No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE J. GERRANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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LAWRENCE J. GERRANS
By appointment by the Ninth Circuit Court

QUESTIONS PRESENTED

1. May a district court, upon the prosecutor's demand that a defendant's Bible be removed from the courtroom during a criminal trial, constitutionally prohibit a defendant from possessing and consulting a Bible while the jury trial is in session?
2. Should this Court overrule Ninth Circuit law, and resolve a Circuit split, by holding that in rare cases, a federal circuit court may remand for further development of the record on a claim of ineffective assistance of counsel?
3. May an appellate court disregard the unequivocal instructions in the Sentencing Guideline Worksheets for the timing and order of calculating sentencing guideline enhancements, and rely on citations to wrong guideline sections, in support of a cursory opinion on a guideline calculation that increases a defendant's prison sentence by years?

PARTIES TO THE PROCEEDING

Petitioner Lawrence J. Gerrans was the sole defendant and appellant below.

The United States of America was the sole plaintiff and appellee.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings in the U.S. Court of Appeals for the Ninth Circuit:

United States v. Gerrans, No. 10378 (9th Cir.) (Jan. 7, 2022) (opinion) and (March 16, 2022) (denying rehearing).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lawrence Gerrans, a devout Catholic, was a successful businessman who rose through the ranks in medical applications at a series of Fortune 500 companies before founding Sanovas, Inc. ("Sanovas"), a life-sciences company that received more than $60 million in investments and developed hundreds of patents, most of them created by Gerrans. He was convicted at trial not because he was guilty but as a direct result of the abject failure of his counsel to conduct an investigation or put on any defense, despite a wealth of material discovered by new defense counsel shortly after Gerrans' trial.

Most egregiously, before the final selection of Gerrans' jury, the prosecutor alerted the district court that Gerrans had a Bible and demanded that it be removed from the courtroom. The district court responded by ordering that his Bible remain in a briefcase during the entirety of the trial. Gerrans' Sixth Amendment trial right was thus impermissibly conditioned upon the deprivation of his First Amendment right to the free exercise of his religion. The Ninth Circuit did not address this constitutional error in its opinion, and declined to rehear the case, including *en banc*, on the issue of such constitutional error.

At sentencing, due to an error in the order of operations in applying the sentencing guidelines, the district court erroneously enhanced Gerrans' sentence by applying to his pre-release conduct an enhancement that is only allowed to be applied to post-release conduct, resulting in an unwarranted multi-year increase in his sentence. Petitioner raises the sentencing issue in this Court because the Ninth

Circuit's affirmed the sentence in a cursory statement that cited to the wrong sentencing guideline section and did not comport with the Sentencing Commission's Worksheets that thousands of practitioners routinely use to calculate sentencing guidelines. Petitioner seeks a remand with a direction to the lower court that it has a duty to give a coherent explanation for important decisions.

OPINIONS BELOW

The Ninth Circuit's decision can be found at *United States v. Gerrans,* 2022 U.S. App. LEXIS 504 (9th Cir. 2022) and is reproduced at App-002. The Ninth Circuit's order denying panel rehearing and/or rehearing *en banc* on four issues is reproduced at App-016.

JURISDICTION

The court of appeals filed its decision on January 7, 2022, and denied Gerrans' petition for panel rehearing and rehearing *en banc* on March 16, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First, Fifth, and Sixth Amendments to the U.S. Constitution are reproduced at App-001.

STATEMENT OF THE CASE

I. Procedural History

Petitioner Lawrence Gerrans was charged in a 12-count Second Superseding Indictment as follows: Counts 1-3, wire fraud (18 U.S.C. § 1343), comprising three transfers of money totaling $580,000 used to buy his home in 2015; Counts 4-5, wire

fraud (18 U.S.C. § 1343), comprising company credit card charges for personal expenses of $32,395.77 and $12,500.00 in 2017; Count 6, money laundering (18 U.S.C. §1957), arising out of Counts 1-3; Counts 7-9, false statements (18 U.S.C. §1001(a)(3)), regarding communications with the FBI; and Counts 10-12, contempt, witness tampering and obstruction (18 U.S.C. § 401(3), 18 U.S.C. §1512(b)(1), 18 U.S.C. §1503), arising out of an argument Petitioner had with his brother, Chris Gerrans.

Gerrans proceeded to trial before the Honorable Edward Chen in the Northern District of California. Jury selection began on January 6, 2022, and the jury was empaneled and trial commenced on January 13, 2020. On January 29, 2020, following a seven-day trial, the jury returned a verdict of guilty on all counts. CR-144.[1]

Gerrans reserved his rights under Federal Rule of Criminal Procedure 29 and brought motions for new trial, judgment of acquittal, and to dismiss based on prosecutorial misconduct, which the district court denied. CR-285.

On November 5, 2020, Mr. Gerrans was sentenced to a term of imprisonment of 135 months. CR-319.

Gerrans timely appealed. CR-387. On January 7, 2022, in a split decision, the Ninth Circuit affirmed Gerrans' conviction and sentence. International Trade Judge H. Miller Baker, sitting by designation, found that Counts 1-6 and 10-12 should be

[1] References are as follows: Excerpts of Record: ER; Appellant's Opening and Reply Briefs: AOB and RB; Panel Decision: SlipOp; "AMR" to Appellant's Motion for Rehearing and Rehearing *En Banc*; "App-__" to Gerrans's Appendix, and "CR" to the docket entries on the district court's Clerk's Record.

vacated based on Gerrans' post-trial showing of ineffective assistance of counsel.[2] CR-429. On February 18, 2022, Gerrans filed a Motion for Rehearing, which the Ninth Circuit declined to hear by Order issued on March 16, 2022. CR-430-431.

II. Statement of Facts Relevant to Petition

1. Jury selection in Gerrans' case began a week before openings. During a break in the jury selection process, government counsel stated that she had a "housekeeping matter," and that with respect to Gerrans' Bible on his counsel table, "the government objects to [a] Bible – as inappropriate, and [it] should not be brought into court, or in any way shown to the jurors during this process, or at any other point." AOB 34 n.6, 5-ER-1110. The prosecutor complained that it was "very prominently displayed." *Id.* When the district court indicated that it would rule that the Bible should be "covered," the government objected that this was insufficient, saying that the Bible "should be removed. It should not be here." 5-ER-1110-1111. The Court then suggested that the Bible be "put in a briefcase" so it would be "[n]ot visible," which government counsel said was "fine." 5-ER-1111. Defense counsel said nothing.

2. Counts 1-5 alleged that Gerrans committed a scheme and artifice to defraud Sanovas, Inc., the company he had co-founded, of company funds. Sanovas was

[2] Judge Baker also found that Counts 1-6 should be vacated due to Gerrans' wire fraud jury instruction challenge because the jury instructions permitted Gerrans to be convicted if it determined that Gerrans merely intended to deceive rather than to cheat, in violation of *Shaw v. United States*, 137 S.Ct. 462 (2016). Slip.Op. 10-14 (App. 11-15). Petitioner did not include this here because the error applies only to a limited number of cases that went to trial in the Ninth Circuit prior to the decision in *United States v. Miller,* 953 F.3d 1095 (9th. Cir. 2020).

formed (by legal counsel) in 2009 as a limited liability corporation by founding members ES Medical, LLC (Erhan Gunday's company), and Halo Management Group, LLC (Gerrans' company). 4-ER-719, 720. It converted into a Delaware C-Corporation in 2011. 4-ER-757, 760. The 2010 employment agreements set the founders' salaries and included a provision by which they would be paid deferred salary once the company received more funding. 4-ER-725.

3. Relating to alleged misconduct pre-dating Counts 1-3, the government called Lloyd Yarborough, Sanovas' former controller, to testify at trial that prior to 2013, Gerrans charged Sanovas for $170,000 in improper personal expenses. 6-ER-1134-1136.

New defense counsel who replaced trial counsel after the trial and prior to sentencing ("new defense counsel") located documents in government discovery showing that Yarborough's boss, CFO Robert Farrell, whom the government did not call as a witness, had in fact approved those very expenses that Yarborough testified were improper; Farrell explained in writing to co-founders Gerrans and Gunday the reason each and every expense was authorized and in accordance with GAAP, citing to specific sections of Gerrans' Employment Agreement and Sanovas' by-laws. 4-ER-773-776, 789-790; 3-ER-527.

Defense counsel did not use these documents or cross-examine Yarborough or any of the other witnesses who testified on this subject.

4. Counts 1-3 concerned $580,000 that Gerrans transferred from Sanovas and used to purchase a family home in March, 2015. The government introduced evidence

that when Gunday left Sanovas in 2014, he was given approximately $1.5 million pursuant to his Separation Agreement, "and some of that is severance, some of it is considered pay." 6-ER-1258. In closing, the government referred the jury to Gunday's severance agreement, which was in evidence as Government's Exhibit 113. *Id.* The government argued that there "was no reciprocal payout for Larry Gerrans" because he remained at the company. *Id.*

Defense trial counsel did not dispute the government's facts.

However, as described below, post-trial, new defense counsel discovered government discovery showing that more than half of what Gunday received in 2014 was deferred compensation for work done in 2010-2012, and that before that disbursement, Sanovas' CFO and outside legal counsel had confirmed that Gerrans was entitled to $723,900 for deferred compensation for the same years. Further, new counsel located in Sanovas' files a missing portion of Government's Exhibit 113 that explained that $816,585 of Gunday's payout was deferred compensation for work performed from 2010-2012.

The government's own discovery showed that Sanovas' Chief Financial Officer and outside attorneys at King & Spalding had confirmed that deferred compensation was owed to Gunday and Gerrans for work performed 2010-2012: In mid-2013, CFO Farrell prepared a chart entitled "Deferred Amounts Owed to Larry Gerrans and

Erhan Gunday," showing that Sanovas owed Gunday $816,585 and Gerrans $723,900 as deferred compensation for 2010-2012. 4-ER-789-794.[3]

Defense trial counsel never contacted or interviewed the witnesses CFO Farrell or the King and Spalding attorneys. 4-ER-666; nor did he introduce any of the business records showing why and how Gunday and Gerrans were each entitled to almost a million dollars in deferred compensation as of 2014, nor did he cross-examine any government witness on these facts.

Nor did trial counsel apparently compare Government Exhibit 113 to the actual Sanovas files; if he had, he would have discovered what new defense counsel did, that Exhibit 113 was missing the critical Exhibit C, which explained exactly why Gunday was entitled to $816,585 – as deferred compensation as part of the $1.5 million he received when he left Sanovas. *Compare* 7-ER-1511-1534 (Gov. Ex. 113, without Exhibit C) to 3-ER-549 (Exhibit C to that Separation Agreement). CR-247 at 8-9, 247-1 at 76. The missing Exhibit C to the Government Exhibit 113 was highly relevant because it directly tracked the amounts that CFO Farrell and King & Spalding attorneys had concurred were due to Gunday and Gerrans as deferred compensation for work from 2010-2012.

Due to ineffective assistance of defense trial counsel, the jury never heard that the co-founders were entitled to deferred compensation their work from 2010-2012,

[3] CFO Farrell prepared the chart after Sanovas outside counsel from King & Spalding advised Gerrans and Gunday that their employment agreements were not in keeping with IRS § 409A requirements, such that they would owe substantial taxes if they were not soon paid the outstanding amount owed to them for deferred compensation. 3-ER-528-533, 4-ER 652.

that $816,585 of the $1.5 million Gunday received in 2014 was for this deferred compensation, and that Gerrans was similarly owed deferred compensation in the amount of $723,000, for the same time period. This giant hole in the evidence allowed the government to argue incorrectly to the jury that while Gunday received $1.5 million, there was "no reciprocal payout for Larry Gerrans" permitted. 6-ER-1258.[4]

5. Counts 4-5 of the Second Superseding Indictment alleged that Gerrans used Sanovas' American Express card to pay personal property taxes ($32,000) and personal expenses ($12,500) in 2017. Again, defense trial counsel offered no defense or affirmative evidence.

Post-trial, new defense counsel located in government discovery documentation showing that in the year prior, Gerrans had used his own personal American Express card to lend Sanovas $200,000, including to make payroll, as confirmed by his personal American Express bills and his detailed emails to his brother, Chris Gerrans, as to how the $200,000 was spent on business expenses and payroll. 2-ER-91-93; 5-ER-983-984.

Defense trial counsel failed to show how Gerrans' use of the company American Express card to pay approximately $50,000 in personal expenses the following year

[4] The government also alleged that Gerrans deceived Sanovas Board Members in May, 2015 about his new employment contract and did not tell them information about additional funds used to purchase his home. These witnesses were not directly relevant to Gerrans' entitlement to the $580,000 as charged in Counts 1-3, and the alleged conduct postdated the conduct alleged in Counts 1-3. Agent Villanueva testified that he did not review Gerrans' employment agreements or the corporate governance documents even though a person's employment agreement "could" "be related to their financial transactions." 6-ER-1243. Nor did the government introduce any evidence or records of deferred compensation, such that there was no evidence as to how much Gerrans was owed by Sanovas for his work from 2010-2017. Villanueva testified as to one side of the ledger – how much Gerrans received from Sanovas, but not the amount *he was entitled to.*

constituted repayment of the amount he had lent the company; the district court agreed that new counsel's proof reduced Gerrans' restitution payment at sentencing by $200,000. CR-319.

6. The government's key witness was Gerrans' brother, cooperating witness Chris Gerrans. Defense trial counsel failed to cross-examine and impeach Chris Gerrans with critical government discovery. A few of many examples include:

(a) whereas Chris testified that he embezzled "about a million dollars" from Sanovas over four years, 6-ER-1194, defense trial counsel failed to introduce government records showing that Chris embezzled (according to the government's own subpoena to Sanovas) (3-ER-574-581) at least $1,519,792.40, a low water mark that did not include missing records, *id.* and did not reflect approximately $200,000 the government acknowledged at Chris Gerrans' sentencing were stolen via Pay Pal.

(b) whereas Chris testified that he started embezzling only because and after he saw Petitioner take money to purchase his home in March, 2015, 6-ER-1194, defense trial counsel failed to cross-examine Chris regarding government records showing that Chris started embezzling on July 1, 2014 and had already embezzled more than half a million dollars by March 2015. 2-ER-99-157, 3-ER-576-577, 3-ER-431;

(c) whereas Chris testified that in late 2014 and early 2015, Sanovas could not afford to pay vendors, 6-ER-1262, defense trial counsel failed to cross-examine Chris regarding government discovery showed that Chris was embezzling hundreds of thousands of dollars during this allegedly dry period, that Sanovas was cutting large

checks to vendors and payees during that time frame, 2-ER-180-319, 3-ER-431, and that Chris was embezzling hundreds of thousands of dollars during the same time in 2016 that Petitioner was using his personal money to may payroll, 3-ER-578.

(d) whereas Chris testified that his fraud stopped in 2018 because Petitioner resigned and it was time to make a fresh start with a new CEO, 6-ER-1195, trial counsel failed to cross-examine Chris with government discovery showing that Chris stopped embezzling from Sanovas ten months before Petitioner resigned as Sanovas' CEO and only after the accounting firm hired by Petitioner discovered inconsistencies in the records, which Petitioner demanded Chris produce records to explain, 2-ER-174.

7. As to Counts 10-12, the government also presented Chris Gerrans as a victim of Petitioner's threats and intimidation. On August 13, 2019, Petitioner and his brother Chris had an altercation at a storage facility, which led to Petitioner's arrest and immediate pretrial incarceration, as well as his indictment and eventual conviction of three additional counts alleging his purported obstruction, contempt and witness intimidation of Chris.

The government argued at trial that the argument was due to Petitioner's anger at Chris for "selling him down the river" because Chris was "cooperating" with the government "in [Larry's] criminal trial." 6-ER-1316. The government argued to the jury that the argument showed Petitioner's "consciousness of guilt." 6-ER-1271.

Gerrans' trial counsel offered no defense of Gerrans as to the incident on August 13, 2019 other than that it was a fight among brothers. 6-ER-1249.

After trial, new defense counsel located and interviewed the two public storage employees who witnessed the August 13, 2019 argument between Petitioner and his brother Chris, and submitted their declarations to the district court in support of Gerrans' post-sentencing bail motion; the two employees, Ryan Swisher and Alice Huante, stated that they had never been contacted by prior defense counsel, that the argument between the brothers did not seem serious and that they did not view anything Petitioner said as a threat, that the argument between the two actually related to Chris' theft from Sanovas, and that they only called the police hours later because the FBI told them to. 2-ER-63-65. Gerrans' trial counsel failed to elicit any of this testimony at trial.

New defense counsel also located emails written just days before the August 13, 2019 argument that documented the actual basis for the altercation – that Petitioner viewed his brother as selling him down the river for allying himself with Sanovas' new CEO; and that he had discovered that Sanovas' bank accounts were empty but that the new CEO and Chris had taken tens of thousands of dollars from the company in two months. 2-ER-66-84; 3-ER-572, 574-580. Trial counsel did not cross-examine Chris on these facts or affirmatively introduce this evidence.

Critically, new defense counsel also located government discovery showing that Chris did not begin his cooperation with the government until *after* the August 13 altercation, 2-ER-85-88, meaning that the altercation could not have been about Chris' cooperation. Again, trial counsel failed to raise this issue.

8. At sentencing, over defense counsel's objections, the district court erroneously grouped Counts 10-12 (post-release conduct) with Counts 1-9 (pre-release conduct) prior to applying sentencing enhancement U.S.S.G. §3C1.3, which applies only to conduct committed while a defendant is on pretrial release.

ARGUMENT

I. The Government and District Court Impermissibly Conditioned Gerrans' Exercise of his Sixth Amendment Trial Right on the Deprivation of his First Amendment Right to Possess and Consult a Bible During his Criminal Trial

Petitioner's case presents a stark and simple issue that reverberates in every court in this Nation: May a prosecutor demand, and a district court order, that a criminal defendant be prohibited from possessing, holding and consulting his Bible during the exercise of his Sixth Amendment right to a criminal jury trial?

Gerrans' First Amendment right to hold his Bible and access its instructions and commands was denied to him when the federal prosecutor and the district court judge literally confiscated his Bible while he was privately and peacefully reading his scriptures at defense table a week before the jury was sworn. The consequences to Gerrans, a devout Catholic, were profound and all-consuming: He lost his ability to read and consult his Bible during trial, including during the testimony of witnesses against him, his consultations with his attorney, and most critically, when making his decision as to whether he would exercise his Fifth, Sixth and Fourteenth Amendment rights to testify in his own defense.

As described verbatim in the Statement of Facts, a week before trial began, government counsel demanded that Gerrans' Bible be removed from the courtroom

during the trial. AOB 34 n.6, 5-ER-1110. The prosecutor rejected the court's suggestion that the Bible be covered as a compromise, 5-ER-1110-1111, and then acceded to the court's ruling that the Bible had to be kept in a briefcase during the trial.

The violation of Gerrans' First Amendment right was twofold, as he was deprived of both the public as well as the private free exercise of his religion while the jury was in session. Such deprivations directly targeted the religious nature of his expression and cannot survive strict scrutiny review. The government and court offered no compelling interest to justify the deprivation and did not narrowly tailor the restriction.

The unprecedented action by the prosecutor and district court were exacerbated by the silence of trial defense counsel, who – in an alarming foreshadowing of the ineffective assistance of counsel in the trial to come – did not even respond to this extraordinary deprivation of Gerrans' rights. Nonetheless, the record contains what is essential: (1) That the government and district court targeted Gerrans' Bible precisely because it was the Bible, in other words, due to its religious significance; (2) that Gerrans's sincere faith was never disputed; (3) that the actions of the government and court purported to be motivated by the public nature of Gerrans' religious expression; and (4) that the government and district court did not narrowly tailor the restrictions on Gerrans free exercise rights.

For the reasons described below, the appropriate remedy is that Gerrans' case be remanded for a new trial where he is not impermissibly forced to make the choice between his First and Sixth Amendment rights.

A. Gerrans's Free Exercise of Religion was Impermissibly Burdened by the Prosecutor's Objection and the District Court's Order

1. The Government and District Court Targeted Gerrans' Free Exercise of Religion

As this Court observed many years ago: "Surely the place of the Bible as an instrument of religion cannot be gainsaid…" *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223-224 (1963). The Bible "is a sacred and authoritative expression of the Judeo-Christian tradition and of the Jewish and Christian faiths." *Robinson v. Polk*, 444 F.3d 225, 227 (4th Cir. 2006). "No one can seriously dispute the importance of the Bible as a religious document. Both Jews and Christians derive the essence of their religious beliefs from the Bible, albeit from different portions." *Crockett v. Sorenson,* 568 F. Supp. 1422, 1427 (W.D. Va. 1983). "[I]t seems fairly clear that relatively innocuous behavior such as possessing a bible is protected" under the right to free exercise of religion. *Avery v. Elia*, 2016 U.S. Dist. LEXIS 21367, *17-18 (E.D. Cal. 2016)

The prosecution's position that a Bible could not be allowed in the courtroom is at odds with the history of this country and the practice in hundreds if not thousands of courts in the United States. "[T]he Bible has always occupied a solemnizing place in public life. It has, for example, been used since the very birth of our nation in administering the oath of office to public officials. *See Elk Grove Unified*

Sch. Dist. v. Newdow, 542 U.S. 1, 26-27 [] (2004) (Rehnquist, C. J., concurring in the judgment) (describing George Washington swearing upon and kissing the Bible during his first inauguration). A Bible likewise commonly accompanies courtroom oaths. *See, e.g.*, N.C. Gen. Stat. § 11-2 (2003)." *Robinson*, 444 F.3d at 228.

Gerrans had brought his Bible with him to every court hearing he attended. A Bible can provide a person "with the sustenance of faith at a difficult or even anguished time," and "daily Bible affirmation, or simply having a Bible nearby" may "constitute[] a crucial aspect of personal identity." *Robinson*, 444 F.3d at 228 (concurring in denying rehearing *en banc* in case involving allegation that juror's possession of a Bible in the jury room violated defendant's rights).[5]

The government never disputed the strength or sincerity of Gerrans' religious beliefs, nor could it have. Gerrans had brought his Bible to every court hearing. His letters to his family, intercepted and reviewed by the government, would have confirmed his religious beliefs. Most importantly, it was Gerrans' possession of the Bible *in fact* that preceded the prosecutor's actions. That Gerrans *was* exercising his religious freedom by bringing a Bible to district court presented the strongest possible evidence of his desire to freely exercise his religion.

[5] "The simple presence of a Bible in the jury room would not broach constitutional norms.... Just as a trial participant may solemnize his oath with a Bible, a juror may retain a Bible in the jury room to remind him of the importance of the duty he has sworn to perform. This is no more objectionable than the President keeping a Bible in the Oval Office or a judge having one in chambers." *Id.* at 227- 228.

2. The Government and District Court Burdened Gerrans' Free Exercise of his Religion

Gerrans' free exercise of religion was clearly burdened by the confiscation of his Bible and its placement in a briefcase during trial.

First, as discussed below, the very fact that he was put to the choice of relinquishing his First Amendment right if he persisted in exercising his right to a jury trial, legally constitutes a burden. *See, e.g., Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (finding that it was "plain" that the city had burdened plaintiff's "religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.")

Further, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese v. Cuomo*, 141 S.Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U. S. 347, 373 (1976) (plurality opinion). AOB at 26 n.5. And this was not just one hearing; Gerrans was deprived of his free exercise right to possess and consult his Bible during the entirety of his seven-day jury trial.[6] More important than the number of days, Gerrans was denied access to his Bible every moment his jury trial was in session, thus affecting the entirety of the criminal trial.

[6] *Compare Blankenship v. Setzer*, 681 Fed. Appx. 274, 277 (4th Cir. 2017) ("Given the importance of the Bible to Christianity and [plaintiff's] religious practice, the burden placed on him by Defendants' actions [incarcerated plaintiff could not carry his Bible on the transport van to the county jail] significantly impeded [his] ability to practice his religion for several days at a time.")

3. The Actions of the Government and District Court Do Not Survive Strict Scrutiny Review

"Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. at 1877 (2021) (citations omitted). A restriction that is "content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 165-166 (2015) (quoting *Cincinnati* v. *Discovery Network*, *Inc.,* 507 U. S. 410, 429 (1993)). Because a person alleging a First Amendment violation does not need to show an "improper censorial motive," *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (citation omitted), "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 576 U.S. at 166.

As neither the prosecutor nor the district court explained why Gerrans' Bible was being confiscated during trial, any discussion of motives is conjecture. The prosecutor's stated objection to the "prominent display" of the Bible implies a purported concern that Gerrans' Bible could cause the jury to look upon him favorably. But a San Francisco courtroom is possibly the last place in the United States in which a Bible could be thought to curry favor with a jury; more likely the

opposite. Only a cynical mind would assume that a Bible is a prop rather than a source of succor and strength.[7]

Here, the government's objection and the court's ruling were, by definition, not neutral because they were specifically based on the religious nature of Gerrans' Bible itself. The government and court thus also engaged in unconstitutional "viewpoint discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109 (2001).

To satisfy strict scrutiny, "government action 'must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests.'" *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. __, 140 S.Ct. 2246 (2020) (quoting *McDaniel v. Paty,* 435 U. S. 618 at 628 (1978)). "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). *See also Trinity Lutheran* 137 S. Ct. 2012, 2021 (2017) (describing "the most exacting scrutiny" for policy imposing a penalty on the free exercise of religion) (citation omitted).

The government and district court burdened Gerrans' free exercise of his religion twice over, with neither violation satisfying the strict scrutiny standard.

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[7] In his district court and appellate filings, Gerrans alleged that a number of actions and statements during trial by this prosecutor constituted prosecutorial misconduct. Separately, before trial, the government intercepted Gerrans' pretrial letters to his family stating that the prosecutor was vindictive towards him and should be investigated because she applied for a seat on Sausalito's City Council at the same time that she served the first subpoena to his company, headquartered in Sausalito, also at the same time that Gerrans had a proposal for a multi-million-dollar development pending in front of Sausalito's City Council. The government filed the letters under seal before the district court. At a post-trial bail hearing, the prosecutor asserted that before trial, Chris Gerrans stated that Petitioner wanted to harm her, a statement that was disputed by the Gerrans' entire law enforcement family and about which Chris never testified or was cross-examined. However, this Court's law makes it clear that the prosecutor's motives, proper or improper, were irrelevant.

First, they prohibited Gerrans from possessing and consulting his Bible in public, including where any jurors might spy the Bible across the room, although the First Amendment has never been held to require a person to exercise his religion only in private. No stated interest, let alone interests of the highest order, would have justified the curtailment of Gerrans' public free exercise rights.

Even assuming *arguendo* that the prosecutor or district court had articulated an "interest of the highest order" that justified keeping Gerrans' possession and consultation of his Bible outside of the sight of the public and the jury, there was no justification for confiscating the Bible rather than allowing Gerrans to privately and discretely exercise his right to hold and consult his Bible.

Nor did the prosecutor or district court narrowly tailor the restriction on Gerrans' rights. There were a variety of ways that he could have been permitted to privately exercise his free exercise rights during trial. For example, a book covering could have been placed on the Bible cover so that the cover was not visible. Or Gerrans could have been ordered to keep the Bible on his lap.

A. The Prosecutor's Actions and the District Court's Ruling Require a Remand for a New Trial

There are three compelling reasons why a remand for a new trial is appropriate.

1. A Remand for a New Trial Is Appropriate because Gerrans was Compelled to Choose between the Exercise of a First Amendment Right and the Exercise of his Sixth Amendment Trial Right

This Court's long-standing jurisprudence is clear that a person cannot be required to choose between forsaking his religious exercise and obtaining certain benefits or privileges. As this Court wrote almost sixty years ago, "'[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'" *Trinity Lutheran*, 137 S. Ct. at 2021-2022 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

In *Sherbert*, "the Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716-717 (1981). In *Thomas,* the Court stated that where, as in *Sherbert*, an employee "was put to a choice between fidelity to religious belief or cessation of work," there was an indistinguishable "coercive impact." *See also McDaniel v. Paty*, 98 S. Ct. 1322 (1978) (plurality opinion) (provision prohibiting clergy from seeking state office "conditioned the exercise of one [right] on the surrender of the other" thus "encroach[ing] upon [his] right to the free exercise of religion"). The constitutional problem identified in *McDaniel* was the forced choice: "To pursue the one, he would

have to give up the other." *Trinity Lutheran*, 137 S. Ct. at 2020. *See also*, *id.* at 2022 (striking down Missouri provision that prevented religious entities from applying for a grant where the state improperly conditioned a benefit on "having to disavow its religious character," finding that "[t]he 'imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights.'" (citations omitted).

Here, it was much more than a public or gratuitous benefit or financial grant that was at stake if Gerrans did not relinquish his free exercise of religion; it was his sacred Sixth Amendment trial right that was impermissibly conditioned upon the loss of his First Amendment right to exercise his religion. Unlike civil cases in which a person can get a job back, or not be prohibited in the future from engaging in protected speech, there is no other remedy for Gerrans' First Amendment violation – he had only one trial by which his guilt or innocence of serious criminal charges was determined – so the only way for his First Amendment rights to be vindicated is for him to receive a new trial.

While forced choice between the First and Sixth Amendment rights alone is sufficient to require a new trial, the violation also affected Gerrans in specific ways. He was prevented from consulting his Bible at any time during adverse witness testimony and his conversations with his attorney while court was in session, including in the hours leading up to his critical decision as to whether to exercise his constitutional right to testify. The absence of his Bible blunted his decision-making

abilities during the greatest moments of stress and confusion.[8] He was deprived of guidance as to how to react to the fact that his trial attorney was failing to mount any defense in his case before his very eyes. As Gerrans submitted in a post-trial declaration to the district court, he learned as the case progressed at trial that he had never even seen critical discovery presented at trial, perhaps in part because his attorney never provided him with the computer that the court had ordered Gerrans could have in custody to review discovery. CR 235-2, ¶¶ 6-9. Thus, Gerrans was denied the right to "the sustenance of faith at a difficult or even anguished time," when faced with the "heavy burden," *Robinson v. Polk*, 444 F.3d at 228, at his trial.

Trial counsel's refusal to prepare Gerrans to testify also came to a decision-point at the end of the trial, when Gerrans had to decide whether or not to exercise his constitutional right to testify.[9] After telling Gerrans that he (trial counsel) had "spoken to divinity" and that it was counsel's "divine wisdom" that Gerrans not testify, trial counsel "invite[d] the court to extract a waiver from Gerrans of his right to testify." CR 235-2, ¶¶2-5, 10-11.

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[8] For Gerrans, the Bible is filled with guidance and proscriptions about to how to make decisions. Among the instructions and commands denied to Gerrans during his trial: "I will instruct you and show you the way you should walk; give you counsel and watch over you." Psalm 32:8; and "My Son, to my words be attentive, to my sayings incline your ear; let them not slip out of your sight." Proverbs 4:20-21. "Woe unto you also, you Lawyers; for you lade men with Burdens grievous to be borne, and you yourselves touch not the burdens with one of your fingers." Luke 11:46.

[9] "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution," including the Fourteenth Amendment's due process guarantee, the Compulsory Process Clause of the Sixth Amendment, and as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987) (citations omitted). *Compare United States v. Ward*, 989 F.2d 1015, 1019-1020 (9th Cir. 1992) (reversing the criminal convictions of a defendant whose First Amendment rights were denied when the court did not let him use a modified oath in order to exercise his right to testify, finding that the "court's interest in administering its precise form of oath must yield to [defendant's] First Amendment rights.")

The confiscation of his Bible also made it clear that if Gerrans did testify, he would not be permitted to hold his Bible or give an oath on this Bible. *Compare Romero v. Rock*, 2011 U.S. Dist. LEXIS 41704, *14 (S.D.N.Y. 2011) (noting that "the United States Supreme Court has never held that the Establishment Clause prohibits a witness in a court of law from swearing to the truth of his testimony with his hand on a bible."); *Doe v. Phillips*, 81 F.3d 1204, 1211 (2nd Cir., 1996) ("[I]n a federal judicial proceeding, the witness always has the option of giving a nonreligious affirmation of her commitment to tell the truth rather than swearing on a bible or to a divine Being) (citations omitted).

2. The Prosecutor's Action of Violating Gerrans' First Amendment Rights Mandates a New Trial

As Gerrans argued in his opening appellate brief and the motion for panel rehearing, the government's action of demanding that Gerrans' Bible be removed from the courtroom during trial, which led to the Bible being in a briefcase during the trial, was an act of misconduct requiring reversal. *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190-1191 (2015), as cited in AOB at 34 and MPR at 17, 20. Where there is no defense objection to the prosecutor's action at trial, a court reviews for plain error and "may reverse if: (1) there was error; (2) it was plain; (3) it affected the defendant's substantial rights; and (4) "viewed in the context of the entire trial, the impropriety seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citations and quotations omitted).

Here, there was plain error for all of the reasons described above: There was no sufficient justification to prohibit Gerrans' exercise of his First Amendment right,

certainly not his private/discrete exercise of that right. The error affected Gerrans' substantial rights because his First Amendment right is a substantial right.

Finally, the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings" because the exercise of Gerrans' Sixth Amendment right was conditioned upon the deprivation of his First Amendment right. "To pursue the one, he would have to give up the other." *Trinity Lutheran*, 137 S.Ct at 2020. The prosecutor's ethical duties to ensure that justice is done and that the rights of criminal defendants are appropriately safeguarded, *see, e.g.*, *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000), were profoundly violated when she confiscated the Bible of a criminal defendant facing serious charges without even an attempt to accommodate his First Amendment rights.

As to public reputation of the judicial proceedings, it is no understatement to say that it would be shocking to most Americans that a criminal defendant could be stripped of his Bible as a condition of his criminal trial.

3. The First Amendment Violation Constituted Structural Error Requiring a New Trial

This Court should find that impermissibly requiring Gerrans to choose between his First and Sixth Amendment rights constituted structural error. Findings of structural error are reserved for "'structural defects'" that "'defy analysis by "harmless-error" standards' because they 'affec[t] the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991)). The most common structural errors, though it is not an

exhaustive list, include the denial of counsel, the denial of the right of self-representation, the denial of the right to public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction. *Gonazlez-Lopez*, 548 U.S. at 149 (citations omitted).

A trial where a criminal defendant is impermissibly forced to sacrifice his First Amendment rights for no compelling reason (actually, no good reason at all) should similarly be examined under structural error standard. The violation cannot be addressed by harmless error analysis because as in cases in which a defendant does not have the lawyer of his choice or does not receive a public trial, the violation cannot be addressed by pointing to certain moments, though Gerrans has highlighted some of those moments. Like other structural errors, the taint permeated the entire trial and affected every moment of it. As with other examples of structural error, the only remedy is for Gerrans to have a trial during which he can exercise those rights and make decisions accordingly.

II. The Court Should Overrule Ninth Circuit Law and Resolve a Circuit Split to Find that there are Rare Cases, such as Gerrans', that Warrant a Remand for further Development of the Record on a Claim of Ineffective Assistance of Counsel

Appellant asks this Court to overrule Ninth Circuit law, *see, e.g., United States v. Reyes-Platero*, 224 F.3d 1112, 1116 (9th Cir. 2000), and hold that under the appropriate circumstances, a federal appellate court may grant a defendant/appellant's request for a remand from direct appeal for fact-finding purposes related to an ineffective assistance of counsel claim, as is permitted in the Second Circuit. *Compare United States v. Melhuish*, 6 F.4th 380, 393-394, 396-399

(2nd Cir. 2021) (finding rare exceptions to habeas being the preferable way to resolve claims of ineffective assistance of counsel, remanding for further development of factual record as to whether counsel was ineffective in failing to offer expert testimony).

While such remand would surely be the exception, it is necessary in the rare case, like Gerrans', in which there is compelling evidence of ineffective assistance of counsel in the appellate record and a hearing in which trial counsel is required to testify is vital. In the instant case, a complex financial fraud case with twelve counts and activity from 2010-2020, involving a $60 million life services technology company with tens of employees and tens of thousands of pages of discovery, defense trial lawyer unfathomably did not introduce a single exhibit or call a single witness at trial, and filed exactly one *motion in limine*. The jury reached a verdict before the exhibits even made it into the jury room. It was as if Gerrans had no lawyer at all.

By contrast, in a very short period of time while preparing for sentencing and receiving tens of thousands of pages of complex discovery in a twelve-count fraud case that spanned over a decade, the new counsel who replaced trial counsel after the trial for the purpose of sentencing quickly discovered the glaring ineffective assistance of counsel and were able to identify hundreds of documents and many witnesses that were exculpatory.

Judge Baker's dissent in the Ninth Circuit opinion held that "both judicial economy and fairness to [Gerrans]" supported granting the claim on appeal, given that "the record is sufficiently developed that an appellate court can decide the issue

on direct appeal." Slip.Op-7 (App-008). The dissent found "simply no conceivable tactical justification for defense counsel's flagrant abdication of the duty to fully prepare": "Since the failure to interview many critical witnesses in connection with Counts 1-6 and 10-12 is so glaring," and because "'multiple deficiencies have the cumulative effect of denying a fair trial' to Gerrans as to those counts," Gerrans should not have to wait "to develop a separate record" through a habeas petition. Slip.Op-9-10 (App-10-11).

As laid out in more detail in the Statement of Facts, trial counsel did not interview key witnesses like Sanovas former CFO Farrell or attorneys at King & Spalding, whose documentation confirmed that Sanovas owed Gerrans $723,000 in deferred compensation and that co-founder Gunday received comparable deferred compensation not long before Gerrans took the $580,000 in early 2015 charged in Counts 1-3. "As Gerrans' only defense to the wire fraud charges against him was that he thought he was entitled to the receipt of the funds in question, trial counsel's failure to at least interview Farrell and the King & Spalding attorneys was inexcusable, as those witnesses might have vouched for his defense." Slip.Op-8 (App-009). "As if that weren't bad enough, trial counsel also inexcusably failed to interview Swisher and Huante, the two witnesses to the confrontation between Gerrans and his brother Chris that undergirds the contempt, witness tampering, and obstruction of justice charges…. [T]o make a professional judgment about whether to call them, counsel needed to interview them." Slip.Op.8-10 (App-009-011).

As included in the Statement of Facts, the record is replete with examples of documents that no effective lawyer would fail to use on cross-examination. The only plausible explanation for trial counsel's failure to cross-examine witnesses or introduce exhibits was a complete lack of familiarity with such discovery.

There should be a mechanism whereby a lengthy, time-consuming and expensive habeas petition can be avoided by an appellate remand and a simple evidentiary hearing in which trial counsel is required to testify as to the decisions he made *not* to interview any key witnesses; *not* to introduce any exhibits despite the hundreds of exculpatory documents presented to the court by new counsel post-trial; *not* to file a number of relevant pretrial motions and motions *in limine*; *not* to prepare his client to testify; and not to provide Gerrans with the voluminous case discovery on a computer in the jail, as the district court had ordered he was entitled to.

The opportunity for appellate remands on ineffective assistance of counsel claims is profoundly fair to people like Gerrans – who has spent the past almost-three years in many prisons/jails, usually in solitary confinement/lockdown due to Covid, away from his wife and children – as well as efficient for the court system. In the time it takes Gerrans to draft a habeas petition and request counsel, witness' memories will fade and evidence may be lost. Given the compelling deficits of trial counsel that new counsel uncovered in only months post-trial while preparing for sentencing, a remand would facilitate a timely comprehensive development of the record.

Because of the structural limitations of habeas petitions, remand in such rare cases is also fair to defendants such as Gerrans who effectively had no defense counsel

at trial. As this Court recognized in *Shinn v. Ramirez*, 2022 U.S. LEXIS 2557, 596 U.S., at ___-___, (2022) (slip op., at 12-13), in a habeas proceeding, a person is not constitutionally entitled to counsel, and "a federal habeas court … is not *required* to hold a hearing or take any evidence. . . . the decision to permit new evidence must be informed by principles of comity and finality that govern every federal habeas case." Relegating Gerrans to navigate the habeas system in which he has many fewer rights than an appellant applies an unnecessary burden to a person whom the evidence overwhelmingly indicates did not receive his constitutional right to an effective attorney the first time around.

This is the rare case that shows that an appellate court should have the power to remand to the district court for further development of the record of ineffective assistance of counsel claims where justice so requires.

III. A Federal Appellate Decision that Upholds a Substantial Increase in a Prison Sentence with a Citation to the Wrong Sentencing Guideline Provision, and that Directly Contradicts the Sentencing Commission's Own Guidelines Worksheets, Undermines Public Confidence and Trust in the Judiciary

Gerrans argued on appeal that the district court erred by increasing his offense level for Counts 1-9 by 3-levels pursuant to USSG §3C1.3, "Commission of Offense While on [Pretrial] Release," where the conduct in Counts 1-9 predated his pretrial release. AOB at 56. He explained that the district court failed to first calculate the offense levels for each count before grouping and finding the group offense level, which led to the incorrect application of an enhancement that applies only to *post-*

release conduct to *pre*-release conduct. RB at 27. The result was a final offense level 33 rather than 30, which increased Gerrans' sentence by several years.[10]

The panel affirmed, stating: "The Guidelines required the court to group the post-release misconduct counts with the underlying wire fraud and money laundering counts before determining the group offense level. *See* U.S.S.G. §§3D1.1, 3C1.1 cmt.n.8. The court then properly applied the three-level enhancement for crimes committed while on release to the group offense level. *See* U.S.S.G. §3C1.3." SlipOp-6.

Critically, the panel misunderstood a basic premise of guideline calculations – that the selection of the "group offense level" under §3D1.3 simply involves choosing the highest offense level amongst the various offense levels in that group, not applying additional obstruction enhancements to "the group." §1B1.1(a)(1)-(4).

The U.S. Sentencing Commission's own worksheets show that the offense levels for Counts 10-12 should have been calculated separately before grouping; and that the already-much-higher offense levels of Counts 1-9 (*without* the 3-level §3C1.3 enhancement) should ultimately determine the adjusted group offense level for the group of Counts 1-12 because the offense level for Counts 10-12 was so much lower. *See* U.S. Sentencing Commission Worksheets (November 1, 2018), Worksheets for Individual Offenders ("Worksheets").[11] App-026-028.

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[10] The district court sentenced Gerrans to the lowest-end of the guideline range for offense level 33, 135-months. His correct guideline range, offense level 30, was 97-121 months.

[11] www.ussc.gov/sites/default/files/pdf/training/worksheets/2018_offender_worksheet.pdf, also attached at App-27-28.

Federal practitioners widely and routinely rely on these Worksheets to follow the often labyrinthian dictates of the guidelines. The Sentencing Commission Worksheets instruct a person to "[c]omplete a separate Worksheet A for each count of conviction…" with the "exception" of where the group offense level is based primarily on "aggregate value or quantity (see §3D1.2(d))" or conspiracy/solicitation/attempt. *Id.* Thus, for Counts 1-9, which the parties agreed are grouped under §3D1.2(d) (aggregate value/quantity), one uses the same Worksheet A.

However, a separate Worksheet A is required for Counts 10-12, which only later groups with the other counts under §3D1.2(c) on Worksheet B. App-028. Gerrans should have received the §3C1.3 enhancement for post-release conduct only on the Worksheet A for Counts 10-12 (No. 4 "(Obstruction Enhancements")).

Under Step 1 of Worksheet B, all of the counts group, with Counts 1-9 already having been grouped under §3D1.2**(d)** as noted on Worksheet A, and with Counts 10-12 grouping with the rest under §3D1.2**(c)**.[12] App-028. Under Step 2 of Worksheet B, one would list the highest adjusted offense level for any count from any of the multiple Worksheet A(s). The highest offense level is 30 (for Counts 1-9), which is then entered in Step 3-#1. As there are no other groups, the highest adjusted offense level is 30 (Step 3-##7-8).

[12] The parties agreed that Counts 1-9 grouped under subsection §3D1.2**(d)** (total loss/aggregated harm), and that Counts 10-12 grouped with the other counts under subsection §3D1.2**(c)**.

A more detailed explanation of the appellate court's error was provided in Gerrans' Motion for Rehearing; the portion of the brief advancing that argument is included in the App-019-026.

The Ninth Circuit decision on this issue was the functional equivalent of no explanation at all. The panel's citation to §3C1.1 cmt.n.8 for a ruling on the order of operations of the Guidelines is inapposite: §3C1.**1** concerns the 2-level enhancement for a different obstruction of justice that Gerrans *also* received and did *not* contest or appeal; it cannot possibly explain the panel's decision regarding the 3-level enhancement under §3C1.**3**.[13] Nor did the panel even address the only appellate case on point, *United States v. Wright*, 401 F. App'x 168 (8th Cir. 2010), which found that the district court committed "obvious" "procedural" error when it applied the §3C1.3 enhancement exactly as the district court did here.

Why does Gerrans raise a sentencing guidelines error with this Court? The credibility of federal appellate courts is fundamentally undermined when a federal appellate court can feel free to summarily dispose of a complex sentencing issue (that adds years to a person's prison sentence) with a cursory ruling that cites to the wrong provision of the guidelines, contradicts the clear directions provided by the Sentencing Commission's own Worksheets, and does not address the only other appellate case on point that found the way it proceeded to be clear error. That is not justice, nor does it provide transparency for the court's ruling.

[13] The other cited guideline, §3D1.1, simply states that the offense level for multiple counts is determined under §§3D1.2-3D1.4.

It is an abuse of an appellate court's discretion to rule in the way described above, and it fosters a lack of respect for the court by the public. Thus, Gerrans requests that this Court summarily remand this issue to the Ninth Circuit so that it may issue a decision that is comprehensible and comports with the Sentencing Commission's own worksheets directing how sentencing guidelines are to be computed.

IV. This Case is Exceptionally Important

The questions presented here are very important. It is almost unbelievable that in a high-profile fraud case in a federal court in the Northern District of California, a seasoned federal prosecutor and experienced judge would believe that it was acceptable, under this Court's jurisprudence, to prohibit a criminal defendant from possessing and consulting a Bible – publicly or privately – while his jury trial was in session.

It is equally as unbelievable that the Ninth Circuit would not even address this violation in its opinion.

The situation demands that the Court step in to affirm that defendants retain their First Amendment rights to exercise their religion by possessing a Bible when they exercise their Sixth Amendment trial right.

Further, given the complexity and ever-changing landscape of habeas law and the compelling interest in having criminal defendants be represented by competent attorneys at trial, this Court should rule that in rare but important cases, an

appellate court may maintain jurisdiction of an allegation of ineffective assistance of counsel by remanding to the district court for further development of the record.

Finally, as to the cursory and clearly erroneous (citing the wrong guideline) ruling on a sentencing issue that added years to Petitioner's sentence, Petitioner seeks this Court's intervention not (just) because the lower court got it so wrong, but so that this Court can remind circuit courts that they have a duty to rule comprehensibly on sentencing issues (*i.e.* citing to relevant law) and in a way that does not contradict basic materials issued by the Sentencing Commission on which thousands of practitioners rely.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Date: June 9, 2022

LAW OFFICES OF SHAWN HALBERT

_____/s/_____
Shawn Halbert
On Behalf of Defendant Lawrence J. Gerrans