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

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

Respondent's Brief in Opposition ("BIO") does not rebut Martin Kipp's showing that his case is worthy of review:

(1) to resolve a "recurring question on which courts of appeal have divided:"[1] Whether clearly established federal law requires that a habeas petitioner's claim that his constitutional rights were violated when a juror brought a Bible into the jury room and read from it 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;

(2) to resolve "an apparent conflict with this Court's precedents"[2] resulting from the Ninth Circuit's failure to apply a presumption of prejudice to Kipp's claim and instead denying relief for lack of prejudice under *Brecht v. Abrahamson*, 507 U.S. 619 (1993); and

(3) to resolve inter-circuit and intra-circuit splits on whether *Brecht* applies to claims of Bible-reading during jury deliberations. *CNH*

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[1] *Clay v. United States*, 537 U.S. 522, 524 (2003).

[2] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991).

*Indus. N.V. v. Reese*, 138 S. Ct. 761, 765 & n.2 (2018); *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 & n.5 (2003).

Petition at i, 22-32, 37-38.

Respondent argues that "the decision below does not squarely implicate any tension between the lower courts on" the first question noted above because "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." BIO at 10. Respondent's effort to conceal a conflict fails. By denying Kipp's claim for lack of prejudice under *Brecht*, the Ninth Circuit essentially ruled that the presumed prejudice rule of *Mattox* and *Remmer* does not apply, and that ruling is in conflict with opinions by this Court, other Circuit Courts, and the Ninth Circuit itself. *See* Petition at 23-24, 32-33, 37-38. The Ninth Circuit opinion implicates and sufficiently addresses a live, recurring and important conflict in the Circuits to make Kipp's case a good vehicle for review. *See Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari to decide whether a presumption applies to a habeas claim challenging a state court judgment "[b]ecause uniformity among federal courts is important on questions of this order").

Respondent asserts that Kipp's argument that he was prejudiced by the juror misconduct "rests in substantial part on evidence that was never

presented in state court," namely, a declaration signed in 2007 by his trial investigator Alan Clow. BIO at 8 & n.2, 11. Respondent is correct that Clow's 2007 declaration was not filed in state court; Kipp mistakenly said it was in his petition. Accordingly, that declaration cannot be considered in evaluating whether 28 U.S.C. § 2254(d) bars relief. *Cullen v. Pinholster*, 563 U.S. 170, 181, 185 (2011).

But as Kipp explained in his petition, his claim is based "primarily" on the declaration of juror Algertha Rivers, which *was* filed in state court. Petition at 19. Her declaration recounts "that during penalty phase deliberations a female juror with dark, shoulder-length hair brought in a Bible and read it to" the jurors, telling them it "would help" them "in making a decision" whether Kipp should live or die. *Id.* at 19-20. Rivers stated that "[a] little over half of the jurors had a religious background and strong religious beliefs." *Id.* at 20. Juror questionnaires filed in state court showed that seven seated jurors self-identified as Christian. *Id.*

The importance of the 2007 Clow declaration, according to Respondent, is that it "is the source of the petition's allegations about the history of jury deliberations and why particular jurors changed their votes." BIO at 11. But the state court had before it a declaration by juror Arnez Vasquez signed on December 2, 2000, which explained that the jury voted three times during its penalty-phase deliberations. District court docket 13-124 (Exhibit 312 to

Kipp's first state habeas petition). Vasquez also handwrote at the bottom of his otherwise typewritten declaration that "[t]he Satanic letters demonstrated Martin Kipp's anger towards society. Some of the jurors were aware of Satanism as a demonic force or a cult, and they were affected by that evidence." *Id.*

Thus, the evidence before the California Supreme Court via the declarations of Rivers and Vasquez and the juror questionnaires was that a majority Christian jury voted three times before choosing death, and selected death only after a juror read "an eye for an eye" passage from the Bible to other jurors to help them make their decision. The state court could not reasonably deny Kipp's claim based on the record before it, particularly without affording him an evidentiary hearing. Petition at 35-37. And with 28 U.S.C. § 2254(d) satisfied based on the state court record, the federal courts can properly consider the 2007 Clow declaration on *de novo* review. *Brumfield v. Cain*, 576 U.S. 305, 311 (2015) (citing *Pinholster*, 563 U.S. at 185-186). Indeed, Kipp submitted the declaration in support of his motion for an evidentiary hearing on his juror misconduct claim. District court docket 99.

Respondent argues that "the admonition to 'judge not lest ye be judged' would reasonably be understood as admonishing *against* harshness toward petitioner." BIO at 12 (original emphasis). But the jurors had already

passed judgment on Kipp during the guilt deliberations before this verse was discussed, reducing any moderating impact this directive might otherwise have had.

Respondent argues that the references to Satan in the letters by Kipp introduced into evidence by the prosecution do not establish prejudice because the petition does not challenge the admission of those letters or their references to Satan. BIO at 12. Respondent does not provide a cite in support of this proposition. A finding of prejudice need not rely solely on evidence shown to have been unconstitutionally admitted. Rather, prejudice is analyzed by examining all the circumstances of trial to assess the harm from the constitutional error. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 762 (1946) (reviewing courts must examine "the proceedings in their entirety" when assessing prejudice); *id.* at 764 (courts must "weigh the error's effect against the entire setting of the record"); *id.* (prejudice from an error is determined "in relation to all else that happened"). Indeed, prejudice findings are often based, at least in part, on facts like the length of jury deliberations, jury notes, etc., which are not the subject of any claim of constitutional error. Petition at 36; *Fry v. Pliler*, 551 U.S. 112, 125 n.4 (2007) (Stevens, J., conc. in part and dis. in part) (collecting cases); *Wharton v. Chappell*, 765 F.3d 953, 978 (9th Cir. 2014).

Adding insult to injury, Respondent argues that the letters introduced by the prosecution show that any jury misconduct was harmless. BIO at 13. Kipp is entitled to argue that the letters show that the jury misconduct was prejudicial.

Respondent argues that "[w]hen 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." BIO at 12. But as Kipp showed in his petition, he established prejudice even if *Brecht* applies to his claim. The three days of jury deliberations before reaching a death verdict indicates a close case and the prejudice from the jury misconduct. Petition at 36; *Wharton*, 765 F.3d at 978.

Further, with regard to the circumstances of the capital offense, the evidence of rape -- the sole special circumstance found by the jury making Kipp death-eligible -- was weak. The rape kit was inconclusive. As the California Supreme Court explained in its opinion on direct appeal, "[e]xamination and analysis" of the "sexual assault kit" "revealed the presence of semen and sperm in Frizzell's vagina and on her external genital area, but not in her mouth or rectal area." Pet. App. 187. Prosecution evidence showed that "[t]here 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. The criminalist acknowledged that the redness

and erosion were consistent with normal, unforced sexual intercourse. Petition at 8.

Finally, Respondent, like the Ninth Circuit, overlooks the import of the Ninth Circuit's decision granting relief 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 v. Davis*, 971 F.3d 939, 943 (9th Cir. 2020). At the guilt-phase 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. Pet. App. 9.

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). As noted in the petition, the Ninth Circuit's circular reasoning undermines its analysis and conclusion. Respondent commits the same error in relying on the Howard evidence to argue the jury misconduct was harmless.

Respondent argues that "[t]he California Supreme Court could reasonably have concluded that *Remmer* and *Mattox* did not require any presumption of prejudice in the circumstances of this case." BIO at 15. Respondent asserts that "[t]hose 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." *Id.* at 16.

The State's current stance is an about-face from its position in *Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017) (en banc), a habeas case challenging a California state court judgment subject to AEDPA. There, the State agreed that *Mattox* and *Remmer* constituted clearly established federal law for the petitioner's claim that he was prejudiced by a juror's communications with a

"judge friend" about the case which were relayed to other jurors. *Id.* at 958-959, 962, 964 n.3.

Respondent argues that this Court's cases granting relief because of an impermissible external influence on the jury are factually distinguishable. BIO at 15-17. But Fourth Circuit Judge H. Lloyd King persuasively synthesized this Court's caselaw in his dissent in *Robinson v. Polk*, 444 F.3d 225, 231 (4th Cir. 2006), and showed its applicability to cases like Kipp's:

> 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*,[3] and the effort to bribe a juror in *Remmer*.

[3] *Turner v. Louisana*, 379 U.S. 466 (1965).

This legal principle also unifies a juror bringing a Bible into the jury room and reading passages from it to other deliberating jurors to help them decide whether a capital defendant should live or die. *Id.* at 232.

Respondent contends that "the California Supreme Court could reasonably have concluded that, even if a presumption of prejudice did apply in this case, that presumption was rebutted." BIO at 18. No it couldn't. Respondent did not rebut the presumption of prejudice in state court with "other, contrary evidence" showing there was no reasonable possibility that the Bible reading influenced the death verdict. *Godoy*, 861 F.3d at 959. Instead, Respondent just argued that Rivers's declaration was not credible based on the declaration itself. Petition at 20-21. Respondent also argued the claim should be denied without an evidentiary hearing. The state court could not reasonably deny Kipp's claim under clearly established federal law, particularly without first affording him a hearing. Petition at 35-37; *Godoy*, 861 F.3d at 959-960.

Respondent's discussion of cases cited by the Ninth Circuit and Kipp to try to show there is "no genuine conflict between the circuits" merely highlights the conflicting approaches among and within the circuits that require this Court's intervention. BIO at 19-22. Respondent asserts that the Ninth Circuit's decisions in *Godoy* and *Clark v. Chappell*, 936 F.3d 944 (9th Cir. 2019), *amended on denial of rehearing*, 948 F.3d 1172 (9th Cir. 2020), "do

not conflict with" its denial of Kipp's claim for failure to satisfy *Brecht* because those cases "remanded jury misconduct claims for consideration of the presumed prejudice standard without addressing whether the *Brecht* standard might independently bar the claim." BIO at 22 n.7. But *Godoy* held that if, on remand, "the state does not present contrary evidence that rebuts the presumption of prejudice by showing 'there is no reasonable possibility that Juror 10's communications influenced the verdict' . . . the district court should grant Godoy's petition for a writ of habeas corpus." 861 F.3d at 970. That is not the language of *Brecht*, but of the more defense-friendly standard that applies under *Mattox* and *Remmer*. *Godoy* made clear that *Brecht* had no role to play in that case.

In *Clark*, similar to here, the district court denied a claim that a capital sentencing juror voted for death after being told that "the Bible says, 'an eye for an eye,'" for lack of prejudice under *Brecht*. *Clark*, 936 F.3d at 971. The Ninth Circuit reversed and remanded because "the district court did not have the benefit of [its] decision in *Godoy* to determine whether the contact [with a minister, who provided the Bible passage to a juror during trial] was 'sufficiently improper' and raised 'a credible risk of affecting the outcome of the case'" adequate to invoke a presumption of prejudice under *Mattox-Remmer*. *Id.* The Ninth Circuit instructed that "if the district court finds the presumption triggered, the state must address its burden of showing that

[the juror's] contact with his minister was harmless -- in other words, that there was 'no reasonable possibility that the communication influenced the verdict . . . .'" *Id.* at 972. Again, this is not the language of *Brecht.* The conflict between the Ninth Circuit's approaches in *Clark* and *Godoy* on the one hand, and in Kipp's case on the other, is clear.

Respondent states that *United States v. Lara-Ramirez*, 519 F.3d 76 (1st Cir. 2008), "said nothing about whether a presumed prejudice analysis should displace the *Brecht* standard on federal habeas review of a state-court judgment." BIO at 19. But *Lara-Ramirez* held that the district court "did not conduct the investigation necessary to determine the magnitude of the prejudice resulting from the presence of the Bible in the jury room" and that this duty to investigate existed "just as it would in other situations where extraneous materials have been brought into the jury's deliberations." 519 F.3d at 89. *Lara-Ramirez* thus supports Kipp's position that "Bible-reading is an impermissible external influence on the jury's deliberations and verdict." Petition at i.

Respondent asserts that the analysis in *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), "is not inconsistent with the decision below in this case." BIO at 20-21. But *McNair* explained that the district court properly rejected the petitioner's claim "[b]ecause the state could successfully rebut the presumption of prejudice arising from the jury's consideration of

extraneous evidence." 416 F.3d at 1309. This holding is in stark contrast to the Ninth Circuit's denial of relief here for the failure to satisfy *Brecht*.

Respondent states that "[t]he Fifth Circuit's decision in *Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008), actually aligns with the Ninth Circuit's disposition below" because it denied relief under *Brecht*. BIO at 21. But *Oliver* demonstrates the conflict among the circuits on whether the *Mattox-Remmer* presumption of prejudice applies when a juror brings a Bible into the jury room and reads from it to other deliberating jurors (*Oliver* answered this question, "yes")[4] and whether such claims can be denied for lack of prejudice under *Brecht*. Petition at i, 22-32, 37-38.

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[4] The court concluded that "it is clear that the prohibition of external influences from *Remmer, Turner*, and *Parker* applies to this factual scenario." 541 F.3d at 336. *See also Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998) ("there is error" in "cases in which a Bible was in the jury room" "because the book was not properly admitted evidence").

## CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the Court should grant Kipp's petition.

Respectfully submitted,

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