fact, harmless." *Id.* (internal quotation marks omitted). Petitioner further contends that "[i]f *Mattox-Remmer* applies to Bible-reading misconduct claims,

[he] is entitled to that prejudice and need not meet *Brecht*." *Id.* Under the circumstances of this case, however, Section 2254(d) forecloses petitioner from obtaining federal habeas relief based on the state court's failure to apply a presumption of prejudice. As a result, this case does not present the question of whether a state court's refusal to presume prejudice in a context where this Court's precedents *would* require such a presumption would exempt a federal habeas petitioner from the ordinary requirement of satisfying the *Brecht* standard.

Because the California Supreme Court's order denied petitioner's claim on the merits, Section 2254 bars federal habeas relief for petitioner's claim unless that decision was contrary to, or involved an erroneous application of, clearly established federal law. *See Harrington v. Richter*, 562 U.S. 86, 98-99 (2011). Because the merits-denial was in a summary order, petitioner must establish that there was "no reasonable basis" on which that court could have denied relief—*i.e.*, that the denial of relief necessarily violated this Court's clearly established precedent. *Id.* at 98. "[C]learly established law" under Section 2254(d)(1) requires Supreme Court precedent that "squarely addresses the issue" before the state court. *Wright v. Van Patten*, 552 U.S. 120, 125-126 (2008) (per curiam); *see Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). If the circumstances of a case are only "similar to" Supreme Court precedents, then the state court's decision is not "contrary to" their holdings. *Woods v. Donald*, 575 U.S. 312, 317 (2015) (per curiam). And "'if a habeas court must

extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 572 U.S. 415, 426 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). That framework prohibits habeas relief here.

The California Supreme Court could reasonably have concluded that *Remmer* and *Mattox* did not require any presumption of prejudice in the circumstances of this case. In *Remmer*, the defendant was a gambling house operator on trial for tax fraud. *See* 350 U.S. at 377, 380. During the trial, a card dealer approached a juror, offering information that the defendant had money available from unreported income and might pay it as a bribe for a favorable outcome. *Id.* at 380. The interaction left the juror "disturbed and troubled." *Id.* at 381. After the juror reported the interaction to the judge, FBI agents investigated by interviewing the juror about it while the trial was still ongoing. *Id.* at 380-381. This Court concluded that the juror had been subject to "extraneous influences to which no juror should be subjected" and held that the defendant was entitled to a new trial. *Id.* at 382.

In *Mattox*, a bailiff told the jurors under his watch that the defendant, on trial for murder, had also committed additional murders that they had not heard about in court. *See* 146 U.S. at 142 ("'This is the third fellow he has killed.'"). That information was reinforced by a newspaper article that was read to the jury and which assessed the prosecution's case as strong. *See id.*

(article stating that the defendant "'has been tried for his life once before,'" that the evidence against the defendant "was very strong," and that the prosecutor's argument for conviction was so "logical" that even the defendant's "friends . . . gave up all hope of any result but conviction"). This Court held that the conviction could not stand. With respect to the article, the Court explained that it was "not open to reasonable doubt that [its] tendency . . . was injurious to the defendant." *Id.* at 150. And with respect to the bailiff's comments, the Court stated that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear[.]" *Id.* at 149.

Those cases are too far afield from this one to satisfy the requirements for relief under Section 2254(d). Indeed, because both cases arose from federal prosecutions and did not cite or discuss the federal Constitution, it is not even clear that their prejudice rules were announced as a matter of constitutional law rather than under this Court's supervisory power over lower federal courts. *See Early v. Packer*, 537 U.S. 3, 10 (2002) (holding that circuit court erred in deeming particular Supreme Court decisions clearly established law for purposes of § 2254(d), where those decisions "reversed [federal] convictions . . . and neither opinion purported to interpret any provision of the Constitution").

In any event, the type of extraneous influences that those cases addressed were quite different from the allegations in this case. In both *Mattox* and

Remmer, jurors were given extraneous information about the defendant himself, which tended to reinforce that the defendant was factually guilty of the charged crimes. In both cases, moreover, the jury learned this extraneous information from government agents outside the jury: the court bailiff (in *Mattox*), and an FBI agent (in *Remmer*) whose interview of the juror during trial effectively corroborated the suspicion that the defendant had attempted to bribe him with undeclared funds. Nothing similar is alleged in this case: here, a juror read two well-known verses that conveyed no information about the defendant in particular, one of which arguably had a tendency to incline the jury toward mercy rather than harshness.[4]

Petitioner argues that such distinctions do not matter because the rule of presumed prejudice applies in general to *any* extraneous information considered by the jury, regardless of the information's nature or its source. To be sure, the law does aim to confine jurors to evidence and instructions from the courtroom. But that does not mean that the state court's application of something other than a presumed prejudice rule in this case would have violated this Court's clearly established precedent. To the contrary, this Court has repeatedly cautioned against attempts, in Section 2254(d) cases, to "'refine

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[4] Although petitioner cites other Supreme Court decisions in passing, *see* Pet. 26, his case differs from those for similar reasons. *See Parker v. Gladden*, 385 U.S. 363, 364-365 (1966) (per curiam) (concerning bailiff's statement to jurors); *Turner v. Louisiana*, 379 U.S. 466, 468-470 (1965) (concerning law enforcement officers who were key prosecution witnesses but also guarded and fraternized extensively with the deliberating jurors).

or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced.'" *Lopez v. Smith*, 135 S. Ct. 1, 7 (2014) (per curiam). The California Supreme Court would not have been unreasonable to conclude that any constitutional requirement to presume prejudice under *Mattox* and *Remmer* did not apply to this very different kind of alleged misconduct.

Finally, the California Supreme Court could reasonably have concluded that, even if a presumption of prejudice did apply in this case, that presumption was rebutted. As explained above, the verses at issue would already have been known to the jurors, and one of them arguably pointed against a capital sentence. They did not relate to petitioner's mentions of Satan in his letters to his wife. And petitioner's record of assaulting, raping, and murdering women—combined with his disavowal of remorse, his contempt for his victims, his attempts at escape, and his stated intent to torture and murder again—would amply have justified a determination that any presumption of prejudice was overcome. *Cf. supra* pp. 12-13; Pet. App. 23 (court of appeal's observation that "the aggravating evidence was overwhelming" and the prosecutor's "methodical recounting of [petitioner's] continuous history of violence" was "devastating").[5] The California Supreme

[5] That is particularly so since, as noted before, many of petitioner's current allegations about what happened in the jury room were not presented to the state court and therefore could not be used on federal habeas to undercut that court's decision. *See supra* pp. 8, 11-12 & n.2.

Court therefore could have reasonably denied relief even under petitioner's proposed standard.

3. Petitioner also contends that review is necessary to resolve a conflict in the lower courts over whether reading or discussing Bible verses is jury misconduct subject to the presumed prejudice rule, and, if so, whether that rule displaces *Brecht* in federal habeas. Pet. App. 22-24. But that argument substantially overstates the degree of any tension between the lower courts on these issues. And, in any event, this case does not present an opportunity to resolve any perceived conflict.

Petitioner argues that the First, Sixth, and Eleventh Circuits have "ruled that when a Bible itself enters a jury room the jury has been exposed to an external influence," while the Fourth Circuit has held that "the Bible is distinguishable from other types of external influences." Pet. 23 (quoting Ninth Circuit's descriptions of discussions in *Oliver v. Quarterman*, 541 F.3d 329, 339-341 (5th Cir. 2008), and *Robinson v. Polk*, 438 F.3d 350, 363-364 (4th Cir. 2006)). But a closer examination of the referenced circuit authority reveals no genuine conflict between the circuits, let alone one that warrants resolution in the context of this case.

The First Circuit decision, *United States v. Lara–Ramirez*, 519 F.3d 76 (1st Cir. 2008), was a direct appeal from a federal prosecution. It said nothing about whether a presumed prejudice analysis should displace the *Brecht* standard on federal habeas review of a state-court judgment. Nor did it

examine whether *Mattox* or *Remmer* clearly established, for purposes of Section 2254(d), that state courts must apply a presumed prejudice analysis whenever Biblical verses are read in a jury room.

The Eleventh Circuit decision, *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), likewise did not consider whether this Court's clearly established precedent requires a presumption of prejudice where Bible verses are read in the jury room, or whether that standard makes *Brecht* inapplicable. Although *McNair* was a habeas case arising from a state prosecution, Section 2254(d) did not apply to the relevant claim because the claim was never presented to the state courts or decided on the merits by them. *McNair* therefore denied relief on grounds of procedural default and lack of exhaustion. *Id.* at 1303-1304. The opinion discussed the presumed prejudice rule only as part of an "alternative holding" to address the "peculiar" analysis that might apply if its procedural default analysis were wrong or if the procedural default had been waived by the State. *Id.* at 1307. In such a circumstance, given that the state court did not address the merits of the claim, the court "assume[d] arguendo"—but "expressly [did] not decide"—that the claim could be reviewed de novo. *Id.*; *see also id.* at 1308-1309 (concluding that under that standard, the presumption of prejudice would apply but was rebutted by the "innocuous nature of the passages" at issue and the evidence that they merely encouraged jurors to take their task seriously). That analysis is not inconsistent with the

decision below in this case, since the claim at issue here was decided by the California Supreme Court on the merits. *See supra* p. 7.

The Sixth Circuit decision, *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), is even further afield. *Coe* did not decide the prejudice standard for jurors' use of a Bible. It concerned whether a trial was rendered unfair by a prosecutor's closing argument that quoted a Biblical verse ("'whosoever sheddeth man's blood, by man shall his blood be shed'") as establishing that capital punishment is the appropriate retribution for murder. *Id.* at 351. The opinion's only reference to jurors' own reading of the Bible was in the course of distinguishing such cases as involving different considerations. *Id.*

The Fifth Circuit's decision in *Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008), actually aligns with the Ninth Circuit's disposition below. Although *Oliver* concluded that the introduction of a Bible into the jury room was misconduct under *Remmer*, it proceeded to deny relief upon concluding that the *Brecht* harmlessness standard was not satisfied. *Id.* at 341.[6] Here, the Ninth Circuit likewise denied habeas relief based upon *Brecht*—and its decision not to resolve whether *Remmer* required the state courts to apply a

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[6] *See also Oliver*, 541 F.3d at 343 (explaining that any state-court factual findings about the effect of an extraneous influence must be deferred to under Section 2254(e), but "if the state court does not make factual findings regarding the effect of an external influence on the jury, then we simply conduct a harmless error analysis using the *Brecht* standard without having to defer to any state court findings").

presumption of prejudice cannot have conflicted with *Oliver*. *See supra* pp. 9-10.

Finally, in *Robinson v. Polk*, 438 F.3d 350 (2006), the Fourth Circuit applied Section 2254(d) and determined that *Mattox* and *Remmer* did not require the state courts to presume prejudice with respect to an allegation of jurors reading the "eye for an eye" verse from a Bible during deliberations in a capital case. *Id.* at 357-358. That obviously does not conflict with the decisions below, which denied petitioner relief on the alternative ground of *Brecht* without deciding whether the state court should have presumed prejudice. *See supra* pp. 9-10. To the extent that *Robinson* may be in tension with *Oliver* as to whether a jury's consultation of the Bible during deliberations is misconduct under this Court's clearly established law, that issue is not properly presented in this case because the court of appeals below resolved this case on *Brecht* grounds.[7]

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[7] Petitioner also implies that the court of appeal's decision below conflicted with prior Ninth Circuit precedents. *See* Pet. 24 (citing *Clark v. Chappell*, 936 F.3d 944, 972 (9th Cir. 2019), and *Godoy v. Spearman*, 861 F.3d 956, 970 (9th Cir. 2017)). The panel below understood circuit precedent to allow it to deny federal habeas relief under the *Brecht* standard without first determining whether the state courts should have applied *Remmer* and *Mattox*. Pet. App. 33. The Ninth Circuit cases cited by petitioner do not conflict with that: they remanded jury misconduct claims for consideration of the presumed prejudice standard without addressing whether the *Brecht* standard might independently bar the claim. *See Clark*, 936 F.3d at 972; *Godoy*, 861 F.3d at 970; *see also* Pet. App. 32 (noting that *Godoy* involved a "wholly different" type of extraneous communication than the one in this case). In any event, any

CONCLUSION

The petition for a writ of certiorari should be denied.

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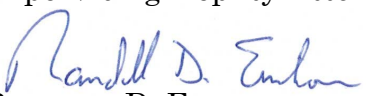

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internal tension in Ninth Circuit precedent can be more appropriately resolved through the en banc process rather than through the intervention of this Court. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").